VOLUME 42

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF RHODE ISLAND

EDWARD C. STINESS

REPORTER

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1920

JUDGES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. C. FRANK PARKHURST.[1]
HON. WILLIAM H. SWEETLAND.[2]

ASSOCIATE JUSTICES.

HON. WILLIAM H. SWEETLAND.[3]
HON. WALTER B. VINCENT.
HON. DARIUS BAKER.[4]
HON. CHARLES F. STEARNS.
HON. ELMER J. RATHBUN.[5]
HON. JOHN W. SWEENEY.[6]

ATTORNEY-GENERAL.

HERBERT A. RICE, ESQ.

ASSISTANT ATTORNEYS-GENERAL.

ABBOTT PHILLIPS, ESQ.[7]
A. A. CAPOTOSTO, ESQ.
FRED A. OTIS, ESQ.
CHARLES P. SISSON, ESQ.[8]

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[1] Resigned Feb. 1, 1920. [2] Qualified Feb. 2, 1920. [3] Qualified as Chief Justice Feb. 2, 1920. [4] Resigned March 13, 1919. [5] Qualified March 24, 1919. [6] Qualified Feb. 6, 1920. [7] Resigned Jan. 1, 1919. [8] Appointed Jan. 20, 1919.

RHODE ISLAND REPORTS—VOL. XLII.

These reports are published in accordance with the provisions of Chapter 277 of the General Laws of 1909 of the State of Rhode Island.

The cases reported include the decisions, opinions, and rescripts of the Supreme Court, involving questions of law, pleading, or practice, from October 17, 1918, to March 17, 1920.

EDWARD C. STINESS,

Reporter.

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CASES

HEARD AND DETERMINED

BY THE

SUPREME COURT OF RHODE ISLAND.

PUBLIC UTILITIES COMMISSION *vs.* PROVIDENCE GAS COMPANY.

OCTOBER 17, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Public Utilities Commission. Appeal. Jurisdiction.*

Where on a proceeding instituted by the Public Utilities Commission, on its own motion, without complaint, to investigate the reasonableness of charges fixed by a public utility, certain municipal corporations, under the rules of the Commission, intervened and acted as parties adversary to the respondent public utility, such intervening parties have the rights of complainants under the provisions of Pub. Laws, R. I., cap. 795, approved April 17, 1912, including the right to appeal from the final order made by the Commission.

APPEAL from order of Public Utilities Commission. Heard on motion of respondent to dismiss for want of jurisdiction and motion denied.

SWEETLAND, J. The above entitled proceedings are respectively the appeal of the city of Providence and the appeal of the town of North Providence from a certain order of the Public Utilities Commission fixing the rates and charges of the Providence Gas Company, a corporation, for gas sold by it in the city of Providence, the town of North Providence and certain other municipalities of the State.

Said proceedings are before us at this time upon the motion of the Providence Gas Company that each of said appeals be dismissed on the ground that this court is without jurisdiction therein for the reason that said city and town are not entitled by law to appeal from said order.

Chapter 795 of the Public Laws, approved April 17, 1912, is an act creating the Public Utilities Commission, prescribing its powers and duties, and providing for the regulation and control of public utilities. All the questions involved in the matter now before us are governed by the provisions of said act.

It appears from the record that on July 12, 1918, the Providence Gas Company filed with the Public Utilities Commission schedules of its rates and charges for gas to be sold by it in said city and town, which rates were to become effective on September 1, 1918. Under the authority conferred by said act, after notice to said Gas Company and to such other interested persons as the commission deemed necessary including the city of Providence and town of North Providence, said commission proceeded upon its own motion to investigate the reasonableness of said schedules of rates. The commission found the rates contained in the schedules filed by the Gas Company to be unreasonable; and by its order the commission substituted therefor rates and charges which in its judgment were just. The city of Providence and the town of North Providence, being dissatisfied with the rates and charges thus fixed in the order of the commission, have sought to appeal to this court. Section 34 of said act regulating appeals from the orders of the commission, among other things, provides that "Any public utility or any complainant, aggrieved by any order of the commission fixing any rate, toll, charge, joint rate or rates . . . may appeal to the supreme court for a reversal of such order." The act does not by its terms give the right of appeal from an order of the commission to any other person. The point of the motion of the Gas Company now under consideration is that neither the city of Providence

nor the town of North Providence can properly be denominated a complainant in said proceeding before the commission; and hence under the act neither has the right to appeal from said order.

Sections 18, 19, 20 and 21 of said act, among other things, provide that any municipal or other corporation or any group of persons designated in said sections may make written complaint to said commission against any public utility alleging that the rates and charges of said public utility are unreasonable. After notice and hearing on said complaint the commission shall make its determination and order. Under the provisions of said four sections the public utility, whose acts are under consideration, is the respondent, and the municipal or other corporation or the group of persons who institute the proceeding is clearly the complainant. It is the contention of the Gas Company that the right of appeal given to a complainant by Section 34 is restricted to a moving party in proceedings instituted under the four sections referred to, viz., Sections 18, 19, 20 and 21.

Sections 26, 27 and 28 of said act, among other things, provide that without complaint said commission may on its own motion investigate the reasonableness of rates and charges fixed by a public utility. Notice of the hearing and investigation shall be given to said public utility and to such other interested persons as the commission shall deem necessary and thereafter the proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated; and the same order or orders may be made in reference thereto as if such hearing and investigation had been made on complaint. This was the procedure followed in the matter now under consideration. The commission undertook to make an investigation on its own motion. Notices of the hearing and investigation were given to the Providence Gas Company as respondent and to such other persons as the commission deemed necessary including the city of Providence

and the town of North Providence; and thereafter, under the provisions of the act, the proceeding was to be conducted as though it was a complaint filed with the commission.

Section 17 of said act provides as follows: "Sec. 17. All hearings, investigations and inquiries before the commission shall be governed by rules to be adopted and prescribed by the commission, and in such hearings and investigations and inquiries, the commission shall not be bound by the technical rules of evidence." Acting under the authority conferred in Section 17 the commission adopted rule sof practice and procedure, Rule III of which, is in part as follows: "Parties or utilities not parties, may petition in any proceeding for leave to intervene and be heard therein. Such petition shall set forth the petitioner's interest in the proceeding. The leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding,".

At the opening of the hearing and investigation now under consideration, the chairman of the commission made the following statement: "I suggest that at this time the various cities and towns will enter their appearances officially with the stenographer and of course such cities and towns as do enter their appearance will be given permission to intervene as parties to these proceedings." Thereupon the city of Providence and the town of North Providence each entered its appearance and throughout the hearing acted as parties adversary to the respondent Gas Company. The solicitor for the city of Providence cross-examined at length the witnesses presented by the respondent and introduced evidence in opposition to the claim of the respondent. At the close of the hearing the solicitor for the city of Providence and the solicitor for the town of North Providence each argued against the approval by the commission of the schedules of rates and charges filed by the respondent. The position assumed at the hearing by said city and town respectively was identical with that of a party instituting a complaint against the respondent Gas Company attacking

the justice of its rates and charges. In the circumstances of the matter we are of the opinion that when said city and town were permitted to intervene as parties in the proceeding, which under the statute was being conducted as though it was a complaint filed with the commission, they intervened as parties complainant with the rights of complainants including the right to appeal from the final order afterwards made by the commission.

The motion of the respondent Gas Company in each of the above entitled proceedings is denied.

Elmer S. Chace, City Solicitor, Henry C. Cram, Charles P. Sisson, Assistant City Solicitors, for complainants.

Swan & Keeney, for respondents.

RHODE ISLAND COMPANY *vs.* SUPERIOR COURT.

OCTOBER 22, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Allowance of Cost of Transcript. Costs.*

Where a verdict had been set aside by the trial justice and the exceptions of plaintiff to such decision overruled and the case remitted to the Superior Court where on a second trial a verdict was returned for plaintiff, the allowance of the cost of the transcript of testimony at the first trial, used in the proceedings on the bill of exceptions, as a part of the taxed costs of the case, was discretionary with the Superior Court.

(*2*) *Costs. Notice.*

No notice to the opposing party is required under the statute, of an application for an allowance of the costs of a transcript of testimony.

(*3*) *Costs. Notice.*

While it is better practice to give notice to the opposing party of an application for the allowance of the costs of a transcript of testimony, particularly in a case where the application is made to a judge who did not preside at the trial, and while the fact that no notice had been given in some circumstances might warrant the finding that there had been an abuse of discretion in granting the motion, yet, in a case where the record was such as to present a fairly complete history of the case, the decision of the justice who heard the motion and allowed the costs of the transcript will not be disturbed.

(4) *Costs. Transcript of Testimony. Review of Decision Allowing Costs.*
Where a motion for the allowance of the costs of a transcript of testimony was made to a justice who was not the one who presided at the trial, and the motion was granted, such motion being addressed to his discretion, his decision is not subject to review by another justice.

CERTIORARI. Heard and writ dismissed.

STEARNS, J. This is a petition for writ of *certiorari* for the purpose of quashing the record of the Superior Court as contained in the order of that court entered July 29, 1918, in the case of *John W. Hanley* v. *The Rhode Island Company*, the effect of which order was to allow the cost of a certain transcript of testimony to remain as part of the plaintiff's costs in said case. The Hanley case was an action for negligence in which three trials were had before a jury. In the first trial, owing to misconduct by the jury, the case was taken from the jury and passed. In the second trial before Mr. Justice SWEENEY, the plaintiff recovered a verdict for five thousand dollars which was later set aside by the trial justice on motion of the defendant, on the ground that the verdict was against the evidence and that the damages awarded were excessive. To this decision the plaintiff duly took exception, filed a transcript of the testimony which was allowed by the court, and his bill of exceptions as required by law and upon hearing of the bill of exceptions before this court the plaintiff's exceptions were overruled and the case was remitted to the Superior Court for further proceedings. The case was again tried before Mr. Justice SWEENEY and another jury and resulted in a verdict for the plaintiff for fifteen hundred dollars which was sustained by the trial court and to this decision of the trial court no exception was taken by either party. In due course the costs of the suit were taxed by the clerk of the Superior Court and included therein was an item for the cost of the transcript of testimony in the second trial which had been allowed by one of the justices of the Superior Court. The application for the allowance of the cost of this transcript of the

second trial was made by the attorney for the plaintiff in the regular course of proceedings to the particular judge of the Superior Court who was assigned for duty during that period of the vacation of the Superior Court. The justice who allowed the cost of the transcript had not presided at any of the trials referred to and no notice of the application was given to the defendant. The defendant then filed in the Superior Court a motion to revise costs in several particulars including the allowance of the cost of transcript aforesaid. This motion was heard by Mr. Justice DORAN who granted said motion in part and refused to interfere in regard to the matter of the allowance of the cost of the transcript. The defendant now petitions this court for a writ of *certiorari* and the particular error of law alleged is the action of Mr. Justice DORAN in regard to the matter of the allowance of the cost of the transcript, and this is the only question now raised in this proceeding.

(1) We find no error in the action of Mr. Justice DORAN in this respect. The transcript in question was used in proceedings in said cause subsequent both to the trial and to the delivery of the transcript to the plaintiff, and in such circumstances the allowance of the cost of the transcript as part of the taxed costs is discretionary with the Superior Court. *N. Y., N. H. & H. R. R. Co.* v. *The Superior Court*, 39 R. I. 560. The application to the justice of the Superior Court in the first instance for the allowance of the cost of this transcript was one which was addressed to his discre-

(2) tion. The statutes do not require that notice of this application shall be given to the opposing party and the failure to give notice to the defendant in this particular case does not render invalid the action of the trial justice. We think that it is better practice to give notice to the opposing party in an application of this kind, particularly in a case where the application is made to a judge who did not preside at

(3) the trial. The fact that no notice or opportunity to be heard had been given, in some circumstances might be sufficient to warrant the finding by this court that there had been an

abuse of the discretion in granting the motion. In this particular case the record was such however as to present a (4) fairly complete history of the case. Inasmuch as this motion was addressed to the discretion of the first justice who had jurisdiction in the matter, we do not consider that the decision thereon was subject to review by another justice of the Superior Court and the action of Mr. Justice DORAN in refusing to review this decision was without error.

The writ of *certiorari* is dismissed and the record in the cause entitled *John W. Hanley* v. *The Rhode Island Company* sent to us by the Superior Court is remitted to said court.

Clifford Whipple, Earl A. Sweeney, G. Frederick Frost, for petitioner.

John P. Brennan, for respondent.

CHARLES H. SPRAGUE *vs.* TOWN COUNCIL OF TOWN OF WEST WARWICK.

NOVEMBER 20, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Elections. Ballots. Distinguishing marks.*

Where a voter after making a cross in the square at the right of a name, blackened the square with his pencil partially concealing the cross, and placed a cross in the square opposite the name of another candidate, while the act may not have been with any actual wrongful intent, the ballot was rendered capable of identification and was properly rejected.

(*2*) *Elections. Ballots, Distinguishing marks.*

A ballot containing a cross entirely without the circle and in the blank space between the circle and the emblem was properly rejected.

(*3*) *Elections. Ballots. Distinguishing Marks.*

On a ballot the voter placed a cross in the circle and also a cross in the square opposite each name on the party ticket. The crosses opposite the names bore evidence of an attempt to erase them, although they were visible. On the same ballot the voter failed to vote in the square assigned for voting on a proposition submitted to the electors, but instead partially blotted out with his pencil the word "no."

Held, that the ballot was properly rejected as bearing distinguishing marks.

(4) *Elections. Ballots. Distinguishing Marks.*

A ballot which contained two very fine and somewhat dim pencil marks, apparently inadvertent touches of the pencil during the operation of marking the ballot was entitled to be counted.

(5) *Elections. Ballots. Distinguishing Marks.*

Ballots, one of which contained a cross within the circle and a pencil mark in the immediate vicinity of the circle, and another whereon there was a somewhat faint pencil line extending across the circle, the circle not having been used, the voter placing crosses in the squares at the right of the names, were entitled to be counted, the marks apparently being inadvertently made during the marking of the ballots.

CERTIORARI. Heard and relief granted.

VINCENT, J. This is a petition for a writ of *certiorari* brought by Charles H. Sprague of the town of West Warwick in the State of Rhode Island and sets forth that the petitioner was a candidate for the office of first councilman of the town council of said West Warwick at the election held on November 5, 1918; that at such election he received a majority of the votes cast for that office; that the votes were counted by the several moderators of the several voting districts in said town and that by such count it appeared that the petitioner had received a majority of the votes for said office; that said votes were duly transmitted to the town clerk of said town of West Warwick and that on November 6, 1918, the town council of West Warwick, sitting as a board of canvassers, counted the ballots cast for the office of first councilman and declared that the petitioner, Charles H. Sprague, the republican candidate for said office, and Frank P. Duffy, the democratic candidate for said office, had each received the same number of votes; and thereupon said town council, acting as a board of canvassers as aforesaid, declared that there had been no election for the office of first councilman in said town of West Warwick at said election held on November 5, 1918.

The petition further alleges that said town council of West Warwick, acting as a board of canvassers as aforesaid, wrongfully and illegally held that certain ballots cast for

the said Charles H. Sprague bore distinguishing marks and therefore were defective and void and could not be counted for the said Charles H. Sprague, whereas in truth and in fact said ballots were lawful ballots and should have been so declared and counted.

Upon this petition a writ of *certiorari* was issued to the town council of the town of West Warwick commanding the production, before this court, of the ballots cast for first councilman at said election together with the record of said town council, acting as a board of canvassers, relating thereto.

The record of the proceedings referred to and the ballots alleged to have been improperly rejected are before us. These ballots are six in number. They were offered in evidence at the hearing by the petitioner and marked as exhibits from one to six both inclusive.

(1) In exhibit number one it is evident that the voter after making crosses in the squares at the right of the greater part of the names comprising the republican ticket, either changed his mind regarding one of the names to which he had appended the cross or had placed the cross in the square unintentionally. To make the correction which he desired, he blackened the square with his pencil partially concealing the cross and placed a cross in the square opposite the name of the candidate for the same office on the democratic ticket.

(2) In exhibit number three the voter with the apparent intention of voting the straight republican ticket placed a cross entirely without the circle and in the blank space between the circle and the eagle.

In exhibit number six the voter seems to have placed a cross in the circle and also a cross in the square opposite each name on the republican ticket. The crosses opposite the names bear evidence of an attempt to erase them although they are still apparent without close scrutiny. At the bottom of this same ballot are the words, "will this town

(3) grant licenses for the sale of intoxicating liquors." These words are enclosed between two horizontal and parallel

lines. These lines are extended to the right so as to include two squares one above the other. On the left of these squares and between the horizontal lines the word "yes" is placed opposite the upper one and the word "no" opposite the lower one. The voter failed to place any mark within either of these squares but instead partially blotted out with his pencil the word "no."

The markings upon the ballots, exhibits one and six, though probably not in either case designed by the voter to be a distinguishing mark, for the purpose of subsequent identification, would nevertheless furnish the means by which such identification would be feasible. The nature of these markings leaves no ground for an inference that they resulted from accident or inadvertence. They were made deliberately and intentionally to serve a purpose which the voter had in mind. While the voter in each case may not have had any actual wrongful intent he has as a matter of fact placed something upon his ballot rendering it capable of identification.

In regard to the ballot exhibit three there is little that need be said. The cross being entirely without the circle there is a failure to comply with the statute and the petitioner does not claim that such ballot should be counted.

We think that these ballots, exhibits one, three and six, were properly rejected.

(4) Upon the ballot exhibit two there are two pencil marks. These marks are very fine, somewhat dim and are not such as would readily attract the attention of an ordinary observer. Their position and appearance fails to suggest any connection between them and anything else appearing upon the ballot. They have no descriptive form or characteristics and seem to be nothing more than inadvertent touches of the pencil during the operation of marking the ballot.

(5) Upon the ballot exhibit four there is a cross within the circle and a pencil mark in the immediate vicinity of the circle and upon the ballot exhibit five there is a somewhat

faint pencil line extending across the circle, the circle not having been used, the voter placing crosses in the squares at the right of the names of the candidates for whom he desired to vote. What we have said as to the ballot exhibit two is equally applicable to the ballots exhibits four and five.

By General Laws, 1909, cap. 11, § 46, it is provided that "no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him." In the case of *Rice* v. *Town Council of Westerly*, 35 R. I. 117, at pp. 122 and 123, this court has clearly stated the rule which should be applied in determining the validity of ballots bearing additional marks and has distinguished those ballots where the voter places upon his ballot a mark unconnected with the voting mark, which additional mark appears to have been knowingly and intentionally placed, from those where it appears that the voter has made some additional mark inadvertently or through want of skill in the handling of the pencil.

We think that the three ballots, exhibits two, four and five, are valid ballots and should have been counted for the petitioner Charles H. Sprague.

So much of the record of the town council of West Warwick acting as a board of canvassers, as declares that there was no election for first councilman and that the three ballots, exhibits two, four and five are defective and void and could not be counted for the said Charles H. Sprague is quashed.[1]

Alexander L. Churchill, John F. Murphy, Felix Hebert, for petitioner.

Joseph C. Cawley, Patrick F. Barry, Town Solicitor of West Warwick, for respondent.

[1]Petition for re-argument denied, November 22, 1918.

STATE OF RHODE ISLAND, HERBERT A. RICE, Attorney General, *ex rel.* CHARLES H. SPRAGUE *vs.* TOWN COUNCIL OF TOWN OF WEST WARWICK.

NOVEMBER 27, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Elections. Ballots. Board of Canvassers.*

A town council sitting as a board of canvassers counted the votes for town council, and found that there had been no election for the office of first councilman. The other four new members qualified. On *certiorari*, certain ballots rejected by the board of canvassers were found to be legal ballots. *Held*, that the members of the former town council still comprised the board of canvassers upon whom devolved the duty to complete their record in the respects indicated by the court.

(*2*) *Elections. Ballots. Board of Canvassers.*

Where six ballots were rejected by a board of canvassers as bearing identification marks, and on *certiorari* the court found that three of such ballots were improperly rejected, no claim being made as to any other ballots, the count as to the other ballots stands, and the only matter devolving on the board of canvassers is to deal with the ballots improperly rejected and to make its declaration in accordance with the opinion of the court.

MANDAMUS. Writ issued.

VINCENT, J. This is a petition for a writ of mandamus brought by Herbert A. Rice, Attorney General of the State of Rhode Island, upon the relation of Charles H. Sprague of the town of West Warwick against Walter A. Hoxie, Alfred Richard, Joseph E. Maynard, Eugene C. Baxter, and George W. Godfrey.

At the election in the town of West Warwick on November 5, 1918, the name of Charles H. Sprague appeared on the ballots as the republican candidate for first councilman and the name of Frank P. Duffy as the democratic candidate for that office. On the day following the election the town council met and, sitting as a board of canvassers, proceeded to count the ballots cast at said election including those cast for the respective candidates for the office of first councilman. After rejecting six of the ballots cast for Sprague on the ground that they were illegal and void because they bore

distinguishing marks, the board of canvassers found that each of the said candidates, Sprague and Duffy, had received an equal number of votes, whereupon it was declared by said board of canvassers that there was no election of first councilman and a record to that effect was accordingly made.

On November 7, 1918, Charles H. Sprague filed his petition for writ of *certiorari* against the town council of the town of West Warwick which appears on the files of this court as Miscellaneous Petition 303. The record of the board of canvassers in that case disclosed that six ballots for Sprague had been thrown out as bearing distinguishing marks, leaving an equal number of votes for Sprague and Duffy and that there was no election for first councilman in the town of West Warwick.

After a hearing upon the petition for a writ of *certiorari*, this court handed down an opinion on November 20, 1918, in which it was held that three of the rejected ballots, exhibits 2, 4 and 5, were valid ballots and should have been counted for the petitioner, Charles H. Sprague, and that so much of the record of the town council of the town of West Warwick acting as a board of canvassers as declared that there was no election for first councilman and that the three ballots aforesaid were defective and void and could not be counted should be quashed.

The petition for a writ of mandamus now before us sets forth that Walter A. Hoxie and the other above mentioned respondents were on November 21, 1918, duly notified of the finding of this court upon the petition for a writ of *certiorari*, and also of the modification of a former restraining order, such modification permitting and authorizing the said Walter A. Hoxie to act as a member of said town council sitting as a board of canvassers, to complete the count of votes for office of first councilman of the said town of West Warwick, etc.; that said Walter A. Hoxie, president of the town council as aforesaid, has refused to call a meeting of said town council to act as a board of canvassers to complete the

count of said ballots as aforesaid for the office of first councilman as aforesaid; and that the other respondents named have refused and neglected and still do refuse and neglect to meet as a board of canvassers for the purposes before mentioned; and the petitioner prays for an order of this court to said respondents to show cause, if any they have, why a writ of mandamus should not issue requiring and commanding them immediately to call a meeting of the town council of the town of West Warwick to sit as a board of canvassers to complete the count of ballots cast for the office of first councilman of said town on November 5, 1918.

At the hearing upon the petition for a writ of mandamus the respondents appeared by counsel and objected to the issuance of such writ upon the ground that the town council of West Warwick, upon whom devolved the duty of counting the ballots and recording the result of such count, had gone out of existence and was *functus officio*. They argued that the board of canvassers having counted the votes for first
(1) councilman and declared the result of such count, and four newly elected members of the town council having qualified, there is now no existing board of canvassers competent to act in the matters now before this court. They further argue that the board of canvassers having counted the votes for first councilman, excluding certain ballots as defective, and declared the vote for first councilman to be a tie, the former first councilman elected in 1916 would hold over.

We cannot accept the view put forward by the respondents. We think that the members of the former town council still comprise the board of canvassers upon whom devolves the duty to complete their record in the respects indicated by this court in its opinion upon the petition for a writ of *certiorari*. Through certain errors committed by the board of canvassers in their count, three votes for Charles H. Sprague were improperly rejected as defective and were not counted as ballots for the office of first councilman. Having found that such ballots were improperly rejected and should have been counted for Charles H. Sprague it

naturally followed that the record of the board of canvassers to the effect that there was an equal number of votes for Sprague and Duffy and that there was no election for first councilman should be quashed and that the board of canvassers must give effect to the three ballots found to have been improperly rejected and make such a declaration and such a record as would be conformable to the opinion of
(2) this court.

The respondents contended at the hearing that if there was to be any further counting in the matter on the part of the board of canvassers that they should again count or recount the whole number of votes cast at the election for the office of first councilman. We do not see that another count of the whole number of votes cast for the first councilman is called for. The board of canvassers made its count and declared the result thereof, which was, that each candidate had an equal number of votes, six ballots having been rejected as bearing marks of identification. This court found that three of those ballots were properly rejected and three were improperly rejected. It is not claimed that the count of the other ballots was improper and such count therefore stands. The only question which was before us under the petition for the writ of *certiorari* was the validity of the six ballots before referred to and the only matter now devolving upon the board of canvassers is to deal with the ballots found to have been improperly rejected and to make its declaration and record in accordance with the opinion of this court heretofore rendered.

In the present case there would seem to be, in effect, little practical difference between the two forms of the order submitted for entry.

It has been argued that the respondents have shown a willingness, if not a desire, to evade the findings of this court as set forth in its opinion heretofore rendered upon the petition for a writ of *certiorari*, and to do things which would not be in conformity with the spirit thereof. We cannot assume that such a situation will arise. We think our former

opinion upon the petition for a writ of *certiorari* and the views which we have now here expressed set forth with sufficient clearness the duty which now devolves upon the respondents and that they will not disregard or undertake to evade that course of conduct in the matter which we have so explicitly pointed out.

A writ of mandamus is issued directing the respondent Walter A. Hoxie to forthwith call a meeting of the town council of the town of West Warwick as it was constituted on the 6th day of November, 1918, consisting of Walter A. Hoxie, Alfred Richard, Joseph E. Maynard, Eugene C. Baxter, and George A. Godfrey, to sit as a board of canvassers to complete the count of votes for the office of first councilman of the town of West Warwick cast at the election on November 5, 1918; and that the said Walter A. Hoxie and the other above named respondents, acting as a board of canvassers for the town of West Warwick, shall forthwith proceed to complete the count of the votes for the office of first councilman cast at the election on November 5, 1918; and upon the completion of said count forthwith declare and record the result thereof.

Wilson, Gardner & Churchill, for petitioner.

Joseph C. Cawley, Patrick F. Barry, Town Solicitor, for respondent.

GIUSEPPE A. MERCURIO *vs.* BOARD OF CANVASSERS AND REGISTRATION.

DECEMBER 4, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Elections. Ballots.*

Where a voter had drawn a wavering line through the name of a candidate upon the ballot, and placed a cross in the square at the right of the name of the opposing candidate, although the line at one point was sufficiently depressed to clear one of the letters in the first name but preserved its contact with all of the other letters, it was a substantial compliance with Gen. Laws, R. I., 1909, cap. 11, § 46, providing "To cancel a name . . . the voter shall draw a pencil mark through the full name."

PETITION FOR CERTIORARI. Heard and portion of record quashed.

VINCENT, J. This is a petition for a writ of *certiorari* brought by Giuseppe A. Mercurio of the city of Providence against the board of canvassers and registration of said city. The petition sets forth that the petitioner was a candidate for councilman in the ninth ward of said city at the election held on November 5, 1918; that his name appeared upon the ballots in the democratic column as such candidate and that in the republican column appeared the name of Thomas F. Black as a candidate for the same office; that the board of canvassers and registration on November 8, 1918, counted the votes cast at said election including those cast for the petitioner and the said Thomas F. Black and announced that the number of votes cast for the petitioner was three hundred and forty-six and for the said Thomas F. Black three hundred and forty-seven. The petition further sets forth that one of the ballots counted for Thomas F. Black by said board of canvassers and registration should have been counted for the petitioner, Mercurio.

At the hearing before us two ballots were presented and marked respectively petitioner's exhibit 1 and respondent's exhibit 1. There is some conflict of testimony as to which of these two ballots is the one alleged by the petitioner to have been improperly counted for the said Thomas F. Black. Without discussing the evidence in detail, we think that we must hold, upon the testimony offered, that the ballot marked petitioner's exhibit 1 is the ballot referred to. In the petitioner's exhibit 1 the name of Thomas F. Black, in the republican column, appears to have a black pencilled line passing through it and a cross appears in the square at the right of the name of the petitioner in the democratic column. The line passing through the name of Thomas F. Black is not straight. It is wavering and at one point becomes sufficiently depressed to clear the letter "o" in the first name, at the same time preserving its contact with all of the other letters.

The board of canvassers and registration counted this ballot for Thomas F. Black for councilman on the ground that the line as drawn did not sufficiently comply with the statute and therefore did not effect the cancellation of that that name. The statute, Chap. 11, Sec. 46, Gen. Laws of R. I. 1909, provides that "To cancel a name within the meaning of this chapter the voter shall draw a pencil mark through the full name," and the respondents now claim that inasmuch as one portion of the line falls below one of the letters of the name there is no cancellation within the meaning and intent of the statute and that such ballot should be counted for Thomas F. Black.

We think that the cancellation upon this ballot, as described, is a substantial compliance with the words of the statute which we have above quoted. The letters composing the name of Thomas F. Black upon the ballot are not large and to say that the failure of the cancelling line to cross a single letter thereof would render nugatory the act of the voter would be giving to the statute a more narrow construction than could have been intended or would be reasonable. It requires some skill to make, with a pencil, a comparatively straight line through a name composed of twelve small letters and we do not think that the statute should be construed with such strictness that the failure to cross one letter of the name should render ineffectual the act of the voter.

We think that the ballot, petitioner's exhibit 1, should be counted for the petitioner, Giuseppe A. Mercurio.

So much of the record of the board of canvassers and registration as declares that the petitioner received 346 votes and the said Thomas F. Black 347 votes is quashed.

Pettine & De Pasquale, for petitioner.

Elmer S. Chace, City Solicitor and Alexander L. Churchill, for respondent.

ALFRED GEOFFROY *et al. vs.* N. Y., N. H. & H. R. R. Co.

DECEMBER 5, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Railroads. Open Gates.*

The closing of the gates at a railroad crossing is simply one means of notifying a traveller of danger and the traveller cannot rely exclusively on the fact that the gates are open, but must to some extent use his senses before going on to the railroad track.

(*2*) *Railroads. Open Gates.*

The fact that crossing gates are open is an important fact for consideration in the determination of the question whether due care was exercised by a traveller. The weight properly to be given to such fact necessarily will vary in different cases and will be affected by different considerations. If the facts are controverted or if fair-minded men could draw different conclusions from facts which are not controverted the question of contributory negligence would be properly submitted to a jury.

(*3*) *Railroads. Open Gates. Contributory Negligence.*

In an action for death of plaintiff's intestate caused by a collision at a grade crossing, evidence considered and

Held, that as plaintiff had failed to show that deceased was in the exercise of due care, a nonsuit was properly granted.

TRESPASS ON THE CASE for negligence. Heard on exception of plaintiff and overruled.

STEARNS, J. This is an action of trespass on the case for negligence brought by the plaintiffs, the heirs and next of kin of one Ephrem Geoffroy, who was killed on the night of December 21, 1917, by a passenger train of the defendant. The accident occurred on the grade crossing in the village of Arctic where River street, a State highway, crosses the railroad at grade. At this place the railroad, a single track line, runs north and south and River street crosses the railroad at a slight angle from the southwest to northeast. South of the crossing on the west side of the track is the Arctic passenger station, a small wooden building, the center of which is 114 feet from the center of the crossing. East of the railroad and running parallel to it for 100 feet south from the crossing there is an unnamed street, a town

highway, which approaches the railroad from the east and joins River street just east of the crossing. Between this street and the railroad there is a board fence which continues up to a point opposite the south end of the crossing planks. This fence is about 23 feet from the nearest rail, and varies in height at different places from five and nine-tenths feet to six and nine-tenths feet. On the east side of the unnamed street there is a stone store called the Arctic store, the northern side of which is about 100 feet south of the northerly end of the board fence above mentioned. At the Arctic store the town highway leaves the line of the railroad and bears away from the railroad in an easterly direction. Just south of the crossing a spur track leaves the main line track, extending southerly and on the east of the main track and parallel to it. On the easterly side of this spur track and about 400 feet south of the crossing there is another building described as the "store house," "cotton house" or "waste house." The crossing is planked to a width of 52 feet and there are crossing gates which are operated by hand. The view from the center of the crossing looking south extends for 714 feet. The view from the corner of the fence looking south is unobstructed and is somewhat more extended. There is no obstruction to the view at any point from the corner of the fence to the rail; north of the crossing the track is straight and the view is unobstructed. On the westerly side of River street and 104 feet west of the crossing is the home and grocery store of Joseph E. Maynard, the employer of Ephrem Geoffroy. The train was a regular express train from Willimantic to Providence which did not stop at Arctic station. It was due to pass this crossing at 8:07 p. m. each evening and this fact was known to Ephrem Geoffroy who was familiar with the crossing over which he had occasion to pass frequently. On the night of the accident Geoffroy, who was driving an automobile delivery truck, approached the railroad crossing from the east on the town highway. The train was about thirty minutes late and was running at the rate of about

forty-five miles an hour. The railroad gates were operated by hand by the station agent during the day and by a night-crossing tender during the night. This night-crossing tender, who was called as a witness by the plaintiff, testified that at the time of the accident the gates were not lowered on the approach of the train; that he was in and out of the station and on the platform; the electric alarm bell did not ring as usual and he first heard the locomotive whistle when the train was at the waste house and it was then too late for him to get to the crossing and lower the gates in time; that the engineer perceiving that the gate was up continued to blow his whistle, after passing by the waste house, up to the crossing.

Joseph E. Maynard testified that Geoffroy, who was twenty-one years old, had worked for him soliciting orders and delivering goods for a year and a half. That the automobile was a Ford delivery truck, open body with a closed-in winter top. There was an isinglass curtain on the left of the driver's seat and the side to the right of the driver was open. There was a curtain at the rear of the driver's seat which separated the driver's seat from the body of the truck. Maynard was standing outside the doorway of his store and saw the top of the automobile which was moving at the time in front of the stone store, and at the same time heard the whistle of the train which was then at the cotton house. The train was running forty-five or fifty miles an hour; the automobile was running about twelve miles an hour and kept the same speed from the time he first saw it until the collision. When the machine turned at the corner of the fence the locomotive was at the Arctic station; Geoffroy usually finished his work about 9 p. m. and left the machine in back of the store. A boy, who was not produced as a witness, was riding with Geoffroy at the time of the accident.

Joseph Potvin, an overseer in the Royal Mill, was walking toward the crossing on the road opposite Maynard's store, and saw the lights of the automobile when the machine

turned the corner at the end of the fence near the crossing; at this time the locomotive was in front of the railroad station. He stood there waiting for the train to pass; the gates were up, with red light on top, and he saw the engine strike the automobile. He heard the locomotive whistle when he was near a telephone post, between Maynard's store and the crossing, and it was about three seconds after he heard the whistle that he saw the lights of the automobile as it came around the corner of the fence.

Arthur Vanasse was standing in front of Maynard's store talking with Maynard and heard the train whistle somewhere in the vicinity of the cotton house; when he first saw the train the locomotive was passing the station and the automobile was then coming around the corner of the fence and within a very few seconds after he first saw the locomotive, it struck the automobile. The train was running between forty and fifty miles an hour.

Arselia Antaya, bookkeeper for Maynard, saw the accident. She was standing inside the store looking out of a window and could see the station and the board fence. The weather was cold and the door and window were closed. She heard the train coming and saw the top of the machine on the curve and then heard the crash. She heard the rattle of the train but did not hear any whistle. The train was at the station at the time she saw the automobile turning the curve by the fence. She was watching the train and consequently did not see the automobile go on the track.

This includes all of the testimony in regard to the happening of the accident and at the conclusion of the plaintiffs' testimony the trial court granted the motion of the defendant for a nonsuit on the ground that the plaintiffs' intestate was guilty of contributory negligence. The case is now before this court on the exception of the plaintiffs to the action of the court in granting a nonsuit.

There is no conflict in the evidence. The deceased was familiar with the surroundings and knew that he was

approaching the railroad crossing, which was a place of danger. There was nothing unusual to distract his attention; as he came up the grade by the Arctic store he knew that the board fence along the railroad track obstructed his view of the track from the crossing to the south. As he turned at the store there was a level stretch of road for 100 feet to the end of the fence and the view of the track to the north after he left the corner of the store was unobstructed so that when he reached the end of the fence near the railroad crossing he knew that the track was clear to the north and the only direction from which danger was to be apprehended was from the south. When he turned the corner at the store he was 100 feet from the crossing and the locomotive at that time was at or near the cotton house, about 426 feet south from the center of the crossing, behind him and running north in the same direction he was travelling. The whistle was blown repeatedly and the only noise was that coming from the train and from the operation of the automobile. It seems almost incredible that the deceased did not hear the whistle before he turned at the corner of the fence and the fact that the boy who was riding with the deceased was not called as a witness and that no explanation was given of the failure to call this witness who presumably could throw some light on the situation, furnishes a basis for the conclusion that the deceased did hear the whistle and decided to take a chance. However this may be, we assume that the deceased did not hear the warning and approached the crossing knowing that the gates were up. As he turned the corner at the fence if he had looked through the isinglass window of his curtain he had a clear and unobstructed view of the track to the south for a distance of more than 714 feet. He was then about 23 feet from the nearest rail and his automobile was running about twelve miles an hour, at such slow speed that it could easily have been brought to a stop within a few feet of the corner. If the deceased neither heard nor saw the train until it was too late to avoid a collision the conclusion is

unavoidable that he neglected to take any precaution whatever for his own safety and that he disregarded the opportunity to protect himself from danger by looking down the track to the south and relied entirely on the fact that the crossing gates were not closed.

The plaintiffs claim that when the crossing gates are open a traveller on the highway is relieved from the obligation in approaching the railroad track to look and listen, and that in such circumstances the question of his contributory negligence is always a question for the jury. In support of these propositions they rely on the cases of *Wilson* v. *N. Y., N. H. & H. R. R. Co.*, 18 R. I. 491, and 18 R. I. 598.

The *Wilson case* first came before the court on demurrer to the declaration, and the court held that the leaving open of the gates was in effect an invitation or more strictly speaking an implied assurance to travellers on the highway that the track might safely be crossed. The plaintiff in that case was a passenger in a large sleigh which was struck by a locomotive at a railroad crossing. The demurrer was overruled and it was held that the question of plaintiff's contributory negligence was for the jury. In discussing the effect of certain decisions of other jurisdictions the court used language which perhaps not unfairly may be understood as approving the doctrine that in every such case the question of contributory negligence is for the jury. When the case again came before the court (18 R. I. 598) it was on the petition of defendant for a new trial after verdict for plaintiff in a trial by jury. The opinion of the court in the latter case as in the first case was delivered by MATTESON, C. J. Although the court at page 605 affirms the decision above referred to on the demurrer it nevertheless qualifies what otherwise might be regarded as a statement of a general rule as follows: "The fact that the gates were open and unattended was evidence of negligence." . . . "To relieve itself from the charge of negligence in leaving the gates open, it was necessary for the defendant to show

that the other warnings of the approach of the train were such that the plaintiff should have heard or perceived them if in the exercise of due care. The jury were told that closed gates would be but one means of notifying travelers of danger; that if they were notified by the ringing of the bell or by the blowing of the whistle or by their vision or by any other means, that would be sufficient; because if the traveller had notice in any way of the approach of the train it would be contributory negligence for him to cross the track, and it would matter not, that the defendant might have been negligent. We think this instruction was correct and was sufficiently favorable to the defendant."

(1) The *Wilson case* does not support the contention of the plaintiffs. As the closing of the gates is simply one means of notifying a traveller of danger the traveller can not rely exclusively on the fact that the gates are open, but must to some extent use his senses before going on to the railroad track.

The fact that the gates are open is an important fact for consideration in the determination of the question whether the deceased exercised due care. The weight properly to be given to this fact necessarily will vary in different cases and will be affected by consideration of the location of the gates, whether on a street in a populous city or in the

(2) country, the presence or absence of traffic on the highway at the particular time and place, the presence or absence of obstructions near the track, the presence or absence of a gateman, etc. If the facts are in controversy or if fair-minded men can draw different conclusions from facts which are not controverted the question of contributory negligence would be then properly submitted to a jury.

In the present case, however, there is no dispute in regard to the facts. In the circumstances the deceased could not rely absolutely on the fact that the gates were open and fail altogether to use his senses to ascertain whether the track was clear. If he had looked down the track to the south at a time when he was in a place of safety he would

have seen the train and could have stopped his car in safety. He did not look but drove onto a dangerous crossing without
(3) taking precautions which he should have done. No reasonably prudent man in the circumstances disclosed would have gone onto the tracks without looking and such being the case as the plaintiffs have failed to show that the deceased was in the exercise of due care, there was no error in the granting of the nonsuit.

Following are some of the cases cited by the defendant in its brief which are in accord with the conclusion of this court in the case at bar. *Ellis* v. *B. & M. R. R.*, 169 Mass. 600; *Lundergan* v. *N. Y. C. & H. R. R.*, 203 Mass. 460; *Koch* v. *So. Cal. R. R. Co.*, 148 Cal. 677; *Coyle* v. *B. & M. R. R.*, 77 N. H. 604; *So. Ry.* v. *Jones*, 118 Va. 685; *Schaub* v. *Kansas City So. Ry. Co.*, 133 Mo. App. 444; *Lindsay* v. *Penn. R. R. Co.*, 78 N. J. Law, 704; *Schnackenberg* v. *D. L. & W. R. R.*, 86 N. J. Law, 517; *Romeo* v. *Boston & Me. R. R.*, 87 Me. 540; *Hayes* v. *N. Y., N. H. & H. R. R. Co.*, 91 Conn. 301.

The exception of the plaintiffs is overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant on the nonsuit.

Quinn & Kernan, for plaintiff.

Eugene J. Phillips, for defendant.

ELI FRANK *et al.* RECEIVERS OF DREADNAUGHT TIRE & RUBBER CO. *vs.* BROADWAY TIRE EXCHANGE CO.

DECEMBER 31, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Demurrers.*

Exceptions based on the overruling of demurrers will not be entertained, where the decision overruling the demurrer permits the action to proceed to a determination of issues of fact tendered by the pleadings, until after these issues of fact have been tried.

(2) *Foreign Corporations. Power of Attorney. Contracts. Receivers.*

Receivers of a foreign corporation which has not filed the power of attorney under Gen. Laws, 1909, cap. 300, §§ 42-44, cannot maintain in the courts of this State an action to recover money arising out of a contract made by the corporation within this State.

ASSUMPSIT. Heard on exceptions of plaintiff and overruled.

PARKHURST, C. J. This is an action of assumpsit on book account and common counts, commenced by Eli Frank and George C. Phillips, receivers of Dreadnaught Tire and Rubber Company of Baltimore, appointed under a decree of the District Court for the District of Maryland.

To the declaration the defendant filed a plea in abatement setting up in substance that the contract on which the writ and declaration were based was made within the State of Rhode Island, and that at the time of the commencement of said action the Dreadnaught Tire and Rubber Co. was a foreign corporation, and had not filed, with the Secretary of State any copy of any written power of attorney duly certified, etc., to accept service of process, etc., in accordance with the provisions of the statute. To this plea the plaintiff filed what is referred to in the pleadings as an additional replication, setting up the fact that the plaintiffs were receivers duly authorized to bring this action and that the action was not commenced by a foreign corporation and that the plaintiffs as receivers were not required, under any statute of the State of Rhode Island, to file the power of attorney referred to in the first plea of the defendant. To this additional replication the defendant demurred on two grounds: First: The conclusion stated therein excusing the necessity for filing a power of attorney under the laws of the State of Rhode Island is erroneous in law: Second, Plaintiffs, as receivers of said corporation, cannot maintain an action at law for the recovery of any debts due the corporation.

After hearing this demurrer a judge of the Superior Court sustained the demurrer on the first ground and overruled it

on the second ground; and thereupon the plaintiffs took exception to the decision sustaining the first ground, and the defendant took exception to the decision overruling the second ground, and both bills of exception have been duly prosecuted to this court, and are now before us.

(1) We do not find it necessary to determine the question raised by defendant's exception, for several reasons; first: certain issues of fact are tendered by other pleadings in this case and it is not our practice to entertain exceptions based upon the overruling of demurrers, where the decision overruling the demurrer permits the action to proceed to a determination of issues of fact tendered by the pleadings, until after these issues of fact have been tried; second: the defendant has argued its exception as if it appeared that the plaintiff receivers were appointed in a bankruptcy proceeding (although it nowhere appears in the pleadings that they are such), and appears to claim that because they are receivers in a bankruptcy proceeding in Maryland they are not entitled to maintain this action; in regard to this it is enough to say that we do not find on defendant's brief sufficient authority on the subject of receivers in bankruptcy and their rights, powers and duties to enable us to arrive at any conclusion upon the question whether such receivers are limited and restricted by law in the matter of bringing suits such as this, or whether they have the same right of suit by comity in the state courts as other receivers, appointed in equity or other proceedings, are generally deemed to have; and lastly the determination of the question is immaterial in this case, in view of our determination of the question raised by the plaintiff's exception.

The plaintiff's exception raises the question, briefly stated, whether the plaintiffs, as receivers of a foreign corporation (other than a national banking association or other corporation existing under the laws or by the authority of the United States) can maintain in the courts of this State an action to recover a sum of money arising out of a contract made within this State, in view of the provisions of Chap.

300, Sec. 42, Sec. 43, Sec. 44 of the General Laws of R. I. (1909), which sections read as follows:

"Sec. 42. No corporation, unless incorporated by the general assembly of this state, or under general law of this state, excepting national banking associations or other corporations existing under the laws or by the authority of the United States, shall carry on within this state the business for which it was incorporated, or enforce in the courts of this state any contract made within this state, unless it shall have complied with the following sections of this chapter.

"Sec. 43. Every such foreign corporation shall appoint by written power some competent person resident in this state as its attorney, with authority to accept service of all process against such corporation in this state, and upon whom all process, including the process of garnishment, against such corporation in this state may be served, and who, in case of garnishment, when the fees therefor shall have been paid or tendered, shall make the affidavit required by law in such cases, and who shall cause an appearance to be entered in like manner as if such corporation had existed and been duly served with process within this state.

"Sec. 44. A copy of such power of attorney duly certified and authenticated, shall be filed with the secretary of state; and copies thereof, duly certified, shall be received in evidence in all courts of this state."

(2) Under the pleadings and briefs in this case, so far as they relate to this exception, it stands admitted that the Dreadnaught Tire and Rubber Co. is a corporation of Baltimore in the State of Maryland; it is not claimed that said company has ever appointed an attorney; it is admitted that it has never filed a copy of its power of attorney, as provided in the above statute, and that the contract sued on was made in Rhode Island.

It is very plain that the Dreadnaught Co. if it were itself the plaintiff in this case could not under Sec. 42, "Enforce in the courts of this state any contract made within this

state." under the circumstances herein set forth; and the same is implied in the case of *Swift & Co.* v. *Little*, 28 R. I. 108.

It is urged by plaintiffs that they, as receivers, could not prior to suit comply with the statute and so save their suit, as Swift & Co. were held to be entitled to do in *Swift & Co.* v. *Little*, *supra;* and that therefore they and the interests they represent ought not to be held to suffer the consequences of the Dreadnaught Co.'s default; and they seem to argue that, in some way, which is not very clear, they ought to be allowed to maintain this action.

We find no ground for such contention. It is generally held that a receiver stands in the shoes of the person over whose estate he has been appointed, and is clothed with only such rights of action as might have been maintained by such person.

This was the principle of the decision in the case of *Ryder* v. *Ryder*, 19 R. I. 188, 192, where the last paragraph of the syllabus states the principle as follows: "In the absence of fraud or statutory regulations, a receiver, like a voluntary assignee for the benefit of creditors, or assignee in insolvency or bankruptcy, succeeds only to the debtor's rights and takes the property subject to the claims, liens and equities which would affect the debtor if he himself were asserting his interest in the property." ; and cites a long list of cases (p. 192) in support thereof.

High on Receivers (4th Ed.) thus states the law: "§ 201. In general, a receiver, by virtue of his appointment, is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded." . . . "§ 245. . . . In ordinary actions brought by a receiver in his official capacity to recover upon an obligation or demand due to the person or estate which has passed under the receiver's control, the defendant may avail himself of any matter of defense which he might have urged had the action been brought by the original party instead of by his receiver." . . .

Also Beach on Receivers (2d Ed.), page 751. "Section 704: A defendant in a suit brought by a receiver may avail himself of any defence which he has to the claim as against the original party, and may plead it with like effect. This rule follows naturally from the proposition already stated that the appointment of a receiver does not affect the obligation of contracts or other rights of action existing between the party whose property is given over to a receiver, and others." . . . See also, 34 Cyc. pp. 389, 439.

The plaintiffs cite no cases in support of their contention, and nothing has been called to our attention that in any way modifies the general principle above set forth.

The plaintiffs' exception is overuled, the decision of the judge of the Superior Court in sustaining the defendant's demurrer on the first ground is affirmed; and the case is remitted to the Superior Court sitting in Providence County for further proceedings.

Edward C. Stiness, Daniel H. Morrissey, for plaintiff.
Philip C. Joslin, Ira Marcus, for defendant.

WASHBURN WIRE COMPANY *vs.* ZENAS W. BLISS *et al.* BOARD OF TAX COMMISSIONERS.

DECEMBER 31, 1918.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Taxation. Corporate Excess. Corporations. Directors. Stock.*

Maine corporation carrying on business both in this State and in the State of New York, transferred its entire plant and assets in the State of New York to a newly organized New York corporation and received as a consideration therefor the entire capital stock of the corporation and $1,400,000 in bonds. Four of the five directors of the New York company were directors of the Maine company. On the question of the right of the Maine company to a deduction of the value of the New York tangible property from the Maine company's corporate excess under the Tax Act of 1912.

Held, that the legal effect of the transfer was not changed by the fact that the Maine corporation owned all of the capital stock of the New York corporation, but by the sale of the New York property the Maine corporation ceased to be the owner of such property and consequently was not entitled to a deduction for the value thereof.

APPEAL from decision of Board of Tax Commissioners under Tax Act of 1912, to Superior Court. Heard on exceptions of Board of Tax Commissioners and decision of Superior Court reversed.

STEARNS, J. This cause is before the court on bill of exceptions brought by the respondents, the State Board of Tax Commissioners, whereby exception is taken to a decision of the Superior Court reducing the petitioner's corporate excess tax assessed by said board for the year ending December 31, 1916.

The facts in the case, which are not in dispute, are as follows: The petitioner, the Washburn Wire Company, is incorporated under the laws of the State of Maine. It owns no property and carries on no business in that state. For a number of years prior to 1916 it had carried on the business of manufacturing and selling wire and steel products. The offices of the company and the principal manufacturing plant were located in East Providence in this State. The company also operated a branch manufacturing plant in New York City. Prior to the year 1916, the petitioner was allowed a deduction, from the aggregate value of its capital stock and indebtedness, on account of the value of its plant and other tangible assets situate in New York, in determining the amount of its corporate excess in Rhode Island so that no tax was in fact imposed upon that part of such aggregate value which arose from the ownership of its New York assets. (Public Laws, 1912, Ch. 769, Secs. 9, 10, 11, Ch. 784, Sec. 3.)

In May, 1916, at the annual meeting of the stockholders of the Washburn Wire Company, a statement by the treasurer of the company was presented to the stockholders the material parts of which are as follows:

"Gentlemen:

As you are aware, we have for some years operated a plant in New York City where we have a considerable investment in real estate, machinery, merchandise and

supplies. There has been a large and growing expense in connection with this plant by way of taxes imposed by the State and City of New York, and your directors have been considering for some time the reorganization of our corporation so that this expense could be reduced. After conferring with counsel, it has seemed advisable to organize a separate corporation under the laws of New York to take over the New York plant. It is proposed to incorporate this New York company with a capital stock of One Thousand Shares, all of which will be issued to and owned by our present company, and also to issue to the present company debenture bonds of the New York company to the extent of One Million Five Hundred Thousand Dollars ($1,500,000.)

"At the completion of this transaction the present company will have sold its New York plant, machinery and other assets there, and will have in its treasury debenture bonds of the New York company amounting to One Million Five Hundred Thousand Dollars, together with all of the capital stock of the New York company, and the New York business will then be run as a subsidiary corporation, rather than as a branch of the present company. The saving by way of taxes will be considerable, and this company will secure additional advantages under the New York law by reason of the fact that its business there will be operated as a New York corporation and not as a foreign corporation; the laws of that state being particularly favorable to manufacturing corporations organized under its laws." . . .

"The officers have also had prepared a proposed contract transferring the New York plant to the New York corporation, and same is submitted herewith for your approval."

The plan thus proposed was approved by the stockholders and the following vote was passed: "*Resolved*, That the stockholders of the Washburn Wire Company hereby approve the organization of a New York corporation, in accordance with the certificate of incorporation read to this meeting, to take over the assets and business of this company in New York State as of June 1, 1916, subject to

the liabilities there owing as of that date, and that the directors and proper officers of the company be and they are hereby authorized to take such action in the matter as may seem necessary or proper, and as they may be advised by counsel, including the execution of the contract read to this meeting and contained in the statement of the Treasurer hereinbefore recorded, and of any and all other contracts, deeds and agreements as may be necessary to carry the said transfer into effect."

We have quoted at some length from the records of the company as we think they serve to illumine both the purpose and the result sought to be obtained. The New York corporation, the name of which is "Washburn Wire Company, Inc.", was organized in May, 1916. The amount of capital with which the corporation was to begin and carry on business was fixed in the certificate of incorporation at $5,000. The company was authorized to issue not exceeding one thousand shares of capital stock which it was provided should have no nominal or par value. The board of directors were authorized to have one or more offices, to keep the books of the company within or without the State of New York, but the company was required to always keep at its principal office in New York correct books of account of all its business and transactions; a stockbook containing the name and residence of each stockholder, and showing the number of shares of stock held and the amount paid thereon by each stockholder, which books should be open daily to stockholders and judgment creditors. By Article V of the certificate of incorporation it was provided that the principal office of the company should be located in the city of Hornell, State of New York. The certificate of incorporation also provided that the directors for the first year should be five designated persons all but one of whom, viz.: Daniel C. Turner the manager of the New York manufactory, were also directors of the Maine corporation. The Maine corporation had a board of seven directors, four of whom, as thus appears, were directors in the New York corporation.

The entire plant of the Maine corporation located in New York, including real estate, machinery, merchandise and other assets was sold and transferred to the New York corporation on June 1, 1916, and in consideration therefor the New York corporation issued one thousand shares of its capital stock and approximately one million four hundred thousand dollars of its debenture bonds to the Maine corporation. Subsequent to December 31, 1916, the Maine company filed a return, as of that date, with the board of tax commissioners in this State setting forth its ownership of the capital stock and bonds of the New York
(1) company valued at $5,000 and $1,230,189.06, respectively, and claiming that these securities were exempt from taxation or non-taxable in determining its Rhode Island corporate excess. The board of tax commissioners, however, ascertained and assessed the company's Rhode Island corporate excess without allowing any deduction from the aggregate value of its capital stock and indebtedness either on account of these securities or the New York tangible property. The petitioner, the Maine corporation, appealed from this decision to the Superior Court and that court held that through its complete stock ownership in the New York company it was the real owner of the New York corporation and continued to be the real owner of the real estate and tangible personal property located in New York notwithstanding the aforesaid sale and transfer to the New York company; that as tangible property located outside of this State belonging to a corporation doing business in this State can not be taxed by this State, the petitioner was entitled to a deduction of the value of the New York tangible property from the company's corporate excess, as found by the board of tax commissioners. To this decision the State Board of Tax Commissioners duly took exception on the ground that the Washburn Wire Company was not the owner of any real estate or tangible personal property located outside of the State which entitled it to any deduction on its tax, and this exception raises the only question now before this court.

The Tax Act of 1912 (Chap. 769 and amendments, Pub. Laws, 1911–1912), provides that every corporation wherever incorporated, carrying on business for profit in this State, with certain exceptions not material to the consideration of this case, in addition to taxes on its real estate and tangible personal property, shall pay an annual tax "upon the value of that portion of its intangible property hereinafter called its corporate excess." The act (Sec. 11) provides the method by which the value of the corporate excess is to be determined which is substantially as follows:

(1) To the value of the total number of shares outstanding there shall be added as part of the measure of value of the property of such corporation the total value of its indebtedness of certain kinds specified.

(2) In the case of corporations also carrying on business outside of this State, a portion of the value ascertained under Clause 1, *supra*, in the case of manufacturing corporations, is apportioned to this State in such proportion as the fair cash value of their real estate and tangible personal property in this State, on December 31st of each tax year, bears to the fair cash value of their entire real estate and tangible personal property then used in their business.

(3) From the total value ascertained under Clause 1, or in case of corporations also carrying on business outside of this State, from the portion of the value apportioned to this State under Clause 2 there shall be deducted the assessed value of their real estate and tangible personal property located in this State.

Clause 4 provides that the tax board shall also make such allowance for such property as is exempt from taxation or is not taxable in this State by deducting it from the value ascertained as above-mentioned.

Clause 5 is as follows: "The remainder shall constitute the value of the 'corporate excess' for the taxation of said corporation.'"

In ascertaining the corporate excess, in the case before us, the tax commissioners followed the method prescribed by

the tax act and the petitioner admits that a proper valuation was placed on its capital stock and that the proper deductions were made, with the exception that the petitioner claims a deduction also should have been made for the value of the real estate and tangible personal property of the New York corporation.

The question thus raised of the right of petitioner to have such deduction made is to be determined by the provisions of the statute.

The Maine corporation does not claim to be carrying on business in New York or elsewhere outside this State and consequently cannot base its claim for a deduction under Clauses 2 and 3, Sec. 11, *supra*. It must rely then on Clause 4 by which the board is directed to make allowance for such property as "is not taxable in this state." The petitioner claims that it is the owner of the real estate and personal property in New York because it owns all of the capital stock of the New York corporation. If this claim is correct the State can not tax the New York property and does not claim the right to do so. If we accept the claim of the petitioner we reach a conclusion the result of which is unique, namely, that in Rhode Island the Maine corporation is the sole and absolute owner of the New York property, whereas, in New York the New York corporation is the sole and absolute owner of the same property. Each of these corporations is a distinct legal entity which in general and in many respects is regarded by the law as a natural person. The Maine corporation sold and transferred the property in question to the New York corporation to accomplish its own ends and for its own advantages. Prior to the sale the Maine corporation was the owner of the property and as such was allowed a deduction for its value in the tax assessment in this State. When the sale was made it is plain that it was the intent of the parties to change the ownership of the property and that the New York corporation should own and control it. Having made such change in ownership, certainly so far as the State of New

York is concerned, we can see no reason why the State of Rhode Island should be asked to disregard the transaction and hold that, so far as this State is concerned, there had been no change effected. The property can not be the exclusive property of each of two different corporations. We do not think that the legal effect of the transfer is changed by the fact that the Maine corporation owns all of the capital stock. This stock ownership it is true gives to the Maine corporation the power to elect a board of directors and thereby, indirectly, the power to control the management of the New York corporation. The direct control and management of the New York corporation however is vested in the directors of that corporation and the officers elected by them. If these directors legally exercise their discretion in the management of the New York company in a manner unacceptable to the Maine company or a majority of its stockholders, the only redress for the Maine corporation is by the election of new directors in the manner and at the time provided for by the by-laws of the New York corporation. The direct control and management of the New York corporation is vested in the directors of that corporation and the fact that a majority of the board are also for the time being directors of the Maine company does not change their relation to either corporation or alter their power of control over the New York company.

The petitioner, in its brief, calls our particular attention to the following cases: *McCornick & Co.* v. *Bassett*, 49 Utah, 444, and *Commonwealth* v. *Westinghouse Air Brake Co.*, 251 Pa. St. 12. It is unnecessary to discuss the case of *McCornick & Co.* v. *Bassett*, as that is a case of double taxation which the court held was prohibited by the peculiar provisions of the constitution of Utah.

In *Commonwealth* v. *Westinghouse Air Brake Co.*, *supra*, it appears that a capital stock tax was imposed under a Pennsylvania statute (Laws of Penn. 1889, p. 420, No. 332, and its Supplements) which required each corporation carry-

ing on business in that state to pay an annual tax, at a fixed rate, on the actual value of its whole capital stock of all kinds. The defendant, a domestic manufacturing corporation, had its manufacturing plant in said state. During the year in which the tax in question was assessed, the defendant purchased a factory in Wisconsin and another factory in Canada and created two corporations, one in Wisconsin and another in Canada, to carry on the business in these localities. The defendant owned all of the capital stock in each of these corporations.

The court held that the Pennsylvania company held the plants in Wisconsin and Canada through the medium of the stock in the two companies and that the evidence of its ownership was the shares of stock which it held, and "that to all intent and purposes the defendant company owns these plants just as securely as if the legal title was vested in it." That the aggregate value of the property in Wisconsin and Canada should be deducted from the aggregate capital stock upon which the tax had been laid.

In that case it also appears that the defendant company in order to establish business relations with certain foreign corporations purchased a limited amount of their capital stock, that it had nothing to do with the incorporation of the companies, and but little to do with their control and management. The court held that the defendant company was not entitled to a deduction for the value of these shares; that "the defendant simply owns some shares in these corporations. In no proper sense can it be said that a Pennsylvania corporation which owns a few shares of the capital stock of a foreign corporation is thereby made the owner of personal property or real estate permanently located beyond our jurisdiction."

The facts in the above case are not reported in detail and it is not clear from the opinion of the court what the decision would have been if the Pennsylvania company had not owned the entire capital stock but only a majority, sufficient to give it control. The decision of the court seems to us to be somewhat inconsistent.

It is true, as argued by the petitioner, that in many cases the law regards the substance and not the form, and the courts, very properly in certain cases, look beyond the corporate entity to the individuals who are interested in the corporation. But we see no sufficient reason for the application of this principle in the case at bar. The petitioner for its own advantage claims in one jurisdiction the full benefit and legal effect of the corporate entity, and in another jurisdiction, likewise for its own advantage, it asks that the act of incorporation be disregarded. We are of the opinion that the Maine corporation by the sale and transfer of the New York property ceased to be the owner of said property and consequently is not entitled to a deduction for the value thereof.

The exception of the respondent board of tax commissioners is sustained, the decision of the Superior Court, entered on the 8th day of June, 1918, is reversed and the case is remitted to the Superior Court with direction to confirm the assessment as made by said board of tax commissioners.

Swan & Keeney, for petitioner.

Herbert A. Rice, Attorney General, for respondents.

THOMAS J. KING *vs.* BOARD OF CANVASSERS AND REGISTRATION OF CITY OF PROVIDENCE.

JANUARY 3, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Elections. Payment of Tax.*

Under the provisions of Cons. R. I. Art. VII of amendments, Sec. 1, "no person shall at any time be allowed to vote in the election of the city council of any city . . . unless he shall within the year next preceding have paid a tax assessed upon his property therein . . . ," the payment within the year of a tax which was in arrears and as to which the tax payer was in default before the beginning of such year, is not sufficient. *Andrews v. Sullivan*. 36 R. I. 137, explained.

(2) *Elections. Payment of Tax.*

Gen. Laws, 1909, cap. 7, § 22, as amended by Pub. Laws, cap. 640, approved August 22, 1910, providing that no person claiming the right to vote upon payment of a tax, for members of a city council shall be admitted to vote by the boards of canvassers, unless upon the production of a certificate that before the sixth day preceding the day of such voting he has paid such tax assessed against him for and within such year, is not unconstitutional as being in derogation of Cons. R. I. Art. VII of amendments, Sec. 1, providing that "no person shall at any time be allowed to vote in the election of the city council of any city . . . unless he shall within the year next preceding have paid a tax assessed upon his property therein . . . ."

(3) *Certiorari.*

Where respondent has not made return to a writ of *certiorari* but has moved to dismiss the writ, and it appears upon the allegations of the petition that the record in question should not be quashed, the proper order to enter is not for quashal or dismissal of the writ but that the same be superseded.

CERTIORARI. Heard on motion to dismiss and writ superseded.

SWEETLAND, J. This is a petition for a writ of *certiorari* to be directed to the board of canvassers and registration in the city of Providence ordering said board to certify for our inspection the record relating to its canvass of the votes cast for members of the common council from the tenth ward of said city at the election held on the 5th day of November, 1918, to the end that so much of said record as is illegal may be quashed.

A writ of *certiorari* has issued as prayed for by the petitioner. The respondent has not made return in obedience to the writ but has filed its motion to dismiss. The motion fails to set out the grounds for dismissal. At the hearing on said motion however it appeared that the respondent sought to have the writ quashed or superseded because of its claim that upon the allegations of the petition the record of the respondent board to which the petitioner objects should not be quashed but affirmed.

It appears from the facts set forth in the petition, all of which are admitted by the respondent to be true, that the petitioner is a citizen of the United States and has had his residence and home in the tenth ward of the city of Provi-

dence for more than two years next preceding the 5th day of November, 1918, the day of said election; that on June 15, 1917, a tax was assessed in Providence upon the petitioner's personal property in Providence valued at least at one hundred and thirty-four dollars; that by the provisions of said assessment said tax was required to be paid to the city treasurer as tax collector on or before October 23, 1917; that the petitioner did not pay said tax on or before October 23, 1917, but paid the same on May 29, 1918. It further appears that on June 15, 1918, a tax was assessed in Providence upon the petitioner's personal property in Providence, valued at least at one hundred and thirty-four dollars; that by the provisions of said last named assessment said tax was required to be paid to the city treasurer as tax collector on or before October 22, 1918; that the petitioner did not pay said last named tax on or before October 22, 1918, but paid the same on October 30, 1918, which day was not before the sixth day preceding said day of election. It further appears that the petitioner was duly nominated as a candidate for the office of common councilman from said tenth ward of Providence on October 16, 1918, to be voted for at the election to be held November 5, 1918, and that his name was placed upon the official ballot as such candidate. It further appears that at the final canvass of the voting lists of said tenth ward the respondent board struck the petitioner's name from the list of persons qualified to vote for members of the common council at the election to be held November 5, 1918, for the reason that before the sixth day preceding the day of said election the petitioner had failed to pay the personal property tax assessed against him; and at said election the petitioner was not permitted to vote for any candidate for member of the common council from said ward. The petitioner was one of the four persons receiving the highest number of votes cast at said election for the office of common councilman from said ward; and if the petitioner was a duly qualified candidate the respondent board admit that he was entitled to be

declared elected to said office. Said board however refused to issue to the petitioner a certificate of election on the ground that he was not eligible to hold the office of common councilman for the reason that he was not at said election a qualified elector for such office.

The following provisions of law relate to the question before us. Section 1, Article IX of the Constitution of Rhode Island is as follows: "No person shall be eligible
(1) to any civil office (except the office of school committee), unless he be a qualified elector for such office."

Section 1 of Article VII of Amendments to the Constitution of Rhode Island, among other things, provides as follows: "*Provided*, that no person shall at any time be allowed to vote in the election of the city council of any city, or upon any proposition to impose a tax or for the expenditure of money in any town or city, unless he shall within the year next preceding have paid a tax assessed upon his property therein, valued at least at one hundred and thirty-four dollars."

Section 22 of Chapter 7, General Laws, 1909, as amended by Pub. Laws, Chapter 640, approved August 22, 1910, is as follows: "Sec. 22. No person who claims the right to vote upon the payment of a tax or taxes assessed against him upon property, for aldermen or common councilmen of any city within this state, or upon any proposition to impose a tax or for the expenditure of money in any town or city, shall by the boards of canvassers be admitted to vote for said officers or upon said propositions, unless upon the production of a certificate from the collector of taxes, town treasurer, or clerk of the town or city in which he resides, that before the sixth day preceding the day of such voting he has paid such tax assessed against him therein for and within such year."

The contention of the petitioner is that for each of the following reasons the action of the respondent board was erroneous and the record in question should be quashed. First, the petitioner claims that the payment by him on

May 29, 1918, of the tax assessed on June 15, 1917, and payable on or before October 23, 1917, was within the meaning of said Article VII of Amendments to the Constitution the payment of a tax within the year next preceding the day of election assessed upon his personal property in Providence; and that by reason of said payment and his other qualification he was on November 5, 1918, a qualified elector for and eligible to said office of common councilman. In support of that claim the petitioner relies upon the opinion of this court in *Andrews* v. *Sullivan*, 36 R. I. 137. In that case the court held that an elector became qualified to vote for members of the city council by reason of the payment by him within the year next preceding the day of election of a tax which had been assessed more than a year before said day of election but which by the provisions of its assessment did not become demandable and enforceable against the taxpayer until within the year next preceding the election. There the court was dealing with a situation quite unlike that presented by the facts in this case. In the course of the opinion the court said: "We think that it is the payment rather than the assessment of the taxes which must furnish the basis in calculating the period of twelve months." Upon that sentence the petitioner lays much stress. Plainly, however, the court had reference merely to the payment then in question of a tax which was not overdue before the year but which for the first time became demandable within the year before the election. There is nothing in the opinion that justifies the application of that language to the payment of a tax which was in arrears, and as to which the taxpayer was in default, before the beginning of such year. That was not the intention of the court, and to so hold would amount to an unwarranted extension of said constitutional provision.

It is further claimed by the petitioner that the payment by him on October 30, 1918, of the tax assessed against him on June 15, 1918, and payable on or before October 22, 1918,
(2) qualified him to vote for members of the common council

at said election. Such contention is in disregard of the provision of Section 22 of Chapter 7, General Laws, 1909, as amended by Public Laws, Chapter 640, approved August 22, 1910, quoted above. The petitioner, however, as the third ground of his position claims that said section is unconstitutional because it is in conflict with the provisions of Section 1, Article VII of Amendments to the Constitution quoted above, and that it constitutes an unwarranted restriction upon the taxpayer's constitutional right to qualify himself to vote in an election of the city council by the payment of a tax, assessed upon his property, at any time throughout the whole of the year next preceding such election.

The provisions of Section 1, Article VII of Amendments to the Constitution quoted above must be given a reasonable construction having regard for the necessary regulations concerning the canvass of voters, the preparation of voting lists and the orderly conduct of elections. The collection of taxes and the preparation of voting lists belong respectively to two different departments in the various cities of the State. As the right to vote for members of the city council depends upon the payment of the tax it is necessary that some method be adopted to convey to the canvassers in an official and orderly way the knowledge that the tax has been paid. It is necessary that a reasonable time should be given for the transmission of such official information and that thereafter a reasonable time should be given to the canvassers to arrange their lists to conform to the information so received. The general assembly has by said Section 22 provided that at least six days should be available for these purposes. Perhaps a shorter time might have been sufficient, but the general assembly having the matter before it has fixed upon that as a reasonable period and we cannot say that it is so unreasonable as to render the provision unconstitutional. By the provisions of Section 3 of Article VII of Amendments to the Constitution, Section 1 of that article shall take in the constitution of the State the

place of Section 2 of Article II "Of the Qualifications of Electors." Article VII of Amendments thus becomes a part of Article II of the constitution of the State. Section 6 of Article II provides as follows: "The general assembly shall have full power to provide for a registry of voters, to prescribe the manner of conducting the elections, the form of certificates, the nature of the evidence to be required in case of a dispute as to the right of any person to vote, and generally to enact all laws necessary to carry this article into effect, and to prevent abuse, corruption and fraud in voting." Said Section 22 quoted above appears to be a not unreasonable provision designed to carry into effect and make operative the provisions of Article VII of Amendments to the constitution. In our opinion said Section 22 is not unconstitutional as being in derogation of Article VII of Amendments to the Constitution.

The action of the respondent board in striking the petitioner's name from the list of electors qualified to vote in said tenth ward for members of the common council was not erroneous; for under the provisions of law he was not a
(3) qualified elector for said office and hence was not eligible to said office.

Upon the allegations of the petition the record of said board should not be quashed. The respondent's motion asks for dismissal. As the respondent has not made return upon the writ, the proper order for this court to enter in the premises is not for quashal or dismissal of the writ but that the same be superseded. It is therefore ordered that the writ of *certiorari* heretofore issued is superseded.

William H. McSoley, for petitioner.

Elmer S. Chace, City Solicitor, Henry C. Cram, Charles P. Sisson, Assistant City Solicitors, for respondent.

WILLIAM W. FERRIS, Adm'r. *vs.* ALFRED W. PETT.

JANUARY 3, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Contracts. Good Will. Improper Solicitation of Business.*

Where a vendor after disposing of the good will of a business interfered with the vendee's rights and sought to divert the business from the vendee, for his own benefit, such action amounts to a violation of the contract on his part, and he is not entitled to recover that portion of the contract price appertaining to the good will.

ASSUMPSIT. Heard on exceptions of defendant and sustained.

VINCENT, J. This is an action of assumpsit brought by William W. Ferris as administrator upon the estate of Henry M. Jewett to recover a balance alleged to be due to the plaintiff under a written contract.

Henry M. Jewett was a doctor of medicine and specialized in matters pertaining to the eye, ear, nose and throat. The practice of Dr. Jewett, like that of other oculists, comprehended not only the treatment of the diseases incident to these parts but also the prescription of such glasses or lenses as he might find, from proper tests, were required to correct or assist the vision of the patient under examination. Upon receiving the prescription, or a copy thereof, the patient customarily takes it to an optician who furnishes the glasses in accordance therewith and this method appears to have been followed by those who availed themselves of the professional aid of Dr. Jewett in the matter of their eyes. It is more or less commonly known, and it may also be gathered from the testimony in the case before us, that the doctor and the optician each retain a copy of the prescription in their respective offices for future reference.

The plaintiff, William W. Ferris, was an optician and the son-in-law of Dr. Jewett. After carrying on the optical business for some years, during which he made glasses for customers sent to him by Dr. Jewett, he sold out his business

in August, 1914, reserving from such sale copies of prescriptions emanating from Dr. Jewett. After disposing of his business Ferris was engaged in other occupations for a period of about two years. He then, in August, 1916, resumed the business of an optician.

In February, 1915, Dr. Jewett died and his son-in-law Ferris was appointed as administrator upon his estate and took possession of his property and effects including his office furniture, appliances, copies of prescriptions, etc.

The defendant, Dr. Alfred W. Pett, was also a specialist in the same lines as Dr. Jewett and for some time prior to the latter's death they had been somewhat associated but not as copartners in professional business. They occupied and used the same waiting room and the same operating room, but each had his own private consultation room and his own patients.

After the death of Dr. Jewett the defendant, Dr. Pett, being desirous of acquiring the business, which had been carried on by the former, entered into a contract with the plaintiff, as administrator, to purchase the business, good will, surgical instruments and furniture for the sum of one thousand dollars. The contract is in writing and bears date January 26, 1916. It provides for a cash payment of two hundred dollars and for the payment of the balance in installments of one hundred dollars each within a year. The contract does not state what part of the consideration is represented by the tangible property and what part by the business and good will but there is some testimony to the effect that in the negotiations between the parties they were considered as being of equal value.

After making payments aggregating five hundred dollars the defendant refused to make any further payments under the contract on the ground that the plaintiff had broken the contract on his part by interfering with the defendant's rights and impairing and injuring the good will by solicitations addressed to the former patients of Dr. Jewett and designed to divert them from the defendant and secure to himself their future patronage.

In support of this contention the defendant offered in evidence three letters sent by the plaintiff to patients of Dr. Jewett. It also appears in evidence that other letters to a considerable number were sent out by the plaintiff presumably similar in tenor to those produced in evidence. We quote one of these letters, as follows:

"January 9th. 17.

MRS. JAMES BLAINE
Arlington, R. I.

DEAR MRS. BLAINE:—

In going over my files this morning I found your name and prescription for glasses as made by the late Dr. H. M. Jewett some little time ago.

In most cases like yours Mrs. Blaine a change of lenses is advisable after such a period as you have had your glasses and so I am writing to inquire if you would like to make an appointment with us to re-examine your eyes at your convenience.

In a short note like this I can do no more than invite you to call at our new offices and acquaint yourself with our modern facilities we have to serve you.

Thanking you in advance for any reply you may care to make.

I am
Very truly yours,
W. W. FERRIS."

The case was tried to a jury in the Superior Court where a verdict was rendered for the plaintiff for the sum of five hundred dollars and interest amounting altogether to $531.83. A motion for a new trial was denied by the trial court and the case is now before us upon the exception of the defendant to that ruling.

There is no conflict of interest between the oculist and the optician so long as the one prescribes the lenses required and the other prepares and adjusts them to suitable frames in which they become practically effective. In the present

case the plaintiff goes much farther as his letters of solicitation clearly indicate. In these letters the plaintiff not only suggests that the party addressed should obtain new glasses from him but that he or she should undergo, at his hands, a re-examination of the eyes with a view to adapting future glasses to such changed conditions as may have resulted from the lapse of time.

We cannot see how the kind or degree of skill required in determining what lenses were suited to the changed condition would differ from that demanded in prescribing glasses in the first instance.

The defendant testifies that he received practically no advantage from the purchase of the good will of the business which had been carried on by Dr. Jewett. That fact would not in itself have any important bearing upon his liability to pay the balance due under the contract. The mere failure of the defendant to realize his expectations as to future business, in the absence of any fraud or interference on the part of the person from whom he makes the purchase, would not establish a failure of consideration. *Smock et al.* v. *Pierson, Ex'r.*, 68 Ind. 405.

In the case at bar however there is something more to be considered than a failure of the defendant's expectations.
(1) The testimony discloses that the plaintiff, after disposing of the good will of the business carried on by Dr. Jewett, interfered with the defendant's rights and sought to divert the business from the defendant, for his own benefit, which clearly amounted to a violation of the contract on his part.

In *Trego* v. *Hunt*, 12 Eng. Rul. Cas. 442, Lord MACNAGHTEN said: "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is

not honest to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

The same rule has been adopted in the case of *Zanturjian* v. *Boornazian et al.*, 25 R. I. 151. In that case the respondents entered into a written agreement with the complainant to convey to him their business, together with the good will thereof. The agreement contained no provision that the respondents should not reëngage in a similar business in the same neighborhood. The complainant offered evidence to show that such was really a part of the agreement although not included in the written instrument, but the court held that such evidence was inadmissible as tending to vary the terms of a written contract and that notwithstanding that the respondents sold the good will of the business they had, in the absence of an express stipulation, the right to reengage in a similar business in the same neighborhood and the court further said that, "The respondents clearly have not the right, however, to apply to any of their old customers privately, either personally or by another, to secure their patronage or to induce them not to deal with the complainant; for this would be in plain violation of their written agreement."

The undisputed testimony presents a question of law which was not argued in the court below on the defendant's motion for a new trial. We think that the solicitations of the plaintiff, as evidenced by his letters to former patients of Dr. Jewett, amount to a violation of the contract on his part and that he is not entitled to recover that portion of the contract price which appertains to the good will.

The plaintiff may, if he shall see fit, appear before this court on Wednesday, January 15, 1919, at ten o'clock, a. m., and show cause, if any he has, why this case should not be remitted to the Superior Court with direction to enter judgment for the defendant.

H. J. Williams, J. J. Rosenfeld, for plaintiff.

Washington R. Prescott, for defendant.

ADELBERT M. PECK *et al. vs.* JOHN LEVESQUE *et al.*

JANUARY 8, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Equity. Pleading. Cross-Bill.*

The office of a cross-bill is to obtain affirmative relief upon the case stated in the bill and not to obtain relief as to other matters.

(*2*) *Equity Pleading. Replication.*

Allegations of matters rendered necessary by the answer to a bill in equity, should be made by way of amendment to the bill and not by replication, under equity rule No. 24.

(*3*) *Deeds. Change of Name.*

Where a deed described a person by a different name than the one she was known by and she could neither read nor write and executed the deed by making her mark, such instrument in itself does not furnish satisfactory evidence of an intention on her part to change her name or that she knew that it had been incorrectly stated in the instrument.

(*4*) *Attachment. Record Title. Pleading. Misnomer.*

Record title to premises being in D. L., action was brought and the interest attached under the name of E. L. The officer's return showed that service was made upon the defendant named in the writ but the return did not show that the person served as E. L., was in fact D. L.

Held, that the record failing to show that D. L. was actually served with process, the further proceedings under execution sale were fatally defective.

BILL IN EQUITY for partition. Heard on appeal of complainant and dismissed.

VINCENT, J. This is a bill in equity brought by the complainants, Adelbert M. Peck and George W. Bennett, Jr., against John Levesque and several other respondents to obtain a partition of certain parcels of land therein described in which the complainant Peck claims to have an undivided interest and the complainant Bennett an interest as mortgagee.

The bill alleges that the complainant Peck and the respondents own jointly in fee simple two certain lots of land with the buildings and improvements thereon situate in North Providence, Rhode Island, which said two lots are designated as lots numbered seventy-six and seventy-seven on the River View Plat of House Lots located in Centredale in the town of North Providence belonging to S. A. Kelly

by W. S. Brown, 1895, and that the complainant Bennett holds a mortgage upon the interest of the said Peck therein. The bill prays for a partition of the two lots above described and for an order of sale.

The respondents filed an answer in which they deny that the complainant Peck has any interest in the lots seventy-six and seventy-seven described in the bill or that the complainant Bennett has any interest therein as a mortgagee or otherwise. The answer then goes on to allege that the respondents are owners in fee simple of five other lots and that the complainants appear to claim some color of title in the whole seven lots by reason of a certain sheriff's deed to the complainant Bennett and ask for affirmative relief, by way of cross-bill, not only as to the two lots named in the complainants' bill but also as to the other five lots described in the answer.

(1) The Superior Court held, upon the authority of *Paine* v. *Sackett*, 25 R. I. 561, that it could not entertain the respondents' answer as a cross-bill for affirmative relief, in respect to the five lots not mentioned in the complainants' bill, saying that the office of a cross-bill is to obtain affirmative relief upon the case stated in the bill and not to obtain relief as to other matters.

After the filing of the respondents' answer, and prior to the decision of the court below, the complainants filed a replication in which they apparently disclaim any title to the five lots named by reason of the sheriff's deed as set forth in the answer of the respondents. In considering this (2) the Superior Court said that the filing of any such special replication was forbidden by Equity Rule No. 24 which requires that allegations of matters rendered necessary by the answer shall be made by way of amendment to the bill.

We think that the position taken by the Superior Court regarding the five lots not mentioned in the bill as well as its conclusions upon the special replication of the complainants was correct and we see no need for the further discussion of those questions.

This brings us to the consideration of the allegations of the bill with respect to the lots seventy-six and seventy-seven. The complainant Peck claims to be the owner of an undivided half interest in these two lots and the respondents deny that the said complainant has ever acquired any interest therein. The alleged title of the complainant Peck rests upon an execution sale.

On September 29, 1899, the two lots now under consideration were conveyed by deed from Joseph Lizotte to Frank Levesque and Alphonsine Levesque, his wife, Frank Levesque being sometimes referred to as Frank Levesque, senior. Upon the death of the wife, Alphonsine, the said Frank Levesque became possessed of a life estate in the remaining undivided half of said two lots.

Frank Levesque remarried and on October 22, 1910, conveyed to his wife, Delima Levesque, through a third party, his interest in one undivided half of said lots seventy-six and seventy-seven. On November 26, 1910, he made another conveyance to his wife, Delima, also through a third party, the purpose of which was to correct the description in the former deed of October 22, 1910. The title to one undivided half interest in these two lots was thus vested in Delima Levesque subject to the life interest acquired by Frank Levesque in the other undivided half upon the death of his first wife, Alphonsine. Subsequent to the commencement of the present suit, Frank and Delima Levesque conveyed their entire interest in these, and other lots to the eleven children who are now named as respondents in the answer to complainants' bill. Later, and prior to the entry of the decree appealed from, Frank Levesque, senior, deceased, so that now there is no existing life estate in the two lots.

In January, 1915, one Francois Robert brought suit against Frank Levesque and Emma Levesque. Service of the writ was made, according to the officer's return thereon, by attaching the interest of the defendants in the two lots before referred to as numbers seventy-six and seventy-seven, and summoning the defendants named therein.

There is no copy of this writ among the papers in the case but the original writ appears to have been produced at the hearing in the court below by the assistant clerk of the Sixth District Court who testified regarding the contents and service thereof. Judgment in this suit was obtained against the defendants by default, execution was issued thereon and levied upon the real estate attached, which was subsequently sold at sheriff's sale to George W. Bennett, Jr., he being the highest bidder therefor. Subsequently George W. Bennett, Jr., conveyed his interest to Adelbert M. Peck one of the complainants here.

It will now be observed that the record title to one undivided half interest in the lots seventy-six and seventy-seven is in Delima Levesque and that the interest attached upon the above mentioned writ of Francois Robert is that of Emma Levesque.

The respondents contend that under these conditions
(3) George W. Bennett, Jr., failed to acquire any title to the interest of Delima Levesque in these lots. On the other hand the complainants claim that Delima, prior to said suit, had adopted the name of Emma and that such an intentional change of name is evidenced by certain deeds or conveyances in which her name appears as Emma Levesque. As Delima could neither read nor write and executed such of these deeds as conveyed her dower interest by making her mark, they do not seem to us to furnish satisfactory evidence of an intention on her part to change her name or that she knew that it had been incorrectly stated in the instruments referred to.

The complainants further contend, and have largely devoted their brief to the argument, that if Delima Levesque had legal notice of the attachment and levy it is immaterial by what name she was sued and summoned, the essential question being, were the persons interested served with process, and that if the real party was sued even under a wrong name the only advantage which could be taken of that error would be by a plea in abatement.

If we assume the correctness of this contention, that if Delima Levesque had legal notice of the attachment and levy it is immaterial by what name she is sued and summoned, we are directly led to inquire as to whether there is any evidence that Delima Levesque had such legal notice. The complainants apparently rely upon the officer's return on the writ in the case of *Francois Robert* v. *Frank Levesque and Emma Levesque* to show that in fact service was made
(4) upon Delima Levesque, for they say in their brief that, "the deputy sheriff who served the writ of attachment left a copy with Delima Levesque." The name of Delima Levesque does not appear in the writ, the name there being Emma Levesque and the officer's return is, "I have summoned said defendants leaving an attested copy of the within writ with each of defendants in their hands and possession." We do not think that the complainants are warranted in relying upon this return as evidence that Delima Levesque received actual notice of the suit. The substance of the return is that service was made upon Emma Levesque, she being the person named in the writ, but such return does not go to the extent of showing that the person served as Emma Levesque was in fact Delima Levesque. An examination of the record fails to disclose any direct testimony that Delima Levesque was actually served with a copy of the writ in the Robert suit. As this seems to us to be a fatal defect in the complainants' case, any further discussion of the matter would be useless.

The complainants' appeal is dismissed, the decree of the Superior Court is affirmed and the cause is remanded to said court for further proceedings.

George W. Bennett, Jr., for complainants.

Terence M. O'Reilly, for respondent.

ETHEL NEWTON *vs.* THE RHODE ISLAND COMPANY.

JANUARY 10, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Workmen's Compensation Act. Dependency.*

By *dependency* under the Workmen's Compensation Act, is intended a reliance for support upon the earnings of a workman at the time of the injury which resulted in his death and not at any time thereafterwards. It is therefore to the time of the injury alone that the court should look in determining who if any, of the members of a family or next of kin should be regarded as a dependent or dependents according to the terms of the Act.

(*2*) *Workmen's Compensation Act. Remarriage of Dependent.*

The remarriage of a dependent widow of a deceased employee to whom compensation has been awarded in accordance with the terms of the Workmen's Compensation Act, does not affect the obligation of the employer to continue the payments under the award.

PETITION under Workmen's Compensation Act. Heard on application of respondent to modify decree, upon questions of law certified by Superior Court.

SWEETLAND, J. The above entitled proceeding is a petition under the Workmen's Compensation Act filed in the Superior Court October 16, 1915. The petitioner therein claimed compensation for loss arising from the death of her husband, James E. Newton; which death resulted from a personal injury received by him through accident arising out of and in the course of his employment with the respondent the Rhode Island Company. On January 16, 1916, by decree of the Superior Court it was adjudged that the petitioner was wholly dependent upon the earnings of the deceased at the time of said injury and the respondent was ordered to pay to the petitioner as compensation the sum of $7.64 per week for a period of three hundred weeks from May 22, 1915, the date of said injury. On November 29, 1916, the respondent, The Rhode Island Company, filed in the Superior Court its application asking said court to vacate or modify said decree for the reason that the petitioner on August 22, 1916,

was legally married to one Nathaniel Major, Jr., and by virtue of said marriage ceased to be dependent for her support within the meaning of the Workmen's Compensation Act upon any other source of income than the earnings or income of said Nathaniel Major, Jr. At a hearing upon said application in the Superior Court it appeared that the petitioner had remarried as set out in the application.

The case is before us upon certain questions of law certified by the Superior Court to this court for its determination. By reason of our decision upon the first of said questions a consideration or determination of the others becomes unnecessary. The first of the questions certified is as follows: "First: Did the obligation of the respondent, The Rhode Island Company, to pay compensation to the petitioner cease by reason of the petitioner's second marriage?"

The application of the respondent is based upon its contention that the provision in favor of the petitioner contained in said decree arose out of her dependency upon the earnings of James E. Newton; that when she remarried her status changed and her former dependency should no longer be considered as the basis of any claim against the respondent; that after her second marriage she became wholly dependent upon the obligation of her present husband to provide for her support; and any benefit arising to her under said decree as widow of James E. Newton terminated.

The rights of the parties in the premises are wholly dependent upon the provisions of the Workmen's Compensation Act, Chap. 831, Pub. Laws, approved April 29, 1912, and the amendments and additions thereto. Unless said act expressly or by necessary implication authorizes the Superior Court to modify its decree upon the second marriage of the petitioner and because of such marriage the question propounded must be answered adversely to the respondents. The provisions of the act justify the respondent's contention that in passing upon the petitioner's claim for compensation her dependency was the point of

(1) supreme importance. By dependency however the statute clearly intends a reliance for support upon the earnings of a workman at the time of the injury which results in his death, and not at any time thereafterwards. Manifestly no one can be regarded as a person dependent upon the earnings of a deceased workman after his death. It was therefore to the time of the injury alone that the Superior Court was to look in determining who, if any, of the members of James E. Newton's family or next of kin should be regarded as his dependent or dependents according to the terms of the statute. The Superior Court found and decreed that the petitioner was at the time of the injury wholly dependent upon the earnings of said Newton for her support. No appeal was taken from this decree; and the standing of the petitioner became fixed as the dependent of James E. Newton, and the person entitled to compensation from the respondent in the amount and for the period fixed by statute. It seems clear that during the lifetime of the petitioner, within the period named in the decree, her status in that regard, depending upon a finally adjudicated fact, cannot be changed by extraneous happenings. The terms of the decree in question, with reference to said payments, were unconditional; and there is nothing contained in the statute which authorized the Superior Court to make them otherwise. In providing for payments to the dependents of deceased workmen extending over so long a period as three hundred weeks we are justified in believing that the General Assembly, in passing the act, could not have been unmindful of the possibility that during such period a change might happen in the financial circumstances of a petitioner found to be dependent; and that by reason of remarriage or the acquisition of other and ample means of support the former dependent might become entirely independent of the compensation decreed in his or her favor. Nevertheless, the Workmen's Compensation Act contains no provision that in the event of such change there should be a modification of the decree which by its terms is absolute and unconditional.

The legislative intent is by no means clear that if the payments under the decree are no longer a necessary part of the petitioner's means of support such payments should be discontinued. The absence of provision to that effect in the act leads rather to the opposite conclusion. A conclusion, adverse to the respondent's contention, is supported in some degree by an examination of certain provisions of the act. Section 14, Article III, provides that within two years after the entry of a decree fixing compensation for an injured employee, who has not deceased, and before the expiration of the period for which compensation has been granted, upon the application of either party on the ground that the incapacity of the injured employee has subsequently ended, increased or diminished, said decree may be reviewed by the Superior Court and modified or vacated in accordance with the facts. The General Assembly in said section was dealing with the subject of the review, vacation or modification of decrees entered under the act; but it failed to provide for the review, modification or vacation of a decree in favor of the dependents of a deceased employee in the event of a subsequent change in the financial circumstances of such dependent. Section 25, Article II provides that, in case payment of compensation has continued for not less than six months, the Superior Court may upon the application of either party order the commutation of the future payments to a lump sum in accordance with the method set out in said section. This provision, in the case of weekly payments decreed in favor of a dependent, is somewhat inconsistent with the view that the decree for weekly payments, at any time during the period for which such weekly payments have been awarded, may be vacated or modified because the necessities of the dependent have changed by reason of a change in his or her condition. For this court to adopt the position of the respondent and to hold that notwithstanding the silence of the statute in that regard the remarriage of the petitioner or a favorable change in her financial condition warranted

a modification of the decree to conform to what must have been the intent of the General Assembly, though such intent is not specifically expressed in the act, would amount to judicial legislation on the part of the court.

The respondent has called to our attention the opinion of a justice of the Common Pleas Court of New Jersey which appears in 39 New Jersey Law Journal at page 170. In that case the justice held that the nature and purpose of the New Jersey compensation act "was to provide for payments to take the place of the earnings of the injured workman if alive, or to be for the benefit of his actual dependents if dead during the temporary period of readjustment made necessary as a result of the accident." Said justice further held that a dependent widow of a deceased workman upon her remarriage ceased to be a dependent within the meaning of the act and had no right to further compensation thereunder.

We find little authority, upon the question now before us, in the reports of the decisions of the appellate courts of England and the courts of last resort in this country. In *Pryce* v. *Penrikyber Navigation Co.*, 1 K. B. Div. 1902, p. 221, the Court of Appeals was considering the claim of an employer, that the widow of a deceased workman should not be considered as wholly dependent upon the earnings of her husband at the time of his death because personal estate of the value of £100, belonging to the husband in his lifetime, passed to his widow upon his death. In the discussion of this point COLLINS, M. R., held that where the deceased's earnings were the only source of support and the widow was wholly dependent upon them at the time of the death of the husband the condition at the time of the death governed and not the conditions which arise afterwards. In the case of *Adleman* v. *Ocean Accident and Guarantee Corporation*, 101 Atl. 529, before the Court of Appeals of Maryland, it appeared that a partly dependent sister of a deceased workman, in whose favor a decree had been entered, married subsequent to the death of the employee;

and the employer filed a petition praying that the compensation awarded her be abated from the date of her marriage. The Workman's Compensation Act of Maryland, unlike the Rhode Island act, specifically provides that "in case of the remarriage of a dependent widow of a deceased employee without dependent children all compensation under this act shall cease." But the Maryland act has no similar provision with reference to compensation granted a dependent sister. The employer urged, however, that, upon analogy the court should hold that compensation awarded a dependent sister should also cease upon her marriage. In discussing this claim the court said: "But there is no such provision in reference to other dependents mentioned in the act, and it is reasonable to conclude that if the legislature while dealing with the subject of abatement of compensation had intended the compensation provided for a sister to abate upon her marriage it would have so declared in plain terms." It thus appears that the court determined the question before it, not in accordance with what might be regarded as the purpose of the compensation act but in strict conformity with its express terms. An authority directly in point is *Bott's Case,* 230 Mass. 152. The Massachusetts Workmens' Compensation Act, like our own, contains no provision for the modification of a decree awarding com-
(2) pensation to the dependent widow of a deceased workman in the event of her remarriage. In the *Bott's Case* it appeared that the dependent widow of a deceased employee to whom compensation had been awarded in accordance with the terms of the act, during the period covered by the award, married a man whose earnings were sufficient for the support of both of them. The court held that it was manifest from the facts found that the woman was no longer dependent for her support upon the payments received under the act. The court said: "The ascertainment of dependents is made as of the time of the injury to the deceased employee. It cannot be made as of any other time." . . . "No provision is made by the act for inquiry into

any subsequent change in her condition of dependency. She may become heiress to a fortune after his death and thus be utterly independent of the payments provided by the act. But there is no provision for an adjudication of that fact." . . . "Whatever incongruity there may be in continuing payments to a person on the presumption that she is dependent on a deceased husband when in fact she is receiving ample support from a new husband is a matter for the Legislature and not for the courts to remove."

Our answer to the first of the questions certified to us is that the obligation of the respondent Rhode Island Company to pay compensation to the petitioner did not cease by reason of her second marriage.

The papers in the case with this decision certified thereon will be sent back to the Superior Court.

Fitzgerald & Higgins, for petitioner.

Clifford Whipple, Earl A. Sweeney, for respondent.

WILLIAM P. DAWLEY *vs.* THOMAS B. CONGDON, *Ex., et al.*

JANUARY 31, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Wills. Secondary Evidence.*

On the issue as to whether a will as found by the executor was the complete will of testatrix, or whether a clause had been removed therefrom, and such clause had not been revoked by testatrix and should be probated as a part of the will, a carbon copy of the will made at the time the will was typewritten, in the office of the attorney who prepared the will, furnished secondary evidence of high probative value as to the contents of the clause as it stood in the will when the same was executed.

(2) *Wills. Evidence.*

A party is not prejudiced by the admission of questions which are not answered.

(3) *Evidence. Exceptions.*

Objection to a question should be made when the question is asked, and after questions had been answered without objection, an exception will not be considered based on a general objection to such questions.

(4) *Wills. Evidence.*

On the issue as to whether a clause had been removed from a will by testatrix or by her direction, it was proper to show the relations which existed to the death of testatrix between her and the legatee named in said clause and also the relations existing between her and the others of her next of kin, and whether the same reasons which impelled the gift when the will was made continued up to the time of the testatrix's death.

(5) *Wills. Direction of Verdict.*

A motion to direct a verdict in favor of a will without a so-called "additional clause," was properly refused if there was any legal evidence before the jury which would have justified it in reaching a contrary verdict. The same question is presented on exception to the refusal to direct.

(6) *Wills. Presumptions.*

Where a will after its execution was left in the possession of testatrix and was found among her effects after her death, the inference arises that the removal of a portion of the instrument was the act of testatrix with intent to revoke the clause, but such presumption would yield to such proof to the contrary as the jury would be justified in regarding as clear and satisfactory. This evidence might be either direct or circumstantial.

(7) *Direction of Verdict.*

On a motion to direct a verdict all evidence in favor of the party against whom the motion is directed, must be taken as true and he is entitled to the benefit of every favorable inference which may be reasonably drawn from the facts in evidence. The credibility of witnesses and the weight which should be given to their testimony is for the determination of the jury and is not to be passed upon by the justice.

PROBATE APPEAL. Heard on exceptions of appellant and overruled.

SWEETLAND, J. The above entitled cause is the appeal of William P. Dawley from the decree of the probate court of the city of Newport admitting to probate the will of Alice B. Slocum, late of Newport, deceased, including the eighth clause to which reference will hereafter be made.

Said appeal was heard before a justice of the Superior Court sitting with a jury and resulted in the verdict that the instrument purporting to be the will of Alice B. Slocum, including the clause referred to as the eighth clause, is the will of said Alice B. Slocum.

The cause is before us upon the appellant's exceptions to certain rulings upon the admission of testimony made by

said justice in the course of the trial, and upon the appellant's exception to the refusal of said justice to grant the appellant's motion that said justice direct the jury to return a verdict in favor of the instrument without said additional or eighth clause.

It appears that Mrs. Slocum, the testatrix was an elderly woman at the time of her death on August 22, 1917. It is stated by the appellant that at that time she was over eighty, and by the appellees that she was over seventy five years of age. She had been a widow since 1913. Her next of kin at the time of her death, and for a year at least prior thereto, were the appellant William P. Dawley, his brother Perry C. Dawley, the legatee named in said eighth or residuary clause, and Mary S. Langdon. William P. Dawley and Perry C. Dawley were the sons of a deceased sister of Mrs. Slocum, and Mrs. Langdon was the daughter of her deceased brother. Since the death of her husband the testatrix had lived in the family of the appellant. Perry C. Dawley visited her frequently and at her request had attended to certain matters of business for her. He appears especially to have had her confidence and esteem. Mrs. Langdon lived in Massachusetts. The testatrix rarely saw her and did not regard her favorably. On July 30, 1915, Mrs. Slocum executed with legal formality said instrument as and for her last will and testament. At the time of its execution said instrument included at the foot of its third page the paragraph referred to throughout the trial in the Superior Court and in this court as the "eighth clause," which paragraph is as follows: "Eighth: All the rest, residue and remainder of my property of every kind and description, to which I may, in any way, be entitled at my decease, I give, devise,and bequeath unto Perry C. Dawley and his heirs forever, because of his kindness to me." Said instrument was prepared in accordance with the instructions of the testatrix by the attorney at law who had acted as her counsel during about twenty-five years before her death. Said attorney was one of the witnesses to the execution of the will. After

its execution at her home the will was left in the possession of the testatrix. She died on August 22, 1917. On the day of her funeral, August 25, 1917, after the burial, said will was found by the appellant, his wife and the executor in a paper envelope which was contained in a locked tin box at the bottom of a locked trunk belonging to the testatrix. Said trunk was at that time in the bedroom which had been occupied by the testatrix during the last years of her life and in which she died. When so found that portion of the third page, upon which said eighth clause had been written, had been removed, apparently by cutting. The portion of the third page so removed, as far as the evidence discloses, was not found among the effects of the testatrix. The executor who was the proponent of the will claimed that said eighth clause had not been removed by the testatrix or by her direction and that said eighth clause should be probated as a part of said will. The will was typewritten and the executor sought to establish the contents of said eighth clause, and that it was part of the will when the same was executed, by the testimony of said attorney at law. At the time the will was typewritten in his office said attorney had caused a carbon copy thereof to be made. This copy he had retained, and it was in his possession at the time of the trial.

The first two exceptions of the appellant relate to the action of the justice in admitting certain testimony of the attorney at law with reference to said carbon copy. At the beginning of the trial the will as found, with the lower part of the third page removed, was before the court. Said attorney, while upon the stand as a witness, was asked the following question: "Q. I will ask you whether or not at the time that will was executed that third page had anything cut off at the bottom?" To this the witness answered, (1) "It did not." He was then asked, "Q. So that, was there or was there not in the will at the time you left it intact, as part of the third page an eighth clause?" The appellant excepted to the ruling of the justice permitting this question

to be asked. To this question the witness replied, "There was." The witness then testified to the making of the carbon copy of the instrument in his office, and the appellant excepted to the refusal of the justice to strike out the following answer of the witness: "This is the duplicate copy that was in my possession." Said carbon copy of the will was then put in evidence. We find no merit in these exceptions of the appellant. The contention of the proponent was that the will as found by the executor was not the complete will of the testatrix; that the so-called eighth clause had not been revoked by her, and hence should be probated as a part of said instrument. To maintain his position it was essential for the proponent to establish to the satisfaction of the jury that said eighth clause was a part of the will at the time of its execution; that it had not been removed therefrom by the testatrix or by some person in her presence and by her direction with the intention of revoking the same and also he must establish the contents of said eighth clause. Of these separate facts he might present evidence in any order that his convenience or his judgment dictated, unless the circumstances were such as to warrant the justice in requiring the proponent to adopt some other order of proof. The carbon copy, made as the attorney testified, furnished secondary evidence of high probative value as to the contents of said eighth clause, as it stood in the will when the same was executed.

The third and fourth exceptions of the appellant relate to rulings of said justice permitting certain questions to be propounded to the appellant in cross-examination. Said
(2) questions are numbered 165 and 170 respectively. Said justice ruled that the questions were proper in cross-examination. Neither of the questions, however, were answered by the witness. We find that the appellant was not prejudiced by said rulings of the justice.

Without objection the appellant while on the stand was asked and he answered a number of questions in cross-examination relating to the larceny of a gold chain be-

longing to Mrs. Slocum by a son of the appellant who was a member of the appellant's household. These questions are numbered 171 to 178 inclusive. After all of said questions had been answered; and when no unanswered question was pending, the appellant made a general objection, as follows: "We object to all this testimony, Your Honor, please." The appellant's exception was noted and he urges this as his fifth exception before us. With reference to this exception the record presents no circumstance and the appellant urges no reason which in this matter calls for a variation of the ordinary rule that objection to a question should be made when the question is asked; and further, if a question is answered by the witness before objection can be made, or in disregard of an objection, or if to a proper question the witness makes
(3) an answer that is not responsive a motion should at once be made that the improper answer be stricken out. Neither of these things was done by the appellant and in our opinion this exception is not properly before us. We will say, however, that in our opinion the questions were admissible and the testimony was pertinent to the issues presented at the trial.

Said justice permitted the following question to be asked of Perry C. Dawley, the legatee named in said eighth clause: "24. Q. After the death of Captain Slocum what did you do for your aunt?" The appellant excepted to this ruling and urges it here as his sixth exception. The essential controversy between the parties at the trial was as to whether or not said eighth clause was removed from the will by the testatrix or by her direction. Upon that issue the parties might show the relation which existed down to the time of her death between the testatrix and the legatee
(4) named in said residuary clause; and also the relations which existed between the testatrix and the others of her next of kin. The appellant introduced evidence tending to show that services were rendered by him to the testatrix, and also to show the kindly feeling which the testatrix had

for himself and the members of his immediate family. One of the appellant's claims made before us was that the name "Perry" was a family name; that his own middle name was Perry; that because of his services to her it was through a mistake that the testatrix had designated Perry C. Dawley as her residuary legatee; that she intended to name him, William Perry Dawley, and not his brother Perry C. Dawley as such legatee; and that when she discovered her mistake she removed the clause in question from the will. He also urged before us that in any event it should be found that the naming of Perry C. Dawley as such legatee was in response to a passing whim. In reply to such claims on the part of the appellant it would be admissible for the appellees to show what were the relations between the testatrix and these two brothers and what was the nature of her feeling toward them respectively. It is not clear that the appellant urged either of these claims at the trial in the Superior Court, but upon the issues which manifestly were presented there it was proper for the appellees to show the conduct of Perry C. Dawley toward the testatrix which might influence her to make him her beneficiary in said eighth clause, and cause her to state as her reason that it was "because of his kindness to me." The appellees should also have been permitted to show, if they were able, that the same reasons which impelled the gift when the will was drawn continued up to the time of the testatrix's death.

At the close of the testimony the appellant moved that said justice direct the jury to return "a verdict in favor of the instrument without the additional clause." This motion was denied and the appellant excepted. He insists upon (5) this as his seventh and last exception. The appellant's motion was properly refused if there was any legal evidence before the jury which would have justified it in reaching a contrary verdict. The instrument after its execution was left in the possession of the testatrix; it was found among her effects three days after her death. From these facts the inference is warranted that after the execution and during

the remainder of her life the instrument remained in her custody. In such case as that the presumption arises that
(6) the removal of the eighth clause from the instrument was the act of the testatrix with intent to revoke the clause. This presumption however would yield to such proof to the contrary as the jury would be justified in regarding as clear and satisfactory. Therefore the question presented to said justice by the appellant's motion was whether or not any legal evidence of that character was before the jury. The same question is presented to us by the exception. The evidence in that regard might be either direct or circumstantial. In considering this question all evidence in favor of the appellees must be taken as true; and the appellees are entitled to the benefit of every favorable inference which may reasonably be drawn from the facts in evidence. As to a number of very important matters there was direct conflict between the testimony of the appellant and that of witnesses for the appellees. The credibility of witnesses and the weight which should be given to their testimony was for the determination of the jury and was not to be passed upon by the justice in his consideration of the motion
(7) to direct a verdict. From an examination of the transcript it appears that there was evidence before the jury from which it might find the following facts. From the time of the execution of said will until the death of Mrs. Slocum there had been no change in the kindly relations between her and Perry C. Dawley, the beneficiary under said clause. If said clause was revoked the residuary estate would pass to the testatrix' next of kin, one of whom was distasteful to her. She told her executor that she did not wish her residuary estate to pass to her next of kin generally but "to somebody particular." Prior to July 30, 1917, the contents of Mrs. Slocum's will were not known to either of her nephews. On July 30, 1917, she became very ill and the appellant left his work to help attend his aunt and remained at home during most of the time until her death. On August 8, 1917, Mrs. Slocum suffered a shock and after that time remained un-

conscious until her death. Between July 30 and August 8, 1917, she was physically unable without assistance to remove said clause from her will and none of the persons who were in attendance upon her during that period, all of whom were witnesses at the trial, testified that they gave her such assistance. In the morning of August 1, 1917, the appellant consulted a lawyer for the purpose of having a guardian or a conservator appointed for the estate of Mrs. Slocum. Later, on the same day, he saw the attorney who drew the will and in an excited manner said to the attorney, "that he had just seen Mrs. Slocum's will and had found that he was not in the residuary clause and he wasn't going to stand for it; he was going to change it." He wanted said attorney to change the will that he might be named in the residuary clause. When informed by the attorney that if Mrs. Slocum would send for him the attorney would go to her and make such changes in her will as she desired, if she was able to authorize such change, the appellant replied that he didn't think she was able to make a will for nearly a year before. After the burial of the testatrix the appellant told the executor that Mrs. Slocum's attorney had informed him, the appellant, that Mrs. Slocum's will was in her tin box. This was untrue as said attorney did not know and had not told the appellant that the will was in said box. In the presence of the executor, the appellant and his wife procured from the bureau of Mrs. Slocum the keys to said trunk and tin box where the will was found. If the jury believed the facts to be true which we have outlined above the jury would be warranted in regarding it as satisfactorily proved that just prior to noon on August 1, 1917, the appellant saw the will of Mrs. Slocum, that then said eighth clause had not been removed from said will; and that it was not afterwards removed by Mrs. Slocum, for the reason that from July 30, 1917, until her death she was physically unable to do so, even if at any time during that period she had been mentally capable of revoking said clause. The appellant's motion was properly denied by said justice.

The appellant's exceptions are all overruled and the case is remitted to the Superior Court for further proceedings following the verdict.

Jeremiah P. Mahoney, Clark Burdick, for appellant.

Sheffield & Harvey, for executor. *Robert M. Franklin,* for appellee.

THOMAS K. WINSOR *et al. vs.* PILGRIM SHOE MACHINERY COMPANY.

FEBRUARY 1, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Receivers.*

State taxes being debts of a public character are entitled to preference in the liquidation of a corporation by a receiver appointed under Gen. Laws, 1909, cap. 213, § 27, as amended.

(*2*) *Taxes. Receivers. Priority.*

Under the provisions of Gen. Laws, 1909, cap. 213, § 27, as amended by Pub. Laws, cap. 780 (1911–1912), a petition was filed for the appointment of a receiver and the dissolution of a local corporation. Insolvency was alleged. The decree appointing the receiver instructed him to "take possession of the assets . . . carry on the business . . . liquidate its assets and distribute the same ratably among its creditors."

Prior to the appointment of the receiver an attachment had been placed on the stock and fixtures of the company by a creditor. Upon demand made by the receiver the property under attachment was surrendered to him by the deputy sheriff. The value of the property attached was greater than the amount of the claim.

Held, that the attachment of the creditor was not vacated by the appointment of the receiver.

Held, further, that the decree of the court directing the receiver to take possession of the assets and carry on the business, of necessity required that the receiver should be allowed to take possession of the property attached.

Held, further, that the attaching creditor was entitled to the benefit of the security of the attachment and the legal priority thus obtained would be protected in equity in the disposition of the proceeds from the sale of the assets to the amount of the value of the property attached.

PETITION for appointment of a receiver. Heard on appeal from a decree of the Superior Court as to certain priority claims. Appeal dismissed.

STEARNS, J. This is an appeal by Charles W. Underwood, receiver of the Pilgrim Shoe Machinery Co., and by the Pilgrim Shoe Machinery Co. from a decree of the Superior Court whereby the Superior Court decreed that a certain claim of the Mechanics National Bank and the claim of the State of Rhode Island for taxes against the said machinery company had priority over certain other claims. The original petition was for the appointment of a receiver and the dissolution of the Pilgrim Shoe Machinery Co., a corporation organized under the laws of Rhode Island and located and doing business in the city of Providence. The petition was brought under the provisions of the statute (Chap. 213, Sec. 27, Gen. Laws, 1909, as amended by Chap. 780, Pub. Laws, 1911-1912). The petitioners are the directors and are also stockholders and creditors of the company; they allege that the company is insolvent.

The petition was filed in the Superior Court, June 18, 1918, and on the same day Charles W. Underwood was appointed receiver by a decree of that court. By said decree the receiver was "instructed and authorized to take possession of the assets and effects of said corporation, collect the indebtedness due to said corporation, carry on the business of said corporation, fill all orders on hand, liquidate its assets, and distribute the same ratably among its creditors."

Prior to the appointment of the receiver on May 24, 1918, the Mechanics National Bank of Providence had brought an action in assumpsit in the Superior Court, county of Providence, to recover the principal and interest then due from the respondent corporation on its promissory note for $2,900. On the 25th day of May, 1918, the stock and fixtures of the respondent's shoe machinery shop were attached pursuant to the directions in the writ in said action; this action is still pending in the Superior Court.

The receiver at once, upon his appointment, went to the shop of the shoe machinery company and demanded possession of the stock and fixtures which were held by the deputy sheriff under the writ of attachment referred to and

thereupon possession was surrendered by the deputy sheriff to the receiver. On June 19, 1918, on motion of the receiver, appraisers were appointed to appraise the value of the property. August 15, 1918, the motion of the receiver for leave to sell all the assets of the company at public auction or private sale was granted by the Superior Court.

(1) It is admitted that there was due from said corporation to the State certain corporate excess taxes, assessed under the Tax Act of 1912 (Pub. Laws, Chap. 769). The receiver petitioned the Superior Court for a determination of the claim for priority of payment of these and certain other claims. The Superior Court held that the unpaid taxes due to the State and the claim of the Mechanics National Bank should be paid as preferred claims. The case is now before this court on appeal by the receiver and the corporation from this decree.

At the hearing before this court the appellants did not press the appeal from the decision of the Superior Court directing priority in the payment of the State taxes. These State taxes are debts of a public character and as such are entitled to a preference in insolvency proceedings. See *Ins. Commissioner* v. *Commercial Insurance Co.*, 20 R. I. 7.

The only question remaining is in regard to the claim of the bank to the right of priority in payment of its claim. As the proceeding in this case is a statutory proceeding the question before us must be considered by reference to the

(2) provisions of the statute. Section 27 above referred to is not restricted to the case of insolvent corporations but its provisions are also applicable to solvent corporations. The dissolution of the corporation and the appointment of a receiver, in the cases specified therein, may be the result of voluntary action on the part of the stockholders, or by adversary proceeding by the creditors, or by the State itself in cases where there is ground for the forfeiture of the charter. The statute contains no provision for the vacating of an attachment, and in that respect differs from Gen. Laws, Chap. 338, Sec. 4, "Of Assignments at Common Law

for the benefit of Creditors," and Chap. 339, Sec. 39, by which it is provided that in the cases specified the attachment if made within four months of the assignment shall be dissolved thereby.

The attachment of the bank therefore was not vacated by the appointment of the receiver in this case. As the Superior Court has found that there was no abandonment of the attachment by the bank, we now come to the consideration of the legal effect of the acts of the parties. Chapter 213, Sec. 30 of the Gen. Laws, 1909, is as follows: "The court shall have jurisdiction in equity of the application and of all questions arising in the proceedings thereon, and may make such orders and injunctions and decrees therein as justice and equity require." Section 28, as amended by Chapter 425 of the Public Laws, is as follows: "Such receiver shall take charge of any such corporation's estate and effects of which he has been appointed receiver, and he shall collect the debts and property belonging to it. He shall have power to prosecute and defend suits in its name or otherwise, to intervene in any action, suit, or proceeding relating to such estate or effects, and to appoint agents under him. He shall have power, under the direction of the court, to preserve the assets of such corporation, to carry on its business, to sell and convert such assets and property into cash, to redeem any mortgages, conditional contracts, pledges, or liens of or upon any such property, refer any controversy or dispute concerning any such property to arbitration, compromise any controversy or dispute concerning any such property, and generally to do all other acts which might be done by such corporation, or that may be necessary for the administration of his trust, according to the course of equity."

The powers of the court and its officer, the receiver, were considerably enlarged and more clearly defined by the amendment in Chapter 425. The purpose of the act is to give to the court ample power of control in the temporary management of the corporate affairs and property in order

that the interests of all parties concerned including stockholders and creditors may be conserved. The receiver, under direction of the court, is empowered to preserve the assets of the corporation and to redeem liens upon the property. As the claim of the bank was not disputed and the value of the property attached was greater than the amount of the claim, the court might have directed the receiver to pay the claim and thereby release the lien of the attachment, or the court in its discretion might do as it did in the case at bar, that is, direct the deputy sheriff in possession of the property attached to surrender possession thereof to the receiver. As the decree of the court directed the receiver to take possession of the assets and effects of the corporation, to carry on the business and fill all orders on hand, the order of the court of necessity required that the receiver should be allowed to take possession of the shop and fixtures, as otherwise the business could not have been continued.

The attaching creditor has no vested right to a particular form of remedy but he is entitled to the benefit of the security of the attachment and the legal priority thus obtained will be protected in equity by the court in the disposition of the proceeds from the sale of the assets. In the circumstances it was the duty of the deputy sheriff to surrender the possession of the property attached to the receiver when the demand was made. The property still remained in the custody of the court and subject to its control; the possession thereof by the order of the court was changed from one officer to another officer of the same court. The attaching creditor has not lost the benefit of its attachment, but is entitled to priority in the payment of its claim to the amount of the value of the property attached. To hold otherwise, in our opinion, would be to defeat the purpose of the act. For instance, in the case of successive attachments on the same property, if the usual procedure at law was followed, the result oftentimes would be to cause unnecessary expense and delay to the parties interested.

The court by taking control of the property and by disposing of the various claims so far as possible in one proceeding is in a position to act promptly and avoid waste of the assets.

The appeal is dismissed, the decree of the Superior Court appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings.

Waterman & Greenlaw, Charles E. Tilley, for Pilgrim Shoe Machinery Company.

Baker & Spicer, for Mechanics National Bank.

Herbert A. Rice, Attorney General, and Lester S. Walling, for General Treasurer.

JACOB D. GARABEDIAN *et al. vs.* GEORGE AVEDISIAN.

FEBRUARY 18, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(1) *Statute of Limitations. Judgments.*

A part payment does not interrupt the statute of limitations in the case of a judgment.

DEBT ON JUDGMENT. Heard on exceptions of defendant and sustained.

VINCENT, J. This is an action of debt on judgment brought by the plaintiffs as trustees for Hagop Aslanian to recover the amount due on a judgment entered against the defendant in the Central District Court of Worcester in the Commonwealth of Massachusetts on the 24th day of March, 1896, for the sum of $110.80.

This action was brought on the 23rd day of August, 1916, more than twenty years after the rendition of the judgment. The defendant filed a plea of *nul tiel record* and also pleaded the statute of limitations. The case was tried to a jury in the Superior Court and a verdict was rendered for the plaintiffs for the sum of $182. The defendant's motion for a new trial was heard and denied and the case is now before us upon the defendant's exceptions. These exceptions are

numbered from one to fourteen, both inclusive. The first exception is to the ruling of the court denying the motion for a new trial; the twelfth exception is to the refusal of the court to direct a verdict for the defendant and exceptions thirteen and fourteen are to portions of the charge. The remaining exceptions are to the rulings of the court in admitting and rejecting testimony.

Our statute provides that actions of debt on judgment "shall be commenced and sued within twenty years next after the cause of action shall accrue, and not after."

It is not claimed that the present suit was brought within twenty years after the rendition of the judgment upon which the suit is based. The plaintiff, however, has shown that prior to the expiration of the twenty years the defendant, on four different occasions, paid to him small sums of money aggregating $28, and that such sums were paid on account of such judgment and he now claims that these partial payments took the case out of the statute of limitations or in other words that the statute of limitations commenced to run anew from the date of the last payment.

This seems to be the most important and perhaps the controlling question in the case and one upon which the authorities are somewhat divided. In some jurisdictions it is held that a judgment is not a contract within the meaning of the statute of limitations. Therefore it is held that the acknowledgment of a judgment or a part payment of the same does not remove the bar of the statute and start the statute running afresh.

In other jurisdictions it is held that an acknowledgment of liability on a judgment debt or a part payment thereof has the same effect to interrupt the running of the statute of limitations as have the same acts in regard to other contractual obligations.

This division of authority is due to different views regarding the character of a judgment, that is, whether it is or not a contract within the meaning of the statute of limitations. The courts holding it to be a contract maintain that part

payment removes the bar of the statute while those holding that a judgment is not a contract reach an opposite conclusion.

Preliminary to an examination of the authorities cited by the plaintiffs in support of their contention that a part payment removes the bar of the statute, it will be desirable to bear in mind the effect of a judgment upon the claim sued upon. The authorities are substantially in accord that when a judgment has been obtained the original debt is merged in it, and can never be revived by a new promise or part payment, so as to be the subject of a cause of action. *Ludwig et al.* v. *Huck*, 45 Ill. App. 651; *Brown* v. *West*, 73 Me. 23; *McCormick* v. *Brown*, 36 Cal. 180; *United States* v. *Leffler*, 11 Pet. 86; *Olson* v. *Dahl*, 99 Minn. 433; *Berkson* v. *Cox*, 73 Miss. 339.

The plaintiffs cite *Gilbert* v. *Collins*, 124 Mass. 174 (1878), which was a suit brought upon an attested promissory note upon which, under the statute of Massachusetts, an action might be maintained by the original payee at any time within twenty years. The statute further provided that nothing contained in the provisions embracing the twenty year's limitation should alter, take away or lessen the effect of a part payment. Under this provision of the statute referred to the decision of the Massachusetts court would seem to be correct.

The case at bar differs from the Massachusetts case, *supra*, in at least two particulars. The claim in the Massachusetts case had not become merged in a judgment and our statute of limitations is not modified by any provision intended to preserve the effect of a part payment. For these reasons it does not seem to us that *Gilbert* v. *Collins* is valuable as an authority in the case at bar.

The case of *Von Hemert* v. *Porter*, 11 Met. 210 (1846), also cited by the plaintiffs, was an action of assumpsit for the recovery of the amount due upon an account for merchandise. The action was not commenced within six years, the time limited by statute. The defendant pleaded the

statute in bar. The court held that inasmuch as the plaintiff was never within the United States he came within the exception that a person absent from the United States at the time when the cause of action accrues may bring his action within the time limited after the disability shall be removed. We see nothing in this applicable to the case under consideration.

The case of *Carshore* v. *Huyck*, 6 Barb. 583 (1849), upon which the plaintiffs to some extent appear to rely, was an action of debt upon a judgment. The plaintiff claimed that a promise by the defendant to pay the judgment, although such promise was made after the period of limitation had expired, was sufficient to revive the judgment and enable him to declare upon it as an existing cause of action. While the decision in this case is to some extent favorable to the contention of the plaintiffs here, it is evident that the learned judge felt that his conclusions were forced upon him by earlier decisions in the State of New York for he expresses his reluctance to follow them in these words: "Upon a full examination of the cases in which the subject has been discussed I am satisfied that, at least in this state, the doctrine is too firmly established to be again unsettled, that where the operation of the statute of limitations is avoided by a new promise, the *old demand*, and not the *new promise*, is to be the foundation of the action. I confess that were I at liberty to reason upon the question, the inclination of my mind would be to the other side of this question. The doctrine rests for its support upon a distinction between the cause of action itself, and the remedy. The distinction is too thin and subtle to be received with satisfaction. An existing, continuing cause of action, without any remedy to enforce it, is, to my mind, a mere abstraction. To say that a man has a cause of action left, after he has lost, by the operation of the statute, his remedy upon it, seems to me little less absurd, than to say I still have my property after I have actually lost it." In 1 Wood on Limitations, 354, 4th Ed., it is stated that the case of *Carshore* v. *Huyck*,

supra, rests upon reasons peculiar to the State in which it was brought and upon reasoning that will hardly commend it as an authority.

The plaintiffs have cited several other cases to the effect that a partial payment upon a bond or attested note, before the expiration of the limited period, interrupts the statute. We see no advantage in stating these cases with greater particularity. In none of them had the claims sued upon been merged in a judgment.

We are inclined to take the view, which appears to be supported by the weight of authority, including some of the more recent cases, that a judgment cannot be revived by a partial payment. In the case of *Olson* v. *Dahl*, *supra*, decided in 1906, the question whether a judgment for the recovery of money comes within the rule applicable to part payment, and whether, when made, it will revive the judgment and continue it in force, was squarely presented and appears to have been very carefully and exhaustively examined. The court in that case found that the weight of authority is to the effect that a judgment is not a contract in any proper sense of that term and that the rule by which statutes of limitation are tolled by a new promise or part payment does not apply to judgments. In support of each of these conclusions the court cites numerous authorities in which an extended discussion of the question may be found. We do not find it necessary or desirable to set forth and discuss these authorities in this opinion as they are now readily available to those who may wish to consult them.

It has also been distinctly held in *Morley* v. *L. S. & M. S. Ry. Co.*, 146 U. S. 162, that a new promise or part payment does not interrupt the statute of limitations in the case of a judgment.

Having reached the conclusion that the plaintiffs are not entitled to recover as a matter of law, we need not discuss the other exceptions relating to the admission and rejection of testimony, requests to charge, etc.

We think that the exception to the refusal of the trial court to direct a verdict for the defendant must be sustained. The plaintiffs may, if they shall see fit, appear before this court on Monday, March 3, 1919, at ten o'clock, a. m., and show cause, if any they have, why this case should not be remitted to the Superior Court with direction to enter judgment for the defendant.

Cunningham & O'Connell, for plaintiff.

Frank H. Wildes, for defendant.

PERE A. PEARSON *vs.* PETER J. RYAN.

FEBRUARY 20, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(1) *Interest. Unliquidated Demands.*

On a petition to establish a mechanic's lien based on a written agreement between the parties which provided that final payment was due and payable on the completion of the building, where respondent made a claim for damages for unsatisfactory workmanship and materials, a portion of which was allowed, and a balance was found in favor of petitioner, interest from the date of giving notice of the claim was properly allowed.

MECHANIC'S LIEN. Heard on appeal of respondent and appeal dismissed.

BAKER, J. This is an appeal by the respondent from a decree establishing a lien entered by the Superior Court on a petition in equity to enforce a mechanic's lien in accordance with the provisions of Chapter 257 of the General Laws. The evidence shows a written agreement by and between the parties in which the complainant agreed "to build a bungalow" for the respondent and "to furnish all labor and materials" therefor, and the respondent agreed to pay the complainant "the sum of three thousand three hundred and fifteen dollars in payments as follows: fifteen hundred dollars when ready for lathing and five hundred dollars when plastered, balance of contract when the house is com-

pleted." The account filed by the complainant gives credit for two payments on account and for certain materials furnished by the respondent and claims a balance due of $1,124.28 with interest. While there is nothing in the papers of the case to show it, the transcript indicates a claim of damages by the respondent by way of recoupment for unsatisfactory workmanship and materials.

Upon hearing the parties the court allowed the respondent's claim to the amount of $307.50, and found that there was a balance due the petitioner on his account of $816.78, on which interest from the date of giving notice of the claim was allowed to the amount of $69.12, making a total of $885.90 for which the lien was established. The notice of a claim of lien and the demand of payment were given and made August 29, 1916, and legal proceedings were commenced the following day. The decree was entered March 13, 1918. The only reason of appeal now urged is that the allowance of the item of interest is against the law, in that the petitioner's claim was unliquidated. If the allowance of interest is held to be proper, the amount allowed is not questioned.

Broadly speaking it is generally held that interest on unliquidated demands will not be allowed as damages. Undoubtedly there is a clear distinction between a claim for damages entirely unliquidated, as for example, claims for damages arising from assault and battery, from seduction, or from slander and libel, which are wholly at large, and a liquidated claim, where there is an express contract to pay a sum certain at a fixed time. In the former cases (1) the amount of damages is unknown until determined after the presentation of evidence by a decision, award or verdict. In the contract case both parties know what the claim is and when it is due and payable. It is in dealing with cases lying between these extremes, where the distinction is less clear and obvious, that courts have so differed in their interpretation and application of the rule as to interest that their decisions are far from harmonious as to when interest

may be allowed. The question as applied to the precise state of facts presented in the case at bar does not appear to have been considered in any reported case of this court. The respondent cites in his brief three Rhode Island cases in support of his claim, namely, *Spencer* v. *Pierce*, 5 R. I. 63; *Durfee* v. *O'Brien*, 16 R. I. 213 and *Dary* v. *Providence Police Association*, 27 R. I. 377.

In *Spencer* v. *Pierce*, *supra*, the question arose on the disallowance of interest by the master in the case on certain sums allowed by him to be due "for labor and service." The court said, on page 71: "The well-settled American rule . . . gives interest, though not stipulated for, as an invariable legal incident of the principal debt, from the day of default, whenever the debtor knows precisely *what* he is to pay, and *when* he is to pay it.", citing *People* v. *New York*, 5 Cowen 331, 334, and recommitted the master's report, saying on page 72: "We, therefore, instruct the master to allow interest at six per cent. per annum, from the day of default in payment, on all sums allowed by him for labor or service, the amount of which is certain, or can be made certain by computation, under the contract of the parties, and in which, the time of payment is fixed, by the terms of the contract, or by the course of dealing between the parties."

In *Durfee* v. *O'Brien*, *supra*, it is said on page 217, "The time when the payments are due and the agreement to pay interest being definite, the charge for interest was properly allowed." This is clearly a liquidated claim under the rule.

Dary v. *Providence Police Association*, *supra*, was an action of assumpsit to recover moneys claimed to be due as sick benefits. There was a plea of the general issue accompanied by an affidavit of valid defence that the claim for sick benefits had been waived. The case was heard on an agreed statement of facts. As to interest, while the court stated the rule enunciated in *Spencer* v. *Pierce*, *supra*, and cited in *Durfee* v. *O'Brien*, *supra*, it held that a beneficial association ought not to be treated as a delinquent debtor

before demand made upon it in order to create the relation of debtor and creditor, but allowed interest from the date of the writ, that being the time of the earliest proof of demand. In this case the right to recover at all was denied by the defendant and apparently in good faith.

Some other decisions of this court relative to the allowance of interest may properly be considered in this connection.

In *Hodges* v. *Hodges*, 9 R. I. 32, the master in a matter of accounting disallowed interest on advances made by a husband for the improvement of his wife's estate, in the absence of any evidence of an agreement to pay interest, and the court held that interest should have been allowed and cited as a correct statement of law the following: "On money lent, interest in this country is always recoverable; because the defendant has had a use from the plaintiff's money. For the same reason, on money paid on account, or to the use or benefit, or at the request of another, interest is allowed from the time of payment, and not merely from the time of notice or demand." . . . "Money lent, and money paid, carry interest when they form matter of account, as well as when they are detached transactions."

Weeden v. *Berry*, 10 R. I. 288, was an action of assumpsit for goods, wares and merchandise sold and delivered and for work and labor done. The declaration also contained certain common counts but no count for interest. The case was sent to referees, who allowed plaintiff interest. It was objected to such allowance that there was no count in the declaration claiming interest. The award of interest was upheld. The decision implies that by the terms of the reference, under which power was committed to "determine all questions of law or of fact" in the case, it was within the discretion of the referees to allow interest as damages.

In *Cross* v. *Brown, Steese & Clarke*, 19 R. I. 220, 240, the question as to whether a garnishee should be required to pay interest on its debt due the principal defendant during the time it was restrained by the attachment from paying

the debt was considered, and answered in the affirmative on the ground that the garnishee had had the use of the money in the meantime after it was due, and that a contrary decision would work an injustice both to the principal defendant and the attaching plaintiff.

In *Lonsdale Co.* v. *City of Woonsocket*, 25 R. I. 428, damages were sought for a continuing trespass resulting from the diversion of water to which the complainant was entitled as a riparian proprietor. The amount of water so diverted and the amount of the resulting damages were both in controversy and there was conflicting evidence on each point. On the damages, as determined by him, the master allowed simple interest from the date of the filing of the bill, and the court on page 444 held this finding to be correct. If interest on unliquidated damages in a tort action is properly allowable from the time of commencing legal proceedings, no reason is apparent why a less liberal rule should apply in action *ex contractu*.

In Sedgwick on Damages, 8th Ed. Section 315, the author says: "Where interest is refused in actions of contract on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ." See also *Ford* v. *Tirrell*, 9 Gray 401; *Barstow* v. *Robinson*, 2 Allen 605; *McFadden* v. *Crawford*, 39 Cal. 662; *Feeter* v. *Heath*, 11 Wend. 477; *Case* v. *Osborn*, 60 Howard's Pr. 187; *McCollum* v. *Seward*, 62 N. Y. 316; *Mercer* v. *Vose*, 67 N. Y. 56; *Tucker* v. *Grover*, 60 Wis. 240; *Lowe* v. *Ring*, 123 Wis. 370.

Healy v. *Fallon et al.*, 69 Conn. 228, was a proceeding to enforce a mechanic's lien under a written contract to build a house for a stated price. The defendants claimed that the house was not finished as called for in the contract, upon which claim some deduction was made by the trial court from the contract price. On pages 235 *et seq.* the court says: "We are also of opinion that the court did not err in allowing interest to the date of judgment upon the sum found to be due after deducting the damages caused by the deviations from the contract." . . . "It is difficult on principle to

see why he should not recover, as compensation for that detention, damages measured by the legal rate of interest upon the sum so detained for that time. It is said, however, that the amount due was unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts. It may be conceded that the amount due the plaintiff was in a certain sense unliquidated up to the time of the judgment, inasmuch as the amount due him under the contract, which was a liquidated amount, was to be lessened by the as yet unascertained damages caused by his deviations from the contract; but it is not true that damages measured by the rate of interest are never allowed for the non-payment of money, where the claim is an unliquidated one. In an action for the value of personal property destroyed by the negligent act of the defendant, where the claim was in a sense an unliquidated one, damages were allowed in the shape of interest upon the value of the property as found upon the trial," citing cases. . . . "We think the damages allowed by way of interest in the case at bar come within the principles applied in the cases cited. The claim was wholly a pecuniary one and was not at large, as are claims for damages for assault and battery, slander, or others of like nature. It represented a loss of a pecuniary value ascertainable with reasonable certainty, as of a definite time; and we think damages in the shape of interest should be recoverable from that time, for such a loss; for only in this way can equity be done between the parties in the case at bar."

Laycock v. *Parker*, 103 Wis. 161, was a proceeding to enforce a mechanic's lien under a building contract, where there was a counter claim for omissions, substitutions and delay, a considerable portion of which was allowed. Interest was allowed on the balance found to be due from the commencement of the suit, to which objection was taken. The court on pages 178 to 189 discusses very fully the question of interest, citing and considering many reported cases, and held that "no error prejudicial to defendant was committed

in the allowance made by the judgment." See also *West Republic Mining Co.* v. *Jones*, 108 Penn. St. 55, 69; *Harwood* v. *Tappan & Noble*, 2 Speer's (S. C.) 536, 551; *Watkins* v. *Junker*, 90 Texas 584, 586 *et seq*; *Bennett* v. *Federal Coal & Coke Co.*, 70 W. Virginia 456; *Vaughan* v. *Howe*, 20 Wis. 523; Sedgwick on Damages, 8th Ed. Sec. 308; Sutherland on Damages, 4th Ed. Sec. 348; 8 R. C. L. 553.

In *Bernhard* v. *Rochester German Ins. Co.*, 79 Conn. 388, the damages were unliquidated. The judgment included interest from the date of defendant's repudiation of liability. In upholding the allowance of interest, the court on page 398, says: "The purpose sought in awarding damages other than vindictive is to make a fair compensation to one who has suffered an injury." . . . "Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages. . . . There are actions to which the suggested rule is applicable. . . . Others, however, present conditions where, without an allowance for interest, although the demand may be unliquidated, fair compensation for the injury done would not be accorded and justice would thus be denied. The determination of whether or not interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule."

See *contra*, *Excelsior Terra Cotta Co.* v. *Harde*, 181 N. Y. 11, where the facts are similar to those in the present case and where the court treats the plaintiff's claim as upon *quantum meruit*, holding that "as the defendant's set-off was unliquidated" the plaintiff's damages were "necessarily dependent upon the amount of the set-off" and were unliquidated and that on them interest was not recoverable.

We do not think it can be successfully urged that the rule enunciated in *Spencer* v. *Pierce*, *supra*, implies that a debtor

may be charged interest *only* when he knows "what he is to pay, and when he is to pay." The entire sentence of the opinion in *People* v. *New York*, *supra*, cited by this court reads, "It will surely not be considered inequitable, that whenever the debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest, if he neglects to pay." There is here no implication that a debtor might not *equitably* be chargeable with interest as damages under a different set of circumstances. It is evident also by the decisions of this court above cited, and in particular by the one in *Lonsdale Company* v. *City of Woonsocket*, *supra*, that, while the court has reaffirmed the rule in *Spencer* v. *Pierce* in later cases, when applicable to the facts therein, it has not adopted it as an arbitrary rule, but has allowed interest in other instances when it seemed equitable to do so, even when the person so charged did not know the amount of the debt or damages, and when the time of its being due was fixed only by the demand for payment.

In the present case by the contract the final payment was due and payable on the completion of the bungalow. The defendant saw fit to contest the payment of the balance specified in the contract, and succeeded in materially reducing the amount claimed. He had, however, the use and benefit of the sum which the court determined that he ought to pay for more than a year and a half after the petitioner made demand of payment and commenced legal proceedings. In these circumstances we find no error in law in the item of interest as allowed by the decree.

The appeal of the respondent is accordingly dismissed, the decree of the Superior Court is affirmed and the case is remanded to the Superior Court for further proceedings.

Hugo A. Clason, for petitioner.

Thomas A. Farrell, for respondent.

EDWARD H. MYERS *vs.* WASHINGTON TRUST COMPANY.

FEBRUARY 26, 1919.

PRESENT: Sweetland, Vincent, Baker, and Stearns, JJ.

(1) *Banks. Deposits. Trust Funds.*

An action to recover a deposit cannot be maintained against a bank which had taken over the assets of a former bank where plaintiff had originally made the deposit, where there is no evidence that the amount deposited by plaintiff ever came into the possession of defendant nor any evidence tending to show that defendant assumed all the obligations of the first bank or any obligations other than those arising from its undertaking to deal with the deposits coming into its possession.

(2) *Banks. Deposits. Trust Funds.*

Where plaintiff made a deposit in a bank which subsequently transferred its assets to another bank and went out of existence but prior to such transfer the first bank paid out the deposit to someone having possession of the pass book, the second bank cannot be held liable by plaintiff as the trustee of a fund which never came into its possession.

ASSUMPSIT. Heard on exceptions of plaintiff and overruled.

VINCENT, J. This is an action of the case in assumpsit brought by Edward H. Myers of Providence in the State of Rhode Island against the Washington Trust Company, a corporation located and carrying on business at Westerly in said State.

The declaration contains a special count setting forth that on several dates between the 23rd day of December, 1865, and the 3rd day of May, 1867, the plaintiff deposited in the Westerly Savings Bank sums of money aggregating $200; that subsequently the said savings bank went out of business and transferred its assets to the defendant, the Washington Trust Company; that the defendant assumed the liabilities of the Westerly Savings Bank and undertook to pay its depositors in full with interest; and that the plaintiff never withdrew or authorized the withdrawal of his deposit in the Westerly Savings Bank. The declaration also contains a common count for money had and received to the use of the plaintiff.

To this declaration the defendant pleaded (1) the general issue, (2) payment of the deposit by the Westerly Savings Bank, (3) payment by the Westerly Savings Bank to some person other than the plaintiff upon presentation and surrender of the pass book in good faith and without negligence, (4) the statute of limitations, and (5) estoppel, the plaintiff having delayed any assertion of his claim for a period of some forty-eight years, and until all the persons connected with the transaction had deceased, rendering it impossible for the defendant to prove anything more than that the aforesaid deposits had been paid to some person having possession of the pass book.

The plaintiff, by his counsel, stated to the Superior Court at the trial, as appears from the transcript, that his "action was brought on the assumption that the assets of a savings bank are trust funds for the benefit of all of their depositors" and that "whenever a trust fund is diverted from its proper field, any person injured thereby can follow those assets wherever they can find them."

Assuming the correctness of this statement, the plaintiff is not relieved of his difficulty. There is no proof that the amounts deposited by him in the Westerly Savings Bank ever came into the possession or under the control of the defendant nor is there any evidence tending to show that the defendant assumed all the obligations of the Westerly Savings Bank or any obligations other than those arising from its undertaking to deal with the deposits coming into its possession. In fact the letter of Mr. Perry, which the plaintiff introduced, shows that the deposits in question were paid out by the Westerly Savings Bank to some person having possession of the pass book, and that the account was closed on October 29, 1868 and the pass book surrendered, long prior to the time when its deposits were taken over by the defendant company for the purposes of liquidation. The defendant cannot be held liable as the trustee of a fund which never came into its possession. Whether the Westerly Savings Bank paid out these deposits

to the plaintiff, or to some other person not entitled to them, is not material in the present state of the testimony. If they were paid out by the Westerly Savings Bank to anybody they could not have reached the defendant and become a trust fund in its hands.

The plaintiff has devoted some space in his brief to a discussion of the point, "Can this trust fund be followed by a depositor of such savings bank into the hands of an assignee with a notice of the trust character of the fund" and has cited some authorities supporting the affirmative of that question.

We do not think it necessary to consider this question as it is based upon the assumption that the fund, comprising the plaintiff's deposits, had found its way into the hands of the defendant, an assumption unsupported by any evidence. The plaintiff further claims, that it appearing that the deposits were made, that the Westerly Savings Bank had ceased to do business, that the defendant took over its assets, that most of the depositors transferred their accounts to the defendant, and that the two banks occupied the same building, he was entitled to go to the jury and that the jury would be warranted in finding that the defendant knew that the assets which it took over were the assets of the Westerly Savings Bank and as such belonged to its depositors. We do not think that the plaintiff would be entitled to go to the jury under the conditions which he describes and without any affirmative proof that the defendant had ever had possession of any money belonging to the plaintiff.

We think that the nonsuit was properly granted. The plaintiff's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the nonsuit.

Herbert Almy, for plaintiff.

Harry B. Agard, for defendant.

NATHAN B. LEWIS, *Ex'r.*, *vs.* MARY E. ARNOLD *et als.*

FEBRUARY 26, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(1) *Wills. Next of Kin.*

Under a clause of a will, "I give devise and bequeath all my property and estate, both real and personal, and wherever situated, to my next of kin and heirs at law, to be divided and distributed among them in the same proportions and shares provided for the descent and distribution of intestate estates of deceased persons under the laws of the State of Rhode Island," the words "*next of kin*" are to be construed in their strict and technical sense and the reference to the laws merely indicates that the personal estate is to be distributed in the same proportions as the statute provides for the distribution of that portion of an intestate's estate, whatever it may be, which by the law belongs to the "*next of kin*," and therefore the *widow* is not included as one of the "*next of kin*."

(2) *Wills. Heirs at Law.*

Under the above clause, the words "*heirs at law*," should be taken in their strict technical sense, as including all the persons answering that description, the reference in the will to the division of the real estate simply pointing out the rule of such division among the heirs.

The language employed negatives any intention that the real estate should go as ancestral estate but plainly includes in the term "heirs" both paternal and maternal kindred.

BILL IN EQUITY by executor for construction of will. Certified under Gen. Laws, 1909, cap. 289. § 35.

BAKER, J. This is a bill in which the complainant as executor asks for the construction of a portion of the will of Charles D. Chapman, late of Westerly, in this State, deceased. It was certified to this court under Section 35 of Chapter 289 of the General Laws. The case is heard on the allegations of fact contained in the bill, all of which are undisputed.

By the bill it appears that Charles D. Chapman died January 26, 1916, leaving a will, dated December 9, 1913, which has been duly admitted to probate, and of which the complainant is the duly appointed and qualified executor. At his death the testator left a widow, Ella M. Chapman, but left no children, or descendants of children, mother,

father, grandfather, grandmother, brothers or sisters. Of his paternal kindred he left about a dozen cousins, and on the maternal side about three times as many cousins and one uncle, the cousins on both sides being chiefly in the second and third degree of relationship. They and the widow are the respondents in the case.

It also appears that the testator and his widow were married December 16, 1875; that for about eleven years next preceding his death they had lived separate and apart from each other; that on June 3, 1913, she filed in the Superior Court a petition for divorce from the testator; that from and after July 15, 1913, the Superior Court ordered the testator to pay his wife $20 a week for her support *pendente lite*, and that in compliance with such order the testator paid said sum until the time of his death, up to that time the petition for divorce not having been heard.

At his decease the testator owned real estate in Westerly of the estimated value of $15,000 and personal estate of the appraised value of $16,606.01, of which after payment of the testator's indebtedness the executor now has in his possession about $11,800 for the payment of the expenses of administration and for distribution to those entitled thereto under the will. In addition the complainant represents that as agent for the owners of said real estate he has collected the rents thereof, of which after payment of taxes and other expenses he now has in his possession about $300. All of said real estate came to the testator by devise from his father Charles P. Chapman.

The testator's will after directing the payment of his just debts and funeral expenses, contained the following paragraph, namely: "Second;—Subject to the foregoing provision of my will, I give, devise and bequeath all my property and estate, both real and personal, and wherever situated, to my next of kin and heirs at law, to be divided and distributed among them in the same proportions and shares provided for the descent and distribution of intestate

estates of deceased persons under the laws of the State of Rhode Island."

The executor asks instructions in the form of three questions, as to the construction to be given said paragraph, as follows:

1. "Is the said Ella M. Chapman, as the surviving widow of Charles D. Chapman, entitled to any part of said personal property under the provisions of said will of Charles D. Chapman?"

2. "Is the title to said real estate in both the paternal and maternal kindred of said Charles D. Chapman, and does said sum of money, being rents of said real estate, belong in equal moieties to the paternal and maternal kindred of said Charles D. Chapman?"

3. "Or is the title to said real estate in the paternal kindred only and does said sum of money belong solely to the paternal kindred of said Charles D. Chapman?"

Some forty years ago a court of last resort distinguished for its ability in a reported opinion made the following statement, which may be accepted as true both as history and as prophecy: "Upwards of two hundred years ago Lord Coke made the observation, which is nearly as true now as it was then, that 'wills and the construction of them do more perplex a man than any other learning; and, to make a certain construction of them, this *excedit jurisprudentum artem.*' (*Roberts* v. *Roberts*, 2 Bulst., 123, 130.) Since that time the construction of wills has continued to perplex the courts, and not much has been done by the evolution of rules to aid them. Such is the multifarious and complex nature of human affairs, and the uncertainty of language, and such the carelessness and inattention with which wills will frequently be drawn and executed, that the 'certain construction' of them will probably be no less difficult in the future than it has been in the past." *Keteltas* v. *Keteltas et al.*, 72 N. Y. 312, 314.

In the present case the respondent, Ella M. Chapman, claims that under the second paragraph of the will of Charles

D. Chapman she is entitled to receive one half of the testator's personal estate, and the other respondents claim that she is entitled to none of it.

Inasmuch as the testator devises and bequeaths all his property and estate, both real and personal to his "next of kin and heirs at law," and as his widow claims no interest in the real estate by virtue of the will, her claim to share in the personal estate must rest upon the testator's intention to include her in the expression "next of kin."

In *Mowry* v. *Taft*, 36 R. I. 427, 435, it was held that the husband "is not of the 'kindred' or next of kin of his deceased wife, and so cannot take in this respect under the statute." Mrs. Chapman's counsel concedes that the words *next of kin* as employed at the common law and generally imply blood relationship and cites authorities to the effect that "the use of the term 'next of kin' does not ordinarily include the surviving spouse of the testator" (Thompson on Wills, p. 147) and "a bequest by a husband to his 'next of kin' would not *prima facie* include his wife as a beneficiary." (Alexander on Wills, Vol. 2, 1264.) The author last named goes on to say, "However, the court will inspect the entire will, and if from the whole there is manifested an intention to include the husband or wife under the term 'next of kin' 'relatives' or the like, the intention will be given effect." In other words, the manifested intention of the testator must always prevail, and technical words may be given an enlarged meaning to accord with such intention. The widow claims that this intention is manifest in the words of the will providing that the property is "to be divided and distributed among them in the same proportions and shares provided for the descent and distribution of intestate estates of deceased persons under the laws of the State of Rhode Island." Attention is called to Section 9 of Chapter 316 of the General Laws regulating the distribution of intestate estates, by which a widow receives one third or one half of said personal estate, according to the fact of the deceased leaving issue or not, and the residue thereof is "distributed

among the heirs of the intestate in the same manner real estates descend and pass by this chapter." The argument is that it is not possible to distribute the personal estate among the next of kin in the same proportions and shares as provided by the statute of distribution without including the widow as of the next of kin; that to interpret the paragraph as the other respondents urge, it would be interpreted as if the paragraph contained the additional words "as if I had died unmarried"; that in the dilemma thus presented it is more reasonable to decide that the testator's intention was that the words next of kin should be taken as having a broad and untechnical meaning, and as including the widow. The argument is certainly not without plausibility. Her counsel cites no case as supporting his view, and says that he has been unable to find a case exactly like the one at bar.

But do the words of the will as to the division and distribution of the testator's property and estate according to the statutes for the descent and distribution thereof indicate anything more than a rule to be followed in such distribution? Without such reference it might be claimed that it was to be shared *per capita*. Does the reference mean more than this, that the beneficiaries are to take *per stirpes* and in the same shares and proportions as obtain in the distribution of personal property among the "heirs" of an intestate?

In *Luce* v. *Dunham et al.*, 69 N. Y. 36, the question raised was almost identical and on a somewhat similar state of facts. A testator died leaving a widow and four sisters, three of them half sisters, but no children. They were all named as beneficiaries in his will. The sixth clause of the will reads as follows: "Sixth. All the rest, residue and remainder of my estate, real and personal, present and hereafter to be acquired, and wherever situated, I give, devise and bequeath, and do desire and will that the same shall be divided among my heirs and next of kin in the same manner as it would be by the laws of the State of New York had I

died intestate." The widow claimed that under this clause she was entitled to participate in the distribution of the residuary estate, which was all personalty, that is, that she was entitled to one half thereof, which claim was upheld by the Surrogate and the General Term of the Supreme Court.

In the opinion of the Court of Appeals (69 N. Y. *supra*), on page 41, this appears: "The devise and bequest are of 'all the rest, residue and remainder of my estate, real and personal, present and hereafter to be acquired, and wheresoever situated.' Where such a disposition is followed by the words 'devise and bequeath,' and a direction that the property be divided among the testator's heirs and next of kin, according to law, as in case of intestacy, there can be no inference that the testator intended to use the words '*heirs*' and 'next of kin' in any other than their legal sense. The language is perfectly appropriate and technically accurate, and the meaning of the draughtsman is plain. The word 'heirs' relates to the realty devised, and the words 'next of kin' relate to the personalty bequeathed, and there is no ground for misapplying these expressions. If the clause did not mention real estate, but bequeathed personal property to heirs or heirs and next of kin, or if it gave real and personal estate to heirs, without mentioning next of kin, the question of the intention of the testator might arise, but here there is no obscurity in the language used, and the subjects of the devise and bequests are such that the technical terms used are accurately applicable to them distributively. In such a case they cannot be construed in any other than their strict and primary sense."; and on page 43 the Court said: "The learned surrogate, in his able opinion, rejected the argument based upon the use of the word 'heirs,' but held, in substance, that the language, not being simply that the personalty be distributed among the testator's next of kin, but being that it should be distributed among his next of kin 'in the same manner as it would be by the laws of the State of New York, had I died intestate,' these latter expressions controlled the words

'next of kin,' and showed that they were intended to embrace all who would be distributees under the statute, and that the will should be construed as though the testator had directed, generally, that his residuary estate be distributed according to the statute as in case of intestacy.

"This same position was taken and argued by counsel, with much force, in the case of *Murdock* v. *Ward* (67 N. Y. 387), and it was urged that a distribution could not be made according to the statute without including the widow. Some of the judges, while the case was under consideration in this court, were strongly inclined to maintain the position contended for, but a full examination of the authorities constrained them to abandon it, and it was finally held that where the bequest was to the next of kin, the addition of the words, 'according to the statute as in case of intestacy,' was not sufficient to enlarge the class of legatees so as to include the widow.

"A provision directing generally that on the decease of a testator, his personal property be distributed as provided by statute in case of intestacy, would, of course, entitle the widow to be included in the distribution, though not specially mentioned, but where the distributees are, by the terms of the will, confined to the next of kin of the testator, effect must be given to that restriction, and the reference to the statute, or to the laws, merely affords the rule of distribution among the next of kin as if there were no widow."

The judgment of the court below was accordingly re-
(1) versed. See also *Tillman* v. *Davis*, 95 N. Y. 17; *Murdock* v. *Ward*, *supra*, and *Keteltas* v. *Keteltas et al.*, *supra*.

In the present case we are of the opinion that the words "next of kin" are to be construed in their strict and technical sense, that the reference to the laws merely indicates that the personal estate is to be distributed in the same proportions as the statute provides for the distribution of that portion of an intestate's estate, whatever it may be, which by law belongs to the "next of kin," and, therefore,

that the widow, Ella M. Chapman, is not included as one of the "next of kin" of the testator.

While the widow has urged that the words "my next of kin" should not be taken in their strict technical sense, but in an enlarged and so-called "every day meaning," the paternal kindred urge that the words "my . . . heirs at law" should not be construed in their strict technical sense, as including all the heirs of the testator, but should be given a restricted meaning, as including the heirs only
(2) of the blood of the testator's paternal ancestry, and this claim is based on the fact that the real estate in question is ancestral as well as on the language of the will as to division and distribution of the property in the "same proportions and shares" as provided by the laws relative to the descent and distribution of intestate estates. We are unable to discover any stronger evidence of the intention of the testator to restrict the meaning of the words "heirs at law" than we found as indicating his purpose to give the words "next of kin" an enlarged meaning.

We are of the opinion, therefore, that the testator intended the words "heirs at law" to be taken in their strict technical sense as including all the persons answering that description, and that the reference in the will to the division of the real estate simply points out the rule of such division among the heirs. The testator had the right to dispose by will of his real estate—ancestral included—as he saw fit. Section 6 of Chapter 316 of the General Laws provides that ancestral estate of an intestate dying without children "shall go to the kin next to the intestate of the blood of the person from whom such estate came," but does not undertake to point out who are to be considered as constituting "the kin next to the intestate" or in what proportions they are to take the property. This is to be determined by the general canons of descent as set forth in the preceding sections of Chapter 316. See *Smith* v. *Smith*, 4 R. I. 1; *Pierce* v. *Pierce*, 14 R. I. 514; *Arnold* v. *O'Connor*, 37 R. I. 557. If the testator intended his real estate to go as ancestral

estate, it was easy for him to make that intention clear by confining the devise to his paternal kindred; or, if he had said that his real estate was to go as if he had died intestate, the present claim of the paternal kindred would have support. He employs language, however, which negatives such intention by devising his real estate to the persons answering the description of his "heirs at law" at the time of his death and provides for its division among them according to the canons of descent stated in our laws, and thus plainly, as we think, included in the term "heirs" both paternal and maternal kindred.

In accordance with what is above stated, we answer question 1 in the negative. Answering questions 2 and 3 together we decide that the title to the real estate is in both the paternal and maternal kindred of said Charles D. Chapman,—that is, an equal moiety is in each of the two lines of kindred, and that the moneys held by the complainant as the net rents of the real estate of the deceased belong one half to the paternal kindred and the other half to the maternal kindred.

A decree in accordance with this opinion may be presented on Monday, March 3, 1919, at 10 o'clock in the forenoon in order that the same may be approved by this court and ordered to be entered in the Superior Court.

Benjamin W. Grim, for complainant.

Fitzgerald & Higgins (*William H. Camfield* of counsel), for respondent Ella M. Chapman.

Herbert W. Rathbun, of Westerly, *Stone & Lovejoy*, for various other respondents.

ANNE A. FILLMORE *vs.* RHODE ISLAND COMPANY.

FEBRUARY 26, 1919.

PRESENT: Sweetland, Vincent, and Baker, JJ.

(*1*) *Carriers. Negligence. Last Clear Chance.*

In applying the doctrine of the last clear chance, the duty of one party to take action to avert the consequences of the negligence of the other, does not

arise until the peril of the negligent party is or should be apparent to the other.

(2) *Carriers. Negligence. Last Clear Chance.*

Where intestate was driving an automobile truck along a highway in a country district, at a speed of six or seven miles an hour, and at a distance of 200 feet from the tracks of an electric road had an unobstructed view of the tracks, for about 1,200 feet in the direction a car was approaching at a high rate of speed, and in fact saw the car, but without changing his speed crossed the easterly track and drove upon the westerly track where he was struck by the car, the negligence of intestate being admitted, in applying the doctrine of the last clear chance, to these facts, the motorman was entitled to assume that intestate saw the car and would stop before reaching a position of danger, and intestate must be held as a matter of law to have been still in a place of safety until he had reached a position quite near the westerly track and until he had passed that point the motorman was under no obligation to take action for his safety.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiff and overruled.

SWEETLAND, J. This is an action brought under the statute by the plaintiff as the widow of Cecil M. Fillmore to recover damages for the death of Cecil M. Fillmore, alleged to have been caused by the wrongful act and neglect of the defendant's agent and servant.

The case was tried before a justice of the Superior Court sitting with a jury. At the conclusion of the plaintiff's evidence, on motion of the defendant, said justice nonsuited the plaintiff. The case is before us upon the plaintiff's exceptions to certain rulings of said justice, made in the course of the trial upon the admission and exclusion of testimony, and upon the plaintiff's exception to the ruling of said justice granting the motion for a nonsuit. At the hearing before us the plaintiff relied chiefly upon the last exception. We have examined, however, her other exceptions and do not find prejudicial error in any of the rulings to which objection is made.

It appears from the transcript of evidence that the accident which resulted in the death of Cecil M. Fillmore occurred on May 2, 1914, at about nine o'clock in the forenoon and that the weather on said day was clear. Just

previous to the accident Mr. Fillmore was operating an automobile truck on one of the highways of the town of Warwick referred to in the evidence as the Palace Gardens Road. Said highway runs practically east and west and crosses the roadbed of the defendant railroad company at right angles and at grade. At said crossing is a sign facing the east on which is painted in large letters the words, "Stop, look and listen, railroad crossing." Said crossing is in a country district; the land about it is level and not built upon. Said railroad roadbed is straight for a long distance to the north and to the south of said crossing and on the roadbed at this point two tracks of the defendant are laid on which the defendant's cars are operated by electricity. On said morning the plaintiff's intestate approached said crossing from the east at a speed of six or seven miles an hour. With Mr. Fillmore on the seat of said truck, and to his right, was Mr. Frederick W. Colclough. When about two hundred feet east of the crossing Mr. Fillmore had an unobstructed view of the track of the defendant for about twelve hundred feet to the north. At that point Mr. Colclough called Mr. Fillmore's attention to a large and heavy construction car of the defendant approaching the crossing from the north at a very high rate of speed upon the westerly track of the defendant. Mr. Fillmore then said that he saw the car. Without changing the speed of his truck Mr. Fillmore crossed the easterly track of the defendant and drove upon the westerly track where said truck was struck between the right hand forward and rear wheels by said construction car. Mr. Fillmore was thrown to the ground and killed.

The negligence of Mr. Fillmore is plain and undisputed. The plaintiff does not question it, but invokes in support of her action the so-called doctrine of the last clear chance. That doctrine, as it has been applied in this State, required that when the defendant's motorman, who was operating said construction car, saw or in the exercise of reasonable care should have seen that the plaintiff's intestate was in

or was about to place himself in a position of danger, said motorman should take such action as was reasonable in the emergency to check the speed of his car, or to stop it, and if possible avert the consequences of the intestate's neglect. An important element in the above proposition is that the motorman's duty to so act did not arise until said intestate's peril was or should have been apparent to the motorman.

(1) In the circumstances it was clear that Mr. Fillmore did not have the right of way across the westerly track and that it was grossly negligent for him to drive his truck upon said track immediately in front of the approaching car. The motorman was entitled to assume that Mr. Fillmore saw the approaching car, as in fact he did, that Mr. Fillmore would not act in disregard of his own safety, and that before he reached a position of danger he would stop and wait until the construction car had passed over the crossing. At the rate of speed at which he was approaching said westerly track Mr. Fillmore at any time could have stopped his truck in a very short space. He must be held, as matter of law, to have been still in a place of safety until he had reached a position quite near said westerly track; and in the circumstances of this case it must be held that until he had passed beyond that point the motorman had no reason to be apprehensive of danger to Mr. Fillmore, and was under no obligation to take action for his safety. When Mr. Fillmore did proceed from the position where he was clearly safe, and where the motorman had a right to assume that he would stop, and indicated that notwithstanding the recklessness of such conduct he was about to go upon the westerly track, the evidence establishes that said construction car was then so near to the crossing that it was impossible for the motorman to stop his car before it struck said truck or in any other way prevent the accident.

In support of her position the plaintiff places great reliance upon the authority of *Underwood* v. *Old Colony Street Railway Co.*, 33 R. I. 319. The facts in that case are clearly distinguishable from those of the case at bar. In

the *Underwood* case there was evidence from which the jury were justified in finding that, when it should have been apparent to the motorman operating the defendant's electric car that the plaintiff's testator was about to proceed into a place of danger upon defendant's track, the electric car was so far from the point of collision that its motorman had ample opportunity to then check the speed of his car or if need be to stop it and thus prevent the accident.

We are of the opinion that in the circumstances of this case the finding would be entirely unwarranted that the defendant's motorman had the last clear chance to prevent the accident which resulted in the death of Mr. Fillmore; or that the defendant or its servant was guilty of any negligence in the premises.

The plaintiff's exceptions are all overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the nonsuit.

Waterman & Greenlaw (*Charles E. Tilley*, of counsel), for plaintiff.

Clifford Whipple, *Alonzo R. Williams*, for defendant.

JAMES O. HAMBLY, p. a. *vs.* BAY STATE ST. RAILWAY CO.

FEBRUARY 26, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Bills of Exceptions. Motion to Dismiss.*

Where counsel claimed that no time was fixed by the court for hearing on the bill of exceptions of the adverse party and that no notice was given him of any hearing as required by rule 31 of the rules of practice of the Superior Court, it was his duty upon discovering that the case had been removed for review and that the transcript had been allowed by the trial justice, if he claimed that such allowance was irregular or prejudicial to his client, to raise such question without further delay and where he waited at least three months, until such lapse of time had rendered it impossible to establish through the recollection of the court and counsel for appellant definitely and conclusively the procedure which was followed, a motion to dismiss the bill will be denied.

(2) *Bills of Exceptions. Allowance.*

Since neither the trial court nor the clerk is required by law to make written record of the facts relative to fixing a time for hearing on allowance of a bill of exceptions or of the giving of the notice to parties of the hearing, where bills are allowed on oral statement of counsel to the court, either the court or clerk should make a record of the giving of notice, of the appearance of parties or their waiver of the right to formal notice and to be heard.

(3) *Bills of Exceptions.*

Where the appellant's bill of exceptions and transcript were properly allowed within the statutory time, appellant was under no duty to see that the trial justice gave the appellee a hearing and notice thereof, but it was within the power of appellee if he had followed the record to have made timely objection to the action of the court in allowing the bill and transcript without a hearing, and a statutory remedy was provided by Gen. Laws, 1909, cap. 298, § 21, for his relief. As appellant followed the travel of the case and appellee did not, if either party is to suffer from failure of the court to observe statutory conditions it should not be appellant.

TRESPASS ON THE CASE for negligence. Heard on motion of plaintiff to dismiss defendant's bill of exceptions and denied.

STEARNS, J. This is a motion made by the plaintiff to dismiss the defendant's bill of exceptions.

The action, which was one of trespass on the case for negligence, was tried before a jury in Newport County and resulted in a verdict for the plaintiff. April 20, 1918, the motion of defendant for a new trial was denied by the Superior Court. The defendant duly excepted to the decision and on the 22nd day of April, 1918, filed in the office of the clerk notice of its intention to prosecute a bill of exceptions to the Supreme Court, ordered the transcript of testimony and deposited with the clerk of the court the estimated fees for transcribing the testimony as required by the provisions of Sec. 17, Chap. 298, Gen. Laws, 1909. Thereupon it was ordered by the trial court that the bill of exceptions and transcript of evidence should be filed in the clerk's office on or before June 9, 1918. June 3, 1918, by order of the court, the time for filing the bill of exceptions and transcript of evidence was extended to June 24, 1918. The transcript of evidence was filed on the 14th day of June and the bill of exceptions on the 19th of June, 1918. On

the 24th of June, 1918, the bill of exceptions and transcript of evidence were allowed by the trial justice and the case was forthwith certified to the Supreme Court by the clerk. October 9, 1918, the plaintiff's attorney took out the transcript of testimony from the office of the clerk of the Supreme Court in Providence for which he gave his receipt, as follows:

"Supreme Court
Oct. 9th A. D. 1918

JAMES OTIS HAMBLY
vs.
BAY STATE ST. R. R. Co. } No.

(1) Received the transcript of evidence in the above entitled cause, in accordance with Rule No. 18, to be kept until October 30th 1918 at 10 o'clock A. M., and then returned without demand made therefor.

MAX LEVY Pltffs Atty."

On January 2, 1919, the plaintiff filed this motion to dismiss defendant's bill of exceptions. The plaintiff alleges that the trial justice to whom the bill of exceptions was presented for allowance did not fix any time for hearing thereon; that no notice was given to him of any hearing as required by Rule 31 of the Rules of Practice of the Superior Court; and that said justice did not give plaintiff a hearing upon the question of the allowance of said bill as provided for by Sec. 19, Chap. 298, Gen. Laws, 1909. For these reasons the plaintiff claims that the bill of exceptions is not properly before this court. Neither the trial justice nor the clerk of the Superior Court for the County of Newport has any record in regard to the facts complained of by the plaintiff. The trial justice in an affidavit on file in this case states that it is his custom to give notice to the attorneys before hearings on the question of allowance of bills of exceptions, either by letter when they reside out of town but generally through the clerk in all cases; in the case in question he does not think that the parties were present at the time of said allowance; that he does not now remember

whether or not he had given notice to counsel by letter or through the clerk or otherwise of the time of the hearing; that the time which has elapsed since said allowance is so long and the matter has been out of his mind so long that he cannot now recall any details in connection with the same.

Counsel for defendant in his affidavit states that either on June 21 or June 22, 1918, he gave to counsel of the plaintiff written notice of the filing of the bill of exceptions and also delivered to him a copy of the bill; that he was not present when the bill and transcript were allowed but to the best of his recollection he had notice of the hearing on the same, although he cannot remember how or by whom said notice was given; that after the cause had been carried to the Supreme Court the matter of the allowance of the bill and transcript was never called to his attention until January 3, 1919, when notice was given of the filing of this motion to dismiss; he is now unable to recall positively any details in connection with the matter.

Counsel for the plaintiff testified, before this court, that he had no recollection of receiving notice of the filing of the bill; he had no notice either from the trial justice or the clerk of the court that a time had been fixed for hearing upon the allowance of bill and transcript; that he was not present at any hearing, if one was had; and that he is unable to state definitely the time when he first discovered that the bill and transcript had been allowed.

The receipt given for the transcript shows that counsel for plaintiff had knowledge at least as early as the 9th of October, 1918, of the fact that the case was then in the Supreme Court and of the allowance of the transcript by the trial justice. If counsel at that time claimed that the allowance by the court was irregular or prejudicial to the rights of his client, he should have raised the question without further delay. The fact that he waited for three months, if not longer, before raising the question, in the circumstances, has worked to the disadvantage of the defendant in that the delay has made it impossible to estab-

lish now definitely and conclusively the procedure which was followed in this case. Neither the trial court nor the clerk of the court is required by law to make written record of the facts in dispute. The practice heretofore in counties other than Providence, where the sessions of the Superior
(2) Court are not continuous, has been more or less informal, as the court is in such counties at fixed intervals only, and for limited periods. It frequently happens that transcripts of testimony and bills of exceptions are presented by counsel, for allowance to the trial justice who allows the same on the oral statement of counsel to the court, given together or at different times that there is no objection to the allowance of the transcript and bill.

This practice, although informal, has tended to facilitate the business of the court, and has been a convenience to counsel. If however this practice is to be continued, it is apparent that either the trial justice or the clerk should make a record of the giving of notice, of the appearance of the parties or their waiver of the right to formal notice and to be heard.

We think on the facts of this case the court is warranted in finding that the regular procedure was followed by the trial justice and the clerk of the court, and that counsel for the plaintiff, as well as the trial justice, by reason of the lapse of time, has forgotten. This conclusion is strengthened by the fact, that apparently counsel had no ground for objection to the allowance of the bill and transcript as no claim is now made that there is any error therein and consequently had no reason to attend a hearing before the trial justice on the matter of the allowance, if notice was given to him. The motion should be denied on another ground also.

(3) This court has repeatedly held that the right of review by bill of exceptions is contingent upon a diligent observance of the conditions imposed by statute and rule of court. See *Carr* v. *Cranston Print Works*, 40 R. I. 376, and cases cited therein. The conditions referred to are such as are imposed

by statute or rule of court upon the parties to the litigation or to such other conditions over which they have the power of control or can comply with. The defendant in this case has fulfilled every requirement of the statute and the rules of court.

If there has been any failure to observe the statutory requirements it is the failure by the trial justice or the clerk. The defendant had no power to compel either the trial justice or the clerk to perform the acts required by statute; if they failed to act within a certain time the statute prescribed the method by which its bill of exceptions should be brought to this court. The defendant was diligent and was not guilty of any negligence. The record showed that the bill and transcript were properly allowed within the statutory period. As the bill and transcript were presented by the defendant, there was no reason for defendant to attend a hearing on the allowance thereof unless objection was taken thereto. The argument of plaintiff in effect is that it was the duty of defendant to see to it that the trial justice performed his duty of giving the plaintiff a hearing and notice thereof. We think this obligation in the circumstances rested upon the plaintiff and not upon the defendant, as it was within the power of plaintiff if he had followed the record of the case to have made timely objection to the action of the court in allowing the bill and transcript without a hearing thereon.

The power of this court to revise the action of the Superior Court and the right of litigants to have such revision is given by the constitution of this State; the procedure by which such revision may be secured is provided by statute, and is to be construed as a system of reasonable rules, by the observance of which a litigant may secure the right of revision. See *Hart Wood & Lumber Co.* v. *Sea View R. R. Co.*, 29 R. I. 530. The only party aggrieved by the action of the court, if plaintiff's contention is correct, was the plaintiff and a statutory remedy was provided for him by the provisions of Sec. 21, Chap 298. The defendant followed

the travel of the case and the plaintiff did not. If either party is to suffer from the failure of the court to observe certain statutory conditions, it certainly should not be the defendant.

Our conclusion is that the bill of exceptions is properly before this court. The motion to dismiss is denied.

Max Levy, for plaintiff.
David R. Radovsky, of counsel.
Sheffield & Harvey, for defendant.

EDWARD R. MORAN *vs.* JOHN GOULARTE.

FEBRUARY 26, 1919.

PRESENT: Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Scire Facias against Bail. Discharge of Bail.*

By Gen. Laws, 1909, cap. 324, § 2, it is provided that bail in a civil action may discharge himself by committing his principal to jail; by paying or tendering the costs which have accrued; by leaving with the keeper of the jail a certified copy of the original writ and by giving to the plaintiff or his agent or attorney of record notice in writing of the time and place of the commitment within six days after making the same.

Held, that the performance of each of the acts so required was essential and was an indispensable prerequisite to the discharge of the bail.

Held, further, that the provision in regard to the six days applied only to the giving of notice and was a limitation of time imposed on the bail and there was nothing in the statute to warrant the implication that this provision was intended to effect a stay of proceedings by the plaintiff for such time after commitment of the principal.

(*2*) *Scire Facias against Bail. Discharge of Bail. Judgment. Default.*

Where in an action of *scire facias* against bail, defendant was defaulted, plaintiff was entitled under Gen. Laws, 1909, cap. 294, § 1 to have judgment entered at once and the liability of the bail was established by the entry of judgment, and if the bail desired to discharge himself from liability the burden was upon him to take the prescribed statutory procedure before the final entry of judgment, and only the complete and timely fulfillment of all the conditions imposed by statute upon him before the entry of final judgment would discharge him, but when judgment has been duly entered the power of the bail to discharge himself had ceased.

(*3*) *Discharge of Bail. Payment of Costs.*

Gen. Laws, 1909, cap. 324, § 2, provides as one of the conditions by which bail in a civil action may discharge himself from liability, "paying or tender-

ing to the creditor or his attorney the costs if any which shall have *accrued* on a writ of *scire facias* against him."

Held, that the costs which have accrued before judgment need not be taxed by the court in the first instance but bail must pay the same or make sufficient tender.

SCIRE FACIAS against bail. Heard on exception of defendant and overruled.

STEARNS, J. This is an action by writ of *scire facias* against bail. The case is before this court on the defendant's bill of exceptions by which exception is taken to the decision of the Superior Court denying the motion of defendant to vacate a judgment for the plaintiff. The facts as appear from the record are as follows: Edward R. Moran brought an action of deceit against Francis E. Tucker which was begun by writ of arrest and the defendant John G. Goularte became bail for Tucker. On July 5, 1917, Moran recovered judgment against Tucker for $1,168.33 and costs of suit, and the execution issued thereon was later returned into court unsatisfied. February 13, 1918, Moran began the present action by writ of *scire facias* which was duly entered in the Superior Court. The defendant filed several pleas to the action and the case was assigned for trial to May 28, 1918. On the 28th of May the counsel for defendant in open court stated that his client would submit to judgment and the defendant was thereupon called and defaulted. On the 31st of May, 1918, the defendant Goularte by his attorney in fact, Anthony G. Perry, took Tucker into custody in the city of New Bedford, Massachusetts, and on the same day Tucker was brought into this State and surrendered by his bail to the keeper of the Providence County Jail. The sum of $4 was then and there paid to said keeper of the jail for the board of said Tucker for the ensuing one week and a certified copy of the original writ and return of the officer thereon was left with the keeper of the jail. On the same day, May 31st, Anthony G. Perry went to the office of O'Shaunessy, Gainer & Carr, who were the counsel of record for the plaintiff Moran. On being

informed by a clerk in that office that Mr. Carr, the member of the law firm who had appeared in court in the proceedings referred to, was out of the city, Perry then left in said office a notice in writing of the time and place of commitment of said Tucker. Perry testified that he carried with him to the office the sum of $6.45 which had been given to him by the attorney of defendant for the purpose of paying the costs which had accrued on the writ of *scire facias;* that Mr. Carr was out of the city and as he, Perry, had been instructed to pay the costs of the writ to Mr. Carr personally, he said nothing to anyone in the office about the costs and neither paid them nor made any tender of payment. Mr. Carr returned to the city and his office about noon on the 3rd of June and at that time found the notice in writing above referred to. On the same day, the 3rd of June, a citation was issued from the Eighth Judicial District Court to the plaintiff Moran, on the complaint of said Tucker that he was imprisoned in the State Jail in Cranston on surrender of bail on a writ of arrest and request made therein to take the poor debtor's oath. The hearing on said citation was set therein for the 10th of June, 1918. Deputy Sheriff Bates went to the office of Mr. Carr on the afternoon of June 3rd and requested him to accept service for Mr. Moran. Mr. Carr refused to do this as he said that his client might not understand his action. Mr. Carr testifies that he met James H. Kiernan, one of the men who had been acting for the defendant Goularte in the surrender and commitment proceedings, there was some talk in regard to a settlement, and reference was made by Kiernan to the contemplated poor debtor proceedings; that Kiernan then left him and he returned to his office where he was shortly thereafter served by Deputy Sheriff Bates with the citation in the poor debtor proceeding. The costs however were not paid nor was any tender thereof made at this time. Mr. Carr then prepared his affidavit and proof of claim and on June 4th, went before a judge of the Superior Court, made proof of his claim and judgment was thereupon entered for the

plaintiff for $1,168.33, which sum was the amount of damages and costs recovered against the principal with interest and costs as is provided by Chapter 324, Sec. 7, Gen. Laws. Execution was issued on the judgment on the 10th of June, 1918, which was levied on the real estate of the defendant on the 11th of June, 1918. On June 8th, 1918, Tucker was released from the Providence County Jail as his board had not been paid for the second week, as required by the provisions of Chap. 325, Sec. 1, Gen. Laws. On July 2nd 1918, the attorney in fact of John G. Goularte tendered payment to Mr. Carr as attorney for Moran the costs on *scire facias* but the money was refused.

The defendant thereafter on the same day moved in the Superior Court that the judgment entered on the 4th of June be vacated. This motion after a hearing was denied and exception to the decision was duly taken by the defendant.

We have stated the facts with particularity as the defendant claimed that he had been unable to pay the costs in time, because of the absence of Mr. Carr from the city. It appears however that this claim is without foundation. It also appears that during Mr. Carr's absence, other members of his law firm were present in the city and that payment of the costs could have been made or tendered to them if the defendant had so desired.

(1) The defendant contends that the entry of judgment was erroneous and that no valid judgment on a writ of *scire facias* can be entered after the commitment of the principal by bail until the expiration of the period of six days within which time the bail is required by statute to give notice in writing to the plaintiff.

By Sec. 2, Chap. 324, Gen. Laws, 1909, it is provided that any person who shall become bail in any civil action may at any time before final judgment against him as bail on *scire facias* discharge himself as bail in either of two modes. "First. By committing his principal to jail in the county in which he became bail or in which the original writ was

returnable, paying or tendering to the creditor or his attorney the costs, if any, which shall have accrued on a writ of *scire facias* against him as bail, and leaving with the keeper of such jail a certified copy of the original writ and the return of the officer thereon, and a certified copy of the bond given to the officer serving said writ or given to the keeper of the jail in the county of Providence, if either of said bonds have been given, and giving to the plaintiff, if in this state, or his agent or his attorney of record, notice in writing of the time and place of such commitment within six days after making the same."

The second method provided for, is by bringing the principal into court before final judgment shall be rendered on the writ of *scire facias* after notice to the plaintiff or his attorney of record, paying the costs on the writ of *scire facias* and certain other costs, and by delivering his principal into the custody of the court.

The defendant attempted to discharge himself as bail by the first method. The statute provides that the bail may discharge himself by doing certain specified things, viz.: by committing his principal to jail; by paying or tendering the costs which have accrued; by leaving with the keeper of the jail a certified copy of the original writ and by giving to the plaintiff or his agent or attorney of record, notice in writing of the time and place of the commitment within six days after making the same. The performance of each of the acts thus required by the statute is essential and is an indispensable prerequisite to the discharge of the bail. *Howard* v. *Capron*, 3 R. I. 182. The provision in regard to six days applies only to the giving of notice and is a limitation of time imposed on the bail. There is nothing in the statute to warrant the implication that this provision was intended to effect a stay of proceedings by the plaintiff for six days after commitment of the principal. The plaintiff was entitled on proof of his claim to have judgment entered on May 28th at once after the case was defaulted. Sec. 1, Chap. 294, Gen. Laws, 1909, provides that upon

(2) default of the defendant in any case at law, "judgment shall be entered at any time thereafter on *ex-parte* motion and proper proof of claim." The liability of bail was established by the entry of judgment. If the bail desires to discharge himself from liability, the burden is placed upon him to take the prescribed statutory procedure before the final entry of judgment. The plaintiff creditor and the bail each has the right to follow the appropriate statutory proceeding. The surrender of the principal by the bail is but one of the steps to be taken by bail seeking to discharge himself as such. The surrender does not operate as a stay of the *scire facias* proceedings; only the complete and timely fulfillment of all the conditions imposed by the statute on the bail before the entry of final judgment will discharge the bail.

In the case at bar the defendant by the delay of the plaintiff in securing judgment, had a certain period of grace during which he might have discharged himself; but when judgment was duly entered the power of bail to discharge himself had ceased.

(3) The defendant also contends that the costs referred to in the statute must be such costs as have been first taxed by the court. The language of the statute however is "the costs, if any, which shall have accrued," etc. The word "accrue" as used in law is thus defined in Webster's New International Dictionary: "To come into existence as an enforceable claim." On May 31st, the date of the commitment, and up to the time of the entry of judgment, the only costs in the case were the officer's fees for the service of the writ. The amount of these fees is regulated by statute and an examination of the writ of *scire facias* would have given to defendant the information of the amount of fees then due. One of the agents who acted for the defendant in making the commitment, testified that the amount of the costs as they appeared on the record was ascertained by him on the day of the commitment and the trial justice found that the failure to pay the costs was due to the fact that the agent of defendant forgot the matter. But whatever the fact may

be, these fees had accrued at the time in question, and the obligation rested upon the defendant to pay the same or to make a tender thereof before entry of judgment. This he failed to do until July 2, some twenty-eight days after entry of judgment, at a time when the principal had been released from custody, which of course was too late. Sec. 7, Chap. 364, Gen. Laws, 1909, provides as follows: "The following fees shall be taxed and allowed in bills of costs to attorneys and parties in the superior court in civil cases:—To the attorney of the party obtaining judgment.....$5 00." The distinction thus appears between the costs in question which have accrued before judgment and costs which have arisen after judgment. The costs which have accrued before judgment need not be taxed by the court in the first instance, but bail must pay the same or make sufficient tender. In the case at bar as the defendant failed to pay the costs on the writ of *scire facias* before final judgment, he failed to discharge himself as bail and the judgment was properly entered against him.

The exception of the defendant is overruled and the papers are ordered sent back to the Superior Court.

O'Shaunessy, Gainer & Carr, for plaintiff.

Daniel A. Colton, Edward M. Sullivan, for defendant.

ANGELO DI SANTIS *et ux. vs.* NATALE CANNATA.

MARCH 4, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Statute of Frauds. Memorandum.*

A memorandum under the statute of frauds is insufficient in an action against the person to be charged, where it is not signed by the seller and he is not mentioned therein either by name or by any description by which he can be identified and it refers to no other writing by which he can be identified.

(2) *Statute of Frauds. Memorandum.*

Where the memorandum under the statute of frauds does not mention the name of the vendor and there is no description of him therein, oral testimony to show who he is, is inadmissible.

Where there was nothing in the memorandum by way of description of the vendor, nor any reference to any check or checks to be given in payment or to any other paper or document, parol testimony was inadmissible to show that the payee of two checks accepted as payments under the memorandum was the vendor, so that the checks and memorandum could be read together as comprising the memorandum required by the statute of frauds.

(3) *Statute of Frauds. Memorandum.*

Where husband and wife, owners of the property in question declared upon an agreement for the purchase of the same, checks payable to the husband and claimed by him to have been given as payments under a memorandum of sale without any evidence that he was the "lawfully authorized" agent of his wife to make sale of her property, fail to show that the husband and wife were the vendors of the property, even were parol evidence admissible in the condition of the memorandum for the purpose of identifying the vendors.

ASSUMPSIT. Heard on exceptions of plaintiff and overruled.

PARKHURST, C. J. This is an action of assumpsit brought by Angelo Di Santis and his wife Maria Di Santis against the defendant, setting up in substance that the plaintiffs bargained and agreed to sell and that the defendant bought of them a certain lot of land with improvements under an agreement referred to in the declaration (a paper, purporting to be a copy being annexed to the declaration); and alleging that the defendant refused to carry out the terms of the sale, and that the plaintiffs thereafter sold the property at a loss of upwards of $700; and plaintiffs seek to recover this loss. The defendant pleaded the general issue; also a special plea which need not be noticed here. The case was tried before a justice of the Superior Court and a jury, and after the plaintiffs had put in certain testimony including the alleged agreement for sale and purchase, the plaintiffs were nonsuited by the trial judge, on the ground that the paper produced in evidence was not a valid agree-

ment or note or memorandum thereof under the Statute of Frauds, whereby the defendant could be charged. Thereupon plaintiffs took exception to this ruling and in due time prosecuted this exception to this court, and the case is now before us on this exception.

At the trial the plaintiff Angelo Di Santis, who was the only witness examined, testified that the property belonged to himself and his wife Maria Di Santis; but it nowhere appears that Maria Di Santis authorized her husband to sell her interest in the property or to make any agreement on her behalf. As a part of the plaintiffs' evidence a paper was put in (over defendant's objection) of which the following is an exact copy, viz.:

"Providence R. I
May 4, 1916

Recd, from Mr Natale Cannata $25,^{00}$ in cash. and $75,^{00}$ dollar to be paid befor May 18 for the sale of House of 128 Sutton St which he paid $4,3^{00}$ dollar forty three Hunder. and said sum of $4,3^{00}$ forty three Hunder dollar to be paid June 1 first 1916.

Wittmess Chas F. Mauro
Natale Cannata "

The admission of this paper in evidence was excepted to by defendant.

The Statute of Frauds of Rhode Island, applicable here is found in Gen. Laws of R. I. (1909), Chap. 283, Sec. 6, and reads as follows: "Sec. 6. No action shall be brought:—*First.* Whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer time than one year" . . . Unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized."

At the trial also the plaintiff, Di Santis, was allowed to put in evidence without objection a check for $25. of which the following is a copy, viz.:

"Providence, R. I. May 4 1916 No. 91

COLUMBUS EXCHANGE BANK 57–40
of Providence, R. I.

Pay to the order of

Angelo De Santi $ 25 $\frac{00}{100}$

Twenty Five $\frac{00}{100}$ Dollars

Natale Cannata"

and testified that this check was duly paid and he (Angelo Di Santis) got the money, and he was also permitted to testify without objection that this payment was on account of the purchase price of the property and should be credited to the defendant.

Plaintiff, Di Santis, was also permitted to put in evidence without objection a check of which the following is a copy, viz.:

"Providence, R. I. May 18 1916 No. 92

COLUMBUS EXCHANGE BANK 57–40
of Providence, R. I.

Pay to the order of

Angelo De Santi $ 75 $\frac{00}{100}$

Seventy five $\frac{00}{100}$ Dollars

Natale Cannata"

and testified that this check was stopped, and he never got the $75.

It further appeared that the defendant never paid the balance of the sum of $4,300 and refused to take a deed of the property, and that the same was later sold to another person at private sale for the sum of $3,537.50.

(1) With regard to the so-called "promise or agreement," or "note" or "memorandum" above set forth, and upon which by their declaration the plaintiffs seek to maintain this suit, aside from numerous informalities apparent upon its face, the principal defect to be noted is that it is not signed by the plaintiffs; they are not mentioned in it either by name, or by any description by which they may be identified, and it refers to no other writing by which they may be ascertained.

It has been settled by numerous authorities that such a memorandum is not sufficient under the Statute of Frauds. Thus in Benjamin on Sales (5th Ed.) p. 248, it is said: "The cases will now be considered with reference to the inquiry whether and to what extent, it is necessary that the writing should show:—

1. The names of the parties to the sale;
2. The terms and subject-matter of the contract.

On the first point, it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favour he is charged. The name of the party to be charged is required to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him, save to the person to whom the promise was made." And numerous cases are cited to support the text. See also 29 Am. & Eng. Enc. of Law, p. 848. In *Lewis* v. *Wood*, 153 Mass. 321, the memorandum of sale was as follows:

"E. Weymouth, Mar. 24, 1890.

Dear Sir,—

My sister and I have decided to accept the offer of $1,450 for our interest in the Cambridge property now under discussion. I think, however, I would better see you this evening or next, between six and seven, if convenient.

Resp.

E. C. Hawes."

The court held: "Without considering all the objections that have been urged against the memorandum, it is sufficient to say that it is fatally defective in not containing the name of the purchaser, or any designation of him whatever. In order to satisfy the statute, the memorandum should not only have been signed by the defendant or her authorized agent, and have identified the property to be sold, but should also have contained the name of the other party to the contract, or should have described him with reasonable certainty. This was not done, and the memorandum is, therefore, insufficient." (Citing numerous cases.) See also, *Grafton* v. *Cummings*, 99 U. S. 100; *Peoria Grape Sugar Co.* v. *Babcock Co.*, 67 Fed. 892; *McGovern* v. *Hern*, 153 Mass. 308; *Lincoln* v. *Erie Preserving Co.*, 132 Mass. 129; *Nichols* v. *Johnson*, 10 Conn. 192; *Sherburne* v. *Shaw*, 1 N. H. 157; Browne, Stat. of Frauds (4th Ed.) Sec. 372.

The plaintiffs' counsel contends that inasmuch as he has produced in evidence the two checks above set forth, signed by Natale Cannata and payable to the order of "Angelo De Santi" and has shown that one of those checks was paid at the bank to the plaintiff Angelo Di Santis and was accepted as first payment under the memorandum, and that the other was intended to be accepted in payment of the second installment due under the memorandum, these checks sufficiently identify the plaintiffs as the parties selling to the defendant, so as to make admissible both the checks and the oral testimony of the plaintiff in regard to them, and so that the checks and the memorandum should be read

together; and further contends that, if so read together the memorandum thereby becomes sufficient under the Statute of Frauds.

We find no authorities cited upon either brief which sustain this contention. It is implied, if not plainly stated, in the authorities above cited that where the memorandum does not mention the names of the vendors, and there is no
(2) description of them in the memorandum, oral testimony to show who they are is inadmissible; and that, only where the vendors are not stated by name, but are referred to by some form of description, is oral testimony admissible to apply the description. There is nothing in the memorandum by way of description of the vendors, nor is there any reference to a check or checks to be given in payment or to any other paper or document. It may be noted also that the plaintiffs declare upon an agreement between Angelo Di Santis and Maria Di Santis his wife, both shown to be owners of the property; so that, if we give to the checks all the probative value that could be claimed for them, they fail to show that Angelo Di Santis and wife were the vendors, and there is no evidence that Angelo Di Santis was the "lawfully authorized" agent of his wife to make sale of her property; in short all the evidence admitted by the court, giving it the highest value which can be claimed for it, falls
(3) short of establishing any such memorandum in writing as to satisfy the requirements of the Statute of Frauds, or to show any such contract between the parties to this suit.

In Benjamin on Sales (5th Ed.) p. 249, we find this language: "But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description. If one party is not designated at all, plainly the whole contract is not in writing, for 'it takes two to make a bargain.' In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the Statute of Frauds (and by the Code). But if the writing shows by description with whom the contract was

made, then the Statute is satisfied, and parol evidence is admissible to *apply the description:* that is, not to show with whom the bargain is made, but who is the person described, so as to enable the Court to understand the description. This is no infringement of the Statute, for in all cases where written evidence is required by law there must be parol evidence to apply the document to the subject-matter in controversy."

Plaintiffs have cited but few cases, and we are of the opinion that none of them is in point in sustaining the plaintiffs' contention. In *Lerned* v. *Wannemacher*, 9 Allen, 412, we have a case of purchase and sale of personal property (coal) where there were two memorandums, one of which was signed by one party, the other by the other; and the case turned upon the question whether the two papers could be read together; it was found that the two papers were substantially identical in delivery, in date and in substance and that they should be read together, and that the parties were properly shown by name in the papers. There was strong internal evidence that the two memorandums related to the same transaction, and such evidence was competent for the consideration of a jury. (p. 417). In *Jenkins* v. *Harrison*, 66 Ala. 345, both the memorandum of sale, and certain deeds offered in evidence together with the memorandum were signed by both vendors and purchasers, and the question in the case did not relate to the want of proper parties to the written memorandum, but whether the terms and conditions of the sale could be shown to be of such certainty and definiteness as to warrant specific performance; and the gist of the decision is that, although the preliminary memorandum of sale was not sufficiently certain in its terms to satisfy the requirements of the statute (p. 355), yet the deeds which were subsequently executed by both parties to carry out the sale, although never delivered were sufficient evidence of a contract in writing for the purchase and sale of land to satisfy the Statute of Frauds. In *Forst* v. *Leonard*, 112 Ala. 296, there was a suit on a bond

given to secure performance of a building contract; the building contract required a bond, and the bond referred to the contract; on p. 303 the court in sustaining the admissibility of parol evidence says: "Its only necessary office in the case is the identification of a contract shown by the bond itself to have been entered into between named parties for a certain purpose, and to be an existing undertaking." In *Lee* v. *Butler*, 167 Mass. 426, *Nickerson* v. *Weld*, 204 Mass. 346, and *Oliver* v. *Hunting*, 44 Ch. D. 205, also cited by plaintiffs, there was no doubt or difficulty about ascertaining the parties on both sides from clear written evidence; the facts were so different and so numerous that we do not find it useful to review these cases; most of the cases cited by plaintiffs relate to difficulties about the terms and conditions of sale or the description of the property, rather than to parties. We have found no case decided in Rhode Island which touches the point here in controversy.

On the whole case, we are of the opinion that the trial judge of the Superior Court committed no error in ordering a nonsuit. The plaintiffs' exception is overruled and the case is remitted to the Superior Court sitting in Providence County with direction to enter its judgment of nonsuit in accordance with the ruling of the trial court.

Flynn & Mahoney, Howard B. Gorham, for plaintiff.
Benjamin W. Grim, for defendant.

EPHREM SMITH *vs.* RAY HOWARD, T. T.

MARCH 7, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Certification of Questions. Questions of Law and Fact.*

The question whether it is the duty of a town to keep its bridges in repair and in safe condition for the passing thereon of motor trucks of the weight of ten tons, is a mixed question of law and fact; whether such weight is a reasonable one being a question of fact to be submitted to the jury under proper instructions.

(2) *Municipal corporations. Duty to Maintain Bridges. Motor Trucks.*

Municipal corporations are under the statutory duty of maintaining public bridges of sufficient structural stability and in such a state of repair that they will sustain the weight of such loads as in the circumstances may reasonably be placed upon them. What is reasonable care required of a town or city in the circumstances of a particular case and what is reasonable weight in a vehicle are questions of fact for the jury.

(3) *Automobiles. Duty to Keep Highways in Repair. Municipal Corporations.*

As to a defect in a highway or bridge, which would be as likely to cause injury to an ordinary horse-drawn vehicle as to an automobile, a municipal corporation under its statutory obligation to keep such highway or bridge in repair, will be equally liable for damages to an automobile or to an ordinary vehicle, resulting from such defect.

(4) *Duty to Keep Highways in Repair. Municipal Corporations. Injuries Peculiar to Automobiles.*

The question as to the obligation of a municipal corporation in the absence of special statutory provisions, to keep its highways and bridges in such condition that automobiles may not be exposed to the liability to injuries peculiar to that type of vehicles, *is not decided.*

(5) *Municipal Corporations. Duty to Keep and Maintain Bridges. Automobiles.*

On question certified for determination:—

Held, that subject to the ordinary rules as to negligence of the parties, and the statutory provisions as to the obligations of towns, a town was liable for injury to plaintiff's motor truck resulting from a defect in or from the insufficiency of a bridge, provided it was found that the use of a vehicle and load of ten tons weight was reasonable upon the kind of bridge which the town should maintain at said location.

TRESPASS ON THE CASE under statute against a town. Certified on questions of law.

SWEETLAND, J. The above entitled cause is an action of trespass on the case brought against the defendant as the town treasurer of Foster to recover damages for injuries to the plaintiff's automobile truck alleged to have been caused by the negligence of said town in permitting a certain bridge in said town to remain in a defective condition.

The amended declaration in substance alleges that it was the duty of the town of Foster to keep the Moosup Valley Bridge, so-called, in repair and in safe condition for travel; that on May 24, 1917, while the automobile truck

of the plaintiff, which with its load weighed approximately ten tons, was passing over said bridge several planks of said bridge gave way and broke by reason of the unsafe, weak, rotten, decayed and defective condition of said bridge, that said truck partly passed through the floor of said bridge and was damaged; and that said town had notice or but for the want of reasonable care on its part should have known of the defective condition of said bridge. The case is before us upon certain questions, stated to be of law, certified by a justice of the Superior Court to this court for its determination. Said questions are as follows:

"First. Was it the duty of the Town of Foster on May 24, 1917 to keep and maintain in repair the Moosup Valley Bridge so-called in a safe condition for the passing thereon of the plaintiff's truck and its load weighing ten tons?

"Second. Is it the duty of the Town to keep its bridges in repair and in safe condition for the passing thereon of motor trucks of the weight of ten tons?"

(1) From the terms of the questions certified and as appeared in the argument of counsel before us the question, which was assumed to be one of law, which arose on the hearing upon the defendant's demurrer to the amended declaration, and in the opinion of said justice was of such doubt and importance that it ought to be determined by the Supreme Court, is as to the duty of the town of Foster to maintain said bridge in such condition that it will sustain a vehicle and its load weighing ten tons. That is a mixed question of law and fact. As to the legal duty of said town to maintain at said place a bridge of sufficient structural strength to sustain an ordinary vehicle with its load of reasonable weight we assume that there can have been no doubt in the minds of said justice and counsel. Whether the weight of ten tons is a reasonable one is a question of fact to be submitted to the jury under proper instructions.

The duty of a town with reference to the repair and amendment of highways, causeways and bridges within its territorial limits is imposed by Chapter 83, Sec. 1, Gen.

Laws, 1909, and is as follows: "All highways, causeways and bridges, except as is hereinafter provided, lying and being within the bounds of any town, shall be kept in repair and amended, from time to time, so that the same may be safe and convenient for travelers with their teams, carts and carriages at all seasons of the year, at the proper charge and expense of such town, under the care and direction of the town council of such town." The liability of towns for damages suffered by reason of defects in or upon highways, causeways and bridges is prescribed by Chapter 46, Sec. 15, Gen. Laws, 1909, and is as follows: "If any person shall receive or suffer bodily injury or damage to his property by reason of defect, want of repair, or insufficient railing, in or upon a public highway, causeway, or bridge, in any town which is by law obliged to repair and keep the same in a condition safe and convenient for travelers with their teams, carts and carriages, which injury or damage might have been prevented by reasonable care and diligence on the part of such town, he may recover, in the manner hereinafter provided, of such town the amount of damages sustained thereby, if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part."

The duty imposed by the General Assembly upon the towns and cities with reference to the care of highways and bridges is that such highways and bridges shall be reasonably safe and convenient for general and ordinary travel. In *McCloskey* v. *Moies*, 19 R. I. 297, this court said: "By the term 'safe and convenient' is not meant, however, that they shall be absolutely safe or free from defects, but reasonably so." In *Foley* v. *Ray*, 27 R. I. 127, this court said: "We cannot say, as a matter of law, that the statutory requirement . . . compelling towns to keep their highways in repair, shall be so construed that no distinction should be made between the care necessary for the construction, maintenance, and repair of a country road and that appropriate in the case of a city street. A reasonable

distinction ought to be made, taking into consideration the circumstances which naturally and necessarily surround each. What would be reasonable care in the one instance might not be in the other, and the question is one of fact which the jury in each case must determine under proper instructions from the court." The standard as to a town's duty, to be applied in each case, is that of reasonable care in the maintenance of highways, having regard to the nature of the locality and the ordinary traffic reasonably to be expected upon said highways. In like manner a town must maintain public bridges of sufficient structural stability and in such a state of repair that they will sustain the weight of such loads as, in the circumstances, may reasonably be placed upon them. What is reasonable care required of a town in the circumstances of a particular case and what is reasonable weight in a vehicle are questions of fact to be submitted to the jury. This rule as to a town's duty is supported by the great weight of authority in this country. It has been well stated in *Gregory* v. *Adams*, 14 Gray, 242, at p. 246, "the obligation of these municipal corporations is, not to keep all their highways and bridges in the highest possible state of repair, or so as to afford the utmost convenience to those who have occasion to use them; but only in such condition that, having in view the common and ordinary occasions for their use, and what may fairly be required for the proper accommodation of the public at large in the various occupations which may from time to time be pursued, each particular way shall be so wrought, prepared and maintained that it may justly be considered, for all the uses and purposes for which it was laid out and designed, to be reasonably safe and convenient." In that case it appeared that an elephant, weighing between five and six tons, while passing over a public bridge in the town of Adams, which bridge was insufficient to sustain the weight of the elephant, broke through said bridge and was injured. The court held that the question of whether the town was liable to the owner of the elephant could not be

(2)

determined absolutely by the court, and that the case should be submitted to a jury under proper instructions. See also *Wilson* v. *Granby*, 47 Conn. 59; *Anderson* v. *St. Cloud*, 79 Minn. 88; *Moore* v. *Hazelton*, 118 Mich. 425; *Yordy* v. *Marshall County*, 80 Iowa, 405; *McCormick* v. *Washington*, 112 Pa. 185.

Our conclusion that said questions cannot be determined by us as legal questions apparently disposes of the matter certified. Counsel for the defendant, however, has argued before us that an automobile truck should not be considered as either a team, cart or carriage within the meaning of the statutory provisions imposing liability upon towns; and hence as to such a vehicle the town of Foster was under no obligation to maintain said bridge in a safe condition for travel. This argument presents a question of law and as it may be regarded as incidentally within the scope of the questions certified we will pass upon it. The General Assembly has by elaborate regulations provided for the legal use of automobiles upon the highways within the
(3) cities and towns of the State. Automobiles probably exceed in number all other vehicles of private locomotion upon our public streets and roads. They surely come within the general designation of carriages, though probably they should be held to differ in kind from the carriages contemplated in said statutory provisions, when the same were first enacted. In many respects the liability of an automobile to injury from a defective highway or bridge does not materially differ from that of a horse-drawn vehicle of the same weight. As to such particulars the burden upon a town in maintaining its roads and bridges safe and convenient for travel with automobiles is no greater than that which arises in travel with ordinary vehicles. In some other respects their liability to injury would seem to be much greater and the corresponding burden upon the town would be largely increased, if it should be held that towns must, without limitation, keep their highways and bridges reasonably safe and convenient not only for ordinary carts and carriages but also for automobiles. It is well

known that they are propelled by complicated machinery, subject to disarrangement. The surfaces of their wheels are covered with expensive tires which may be injured by sharp substances or by some other materials upon the surface of a highway or bridge. Their wheels are particularly liable to side-slip or skid with injurious results, or to be impeded in their operations by the nature and condition of the surfaces of highways or bridges; and it is not unlikely that in other ways, unknown to the court, automobiles may be the subject of injuries to which the ordinary vehicle is not exposed. In this case the question has not
(4) been argued before us as to the obligations of towns, in the absence of special statutory provisions, to keep their highways and bridges in such condition that automobiles may not be exposed to injury in the particulars of which we have spoken and as to which the liability to injury is peculiar to that type of vehicles. The question does not arise in this case and we will leave it for determination in some case in which it may be directly involved. As to a defect in a highway or bridge, which would be as likely to cause injury to an ordinary horse-drawn vehicle as to an automobile, we will hold that a town, under obligation to keep such highway or bridge in repair, will be equally liable for damages to an automobile or to an ordinary vehicle, resulting from such defect.

(5) In the matter now under consideration we say that, subject to the ordinary rules as to negligence of the parties, and the provisions as to the obligations of towns, the defendant is liable for injury to the plaintiff's automobile resulting from a defect in, or from the insufficiency of, said bridge provided it is found that the use of a vehicle and load of ten tons weight is reasonable upon the kind of bridge which the defendant should maintain at said location.

The papers in the case will be sent back to the Superior Court with this decision certified thereon.

Archambault & Archambault, for plaintiff.

John P. Beagan, for defendant.

JOHN TAGLINETTE *vs.* THE SYDNEY WORSTED COMPANY.

MARCH 7, 1919.

PRESENT: Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Workmen's Compensation Act. Minors.*

Pub. Laws, cap. 831 (The Workmen's Compensation Act), Art. I, § 6, provides "A minor working at an age legally permitted, under the laws of this State shall be deemed *sui juris* for the purpose of this act."

Pub. Laws, cap. 1378, § 1, clause 1, amending Gen. Laws, cap. 78, § 1, provides that no child under fourteen years of age shall be employed or permitted or suffered to work in any factory or manufacturing or business establishment within this State and by clause 2 that no child under the age of sixteen years shall be so employed unless his employer shall have in his possession an age and employment certificate given by or under the direction of the school committee.

Held, that the employment of a child of fourteen years without the above certificate was expressly prohibited and therefore unlawful.

(*2*) *Workmen's Compensation Act. Minors. Employment Certificate.*

The entire responsibility of obtaining the information required to be set out in an age and employment certificate and of issuing a proper certificate under Pub. Laws, cap. 1378, is placed in the first instance on the school committee of the child's place of residence, although a factory inspector may investigate the accuracy of the statements contained in such certificate and order its cancellation if he finds it should not have been issued. Therefore an employer who has received from the proper authority a certificate substantially in form required by law in all its essential features is not required to investigate the accuracy of the statements of the certificate, but is entitled to rely upon it as rendering the employment by him of the child therein named as being legally permitted and said child is *sui juris* as an employee under the Workmen's Compensation Act, Pub. Laws, cap. 831, Art. I, § 6.

(*3*) *Workmen's Compensation Act. Minors. Employment Certificate.*

An inaccuracy of statement in an employment certificate given to an employer under Pub. Laws, cap. 1378, in that the mother signed the certificate and stated that she had control of the child, the child's father at the time living with and having control of him, does not in itself invalidate the certificate so as to render the employment of the child unlawful, as regards the provisions of the Workmen's Compensation Act.

(*4*) *Pleading. Minors. Workmen's Compensation Act. Employment Certificate.*

To a declaration in an action to recover for the death of a minor from injuries received while employed in the factory of defendant, defendant filed a plea in abatement alleging that at the time of the accident both defendant as employer and deceased as employee were subject to the provisions of the

Workmen's Compensation Act and therefore a common law action could not be maintained.

Plaintiff by replication alleged that deceased while over fourteen years of age was under sixteen years of age and was employed in a manufacturing establishment and that defendant *at the time deceased entered its employ*, did not have in its possession an age and employment certificate under the provisions of Gen. Laws, 1909, cap. 78, § 1, as amended. On demurrer:—

Held, that the pleadings of plaintiff were defective in not alleging that *at the time of the accident*, defendant did not have the certificate, but such defect was amendable.

TRESPASS ON THE CASE for negligence. Heard on exception of plaintiff and overruled.

BAKER, J. This is an action at common law to recover damages for the death of Vito Taglinette, a minor, resulting from injuries received while employed by the defendant at its factory in Woonsocket. The plaintiff is the father of the deceased.

The declaration is in the usual form for common law actions based on negligence. To the declaration the defendant filed a plea in abatement, which alleges in substance that at the time of the accident both the defendant as employer and the deceased as its employee were subject to the provisions of the Workmen's Compensation Act, and therefore a common law action could not be maintained.

The plaintiff in his replication sought to take the case out of the provisions of the Workmen's Compensation Act by alleging that under Section 6, Article I thereof, a minor, in order to become subject to its provisions, must be of an age at which he can legally be permitted to work under the laws of Rhode Island; that at the time of the injury the deceased was over fourteen years of age, but not sixteen, and was employed in a manufacturing establishment; that the defendant at the time the deceased entered its employ did not have in its possession an age and employment certificate prescribed by Section 1 of Chapter 78 of the General Laws of 1909, as amended by Section 1, Chapter 1378, because the age and employment certificate in the possession of the defendant stated that the mother had control of the de-

ceased and was signed by her, whereas it should have been signed by the plaintiff and should have stated that the father had control of the deceased. A copy of the certificate in question is set forth in the replication.

The defendant demurred to the replication upon the following grounds:

"1. It appears in the declaration and in the replication that said Vito Taglinette at the time of the said alleged accident mentioned in the declaration, was working at an age legally permitted under the laws of this State.

2. It appears in the replication that at the time said Vito Taglinette entered the employment of said defendant, the latter had in its possession an age and employment certificate of said Vito Taglinette given by or under the direction of the School Committee of the City of Woonsocket, where said Vito Taglinette resided, which said certificate conformed to the provisions of said Section 1 of Chapter 1378 of the Public Laws of Rhode Island of 1916.

3. It appears in the replication that at the time when said Vito Taglinette entered the employment of said defendant the latter had in its possession an age and employment certificate of said Vito Taglinette as required by law.

4. It does not appear in and by the declaration or replication that at the time of the said alleged accident to said Vito Taglinette mentioned in the declaration the defendant did not have in its possession the age and employment certificate of said Vito Taglinette required by law.

5. It is immaterial in so far as the defendant is concerned that said age and employment certificate referred to in said replication stated falsely that the person having control of said Vito Taglinette was his mother, rather than his father, inasmuch as it appears that said certificate was in proper form and given by or under the direction of the School Committee of said City of Woonsocket.

6. It is immaterial in so far as the defendant is concerned that said age and employment certificate referred to in said replication was signed by the mother of said Vito Taglinette

instead of by his father, inasmuch as said certificate was in proper form and given by or under the direction of the School Committee of said City of Woonsocket."

The Superior Court rendered a decision sustaining said demurrer to which decision the plaintiff excepted. The case is now here on said exception.

The question in controversy really is whether or not the plaintiff's deceased minor child was at the time of his death an employee of the defendant subject to the provisions of Chapter 831 of the Public Laws, designated as the Workmen's Compensation Act. If he was such an employee, then the present action is not maintainable, as "the right to compensation for an injury, and the remedy therefor granted by" said act, are "in lieu of all rights and remedies as to such injury . . . either at common law or otherwise" which existed at the time of the passage and approval of said Chapter 831. The question arises primarily from the fact that said deceased was a minor. One of the provisions (1) of Section 6 of Article I of said chapter is as follows: "A minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act." The act, however, is itself silent as to when a minor is legally permitted to work. The conditions determinative of this fact are set forth in Section 1 of Chapter 1378 of the Public Laws, which is in amendment of and in addition to Section 1 of Chapter 78 of the General Laws, entitled "Of Factory Inspection."

Clause 1 of Section 1 of Chapter 1378 declares that "no child under fourteen years of age shall be employed or permitted or suffered to work in any factory, or manufacturing or business establishment within this state." And Clause 2 of the same section declares that "no child under sixteen years of age shall be employed or permitted or suffered to work in any factory or manufacturing or business establishment unless said person, firm, or corporation employing him or her shall have in his, their or its possession an age and employment certificate, given by or under the direction

of the school committee of the city or town in which said child resides." One of the statements which said certificate must contain is "that said child has completed fourteen years of age." From this it is plain that no child under fourteen is legally permitted to work in the business establishments enumerated, that a child under sixteen years of age who has completed fourteen years *may* work in such business establishments, but only when his employer has in his possession the age and employment certificate referred to. In the present case the facts admitted by the pleadings show the deceased was a few months more than fourteen years of age when he was employed by the defendant company to work in its factory.

The first ground of demurrer is that the admitted facts show that the deceased minor at the time of his death "was working at an age legally permitted under the laws of this state," and the defendant urges that as a necessary consequence the deceased was *sui juris* for the purposes of the Workmen's Compensation Act. To state it otherwise, in effect the claim is that inasmuch as the deceased was fourteen years of age, and inasmuch as a child of that age *may* legally be permitted to work in a factory, the deceased simply because of his age was legally an "employee" under the Workmen's Compensation Act, as that term is defined in Section 1 (b) of Article V of the act.

Most, if not all, of the states, which have a provision in their compensation acts relative to the employment of minors employ this language—"minors who are legally permitted to work under the laws of the state." It has been held that this language "was intended to exclude from the statute" (Workmen's Compensation Act) "minors whose employment is prohibited by law." *Pette v. Noyes*, 133 Minn. 109, 112;–*Westerlund* v. *Kettle River Co.*, 15 N. C. C. 720, 724, 162 N. W. 680 (Minn.). The language of our act, "A minor working at an age legally permitted under the laws of this state shall be deemed *sui juris*" is apparently employed in no similar act except in

Ohio, where the Supplemental Act (effective January 1, 1914) in amendment of the Workmen's Compensation Act employs the identical language of our act. See Honnold on Workmen's Compensation, Vol. 2, 1487, Sec. 46. In *Acklin Stamping Co.* v. *Kutz*, 120 N. E. 229, 231 (Ohio Supreme Court, 1918), it is held that if illegally employed a minor "would not be an employee within the meaning of that term" in the Compensation Act. Inasmuch as the Compensation Act is silent as to the age when a minor is permitted to work it is obviously necessary that this provision must be construed in connection with Section 1 of Chapter 1378. Doing this, we are of the opinion that the first ground of defendant's demurrer is not well founded. As already appears Clause 2 of Section 1 of Chapter 1378 provides that "no child under sixteen years of age shall be employed or permitted or suffered to work in any factory" unless the employee has in his possession an age and employment certificate. Hence the employment of a child of fourteen without such certificate is expressly prohibited and, therefore, unlawful. If the statute without qualification named fourteen years as the age at which minors are legally permitted to work, then the construction claimed would unquestionably be correct. But since the statute prohibits employment below the age of sixteen unless the employer has a certificate in his possession then in our opinion, it must be held that a minor working in a factory at the age of fourteen, when there is no certificate in his employer's possession, is not working at an age legally permitted under the laws of this State. To state it otherwise the word "age" in the citation from Section 6 of Article I of the Workmen's Compensation Act is to be construed in the light of the condition expressed in Section 1 of Chapter 1378 affecting and determining the legality of the employment of a minor fourteen years old. The Factory Inspection Act, in so far as it affects child labor, and the Workmen's Compensation Act are both examples of modern social legislation along different lines. The one seeks to give the child a larger opportunity for future

usefulness by requiring him to get some measure of education before engaging in certain kinds of work and by protecting him in his years of immature mental and physical development from hazardous and hurtful employments. The other provides compensation and new remedies for those injured in industrial employments which involve less delay and expense and render more certain the certainty of recovery of compensation, when most needed, than existed under the older forms of remedy. Each has a beneficent design, and each is to be interpreted with a liberality calculated to effectuate its purpose. The argument, however, in favor of extending the Compensation Act by recognizing as legal the inclusion among employees those minors whose employment the Factory Act forbids does not commend itself. It may be noted that Chapter 1378 of the Public Laws was enacted four years after the passage of Chapter 831, and is, therefore, in so far as their provisions conflict, if such be the case, controlling.

(2) The second and third grounds of demurrer state in different ways that the employment in its factory of the deceased by the defendant was legal because it had in its possession an age and employment certificate given by or under the direction of the proper school committee. It is admitted by the plaintiff that the defendant had a certificate thus given, but he claims that it was not the certificate required by Section 1 of Chapter 1378; that it was, therefore, null and void and that in consequence the deceased was not legally employed.

Without now discussing the effect of inaccuracies of statements of fact in such a certificate, it is proper first to consider the significance and effect of an employer's having in its possession an age and employment certificate given by or under the direction of the proper school committee. This renders necessary a more careful consideration of Section 1 of Chapter 1378.

We have already seen that Clause 2 of said section prohibits the employment of a child under sixteen years unless

the employer has in "its possession an age and employment certificate, given by or under the direction of the school committee of the city or town where the child resides." It appears by the same clause that "the official authorized to issue the age and employment certificate" determines from the evidence submitted to him whether "the child applying for such certificate is fourteen years of age" and whether the child has the educational qualifications required by the statute and if his findings on these points are favorable he then sends such child to a licensed physician for a physical examination, who is required if the result of his examination justifies it to "certify in writing that such child is in sufficiently sound health and physically able to be employed in any of the occupations or processes in which a child between fourteen and sixteen years of age may be legally employed." This physician's certificate is apparently to be sent to the official authorized to issue the age and employment certificate inasmuch as such official in his certificate is required to state that the examining physician has certified to the physical fitness of the child, and inasmuch as Clause 10 of said Section 1 requires said official to "keep on file a copy of each certificate granted, *together with the evidence on which such certificate was granted.*"

Clause 3 provides that the age and employment certificate may be applied for and completed at any time, and that it "shall be kept on file and not delivered by the official authorized to issue the same until he shall have received a written statement signed by the employer . . . with the name and address of the employer agreeing to employ the child in accordance with . . . all provisions of law governing such employment." This clause also provides that "all such certificates shall be delivered to the employer when issued and in force and in no case to the child."

Clause 4 provides that such certificates shall be uniform throughout the State and in the form set out in said clause, "or such substantially similar form as may be approved by the secretary of the state board of education."

Clause 5 provides for the return to the school official of such certificate by the employer within five days after the termination of employment of said child, to be kept on file by such official until issued again as before.

By Clause 7 such certificate is required to be kept by the employer "at the place where such child is employed" and is to be shown to any factory inspector on demand.

Clause 8 is as follows: "Whenever any factory inspector shall have reason to doubt the accuracy of any statement made in any such certificate concerning the age or other qualifications of any child employed thereunder, such inspector shall demand such certificate of the employer of such child, and upon receiving the same shall give such employer a receipt therefor. If after investigation such inspector shall find that such certificate should not have been issued to said child under the provisions of this law, then he shall deliver such certificate to the person who issued it, and shall order it to be cancelled, and shall forthwith notify the said employer that such child must not be longer employed. Every employer or proprietor or manager of any factory or manufacturing or business establishment who shall continue to employ such child after receiving such notice from any factory inspector shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to the penalty imposed by Section 12 of this chapter."

Section 12 of Chapter 78 makes it a misdemeanor for any person to employ a child who is under sixteen years of age without the certificate required by Section 1.

From the provisions of Section 1 of Chapter 1378 above-quoted and referred to it is very clear, we think that the entire responsibility of obtaining the information required to be set out in an age and employment certificate and of issuing a proper certificate is placed in the first instance on the school committee of the child's place of residence; that in certain respects the statements contained in the certificate may after it is issued be examined by any factory inspector as to their accuracy, and that if he finds the cer-

tificate should not have been issued, he may order its cancellation. We regard it as equally plain that in these circumstances an employer who has received from the proper school committee and has in his possession a certificate in form substantially as required by law and particularly in all its essential features, is not required to investigate the accuracy of the statements of the certificate, but is entitled to rely upon it as rendering the employment by him of the child therein named as being legally permitted, and that said child is *sui juris* as an employee under the Workmen's Compensation Act. The provision in Clause 8 relative to the continued employment of the minor after cancellation of the certificate strongly implies that prior to such cancellation the employment is legal.

It is conceivable that something denominated an age and employment certificate might be given to an employer, so plainly deficient on its face in the essential particulars prescribed by statute, that it would not legalize the employment of the child, or protect the employer from criminal prosecution. On the other hand it probably would not be contended that every possible inaccuracy of statement would render the certificate of no legal effect. The only specified defect, as already stated, is that in the certificate given by the official designated by the School Committee of Woonsocket to issue such certificate, the mother of the child signs the certificate and states that she has control of the child, which it is alleged is a false statement, inasmuch as the plaintiff, the child's father, at the time, lived with and had control of him.

(3) The defendant by its demurrer while admitting this allegation of fact to be false, namely, that the mother had control of the child, says in effect in its fifth and sixth grounds of demurrer that the inaccuracy or defect is immaterial so far as the defendant is concerned. An inspection of Clause 2 of Section 1 of Chapter 1378 makes it very evident that in addition to the child's name and residence there are only three matters treated as of prime importance

in the certificate, namely (1) that the child has completed fourteen years of age, (2) that he is able to read at sight and write legibly simple sentences in the English language and (3) that he shall be certified by a physician to be in sufficiently sound health and physically able to be employed in any of the occupations or processes in which a child between fourteen and sixteen years of age may be legally employed.

The statute also provides for the inclusion in the certificate of a description of certain specified physical characteristics of the child, such as height, color of eyes and hair, and complexion, states who shall furnish some of the information called for and specifies with particularity what kind of evidence must be furnished to prove the age of the child.

It is noteworthy, however, that as by Clause 8 authority is only conferred on a factory inspector to investigate as to whether a certificate has been properly issued, and, if his finding is adverse, to order cancellation, when he "shall have reason to doubt the accuracy of any statement made in any such certificate concerning the age or other qualifications of any child employed thereunder," confirmatory evidence is furnished thereby of the essential importance of the statements as to age, as to the possession of ability to pass the specified educational test and as to the physical fitness of the child for work in which he may be legally employed, these in fact being the only "qualifications" of the child required to enable him to be legally employed. It is fairly implied, we think that while the other statements in the certificate may be useful, for example, in establishing the identity of the child working under the certificate with the child named therein, they are not of such material importance that every inaccuracy in such statements would render the certificate null and void.

The form of the certificate given in Clause 4 commences, as follows: "This certifies that I am the (father, mother, guardian, or custodian) and have control of (name of child) whose signature appears below, and that (he or she) was born at (name of town or city), in the county of

and state (or country), of , on the (day)
of (month), A. D.
and is now (number of years and months) old."

This is to be signed by the child and by the "person having control of said child."

As already stated, the plaintiff relies wholly on the fact that the child's mother represented herself as being in control of the child and signed the certificate.

It is doubtless a natural arrangement to have the information contained in the foregoing certificate given by a person holding the relation to the child of parent, guardian or custodian. Ordinarily such persons might be presumed to possess such information. But inasmuch as in general a father is entitled to the custody and control of his minor child, and as the guardian of the person of such child is by law entitled to such control, and as also this is true of a mother, if she be a widow, and ordinarily so with her in fact in the absence, whether temporary or prolonged, of the father, it is not easily apparent why the form should have the words asserting control of the child, especially as the certificate is apparently simply for the purpose of giving the name, place, date of birth and age of the child, and especially also as the statements in the certificate in regard to name, date and place of birth of said child cannot be accepted as true by the official of the school committee until "substantiated by a duly attested copy of the birth certificate, baptismal certificate, or passport of such child" (Clause 2), or if it appears that such evidence cannot be produced, until substantiated by "other evidence satisfactory to the secretary of the state board of education." (Clause 6). Under Chapter 139 of the General Laws entitled "Wrongs to Children," a child may be taken into custody by designated officers of the law and delivered to certain named institutions for the care of children or "to some suitable person, who may be willing to receive" the child "into his family," to be there properly brought up. Such person may aptly be described as having the control, and as being cus-

todian of the child. Perhaps cases involving children thus situated may have led to the use of the words "and have control" in the certificate. It also may be noted that the prescribed form of the certificate nowhere requires the assent of the parent, guardian or custodian to the employment of the child, although, if deemed of importance, such consent could be inferred from the signing. However, whatever may have been the purpose in the use of the words "and have control" in the form of certificate prescribed we are of the opinion that the fact of their falsity in strict legal sense when applied to the mother, while the father lives with their child, does not itself invalidate an age and employment certificate. In view of the slight credence which the statute permits to be given to the statement by the parent, guardian or custodian as to the name, place and date of birth of the child, and in view also of the purpose of Chapters 78 and 1378 in permitting the employment of minors of the age of fourteen and fifteen years when they possess certain specified educational and physical qualifications, when these qualifications are shown to exist, we are of the opinion that it would not be reasonable to hold the employment of a minor to be illegal on account of the incorrectness of a statement so clearly unimportant as the one on which the plaintiff rests his case.

The plaintiff cites certain cases as supportive of his claims but we think they are for the most part of little assistance in deciding the question before us.

In *Lostutter* v. *Brown Shoe Co.*, 203 Ill. App. 517, a minor over fourteen years of age and under sixteen was injured while engaged in work prohibited by the Child Labor Act and it was held that he was not under the provisions of the Workmen's Compensation Act. There was no question as to the sufficiency of an employment certificate considered. One question argued was whether an amendment to the compensation act by implication repealed or abrogated a provision of the Child Labor Act.

In *Westerlund* v. *Kettle River Co.*, *supra*, it was held that the minor was working in a prohibited employment and that he was not within the provisions of the compensation act. *Kutz* v. *Acklin Stamping Co.*, 27 Ohio App. 273 (1917) is *Acklin Stamping Co.* v. *Kutz*, *supra*. In that case a minor less than sixteen years old was working without a certificate and at a prohibited hour of employment. The *American Car and Foundry Co.* v. *Armentraut*, 214 Ill. 509 (1905) does not involve a construction of the Workmen's Compensation Act of that state, which did not go into effect until 1912. A minor was working in violation of the Child Labor Law, and was injured. Questions as to the liability of the employer were considered, one of them being the effect of a misrepresentation of the minor as to his age. In *Roszek* v. *Bauerle & Stark Co.*, 282 Ill. 557 (1918) a minor between the ages of fourteen and sixteen years was working without a permit although one was required for minors of such an age. Held that the employment was unlawful and that the minor was not an employee within the provisions of the Workmen's Compensation Act. In *Stetz* v. *F. Mayer Boot & Shoe Co.*, 156 N. W. 971 (Wis. 1916), a minor less than sixteen years of age at the time of his employment and injury had not obtained from the commissioner of labor "a written permit authorizing the employment of such child." The plaintiff when employed represented that he was sixteen years of age. Held that the employment was illegal. The question of whether the misrepresentation as to his age would bar plaintiff's action at law was considered and decided in the negative. In *Chabot* v. *Pittsburgh Plate Glass Co.*, 103 Atl. 283 (Penn. 1918), a boy fourteen years old was injured. Public Law 283 passed in 1909 forbade his employment, unless his employer procured and kept on file an employment certificate issued to the minor and kept "two lists of all minors under the age of sixteen years employed in or for his or her establishment"; one of said lists to be kept on file in the office, and one to be conspicuously posted in each of the departments in which minors were employed. The employment certificate was procured, but the lists of minors

were not kept or posted. It was held that the requirement to post the lists was mandatory, and that such breach of the law was sufficient to convict the defendant of negligence as a matter of law. The Workmen's Compensation Act passed in 1915 is not referred to, and there is no suggestion that either party to the action at law claimed to be under the compensation act.

The defendant calls attention to *Foth* v. *Macomber & Whyte Rope Co.*, 161 Wis. 549. In this case a minor, while properly employed by the defendant, was at one time put to the performance of some work prohibited by law. Being injured he brought an action at law. It was held that it could not be maintained as he was an employee within the provisions of the Workmen's Compensation Act. In *Lutz* v. *Wilmanns Bros. Co.*, 164 N. W. 1002 (Wis. 1917) on a similar state of facts the court followed its ruling in the case of *Foth* v. *Macomber & Whyte Rope Co.*, *supra*, distinguishing the latter case from *Stetz* v. *Mayer Boot & Shoe Co.*, *supra*.

(4) The fourth ground of demurrer is that the plaintiff nowhere alleges that at the time of the accident "the defendant did not have in its possession the age and employment certificate . . . required by law." We think this ground is well taken as inspection shows this defect in the statement of plaintiff's case. This, however, is plainly an amendable defect, while the other grounds are decisive of the plaintiff's right to recover in this action.

In accordance with what has already been said we are of the opinion that the decision of the Superior Court was right in sustaining the defendant's demurrer to the plaintiff's replication on all the grounds stated therein, except ground 1, which we do not think is well taken.

The exception of the plaintiff is, therefore, overruled and the case is remitted to the Superior Court for further proceedings.

Archambault & Jalbert, for plaintiff.

Green, Hinckley & Allen, for defendant. *Abbott Phillips, Chauncey E. Wheeler*, of council.

CARLO LARISA *vs.* EBENEZER TIFFANY, Town Treasurer.

MARCH 12, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Bill of Exceptions. Transcript of Evidence. New Trial.*

An exception to a refusal to grant a new trial cannot be considered, in the absence of a complete transcript of the evidence presented at the trial.

(2) *Husband and Wife. Municipal Corporations. Highways. Actions.*

An action properly lies in favor of a husband against a town to recover damages which he has suffered in consequence of personal injuries sustained by his wife through the negligence of the town in failing to keep its highway safe and convenient for travel.

(3) *Damage to "Property." Husband and Wife. Loss of Service. Municipal Corporations.*

Gen. Laws, 1909, cap. 46, § 15, "If any person shall receive or suffer bodily injury or damage to *his property* by reason of defect, want of repair or insufficient railing, in or upon a public highway . . . in any town which is by law obliged to repair and keep the same in a condition safe and convenient for travelers . . . he may recover of such town the amount of damages sustained thereby . . . " confers the right of action for damages to every species of property, including the loss by the husband of the services of his wife and also his expenses for the care of his wife occasioned by her injuries.

(4) *Words and Phrases. "Property."*

The word "property" used without limitation is one of broad meaning. The exclusive right to a thing constitutes property in that thing, and the thing may be tangible or intangible.

TRESPASS ON THE CASE against a town under the statute. Heard on exceptions of defendant and overruled.

SWEETLAND, J. This is an action of trespass on the case brought against the town treasurer of the town of Barrington to recover damages for the plaintiff's loss of the services of his wife and to recover the expenses incurred by the plaintiff for medical attendance furnished his wife, all in consequence of personal injuries alleged to have been received by her through the neglect of said town in permitting a certain defect to remain in one of the highways, which said town was bound to keep safe and convenient for travelers.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff. The case is before us upon exception to the decision of a justice of the Superior Court overruling the defendant's demurrer to the amended declaration and upon exceptions to a ruling of the justice presiding at the jury trial admitting certain testimony and to the decision of the last named justice denying the defendant's motion for a new trial.

(1) The defendant's exception to the refusal of said justice to grant him a new trial is not properly before us as the defendant has failed to bring to this court a complete transcript of the evidence presented at the trial without which we are unable to pass upon said exception. We understand, however, from the argument of counsel that the only question involved in this exception is that which is presented in the other exceptions.

The defendants demurred to the amended declaration on the ground that in this State a husband cannot recover against a town for damages which he has suffered in consequence of personal injuries sustained by his wife through the negligence of such town in failing to keep its highway

(2) safe and convenient for travel. This demurrer was overruled and the defendant excepted. At the trial before the jury the defendant excepted to the ruling of the justice presiding admitting the testimony of the plaintiff as to the amount of his damages occasioned by the loss of his wife's services while she was incapacitated as a result of said personal injuries. Thus the sole question presented by the defendant's bill of exceptions is as to the right of a husband in this State to maintain an action against a town for the cause alleged in the amended declaration and set forth above.

Chapter 46, Sec. 15, Gen. Laws, 1909, is as follows: Sec. 15. If any person shall receive or suffer bodily injury or damage to his property by reason of defect, want of repair, or insufficient railing, in or upon a public highway, causeway, or bridge, in any town which is by law obliged to repair and keep the same in a condition safe and convenient

for travelers with their teams, carts and carriages, which injury or damage might have been prevented by reasonable care and diligence on the part of such town, he may recover, in the manner hereinafter provided, of such town the amount of damages sustained thereby, if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part." The plaintiff bases his right of action upon the provisions of this section and claims that the loss of his wife's services and the injury to his personal estate through his expenditures for her medical attendance and care should properly be considered as "damage to his property" within the meaning of the language of said section. It is the contention of the defendant that under said section the damage to property for which recovery is permitted is restricted to damage to tangible personal property. The defendant urges this contention upon the authority of certain decisions of the courts of Connecticut and Massachusetts in which said courts have construed the statutory provisions of their respective states prescribing the liability of a town for injuries arising from the neglect of such town to keep its highways safe and convenient for travel.

In an examination of the decided cases we are met by the directly opposed views which obtain in this country upon the subject of municipal liability for neglect in the maintenance of highways, which by legislative authority have been placed under the control of such municipalities. The first of these views, which has been called the New England doctrine, is that as to quasi municipal corporations and as to chartered municipalities, the duty to keep the highways within their respective territorial limits safe for travel is one imposed upon the municipality by the legislature for the public benefit; that the breach of that duty will not give a right of private action to one specially damaged thereby in the absence of statute conferring such right; and that when the right of private action is given by statute it is not to be extended in favor of those who do not come clearly within

the statutory provisions. This view has been very exhaustively considered in *Hill* v. *Boston*, 122 Mass. 344, and has been generally adopted by the courts of the other New England States and in a very few jurisdictions outside New England. So far as our reported cases indicate this court has not been called upon to determine that specific question; because from before the time of the publication of the first volume of Rhode Island Reports there has been upon our statute books liberal provision for private action against a town in favor of one who has suffered bodily injury or damage to his property by reason of defects or want of repair in a public highway, which said town was obliged to keep safe and convenient for travel. However the so-called New England doctrine, as to the basis of the liability of municipalities in this regard, has been referred to without disapproval by this court. *Taylor* v. *Peckham*, 8 R. I. 349; *Blair* v. *Granger*, 24 R. I. 17. Opposed to the New England doctrine, in New York, Pennsylvania and in the other states outside of New England and the few jurisdictions to which we have alluded, the so-called doctrine of implied liability prevails; and it is held, especially in the case of incorporated cities and towns, that if such municipality is given the control of its street and highways with the means of keeping them in repair there is by reason of the nature of the duty imposed an implied liability on the part of such municipality toward those who are injured by the neglect to perform such duty. Elliott on Roads and Streets, Sec. 788, n. 3 and 6; Dillon on Municipal Corporations, Secs. 1710 to 1716.

By reason of the position taken as to the nature of municipal liability, in states where the doctrine of implied liability prevails, although there are numerous cases in the reports of those jurisdictions each of which deals with the suit of a husband brought to recover for the loss of the services of his wife arising from her personal injuries occasioned by defect in a highway, such cases have been before the courts of last resort upon other points. The right of a

husband to maintain such action has rarely been questioned, and if so such objection has been overruled as in *Borough of Nanticoke* v. *Warne*, 106 Penn. St. 373, in which the court said: "Whatever the law may be in other states, in Pennsylvania, townships and boroughs are bound to keep the roads and streets in repair, and are liable for injuries resulting solely from negligence in performing that duty. The liability is the consequence of the neglect of a statutory duty and the right of a person does not depend on the construction of a statute providing who may recover and for what, in case of injury from defect in the highway." Among numerous cases in which is recognized the right of a husband to maintain his action for the cause in question are the following: *Kelley* v. *Mayberry Township*, 154 Pa. St. 440; *McDevitt* v. *St. Paul*, 66 Minn. 14; *Wyandotte* v. *Agan*, 37 Kas. 528; *Columbus* v. *Stranssner*, 138 Ind. 301; *Krisinger* v. *Creston*, 141 Iowa 154; *Lewis* v. *Atlanta*, 77 Ga. 756; *Dallas* v. *Moore*, 32 Tex. Civ. App. 230.

The defendant contends that the provisions of Chapter 46, Section 15, Gen. Laws, 1909, giving an action, in the circumstances named in said section, to a person suffering "damage to his property" shall be so construed as to restrict such action to the recovery of damages to tangible personal property, and that a husband's loss of his wife's services does not constitute damage to the husband's property. In support of this position the defendant cites to us as authorities *Chidsey* v. *Canton*, 17 Conn. 475 and *Harwood* v. *Lowell*, 4 Cush. 310. To these cases the defendant might have added *Roberts* v. *Detroit*, 102 Mich. 64, for in the latter case the Supreme Court of Michigan reaches the same conclusion as do the courts of Massachusetts and Connecticut. An examination of these cases indicates that the decisions therein were not based upon any inherent obstacle to the husband's recovery because the wife's incapacity was occasioned by a defective highway, nor upon the determination that the loss of service is not a damage to a husband's property rights. In each case the Court's conclusion was

that, in accordance with the construction which it gave to the statute under consideration, this particular property right of a husband was not included in the term "property" for the damage to which an action had been provided. *Chidsey* v. *Canton*, 17 Conn. 475, was an action by a husband and father for loss of the services of his wife and minor daughter, and for his expenses for their nursing and care. The provisions of the Connecticut statute under consideration are quoted in the opinion and were as follows: "If any horse or other beast or cart, carriage or other property, shall receive any injury or damage through or by means of any defective road or bridge" the town "shall pay the owner of such beast or property just damages." Speaking of the plaintiff's claim the court says, "But it is said that he has sustained an injury in his *property* by reason of the loss of the services of his wife and daughter, and the expenses incurred in their sickness. This is undoubtedly so. But is that the species of property of which the statute speaks? It enumerates particular articles of personal property a horse or other beast, a cart, carriage, and then adds the words *or other property*. By these we are to understand property of the kind enumerated." It thus appears that the court does not question that the loss by the plaintiff of the services of his wife is an injury to his property but puts its determination squarely upon the ground that in accordance with the terms of the statute recovery can be had solely for injury to property of the kind enumerated. *Harwood* v. *Lowell*, 4 Cush. 310, was an action against the city of Lowell brought by a husband whose wife had been injured by reason of a defect in a highway of said city to recover for expenses incurred and for loss of his wife's services in consequence of such injury. The provision of the Massachusetts statute then in operation, provided: "If any person shall receive any injury in his person or property by reason of any defect or want of repair", etc., the person so injured may recover, etc. In considering this statute the court found that it was a revision of a former enactment

which provided "a remedy for any person who shall lose a limb, break a bone or receive any other injury in his person or in his horse, team or other property through any defect." The court determined judicially that the change of language did not indicate an intention on the part of the legislature to change the rule of law so as to include consequential damages; that the legislature well understood that the prior law gave damages only for direct injury to the person and direct injury to personal property and intended to reënact the same rule in the present terms. The court then decided the case upon the terms of the former statute, viz., that the right of recovery for injury to property was limited to a person who had received an injury "in his horse, team or other property," and applied the rule of construction *noscitur a sociis*, where several particulars are enumerated followed by a word more general, the provision is thus limited to things of like kind. The court held that the remedy was confined to loss or damage done to visible and tangible property such as animals, goods or chattels and could not be extended to damage to such species of property as a husband's right in his wife's services. In the course of its opinion the court said: "Were this a new act of legislature expressed in the same terms we should regard it as more equivocal." The case of *Roberts* v. *Detroit*, 102 Mich. 64, was the action of a husband based upon the loss of the services of his wife who was injured by falling upon a defective sidewalk. The court held that the husband could not recover. The Michigan statute under consideration provided that "If any horse or other animal or any cart, carriage or vehicle or other property shall receive any injury or damage by reason of neglect by any township, village, city or corporation, to keep in repair any public highway, . . . the township, village, city or corporation whose duty it is to keep such public highway . . . in repair shall be liable to and shall pay the owner thereof just damages." The court applied to this statute the same rule of construction which had been applied by the courts of

Connecticut and Massachusetts in the cases last above considered and said, "while this statute uses the word 'property' it is preceded by several words descriptive of particular kinds of property and the provision is limited to things of a like kind." The court distinguished the case before it from a Wisconsin case in which a husband had been permitted to recover for the same cause of action, on the ground that the Wisconsin statute is broader in its terms than the Michigan statute. The court in each of the three cases which we have just considered was controlled by the particular provisions of the statute under consideration and felt constrained to reach the conclusion expressed in the opinion because of the limitations which by construction they found said statute contained. These must be considered as persuasive authorities in such cases only as are brought under statutes which require a like construction. In *Hunt* v. *Winfield*, 36 Wis. 154, a husband was permitted to recover in an action based on the loss of his wife's services caused by her injury in consequence of an alleged defective highway. The provisions of the statute under which the action was brought are set forth in the opinion and are as follows: "If any damage shall happen to any person, his team, carriage, or other property, by reason of the insufficiency or want of repairs of any road in any town the person sustaining such damage shall have a right to sue for and recover the same against such town." In *Whitcomb* v. *Barre*, 37 Vt. 148, a judgment was sustained in an action by a husband for the cause now under consideration. The statute of Vermont then in force and under which the action was brought was as follows: "If any special damage shall happen to any person, his team, carriage, or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same in an action on the case." (Chapter 25, Section 41, General Statutes of Vermont Revision of 1863.)

The Rhode Island statute conferring the right of action against towns is broader in its provisions than either of the statutes which were before the courts respectively in the cases which we have considered above. The language of our
(3) statute is, if any person shall "receive or suffer" . . . damage to his property by reason of defect." In the interpretation which should be given to the word "property" in said section we are not restricted by any previous enactment of the General Assembly. If we should follow the method of construction adopted by the Massachusetts court in *Harwood* v. *Lowell* (*supra*), based upon the course of legislation, and hold that a new provision substituted for an old, in somewhat different terms, did not indicate an intention on the part of the legislature to change the rule of law, unless the purpose to alter the rule is clearly expressed, the position of the plaintiff is by no means weakened. The original enactment appearing in the Revision of 1844, Public Laws of Rhode Island, entitled "An Act for Mending of Highways and Bridges," is as follows: "And said town shall also be liable to all persons who may in any wise suffer injury to their persons or property by reason of such neglect." Nor in the construction of the word "property" in our statute is there occasion for the application of the maxim *noscitur a sociis*. The generic word does not follow the enumeration of particular species of property as in the statutes of Connecticut, Massachusetts and Michigan. By employing the generic word without qualification the legislative intent is apparent to confer the right of action for damages to every species of property. The legislative intent therein expressed is in accordance with reason. A duty has been imposed upon towns; for injury arising from the negligent disregard of that duty liability to private action is provided. Unless such intention is clearly expressed we should not assume that the General Assembly intended to confer the benefit of this provision upon some and withhold it from others, who may be equally damaged by a town's neglect. In the matter now under consideration the plain-

tiff's wife in her action against the town may recover not only for the injury to her person but also if she was engaged in labor for her own benefit outside of her husband's household she may recover for loss of wages. The latter element of her damage is neither "bodily injury" nor damage to tangible personal property. The loss to a husband of the valuable services of his wife in his household does not differ in kind from her loss of wages, and in many cases may constitute a much greater pecuniary injury.

(4) The word "property" used without limitation is one of broad meaning. The exclusive right to a thing constitutes property in that thing and the thing may be tangible or intangible. In speaking of the meaning of the words "property or estate" as used in our statutes concerning the rights of married women, this court in *Cooney* v. *Lincoln*, 20 R. I. 183, said: "Our statute law in our opinion uses the words *estate and property* in an extremely broad sense and includes choses in action as well as property in possession," and the court approved the following language of Austin in his Jurisprudence, "The word *property* is a term of exceedingly complex meaning, comprising a vast variety of rights." While statutes have secured to a married woman as her sole and separate property the compensation for her labor performed for persons other than her husband, the obligation still remains in the husband to furnish his wife with support including necessary medical attendance and care, and the husband is still entitled to receive the services of his wife performed in the care of his household. The right of a husband to receive the services of his wife is considered a valuable property right and for its loss in consequence of the negligent act of a third person the husband is entitled to pecuniary compensation. The right of either husband or wife to the consortium of their respective spouse, as distinguished from the right of service belonging to the husband or the right to support belonging to the wife, has been regarded as of a somewhat sentimental character. Yet this right of consortium has been treated by a number of

courts as a species of property. In *Foot* v. *Card*, 58 Conn. 1, the court said, "So far forth as the husband is concerned from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property and has compelled the man who has injured it to make compensation." In speaking of the right of consortium, the court in *Jaynes* v. *Jaynes*, 39 Hun. 40, says, "These reciprocal rights may be regarded as the property of the respective parties in the broad sense of the word property which includes things not tangible or visible and implies to whatever is exclusively one's own." This view has been taken by the courts in *Warren* v. *Warren*, 89 Mich. 123; *Lockwood* v. *Lockwood*, 67 Minn. 476; *Williams* v. *Williams*, 20 Colo. 51; *Price* v. *Price*, 91 Iowa, 693. Blackstone regards the right of the husband in the company care or assistance of his wife as property but, in accordance with the illiberal view of his time, denies the existence of a reciprocal property right in the wife. 3 Bl. Comm. 143. It appears clearly upon principle and authority that the loss by the husband of the services of his wife is a damage to his property.

As to whether or not the plaintiff's expenses for the care of his wife occasioned by her injuries are to be regarded as a damage to his property is governed by the opinion of this court in *Bullowa* v. *Gladding*, 40 R. I. 147. In that case the court had under consideration the question of the survival of actions under our statute. By said statute it is provided that causes of action and actions of trespass on the case for damages to personal estate shall survive. The defendant in that case contended that by damage to personal estate was intended solely damages to some specific personal property. The court held that injury arising from false and fraudulent representations whereby the plaintiff was induced to purchase worthless stock, although it worked an injury to his estate generally and not to any specific piece of property, should be regarded as within the meaning of the statute a damage to his personal estate or

property. The principle of that case is directly applicable here and the wrongful act of said town causing this plaintiff to expend money for the care of his wife caused a damage to his property within the meaning of the provisions of the remedial statute now under consideration. We have examined the cases of *Sanford* v. *Augusta*, 32 Me. 536 and *Reed* v. *Belfast*, 20 Me. 246, and do not consider them valuable as authorities.

The defendant claimed in argument before us that it has been generally understood at the bar that an action by a husband can not be maintained against a town to recover for loss of a wife's services and for his expenses in consequence of an injury to the wife occasioned by a defective highway, and that there is no case in this State in which a recovery has been permitted for such consequential damages. In this the defendant is in error. An examination of the records of the Common Pleas Division and of the Superior Court discloses that numerous actions of that nature have been brought and as far as we are informed the question of a husband's right to maintain such action has not been questioned. Such actions have been before this court upon other questions. The case of *William Palmer* v. *J. Ellis White, City Treasurer, et al.*, numbered 16,384 in the Common Pleas Division and 20,419 in the Superior Court, was an action for the cause now under consideration. It came to this court upon a petition for new trial after a trial and decision for the defendants upon the merits of the case, and the decision of the Common Pleas Division was approved. The case of *Everett L. Tourjee* v. *John Matteson, Town Treasurer of Coventry*, reported in 34 R. I. 270, was the action of a husband for the loss of his wife's services alleged to have resulted from injury to the wife caused by a defective highway in said town of Coventry. The case was before this court upon the question of the abatement of said action because of the failure of the plaintiff to summon in the new town treasurer after the resignation of the defendant. The case of *Arthur Haley* v. *Herbert C. Calef, Town Treasurer of*

Johnston and John Ogden, Town Treasurer of North Providence, is reported in 28 R. I. 332. That was an action against said town treasurers jointly brought by the plaintiff to recover for loss of his wife's services and for his expenses alleged to have been caused by an injury received by the wife in consequence of the defective condition of a bridge, which said towns were required to maintain across a river which separated said towns. After verdict for the plaintiff against said defendants jointly the case came to this court on the question of whether the duty of the towns to keep said bridge in repair was a joint obligation. The case was sent back to the Superior Court for a new trial to determine in which town the alleged defect was located. Upon new trial there was a verdict fixing the defect in the town of Johnston. The case again came to this court upon exceptions taken in the course of the latter trial. Said exceptions were dismissed and the case remitted to the Superior Court with direction to enter judgment for the plaintiff. On February 18, 1918, judgment was entered in the Superior Court for the plaintiff against the town of Johnston for the sum of two hundred and twelve dollars. The existence of these cases is by no means conclusive of the matter before us but they indicate the mistake of the defendant as to the practice in actions for this cause.

The defendant's exceptions are overruled and the case is remitted to the Superior Court for the entry of judgment on the verdict.

Herbert Almy, Charles H. McKenna, for plaintiff.
Hugo A. Clason, for defendant.

RHODE ISLAND HOSPITAL TRUST CO., *Ex'r. vs.* SAMUEL W. BRIDGHAM *et al.*

MARCH 28, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Wills. "Issue."*

By the residuary clause of a will a life estate was given testator's wife and the remainder given "in fee simple absolutely and forever to my brother J. and his issue." Both the wife and brother died in testator's lifetime. The estate consisted entirely of personal property, none of it being proceeds of real estate of which testator died seized.

Held, that the word "issue" was one of purchase, and under the circumstances presented by the case, unless such an intention appeared, a distribution among descendants *per capita* would be contrary to the intention of testator, and the word should be held to import representation.

Held, further, that testator's intention was upon the death of his wife to give the remainder of his estate to J. and all his descendants then living and since both the wife of testator and J. predeceased testator, the gift passed to the descendants of J. living at the death of testator *per stirpes* and not *per capita*.

(*2*) *Wills. "Issue."*

In a bequest of personalty the word "issue" is more readily construed as a word of purchase than it is in a devise of realty. "Issue" used in a will as a word of limitation is not equivalent to "heirs" but to "heirs of the body."

(*3*) *Wills. Estate in Fee Simple.*

An estate in fee simple is not to be cut down to a lesser estate by subsequent ambiguous words unless the will shows a clear intention in the testator to do so.

(*4*) *Wills. "Issue." Estate in Fee Simple.*

The word "issue" is in its nature ambiguous. It may be of purchase or of limitation and its use alone would be insufficient to reduce the explicitly devised estate in fee simple to an estate tail.

BILL IN EQUITY for construction of will. Certified by Superior Court for determination.

SWEETLAND, J. The above entitled cause is a bill in equity asking for a construction of certain provisions of the will of William H. Bridgham late of East Providence, deceased, and for instructions to the complainant, as executor of said will. Said cause, being ready for hearing

for final decree, has been in accordance with the statute certified by the Superior Court to this court for determination.

Said will was executed April 28, 1906. The testator died July 29, 1916. Said will was duly admitted to probate in the town of East Providence. By the first article of the will the testator provides for the place of his burial; by the second and third articles the testator makes two pecuniary legacies; the fourth article contains the provision as to which construction is sought and direction is requested by the complainant; and in the fifth and concluding article the testator appoints the complainant executor of the will and revokes all other and former wills by him made. Said fourth article is as follows:

"ARTICLE FOURTH.

"All the rest, residue and remainder of my estate of every kind whatsoever, real, personal and mixed, I give, devise and bequeath to the Rhode Island Hospital Trust Company, IN TRUST, nevertheless, to collect and receive the rents and profits, interest and income thereof, and to pay over and apply the same to the use of my wife, Honorine G. Bridgham, during and for the term of her natural life, and upon her death, I give, devise and bequeath all such rest, residue and remainder of my estate, in fee simple, absolutely and forever, to my brother, Joseph Bridgham, and his issue.

"This disposition of my residuary estate to my brother Joseph Bridgham and his issue, is made because my brother Samuel W. Bridgham has an ample estate of his own."

By the allegations of the bill which are admitted by the respondents it appears that the testator's wife Honorine G. Bridgham and the testator's brother Joseph Bridgham died during the testator's lifetime and that "All of the property which is the subject matter of this bill is personal property and is either personal property of which said William H. Bridgham was possessed at the time of his death, or the proceeds or accumulations of such personal property, and

that none of said property is the proceeds of real estate of which the said William H. Bridgham died seized."

The complainant seeks the direction of the court "as to its duties as executor under the circumstances set forth and particularly as to which and how many of the respondents are entitled to share in the distribution of the residue of said estate under the provisions of said fourth article and as to in what proportions such respondents are entitled to share such residue." The respondents are Samuel W. Bridgham, Ida F. Bridgham and Eliza H. Appleton, children of Joseph Bridgham, and Frances M. Bridgham, Samuel W. Bridgham, Jr., and Jesse C. F. Bridgham, grandchildren of Joseph Bridgham and children of the respondent Samuel W. Bridgham. These three children and three grandchildren constitute all of the descendants of Joseph Bridgham. They were all alive at the time of the execution of said will except the last named grandchild, Jesse C. F. Bridgham, who was born May 4, 1908, eight years before the death of the testator. All of said children are of full age. Said grandchildren are minors and are represented before us by a guardian *ad litem*.

The three respondents first named, the children of Joseph Bridgham, in their answer and before us claimed that they are exclusively entitled to one third each of said estate in the distribution of the residue. It is claimed before us by the guardian *ad litem* in behalf of the infant respondents that each of said infant respondents, as one of the issue of Joseph Bridgham, living at the time of the death of the testator's wife, is entitled to either one-sixth or one-seventh of the residuary estate to be distributed.

The portion of the fourth article with reference to which construction is sought, is that in which the testator provides for the disposition of his residuary estate after the death of his wife. The language of the provision is as follows: "and upon her death, I give, devise and bequeath all such rest, residue and remainder of my estate, in fee simple, absolutely and forever, to my brother, Joseph Bridgham,

and his issue." As to this provision the adult respondents, children of Joseph Bridgham, suggest to the court three possible constructions, either of which if adopted by us will support their claim to the entire residue of the estate. These claims are *first*, that said provision should be held to constitute a devise in fee simple to Joseph of the testator's real estate and an absolute bequest to Joseph of the testator's personal estate; and that said bequest of personalty did not lapse by reason of the death of Joseph in the lifetime of the testator, but took effect and operated as a bequest to said three respondents in accordance with the provision of Chapter 254, Section 31, Gen. Laws, 1909; *second*, that the words "and his issue" may be construed as words of limitation, giving to Joseph a fee tail in the testator's real estate and an absolute gift of the personal estate in accordance with the rule that language, which in a devise of realty would create an estate tail, will if the property be personalty give an absolute estate; and *third*, if the word "issue" shall be regarded as a word of purchase and not of limitation it should be construed to mean "children" and not descendants generally. And if the gift to Joseph and his issue should be held to constitute a bequest to a class, of which Joseph was one member, then said children would take the whole of said residue as the members of such class surviving at the time of the death of the testator's wife; or, if the bequest should be held to be a gift to Joseph and his issue as individuals then each of said children would take one fourth of said estate under the provisions of the will, and the one fourth share bequeathed to Joseph would fall to said children under Chapter 254, Sec. 31, Gen. Laws, 1909, *supra*, which provides that certain legacies shall not lapse. And said respondents further urge that, whether the word "issue" be interpreted as meaning "children," or as meaning "descendants," said adult respondents should take by right of representation to the exclusion of the other respondents, the remoter issue of Joseph. Said respondents have not explicitly formulated all of said claims, but those

which we have named appear to be fairly deducible from the argument and brief of their counsel and seem to us to state the limit and extent of their contention made before us. We will consider these claims in the order in which we have stated them.

As to all of said claims the adult respondents urge upon us the generally accepted doctrine that "it is the duty of the court in construing a will to bear in mind the circumstances under which it was made so as to look at it as far as possible from the testator's point of view." *In Re Boardman, Petitioner*, 16 R. I. 131; and the respondents quote in their brief the first portion of the following language of this court in *Perry* v. *Hunter*, 2 R. I. 80: "In construing a will, we admit the rule that courts are to put themselves in the situation of the testator with reference to the property and the relative claims of his family, the relations subsisting between him and them and the circumstances which surrounded him. But this rule is intended to aid in the construction of the will, where the provisions are doubtful or may admit of more than one interpretation, and not to control the plain meaning of the language of the will. Where this language is clear and explicit it must prevail." The only information which we have as to the circumstances surrounding the testator at the time of making said will is that afforded by the will itself and the undisputed facts alleged in the bill or agreed to by the parties. From those sources it appears that the testator married somewhat late in life; that previous to his marriage he resided at the Bridgham farm in East Providence, sharing and occupying with his brother, Samuel W. Bridgham a house on said farm; that the testator's brother Joseph with his family occupied another house on said farm; that the respondent Samuel W. Bridgham, son of Joseph, with his family also occupied a house on said farm; that these residences were in close proximity to each other; that said testator was on terms of greatest intimacy with his brother Joseph and his children and was well aware of the existence

of the infant respondents Frances M. Bridgham and Samuel W. Bridgham, Jr.; that shortly before the execution of said will the testator married and soon after its execution he went abroad with his wife and did not thereafter reside on said Bridgham farm; that the respondent Ida F. Bridgham at the time of the making of said will was unmarried and is now unmarried; that the respondent Eliza H. Appleton was at the time of the making of the will unmarried and is now married but without issue; that the infant respondent Jesse C. F. Bridgham was born May 4, 1908, after the execution of said will.

If by reason of ambiguity in the language of the will we were justified in seeking intrinsic aid as to its construction we would find nothing in the facts, recited above, which would throw light upon the intention of the testator with regard to the provision under consideration.

As to the first claim of the adult respondents that the provision in question may be construed as a devise in fee simple to Joseph of the testator's entire real estate and an absolute bequest to Joseph of all the testator's personal estate, these respondents urge that such intent may be found in an examination of the whole will and in the circumstances surrounding the testator. We have already pointed out that the testator's circumstances fail to furnish the basis for even a conjecture as to his intention, and the only general intent to be found in the will is the wish to give the income of his residuary estate to his wife during her life and upon her death to make an absolute gift of said estate; the meaning of which latter provision we are now seeking to determine. These respondents further urge that the concluding sentence of the fourth article indicates the testator's intention to give the residue after the death of his wife to Joseph absolutely. The apparent purpose of that sentence is to explain the testator's reason for making no gift to his brother Samuel and its language affords no assistance in the determination of the nature of the gift to Joseph, unless by the repetition of the words "and his issue" it should be

regarded as furnishing some indication that those words were used by the testator as words of purchase in the gift "to my brother Joseph Bridgham and his issue." This first position of said respondents requires us either to ignore the words "and his issue" or to treat them as superadded words of limitation. They should not be disregarded. They must be taken either as words of purchase or as words of limitation. The testator has specifically made an absolute gift in fee simple. To support a claim that the words "and his issue" are used merely as superadded words of limitation after the devise in fee simple, they must be construed as equivalent to the expression "and his heirs"; but the word "issue" used in a will as a word of limitation is not equivalent to "heirs" but to "heirs of the body," which import not a fee simple but a fee tail. Such construction would lead to the ambiguity of a gift in fee simple to be held in fee tail; which ambiguity is avoided if said words are treated as words of purchase. In a bequest of personalty the word "issue" is more readily construed as a (2) word of purchase than it is in a devise of realty. "In gifts of personalty the tendency seems to be to treat 'issue' as a word of purchase rather than a word of limitation." 2 Jarman on Wills, 1930 n (h). "The construction by which a devise of real estate to A. and his issue is held to give A. an estate tail effectuates the intention as far as possible while to hold that a bequest of personal property to A. and his issue gives A. an absolute interest defeats the intention because the issue takes nothing." 2 Jarman on Wills, 1199.

The *second* position of said adult respondents is equally untenable. The rule, that language which in a devise of realty would create an estate tail will if the property be personalty give an absolute estate, although not always followed by the courts may be considered as a generally accepted rule in the construction of wills. Such rule has been recognized by this court. *Bailey* v. *Hawkins*, 18 R. I. 573, at 584; *Hartwell* v. *Tefft*, 19 R. I. 644; *In re*

Tillinghast, 25 R. I. 338. In the will before us the testator has in terms coupled a disposition of both real and personal estate, although at the time of his death he was possessed of personalty only. In the consideration of this suggestion of the adult respondents it is necessary to examine the language devising the realty and determine if it would create an estate tail, for that is the condition upon which depends the application of the rule invoked. The testator in terms provides for the creation of an estate "in fee simple absolutely and forever." This language considered alone undoubtedly created a fee simple estate.
(3) Does the addition of the words "and his issue" change such devise to a fee tail? It is a fundamental principle of construction that an estate in fee simple is not to be cut down to a lesser estate by subsequent ambiguous words, unless the will shows a clear intention in the testator to do so. *Briggs* v. *Shaw*, 9 Allen, 516; *Schmaunz* v. *Goss*, 132 Mass. 141. The word "issue" is in its nature ambiguous. It may be of purchase or of limitation and its use alone would be insufficient to reduce the explicitly devised estate in fee simple to an estate tail. The effect of the language of the devise differs materially from that of a devise to a man and his heirs followed by a limitation over in case of his dying without issue. The latter form of devise is the subject of a well recognized exception. In such a devise the fee simple, ordinarily created by a devise to a man "and his heirs," is reduced to a fee tail by implication, "on the ground that the testator has by the words introducing the limitation over explained himself to have used the word 'heirs' in the preceding devise in the qualified and restricted sense of heirs of the body." I Jarman on Wills, 657. The basis upon
(4) which said respondents have asked for the application of the rule does not exist in this case, as the language of the devise before us would not create an estate in fee tail in the realty.

We are of the opinion that there is no warrant to be found in the will for disregarding the expression "and his issue"

or for treating it as embodying words of limitation, which either create an absolute gift to Joseph alone or cut down the devise of a fee simple to a fee tail and give the personalty absolutely to Joseph. The testator's plainly expressed intention is effected by treating such expression as words of purchase.

We now reach the third position of the adult respondents, which in part is that the word "issue," if treated as a word of purchase, should be interpreted to mean "children" and not descendants generally. In urging this as an unqualified rule the claim is clearly contrary to the great weight of authority in this country and in England. Said respondents are not supported by most of the reported cases which are cited by them as authorities upon this point. When used as a word of purchase "issue" is not a term of exact and inflexible meaning. By the context it may appear that the testator used it in the sense of "children" and then it must be so interpreted, but unless that is apparent or unless its meaning has been fixed by statute it will be interpreted in its legal sense of "descendants." Chancellor Kent in his Commentaries has urged that the intention of a testator will generally be effected by treating the word as synonymous with "children" unless a contrary intention appears in the will. And this view is approved by Judge Redfield, in 2 Redfield on the Law of Wills, p. 38, n. 9; but courts generally have not followed these text-writers. It has been frequently claimed and was so argued before us by these respondents that "in the ordinary parlance of laymen it means children and only children." It is by no means clear that this contention as to the popular meaning of the term "issue" is justified. Lord Loughborough in *Freeman* v. *Parsley*, 3 Ves. 421, said: "In the common use of language as well as in the application of the word 'issue' in wills and settlements it means all indefinitely." And in *Soper* v. *Brown*, 136 N. Y. 244, the court in speaking of what was the popular meaning of the word said: "It is very unusual, I think, for a parent to speak of his children as his issue

either during life or in a testamentary instrument. When one speaks of the 'issue' of a person deceased, I think in most cases he would intend his descendants in every degree. In popular language if one speaks of the issue of a marriage he probably means the children of a marriage. The collocation of the words 'issue' and 'marriage' makes this in the case supposed the natural meaning." This view as to the popular meaning of the word is embodied in the Massachusetts statute. Revised Laws of Massachusetts, 1902, Chapter 8, Section 5. The Massachusetts Court states that the legal meaning of the word is also its popular meaning in that commonwealth. *Jackson* v. *Jackson*, 153 Mass. 374. This court in a very carefully considered opinion in *Pearce* v. *Rickard*, 18 R. I. 142, approved the doctrine "that the word 'issue' unconfined by any indication of intention includes all descendants; and that intention is required for the purpose of limiting the sense of that word, restraining it to children only." It appears to us that that is the interpretation of the word established by our decisions and amply supported by the weight of authority. In the case of *Pearce* v. *Rickard*, *supra*, the court was considering a bequest to a trustee for the benefit of one R. with direction that at the time of the decease of R. said trustee should pay, transfer and deliver over the said trust property then remaining to the lawful issue of said R. then alive. The court in that case carried the interpretation of the word "issue" to what may be termed its logical result and directed that upon the death of R. the trust fund should be distributed *per capita* among the descendants of R. then living, grandchildren taking equal shares with children and the children of living children taking in competition with their parents. The court found nothing in the gift to issue in any way substitutional in its nature or as indicating that issue were to take in a representative or *quasi* representative way, and probably felt constrained to reach its conclusion upon the matter of distribution as the result of its general determination that "issue" in the provision before it meant descendants gen-

erally and not immediate descendants or children. In *Freeman* v. *Parsley*, 3 Ves. 421, the court had under consideration a gift to be divided between the lawful issue of R. share and share alike. The court held that the descendants of R. living at the time of her death took *per capita* and not *per stirpes*. In that case Lord Loughborough said: "I very strongly suspect that in applying that to this will I am not acting according to the intention, but I do not know what enables me to control it. If a medium could be found between a total exclusion of the grandchildren, and the admission of them to share with the parents, the nearest objects of the testator, that would be nearer the intention; as by letting in those, whose parents were deceased, to take the share the parents, if living, would have taken." In *Cancellor* v. *Cancellor*, 2 Dr. & S. 194, the Vice-Chancellor said: "Now it is certainly not very probable, *à priori*, that a testator should intend that parents and children and grandchildren should take together as tenants in common *per capita;* and the court will not very willingly adopt such a construction." It is apparent that courts generally have had a strong feeling that, in directing the distribution *per capita* of a gift to issue, they may be defeating the real intention of the testator, when such distribution will result in giving to issue of a more remote generation an equal share with those of a nearer generation; as for instance, permitting grandchildren and great grandchildren of deceased and living children to receive the same shares individually as the living children. Hence courts have sought for and have followed very slight indications of an intention on the part of a testator to use the word "issue" as an expression of representation; and they have been governed by such indications not only in the devise or bequest under consideration but also when it could only be inferred from the language of other parts of the will, entirely disconnected with such devise or bequest. In *Dexter* v. *Inches*, 147 Mass. 324, the court said: "The difficulty which was felt by Lord Loughborough in *Freeman* v. *Parsley*, 3 Ves. 421, in

finding a medium between total exclusion of grandchildren and the admission of them to share with their parents does not strike us as insuperable, supposing that he would have felt it in such a case as this. Nor do we think that the difficulty in stating a conclusion justifies a construction which the language used as well as the probabilities show to be contrary to what the testator could have meant." And the court in that case also said: " 'Issue' is a word which lends itself very easily to the expression of representation." In *Jackson* v. *Jackson*, 153 Mass. 374, the bequest under consideration was substantially as follows: the sum of ten thousand dollars should be put in trust, the income thereof paid to one Susan during her life, and at her death said trust fund should be paid to her issue. Upon her death said Susan left four children and five grandchildren the children of a living child. There was certain ambiguous language in the will from which it might be found that the testator intended the issue of Susan to take by right of representation. With reference to that matter the court said: "but we do not think it necessary to determine this" and then passed upon the question of the distribution of said trust fund plainly without reference to such ambiguous language. The court said: "The tendency of our decisions has been more and more to construe 'issue' where its meaning is unrestricted by the context, as including all lineal descendants and importing representation, and certainly when the issue take as of a particular time after the death of the testator and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors." The court then stated the following rule of general application: "We are of the opinion that when by a will personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living it is to be presumed that the intention was that the issue should include all lineal descendants and that they should take *per stirpes* unless from some other language of the will a contrary in-

tention appears." After an extended consideration of the question we are of the opinion that in circumstances such as are presented in the case at bar and such as were before the court in *Jackson* v. *Jackson*, *supra*, unless such intention appears a distribution among descendants *per capita* will be contrary to the intention of the testator, and that in such case the word "issue" should be held to import representation. We have less hesitation in thus disregarding the authority of *Pearce* v. *Rickard*, *supra*, in this particular, because since that decision the General Assembly has by statute changed the rule of construction laid down in that case with reference to a devise or bequest to one for life and thereafter to his issue. Such statutory provision being now Chapter 254, Sec. 11, Gen. Laws, 1909, which is as follows: "Whenever a devise or bequest is made to one for life and thereafter to his issue, in any will hereafter made, such issue shall be construed to be the children of the life-tenant living at his decease, and the lineal descendants of such children as may have then deceased, as tenants in common, but such descendants of any deceased child taking equally amongst them the share only which their deceased parent if then living, would have taken." In so far as in said section the word "issue" is interpreted to mean "children" we must hold that it does not apply to the bequest now before us, as that is not one for life with the remainder over to the issue of the first taker, and the statute changes the rule of the common law merely with reference to such devises and bequests as are expressly named in said section. It is with reference to the construction of devises and bequests to issue after a life estate that the question of the manner of distribution most frequently arises and as to such bequests the statute now provides for distribution *per stirpes*. Hence, we feel greater freedom in changing the rule with reference to the distribution of those estates, extremely few in number, that are not within the scope of said statutory provision, in order that the construction of language similar to that now under consideration may conform to what seems

to us is the intention of the testator indicated by the use of the word "issue" without qualification.

Applying the conclusions which we have reached to the construction of the testamentary gifts under consideration we say that the testator's intention was upon the death of his wife to give the remainder of his estate to his brother Joseph and all his descendants then living. Since both the testator's wife and his brother Joseph predeceased the testator the gift passed to the descendants of Joseph living at the death of the testator *per stirpes* and not *per capita*. As all of the first generation after Joseph survived the testator the estate will be distributed among them in equal shares.

The complainant executor is instructed to distribute the remainder of said estate in its hands among the respondents, Samuel W. Bridgham, Ida F. Bridgham and Eliza H. Appleton, in equal shares. The parties may present to the court on April 4, 1919, a form of decree in accordance with this opinion.

Tillinghast & Collins, *Edward A. Stockwell*, for complainant.

Thomas A. Jenckes, *Samuel W. Bridgham*, *Everard Appleton*, for Ida F. Bridgham.

Livingston Ham, for other respondents.

WILLIAM B. SHEPARD *et al. vs.* SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY *et al.*

FEBRUARY 26, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Appeal and Error. Equity Appeals. New Trial.*

In an equity cause complainants examined a number of witnesses, and defendants made no offer of oral testimony but introduced an award and also put in certain evidence by way of a stipulation signed on behalf of all parties and after complainants had closed their testimony defendants moved for dismissal of the bill which was granted. On appeal, which was sustained, defendants claimed that they should be permitted to complete

their defence either before the appellate court or the Superior Court, before a final order was made for the disposition of the cause.

Held, that as there was no exclusion of evidence offered by defendants and no "accident or mistake" within the meaning of Gen. Laws, 1909, cap. 289, § 30, and as defendants did not see fit to introduce evidence to meet the evidence on behalf of complainants, there was no authority for allowing the taking of further evidence by defendants in the appellate court.

Held, further, that the provisions of Gen. Laws, 1909, cap. 289, §§ 30-33, are general provisions confiding to the discretion of the court the correction of error and injustice and do not imply that as a matter of course it is the duty of the court except in unusual cases to allow testimony to be taken before the appellate court or to remand the case for a retrial.

(2) *Appeal and Error. Equity Appeals. New Trial.*

While the court has the power under Gen. Laws, 1909, cap. 289, §§ 30-33, in a proper case either to hear further testimony upon appeal, in case of "accident or mistake or erroneous ruling excluding evidence in the superior court" or to remit a cause for the purpose of taking further testimony in the Superior Court in cases where justice requires such action, the determination of the question rests upon the peculiar circumstances of the particular case and no general rule has been or can be arrived at.

(3) *Constitutional Law. Due Process.*

Where a bill in equity sought to set aside an award under insurance policies and was a proceeding in aid of the prosecution of pending suits at law upon the policies, and appellees had had an opportunity to offer before the court below all the evidence they desired, the result of a decree setting aside the award to be entered under the order of the appellate court (after denial of appellees request to offer further evidence) will not be to deprive appellees of their property "without due process of law" in contravention of Art. XIV of Amendments to the Constitution of the United States, but merely deprives appellees of an opportunity to interpose the award by way of special plea, leaving them full liberty to offer all such testimony as they would be able to offer if a retrial had been granted in the case at bar, in relation to the question tendered by the pleadings at law.

(4) *Appeal and Error. Equity Appeals.*

The statutes relative to an appeal in equity plainly imply that in the usual case, an appeal is to be treated in the appellate court not as a proceeding *de novo* for a retrial of the cause but as a proceeding for the purpose of reviewing the errors stated in the appellant's reasons of appeal.

BILL IN EQUITY. Heard on motion for reargument after opinion reported in 41 R. I. 403.

PARKHURST, C. J. After the opinion in the above cause filed July 1, 1918, the defendants filed a motion for reargument on July 9, 1918, by permission, in vacation, and

the same stood over to the October session, 1918, for consideration as appears by rescript filed October 21, 1918, which is as follows:

"RESCRIPT.

"On respondents' motion for leave to reargue the above cause, filed by leave of court July 9, 1918, in vacation, and now considered after the opening of the present term (Oct. 1918):

"1. As to that portion of the motion which relates to the weight and effect of the testimony before this court upon complainants' appeal, the matters stated and referred to in the motion were all argued before this court and were fully considered by the court in framing its opinion filed at the last term (July 1, 1918), and the court finds no reason for a reargument of the cause upon such matters; that portion of the motion is therefore denied.

"2. It appears from the transcript, that at the conclusion of complainants' testimony, the cause was dismissed upon motion of the respondents upon two grounds, one of which is not urged in the present motion, and was fully disposed of in the opinion, in favor of the complainants. The other ground was that upon all the complainants' testimony the allegations of the bill were not sustained and no case was made for setting aside the award. The trial court took that view of the testimony and ordered the bill dismissed. This court took a contrary view of that testimony and found that the complainants had sufficiently supported the material allegations of the bill and were entitled to have the award set aside, and thereupon reversed the decree of the lower court and ordered the cause to be remanded to the Superior Court sitting in Washington County, with direction to enter its decree setting aside the award.

"The respondents now urge that since the bill was dismissed after the testimony for the complainants was heard, and without hearing any of the testimony which the re-

spondents now say that they were prepared to offer in defence, if their motion to dismiss had not been granted, this court ought not to order the bill to be dismissed upon the record as it stands, and seem to imply that the respondents should have an opportunity to offer their testimony in defence before the cause is finally determined.

"The court will hear the parties upon this branch of the cause, upon the question whether the respondents should be allowed to present such evidence in defence, and if so, in what court, and in what manner, and subject to what conditions, such evidence should be presented. The cause may be assigned for hearing upon this question by agreement or on motion in due course."

Thereafter the cause was assigned for hearing by agreement of parties to December 30, 1918, upon the question left open for hearing by the last paragraph of the rescript above quoted, and counsel for the parties were heard thereon at that time. It was then contended on behalf of the defendants, that before a final order should be made in this cause the defendants should be allowed to present such further testimony as they should see fit in reply to the testimony submitted in behalf of the complainants in the court below, before this court, or, in the alternative, that the cause should be remanded to the Superior Court with direction to permit the defendants to offer further testimony there in defence to the bill, and in reply to the complainants' testimony.

It appears from the transcript sent up on the complainants' appeal that at the hearing of the cause before the Superior Court, the complainants examined a number of witnesses on their behalf as to the questions discussed at length in our opinion filed July 1, 1918; and that on behalf of the defendants there was no offer of oral testimony, but that the defendants did put in the award signed by Messrs. Houlihan and Evans, and that they also put in certain evidence by way of a stipulation signed on behalf of all parties for the purpose of showing what had been done by

the parties in three certain suits at law, by way of tender and payment into the law court of certain sums of money stated to aggregate the total amount of the award, and of the withdrawal thereof by the complainants; and it further appears by said transcript that after the complainants had closed their testimony in this cause the defendants did not offer any testimony in addition to that already before the court (to wit, the award, and the stipulation,) and thereupon moved for dismissal of the bill on the grounds already fully set forth and discussed by this court in its opinion of July 1, 1918.

The defendants contend that their defence was not fully made before the Superior Court; that they had witnesses whom they could and would have called, if the bill had not been dismissed upon their motion; that since this court has in effect overruled the justice of the Superior Court, as to his decision that the bill should be dismissed, this court should now permit the defendants to complete their defence before making a final order for the disposition of the cause; and that, if this court should now make a final order reversing the decree of the Superior Court and ordering the entry of a decree setting aside the award, as it has purported to do in its opinion of July 1, 1918, it would deprive the defendants of rights guaranteed to them by Article XIV of Amendments to the Constitution of the United States, because it would deprive them of their property "without due process of law."

Our statutes governing procedure upon equity appeals, so far as applicable to the present phase of this case, are found in Gen. Laws, R. I. (1909) Chap. 289, "Of Practice in Equity Causes," &c., and are as follows:

"Sec. 30. No new testimony shall be presented to the supreme court on appeal, but in case of accident or mistake, or erroneous ruling excluding evidence in the superior court, the supreme court may grant leave to parties to present further evidence, and may provide by general rule or special order for the taking of such evidence." . . .

"Sec. 32. Upon any cause being brought by appeal to the supreme court that court shall hear and determine such appeal and affirm, reverse, or modify the decree or judgment appealed from and make such orders and decrees therein as shall be just.

"Sec. 33. Upon reversal or modification of the decree or judgment appealed from, the supreme court may remand the cause to the superior court with such directions as are necessary and proper, or may take such further proceedings in the cause as justice and the speedy determination of the cause may require, and after such proceedings shall remand the cause as aforesaid. In any such case the supreme court, if practicable, shall determine the form of the final decree or judgment before remanding the cause to the Superior Court. In case the supreme court shall affirm the decree or judgment appealed from, it shall certify its affirmation and remand the cause to the superior court for further proceedings. In every case the supreme court, upon remanding a cause to the superior court, shall transmit all the papers in the cause to the superior court, and the final decree or judgment shall be entered in the superior court."

Few cases have arisen before this court, where either party, after an equity appeal from a decree of the Superior Court to this court, has sought to put in further testimony before this court, or to be allowed substantially a new trial in the Superior Court.

In *Steere* v. *Tucker*, 39 R. I. 531, after the opinion there reported was rendered reversing the decree appealed from and directing the dismissal of the bill, the complainant filed his motion for reargument and as a part thereof embodied a request for permission to introduce further evidence in this court as to complainant's actual pecuniary loss or damage to his property; the principal ground of decision being that he was a private citizen seeking to enjoin a public nuisance, and had shown no such special and peculiar injury to his rights as to warrant an injunction. This court held that it did not find in the statute, Gen. Laws, R. I. (1909),

Chap. 289, § 30 (above quoted) that it had any authority to permit the presentation of such testimony on appeal in this court. (See rescript on file, Equity No. 334, filed Jan. 17, 1917.) In the case just cited, it appeared that the complainant had been allowed by the trial judge to introduce substantially all the evidence that he saw fit to offer to make out his case; that there was no "erroneous ruling excluding evidence in the Superior Court," and that there was no case of accident or mistake on the part of the complainant, by reason of which he could invoke the provisions of Section 30, above quoted; and the motion for leave to introduce further evidence was denied.

In the case of *Chase* v. *Cram*, 39 R. I. 83, 92, the complainant appealed from the decree of the Superior Court wherein it was purported to determine the rights of the parties to the water of a certain spring; it was claimed that the language of certain deeds conveying rights in the spring was ambiguous; in the Superior Court the defendant was allowed to introduce certain testimony setting forth statements made by the grantor as to his intentions in making a certain conveyance of rights in the spring to his daughter (the defendant), such statements being made both before and after the date of the conveyance; the complainant also in the Superior Court, then offered evidence of certain witnesses as to statements made by the grantor after the date of his conveyance to his daughter and to his sons for the purpose of showing the grantor's intentions with regard to the use of the spring; this evidence offered on behalf of the complainant was excluded by the Superior Court. After appeal to this court, and before trial upon the merits, the complainant (appellant), filed his motion in this court for leave to introduce the testimony offered by him and excluded below, on the ground that the exclusion of such testimony was an "erroneous ruling excluding evidence in the Superior Court" under the provisions of Gen. Laws, R. I. (1909,) Chap. 289, § 30, above quoted; after hearing this motion this court filed the following rescript (Oct. 6, 1915), viz.:

"The complainant's motion for leave to introduce in this court the testimony of Eugene Chase, Jr., and of Eugene Chase as set forth in the motion filed September 29, 1915, is hereby granted. This court cannot at this time determine the relevancy or admissibility of such testimony without considering the merits of the case which are not now before it. The testimony will be admitted *de bene;* the defendant will be allowed also to introduce testimony in reply to the complainant's testimony so introduced. The witnesses may be produced and examined in open court at such time as may be agreed upon by the parties."

Thereafter the testimony was taken in this court; and thereafter the appeal was heard, upon its merits, and it was determined that "the grant in the deed to the respondent is not ambiguous and that therefore oral testimony tending to show the intent of the grantor was properly excluded"; and the cause was decided without reference to such testimony. (See *Chase v. Cram*, 39 R. I., 83 at p. 92.)

In the case at bar there was no exclusion by the Superior Court of evidence offered by the defendants, and there was
(1) no "accident or mistake" within the meaning of Section 30 above quoted. The defendants did put in evidence the award of Messrs. Houlihan and Evans, and, by stipulation, the facts with regard to the payment of moneys into the law court in the three suits at law and the withdrawal thereof by the complainants; and thereupon after the evidence on behalf of the complainants was closed, the defendants, by their counsel, acting upon their view of the complainants' evidence and the weight thereof saw fit not to introduce any evidence to meet the evidence on behalf of the complainants; although they now say that they had witnesses in court ready to testify to something which up to this time they have not disclosed. We can only conjecture that the defendants might have offered evidence to contradict the complainants' witnesses or to impeach them, or tending to show that the award of the referees was fair and adequate. They saw fit, however, to rest their defence upon the con-

tentions which we have already fully discussed in our former opinion. The decree appealed from was a decree of dismissal; we have stated fully our reasons for reversing that decree and we find no authority in Section 30 above quoted for allowing the defendants to take further testimony in this court for the purpose of showing that the decree of the Superior Court appealed from would have been a proper decree if there had been before that court other or further evidence than the transcript discloses.

That the judge of the Superior Court understood that the defendants had offered all the evidence they desired to offer is borne out by his statement in granting the motion to dismiss; after hearing and participating in rather an extended argument of counsel upon this motion wherein the evidence was quite fully considered, the judge says (Tr. pp. 383, 384): "I am going to grant the motion to dismiss the bill at this point and I do so more willingly because it doesn't need a retrial in the event that the Supreme Court takes a different view from what I have taken."

There have been few equity cases before this court, wherein it has been moved or suggested that the cause ought to be remanded to the Superior Court to take further evidence or to give a new trial. In the case of *Turner* v. *McManus*, 38 R. I. 35, 40, which was a bill in equity to establish a trust upon a certain fund for the benefit of the complainant, the judge of the Superior Court dismissed the bill upon the defendant's motion, after hearing the evidence for the complainant only, for want of sufficient proof; the defendant put in no evidence. The complainant appealed from the decree of dismissal and, upon hearing, this court took a different view of the evidence from that held by the judge below, and entered the following order: "The complainants' appeal is sustained, the decree of the Superior Court is reversed, and the case is remanded to said Superior Court for retrial unless the parties choose to stand upon the evidence adduced at the hearing, in which event a decree should be entered for the complainant in accordance with this opinion."

Upon examining the files in *Turner* v. *McManus*, *supra*, it appears that the complainant-appellant herself, upon the last page of her brief, "respectfully asks that this cause be remitted to the Superior Court for a new trial therein or for such further proceedings as to this court shall seem just and proper"; and it also appears that the cause was retried before a judge of the Superior Court, that both parties put in evidence, and that the trial judge upon the evidence introduced by both parties granted the relief prayed by the bill; and no appeal was taken thereafter.

The defendants in this case rely very much upon *Turner* v. *McManus*, *supra*, as a precedent for sending the case at bar back to the Superior Court for a new trial. But we find certain differences; in the *Turner* case, the appellant herself asked for this course, there was no opposition and no argument on the point; the record was short and contained only the testimony of the complainant and her husband, and the retaking of their testimony would not be very burdensome. It was within the power of this court under Sections 32 and 33 above quoted to remand the case as it did for a retrial, if it appeared to the court that justice required such action. We do not find that the *Turner* case is a binding precedent in the case at bar, where the circumstances are so different.

In the case of *Raferty et al.* v. *Reilly et al.*, 41 R. I. 47, also reported in 102 Atl. 711, and reported on motion for reargument in 102 Atl. 963, the complainants were suing to obtain for the personal representatives of a deceased person a sum of money on deposit in a bank, and the defendant Reilly was claiming the right to have for himself the balance on deposit by virtue of a certain certificate of deposit on joint account, with survivorship, which said defendant had held from the time of the deposit of funds, then and prior to the deposit, the property of the deceased. In the Superior Court the complainants obtained a decree in their favor from which defendant Reilly appealed; on appeal this court found in favor of defendant Reilly and reversed the

decree of the Superior Court; thereupon complainants-leappesel moved for a reargument and urged in substance as one ground of their motion that by reason of the action of the justice presiding in the Superior Court the complainants were deprived of an opportunity to cross-examine the defendant Reilly, and to contradict his testimony (see 102 Atl. 963); and they suggested that this court should remit this cause to the Superior Court for retrial as was done by this court in the case of *Turner* v. *McManus*, 38 R. I. 35.

This court found that the complainants were not so deprived by the Superior Court; that they might have proceeded to cross-examine Reilly and might have introduced evidence to contradict him if they had seen fit; and that there was no warrant for "permitting the complainants to reopen their case here when the cause is before us solely upon the respondent's reasons of appeal." The motion was denied.

(2) We believe that the cases cited above are all of the cases where this court has been called upon to determine questions similar to that now raised and discussed in this opinion. While it is evident from the above that this court has considered that it has the power under the statutes above quoted in a proper case either to hear further testimony upon appeal in this court "in case of accident or mistake, or erroneous ruling excluding evidence in the superior court" (Sec. 30) (*Chase* v. *Cram*, *supra*), or to remit a cause for the purpose of taking further testimony in the Superior Court (Sec. 32, Sec. 33) in cases where justice requires such action (*Turner* v. *McManus*, *supra*), (*Raftery et al.* v. *Reilly et al.*, 102 Atl. 963, 964); it is to be noted that in each case the determination of the question has rested upon the peculiar circumstances of the particular case, and no general rule has been or could be arrived at.

In the case at bar, we have already shown that there is nothing to bring this case within the terms of Section 30, as applied in *Chase* v. *Cram*, *supra*, so that there is no warrant for permitting the defendants to take further testimony

in this court. As to permitting further testimony to be taken in the Superior Court, we think that the case of *Raftery* v. *Reilly*, *supra*, is more nearly in point than the case of *Turner* v. *McManus*, because in *Raftery* v. *Reilly*, as in the case at bar the moving parties were not prevented by the action of the Superior Court from taking all the testimony they desired to take, while in *Turner* v. *McManus*, the appellant, herself, moved for a retrial and there was no opposition or discussion.

We are of the opinion that justice does not require the remanding of this cause to the Superior Court for a retrial, involving as it might, the retaking of all the testimony (upwards of 300 pages) offered on behalf of the complainants, so as to enable them to have the benefit of oral testimony before the trial judge; there is no way except by agreement of the parties that the complainants could be saved from this delay and expense; no order of this court imposed as a condition upon the defendants could be made to compel either party to stipulate that the transcript of testimony already taken should be used in the retrial of the cause; for this reason we think a retrial of the cause would be an injustice to the complainants as it might involve them in unwarranted expense and delay, and would not tend to "the speedy determination of the cause" (Sec. 33, *supra*).

It is also to be borne in mind that the case at bar is a bill
(3) in equity to set aside an award under insurance policies, and is a proceeding in aid of the prosecution of pending suits at law upon the policies, as fully set forth in our former opinion; that the defendants in the court below have had their day in court and have had the opportunity to fully set forth their defence as they saw fit to make it, and to offer before the court below all the evidence they desired in order to make a complete record upon appeal; (*Raftery et al* v. *Reilly et al.*, 102 Atl. 963). It is further to be borne in mind that the result of a decree setting aside the award to be entered under the order of this court will not be to deprive the defendants of their property "without due process of

law," in contravention of Article XIV of Amendments to the Constitution of the United States; such a decree only deprives the defendants of an opportunity to interpose the award by way of special plea as a bar to the maintenance of the three suits at law. In those three suits at law, as we have already shown, the only question now open to the defendants on the pleadings, they having tendered and paid into court certain amounts of money admitted to aggregate the amount of the award, is whether "the said plaintiffs ought further to have or maintain their said action against it to recover any more or greater damages than said sum of $, parcel of the several sums of money in said declaration mentioned" (See opinion, pp. 11-12). It therefore appears that when those suits at law are tried the several defendants will have full opportunity to introduce in defence all such evidence as they are able to offer to show that the award was fair and just in fact and that the plaintiffs have in fact suffered no damages beyond the amount of the award; in other words the entry of the decree setting aside the award, by order of this court in the case at bar, still leaves the defendants in the suits at law at full liberty to offer all such testimony as they would be able to offer, if this court should grant a retrial of the case at bar, in relation to the question tendered by the pleadings at law, whether the plaintiffs ought to recover more than has been already paid. The defendants will not be deprived of any money in excess of the award unless after a trial at law it appears that as a matter of fact they ought to pay more to compensate the plaintiffs than they have already paid.

(4) Our statutes relating to procedure on appeal in equity plainly imply that, in the usual case, an appeal in equity is to be treated in this court, not as a proceeding *de novo*, for a retrial of the cause, but as a proceeding for the purpose of reviewing the errors stated in the appellant's reasons of appeal. *Vaill* v. *McPhail et al.*, 34 R. I. 361.

The provisions above quoted (Secs. 30, 32, 33, Chap. 289) with regard to taking further testimony in this court upon

appeal, and granting power to this court for the taking of such further testimony and the making of "such orders and decrees therein as shall be just," and taking "such further proceedings in the cause as justice and the speedy determination of the cause may require" are such general provisions as confide to our judgment or discretion the correction of error and injustice; but these same provisions do not imply that as a matter of course it is our duty in equity appeals, except in unusual cases, to allow testimony to be taken in this court, or to remand equity cases for a retrial.

For the reasons stated above, this court is of the opinion that the defendants have shown no error or injustice which requires that this cause be sent back to the Superior Court for a retrial, or that further testimony be taken in this court.

The motion is therefore denied; and the cause will be remanded to the Superior Court, sitting in Washington County, for the entry of a decree setting aside the award, pursuant to the order already made at the conclusion of the opinion of July 1, 1918.

Wilson, Gardner & Churchill, for complainants.

Mumford, Huddy & Emerson, for respondents.

HOWARD B. BRYER *vs.* OMER SEVIGNEY.

APRIL 8, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Elections. Ouster. Mandatory and Directory Provisions.*

Under the provisions of Cap. 8, Gen. Laws, 1909, "Of canvassing the Rights and Correcting the Lists of Voters," and of cap. 10, "Of the Manner of Conducting Elections," the requirement that boards of canvassers shall prepare voting lists for the use of election officers in the conduct of elections and the provision that no person shall vote at an election unless his name appears upon such a voting list, are clearly mandatory, but the provision of Cap. 7, Sec. 2, that a citizen of foreign birth shall file with the town clerk proof that he is a citizen of the United States at least five days before any meeting of the board of canvassers, is *directory*, and if notwithstanding the failure of such citizen to file the required proof the board of canvassers place his name on the list and he votes, if the voter is otherwise qualified, his vote

will be held a valid vote, and the election of such voter to a civil office will not be disturbed under the provisions of Cons. R. I., Art. IX, Sec. 1.

PETITION IN EQUITY in nature of *quo warranto*, seeking decree of ouster. Petition denied.

SWEETLAND, J. This is a petition in equity brought under the statute in the nature of *quo warranto* to try the title of the respondent to the office of third councilman of the town of West Warwick.

The parties have agreed to the following material facts. At the time of the election for said office of third councilman on November 5, 1918, the respondent Omer Sevigney was a male citizen of the United States and was twenty-nine years of age. He was born in Canada, but now resides and has his domicile in the town of West Warwick, and has so resided and had his domicile continuously for twenty-seven years last past. He is a naturalized citizen of the United States. His final naturalization papers were granted and legally issued to him by the District Court of the United States for the District of Rhode Island on October 2, 1916, and said papers have been since that time and now are in full force and effect. He registered his name in accordance with law as a registered voter of said town before the last day of June, 1916, and also before the last day of June, 1918. At a meeting of the town council of said town acting as a board of canvassers of said town held in accordance with law before the election in November, 1916, the name of the respondent was placed on the voting list as a registered voter in said town. His name was not stricken from said list by said board of canvassers and he voted at the election held in November, 1916, as a registered voter. The town council of said town, acting as a board of canvassers of said town, at a meeting legally held before the election on the fifth day of November, 1918, placed the name of the respondent on the list of registered voters of said town. Said board of canvassers did not strike the respondent's name from said list and the respondent voted

at said election held on the fifth day of November, 1918, as a registered voter. Said respondent did not file his said certificate of naturalization with the town clerk of said town until December 11, 1918, when he filed the same with said town clerk. At the election held in said town on the fifth day of November, 1918, the respondent was a candidate for the office of third councilman for said town, and received 1,014 votes at such election. The petitioner received at said election 1,008 votes for the office of third councilman. It is alleged in said petition and admitted by the respondent that said town council acting as a board of canvassers on the sixth day of November, 1918, declared the respondent elected to said office; that the respondent took an engagement of said office, entered upon the duties thereof, and still holds, uses and enjoys the privileges, powers, authorities and franchises of said office.

Article IX, Sec. 1 of the Constitution of Rhode Island provides as follows: "No person shall be eligible to any civil office (except the office of school committee), unless he be a qualified elector for such office." Article VII of Amendments to the Constitution, Sec. 1, as amended by Article XI, Section 11 of Amendments to the Constitution, so far as the same is applicable to the matter before us, is as follows: "Every male citizen of the United States of the age of twenty-one years, who has had his residence and home in this state for two years, and in the town or city in which he may offer to vote six months next preceding the time of his voting, and whose name shall be registered in the town or city where he resides on or before the last day of June, in the year next preceding the time of his voting, shall have a right to vote in the election of all civil officers and on all questions in all legally organized town or ward meetings." Chapter 7, Sec. 2, Gen. Laws, 1909, with reference to the registry and canvassing of voters among other things provides as follows: "Provided, that before any person's name shall be placed upon the voting-list, if such citizen shall be of foreign birth, he shall file proof, at least five days

before any meeting of the board of canvassers, with the town clerk that he is a citizen of the United States, and such proof shall be subject to the approval of the board of canvassers of the town or ward wherein such person shall claim the right to vote."

By Article VII of Amendments to the Constitution as amended, quoted above, the Constitution has fixed the qualification of registered voters of the town of West Warwick who are electors for the office of third councilman. Article II, Section 6, Constitution of Rhode Island, provides as follows: "The general assembly shall have full power to provide for a registry of voters, to prescribe the manner of conducting the elections, the form of certificates, the nature of the evidence to be required in case of a dispute as to the right of any person to vote, and generally to enact all laws necessary to carry this article into effect, and to prevent abuse, corruption and fraud in voting." Under this provision the General Assembly may make rules relating to the exercise of the right of suffrage given by the constitution provided such rules are reasonable and do not tend to defeat the right. *King* v. *Board of Canvassers*, 42 R. I. 41. As a part of the statutory regulations, deemed by the General Assembly essential to the orderly conduct of elections, boards of canvassers have been created in the cities and towns of the State. Such boards are required, among other things, to prepare before each election lists of voters eligible to vote at such election. Under the provisions of Chapter 8, General Laws, 1909, "Of canvassing the Rights and Correcting the Lists of Voters," and of Chapter 10, General Laws, 1909, "Of the Manner of Conducting Elections," the requirement that boards of canvassers shall prepare voting lists for the use of election officers in the conduct of elections and the provision that no person shall vote at an election unless his name appears upon such a voting list are clearly mandatory. Statutory directions regarding the preparation of voting lists by boards of canvassers unless made mandatory by the terms of the statute are generally held to be directory.

(1)

If a voter qualified to vote for a certain office finds his name upon the official voting list in the hands of the election officer and is permitted to vote at an election for such office such vote shall not be regarded as an invalid or illegal vote and such voter shall be held to be a qualified elector for such office although all the statutory directions have not been complied with by the board of canvassers in placing his name upon such voting list.

The purpose of the statutory direction contained in Chapter 7, Section 2, General Laws, 1909, quoted above, providing that a citizen of foreign birth shall file with the town clerk proof that he is a citizen of the United States at least five days before any meeting of the board of canvassers, is apparent. It was to assist boards of canvassers in the preparation of voting lists, and in accordance with well established principles is a directory provision and not a mandatory one. Such provision is binding upon a citizen of foreign birth who seeks to have his name placed upon a voting list or who complains of the action of a board of canvassers in refusing to place his name there. Such citizen if he fails to comply with this requirement cannot be heard to object because his name has been omitted from the voting list. If notwithstanding the failure of such citizen to file the required proof, the board of canvassers place his name on the list and he votes, if the voter is otherwise qualified, his vote will be held to be a valid vote. The distinction which we have pointed out between those provisions of an election law which are directory and those which are mandatory has been considered by this court in *State* v. *Carroll*, 17 R. I. 591, and in *Hoxsie* v. *Edwards*, 24 R. I. 338. In regard to the failure of a strict compliance with statutory requirement in the preparation of nomination papers, the court said in *Attorney General* v. *Campbell*, 191 Mass. 497, "We are of the opinion that, while the provisions as to holding caucuses for the nomination of candidates and as to the filing of nomination papers are binding upon the officers for whose guidance they are intended, they may be disregarded

in determining the validity of a subsequent election, if it plainly appears that the will of the majority of the electors is fairly expressed by their ballots." The general rule relating to mandatory and directory provisions in election laws is well stated in *Jones* v. *State*, 153 Ind. 440, "All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

In our opinion the petitioner has not made out a meritorious case for a decree of ouster, and is not entitled to the relief prayed for in his petition. The petition is denied.

Patrick F. Barry, Joseph C. Cawley, for petitioner.

Alexander L. Churchill, John F. Murphy, for respondent.

FLORENCE L. RICHMOND *vs.* SAMUEL KETTELLE, T. T.
PHŒBE L. RICHMOND *vs.* SAMUEL KETTELLE, T. T.
RUTHERFORD B. H. RICHMOND *vs.* SAMUEL KETTELLE, T. T.

APRIL 25, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Judgment Against Town. Liability of Town Treasurer.*

Under Gen. Laws, 1909, cap. 46, §§ 12, 13, 14, relative to the satisfaction of a judgment against a town or city, a town or city treasurer is not personally responsible or primarily liable to pay the judgment in the first instance. *Barber* v. *Barber*, 32 R. I. 266, so far as inconsistent with the foregoing but not otherwise, overruled.

(*2*) *Judgment Against Town. Liability of Town Treasurer.*

While a town is required to be sued by an action against the town treasurer in his official capacity, such suit is in substance and legal effect a suit against the town and the judgment is as much a judgment against the town as if it

were required that the suit be brought against the town in its corporate capacity and name.

(3) *Judgment Against Town Treasurer. Executions.*

A judgment against a town treasurer cannot be collected by execution as there is no requirement or provision of law for the issue or service or return of execution in such a case.

(4) *Judgment Against Town Treasurer. Mandamus.*

Mandamus is the only proceeding by which a judgment against a town treasurer may be enforced either against the town treasurer or against the town. The writ of mandamus in such case is in the nature of the statutory writ of execution and is legally equivalent thereto.

(5) *Judgment Against Town Treasurer. Successor in Office.*

After a suit against a town treasurer in his capacity as such has proceeded to judgment, it is not necessary to summon in his successor in office within one year in order to keep the judgment alive in case the town treasurer against whom the judgment was rendered ceases to hold office and a successor is elected and qualified before the judgment is paid, but a judgment against a town treasurer is equally binding against his successor in office by reason of his representative capacity in succession to the town treasurer against whom the judgment was rendered and in privity with him, and mandamus properly lies against him to compel action to provide for payment of the judgment.

(6) *Mandamus. Judgment Against Town Treasurer.*

While mandamus properly lies against a town treasurer to enforce settlement of a judgment either by the town treasurer or the town, the fact that the town treasurer has not sufficient funds in his hands to satisfy and pay the judgment affects the nature of the relief which should be asked and granted and such being shown to be the fact the relief sought should be action by the town treasurer under Gen. Laws, 1909, cap. 46, § 13, so that a tax should be levied.

MANDAMUS. Heard on appeal from Superior Court and petitioners granted relief on amendment of petition prior to entry of order.

PARKHURST, C. J. These are three several petitions for mandamus to compel the respondent town treasurer to pay certain judgments held by petitioners, and are in all respects identical except as to the names of the petitioners and the amount of their respective claims. The prayers of the petitions were granted in the Superior Court in the county of Kent, orders being entered therein on the twelfth day of September, 1918, that writs of mandamus issue commanding

the respondent to pay the judgments; and appeals therefrom to this court were taken by the respondent.

The facts appearing on record, by admission of the parties are substantially as follows: The petitioners, on the 30th day of October, 1912, obtained judgments of the Superior Court in the county of Kent against John E. Cole, then Town Treasurer of the town of West Greenwich; Florence L. Richmond for the sum of $545.37 debt and costs of suit taxed at $9.25; Phœbe L. Richmond for the sum of $605.11 debt and costs of suit taxed at $9.25; and Rutherford B. H. Richmond for the sum of $1,090.68 debt and costs of suit taxed at $9.25. John E. Cole, Town Treasurer as aforesaid, never paid or satisfied said judgments, or either of them, or any part thereof, during his continuance in office, although demand was made upon him at different times by the attorney of said judgment creditors.

On the third day of November, 1914, said John E. Cole ceased to be town treasurer of said town and was succeeded in that office by Samuel Kettelle, the respondent in these cases, who was duly elected town treasurer of said town of West Greenwich on the date last aforesaid and soon thereafter duly qualified as such town treasurer. Said Samuel Kettelle as such town treasurer has never paid said judgments, or either of them, or any part thereof, although repeated demands have been made upon him by the petitioners through their attorney.

The petitions for mandamus in these cases were all filed in the office of the clerk of said Superior Court in Kent County on October 22, 1917, and citations to the respondent were ordered to be issued on the same day by the justice then holding the session of said court. Said citations were made returnable October 31, 1917, were duly served and returned to said court.

On November 8, 1917, counsel for respondent filed a demurrer and answer in each case as follows:

Respondents' Demurrer.

And now comes the respondent, Samuel Kettelle, as Town Treasurer and demurs to the petitioner's said petition, and for causes of demurrer states:—

1. It does not appear in and by said petition that the petitioner has ever taken out execution upon said judgment.

2. Or that said petitioner has ever caused an execution, based upon said judgment, to be served upon the said John E. Cole as Town Treasurer or upon the present Town Treasurer, this respondent.

3. It does not appear in and by said petition that the petitioner has kept said judgment alive by summoning in this respondent as successor to the said John E. Cole as Town Treasurer.

4. It does not appear in and by said petition that this respondent has ever been made a party of record in the cause in which said judgment was rendered.

Wherefore the respondent prays judgment and that the petition may be dismissed.

Answer of the Respondent.

And now comes the respondent, Samuel Kettelle, as Town Treasurer of the Town of West Greenwich, not waiving his foregoing demurrer but insisting thereupon, in the event of said demurrer being overruled makes answer to said petition as follows:

FIRST. He is wholly unable to pay said judgment for the reason that he has no funds in his hands as Town Treasurer with which to make such payment.

SECOND. Said judgment has lapsed and become unenforceable against the Town of West Greenwich or against the Town Treasurer thereof because the petitioner has failed to summon in this respondent as successor to the said John E. Cole, as party defendant to said judgment.

All of which matters and things this respondent is ready to aver, maintain and prove as this Honorable Court may

direct, and prays to be hence dismissed with reasonable cost and charges.

On December 19, 1917, counsel for petitioners filed a motion and demurrer in each case, as follows:

Petitioner's Motion.

And now comes the petitioner in the above entitled case and moves that the demurrer of the respondent be overruled and dismissed, for that:

1. There is no provision known to the law for issuing an execution against a town or municipal corporation in this State.

2. There is no provision in law for issuing an execution against a town treasurer in this State. The statute provides the mode of paying judgments against town treasurers and that mode is exclusive of other methods.

3. The provisions of the statute in relation to summoning in the successor of a town treasurer who has ceased to hold the office, applies only to pending suits and not to cases which have been prosecuted to judgment.

4. Samuel Kettelle as the successor of the said John E. Cole is in privity with said Cole, and is legally bound to pay the judgment obtained by the petitioner against said Cole as town treasurer. A judgment against a town treasurer is virtually a judgment against the town, and binds his successors in said office until paid.

Petitioner's Demurrer.

And as to the answer of said respondent by him above pleaded, the said petitioner comes and demurs thereto and for causes of demurrer, says:

1. That in case said respondent has no funds in his hands as town treasurer with which to pay and satisfy said judgment, the statute provides a speedy method by which he can secure adequate funds for the payment of the same.

2. There is no provision of law which requires a judgment creditor of a town in this State to summon into court a

successor of the town treasurer against whom the judgment was rendered, in order to keep said judgment alive. Each and every town treasurer when elected and qualified takes the office with all the liabilities with which it is burdened.

It is admitted by agreement on file that the statements in the respective pleadings are true so far as they purport to be statements of fact; one of these facts to which attention is particularly called is the statement in the answer of the respondent Kettelle "that he has no funds in his hands as Town Treasurer with which to make such payment" (*i. e.*, payment of these judgments). It also appears that said Kettelle was duly elected and qualified as Town Treasurer of West Greenwich in November, 1914, as successor to John E. Cole, and remained such Town Treasurer at the time of filing these petitions and continuously thereafter to the entry of the judgments (Sept. 12, 1918) and thereafter, pending these appeals in this court, at the time of hearing on March 10, 1919.

Before taking up in detail certain particular questions argued by counsel in the case at bar, it will be useful to take a glance at the early Colonial and State Laws bearing upon suits to recover moneys due from towns. The earliest act which we have found appears in a compilation or digest of "Laws and Acts of Her Majesties Colony of Rhode Island," &c. (1636 to 1705) printed by Sidney S. Rider and Burnett Rider in 1896; in this volume there appears on page 50 of the reproduced manuscript laws, and on page (26) of the printed portion, the following act, viz.: "The Town Treasurer to be arrested for any Debt due from the Town.

It is Further Enacted & Ordered y^{t} it Shall be Lawfull for any Plaintiff Against any town in this Colony in any Actionable Case to Arrest y^{e} Town treasurer who being Arrested Shall Consult wth y^{e} Town's or Town Coun^{ll} whether to Compound or Stand out y^{e} Suit & he Shall demand of y^{e} town a rate to repay his Charges & disbursements & if he can not attain a Rate he Shall by vertue of

this ord^{er} have pow^{er} to Arrest to y^{e} Gener^{ll} Court of Tryalls any of the Obstructers of s^{d} Rate whom he Please."

This act appears to have been passed at Portsmouth session of August, 1659; see 1 R. I. Col. Rec., p. 419, p. 424.

It appears, however, that the above quoted act did not remain long in force, for we find that at a session of the General Assembly held in Newport, October 31, 1677, a much more comprehensive act relating to recovery of debts due from towns was passed, which seems to have superseded the act above quoted (which act we do not find reprinted in any of the subsequent compilations or digests). The act of 1677 is as follows, viz.: "An Act to Enable private Persons to Recover their Debts due from any Town by Action, against the Town Treasurer.

"Be it Enacted by the General Assembly, and by the Authority of the same, That all Persons whatsoever, That shall have any Money due to him or them, from any Town in this Colony, for any matter, cause or thing whatsoever, shall take the following Method for the obtaining of the same, (to wit) such person or persons. shall Present to the Town Meeting, a particular Account, of such Debt or Money due, and how Contracted; which being done in Case Just, and due satisfaction is not made him or them by the Town Treasurer of such Town, within one Months time after such account be given in as aforesaid, that then it shall be Lawful for such person or persons, to Commence his or their Action against such Town Treasurer, for the recovery of the same, and upon Judgment Obtained for such Debt or Money due, in Case the Town Treasurer shall not have sufficient of the Towns Money in his hands, to satisfy and pay the Judgment Obtained against him, and the charges expended in defending such Suit; That then upon Application made by such Town Treasurer, to any one Assistant, Justice of the Peace or Warden of such Town, such Assistant, Justice or Warden, shall grant forth a Warrant, to the Town Sergeant of such Town, Requiring him to Warn the Inhabitants of such Town, to hold a Town Meeting, at such time and place

as shall be Appointed, for the speedy ordering and making a Rate, to be Collected for the Reimbursement of such Town Treasurer; And in Case such Town upon due Warning given them, shall not take due, speedy, and effectual care to Reimburse, Pay, or Satisfy such Town Treasurer such Moneys, Costs and Charges by him Expended or Recovered against him; That then upon Information or Complaint thereof by him made, to the next General Assembly of this Colony, such order shall be given therein, for the said Treasurers Reimbursement, with allowance for all incident costs, charges and trouble occasioned thereby; and such Town shall be Fined, at the Discretion of the said General Assembly." See Pub. Laws of R. I. 1719 (Riders' Reprint 1895) p. 29.

This act, in substance, with certain unimportant verbal changes, appears in various compilations and digests printed since 1677 (Pub. Laws, R. I. 1730, p. 24); 1744, p. 16; 1767, p. 262), and has been in substance reënacted, with certain changes not affecting the purpose and scope of the act, in all subsequent revisions of our laws. There also appears in a volume of laws entitled "Rhode Island Acts and Resolves—February, 1783 to October, 1785," the following resolution, which appears to have been adopted at Newport, June, 1783, p. 34, viz.: "It is Voted and Resolved, That on all Judgments which may hereafter be obtained against any Town-Treasurer in this State, on any Notes or other Securities given by him in his said Capacity, Execution shall issue against the Town-Treasurer for the Time being."

This resolution does not reappear in the first revision and digest of the laws of this State which was adopted in 1798, next hereinafter referred to, and is taken to be included within the repealing clause.

After the Declaration of Independence and the adoption of the Constitution of the United States with several amendments thereto, the Colony of Rhode Island and Providence Plantations, having become the State of Rhode Island and

Providence Plantations, the General Assembly at its January Session, 1798, enacted and established a Digest of Laws since known as the Public Laws of Rhode Island of 1798. In the first act printed in this digest, the General Assembly provided for the adoption, printing and promulgation of the laws, and in Section 4, page 77, provided "that the acts and laws contained in the said digest" . . . "shall, and hereby are declared to be, the public statute laws of this State, and that all other public statute laws, heretofore made and published, which are not contained in the said digest, shall be and hereby are declared to be repealed," with the usual saving clause as to accrued or vested rights, pending suits, criminal process, etc.

In this Digest of 1798 (p. 330), the law hereinabove quoted as enacted in 1677, entitled "An Act to Enable private Persons to recover their Debts due from any Town by Action, against the Town Treasurer," was substantially reënacted and appears as Section 12 of a chapter entitled "An Act declaring Towns to be Bodies corporate, establishing Town-Councils, regulating Town-Meetings, and prescribing the Manner of recovering Debts due from Towns."

"Sec. 12. *And be it further enacted*, That all persons who shall have any money due to him or them from any town in this State, or any demand against such town, for any matter, cause or thing whatever, shall take the following method to obtain the same, to wit: Such person or persons shall present to the freemen of said town, when legally assembled in town-meeting, a particular account of his or their debt or demand, and how contracted; which being done, in case just and due satisfaction is not made him or them, by the Town-Treasurer of such town, within one month after the presentment of such debt or demand as aforesaid, that then it shall be lawful for such person or persons to commence his or their action against such Town-Treasurer, for the recovery of the same; and upon judgment obtained for such debt or demand, in case the Town-Treasurer shall not have sufficient of the town's money in his hands to satisfy and

pay the judgment obtained against him, and the charges expended in defending such suit, that then, upon application made by such Town-Treasurer to any Justice of the Peace or Warden of such town, such Justice or Warden shall grant forth a warrant to the Town-Sergeant of such town, requiring him to warn the inhabitants of such town to hold a town-meeting, at such time and place as shall be appointed, for the speedy ordering and making a rate to be collected for the reimbursement of such Town-Treasurer; and in case such town, upon due warning given them, shall not take due and effectual care to reimburse, pay or satisfy such Town-Treasurer such monies, costs and charges, by him expended or recovered against him, that then, upon information or complaint thereof by him made to the next General Assembly to be holden within the State, such order shall be given therein for the said Treasurer's reimbursement, with allowance for all incidental costs, charges and trouble occasioned thereby; and such town shall be fined at the discretion of the General Assembly."

Similar provisions, substantially reënacting the last quoted statute, appear in all subsequent revisions of our laws down to the present time, with certain changes of procedure, as to the presentation of claims or demands to town councils instead of to town meetings (Rev. Stat. 1857, p. 91); and in case the town authorities after judgment against the town treasurer, fail to levy and collect a tax to "reimburse, pay or satisfy the town treasurer, the money, costs and charges by him expended, *or recovered against him*," instead of application for relief to the General Assembly, as provided in all of the acts down to the General Statutes of Rhode Island, 1872, it was then provided that the town treasurer or the creditor might apply for relief to the Supreme Court and the court might order the town assessors to levy a tax to pay the judgment and costs, charges and expenses. (See Gen. Stat. R. I. (1872) Chap. 31, §§ 11, 12, 13, p. 89).

The same law in substance appears in all subsequent revisions, and in Gen. Laws of R. I. (1909), which was in

force when these judgments were obtained, and has ever since remained in force, the law in this regard is as follows: (Gen. Laws, R. I. (1909) Chap. 46, §§ 12, 13, 14.)

"Sec. 12. Every person who shall have any money due him from any town or city, or any claim or demand against any town or city, for any matter, cause or thing whatsoever, shall take the following method to obtain the same, to wit: Such person shall present to the town council of the town, or to the city council of the city, a particular account of his claim, debt, damages or demand, and how incurred or contracted; which being done, in case just and due satisfaction is not made him by the town or city treasurer of such town or city within forty days after the presentment of such claim, debt, damages or demand aforesaid, such person may commence his action against such treasurer for the recovery of the same.

"Sec. 13. On judgment being obtained for such debt, damages or demand, in case said treasurer shall not have sufficient of the money of such town or city in his hands to satisfy and pay the judgment obtained and the charges expended in defending such suit, the said treasurer shall make application to any justice of the peace in such town or city, and thereupon the justice shall grant a warrant to the town sergeant of such town, requiring him to warn the electors of the town to hold a town meeting, at such time and place as shall be appointed, or to the mayor of such city requiring him to call a special meeting of the city council of such city, for the speedy ordering and making a tax, to be collected for the reimbursement of said treasurer.

"Sec. 14. In case said electors, or said city council, as the case may be, upon due warning given them, shall not take due and effectual care to reimburse, pay or satisfy said treasurer the money, costs and charges by him expended, or recovered against him, upon petition, in the nature of a petition in equity, by him or by the person recovering the judgment named in section thirteen of this chapter, made to the superior court at any time thereafter, setting forth the

facts, the court may order the assessors of said town or city to assess upon the ratable property thereof, and the collector to collect, a tax sufficient for the payment of said judgment, with all incidental costs and charges, and the expense of assessing and collecting such tax."

In comparing these several enactments, reënactments and revisions of the law, certain things should be noted; premising that in all of them beginning with 1798, the first section of the act enacts "that the inhabitants of each town within this State are hereby declared to be a body politic and corporate" and may sue and defend actions, etc. (See Pub. Laws, R. I. 1798, p. 326); or as expressed in Gen. Laws, R. I. (1909), p. 217, "Section 1. The inhabitants of every town shall continue to be a body corporate, and may, in their corporate name, sue and be sued, prosecute and defend, in any court and elsewhere."

It should be noted that in all these acts the subject of suit is for "money due" from a *town* or *city*, or for "any claim or demand against any *town* or *city*"; the suitor "*shall* take the following method to obtain the same"; and then follows the procedure of presenting the claim, the time limit after which action may be commenced against the treasurer; and after judgment in favor of the plaintiff, the law plainly implies that the treasurer is to pay the judgment out of town or city money if he has enough, and if not, then his duty is to proceed and procure the levy of a tax to pay it; and if that fail, then he or the creditor may apply to the court for relief. At least since 1798, when the ancient laws (1) above quoted permitting arrest of town treasurers in actions for debts due from towns, (1659) and requiring executions to issue against a town treasurer on judgment on notes or other securities given by him in his said capacity (1783), were repealed, and substantially the present method of procedure was enacted as the exclusive method, we find nothing in the statute which implies that the treasurer is to be held to be personally responsible or primarily liable to pay the judgment in the first instance out of his own

pocket. It is nowhere so stated in express terms. The method laid down "*shall*" be followed; and the only reasonable construction of the act, in view of the previous history of the legislation, is that, although in ancient times by means of arrest and execution, the law may for a few years have intended to hold the town treasurer as a sort of legal hostage for the payment of town debts, even then it was intended that the town should pay them out of its treasury, if there was enough money therein, or should levy a special tax to pay them. The only implication we can indulge, as to the payment of judgments by a town treasurer out of his own money, under the law as it has stood since 1798, is that he *may* pay if he so chooses, as he may find it convenient to do, if the amounts are small, or if for any reason he sees fit to do so; and that then he would be entitled to be reimbursed, as provided, by means of a tax, and would not be deemed to be in the situation a volunteer, who having paid the debt of another without authority or consideration is held to be unable to recover.

In the case of *Barber* v. *Barber*, 32 R. I. 266, this court on page 278, *et seq.*, gave some attention to the matter above referred to and came to the conclusion that the statutes "seem to impose the primary liability to pay the judgment" . . . "upon the town treasurer"; but in the case at bar, after carefully reconsidering the question, we are of the opinion that too much stress was laid upon the words "reimburse" and "reimbursement," and upon the effect of the statute of 1659 allowing arrest of town treasurers; it is to be noted that although the words "reimburse" and "reimbursement" have been used in all the statutes above quoted, for more than two hundred and fifty years, there are also used in the latter part of the act of 1677 the words, "And in Case such Town upon due Warning given them, shall not take due, speedy, and effectual care to Reimburse, Pay, or Satisfy such Town Treasurer such Moneys, Costs and Charges by him Expended or *Recovered against* him"; then upon information, the General Assembly shall give him relief. These latter words taken in con-

nection with the earlier words in the same act, "and upon Judgment Obtained for such Debt or Money due, in Case the Town Treasurer shall not have sufficient of the Towns Money in his hands," which have appeared in substance in all these acts ever since 1677, plainly imply, in our opinion, that it is the duty of the treasurer to pay a judgment out of the money in the treasury, if he have enough, that if he have not enough it is his duty to proceed for the levy of a tax to pay the judgment, &c. as provided; and that there is no implication that at any time or in any event is the treasurer personally liable or *bound*, to pay any such judgment out of his own funds. So far as the judgment in *Barber* v. *Barber*, *supra*, is inconsistent with the foregoing the same is hereby overruled; but we do not intend to impugn that judgment otherwise, as in our opinion it is fully justified by other considerations set forth in the opinion.

It is quite plain from the above consideration, that a town being a body corporate and liable to be sued, in such cases as the case at bar, is required to be sued in a certain
(2) manner for the recovery of "money due," or of "any claim or demand," to wit, by a suit against the town treasurer in his official capacity; that such suit is in substance and legal effect a suit against the town, and that the judgment in such suit is as much a judgment against the town as if it were required that the suit be brought against the town in its corporate capacity and name, with provision for service of the writ upon the treasurer as its chief financial officer and representative, as is so frequently done in the case of other corporations of all kinds, it being obvious in all these cases that the only practicable method of service must be upon a representative. (See *Saunders* v. *Pendleton*, *T. T.*, 19 R. I. 659.)

Having in mind these general considerations, we now proceed to the discussion of the particular questions, substantially raised upon the pleadings and statements of fact in the cases at bar, as follows:

(3) 1. Can a judgment against a town treasurer in this State be collected by execution?

2. Is mandamus the proper proceeding to compel payment of such judgment?

3. After a suit against a town treasurer in his capacity as such has proceeded to judgment, is it necessary to summon in his successor in office within one year, in order to keep the judgment alive, in case the town treasurer against whom the judgment was rendered ceases to hold office and a successor is elected and qualified before the judgment is paid?

4. Is the answer of the respondent that he has no funds in his hands with which to pay and satisfy said judgment any bar to the granting of mandamus against him, when the statute, Section 13, Chapter 46 of the General Laws (1909), provides a method by which he may and shall proceed to raise money to pay said judgment?

Our answer to question 1 is in the negative. There is no provision of our law for the issue or service of execution in cases of this sort. *Barber* v. *Barber*, 32 R. I. 266, 279, *et seq.* See also 2 Black on Judgments (2nd Ed.) § 985 a, *infra.* It may be, as stated in argument by counsel for the respondent, that the issue of such an execution is a common practice, and that such an execution furnishes a convenient method of demand and notice to the treasurer to pay the judgment including costs, as well as a convenient paper to return to court for entry, in case it is paid and satisfaction is indorsed thereon by the plaintiff's attorney, so as to form a sort of official record of payment; but there is no requirement or provision of law for either the issue or service or return of such an execution, since there is no property of the town subject to the lien of such execution, and the treasurer's property is not subject thereto. The fact that execution upon the judgments set forth in these petitions has never been issued is quite immaterial.

(4) Our answer to question 2 is in the affirmative. It is plain from the provision of law above quoted that mandamus is the only proceeding by which such judgment may be en-

forced either against the town treasurer or against the town. If the treasurer has enough of the town's money in his hands to pay the judgment, it is plainly implied that as a matter of course, he shall pay the judgment out of that money, and in that case mandamus is an appropriate remedy to compel such payment by him. If, as in the case at bar, the treasurer has no money of the town in his hands to pay the judgments, then it is equally plain that it is his duty to proceed to procure the levy of a tax to provide for such payment. The writ of mandamus, as thus employed, is in the nature of the statutory writ of execution, and is legally equivalent thereto. The law applicable to both questions 1 and 2 is well stated in 2 Black on Judgments, § 985 a, as follows: "As a general rule, the property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, town halls, etc., or property which has been destined and set apart by statute as a source of permanent revenue for the corporation, cannot be seized or sold on execution against it. Nor can its taxes or public revenues be levied on under an execution in favor of a private creditor. And in several of the states, it is now well settled that the writ of execution cannot be employed at all when the judgment debtor is a municipality. In these circumstances, the legal method of enforcing the payment of a judgment against a municipal corporation is by a writ of mandamus, issuing from a court of competent jurisdiction, and based on proper proceedings, commanding the officers of the corporation to pay the judgment out of public funds in their hands, or to levy and collect taxes sufficient in amount to discharge the obligation. The writ, as thus employed, is in the nature of the statutory writ of execution and is legally equivalent thereto. Accordingly, we find numerous decisions recognizing the power of the courts of a state to issue the writ of mandamus to compel the payment of judgments recovered against the municipal corporations of the State, either in the state's own courts or in the federal Courts sitting within its borders." See also, High on

Ex. Legal Rem. par. 356; 26 Cyc. 307; *Fry* v. *Commissioners. &c.*, 82 N. C. 304, 307; *McLendon* v. *Commissioners*, 71 N. C. 38; *Webb* v. *Beaufort*, 70 N. C. 307; *Anniston* v. *Hurt*, 140 Ala. 394; *White* v. *Decatur*, 119 Ala. 476; *Lyons* v. *Cooledge*, 89 Ill. 529, 535; *County of Cass* v. *Johnston*. 95 U. S. 360, 370; *same* v. *Jordan*, 95 U. S. 373; *U. S.* v. *Keokuk*, 6 Wall. 514, 517; *Weber* v. *Lee County*, 6 Wall. 210, 213; *Labette County Comm'rs* v. *Moulton*, 112 U. S. 217; *Riggs* v. *Johnson County*, 6 Wall. 166, 198.

(5) Our answer to question 3 is in the negative. The respondent in his demurrers and answers to these petitions contends that the judgments rendered against John E. Cole, the former town treasurer, have not been kept alive by summoning this respondent into court as successor of said Cole, that this respondent has never been made a party to the record in the causes in which the judgments were rendered (Dem. 3, 4); and that said judgments have lapsed and become unenforceable against the town of West Greenwich or the respondent town treasurer, because the petitioners have failed to summon in this respondent, as a party defendant to said judgments. (Answer—"Second" par.)

The statute upon which the respondent attempts to base these contentions, being Gen. Laws R. I. 1909, Chap 283, § 13, is as follows: "Sec. 13. No action, suit or proceeding, commenced or pending by or against any officer, receiver, or trustee, in his capacity as such, shall abate in consequence of his death, or of his ceasing to hold his office, place, or trust, within one year thereafter; but at any time within one year thereafter his successor in the office, place, or trust may come in and take upon himself, or he may be summoned in to take upon himself, the prosecution or defence of such action, suit, or proceeding."

This statute has no application to the case at bar. The judgments, although in form, under the statutes, against the town treasurer named in the writs (John E. Cole) then in office, are, as we have above shown, judgments against the town in its corporate capacity; the record of the suits

is complete when judgment is entered and it cannot be said that the *suits* are *pending* simply because the judgments have not been paid. The abatement spoken of in the last quoted statute would have relation to a suit which, being commenced against a town treasurer, who goes out of office, while the suit is still pending and undetermined, has to be carried to judgment against his successor in office; in such case the successor must be summoned in or come in within a year, or the suit will abate. (*Saunders* v. *Pendleton*, 19 R. I. 659; *Tourjee* v. *Matteson*, 34 R. I. 270; *Whitford* v. *Palmer*, 38 R. I. 53.)

We find no cases cited by either party which in any way support the respondent's contentions in this regard, and we know of none in this State or elsewhere. We do find on the petitioners' brief certain cases which seem to us plainly to be hostile to the respondent's contentions.

We find numerous cases where it has been held that judgments against town officers, involving the rights, duties and obligations of towns, are binding upon their successors in office. A most notable case of this character is that of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 388; in this case the bank was exempt by charter from certain taxes imposed by law upon other corporations; during a long period of years the taxing officers of the city of New Orleans and of the State of Louisiana saw fit, from time to time, but not continuously year by year, to attempt to impose upon this bank taxes from which it was exempt by law, and the bank brought various suits, for injunction against the collection of some taxes, and defended certain suits for the collection of other taxes; in all these cases final judgments were entered in favor of the bank in the state courts. It appeared as a matter of course, in considering all these proceedings in the state courts, extending from 1878 to 1892 wherein the state and city taxing officers were parties, that there were numerous changes in the personnel, and the point was urged that the judgments against prior holders of office were not to be taken as *res adjudicata* against the

successors in office of the prior defendants. On this point the U. S. Supreme Court (167 U. S. p. 388) said: "The first contention based upon the mere change in the person holding the particular office is without merit. It is not denied that the tax collectors and board of assessors who stood in judgment in the suit when the decisions were rendered were duly qualified and empowered to that end. And it is also not gainsaid that the successors in office of those officers who are defendants here are also duly empowered. The mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged." (Citing cases.) See also *Harshman* v. *Knox County*, 122 U. S. 306. This case was for a mandamus to compel the justices of the County Court of Knox County to levy a tax to pay a judgment against the county. The point was raised by counsel (p. 313) that the defendants, justices of the county court, were neither parties nor privies to the judgment, but the court said (pp. 319–320): "In such cases, the law which authorizes the issue of the bonds gives also the means of payment by taxation. The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity, as well as the county itself, because, as was said in *Labette County Commissioners* v. *Moulton*, 112 U. S. 217, they are 'the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction. They are not strangers to it as being new parties on whom an original obligation is sought to be charged, but are bound by it as it stands without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment.'" See also *Labette County Commissioners* v. *Moulton*, 112 U. S. 217, 221.

As to judgment against town officers in their official capacities being binding upon the town, and upon successors in the same office, see 23 Cyc. 1270 u. v.; *Town of Fulton* v. *Pomroy*, 111 Wis. 663 (highway); *Holsworth* v.

O'Chander, 49 Neb. 42 (overseer of highways in privity with predecessor in office); *State* v. *Kennedy*, 60 Neb. 300, 308 (police and fire commissioners); 1 Freeman on Judgments, Sec. 170, Sec. 178.

We are clearly of the opinion both upon reason and upon authority that the judgments set forth in the petitions in the case at bar are valid, binding and subsisting judgments in fact and in law against the town of West Greenwich which are enforceable at any time within twenty years next after the cause of actions accrued (*i. e.*, within twenty years after the judgments were entered, October 30, 1912, even if these proceedings by way of mandamus could be said to be within the Statute of Limitations, Gen. Laws R. I. (1909) Chap. 284, § 4, p. 1002, relating to actions of debt on judgments, which we do not decide).

We are further of opinion that said judgments, being valid, binding and subsisting judgments against the town of West Greenwich and against its former treasurer, John E. Cole, are equally valid and binding as against the respondent, Kettelle, Town Treasurer, by reason of his representative capacity as the town treasurer of said town in succession to said John E. Cole and in privity with him, and that the respondent, being the person "on whom the law has cast the duty of providing for its satisfaction" . . . "and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment," (*Harshman* v. *Knox County*, 122 U. S. 319, 320) is the very person against whom these proceedings should have been and were rightly taken; and that there is no authority for the respondent's position that anything should have been done by the petitioners, other than by making demand on him for payment, as they did, which was requisite as a condition precedent to the commencement of these proceedings; even without a demand we think the respondent as the financial officer of the town was bound to take notice of these judgments and to proceed to provide for their payment.

(6) As to question 4 our answer, as shown above, is that the respondent was the proper party against whom to proceed; but the fact that he had not "sufficient of the money of such town" . . . "in his hands to satisfy and pay the judgment" etc., has an important bearing upon the nature of the relief which should have been asked and which should be granted. The petitioners prayed that the respondent be commanded *to pay* the judgments, and the court so ordered, apparently ignoring the admitted fact that the treasurer did not have "sufficient of the money of such town" with which to pay. Such being shown to be the fact the petitioners should thereupon have been required to amend their petitions by adding a prayer in the alternative that the treasurer should be commanded to proceed in accordance with the statute in such case provided (Sec. 13 above quoted) to "make application to any justice of the peace of such town" for a "warrant to the town sergeant of such town" etc., so that a tax should be levied. This is the plain intent of the law and it was error on the part of the trial court to proceed as it did and to decree as it did that the treasurer should pay.

Since there is here no dispute as to the facts, it is our opinion that the petitioners should be permitted and required to amend their petitions by adding the prayer above suggested; and thereupon this court will reverse the orders of the lower court in these cases, and will enter such orders as shall be proper commanding the respondent as town treasurer to proceed in accordance with the statute for the levy of a tax wherewith to pay these judgments, etc.

The petitioners have leave to present for the consideration of this court such orders for the amendments to the prayers of their petitions, and such orders for the writs of mandamus as shall be in accordance with this opinion on or before the twelfth day of May, 1919.

Nathan B. Lewis, for petitioner.

Quinn & Kernan, for respondents.

STATE *vs.* ALBERT O. ROBBINS.

APRIL 25, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Rathbun, JJ.

(1) *Criminal Law. Grand Jury. Indictments.*

The pending of a criminal complaint against a respondent in a district court under which he is held to bail, is not a bar to an indictment by a grand jury for the same offence, but the grand jury may exercise its powers under Gen. Laws, 1909, cap. 273, § 15, independently and without giving consideration to any proceeding which may have been instituted or may be pending in a district court.

INDICTMENT. Heard on motion to quash and denied.

VINCENT, J. On November 25, 1916, the defendant was arrested upon a complaint and warrant issued out of the District Court of the Eighth Judicial District charging him with performing a criminal operation upon the body of one Dorothy Vivian Hughes which resulted in her death. On the same day the defendant was arraigned upon said complaint, pleaded not guilty, and furnished bail.

On December 4, 1916, the defendant was indicted by the Grand Jury for the counties of Providence and Bristol for the same offence. Upon this indictment the defendant was arraigned in the Superior Court, December 16, 1916, pleaded not guilty and gave bail, and on December 20, 1916, the complaint pending in the district court was voluntarily discontinued by the prosecution without any hearing or other action thereon. The defendant was tried upon the indictment in February, 1917, and found guilty. Defendant's motion for a new trial was heard and denied by the trial court and the case is now pending in this court upon the defendant's exceptions upon which there has been no hearing.

The defendant has now filed in this court his motion asking (1) that the indictment be dismissed or quashed; (2) that the defendant be released and discharged from

arrest; and (3) that the bail and sureties of the defendant be released and discharged from further liability.

(1) The defendant bases his motion on the want of jurisdiction in the Superior Court, the Grand Jury having no jurisdiction to indict the defendant while preliminary proceedings were pending against him for the same offence in the district court.

The defendant does not claim that it would be illegal for the Grand Jury to find an original indictment without any preliminary proceeding or examination in the lower court, but he does claim that the actual pendency of the preliminary proceeding suspends the jurisdiction of the Grand Jury to act, and that to hold the defendant to bail in two different proceedings at the same time and for the same offence would be illegal.

As we have no statute in this state requiring a preliminary examination as a condition precedent to the finding of an indictment by the Grand Jury, and as the defendant admits that the Grand Jury may properly find an indictment in the absence of any previous examination in the district court, our investigation necessarily becomes limited to the single question as to whether the pendency of preliminary proceedings interrupts or neutralizes, at least for the time being, any action by the Grand Jury.

It is undisputed that for a long time it has been the practice in this State for Grand Juries to take up cases pending in the district courts and bring indictments and that Grand Juries have found indictments in some cases where the district court has discharged the defendant and in other cases has refused to find indictments against defendants who have been bound over. While such existing practice may not be decisive of the question before us it may be taken into account in its consideration.

By Section 15 of Chapter 273, General Laws of Rhode Island, it is provided that: "All grand juries shall be impaneled by the superior court. They shall be empowered, required, and charged to diligently inquire and true pre-

sentment make of all crimes and offences done or committed within their jurisdiction, and shall, in so far as may be deemed necessary, be instructed by the court in the law relative thereto."

In *State* v. *Snell*, 21 R. I. 232 at page 234, the court said: "The grand jury under its common law powers, and also under the provisions of Gen. Laws, R. I. cap. 223, § 6, has full power to find an indictment regardless of the source of the complaint. Its powers, generally speaking, are co-extensive with the original criminal jurisdiction of the court of which it is a constituent part. *United States* v. *Hill*, 1 Brock. C. C. 156; 9 *Am. & Eng. Ency. L.* 13; *State v. Barnes*, 5 Lea 398."

We do not need to pursue the discussion further. We think that the action of the Grand Jury, in the case at bar, was in accordance with our statute and the decisions of this court and that a Grand Jury may exercise the powers, which the statute confers, independently and without giving consideration to any proceedings which may have been instituted, or may be pending, in the district court.

The defendant's motion is denied.

Herbert A. Rice, Attorney General. Abbott Phillips, of counsel, for State.

Cushing, Carroll & McCartin, for defendant.

JOSEPH DEMARA *vs.* RHODE ISLAND COMPANY.

JUNE 12, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Compromise. Evidence. New Trial.*

Where evidence as to the liability of a defendant was conflicting, it cannot be said that the prejudice arising from placing before the jury evidence as to an attempted settlement by defendant, might not have been the determining factor by which a verdict was found for the plaintiff, in spite of the charge of the trial court to disregard it, and under such circumstances a new trial will be granted.

(2) *Objectionable Evidence. Motion to Pass Case. Exceptions.*

The benefit of exception to objectionable evidence is not lost because counsel did not object upon the instant and move that the case be passed; where the witness closed his evidence very shortly thereafter, and counsel immediately made his motion in the absence of the jury.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained.

PARKHURST, C. J. This is an action of trespass on the case for negligence to recover for personal injuries alleged to have been sustained by the plaintiff by reason of a collision on November 4, 1915, between an auto-truck, on which the plaintiff was riding as a passenger, and a car of the defendant company.

The case was tried before a judge of the Superior Court sitting with a jury, November 13–20, 1918, and resulted in a verdict for the plaintiff in the sum of $3,500; thereafter defendant's motion for a new trial was heard and denied, and the defendant has duly prosecuted its bill of exceptions to this court alleging in all eighteen exceptions, of which only three were pressed before this court, the other exceptions being expressly waived.

The exceptions urged in argument are those numbered respectively 6, 16 and 17, the two latter exceptions being to the denial of defendant's motion for a new trial based upon the grounds that the verdict is contrary to the evidence and the weight thereof, and that the verdict is contrary to the law.

Exception No. 6 is "To a ruling of said justice, at said trial, refusing to grant defendant's motion to take the case from the jury and pass the same, as appears on pages 414 and 415 of said transcript." The testimony, upon which this motion "to take the case from the jury and pass the same" is based, is to be found on pp. 411–412 of the transcript almost at the conclusion of the plaintiff's testimony when he was under examination by his own attorney, and is as follows: "Q. Did anybody representing the railroad company come to see you while you were at home in bed?

A. Yes, sir. Q. Who was it? A. A man named Mr. Mott. Q. Did he tell you what his purpose was? A. Yes, sir. Q. What did he tell you his purpose was? A. He said he was trying to settle it. Q. The business, Claim Agent? A. Claim Agent." The attorney for the defendant did not at the moment object or raise a question as to this testimony, but waited until the plaintiff's direct examination was completed (a few more questions only being asked him, concluding on p. 414); at that point counsel for defendant consulted with the court, the jury was directed to retire, and in the absence of the jury, defendant's counsel made his motion that the case be passed, calling attention to the testimony above quoted, and stating his objection thereto; there was a short colloquy between court and counsel, the court evidently believing from its language to plaintiff's attorney that the evidence was improper and prejudicial; p. 415: "*The Court:* You were getting around to talk about the Claim Agent; you are on dangerous ground. The plaintiff's lawyer ought to be careful." Again the court says: "*The Court:* Well, I will deny the motion, Mr. O'Connell. But your man puts on me the burden of fighting with that jury over that word." (The last sentence addressed to plaintiff's attorney.) After a short recess the jury was brought in and the case proceeded; and nothing was said to the jury at that time about this objectionable testimony, nor were they then and there cautioned and directed to disregard it; the judge spoke about it in his charge; he then told them in substance that such testimony regarding an attempt to settle a case was improper and prejudicial and ought to be strictly excluded, and on pp. 689–690 of the transcript he said as follows: "Now, for those reasons, and perhaps others, talk about compromise or settlement is strictly excluded; and very often it happens that the consequence which follows from an injection of that kind of testimony is simply to take the case away from the jury and stop it right where it is. But this case had run along so long, so many days, and so much time and

trouble and, probably, expense that has been put into it, that I felt I would take a chance and not do that, not stop the case there, and take a chance of your doing your duty in this respect; and that is to give absolutely no effect either one way or the other to that part of Demara's testimony; treat it as though it had never been uttered. That is your duty, and I'll assume that you will do it."

All these words of the court seem to us to show that he fully recognized the prejudicial character of the testimony complained of, and that he was, as he said, taking "a chance" that what he said to the jury might cause them to do their duty; it is quite plain that he felt no assurance that his words would have that effect, but was in serious doubt as to the propriety of his action.

(1) We are of the opinion that the defendant's exception upon this point must be sustained. The principle of law here involved was well stated by DUBOIS, J., in the case of *Salter* v. *The Rhode Island Company*, 27 R. I. 27. "One of the grounds for a new trial relied upon by the defendant is based upon the persistent attempt of the attorney for the plaintiff to bring before the jury offers of settlement, claimed to have been made by officers or agents of the defendant, which the presiding justice had properly excluded as inadmissible.

"That this action upon the part of the plaintiff's counsel was deliberate appears from the fact that the attempt was first made and abandoned during the examination of the plaintiff, and afterwards was brought to a successful conclusion in the examination of the plaintiff's wife, as appears from the following extracts from the record of their testimony." . . .

" '67 Q. You don't know of any settlement that the company has made with you or your husband? A. No, sir, they asked to settle two or three times. 68. Q. Now I will ask you whether before these injuries—' " . . .

(Objections and exceptions.)

"It is well-settled law that offers to compromise or to buy peace or cessation of litigation are favored by the law;

such communications are privileged, are confidential, and if unsuccessful can not be used against the party making them as evidence of an admission of liability. As ignorance of the law excuses no one, all persons, including members of the bar, are presumed to know the law; the counsel should have recognized it, especially after his attention had been directed to it by the court. His concluding remarks, hereinbefore referred to, indicate that he was unwilling that the jury should lose the effect of the objectionable question and answer, even after he had withdrawn them."

"To measure the effect of such misconduct upon the verdict in a case where the evidence for the plaintiff was not conclusive is beyond the power of the court, and although it imposes hardship upon the parties to require a retrial of the cause, it is the only remedy for the correction of such abuses." (Exception sustained and new trial granted.)

The statement above quoted shows a case of aggravated and persistent misconduct on the part of the attorney, far beyond that appearing in the case at bar; but it is to be noted that the new trial is granted, not for the purpose of punishing the attorney, but because of the prejudice which the court believes has been injected into the minds of the jury by such testimony which would naturally be construed by the jury as an admission of liability on the part of the defendant.

It is to be noted also that in the last paragraph of the opinion quoted Mr. Justice DUBOIS uses these words, "in a case *where the evidence for the plaintiff was not conclusive;*" in the case at bar the evidence for the plaintiff was not conclusive; it is strenuously contended by defendant that the evidence on the question of the negligence of the defendant strongly preponderates in its favor; the evidence as to the liability of the defendant was sharply conflicting, and it is impossible for this court to say that the prejudice naturally arising from placing before the jury the evidence as to an attempt to settle the case might not have been the very determining factor of the case in the minds of the jury in

coming to their verdict, in spite of all that was said to them by the judge in his charge.

The plaintiff's attorney in his brief cites certain cases wherein exceptions relating to inadmissible matters brought before the jury, and which they were instructed not to consider, were deemed to have been covered by the instructions of the trial court, and were overruled by this court. In *McHugh* v. *R. I. Co.*, 29 R. I. 206, 208, the exceptions related not to evidence before the jury but to certain statements of counsel in the opening and during the trial; this court found that the statements objected to were promptly and properly treated by the trial court and that there was no reversible error. In *Tillinghast* v. *Sawyer*, 68 Atl. 478, a suit for alienation of plaintiff's husband, it appears that plaintiff, the wife, was allowed over objection "to state some conversation with her husband. This was error, but in view of the weight of evidence proving the desertion, the declarations of the husband could not have had any appreciable influence on the verdict." In *McGinn* v. *Comstock & Son Co. et al.*, Ex. No. 5236, a case of collision between two automobiles, a statement regarding both of the parties being insured, was a part of a statement otherwise admissible as part of the *res gestae*. The court upon objection made to that part of the evidence regarding insurance at once instructed the jury to disregard what was said about insurance, and refused to take the case from the jury; and this court found that there was no reversible error.

We do not find in these cases anything to sustain the plaintiff's contention in the matter of this exception.

(2) The defendant was not in default in taking his exception because he did not upon the instant when this inadmissible testimony was put in, at once object and move that the case be passed; its attorney was probably surprised and was justified in waiting to see whether this answer was followed up by any other such testimony; it was very near the conclusion of the plaintiff's evidence in direct examination which closed in a very few minutes; it was very appropriate that

the motion to pass the case should have been made when it was and in the absence of the jury, when the jury could be excused without stopping the plaintiff's further examination which was unobjectionable.

As to defendant's exceptions 16 and 17, taken to the denial of defendant's motion for a new trial, involving the evidence and the weight thereof and the law of the case, we do not intend to deal with them at this time for the reason that we do not find that the case was properly submitted to the jury in the matter of the evidence above referred to. When it shall appear that the case has been submitted to the jury without prejudicial and reversible error, it may then become our duty to consider exceptions of this character.

Defendant's exception No 6 is sustained; all of defendant's other exceptions are overruled and the case is remitted to the Superior Court sitting in Providence County for a new trial.

Cooney & Cooney, for plaintiff.

Clifford Whipple, Alonzo R. Williams, for defendant.

SERAFINO MONTANARI *vs.* INDUSTRIAL TRUST COMPANY.

JUNE 13, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Contracts. Novation.*

Owing to difficulties about payment resulting in the stopping of work by a sub-contractor the contractor gave to the sub-contractor an order upon the owner of the premises for a sum to be due under the contract between the owner and the contractor.

The sub-contractor secured orders from time to time from the architects on the owner for money due the contractor; which were endorsed over by the contractor to the sub-contractor and paid by the owner. It appeared in the testimony for the sub-contractor in his action against the owner that the latter stated when presented with the order, "Go ahead and finish the work; as long as you have that paper I will pay you."

Held, that from the facts there was no novation, but simply an expression of willingness to accept the order.

ASSUMPSIT. Heard on exception of plaintiff and overruled.

VINCENT, J. This is an action of the case in assumpsit brought by the plaintiff against the defendants, the Industrial Trust Company and Marshall B. Mead, as executors of the will of Philip Case.

In 1915, Thomas Fahey, a contractor, entered into a written contract with Mr. Case concerning the erection, alteration and reparation of a certain building upon premises owned by the latter and situated in the city of Providence at number fifteen Carpenter street.

Fahey let out portions of the job to various sub-contractors and from time to time received money on account which was paid by Mr. Case through the architects, William R. Walker & Son, and from the monies thus received payments were made to the sub-contractors.

In September, 1915, the plaintiff, one of the sub-contractors, not having received his pay for certain work which he had done under his contract with Fahey, stopped work. This naturally led to some negotiations between the plaintiff and Fahey, which resulted in the giving of a note by Fahey to the plaintiff for $750, covering the amount then due to him, which note was subsequently paid, and the making of some provisions for future payments, as the work should progress, which were embodied in the following order and agreement:

"September 24, 1915.

PHILIP CASE, ESQ.,
Providence, R. I.

Please pay to Serafino Montanari the sum of Twenty eight Hundred and Fifty Dollars ($2850.) when same is due me under my contract with you and charge the same to my account.

(Signed) T. J. FAHEY

"In consideration of the above order, it is hereby agreed by and between Thomas J. Fahey and Serafino Montanari

that the balance due Serafino Montanari under his contract with said Fahey for work done and to be done on Philip Case's house, Providence, after the payment of the above order is Seven Hundred and Fifty Dollars ($750.) for which a negotiable promissory note has been signed by Thomas J. Fahey and Thomas J. Fahey, Jr. In case the amount due said Fahey from said Case should be less than $2850. then the said Fahey agrees to reimburse the said Montanari with whatever difference there may be between the $2850. the amount of the above order, and the amount actually received from said Case.

"In consideration of the above order and also the receipt of the above note for $750. as herein set forth, the said Montanari hereby agrees that he will faithfully perform all the work, labor and material according to the contract heretofore entered into between the said Fahey and Montanari for the reparation, construction and erection of the house of Philip Case on Carpenter Street, Providence, R. I.

(Signed) T. J. FAHEY"

The plaintiff advised the architects and also Mr. Case of this arrangement and resumed work under his contract with Fahey. As the work progressed the plaintiff from time to time secured from the architects orders on Mr. Case for money due to Fahey which, in each instance, were endorsed over by Fahey to the plaintiff, paid by Mr. Case and receipted for by the plaintiff.

Upon the completion of the whole work called for by the contract between Fahey and the plaintiff the latter requested the architects to give him an order on Mr. Case for $650. that being the final amount due him from Fahey. The order was refused on the ground that the entire amount of the contract price had already been expended.

The plaintiff then instituted proceedings for the establishment of a lien upon the premises, basing his right thereto on his contract with Fahey, but he was unsuccessful.

The plaintiff now claims that there is no subsisting contract between him and Fahey but that by a novation, which

came into operation prior to the lien proceeding, the parties were changed, that Fahey dropped out and that he became substituted in his place.

The case was tried to a jury in the Superior Court. At the conclusion of the testimony the defendants moved for the direction of a verdict.

It appeared from the evidence that at the time when the plaintiff sought the order for $650. there was due and payable to Fahey upon his contract with Case the sum of $15.30 and for that sum the trial court directed the jury to return a verdict for the plaintiff, ruling that there was no novation.

The case is now before us upon the exception of the plaintiff to the direction of a verdict.

The plaintiff after receiving the order and agreement from Fahey had an interview with Mr. Case at the latter's home. He was accompanied by Antonio Capece, later a witness for the plaintiff at the trial. According to the plaintiff's testimony, Mr. Case read the order and agreement and said, "Well, go ahead and finish. I got to pay somebody. I don't care who I pay. I will pay you when you finish; go ahead and start the work again on Monday, the 27th of September, 1915."

According to the testimony of Capece, Mr. Case said, "Go ahead; I pay you all right. I tell you go ahead and finish the work. I don't care; I got to pay somebody, any way. As long as you have that paper I will pay you." It will be noticed that the statements of these two witnesses as to what Mr. Case said are substantially alike with the exception of the words, "As long as you have that paper I will pay you" added by Capece.

It is upon this language of Mr. Case that the plaintiff founds his claim of a novation and we think that in construing it we must have in mind the surrounding circumstances in connection with which it was uttered. Mr. Case had just read the order of Fahey which was addressed to and requested him to pay to the plaintiff money as it became due under the contract between Fahey and Case and to

charge the same to Fahey's account. The statement made by Case followed his reading of the order. The statement, in terms, shows that Case had the order in mind when he made use of the words, "As long as you have that paper I will pay you."

We see nothing in the language employed by Case, as stated by either witness, beyond an expression of his willingness to accept the order and carry out the conditions which such acceptance imposed. Such appears to have been the construction which the plaintiff originally placed upon it himself when he filed his petition for a mechanic's lien setting forth that Thomas J. Fahey was indebted to him in the sum of $650 for work, labor and materials furnished in connection with the building belonging to Philip Case. In addition to this the plaintiff admitted that he had never sent Mr. Case any bill for the $650, although he had rendered him a bill for $65 for other work, which was promptly paid.

We think that the trial court was correct in ruling that there was no novation. As this disposes of the only question which the plaintiff raises, and is decisive of the case, further discussion is not necessary.

The plaintiff's exception is overruled and the case is remitted to the Superior Court to enter judgment for the plaintiff on the verdict as directed.

Pettine & De Pasquale, for plaintiff.

John Henshaw, Benjamin F. Lindemuth, for defendant.

H. A. GRIMWOOD COMPANY *vs.* FRED W. GREENE.

JUNE 13, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Mechanic's Lien. Personal credit.*

Where a dealer had a running account with a contractor and delivered materials for use by the contractor which were charged on his general account with the knowledge on the part of the dealer that the materials might be used by the contractor on any one of several different jobs, the credit was given solely to the contractor without reference to the use which was to be made of the

materials, and knowledge subsequently acquired by the dealer that some of the materials were used in the construction of the house of the respondent did not entitle him to a lien.

PETITION FOR MECHANIC'S LIEN. Heard on appeal of petitioner and dismissed.

STEARNS, J. This is a petition to establish a mechanic's lien for lumber and other materials, furnished by the petitioner to one John G. Wright and by him used in the construction of a dwelling house for the respondent in the city of Newport.

The petitioner, a corporation which is located in Providence, is a dealer in lumber and building materials; Mr. Wright, who was a contractor engaged in business in Newport, had a running account with the petitioner. This was a general account which contained charges against Wright for sales of materials made prior to the sales in question, which were made in October and November, 1917.

The materials for which the lien is claimed were ordered at different times by Mr. Wright and were delivered by the Grimwood Co. in Providence for transportation to Newport at the dock of the steamboat which runs between Providence and Newport. The title to the materials passed to Wright upon delivery at the dock in Providence. The materials in question were charged as usual to Mr. Wright on his general account. The petitioner knew nothing about the contract between Wright and the respondent, but did know that Wright was engaged on several building jobs in Newport. The agent of the petitioner, who had charge of the credits, orders and deliveries of the company, testified that after the delivery he expected Wright would use the materials whenever he wanted to. As no part of the general account was paid by Wright, the agent of the petitioner then went to Newport and then for the first time learned that Wright was building a house for the respondent and that some of the materials which had been sold to Wright were by him used in the construction of the house. The petition for a lien was

then filed in the Superior Court in accordance with the provisions of Chapter 257, General Laws, 1909.

The trial justice held that the petitioner was not entitled to the lien. The court, on the undisputed testimony in the case, also found specifically that petitioner had no knowledge as to what building or buildings its lumber was bought for until after the lumber had been used and placed in the building.

The case is now before this court on the appeal of the petitioner.

We are of the opinion that in the circumstances the petitioner has no lien on the property of the respondent. In its brief the petitioner says it is a question of fact to be determined by the court whether the petitioner furnished the materials solely and absolutely upon the personal credit of the contractor, if it waived its right of lien or if it retained that right to the end. We think that the petitioner in this case never had a lien. The materials were sold upon the personal credit of the contractor. The petitioner did not even know of the existence of the respondent. The materials were delivered in Providence for use by a building contractor in another part of the State, with the knowledge on the part of petitioner that the materials might be used by the contractor on any one of several different jobs. The credit was given solely to the contractor, without reference to the use which was to be made of the materials. The contractor could sell the materials or use them as he saw fit, without any breach of good faith with the petitioner.

In *Gurney* v. *Walsham*, 16 R. I. 698, this court, speaking through DURFEE, C. J., in regard to the Mechanics' Lien Law, which in the revision of 1909 is now found in Chapter 257, Section 1, said: "The lien given by said cap. 177, § 1, as amended, extends to 'the materials used in the construction, erection, or reparation, . . . which have been furnished by any person,' etc. The language seems to us to be unambiguous except as regards the word 'furnished.' The word is not expressly limited, and may be thought to

cover materials furnished to the contractor on general account, as well as materials furnished to him for use in performing his contract, and so used. We think, however, that the word, taken in connection with its context, must receive the more limited interpretation; that is to say, that, for the lien to attach for the benefit of the material man, the materials must not only have been used in 'the construction, erection, or reparation,' but must also have been furnished by him to be used so. The defendant contends that, to give rise to the lien, they must have been furnished on the credit of the owner of the estate sought to be charged. We see nothing to warrant this view. The requirement in the provision above quoted, that the written notice shall be given to the owner, 'if such owner be *not* the purchaser of the materials,' is inconsistent with it. We are of opinion that the petitioners, so far as their materials were furnished to May to be used in the erection of said house on said lot, and were so used by him, are entitled to lien therefor, if, and in so far as, they have taken the proper steps to secure it."

The above statement, in our opinion, is a correct statement of the law and is supported by the decided weight of authority (for a collection of some of the authorities on this point, see 27 Cyc. p. 48 and foot notes and 18 R. C. L. p. 922, § 52 and foot note).

As the decision of the question in regard to the lien claimed is decisive of the case it is unnecessary to consider other minor questions raised in the appeal.

The appeal of the petitioner is dismissed, the decree of the Superior Court appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings.

Max Levy, for petitioner.

Sheffield & Harvey, for respondent. William P. Sheffield, Jr., of counsel.

FRANCESCO NERI vs. RHODE ISLAND COMPANY.

JUNE 24, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Rathbun, JJ.

(1) *Amended pleadings. Bills of Exceptions.*

Where after demurrer had been sustained to two of three counts of a declaration plaintiff filed an amended declaration on which he went to trial, and a verdict was directed in favor of defendant to which no exception was taken, an exception to the ruling sustaining the demurrer to the original declaration will not be considered, as the original declaration is superseded by the amended declaration.

TRESPASS ON THE CASE for negligence. Heard on motion to dismiss plaintiff's bill of exceptions and granted.

VINCENT, J. This case is now before us upon the motion of the defendant to dismiss the plaintiff's bill of exceptions. The original declaration of the plaintiff was in three counts. To the first and second of these counts the defendant demurred and the demurrer was sustained by the Superior Court. Without proceeding further with his original declaration the plaintiff filed an amended declaration upon which he later went to trial. By direction of the court the jury returned a verdict for the defendant to which the plaintiff took no exception within the statutory period.

The sole exception now before us is to the ruling of the Superior Court in sustaining the demurrer to the first and second counts of the original declaration.

We think that the motion of the defendant to dismiss the plaintiff's bill of exceptions must be granted.

The law covering the question for consideration is well stated in 31 Cyc. 465, as follows: "An amended pleading, filed as a substitute for the original pleading, supersedes it and the original pleading ceases to be part of the record, except for the purpose of deciding when the action was in fact commenced, and whether a new cause of action has been introduced. Therefore, after an amended pleading has been filed the prayer for relief in the original cannot be con-

sidered, and a demurrer to the original pleading does not apply, nor can objection to the action of the court in sustaining or overruling the demurrer be raised on appeal. As long as the amended pleading is recognized by the court, no issue based on the original can be properly submitted to the jury, or considered on appeal."

The plaintiff's bill of exceptions is dismissed and the case is remitted to the Superior Court with direction to enter judgment for the defendant on the verdict as directed.

Pettine & De Pasquale, for plaintiff.

Clifford Whipple, Frederick W. O'Connell, for defendant.

NARCISSE GUILLOT *vs.* EXILIA GUILLOT.

JUNE 13, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Divorce. Res adjudicata. Living Separate and Apart.*

Gen. Laws, 1909, cap. 247, § 3, provides that "whenever in the trial of any petition for divorce from the bond of marriage, it shall be alleged in the petition that the parties have lived separate and apart from each other for the space of at least ten years, the court may in its discretion enter a decree divorcing the parties from the bond of marriage."

Held, that as the court cannot exercise its discretion without first ascertaining that the parties come within the statutory provision, where the evidence fails to establish such fact the court is without jurisdiction to do any thing except dismiss the petition, leaving the petitioner free to file another petition on similar grounds, when the statutory period has expired.

(*2*) *Divorce. Living Separate and Apart. Recrimination.*

The granting of a divorce under Gen. Laws, 1909, cap 247, § 3 (living separate and apart for ten years) does not depend upon the previous conduct of the petitioning party, and while testimony of a recriminating character may be admitted it should not be binding upon or control the action of the court, but may be considered by way of aiding the court in the exercise of its discretion.

DIVORCE. Heard on exceptions of petitioner and sustained.

VINCENT, J. This is a petition for divorce in which the petitioner alleges that he and the respondent have lived

separate and apart for a period of more than ten years and he therefore claims that he is entitled to a decree of divorce under the provisions of Section 3, Chapter 247 of the General Laws of 1909. A hearing was had upon the petition in the Superior Court and the same was denied and dismissed. The case is now before us upon the exceptions of the petitioner: (1) To the ruling of the court permitting counsel for the respondent to cross-examine the complainant on matters involving evidence of incrimination; (2) To the decision of the trial court denying and dismissing said petition for divorce.

In March, 1918, the petitioner filed in the Superior Court his petition praying for a decree divorcing him from the bond of marriage and from the said Exilia Guillot, the respondent. The petition set forth that the respondent had been guilty of extreme cruelty; that she had deserted the petitioner for more than five years; and that the petitioner and respondent had lived separate and apart from each other for the space of ten years last past.

This petition was heard in the Superior Court on July 2 and 3, 1918. The trial court found that the petitioner had failed to prove either extreme cruelty or willful desertion for five years.

As to the allegation of the petition that the parties had lived separate and apart for the space of more than ten years, the trial judge, after expressing himself to the effect that if the parties had lived separate and apart for ten years there would appear to be no reason for keeping them together and to do so would serve no good purpose, there being no prospect of reconciliation under all the circumstances, denied and dismissed the petition on the ground that it did not definitely appear from the evidence that the separation had existed for the full statutory period of ten years.

On July 20, 1918, the petitioner filed in the Superior Court another petition praying for a decree divorcing him from the bond of marriage and from the said Exilia Guillot, the respondent, setting forth the single ground that the petitioner

and respondent have lived separate and apart for the space of more than ten years last past.

By Chapter 1187 of the Public Laws passed May 18, 1893, now Section 3 of Chapter 247 of the General Laws of 1909, it is provided that, "Whenever in the trial of any petition for divorce from the bond of marriage, it shall be alleged in the petition that the parties have lived separate and apart from each other for the space of at least ten years, the court may in its discretion enter a decree divorcing the parties from the bond of marriage, and may make provision for alimony."

To this second petition the respondent entered a plea of *res adjudicata* claiming that the ground now alleged was included in the prior petition which had been heard, denied and dismissed. The second petition came on for hearing before
(1) another justice of the Superior Court. The petitioner claimed that the time which had elapsed between the filing of the two petitions was sufficient to establish, beyond any question, that the separation had continued for the statutory period. There was testimony which would support a finding by the trial court that at the time of the filing of the last petition the parties had not lived together for a period of ten years. The trial judge, however, as appears from his rescript, proceeded upon the assumption that the court, under the former petition, had exercised the discretion conferred upon it by the statute and had dismissed the petition, thus substantially recognizing the plea of the respondent that the question was *res adjudicata*. We think this was error. The court, under the first petition, could not exercise its discretion without first ascertaining that the parties came within the statutory provision, that is, that they had been living separate and apart for ten years. As the court did not and could not so find from the testimony it was powerless and without jurisdiction to do anything further, except to dismiss the petition. The situation here is analogous to that of a petitioner whose petition is dismissed because he has failed to satisfy the court that he has resided within the

state for the full period of two years before preferring his petition. Under such conditions there would be no finding upon the merits of the case and the petitioner would be free to bring another petition based upon the same grounds upon the completion of the required term of residence.

(2) At the hearing the respondent, in the cross-examination of the petitioner as well as by the testimony of other witnesses, sought to bring out the fact that the petitioner had been guilty of one or more of the statutory offenses for which divorces are decreed and thus bar him from obtaining his divorce. This line of examination was objected to and an exception duly taken.

This raises the question as to whether the defense of recrimination is available against a petition based upon Section 3 of Chapter 247 of our statute. The trial court held that such a defense was available and said in its rescript, "A petition for divorce on the ground of ten years living apart is subject to any applicable principle of divorce law. For example, if it were admitted or indisputably proved that the living apart was the result solely of an agreement to live apart, for the purpose of divorce, divorce would have to be denied for collusion. The defense of recrimination lies on this ground as to a petition on any other ground. If in any case it were clear that the petitioner alone caused the ten years living apart, it does not seem to me that the court would have the right to decree divorce."

We think this view of the law is erroneous. While we are not prepared to follow the decisions of the three other states, in which similar statutes are to be found, to the extent of saying that the trial court cannot admit testimony of a recriminating character, we think that such testimony should not be binding upon or control the action of the court but that it might be considered by way of aiding the court in the exercise of the discretion conferred by the statute. In other words the granting of a divorce under this statute does not depend upon the previous conduct of the petitioning party. It is easy to conceive that the trial

court, under the circumstances of some particular case, might find it for the best interests of both parties and of society that a divorce should be decreed irrespective of the earlier behavior of the petitioner.

The first exception of the petitioner, relating to the admission of recriminating testimony, is overruled, his second exception is sustained and the case is remitted to the Superior Court with direction to give the petitioner a new trial.

Wm. H. McSoley, Albert B. West, for petitioner.

Archambault & Archambault, Severin M. Lamarre, for respondent.

J. E. HARLOW *et al. vs.* ELLEN W. DURYEA *et al.*

JUNE 26, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Powers. Wills. Deeds. Contracts.*

The rights of an appointee under the exercise of a power are to be sought in the construction of the instrument creating the power and if such instrument be a deed or contract the exercise of the power and the rights of the appointee depend upon the construction which should be given to such deed or contract.

(2) *Powers. Contracts. Exercise of Power by Residuary Clause. Conflict of Laws.*

Under the terms of a contract between donor and an insurance company an annuity in trust was created, by which an annuity was to be paid to donor for life and after her death to X. for life and after the decease of the survivor of donor and X., then to Y. for life, and upon the decease of the survivor of these three, the principal sum to be paid to the executors or administrators of the survivor, in trust to be disposed of as X. might by will appoint and in default of appointment to the heirs of Z.

At the time of making the contract donor was domiciled in Massachusetts, the contract was made there, the trust fund was located there and was to be administered there by a Massachusetts corporation. The donee of the power was also domiciled in Massachusetts, and died there leaving a will which did not by any specific provision exercise the power but which contained a residuary clause.

Donor established a domicile in Rhode Island and died there leaving a will probated there.

Held, that the parties intended to make a contract governed by the Massachusetts law and that donor intended to create a power of appointment in X. which should be exercised in accordance with the law of that state and

the subsequent change of domicile of donor in no way affected the construction to be given the contract.

Held, further, that under the Massachusetts rule the power was exercised by the residuary clause.

BILL IN EQUITY in form of bill of interpleader. Heard after certification under Gen. Laws, 1909, cap. 289, § 35.

SWEETLAND, J. This is a bill in equity in the form of a bill of interpleader brought by J. Edwards Harlow and William P. Sheffield, the executors of the will of Caroline L. Weld, late of Newport, against Ellen W. Duryea and Mary Weld to determine the title to a certain fund which came into the hands of said executors in accordance with the terms of a so-called annuity in trust.

The case, being ready for hearing for final decree, has been certified to this court for final determination under General Laws, 1909, Chapter 289, Section 35, upon bill, answers and proof.

The evidence is uncontradicted and the material facts may be summarized as follows: On August 31, 1876, Caroline L. Weld, then domiciled in Nahant, Massachusetts, paid $25,000 to the Massachusetts Hospital Life Insurance Company, a corporation located in and incorporated under the laws of Massachusetts; and in consideration of this payment the Massachusetts Hospital Life Insurance Company issued a so-called annuity in trust. By the terms of this annuity in trust the company undertook to invest the sum received and to pay an annuity (1) to Caroline L. Weld during her life; (2) after her death to her son, William F. Weld, during his life, and (3) after the decease of the survivor of herself and William F. Weld to her son Charles G. Weld during his life. Upon the decease of the survivor of these three annuitants the company was to pay over the principal sum, a proper allowance being made for gains and losses, "to the executors or administrators of said survivor, in trust by them to be disposed of as said William may by any last Will & Testament direct or appoint, in default of such direction or appointment them to pay over the same to the heirs of

William G. Weld." William G. Weld was the husband of Caroline L. Weld and the father of William F. Weld and Charles G. Weld. Subsequently to the transaction just referred to and about 1881, Caroline L. Weld and her husband, William G. Weld, acquired a domicile in Newport, Rhode Island, which they maintained during the remainder of their lives. On January 9, 1893, William F. Weld, the donee of the power of appointment just quoted, died domiciled in Brookline, Massachusetts, leaving a will dated December 5, 1892, which was admitted to probate on February 1, 1893, by the Probate Court for the County of Norfolk, Massachusetts. Charles G. Weld, named in said "annuity in trust" died on June 18, 1911. Caroline L. Weld survived both her sons and died on April 14, 1918, domiciled in Newport, Rhode Island, leaving a will which was admitted to probate by the Probate Court of the city of Newport and of which the complainants qualified as executors. In pursuance of the terms of the annuity in trust the Massachusetts Hospital Life Insurance Company has paid the principal sum of $25,000 to the complainants; and they now under the provision already quoted hold it in trust by them to be disposed of as William F. Weld by his will appointed or, in default of such appointment, in trust to pay the same to the heirs of William G. Weld who died in 1896. William F. Weld, the donee of the power of appointment, did not by any specific provision in his will exercise said power. His will however contained the following paragraph.

"Fourth: All the rest and residue of my property, real, personal and mixed, of which I may die seized and possessed or to which I may be entitled at the time of my decease, I give, devise and bequeath to my wife, Ellen Homer Weld of said Brookline, absolutely and in fee."

Ellen Homer Weld the widow of William F. Weld has remarried and is the respondent Ellen W. Duryea. She claims that the said power of appointment was exercised in her favor by William F. Weld in the above quoted residuary clause of his will. The minor respondent, Mary Weld, who

is represented here by guardian *ad litem*, is the daughter of Charles G. Weld and the sole surviving descendant and heir of her grandfather William G. Weld. It is claimed in her behalf that the residuary clause of William F. Weld's will did not operate as an exercise of the power of appointment and that under the provisions of said annuity in trust, effective in default of appointment she is entitled to said fund in the hands of the complainants as the sole heir of said William G. Weld. The position of Mrs. Duryea is based upon her contention that as the donor of the power of appointment at the time of its creation was a resident of Massachusetts, and the instrument creating it was executed in Massachusetts and the situs of the property subject to the power was in that state at the time of the death and the probate of the will of the donee, it is the Massachusetts law which determines whether said donee made a valid exercise of said power. It is the contention of the respondent Mary Weld that as the donor of the power, Caroline L. Weld, at the time of the death and the probate of the will of the donee, was domiciled in Newport, the law of Rhode Island, in force at that time, determines whether said power has been exercised.

At the time of the execution of the instrument upon which was issued the so-called annuity in trust, and at the time of the death and probate of the will of William F. Weld, by a long course of judicial determination it had become the settled law of Massachusetts that, unless a contrary intention appears, a general residuary clause in a will operates as an exercise of a power to dispose of property by will. *Cumston* v. *Bartlett*, 149 Mass. 243; *Stone* v. *Forbes*, 189 Mass. 163; *Thompson* v. *Pew*, 214 Mass. 520. That such was the state of the law of Massachusetts in this regard was recognized by this court in *Cotting* v. *De Sartiges*, 17 R. I. 668.

In Rhode Island at the time of the death and of the probate of the will of William F. Weld it was the established law that unless the power to appoint a disposition of property by will had been exercised by the donee by specific provisions in his will, there had been a default of such power,

and that the intent to exercise such power could not be inferred from the general language of a residuary clause. This remained the law of Rhode Island until the passage of Chapter 203, Section 9, General Laws, 1896, now Chapter 254, Section 9, General Laws, 1909, under which statute it is provided that a general devise or bequest is sufficient to execute a power of appointment.

The question before us is whether the residuary clause of William F. Weld's will operated as an exercise of the power of appointment.

The contention of the respondent Mary Weld is that the donor of the power after its creation changed her domicile from Massachusetts into Rhode Island and "that the law governing the construction of the exercise of the power of appointment of personal property changes with the domicile of the donor." In support of this said respondent calls to our attention the principle of construction that in the case of a power created by the will of the donor and exercised by the will of the donee or appointer, the appointer is merely the instrument by whom the original testator designates the beneficiary, and the appointee takes under the original will and not from the donee of the power. *Cotting* v. *De Sartiges*, 17 R. I. 668. This respondent also cites to us a number of cases involving questions arising with reference to the exercise of a power created by will. These cases rest upon the generally recognized doctrine that a will speaks and takes effect as if executed immediately before the death of the testator, unless a contrary intention appears in the will. Hence whatever may have been the domicile of the testator at the time of the execution of the will, or however many times he may have changed his domicile thereafter, the rights of parties thereunder with reference to personal property is (1) governed by the law of the testator's domicile at the time of his death. The real principle underlying these cases is that the rights of an appointee under the exercise of a power are to be sought in the construction of the instrument which creates the power. If that instrument be a will, as to personalty at least, those rights are governed by the law of the

testator's domicile at the time of his death, for then and there the instrument creating the power became effective. If the instrument creating the power be a deed or a contract, the exercise of the power and the rights of the appointee depend upon the construction which should be given to such deed or contract. *Cotting* v. *De Sartiges*, 17 R. I. 668, *Russell* v. *Joys*, 227 Mass. 263.

At the time of entering into the contract with the Massachusetts Hospital Life Insurance Company the donor was domiciled in Massachusetts, the contract was made there, the trust fund was located in Massachusetts and was to be administered in that state by a Massachusetts corporation. Also perhaps of minor importance in the determination of this question, the donee of the power was domiciled in Massachusetts and the donor must be presumed to have contemplated, at the time of executing the contract, that the power would be exercised, if at all, by the donee through the medium of a will to be probated in Massachusetts. These facts irresistibly lead to the conclusion that the parties thereto intended to make a contract governed by the Massachusetts law and that Mrs. Weld intended to create a power of appointment in her son which should be exercised in accordance with the law of that state. Her subsequent change of domicile in no way affected the construction which should be given to that contract.

We are therefore of the opinion that William F. Weld made a valid exercise of his power of appointment in favor of his wife, and that the complainants should pay to the respondent Ellen W. Duryea said trust fund now in their hands, less any deduction for inheritance taxes or other proper charges that should be made against it.

The parties may present a form of decree in accordance with this opinion on July 7, 1919.

William Paine Sheffield, for complainants.

Walter A. Edwards, *Edwards & Angell*, for Ellen W. Duryea. *Alexander & Green*, of counsel.

William R. Harvey, guardian *ad litem*; for Mary Weld.

William P. Sheffield, Jr., on brief.

JAMES KEATS vs. BOARD OF POLICE COMMISSIONERS OF THE CITY OF PROVIDENCE.

JULY 3, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Police Officers. Charges. Rules of Commissioners. Jurisdiction.*

Where a police officer was suspended pending investigation of charges, the fact that he was acquitted under an indictment for an offence forming the basis of some of the charges, does not prevent the Board of Police Commissioners from proceeding thereafter with the hearing of the charges for violation of rules of the department but it is not only their right but their duty to make the investigation before reinstating the officer, unless they are satisfied he had no criminal intent in his acts.

(2) *Police Officers. Rules of Commissioners. Charges.*

Rule 12 of the Rules and Regulations of the Board of Police Commissioners of the City of Providence authorizing the Board in its discretion to punish police officers by various penalties on conviction by the Board of any legal offence is not in violation of Gen. Laws, 1909, cap. 50, § 30.

(3) *Police Officers. Charges. Rules of Commissioners.*

Rule 2, Section 6 of the Rules and Regulations of the Board of Police Commissioners of the City of Providence, requiring a written complaint to be filed within 24 hours of the suspension of a police officer, does not prevent the amplification later of the original charges properly filed in compliance with the rule, such amplification being in the nature of a bill of particulars based upon additional information.

(4) *Police Officers. Rules of Commissioners. Jurisdiction.*

Where no rule of the Board of Police Commissioners of the City of Providence or any statute of the State requires the Board to act upon charges against a police officer while he was not seeking a hearing, it was proper for the Board to continue the hearing while the officer was awaiting trial on a criminal charge, and the jurisdiction of the Board over the charges is not lost for want of prosecution.

PROHIBITION. Petition denied and dismissed.

RATHBUN, J. Heard on petition for writ of prohibition to enjoin respondent from hearing charges preferred against petitioner in his capacity as a police officer.

Upon the 8th day of March, 1918, and for a long time prior thereto the petitioner was a member of the police force of the city of Providence. On said 8th day of March he was "suspended from duty pending investigation" by the super-

intendent of police and was served with the following charges:

"OFFICER JAMES KEATS,
PRECINCT ONE.

DEAR SIR:—In consequence of a report received at this office charges have been preferred against you for violation of Rule No. 12, Section No. 1, of the Rules and Regulations of the Board of Police Commissioners; to wit, conduct unbecoming an officer. The specific charge being that on the night of March 5, 1918, at 12:30 A. M., you were seen to enter the liquor saloon licensed to James Lavell, 24–28 Fountain St., and to remain there for about ten minutes, also on the night of March 7, 1918, at 12:35 A. M., you entered the same premises. During the night of March 5th Mr. Lavell reports five dollars was stolen from the money drawer and also that the place has been entered on different occasions for the past several weeks and money and liquor stolen.

As you have already been suspended from duty pending investigation of the above charge, you will await further orders from this office.

PETER F. GILMARTIN,
Superintendent of Police.

On said 8th day of March the petitioner was arrested on a warrant and complaint charging that the petitioner did break and enter in the night time the store of James Lavell with intent to commit larceny therein. On this complaint the petitioner was adjudged probably guilty by the Sixth District Court and bound over to await the action of the grand jury. An indictment was returned charging petitioner with the offense set forth in the complaint. The petitioner was tried on this indictment and on May 1, 1919, the jury returned a verdict of not guilty. On the 8th day of May, 1919, the following notice was served on the petitioner:

"OFFICER JAMES KEATS,
PRECINCT ONE.

DEAR SIR:—In addition to complaint against you when you were suspended from police duty March 8, 1918, the following amplification has been made of the charges preferred against you at that time for violation of Rule No. 12, Section No. 1, of the Rules and Regulations of the Board of Police Commissioners; to wit, conduct unbecoming an officer, and further added thereto, neglect of duty.

The specific charge being that on the night of March 5, 1918, at 12:30 A. M., you were seen to enter the liquor saloon licensed to James Lavell, 24–28 Fountain St., and remain for about ten minutes, during which time Mr. Lavel reports that five dollars was stolen from the money drawer, also on the night of March 7, 1918, at 12:35 A. M., you entered the same premises with a key and were apprehended by Inspector Franklin and Sergeant McShane, who were waiting in said saloon, detailed there as a result of the complaint from Mr. Lavell that the said premises had been entered on different occasions and money and liquor stolen. Further, while waiting for Sergeant McShane to secure the saloon, you endeavored to get Inspector Franklin to help you square yourself or at least to take the key to the saloon so that it would not be found in your possession. Further, when near the Church House on the way to the station, you threw away the key and attempted to escape until halted by shots from Sergeant McShane's revolver. Further, when questioned by me in my office, you said that when you tried the door to the above saloon you found the key in the door and that you put it in your pocket, tried the other doors on your post and then returned to the saloon, admitted that you later threw the key away saying that you did not want it found in your possession, that you made no attempt to ascertain if anybody had entered the saloon at the time you claimed you found the key, and that you had not reported the matter to your superior officer nor had you intended to do so

knowing full well that such neglect of duty was a direct violation of the police rules.

The Board of Police Commissioners will give you a hearing on the above charge on Monday, May 12, 1919, at 10:30 A. M., at which time you will be present with any witnesses you may have.

Respectfully yours,

PETER F. GILMARTIN,

Superintendent of Police."

(1) The petitioner contends (1) that after the verdict of not guilty all issues involved in that trial are *res adjudicata* and that the respondent is thereby barred from considering the charges in so far as they raise questions which were issues in the trial on the indictment; (2) that rule 12 of the Board of Police Commissioners is in violation of Gen. Laws, Chap. 50, § 30, in so far as said rule authorizes the Board of Police Commissioners in its discretion to punish "either by reprimand, forfeiture of pay for not exceeding thirty days for any one offence, by being reduced in rank, or by dismissal from the force, on conviction" by said Board of any legal offence; (3) that the charges on May 8, 1919, in so far as they are additional to the charges of March 8, 1918, are void because not filed within the time limit prescribed by the rules and regulations of said Board; and (4) that the charges of March 8, 1918, are void for want of prosecution.

The petitioner's first contention is unsound. Of course he cannot be again placed on trial for the same offence in a criminal court. So far as the criminal laws of the state are concerned, he is not guilty of the offence charged in the indictment. But the verdict of not guilty is simply a bar to further criminal prosecution for the same offense. Had he in the indictment been charged with larceny from Mr. Lavell and on trial found not guilty the judgment of not guilty would not have precluded Mr. Lavell from proceeding against the petitioner in a civil action and recovering the value of the goods carried away. Mr. Lavell would be per-

mitted in spite of the verdict of not guilty to prove that the petitioner was, as a matter of fact, guilty.

23 Cyc. p. 1349 lays down the rule as follows: "Where the same acts or transactions constitute a crime and also give to a private individual a right of action for damages or for a penalty, the acquittal of the defendant, when tried for the criminal offence, is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action."

Mr. Lavell would not be barred by the verdict for the reason, first, that he was not a party to the criminal action, and second, because the rule as to the burden of proof is different in a civil case. To secure a conviction in a criminal case the state must prove the defendant guilty beyond a reasonable doubt. In a civil action the plaintiff is entitled to a verdict if he can prove his case by a fair preponderance of the evidence.

For the reasons stated it is clear that the Board of Police Commissioners has jurisdiction. It is not only the right but the duty of the Board of Police Commissioners, before reinstating the petitioner to investigate this phase of the charge unless they are satisfied that the petitioner had no criminal intent.

(2) No part of rule 12 of said Board is in violation of Gen. Laws, Chap. 50, § 30, which reads as follows: "No ordinance or regulation whatsoever, made by a town council, shall impose or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor or offence, by the statute law of the state."

It is sufficient to say that the rule of the Board of Police Commissioners is not an ordinance or regulation made by a town council or by the ordinance making power for the city of Providence. The Board of Police Commissioners has no authority and does not assume to legislate. But it may make rules for the efficient management and direction of the police department.

Sections 3 and 7 of Chapter 930 of the Public Laws, passed November 22, 1901, read as follows: "Sec. 3. Said board shall have authority to appoint, remove, organize, and control the chief of police and the police and the police matrons and all other attaches of the police department of said city as said city is now or hereafter may be constituted, and shall have authority to make all needful rules and regulations for their efficiency, management, and direction not inconsistent with the laws of the state."

"Sec. 7. Said board may remove from office at any time any officer appointed by it or placed under its control by law."

The petitioner was suspended March 8, 1918. On the same day charges in writing were preferred against him. Since that date the petitioner has been continuously and
(3) still is suspended from duty. The communication from the Board to the petitioner under date of May 9, 1919, only purports to be an amplification of the charges preferred March 8, 1918. It is in the nature of a bill of particulars, based upon additional information. Rule 2, Section 6 imposes on the superintendent of police the duty of making a written complaint to be filed within twenty-four hours of suspension. The rule was complied with in this case. The Board is not a court of law. Therefore the strict rules of pleading and practice applicable to courts of law do not apply. There is no rule of the Board which prevents the filing of further written complaints at any time. The only requirement as to preferring charges against a member of the police force is that the charges must be in writing.

(4) It does not appear that the petitioner demanded a hearing before or during the time he was awaiting trial on the criminal charge. If the petitioner did not ask for a hearing it was proper for the Board of Police Commissioners to continue the hearing on the charges in order that his cause before the criminal court might not be prejudiced. No rule of the Board of Police Commissioners or law of the state required the Board to act while the petitioner was not seeking a

hearing. The Board of Police Commissioners has jurisdiction to hear the charges preferred against the petitioner unless its procedure fails to comply with its own rules or violates a law of the state.

The Board is charged with that important duty of enforcing the laws of the state and the ordinances of the city of Providence and protecting the lives and the property of the citizens of the community. In order to obtain the best results, it is necessary that the police department should be maintained at the highest standard of efficiency and discipline, and, in order to accomplish the purpose for which the Board of Police Commissioners was established, broad powers are specifically conferred on this Board by Chapter 930 of the Public Laws of 1901.

It is evident from the facts as set out in the petition that the Board of Police Commissioners has acted in accordance with the laws of the state and that it has complied with its own rules.

The petition is denied and dismissed and the restraining order heretofore entered by this court is dissolved.

John J. Fitzgerald, Joseph C. Cawley, for petitioner.

Elmer S. Chace, Henry C. Cram, Ellis L. Yatman, for respondent.

ELISE P. SMITH *vs.* SUPERIOR COURT.

APRIL 29, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(*1*) *Poor Debtor's Oath. "Debt or Demand."*

A defendant in an action of deceit, who is at liberty upon bail, is not entitled to take the poor debtor's oath under the provisions of Gen. Laws, 1909, cap. 326, after verdict given for the plaintiff but prior to the entry of judgment in said action, for a claim for damages does not become a debt within the meaning of section one of said chapter until the entry of judgment thereon; the words, "debt or demand" in section 12 of said chapter being intended to cover comprehensively only the different actions referred to in section 1.

PETITION for writ of prohibition. Petition granted.

STEARNS, J. This is a petition for a writ of prohibition to restrain the Superior Court from proceeding to act upon the petition of one John G. Platt to take the poor debtor's oath.

John G. Platt is the defendant in an action on the case for deceit wherein the petitioner, Elise P. Smith, is the plaintiff. The action was begun by writ of arrest ; the defendant was arrested, furnished bail and is now at liberty on bail. The action was tried in the Superior Court and resulted in a verdict for the plaintiff. Thereupon the defendant filed a motion for a new trial in the Superior Court, upon which no hearing has yet been had. The defendant also filed in the Superior Court a petition asking that he be allowed to take the poor debtor's oath under the provisions of Chapter 326, General Laws of R. I., 1909.

The question of law thus raised is as follows: Is the defendant in an action of deceit, who is at liberty upon bail, entitled to take the poor debtor's oath after verdict given for the plaintiff but prior to the entry of judgment in said action?

Chapter 326, "Of the Relief of Poor Debtors" provides for the relief of poor debtors in three situations.

1. Where the applicant is imprisoned at the time the petition for relief is filed. (Secs. 1 to 11, inclusive.) The provisions of sections 1 to 11 apply to all cases where the defendant is imprisoned for debt, with certain definite exceptions enumerated in Section 10 of the chapter.

2. Where the applicant is not imprisoned at the time the petition for relief is filed, but if he were then committed to jail would be entitled to take the poor debtor's oath. (Secs. 12 to 16, inclusive.) The application must be made to the court before which the action is pending. Relief in this situation is limited to the period preceding the issuance of execution against the defendant. *Taylor, Symonds & Company* v. *Bliss*, 30 R. I. 453, 456.

3. Where the applicant is not imprisoned at the time the petition for relief is filed, but where execution has been issued against him, or judgment has been rendered against him,

and in either case, the applicant, if committed to jail, would be entitled to take the oath. (Secs. 17 *et seq.*) The application in classes one and three must be made to the justice of a district court in the county in which the defendant is liable to be imprisoned. If the defendant is entitled to relief it must be by virtue of the provisions of Section 12, which section is as follows: "The court before which any action is pending for the recovery of any debt or demand for which the defendant, if committed to jail thereon, would be entitled to be admitted to take the oath aforesaid, may administer the said oath to the defendant as hereinafter provided."

The right of the defendant in this case to relief is the same as if he were imprisoned and not on bail. This brings us to a consideration of Section 1 of said chapter, which is as follows: "Any person who shall be imprisoned for debt, whether on original writ, mesne process, or execution, or for non-payment of military fine or town or state taxes, or on execution awarded against him as defendant in any action of trespass and ejectment or trespass *quare clausum fregit*, in which title to the close was in dispute between the parties," . . . "may request to be admitted to take the poor debtor's oath."

This section as well as the other provisions of Chapter 326 has been in the statute law of this state for more than a century. A review of the history of the act may be found in *Thompson* v. *Berry*, 5 R. I. 95 and *In Re Kimball*, 20 R. I. 688.

Under Section 1 a person must be imprisoned for debt to be admitted to take the oath. If the defendant were now imprisoned in this action for deceit, he would be imprisoned on a claim for damages in an action for a tort and not for a debt; as this claim for damages does not become a debt within the meaning of the statute, until the entry of judgment thereon the defendant if imprisoned could not now take the oath. See *In the matter of Harvey F. Payton*, 7 R. I. 153.

But it is argued that as Section 1 is restricted to cases of imprisonment for debt and as Section 12 refers to actions for the recovery of any debt or demand, the words *debt* or *demand* as used in Section 12 include any action of such a nature that the defendant, if imprisoned on execution in such action, would be entitled to take the poor debtor's oath. It is conceded that this construction of the act is one which has never before been made by this court. The practical construction of the act thus appears to be adverse to the claim of the defendant. We think that the words *debt* or *demand* in Section 12 were simply intended to cover comprehensively the different actions referred to in Section 1. The defendant has not been imprisoned because he was able to furnish bail. To allow the defendant the relief given by the poor debtor's oath when he is not imprisoned, which would be denied to him in the same circumstances if he were imprisoned, would be contrary to the intent of the act and we find nothing in the terms of the statute which warrants such a construction of the act.

As judgment has not been entered in this case, the defendant Platt is not now entitled to take the poor debtor's oath.

The petition for a writ of prohibition is granted.

Green, Hinckley & Allen (*Chauncey E. Wheeler* of counsel) for petitioner.

Waterman & Greenlaw, Charles E. Tilley, for respondent.

OPINION TO THE GOVERNOR.

RENDERED BY THE JUSTICES OF THE SUPREME COURT IN THE MATTER OF THE PRACTICE OF OSTEOPATHY.

(*1*) *Osteopathy. Death Certificates.*

Persons who have received certificates to practice Osteopathy from the State Board of Health under cap. 1058, Pub. Laws, 1914, and who have registered under cap. 193 of the Gen. Laws, in the town clerk's office of the city or town in which they reside, their authority for so practicing, are legally entitled to sign death certificates in those cases where they were last in attendance professionally upon the deceased.

SUPREME COURT,
June 19, 1919.

To His Excellency R. Livingston Beeckman, Governor of the State of Rhode Island and Providence Plantations:

We have received from Your Excellency a request for our opinion upon the following question, viz.:

"Are the persons who have received certificates to practice Osteopathy from the State Board of Health under Chapter 1058 of the Public Laws of 1914, and who have registered, under Chapter 193 of the General Laws, in the Town Clerk's office of the city or town in which they reside, their authority for so practicing, legally entitled to sign death certificates in those cases where they were last in attendance professionally upon the deceased?"

We answer the question in the affirmative.

Chapter 1058, approved May 1, 1914, is entitled "An Act Regulating the Practice of Osteopathy and in Addition to and in Amendment of Chapter 193 of the General Laws." In Section 1 the practice of osteopathy is defined to be the treatment by manipulation of diseased or abnormal conditions of the human body. The act provides that authority to practice osteopathy shall be a certificate from the State Board of Health which shall be granted to any reputable person applying therefor who is a graduate from a school or college of osteopathy in good standing, and who shall pass an examination satisfactory to a board of three examiners approved by the State Board of Health. Section 6 is as follows: "Except as otherwise expressly provided in this act, all provisions of Chapter 193 of the General Laws and all acts in amendment thereof or in addition thereto shall apply to the practice of osteopathy and to persons practicing osteopathy within this state."

Chapter 193 of the General Laws, "Of the Practice of Medicine" is the general act by which it is provided that authority to practice medicine or surgery shall be a certificate from the State Board of Health. The act also gives

to the State Board of Health authority to refuse to issue certificates or to revoke any certificate which has been issued to any physician who is not of good moral character or who in the opinion of the Board is an unfit person to practice medicine.

By Section 8 of Chapter 193, penalties are provided for the unlawful practice or attempt to practice medicine or surgery or any of the branches of medicine or surgery.

It cannot be doubted that the practice of osteopathy as authorized by Chapter 1058 is the practice of medicine within the meaning of those words as used in Section 8, Chapter 193. *State* v. *Mylod*, 20 R. I. 632; *Swarts* v. *Siveny*, 35 R. I. 1; *State* v. *Heffernan*, 40 R. I. 121. The statute authorizes the licensed practitioner of osteopathy to make a diagnosis of diseased or abnormal conditions of the human body and to apply a remedy therefor. This power of diagnosis is not restricted; having determined however the nature and the cause of the sickness, the practitioner is then restricted to the remedy for the ailment which must be confined to manipulation of the body; the method and the extent of the manipulation is left to the judgment of the practitioner.

Section 7, Chapter 121 of the General Laws, 1909, as amended by Section 2, Chapter 575, Public Laws, 1910, provides that in case of death the undertaker or embalmer who has charge of the body, shall file with the town clerk or registrar a certificate of death prepared in accordance with Section 3 of this chapter. This section also provides that the medical certificate, which is a required part of the death certificate, shall state the cause of death in detail as specified in the statute and that "The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, but whenever the body of a person is lying dead in any town or city, who has been unattended in his or her last sickness, by a physician registered to practice in this state, the town or city clerk, or in the city of Providence, the city registrar, shall call upon a registered physician, or

the medical examiner of the district in which the remains are lying to inquire into and to certify as to the cause and manner of death. . . . "

Is a registered practitioner of osteopathy, a physician registered to practice in this state within the fair meaning of these words in this section? We think that he is. There is no express and specific requirement in Chapter 1058 which requires an osteopath to register his certificate. The obligation to register is imposed by Section 2, Chapter 193, which is general in its terms and applies to all persons who practice medicine or surgery. The person registering under this section is required to subscribe and verify by oath an affidavit of his age, address, *etc.*, and "the school or system of medicine to which he or she proposes to belong."

Section 1 of Chapter 193 provides as follows: "It shall be the duty of each town and city clerk to purchase a book of suitable size, to be known as the 'medical register' of each city or town, and to set apart one full page for the registration of each physician." The recognition in the sections referred to of the practitioner of osteopathy as a physician is clear and unmistakable. The osteopath is required to register and by Section 1 he is to be registered as a physician in the "medical register." All physicians get their authority to sign medical certificates in cases of death by the provisions of Chapter 193, of which Chapter 1058 is now a part. As the osteopaths are now authorized to practice medicine in a particular way, as they are required to be registered in the medical register and are subject to the disciplinary control of the Board of Health by the same general provisions of Chapter 193 as all doctors of medicine so-called, we think that the word *physician* in Section 2, Chapter 575, should properly be construed in its broader meaning to include osteopaths, and that as used in this part of the statutes it is not to be confined to its limited meaning of doctor of medicine. In some parts of the statutes the word *physician* undoubtedly does have the limited meaning of doctor of medicine and

not the broader meaning; as in Chapter 123, Section 54, by which it is provided that liquors are not to be sold, etc., except upon a physician's prescription, and in Section 17, Chapter 178, "Of Medicines and Poisons," where it is provided that any physician who shall prescribe certain drugs, etc. As osteopaths have no authority to give prescriptions or to prescribe drugs, it is manifest that the word *physician* in these clauses does not include a practitioner of osteopathy.

We think that the conclusion we have reached is strengthened by a consideration of the result if the other construction were adopted. In that case we would have this situation: The State by its examination and certificate has certified to the ability of the osteopath to discover the cause of the disease while the patient is alive; but upon the death of the patient, the osteopath then is to be held to be incompetent and unauthorized to state the cause of death. Such a construction is illogical, and its effect would be to impose in many instances unnecessary hardship and pain on the relatives of the deceased.

For the reasons stated we answer the question in the affirmative.

C. FRANK PARKHURST,
WILLIAM H. SWEETLAND,
WALTER B. VINCENT,
CHARLES F. STEARNS,
ELMER J. RATHBUN.

CLARENCE H. BROLEY *et al. vs.* SUPERIOR COURT.

JUNE 20, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Certiorari. Auditors. Review. Exclusive Jurisdiction of Superior Court.*

Where parties have by agreement under the provisions of Gen. Laws, cap. 293, referred a cause to an auditor, the decision of the Superior Court on his report is *final*, and not subject to review *by any means*.

CERTIORARI. Heard on petition for writ and denied.

PARKHURST, C. J. This is a petition for a writ of *certiorari*, to order the certification of the record in a certain cause, now pending in the Superior Court, Providence County,— to the end that said record, or as much thereof as is illegal, may be quashed. The petitioners are Clarence H. Broley and George Kirk.

Said cause in the Superior Court is entitled, "No. 37601,— Robert S. Emerson Tr. *vs.* Broley & Kirk." It is an action on book account and on the common counts brought by Robert S. Emerson, as Trustee in Bankruptcy of the Cataract Rubber Company, a corporation, against said Clarence H. Broley and George Kirk, both of North Providence, described in the writ in said cause as "formerly co-partners as Broley & Kirk."

The petition in bankruptcy was filed against the said corporation on October 23, 1914; and said corporation was adjudged a bankrupt on November 7, 1914. Mr. Emerson was a little later appointed trustee. He commenced said action by writ dated November 22, 1915.

The said Cataract Rubber Company dealt at wholesale in automobile tires. In the course of said business, it consigned certain tires to Broley & Kirk for them to sell at retail.

Said action was brought for an alleged unpaid balance for tires thus consigned. Said Broley and Kirk were engaged as co-partners in a garage and retail automobile tire business in the city of Providence, at first under the name "Broley & Kirk," and later under the name "Cataract Tire & Garage Co.".

The plea in said cause was the general issue; but a stipulation was entered into between counsel that the defendants could make under said general issue any valid defense with the same effect as if such defense had been specially pleaded.

After said cause was ready for trial, the same was, by agreement, submitted to Henry M. Boss, Esq., as auditor, who thereafter heard the parties at various times, and finally on August 20, 1918, filed his report. Said report

quite fully reviewed the accounts and the dealings involved in said cause and at the end found that the sum of $1,857.97 was due from the defendants to the plaintiff.

The defendants, in due course, filed seven exceptions to said auditor's report, the first five of said exceptions, in varying form, relating to the auditor's particular ruling of law which, together with the judge's decision confirming the same, the petitioners are now seeking to have reviewed before this court by proceedings under a writ of *certiorari*.

Later the defendants' said exceptions were heard in said Superior Court by Mr. Justice BARROWS who, in a rescript and decision handed down on February 21, 1919, confirmed the auditor's aforesaid ruling of law, overruled all the exceptions and confirmed said auditor's report.

The petitioners thereafter on February 27, 1919 filed this petition for a writ of *certiorari* to bring up the record for the purpose of reviewing the decision of the Superior Court justice in the matters above set forth, particularly the ruling which confirmed the ruling of the auditor disallowing a certain item of set-off to the plaintiff's account and claim which the petitioners claim to have been an error in law.

The case was heard in this court May 8, 1919, upon citation to the Superior Court, the respondent, to show cause why a writ of *certiorari* should not issue; at that time, by agreement of counsel, the case was heard solely upon the question whether *certiorari* was appropriate for such a review, which involves the question whether this court will undertake to review the decision of the Superior Court in a case of this character; all questions of law, as to the validity of the rulings sought to be reviewed, being reserved for future argument, in case this court should find that this procedure is open to the petitioners.

Chapter 293 of the General Laws of R. I. (1909) entitled "Of Referees, Auditors, and Masters in Chancery," under which this submission to an auditor was had, after providing in Section 10 that in a case at issue in the Superior Court, "in any way involving accounts, the court, *of its own motion*,

or on application of either party in a proper case, may appoint one or more auditors" etc., and in Sections 10–16 providing for details of procedure by and before auditors, then continues as follows:

"Sec. 17. The court, upon the reception of the report, if no cause be shown against the allowance of the same, shall render a decision thereon which shall be final, unless within two days thereafter the plaintiff or defendant shall, in writing, file with the clerk of the court in which said cause is pending a demand for jury trial, if the same has not been waived.

"Sec. 18. Every reference to referees or auditors under the provisions of this chapter, when made by agreement of all the parties, shall be deemed a waiver of any claim for jury trial."

Under these sections the respondent contends that, as an auditor was appointed by the parties in the present cause by agreement, there was in consequence a waiver of any claim for jury trial, and that, a jury trial having been waived, the finding of Mr. Justice BARROWS which confirmed the report of the auditor is final, and not subject to review by this court in this proceeding; and further contends that this court has no jurisdiction to review the decision of the judge in such a case; and cites in support of that contention the cases of *Blanding* v. *Sayles*, 21 R. I. 211; *Blanding* v. *Sayles*, 23 R. I. 226, and *Doane* v. *Simmons*, 31 R. I. 530.

The case of *Blanding* v. *Sayles* was before the Appellate Division of the Supreme Court in several phases on petitions for new trial as reported in 21 R. I. 211, 21 R. I. 512, 23 R. I. 226; the case was substantially like the case of *Emerson, Trustee* v. *Broley & Kirk*, here involved, in that there had been a voluntary agreement by the parties to submit the case to an auditor, the auditor had acted and made his report, and the same was confirmed by a judge of the Common Pleas Division.

The case reported in 23 R. I. 226, after reargument of the questions involved in the case as previously reported, deals with the question of the jurisdiction of the Common Pleas

Division in cases of this character under the statute then in force which is essentially the same as that above quoted; the opinion cites numerous cases relating to statutes in other states and in England where it is provided that in certain cases relating to certain matters the decision or judgment of an inferior tribunal or officer shall be "final", and wherein it was held that such decisions or judgments could not be reviewed by an appellate court on appeal, writ of error, exceptions or *certiorari*, because the jurisdiction conferred by law upon the inferior tribunal or officer was exclusive. (See 23 R. I. 229–233). The gist of this decision (*Blanding* v. *Sayles*, 23 R. I. 226) so far as it touches the particular question involved in the case at bar is to be found on pp. 236–237, as follows: "This case is one on a peculiar footing, put there by the voluntary agreement of parties, wherein the Common Pleas Division having upon the express agreement of the parties referred it to an auditor, the duty is devolved upon that Division that it, in the words of the statute, 'upon the reception of the report, if no legal cause be shown against the allowance of the same, shall render such decision thereon as to right and justice shall appertain; such decision to be final, unless within two days thereafter the plaintiff shall, in writing, file with the clerk of the court in which said cause is pending, a demand for jury trial, if the same has not been waived." As jury trial had been waived the decision of that Division is to be final.

"The final disposition of the case depends, not upon a decision of the Common Pleas Division that shall, or may, be sustained by the Appellate Division on appeal or review, but upon such a decision of the Common Pleas Division as to right and justice shall appertain in its opinion, and such a decision is to be final.

"When that Division has arrived at such a decision in its own opinion, it will enter judgment and cause an execution to be issued to enforce the same, without reference to or interference by this Division. If it renders any decision that under Gen. Laws, cap. 246, § 2, or under any other

provision of the statute, it thinks it can recall, its opinion, and not ours, is the one to prevail in this case. In brief, the Common Pleas Division having exclusive jurisdiction in this case, as we think it has, the Appellate Division has no power in or control over it, and though the Common Pleas Division may make error after error in our opinion, it matters not, for error depends upon the standard of judgment erected, and in this case the legislature upon the agreement of parties has made the opinion of the Common Pleas Division the standard of judgment. There seems nothing strange to us in this, for the justices of the Common Pleas Division are members of the Supreme Court like ourselves, the only difference being that the chief justice has delegated them to hold court in the Common Pleas Division for the time being, and this peculiar tribunal could not have been imposed upon the parties but by their own agreement."

The above cases were decided before the creation of the present Supreme Court under the provisions of Article XII of Amendments to the Constitution of Rhode Island. After the passage of that amendment and of the Court and Practice Act, under which the Supreme and Superior Courts were organized, the case of *Doane* v. *Simmons*, 31 R. I. 530, was decided. That case was of a similar character to the case of *Blanding* v. *Sayles*, *supra*, and to the case of *Emerson Trustee* v. *Broley & Kirk*, here under discussion, in the matter of the voluntary agreement to appoint an auditor and to refer the case to him, the reference to an auditor, his report and the confirmation of his report by a judge of the Superior Court. To this decision the defendants attempted to except, and this court, on plaintiff's motion to dismiss the defendant's bill of exceptions, dismissed the same on the same grounds substantially as above set forth in *Blanding* v. *Sayles*, *supra*, viz.: on the ground that the decision of the case by the Superior Court was final and conclusive and could not be reviewed by this court on exceptions.

After setting forth the travel of the case and showing that the parties, having originally the right to claim a jury trial

and to take exceptions, might by their voluntary acts waive those rights, and had done so, the court, after quoting the statute, says on p. 533: "It thus appears that the *only* way to avoid the finality of the decision of the Superior Court rendered upon an auditor's report is to file a written demand for jury trial within two days thereafter. But it also appears that this can not be done where jury trial has been waived. The same statute further provides: 'Sec. 423. Every reference to referees or auditors under the provisions of this chapter, when made by agreement of all the parties, shall be deemed a waiver of any claim for jury trial.' This is notice to all parties to a suit that if they so desire they may agree to refer the case to referees or auditors, and by so doing make the decision of the Superior Court upon the report final and conclusive in the matter. It is a warning to parties not to agree unless willing to incur the consequences of such agreement. So parties entering into an agreement of this kind can fairly be said to have intentionally relinquished certain known rights, viz., the right to claim a jury trial, and the right to take exceptions to the rulings of the Superior Court. It is not for us to say that a claim for jury trial after decision upon an auditor's report is an inappropriate or inconvenient method of procedure; that is a legislative question and not a judicial one. A demand for jury trial is the way provided by the legislature to bring in question the decision of the Superior Court upon the report of an auditor. As the parties have seen fit, by their own voluntary agreement, to permanently close against themselves the only avenue of escape from the decision of the Superior Court, they have no just cause for complaint. They selected and elected their own ultimate tribunal and must abide by the result. See *Blanding* v. *Sayles*, 21 R. I. 211 and 23 R. I. 226."

Although the case of *Blanding* v. *Sayles*, *supra*, denied the rights of parties to move for a new trial and the case of *Doane* v. *Simmons*, *supra*, denied the right to a review based upon a bill of exceptions, the reasoning in both cases

is so broad as to include the denial of any right of review by any means, because in cases of this character the jurisdiction of the Superior Court is exclusive and the decision is final and conclusive.

We hold therefore under the authority of these cases, that this court has no power to review the decision of the Superior Court in *Emerson, Trustee*, v. *Broley & Kirk*, and that the petition for a writ of *certiorari* must be denied.

It may be said in conclusion that the primary office of a writ of *certiorari*, unless enlarged by statute, "is to review the action of an inferior tribunal taken without jurisdiction, or in excess of the jurisdiction given to it; and such writ ordinarily does not lie to correct error in the exercise of jurisdiction." See *Cohen* v. *Superior Court*, 39 R. I. 272, 275. Since it is shown by the cases cited that the matter involved in the case of *Emerson, Trustee*, v. *Broley & Kirk*, and the decision thereof was within the exclusive jurisdiction of the Superior Court, and that its decision was final and conclusive, it would be a novel and unwarranted use of the writ of *certiorari* to allow its issue for the purposes set forth in the petition.

Petition denied. Papers in the case of *Emerson, Trustee*, v. *Broley & Kirk* to be sent back to the Superior Court, sitting in Providence County.

Cushing, Carroll & McCartin, for petitioner.

Huddy, Emerson & Moulton, for respondent.

GEORGE DUFFNEY *vs.* A. F. MORSE LUMBER COMPANY.

JULY 1, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Workmen's Compensation Act. Vested Right in Payment to Partial Dependent.*

The right of a mother of a deceased employee, to payment as a partial dependent, under an agreement made under the Workman's Compensation Act, is not vested and does not pass to the administrator of the dependent but ceases with her death.

PETITION under Workmen's Compensation Act. Heard on appeal of respondent and sustained.

PARKHURST, C. J. This case comes before this court upon the respondent's appeal from a decree of the Superior Court. By this decree the respondent was ordered to pay to the petitioner as administrator of the estate of Emma Duffney, his wife, weekly compensation at the rate of $2 a week, beginning January 16, 1918, until the expiration of the period of three hundred weeks from December 11, 1916, the date of the injury of the deceased employee, Dave Duffney, which payments would have been payable to Emma Duffney, if she had lived, under the Workmen's Compensation Agreement No. 6510, filed in Superior Court February 1, 1917, and approved by the Superior Court on February 8, 1917.

By the terms of this agreement it appears that George Duffney and Emma Duffney, his wife, were the parents of Dave Duffney, the deceased employee, were partially dependent upon his earnings for support at the time of his death, and payments of $2 a week were agreed to be paid by the said respondent as employer to each of the said partial dependents, "to begin as of December 11, 1916, and to continue for a period not to exceed 300 weeks from December 11th, 1916." Under this agreement payments of $2 a week were made to each of these partial dependents from December 11, 1916 to January 9, 1918, on which date Emma Duffney died. During that period of time the respondent took from each of the said dependents separate receipts for the weekly payments of compensation of $2.

Since January 9, 1918, the employer has paid to the said petitioner under this agreement the sum of $2 weekly, but has refused to pay to him the weekly payments of $2 formerly made to Emma Duffney. In June, 1918, the petitioner as "a dependent" brought a petition against the respondent, claiming that he was entitled to the compensation formerly paid to his wife under the agreement on the ground that he was the sole surviving dependent of his son, Dave Duffney, and also on the ground that the right of Emma Duffney to

compensation under the agreement was a vested one and passed to him as her "surviving husband"; and accordingly he prayed for the enforcement of the agreement so that this weekly sum of $2 formerly paid to Emma Duffney should be paid to him for the balance of the compensation period. This petition was heard before Mr. Presiding Justice TANNER, who filed a rescript denying the petition on the ground, first, that even if the right of Emma Duffney to compensation under the agreement was a vested one, yet it did not pass to the petitioner because he had not been appointed administrator, and secondly, because the mere survivorship of the petitioner did not entitle him to all the compensation payable under the agreement to himself and wife.

Later, on January 4, 1919, the petitioner filed an amended petition substantially to the same effect as the former one, except that it was alleged that George Duffney had been appointed administrator of the personal estate of Emma Duffney, his wife, and had given a bond to pay the debts of his wife, and was therefore "entitled to demand and recover as his own property, the remaining weekly sums of $2 each accruing after the death of said Emma Duffney under said memorandum of agreement." This amended petition was heard before Mr. Justice DORAN, who rendered a decision in which he held that the right of Emma Duffney as partial dependent under the compensation agreement was a vested one and upon her death passed to the petitioner as administrator of her estate. Thereafter a decree was entered by Mr. Justice DORAN in which it was decreed as follows:

"(1) That the said petitioner is not entitled to said compensation formerly paid to his wife, Emma Duffney, under said agreement as surviving dependent.

(2) That the right of the said Emma Duffney to compensation under said agreement was a vested right which survived her death and passed to the said petitioner as administrator of her estate.

(3) That as administrator of the estate of Emma Duffney the said petitioner is entitled to receive compensation at the

rate of $2 per week beginning January 16, 1918, until the expiration of the period of three hundred weeks, beginning December 11, 1916, the date of the injury to the said Dave Duffney, deceased, which said payments would have been payable under said agreement to the said Emma Duffney if she had lived."

To this decree the respondent duly filed its claim of appeal and reasons therefor and has duly prosecuted its appeal to this court, and this appeal is now before us.

The principal question, decisive of this case, is whether or not the right of Emma Duffney, (mother of the deceased employee, and a partial dependent upon him at the time of his death) to receive $2 per week as compensation under the agreement was vested in her and passed to her administrator upon her death.

(1) The provisions of the "Workmen's Compensation Act" of Rhode Island, being Chap. 831, Pub. Laws, January, 1912, p. 424, *et seq.*, which are important in this case may be briefly stated as follows: By the terms of Section 6 of Article II of our Workmen's Compensation Act it is provided that in case the employee dies as a result of the injury, the employer shall make certain payments to his dependents. If the dependent to whom the compensation shall be payable is the widow of the employee, then it is provided that "upon her death the compensation thereafter payable under this act shall be paid to the child or children of the deceased employee, including adopted and stepchildren, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, dependent upon the widow at the time of her death." It is also provided that where weekly payments have been made to the injured employee before his death, then "the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury: *Provided, however*, that if the deceased leaves no dependents at the time of the injury, the employer shall not be liable to pay compensation

under this act except as specifically provided in Section 9 of this article". Section 9 provides that where an employee dies leaving no dependents at the time of his injury, then the employer shall pay the reasonable expense of his last sickness and burial, which shall not exceed $200.

It is also provided in Section 7 of Article II that in all cases except those of a dependent wife, husband or children, "questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury"; that "if there is more than one person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent"; and that "if there is no one wholly dependent and more than one person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency".

Another section of the Act relative to the question at issue is Section 8, Article II, which provides that "no person shall be considered a dependent unless he is a member of the employee's family or next of kin, wholly or partly dependent upon the wages, earnings or salary of the employee for support at the time of the injury". Section 23 provides that "no claims for compensation under this act, or under any alternative scheme permitted by Article IV of this act, shall be assignable, or subject to attachment, or liable in any way for any debts".

There is no express provision of the act for the further or future payment of any sum of money awarded to a partial dependent, such as was the mother of the deceased employee in the case at bar, after her death, to any other person, (such as exists in case of the dependent widow leaving children within certain ages and conditions).

No case in this State has dealt with this question, but it has been passed upon in other jurisdictions. In *Murphy's Case*, 224 Mass. 592, under the Massachusetts Act, which in essential respects is similar to ours, the sole dependent

of the deceased employee was his mother and she died while her claim for compensation was pending. After her death her administrator intervened, and the Industrial Accident Board made an award of compensation based on total dependency and the Superior Court confirmed this award and ordered that compensation should be paid to the administrator for the period of three hundred weeks under the Massachusetts Compensation Act. The Supreme Judicial Court in reversing this decision held that the estate of the dependent mother was entitled to compensation from the date of the injury to the date of her death, but that her administrator had no right to further compensation, since the right of the dependent mother to compensation was not a vested right which passed to her legal representatives. The court said at page 594: "To hold that the dependent's right to compensation is a vested right, which passes to a legatee by will, and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the business in which he was employed.

"The opposite result has been reached in England and in Ohio. But both those decisions were founded on provisions of the acts there in question which were not like the provisions of our Workmen's Compensation Act. The decision in *United Collieries, Ltd.*, v. *Simpson*, (1909) A. C. 383, was based upon the provision of the English act, that in case the employee was killed a lump sum should be paid to those dependent upon him." . . . "The decision in Ohio (*State* v. *Industrial Commission of Ohio*, 92 Ohio St. 434, 436, 437) was founded on a provision of the act that in the case of persons wholly dependent 'the payment shall be sixty-six

and two-thirds per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of injury.' This provision, construed in the light of the report of the commissioners, was held by the court to mean what by a literal interpretation of its words it provided.

"For these reasons we are of opinion, that although there is no express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies."

In *Bartoni's Case*, 225 Mass. 349, 353, the Massachusetts Court, following *Murphy's Case*, *supra*, held that under the Workmen's Compensation Act the right to a weekly award for the death of a deceased employee is not vested absolutely in his widow, but continues only during her life and ceases with her death. In the Massachusetts Act there is no provision, as in ours, that in the case of the death of a dependent widow, the compensation shall thereafter be paid to the children of the deceased employee, dependent upon her for support at the time of her death.

The two cases above cited were referred to and approved by the Massachusetts Court in *Bott's Case*, 230 Mass. 152, where it was held that a widow awarded compensation for the death of her husband is not barred from receiving further payments as a dependent upon her remarriage, although the remarriage renders her no longer dependent for her support upon the payments received under the act. On page 154 the court said: "It was held in *Murphy's Case*, 224 Mass. 592, that the right to payments under the act was not vested, and ceased upon the death of the dependent. But that decision does not reach to the point here raised. Its reasoning in brief was that there was no provision in the act for payment to be made to anybody save to the dependents therein named, and nothing to indicate a purpose that the payments be made to the personal representatives of dependents in case of their death, and that to treat the right to such payments as passing to their executors or administrators

often would or might result in payments to persons in no way connected with the deceased employee or his family or kindred, and this might deprive some of his kindred in truth dependent upon his wages for support of any payment under the act. The practical justice of that decision is illustrated by *Bartoni's Case*, 225 Mass. 349, 354. The word 'dependents' as matter of construction did not seem rationally susceptible of including their personal representatives in case of their death, in view of the context of the act and its general purpose. That reasoning does not apply to the case at bar."

Bott's Case, supra, was cited with approval by this court in *Newton* v. *Rhode Island Company*, 42 R. I. 58, 63 (105 Atl. 363, page 365). This Massachusetts case clearly shows that the question decided by this court in *Newton* v. *Rhode Island Company, supra*, is quite different from the one involved here and consequently that case is not an authority in point here, as contended by the petitioner.

To the same effect, that the right to compensation awarded to an injured employee or to dependents is not a vested right and does not pass to a personal representative under Workmen's Compensation Acts of a nature substantially similar to our own, see also *Erie Railroad Co.* v. *Callaway*, 102 Atl. 6 (N. J.) (right of employee himself); *Ray Adm'r.* v. *Ind. Ins. Com.* 99 Wash. 176, 178 (right of employee himself); *Lahoma Oil Co.* v. *State Ind. Com. of Okla.*, 175 Pac. 836–7 (right of employee himself); *Wozneak* v. *Buffalo Gas Co.*, 161 N. Y. Supp. 675, 679 (right of employee himself); *Matecny* v. *Vierling Steel Works*, 187 Ill. App. 448, 458 (dependent mother); *Corcoran* v. *Farrel Fdy. & Mch. Co.*, 1 Conn. Comp. Dec. 42, 44, par. 24–25 (dependent mother); *Ledford* v. *Caspar Lumber Co.*, 2 Cal. Ind. Acc. Com. 679 (dependent mother).

Counsel for petitioner in their brief cite only a few cases under compensation acts in support of their position that the award of compensation to the dependent mother in this case was vested in her and at her death passed to her ad-

ministrator. Most of them are not in point; thus *Wangler &c. Co.* v. *Ind. Com.*, 122 N. E. 366 (Ill.) and *Hansen* v. *Brann & Stewart Co.*, 103 Atl. 696 (N. J.) support the doctrine laid down by this court in *Newton* v. *Rhode Island Co.*, 42 R. I. 58 (*supra*) that a widow receiving compensation as a dependent does not forfeit the same by remarriage. *Roma* v. *Ind. Com.*, 119 N. E. 461 (Ohio) has no bearing on this case; *Smith* v. *Southern Surety Co.*, 193 S. W. 204 (Tex.) has no application; the provisions of the Texas act are radically different, the scheme and method of payment are entirely different; it is held that a temporary administrator of a deceased employee cannot recover because the plain terms of the act point out the destination of the compensation in case of the death of the injured employee. *Re Constantine Towle*, Op. Sol. Dept. of Labor, p. 565, is under the Federal Compensation Act and, so far as it goes, is against the petitioner in that it finds that when the dependent widow of a deceased employee, having received an award died one week thereafter, the amount accrued between the death of the employee and *her death* became a part of her estate. This *Towle* case is incorrectly stated in Bradbury's W. C. L., 3d Ed. 803–804, also cited by petitioner, which probably accounts for the citation of this case by the petitioner. *Monson* v. *Battelle*, 170 Pac. 801 (Kan.) simply holds that a lump sum judgment in favor of an injured workman under the Workmen's Compensation Act does not abate by his death, but may be revived in the name of an administrator. It appeared in that case that before the death of the injured workman there had been a judgment entered in his favor, commuting all future payments of compensation to a lump sum and pending the appeal by the employer, which was later denied, the employee died. The court said at page 802: "In the present case the plaintiff had obtained an absolute personal judgment requiring the immediate payment of a fixed amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made, the money would have been

wholly at the disposal of the plaintiff. If the final result is an affirmance, it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having taken an appeal which is ultimately determined not to have been well founded."

The petitioner also cites in support of his contention *United Collieries, Ltd.* v. *Simpson*, (1909) A. C. 383, a Scotch case on appeal in the House of Lords under the English Act of 1906; (see also 2 Butt. W. C. C. 308); and the case *State* v. *Industrial Com. of Ohio*, 92 Ohio St. 434; both of these cases were cited by the Massachusetts Court in *Murphy's Case*, 224 Mass. 592, 594, from which we quote, *supra:* These cases have been fully examined and we are of the same opinion as was expressed in *Murphy's Case* with regard to the difference between the several acts under consideration; we do not find either in the English case or in the Ohio case any aid or controlling value in determining the true construction of our own act.

We find upon the petitioner's brief a large number of cases cited relating to the vesting of various kinds of incorporeal hereditaments or property rights or interests, such as rights under patents, ferry franchises, water-rights and rights of flowage, annuities under wills or trusts, alimony, rights under contracts, &c., &c., from which petitioner seems to endeavor to draw arguments by way of analogy in support of his claim that his wife had a vested interest in the compensation agreed to be paid to her in this case. A great number of these cases have been examined; but we do not find in them any support for the petitioner's contention or any aid in the construction of the Act here under consideration, and there is no occasion to refer to any of them more particularly.

After due consideration of all the cases cited we find that the weight of authority, under acts similar to our own, is against the petitioner; that the compensation agreed to be paid to the dependent mother was not vested and did not pass over to her administrator but ceased with her death.

We therefore hold that the decree appealed from was erroneous and should be reversed.

The appeal is allowed, the decree appealed from is reversed, and the cause is remanded to the Superior Court sitting in Providence County with direction to dismiss the petition.

James F. Murphy, James M. Gillrain, for petitioner.

Gardner, Pirce & Thornley, for respondent. *Charles R. Haslam,* of counsel.

ALMON C. ALBRO *vs.* SAMUEL KETTELLE, Town Treasurer.

JULY 1, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Taxes. Payment under Protest.*

The payment of an overdue tax under protest is not such a voluntary payment as would preclude a taxpayer from recovering it back upon showing its illegality, although no levy or threat to levy had been made or any suit instituted or threatened for its collection.

(*2*) *Taxes. Payment to Collector.*

Payment of a tax to the collector constitutes payment to the town and an action to recover a tax paid under protest on account of illegality may be maintained against the town treasurer without affirmative proof that the money was paid over by the collector to the town treasurer.

(*3*) *Taxes. Payment under Protest.*

A protest to the payment of taxes in order to be effective should point out with reasonable certainty the defect or error upon which such protest is based. *Rumford Chemical Works* v. *Ray,* 19 R. I. 456, and *Whitford, Bartlett & Co.* v. *Clarke,* 33 R. I. 331, in so far as they hold that a protesting taxpayer is not required to state the grounds of his protest, overruled.

ACTION TO RECOVER taxes paid under protest. Heard on exceptions of defendant and sustained.

VINCENT, J. This is an action brought by the plaintiff against the defendant, as town treasurer of the town of West Greenwich, to recover the amount of certain taxes paid to said town for the years 1908, 1910 and 1912, which said payments are alleged to have been made under protest.

The case was tried in the Superior Court for the county of Kent. The defendant introduced no evidence. At the conclusion of the testimony for the plaintiff each party moved the court to direct a verdict in his favor. The court granted the motion of the plaintiff and in accordance with such direction the jury returned a verdict for $623.02.

The case is now before us upon exceptions to various rulings of the trial court, admitting and excluding evidence, and also to the direction of a verdict for the plaintiff.

The plaintiff, a resident and taxpayer in the town of West Greenwich for many years, paid his tax for each of the years 1908, 1910 and 1912 upon the demand of the duly appointed collector. In each instance, however, he received from the collector a receipt upon which appears the words "paid under protest." It is not disputed that, in each case, the receipt is in the handwriting of the collector. These receipts are dated respectively January 25, 1909, December 30, 1910 and March 26, 1913.

The defendant in his brief presents two questions for our consideration: (1) "Were the several payments made by the plaintiff, under the circumstances as related by him, involuntary payments?" and (2) "Assuming that the plaintiff is entitled to recover, is he entitled to recover against the town treasurer, upon the record in this case, there being no evidence that the money was ever paid over to the defendant?"

The defendant claims, upon his first point, that, inasmuch as there had been no levy or threat to levy on the plaintiff's property and no suit had been instituted or threatened against him for the collection of these taxes, the payment thereof was voluntary notwithstanding the fact that he claimed to have made such payments under protest as evidenced by the receipts given, and that having been made voluntarily they cannot be recovered.

That the several collectors were acting under proper warrants authorizing them to collect taxes and to levy upon and sell the property of delinquent taxpayers is not disputed.

From the dates upon the receipts given to the plaintiff it appears that the taxes must have been overdue at the time of payment. The plaintiff would be supposed to know that his continued refusal to pay his taxes would lead to a levy upon his property or the commencement of a suit against him and that, in either event, he would be obliged to pay an additional amount by way of costs and interest, in case he was unsuccessful, together with other expenses which are usually incurred in litigated matters. To say that a taxpayer must assume such an added responsibility in order to place himself in a position where he could recover the amount of a tax illegally assessed would not be reasonable.

In *Dunnell Mfg. Co.* v. *Newell*, 15 R. I. 233, 238, this court said that the payment of a tax could not be considered as compulsory from the mere fact that the collector had a warrant authorizing him to collect it and that to so hold would practically make all payments compulsory as the collector would have no authority to collect without a warrant. The court further held, however, that the tax, for the one year, which had been paid under protest could be recovered back.

(1) In *Rumford Chemical Works* v. *Ray*, 19 R. I. 456, this rule was adhered to and the conclusion arrived at in *Dunnell Mfg. Co.* v. *Newell, supra*, regarding voluntary and involuntary payments was affirmed. It seems to be well established as the law of this State that a tax paid under protest is not such a voluntary payment as would preclude the taxpayer from recovering it back upon showing its illegality.

The defendant argues that there is nothing in the record to show that the monies paid to the several collectors for taxes for the years in question were ever paid over to the town treasurer of the town of West Greenwich and that so far as appears they are still in the hands of the collectors and, therefore, the trial court should have directed a verdict for the defendant and in support of that proposition cites *Lindsey* v. *Allen*, 19 R. I. 721 (1897). In that case the col-

lector of taxes levied upon the taxpayer's estate for collection of the tax and the tax was paid without protest. The
(2) taxpayer brought suit against the collector, joining the town as a party defendant. It appeared affirmatively that the money was still in the hands of the collector and the court held that as the money had not come into the possession of the town the town treasurer was not a proper party to the suit and that it must be dismissed as to him. The court in that case seems to have reached this conclusion without any consideration of the question as to whether the possession of the collector would or not be the possession of the town, the one being the authorized agent of the other. However, the case of *Lindsey* v. *Allen*, *supra*, does not appear to have been followed, at least so far as this particular point is concerned, in some of the later cases decided by this court. Three years later in *Fish* v. *Higbee*, 22 R. I. 223 (1900) this court said, "A collector is the agent of the town or city in collecting a tax, and the town is really the only party interested in defending it. The money paid belongs to the town and not to the collector." Following this the court proceeds to set forth the reasons for its conclusions which we need not here repeat.

In *Pendleton* v. *Briggs*, 37 R. I. 352, this court said, "The taxpayers are called upon to pay their taxes to the town treasurer who proceeds to collect them under the duly executed warrant of the town, and whether or not such collector has given a sufficient bond to the town is not important to the taxpayer as it is at once apparent that the town could not, under such conditions, be permitted to collect the tax again." This is equivalent to saying that the payment of the tax to the collector constitutes a payment to the town and therefore discharges the obligation of the taxpayer and that he is not responsible for the disposition of the money after it reaches the hands of the collector.

The defendant contends that the several payments of the plaintiff, now sought to be recovered, were not accompanied by any written protest within the decision of this court in

Rumford Chemical Works v. *Ray*, *supra*, and that the protest claimed to have been made by the plaintiff was nothing more than an oral protest, the placing of the words, "paid under protest" upon the receipts by the collector being merely an acknowledgment that an oral protest had been made.

(3) The purpose of requiring the taxpayer to make his protest in writing is to place on record some irrefutable evidence that such a protest was actually made at the time the tax was paid and not leave it to rest upon the [redacted] assertion of some one who might find it for his interest to seek its establishment at some later period when those who might disprove it were no longer available. We think that the receipts bearing the words, "paid under protest" placed there by the collector and by him given to the taxpayer were to all intents and purposes protests in writing but whether or not they were in terms sufficient protests remains to be considered.

The defendant in his brief has not directly discussed the adequacy of the protest but that question was argued by counsel and therefore may be considered.

As we have already seen, the plaintiff in addition to the payment of these taxes under protest said to the collector that he did not think he had been legally assessed but he failed to point out or even intimate in what respect the assessment was illegal and so far as appears he had, at the several times when he protested, no knowledge of any specific defect or illegality.

In the case of *Cole* v. *The Warwick & Coventry Water Co.*, 35 R. I. 511, decided July 13, 1913, it was held that the vote ordering the tax in the town of West Greenwich for the year 1910 was invalid for the reason that the meeting authorizing the assessment of the tax was not legally called. While the validity of the tax for 1910 was the only question before the court in that case, the decision therein was equally applicable to the years 1908 and 1912, the meeting in each of those years having been called in the same manner as in 1910.

The plaintiff brought his suit to recover back the taxes for the years 1908, 1910 and 1912 on January 25, 1917, some three years and six months subsequent to the decision of this court in *Cole* v. *The Warwick & Coventry Water Co.*, *supra.*

Inasmuch as it does not appear that the plaintiff in making his protests had in mind any specific defect or defects in the proceedings bearing upon the assessment of these taxes and did not bring his suit until after the illegal action of the town had been revealed through the opinion of this court in another case, it may be reasonably inferred that such protests were made with a view to taking advantage of and utilizing any irregularity which might be discovered at some later period.

The authorization, assessment and collection of a tax upon the ratable property of a town or city under our present laws is attended with much detail and offers many chances for the commission of error. Every person having taxable property should bear his proportionate share of the expenses of the municipality in which he resides or in which his possessions are located and it is reasonable that whenever he has been unlawfully assessed, and desires to take advantage of the error, he should apprise the proper authorities of the basis of his claim to the end that the error may be corrected, if possible, or subsequently avoided. This would not throw any burden upon the taxpayer because, as the court said in *Louden* v. *East Saginaw*, 41 Mich. 23, "He could not know it was illegal without knowing in what the defect was." The necessity for such action on the part of the taxpayer is well illustrated in the present case where the error was repeated in several successive years.

Because there is no statute specifically requiring a protesting taxpayer to state the foundation of his protest, he is not relieved from pursuing a method which would be just and reasonable if he would seek to avoid the payment of his tax. To claim that the tax is illegal without any specification whatever would be unfair and unjust in that it might deprive

the town of all opportunity to correct its error and perhaps leave open the door for its repetition. This court said in *Dunnell Mfg. Co.* v. *Newell*, *supra*, "It is . . . no more than fair that a tax-payer, if he intends to take advantage of a defect, should at least object or protest against the tax when he pays it, so that the assessors may have notice and correct the defect for the future." That case, however, did not involve any question as to the sufficiency of a protest as the court says, "In the case at bar the taxes . . . were paid without objection and without protest." The language of the court above quoted only goes to the extent of saying that in order to recover back taxes, paid under an invalid assessment, the taxpayer must have made a protest without defining what the form of such protest should be. That case, therefore, is not helpful in determining the particular question now under consideration.

We are thus brought face to face with the case of *Rumford Chemical Works* v. *Ray*, *supra*, in which this court said, "We see no reason for requiring a specification, in the protest of the alleged illegality" and also the case of *Whitford, Bartlett & Co.* v. *Clarke*, 33 R. I. 331, where this court following the case of *Rumford Chemical Works* v. *Ray*, *supra*, held that a protest without any specification of alleged illegality was sufficient.

The case of *Rogers* v. *The Inhabitants of Greenbush*, 58 Me. 390, which has been cited in connection with the case of *Whitford, Bartlett & Co.* v. *Clarke*, *supra*, is not an authority upon the question we are now discussing. To be sure, the court in that case said, "We think that the law requires something more definite and distinct than general fault finding, grumbling, complaint of injustice or inequality, even if in language it takes the form of protestation. It must be a distinct and definite protest against paying the particular tax, on the ground of its illegality. The form may not be material." This, however, is a mere dictum as the court immediately added, "In the present case, as the parties desire a decision on the main question, we waive a decision on this question."

Unless a protest contains something directing attention to the alleged defect it would be likely to prove useless through its failure to give to the assessors, or other town authorities, that information which would lead them to discover their error and enable them to correct it or avoid its repetition.

If one taxpayer can, by a protest in general terms, place himself in a position where he can recover back the tax he has paid, upon the later discovery of some defect within the period of the statute of limitations, many others or even all of the taxpayers might do the same and thus force the town into a most embarrassing situation. Suppose, for instance, that a large number of the taxpayers in the town of West Greenwich had paid their taxes for the years 1908, 1910 and 1912 under a protest in general terms, as did the plaintiff in the case at bar, what would have been the result if the rule in the two cases above referred to should be followed? The town would be liable for the repayment of the money which doubtless it had already expended in meeting its current expenses and might be placed, temporarily at least, in a bankrupt condition.

We do not think that a situation affording such opportunities should be permitted to continue but that any protest relating to the payment of taxes, in order to be effective, should point out with reasonable certainty the defect or error upon which such protest is based.

This conclusion is not unsupported by authority. In *Louden* v. *East Saginaw*, *supra*, the court said, "It would be a harsh and violent presumption to assume that under any general protest, specifying nothing, the council could find what particular slip or fault could be found in an assessment which was regularly and lawfully ordered, and only fell through by what was a clerical blunder, although one which cannot be called merely formal. . . . The council cannot be in fault for not knowing what a party means to complain of when he does not see fit to tell them."

In *Meek* v. *McClure*, 49 Cal. 623, the court said, "Wherever a protest is essential, it is, therefore, necessary to state the grounds upon which the party paying the money claims that the demand is illegal." With the establishment of such a rule it logically follows that in any action taken by the taxpayer he must be confined to the defect or defects alleged by him in the protest which he makes at the time of payment.

The cases, *Rumford Chemical Works* v. *Ray* and *Whitford, Bartlett & Co.* v. *Clarke*, both *supra*, are, in so far as they hold that a protesting taxpayer is not required to state the grounds of his protest, overruled.

The plaintiff may appear before this court on Monday July 7, 1919, at ten o'clock in the forenoon, if he shall see fit, and show cause, if any he has, why this case should not be remitted to the Superior Court with direction to enter judgment for the defendant.

Greenough, Easton & Cross, for plaintiff.

Quinn & Kernan, for defendant.

STATE *vs.* EMILE VANASSE.

JULY 2, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Criminal Law. Evidence. Credibility.*

A sentence for crime or misdemeanor may be shown to affect a witness' credibility, under Gen. Laws, 1909, cap. 292, § 43 whether such sentence is based upon a verdict or plea of guilty or upon a plea of *nolo contendere*.

(*2*) *Criminal Law. Intent. Drunkenness.*

Voluntary intoxication is not a defence to any crime actually committed, but where a particular intent is charged which aggravates the offence actually committed and enlarges it into a greater offence, drunkenness may be offered to negative the specific intent but only when it is of such a degree as to completely paralyze the will of the respondent, take from him the power to withstand evil impulses and render his mind incapable of forming any sane design.

INDICTMENT. Heard on exceptions of respondent and overruled.

SWEETLAND, J. This is an indictment charging the respondent with an assault with intent to commit rape upon Mary Anne Hargraves.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict of guilty. The respondent filed his motion for a new trial which was denied by said justice. The case is before us upon the respondent's exception to the refusal of said justice to grant a new trial and upon certain exceptions taken by him in the course of the trial.

The exception to the refusal of said justice to grant a new trial is without merit. It appears from the evidence presented by the State that on the fifteenth of April, 1918, between nine and ten o'clock in the evening, Mrs. Hargraves and a woman companion were walking along the Albion Road, so-called, in the town of Lincoln toward their home; that the respondent, a young man, accosted them, walked along near them, attempted to kiss the companion of Mrs. Hargraves, accompanying the attempt with indecent proposals to her; that the two women resisted him; that he seized Mrs. Hargraves, threw her to the ground and then made violent attempts to overpower her and reach her person. The women screamed and cried "Murder." Their screams and cries attracted the attention of three men who were at a house, a considerable distance away. The three men hurried to the assistance of Mrs. Hargraves and her companion, and upon the approach of these men the respondent ran away and escaped. The respondent, who testified, made no denial of this evidence but claimed that he had been drinking heavily upon the day in question and had no memory of his acts after five o'clock in the afternoon of that day. He also presented the testimony of other witnesses that he had been drinking during the day and that in the early evening he appeared to be intoxicated. His sole defence was that he was so drunk during the evening and night of April 15, 1918, as to be incapable of forming the intent to commit rape. The evidence fully warranted

the finding that the respondent attempted to ravish Mrs. Hargraves and that his conduct made it plain that he appreciated what he was doing; that he understood the criminal nature of his act and the serious consequences which would follow to himself if he should be caught and held responsible for the assault.

During the cross-examination of the respondent the Assistant Attorney General asked of the respondent the following question with reference to a former indictment against the respondent: "The charge is assault with intent to commit rape on the person of Ella Holbrook, and in this court were you not sentenced to three years in the State's Prison?" Upon the suggestion that the date was not included in the question the Assistant Attorney General added the following: "On May 10, 1915, were you not sentenced to three years at the State's Prison and served that sentence?" The respondent's attorney objected to the question, excepted to the ruling of the justice directing the respondent to answer, and urges the exception before us. It appeared that the respondent had been sentenced on the former indictment after his plea of *nolo contendere* and he urges that his sentence to prison following such plea could not be shown at the trial of this indictment for the purpose of affecting his credibility. The respondent takes nothing by this exception. Section 43, Chapter 292, General Laws,
(1) 1909, is as follows: "Sec. 43. No person shall be deemed an incompetent witness because of his conviction of any crime, or sentence to imprisonment therefor; but shall be admitted to testify like any other witness, except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility." The language of this statute so far as it relates to a "sentence" for a crime or misdemeanor is unequivocal. In accordance with its plain provision a sentence for crime or misdemeanor may be shown to affect a witness' credibility whether such sentence is based upon a verdict or plea of guilty, or upon a plea of *nolo contendere*.

The respondent's exception to the refusal of said justice to charge the jury in accordance with the respondent's second request, and his exception taken to the Judge's charge are not sustained. The respondent's second request
(2) is not a correct statement of the law. He asked said justice to instruct the jury that the element of intent to commit the crime charged in the indictment is lacking when by reason of intoxication a respondent does not fully realize what he is doing. This request was much too broad. Such element can properly be found to be lacking only when the respondent's intoxication is so complete that he has become entirely incapable of forming the design with which he is charged. It is an elementary principle of criminal law that voluntary intoxication does not excuse the commission of an offence. Such intoxication is not a defence to any crime actually committed. When a particular intent is charged which aggravates the offence actually committed and enlarges it into a greater offence, as in the case under consideration the assault is alleged to have been made with intent to commit rape, then drunkenness is no excuse for the assault, but it may be offered to negative the specific intent charged, but only when the drunkenness is of such a degree as to completely paralyze the will of the respondent, take from him the power to withstand evil impulses and render his mind incapable of forming any sane design. The Judge's instruction to the jury was a correct statement of the law.

All of the respondent's exceptions are overruled and the case is remitted to the Superior Court for sentence.

Antonio A. Capotosto, Asst. Atty. General, for State.

Eugene L. Jalbert, for defendant.

HYMAN G. SHOLOVITZ *vs.* HENRY A. NOORIGIAN.

JULY 2, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Memorandum of Sale. Statute of Frauds.*

The statute of frauds (Gen. Laws, 1909, cap. 283, § 6,) does not require that the agent signing the memorandum, shall be acting under written authority but such authorization may be by parol and the authority to make a contract for the sale of real estate confers authority to sign the memorandum.

(*2*) *Memorandum of Sale. Statute of Frauds.*

In an action to recover damages for breach by defendant of a contract to convey real estate the memorandum for sale was as follows:—"Aug. 17 1916 Received of X., $25 to bind the bargain for the sale of Harry Noorigian Brick store and land at 46 Blackstone St. to X. Said deposit to be forfeited to Harry Noorigian in the failure of X to purchase said property on August 25 1916. Ballance due $1975

J F GREENE agt. for H NOORIGIAN."

Held, that a memorandum was sufficient if from a consideration of the whole contract it could be gathered that it was the intention of one party to convey and of the other to purchase, regardless of apt words expressing the agreement of the parties to sell and to buy.

(*3*) *Memorandum of Sale. Parol Evidence. Description.*

If the description of the subject-matter of the agreement between the parties is so uncertain and indefinite that it cannot be applied exclusively to any specific land, parol evidence cannot be received to complete the description but if the description is definite though requiring extrinsic evidence to identify the land which it represents, parol evidence may be received for that purpose.

(*4*) *Memorandum of Sale.*

Where a memorandum was made in Woonsocket and both parties resided there and defendant owned property on Blackstone Street in that city, the description "46 Blackstone St" will be presumed to refer to that number on that street in that city.

(*5*) *Memorandum of Sale.*

The description in a memorandum, "brick store and land at 46 Blackstone St" is not indefinite, because there are two doors to the store numbered 44 and 46.

(*6*) *Memorandum of Sale.*

The description in a memorandum, "brick store and land at 46 Blackstone St" is not insufficient because the width and depth of the lot on which the store stands is not set out, since such description must define at least the land on which the store stands.

(7) *Memorandum of Sale. Evidence.*

In an action to recover damages for breach by defendant of a contract to convey real estate, certified copy of deed by which defendant acquired the whole parcel of land of which the lot in question was a part, was properly admissible on the part of the plaintiff to identify the property described in the memorandum.

ASSUMPSIT. Heard on exceptions of plaintiff and sustained.

SWEETLAND, J. This is an action in assumpsit to recover damages for the alleged breach by the defendant of a contract to convey to the plaintiff certain real estate in the city of Woonsocket.

The case was tried before a justice of the Superior Court sitting with a jury. At the close of the plaintiff's evidence on motion of the defendant said justice granted a nonsuit. The case is before us upon the plaintiff's exceptions to the ruling of said justice on the motion for nonsuit, and to a ruling of said justice refusing to admit in evidence the certified copy of a certain deed.

The material facts which appear in the transcript of evidence may be summarized as follows: The defendant on August 17, 1916, was the owner of certain real estate situated on the southerly side of Blackstone street in Woonsocket and extending southerly to Burts Lane. Burts Lane is not parallel with Blackstone street, and the east line of the defendant's land is considerably shorter than its west line. The level of Burts Lane in the rear of said land is higher than the level of Blackstone street and said lane is supported by a retaining wall along the south line of the defendant's land. At the easterly end of the defendant's land is situated a one story brick building containing one room used as a store. In the front of said brick building on Blackstone street are two doors side by side, one of which is numbered 44 and the other 46 on Blackstone street. At some time previous to August 17, 1916, there had been a partition in said room running from between said doors to the southerly interior wall of said room, and each portion of the

room so partitioned had been used as a separate store; but before August 17, 1916, said partition had been removed and thereafter the room had been used as a single store having the two doors as a double door. This was the condition of the premises on said date. To the north said brick building or store was situated on the line of Blackstone street, to the east it extended to within about a foot of the easterly line of the defendant's land, to the west it abutted upon a wooden building of the defendant, and to the south, at its south-easterly corner it was built into the retaining wall of Burts Lane and at the southwesterly corner it extended to within a few feet of the retaining wall of Burts Lane. It thus appears that said brick building occupied all of the defendant's land to the east of his frame or wooden building except a strip a few inches wide along the easterly line of the defendant's land and a small triangular piece along Burts Lane. Previous to August 16, 1916, the defendant placed all of his real estate on Blackstone street in the hands of James F. Greene, a real estate broker of Woonsocket, with authority to sell the same at the price of $8,000. On August 16, 1916, the defendant authorized Mr. Greene to sell the brick store, so-called, separate from the rest of said real estate, for $2,000. In the forenoon of August 17, 1916, Mr. Greene, acting upon the authority thus given him by the defendant, completed an agreement with the plaintiff whereby the defendant sold and the plaintiff purchased said brick store for $2,000. The plaintiff paid Mr. Greene $25 as earnest money, and Mr. Greene gave to the plaintiff the following writing: "August 17, 1916. Received of H. G. Sholovitz Twenty five 00/100 Dollars To bind the bargain for the sale of Harry Noorigian Brick store and land at 46 Blackstone Street to H. G. Sholovitz. Said deposit to be forfeited to Harry Noorigian in the failure of H. G. Sholovitz to purchase said property on August 25th 1916. Balance due nineteen hundred and seventy five dollars. J. F. Greene Agt for H. Noorigian." Mr. Greene then, on the same forenoon, brought the defendant to the plaintiff,

showed and read said memorandum to the defendant, showed to the defendant the earnest money which he had received, and said to the defendant, "If he does not pay the balance on the twenty fifth of August this twenty five is yours." The defendant then said that he would have the deed ready and would pass title at two o'clock in the afternoon of the same day. Later he refused to make the conveyance. On August 25, 1916, the plaintiff offered the defendant the balance of the purchase price and requested him to make a conveyance of the property, but the defendant refused, and the plaintiff has brought this action to recover damages for the defendant's breach of said agreement.

The justice presiding nonsuited the plaintiff on the ground that the written paper given by Mr. Greene to the plaintiff did not constitute an agreement on the part of defendant to convey and, if said writing should be considered as an agreement to convey, the description of the property was too indefinite to be enforced.

The Rhode Island Statute of Frauds (Sec. 6, Chap. 283, Gen. Laws, 1909) in part provides as follows: "Sec. 6. No action shall be brought:—*First.* Whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer time than one year;" . . . "Unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." The note or memorandum sufficient to prevent the operation of the statute upon a contract for the sale of land need not have the formal precision usually found in a written contract or agreement. Such note or memorandum meets the requirements of the statute if it sets out who are the seller and the buyer, their respective intention to sell and to purchase, such a description of the subject matter of the sale as may be applied to a particular piece of land, the purchase price, and the terms of payment if the sale is

not for cash; and further such note or memorandum must be signed by the party to be charged in the action or by his agent lawfully authorized.

Whatever may be held as to the sufficiency of the writing now under consideration in other respects, the evidence tends to establish that it is one signed by the lawfully au-
(1) thorized agent of the defendant. By the provision of the statute of frauds in a few jurisdictions it is required that an agent signing such promise, agreement, or note or memorandum thereof, shall be one acting under written authority. There is no such requirement under our statute. In the absence of a statutory provision to the contrary the ordinary rules of the law of agency prevail. Such authorization may be by parol; and the authority to make a contract for the sale of real estate confers authority to sign the written note or memorandum which renders such contract effective and binding. According to the evidence the broker, Mr. Greene, had been authorized by the defendant to sell the real estate which was the subject of the oral negotiation between Mr. Greene and the plaintiff for the sum of two thousand dollars. Immediately after preparing the writing in question the broker showed and read it to the defendant and explained to him its effect. A finding would be warranted that the broker had full authority to sell the property in question and to sign on behalf of the defendant the writing before us; also upon the evidence, from the conduct of the defendant, a finding would be warranted, that the defendant ratified the act of the broker in making the contract, receiving the earnest money, and delivering said writing to the plaintiff.

In granting the motion for nonsuit said justice gave as a reason that the writing failed to express an agreement on the part of the defendant to convey the land to the plaintiff. *Thornton* v. *Kelly*, 11 R. I. 498, was an action brought to recover damages of the defendant for refusing to take and pay for a house and lot which the plaintiff alleged he agreed to purchase of him. The written memorandum of agree-

ment was as follows: "I hereby agree to sell to John Kelly the house and lot situate on Lockwood Street, second lot east of Clay Street, on north side of Lockwood, for the sum of ($7,000) seven thousand dollars, and agree to give a satisfactory deed on or before the first day of September next, and hereby acknowledge the receipt of ten dollars on account of above sale." This agreement was signed by the plaintiff Thornton and by the defendant Kelly. It will be observed that in this memorandum while the plaintiff Thornton agrees to sell and convey, the defendant Kelly does not agree to purchase, yet the court held that the memorandum was sufficient to charge the defendant and said, "The word 'sale' necessarily imports concurrence or agreement. It shows, then, that the contract between these parties was complete, and that it only remained to carry it into effect." The court further said, "But the statute does not require a complete contract. It requires only that the promise or agreement, 'or some note or memorandum thereof,' shall be in writing. We do not think there can be a doubt that the memorandum here would have been sufficient to charge the plaintiff in favor of the defendant, if the plaintiff had refused to fulfill the contract on his part. Why, then, is it not sufficient to charge the defendant in favor of the plaintiff? The answer given is, that it does not show any promise in writing by the defendant. But it shows that there was a valid agreement between the plaintiff and the defendant, and what the agreement was; and such a memorandum, signed by the party to be charged, is all that the statute requires." The reported cases disclose that courts have frequently had under consideration writings relating to the sale of real estate in which a receipt for a portion of the purchase price has been coupled with some reference to the terms of the contract. In many cases such writings have been held to constitute a sufficient compliance with the provisions of the statute where the agreement of the vendor to make a conveyance was much less explicit than in the writing before us. In *Tobin* v. *Larkin*, 183 Mass. 389, the

written memorandum was as follows: "Lawrence, Mass. May 12, 1902. Received of Patrick Tobin $25 as part payment of house and land number 10 Howard street belonging to Bridget Larkin. The price to be paid is seventeen hundred dollars ($1700). Lot is 100 by 210 feet. Herman Otto, Agent." The writing in *Tobin* v. *Larkin* is typical of many considered and approved by the courts. *Ullsperger* v. *Meyer*, 217 Ill. 262; *Hurley* v. *Brown*, 98 Mass. 545; *Eppich* v. *Clifford*, 6 Colo. 493. In *Van Doren* v. *Roepke*, 107 Wis. 535, the court had under consideration memorandum which contained no explicit words expressing the agreement on the part of the respondent to convey or of the complainant to purchase. The court said: "Neither
(2) is it necessary that the memorandum should contain apt and definite words expressing the agreement to convey. It is sufficient if from a consideration of the whole contract it can be gathered that it is the intention of one party to convey and of the other to purchase." In reaching his conclusion that the memorandum in this case does not express an agreement to convey, said justice has not given to the terms of the memorandum their true legal effect. The writing plainly recites that the defendant's agent has received from the plaintiff twenty-five dollars for the purpose of binding the bargain for the sale of the defendant's property to the plaintiff. The expression "bargain for the sale, &c.," used in the memorandum, in accordance with both its ordinary and legal interpretation imports an agreement on the part of the plaintiff and the defendant, respectively, the one to convey and the other to accept the conveyance and pay the purchase price. In *Koenig* v. *Dohm*, 209 Ill. 468, the court, following the definition of Webster, held, that a bargain is "an agreement between parties concerning the sale of property; or a contract by which one party binds himself to transfer the right to some property for a consideration, and the other party binds himself to receive the property and pay the consideration."

Said justice of the Superior Court in nonsuiting the plaintiff also held that the memorandum was defective in that the description of the property was too indefinite to be enforced; and the justice called attention to the fact that while the memorandum described the brick store and land as at 46 Blackstone street the evidence disclosed that one of the doors in said store was numbered 44 on Blackstone street and also to the fact that the memorandum failed to specify the width and depth of the lot on which the brick store was situated. In *Ray* v. *Card*, 21 R. I. 362, the court held that a note of an agreement for the sale of land was insufficient to answer the requirements of the statute of frauds when said note contained no description of the land other than a reference to it as "that lot," and that resort could not be had to parol evidence to supply the description. In *Lee* v. *Stone*, 21 R. I. 123, the court held that the "identity of the land may be shown by parol." The holding of the court in these two cases represents the generally accepted doctrine. If the description of the subject matter of the agreement between the parties is so uncertain and indefinite that it cannot be applied exclusively to any specific land parol evidence cannot be received to complete the description; if the description is definite though requiring extrinsic evidence to identify the land which it represents parol evidence may be received for that purpose. In *Hurley* v. *Brown*, 98 Mass. 545, the description contained in the memorandum under consideration was simply "a house and lot of land situated on Amity street, Lynn, Mass." As to this description the court said: "We regard the fair construction of the words used to be, that they relate to a house and lot owned, at the time the memorandum was signed, by the parties who subscribed it. Thus interpreted, they are sufficiently certain, and the oral evidence is needed only to apply the description. This must be done by extrinsic evidence in every contract or conveyance, however minutely the boundaries of the estate may be set forth. The maxim, *id certum est quod certum reddi potest*, is the established rule

(3)

of construction in suits for specific performance. The contract in the present case seems to us fairly within its application." The doctrine enunciated in *Hurley* v. *Brown*, has been followed by the Massachusetts court in subsequent cases. The description in the memorandum before us is "Harry Noorigian brick store and land at 46 Blackstone street." It appears in evidence that the defendant Henry A. Noorigian was known as "Harry Noorigian" and there is no question raised but that by that name in the memorandum reference is made to the defendant. According to a commonly recognized presumption, since the memorandum was made in Woonsocket and both parties reside in Woonsocket and the defendant owns property on Blackstone street in Woonsocket, "46 Blackstone street" in the memorandum refers to number 46 Blackstone street in the city of Woonsocket. As thus interpreted the description is of the defendant's brick store and land at 46 Blackstone street in
(4) Woonsocket. This on its face is a definite description of a particular brick store and at least the land on which it stands.

(5) A description is required in a memorandum evidencing a sale of land in order that the property which is the subject of the contract may be identified. We cannot agree with the criticism of the said justice that because there were two doors to the brick store of the defendant, one numbered 44 and the other 46, that said store is not identified when referred to as "at 46 Blackstone street." The fact that the other door is numbered 44 creates no uncertainty as to the identity of the store or building described in the memorandum.

(6) Neither in our opinion should the memorandum be held insufficient to charge the defendant because the width and depth of the lot, on which the store stands, is not set out therein. We have already said above that the description without question must be held to define at least the land on which the brick store stands and surely to that extent the defendant was bound to make conveyance. By reference to the evidence presented in the case at bar it appears that

the defendant's brick store at 46 Blackstone street was situated at the easterly end of the defendant's property and that the land on which it stands and the small amount of land adjoining it was well defined and set off from the remainder of the defendant's land by monuments, consisting of Blackstone street and Burts Lane to the north and south respectively, the land of one Cunningham on the east and the wooden building of the defendant on the west. In *Scanlan* v. *Geddes*, 112 Mass. 15, the court was considering the sufficiency of a written memorandum of an agreement to sell real property. The description in the memorandum was "house on Fifth Street, between D and E Streets." The court said, p. 17, "It is equally clear also that the house was to be conveyed, not as mere personal property with an easement in land, but by a warranty deed, and as real estate. *Esty v. Currier*, 98 Mass. 500, and cases there cited. The proper construction of the agreement is that the house was to be conveyed, with the land upon which it stood, and so much more as was necessary to its beneficial enjoyment, and within the power of the defendant to convey."

We are of the opinion that the description in question is in itself a sufficient description; that by the aid of parol evidence the finding would be warranted that the property described may be identified as all that portion of the defendant's property on Blackstone street which is east of the defendant's wooden building, and which is delineated on the plat in evidence marked Plaintiff's Exhibit 2 as the lot which at the trial was marked by a cross drawn with a pencil, which cross still remains upon said plat. The granting of the motion for nonsuit was error.

The plaintiff's exception to the refusal of said justice to
(7) admit in evidence a certified copy of the deed from William Meyers to the defendant should be sustained. This was the deed by which the defendant acquired the whole parcel of land on Blackstone street of which the brick store was a part, and in its description it sets out the boundaries of said

parcel. As part of the evidence properly admissible to identify the property described in the memorandum the plaintiff should have been permitted to show the ownership of the defendant, his relation to the property, the extent of his holding and the boundaries of the whole tract if thereby aid would be furnished in fixing the location and the boundaries of the portion described in the memorandum. It clearly appears that said deed would have furnished evidence to that end and it should have been admitted. *Baker* v. *Hall*, 158 Mass. 361, was a cause for the specific performance of a contract to convey twenty-nine hundred and twenty-five square feet of a much larger tract of land belonging to the defendant. This contract was evidenced by a memorandum of agreement in writing signed by the parties. The position upon the larger tract of the land to be conveyed could be identified only by reference to a sketch accompanying the memorandum and the sketch was interpreted by resort to the aid of a plat and a number of deeds which were admitted in evidence. The court said: "For the purpose of interpreting the document, we may put ourselves 'in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the memorandum'; *Farwell* v. *Mather*, 10 Allen, 322, 324; and we are also to presume that the words used to describe the land relate to land owned at the time by the vendor. *Hurley* v. *Brown*, 98 Mass. 545. The same presumption is, of course, to be applied in interpreting the sketch which is part of the memorandum."

The plaintiff's exceptions are sustained. The case is remitted to the Superior Court for a new trial.

James H. Rickard, Jr., for plaintiff.

Greene & Rousseau, for defendant.

LAURA B. HAM *vs.* MASSASOIT REAL ESTATE CO.

JULY 2, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Contracts. Fraud.*

The mere non-performance of an oral contract within the statute of frauds, where no relation of trust and confidence exists, does not constitute fraud.

(*2*) *Deeds. Restrictions. Easements. Statute of Frauds. Equity Part Performance.*

Complainant claimed that during negotiations which resulted in the purchase of a lot on a recorded plat, respondents' agents represented that all lots on a portion of such plat were subject to the same restrictions contained in complainant's deed and would be sold subject to such restrictions. On bill seeking to restrain respondent from conveying certain lots free from restrictions:—

Held, that, no actual fraud being established, complainant was not entitled to enforce an oral agreement to establish restrictions which would be negative easements in respondent's land; this coming within the prohibition both of the Statute of Frauds and the Statute on Conveyance of Estates.

Held, further, that the equitable rule that part performance will take a contract out of the statute of frauds, did not apply, since this was not a suit to obtain or reform a deed, but one to enforce an oral contract.

BILL IN EQUITY. Certified by Superior Court under cap. 289, sec. 35.

RATHBUN, J. This is a bill in equity seeking to enjoin the respondent from conveying certain house lots free from restrictions such as are contained in a deed from respondent to complainant's husband; also seeking to compel respondent to remove certain buildings which are located within the street lines as laid out on the plat.

The bill was heard on bill, answer and proof by a justice of the Superior Court who, without rendering any decision, certified the case to this court, in accordance with the provisions of General Laws, 1909, Chapter 289, Section 35.

In 1903 the respondent platted certain land situated south of the railroad at Oakland Beach and caused the plat to be recorded. Two streets appear on this plat running south from the railroad location to the shore and approximately parallel with each other, viz., Maple street and Oakland Beach avenue. The complainant's claim is that during the

negotiations which resulted in a purchase of lot No. 866 on said plat by complainant's husband the respondent, by its agents, Brown and Deio, represented to complainant and her husband that all lots between Maple street and Oakland Beach avenue and also the row of lots on the easterly side of Oakland Beach avenue were subject to the same restrictions as were incorporated in respondent's deed conveying lot No. 866 to complainant's husband and that all of its lots within this area would be held or sold subject to said restrictions.

On May 7, 1910, respondent conveyed by warranty deed lot 866 within the above described area to complainant's husband. The lot was subsequently conveyed to complainant and is now owned by her. The deed to complainant's husband contained the following restrictions, viz.:

"TO HAVE AND TO HOLD the aforegranted premises . . . upon condition nevertheless :

"First : That no building at any time shall be erected or placed upon said premises within ten feet of the line of any street, avenue or park, as laid out upon said plat, nor shall any barn or stable be erected or placed upon said premises, nor shall any house be erected upon said premises that shall cost less than Two Thousand Dollars, nor shall any house or building erected thereon be used at any time for any other purpose than as a residence, and for the use of a private family.

"Second : That said premises nor any part thereof shall not at any time be used for carrying on any mechanical or manufacturing business, or public trading of any kind, nor shall any spirituous or intoxicating or malt liquors be at any time made, sold or kept for sale at any time therein or thereon.

"Third : The foregoing conditions shall be binding upon the grantee his heirs, successors and assigns."

Later complainant purchased from respondent lot 865, situated within the above described area. The deed of lot 865 contained restrictions identical with those contained in the deed to complainant's husband. Previous to the sale

to complainant's husband, respondent had conveyed, subject to restrictions, two lots in the above described area. Within one month thereafter it conveyed free from restrictions a lot within the same area; thereafter several conveyances were made with the same or different restrictions and many lots were conveyed by deeds containing no restrictions. Before suit was commenced respondent had entered into agreements to sell free from restrictions seventeen other lots within this area. There was no covenant in the deed to complainant's husband or in any of the other deeds binding the respondent to hold and convey the remaining lots subject to restrictions.

Hedley V. Ham, complainant's husband, testified as follows: "He said his idea in restricting those lots was to have a good class of houses built in that area." . . . "Yes, he said he had built a very nice house there and the reason he put on the restrictions was to have that area restricted and have a nice class of houses put up there." Laura V. Ham testified as follows: "He told us they were restricted and all that whole plat right up through there was and really got us to agree to put up a good house so as to advertise the plat for other houses and to get our friends if we could." . . . "No, he told us they were already restricted; he said, 'And my house cost $8,000.00, and my two daughters built right besides me, and perhaps my son will build later, and, of course, I have restricted all this land right through here." Brown and Deio having deceased were unable to either affirm or deny the allegations and testimony relative to oral representations. The respondent in its answer denies making said oral representations and sets up the statute of frauds and urges that if any such oral representations or agreements were made they were merged in the deed and that complainant is barred by the statute of frauds.

Whatever may have been the original intention of the respondent, the land had not been restricted when the complainant purchased and thereafter no consistent scheme to restrict was followed. A much larger number of lots were sold free from restrictions than were conveyed subject to

restrictions. Respondent's land never became restricted by reason of any scheme to restrict. Whether the parol agreement to restrict could be proved by parol evidence, providing that nearly all of the conveyances had been made subject to the same or substantially the same restrictions, we do not decide.

The complainant argues that she is entitled to relief on the ground of fraud, estoppel and part performance.

(1) The proof does not show and the complainant does not contend that actual fraud was committed by Brown or Deio in representing that the land either was or would be restricted. No relation of trust or confidence existed between the parties. In *Sprague* v. *Kimball*, 213 Mass. 380, the court said: "But the mere non-performance of an oral contract, within the statute which is pleaded, as in the case at bar, and where no relation of trust and confidence exists, does not constitute fraud."

Courts of equity sometimes grant relief on the ground of estoppel and part performance even when there was no fraud in the inception of the contract. For example, A. orally agrees to sell a house to B. for a stipulated sum and B., relying upon the oral contract, with full knowledge of A. enters upon the land and erects a house, whereupon A. changing his mind decides not to give B. a deed. In such case it is clear that a court of equity would decree specific performance notwithstanding the statute of frauds. A. knowing that B. was relying upon the oral contract permitted B. to expend his time and money in constructing a house on A.'s lot. A. would be estopped to set up the statute of frauds thereby preventing proof of the contract because such conduct would be fraudulent. The case would be lifted out of the statute of frauds. His conduct is an admission that a contract existed between the parties. But equity will not grant relief in all cases where it would appear to be fraudulent to set up the statute of frauds. In the case suggested for illustration there is evidence to aid the court outside of the story of the complainant and his witnesses. The house is visible and tangible evidence that the parties

have entered into a contract. The court will inquire into its terms and compel the vendor to comply with his part of the oral agreement.

The complainant argues that the payment of the purchase price of the lot constituted such a part performance as will entitle her to relief in equity; also that the expenditures of money in the erection of the house made with knowledge of Brown estopped the respondent to set up the statute of frauds.

The lot was purchased and the house erected because complainant and her husband desired a summer residence at Oakland Beach. It is as reasonable, at least, to assume that the house was erected for the purpose of occupancy by complainant and her family, and that Brown supposed it was being constructed for that purpose as it is to assume that the house was built because she relied on Brown's oral representations or promise. She built and occupied a house as has been done by millions of other persons who expected to obtain no right or interest in their grantor's remaining land. The complainant simply improved her own real estate. She made no expenditures or improvements on the grantor's remaining land on which she seeks to impose a burden. See *Peckham* v. *Barker*, 8 R. I. 17.

The court in *Sprague* v. *Kimball*, *supra*, at p. 384, used the following language: "Nor did the plaintiffs, on whom and not on the defendant the burden of part performance rests where this ground for relief is sought, by taking title, entering into occupation and making improvements on their own estates in reliance upon the parol agreement, acquire any legal or equitable interest in the defendant's remaining land"; citing *Caton* v. *Caton*, L. R. 1 Ch. 137; *Graves v. Goldthwait*, 153 Mass. 268, 269; *Low* v. *Low*, 173 Mass. 580, 582; *Sarkisian* v. *Teele*, 201 Mass. 596.

The equitable rule that part performance will take a contract out of the statute of frauds does not apply. This is not a suit to obtain or reform a deed. It is an attempt to enforce an oral agreement. The complainant's husband purchased a house lot and, upon payment of the purchase

price, received a deed which is a solemn instrument under seal intended to recite definitely and accurately everything which the grantee takes and is to enjoy in consideration of the purchase price. See *Pyper* v. *Whitman*, 32 R. I. 510; *Norton* v. *Ritter*, 121 App. Div. N. Y. 497; *Sprague* v. *Kimball*, 213 Mass. 380; *Squire* v. *Campbell*, 1 Myl. & Cr. 459.

These restrictions if established are negative easements in respondent's land. *Kenyon* v. *Nichols*, 1 R. I. 411; *Foster* v. *Browning*, 4 R. I. 47; *Green* v. *Creighton*, 7 R. I. 1; *Pyper* v. *Whitman*, 32 R. I. 510; *Sprague* v. *Kimball*, 213 Mass. 380, 100 N. E. 622; *Sargent* v. *Leonardi*, 223 Mass. 556, 112 N. E. 633; *Trustees* v. *Lynch*, 70 N. Y. 440; *Norton* v. *Ritter*, 121 App. Div. N. Y. 497.

Our statute of frauds and statute on "The Conveyance Of Estates" each forbid the establishing of an easement on parol testimony.

"No action shall be brought :—*First.* Whereby to charge any person upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof for a longer time than one year;" . . . "Unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." Gen. Laws, Chap. 283, § 6.

"Every conveyance of lands, tenements, or hereditaments, absolutely, by way of mortgage, or on condition, use or trust, for any term longer than one year, and all declarations of trusts concerning the same, shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land-evidence in the town or city where the said lands, tenements or hereditaments are situated." Gen. Laws, Chap. 253, § 2.

Each of the above statutes contains the word "hereditaments". An easement is a hereditament and an interest in land capable of creation or transfer only by operation of

law, or by grant or prescription. Words and Phrases (Second series) Vol. 2, page 213.

This question has been considered and determined in this State in the recent case of *Pyper* v. *Whitman*, 32 R. I. 510. The facts in said case were admitted to be true on demurrer. The case came to this court upon appeal from decree of the Superior Court sustaining the demurrer and dismissing the bill. The complainant purchased a tract of land from the respondent relying on a plat exhibited as the time of the sale which showed a contemplated street running along the back end of the property purchased by the complainant. This plat was extensively used by the respondent in advertising his land for sale. The plat was posted in several places in the vicinity. At the time of purchase the respondent represented to the complainant that all of the streets designated upon the plat would be laid out and opened for public use. The complainant relying upon these representations purchased the property and alleged that he paid a larger price therefor because of the fact that a street was laid out along the back end of the same as shown by the plat. There was no reference to the plat or to the street in question in the deed to complainant. The property was replatted by the respondent and the street in question was moved one hundred feet to the west leaving a row of house lots between complainant's property and the street. The bill prayed that the respondent might be compelled to lay out the street as shown on the original plat. The demurrer to the bill of complaint was sustained and upon an appeal the action of the Superior Court was affirmed. In considering the case this court said: "There being, then, no grant of a right of way by express terms by the deed, or by reference to the plat, no claim of a right of way acquired by implication by reason of any actual existing way in use as an apparent and continuous easement, and no claim of a right of way by necessity, we are unable to find that the complainant has acquired any right of way in Conimicut avenue (so-called) merely by the exhibition of a plat to him

prior to the sale of the land to him, on which plat there was a street delineated and shown under the name of Conimicut avenue."

The only distinctions that can be drawn between the case of *Pyper* v. *Whitman* and the case now under consideration is that the former case involved the consideration of what might be termed a "positive easement," viz., a right of way, and the present case concerns a negative easement, viz., a restriction upon the land of the respondent company and it does not appear in *Pyper* v. *Whitman* that the complainant erected a house on the land. These distinctions are immaterial. The second distinction has been considered above. The evidence in *Pyper* v. *Whitman* was far stronger as to the character of the representations alleged to have been made than in the present case and the added element was present in that case of a plat duly laid out and used extensively for advertising purposes. To this extent there was a written or rather printed paper which was some evidence of what was the original intention of the parties. In the present case we have no evidence of any tangible nature by which the fact (if it is a fact), that representations were made by the respondent's agents, can be established. To supplement the oral testimony of the complainant, her husband and two other witnesses—each testifying to different conversations held at different times with the company's treasurer—we have nothing but a plat on which a pencil mark has been drawn around certain house lots by some person at some time. We are aware of the fact that in some jurisdictions there are cases which appear to be opposed to the doctrine laid down in *Pyper* v. *Whitman*, *supra*, but we think that our conclusions are not only founded on the better reason but are supported by the great weight of authority. *Pyper* v. *Whitman*, 32 R. I. 510; *Norton* v. *Ritter*, 121 N. Y. App. Div. 497; *Sprague* v. *Kimball*, 213 Mass. 380; *Squire* v. *Campbell*, 1 Myl. & Cr 459.

In *Hall v. Solomon*, 61 Conn. 476, each of several purchasers, including defendant, entered into a parol agreement

with the grantor, "that no portion of the premises so sold should be used for the sale of intoxicating liquors. This agreement was in each case a part of the consideration of the sale." The court evidently found that the whole tract had been restricted and that each lot owner, when he purchased, understood and agreed that his lot would be restricted. Upon complaint of grantor and other lot owners, the defendant was enjoined. The court found that the oral agreement was not an agreement for the sale of an interest in or concerning real estate. We have already stated that the restrictions contended for in this case are easements and interests in land. The court in *Hall* v. *Solomon* cited *Tallmadge* v. *East River Bank*, 26 N. Y. 105. The latter case is also cited in the complainant's brief in this case. The language used in *Norton* v. *Ritter*, *supra*, namely, "The agreement was deemed valid in *Tallmadge* v. *East River Bank* (26 N. Y. 105) whether correctly or not" indicates that there was at least a question in the mind of the New York court whether the latter case was correctly decided.

We find that the complainant is not entitled to have the restrictions contained in the deed to her husband imposed upon the respondent's house lots.

It appears in evidence that a "plat office" building and two other small buildings, used as stores are located within the street lines at the junction of Warwick avenue and Oakland Beach avenue. Counsel for respondent admitted in argument that respondent was bound to remove all buildings under its control which were located within the street lines. For a long time the respondent in connection with its business used the "plat office." Mr. Ham testifies that Brown, the respondent's treasurer, leased to tenants the two small store buildings. The complainant is entitled to a decree for the removal of these buildings.

On July 7, 1919, at ten o'clock A. M., parties may present decree in accordance with this opinion.

George F. Troy, for complainant.

Wilson, Churchill & Curtis, for respondent.

G. W. McNEAR, INC. vs. AMERICAN & BRITISH MFG. CO.

JULY 10, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Combinations in Restraint of Trade. Anti-Trust Act.*

Although a contract is to be performed in a particular State, yet if it is part of an illegal combination to secure control of a product and raise its price to all buyers in the United States, it is within the prohibition of the anti-trust act.

(2) *Combinations in Restraint of Trade. Conflicting Instructions in Charge.*

The issue in an action being whether or not the contract was part of a conspiracy between the parties to obtain a monopoly of a commodity and sell it at an unreasonable profit in violation of the common law, of the Sherman anti-trust act and of the statutes of the State, the court in one portion of the charge submitted to the jury the question of whether or not there was between the parties an illegal combination to create a monopoly; in another portion it took from them the issue of illegal combination by instructing them that there was no evidence of a conspiracy between the parties to restrain trade.

Held, that, in order to justify the finding of a conspiracy it is not necessary that the proof should be by direct evidence, but the jury may base such finding upon inferences fairly to be drawn from the facts and circumstances in evidence when such inferences amount to more than a conjecture and are of such a conclusive nature as to furnish the burden of proof required of the defendant in the case.

Held, further, that the issue of illegal combination should have been submitted to the jury, and the charge that there was no evidence of an illegal combination to create a monopoly constituted reversible error which was not cured by the contrary instructions in the general charge.

(3) *Contracts in Restraint of Trade.*

The illegality in a contract in restraint of trade consists in the intent to establish a monopoly and to control prices and the plan of the parties for gathering in the profit is merely an unimportant detail.

(4) *Conflicting Instructions. Reversible Error. New Trial.*

When contrary instructions are calculated to confuse and mislead a jury they constitute reversible error. It cannot be left to the jury to reconcile conflicting statements of law and it is impossible for the appellate court to determine in accordance with which of two inconsistent statements their verdict has been reached.

(5) *Contracts in Restraint of Trade. Instructions to Jury.*

Instructions that the Anti-Trust Statute does not apply to an act between private parties unless the contract sued on itself contains provisions in violation of that statute and that "there are no provisions in the contracts in suit which violate any statute against restraints in trade and monopolies,"

took from the jury the issue of whether or not the contracts were invalid by reason of the provisions of the anti-trust act and constituted reversible error, for such contracts should be found to be illegal if they were entered into in furtherance of a combination which was itself illegal under the Act, although the contracts on their face contained no provision indicating such illegality.

(6) *Contracts in Restraint of Trade. Illegality as a Defence.*

Where the issue was whether or not the contract was part of a conspiracy between the parties to obtain a monopoly, refusal to charge that "if you find from the evidence that the contracts sued upon were entered into as a part of a scheme to artificially raise the price of quicksilver, then your verdict must be for the defendant" and "if the plaintiff knew the purpose for which the defendant was purchasing the quicksilver and that purpose was so to control the market that it could raise the price of quicksilver, the verdict must be for the defendant" was error, for courts will not enforce contracts tainted with illegality, and an illegal combination of which the contract was a part may be set up as a defence to its enforcement.

Vincent, J., dissents.

Assumpsit. Heard on exceptions of defendant and sustained.

Sweetland, J. This is an action in assumpsit brought by the plaintiff, a corporation organized under the laws of California, against the defendant, a corporation organized under the laws of New York and doing business in the city of Providence, to recover damages for the alleged breach of two contracts in writing, dated respectively January 28, 1916 and February 9, 1916.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff for $124,295.94, being the full amount of the plaintiff's claim with interest. The defendant duly filed its motion for new trial which was denied by said justice. The case is before us upon the defendant's exception to this action of said justice and upon certain exceptions taken by the defendant in the course of the trial.

The declaration alleges that on January 28, 1916, the plaintiff entered into a written contract with one Murray Innes by which it agreed to buy and said Innes agreed to sell 240 flasks of quicksilver at $275 a flask; and also that

on February 9, 1916, by another contract in writing the plaintiff agreed to buy and said Innes agreed to sell the full output of the "Oceanic" quicksilver mine owned by said Innes for six months from the date of the contract at $275 per flask. Said Innes reserved from said full output 25 flasks, sold to another concern, and the 240 flasks which were the subject of the contract of January 28, 1916. The declaration further alleges that by written agreements the plaintiff assigned said contracts to the defendant, which assumed them; that the defendant refused to accept or to pay for any of the flasks of quicksilver delivered under said contract; that the plaintiff has been obliged to receive and pay for them and has sold said flasks at auction at a loss of $111,606.93, which with interest was the amount of the verdict. The defendant in addition to the general issue set up a number of pleas in defence to the effect that said contracts, and the assignments of the same to it, were part of conspiracy between the plaintiff and itself to obtain a monopoly of quicksilver and sell it at an unreasonable profit in violation of the common law, of the statutes of California, and of the act of Congress known as the Sherman Act. The defendant also pleaded that the contracts sued upon were *ultra vires* the defendant.

It appears that the plaintiff was an old established concern of San Francisco carrying on extensively the business of a general shipping and commission merchant on the Pacific coast, handling merchandise in large quantities by carload and shipload lots, buying and selling on its own account and as agent for others, engaged in chartering cargo ships, "shipping to the Orient and Europe, merchandise of any kind," and having "a large grain warehouse in California.". The active managers are George W. McNear, Jr., and John A. McNear. The business was founded and built up by their father, G. W. McNear, Sr., and was incorporated in 1908. The finding is warranted that the transactions involved in the case before us were carried on for the plaintiff by John A. McNear, its Vice-President, and that on the part of the

defendant these transactions were conducted by its agent, Joseph H. Hoadley.

Quicksilver or mercury is used in making certain chemical and medicinal drugs, in the manufacture of certain kinds of paint, of thermometers and other articles, and much more extensively in the manufacture of fulminate of mercury. This latter substance is indispensable in the manufacture of cartridges and the primers of other ammunition. With the beginning of the late war the demand for quicksilver increased. Its production in this country was chiefly in California, some was produced in Texas and small quantities in other western states. Outside of this country the chief sources of supply were from mines in Spain and Austria. The war closed the Austrian mines to the world outside the Central European powers. The British controlled the output of the Spanish mines and had placed an embargo upon the exportation of quicksilver from Great Britain. Quicksilver is sold on the market, contained in iron cases about twelve inches high with a screw stopper. Each case contains seventy-five pounds of quicksilver. These cases are called flasks and the market price is fixed per flask.

John A. McNear met Joseph H. Hoadley in New York in December, 1916. Mr. and Mrs. Hoadley entertained Mr. and Mrs. McNear at dinner one evening and during that entertainment, as the plaintiff claims, Mr. Hoadley intentionally "planted" in the mind of Mr. McNear that he had intimate relations with some body of men which he called indefinitely the Russian syndicate. Throughout the testimony reference is made to this group as the "Russians," the "Russian syndicate" and the "Russian representatives." After the return of Mr. McNear to California, on January 6, 1916, he received the following telegram from Mr. Hoadley in New York: "Put yourself in touch with controlling interests to purchase output for 1916 of quicksilver of following producers act quick wire fully 18 East Eighty Second Street will care for your interests want number of flasks price and monthly deliveries get ten days to accept New

Idria Mines San Benito County New Almaden and Guadaloupe Santa Clara Oceanic San Luis Obispo St. John Solano Oathill Napa Mercy Fresno Great Western Lake County Parkfield Monterey Wondeer Hernadez San Benito Cambria Karl San Luis Obispo Los Prietes Santa Barbara Phœnix Santa Clara Great Eastern Sonora Reed Colo." Mr. McNear immediately began the study of the whole quicksilver situation, acted as he was requested in the telegram of January 6, and reported to Mr. Hoadley. He found that the yearly output of quicksilver in this country was between 18,000 and 20,000 flasks; that the largest source of supply was California which produced about 15,000 or 16,000 flasks per year; and that the list of mines mentioned in the telegram of January 6, 1916, embraced about all the large producers of quicksilver. Following the telegram of January 6, 1916, there were a large number of communications between Mr. McNear and Mr. Hoadley in regard to securing control of the output of various mines for 1916. These communications were almost daily, to some extent they were by letter but largely by means of telegrams and by conversations over the telephone. On January 6, 1916, the market price of quicksilver was about $150. per flask. The price rose rapidly thereafter until it reached $275. and $300. per flask between January 26 and February 15. As a result of the negotiations of Mr. McNear, the plaintiff procured an agreement for the sale to the defendant of the total output of the New Idria mine, the largest producer in California. Its estimated production was 7,500 flasks per year with a possible output of 10,000 flasks per year. This contract, however, did not become effective through the failure of the defendant later to furnish the required guaranty of performance. Mr. McNear also negotiated with the owners of other mines and progress was made toward securing options upon the output of a number of smaller mines. Mr. McNear through his dealings with Mr. Murray Innes obtained the contracts which are involved in this suit for the product of the Oceanic mine, the third largest producer in California. Mr. Innes

refused to execute these contracts with the defendant without a satisfactory guaranty that the contracts would be kept by the defendant. After a series of promises on the part of the defendant to furnish a satisfactory guarantor, which promises it did not keep, in order to prevent a failure of the negotiations the plaintiff took the contracts in its own name and was allowed a rebate or concession on the price of the quicksilver by Mr. Innes. According to the testimony the facts relating to the rebate were communicated to the defendant and approved by its agent Mr. Hoadley. The defendant received assignments of these contracts and assumed the obligation of receiving the quicksilver from the seller and paying for the same. According to the testimony soon after this time, upon the urgent request of certain large manufacturers of ammunition who were users of fulminate of mercury, the British government permitted two shipments of quicksilver to be made to this country of about 2,000 and 1,000 flasks, respectively. These shipments resulted in bringing about a rapid decline in the market price of quicksilver which in the month of August, 1916, reached $68 per flask. For the rest of 1916 the price fluctuated between $70. and $80. per flask. The defendant failed to keep its agreements named in the assignments of said contracts and the plaintiff was obliged to receive and pay for the output of the Oceanic mine as delivered, which quicksilver it afterwards sold at a loss.

The principal issue between the parties at the trial was that raised by the defendant's plea, that said contracts were entered into by the plaintiff and the defendant in furtherance of an illegal combination to acquire all or a large part of the quicksilver production for the year 1916, for the purpose of creating a monopoly therein, thus acquiring the power to control the price of that commodity, with the intention of enhancing its price to their own profit and to the detriment of the public. If the effect of the monopoly aimed at by such combination or conspiracy would be to check or to hinder the natural free flow of trade and com-

merce between the states it would be in violation of the act of Congress known as the Sherman Act. *United States* v. *Reading Co.*, 183 Fed. 427; *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211. The Sherman Act provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal." The contracts sued upon were to be performed in California yet if the contention of the defendant is established, that they were part of an illegal combination (1) to secure control of the product and raise the price of quicksilver to all buyers in the United States, such contracts are within the prohibition of the Anti-Trust Act. *Loewe* v. *Lawlor*, 208 U. S. 274; *United States* v. *Reading Co.*, 226 U. S. 324.

As to the issue of illegality it is the contention of the plaintiff that the transactions between these parties, with reference to the purchase of the 1916 output of quicksilver, were of such a nature that the only inference properly to be drawn from them is that the plaintiff was unaware of any illegal purpose on the part of the defendant; that if the defendant had such illegal intent the plaintiff was not a party to it or combined with the defendant to promote it; that the acts and purposes of the plaintiff were plainly those of an agent arranging for the purchase of a commodity on behalf of a principal who is seeking to supply the legitimate requirements of a ready customer or customers, viz., the Russian government and perhaps the Canadian government. It is the contention of the defendant that the evidence warranted the finding, and that the jury should have found, that the purpose of the defendant was to create an illegal monopoly in quicksilver; that the plaintiff was well aware of such purpose and combined with the defendant to promote it with the expectation of sharing in the profits which should accrue from its successful accomplishment.

In his general charge to the jury said justice, after calling to their attention the defendant's claim of a conspiracy between the plaintiff and the defendant and after instructing the jury as to what constituted a conspiracy, and as to the right of an owner of property to fix the price at which he will sell the same, continued as follows: "but there must be a combination between two or more persons in order to have a conspiracy, and so you take the testimony relating to the communications from Hoadley to McNear and from McNear to Hoadley and determine from the evidence whether or not there was a conspiracy between them in view of what happened between these gentlemen and the American & British Company." At the request of the defendant said justice charged the jury, reading from the defendant's first request, as follows: "1. If you find from the evidence that the plaintiff and defendant conspired to create a corner in quicksilver, then your verdict must be for the defendant." Later, upon the request of the plaintiff, he instructed the jury as follows, reading to them from the plaintiff's third request to charge: "3. That there is no evidence in the case that the plaintiff knew of or had any scheme to monopolize quicksilver and that if Joseph H. Hoadley or the defendant had any such scheme in his mind which was illegal, which was not communicated to the plaintiff's agent, such illegal scheme in the mind of Hoadley could not be imputed to the plaintiff, the McNear Company." And further instructed them, reading from the plaintiff's twenty-third request to charge: "23. There is no evidence of any conspiracy or agreement between the plaintiff and the defendant to control or fix prices or to restrain trade." Later, upon his own motion, the court instructed the jury as follows: "I think, Gentlemen, I have covered the provisions of the law relating to this case and now it is for you to take the case and consider the evidence under the law as stated to you by the Court, and if you come to the conclusion that the defendant has not shown by a fair preponderance of the evidence that there was a contract or that

these contracts were made in conspiracy for the purpose of advancing the price of quicksilver on account of the defendant and the plaintiff obtaining a monopoly on it, or that the contracts were not in contravention of the Statute Laws of the United States, the Sherman Act or the laws of the State of California, why you will return a verdict for the plaintiff for the sum stated in the amended Bill of Particulars which has been filed as evidence in this case." Still later, after an inquiry from counsel for the defendant the justice instructed the jury as follows: "All the requests to charge which I have read to you, both for the plaintiff and for the defendant, are granted as read to you."

(2) We have given very careful consideration to these instructions and they appear to us to be without doubt contradictory and misleading. In one portion of his charge he submits to the determination of the jury the question of whether or not under the evidence there was between the parties an illegal combination to create a monopoly and restrain trade; in another portion he takes from them the issue of illegal combination by instructing them that there was no evidence of a conspiracy between the parties to fix prices or to restrain trade. If in fact there was no legal evidence in the case which warranted the finding of a conspiracy, then although the charge was contradictory the defendant has not been prejudiced thereby and it would only appear that some portion of the instructions was more favorable to the defendant's claim than the evidence would justify. We think, however, that the issue of illegal combination should have been submitted to the jury. In order to justify the finding of a conspiracy it is not necessary that the proof should be by direct evidence. The jury may base such finding upon inferences fairly to be drawn from the facts and circumstances in evidence, when such inferences amount to more than a conjecture and are of such a conclusive nature as to furnish the burden of proof required of the defendant in this case.

In *Marrash* v. *United States*, 168 Fed. 225, the court said, at page 229: "It is argued that there was no direct evidence of conspiracy and the circumstantial evidence was insufficient to warrant a conviction. . . . It is not necessary to establish the conspiracy by direct evidence. Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine. It is enough that they have a common purpose to defraud and that they act together for that purpose.

"It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common unlawful design apart from and unknown to the others. It is manifest, therefore, that in many and, indeed, in most cases of conspiracy the corrupt agreement is proved by circumstantial evidence." *Alaska S. S. Co.* v. *International Longshoreman's Ass'n.*, 236 Fed. 964; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Newton*, 52 Fed. 275; *In Re Friedman*, 164 Fed. 131.

Different minds might reach different conclusions as to the inferences reasonably and fairly to be drawn from the evidence, but it is clear to us that it cannot be said as a matter of law that there was no legal evidence before the jury upon which they could find a conspiracy to obtain an illegal monopoly with the intent to restrain trade. The plaintiff has urged that Mr. McNear was flattered by the social attentions paid to him by Mr. Hoadley during the former's visit to New York and that in some way by what is termed the "glamour" of Mr. Hoadley's personality he was deprived of the power of understanding Mr. Hoadley's purposes. If such influence should be found to exist the inference might not appear unreasonable to some minds that for this reason Mr. McNear might be more readily inclined to follow the lead of Mr. Hoadley and to have confidence in the ultimate success of his schemes. Mr.

McNear appears to have been a man of long experience in large affairs. He entered actively into the business of his father in 1882; for a number of years he had charge of the Liverpool office of the concern. From all the testimony it might be found that his business experience had been as great as that of Mr. Hoadley, and that he undoubtedly had knowledge of the methods of speculation, the nature of "corners," the power to enhance prices which comes from the complete or partial control of a commodity the demand for which is greater than the supply, and that he was familiar with the means usually employed to acquire such control of a commodity and thus to obtain the unreasonable profit which such control made possible. If found to be a man of that experience and knowledge it would not be unreasonable to ascribe to him an understanding of the probable purport of many of the circumstances of this transaction. There can be no question that he undertook to assist the defendant in obtaining as far as possible control of all the quicksilver production for 1916 in California and that he was informed that Mr. Hoadley desired to acquire control of that produced in other states. It is urged that he supposed that the control was for the legitimate purpose of supplying the need of the Russian government. There is evidence from which it might be found that this was not so, and that Mr. McNear had ample notice by telegrams and telephone communications from Mr. Hoadley that the latter had no contract, agreement or understanding with any representatives of the Russian government; but that without success he was actively engaged in trying to obtain some agreement whereby he might sell to such representatives the quicksilver over which he had acquired control at the greatly advanced prices which his manipulations had produced; and it might be found that it was from the Russians, equally with the others who might need quicksilver, that the defendant was looking to obtain the great and unreasonable profit which would arise from a complete or partial control of the limited supply of that commodity. It is obvious that the profits of

such an illegal monopoly as is alleged can only be secured by disposing of the commodity acquired at the enhanced price which the monopolist is in a position to demand. Such prices can be obtained, if at all, from those whose necessity compels them to purchase. It is represented that the Russians were in great need of quicksilver; they might be regarded as the readiest and most convenient victims; but the scheme, if it existed, is no less in restraint of trade and illegal because its authors hoped to receive a large part of their unreasonable profit from the Russians rather than from the thermometer or medicine manufacturers or the American makers of ammunition. The illegality consists in the intent to establish a monopoly and to control prices.

(3) The conspirator's plan for gathering in the profit, in the contemplation of law, is merely an unimportant detail. It appeared that New York is the market for quicksilver and that market fixes the price throughout the country. It was in evidence that while Mr. McNear was working in California to obtain control of the supply Mr. Hoadley within the knowledge of Mr. McNear was endeavoring to sustain the price of the commodity in New York and it might be found that his acts were inconsistent with those of an agent who in good faith was endeavoring to purchase in order to supply the legitimate needs of a ready customer. In one of his telegrams to Mr. McNear, Mr. Hoadley said, referring to his own actions in New York, "Can stop purchasing if advisable but wish to sustain price unless it interferes with your work to control product." Mr. Hoadley kept Mr. McNear informed as to his success in securing all "spot," or quicksilver that was on the New York market. Mr. McNear in one of his letters says: "With the position I have put you in on the New Idria contract and the Oceanic and with the new Almaden tied up as you say it strikes me that you hold a very strong position, in fact, that you have the matters in your hands." On February 26, 1916, he telegraphed as follows to Mr. Hoadley: "Wire me confidentially without fail how matters stand. Inside reports

here very unfavorable to market. Have done my part for you and if something goes wrong you should give me inside information to protect my position." In explanation of this telegram he testified that the unfavorable inside reports to which he referred were that "the market was weak." To this telegram Mr. Hoadley replied, "Answering. Learned that great activity of strong interest to induce foreign importations so prefer a market weak at present. All matters going to entire satisfaction. Have closed with St. John Mining Company same basis as Idria." It was soon after this that the two British shipments were made to this country. Mr. McNear also testified that at one time Mr. Hoadley sent him a wire that he was putting the price up. "He didn't tell me what for and I didn't ask him." Mr. McNear also testified as follows: "774 Q. Did you and Mr. Hoadley talk over what you expected to be the condition of the market in consequence of these purchases that you made? A. Why, Hoadley came through and telephoned several times, one or two times anyway, with very flighty ideas. 745 Q. How high did he tell you he expected the market to go? A. I think he got as high as 500 or 600." Mr. McNear also testified with reference to his compensation as follows: "555 Q. What did you expect to get for your services in this matter? A. Relying upon Hoadley's first wire, I never knew exactly what I would get but something very substantial from his promises to me. In fact, the satisfaction he had expressed for what I had done in getting the New Idria contract, I asked what I was to get out of it and he says, 'leave it to me. You will be very well treated.' So I expected more than the ordinary commission."

There are other facts and circumstances appearing in the correspondence between the parties from all of which a jury might with reason conclude that a conspiracy existed between these parties; there are other circumstances which some minds might regard as strongly supporting the contention of the plaintiff. The case was one requiring a submission of the issues to a jury upon the conflicting evidence.

In our opinion the instruction to the jury which the court gave in response to the plaintiff's third and twenty-third requests, quoted above, constitute reversible error, and the error is not cured by the contrary instructions in the judge's general charge. This court has recently considered the case of *Greenhalch* v. *Barber*, reported in 104 Atl. 769. In that case in the Superior Court the trial justice had at different points in his charge instructed the jury as to the care required of the driver of an automobile in the circumstances of the case. In one portion of his charge he had given to the jury a proper statement of the law in that regard and in another portion his instruction as to the driver's duty was erroneous. The court held that these conflicting and confusing instructions constituted error and entitled the defendant to a reversal and a new trial. This is in accord
(4) with the established doctrine that when contradictory instructions are calculated to confuse and mislead the jury they constitute reversible error. It cannot be left to the jury to reconcile the conflicting statements of law; and it is impossible for the appellate court to determine in accordance with which of two inconsistent statements their verdict has been reached.

Upon the plaintiff's fifth and sixth requests to charge the justice instructed the jury as follows: "5. That the federal
(5) statute does not apply to an act between private parties unless the contract sued on itself contains provisions in violation of that statute. 6. That there are no provisions in the contracts in suit which violate any statute against restraints in trade and monopolies." By these instructions the justice took from the consideration of the jury the issue of whether or not said contracts were invalid by reason of the provisions of the Anti-Trust Act. The instruction thus given was reversible error. Such contracts should be found to be illegal if they were entered into in furtherance of a combination which was itself illegal under the provisions of the act, although the contracts on their face contain no provision indicating such illegality. In *U. S.* v. *Reading Co.*,

226 U. S. 324, the court said: "It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. But a series of such contracts if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other states and thereby suppress competition in prices between their own output and that of the independent operators would come plainly within the terms of the statute and as parts of the scheme or plot would be unlawful." In *Darius Cole Transportation Co.* v. *White Star Line*, 186 Fed. 63, the court said: "The federal anti-trust law forbids every contract, combination or conspiracy which directly or necessarily operates in restraint of trade between the states without regard to the form which the transaction takes. Can it make any difference with the result that the lessor did not propose the insertion of stipulations against competition if he knew that the object of the lessee was to effect a continuance of the monopoly which had been maintained by the participation of the parties up to that time and that such would be its effect and approved of such result knowing that it, as lessor, was receiving a rental which could only be paid because of the securing of such monopoly." *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed, 721; *Continental Wall Paper Co.* v. *Louis Voight*, 212 U. S. 227; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

(6) The refusal of said justice to charge the jury in accordance with the defendant's seventh and eighth requests to charge was error. These requests are as follows:

7. "If you find from the evidence that the contracts sued upon were entered into as a part of a scheme to artificially raise the price of quicksilver then your verdict must be for the defendant."

8. "If the plaintiff through John McNear knew the purpose for which Hoadley or the defendant was purchasing the quicksilver and that purpose was so to control the market

that it could raise the price of quicksilver the verdict must be for the defendant. (Tr. p. 856.)

These requests are correct statements of the law. The plaintiff contends that individuals can not set up the Sherman Act as a defense against such contracts as are here sued upon. That contention is unsound. Courts will not enforce contracts which are tainted with illegality. In *Continental Wall Paper Company* v. *Voight and Sons Co.*, 212 U. S. 227, the court said: "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law." *McMullen* v. *Hoffman*, 174 U. S. 639; *Bement* v. *National Harrow Company*, 186 U. S. 70; *Oscanyan* v. *Arms Company*, 103 U. S. 261. The plaintiff claims that its position in this regard is supported by *Wilder* v. *Corn Products Refining Company*, 236 U. S. 165. That case is not in point and its language does not justify the plaintiff's conclusion that the United States Supreme Court after some uncertainty as to its position has in the *Wilder* case finally decided that individuals could not set up the act as a defense against such contracts as are here sued upon. As we have said above the question should have been submitted to the jury as to whether there was an illegal conspiracy between these parties to create a monopoly and to restrain trade contrary to the provisions of the Sherman Act. If it should be found that there was, then the contracts sued upon were clearly in furtherance of that conspiracy, and the illegality by reason of the violation of the Federal statute is inherent in the contracts. The United States Supreme Court has never indicated any uncertainty in its position that in such circumstances the illegal combination, of which such con-

tract was a part, might be set up as a defense to its enforcement, although the illegal scheme did not appear in any of its provisions. And in *Wilder* v. *Corn Products Co.* that position of the court was plainly set forth. That case is authority for the proposition, stated in its headnote, that "a party cannot assert as a defense to a suit for money otherwise due under a contract, not inherently illegal, the fact that the party otherwise admittedly entitled to recover is an illegal combination under the Anti-Trust Act."

The defendant has included in its bill of exceptions about three hundred which relate to rulings of said justice made in the course of the trial upon the admission and exclusion of testimony. We have examined them. Most of them are upon the refusal of said justice to permit the defendant to ask certain questions in cross-examination of the plaintiff's witnesses. In many instances we are of the opinion that there is merit in the exception, but none of them relate to matters which are vital in the case, and in view of our determination upon other exceptions, we will not extend the opinion by a discussion of this large number of rulings. They all relate to rather elementary principles with regard to the latitude properly allowed in the cross-examination of witnesses; they indicate that in a number of instances the defendant was unduly restricted in such examination.

All exceptions which relate to the defendant's claim that the contracts of the defendant were *ultra vires* are overruled. The powers given to the defendant by its charter are clearly broad enough to authorize the making of such contracts.

The exceptions which concern the defendant's claims that said contracts are not enforceable against the defendant because the forms of guaranty attached thereto were not executed are without merit.

The testimony of Joseph H. Hoadley given at a former trial, in the circumstances appearing in the transcript was properly excluded.

We are of the opinion that the defendant's exceptions should not be sustained to the judge's rulings excluding the

declarations of Hoadley to the witness Beach and evidence as to the acts of Hoadley at the time of the formation of the Mercury Products Company. The defendant urges that after the introduction of evidence of a conspiracy the acts and declarations of each conspirator in pursuance of its objects are admissible against all. We have already indicated that in our opinion there was sufficient circumstantial evidence of conspiracy to require the submission of the question of its existence to the jury. We think, however, that in the state of the proof and the uncertainty as to the connection of the declarations and the acts in question to the conspiracy alleged in this case, said justice was acting well within his discretion in excluding such testimony from the jury.

As to the defendant's exceptions to rulings relating to the alleged bad faith of the plaintiff in receiving rebates on the price of the quicksilver which is the subject of the contracts sued upon, it is the uncontradicted testimony that full disclosure was made by the plaintiff's agent to the defendant's agent with regard to these rebates. The allegations of bad faith are unsupported.

The justice's rulings with regard to the admission of evidence of damages accruing subsequent to the date of the writ are without error as are his rulings as to the allowance of interest in case the plaintiff should be permitted to recover the principal of its claim.

The defendant's exceptions numbered 239, 240, 254, 256, 257 and 274 in its bill of exceptions are sustained; all of its other exceptions are overruled.

The case is remitted to the Superior Court for a new trial.

Vincent, J., dissenting. I am unable to agree with the majority of the court in sustaining the exceptions of the defendant numbered 239, 240, 254, 256, 257 and 274.

While the defendant's requests to charge, covered by exceptions numbered 239 and 240, embrace substantially correct statements of the law they had been fully covered

in the charge already given and the court was not in error in refusing to give them undue prominence through repetition.

The remaining four exceptions relating to portions of the charge given upon the requests of the plaintiff, numbered 3, 5, 6 and 23, I will discuss briefly.

The third request is, "That there is no evidence in the case that the plaintiff knew of or had any scheme to monopolize quicksilver and that if Joseph H. Hoadley or the defendant had any such scheme in his mind which was illegal, which was not communicated to the plaintiff's agent such illegal scheme in the mind of Hoadley could not be imputed to the plaintiff, the McNear Company."

The twenty-third request is, "There is no evidence of any conspiracy or agreement between the plaintiff and defendant to control or fix prices or to restrain trade."

The defendant argues that the charge of the third request took from the jury the question whether the plaintiff knew of or had any scheme to monopolize quicksilver and that the charge of the twenty-third request was virtually telling the jury to find for the plaintiff upon the question of the restraint of trade and that these requests as charged were inconsistent with, and contradictory of, another portion of the charge which is, "And so you take the testimony relating to the communications from Hoadley to McNear and from McNear to Hoadley and determine from the evidence whether or not there was a conspiracy between them in view of what happened between these gentlemen and the American and British Company."

The two portions of the charge covered by the third and twenty-third requests may be considered separately. Taking the first part of the third request, "That there is no evidence in the case that the plaintiff knew of or had any scheme to monopolize quicksilver" there is certainly no evidence that the plaintiff had originated or adopted any such scheme. The defendant says that the plaintiff knew of such a scheme and in substantiation of that statement makes

reference to the testimony of John F. McNear that he knew Hoadley was trying to buy up all the output and that he was doing all in his power to help him. To treat this testimony fairly it must be considered in connection with other testimony in the case. In the first place the purchase of or the attempt to purchase the entire output of the California mines could not be considered as an attempt to obtain a monopoly in restraint of trade and for the purpose of unduly enhancing prices if the object of the purchase was legitimate. This admission of McNear that he was trying to help Hoadley buy up the California output, in view of other undisputed facts, cannot be characterized as evidence showing knowledge on the part of McNear that Hoadley was engaged in conducting an illegal enterprise and there was no evidence that McNear participated in or had any knowledge of any plan on the part of Hoadley to fix the selling price of quicksilver at a figure which would operate as a restraint of trade.

The object of Hoadley as it was again and again brought to the attention of McNear was to obtain quicksilver for the Russian and Canadian governments and the quantity which Hoadley contemplated acquiring for that purpose was within the limits of their reasonable requirements. To say, as the defendant does, in substance, that because McNear knew that Hoadley was trying to get the California output he must have known that it was for an illegal purpose, is assuming something which the testimony does not warrant. I think the trial court was correct in saying that there was no evidence that the plaintiff knew that Hoadley was trying to create a monopoly for illegal purposes.

As to the latter part of the third request it is unnecessary to argue that any illegal scheme in the mind of Hoadley which was not communicated to the plaintiff or to its agent John F. McNear could not be imputed to the plaintiff. The defendant also further argues that the latter portion of the third request took away from the jury any consideration as to whether it might be inferred from facts and circumstances that the plaintiff's agent knew of an illegal scheme

although Hoadley had not directly communicated it. This question however was distinctly left to the jury as I shall have occasion to point out later.

The meaning of the twenty-third request seems to me to be clear. Conspiracy has been defined to be a combination of persons for an evil purpose; an agreement between two or more persons to commit in concert some reprehensible, injurious or illegal act. There was no evidence of any such agreement between the plaintiff and the defendant. The court had already pointed out to the jury that the plaintiff and defendant were both corporations and that they could only act through authorized agents. The language of the court that there was no evidence of any conspiracy or agreement to fix prices, etc., between the plaintiff and defendant was strictly correct. That the court was referring to the parties as corporations is obvious. That such was the meaning of the court is clearly evidenced by a later portion of the charge in which the court submitted to the jury the question, "Was there an agreement between the plaintiff and the defendant, these two corporations, acting through their respective agents to do an unlawful act" and further on the court charged the jury to "take the testimony relating to the communications from Hoadley to McNear and from McNear to Hoadley and determine from the evidence whether or not there was a conspiracy between them in view of what happened between these gentlemen and the American & British Company."

Again the court said, "it is for you gentlemen to determine if there was a conspiracy between the McNear Company and the American & British Company for that purpose and in violation of the law."

Still later the court said, "If you find from the evidence that Joseph H. Hoadley and John A. McNear conspired to artificially raise the price of quicksilver in this country or any state thereof, and the contracts sued upon were executed in furtherance of such conspiracy, then your verdict must be for the defendant."

And finally the court said, "it is for you gentlemen to consider the evidence relating to those matters and to the excuse offered by the defendant, and, if the defendant shows by a fair preponderance of the evidence that it was justified in repudiating the contracts and in not going on with them or with either of them or both of them, then your verdict would be for the defendant."

So far as appears the only authority which was vested in Hoadley by the defendant was the negotiation of the contracts of January 28 and February 9 and the only evidence that the defendant conferred that authority is its acceptance of the transfer and its undertaking to assume all liabilities of the plaintiff thereunder which it later repudiated.

There is no inconsistency between these two requests, numbered three and twenty-three, and that portion of the charge wherein the court instructed the jury to take the testimony relating to the communications from Hoadley to McNear and from McNear to Hoadley and determine from the evidence whether or not there was a conspiracy between them, in view of what happened between these gentlemen and the American & British Company.

From the reading of the charge as a whole it is apparent that the trial court sought to distinguish between a conspiracy evidenced by an actual agreement between the parties and a conspiracy which might be inferred from their relations evidenced by the letters, telegrams and telephonic conversations which passed between Hoadley and McNear and to bring to the minds of the jury the precise question which, under the testimony, it was their province to decide, that is, Did the communications which passed between McNear and Hoadley show a conspiracy between the plaintiff and the defendant?

It must be remembered that these contracts were entered into between the plaintiff and defendant and not between the plaintiff and Hoadley. There is absolutely no direct evidence that the plaintiff and defendant conspired together and there is no direct evidence that Hoadley was endeavor-

ing to set up a conspiracy at the instigation of the defendant, with its knowledge or for its benefit. If there was such a conspiracy it must be determined by way of inference from facts and circumstances connected with the transactions carried on between McNear and Hoadley. The trial court in submitting the case to the jury explicitly stated to them no less than four times that the question of conspiracy must in determined by them after considering the testimony relating to the communications between McNear and Hoadley.

This instruction having been repeatedly given to the jury with such distinctness, I cannot see how any doubt or confusion could have arisen in their minds as to whether the question of conspiracy was left to them. There is nothing in the record suggesting that any such doubt or confusion existed and there was sufficient testimony upon which the jury might find the verdict which it did.

The majority opinion finds reversible error in that portion of the charge of the trial court relating to the Sherman Act. Assuming that the view expressed by the court was an erroneous one, it was harmless error under the circumstances of the case. As before stated the question of conspiracy, as evidenced by the various communications between Hoadley and McNear, was submitted to the jury and upon consideration of the evidence the jury found that there was no conspiracy. If there was no conspiracy then there could have been none under the Sherman Act and the exclusion of that Act from the jury would not be prejudicial to the defendant. The jury were left free to find conspiracy at common law or under the laws of California if, in their judgment, the evidence warranted such finding.

I think that the exceptions which the majority opinion sustains should be overruled and that the case should be remitted for judgment for the plaintiff on the verdict.

Charles F. Choate, Jr., Frank T. Easton, Greenough, Easton & Cross, for plaintiff.

Waterman & Greenlaw, for defendant.

DAVID SYME *et al. vs.* ARCHIBALD MCNEIL *et al.*

JUNE 24, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *New Trial.*

While the denial of a motion for new trial is a formal approval of a verdict, yet where it is evident from the decision of the justice that the verdict in the opinion of the trial court failed to do justice between the parties and would have been set aside had the court felt it was possessed of the power to do so, the conclusion of the justice cannot be given the weight and consideration to which it might otherwise be entitled.

ASSUMPSIT. Heard on exceptions of defendant and sustained.

VINCENT, J. This is an action in assumpsit brought to recover an amount alleged to be due to the plaintiff Syme on account of labor and materials furnished in the erection of a dwelling house situated at a place called Musicolony, in the town of Westerly, Rhode Island. The case was tried to a jury in the Superior Court and a verdict was rendered for the plaintiffs in the sum of $4,113.72. The defendants' motion for a new trial was denied. The case is now before us upon the defendants' exceptions to the rulings of the trial court, (1) refusing to strike out certain testimony, (2) to the refusal to direct a verdict, and (3) to the denial of the defendants' motion for a new trial.

On September 14, 1914, a contract in writing was entered into between Connor & Syme, contractors, and Archibald and Jean McNeil, whereby it was provided that the plaintiffs should erect, for the defendant Jean McNeil, a house at Musicolony in accordance with certain specifications which were made a part of said contract, at a total cost of $4,500.

From the date of the contract, September 14, 1914, to December 24, 1914, Connor appears to have had the active management, supervision and control of the work. On and after December 24, 1914, Connor seems to have vanished so far as his further connection with the work was concerned.

On the 20th of February, 1915, following the elimination of Connor, Syme and Mrs. McNeil entered into a new contract for the completion of the work, as follows: "This agreement entered into this 20th day of February, 1915, by and between Jean M. McNeil, of the city of Bridgeport, county of Fairfield and state of Connecticut, as party of the first part, and David Syme, of Westerly, Rhode Island, party of the second part.

WITNESSETH:

1. Both parties to this contract hereby agree that the contract made by and between Jean M. McNeil and Connor and Syme on the 14th day of September, 1914, shall be superseded entirely by this agreement and that each of the parties hereto shall not in any way hold each other liable in any manner upon the said contract or upon any of the circumstances arising out of the manner of the execution of the said preceding contract.

2. The party of the first part hereby promises and agrees to employ the party of the second part to complete the dwelling house which is being erected for the party of the first part on a plot of ground located in Musicolony, town of Westerly, state of Rhode Island and to pay him therefor the sum of six dollars ($6) per day for the supervision of the said work and for all work that he shall perform in the execution of this contract.

3. The party of the first part agrees to pay for all of the materials and labor which shall be used upon this work and to pay for them promptly upon their presentation to her with the O. K. of the party of the second part.

4. The party of the second part hereby agrees, in consideration of the promises and agreement hereinbefore set forth, to carry to completion the aforesaid building for the compensation of six dollars ($6) per day for every working day between now and the date of the completion of the said building.

5. The party of the second part hereby agrees to keep a record of all moneys expended, either for labor or for materials and to present correct bills for the same promptly to the party of the first part.

6. Both parties to this contract hereby agree that the said building shall be entirely completed not later than the first day of May, 1915.

7. Both parties to this contract agree that all of the trim used in said building shall be furnished by R. A. Sherman's Sons Company and that the same shall not exceed the sum of one thousand (1000) dollars and shall contain all such items as were specified in the statement on October 6, 1914 by the said R. A. Sherman's Sons Company to Bloodgood Tuttle.

In witness whereof the parties have hereunto set their hands and seals the day and date first above written.

JEAN M. MCNEIL
By ARCHIBALD MCNEIL.

DAVID SYME."

It will be observed that, by the terms of this agreement, especially the first clause thereof, the earlier agreement of September 14, 1914, between Connor and Syme and the defendant Jean McNeil was entirely superseded, abandoned and annulled and the parties thereto became divested of any rights whatsoever thereunder.

The matters of which the plaintiff Syme now complains and upon which he now seeks a recovery in the present suit occurred prior to February 20, 1915, the date of the agreement abrogating the first agreement of September 14, 1914, and he would therefore be powerless to sustain his action so long as the former agreement remained effective. In order to clear from his pathway this obstructing agreement, the plaintiffs pleaded that it was obtained by the fraud and false representations of the defendants and through the mistake of the plaintiff Syme. There was no evidence offered as to mistake. The plaintiffs, at the trial, undertook

to show a deliberate fraud on the part of Mr. McNeil at the time the agreement of February 20, 1915, was executed.

The charge of fraud set up in the replication of plaintiffs is to the effect that the release was obtained by fraud and misrepresentation, by which the defendants falsely and fraudulently represented to the plaintiffs that if they, the plaintiffs, would execute and sign the release that defendants "would pay all bills contracted on account of the erection or repair or addition to that certain building or dwelling of said defendants or work done incident to the same, and that after the signing of said release they said plaintiffs would and should proceed to finish the work on said house and all sums due at the time of the execution of said release would later be paid, to wit, at said Westerly, wherefore the said plaintiffs say that the said release in said plea mentioned is void in law."

Mr. Syme had comparatively little to do with the carrying out of the contract prior to the agreement of February 20, 1915, between himself and Mrs. McNeil. Although work was commenced about September 18, 1914, it was not until the early part of February, 1915, that Syme made the acquaintance of Mr. or Mrs. McNeil, and he had never seen them on or about the property previous to that time.

Connor withdrew altogether from the firm of Connor & Syme about December 24, 1914, and was in no way associated with the matter thereafter. He did not appear as a witness at the trial. It was the retirement of Connor that brought Syme into action and led to the new arrangement, between him and the McNeils looking to the completion of the work, expressed in the release and contract of February 20, 1915.

At the time when this contract was executed, Mr. Syme states quite positively that he signed it upon the express undertaking, on the part of Mr. McNeil, that he, McNeil, would pay outstanding bills. Mr. Charles E. Sherman, President of the R. A. Sherman & Sons Company, testified that he was with Syme at the time of his interview with

McNeil relative to the contract of February 20, 1915, and heard the conversation between the parties. The Sherman Company was a creditor to the amount of some $3,000 for lumber furnished for the house in question. As Connor had disappeared and Syme was not a person of financial responsibility, Mr. Sherman would naturally feel that the chances for obtaining the payment of the Sherman Company account would be greatly enhanced by a recovery in this suit. Even under the influence of a self interest, the testimony of Mr. Sherman, taken as a whole, is not convincing as to the alleged promises of Mr. McNeil. After stating that Syme showed to McNeil a list of outstanding bills to the amount of some three or four thousand dollars he goes on to say, "Mr. McNeil told Mr. Syme that he realized that the job was going to cost more than it was originally contracted for. He was—didn't want to have him lose any money, and he wanted to make a new agreement to have Mr. Syme continue the work. . . . At that time, after a little discussion, McNeil told Mr. Syme that he would enter into a new agreement with him and he refused to pay the matter of three thousand dollars to us, which was represented by notes from Syme to our corporation. . . . He told Mr. Syme that he wanted him to continue the work and that at the end of the job he would see that all outstanding accounts against the job were paid."

Later Mr. Sherman says, "I think that list of bills had a direct bearing on the matter under discussion" but he is not positive that Mr. McNeil made any statement relative to those particular bills which amounted to some three or four thousand dollars; that he cannot recall any conversation directly referring to that sum of money and that he only has a clear recollection that Mr. McNeil said he would "pay all accounts on completion of the job."

By the new contract, entered into on February 20, 1915, Syme was to superintend the work at a fixed compensation per day and Mr. McNeil was to pay for materials and labor. Inasmuch as Mr. McNeil had positively refused, as Mr.

Sherman states, to pay his company the $3,000 due for lumber used in the building, it is not probable that, in using the language which Mr. Sherman attributes to him, he intended to promise anything more than that he would pay such bills as should be outstanding at the completion of the job and under the new contract. When Mr. Sherman says, "I think that list of bills had a direct bearing on the matter under discussion" he is simply stating an impression which, so far as appears, is not justified by anything which Mr. McNeil said. Mr. Sherman finally says, referring to the list of bills which Mr. Syme had, "I am not absolutely positive as to any statement he made relative to these particular bills."

As before stated, Connor retired from the firm the latter part of December, 1914, and the work was carried on by Syme after Connor left down to February 20, 1915, when the new agreement was made, and during that time McNeil made no payments to Syme. It would seem, therefore, that on February 20, 1915, there must have been outstanding bills which had been incurred by Syme in his prosecution of the work after Connor had quit both the job and the firm. That being so it is possible, assuming that McNeil at the interview of February 20, 1915, preceding the execution of the agreement of that date, uttered the words attributed to him by Syme, that he may have referred to the later bills contracted by Syme subsequent to the retirement of Connor.

It is somewhat significant that at the time of the execution of the new contract, or immediately following it, McNeil paid outstanding bills to the amount of $3,245.07 and that on February 11, 1915, nine days prior to the new contract, Mr. Tuttle, the architect, who was a witness for the plaintiff, had written Mr. McNeil, "If you will be able to send Mr. Syme $2000, to take up his note in Westerly and $1161.75 he will be able to complete the job and pay all bills." Mr. Tuttle had previously, on December 29, 1914, written Mr. McNeil, "I visited Musicolony Thursday and managed to get most of the bills for labor, etc., paid up." The payment

by Mr. McNeil of $3,245.07 on February 20, 1915 for outstanding bills, taken in connection with the letters of Tuttle, the architect, above quoted from, makes it difficult to see how other bills to the amount of $4,113.72 could have been outstanding on February 20, 1915. Mr. Syme claims that most of this amount is for extras. The architect's certificate showed $539.10 due on December 24, 1914, with nothing expended for extras. If the claim, which is the subject of this suit, is valid there must have been due upon this house on February 20, 1915, $7,359.79. Why and for what such a sum was required does not clearly appear. The note of Syme to the Sherman Company could not be included to make up the sum covered by the alleged agreement of Mr. McNeil to pay outstanding bills because he had positively refused to assume that obligation.

Mr. McNeil and Mr. Farron, his counsel, the latter being present during a considerable portion of the interview, both deny that there was any statement made by Mr. McNeil to the effect that he would pay the bills which were outstanding on February 20, 1915.

The declaration consists of the common counts and is supplemented by a bill of particulars embracing various items to the amount of $5,835.69. The item of $1,257.74 for commissions was waived. The other deductions, bringing the claim down to $4,113.72 do not appear. The jury after being out for a time returned for instructions desiring to know the amount the plaintiff claimed to be due him, and were informed by the court that it was $4,113.72, and a verdict for that sum followed.

Up to December 24, 1914, McNeil had paid to Connor & Syme $3,906.90. This money passed into the hands of Connor as a member of the firm of Connor & Syme. There is no evidence as to what he did with the money. There is nothing to show that it was used in the payment of any bills for work or materials which went into the erection of this house. For aught that appears Connor may have retained it and later appropriated it to his own use on retiring from the

firm, claiming it as his share of the partnership effects, or he may have applied it in some other way not in reduction of the outstanding bills for which claim is now made. If this amount of $3,906.90 was not appropriated to the payment of bills contracted in the erection of this house the alleged claim of the plaintiffs would be correspondingly reduced.

The trial justice, discussing the case in his rescript upon the defendants' motion for a new trial, expresses his dissatisfaction with the verdict in several particulars. He says, "The evidence disclosed a situation in regard to the contract and specifications which rendered it impossible to know what was included in the written contract. The question of extras had to be determined entirely from the testimony of Tuttle and Syme. We do not believe Syme had any clear idea of extras. If plaintiff's verdict rested upon this evidence alone, it should not stand."

In speaking of the alleged promise of McNeil on February 20, 1915, to pay outstanding bills, the rescript says, "the Court was inclined to believe that McNeil did not make an absolute promise, nor intend to make an absolute promise that he would pay all outstanding bills against the job, and that his promise was not as absolute as Sherman and Syme remembered it. Neither Syme nor McNeil knew anything about the use to which the money ($3,906.90) paid to Connor had been put, nor whether that money had been applied to the job. An agreement such as McNeil is said to have made would have been unusual for a business man of McNeil's experience;" the court adding, although it might be "consistent with McNeil's impatience about the job and his honest desire to pay for what he got even though he felt that he was being imposed upon."

The rescript further says that, "Syme's testimony as to what took place on his visit to Mrs. McNeil is evasive and unsatisfactory. In fact, Syme's whole testimony was not altogether candid. He had suffered financial loss and been imposed upon, and uncertain just where to lay the blame was seeking to place it upon some one other than himself."

In referring to the agreement of February 20, 1915, sometimes called the release, the court said, "We cannot agree with the jury's finding on the question of fraud in procuring the release."

The trial court finds a "confirmation for the jury's finding in the unfavorable impression created by Mr. McNeil. He acted in a testy manner on the stand and was impatient. . . . This manner was probably due, as he said, to the fact that it was his first time in court after a business experience of something over 50 years."

The trial court further accounts for the verdict by saying that "Mr. Syme . . . was a small carpenter who faithfully did his work and was victimized either by Tuttle or Connor, or both, and it was not unnatural, under the circumstances, that the jury should have felt a very strong sympathy for his position. . . . The case on the facts, therefore, is one where we should like to, but do not feel warranted in granting a new trial."

From these excerpts from the rescript of the trial judge his estimate of the verdict is readily discernible. He felt constrained to deny the motion for a new trial in order to avoid any infringement upon the province of the jury, whose duty it is to determine the facts, perhaps overlooking the power of the Superior Court to grant new trials whenever its superior and more comprehensive judgment teaches it that the verdict of the jury fails to administer substantial justice to the parties in the case. *McMahon* v. *The Rhode Island Company*, 32 R. I. 237.

(1) While the denial of the motion for a new trial may be said to be a formal approval of the verdict, it is evident from the rescript that the verdict, in the opinion of the trial court, failed to do justice between the parties and would have been set aside had the court felt that it was possessed of the power to do so. The conclusion of the trial judge therefore cannot be given the weight and consideration to which it might otherwise be entitled. *Campbell* v. *Cottelle*, 38 R. I. 320.

We are of the opinion that in the interests of justice the case should be submitted to another jury.

The defendants' first and second exceptions are overruled. The third exception to the denial of the motion for a new trial is sustained and the case is remitted to the Superior Court with direction to give the defendants a new trial.

Herbert W. Rathbun, John J. Dunn, for plaintiff.

Fitzgerald & Higgins, Wayne H. Whitman, for defendant.

HAGOP S. SURMEIAN *vs.* C. C. SIMONS.

JULY 8, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Baker, and Stearns, JJ.

(*1*) *Negligence. Lights on Vehicles. Causal Relation.*

Where plaintiff's carriage was struck from behind by defendant's automobile, as a matter of law a special finding that plaintiff was acting in disregard of Pub. Laws, 1914, cap. 1028, requiring every vehicle to display a light between certain hours is not conclusive upon the question of his right to recover. The absence of lights may have or may not have a causal relation to the collision, depending upon the condition of the light in the highway in the neighborhood of the place of the accident.

(*2*) *New Trial. Reviewing Decision of Trial Judge.*

The finding of the trial judge upon the validity of a jury's verdict is not binding upon the appellate court but the court will examine the transcript of evidence and if it appears that the determination of the trial judge upon the weight of the evidence was clearly wrong or that his decision was not made upon conflicting testimony but was based upon a misconception of the evidence his decision will not be approved; but in the ordinary case where such justice has approved or set aside a verdict in accordance with his view as to the value of evidence clearly conflicting his determination will be regarded as of great persuasive force.

Following the rule established in *Wilcox* v. *R. I. Co.*, 29 R. I. 292, and *McMahon* v. *R. I. Co.*, 32 R. I. 237.

(*3*) *New Trial. Constitutional and Statutory Jurisdiction of Supreme Court.*

When the evidence before a jury is conflicting upon the issues, a review of the decision of the justice presiding either approving or setting aside the verdict is not a question of law. Such review does not come before the appellate court by virtue of the constitutional provision giving it final revisory and appellate jurisdiction upon all questions of law and equity, but its jurisdiction is entirely statutory, conferred as part of the procedure by which a party may test the validity of a jury's verdict.

VINCENT, J., dissents.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and overruled.

SWEETLAND, J. This is an action of trespass on the case to recover damages for injuries alleged to have been suffered by the plaintiff through the negligence of the defendant in the operation of an automobile.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a general verdict for the defendant with a special finding adverse to the plaintiff. The plaintiff filed his motion for a new trial which was granted by said justice. The case is before us upon the defendant's exception to the decision of said justice granting a new trial.

It appears that at about ten o'clock on the night of August 14, 1917, the plaintiff was driving a two seated carriage upon Elmwood avenue in the town of Warwick; that he was proceeding toward the north and was upon the extreme easterly side of the traveled part of the road; that when he had reached a point near the intersection of Pawtuxet avenue with Elmwood avenue, about one third of a mile south of the bridge over which Elmwood avenue crosses the Pawtuxet river, his carriage was struck from behind without warning by an automobile operated by the defendant, who at that time was also proceeding northward on Elmwood avenue. As a result of this collision the carriage of the plaintiff was injured, his horse was caused to run away, and the plaintiff claims that he received personal injuries. At the time of the accident the plaintiff was alone in his carriage. The defendant was accompanied in his automobile by three friends and was returning to Providence from a pleasure ride to East Greenwich. Said night was warm, the weather was fair but the moon was not shining. This part of Elmwood avenue is in a suburban district and is lighted by incandescent electric lights. There is a conflict in the evidence as to the distance between said lights and as to the extent to which said lights illuminated the road on the night in question.

The defendant claims that the plaintiff was guilty of contributory negligence in that at the time of the accident he was driving said carriage in violation of the provisions of Chapter 1028, Pub. Laws, 1914. Said chapter, among other things, provides as follows: "Sec. 16. Every vehicle, when located or operated on any public highway or bridge shall display one or more lights on said vehicle so placed as to be visible both in the front and the rear, during the period from one hour after sunset to one hour before sunrise." Whether or not the plaintiff just before the accident did display one or more lights on his carriage so placed as to be visible from the front and the rear was one of the disputed issues in the case. The testimony on this point was conflicting; the jury found specially that the plaintiff did not. From an examination of the transcript of evidence we find some warrant for the plaintiff's claim that this was
(1) treated by the defendant during the trial as the controlling issue. The plaintiff further contends that, notwithstanding the instruction of the justice, the jury acted under the misapprehension that their special finding upon this point was determinative of the case. As a matter of law the finding that the plaintiff was acting in disregard of the statute is not conclusive upon the question of his right to recover. The purpose of the statutory provision is plain, viz., to apprise travelers, between the hours named, of the presence and location of vehicles upon public highways and bridges. In case of a collision during those hours between a traveler who is complying with the statute and a vehicle not displaying one or more lights, if such traveler is exercising reasonable care and the collision is due to ignorance on his part of the presence of said unlighted vehicle in the dark highway, then the absence of such light or lights may be considered as an efficient and immediate cause of the collision and the fact of the violation of the statute is evidence of negligence on the part of the driver of the unlighted vehicle. If however the collision between such traveler and the unlighted vehicle occurs in the nighttime upon a highway which is

itself so well lighted that the unlighted vehicle can be plainly seen by other travelers then the fact of the violation of the statute is immaterial in the consideration of the negligence of the respective parties, because the absence of lights upon the vehicle had no causal relation to the collision. Therefore the condition of the light in the highway in the neighborhood of the place of the accident in question became a material matter in the consideration of the case. According to the testimony of some of the witnesses who, as far as the record discloses, are disinterested said highway was so light that at the point in question the defendant if he had been exercising reasonable care could not have failed to see the carriage of the plaintiff in front of him in ample time to have avoided it. Witnesses for the defendant testified that at the time and place of the accident the highway was dark so that the carriage of the plaintiff could not be seen by the defendant until he was so close to it that the collision could not be prevented.

Upon the motion of the plaintiff for a new trial there was presented to the judge who presided with the jury the question of whether the jury's verdict did justice between the parties. He was to pass upon that question after a review of the evidence and a consideration of where lay the fair preponderance of the evidence upon the issues in the case
(2) applying in such consideration his conclusions as to the credibility of witnesses and the value which should be placed upon their testimony. When a justice presiding has decided such a motion adversely to a verdict we must assume that he has reached his conclusion in the manner which we have outlined and that he finds the verdict to be unjust; unless it shall appear in his decision that his determination is based upon other considerations. We have held that the question of the weight of evidence and the credibility of witnesses is not for the trial judge upon a motion to direct a verdict; but upon the consideration of a motion for a new trial the determination of these questions is presented to him and it is his duty to pass upon them for in that way alone can such

justice exercise the function of reviewing the jury's verdict which has been placed in him by the statute.

The defendant contends that the preponderance of the evidence supports the verdict and that in setting it aside said justice has usurped the functions of the jury. In the consideration of an exception to the decision of a trial justice upon a motion for new trial this court has not adopted the position taken by courts of last resort in some states where the relation of the trial court to the appellate is similar to that which exists between the Superior Court and this. We have not held that the finding of a trial judge upon the validity of a jury's verdict was binding upon us but we will for ourselves examine the transcript of evidence. If from such examination it appears to us that the determination of the trial judge upon the weight of the evidence is clearly wrong, or that his decision was not made upon conflicting testimony but was based upon a misconception of the evidence in the case we will not approve his decision. In the ordinary case, however, where such justice has approved or set aside a verdict in accordance with his view as to the value of evidence clearly conflicting we will regard such determination as of great persuasive force in appellate proceedings before us.

It was upon the passage of the Court and Practice Act that jurisdiction to consider a motion for new trial after verdict was given to a justice presiding in a jury trial and the right of exception to his decision was conferred. In *Wilcox* v. *R. I. Company*, 29 R. I. 292, after the adoption of the Court and Practice Act, this court first stated definitely the rule which should govern a justice of the Superior Court in passing upon a motion for new trial on the ground that a verdict is contrary to the weight of the evidence. In that case also this court applied the principle that when the evidence before the jury was conflicting, the decision of the trial court in approving or setting aside the jury's verdict should be given great weight in proceedings before us. *Wilcox* v. *R. I. Co.*, was before us upon an exception to the

decision of a Superior Court justice sustaining a jury's verdict; afterwards in *Noland* v. *R. I. Co.*, 30 R. I. 246, and in *McMahon* v. *R. I. Co.*, 32 R. I. 237, the court applied the same principle to the decision of a trial court setting aside the verdict of a jury. In *McMahon* v. *R. I. Co.*, the position of this court was very carefully considered and explained. These cases have been approved and followed in many subsequent cases and must be regarded as declaring the settled rule in this State. In *Wilcox* v. *R. I. Co.*, and in *McMahon* v. *R. I. Co.*, a number of cases were cited from other jurisdictions. It is not, however, upon the authority of the cited cases that the rule in the *Wilcox* and the *McMahon* cases is primarily based but upon an interpretation of the legislative intent, which this court has found in the statutory provisions under which motions for new trial are decided by justices of the Superior Court and exceptions to their decisions are brought before us. Such interpretation however is in accord with the construction which has been placed upon similar statutory provisions by the courts of other American states and by the Federal courts, as appears by the great number of cases cited in the note appended to the report of *McMahon* v. *R. I. Co.*, *supra*, in 25 Ann. Cas. 1226.

In thus giving great force to the determination of a justice of the Superior Court upon the weight of conflicting testimony we cannot with propriety be said to disregard the final revisory and appellate jurisdiction upon all questions of law and equity conferred upon this court by amendment to the constitution. When the evidence before a jury is conflicting (3) upon the issues in a case then a review of the decision of the justice presiding either approving or setting aside the verdict is not a question of law. Such review does not come to us by virtue of the constitutional provision giving to this court final, revisory and appellate jurisdiction upon all questions of law and equity. Our jurisdiction in that regard is entirely statutory. It is conferred as part of the procedure by which a party to a cause may test the validity of a jury's verdict; hence, a consideration of the exclusive

constitutional powers of this court is in no way involved in this question.

We have examined all of the evidence presented at the trial and find that it was conflicting upon the issues in the case. The plaintiff testified that he lighted the lights in the lanterns on either side of his wagon at the time he left his home on the evening in question; that the lights were burning up to the time of the accident, but that the impact of the collision extinguished them and broke the glass in one of the lanterns. In this the plaintiff is corroborated by the testimony of the witness Amoroso who said that just before the accident he was walking upon the side of Elmwood avenue; that the plaintiff passed him about five hundred feet south of the place of the accident and that when he passed the light on the left side of the plaintiff's wagon was lighted. The defendant testified that just before the accident the plaintiff did not display any lights upon his wagon. Upon this point the defendant is directly supported by the testimony of the persons who were with him in the automobile and indirectly by the testimony of a witness who said that after the accident he placed his hand upon the lantern on the side of plaintiff's wagon and said lantern did not feel warm. Upon the question of the condition of the lights in Elmwood avenue at and near the point of collision the defendant testified that the night was dark; that although there was a street light on a pole at the junction of Elmwood and Pawtuxet avenues it did not illuminate the highway at the place of the accident; that just before the collision he saw another automobile approaching from the north and that he and the driver of the other automobile each dimmed their respective lights. To the same effect is the testimony of the three persons who were riding with the defendant. Two witnesses who were in automobiles behind the defendant each testified that there was no moonlight; one said there were very few stars shining, if any, and the other that the night was dark. Opposed to the testimony of the defendant and his witnesses is that of Joseph Amoroso who

said that he carried on the grocery business near the place in question; that he had closed his shop and was walking on the side of Elmwood avenue about five hundred feet south of the junction of Elmwood and Pawtuxet avenues; that he saw the plaintiff approaching in his wagon and that at first the witness thought that the defendant was a friend, but when the witness came nearer to the plaintiff he saw that the plaintiff was unknown to him; that soon after he heard the crash of the collision and ran to the place and recognized the plaintiff as the man who had previously passed him on the avenue; that the place of the accident was not more than twenty-five or thirty feet from the light at said junction and that said light "is a big light, town light—almost every post —that is the light they have"; that he was unacquainted with either plaintiff or defendant. Charles A. Lufkin also testified that he was not acquainted with either plaintiff or defendant; that just after the accident he was crossing the bridge over the Pawtuxet river on Elmwood avenue, about sixteen hundred feet north of the place of accident; that he was proceeding southerly; that the night was pleasant; that he saw the horse of the plaintiff attached to the front wheels of the plaintiff's carriage running toward him. When he first saw the horse it was about four hundred feet from him; that he then hurried to the junction of Elmwood and Pawtuxet avenues and there saw the plaintiff, the defendant and the injured carriage. This witness testified that he resides in the neighborhood of the accident; that he works at a theatre and drives over this road every night. When asked "What is the condition of the place of the accident with regard to lightness or darkness" Mr. Lufkin replied "It was as light as an ordinary street that is lit by electric lights. The lights are there quite thick." At the hearing upon the plaintiff's motion for a new trial upon the claim of newly discovered evidence said justice received and considered the affidavit of John J. Johnson, who affirmed that he lived in the neighborhood of the accident; that on the night in question he was walking along Elmwood avenue

approaching the junction of Pawtuxet avenue; that when a considerable distance away he saw the people about the place of the accident and that "electric lights were burning all along Elmwood avenue making the entire street north and south of Elmwood and Pawtuxet avenues bright and clear. There was one electric light burning brightly directly opposite the place of the collision."

To the defendant's contention that the decision of said justice was against the preponderance of the conflicting evidence it must be said that in the consideration of a motion for new trial as well as in the making of a verdict the weight of evidence does not depend solely upon a computation of the number of witnesses. It depends largely upon the value which should be assigned to the testimony of the witnesses. The justice presiding was in a better position than we are to justly weigh their testimony. He sat in the trial; we have simply the written transcript which may entirely fail to reproduce for us some of the elements which are vital to a just determination in regard to the weight of evidence.

Neither can it be said properly that in setting aside the jury's verdict said justice has usurped the jury's function. By our fundamental law juries are made the triers of fact, and if the evidence upon issues in a case be conflicting it is by the determination of a jury that the facts in the case must ultimately be determined. Upon proceedings for new trial, however, the jury's verdict may be reviewed. Until the passage of the Court and Practice Act in 1905 this court was obliged to pass upon the validity of a verdict with the aid of the transcript of evidence merely. Upon the passage of that act and the establishment of the Superior Court, having exclusive jurisdiction in jury trials, another step was added in the procedure for review, and a litigant defeated before a jury is required first upon a motion for new trial to submit the correctness of the jury's verdict to the judge who presided at the jury trial before such litigant is permitted to seek reversal before us. The justness of the verdict is thus subjected to the scrutiny of a trained jurist

who sat in the atmosphere of the trial, saw and heard the witnesses and from his experience, judgment and impartiality is able to render a decision of great value as to the weight of the evidence. The intervening step in procedure of which we have spoken was not provided without purpose; the legislature did not intend that proceedings for the review of a jury's finding should still come before us for determination upon the transcript alone, but provided that this court should have the benefit of the decision of the trial justice given upon the motion for new trial. In the case at bar said justice in setting aside the verdict did not usurp the function of the jury. The function of a jury is to make a determination of the issues of fact submitted to them. If their finding is not set aside in conformity with due and orderly process of law, such finding becomes the final determination of those issues between the parties. If the evidence is conflicting such issues must finally be decided by a jury. In setting aside a verdict because a trial justice finds that it is unjust he is not attempting to make a final determination of the issues of fact in the case. He is simply applying the check and the regulation which the law has provided with the intent of making trial by jury a more efficient proceeding for the determination of issues of fact, and the doing of justice between litigants. If the decision of the justice setting aside a verdict is approved by this court the issues of fact must again be presented to a jury for determination.

The defendant's exception is overruled and the case is remitted to the Superior Court for a new trial.

VINCENT, J., dissenting. On August 14, 1917, at about ten-thirty o'clock in the evening, the plaintiff was driving a two seated vehicle, commonly called a carryall, upon Elmwood avenue in the direction of Providence and at the time of the accident he had reached a point in the town of Warwick near the intersection of Elmwood avenue and Pawtuxet avenue. He had a load of vegetables which he intended to dispose of in Pawtucket the following morning.

The defendant was driving his automobile in the same direction that the plaintiff was proceeding with his horse and carriage and both were traveling upon their right-hand side of the road. The larger and central portion of the traveled way is madacamized. The macadam however is paralleled upon either side by a narrower strip of "dirt road," so-called, upon which moving vehicles may safely and properly encroach. At the time of the accident the plaintiff was driving with his right wheels upon the strip of dirt and his left wheels upon the macadam. The defendant was driving his automobile entirely upon the macadamized part of the road and was not therefore as far to the right as the plaintiff. While the plaintiff and the defendant were thus proceeding the latter saw another automobile approaching from the opposite direction with bright headlights. Upon coming nearer the driver of the approaching automobile dimmed his lights, whereupon the defendant did likewise. Almost immediately, and too late to avoid a collision, the defendant discovered the carriage of the plaintiff only a few feet ahead of him. The right-hand end of the fender of the automobile struck the left-hand rear wheel of the carriage.

The case was tried to a jury in the Superior Court. The defendant claimed, and offered testimony to show, that the plaintiff was traveling without any light upon his carriage visible to a person approaching from the rear; that the street was not well lighted at the locus of the accident. That the night was somewhat cloudy and that under the conditions existing he could not have discovered, by reasonable vigilance, the presence of the carriage in time to avoid it.

The questions presented for the consideration of the jury were, (1) Did the plaintiff have any lights upon his carriage and (2), Was the place of the accident sufficiently illuminated to have enabled the defendant, if he had been in the exercise of proper care, to have seen the plaintiff's carriage in time to escape a collision?

The jury rendered a general verdict for the defendant and also found specially that the plaintiff's carriage was without

lights. Upon motion of the plaintiff a new trial was granted by the trial judge and the case is now before this court upon the exception of the defendant to that ruling.

The trial judge, in granting the plaintiff's motion for a new trial, did not file any rescript pointing out his reasons for so doing. The meager endorsement upon the file wrapper indicating that the plaintiff's motion for a new trial had been heard and granted is all that is vouchsafed to us. When the transcript of testimony is turned to and examined with a view to discerning something which might have actuated the trial judge in his decision or at least might explain or account for his attitude upon the motion for a new trial, the difficulty is increased rather than lessened and the effort to discover something in that line fails.

There is much testimony of a substantial character upon which the jury might well find a verdict for the defendant. A number of witnesses for the defendant testified to the effect that the plaintiff did not have any lights upon his carriage and that the light at the place of the accident was barely sufficient to enable a person to see the plaintiff's vehicle a few feet away. It is not too much to say that the preponderance of the testimony upon both questions was in favor of the defendant. The defendant's witnesses appear to have given their testimony in a clear, plain and straightforward manner. The jury had a right to believe them and the verdict shows that they did believe them.

In the case of *Wilcox* v. *The Rhode Island Co.*, 29 R. I. 292, commonly referred to as the *Wilcox* case, this court said in the course of its opinion, referring to *nisi prius* courts, "Those courts ought to independently exercise their power, to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case."

In view of the *Wilcox* case the majority of this court take the position that it is precluded from any consideration of

or inquiry into the justness of the decision of trial courts in matters of new trial, except when there is found to be an error of law or an absence of any supporting testimony. Accepting, for the sake of the argument, the principle or the practice sought to be established by the above quoted language from the *Wilcox* case, and giving to it all the force and breadth which can be reasonably claimed for it, is this court so bound by it that it cannot, in a case like the present, sustain the exception when no reason appears for the action of the trial court and there is abundant testimony to sustain the verdict of the jury? I cannot believe that the language in question restricts or should restrict the action of this court to such an extent.

The overruling of the exception in this case is practically saying that the trial judge may, without any discernible reason or upon his mere whim or caprice, grant or deny a motion for a new trial and that this court is powerless to correct the error. It does not seem possible that the court, in announcing its decision in the *Wilcox* case, could have intended to place itself in such a helpless situation. Taking the language of the *Wilcox* case as it stands, it should not, in my opinion, be so construed as to form a barrier beyond which this court cannot go in a case like the present, where the record furnishes no reason for the action of the trial court and the imagination fails to supply one.

Such a construction is *pro tanto* an abrogation of the powers conferred upon this court by our constitution and by our statute. By Section 1, Article of Amendment XII of the Constitution of Rhode Island it is provided that "The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity . . . and shall also have such other jurisdiction as may, from time to time, be prescribed by law."

By Section 2 of Chapter 1 of The Court and Practice Act passed at the January Session of the General Assembly, 1905, and now Section 2 of Chapter 272, General Laws of 1909, it is provided that "the supreme court shall have

general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided."

The language of the *Wilcox* case, decided in 1908, so far as it bears upon the point in question, is merely a pronouncement of this court and if it is not possible to give to it a more liberal interpretation, than the majority opinion would seem to indicate, it should be modified to the end that this court may again exercise the power which the constitution and statute confer upon it and which will enable it to deal more satisfactorily with cases like the one at bar.

Looking at the *Wilcox* case and examining the authorities therein cited and upon which it rests, it is found to be destitute of any secure or stable foundation. It will not be disputed that the value of an authority must be determined by taking into account the particular constitution and statutes of the state under which the decision is rendered, and that in another state such authority is worthy of consideration only when, and so far as, the powers conferred by the constitution and statutes of the one State are in harmony with the powers conferred by the constitution and statutes of the other.

The portions of the opinion in the *Wilcox* case which relate to the question now being discussed are founded upon two cases therein cited, *Dewey* v. *The Chicago & N. W. R. R. Co.*, 31 Iowa 373 and *Clark* v. *Great Northern Railway Co. et al.*, 37 Wash. 537. These cases may be conveniently referred to as the Iowa case and the Washington case.

The Washington case closely follows the Iowa case. In neither of these two states does the constitution or the statute confer upon the Supreme Court the broad and explicit powers which are conferred upon our court by our constitution and our statute.

The Constitution of Iowa, Article V, Section 4, provides that, "The supreme court shall have appellate jurisdiction only in cases in chancery and shall constitute a court for the correction of errors at law."

In the Iowa case, decided in 1871, the court cites no authority in support of the rule stated as to the duty of *nisi prius* courts in the matter of motions for new trials. In that case the defendant's motion to set aside the verdict on the ground that the evidence was not sufficient to sustain it was denied by the trial court. In some way it appeared on appeal though in what manner is not disclosed, that the decision of the trial court was based upon the assumption that a new trial would not avail the defendant and that the questions might as well be settled by the Supreme Court under the trial already had. *But nevertheless the Supreme Court examined the testimony, found it insufficient to support the verdict, and reversed the judgment of the court below,* the court including in its opinion the dictum which is now the basis of the *Wilcox* case.

The Constitution of Washington provides that, "The Supreme Court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings" and "shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."

In the Washington case the court cites some authorities, in addition to the Iowa case, to the effect that where the trial judge is convinced that the verdict is clearly against the weight of the evidence it is his duty to grant a new trial. Such authorities have no application to a case like the one at bar where it is obvious to anyone that the verdict is not against the weight of the evidence but rather in accordance with it. In the Washington case the lower court had denied the motion for a new trial and the Supreme Court reversed that decision upon two grounds, one of which was that the trial court had "*failed to properly exercise the power and discretion vested in it.*"

In *McMahon* v. *The Rhode Island Company*, 32 R. I. 237, decided in 1911, this court followed and approved the doc-

trine proclaimed in the *Wilcox* case and in further support thereof cited the case of *Kansas Pac. R. Co.* v. *Kunkel*, 17 Kan. 172, and quoted from that portion of the opinion of Mr. Justice BREWER in which he distinguished the powers of trial and appellate courts as follows: "The functions of the two are widely dissimilar. The one has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence it is his imperative dury to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon he has no right to disturb the findings of the jury, although his own judgment might incline him the other way."

The language above quoted does not sanction the application of the *Wilcox* case to the case at bar but on the contrary demonstrates the preposterousness of any attempt to so apply it. The language referred to not only protects the verdict of a jury from any interference on the part of the trial court in cases like the one at bar, where there is preponderance of testimony, but it also goes much further and condemns the interposition of the trial court in cases where the evidence is nearly balanced as well as in cases where different minds would *naturally* and *fairly* come to different conclusions.

Our constitution and statute confer upon this court broad and specific powers and impose upon it a definite duty. It is charged with a "general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein." No such ample or comprehensive powers are conferred upon the Supreme Court of either of the States mentioned, by constitution or statute. Therefore, being without any substantial foundation, the authoritative value of the *Wilcox* case becomes insignificant, if it is not wholly lost.

I do not contend that the so-called principle of the *Wilcox* case should not be applied in some cases where the record discloses circumstances warranting its application, but to impute to it an importance sufficient to stifle all freedom of action on the part of this court in cases like the one at bar, in my opinion, amounts to a denial of justice. The defendant's exception should be sustained.

Jasper Rustigjan, Cooney & Cooney, for plaintiff.
McGovern & Slattery, for defendant.

FRED B. HALLIDAY *vs.* RHODE ISLAND CO.

JULY 3, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Negligence. Electric Railways. Last Clear Chance.*

Where a motorman of an electric car sees a person on or approaching the track he ordinarily has a right to act on the assumption he is in possession of his faculties and will exercise reasonable care and in such case the motorman is not bound to anticipate that such person will stay on or get on the track and to take steps to avoid injuring him, by slackening the speed or stopping the car until it becomes reasonably apparent that he cannot or will not get out or keep out of the way and if in view of his right to act on such assumption the motorman exercises reasonable care and caution to warn such person of his peril and to slacken the speed or if necessary stop the car in time to avoid injuring him, but is unable to avert an accident by reason of such person's remaining on or near the track the carrier is not liable for the resulting injuries.

(2) *New Trial. Last Clear Chance. Review of Decision of Presiding Justice.*

Where a case was submitted to a jury upon the question, among other issues, of the last clear chance, which was not involved in the case, and the court cannot determine from the rescript of the justice on which phase of the case he sustained the verdict, the plaintiff's testimony on the question of due care being unsupported, a new trial will be ordered, the decision of the court if based on the theory of the last clear chance adding nothing to the verdict.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained.

RATHBUN, J. This is an action of trespass on the case for negligence to recover for personal injuries and damage to an automobile. The trial resulted in a verdict for the plaintiff for four hundred and ninety dollars. The defendant filed a motion for a new trial which was denied by the trial court and the case is before us on defendant's exception to the ruling of the trial court refusing to direct a verdict for the defendant; also on exception to the decision of said court denying defendant's motion for a new trial made on the grounds that the verdict is against the law and the evidence and the weight thereof.

The defendant's street car collided with plaintiff's automobile, east of Traverse street on Tockwotten street, in the city of Providence. The car track is located in the middle of Tockwotten street, which runs approximately east and west. The plaintiff turned his automobile from Benefit street into Tockwotton street and drove toward the east, with the wheels of his automobile running in the car track. He proceeded driving in the car track about half a block when he saw the street car about a block and a half away coming toward him "at a pretty good rate of speed." The car track was wet with water and slush. According to the testimony of the plaintiff he immediately turned the front wheels of his automobile to the right at an angle of 22½ degrees and endeavored to drive out of the car track but although he had chains on the rear wheels and held the front wheels at an angle of 22½ degrees with the car rail the automobile, proceeding about ten miles an hour, went about one hundred feet, passing over two switches in the track before the plaintiff succeeded in driving the front wheels of his automobile out of the car track. When the automobile was partially off the track the electric car collided with the left hand side of the automobile.

Henry J. Lattimer, the motorman in charge of the electric car, testified that he made a stop at Brook street, which is about three hundred feet from Traverse street, and when he first saw the automobile it was coming toward the car

and running on the south side of Tockwotton street so near the track that there was not room for the electric car to pass although no part of the automobile was on the track, and that the car and automobile were about two hundred feet apart. According to the testimony of the motorman he immediately shut off the power when he first saw the automobile but did nothing more to stop the car. After the car had coasted about fifty feet and was about one hundred feet from the automobile he put on his brakes because he saw that the automobile was proceeding in the same close proximity to the car track. The application of the brakes causing the car to slide, he let off the brakes to release the wheels, put the brakes on again, rang the bell and put on the reverse. The car slid a short distance with the power reversed. He testified that when he saw an accident was imminent he did all he could do to avoid the collision.

The plaintiff argues that inasmuch as the trial court denied the defendant's motion for a new trial the rule laid down by this court in the case of *Wilcox* v. *Rhode Island Co.*, 29 R. I. 292, should be applied to this case and a new trial refused.

The rule referred to is concisely stated in the syllabus of said case as follows: "Where the evidence is conflicting and the *nisi prius* court has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, the appellate court will not interfere where there is nothing to show that the jury were governed by any improper motives or that the trial judge erred in the performance of his duty."

The case was submitted to the jury on the usual questions of negligence and contributory negligence and also on the question of the last clear chance.

(1) In considering the question of liability under the doctrine of the last clear chance we observe that there was no conflict in the evidence as to what the motorman did to stop the car when it became evident that the plaintiff might not yield sufficiently to allow the car to pass. The motorman relates in detail what he did and testifies that he did every-

thing he could do to avoid the accident. His testimony is consistent and reasonable. It is the only evidence bearing on this question. This testimony is not impeached by any physical facts or "by circumstantial evidence either intrinsic or extrinsic" and therefore must be taken to be true. *Gorman* v. *Hand Brewing Co.*, 28 R. I. 180; *Murray* v. *Pawtuxet Valley St. Ry. Co.*, 25 R. I. 209. He did all that the law required of him and there is no liability under the doctrine of the last clear chance. *Winn* v. *Union R. Co.*, 82 Atl. Rep. (R. I.) 81. The rule is clearly stated in 36 Cyc. p. 1517, as follows: "Where the driver or motorman of a street car sees a person on or approaching the track in advance of his car, he ordinarily has a right, in operating his car, to act upon the assumption that such person is in possession of all his faculties, as that he is of sound mind and has good hearing and eyesight, and that he will see the approaching car, or will hear and heed the bell or gong when sounded, and will exercise reasonable care for himself and will get off or stay off the track until the car passes; and in such a case the driver or motorman is not bound to anticipate that such person will stay on or get on the track, and to take steps to avoid injuring him, by slackening the speed or stopping the car, until it becomes reasonably apparent, that he cannot or will not get out or keep out of the way; and if in view of his right to act on such assumption the driver or motorman exercises reasonable care and caution to warn such person of his peril and to slacken the speed or if necessary stop the car in time to avoid injuring him, but is unable to avert an accident, by reason of such person's suddenly going upon or near the track, the street railroad company is not liable for the resulting injuries."

There is no corroboration of plaintiff's testimony relative to the most extraordinary feat performed, as he says, by his automobile in sliding one hundred feet on the car rails when he was attempting to drive out of the car track. The plaintiff did not look to see whether a car was approaching when he drove on and proceeded to drive in the car track.

He drove some distance before he looked. Had he looked when he first came upon the track he would have had a clear view of Tockwotton street for at least a block beyond the point where he first observed the car. There was no traffic in the street and nothing to prevent the plaintiff from driving on either side of the car track. No exception was taken to the charge of the court submitting the case to the jury on the question of the last clear chance. The justice considered this question was an issue in the case otherwise he would not have submitted the question to the jury. In his rescript he gives no reasons for his decision denying defendant's motion for a new trial therefore we cannot determine on which phase of the case he sustained the verdict. If his decision was based on the theory of the last clear chance his approval, of course, adds nothing to the verdict. *Winn* v. *Union R. Co.*, *supra.*

As the question of the last clear chance was a prominent feature of the charge and in view of the plaintiff's unsupported testimony bearing on the question of due care, we are of the opinion, after a careful examination of the evidence, that the defendant did not have a fair trial.

Defendant's first exception is overruled.

Defendant's exception to decision of trial court denying defendant's motion for a new trial sustained and case remitted to the Superior Court for a new trial.

Waterman & Greenlaw, Charles E. Tilley, for plaintiff.
Clifford Whipple, Alonzo R. Williams, for defendant.

HARRY TAYLOR *et al. vs.* NORTHERN INSURANCE CO.
HARRY TAYLOR *et al. vs.* PEOPLES NATIONAL FIRE INSURANCE CO.

JULY 8, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, and Stearns, JJ.

(1) *Fire Insurance. Insurable Interest.*

X. being the owner of property subject to a first mortgage to A. and a second mortgage to B. conveyed the property to B. and B. executed a transfer of

his second mortgage and note to X. but the note was not endorsed and it did not appear whether the transfer and note were ever delivered to X.

X. had spent about $600 in improvements on the property while he owned it.

Held, that X. had an equitable interest in the property to the extent of the amount expended by him in improvements, which claim would be recognized and protected in equity and having such equitable interest he had an insurable interest therein.

(2) *Fire Insurance. Actions. Parties.*

Under a policy payable to X. as first mortgagee and to Y. as second mortgagee, after the death of X., Y. by survivorship may maintain an action under the "loss payable" clause in his own name without joinder of the executor of X.

(3) *Fire Insurance. Action by mortgagee.*

In an action by mortgagee under the "loss payable" clause of a fire insurance policy, request of defendant to charge that "the insurable interest of plaintiff is limited to the amount of his mortgage note—only one-third of this can be recovered from the company together with interest" was properly denied, for the action was on the contract made by defendant with mortgagor and it was the interest of the mortgagor which was insured and not of the mortgagee who under the loss payable clause was simply the appointee of insured to whom payment was to be made of any loss due under the policy and whose right to recover was subject to be defeated by any defence valid against the mortgagor.

(4) *Fire Insurance. Description of Property.*

In a fire insurance policy the property was described as a "three story frame dwelling house and additions with shingle roof occupied for dwelling house purposes," and it appeared that the building contained about nine tenements with a room on the lower floor which had at one time been used as a store previous to the time the property was bought by the last owner, and thereafter used as a bed room until about a week prior to the fire.

Held, that the purpose for which the building was designed was immaterial. The property when insured was used as a dwelling house and continued to be used exclusively as such.

(5) *Fire Insurance. Description of Property.*

In the description of property under a policy of fire insurance the test is, not what was the use for which the building was originally designed, but what was the actual use which was made of the building at the time the insurance was taken out and during the time covered by the policy.

(6) *Fire Insurance. Proof of Loss.*

Where a proof of loss although somewhat informal concluded "any other information that may be required will be furnished on call and considered a portion of these proofs," it was sufficient to comply with the requirements of the policy and if defendant desired more detailed information it could have procured it, and if it objected to the proof it was in fairness bound to notify insured within a reasonable time, and failing to do so it cannot on the trial set up a merely formal objection to defeat recovery.

(7) *Fire Insurance. Proof of Loss.*

Where the jury was instructed that insured was required to make proper proof of loss, the question was properly left to it to decide whether or not defendant had waived any deficiencies or defects in the proof of loss.

(8) *Fire Insurance. Awards. Procedure.*

Where the validity of an award was not questioned at a trial under a policy of fire insurance, the defendant will not be heard to object to the award on hearing on bill of exceptions.

DEBT under policies of fire insurance. Heard on exceptions of defendant and overruled.

STEARNS, J. These are actions of debt on two fire insurance policies which were brought originally by Harry Taylor, the owner of the building insured, Sarah J. Wood and Daniel Di Meo, first and second mortgagees respectively. One policy for $2,000 was issued by the Northern Insurance Company, April 9, 1912, to Harry Taylor for a period of three years; it is in the standard form and contains a loss payable clause whereby the loss if any is made payable to Sarah J. Wood first and Daniel Di Meo second mortgagee, also a mortgagee clause in the usual form whereby the loss if any is made payable to Sarah J. Wood first and Daniel Di Meo second mortgagee, as interest may appear, with provisions that the interest of the mortgagees should not be invalidated by any act or neglect of the mortgagor owner of the property, etc. The second policy of insurance on the same property for $4,000 was issued by the Peoples National Fire Insurance Company to Daniel Di Meo, September 27, 1911, for a period of three years and made payable in case of loss to Sarah J. Wood mortgagee as her interest may appear. March 20, 1912, Di Meo with the written consent of the company assigned his interest as owner to Harry Taylor. Also attached to and made a part of this policy is a mortgagee clause dated March 20, 1912, whereby loss if any is made payable to Daniel Di Meo as second mortgagee (or trustee) as interest may appear, etc.

The property insured was destroyed by fire May 10, 1912, and proofs of loss executed by Harry Taylor were filed with the defendant companies June 6, 1912.

By a letter dated July 9, 1912, to Harry Taylor the Northern Insurance Company acknowledged the receipt of the proof of loss and in regard thereto stated as follows: "This Company must decline to accept the same as in full compliance with the terms and conditions of the policy, as the property does not appear to be properly described either in the policy or said purported proof and for other good and sufficient reasons." The letter then proceeds, after stating that the company does not waive any of the conditions of the policy, with the statement that the company desires that the amount of sound value and damage be ascertained as called for under the terms of the policy; the company names Charles A. Cooley to act as appraiser for the company and requests Taylor to name an appraiser to represent his interest. On the same day a similar letter was sent to Taylor by the defendant the Peoples Insurance Co.

On July 20, 1912, acting in pursuance of the terms of the policies, Taylor and the defendant companies agreed to submit to M. J. Houlihan and C. A. Cooley, as appraisers, the adjustment of the sound value and loss of the property; Houlihan and Cooley selected as umpire one V. W. Beck and on October 15, 1912, Cooley and Beck made their award in writing, whereby they found that the sound value and the loss and damage were $3,279.

The defendants refused to pay the award and these suits were brought May 5, 1913, to recover on the award. Numerous amendments to the original declarations and demurrers and objections to parties plaintiffs have been made and argued by counsel in the Superior Court, detailed reference to which pleadings and decisions thereon is unnecessary in this court.

From the record in each case it appears that on May 6, 1914, the death of Sarah J. Wood was suggested to the court and thereupon John Dexter, executor of Sarah J. Wood, was

substituted in her place as a party plaintiff: April 25, 1915, Harry Taylor on motion was allowed to discontinue and judgment on discontinuance for each of the defendants against the plaintiff Taylor for costs of defense was entered; February 17, 1917, in the Northern Insurance Company case John Dexter, executor of Sarah J. Wood, was dropped as a party plaintiff, thereby leaving Di Meo as the sole plaintiff in this case and on the same day in the Peoples Insurance Co. case Di Meo was dropped as party plaintiff, thereby leaving John Dexter, executor, sole plaintiff in the second case. At the trial of these cases the second count of the declaration in each case, which was based on the mortgagee clause was dropped by the plaintiff and the cases were then submitted to a jury on the single count in each declaration based on the loss payable clause. A verdict was returned in each case in favor of the plaintiff. Subsequently defendant's motion for a new trial in each case was denied by the trial justice and the cases are now before this court upon the defendants' bills of exceptions. The two cases although tried before different juries, at the request of counsel, are considered together by this court as practically the same questions are raised in each case.

The first exception raises the question whether Di Meo had any insurable interest as mortgagee in the property destroyed by fire. The estate in question was originally owned by Sarah J. Wood and by her was conveyed September 2, 1911, to Di Meo who on the same day gave to Mrs. Wood a mortgage thereon for $2,500. with the express condition in said mortgage that Di Meo should paint and repair the mortgaged premises. On the same day Di Meo also gave a second mortgage with a mortgage note for $800. to Harry Taylor upon the said property.

Taylor conducted the negotiations for the sale and acted as agent for Mrs. Wood in the transaction referred to.

From the indorsements on the mortgage note for $800 it appears that six month's interest thereon was paid in advance on September 2, 1911, and again interest was paid on March

2, 1912, up to September 2, 1912, and that $100 on the principal was paid March 2, 1912. On the 18th day of March Di Meo by warranty deed conveyed the fee in the property to Taylor with a covenant therein that the premises were free from all incumbrances except two mortgages amounting to $3,300, and on the same day Taylor executed a mortgage transfer to Di Meo, on a printed blank of the customary form, of the mortgage deed and note which had previously been given by Di Meo to Taylor.

The consideration of the transfer, which was not acknowledged or recorded, as stated therein was the payment of "$800. by Harry Taylor to Harry Taylor." It does not appear in the testimony whether this mortgage transfer and the mortgage note which was never endorsed by Taylor were ever delivered to Di Meo and we are left to conjecture in regard to the facts. All that the record discloses is that the note and transfer were produced by counsel for the plaintiff Di Meo, but Di Meo was not called as a witness by either party. It is argued that the transfer of the mortgage was a cancellation thereof and that Di Meo has now no interest in the estate.

The testimony of Taylor in regard to the transaction was somewhat contradictory but we think the effect of his testimony is fairly expressed by the following extracts therefrom. "88 Q. Then you cancelled the indebtedness which he owed you and in addition to that you assumed an indebtedness of $800. didn't you? A. Well, I suppose it is practically the same thing as making out a new mortgage—transferred that one back. At least we thought so at the time. 106 Q. Do you know how much money he spent on repairs? A. Well painted the house and repaired it; it needed painting, quite a large house, and I should say around $600. the repairs to that house were. 108 Q. And when he transferred to you, was this matter of repairs spoken of? A. Yes that was considered, of course I considered that— 109 Q. Did that have anything to do with your transferring the mortgage, rather than forgiving the mortgage, as Mr. Jones calls it.

A. Why no,—in a way—I knew he done the repairs and that the property was worth it; otherwise I wouldn't have transferred the mortgage back to him. 111 Q. You and Mr. Di Meo considered that you owed him the amount of that mortgage? A. Yes. 111 Q. And owe it to him today? A. Yes, I do."

It thus appears that Di Meo at the least had an equitable interest in the property to the extent of the amount expended by him in improvements thereon. Taylor, the present owner, acknowledges the indebtedness and whatever the exact legal effect of the transaction in question may be, it is clear that Di Meo has a lien or claim on this property which a court of equity would recognize and protect. As Di Meo had an equitable interest in the property, he had an insurable interest therein. *Tuckerman* v. *Home Insurance Co.*, 9 R. I. 414; *Williams* v. *Roger Williams Insurance Co.*, 107 Mass. 377; although we have thus considered this question at some length, the decision thereof is not strictly necessary as the interest, the loss of which is sued for in the first and now the only count in each declaration, is the interest of the owner and not that of the mortgagee.

In the Northern Insurance Company case exception is taken to the ruling of the court in denying defendant's motion to strike out the first count of the declaration. Error is alleged because the count is for recovery by the plaintiff Di Meo alone under the "loss payable" clause, without the joinder of Mrs. Wood's executor, while the loss is made payable to both Mrs. Wood as first mortgagee and Di Meo
(2) as second mortgagee.

The court did not err in refusing to strike out this count. The mortgagee may sue in his own name upon a policy in this form. *Smith* v. *Union Insurance Co.*, 25 R. I. 260 and cases cited therein at p. 268.

In *Brown* v. *Roger Williams Insurance Co.*, 5 R. I. 394, it appears that a policy of fire insurance was issued by the defendant company to the owner and mortgagor of a stock of merchandise, and the loss if any was made payable by the

terms of the policy to the plaintiff mortgagee of the stock insured. It was held that the plaintiff was entitled to bring suit on the policy and to recover the entire amount of the loss, without regard to the fact whether the mortgage debt was paid or not; which fact affected only the account of the proceeds of the action which plaintiff would be required to render other mortgagees and the owner of the property insured.

In the case of the Northern Insurance Company, Mrs. Wood and Di Meo were joint payees or assignees of the policy; after the death of Mrs. Wood, Di Meo by survivorship was entitled to bring the action in his own name. *Anderson* v. *Martindale*, 1 East. 497; *Smith* v. *Franklin*, 1 Mass. 480; *Donnell* v. *Manson*, 109 Mass. 576.

Certain exceptions in the Northern Insurance Company case are to the rulings of the trial court denying the defend-
(3) ant's first and second requests to charge the jury. The first request is as follows: "The insurable interest of the plaintiff covered by the policy in suit is limited to the amount of his mortgage note upon which there was due at the time of the fire $700—only one-third of this amount can be recovered from the insurance company named as defendant in this case, together with interest from the date when said amount became due." The second request is similar to the first. These requests were properly denied. The plaintiff in the first count was suing on the contract made by defendant with Taylor. The property insured was Taylor's, the mortgagor, by whom the premium was paid and to whom the policy was issued. It was the interest of Taylor the mortgagor that was insured and not of the mortgagees, who under the loss payable clause were simply the appointees of Taylor the insured, to whom payment was to be made of any loss due under the policy, and whose right to recover under the policy was subject to be defeated by any defense which was valid against Taylor. *Smith* v. *Union Fire Ins. Co. supra*, and *Brown* v. *Roger Williams Ins. Co. supra*.

Other exceptions are to the ruling of the court denying the defendant's third and fourth requests to charge. The question thus raised is whether the policy in suit is void because of a false description of the property insured. In the policy the property is described as a "three story frame
(4) dwelling house and additions with shingle roof occupied for dwelling house purposes." The building in question was about twenty-five feet wide and contained about nine tenements. On the lower floor there was a room in the front about eighteen or twenty feet in width and about the same depth, which some years before the property was purchased by Mrs. Wood had been used at one time as a saloon and later as a grocery store. There was a stairway also on the front about four or five feet wide, which gave access to the upper tenements. This room had not been used as a store for several years prior to the time when Mrs. Wood bought the property; during the period of Mrs. Wood's ownership the room was used as a bedroom by Mrs. Knight, one of her tenants, who paid rent for it in addition to the rent paid for her tenement which was on the second floor. The room had the usual bedroom furniture, and lace curtains and shades on the windows. The room continued to be used as a bedroom by various lodgers until a week or two prior to the fire when the boarder who occupied it moved out, but no change was made in the arrangements. On this state of facts the defendant claims that the property was a store and tenement property combined and not simply a tenement property. It is admitted that the rate of insurance is higher on the first class of property than on the last mentioned.

It is argued that the description of the property by the insured as a dwelling house is a warranty that the property was designed for the purpose of a dwelling house and not for a combination of dwelling and store.

In the circumstances the purpose for which the building was designed is immaterial. The property when it was insured was used as a dwelling house and continued to be used exclusively as such.

The case of *Thomas* v. *Commercial Union Assurance Co.*, 162 Mass. 29, cited by the defendants in support of their contention differs materially in the nature of the facts from the cases at bar. In the *Thomas* case the plaintiff bought at auction a parcel of land and building thereon which for a number of years prior to the sale to plaintiff had been used as a hotel, which was known as the Glen Hotel, and was so described by the auctioneer at the sale. The building contained the usual rooms ordinarily found in a hotel which were numbered and adapted for the varied uses of guests. After the sale plaintiff employed a caretaker, who slept in one of the rooms, the rest of the structure being unoccupied. In the policy of fire insurance issued to plaintiff, the building was described as a frame dwelling house. It was held that the mere fact of the employment of the caretaker who slept in one of the rooms and the undisclosed intention of plaintiff to let the house as a dwelling house, did not change the open and visible character of the property; as the building in question was a hotel and as a hotel risk was different from and more hazardous than a dwelling house risk, the description of the property in the policy was such a misdescription as avoided the policy. In its opinion the court, at page 33, says: "No doubt the plaintiff could have made a dwelling house of it; but she did not," and again: "It is possible that a building, though called a hotel, may be in fact a dwelling house, and more correctly described as such."

In our opinion the test in each case is not what was the use for which the building was originally designed but what
(5) was the actual use which was made of the building at the time the insurance was taken out and during the time covered by the policy. The building in question in this case was properly described as a dwelling house.

Exception is also taken, in each case, to the refusal of defendant's motion to direct a verdict for the defendant. The grounds on which this motion was made were that no sufficient proof of loss was filed with the company, and a misdescription of the property; the latter objection has

already been disposed of. So far as appears from the record the only specific objections made at the trial to the proof of loss were made by the defendant at the conclusion of plaintiff's case, on a motion for nonsuit. The defendant claimed that the proof of loss was insufficient because the names of the tenants were not given therein, the statement thereon being as follows. The building described was occupied as follows: "First floor, three tenements all vacant; second floor, three tenements, all occupied as dwelling; third floor, 3 tenements all vacant." Objection also was made that the proof did not show all incumbrances. The insured by the
(6) terms of the policy was required to give immediate notice of any loss to the company and within sixty days after the fire to render to the company proof of loss. The proof of loss although somewhat informally drawn was sufficient to comply with the requirements of the policy. It concluded as follows: "any other information that may be required will be furnished on call and considered a portion of these proofs." This was notice to defendant of a desire on part of the plaintiff to comply with all requirements of the defendant. If defendants desired more detailed information they could easily have procured it from the plaintiff and if defendants objected to the proof, they were in fairness bound to notify plaintiff within a reasonable time. As defendants failed to do this they cannot now be permitted to set up what appears to be merely a formal objection to defeat plaintiff's recovery. The jury was instructed that
(7) plaintiff was required to make proper proof of loss and the question was left to the jury with suitable explanation to decide whether or not the defendant had waived any deficiencies or defects in the proof of loss. There was no error in this respect. *Davis, Hackett & Co.* v. *Western Mass. Ins. Co.*, 8 R. I. 277.

The defendants for the first time now seek to raise certain objections to the award. As the validity of the award was not questioned by either party at the trial, it is now too late
(8) for defendants to seek to impeach the award, and we do not consider that this question is properly before us.

As the verdict in each case has been approved by the trial justice and as we find no reversible error in the record of these cases, all of the exceptions of the defendant in each case are overruled and the cases are remitted to the Superior Court with direction to enter judgment on each verdict.

Philip S. Knauer, John Henshaw, for plaintiffs. *Walter J. Ladd, Henry E. Fowler,* of counsel.

Frederick A. Jones, for defendants.

RHODE ISLAND HOSPITAL TRUST CO., Executor and Trustee *vs.* WILLIAM T. PECKHAM *et al.*

JULY 2, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Wills. Intention. Extraordinary Dividends.*

The expressed intention of a testator in his will as to the disposition of extraordinary dividends, governs.

(*2*) *Wills. Ordinary and Extraordinary Dividends.*

Ordinary dividends, regardless of the source whence, or the time when the fund was accumulated, go to the life tenant.

(*3*) *Wills. Trusts. Capital Assets. Life Tenant and Remainderman.*

Capital assets in liquidation are capital, and not income, as between life tenants and remaindermen.

(*4*) *Trusts. Extraordinary Dividends. Life Tenant and Remainderman.*

Where a stock dividend was declared against surplus accumulated before the death of testator, and instead of distributing the stock among the stockholders the corporation sold it and distributed the cash received in the form of extraordinary cash dividends, such dividends go to the *corpus* of the trust and not to the life tenants.

BILL IN EQUITY by trustee seeking instructions.

RATHBUN, J. This is a bill in equity seeking instruction brought by the complainant as executor and trustee under the will of Fenner H. Peckham, Jr., to determine whether certain dividends should be paid as income to the life tenants under the terms of said will or added to the principal of the trust estate for the benefit of the remaindermen.

A guardian *ad litem* was appointed to represent the interest of the three minor children of William T. Peckham,

deceased, and the interests of all persons not in being and ascertainable having any interest in the subject matter, and has filed his answer submitting the interests of his wards to the care of the court. The respondent, Charles F. Peckham, and the administrator of the estate of William T. Peckham, have answered, admitting the facts. The bill was taken *pro confesso* as to the remaining respondents.

Fenner H. Peckham, Jr., died on the 25th day of December, 1915, leaving a will wherein he devised to the complainant in trust the residue of his estate. The material provisions of the trust are as follows: "The remainder of the net income of this trust estate shall be paid over quarterly by my said Trustee, one-third (1/3) to my wife, Mary Carpenter Peckham, two-ninths (2/9) to my son, Charles F. Peckham, two-ninths (2/9) to my daughter Alice Peckham and two-ninths (2/9) to my son, William T. Peckham; or in the event of the death of any of my said children, the issue of any deceased child is to take that portion of the income which his, her or their parent would have taken, if living." And after providing for the disposition of said income upon certain other contingencies, none of which have occurred, the testator directed that upon the decease of the survivor of his said three children, "all of said trust estate shall be divided among my heirs-at-law, in accordance with the Statute then in force in the State of Rhode Island, in the case of persons dying intestate, and said trust shall thereupon cease and determine."

On the testator's death, he was the owner of two hundred and seventeen shares of the common stock of the Hope Webbing Company, a Rhode Island corporation. These shares became part of the residuary trust estate. They were not specifically mentioned in the will.

On May 17, 1917, while the trust was in operation, and during the progress of the life estate, the Hope Webbing Company submitted to its stockholders a tentative plan for what was called a "re-organization of the capitalization of your Corporation." On May 25, 1917, a Massachusetts corporation was formed bearing the same name and having

the same number of shares of authorized common capital stock as the said Rhode Island corporation. On the same day—May 25, 1917—all the assets of the Rhode Island corporation were sold and transferred, as a going concern, to the new Massachusetts corporation, in consideration of the assumption by the Massachusetts corporation of all the liabilities of the Rhode Island corporation and of the transfer to the Rhode Island corporation of all of the common stock of the Massachusetts corporation,—the Massachusetts corporation, however, retaining the right to issue preferred stock to the amount of $750,000. On the same day it was agreed that the Massachusetts corporation should take over sufficient assets of the Rhode Island corporation to pay for the common stock of the new company, and that the balance of said assets, $1,218,131.65—the surplus of the old Rhode Island corporation—should constitute the paid-in surplus capital of the new corporation at its organization. It was ascertained that $690,018.39 of this surplus was accumulated by the Rhode Island corporation prior to March 1, 1913. On the same day—May 25, 1917— the Rhode Island corporation distributed, "as a final distribution in liquidation" to its common stockholders, in exchange, share for share, of their common stock in the corporation, the said capital stock of the new Massachusetts corporation. The complainant trustee exchanged the two hundred and seventeen shares of the old corporation held by it as part of the residuary estate.

Three days later, May 28, 1917, the Massachusetts corporation voted to issue preferred capital stock to the amount of $750,000 under a contract of underwriting with bankers and to give subscription rights thereto to its common stockholders, in the proportion of three shares preferred for every four shares of common stock. The entire issue of preferred stock was sold and paid for in cash. The trustee did not subscribe.

The "plan of re-organization," so-called, was completed by the Massachusetts corporation declaring on June 29, 1917, and on August 24, 1917,—out of the surplus accumu-

lated by the Rhode Island corporation prior to March 1, 1913,—dividends of $50, $10 and $9 per share, payable respectively on June 30, September 1, and October 1, 1917. Letters were sent with the checks stating that each payment was in distribution of surplus earned prior to March 1, 1913, and that, in the opinion of counsel, the payment would be free from Federal income taxes. The complainant trustee received on account of these three payments, a total of $14,973.00, and it is regarding the distribution of this sum that the trustee now seeks instruction.

The question presented to the court is whether this fund of $14,973.00, representing dividends, should be paid by the trustee to the life tenant as income or added to the *corpus* of the trust estate for the benefit of the remainderman.

The fund in question represents extraordinary dividends. These dividends were 50%, 10% and 9%, payable respectively June 30, September 1, and October 1, 1917. For several years the old Rhode Island corporation paid regular quarterly dividends amounting to 13% annually. The letter of May 17, 1917, from the Rhode Island corporation to its stockholders, describing "the plan of re-organization stated that "the plan would make possible a distribution of a part of the company's surplus" and also that "the dividend charges on the new preferred stock will not imperil the continuance of regular quarterly dividends on the common stock." When the checks making the payments of $50, $10, and $9 per share were sent to the stockholders, a letter in each instance was enclosed stating that the paymen was in distribution of surplus earned prior to March 1, 1913.

(1) It is conceded that these dividends were earned before March 1, 1913, that is, before the testator's death and the commencement of the trust.

If the testator in his will had expressed an intention relative to the disposition of extraordinary dividends such intention would govern. *R. I. Hospital Trust Co.* v. *Bradley*, 41 R. I. 174; *Bushee* v. *Freeborn*, 11 R. I. 149, 150. But the testator made no special provision for extraordinary dividends. He makes no specific mention of his stock in the

Hope Webbing Company and his intention cannot be gathered from the will.

The law is well settled that ordinary dividends, regardless of the source whence or the time when the fund was accumulated, go to the life tenant. Ordinary dividends are presumed to have been earned when declared. *Newport Trust Co.* v. *Van Rensselaer*, 32 R. I. 231; 7 R. C. L. 291; *Matter of Osborne*, 209 N. Y. 450, 476.

(2) On what principle shall we determine whether the fund representing extraordinary dividends is income going to the life tenant or capital to be held for the benefit of the remaindermen?

A few courts have adopted what has been termed a "practical rule of convenience" and commonly known as the Massachusetts rule. The rule was first stated as follows: "A simple rule is to regard cash dividends, however large, as income and stock dividends, however made, as capital." *Minot* v. *Paine*, 99 Mass. 101, 108. When surplus is distributed in cash these courts say it is income regardless of the time when the surplus was accumulated and give the dividend to the life tenant. If the distribution is in the form of a stock dividend it is capital and belongs to the corpus of the trust. In other words, cash is income and stock is capital. "The simple question in every case is whether the distribution made by the corporation is of money to be spent as income or is of capital to be held as an investment in the corporation." *D'Ooge* v. *Leeds*, 176 Mass. 558. See *Gibbons* v. *Mahon*, 136 U. S. 549; *Richardson* v. *Richardson*, 75 Me. 570; *DeKoven* v. *Alsop*, 205 Ill. 309. These courts give extraordinary cash dividends to the life tenant regardless of whether the surplus from which the dividend came was accumulated before the death of the testator or during the life of the trust. In *Talbot* v. *Milliken*, 221 Mass. 367, a cash dividend of 50% was declared within, at least, one year after the creation of the trust, by a corporation with surplus assets, at the death of the testator, nearly equal to its capital stock, and the court held that the dividend was income and should go to the life tenant.

The question of disposition of an extraordinary cash dividend earned before the creation of the trust has never been considered by this court.

We cannot sanction a rule which depends entirely upon the action of a board of directors attending to their own business, in their own proper way, with no thought or care as to the rights of life tenants and remaindermen. If, from surplus accumulated before the death of the testator, the directors declared a cash dividend, by such a rule it goes to the life tenant as income although it was not earned by the trust fund. Had the directors instead of distributing cash used the money to purchase stock in their corporation, the stock dividend would go to the *corpus* and the trust fund would not be robbed for the benefit of the life tenant. If a stock dividend is declared from the surplus accumulated during the life of the trust the *corpus* is enriched at the expense of the life tenant. The great weight of authority is opposed to this rule.

In *Vinton's Appeal*, 99 Pa. St. 434, the court said: "The rule . . . is a very simple and convenient one and may relieve trustees and courts of much trouble but it is certainly not one that commends itself for its justice and equity. . . . To us it seems like a bungling rule of law that, at one time, would give what is indisputably income to the remainderman, and at another, what is as clearly capital to the life tenant."

Much of the confusion has arisen through the inability (by lack of evidence) or unwillingness of courts to apportion dividends when the surplus was earned partly before and partly after the creation of the trust. We know of no reason why a court should refuse to effectuate the intention of the testator and do justice between the parties by apportioning an extraordinary dividend, and many courts whose opinions are highly respected do not hesitate to apportion dividends earned partly before and partly after the creation of the trust.

In *Earp's Appeal*, 28 Pa. 368 (a leading case which has been consistently followed by the Pennsylvania Court) stock

dividends having been declared based upon surplus accumulated partly before and partly after the death of the testator were equitably apportioned between the life tenant and the remainderman. See also *In Re Smith's Estate infra; Matter of Osborne,* 209 N. Y. 450; *Van Doren* v. *Olden,* 19 N. J. Eq. 176; *Thomas* v. *Gregg,* 78 Md. 545, 28 Atl. 565.

A sensible and equitable rule for disposing of extraordinary dividends was enunciated in *In Re Smith's Estate,* 140 Pa. St. 344, 352: "But it is well settled in this state, when the stock of a corporation is by the will of a decedent given in trust, the income thereof for the use of a beneficiary for life, with a remainder over, the surplus profits, which have accumulated in the lifetime of a testator but which are not divided until after his death, belong to the *corpus* of his estate; whilst the dividends of earnings made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash, script or stock." This rule, known as the Pennsylvania rule, is some times called the American rule.

In Re Smith's Estate, supra, a corporation with large assets accumulated before the death of the testator increased its capital stock, permitting the stockholders, in proportion to their holdings, to subscribe for the stock at par. The stockholders, including the trustees, subscribed and paid cash for the stock. Immediately thereafter the corporation declared a cash dividend on its whole stock equal to the amount received by the sale of the new stock. It was held that the new stock and the cash dividend were capital and not income.

Judge Bartlett, in *Matter of Harteau,* 204 N. Y. 292, 299, used the following language: "The question whether the surplus dividend is to be deemed capital or income depends upon the time of the acquisition of the surplus which was divided." *Matter of Harteau, supra,* is cited with approval in *Matter of Osborne, supra.* The latter case reviews the New York decisions and uses the following language, at page 477: "Notwithstanding the difficulty in many cases of apportioning dividends, it is wiser and better to leave an

apportionment to courts of equity, in preference to adhering to a rule that depends more upon its simplicity and convenience of enforcement than upon justice and right. The distinction between ordinary and extraordinary dividends is necessary to make a workable rule and at the same time preserve the integrity of the trust fund. The integrity of the trust fund and rights of the life beneficiary under the trust should each be considered, determined and preserved by a court of equity. As far as the courts in this state have made statements to the contrary, it has been in opinions where such statements have been unnecessary to the determination of the case then under consideration, and such statements are disapproved. It should be held: 1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

Cases involving the disposition of large extraordinary cash dividends are not numerous. Corporations are probably more given to issuing stock dividends against accumulated surplus than distributing the surplus in cash but, as we have shown above, the same rule should apply whether the dividend be in stock or cash. In this case there is no necessity for apportionment. The whole of the dividend came from surplus accumulated before the death of the testator. The fund in question was not earned by the trust capital. It was earned long before the creation of the trust. The surplus, from which the fund was derived, gave an additional value to the trust capital and the dividends, although at that time undistributed, were practically a part of the trust capital when the trust came into being. "If the trustees in

order to change the investment, had at the testator's decease sold the shares, they would have received their value as affected by the surplus then undivided, and the amount received would in that case, have been the principal upon which the life tenant would be entitled to receive income. Upon what principal of justice, then, should the act of the corporation, over which the parties had no control be allowed to affect their rights, by taking from the remaindermen that which clearly belongs to them, and handing it over bodily to the life tenant?" *In Re Smith's Estate*, 140 Pa. St. at page 356.

Let us view the case from another angle. Although the first letter to the stockholders described a plan for "re-organization of the capitalization of your Corporation" the later correspondence spoke of "liquidation," "dissolution" and "winding up." We think the facts show a re-organization rather than a dissolution. But, if the dividends are to be considered dividends of capital assets in liquidation, the fund belongs to the *corpus* of the estate. Authorities agree that capital assets in liquidation are capital and not income.

(3) See *R. I. Hospital Trust Co.* v. *Bradbury, supra; Brownell* v. *Anthony*, 189 Mass. 442; *Curtis* v. *Osborn*, 79 Conn. 555.

Although the dividends were in form cash dividends, the practical effect of the transaction was an issue of a stock dividend. It is probable that neither the old nor the new corporation had sufficient cash available to pay the dividends which amounted to 69% of the capitalization. Before the dividends were declared the new corporation issued preferred stock at par to the amount of $750,000. The preferred stock was first offered to the old stockholders. The amount received from the sale of preferred stock was a little larger than the fund distributed in extraordinary dividends. Not only do the letters from the Rhode Island corporation to its stockholders indicate an intention to pay the dividends in question from the proceeds of the sale of the preferred stock but the records of the Massachusetts corporation clearly show that the dividends were paid from such pro-

(4) ceeds. It is apparent that a stock dividend was declared against surplus assets and that, instead of distributing the stock among the stockholders, the corporation sold the stock and distributed the greater portion of the cash received from the sale of the stock. The stockholders, instead of receiving a preferred stock dividend, received, in lieu thereof, cash from the proceeds of the sale of a preferred stock issued against surplus. As we have already indicated the decision should be the same whether the dividends be considered stock dividends or cash dividends but the authorities are almost unanimous in holding that an extraordinary stock dividend declared against surplus accumulated before the creation of a trust goes to the *corpus* of the trust. *Parker* v. *Mason*, 8 R. I. 427; *Brown* v. *Larned*, 14 R. I. 371; *Greene* v. *Smith* 17 R. I. 28; 7 R. C. L. 291; see cases cited in foot note of *Green* v. *Bissell*, 118 A. S. R. 167 and 168; *Talbot* v. *Milliken*, 221 Mass. 367; *Matter of Osborne, supra; In Re Smith's Estate, supra; Van Doren* v. *Olden, supra; DeKoven* v. *Alsop, supra; Bryan* v. *Aiken* (Del.), 86 Atl. 674.

Would the situation of all the parties including the corporation be materially different if the corporation had actually issued and distributed a preferred stock dividend and the trustees had sold their allotment of preferred stock? As we have shown above the preferred stock thus issued would be capital and belong to the trust fund. After the trustees sold their preferred stock would any one say that the proceeds were income which must be given to the life tenants?

By holding that the dividends are capital and not income, the trust fund is preserved. The assets which went into the trust fund remain as the testator knew those assets at his decease. To decide otherwise would enrich the life tenant at the expense of the trust fund. The surplus, which increased the value of the stock in the trust fund, would be taken away from the trust and the trust left with a stock not only shorn of its surplus but burdened by a preferred stock. The cash received from a sale of stock having a preference

over the common stock is no more income on the common stock than borrowed money secured by a mortgage on a farm is income and profit from the farm.

Our decision is that the fund in question belongs to the *corpus* of the trust estate and not to the life tenants, and the complainant is advised accordingly.

On July 7, 1919, at ten o'clock A. M. the parties may present a decree in accordance with this opinion.

Tillinghast & Collins, for complainant. *Harold B. Tanner*, of counsel.

Benjamin F. Lindemuth, for respondents.

Elisha C. Mowry, Guardian ad litem, pro se ipso.

TERESA DI VONA *vs.* WILLIAM M. LEE, City Treasurer.

JUNE 26, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Personal Injury. Damages. New Trial.*

While in a suit to recover compensation for personal injuries, pain and suffering, when the extent of the injury has been established, it is peculiarly within the province of the jury to determine the amount of the award, yet when it appears to the justice presiding that the amount of the verdict is based upon a finding as to the extent of injury which is unsupported by the evidence, or when such amount is grossly excessive upon any possible finding regarding the extent of the injury, it is the duty of the justice to grant a new trial, as the amount of the award is not based on the evidence.

TRESPASS ON THE CASE against a municipal corporation. Heard on exceptions of both parties and overruled.

SWEETLAND, J. This is an action of trespass on the case brought against the city treasurer of Cranston to recover damages for personal injury alleged to have been caused by a defect in one of the highways of the city of Cranston, which defect is alleged to have existed at the time the plaintiff received said injury through the negligence of said city, its officers, and agents.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff for fifteen hundred dollars. Upon the defendant's motion for a new trial said justice refused to disturb the jury's finding that the defendant was liable, but held that the amount of the damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit all damages in excess of eight hundred dollars. The plaintiff did not file her remittitur but excepted to the decision of said justice. The defendant also excepted to the decision of said justice. The case is before us upon the plaintiff's exception to the decision granting a new trial, and upon the defendant's exceptions to the refusal of said justice to grant a new trial without condition and to the refusal of said justice to grant the defendant's motion to direct a verdict in his favor at the close of the testimony.

There was evidence presented at the trial which tends to support the plaintiff's claim that on the evening of April 30, 1917, while she was proceeding with due care along the sidewalk on the westerly side of Cranston street in said city, she stepped into a hole in the sidewalk and was caused to fall with force to the ground thereby receiving injury; that she was ignorant of the existence of said hole; that in the condition of light on said street at the time of said occurrence she was not guilty of contributory negligence in failing to see said hole and in failing to avoid stepping into it; and that the city of Cranston through its responsible officers and agents had knowledge of said defect and ample opportunity to repair the same.

The defendant's exceptions are without merit. There was evidence offered at the trial which, if believed by the jury, warranted the finding that the alleged defect existed at the time of the plaintiff's fall, that said city had knowledge of it, and that her fall was caused by stepping into said defect. The issues in the case were properly submitted to the determination of the jury. The evidence upon the question of the defendant's liability was conflicting. The finding of

the jury on that question has been approved by the justice presiding and from an examination of the evidence we find no sufficient reason for setting aside his decision in that regard upon the motion for new trial.

We are also of the opinion that the plaintiff's exception to the decision of said justice granting a new trial should be overruled. The evidence as to the plaintiff's damages warranted the conclusion of said justice that she had failed to establish by a fair preponderance of evidence injuries justifying an award of damages in excess of eight hundred dollars. We have frequently said that in a suit to recover compensation for personal injuries, pain and suffering, when the extent of the injury has been established, it is peculiarly within the province of the jury to determine the amount of the award. When, however, it appears to the justice who presided at the trial that the amount of the verdict is based upon a finding as to the extent of injury which is unsupported by the evidence, or when said amount is grossly excessive upon any possible finding regarding the extent of the injury, it is the duty of said justice to set the verdict aside and grant a new trial, as the amount of the award is not based on the evidence and hence works injustice to the defendant. The plaintiff has cited in support of her position the language of the court in *Powell* v. *Rousseau*, 38 R. I. 294 at 300, in which the court said: "The justice does not suggest in his decision that in his opinion the jury were influenced by any improper motives. It appears simply that he would have arrived at a different conclusion from that of the jury. We are forced to hold that we find nothing in the evidence or in said decision which would justify us in accepting the estimate of the judge rather than that of the jury upon this question which is so clearly within the jury's province to determine." The matter then under consideration, with reference to which said language was used, was as to an estimate made by the justice presiding of the probable cost to a father of main-

taining a child from early youth during the period of her minority. It appeared in that case that the estimate of said justice was not based upon the evidence but rested entirely upon his own experience. The situation here differs essentially from that presented in *Powell* v. *Rousseau*. Here we have the judge's view, based upon evidence, of the amount of damages which would be just compensation for the injury which had been established by the preponderance of the evidence. Being of the opinion that the amount of the verdict was unfair said justice properly set it aside and ordered that unless the plaintiff would accept a sum which the evidence warranted he would refer the matter to another jury for determination.

We have examined all of the evidence and are of the opinion that the sum of eight hundred dollars, arrived at by said justice, is liberal compensation for the injury which the evidence fairly shows the plaintiff suffered as a result of the accident and that a larger award could be granted only upon a basis of physical injury which the plaintiff has entirely failed to establish.

The exceptions of both plaintiff and defendant are overruled. The case is remitted to the Superior Court for a new trial unless the plaintiff on or before July 7, 1919, shall in writing, filed with the clerk of the Superior Court, remit all of said verdict in excess of eight hundred dollars. If on or before said date the plaintiff files such remittitur the Superior Court is directed to enter judgment for the plaintiff for eight hundred dollars.

Sullivan & Sullivan, for plaintiff.
Frank H. Wildes, for defendant.

PUBLIC UTILITIES COMMISSION *v.* THE RHODE ISLAND CO.

(Appeal of the town of West Warwick.)
(Appeal of the city of Cranston.)
(Appeal of the town of Cumberland.)
(Appeal of the town of Warwick.)
(Appeal of the town of Johnston.)
(Appeal of the town of Burrillville.)
(Appeal of the town of East Greenwich.)
(Appeal of the city of Pawtucket.)
(Appeal of the town of North Providence.)

OCTOBER 20, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Public Utilities Commission. Order of Single Justice. Notice. Constitutional Law.*

The provisions of Section 35 of the Public Utilities Act giving to a single justice of the Supreme Court, when the court is not in session, jurisdiction to suspend the usual operation of an appeal is not in violation of Article XII, Section 1 of Amendments to the Constitution, such jurisdiction being interlocutory in its nature and not derived primarily from the constitution but conferred in accordance with constitutional provisions by the General Assembly.

(2) *Public Utilities Commission. Order of Single Justice. Notice.*

A reasonable construction of Public Utilities Act, Section 35, authorizing a single justice of the Supreme Court when the court is not in session to order that an appeal from an order of the Public Utilities Commission shall not operate as a stay of the order appealed from, "if in the opinion of such . . . justice, the appeal is brought for purposes of delay, or if justice, equity or public safety shall so require," requires an appellee desiring a suspension of the ordinary effect of an appeal, to set out the grounds on which it bases its prayer for relief, and it would become the duty of the justice to set down the matter for speedy hearing with notice to the appellant, unless the case were one where in the opinion of the justice, public safety or danger of irreparable injury required an immediate suspension of the effect of the appeal, until the parties could be heard on the question of permanent suspension.

(3) *Public Utilities Commission. Order of Single Justice. Notice.*

Where without notice to appellant, an order was entered by a single justice of the Supreme Court, under provisions of Public Utilities Act, Section 35,

granting suspension of the effect of an appeal from an order of the Public Utilities Commission to continue until determination of the appeal, the order will be vacated so far as it grants a permanent suspension, but as the justice had general jurisdiction over the application, the order although made without notice will be treated as valid until set aside.

APPEALS from an order of Public Utilities Commission. Heard on motions of appellants to vacate orders entered by a single justice.

SWEETLAND, J. These matters are before the court upon the motions of the respective appellants asking the court to vacate the orders entered by a single justice when the court was not in session.

It appears that the Rhode Island Company by its receivers filed with the Public Utilities Commission a proposed schedule of increased passenger rates upon its railroad lines and its petition that said schedule be approved by the commission; that after hearing, said commission on September 23, 1919, did by its order grant the petition of the Rhode Island Company for an increase of its rates; that the above-named appellants duly appealed to this court from said order of the Public Utilities Commission on the ground that said order was unreasonable, unjust and discriminatory against said appellant municipalities and the residents thereof.

It is provided by the Public Utilities Act, Section 35, that an appeal from the order of the Public Utilities Commission "shall act as a stay of the order appealed from." The normal effect therefore of the above-named appeals was to stay the order of said commission entered on September 23, 1919, and to continue in operation the rates of passenger fare in effect just before the entry of said order. Said Section 35, however, further provides as follows: "*Provided*, that the court, or if the court is not in session, any justice of such court, may at any time order that such appeal shall not so operate if, in the opinion of such court, or justice, the appeal is brought for purposes of delay, or if justice,

equity or public safety shall so require." Relying upon the last quoted provision of the Public Utilities Act said Rhode Island Company, through its receivers, in the case of each of said appeals presented to a single justice of this court, when the court was not in session, a motion asking that said appeal should not operate as a stay of the order of the Public Utilities Commission. Upon each of said motions said justice, without notice to the appellant and without giving to said appellant an opportunity to be heard thereon, granted said motion and entered his order that said appeal should not operate as a stay of the order of the commission. In neither of said motions does the Rhode Island Company set out on which of the grounds, enumerated in the last quoted provision of the Public Utilities Act, its motion is based and in neither of his orders does said justice state the ground upon which said motion is granted.

The above-named appellants are before us asking that the several orders of said justice entered as aforesaid should be vacated. Each of said motions to vacate is urged upon two general grounds, as follows: first, because the provision of the Public Utilities Act which purports to give to a single justice of this court jurisdiction to order that an appeal from an order of the Public Utilities Commission shall not operate as a stay is unconstitutional, in that it is repugnant to Article XII, Section 1 of Amendments to the Constitution of this State; which section, among other things, provides that a majority of the judges of the Supreme Court shall always be necessary to constitute a quorum; second, because the orders of said justice were entered without notice, and, in disregard of law, deprived these appellants, without hearing, of valuable rights given them under said act.

(1) As to the first of these grounds the argument of the appellants is not without force. We are of the opinion, however, that the provisions of the act giving to a single justice, when the court is not in session, jurisdiction to suspend the usual operation of an appeal should not be held to be in violation of the constitutional provision referred to above. Any

statute which purports to delegate to a single justice the power to exercise the functions of this court would be unconstitutional. The jurisdiction finally to review the determination of the Public Utilities Commission or that of any other inferior court or commission, upon questions of law and equity, cannot constitutionally be given to any tribunal other than this court, which must act through a majority of its justices. The statutory provision in question couples jurisdiction given to this court with that given to a single justice if the court is not in session, but in our opinion none of the exclusive constitutional functions of this court has thereby been conferred upon such justice.

In considering the question before us the general rule of construction frequently recognized by this court should be applied; and a reasonable presumption should be indulged in favor of the constitutionality of the statutory provision. We are of the opinion that upon a reasonable construction of said provision it should be held that the power to suspend the stay of the Commission's order, which is worked by an appeal, although judicial and although it has been given to this court, is interlocutory in its nature, and is an instance of the sort of jurisdiction which this court does not derive primarily from the constitution but which in accordance with the constitution may from time to time be conferred upon it by the General Assembly. Jurisdiction of the latter kind may be given to this court and to some other tribunal to be exercised concurrently. In providing for the oversight and control of certain public utilities by the Public Utilities Commission the General Assembly has prescribed a procedure for the review of the determinations of said Commission by the method of appeal. The power to finally review the findings of the commission has been given to this court, where the constitution requires that final review shall be placed as to all questions of law and equity. As a part of the scheme of appellate proceedings the General Assembly has prescribed that an appeal shall stay the order appealed from. When, however, the circumstances enum-

erated in the above quoted proviso exist the General Assembly did not intend that the appeal should act as a stay. There is no constitutional bar which would prevent the General Assembly from placing the determination of whether said enumerated circumstances do or do not exist in any tribunal which it saw fit. It did give to this court power to make that determination; and it was within the legislative authority to confer concurrent jurisdiction to pass upon that question upon a single justice of this court when the court is not in session.

We will now consider the second ground of the appellant's motion to vacate the orders of said justice. The order of the Commission if allowed to go into effect increased the rates of fare upon the street railway system in each of the municipalities here represented. The appeals of these
(2) municipalities under the statute automatically stayed the operation of the Commission's order and held the rates of fare as they existed just before the entry of such order. It is clearly the intent of the act that ordinarily this status, resulting from an appeal, shall be maintained until there can be a hearing upon the appeal and a determination thereof. The right thus to have the old rate of fare continued pending the appeal constituted a valuable interest in the appellant municipality. Under the statute that interest cannot be disturbed unless it is made to appear to this court or to a single justice thereof, when the court is not in session, either that the appeal was brought for the purpose of delay or that justice, equity or public safety require that said interest should be disturbed and the order of the Commission permitted to have effect pending the appeal.

It is the ordinary rule of procedure founded in natural justice that courts will not take action affecting the interest of a party or depriving him of a right without giving him notice and an opportunity to be heard in opposition to such action. There is nothing appearing in said statute or in the circumstances surrounding this matter which require that the ordinary rule shall not be observed.

In our opinion a reasonable construction of the statute requires that if an appellee, in this case the Rhode Island Company, desires a suspension of the ordinary effect of an appeal for either of the reasons enumerated in said section such appellee should apply to this court, or, if the court is not in session, to some justice thereof; and in its application such appellee should set out upon which one or more of said grounds it bases its prayer for relief. It would then become the duty of this court, or of such justice, to set down the matter for speedy hearing with notice to the appellant. At said hearing it would become the duty of such appellee to satisfy the court or justice respectively that it was entitled to the relief sought; and an opportunity should be given to the appellant to be heard in opposition. We can conceive that a situation may possibly arise in which public safety or the danger of irreparable injury may in the opinion of the court or justice require that there should be an immediate suspension of the effect of an appeal until the parties could be heard upon the question of a permanent suspension pending the appeal. In that case we think it would be within the power of this court or of said justice to make a temporary order of suspension until there could be notice to the appellant and a hearing of the parties. In the matter now under consideration the order of said justice indicates that the suspension granted was not intended to be a temporary one but was to continue until the determination of the appeal.

The control of the Public Utilities Commission over public utilities is extensive. The orders of said Commission may affect the rights of public utilities, municipalities and the public in a great variety of ways. It is not the intent of the statute that suspension of the effect of an appeal should be granted as a matter of course. We can well believe that if upon some application to regulate the rates of this appellee, the Rhode Island Company, said Commission should order a reduction of the rates of said company, and said company should feel obliged to appeal from said order on the grounds
(3) that it was unreasonable, unjust and confiscatory, said company would complain, and with reason, that it had been

treated unjustly, if this court, without giving to it a hearing, should suspend the effect of its appeal and continue in force the alleged unreasonable and confiscatory order of said Commission. It developed at the hearing before us on the motions to vacate, that these appellant municipalities have bona fide objections which they desire to urge in opposition to the claim that their appeals were brought for the purposes of delay or that justice, equity or public safety require that the effect of their appeals should be suspended.

We are of the opinion that justice requires that the orders in question should be vacated in so far as they purport to grant a permanent suspension of the effect of these appeals.

As said justice had general jurisdiction over the applications of the appellee, we must hold, in accordance with well recognized principles, that while the orders of said justice were erroneous, because they were made without notice, they nevertheless are to be treated as valid until they are set aside; and the collection of fare by the Rhode Island Company in accordance with said orders has not been and is not illegal or void.

We cannot be unmindful of the confusion and the possible misunderstanding and conflict between the passengers and the servants of the Rhode Island Company which are likely to arise over its extensive system if the rates of fare are changed back and forth without ample notice to the company and to the public. After careful consideration we have decided that the best way to deal with this situation is to treat the orders of said justice as having a temporary effect until the parties can be heard, and to set down the applications of the Rhode Island Company for speedy hearing. We therefore set down said applications for hearing before us on Wednesday, October 22, 1919, at 10 o'clock a. m., at which time the Rhode Island Company must be prepared to proceed unless the appellants consent to a continuance. Notice of the entry of this order shall operate as notice to said appellants to come in and be heard upon said applications.

Herbert A. Rice, Attorney General, for Public Utilities Commission.

Clifford Whipple, G. Frederick Frost, for Rhode Island Company.

Frank H. Wildes, for City of Cranston.

Patrick E. Dillon, for Town of Cumberland.

John F. Murphy, for Town of West Warwick.

Harold R. Curtis, for Town of Warwick.

James E. Dooley, for Town of Johnston.

John J. Lace, Jr., for Town of Burrillville.

Alfred G. Chaffee, for Town of East Greenwich.

James F. Connolly, for City of Pawtucket

Arthur Cushing, for Town of North Providence.

ADELARD MAYNARD *et al. vs.* HENRY VIGEANT, Inspector of Buildings.

OCTOBER 29, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Building Construction. Time of filing Remonstrances.*

Ordinance of the city of Pawtucket, cap. 166, in relation to the erection etc., of automobile garages, provided that "*at the hearing,*" owners of land within a radius of 200 feet might file objections, etc.

A hearing was had upon an application, the record concluding, "Hearing closed. Attorneys given one week to file briefs on the question of including street areas. Decision reserved."

Within the week an additional remonstrance was filed.

Held, that the last remonstrance was not filed within the time prescribed, as the hearing had been concluded and the only question remaining was one of law.

CERTIORARI. Heard and writ dismissed.

STEARNS, J. The proceeding in this cause is by writ of *certiorari.* The respondent, Vigeant, the Inspector of Buildings in the city of Pawtucket, on the 8th day of September, 1919, granted a permit to one Herman Doll to construct a public garage on Trenton street in said city.

The petitioners, *Maynard et al.*, who are owners of land adjacent to the land on which the proposed garage is to be erected, claim that the issuance of said permit was illegal. By an ordinance of said city (Chap. 166, an ordinance relating to automobile garages, approved July 25, 1919), it is provided that every person desiring to erect, alter or enlarge any automobile garage shall file an application therefor in the office of the Inspector of Buildings, and shall not commence any work thereon without a permit from the Inspector of Buildings; said inspector is required to give notice by advertisement of the time and place of the hearing on the application; at the hearing owners of land within a radius of two hundred feet of the lot upon which said garage is or is to be located may file their objections in writing to the granting of the application together with a plat showing the location of the building or proposed building and the lot numbers and names of the owners of the land within two hundred feet of the lot upon which the garage is to be located; if the owners of the greater part of the land within two hundred feet of such lot shall file the required plat, and their objections in writing to the granting of the application said application shall be denied.

From the record produced by the respondent in response to the writ, it appears that a public hearing on the application of Doll for a permit to build the garage, after legal notice had been given by advertisement, was held by the Inspector of Buildings, August 18, 1919. At the hearing on that day the petitioners, Maynard *et al.* filed their written objections to the granting of the application and a plat as required by the city ordinance. The remonstrants and Doll were represented by attorneys by whom arguments were made in behalf of their clients. The record concludes as follows: "The hearing closed. Attorneys given one week to file briefs on the question of including street areas. Decision reserved."

At the hearing before this court evidence was presented by both parties, and it was agreed that the remonstrants on

August 18th were not the owners of the greater part of the land within two hundred feet of the proposed location. It is also agreed that in computing the area of the land within a radius of two hundred feet of the location of the garage the area of public highways is to be excluded. *R. I. Society &c.* v. *Town Council of Cranston*, 21 R. I. 577. Within the week allowed, briefs were filed by counsel with the Inspector of Buildings and a new remonstrance was also filed by the Everlastik, Inc., a corporation which owned land within the two hundred feet radius. If this remonstrance was made in proper time or, to state the question in the terms of the ordinance, if it can properly be considered as made "at the hearing" held by the Inspector of Buildings, then the issuance of the permit to build was illegal as the remonstrants by the inclusion of this corporation are the owners of the greater part of the land within the radius of two hundred feet, and in that case the Inspector of Buildings has no discretion but must deny the application. We are of the opinion that the remonstrance of this corporation was not filed within the time prescribed by the ordinance, as the hearing at that time had been concluded, the parties had presented their evidence and the question then was a question of law, in regard to the proper interpretation of the ordinance.

(1)

It is argued that the action of the inspector at the conclusion of the hearing on August 18th was in effect and in fact a continuance or an adjournment of the hearing for one week and that during that period or until the time when the decision was given by the inspector, September 8, 1919, the hearing contemplated by the ordinance could not be said to be closed. The ordinance in question should be construed with reasonable liberality having in mind the fact that the tribunal created thereby is not a court of law, and that the parties interested in the applications for permits to build or opposed thereto in many cases appear without counsel.

But the time within which remonstrants must act is limited by the ordinance to the time of the hearing. This includes not only the first hearing as advertised, but any continuance or adjournment thereof so long as the hearing is not closed. Having heard all of the testimony presented by the parties, it is proper to declare, as was done in this case, that the hearing is closed, and thus conclude the period within which remonstrances can be lawfully made.

As the petitioners in this cause were not at the time of the hearing the owners of the greater part of the land within two hundred feet of the proposed location of the garage, the question of the granting of the permit was one to be decided by the Inspector of Buildings in the exercise of his discretion, and his decision is not subject to review by this proceeding by writ of *certiorari*.

The writ of *certiorari* is dismissed.

John F. Collins, for petitioner.

James G. Connolly, City Solicitor of Pawtucket, for respondent.

ARTHUR O. TROTTIER *vs.* THOMAS FOLEY

NOVEMBER 7, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Writs of Error. "Decision" of District Court. Conclusions of Law and Fact.*

Where no record appears, other than the decision noted on the writ to show what the "conclusions of law and fact" of a judge of a district court, were, as it does not appear from the record whether such decision was based wholly upon facts or upon conclusions of law, a writ of error will not lie to review such decision.

(2) *Writs of Error.*

Upon a writ of error, questions of law and not errors of fact are reviewable.

(3) *"Decision" of District Court. Conclusions of Law and Fact.*

It is competent for a judge of a district court at any time to amend his decision by amplifying it if necessary to conform to Gen. Laws, 1909, cap. 288, Sec. 20, in regard to noting his conclusions of law and fact, as of the date of the decision so as to show whether such decision was based wholly upon facts or upon conclusions of law.

WRIT OF ERROR. Heard on motion for reargument and denied.

PER CURIAM. After the rescript of this court, fileld October 15, 1919, upon the petition of the garnishee, Original Bradford Soap Works, Inc., for a writ of error to review the action of a judge of the District Court of the Sixth Judicial District in charging the garnishee, in which rescript this court held that it could find no error upon the record, and ordered that the writ of error be abated, the petitioner, by leave of court, filed a motion for reargument. This court has considered the grounds of that motion and finds nothing therein which in any wise changes its opinion as expressed in its rescript.

In that rescript we said: "The petitioner could have requested the judge to state in his decision the grounds thereof (See Gen. Laws, R. I. 1909, Chap. 288, Sec. 20)." Chap. 288, Sec. 20, reads as follows: "Sec. 20. In every case tried by the district court, or by the superior court without the intervention of a jury, the court deciding the same shall briefly note its conclusions of law and fact on its docket, or file the same with the papers in the case, and such record shall be known as a decision."

The decision noted by the judge on the back of the writ and thus filed "with the papers in the case" is as follows: "September 24, 1919. On motion and proof judgment is entered for the plaintiff for $10.25 and costs, the garnishee charged to the extent of $14. on the original attachment, and to the extent of $18. on the attachment by mesne process. Frederick Rueckert Justice."

It appears in the papers that the treasurer of the garnishee was summoned by writ of subpœna *duces tecum* to appear with books and papers, &c. to testify before the court on September 24, 1919, but no record of such testimony appears in the papers and the only record which appears in the papers is the decision quoted above; we are led to infer that the garnishee's treasurer did appear and testify and that the judge made his decision on September 24, 1919, after

hearing such testimony; but no record appears, other than that decision, which shows what the judge's "conclusions of law and fact" were. We can only infer that after hearing said testimony the judge came to the conclusion that the garnishee in fact did owe to the defendant the sums of $14. and $18. respectively as set forth in the decision. As stated in our rescript (filed October 15, 1919): "The petitioner could have requested the judge to state in his decision the grounds thereof (See Gen. Laws, R. I. 1909, Chap. 288, Sec. 20); he has seen fit to bring the record here as it is; and there is nothing therein from which we can find any error of law subject to review."

Under the authority of *The Ashaway National Bank* v. *The Superior Court*, 28 R. I. 355, 359, it was competent for the judge of the District Court at any time to have amended his decision "in the interest of truth" by amplifying it if necessary to conform to the statute, as of the date of the decision (September 24). If that were done, it would then appear whether the decision was based wholly upon facts or upon conclusions of law. Upon a writ of error this court considers only questions of law; errors of fact are not thus reviewable. In the present state of the record we are unable to find any error of law to review. If, by addition to or amendment of the decision, it shall hereafter be made to appear that any question of law is involved, such question may be reviewed upon another writ of error.

The motion for reargument is denied.

Robinson & Robinson, David C. Adelman, for plaintiff.

John L. Curran, for garnishee.

WILLIAM T. KEYWORTH *vs.* ATLANTIC MILLS.

NOVEMBER 14, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Workmen's Compensation Act. Entire Loss of Sight.*

The language of Workmen's Compensation Act, Article II, Sec. 12, paragraph b, "the entire and irrecoverable loss of sight of either eye," must be taken

in its ordinary sense and cannot be extended to cover the case of one who has had the sight of his eye reduced to ten per cent of the normal vision.

PETITION under Workmen's Compensation Act. Heard on appeal from decree of Superior Court and appeal denied.

VINCENT, J. On October 5, 1918, the petitioner filed his petition in the Superior Court setting forth that on July 23, 1917, being at the time in the employ of the respondent as a painter, he fell out of a second-story window whereby he sustained two broken ribs, the loss of sight of his right eye and various bruises, and became totally incapacitated for an undetermined period; that compensation is being made for total incapacity but that no compensation has been made for the loss of his eye; and that he is entitled to the additional or special compensation provided in Section 12, Paragraph b. of Article II of the Workmen's Compensation Act.

After a hearing, the Superior Court ordered and decreed that "the petitioner is entitled to compensation for total incapacity at the rate of ten dollars ($10.) per week beginning on the 23rd day of July, A. D. 1917, and continuing during the period of total incapacity but not exceeding a period of five hundred weeks from the date of said injury," and that "petitioner is entitled to no additional compensation for the entire and irrecoverable loss of sight of an eye under the provisions of Paragraph b. of Section 12 of Article II of the Workmen's Compensation Act."

From this decree of the Superior Court the petitioner has taken an appeal which is now before us.

The only question raised by the appeal is whether or not the petitioner has brought himself within the provisions of Paragraph b. before referred to. It appears from the transcript of the testimony produced at the hearing before the Superior Court that the petitioner has not sustained a total loss of the sight of his right eye but that, on the contrary, he still retains about ten per cent. of the normal vision which is useful to a limited extent for certain purposes and that he

also retains a stereoscopic vision of some value, although it would not afford him any assistance in a vocational pursuit.

(1) Upon this state of the testimony the petitioner argues that, having lost so much of the vision of the right eye that it would no longer serve him in any occupation in which he might engage in earning his livelihood, this court should give to the words of the statute, "the entire and irrecoverable loss of sight of either eye" an interpretation broad enough to cover his case. In other words that a man with the sight of his eye reduced to ten per cent. of the normal vision should be deemed to have suffered the "entire and irrecoverable loss of sight" therein.

With this contention of the petitioner we cannot agree. We think the words of the statute must be taken in their ordinary sense and that their meaning is clear. To say that this statute was designed to go any further than to provide for additional compensation for injuries which resulted in total and complete loss of sight would amount to a distortion of its language.

The view which we now take is in accord with the opinion of this court in *Weber* v. *American Silk Spinning Co.*, 38 R. I. 309. In that case the petitioner's thumb was injured in a manner which made it necessary to remove therefrom a small piece of bone and to sever pieces of tendons and flesh rendering the thumb permanently stiff. The Superior Court found that the injury to the petitioner's thumb did not bring him within the terms of the Workmen's Compensation Act providing for additional compensation, "for the loss by severance" of a thumb and such finding was held to be without error by this court.

In re J. & P. Coats, Inc. for an opinion, 41 R. I. 289, this court held that where the employee at the time of the accident was blind in one eye and sustained a loss of sight in the other and thereby became totally blind, he was entitled to compensation based upon total disability but not to the additional compensation provided for by Section 12 of the Workmen's Compensation Act for the entire and

irrecoverable loss of the sight of both eyes, and in its opinion said, "The purpose of section 12 is plainly to provide compensation for specified injuries in addition to the compensation otherwise provided for in the act. There is and can be no question that the specified injury in this case is 'the entire and irrecoverable loss of the sight of' one eye, and not of both, and accordingly the employee is entitled to compensation therefor for 50 weeks, and not for 100 weeks."

In the petitioner's brief several cases are cited construing the Workmen's Compensation Acts in other states but as such decisions are based upon language differing from that of our act they are not particularly helpful and do not seem to us to demand any special discussion.

The petitioner's appeal is denied and dismissed; the decree of the Superior Court is affirmed and the cause is remanded to said court for further proceedings.

Waterman & Greenlaw, Charles E. Tilley, for petitioner.

Gardner, Pirce & Thornley, Benjamin M. McLyman, Charles R. Haslam, of counsel, for respondent.

PUBLIC UTILITIES COMMISSION *vs.* THE RHODE ISLAND CO.

(Appeal of the town of West Warwick.)
(Appeal of the city of Cranston.)
(Appeal of the town of Cumberland.)
(Appeal of the town of Warwick.)
(Appeal of the town of Johnston.)
(Appeal of the town of Burrillville.)
(Appeal of the town of East Greenwich.)
(Appeal of the city of Pawtucket.)
(Appeal of the town of North Providence.)

NOVEMBER 14, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Public Utilities Commission. Appeals.*

Upon hearing by full court, after notice to parties, of the motions of respondent street railway, that appeals from the order of the Public Utilities Commission should not operate as a stay of said order.

Held, that the objections to the order could only be determined upon hearing upon the merits of the appeals, and in the meantime none of such appeals should operate as a stay.

VINCENT, J. Dissents.

APPEAL from order of Public Utilities Commission. Heard on motion of Public Utility that none of the appeals should operate as a stay of the order and granted.

RATHBUN, J. Heard on motion of the Rhode Island Company that the above appeals from an order of the Public Utilities Commission do not operate as a stay of said order.

On August 8, 1919, the Rhode Island Company by its receivers filed with the Public Utilities Commission a petition praying that an order be made modifying, in accordance with the plans set forth in said petition, the tariff rates then applying to said company.

After an extended hearing, at which all parties interested were heard, said Commission on September 23, 1919, entered an order that the Rhode Island Company file with the Public Utilities Commission, tariff schedules, in accordance with a plan marked B, in modification of the tariff rates then in effect; "said tariffs to become effective upon three day's notice to the public and Commission; that said tariffs so made effective shall be and remain effective during the continuance of the receivership of said company and until otherwise ordered by the Commission." Said order increased the rates which said company was authorized to charge and each of the above appellants duly appealed from said order to this court.

Section 35 of Chapter 795 of the Public Laws provides: that every such appeal shall act as a stay of the order appealed from: "*Provided*, that the court, or if the court is not in session, any justice of such court, may at any time order that such appeal shall not so operate if, in the opinion of such court, or justice, the appeal is brought for purposes of delay, or if justice, equity or public safety shall so require." Each of the above appeals was taken at a time

when this court was not in session and in connection with each appeal a separate order was entered by a single justice providing that such appeal shall not operate as a stay of said order of said Commission. The full court, in an opinion filed October 20, 1919, held that the orders entered by a single justice operated only as a temporary stay of said order of said Commission and the motions of said company that said appeals should not operate as a stay of said order of said Commission were heard, after notice to parties, *de nova* by the full court. At this hearing all parties were represented and heard. The transcript of evidence taken by the Commission and the report of the Commission were before the court. It appeared that a strike of the employees of the Rhode Island Company on July 19, 1919, for increased wages and improved working conditions resulted in a cessation of service until August 6, 1919, on which date the strike was settled. According to the report of the Commission the strike caused a net loss to the company of $142,000; and the settlement agreement increased the annual wage charge $663,900. It appeared that before the Commission entered said order increasing the rate of fares the necessary operating expenses of said company were greatly in excess of its receipts. It is manifest that receivers cannot long operate a railroad without funds.

The appellants objected to the granting of said motions and argued that the order increasing the rate of fares was unjust and discriminatory against the patrons of certain communities and that the Commission granted a greater increase in fares than was necessary.

As this court said in *Public Utilities Commission* v. *Rhode Island Company*, 42 R. I. 379: "The force of these objections can only be determined by this court after a hearing upon the merits of the appeals. In the meantime it is essential to the welfare and safety of the various communities served by said company that there should be no interruption of that service." The Commission did not attempt to raise the fares so that a fair return, or any return, be

given to the capital invested in said company. It was dealing with an emergency.

We order that none of said appeals shall operate as a stay of said order of said Commission.

VINCENT, J. I believe that justice, equity and a due regard for public safety demands that these appeals should not be permitted to operate as a stay of the order of the Commission authorizing the Rhode Island Company to increase its rates to meet its operating expenses. I am however clearly of the opinion that the hearing before this court on Wednesday, October 22, 1919, was not only unnecessary and unwarranted but that the court was without jurisdiction to determine the matter which had already been determined by a single justice under the special powers conferred upon him by statute.

By Section 35 of Chapter 795 of the Public Laws, being the act creating the Public Utilities Commission, it is provided that, "Every such appeal shall act as a stay of the order appealed from: *Provided*, that the court, or if the court is not in session, any justice of such court, may at any time order that such appeal shall not so operate if, in the opinion of such court, or justice the appeal is brought for purposes of delay, or if justice, equity or public safety shall so require; . . . ."

The Public Utilities Commission having made its order empowering the Rhode Island Company to increase its rates of fare and to put such increase into effect on a certain day and at a certain hour, various cities and towns affected by such order appealed therefrom to this court. These appeals would operate as a stay of the order appealed from unless the court, or some justice thereof, should in the exercise of the power which the statute confers order otherwise.

In this situation the Rhode Island Company, the court not being in session and a majority of the members thereof not being available, applied to a justice thereof for an order suspending the operation of the appeals as a stay of the

order of the Commission. The justice to whom the application was made being satisfied that such order would, under the circumstances of the case, be proper caused the same to be entered.

The various respondents then moved the court to vacate the order of the single justice, made as aforesaid, on the grounds (1) that it was made *ex parte* depriving them of a hearing, (2) that neither justice, equity nor public safety required such action and (3) that the statute authorizing and empowering a single justice to act violated that part of our constitution which provides that a majority of the judges of the Supreme Court shall always be necessary to constitute a quorum.

After a preliminary hearing upon these motions, the majority of this court on October 20, 1919, rendered an opinion distinctly stating that there is no constitutional bar preventing the General Assembly from placing the determination of the questions which were submitted to the single justice in any tribunal which it saw fit and that it was within the legislative authority to confer concurrent jurisdiction to pass upon these questions upon a single justice of this court when the court is not in session.

Further on the opinion recites that it is the duty of a single justice upon applications, like those made by the Rhode Island Company, to set them down for speedy hearing, giving to the appellants notice thereof and an opportunity to be heard. The opinion however continues as follows: "We can conceive that a situation may possibly arise in which public safety or the danger of irreparable injury may in the opinion of the court or justice require that there should be an immediate suspension of the effect of an appeal until the parties could be heard upon the question of a permanent suspension pending the appeal. In that case we think it would be within the power of this court or of said justice to make a temporary order of suspension until there could be notice to the appellant and a hearing of the parties."

The opinion concludes with the statement that "justice requires that the orders in question should be vacated in so far as they purport to grant a permanent suspension of the effect of these appeals" and the appealing parties were given an opportunity to be heard before the full court on October 22, 1919, upon the question of vacating altogether the order of the single justice, at which time the Rhode Island Company was ordered to be prepared to proceed.

The second hearing thus inaugurated has been had and as a result thereof this court has reached the conclusion that the operation of the appeals should remain suspended.

It is readily apparent from the perusal of Section 35 of the Public Utilities Act, above quoted, that it was the intent of the General Assembly to give to a single justice, whenever the court was not in session, the same power to act with which it invested the full court at other times. The opinion of this court filed October 20 clearly recognizes that the jurisdiction of the single justice, when the circumstances authorize him to act, is a concurrent jurisdiction. If that be so a single justice at such times as he is authorized to act is invested with an authority equal to that which may be exercised at other times by the full court. That being the situation, the full court has no jurisdiction to take up and determine the same question. *Simpson* v. *Hart*, 1 Johnson's Chan. 91; *State* v. *Evans*, 74 N. C. 324.

Whether or not the full court may later properly hear and determine a motion for the vacation of the order based upon a change of circumstances is a question which does not arise here and need not be discussed.

The question as to the constitutionality of the statute empowering a single justice to act when the court is not in session was not raised before the single justice and he would have been powerless to act upon it if it had been presented to him. That question required the consideration and determination of the full court and has been properly dealt with.

The opinion of October 20 is based on the fact that the single justice before directing the entry of an order did not notify the appealing parties and give them an opportunity to be heard. The statute makes no provision to that effect and evidently such notice and hearing was not contemplated by the General Assembly in the passage of the act. In order to reach such a construction of the statute it is necessary to read into it something which it does not contain and something which it cannot be assumed the lawmaking power contemplated. It amounts to judicial legislation.

That there may be circumstances rendering it necessary for the court, or single justice, to act immediately, the former opinion of this court recognizes. How can the court say, even inferentially, that such a necessity did not appear to the single justice in granting the orders which he did? It was for him to judge of the emergency. Under the act he is constituted a special tribunal and from his decision the statute fails to provide for any appeal to the full court. This court says in its opinion, before referred to, that "there is no constitutional bar which would prevent the General Assembly from placing the determination of whether said enumerated circumstances do or do not exist in any tribunal which it saw fit." The General Assembly has seen fit to place the determination in a single justice of the Supreme Court, not acting as a Supreme Court but as a special tribunal to discharge certain duties devolving upon him under the statute.

In *Hawkins* v. *Burwell*, 191 Ill. 389, a judge of the Circuit Court, upon application of the plaintiffs in error, made an order in vacation for a preliminary injunction restraining defendant in error from sitting as a member of the city council. Later, in vacation, the same judge overruled a motion of the defendant in error to dissolve the injunction. In its opinion the court said, "To reverse the orders granting said injunction and refusing to dissolve the same the defendant in error prosecuted an appeal to the Appellate Court, . . . which court, after overruling a motion to

dismiss said appeal for want of jurisdiction, reversed said cause without remanding the same, from which judgment of reversal the plaintiffs in error have prosecuted this writ of error.

"The Appellate Court erred in overruling the motion of plaintiffs in error to dismiss said appeal. The right of appeal can be exercised only when conferred by statute, and there is no statute in force in this state allowing appeals from the orders of circuit judges granting or refusing to dissolve injunctions in vacation."

In *Greve* v. *Goodson*, 142 Ill. 355, the court said, "The right of appeal is purely a statutory one, and there is no provision of our statute allowing appeals from the orders of circuit judges granting or dissolving injunctions in vacation. The order, in such case, is not the judgment or decree of a court, but only the order of an officer of a court made by virtue of a statute conferring certain powers upon judges of circuit courts in vacation."

In that case the court also held that the statute "allowing appeals from interlocutory orders, applies only to orders entered in term time, and not to orders entered in vacation."

State ex rel. Bennett v. *Barber et al.*, 4 Wyo. 56 and *Lowe* v. *Summers*, 69 Mo. App. 637 at 646, also support the jurisdiction of a single judge in vacation in matters which are interlocutory and do not involve the merits of the controversy.

If it be assumed that the General Assembly intended to confer the powers of the Supreme Court upon a single justice to hear and determine the issues raised a serious constitutional question would arise.

The court in its opinion already referred to says that "the best way to deal with this situation is to treat the orders of said justice as having a temporary effect until the parties can be heard, and to set down the applications of the Rhode Island Company for speedy hearing." The statute before referred to gives no authority for any such thing. The orders of the single justice were temporary in the first place. They

were only effective until such time as the matter could be heard by the full court on its merits. The decision of the court now, upon this particular branch of the matter, is to make the orders of the single justice "temporary temporary" orders, something rare in legal proceedings, and something which it is safe to say is neither provided for in nor contemplated by the statute.

In considering the question of notice and hearing the impracticability of such a course in the present case becomes obvious. Under the order of the Utilities Commission the Rhode Island Company was empowered to put into effect its new schedule of rates at twelve o'clock Sunday night. Late in the afternoon of the Friday preceding, the first appeal was filed. Other appeals were filed from time to time during the early part of the following week. It is evident that a notice to the appealing parties and a hearing could not be effected by twelve o'clock Sunday night at which time the new rates were to become effective and it was therefore certain that if the appeals were to be allowed to stay the operation of the order of the Utilities Commission the Rhode Island Company would be suddenly confronted with a change of its plans, already consummated, and the resumption of its former rates, something which, in the limited period which remained would be a practical impossibility and if attempted would be necessarily attended with great confusion and distress, not only to the officers and the employees of that company but to the traveling public.

At the time of the filing of the first appeal other appeals were known to be in contemplation and as before stated were filed from time to time during two or three succeeding days. As each appeal, unless its operation was stayed, would necessitate, under the recent opinion of this court, a notice and hearing, the whole matter would become harassing and disturbing to all concerned.

If the action of the single justice was an illegal act through the want of notice and an opportunity for the appealing parties to be heard, assuming that the court had jurisdiction

of the matter, it was void and should have been vacated. If it was void it was without any legal efficacy and had no legal or binding force. If it was illegal and void how can the full court, assuming that it has any right to deal with it at all, hold it to be good and valid as an order, differing in purpose and effect from the one issued, which is now claimed to be without foundation in law.

The opinion of October 20, in stating that it is within the province of the General Assembly to confer the powers enumerated in Section 35 of Chapter 795 of the Public Laws upon whoever it may see fit and that the person so empowered has a concurrent jurisdiction, furnishes its own reputation.

The matter now having been heard before the full court the same conclusion has been reached, which the single justice previously arrived at, that the operation of the appeals should be stayed leaving the lack of notice and hearing as the only basis for the interference of the full court, something which the statute neither mentions nor contemplates.

John F. Murphy, Town Solicitor, for town of West Warwick.

Frank H. Wildes, City Solicitor, for city of Cranston.

Patrick E. Dillon, Town Solicitor, for town of Cumberland.

Harold R. Curtis, Town Solicitor, for town of Warwick.

James E. Dooley, Town Solicitor, for town of Johnston.

John J. Lace, Jr., Town Solicitor, for town of Burrillville.

Alfred G. Chaffee, for town of East Greenwich.

James G. Connolly, City Solicitor, for city of Pawtucket.

Arthur Cushing, Town Solicitor for town of North Providence.

Clifford Whipple, G. Frederick Frost, for receivers of Rhode Island Co.

ROBERT L. BRIGHT *vs.* JOHN T. WILCOX.

DECEMBER 5, 1919.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Equity. Specific Performance. Laches.*

Where in a decree for specific performance no time was specified within which payment to the vendor was to be made and the amount to be paid by the vendee was undetermined and left to the decision of a master and neither party made any effort to press the suit before the master, there being no evidence that the delay worked any disadvantage to the respondent, complainant is not barred from his right to the performance of the decree on the ground of laches, for mere delay to enforce a right is not laches.

(2) *Equity. Superior Court. Jurisdiction.*

A suit brought in Washington county for specific performance of a contract to convey land, is of such a nature that it could properly be heard and decree entered in Providence county and where this was done by express request of the parties, one of them cannot thereafter be heard to object to such action.

(3) *Equity. Specific Performance. Cost of Transcript.*

Where on a bill for specific performance, a transcript was prepared by agreement of parties, after the hearing on the original bills, and used at request of the parties, by the trial court to assist him in his decision of the cause, and under agreement by parties to share the expense which respondent failed to keep, complainant paying the whole cost, respondent was properly charged in the bill of costs with one-half of the cost of the transcript.

(4) *Equity. Specific Performance. Interest.*

Where under the original decree granting relief, the amount of payment was not determined and no time limit for hearings before a master or for payment was fixed, and the responsibility for delay in pushing the further proceedings rested equally upon both parties, respondent is not entitled to interest on the purchase price.

BILL IN EQUITY for specific performance. Heard on appeal of respondent and dismissed.

STEARNS, J. This suit was brought in Washington County for the specific performance of a contract by which the respondent agreed to sell and convey certain land in said county to the complainant Bright. The parties thereafter made an agreement in writing whereby the cause, with the consent of the court, was transferred to the Superior Court in Providence County for final hearing and disposition.

After a hearing in Providence on various days, a decree in favor of the complainant was entered in Providence, November 7, 1914, by which it was adjudged that Bright was entitled to specific performance of the contract; that the cause should be referred to a standing master in chancery to determine the amount and value of timber and other materials removed by the respondent from the land in question after the date of the contract of sale, and that complainant was entitled to have the value of such timber applied as a credit or payment on the unpaid balance of the purchase price; that upon the payment to the respondent or into the registry of the court the balance which should be found to be due of the purchase price, less the value of the wood removed, the respondent should make a proper conveyance of the property. The suit was then referred by the court to a master to take an account of the damage done to the property but no hearing was ever had on the matter by the master and no action was ever taken by either of the parties to secure a hearing.

In March, 1918, the death of complainant Bright, which occurred in February, 1917, was suggested to the court by the administrator of his estate, who then entered his appearance in the cause and assumed the prosecution thereof.

January 17, 1919, Thomas G. Bradshaw, receiver of the New England Supply Company, filed a petition for leave to intervene as a party complainant, to assume and continue the prosecution of the cause and offered to perform the contract in behalf of the vendee and asked that the respondent be ordered to make a conveyance to him upon the payment of the amount of money which should be found to be due the respondent. By affidavit in the petition it appears that all of the interest of the original complainant, Bright, in the contract sued upon had for valuable consideration been transferred to said corporation and that Bright had been prosecuting the suit in its behalf.

The widow and the heirs of the complainant Bright then entered their appearance in the suit, and they and the

administrator of his estate admitted the truth of the facts alleged in the affidavit and petition to intervene and assented to the filing of the petition.

The suit was then, upon motion of the intervenor, assigned for hearing in the Superior Court for Providence County upon the relief prayed for in the intervening petition. After the hearing, the intervenor having filed a waiver of any claim that he might have for a reduction from the purchase price of the property by reason of any damage done thereto by the respondent, a decree was entered April 17, 1919, by which the respondent was ordered to convey the property to the intervenor, upon payment by the intervenor into the registry of the court of the balance of the purchase price, namely $985.00, less the complainant's costs, including the master's fee of $12.00 and one-half the cost of the transcript of the testimony taken in this suit and another suit involving the same issues and between the same parties and others, which had been tried together by agreement of the parties.

The cause is now before this court on the appeal of the respondent from this decree. The principal ground urged against the decree is that the original complainant, Bright, by his delay was guilty of laches in not conforming with the terms of the decree of the Superior Court of November 7, 1914, and as a consequence it is claimed that the intervenor who stands in the shoes of Bright is not entitled to the relief prayed for. The respondent neither in this court nor in the Superior Court has presented any testimony in support of this claim, but relies solely on such facts as appear from the court record of the proceedings.

By the decree no time was specified within which the payment to the vendor was to be made. The question of the amount to be paid by the vendee was undetermined and was left to the decision of the master. Neither party made any effort to press the suit before the master and as each party had an interest in the subject matter of the suit and as both parties must take part in any hearing, it was in the power of either party who desired the action to proceed

before the master to take the initiative. In the circumstances the failure to press the suit before the master cannot be held to be a fault on the part of one party more than of the other. The respondent made no demand for action and during all this period had, and in fact still retains, a part of the purchase price and, so far as appears, the delay now complained of may have been in accordance with his wishes. There is no evidence that the delay worked a disadvantage to the respondent. Mere delay to enforce a right is not laches. *Chase* v. *Chase*, 20 R. I. 202. To the same effect see *Bright* v. *James*, 35 R. I. 128. As the respondent failed to act when he had the power to do so he cannot now justly place the entire fault for the delay in the proceedings on the complainant. The petitioner is not barred from his right to the performance of the decree on the ground of laches.

The second reason of appeal is that the Superior Court was without jurisdiction to enter a decree in said cause in
(2) Providence. There is no merit to this objection as the action complained of was of such a nature that it could properly be heard in Providence and it was heard there at the express request of the parties.

The third reason of appeal is that the court erred in providing in the decree for the deduction from the amount to be paid by complainant of one-half of the cost of the transcript of the testimony. The transcript in question was
(3) prepared by agreement of the parties after the hearing on the original bills in equity and was used at the request of the parties by the trial justice to assist him in his decision of the cause. The parties agreed to share the expense but the respondent failed to pay his share and the whole cost was paid by complainant. There was no error in the order of the court in this respect. The matter of costs by the original decree was expressly left open and the deduction of respondent's share was properly ordered by the court.

The respondent at the hearing before this court has asked
(4) that he be allowed interest on the purchase price although no objection was specifically taken to the decree on this ground.

For the reasons already stated we do not think he is entitled to interest. The amount of payment was not determined and no time limit either for hearings or payment was fixed in the decree and as we have already stated the responsibility for the delay in pushing the proceedings rested upon both parties.

The appeal is dismissed, the decree appealed from is affirmed and the cause is remanded to the Superior Court sitting in Washington County for further proceedings.

William W. Moss, for intervenor.

John J. Dunn, for respondent.

CRUISE & SMILEY CONSTRUCTION CO. *vs.* TOWN COUNCIL OF TOWN OF LINCOLN.

JANUARY 7, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ

1. Explosives. Blasting. Town Councils.

Gen. Laws, 1909, cap. 50, § 21 authorizes town councils to prescribe rules and regulations governing the use of explosives for any and all purposes which includes their use for blasting.

2. Explosives. Blasting. Town Councils.

While a town council is authorized under Gen. Laws, 1909, cap 50, § 21, to prohibit the use of explosives for blasting in the absence of a license, it is also true that the power to make rules and regulations under Section 29 of the same chapter carries with it, at least impliedly, the power also to require a license.

3. Mandamus. Discretionary Powers.

Mandamus will not lie to control the exercise of a discretionary power by a public official.

MANDAMUS. Heard on appeal from decree of Superior Court dismissing petition. Appeal dismissed.

VINCENT, J. This case comes before us on appeal from a decree of the Superior Court denying and dismissing the petition for a writ of mandamus. The petitioner seeks to have the respondent ordered to issue to it a license to conduct certain blasting operations in the town of Lincoln.

The respondent filed a motion to dismiss the petition upon two grounds: (1) because the Superior Court had no jurisdiction to grant a writ of mandamus; and (2) because the petitioner had not stated a case sufficient in law to justify the issuance of such writ.

The petitioning corporation alleges in substance that it owns certain real estate located on Arnold avenue in the town of Lincoln consisting almost wholly of a ledge of rock, which ledge unless removed renders the premises useless. That it purchased said premises for the purpose of utilizing said rock for crushed stone in furtherance of its construction business. That in August, 1919, the petitioner notified the town council of its intention to remove said rock by blasting whereupon said town council on September 4, 1919, amended its ordinances and added thereto, among other things, the following section: "Section 1. No person shall use any gunpowder, gun-cotton, dynamite, nitro-glycerine, or other explosive for blasting within the limits of the Town of Lincoln, except upon license therefor duly granted by the Town Council, upon application made to said Council for that purpose, setting forth the location at which it is proposed to do such blasting, and upon such terms, conditions and restrictions as said Council may impose." That on September 6, 1919, petitioner made formal application to said town council for a license to blast. That on September 9, 1919, petitioner received from said town council a request for further specifications regarding location of proposed blasting. That on September 11, 1919, petitioner filed with the council a reply to such request, together with a plat. That on September 20, 1919, at a meeting of the town council said petition was heard and petitioner was given leave to withdraw. That petitioner, relying on the ordinances as they existed prior to the amendment, had entered into contracts for machinery, materials and labor to be used in connection with the development of said premises, all of which will involve considerable loss to petitioner unless a blasting license is granted.

It does not appear that prior to the amended ordinance of September 4 there was anything in the ordinances of the town requiring any notification, permit or license to do blasting. The petitioner while admitting it to be the duty of the town council to prescribe reasonable rules and regulations governing the use of blasting materials claims that it has the right, as a matter of law, to blast upon its own land in compliance with such rules and regulations; that the action of the town council requiring a permit to do blasting is illegal and void; that the said town council is only authorized and empowered to make rules and regulations and is without power to prohibit blasting or to require its assent before the right to do so can be exercised; and that Section
(1) 21, Chapter 50, General Laws of 1909, relates to the general use of explosives by the people at large while Section 29 of the same chapter allows the free exercise of the right to blast subject only to such reasonable conditions and restrictions as the municipality may determine.

Section 29 was enacted in 1895 and is included in General Laws of 1896 as Section 28 of Chapter 40. Section 21 was enacted in 1902, Public Laws, Chapter 988, and is now Section 21 of Chapter 50 of the General Laws of 1909.

Chapter 988 of the Public Laws contains no repealing clause and therefore we come directly to the question as to whether under Section 29 the petitioner has the right to carry on blasting as a matter of right, only subject to such rules and regulations as the town council may prescribe or whether he must obtain a license under the provisions of Section 21.

We do not see any conflict between these two sections. There may be some difficulty in seeing any usefulness in retaining Section 29 after the enactment of Section 21. The powers with which town councils are invested by Section 29 are included in those covered by Section 21. Under Section 21 they are authorized to prescribe rules and regulations governing the use of explosives for any and all purposes which would include their use for blasting.

We cannot agree with the contention of the petitioner that Section 21 relates to the "general use of explosives and explosive substances by the people at large" and that those who desire to use explosives for blasting are absolved from the provisions of that section and are only answerable to those of Section 29. It is true that Section 21 extends the supervision of the town council to the manufacture, storage, keeping, having in possession, sale and use of all explosives irrespective of any purpose for which they are to be used or by whom they are to be used and specially empowers the town council to grant licenses for such use and in the
(2) absence of such license to prohibit the use of the same.

If we consider the case independently of Section 21, we think that the power to make rules and regulations under Section 29 carries with it, at least impliedly, the power to require a license. The matter of granting a license is one of discretion on the part of the town council having in view the safety of the community and the protection of property.

It seems to be well settled that mandamus will not lie to control the exercise of a discretionary power, which would in effect substitute the discretion of the court for that of the person or body designated by statute and the law upon this point is well summarized in 18 R. C. L. p. 124, as follows: "It is a well recognized rule that where the performance of an official duty or act involves the exercise of judgment or discretion, the officer cannot ordinarily be controlled with respect to the particular action he will take in the matter; he can only be directed to act, leaving the matter as to what
(3) particular action he will take to his determination. Therefore, where an officer, in the exercise of a discretionary power, has considered and determined what his course of action is to be, he has exercised his discretion, and his action is not subject to review or control by mandamus. And as a general rule where an officer or subordinate body is vested with power to determine a question of fact involving the examination of evidence and passing on its probative force and effect the duty is judicial, and though it can be

compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be. Were the rule otherwise, instead of officers discharging their duties in accordance with their own discretion, that of a court would be substituted therefor. . . . On the other hand, if, in matters involving discretion, the inferior tribunal or officer refuses to act in *toto*, mandamus may issue to move him to action, leaving him to determine what particular action he will take in the matter."

In further support of the proposition that mandamus will not lie to direct or control the exercise of a discretionary power we may cite *State* v. *Town Council*, 18 R. I. 258; *Corbett* v. *Naylor*, 25 R. I. 520; *Kenney* v. *State Board of Dentistry*, 26 R. I. 538; *Roach* v. *Town Council of East Providence*, 35 R. I. 363.

The petitioner's appeal is dismissed, the judgment affirmed and the petition is remanded to the Superior Court for further proceedings.

Charles A. Walsh, for petitioner.

Albert B. West, for respondent.

WINNIE LEWIS MONROE *et al.* FOR AN OPINION.

JANUARY 7, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Wills. Joint Tenancy.*

Residuary clause of will provided, "I give to B. and C. the income from the residue of my estate both personal and real, share and share alike, during their lifetime, and at their deaths, I give and bequeath all the residue of my estate both personal and real to the X. Public Library as a memorial."

B. deceased, and upon the question as to the application of that one-half of the income during the life of C.:—

Held, that under Gen. Laws, 1909, cap. 252, § 1, it manifestly appeared that the intention of testatrix was that B. and C. should take the income as joint tenants and the entire income should be paid to C. as surviving beneficiary.

PETITION for construction of will under Gen. Laws, 1909, cap. 289, § 20.

STEARNS, J. This is a petition for the construction of the will of Susan S. Flagg, deceased, brought under the provisions of Section 20, Chap. 289, Gen. Laws, 1909.

From the agreed statement of facts made by all the parties in interest, it appears that Susan S. Flagg, a resident of the city of Central Falls, died November 15, 1913. By her last will and testament, after making a number of small bequests to various persons, she disposed of the bulk of her estate by a residuary clause which we are now asked to construe and which is as follows: "I give to Amy A. Whipple and Winnie Lewis Monroe of Central Falls, R. I. the income from the residue of my estate both personal and real, share and share alike, during their lifetime, and at their deaths, I give and bequeath all the residue of my estate both personal and real to the Central Falls Public Library, as a memorial to the late Lisander Flagg and his family."

The income from the residue of the estate has been heretofore paid in equal shares to Amy A. Whipple and Winnie L. Monroe. Amy A. Whipple died October 30, 1919, and Winnie Lewis Monroe now claims that she is entitled to the entire income of the residue of the estate during her lifetime. The city of Central Falls claims that it is entitled to one-half of said income for the benefit of the Central Falls Public Library. Said city waives the right to file a brief and submits its rights to the court on the agreed statement of facts.

The amount of the residuary estate is approximately twenty-one thousand dollars and the income therefrom is approximately sixteen hundred dollars.

The opinion of this court is requested upon two questions, namely,—Should the income of the residuary estate be paid in its entirety to Winnie L. Monroe as surviving residuary beneficiary; if she is entitled to receive only one-half of said income, what disposition should be made of the other half

of said income during the life of Winnie L. Monroe? The primary question is,—Were Amy A. Whipple and Winnie L. Monroe joint tenants or tenants in common of the income of the residuary estate?

Section 1, Chapter 252 of the Gen. Laws, 1909, is as follows: "Section 1. All gifts, feoffments, grants, conveyances, devises, or legacies, of real or personal estate, which shall be made to two or more persons, whether they be husband and wife or otherwise, shall be deemed to create a tenancy in common and not a joint tenancy, unless it be declared that the tenancy is to be joint, or that the same is
(1) to such persons and the survivors or survivor of them, or to them as trustees or executors, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common."

We are of the opinion that it manifestly appears that the intention of the testatrix was that Amy A. Whipple and Winnie Lewis Monroe should take the income of the residue of the estate as joint tenants and not as tenants in common.

The residuary clause appears to be the principal clause of the will and thereby the testatrix disposes of the bulk of her estate and establishes a memorial to the late Lisander Flagg. A clear distinction is made by the testatrix in the disposition of the income and the *corpus* of the residuary estate. The beneficiaries of the income, Amy A. Whiple and Winnie Lewis Monroe are given the whole and undivided income, "share and share alike"; the period of time during which the income and corpus of the estate are to be kept separate is to be "during their lifetime"; by the terms of the will it is only "at their deaths" that the testatrix is then for the first time desirous of making a gift to the library, and at that time the separation of the income from *corpus* of the estate is to come to an end. We have here all the essentials of a joint tenancy, namely, unity of interest, title, time, and possession, accompanied by the clear and evident intention of the testatrix as manifested by the

provisions of the will to create a joint tenancy and not a tenancy in common.

Our opinion is that the entire income of the residuary estate should be paid to Winnie Lewis Monroe as surviving beneficiary of the joint tenancy created by said will.

The conclusion we have reached disposes of the second question to which no answer is now required.

James L. Jenks for Winnie Lewis Monroe and Augustus A. Mann.

Lawrence F. Nolan, City Solicitor, for City of Central Falls.

ROWLAND HAZARD, Trustee *et al. vs.* LEONARD BACON *et al.*

JANUARY 7, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Wills. Trusts. Trustees. Discretion. Substituted Trustee.*

Where testator created a trust in favor of the daughters of the original trustee as a class with power in the father, who was named as trustee, to apportion the fund equally or otherwise as he should deem for the best interest of the class, and with power of appointment in the original trustee to designate a new trustee by will or otherwise who should hold the trust estate subject to such condition not incompatible with the intent of the will as the original trustee might prescribe, and the original trustee died without executing the power or making a new appointment, the power given the original trustee to apportion the trust estate among his daughters as he saw fit was a special discretionary one, personal to him and not annexed to the trust itself, and cannot be exercised either by a substituted trustee appointed by the court nor by the court, but the general intention of testator will not be permitted to fail and a division of the trust estate among the members of the class will be ordered in accordance with the most equitable rule which in this case is that of equality.

BILL IN EQUITY for construction of will. Heard upon certification by Superior Court.

SWEETLAND, J. This is the bill in equity of Rowland Hazard, Trustee, and of Caroline Hazard, Helen H. Bacon and Margaret H. Fisher, praying for the construction of certain provisions contained in the will of Rowland Hazard, late of South Kingstown, and for instructions to said trustee.

Said bill in equity being ready for hearing for final decree has been certified to this court for its determination in accordance with the provisions of the statute.

It appears that the testator Rowland G. Hazard is the great grandfather of the complainant trustee; that said testator died in 1888 and in his will which was duly probated made a certain bequest to his son Rowland Hazard, the grandfather of the complainant trustee. Said bequest is as follows: "To my son Rowland Hazard I give & bequeath the sum of seventy-five thousand dollars as a fund to be held by him as trustee with all the income & profits derived from the same in trust for the use and benefit of his daughters, children of the said Rowland & Margaret R. his wife, to be expended for or divided among his said daughters in such proportion & amounts to each and at such times to any one or more of them as he may deem fit, with power and authority to the said Rowland to transfer the said fund or any portion thereof to such other trustee, or trustees by will, or otherwise, as he may appoint in his stead to hold the same in trust for the use & benefit of the said daughters or of such of them as the said Rowland may designate in writing at the time of the transfer or transfers to said other trustee or trustees or thereafter. The said trustee or trustees so appointed by said Rowland to hold the said fund or any portion thereof for the use & benefit of the said daughters, or of any of them, subject to such conditions not incompatible with the terms & intent of this will as the said Rowland may prescribe.

"In case of the death of any of the said daughters, her issue, if any, to stand in her place & stead in relation to said fund; and if without issue, the said Rowland shall hold any portion which had been or would have been assigned to her, with the income & profits thereof for the use & benefit of any or all of the children of the said Rowland & Margaret R. in such proportion and at such times as the said Rowland may deem fit."

It further appears that at the time of the death of said testator the complainants Caroline Hazard, Helen H. Bacon and Margaret H. Fisher were the only daughters of Rowland Hazard, the trustee named in the will, and his wife Margaret R. Hazard; that said daughters are now alive and are now and always have been the only daughters of said Rowland and Margaret R. It does not appear whether or not said Margaret R. Hazard is now alive but her husband, said Rowland, died in 1898. Said Rowland Hazard, the trustee named in said bequest, accepted the trust and administered the same during his life, without making any appointment of a new trustee or any provision for carrying on the trust after his death. Upon his death in 1898 he left a will which contained no provision with respect to said trust fund or the appointment of a new trustee. On December 8, 1917, the complainant Rowland Hazard was by decree of the Superior Court appointed trustee under the will of said Rowland G. Hazard in the place of said Rowland Hazard deceased, and the said complainant now holds said trust fund of seventy-five thousand dollars with certain accumulations.

The complainant trustee desires to terminate said trust and divide said trust estate among said Caroline Hazard, Helen H. Bacon and Margaret H. Fisher, and asks this court to construe said will and advise him as to his power to make such division and terminate said trust. Said complainant further states in his bill that if it be determined that he has the power to divide said trust estate, it is his intention to make an equal division thereof among said Caroline Hazard, Helen H. Bacon and Margaret H. Fisher.

It has been urged before us that the authority and discretion vested in the original trustee can be exercised by the present trustee. Our attention has been called to Gen. Laws 1909, Chap. 259, "Of Trusts." Said chapter after providing for the appointment of new trustees proceeds in Sections 5 and 7 as follows: "Sec. 5. Every trustee appointed pursuant to the provisions of this chapter shall

have the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust." "Sec. 7. The preceding six sections apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained."

The power given by the testator to the original trustee was to expend for or divide among said daughters "in such proportion & amounts to each and at such times to any one or more of them as he may deem fit." The power thus given indicated a high degree of personal confidence in the trustee named. The trustee was the father of the beneficiaries and acquainted with their dispositions and characters. He would have a special personal knowledge of their family relations and needs as they advanced in life. He was a person especially qualified to carry out the intention of the testator, that said trust fund should be used for the highest benefit of said daughters as a class. The power of appointment given to the original trustee was not to be exercised in favor of a new trustee or new trustees who should possess the same discretion and authority as himself but to a trustee or trustees who should hold said trust estate subject to such condition "as the said Rowland may prescribe." In our opinion the power given to the original trustee to apportion the trust estate among his daughters as he saw fit was a special discretionary one, personal to the original trustee and not annexed to the trust itself. In the terms creating the trust we find the expression of an intention which is inconsistent with and contrary to discretion and authority in a new trustee to divide said trust fund among said daughters "in such proportions & amounts to each and at such times to any one or more of them as he may deem fit."

The testator clearly created a trust in said fund in favor of the daughters of Rowland and Margaret R. Hazard as a

class with power in the father, Rowland, to apportion the fund equally or otherwise as he should deem for the best interests of the class. He died without executing the power or directing the manner in which it should be executed by a new trustee of his appointment. In the circumstances of this case we have held that the discretion personal to the original trustee can not be exercised by a substituted trustee appointed by the court nor can it be exercised by the court. The court however will not permit the general intention of the testator to fail but will order a division of the trust estate among the members of the class, for whose benefit the trust was created, in accordance with the most equitable rule, which in this case is that of equality. *McGaughey's Administrator* v. *Henry*, 54 Ky. 383, 1 Story Eq. Jur. § 98, *Cathey* v. *Cathey*, 28 Tenn. 470, *Burrough* v. *Philcox*, 5 My. & Cr. 72, *Brown* v. *Higgs*, 4 Ves. 708, *Grieveson* v. *Kirsopp*, 2 Keen, 653.

The complainants Caroline Hazard, Helen H. Bacon and Margaret H. Fisher are entitled to have said trust fund equally divided among them; and the complainant trustee should be empowered and directed to make such distribution of said fund and its accumulations now in his hands.

On January 12, 1920, the parties may present a form of decree in accordance with this opinion.

Green, Hinckley & Allen, Harold P. Salisbury, Frederick W. Tillinghast, of counsel, for complainants and respondents.

James B. Littlefield, guardian, *ad litem*.

STATE *vs.* GAETANO VISCIANI.

JANUARY 7, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Jurors. Constitutional Law.*

Pub. Laws, 1918, cap. 1677, § 23, relative to the service of persons drawn as grand and petit jurors, is not obnoxious to Cons. R. I. Art. I, § 7.

(2) *Constitutional Question.*

A motion to quash an indictment on the ground that the grand jury was not impaneled in accordance with the statute, must in the first instance be presented to the Superior Court and is not properly before the appellate court upon the certification of a constitutional question which formed another ground of the motion to quash.

INDICTMENT. Heard on certification of a constitutional question.

SWEETLAND, J. The above entitled proceeding is an indictment charging the respondent with the crime of murder.

In the Superior Court the respondent filed his motion to quash said indictment. As one of the grounds of said motion the respondent questions the constitutionality of a certain provision of the statutes of this State. The constitutional question has been certified to this court for determination. It appears in said motion as follows: "The defendant, Gaetano Visciani, moves to quash this indictment as to him because Section 23, Chap. 1677, Pub. Laws, 1918, under which said indictment is drawn is in violation of Section 7 of Article I of the Constitution of Rhode Island provided as follows: 'No person shall be held to answer for a capital or other infamous crime, unless on presentment or indictment by a grand jury, except in cases of impeachment, or of such offences as are cognizable by a justice of the peace; or in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. No person shall, after an acquittal, be tried for the same offence.' "

(1) We have examined the question certified and the respondent's claim appears to us to be entirely without validity. Sec. 23, Chap. 1677, Pub. Laws, 1918, is as follows: "No person summoned as a petit juror shall be required to serve for more than two weeks in any year in which he may be summoned; unless at the expiration of such period of two weeks he shall be actually serving on a jury theretofore impaneled to try an issue then pending and

undetermined; in which case he shall continue to serve until such trial is concluded: *Provided*, that in the counties of Newport, Washington and Kent he may be required to serve for and during the session of the court in said counties. Every person summoned as a grand juror shall serve as such in the year for which he is summoned for such time as the court may require."

Without passing upon whether it can properly be said that "said indictment is drawn" under said Section 23, it is clear that said section in no respects violates the provisions of Section 7, Article I of the Constitution of Rhode Island.

(2) In another ground of his motion to quash it appears that the respondent claims that the indictment "was returned by a grand jury that was not impaneled, examined and drawn in accordance with Section 36 of Chapter 1677 of the Public Laws of 1918." Before us the attorney for the respondent based a considerable portion of his argument upon that contention. This second ground of his motion, however, is not before us upon the constitutional question. If the respondent desires to urge that said indictment was not returned by a grand jury impaneled in accordance with the statute such objection must in the first instance be presented to the Superior Court and it does not come here upon the certification of a constitutional question.

Our decision is that Section 23, Chapter 1677, Pub. Laws, 1918, does not violate Section 7, Article I of the Constitution of Rhode Island. It is ordered that the papers in the case shall be sent back to the Superior Court with this decision certified thereon.

Antonio A. Capotosto, Asst. Atty. General, for State.
Benjamin Cianciarulo, Frank J. Rivelli, for defendant.

ARTHUR O. TROTTIER *vs.* THOMAS FOLEY.

JANUARY 7, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Garnishment. Assignment of Wages.*

Defendant on account of a loan from his employer gave a receipt, "Received from X. Co. $50 against which I pledge my wages until paid back. They to retain $2 per week or more if they see fit."

Two attachments of the personal estate of defendant in the hands of the employer were made and in each case after the attachment, the garnishee deducted $2 from the amount of wages due and paid over the balance to defendant and made a return of "no funds."

Held, that the agreement was in effect an assignment of wages and not being recorded was invalid as against the attaching creditor, and further it was fraudulent against creditors.

Held, further, that it was the privilege and duty of the garnishee within a reasonable time after the attachment to elect whether or not it would set-off its claim against defendant's claim, and its action in paying over part of the wages to defendant was an election not to set-off and an admission of indebtedness to the amount of the funds turned over.

WRIT OF ERROR by garnishee in action in assumpsit. Judgment of lower court affirmed.

STEARNS, J. Petition for a writ of error by Original Bradford Soap Works, Inc., garnishee, to the District Court of the Sixth Judicial District. The writ was ordered and issued and the case is now before this court on writ of error.

After the opinion (*Trottier* v. *Foley*, 42 R. I. 389) was given by this court, the justice of the district court amended and amplified his decision by filing a written decision in which the court noted its conclusion of law and fact (Gen. Laws, 1909, Chap. 289, § 20).

The facts as thus disclosed are as follows: The defendant, who was in the employ of the garnishee at a weekly wage of $24. on August 9, 1919, received a loan from his employer of $50. for which a receipt was given to the employer as follows: "August 9, 1919, Received from Original Bradford Soap Works, Inc. $50.00 against which I pledge my wages until paid back. They to retain $2. per week or more if they see fit. Thomas Foley."

On August 16 and August 23, the garnishee deducted $2. from the defendant's wages earned and due at those dates and applied the $2. each time in part payment of the loan and each time paid over the balance of the wages to the defendant.

August 25, 1919, the plaintiff Trottier brought suit against Foley on book account by writ returnable September 10; attachment of the personal estate of the defendant in the possession of the garnishee was made and prior to the return day of the writ, a writ of attachment of mesne process was also served on the garnishee. The case was not answered by the defendant and thereafter, on motion and proof, judgment was entered for the plaintiff for $10.25 and costs, the garnishee was charged to the extent of $14. on the original attachment and to the extent of $18. on the attachment by mesne process.

On August 28, the date of the service of the first writ of attachment, the amount of wages earned by and due to the defendant was $16. the amount unpaid on the loan and due to the garnishee was $46. On August 30 the garnishee deducted $2. from the amount of wages $16. then due defendant, applied the same in part payment of the loan, and paid over to the defendant $14. the balance of his wages and thereafter filed its answer of no funds in its hands belonging to defendant. On September 5, the date of the service of the writ of mesne process upon the garnishee, the defendant had earned $20. in wages for the week preceding and the amount of the loan thereon unpaid was $44. On the day following, September 6, the garnishee deducted $2. from the defendant's wages and applied the same in part payment of the loan and paid over the balance of $18. to the defendant and claimed a balance due to it on said loan of $42. Thereafter the garnishee filed its answer of no funds belonging to the defendant at the time of the service of the writ of mesne process. The treasurer of the corporation, garnishee, who signed the garnishee's answers, was summoned to testify in relation to the facts and after a hearing the garnishee was charged as above stated.

The only question now raised by the garnishee is in regard to the right of the court to charge it as garnishee. The amount of the charge is not in issue. The claim of the garnishee is that, as the defendant at the time of the service (1) of each of the writs of garnishment was indebted to the garnishee for a larger amount than the amount due to defendant for wages, there was no property of the defendant in its hands subject to attachment and, as it is claimed the defendant could not sue for and receive the amount of wages earned, consequently the attaching creditor who has no other or greater rights than the defendant has no right to a recovery.

The trial justice found specifically that at the time of the two attachments or immediately thereafter the garnishee decided and elected to retain only $2. each time out of the wages earned and in its hands in payment of its loan and treated the balance of such wages on each of those occasions as the property of the defendant; that the acts of the garnishee in applying only a small portion of the money earned by the defendant to the payment of the loan, in paying over the balance of such money to the defendant, in thus keeping its own claim open and alive and making its answer of no funds in its possession, because as it claims the defendant is still indebted to it in a larger amount, operated to delay, hinder and defraud other creditors and that the garnishee should be charged to the extent of the several amounts paid over to the defendant after each attachment.

We find no error in the action of the trial justice. The agreement evidenced by the writing above quoted is in legal effect an assignment of wages. Sec. 5, Chap. 260, Gen. Laws, "Of the assignment of wages," is as follows: "The term 'assignment' as used in this chapter shall include every instrument purporting to transfer an interest in or an authority to collect the future earnings of any person." The writing in question purports to transfer an interest in future wages by way of a pledge and hence is an assignment. As it was not recorded as required by Sec. 3, Chap. 260, it

is not valid as against the attaching creditor. The agreement is invalid as it is fraudulent against creditors.

In *Hickey* v. *Ryan*, 19 R. I. 399 and in *Robinson* v. *McKenna*, 21 R. I. 117, it was held that a debtor can not lawfully place his earnings beyond the reach of attachment and at the same time then receive a portion thereof for his own use, and an assignment of wages which is intended to accomplish this result is fraudulent against creditors and hence is not valid.

In the absence of any agreement between the defendant and the garnishee, the latter if sued by the defendant could in the circumstances defeat such suit by a plea of set-off. (Gen. Laws, Chap. 288, §§ 10 to 13 inc.). Such procedure by the garnishee is optional however and requires an election by the garnishee between the defence of set-off or procedure by original action against the defendant for the recovery of the amount of the loan. In the present case the garnishee by his answer claims that he has elected to set-off the entire amount of wages due, but as a matter of fact he only elected to set-off part of the debt and the balance due to defendant is by his own act and election treated as the property of the defendant and consequently he is clearly chargeable as garnishee for the amount of wages turned over to defendant after the attachment. It was the privilege and also the duty of the garnishee within a reasonable time after the attachment was made to elect whether or not he should set-off his claim against defendant's claim. But the garnishee must act with good faith and can not be permitted to take inconsistent action to the prejudice of the attaching creditor.

The garnishee exercised his right of election and by his action in paying part of the wages to the defendant thereby admitted his indebtedness to the defendant to the amount of the funds turned over to him. To allow the garnishee to claim his right of set-off to defeat the claim of the creditor, and then to permit him to pay the fund in controversy to the defendant would result in effecting a fraud on the other creditors of the defendant.

We find no error in the record. The judgment of the district court is affirmed, and the papers in the case will be sent back to the District Court of the Sixth Judicial District.

John L. Curran, for garnishee.

Robinson & Robinson, David C. Adelman, for Arthur O. Trottier.

MARIA ANNE CHENEVERT AND MATHILDE BOULAIS *vs* ALGONDUS LARAME.

JANUARY 16, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Easements. Right of Way by Necessity. Increasing Burden.*

One having a right of way by necessity over land of his grantor to a highway cannot use such right of way for the purpose of ingress and egress to other land acquired from another grantor, but contiguous to the first parcel, as such use increases the burden beyond the servitude lawfully created.

(*2*) *Easements. Right of Way. Obstructing Way.*

Where one has a right of way by necessity over land of his grantor to a highway, the placing of a gate of light construction easily opened on the end of the way at the highway, by the owner of the fee, is not an unlawful interference with the use of the way.

(*3*) *Easements. Right of Way. Directing Verdict. Obstructing Way.*

Where there was no evidence that a gate was an unreasonable obstruction to the use of a right of way it was not error to direct a verdict for the owner of the servient tenement.

TRESPASS QUARE CLAUSUM. Heard on exception of defendant and overruled.

PARKHURST, C. J. This is an action in trespass *quare clausum* and is brought by Maria Anne Chenevert and Mathilde Boulais, both of the town of West Warwick, against Algondus Larame, also of West Warwick, the writ being dated May 1st, A. D. 1917. The land is situate in what is now the town of West Warwick, formerly Warwick, at Arctic Centre.

The declaration is in two counts. The first count alleges that the defendant entered the close of the plaintiffs and

tore down a gate. The second count alleges that the defendant entered the close of the plaintiffs and trampled down and walked upon the herbage and committed other wrongs of a like nature.

The defendant pleaded (1) the general issue, (2) unobstructed right of way by prescription, (3) unobstructed right of way by necessity. The plaintiffs traversed these pleas and issue was joined.

The case came on for trial in the Superior Court before Mr. Justice DORAN and a jury at East Greenwich, June 28, July 2 and July 3, 1918, and resulted in a disagreement. It was again tried on February 7 and February 10, 1919, before Mr. Justice SWEENEY and a jury. At the conclusion of testimony, and upon motion of the plaintiffs, the court directed a verdict for the plaintiffs with damages assessed in the sum of one dollar.

The case is here on the exceptions of the defendant to the ruling of the court directing a verdict for the plaintiffs.

The essential facts appearing in evidence are as follows: On November 18, 1893, John B. Archambault, the common ancestor in title of the parties, conveyed to Algondus Larame, the defendant, a parcel of land in Warwick, R. I., being the southwest corner of lot No. 30 on a plat of house-lots made and surveyed by G. T. Lamphear for A. K. Barnes. The grantor owned in addition to lot No. 30, lots Nos. 28 and 29 on said plat, and the parcel conveyed to the defendant was bounded southerly and westerly by land of other owners and northerly and easterly by land of the grantor, John B. Archambault, who at that time owned and occupied the cottage now owned and occupied by these plaintiffs, the lot on which it stands bounding easterly on McNiff Street. No reference was made in the deed from John B. Archambault to the defendant concerning a right of way from said parcel of land, the cottage lot so-called, to a street. There was a cottage house on the land purchased by the defendant and when he moved into it and occupied it he gained access to McNiff Street by passing over land of

John B. Archambault on a path about nine feet wide north of the northerly side of the house occupied then by Mr. John B. Archambault, the grantor, and now by these plaintiffs. At the time that John B. Archambault conveyed the cottage lot to the defendant, November 17, 1893, there was no way for the defendant to reach McNiff Street, or any other public highway, except over land of John B. Archambault.

On September 2, 1896, John B. Archambault conveyed to Alphonse Archambault that portion of lot No. 30, which is now plaintiffs' land, bounded easterly on McNiff Street, northerly by land of John B. Archambault and westerly by the cottage lot, so-called, of the defendant. In the deed conveying said lot to Alphonse Archambault was the following clause: "the owner of a lot west of this lot has the right of a driveway on this lot to McNiff Street."

Alphonse Archambault conveyed said lot to Alfred Laramee, by a deed, dated August 19, 1901, containing the following clause: "the owner of the lot west of this lot has the right of a driveway on this lot to McNiff Street."

The plaintiffs purchased the same lot from Alfred Laramee on December 18, 1911, and their deed contained the following clause: "this conveyance is made subject to the right of way over said premises referred to in said deed," referring to the deed last above mentioned.

At the time John B. Archambault conveyed the cottage lot, so-called, to this defendant there was a fence along the northerly side of the path, which has always remained there. The defendant, on August 6, 1901, purchased from Lucien Archambault a lot of land west of his cottage lot and adjoining it. The lot purchased from Lucien Archambault was bounded westerly by a platted street known as McGlynn Street, being the highway delineated on plaintiff's exhibit "A" simply as "Street."

Seven years and one-half before the bringing of this action the defendant built a two family house on the lot which he purchased from Lucien Archambault, which is west of and

bounds upon the so-called cottage lot, and he has occupied that house ever since and rented the other tenement and likewise the cottage.

The plaintiffs placed a gate on McNiff Street at the easterly end of the path or driveway on April 21, 1917, and the defendant tore it down. Two weeks later the plaintiffs erected another gate which was immediately knocked down by the defendant. Within a day or two thereafter a third gate was put up at the same place by the plaintiffs and that gate was knocked down by the defendant.

At the trial in the Superior Court it was agreed that the only issue in the case was to be whether or not the defendant committed trespass when he removed the gates erected by the plaintiffs across the path or driveway on McNiff Street; in other words, the trial was had solely on the first count of the declaration.

It has not been disputed that the defendant, his ten children, his tenants and tradesmen in general, used the way for the purpose of gaining ingress to and egress from the two-tenement house in which the defendant lived on the lot west of the so-called cottage lot also owned by the defendant, from the time the house was built, seven and one-half years before the trial, as well as for ingress and egress to and from the cottage lot.

The defendant has pleaded an unobstructed right of way by prescription for more than ten years; also an unobstructed right of way by necessity; and while admitting the entrance upon the way and taking down the gates, claims that the gate erected by the plaintiffs was an obstruction to his right of way and that he was justified in removing it.

As to the claim of a right of way by prescription the evidence does not support such claim. There is no need to claim a right of way by prescription so far as the use of the way for entrance and egress to and from the cottage lot is concerned, because from the outset he had a right of way by necessity to the cottage lot, and all the evidence is to that effect; there was no other way to get to and from the cottage

lot to the highway except over the land of his grantor, John B. Archambault. The defendant had as much right to use the way as appurtenant to this cottage lot the first moment that he took possession of it as he ever had, and the only relevancy of the evidence as to continued and uninterrupted user of the way would be to show what was the way set out and defined by the grantor over the grantor's land, if in fact the right to use that particular way for that purpose were ever disputed, which it never was so far as the evidence discloses.

It is to be noted also, that when in September, 1896, John B. Archambault conveyed the land now owned by the plaintiffs and his grantee in turn conveyed the same land to Alfred Laramee, August 19, 1901, the deeds contained the clause, "the owner of the land west of this lot has the right of a driveway on this lot to McNiff Street" and that the deed to the plaintiffs from Alfred Laramee, December 18, 1911, is made subject to this same right of way; this language served to further define the location and extent of the right of way, and to notify the plaintiffs and their predecessors in title of its existence in favor of the defendant and to estop the plaintiffs and their predecessors from disputing it so far as it was lawfully appurtenant as a way of necessity to the defendant's cottage lot. Further it is to be noted that the words of the reservation of the right of way are "the right of a driveway," and do not say an "unobstructed" right of way.

As to the testimony regarding the use or attempted use of this way as appurtenant to the lot westerly of the cottage lot, where the defendant's two-tenement house was built, it appears that this two-tenement house was built seven and one-half years prior to the trial or about 1911-1912; prior to that time it appears that the defendant used the westerly lot as a vegetable garden for himself and family, and the evidence entirely fails to show any such continuous and uninterrupted use of the way for purposes of ingress and egress to and from this garden lot, or for carrying mate-

rial to and from the garden lot, over the way, as to give any support to the claim, which does not appear to be very strongly urged, that the defendant had acquired any prescriptive right to the use of the way as appurtenant to the westerly lot. Of course the defendant could not claim any way of necessity to the westerly lot, because it was not cut off from the street by the land of defendant's grantor, but in fact was bounded on McGlynn Street, a platted street (though not a public highway), to which the defendant had always a right of access from his land. We find that, so far
(1) as the defendant used the right of way from McNiff Street for purposes of ingress and egress to the westerly or garden lot, such use was unauthorized and was hostile to the plaintiffs' interests as owners of the fee in the way as increasing the burden thereon beyond the servitude lawfully created thereon; but the evidence is not sufficient to show such hostile and adverse use for a sufficient length of time to ripen into a prescriptive right under the statute.

It is too well settled to require argument that the defendant could not claim that by reason of the contiguity of his cottage lot to his garden lot, he acquired any right to use the way to his cottage lot as appurtenant to his garden lot; although there is evidence tending to show that he, at one time, had such a claim in mind, when he put in much testimony tending to show the inconvenience that would result to him, if he was obliged to make his way out from the garden lot by way of McGlynn Street and was not allowed to use the way out to McNiff Street in connection with the garden lot and the two tenement house thereon erected. "In the case of a right of way to certain land by prescription, as in that of one by grant, the way cannot be used for the purpose of going to and from other land beyond." I Tiffany Real Property, Chap. 12, Par. 322. See also, *Evans* v. *Dana*, 7 R. I. 306, 311.

The only real question which is here involved is whether the placing of the gate on the easterly end of the way at McNiff Street was such an obstruction to the lawful use of

the way by the defendant as to warrant him in removing it.

We find that the great weight of authority favors the erec-
(2) tion and maintenance of such a gate as was here erected by the plaintiffs. The evidence shows that the gate was of light construction, not locked but hooked or bolted in such a way that a child of tender years could open it; the evidence in fact shows that it was constantly, immediately after erection, opened by the children of the defendant who were of various ages from three to twelve years. There is no evidence that the gate in question could not be opened and swung easily even by children; so that the defendant's contention simply amounts to a claim that, as matter of law, he has a right to unobstructed passage, and that in law the gate is an unauthorized obstruction.

We are of the opinion that the defendant's contention is opposed to the great weight of authority upon this point. This court has itself held in *Griffin* v. *Gilchrist*, 29 R. I. 200, in effect that a reasonable gate constructed at the intersection of a private way with the highway is not an unlawful or substantial interference with the use of the way; see also *Short* v. *Devine*, 146 Mass. 119; *Boyd* v. *Bloom*, 152 Ind. 152; *Connery* v. *Brooke*, 73 Pa. St. 80; *Whaley* v. *Jarrett*, 69 Wis. 613; *Ames* v. *Shaw*, 82 Me. 379; *Houpes* v. *Alderson* 22 Iowa, 160; *Huson* v. *Young*, 4 Lans. 63; *Maxwell* v. *McAtee*, 9 B. Monroe (Ky.) 20.

The law is well summed up in Jones on Easements, § 406, as follows: "It is reasonable that the owner of the fee in land subject to a right of way should maintain a gate at the point where it intersects a public road. While such a gate may be a slight inconvenience to the owner of the easement, it may be quite essential for the use and enjoyment of the land. It may be true that the owner of the servient estate cannot maintain an unreasonable number of gates, or otherwise unnecessarily interfere with the use of the way by the owner of the dominant estate; but we think it entirely clear that maintaining a gate at the place where the private way intersects a public road is a reasonable and legitimate

exercise of the right which resides in the owner of the fee. We have found no substantial diversity of opinion upon this question for the authorities are well agreed that it is the right of the owner of the servient estate to swing a gate across the private way."

It may be noted in this connection that the defendant himself for many years maintained a gate upon his own line (3) at the cottage lot where the way entered upon his land.

It is true that in some of the cases above cited it is said that the question, whether a gate is an unreasonable obstruction to a way, is a question for the jury. But in this case, there is no evidence that the gate was an unreasonable obstruction, but all the evidence is to the contrary.

We find that the trial judge committed no error in directing the jury to return a verdict for the plaintiffs, and the defendant's exception thereto is overruled.

The case is remitted to the Superior Court sitting in Kent County, with direction to enter judgment for the plaintiffs on the verdict.

Murphy, Hagan & Geary, for plaintiff. *John F. Murphy*, of counsel.

Archambault & Archambault, for defendant.

ANGELINA C. SALVATE *vs.* FIREMEN'S INSURANCE COMPANY.

JANUARY 16, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Fire Insurance. Notice. Soliciting Agent. General Agents.*

An insurance company is not bound by notice of facts communicated by insured at the time of making the application to one who was acting as soliciting agent for the general agents of the company.

ASSUMPSIT. Heard on exception of plaintiff and overruled.

STEARNS, J. This is an action of assumpsit brought by the plaintiff on a policy of fire insurance in the standard form issued by the defendant corporation to the plaintiff, June 23, 1916.

The policy was for the term of one year and insured to an amount not exceeding six hundred dollars, the stock of meats, groceries, provisions, fixtures, furniture, scales, etc., in plaintiff's market in the city of Providence. On the night of July 7, 1916, the stock and fixtures of the value of six hundred and sixty dollars were totally destroyed by fire. Proof of loss was made to the defendant by whom no action was taken and the plaintiff within the year brought this suit. At the conclusion of the plaintiff's case the trial justice on motion of the defendant nonsuited the plaintiff, on the ground that the policy was void because the interest of the plaintiff in the property insured was other than unconditional and sole ownership.

The case is before this court on bill of exceptions of the plaintiff and the only question is in regard to the action of the court in granting the nonsuit.

The policy contained the usual provisions that the entire policy should be void "if the interest of the insured be other than unconditional and sole ownership"; "or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

It appears from the testimony that a Mr. Tillinghast went to the store of the plaintiff and asked one Alfred Calone, the manager of the store, if he wanted to take out insurance. Tillinghast was told by the manager that the fixtures and furniture in the store did not belong to the plaintiff as they had not been paid for and were held under a leasehold agreement whereby title did not pass to the plaintiff until all of the articles were fully paid for. To this Tillinghast replied that it did not matter, it would not make any difference. Calone after conferring with the plaintiff, on the second visit of Tillinghast to the store, agreed to take

out a policy and the policy now in question was subsequently delivered by Tillinghast to Calone at plaintiff's store and the premium due thereon was paid to Tillinghast.

The policy in this case is executed and signed as follows: "In witness whereof, this company has executed and attested these presents, but this policy shall not be valid unless countersigned by the duly authorized agent of the company at Providence, R. I.

A. H. HASSINGER
Secretary

DANIEL H. DUNHAM
President.

Countersigned at Providence, R. I. Beach & Sweet Incorporated

JOSEPH G. HENSHAW
Agent"

On the back of the policy was pasted a printed slip, "P. S. Tillinghast., Insurance with Beach & Sweet Inc. 15 Westminster St. Providence, R. I."

The receipt given for the premium was as follows: "Received payment Beach & Sweet, Inc. by P. S. T." and stamped thereon with a rubber stamp, "P. S. Tillinghast."

The value of the fixtures insured but not owned by the plaintiff when the policy was issued was three hundred and ninety-two dollars, and at the time of the fire the plaintiff still owed two hundred dollars therefor.

Calone and the plaintiff after the fire went to the office of Beach & Sweet, Inc., and gave notice of the fire. They did not see Tillinghast at this time but on a subsequent visit, on enquiry made, Mr. Tillinghast appeared and talked with them in the office, but there is no testimony as to the details of the conversation.

The plaintiff contends the evidence proves that Beach & Sweet, Inc., were general agents of the defendant; that Tillinghast was an agent of Beach & Sweet, Inc., and consequently of the defendant; that notice to Tillinghast was notice to the defendant and because of such notice and of

the statements made by Tillinghast, the defendant must be held to have had knowledge of the plaintiff's title to the property at the time of the issuance of the policy, and hence is now estopped to claim that plaintiff did not have unconditional and sole ownership.

If it be conceded on the evidence, meager as it is, that there is sufficient evidence to warrant a finding that Beach & Sweet, Inc. were the general agents of the defendant, what can be said fairly to be established in regard to the relationship of Tillinghast to Beach & Sweet, Inc.? There is no testimony to show who Tillinghast was or in what way, if any, he was connected with Beach & Sweet, Inc. He manifestly had no power to issue a policy and the evidence shows but this one instance in which Tillinghast ever acted for Beach & Sweet, Inc. He solicited the business, delivered the policy, received the premium, and receipted therefor. Apart from these acts there is nothing to show whether he acted with or without authority in this particular case or whether his services, if rendered to Beach & Sweet, Inc., were gratuitous or to what extent, if any, he was paid for them. If the authority of Tillinghast was more extensive than appears from the evidence, the plaintiff, if she seeks to secure the advantage thereof, must prove it.

(1) Making all reasonable inferences from the testimony in favor of plaintiff's case, we assume that Tillinghast was either an insurance broker or what is commonly called a soliciting agent for Beach & Sweet, Inc., the general agent of the defendant corporation. It is not claimed that either the general agent or the defendant had actual notice of the facts in regard to ownership. In these circumstances, is the knowledge of Tillinghast sufficient to bind the defendant? We think not.

This question has been settled in this State by the decisions of this court in *Reed* v. *Equitable Fire & Marine Insurance Co.*, 17 R. I. 785 and *Wilson* v. *Conway Ins. Co.*, 4 R. I. 141, and unless these cases are to be overruled these decisions are controlling and decisive in the present case.

In the *Reed* case the action was assumpsit on a policy of fire insurance, a condition of the policy was that the policy should be void in case the insured had or should afterwards have other insurance on the property insured, without the assent of the defendant in writing or in print. It appeared by the pleadings that there was other insurance on the property when the policy in suit was issued, without the assent of defendant. It was held on the authority of *Greene* v. *Equitable Ins. Co.*, 11 R. I. 434, that the company was estopped from setting up the clause above referred to in defense to an action on the policy where the insurance company had actual notice of the fire insurance at the time the policy was issued. But the court held that the knowledge of the agent of the company, who solicited the insurance, of the existence of other insurance not communicated to the insurance company did not bar the company from the defense of the clause referred to and that the policy in the circumstances last referred to was void. In its opinion the court after referring to the authorities, conceded that the tendency and the weight of modern decisions were in favor of the plaintiff and opposed to the decision of the court and said (p. 789), "If this were a new question in this State we might feel compelled to yield to the weight of authority." In speaking of *Wilson* v. *Conway Ins. Co.*, the court said, "In that case it was held that an agent who is empowered merely to receive applications to transmit to the company, and, if they choose to take the risk, to receive the policy and to issue it to the applicant on payment of the premium, is not the agent of the company for the making of applications; that if he is employed by the applicant, or acts for him in drawing up the application, he is the applicant's agent, for whose mistakes the applicant is responsible; and that the company cannot be affected with notice by verbal communications made by an applicant to an agent so authorized. Stability of decision is very important in the administration of the law; and as this doctrine has stood so long in this State, apparently without question, and as it rests upon

good reason, and is, moreover, in line with the rule of the State under whose law both these policies were issued, we see no sufficient ground to depart from it." To the same effect see *Bryan* v. *National Life Ins. Co.*, 21 R. I. 149; *O'Rourke* v. *John Hancock Ins. Co.*, 23 R. I. 457; *Dow* v. *National Assurance Co.*, 26 R. I. 379; *Monast* v. *Manhattan Ins. Co.*, 32 R. I. 557. The authorities in different jurisdictions now as at the time of the decision in the *Reed* case, *supra*, are conflicting and irreconcilable.

We appreciate the force of the argument that in many cases the insured is unfamiliar with the law of agency and frequently regards any insurance agent, whether general or special, as invested with full and unrestricted authority to act for the insurance company. On the other hand, having in mind the great extension of the insurance business in recent years and with the knowledge that the soliciting of insurance is frequently the occasional and not the regular and usual business of the person who takes the application for insurance, we think in reason and in justice the insurance company acting in good faith and for its own protection should be permitted to place some limitation on the authority of such special agents. Other considerations apply in the case of a general agent with authority to issue policies, etc., in which case a different conclusion might well be reached.

Upon consideration of the facts and the decisions referred to we are of the opinion that the defendant corporation was not bound by notice of the facts communicated to Tillinghast by the agent of the plaintiff and that the policy is void for the reasons stated.

The exception of the plaintiff is overruled and the case is remitted to the Superior Court with direction to enter judgment upon the nonsuit.

Benjamin Cianciarulo, McGovern & Slattery, for plaintiff.
Frederick A. Jones, for defendant.

MARY A. REDDINGTON vs. WALDO I. GETCHELL.

JANUARY 23, 1920.

PRESENT: Sweetland, Vincent, and Stearns, JJ.

(1) *Exceptions. Establishing Truth of Exceptions. Time.*

Where the power of the trial judge has absolutely and entirely ended, as by his elevation to the Supreme Court, the filing of a petition to establish the truth of exceptions prior to the expiration of the period of twenty days prescribed by Gen. Laws, 1909, cap. 298, § 21, is not premature.

(2) *Exceptions. Establishing Truth of Exceptions.*

After reciting various steps taken by the appellant a petition to establish the truth of exceptions continued "in order to establish the truth of said exceptions and the correctness of said transcript of testimony."

Held, that from the whole paragraph it sufficiently appeared that appellant was asking for a hearing for the purpose of establishing the truth of exceptions and transcript rather than for a final hearing upon exceptions which had neither been allowed or established.

(3) *Exceptions. Affidavit. Establishing Truth of Exceptions.*

An affidavit to a petition to establish truth of exceptions under rule 13 which concluded "the plaintiff's ground of exception is the decision of the trial justice upon the admission or regulation of certain testimony as shown by the bill of exceptions annexed hereto" is adequate, the intention being to direct the attention of defendant to the bill for the information to which under the rule he would be entitled.

(4) *Exceptions. Affidavit. Transcript of Testimony.*

On a petition to establish truth of exceptions the affidavit of counsel did not mention the transcript of testimony, but the stenographer filed an affidavit that "the transcript made by me is a true record according to my notes."

Held, that the affidavit was sufficient *prima facie*, to establish the correctness of the transcript.

PETITION to establish truth of exceptions. Heard on motion of defendant to dismiss and denied.

VINCENT, J. This case comes before us upon the motion of the defendant to dismiss the petition of the plaintiff to establish the truth of her exceptions. The defendant claims that this court is without jurisdiction to consider said petition, it not having been filed in conformity with the statute, General Laws, 1909, Sec. 21, Chap. 298.

The bill of exceptions was filed December 6, 1919, and the plaintiff's petition was filed December 8, 1919.

The petition sets forth that "the trial justice who presided at the trial of said case . . . is no longer a member of said Superior Court and hence cannot within the period of twenty days after such filing act upon or return the same or disallow, alter or refuse to alter the same as required by statute," etc.

Section 21 of the statute referred to is as follows: "Sec. 21. If the justice who presided at the trial shall, for a period of twenty days after a bill of exceptions has been filed, fail to act upon or return the same, or shall disallow, alter, or refuse to alter the same, and either party is aggrieved thereby, the truth of the exceptions may be established before the supreme court upon petition stating the facts, filed within thirty days after the filing of the bill of exceptions in the superior court; and thereupon, the truth of the exceptions being established in such manner as the court shall by rule prescribe, they shall be heard and the same proceedings taken as if the exceptions had been duly allowed and filed. And upon such petition being filed, the supreme court may order the clerk of the superior court to certify and transmit to the clerk of the supreme court the papers in the cause."

(1) The defendant argues that, inasmuch as the basis of a petition to this court to establish the truth of exceptions is the failure of the trial justice to act upon such exceptions, and that the statute having fixed a period of twenty days within which such action may be taken, any proceeding prior to the expiration of such period would be premature, would not comply with the statute, and would entitle the defendant to a dismissal of the petition. In other words, that the plaintiff cannot under any circumstances assume that the trial judge will not act upon the bill of exceptions but that the final determination of that question can only be reached with the expiration of twenty days.

While this question is quite technical in its character we do not view it with disfavor for that reason nor deem it less deserving of our careful consideration.

Upon the elevation of the justice who heard the motion for a new trial to this court, he ceased to be a member of the Superior Court and his power to further exercise any of the functions of a justice of that court became wholly terminated. The evident purpose of the statute, in fixing a period of twenty days within which the trial justice is required to act upon a bill of exceptions, was to afford him a fair opportunity for such examination of the matters connected therewith as might be necessary, but we do not think it was intended as a positive temporary bar to other proceedings, as for instance, to establish the truth of exceptions in a case where the power of the trial judge to act had entirely and absolutely ended. In such a situation it is a foregone conclusion that if the losing party desires to prosecute his bill of exceptions he can only do so by getting their truth established by petition to this court. Under such circumstances we cannot see that such a proceeding instituted within the twenty days and after the trial judge has become powerless to act invades any rights of the defendant or in any way operates to his disadvantage.

The defendant does not contend that if within the twenty days the trial judge had disallowed, altered or refused to alter the bill of exceptions the aggrieved party could not forthwith file his petition at any time thereafter without waiting for the expiration of the twenty day period. In that case the trial judge would have exhausted his power through its exercise while in the case at bar the exercise of the power had become impossible. We think it would be somewhat illogical to say that the statute should receive the restricted interpretation for which the defendant contends in the one case and a more liberal and broader construction in the other.

The defendant cites the case of *Hartley* v. *Rhode Island Co.*, 28 R. I. 157 in support of the proposition that not until

the expiration of twenty days after the filing of the bill of exceptions could this court acquire jurisdiction to establish the truth of the exceptions. In that case it does not appear that the trial judge had absolutely and forever lost his power to act but simply that he had failed to act within twenty days and that no petition to establish the truth of the exceptions had been filed within thirty days after the bill of exceptions had been filed in the clerk's office. That case neither presented nor suggested the question which is now before us in the case at bar. The question here is not based upon any failure of the trial judge to act within a period of twenty days which has elapsed, nor is it based upon any failure of the defendant to take any action within a period prescribed by rule or statute.

The defendant also cites *Carr* v. *Cranston Print Works*, 40 R. I. 376, and argues that certain language used by the court in its opinion recognizes the validity of the claim which he now makes. That case however dealt (1) with the sufficiency of the affidavit accompanying the petition to establish the truth of the exceptions and (2) whether a supplementary affidavit covering the admitted omissions of the first affidavit and filed after the expiration of thirty days, the time limited by the rule, could be regarded as a compliance therewith. The part of the opinion quoted by the defendant, when read with its context, is nothing more than a description of the steps which had been pursued in that particular matter and has no bearing upon the question now being considered.

The defendant raised certain other questions: (1) That the petition contains no prayer that the truth of the exceptions and the correctness of the transcript be established;
(2) (2) that the petition is not verified by affidavit setting forth the rulings upon which the exceptions are based as required by rule 13 of this court; and (3) that the petition is not accompanied by an affidavit setting forth that the transcript certified by the court stenographer is correct or incorrect as the case may be as required by said rule 13.

After reciting the various steps taken by the plaintiff, the petition continues with and contains the following words; "in order to establish the truth of said exceptions and the correctness of said transcript of testimony." While the succeeding portion of the paragraph from which the above is quoted is unskilfully worded and somewhat confused we think that it sufficiently appears that the defendant is asking for a hearing before this court for the purpose of establishing the truth of the exceptions and transcript, rather than for a final hearing upon exceptions which had neither been allowed or established.

The affidavit in verification of the petition does not appear to have been very skilfully prepared. The defendant objects to its validity on the ground that it does not set forth the
(3) rulings upon which the exceptions are based as required by rule 1. The conclusion of the affidavit is, "the plaintiff's ground of exception is the decision of the trial justice upon the admission or regulation of certain testimony as shown by the bill of exceptions annexed hereto" and the plaintiff now claims that such reference to the exceptions is sufficient to make them a part of the affidavit and to bring the affidavit into conformity with the rule. A more careful preparation of the affidavit would have avoided this question. The object of the rule is to point out to the opposite party and to define with such particularity as will enable him to readily comprehend them, the rulings which are to be the subject of argument in this court. It is evident that it was the intention of the affiant in referring in his affidavit to the bill of exceptions as "annexed hereto" to direct the attention of the defendant to said bill for the information to which, under the rule, he would be entitled. The affiant in speaking of the bill of exceptions and making use of the phrase "annexed hereto" has not added the words "and made a part hereof" but as there could have been no other object in the annexation than to bring about such an introduction we think that we must hold that the affidavit is adequate.

(4) The last point which the defendant makes is that there is no sufficient verification to the correctness of the transcript of evidence. The affidavit of counsel which we have already discussed does not mention the transcript. The transcript in the present case bears the usual certification of the stenographer and in addition thereto there is her affidavit that "the transcript made by me is a true record according to my notes." It is true that the language quoted imports some limitation but it must be remembered that the stenographer is an officer sworn to correctly transcribe the testimony; that her knowledge as to the correctness of the transcript would doubtless be equal, if not superior, to that of anyone else and that counsel have an opportunity for examination and to seek the correction of any errors or omissions which such examination may bring to light. We think that the stenographer in this case goes as far as she could be expected to go, having a due regard for her oath, and that her testimony thus given is sufficient, *prima facie*, to establish the correctness of the transcript.

The defendant's motion to dismiss the plaintiff's petition is denied.

Charles R. Easton, for plaintiff.

Huddy, Emerson & Moulton. E. Butler Moulton, for defendant.

EMMA J. WAY *vs.* SUPERIOR COURT.

JANUARY 28, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Judgment. Time of Entry.*

Gen. Laws, 1909, cap. 294, § 1, providing that "judgment shall be entered on the seventh day following the day of the rendition of the verdict or the decision of the court, unless some motion operating as a stay be filed, &c.," must be construed in connection with cap. 298, § 17, relating to procedure in prosecuting a bill of exceptions, and therefore a judgment may be entered at the end of the seventh day, but not before, and the clerk in making the record of judgment on the eighth day made the entry on the first day on which he was authorized by statute to act.

(2) *Judgment. Setting Aside Judgment. Assignment to Trial.*

April 2, plaintiff was nonsuited; April 10, the clerk made the record, "judgment entered for defendant; April 9, the parties executed an agreement, "default removed, case assigned for trial June 25." The next entry on the record was "April 10, by agreement of counsel default heretofore entered removed and case assigned for trial to June 25." This last entry was made without order from the court. On October 27, the court assigned the case to trial.

Held, that an act of the court being required to set aside a judgment it was error to assign the case to trial as there was nothing to try.

CERTIORARI. Heard and record quashed.

RATHBUN, J. *Certiorari* to vacate assignment of case in Superior Court.

The petitioner alleges that she is the defendant in the Superior Court in Law Case No. 785, *Ethel M. Way* v. *Emma J. Way*. From the record it appears that on April 2d, 1919, the plaintiff was called and declared nonsuited; that on April 10th, 1919, the clerk made the following record, "Judgment entered for defendant." It appears that on April 9th, 1919, on the seventh day after the nonsuit, the parties by their attorneys signed an agreement that the following entry be made: "Default removed—case assigned for trial June 25th 1919." The next entry on the record is "1919 April 10 by agreement of counsel default heretofore entered removed and case assigned for trial to June 25, next." (The later entry was made without order from the court.) Thereafter no action was taken in the case until the court on October 27, 1919, on plaintiff's motion, assigned the case for trial to October 29, 1919. Defendant objected to the assignment and his exception was noted. Thereupon the defendant petitioned this court for a writ of *certiorari*.

The petitioner contends that judgment having been entered for the defendant on April 10, 1919, the court had no jurisdiction to assign the case for trial without having first set aside the judgment in accordance with Section 2, Chapter 294 of the General Laws, 1909. The respondent contends that, as the clerk did not enter judgment on the seventh day following the nonsuit, he could not thereafter

without order of the court enter judgment and hence that the entry on April 10th, 1919, purporting to enter judgment was a nullity.

Section 1, Chapter 294 of General Laws, 1909, provides that "judgment shall be entered on the seventh day following the day of the rendition of the verdict or the decision of the court, unless some motion operating as a stay be filed, or unless there be an express order of the court for the entry hereof, on some later day." This provision must be construed in connection with Section 17, Chapter 298 of General Laws, 1909. "Sec. 17. Any person or party who has taken exceptions in the superior court may prosecute a bill of exceptions to the supreme court by taking the following procedure: *First.* Within seven days after verdict or notice of decision, but if a motion for a new trial has been made, then within seven days after notice of decision thereon, he shall file in the office of the clerk of the superior court notice of his intention to prosecute a bill of exceptions to the supreme court together with a written request to the court stenographer for a transcript of so much of the testimony as may be required, and shall deposit with the clerk the estimated fees for transcribing such testimony as may be required. The filing of such notice and making of such deposit shall stay judgment or sentence until further order of the court."

(1) It is the clear intention of the statute that a party taking exceptions in the Superior Court shall have seven full days within which he may file "in the office of the clerk of the superior court notice of his intention to prosecute a bill of exceptions to the supreme court" &c. It is also clear that the proceedings to prosecute a bill of exceptions are to be commenced before the decision or verdict ripens into a judgment. Said Section 17 concludes as follows: "The filing of such notice and making of such deposit shall stay judgment or sentence until further order of the court." The judgment may be entered at the end of the seventh day but not before. The clerk by making the record on the

eighth day made the entry on the first day on which he was authorized by statute to act. The agreement of the parties entered into on April 9th, 1919, before the decision went to judgment was an agreement to remove the default and assign the case for trial. It was not an agreement to set aside the judgment and the agreement was not approved by the court. It requires an act of the court to set aside a judgment. Had the parties agreed to set aside the judg-
(2) ment their written agreement would not have effectuated their purpose until the agreement was approved by the court. It was error to assign the case for trial as there was nothing to try. Judgment had been entered for defendant. The court had the power to set aside the judgment. See Gen. Laws, 1909, Chap. 294, § 2. Had this been done the case could have been assigned for trial on the motion of either party.

The record, "Assigned for trial to October 29, 1919," is quashed and the papers in the case are sent back to the Superior Court.

Murphy, Hagan & Geary, for petitioner. *John F. Murphy*, of counsel.

William R. Champlin, for respondent.

MAX JACOBSON *vs.* ARTHUR O'DETTE.

JANUARY 28, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Contributory Negligence. Question for Jury.*

The question of contributory negligence is one for the jury unless it clearly appears that the only proper inference from the undisputed facts is that in the circumstances of the case a person of ordinary prudence would not have acted as did the plaintiff.

(2) *Contributory Negligence. Automobiles.*

The driver of an automobile who crosses an intersecting street without taking any observation, except looking straight ahead, when had he looked before attempting to cross he must have seen defendant's automobile coming at right angles but a short distance from him at a rapid rate of speed, is guilty of contributory negligence.

TRESPASS ON THE CASE for negligence. Heard on exception of plaintiff and overruled.

RATHBUN, J. This is an action of trespass on the case for negligence to recover compensation for damage to plaintiff's automobile caused by collision with defendant's automobile. The plaintiff at the close of his testimony was nonsuited on the ground that his driver was guilty of contributory negligence. The case is before this court on exception to the nonsuit.

The collision occurred shortly after midnight in the business section of the city of Providence at the intersection of Empire and Westminster streets. Westminster street runs easterly and westerly and Empire street northerly and southerly. The two streets cross at approximately right angles. The plaintiff's automobile was proceeding along Empire street in a southerly direction and was crossing Westminster street when it was struck at the right-hand rear wheel by defendant's automobile which was proceeding in an easterly course on Westminster street. The driver of the plaintiff's automobile blew his horn as he approached the intersection of the two streets but did not look to the right or to the left. He testified that the street was clear and that he was looking "straight ahead towards Broad street" and did not see defendant's automobile until after he heard the crash. Had the driver looked before attempting to cross Westminster street he would have had a clear view of Westminster street in either direction for a considerable distance. Westminster street is the principal business street of the city and said intersection is much frequented by pedestrians, electric cars, automobiles and other vehicles.

(1) No question of the last clear chance is involved. The plaintiff's contention is that the question of contributory negligence should have been submitted to the jury. The question of contributory negligence is one for the jury unless it clearly appears that the only proper inference from the undisputed facts is that in the circumstances of the case a person of ordinary prudence would not have acted as did

the plaintiff. As this court said in *Clarke* v. *R. I. Elec. Lghtg. Co.*, 16 R. I. 465: "Generally the question of negligence is a question of fact to be determined by the jury; but sometimes, when there is no controversy as to the facts, and when it clearly appears from them what course a person of ordinary prudence would pursue, it is a question for the court." See also *Gaffney* v. *Inman Mfg. Co.*, 18 R. I. 781.

Had the driver looked before attempting to cross Westminster street he must have seen the defendant's automobile "coming very fast" but a short distance from him, in which event it would have been negligence to attempt to cross directly in front of it. The only inference that can be drawn from his conduct in proceeding as he did, without looking in any direction except "straight ahead" is that he failed to exercise common prudence. In *Barker* v. *Savage*, (2) 45 N. Y. 191, the court held that a pedestrian by crossing a street without taking any observations except "looking straight ahead" was guilty of contributory negligence. This court in *Beerman* v. *Union R. R. Co.*, 24 R. I. at page 285, in discussing the rights of pedestrians and vehicles on the highway, said, if a pedestrian attempts "to cross from one side of the street to the other . . . it would be incumbent upon him to glance up and down the street to see that he was not stepping in front of an approaching horse and carriage going at a speed that would cause collision and probable injury. . . . One using a vehicle must use due care no less than a pedestrian." See also *Gibbs* v. *Dayton*, 134 N. W. 544; *Niosi* v. *Empire Steam Laundry*, 117 Cal. 257; *Baker* v. *Pendergast*, 32 Ohio St. 495; *Hannigan* v. *Wright*, 5 Pennewill (Del.) 537.

We think the motion for a nonsuit was rightly granted. Plaintiff's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment on the nonsuit.

Samuel I. Jacobs, of Boston, *Walter W. Osterman*, for plaintiff.

E. Raymond Walsh, for defendant.

SARAH STUCKEY *vs.* THE RHODE ISLAND COMPANY.
ALBERT STUCKEY *vs.* THE RHODE ISLAND COMPANY.

JANUARY 12, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Negligence. Common Carriers. Personal Injury. Non-Expert Evidence. Reversible Error.*

The admission of evidence of a plaintiff in a personal injury action, in describing the nature of her injuries, and the medical terminology thereof, constituted reversible error, such evidence being inadmissible both as hearsay and as beyond the competence of a non-expert witness.

(2) *Negligence. Common Carriers. Personal Injury. Evidence. Reversible Error.*

In a personal injury action, evidence regarding a second injury to plaintiff's knee which occurred more than two years after the injury alleged to have resulted from the accident in suit, and as to expenses incurred and pain and suffering, after the second accident, there being nothing to show that the condition of the knee arising from the accident in suit was the cause of the second injury, but on the contrary there being evidence tending to show a complete recovery from the first injury prior to the second, was inadmissible and constituted reversible error.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained.

PARKHURST, C. J. These are two actions of trespass on the case for negligence, brought by a husband and wife, the action of the wife being for personal injuries, and that of the husband for loss of services, expenses of illness, &c.; the two actions were tried together before a judge of the Superior Court and a jury in January, 1919, and resulted in a verdict for the plaintiff in both cases. The cases have been brought to this court upon the defendant's bills of exceptions, which are identical.

It appears from the evidence substantially as follows: On Sunday evening, May 14, 1916, the plaintiff, Sarah Stuckey, was on her way from Central Falls, R. I., to her home in the Olneyville or Mount Pleasant section of Providence. The plaintiff had reached Main Street Square, in Pawtucket, about 7:20 P. M., where she had alighted from

the car which had taken her from Central Falls. It was getting dark and the lights on the street cars had been lighted. The plaintiff testified that she stepped up to the rear platform of the car concerned in the accident, a Providence-bound car, and asked the conductor of the car questions concerning the destination of the car. The plaintiff claims that immediately upon receiving answers from the conductor she started to board the car and had one foot on the step and one hand on the grab handle when the car suddenly started up and threw her. The defendant contends and the evidence tended to show that the plaintiff, Sarah Stuckey, stepped up to the rear platform of the car where the conductor was standing and after asking a certain question turned away and started back toward the sidewalk without making any attempt to board the car; that after the car started up and had gone some few feet the plaintiff changed her mind, ran after the car, stumbled in some way and fell in the street. The plaintiff, Sarah Stuckey, testified that she had injured her knee as result of the accident.

In our view of the case, this court feels that it is necessary to consider only exceptions Nos. 1–5, inclusive, those exceptions being based upon certain testimony of the two plaintiffs themselves, which was allowed to be introduced against defendant's objection, and as to which exceptions were duly noted on behalf of the defendant.

The questions raised by these exceptions may be stated as follows:

I. Did the trial court err in allowing the plaintiff, Sarah Stuckey, to testify as to the nature of her injuries, their medical terminology, etc., or should said plaintiff have been confined to testimony relating to the outward appearance of such injuries and to various symptoms experienced by her such as pain and suffering, etc.?

(Defendant's exceptions 1 and 2.)

II. There being a history of another accident which occurred to the plaintiff, Sarah Stuckey, between the date of the accident giving rise to the case at bar and the trial

thereof resulting in certain injuries being sustained by said plaintiff did the trial court err in admitting certain evidence under the record as it then stood, as to pain and suffering, loss or losses sustained by said plaintiffs, Sarah Stuckey and Albert Stuckey, subsequent to the date of said second accident?

(Defendant's exceptions 3, 4, and 5.)

The testimony leading up to the defendant's first and second exceptions is found on page 15 of the transcript; the plaintiff, Sarah Stuckey, was the witness in direct examination: "123 Q. What was the matter with you while you were in bed? A. My knee was the trouble, my left knee. 124 Q. What was the matter with it? A. I got hurt on the car. 125 Q. What was the condition of it? A. I couldn't tell just what the condition of it was." Here the defendant objected to the further questioning of the witness on this subject substantially for the reason that the plaintiff admitted that she knew nothing of the actual condition of her knee and therefore any further questions would call for opinion evidence, not for facts; that not being an expert she was not qualified to testify. The plaintiff, over the defendant's objection, was allowed to continue to describe
(1) the nature of her injuries, even to naming the medical term "dislocated cartilage of the knee," (127 Q. p. 16 Transcript) and the defendant's motion to strike out the testimony was denied. Transcript p. 16 continues: "126 Q. What was the condition of the knee when you looked at it, Mrs. Stuckey? What would you say its condition was, when you looked at it? A. It was all swollen and sore. I couldn't move it. It was swollen out like that. I couldn't say just what the doctor called it. It was a funny name, something like dislocated cartilage of the knee. 127 Q. You can't remember the funny name? A. Yes, sir, something like 'dislocated cartilage of the knee.'" Defendant's attorney moved to strike out and the motion was denied.

We think these rulings of the court were clearly erroneous. The attending physician was not called, and it does not

appear from the record that before the trial any effort was made to secure his attendance; it does appear by inference that plaintiff did not summon him, and it further appears that the plaintiff only went to get him after the trial opened, during a recess, and then found that the doctor was out of the city. The above recited testimony was an attempt on the part of plaintiff's attorney to get before the jury the effect of the expert opinion of the doctor through the non-expert plaintiff, and the testimony admitted and permitted to stand was inadmissible both as hearsay and as beyond the competence of the non-expert plaintiff, upon all the authorities cited by defendant (nothing to the point being cited on behalf of the plaintiffs).

Wigmore on Evidence, Vol. 3, Sec. 1975, p. 2618, states the law on this question as follows: "Testimony to the actual condition of health (for example, the existence of a disease or wound) differs from testimony to the preceding class of topics in that it concerns the internal actuality and not the external appearance. This difference is important with reference to the experiential qualifications of the witness, in that for the former a medical expert will usually be required."

In *Atlanta Street Railroad Company* v. *Walker*, 93 Ga. 462, where the opinion of a non-expert plaintiff was allowed to be given regarding the permanency of his injury, the court said, page 465: "The plaintiff was competent to testify to his feelings, pains and symptoms, as well as to all the characteristics of the injury, external and internal. This was the limit of his competency, and any opinion legitimately arising out of the facts could be more safely formed by the jury than by him. Scarcely anything is less reliable than a sick plaintiff's opinion of his own case when he is in pursuit of damages." The admission of the testimony was held to be error.

In *Thompson* v. *Bertrand*, 23 Ark., at page 733, the court said: "To make an opinion upon disease competent testimony, it must be given by one skilled in the science and

practice of medicine." See to the same effect in principle: *U. B. Mutual Aid Society* v. *O'Hara*, 120 Pa. St. 256, 265; *Zinn* v. *Rice*, 161 Mass. 571, 576; *Dominick* v. *Randolph*, 124 Ala. 557, 562; *Redd* v. *State*, 63 Ark. 457; *McLean* v. *State*, 16 Ala. 672, 679; *Boies* v. *McAllister*, 12 Me. (3 Fairfield) 308; see also *Inhabitants of Ashland* v. *Inh. of Marlborough*, 99 Mass. 47, where it was expressly held that a statement by a non-expert witness that the doctor had told him that he had kidney disease was incompetent, and inadmissible.

See also, *Motton* v. *Smith*, 27 R. I. 57, where this court said: "That a witness can not testify as an expert unless he be an expert, is elementary law and familiar practice," the case being one where the owner of jewels, alleged to have been converted, was allowed to testify as to their value, although not qualified as an expert, on the ground that she was the owner: Held error, and new trial granted.

Exceptions Nos. 1 and 2 are therefore sustained.

(2) As to the second question above stated, whether there was error in allowing testimony regarding a second injury to Mrs. Stuckey's knee which occurred about six months before the trial, and more than two years after the injury alleged to have resulted from the accident on which this case was founded, we think there was manifest error in this regard. With regard to this second injury to the knee the plaintiff Sarah Stuckey testified (Transcript pp. 50, 51), as follows: "387 Q. When you hurt your knee the second time, what did you do? A. I was getting some clothes that I was taking up into the attic and I made kind of a little trip on it and caught myself against one of the stairs, and it just threw me like that against one of the stairs,—that's all. 388 Q. You tripped against the stairs? A. You know how you will, going up stairs, trip against the next step." . . . "392 Q. Before this accident happened—referring to your accident, Mrs. Stuckey—what was your health? A. Fairly well, always well enough to do my work and to get around. That is as well as a woman of my age would be or could be." In spite of this prior testimony, the plaintiff, Albert Stuckey,

was asked the following questions in direct examination, beginning page 68 of the transcript: "59 Q. Do you know of your own knowledge whether or not your wife has had to call the doctor with reference to that same knee a second time? A. Yes, sir, she has. 60 Q. Did you notice the knee then? A. Yes, sir. 61 Q. How long ago was it then? A. About six months I should judge. 62 Q. What was her condition then?" Here the defendant objected on the ground that there was a history of the other accident referred to *supra* and that it was unconnected with the street car accident which had caused the same injury to the plaintiff's knee and, therefore, the testimony was irrelevant. The plaintiff, Albert Stuckey, was also, over the defendant's objection (Transcript, pp. 70, 71, 72), allowed to testify as to expenses incurred by him after the date of the second accident and as to pain and suffering after the second accident. The defendant contends that the testimony as to injuries and the damages arising therefrom should have been strictly limited to those which arose prior to the second accident.

We think this contention of the defendant is well founded. There was nothing in the evidence to connect the second injury to the plaintiff's knee with the street-car accident, nothing to show that the condition of the knee arising from the street-car accident was the cause of the second injury; on the contrary the testimony above quoted tends to show a complete recovery from the first injury prior to the time six months before the trial, when she tripped and fell upon the stairs. There was error in admitting this testimony; from it the jury might deem it fair to draw an inference that, because the court deemed it proper to admit it, it was in some way connected with the street-car accident and that the pain, suffering and expense due to and arising from the second injury to the knee might be considered as increasing the damages arising from the first injury. Exceptions Nos. 3, 4 and 5 are therefore sustained.

Exceptions Nos. 6 and 8 are not pressed.

Exception No. 7 relates to the refusal of the trial judge to continue the case over to the next jury session of the court to give the defendant time to procure certain witnesses whose presence he had not before deemed material; exceptions Nos. 9, 10 and 11 relate to the denial of defendant's motion for a new trial. Inasmuch as this court has found reversible error, in the above rulings regarding the admission of testimony, which requires a new trial, it is not necessary to pass upon these latter exceptions (7, 9, 10, 11) because the defendant will have an opportunity to summon such witnesses at the new trial; and the testimony before the jury at such new trial will not be the same as now appears in this transcript.

Defendant's exceptions Nos. 1–5, inclusive, are sustained, and the cases are remitted to the Superior Court sitting in Providence county with direction to grant a new trial in both cases.

Pettine & DePasquale, for plaintiff.

Clifford Whipple, Earl A. Sweeney, for defendant.

ELISABETTA SCOLARDI *vs.* ANTONIO SCOLARDI.

JANUARY 28, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Divorce. Judgments. Relief After Judgment.*

Gen. Laws, 1909, cap. 297, § 1, of relief within one year after judgment, does not apply to a petition for divorce as no judgment can be entered therein.

(*2*) *Divorce. Relief After Final Decree in Divorce.*

After entry of a final decree in an uncontested petition for divorce, respondent cannot obtain relief under Gen. Laws, 1909, cap. 297, § 3, allowing relief on petition filed within one year to persons aggrieved by any order decree decision or judgment, where from accident mistake unforeseen cause or lack of evidence newly discovered they have failed to claim or prosecute an appeal or bill of exceptions or motion or petition for new trial, since petitioner having taken no exceptions could not through accident, &c.: have failed to file a bill of exceptions, which is the appropriate way to review questions of law in divorce petitions.

DIVORCE. Heard on petition to vacate final decree and denied.

RATHBUN, J. This is a petition filed in this court to vacate a final decree entered in a divorce case and to grant a trial.

This respondent filed in the Superior Court his petition, Divorce No. 9750, *Antonio Scolardi* v. *Elisabetta Scolardi*, for a divorce from this petitioner. Citation in the original divorce proceedings was duly served upon the respondent, this petitioner, in Italy. No appearance being entered for the respondent the case was heard as an uncontested petition and the petition was granted on September 21, 1918, on the ground of extreme cruelty. A final decree of divorce was entered March 24, 1919.

On November 11, 1919, the respondent in the original proceedings filed this petition seeking to vacate said final decree and to obtain a trial upon the petition for divorce and alleges that she was in Italy with her husband's consent; that at the time the petition was served on her she was unable by reason of the war to leave Italy and come to Rhode Island to defend the petition; and that on her first opportunity she came to Rhode Island and filed this petition which is based on Sections 1 and 3 of Chapter 297, General Laws, 1909.

Said Section 1 reads as follows: "A party or garnishee in
(1) any action or proceeding in the superior court or in any district court wherein no trial has been had, against whom a judgment has been rendered on nonsuit, default, or report of referees, by reason of accident, mistake, or unforeseen cause, may, within one year after such judgment, petition the supreme court for a trial; and the supreme court may order a trial in the action or proceeding in the court in which such judgment was entered, upon such terms as the supreme court shall prescribe." This section affords no relief to the petitioner as no judgment has been entered against her. No judgment can be entered in a divorce case. Divorces in this state are purely statutory and follow the course of

equity so far as the same is applicable. In equity and divorce causes the decision of the court is embodied in a decree and the petitioner is asking that a decree and not a judgment be vacated.

Said Section 3 reads as follows: "When any person is aggrieved by any order, decree, decision, or judgment of the superior court or of any probate court or town council, and from accident, mistake, unforeseen cause, or lack of evidence newly discovered, has failed to claim or prosecute his appeal, or to file or prosecute a bill of exceptions, or motion, or petition for a new trial, the supreme court, if it appears that justice requires a revision of the case, may, upon petition filed within one year after the entry of such order, decree, decision, or judgment, allow an appeal to be taken and prosecuted, or a bill of exceptions or a motion for a new trial to be filed and prosecuted, upon such terms and conditions as the court may prescribe." Has the petitioner (2) "from accident, mistake, unforeseen cause, or lack of evidence newly discovered" "failed to claim or prosecute" her "appeal, or to file or prosecute a bill of exceptions, or motion, or petition for a new trial"?

It cannot be said that "from accident, mistake," or "unforeseen cause" she has failed to claim or prosecute her appeal because there is no appeal from a decision in a divorce case. See *Fidler* v. *Fidler*, 28 R. I. 102. A motion for a new trial is an inappropriate procedure in a divorce case. Divorces are heard by a justice sitting without a jury. The action of a justice sitting without a jury is reviewable only on exceptions. In *Thrift* v. *Thrift*, 30 R. I. 456, it was held that a motion for a new trial in a divorce case could be filed only on the ground of newly discovered evidence. This court said in *Thrift* v. *Thrift*, 30 R. I. 357, at p. 365: "Under the constitution and statutes a bill of exceptions is the appropriate vehicle to employ for the purposes of bringing and presenting to this court questions of law which may arise in the trial of divorce cases, for determination under our final revisory and appellate jurisdiction."

This petitioner being unrepresented at the hearing on the petition for divorce took no exceptions. Section 10 of Chapter 298, General Laws, 1909, provides, "Exceptions to rulings, directions, and decisions made during a hearing in a cause heard by the court without a jury or during a trial by a jury shall be taken immediately." As this petitioner neither has nor can have at this time any exceptions (see *Thrift* v. *Thrift*, 30 R. I. 357 and 456, *Mahoney* v. *Mahoney*, 30 R. I. 458), she cannot urge that "from accident, mistake," or "unforeseen cause" she has failed "to file or prosecute a bill of exceptions." Section 3 also offers no relief to the petitioner.

Citation was served upon the petitioner more than three months before the hearing on the divorce petition. She had time and in fact did communicate with the Italian consular agent at Providence, Rhode Island. Had the consular agent or a member of the bar suggested to the court that the respondent in the divorce petition denied the allegations in the petition and desired an opportunity to offer her defense and that by reason of the war she was unable to leave Italy, undoubtedly the court would have continued the case and given her a reasonable opportunity either to be present in person or to present her defense by depositions.

After decision of the court granting the petition she had six months within which she might have moved the Superior Court to grant her a hearing on the divorce petition. Section 19, Chapter 247, General Laws, 1909, provides that, "After final decree for divorce from the bond of marriage either party may marry again; but no decree for such divorce shall become final and operative until six months after the trial and decision."

No fraud is alleged. The court had jurisdiction to hear the divorce petition. A final decree has been entered and the divorce has become final.

The petition is denied and dismissed.

Benjamin Cianciarulo, for petitioner.

Pettine & De Pasquale, for respondent.

ARNOLD C. MESSLER vs. WILLIAMSBURG CITY FIRE INS. CO.

JANUARY 31, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(1) *Fire Insurance. Limitation Clause.*

Where a policy of fire insurance contained a provision that "no suit or action on this policy for the recovery of any claim shall be sustainable . . . unless commenced within twelve months next after the fire," if the insured acted diligently and in good faith and there was no adjustment of the loss within a year after the fire, the fact that more than a year elapsed before the suit, is not a bar.

(2) *Fire Insurance. Appraisal.*

In an action on a policy of fire insurance, defendant's request to charge that "if on or before Jan. 9, 1913 the appraisal failed through no fault of defendant and no request was made by insured for a new appraisal until Nov. 18 1913, at which time an action upon the policy was pending," the verdict must be for defendant, was properly refused, where the court properly submitted the issue to the jury whether insured seasonably followed up his rights to have an appraisal after the failure of the first appraisal.

(3) *Fire Insurance. Protection of Property After Fire.*

In an action on a policy of fire insurance, a request to charge in substance that if plaintiff did not protect the property after the fire it was a bar to his right to recover on the policy was properly refused, since such failure to do so would only go to the amount of his recovery.

(4) *Fire Insurance. Appraisal.*

Where the question whether insured had been sufficiently diligent in asking for a second appraisal was an issue in the case, this must be determined by a consideration of all the facts, which include the insurer's attitude and conduct; and there was no error in charging that after a faliure of appraisal, it was as much the duty of the insurer as the duty of insured to seek a new appraisal.

(5) *Fire Insurance. Evidence. Limitation Clause.*

Evidence that negotiations were had between insurer and insured concerning the loss is admissible upon the question as to whether insurer has waived the time limit for bringing suit and also as it tends to explain the delay in bringing suit, as bearing upon the question of diligence on the part of insured.

(6) *Evidence. Prejudicial Answer.*

Where a question is admissible, a party takes nothing by his objection to the question and his exception to an irrelevant and prejudicial answer, but if it was considered after such answers had been stricken out that the jury would be improperly influenced, a motion to take the case from the jury should have been made, and refusal of such motion could be reviewed on exception.

(7) *Fire Insurance. Pleading Inconsistent Facts.*

In an action on a policy of fire insurance, on the issue whether there had been a failure of an appraisal through fault of defendant, plaintiff's declaration alleged that the plaintiff and defendant each selected a competent and disinterested appraiser. Plaintiff introduced a letter written by him to defendant, which was competent for the purpose of showing a demand for a new appraisal but which assumed that defendant did not appoint a competent and disinterested appraiser.

Held, that the plaintiff had removed the issue as to the competency of defendant's appraiser by his allegation as to his competency and refusal to charge as requested by defendant that the jury must assume that defendant's appraiser was competent and disinterested, since plaintiff had admitted these facts, constituted reversible error.

(8) *Evidence. Pleading Irrelevant Matter.*

A party may not render incompetent or irrelevant testimony competent merely by pleading it, nor does the failure of the opposing party to move to strike it out as irrelevant or redundant render it admissible.

STEARNS, J., dissents.

ASSUMPSIT. Heard on exceptions of defendant and sustained.

RATHBUN, J. This is an action of assumpsit on two fire insurance policies. Heard on defendant's exceptions after verdict for the plaintiff in the Superior Court for $634.66.

The policies were of the standard form prescribed by Chap. 222, Gen. Laws, 1909. On June 21, 1912, a fire caused considerable damage to a portion of the plaintiff's property covered by these policies. The defendant company was promptly notified and on the following day its agents visited the scene of the fire. Proofs of loss were duly delivered to the defendant. The parties being unable to agree as to the amount of the loss entered into a stipulation September 11, 1912, for the appointment of appraisers. The insurer and the insured each appointed an appraiser but the two appraisers were unable to agree upon an umpire. On May 11, 1913, after considerable fruitless correspondence between the two appraisers, and also between the parties, the plaintiff commenced suit on the policies. Said suit failed on demurrer to the declaration for the reason that the declaration did not allege either an award by arbitration or

facts which rendered it unnecessary as a condition precedent to a right of action to first ascertain the amount of loss by appraisal. See *Messler* v. *Ins. Co.*, 94 Atl. 875. This court sustained the demurrer, July 9, 1915. In November, 1913, plaintiff wrote the defendant requesting a new appraisal "without admitting the necessity for the same." Defendant refused to consider this request. On February 16, 1916, the plaintiff demanded a new appraisal. The demand was refused and the present suit was commenced April 20, 1916.

Defendant's 73rd exception is to the refusal of the court to charge the jury in accordance with its seventh request, as follows: "If, from the evidence, it appears that the present action was commenced more than twelve (12) months after the date of the fire, the jury must return a verdict for the defendant." Defendant's 77th exception is to the granting of plaintiff's second request to charge, as follows: "If the plaintiff acted diligently and in good faith and there was no adjustment of the loss within a year after the fire, the fact that more than a year elapsed before the suit is not a bar." These two exceptions raise the question whether an insured under all circumstances is absolutely precluded from recovering if he fails to bring suit within twelve months after the fire.

By dissecting the policy we readily find the language "no suit or action on this policy, for the recovery of any claim shall be sustainable" . . . "unless commenced within twelve months next after the fire." But if we are to ascertain the intention of the parties as expressed in their contract it is necessary to read this language in connection with other provisions of the policy which provide that "in the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss." The policy also provides that "the loss shall not become payable until sixty

days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." The policy further provides that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements" (which includes the provision as to appraisement and award) "nor unless commenced within twelve months next after the fire." The policy requires the insured to file proof of loss within sixty days after the fire. The insurer, after receiving the proof of loss may take sixty days to examine the same. The insured after taking a reasonable time, not exceeding sixty days, to file his proof of loss may be compelled to await sixty days before he knows whether or not there is to be a disagreement on the amount of the loss. If the parties agree as to the amount of loss or if the insurer fails for sixty days after receiving proof of loss to notify the insured that the insurer objects to the amount demanded in the proof of loss the insured may bring suit immediately after the expiration of sixty days after making the proof. *De Paola* v. *Ins. Co.* 38 R. I. 126. No appraisal is necessary or can be had unless there is a disagreement as to the amount of the loss. If the insurer on the sixtieth day objects to the loss, as stated in the proof of loss he may still require the plaintiff to furnish much and varied data and information and if an appraisal is demanded immediately and all parties act in good faith and with reasonable expedition it may not be possible to obtain an award within twelve months next after the fire. The policy provides that the loss shall not become payable when an appraisal has been required until sixty days after the award; of course suit should not be brought until the loss becomes payable. It is manifest that it may become impossible for an insured acting diligently and in good faith to comply with all of the provisions of the policy with sufficient dispatch to enable him to bring suit within twelve months next after the fire.

Suppose the award was made eleven months after the fire, what must the insured do? If he brings suit within twelve months after the fire he is met by the objection that the loss was not payable when the suit was commenced. If he waits until sixty days have elapsed after the award he has not commenced his suit within twelve months next after the fire. What was the intention of the parties as expressed in their written agreement? It is certain that the parties did not intend to agree that the insured after suffering a loss covered by the policy should lose his rights under the policy by not commencing suit within twelve months after the fire in the event that it should become impossible for him, without fault on his part, to perform all of the conditions precedent to the right to bring suit within twelve months next after the fire. The parties in their agreement did not specifically provide for the contingency which has arisen. A reasonable construction must be given to the somewhat inconsistent provisions of the policy.

When conflict has arisen between the different provisions of the policy in the limitation clause, the courts have reached different conclusions. Some jurisdictions hold that the twelve months do not begin to run until after "full compliance by the insured with all the foregoing requirements," including an appraisal and award even when the language of the limitation is the same as in the case at bar, viz.: "twelve months next after the fire." *McConnell* v. *Iowa Mut. Aid Assn.*, 79 Iowa 757; *Ins. Co.* v. *Scales*, 101 Tenn. 628; *Steel* v. *Phenix Ins. Co.*, 51 Fed. 715; *Case* v. *Sun Ins. Co.*, 83 Cal. 473; *Sample* v. *London & L. Fire Ins. Co.*, 46 S. C. 491, 47 L. R. A. 696; *Read* v. *State Ins. Co.*, 103 Iowa 307; *Fireman's Fund Ins. Co.* v. *Buckstaff*, 38 Neb. 150; *German Ins. Co.* v. *Davis*, 40 Neb. 700; *Hong Sling* v. *Royal Ins. Co.*, 8 Utah, 135; *Friezen* v. *Allemania Fire Ins. Co.*, 30 Fed. 352; *Egan* v. *Oakland Ins. Co.*, 29 Or. 403; *State Ins. Co.* v. *Meesman*, 2 Wash. 459; *Hogl* v. *Aachen Ins. Co.*, 65 W. Va. 437; *Williams* v. *German Ins. Co.*, 90 App. Div. 413. Other jurisdictions hold that the limitations

because of the inconsistency are ineffectual, that is, they defeat themselves and the ordinary statute of limitations is applicable. See *Leach* v. *Repub. Ins. Co.* 58 N. H. 245.

In *Dwelling House Ins. Co.* v. *Trust Co.*, 5 Kans. App. 137, the policy on which suit was brought contained a provision that suit should be brought within six months and also a provision that as to mortgagee the primary security must be exhausted before suit. The court held, as
(1) stated in the syllabus of the case, that "where an insurance policy contains the provision 'that when a policy is issued upon the interest of a mortgagee the assured must first exhaust the primary security before he can recover the amount of insurance,' and another clause providing: 'No suit or action against this company upon this policy shall be sustainable in any court of law or equity, unless commenced within six months after the loss or damage shall occur;" such provisions being inconsistent, the ordinary statute of limitations would be applicable to such cases.

Our attention has not been called to any authority which holds that when without fault on the part of the insured there has not been an ascertainment of loss within a year after the fire and an ascertainment is required, suit could not be brought more than twelve months after the fire.

In *McNees* v. *Ins. Co.*, 69 Mo. App. 232, it appeared that a former action had been brought which failed because there had been no appraisal. The policy contained the same limitation provision as do the policies in the case at bar. The court said (p. 244): "After the cause was determined here as we have stated, plaintiff, near two years after the loss, demanded an arbitration, and defendant refused, principally on the ground that the demand was too late. The policy does not prescribe a time within which arbitration shall be had, but, in this respect, only provides that the sum due plaintiff shall not be payable until sixty days after it shall have been fixed by the arbitrators and the award received by the defendant." It is true that when no time is specified for notice of loss and for proofs of loss, a reasonable

time is meant. But what period constitutes a reasonable time depends upon the circumstances of the particular case. In other words, circumstances may prolong or shorten the period which would be denominated a reasonable time.

"In the matter of proofs of loss, but one party, the insured, can act. It is an undertaking to be performed by him alone. In an arbitration under this policy either can set it on foot, and both must take part in it. Though it be true that the insured, in bringing suit, thereby holding the affirmative and the *onus* of showing himself entitled to sue, must act if the other does not, yet the company may very well, if it so desires, take the initiative, on a difference arising, and demand an arbitration. If the company, knowing there is a disagreement as to the amount of the loss and of its right to have an arbitration, omits to call for such arbitration it ought not to be heard to complain of plaintiff's mere delay in making the offer. Of course, since, in the event of the parties disagreeing, plaintiff's cause of action depends on an arbitration for support, he takes upon himself the chance or peril which may happen from the delay. If a demand for appraisal should be made by the insured so late that the defendant should refuse it, then if he could show by answer and proof that it refused for the reason that plaintiff had so delayed that it was impossible, or impractical to arbitrate, it would deprive plaintiff of the benefit of the arbitration."

"These views prevent the possibility of any injustice to the parties and are in harmony with that rule of law which disfavors forfeitures except when clearly demanded by the stipulation of the parties. We shall, therefore, hold the plaintiff's offer of arbitration not too late."

See also *Gragg & Gragg* v. *Ins. Co.*, 132 Mo. App. 405. No error was committed in denying the defendant's seventh request to charge and granting plaintiff's second request. Defendant's 73rd and 77th exceptions are overruled.

Defendant's 71st exception is to the refusal of the court to grant defendant's fifth request to charge, as follows:

"If the evidence shows that, on or before January 9, 1913, the appraisal failed through no fault of the defendant, and if the evidence shows that no request was made by Mr. Messler to the defendant company for a new appraisal until November 18, 1913, at which time an action at law upon the policy was pending, the jury must return a verdict for the
(2) defendant in the present action." The request was properly refused. The court properly submitted this issue to the jury by the following charge, to which defendant's 81st exception applies: "Now as to the question of liability, Gentlemen, it is for you to say whether this plaintiff after the failure of the appraisers to do the first act that they were called on to do, did seasonably follow up his rights according to the terms of the policy, I mean, to have an appraisal; or did the delay that occurred and his conduct in first bringing the suit, bringing the first suit instead of pursuing his terms under the policy, amount to such a neglect of the course called for by the policy as to give you a right to condemn him for not having seasonably followed up his rights. If you find that he did seasonably follow up his rights, he is entitled to a verdict for the loss. If he did not, the defendant is entitled to your verdict." See *Uhrig* v. *Ins. Co.*, 31 Hun. 98, 101 N. Y. 362.

Defendant's 71st and 81st exceptions are overruled.

Defendant's 75th exception is to the refusal of the court to charge as follows: "It was the duty of the insured, Arnold C. Messler, in the event of the occurrence of fire, to protect the property from further damage and to put the property in the best possible order and if it be found that the plaintiff did not do these things, the jury must return a verdict for the defendant." The request was properly refused. As the court said in *German-American Ins. Co.* v. *Brown*, 75
(3) Ark. at 259: "The effect of such neglect on the part of the insured would only have been to prevent a recovery of so much of the property as could have been saved by the use of reasonable means at their command. The language of the policies on that subject is as follows: 'This company

shall not be liable for loss caused . . . by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire.' This language cannot be interpreted to mean that a negligent failure to use such means to save the property works a forfeiture of the entire policy. The instruction asked by appellants conveying that interpretation of the contract was therefore erroneous, and was properly refused."

In *Gage* v. *Connecticut Fire Ins. Co.*, 34 Okl. 744, 127 Pac. 407, the court held that it was error for the trial court to direct a verdict for the defendant because of the insured's failure to protect the property and used the following language: "The defendant next urges in support of the court's ruling that the plaintiff violated the provision of the policy requiring him to protect the property from damages after loss; but it is manifest that failure to do so would not destroy his right of action entirely, but would only go to the amount of his recovery."

See also *Wolters* v. *The Western Assurance Co.*, 95 Wis. 265; *Beavers* v. *Security Mutual Ins. Co.*, 76 Ark. 595; *Knox-Burchard Mercantile Co.* v. *Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N. W. 650; *Sisk* v. *Citizens' Ins. Co.*, 45 N. E. 804. The latter case, cited by the defendant, does not support defendant's contention that a failure to protect the property after the fire is a bar to plaintiff's right to recover on the policy.

Defendant's 75th exception is overruled.

Defendant's 82nd exception was taken as follows: "Also to those portions of the charge which instruct the jury that after a failure of appraisal it is as much the duty of the insurer as the duty of the insured to seek a new appraisal." In the charge complained of the court was not considering the question of an appraisal as a condition precedent to the right to bring suit. That question had been properly and
(4) adequately considered in the charge. The court was considering the question of delay on the part of the plaintiff before asking for a second appraisal. Whether the plaintiff

had been sufficiently diligent in asking for a second appraisal was an issue in the case. The question whether a person has acted with reasonable diligence must be determined by a consideration of all the facts and circumstances connected with the particular case, and one of those facts in this case was the defendant's attitude and conduct. Both parties to the suit were parties to the contract of insurance. Speaking from the standpoint of duty it is as much the duty of the defendant to attempt promptly to adjust the dispute on the question of the amount of loss as it is the duty of the plaintiff. In *Johnson* v. *Ins. Co.*, 69 Mo. App. 231, the court said: "Neither was compelled to await the action of the other; the calling for an arbitration was as much the privilege or duty of the one as the other." See *Am. Ins. Co.* v. *Rodenhouse*, 36 Okl. 211. If an insured does not follow up his rights and seasonably demand an appraisal but awaits until after the goods are sold or destroyed or until for some other reason an appraisal is impossible it has been held that the demand was made too late and that there could be no recovery on the policy. *Morley* v. *Ins. Co.*, 85 Mich. 210. But these cases are not in point.

Defendant's 70th, 78th, 82nd and 84th exceptions are overruled.

Exceptions 29, 30, 32, 33, 35 and 36 apply to the following questions by Mr. Waterman and answers by witness Matie C. Messler. "13 Q. Up to what time did negotiations between the insurance companies and you in regard to this loss continue? Mr. Moulton: I object to that. (Defendant's exception noted.) A. Do you mean the date? 14. Q. Yes. A. Why, we were conferring back and forth with them for some time. 15 Q. Up to what time? What was the final negotiations that you had with the insurance companies as to this loss? Mr. Moulton: We object. (Defendant's exception noted.) (Ex. 29.) A. We went over to the Insurance Commissioner, and he said we had done everything that we could reasonably be expected to do.

The Court: Don't tell what he said. 20 Q. Has any representative of any insurance company been to see you since that time? Mr. Moulton: I object. (Defendant's exception noted.) (Ex. 30) A. That man that came to offer to settle with us for eight thousand dollars. 21 Q. When was that? Mr. Moulton: I object. The Court: (5) The offer to settle may be struck out. You were asked for the date. A. I don't know what date that man came in. 22 Q. How long ago was it? Mr. Moulton: I object. (Defendant's exception noted.) (Ex. 32) A. It was after we put the matter in your hands, he came in and said— 23 Q. You can't tell what he said. A. Not what he said to me? 24 Q. No. What I want to get at is the date that he came; about how long ago? Mr. Moulton: I object. (Defendant's exception noted.) (Ex. 33) A. I think it was three or four years ago. The Court: Now you ought to identify that person as well as you can. 25 Q. Who was that person who came to see you? A. I do not recall the name, but I think I gave his card to you later. 26 Q. Well, do you remember which company he purported to represent? A. He purported to represent all the companies, and he said that this matter—Mr. Moulton: I object. The Court: You can't tell the conversations. Mr. Moulton: I also ask to have that struck out. If your Honor please, may this witness be instructed to wait just a minute and give me a chance to object? The Witness: But Mr. Eddy told me that, and this man told me. Mr. Moulton: I think we are entitled to the ordinary courtesies in this case, and I ask that the witness be instructed not to answer until I get a chance to object. The Witness: How long will I wait? Mr. Moulton: There is a lot of hearsay evidence here. The Court: Go on, Mr. Waterman. 27 Q. Now, did you have any conference with Mr. Eddy about the matter at that time? A. Yes, I did have. Mr. Moulton: I object. The Court: You may answer. Exception. (Defendant's exception noted.) (Ex. 35) A. (Continued) A conference. That is, Mr. Eddy came in

and talked with me frequently, and he felt very badly—The Court: Well, you have answered. A. (Continued) About the way the insurance people were treating the matter. 28 Q. Now I am referring to the time this man came over to see you; did you have any talk with Mr. Eddy at that time? Mr. Moulton: I object. (Defendant's exception noted.) (Ex. 36) Q. (Continued) In regard to that person coming over to see you? A. Yes. Mr. Eddy said that—The Court: You saw Mr. Eddy about it. Now, that is all you were asked. The Witness: Yes, I saw Mr. Eddy. Excuse me. Mr. Waterman: I want to connect up through Mr. Eddy as far as I could who that man was. The Court: Well, that is all right, but apparently she was going on to tell what Eddy and she said. A. (Continued) He represented the insurance companies, and offered to settle with us for eight thousand dollars, and I told him we couldn't settle for less than eleven thousand two hundred and the interest, plus the interest; and I also told him—Your Honor, may I tell what I told him? The Court: You have gone way beyond the question that was asked you. Mr. Waterman told you he wanted you as far as you could to identify that person who called. Mr. Moulton: I want to have my objection noted to the compromise conversation that has gone in. The Court: It should not have been stated, as has been remarked before. It isn't evidence."

Each of the questions objected to was clearly admissible. No one of these questions calls for an answer tending to prove an offer to compromise. Plaintiff's counsel was seeking to prove only that negotiations were conducted between the parties for a considerable time. Evidence that negotiations were had between the insurance company and the insured concerning the loss is admissible upon the question as to whether the insurance company has waived the time limit for bringing suit and also, as it tends to explain the delay in bringing suit, as bearing upon the question of diligence on the part of the plaintiff. See *Bates* v. *German*

Commercial Accident Co., 88 Atl. (Vt.) 532; *Lynchburg Cotton Mill Co.* v. *Travelers' Insurance Co.*, 149 Fed. 954. The answers to the questions so far as they recite the details of an offer by the insurance company to compromise were clearly inadmissible and prejudicial. The court on its own motion ordered some of these answers stricken out. Apparently the court did not refuse to strike out any of the prejudicial answers. At least no exception is taken to such a refusal. It is evident from the record that the court tried as much as did defendant's counsel to prevent the witness from giving irrelevant and prejudicial answers.

The question being admissible the defendant takes nothing by his objection to a question which is unobjectionable and his exception to an irrelevant and prejudicial answer. The defendant received no adverse ruling from the court concerning the irrelevant and prejudicial answers. Defendant does not complain that the court refused to strike out the improper answers or refused to properly
(6) instruct the jury concerning such answers. If the defendant considered, after the prejudicial answers had been given and stricken out, that the jury would be improperly influenced and the defendant prejudiced by reason of the improper answers, the defendant should have moved to take the case from the jury. Had such a motion been refused and the defendant's exception was before us the defendant's contention as to prejudicial error would appeal very strongly to this court. See *Demara* v. *Rhode Island Co.*, 42 R. I. 215. As this court said in *Salter* v. *Rhode Island Co.*, 27 R. I. 27, "To measure the effect of such misconduct upon the verdict in a case where the evidence for the plaintiff was not conclusive is beyond the power of the court."

The defendant relies upon *Salter* v. *Rhode Island Co.*, *supra*, as an authority in this case. The questions which were objected to and which were answered by testimony showing offers of compromise in *Salter* v. *Rhode Island Co.*, were inadmissible. It was immaterial whether any repre-

sentative of the railroad company had called to see the plaintiff.

Defendant's exceptions 29, 30, 32, 33, 35 and 36 are overruled.

The defendant's 74th exception is to the refusal of the court to grant defendant's request to charge the jury as follows: "The jury must assume that Percy A. Harden, the appraiser appointed by the defendant company, was a competent, disinterested and duly qualified appraiser, since the plaintiff admits these facts in its declaration." In the first count of the plaintiff's declaration we find the following language: "and the plaintiff avers that after said loss and damage as aforesaid, the said plaintiff and the said defendant were unable to agree upon the amount of loss or damage as aforesaid, and thereupon, in pursuance of the
(7) terms of said policy, said plaintiff and said defendant entered into an agreement of appraisal, and said plaintiff selected a competent and disinterested appraiser, and said defendant selected a competent and disinterested appraiser, and the said appraisers under said agreement of appraisal and said policy of insurance were to select a competent and disinterested umpire and to appraise said damage and loss, and in said agreement of appraisal it was agreed by the plaintiff and defendant that said appraisers should act in the premises, but the two appraisers so selected have as yet failed to agree upon a competent and disinterested umpire, without fault on the part of the said plaintiff." The declaration proceeds to set out the travel of the first suit betwen the parties and alleges that said suit failed on demurrer to the declaration. The declaration in this suit alleges in substance that the plaintiff twice demanded a new appraisal, once while the first suit was pending and again after the termination of the first suit. But instead of formally alleging a demand by plaintiff for a new appraisal and a refusal by the defendant, the declaration sets out in full the correspondence between the parties on the subject of a new appraisal. One of the plaintiff's letters set out in the declaration is as follows:

"PROVIDENCE, R. I.
November 18, 1913.

The Williamsburg City Fire Insurance Company,
Brooklyn, New York.

Inasmuch as you have not selected a competent and disinterested appraiser to act with a competent and disinterested appraiser selected by me, to determine the amount of loss under policy No. 3, 297,701 and 3, 297,898 in your company, there having been a disagreement as to the amount of loss under said policy, said loss resulting because of the damage and destruction of my property by a fire on or about the 21st day of June, 1912, and inasmuch as the appraiser selected by you and the appraiser selected by me have been unable to agree upon a competent and disinterested umpire, said inability to agree not being due to my fault or any fault on the part of the appraiser selected by me, but being due solely to the fault of your company and its representative and the appraiser selected by your company, and inasmuch as the appraiser selected by your company has refused to act any further in the premises and to attempt further to agree upon a competent and disinterested umpire, or to do any other act under the terms of said policy, and the appraisal provided for therein, I hereby request and demand that you select under the said policy a competent and disinterested appraiser to act with a competent and disinterested appraiser to be selected by me, and I do hereby offer to select such an appraiser, in the selection of a competent and disinterested umpire and the appraisal of my loss under said policy.

This request and demand I make without admitting the necessity of the same and without waiving any of my rights in the premises.

(Signed) ARNOLD C. MESSLER."

The only legitimate purpose of setting out this letter in the declaration was to allege that the plaintiff had demanded a new appraisal. Much of the letter on motion

might have been stricken from the record as irrelevant and inconsistent. *Reed* v. *Poindexter*, 16 Mont. 294; *State* v. *Dickerman*, 16 Mont. 278; 31 Cyc. 640. Said letter was properly received in evidence to prove a demand for a new appraisal. It will be noted that this letter reflects severely upon defendant's appraiser, Percy A. Harden. Plaintiff in his declaration did not see fit to allege that the defendant had knowingly selected an incompetent and interested appraiser. He doubtless would have so alleged if he believed he could sustain such an allegation by proof as there could be no doubt as to his right to bring suit before an award was obtained if the defendant had knowingly selected an incompetent and interested appraiser. The plaintiff preferred to allege and did allege that the plaintiff and defendant each selected a competent and disinterested appraiser and the plaintiff appears to take the position that the appraisal has never failed. The prejudicial portions of said letter set out in the declaration are not allegations of facts tendering an issue but are a recital of evidence of facts inconsistent with the facts alleged in the same count. After alleging that the defendant had appointed a competent and disinterested appraiser the plaintiff should not have been permitted to insinuate or prove that the defendant's appraiser Harden was incompetent or interested. See *Hall* v. *Polack*, 42 Cal. 218. Said letter contains the following language: "and inasmuch as the appraiser selected by you and the appraiser selected by me have been unable to agree upon a competent and disinterested umpire, said inability to agree not being due to my fault or any fault on the part of the appraiser selected by me, but being due solely to the fault of your company and its representative and the appraiser selected by your company, and inasmuch as the appraiser selected by your company has refused to act any further in the premises and to attempt further to agree upon a competent and disinterested umpire, or to do any other act under the terms of said policy and the appraisal provided for therein," &c. The reasonable inference to be

drawn from this language is that the defendant had selected an incompetent and interested appraiser; that the defendant had improperly influenced the action of such appraiser and that the appraisal failed through fault of the defendant. But in the same count the plaintiff alleges that "the said appraisers duly qualified to perform their duties and did not at any time resign or surrender their positions as such appraisers and are still duly qualified appraisers of the loss and damage sustained by the plaintiff, and the said agreement of appraisal is in all its parts in full force and effect and has never been suspended, rescinded, cancelled, or annulled"; that the plaintiff has acted in good faith and with due diligence to obtain an award and that no appraisal has been had. A portion of one of defendant's pleas to this count is as follows: "to wit, upon the 9th day of January A. D. 1913, the appraiser named by the plaintiff and the appraiser named by the defendant failed to agree upon an umpire without fault on the part of the defendant, of which the plaintiff had knowledge. Yet the plaintiff did not diligently and seasonably demand a new appraisal or name a new appraiser or in any way seek a new appraisal, but then and there abandoned said arbitration and appraisal and made no further attempt or effort to have the amount of the loss alleged to have been sustained by him determined in the manner provided by the policy of insurance in said first count mentioned but brought an action on said policy," &c. The plaintiff traversed a portion of the above plea as follows: that the appraisers "did not fail to agree upon an umpire, nor did they fail to agree upon an umpire without fault on the part of the defendant, on the 9th day of January, A. D. 1913, or at any other time, nor did the said plaintiff then and there, or at any time or place abandon said arbitration and appraisal," &c.

From these pleadings it became an issue as to whether there was a failure of an appraisal through fault of the defendant.

The plaintiff's said letter should have been limited to the purposes for which it was properly admitted. In *Ireton v. Ireton*, 59 Kans. at p. 95, the court said, "A party may not render incompetent or irrelevant testimony competent merely by pleading it, nor does the failure of the opposing party to move to strike it out as irrelevant or redundant render it admissible."

(8) After alleging that the defendant selected a competent and disinterested appraiser the plaintiff should not have been permitted to prove that his allegation was untrue for the purpose of meeting one of defendant's pleas to the same count. See *Hall* v. *Polack*, 42 Cal. 218. Had the defendant directed the Court's attention to this inconsistency and requested a charge to the effect that the letter was admitted in evidence for the purpose of proving a demand for an appraisal and that it could not be treated as evidence of interestedness or incompetency on the part of Harden the Court doubtless would have granted such a request and also the request which was refused. It would have been better to have so framed the request that the mind of the Court would have been drawn to the letter in question as it would have been clearly apparent that the plaintiff should not be permitted to disprove or deny his solemn allegations. The plaintiff does not contend that he should have been permitted so to do. He states in his brief, "The question of Harden's competency was not submitted to the jury. It was not in issue. There was no testimony that showed that Harden was incompetent." We think the letter in question introduced by the plaintiff for another and proper purpose did seriously attack the competency and disinterestedness of Harden.

One of the issues in the case was whether the appraisal failed through fault of the defendant. The appraisal could have failed throughf ault of the defendant if it knowingly selected an incompetent and interested appraiser. Said letter which was introduced in evidence by the plaintiff assumes that defendant did not appoint a competent and

disinterested appraiser (in other words, did appoint an incompetent and interested appraiser) and assumes that the failure to select an umpire (in other words, the failure of the appraisal) was "due solely to the fault of your company and its representative and the appraiser selected by your company," &c. In connection with said issue there would have been the issue whether Harden was a competent and disinterested appraiser had not the plaintiff barred this issue by alleging that "said defendant selected a competent and disinterested appraiser." While, as the plaintiff argues, Harden's competency was not in issue yet the jury was not instructed that it was not in issue and the jury was not instructed that the letter in question could not be considered as evidence of incompetency or interestedness on the part of Harden. What reason can be advanced for assuming that the jury, with the prejudicial letter before them, did not conclude that Harden's competency and interestedness was an issue in the case?

It is well established that a party is not bound by every statement and allegation in his pleadings but inasmuch as the plaintiff had the opportunity of tendering an issue by pleading that: the defendant did not select a competent and disinterested appraiser but on the contrary, well knowing that the appraiser selected by it was incompetent and interested (the plaintiff being ignorant of the facts), did select an incompetent and interested appraiser and that the appraisal failed through fault of the defendant in so selecting an incompetent and interested appraiser, and inasmuch as the allegation that the defendant selected a competent and disinterested appraiser must have been made advisedly as the letter in question, containing language inconsistent with said allegation, was recited in the same count, we think the plaintiff must be deemed to have admitted that Harden was a competent and disinterested appraiser. Some liberality is allowed in pleadings particularly as regards inconsistent pleas, but a plaintiff is not permitted by blowing both hot and cold at the same time to maintain an action.

The defendant was entitled to have said request granted. It is apparent that the irrelevant portions, not only of said letter but of other letters which were before the jury, were highly prejudicial to the defendant. Such testimony is likely not only to have weight but to be regarded by the jury as decisive of the plaintiff's right to maintain his action. Defendant's 74th exception is sustained.

As a new trial must be granted the court does not deem it necessary or proper to consider at this time whether the verdict is against the evidence or whether the damages are excessive.

All of defendant's other exceptions are overruled and the case is remitted to the Superior Court for a new trial.

STEARNS J. dissents.

Waterman & Greenlaw, Lewis A. Waterman, Ralph M. Greenlaw, Charles E Tilley, for plaintiff.

Huddy, Emerson & Moulton, E. Butler Moulton, Brown & Caine, Frederick W. Brown, for defendant.

WILLIAM F. O'NEIL, DEPUTY CHIEF OF POLICE *vs.* PROVIDENCE AMUSEMENT COMPANY.

FEBRUARY 2, 1920.

PRESENT: Parkhurst, C. J., Sweetland, Vincent, Stearns, and Rathbun, JJ.

(*1*) *Theatres. Firemen. Constitutional Law. Freedom of Contract. Due Process of Law.*

The provisions of Pub. Laws, 1919, cap. 1780, compelling the holder of a theatrical license in the city of Providence to pay three dollars a day to a person employed by him and stationed in the theatre to guard against fire, and providing that the salary shall not be reduced except by consent of the board of fire commissioners and that such person cannot be discharged without the prior approval of such board, are unrelated to the purposes of the act, which is intended to diminish danger from fire to those assembled in places of amusement and which in its other provisions fully meets all of the requirements of its enactment, and amply provides for the safety of the public, and are obnoxious to Cons. U. S. Art. XIV of Amendments, as depriving a licensee of freedom and liberty of contract, and as depriving him of his property without due process of law.

SWEETLAND and RATHBUN, JJ., dissenting.

CRIMINAL COMPLAINT. Heard on constitutional questions.

VINCENT, J. This case comes before us upon the constitutionality of Section 5 of Chapter 131 of the General Laws of 1909 as amended by Chapter 1780 of the Public Laws of 1919, approved April 24, 1919. The act is entitled, "Of diminishing danger to life in case of fire."

The portion of the act which we are called upon to examine in the consideration of the questions presented to us is as follows: "The board of fire commissioners, or in case there is no such board, the chief of the fire department of every city shall station in every theatre during the time any audience is present therein a fireman, and the person or persons holding the license for the same shall pay such city for the attendance of such fireman the sum of two dollars, except in the City of Newport, where such person or persons holding the license shall pay such city for the attendance of such fireman the sum of three dollars, for every day during which any performance, show or exhibition shall be given therein: *Provided, however*, that in the city of Providence in lieu thereof the person or persons holding the license pertaining to such theatre shall employ at a salary of not less than three dollars per day a suitable person, approved by the board of fire commissioners thereof, who shall be stationed in such theatre during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said board to guard against fire, and to protect life and property in case of fire therein, and who shall not have any other duties and in case said board at any time shall withdraw its approval of any such person, another person approved by said board shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment nor his salary reduced except with the prior approval of said board; and said board from time to time may prescribe a distinctive uniform

and badge to be worn by every such employee during the time he is performing such duties; and said board from time to time may assign any officers or members of the fire department thereof to inspect such theatres and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theatres in said city; *and provided, further*, that in the cities of Woonsocket and Central Falls in lieu thereof the person or persons holding the license pertaining to such theatres shall employ a suitable person approved by the chief of the fire department thereof, who shall be stationed in such theatre during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said chief of the fire department to guard against fire, and to protect life and property in case of fire therein, and in case said chief of the fire department at any time shall withdraw his approval of any such person, another person approved by said chief of the fire department shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment except with the prior approval of said chief; and said chief from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said chief from time to time may assign any officers or members of the fire department thereof to inspect such theatres and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theatres in said cities."

A complaint issued by the District Court of the Sixth Judicial District charged the defendant, holding a theatrical license in the city of Providence, with failure to pay three dollars a day pursuant to said Section 5 to one Robert S. Gallagher employed by said defendant to guard against

danger from fire in its theatre located in said city. The defendant pleaded not guilty.

At the hearing in the district court, it appeared that the defendant had not paid the sum of three dollars a day to the said Gallagher; that he had been employed for some two years, and still was employed, at two dollars a day; that he was approved as competent for such employment by the board of fire commissioners of the city of Providence; and that such approval was in force at the date of the complaint.

The defendant offered testimony as to the character of the contract of hiring, the seating capacity of the theatre in question, and the seating capacity of the theatres in the various cities of the State and then filed its motion to dismiss the complaint and to discharge the defendant on the ground that said act was unconstitutional.

The defendant was found guilty, sentence was stayed, and the constitutional questions raised by the motion to dismiss were certified to this court for determination.

The act in question appeared originally as Chapter 131 of the General Laws of 1909 and by Section 5 of the said original act it was provided as follows: "Sec. 5. The board of fire commissioners, or, in case there is no such board, the chief of the fire department, of every city shall cause to be installed and maintained in every theatre therein a fire alarm box, and shall station in every theatre, during the time any audience is present therein, a fireman, and the person or persons holding the license for the same shall pay such city for the attendance of such fireman the sum of two dollars for every day during which any performance, show, or exhibition shall be given therein. The board of police commissioners, or in case there is no such board, the chief of police of every city shall cause to be installed and maintained in every theatre therein a police call box."

Before noting the changes in this section brought about by the later amendatory acts it may be well to bear in mind that the original act provided that a member of the fire department of each city in the State should be stationed by

the fire commissioners or chief of the fire department in every theatre and that each theatre in which a fireman was so stationed should pay to the city the sum of two dollars per day for his attendance. At the January Session of the General Assembly, 1916, Section 5 was amended by Chapter 1366 of the Public Laws in respect to the theatres in Providence, the amendment providing that the licensee of the theatre should employ a suitable person, to be approved by the board of fire commissioners, who should perform the duties which had previously devolved upon the fireman stationed therein, and that such person so employed could not be discharged by his employer without the consent of such board.

At the January Session of the General Assembly, 1919, the act was again amended by Chapter 1780 of the Public Laws in respect to the theatres in the city of Newport, the amendment providing that the theatres in that city should pay the sum of three dollars per day for the services of the fireman stationed therein.

Later, at the same session, the act was further amended by Chapter 1780 of the Public Laws. It is upon the act as finally amended that the questions now submitted to us arise. Under the provisions of the act as it now stands, in the cities of Newport, Pawtucket and Cranston firemen must be stationed in theatres by the respective municipal authorities for which services the city of Newport is required to pay three dollars per day and the cities of Pawtucket and Cranston two dollars per day.

In the cities of Providence, Central Falls and Woonsocket a person approved by the board of fire commissioners, or other municipal authority, must be employed by the person holding a theatrical license to guard against danger by fire, and cannot be discharged by his employer without the consent of the proper municipal authority.

In the city of Providence such employee must be paid not less than three dollars a day while in Woonsocket and Central Falls no compulsory payment of any amount what-

soever is made necessary, and further, in Providence the salary of such person cannot be reduced without the previous approval of the board of fire commissioners while no such provision is in force as regards Woonsocket and Central Falls.

The defendant claims that Section 5 of Chapter 131, General Laws, 1909, as thus amended, is unconstitutional and raises the following questions:

(1) Does the provision compelling the holder of a theatrical license in the city of Providence to pay three dollars a day to a person employed by him and stationed in the theatre to guard against fire deprive the defendant of liberty and property without due process of law?

(2) Does such provision deny the defendant the equal protection of the law?

(3) Does the provision that the salary of the person employed to guard against fire shall not be reduced except by consent of the board of fire commissioners deprive the defendant of its liberty and property without due process of law?

(4) Does such provision deny the defendant the equal protection of the law?

(5) Does the provision that such employee cannot be discharged without the prior approval of the board of fire commissioners deprive the defendant of liberty and property without due process of law?

(6) Does the provision requiring the payment of three dollars a day violate the obligation of any contract between this defendant and Robert S. Gallagher mentioned in the complaint and warrant?

(7) Does the provision requiring the payment of three dollars a day violate Art. I, Section 2 of the Constitution of Rhode Island in that it does not distribute the burdens of the State fairly among its citizens?

The defendant advises the court in its brief and argument that it does not object to the provisions of Section 5 of Chapter 131 as amended by Chapter 1780 of the Public

Laws, in so far as they compel every person holding a theatrical license to employ a competent person to guard against fire in the theatre to which such license pertains, nor to the provision requiring such employee to be approved by the board of fire commissioners, nor to those portions of Section 5 as amended which give power to officers of the fire department to inspect theatres and ascertain whether such employee is properly performing his duty and, therefore, all discussion of those matters may be eliminated.

It may be further noted here that under Section 8 of said Chapter 131 of the General Laws of 1909 it is also provided that the license of any owner or lessee of any theatre who shall neglect or refuse to comply with any obligations imposed by said chapter may be suspended or revoked by the authority having the power to grant the same, thus preventing such owner or licensee from giving any performance or entertainment therein.

The defendant claims first that the portion of the act which compels the payment of three dollars a day to the person employed is unconstitutional in that it deprives the defendant of liberty of contract and deprives it of its property without due process of law and is, therefore, in conflict with the Fourteenth Amendment of the Constitution of the United States.

That the carrying on of a theatre or place of amusement is a private business has been clearly stated by this court in the case of *Buenzle* v. *Newport Amusement Association*, 29 R. I. 23, in which the following language of the court in *Horney v. Nixon*, 213 Pa. St. 20 was adopted and made a part of its opinion. "The proprietor of a theatre is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit every one who may apply and be willing to pay for a ticket, for the theatre proprietor has acquired no peculiar rights and privileges from the state, and is, therefore, under no implied obligation to

serve the public. When he sells a ticket he creates contractual relations with the holder of it, and whatever duties on his part grow out of these relations he is bound to perform, or respond in damages for the breach of his contract," and the opinion further holds that no analogy can be drawn between a place of entertainment and a corporation affected with a public duty. Such therefore is the law of this state and it would be useless to pursue further the discussion of this particular point in the case. Reference however may be made to *Adair* v. *U. S.*, 208 U. S. 161 and *Coppage* v. *Kansas*, 236 U. S. 1, which sustain the proposition that while the duties of the person so employed may have to do with the public safety his employment remains a private relationship in its legal and constitutional aspects. Under the very terms of the act he is employed by the licensee of the theatre and from such licensee he receives his wages. He has no claim against anyone else for compensation for his services. The power of the board to pass upon his competency, prescribe his duties and scrutinize their performance are only matters of supervision in the interest of public safety.

The sole purpose of the act in question, as its title indicates, is to diminish the danger from fire to those who may assemble in places of amusement, a danger which not only arises from fire itself but also from the panic which is apt to seize upon an assemblage of people whose individual freedom of movement is more or less restricted. The act provides that every person holding a theatre license shall employ a suitable person approved by the board of fire commissioners who shall be stationed in the theatre during the time any audience is present therein; that such person shall perform such duties as may be prescribed by said board to guard against fire; that such person shall have no other duties; that said board may at any time withdraw its approval of any such person when another person approved by said board shall be employed in his stead; and that said board may assign any officer or member of the fire department to inspect the theatres for the purpose of ascertaining

whether the persons employed are properly discharging their duties. These provisions fully meet all the purposes and requirements of the act which is to protect the audience from the dangers of fire and to such provisions the defendant offers no objection.

The act however goes further and provides that the
(1) licensee of the theatre employing such a person shall pay him a wage of not less than three dollars per day and that no such employee shall be discharged by such licensee from his employment nor his salary reduced except with the prior approval of the board.

In the case at bar it appears that one Robert S. Gallagher had been for a long period an employee of the defendant at its theatre in Providence charged with the duty of protecting the premises from the dangers of fire. His employment in that capacity had been approved by the board of fire commissioners and such approval had never been withdrawn; and that the defendant paid to the said Gallagher for his services the sum of two dollars per day. This arrangement between the defendant and Gallagher continued without interruption from the time when the latter was employed by the defendant down to April 24, 1919, when Chapter 1780 of the Public Laws was approved. Thereafter upon the neglect or refusal of the defendant to raise the pay of its said employee to three dollars per day the complaint was instituted under which the constitutional questions now before us have arisen.

The defendant contends that these provisions, compelling the payment of three dollars per day, forbidding the discharge of the employee without the approval of the board of fire commissions, and forbidding any reduction in the salary of such employee, are unconstitutional, being in violation of the Fourteenth Amendment of the Constitution of the United States.

These provisions seem to us to be unrelated to the purposes of the act. The safety of the public is amply provided for without them. If these provisions are eliminated

the act would still effectively provide for the safety of the people who may compose the audience and the degree of safety is neither increased or diminished by the amount of wages paid to the employee nor does it depend upon depriving the employer of the right to discharge his employee or to reduce his wages. Whatever may be the amount of the wages paid to the employee and whoever may be empowered to reduce his salary or bring about his discharge, the fact remains that all the elements of the act bearing upon the safety of the public still remain in full force and effect. A man whose competency is approved by the board of fire commissioners must be on duty whenever an audience is present, and at all times under the supervision of said board who may prescribe his duties and through inspection see that he discharges them properly, and who may in its discretion withdraw its approval thus compelling the licensee to employ another person in his stead who likewise can only act with the approval of said board. Any failure on the part of the licensee to have an approved man on duty would bring about the cancellation of his license without which he could not continue his business.

As the amusement business is a private business and not a business affected with a public interest it may be exercised under the police power of the State. But the police power of the State is subject to the limitations and provisions of the Federal Constitution as the Supreme Court of the United States has held in several cases.

In *Connolly* v. *Union Sewer Pipe Co.*, 22 Sup. Ct. Rep. 431, the court said: "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary

notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." See also *Atchison, Topeka & Santa Fé Ry. Co.* v. *Vosburg*, 238 U. S. 56; *Buchanan* v. *Warley*, 245 U. S. 60.

The Fourteenth Amendment to the Constitution of the United States provides, "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The meaning of this provision has been interpreted and defined by the Supreme Court of the United States in a number of cases. In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the court said: "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." And in *Coppage* v. *Kansas*, 236 U. S. 1, the word "liberty" as used in the Fourteenth Amendment

is defined as follows: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." And to the same effect are the cases of *Adair* v. *U. S.*, 208 U. S. 161 and *Smith* v. *Texas*, 233 U. S. 630.

In the case of *Adair* v. *U. S.*, *supra*, the court said: "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."

The case of *Wilson* v. *New*, 243 U. S. 332 is referred to in the brief of the complainant and also in the brief of the defendant. It involves the constitutionality of an act of Congress popularly known as the Adamson Act.

We do not deem it necessary to discuss that case at great length. The act provided among other things that, pending the report of a commission to investigate and deal with the wages of trainmen on interstate railroads, the then existing rate of compensation should "not be reduced below the present standard day's wage." It differs materially from the case at bar in that it was a temporary expedient resorted

to in the face of an emergency. It did not undertake to fix a permanent wage but to retain the already existing wage for a limited period of thirty days until, through an investigation then progressing, certain rights might be determined "leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time." The act was intended as an exercise of governmental power over a matter of interstate commerce or a business affected with a public interest. The act was passed to meet an emergency arising from a nation-wide dispute over wages between railroad companies and their train operatives in which a general strike was threatened which would bring about commercial paralysis and grave loss and suffering, the parties concerned being unable to agree. It was designed to bridge over a limited period within which the parties might reach an agreement.

The question in that case as stated by the court in its opinion was, "Did Congress have power under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, . . . to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words did it have the power in order to prevent the interruption of interstate commerce to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling for the limited period provided for?" The difference between the Adamson law and the act which we are considering, which fixes a permanent wage in the absence of any emergency, is so apparent that it need not be specifically pointed out. That the court recognizes a distinction between employment in a private business and an employment in a business charged with a public interest and that its decision is not intended to apply to the former

is fully evidenced in the opinion itself wherein it is stated, "Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest," and it may be fairly said that the court confined itself solely to dealing with an employment charged with a public interest for the opinion states, "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority.". And further that, "there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest."

In *Smith* v. *Texas*, 233 U. S. 630, the court, in passing upon a statute forbidding the employment of any person as a passenger conductor unless such person had had two year's experience as a brakeman or conductor of a freight train, declared that, "The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employé."

In *Gulf C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, the court said, "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

We have already pointed out that it is obligatory upon the licensee, under the provisions of the act, to employ a person who shall attend at the theatre during the time when an audience is present for the purpose of guarding against fire; that such person must be approved by the board of fire commissioners; that such approval may be withdrawn compelling the licensee to employ another man; that said board may prescribe the duties to be performed; that the said board may direct some member of the fire department whose duty it shall be to make an inspection for the purpose of determining whether the person so employed is properly discharging his duties; and that these provisions of the act are not objected to by the defendant.

The act goes further and dictates a minimum wage and seeks to take away from the employer the right to discharge or reduce the wages of the employee whom he has employed in the conduct of his private business. Neither of these last named provisions are essential or have any relation to the protecting features of the act which are its sole object and purpose.

We cannot assume that the legislative power has been properly exercised. It does not follow that because the General Assembly has enacted a law that it must have had some good and sufficient reason for so doing although such reason may not be apparent. The Court of Appeals of New York, *In re Jacobs*, 98 N. Y. 98, in a carefully considered and well reasoned opinion has satisfactorily disposed of that question, holding that while generally it is for the legislature to determine what laws are required to protect and secure the public health, comfort and safety, under the guise of police regulations it may not arbitrarily infringe upon personal or property rights; and its determination as to what is a proper exercise of the power is not final or conclusive but is subject to the scrutiny of the courts; and that when the legislature passes an act ostensibly for the public health, but which does not relate to the purpose sought to be carried out and which destroys the property or interferes with

the rights of the citizens, it is within the province of the court to determine that fact and to declare the act unconstitutional.

Other portions of the opinion in the *Jacob* case seem to have a substantial bearing upon the questions now before us. The court in stating the facts says, "The relator at the time of his arrest lived with his wife and two children in a tenement-house in the city of New York in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied by one family living independently of the others, and doing their cooking in one of the rooms so occupied. "The relator at the time of his arrest was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except the room where he was thus engaged. These facts showed a violation of the provisions of the act." The court then proceeded to quote the provisions of the act the first section thereof being as follows: "Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement-house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking or doing any household work therein.". The title of the act was, "An act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement-houses in certain cases, and regulating the use of tenement-houses in certain cases."

This law by its title and otherwise purports to be designed to promote the public health and the court says in respect to that, "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is

appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void." The court further says, "This law was not intended to protect the health of those engaged in cigarmaking, as they are allowed to manufacture cigars everywhere except in the forbidden tenement-houses. It cannot be perceived how the cigarmaker is to be improved in his health or his morals by forcing him from his home and its hallowed associations and beneficent influences, to ply his trade elsewhere." "It is plain therefore that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement-house who is a cigarmaker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and of some portion of his personal liberty". The opinion also quotes with approval from the cases of *Austin* v. *Murray*, 16 Pick. 121, 126 and *Watertown* v. *Mayo*, 109 Mass. 315, 319. In the first mentioned case the court said, "The law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation," and in the last mentioned case the court said, "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."

So in the case at bar, as we have already demonstrated, the purpose of the act is to protect the public from the dangers of fire and that the degree of protection for which the act provides can be neither increased or diminished by fixing the wages of the person employed in carrying out its provisions.

The defendant argues that if the lawmaking power can fix the wages of such employee it could with equal propriety

fix the wages of motormen, telegraph operators and of those engaged in a variety of other employments. We think there is much logic in that argument. In the *Jacob* case, *supra*, the court said, "Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, . . . we will not be far away in practical statesmanship from those ages when government prefects . . . regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions."

In *Lochner* v. *New York*, 198 U. S. 45, it was held that a statute of New York providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such is in conflict with, and void under, the Federal Constitution.

People v. *Coler*, 166 N. Y. 1 is another case decided by the Court of Appeals of New York. A contractor having performed his contract for grading a public street and having received from the proper authorities a certificate that the contract price had been earned, it was held that he may compel the city to pay the amount due by mandamus although he has failed to comply with the labor statute regulating the amount of wages to be paid his employees on the ground that such labor law, in such respect, invades rights of liberty and property in that it denies to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compels them to pay an arbitrary and uniform rate, and further, that in effect it imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employees upon the terms and conditions of the employment.

And it was held in the case of *Tannenbaum* v. *Rehm*, 152 Ala. 494, that a fireman assigned to duty at a theatre under an ordinance requiring the assignment, and providing that the manager of the theatre shall pay for such attendance, may bring his action against such manager for compensation for his services. The main contention in that case however was that the actual cost of the services could be collected, a point not involved here. It cannot be reasoned from this case that a property owner may be compelled to pay an amount in excess of cost and we need not consider the cases which deal with the right to reimbursement for the services of firemen appointed to duty at a theatre from the regular force of the city.

In *Nashville, Chattanooga and St. Louis Ry.* v. *Alabama*, 128 U. S. 96, the court held that a state statute which requires locomotive engineers and other persons, employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined in this respect by a tribunal established for the purpose, and which exacts a fee from the company for the service of examination does not deprive the company of its property without due process of law. In that case such provisions were not only closely related to the purposes of the act but were absolutely essential if the act was to be effective. As the court said in its opinion, "Color blindness is a defect of a vital character in railway employees . . . Ready and accurate perception by them of colors . . . are essential to safety of the trains, and, of course, of the passengers and property they carry" and the court further held that, "Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads . . . is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employees possess the physical qualifications required by law.". The difference between that case and the case at bar is too apparent to require elucidation.

In *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, the question presented was as to the validity of an act precluding the railroad company from making the defense that recovery was barred by the acceptance of benefits under a contract of membership in its relief department. The defendant in error while acting as a brakeman in the service of the railroad company had received injuries for which he had recovered judgment. The railroad company claimed that the defendant in error having received the benefits to which he was entitled from the relief fund the payment and acceptance thereof subsequent to the injury constituted a full satisfaction of his claim.

The statute involved in that case is as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including the employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employees; when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

The railroad company contended that the statute attempts to prohibit the making of a contract for settlement "by acts

done after the liability had become fixed." The court however rejected that view holding that while the acceptance of benefits was, of course, an act done after the injury, the legal consequences sought to be attached to that act were derived from the provision in the contract of membership and that the stipulation which the statute nullifies is one made in advance of the injury, that the subsequent acceptance of benefits shall constitute full satisfaction. The full import of the case is that it is within the power of the legislature to provide that contracts entered into prior to the injury and designed to exempt the employer from liability shall not be legal or binding and that the statute cannot be abrogated by such a contract. The opinion itself excludes its application to the case at bar when it says, quoting from the case of *Frisbie* v. *United States*, 157 U. S. 160, 166, "The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

The weight of authority is well stated in 6 R. C. L. § 258, as follows: "Since an employee cannot be compelled to work against his will, it is generally recognized that he is at liberty to refuse to continue to serve his employer. In this respect the rights of the employer and the employee are equal. Any act of the legislature that would undertake to impose on an employer the obligation of keeping one in his service whom, for any reason, he does not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property."

It may be here observed that the act before us seeks to deprive the licensee of the free exercise of his right to discharge his employee but does not attempt to place a similar restriction upon the right of the employee to leave the service of his employer.

We think that the provisions compelling the payment of three dollars per day, forbidding the discharge of the employee without the prior approval of the board of fire com-

missioners, and forbidding the reduction of his salary take away that freedom and liberty of contract to which the defendant is entitled under the Fourteenth Amendment to the Constitution of the United States and are, therefore, unconstitutional and void.

We do not think however that the elimination of these provisions tends to nullify the act as a whole but that the other requirements thereof remain in full force and effect.

Under the provisions of the act if the defendant fails to pay three dollars per day its license will be refused or taken away by the board of police commissioners and the defendant's business, otherwise lawful, will forthwith cease. It appears in the case at bar that the defendant prior to the objectionable enactment employed a person approved by said board, at two dollars per day, down to the time that the act fixing the wage at three dollars was passed. Such fixing of the price is made without regard to the market price of such services or whether employer and employee fix a lower rate. It seems to us that this is depriving the defendant of his property without due process of law and is therefore unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States.

As the city of Providence does not furnish any of its employees to guard against fire in any of its theatres we need not discuss a number of cases cited in the briefs bearing upon the question as to whether the city could legally claim reimbursement for such services.

The defendant further claims that the act deprives it of equal protection of the laws contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States. In other words that the law which is applicable to all cities in the State imposes upon the owners or lessees of theatres in Providence a greater burden than is imposed upon others carrying on a similar business in other portions of the State and the defendant points out that in the cities of Pawtucket and Cranston the act provides that firemen from the city force must be stationed in each theatre to be

paid two dollars per day for their services and that in Providence the person employed by the owner or lessee of a theatre shall receive for his services not less than three dollars per day while in Woonsocket and Central Falls the act does not fix any wage to be paid to the person employed but leaves owners and lessees in the two cities last named to contract for such service in their discretion.

We do not think it necessary for us to discuss this question in view of the conclusions which we have already reached regarding the fixing of wages.

With that portion of the act eliminated which seeks to fix the wages of such employees the question of equal protection under the law disappears and becomes purely academic. With such elimination all parties will stand upon an equal footing and be left to contract for such required service upon such terms as may be in accordance with their own judgment and wishes.

If the employer and employee have a right to agree upon the terms of the employment it naturally follows that such employment may be terminated by either party without the interference or dictation of the board of fire commissioners and such right is well settled by authority. *Adair* v. *U. S.* 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1.

Our decision is that General Laws, 1909, Chapter 131, Section 5, as amended by Public Laws, January Session, 1919, Chapter 1780 is in violation of the Fourteenth Amendment of the Constitution of the United States in so far as it undertakes (1) to fix the wages which a person holding a theatrical license shall pay to a person employed by him to guard against danger by fire; (2) to forbid the discharge of such person so employed without the consent of the board of fire commissioners; and (3) to forbid a reduction in the wages of such employee without the consent of the board of fire commissioners.

The papers in the case are sent back to the District Court of the Sixth Judicial District, with the decision of this court certified thereon, for further proceedings.

RATHBUN, J., dissenting. I am obliged to dissent from the opinion of the majority and have, as I deem it my duty to do, without attempting to analyze said opinion in detail, here set out at length my opinion as to the legal principles involved in the constitutional question before us. I do this for the reason that the majority opinion appears to me to completely disregard the essential facts involved in the case; fails to make application of very elementary principles of the common law of contracts and particularly because said opinion adopts a novel and surprising position, opposed to the uniform decisions of this court and, so far as I can ascertain, to the decisions of all courts, as to the relative powers of the legislative and judicial departments of government.

The above entitled proceeding is a criminal complaint preferred against said respondent corporation in the District Court of the Sixth Judicial District. The matter is before us upon the certification of a constitutional question.

Said complaint charges that the respondent "being the person and corporation holding the license pertaining to the Bijou Theatre unlawfully did neglect and refuse to pay to Robert S. Gallagher, a suitable person approved by the Board of Fire Commissioners of said Providence, and employed by the said Providence Amusement Company, a corporation, and stationed in the said Bijou Theatre pursuant to the provisions of Section 5 of Chapter 131 of the General Laws of 1909 as the same was amended by Chapter 1780 of the Public Laws of 1919, the sum of three dollars per day while employed as aforesaid, against the statute and the peace and dignity of the state." To this complaint the respondent pleaded not guilty and at the trial in said district court questioned the constitutionality of said Section 5, Chapter 131, General Laws, 1909, as amended by Chapter 1780 of the Public Laws, January Session, 1919. The respondent was adjudged guilty, sentence was deferred, and said constitutional question has been certified to this court for decision.

Said Section 5 as amended so far as the same relates to the question now before us is as follows: "The board of fire commissioners, or in case there is no such board, the chief of the fire department of every city shall station in every theatre during the time any audience is present therein a fireman, and the person or persons holding the license for the same shall pay such city for the attendance of such fireman the sum of two dollars, except in the City of Newport, where such person or persons holding the license shall pay such city for the attendance of such fireman the sum of three dollars, for every day during which any performance, show or exhibition shall be given therein: *Provided, however*, that in the city of Providence in lieu thereof the person or persons holding the license pertaining to such theatre shall employ at a salary of not less than three dollars per day a suitable person, approved by the board of fire commissioners thereof, who shall be stationed in such theatre during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said board to guard against fire, and to protect life and property in case of fire therein, and who shall not have any other duties and in case said board at any time shall withdraw its approval of any such person, another person approved by said board shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment, nor his salary reduced except with the prior approval of said board; and said board from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said board from time to time may assign any officers or members of the fire department thereof to inspect such theatres and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theatres in said city; *and provided further*, that in the cities of Woonsocket

and Central Falls in lieu thereof the person or persons holding the license pertaining to such theatres shall employ a suitable person approved by the chief of the fire department thereof, who shall be stationed in such theatre during the time any audience is present therein, and who shall perform such duties as from time to time may be prescribed by said chief of the fire department to guard against fire, and to protect life and property in case of fire therein, and in case said chief of the fire department at any time shall withdraw his approval of any such person, another person approved by said chief of the fire department shall be employed in his stead; and no such employee approved as aforesaid shall be discharged by such licensee or licensees from his said employment except with the prior approval of said chief; and said chief from time to time may prescribe a distinctive uniform and badge to be worn by every such employee during the time he is performing such duties; and said chief from time to time may assign any officers or members of the fire department thereof to inspect such theatres and see whether such persons are properly performing their said duties therein, and such officers or members at all reasonable times upon showing their credentials shall be admitted free of charge into all parts of all theatres in said cities."

The respondent's various claims as to the unconstitutionality of said section are substantially as follows: 1. That said section compelling the holder of a license pertaining to a theatre in the city of Providence to pay three dollars per day to the person employed to guard against fire and to protect life in case of fire in such theatre, and in providing that the salary of the person so employed to guard against fire and to protect life in such theatre shall not be reduced except with the prior approval of the board of fire commissioners of the city of Providence deprives the defendant of its liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. 2. That said section by imposing

an unequal burden on the defendant as against the burdens imposed on other persons holding theatrical licenses in other cities in the State of Rhode Island and in providing that the salary of the person employed to guard against fire and to protect life in a theatre in the city of Providence shall not be reduced except with the prior approval of the board of fire commissioners of the city of Providence denies to the defendant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. 3. That the provision of said section compelling the holder of a license pertaining to a theatre in the city of Providence to pay three dollars per day to the person employed by such holder to guard against fire does not distribute the burdens of the state fairly among its citizens, and is in violation of Article I, Section 2 of the Constitution of the State of Rhode Island. 4. That the provision of said section compelling the holder of a license pertaining to a theatre in the city of Providence to pay three dollars per day to the person employed by such holder to guard against fire and to protect life in such theatre deprives the defendant of its liberty and property without the judgment of its peers and is in violation of Article I, Section 10, of the Constitution of the State of Rhode Island. 5. That the provision of said section fixing the salary of the person employed to guard against fire in a theatre in the city of Providence impairs the obligation of a contract existing between the defendant and Robert S. Gallagher and is in violation of Article I, Section 10, of the Constitution of the United States.

The section in question is plainly an attempt on the part of the General Assembly in the exercise of its police power to legislate for the safety and welfare of the people. As was stated by this court in *Opinion to the Governor*, 24 R. I. 603, 605, "There is also a common assent that the legislature has the right of control in all matters affecting public safety, health and welfare, on the ground that these are within the indefinable but unquestioned purview of what is

known as the police power. It is indefinable because none can foresee the ever changing conditions which may call for its exercise; and it is unquestioned because it is a necessary function of government to provide for the safety and welfare of the people."

In *Barbier* v. *Connolly*, 113 U. S. 27, the court said: "But neither the Amendment" (the Fourteenth Amendment), "broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people."

It is beside the mark for the respondent to claim that it is beyond the power of the General Assembly to provide these regulations for the conduct of the theatrical business in this state, because the operation of a theatre is a private business. The purpose of the statute is not primarily to regulate the business of the holders of theatre licenses; but to guard the safety of those who attend theatrical entertainments. In the city of Providence upon every secular day the audiences in the many theatres number thousands, a large proportion of whom are women and children. Experience has forcibly demonstrated the great hazard to which such audiences are subjected in the absence of safeguards for their protection and constant vigilance that such safeguards are maintained. It has been shown in many instances that the maintenance of such regulations for the safety of audiences cannot prudently be left to the initiative or to the control of the theatre managers or their employees. Although the operation of theatres may in law be regarded as a form of private business the care for the safety of theatrical audiences clearly presents a field for the exercise of the police power of the state for the public welfare. *Tannenbaum* v. *Rehm*, 152 Ala. 494; *Hartford* v. *Parsons*, 87 Atl. 736.

The respondent contends that said section in requiring that it as the operator of a theatre in the city of Providence should employ a fire guard or inspector at a salary of not less

than three dollars per day and that said guard should not be discharged nor his salary reduced except with the approval of the board of fire commissioners interferes with the respondent's right to freely contract with its servant and thus deprives it of its liberty without due process of law. It has been held that the right to make contracts is embraced in the conception of liberty guaranteed by the Fourteenth Amendment. This was pointed out by the court in *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *N. Y.* 198 U. S. 45; *Adair* v. *U. S.*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1. It may be noted in passing that the respondent and the majority opinion place great reliance upon the authority of the cases just cited, but the legislation under review in those cases had no reference to health, safety, morals or the public welfare; and it is in the regulation of those matters alone that the legitimate field is presented for the exercise of the police power. In *Allgeyer* v. *Louisiana*, 165 U. S. 578 the court was considering the application of a statute of Louisiana, regulating insurance upon property in said state to a contract of insurance made in New York. In *Lochner* v. *New York*, 198 U. S. 45, a statute of New York regulating the hours of labor of bakers was declared to have no relation to public health and not an exercise of the police power. In *Adair* v. *United States*, 208 U. S. 161, an act of Congress making it an offence for a public carrier to discharge an employee because he was a member of a labor organization was held not to be within the power of Congress in the regulation of interstate commerce. In *Coppage* v. *Kansas* the court was considering a statute of Kansas making it a misdemeanor for an employer to require an employee to agree not to become or remain a member of a labor organization during the time of the employment. Those cases therefore are not in point upon the question now before us. They all admit that when the police power may properly be exercised for the preservation of public health and safety, as Mr. Justice PITNEY says in *Coppage* v. *Kansas*, 236 U. S. 1, "Such police regulations may reason-

ably limit the enjoyment of personal liberty including the right of making contracts." Mr. Justice HUGHES, in commenting upon these cases in *Chicago* v. *McGuire*, 219 U. S. 549, at 567, says: "But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right"; and further, that the right to make contracts "is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction." Said justice then cites at page 568 a list of cases in the United States Reports which supports the doctrine which he has enunciated.

In *Chicago, &c. R. R. Co.* v. *McGuire*, *supra*, the court held that the "State has power to prohibit contracts limiting liability for injury made in advance of the injury received and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract," and that "such a statute does not impair the liberty of contract guaranteed by the Fourteenth Amendment."

In *State* v. *Read*, 12 R. I. 137, the defendant had been convicted on a complaint charging him with "keeping and exposing for sale certain drinks, food and merchandise" in violation of the following statute: "Sec. 1. Whenever any religious society shall hold any camp, tent, grove, or other out-door meeting, for any purpose connected with the object for which such religious society was organized, no person, without the consent of such religious society or of its proper officers, shall keep in any shop, tent, booth, wagon or carriage, or other place for sale, or expose for sale any spirituous or intoxicating liquors, or other drinks, or food, or merchandise of any kind, or hawk or peddle any such liquors, or merchandise within one mile of the place of such meeting; . . . *Provided, however*, that nothing herein contained shall be construed to prevent innkeepers, grocers, or other persons from pursuing their ordinary business at their usual

place of doing business, nor to prevent any person from selling victuals in his usual place of abode."

The defendant had leased land for the purpose of selling food but the statute prohibited his enjoying the privileges provided for in his contract. He as well as all land owners, except "inn keepers, grocers or other persons," "pursuing their ordinary business at their usual place of doing business," and a person "selling victuals in his usual place of abode," within one mile of the meeting were by the act denied the liberty of acquiring property by making contracts for the sale of food and other merchandise. But this court held that the statute was constitutional as a valid police regulation.

In the case of *In re Williams, Petr.*, 79 Kas. 212, the court upheld a statute which interfered with the petitioner's liberty of making contracts for the sale or delivery of black powder. The act provided as follows: "It shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal mine or mines in the State of Kansas, black powder in any manner except in original packages containing twelve and one-half pounds of powder, said package to be securely sealed," &c. The statute applied to no explosive except black powder and was limited to coal mines, but the court held that the act was a valid police regulation and did not violate the state constitution or the Fourteenth Amendment.

In *Dayton Coal & Iron Co.* v. *Barton*, 53 S. W. (Tenn.) 970, the court upheld a statute which interfered with the obligation of contract, existing between employer and employee, that the employee should receive a certain portion of his wages in orders on the employer's store. The act provided, "that all persons using store orders to pay their employees shall if demanded redeem the same in the hands of the employee or a *bona fide* holder, in money." The court held that the statute was a valid police regulation and did not violate the state constitution or the Fourteenth Amendment.

And in *Davis Coal Co.* v. *Polland*, 158 Ind. 607, where the statute required as a safety appliance that mines be propped up and gave a right of action to employees for any injury occasioned by failure to comply with the provisions of the statute, the employee not only knew the risk but had by contract with the mine owner waived the right provided by statute to have the mine roof propped up for his safety. The court held that the contract was unenforceable and that the employee could recover for the injuries received by reason of the owner's failure to do that which the employee had agreed for a good consideration that the owner need not do. The court held that the act was a proper police measure and not unconstitutional.

See *People ex. rel. N. Y. Electric Lines Co.* v. *Squire*, 107 N. Y. 593. The city of New York had by contract given the electrical company the right to use the city streets. The statute requiring electrical conductors to be placed underground imposed a heavy financial burden upon the electrical company as a condition precedent to its enjoying the benefits to be derived from its contract. The New York Court held that the act was a valid police measure and was not unconstitutional as in violation of the contract wherein the electrical company obtained from the city the right to use the streets. On appeal the act was upheld by the United States Supreme Court. See *People ex. rel. N. Y. Elec. Lines Co.* v. *Squire*, 145 U. S. 175.

In *Presbyterian Church* v. *N. Y. City*, 5 Cow. 538, an ordinance was held valid which prohibited the use for burial purposes of land which the city had previously conveyed to the plaintiff for church and cemetery purposes by deed containing full covenants of warranty. The court held the ordinance to be a valid police measure.

In *Silz* v. *Hesterberg*, 211 U. S. 31, an act prohibiting the purchase, sale or possession of game during the closed season, even when the game was lawfully killed in a foreign country, was held to be a proper police regulation and not in violation of the state constitution or the Fourteenth Amendment.

In *Geer* v. *Conn.*, 161 U. S. 519, an act was held valid as a police measure which prohibited the sale and shipment out of the state of game lawfully killed. To the same effect see *Kidd* v. *Pearson*, 128 U. S. 1; *Hall* v. *DeCuir*, 95 U. S. 485; *Sherlock* v. *Alling*, 93 U. S. 99 and *Gibbons* v. *Ogden*, 9 Wheat. 1.

In the following cases statutes limiting the right to contract have been held constitutional as valid police measures: In *Holden* v. *Hardy*, 169 U. S. 366, an act limiting labor in mines to eight hours a day; In *Soon Hing* v. *Crowley*, 113 U. S. 703, an act prohibiting work in laundries from 10 P. M. to 6 A. M.; to the same effect see *Barbier* v. *Connolly*, 113 U. S. 27. In *Munn* v. *People of Ill.*, 94 U. S. 113, an act fixing the maximum charge for storing grain and prohibiting contracts for a larger amount, and in *Frisbie* v. *U. S.*, 157 U. S. 160, an act of Congress prohibiting attorneys from contracting for a larger fee than ten dollars for prosecuting pension claims.

In *Opinion to House of Representatives*, 163 Mass. 589, the court held constitutional an act requiring all corporations, copartnerships or individuals engaged in any manufacturing business and employing more than twenty-five employees to pay wages weekly, thus interfering with the right to freely contract.

In *Gundling* v. *Chicago*, 177 U. S. 183, 188, the court said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what such regulation shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and the personal rights of the citizen are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass and they form no subject for Federal interference."

We have at this length considered the respondent's claim that under the Fourteenth Amendment there has been secured to the theatre manager the absolute and unqualified right to contract as to the service and the compensation of the fireguard or inspector stationed at its theatre and that said Section 5, in violation of the Fourteenth Amendment, has undertaken to control the contract between *it* as a *master* and said inspector as a *servant*. In making this contention the respondent and the majority opinion completely lose sight of the fundamental principles underlying the relation of master and servant. These principles are too elementary to require statement save for the fact they have been entirely disregarded by said argument and majority opinion. The relation of master and servant exists only when "the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done." 26 Cyc. 966. "He is to be deemed a master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work but in the details." 26 Cyc. 965. An examination of said Section 5 unmistakably indicates that the relation there established between a theatre operator and a fire inspector is entirely lacking in the elements essential to the relation of master and servant. Disregarding for the time those provisions the validity of which the respondent questions(viz., fixing a minimum salary and providing that the fireguard may not be discharged or his salary reduced "except with the prior approval of said board"), it appears that in the city of Providence the licensee of a theatre shall employ a suitable person approved by the board of fire commissioners who shall be stationed in such theatre during the time any audience is present therein, who shall perform the duties prescribed by the board to guard against fire and to protect life and property in case of fire in such theatre, who shall not have any other duty, and in case said board at any time

shall withdraw its approval of such person another person, approved by said board, shall be employed in his stead. The theatre licensee has neither the unrestricted choice, control or direction of the inspector. Such licensee can only employ an inspector approved by the board of fire commissioners. The period during which his services are to be performed are fixed by law. The licensee cannot prescribe his duty, such direction being vested in the fire commission; the licensee may not require or receive services from the inspector beyond the duties prescribed by said board. If said board is not satisfied with the manner in which the inspector performs his duties he must be replaced by another inspector approved by the board; and the power is given to the board and not to the licensee to prescribe the uniform and the badge to be worn by such inspector. Said section does use the word "employ" with reference to the appointment of such inspector. The respondent seizes upon said word as indicative of the nature of the inspector's service and appears to assume that since masters "employ" their servants the employment of the inspector by the licensee makes said inspector the servant of the licensee. Such reasoning magnifies the use of a somewhat indefinite word into an indication of legislative intent contrary to and inconsistent with all the other provisions of said section. It is plain that the limit of the intention of the General Assembly in the use of the word "employ" was to permit the theatre licensee in Providence to nominate for the approval of the fire commissioners, or to select for their approval, the person who should act as fire inspector in the theatre of such licensee but the person so nominated when approved by the board did not become in the slightest particular the servant of such licensee but became the person charged with the performance of a public duty under the direction of the board of fire commissioners. For the court to give the conclusive force to the word "employ" which the respondent urges would be to question the deliberate action of a coördinate branch of the government upon a mere verbal quibble, and to magnify what is

clearly circumstantial into something essential and intrinsic. Under the statute the nature of the duties to be performed by the theatre fire guards in each of the cities of the state are the same whether said fireguard be a member of the fire department of such city or a person selected by the theatre licensee and approved by the board of fire commissioners or the chief of the fire department of such city, save that in the city of Providence it is specially provided that the duties of the fireguard shall be restricted to the public duty of guarding against fire and protecting life and property in case of fire and that he shall have no other duty. This provision would completely exclude the performance by the inspector of any service for the theatre licensee in the ordinary conduct of its business as the operator of a theatre. It is clear to us that the fireguard stationed in a theatre is not the servant of the theatre licensee but a person charged with the performance of a public duty, and all the respondent's criticism of said Section 5 as an attempt to interfere with its right to contract freely with its servant is without point or pertinency.

One of the tests which the respondent suggests to establish that the fire inspector is his servant is that the respondent would be responsible for the result of the inspector's negligence. A master may be compelled to respond in damages for the negligent act of his servant but the theatre manager would not be liable for the negligent act of the fireguard in the performance of his duties because the manager can not direct or control the acts of the fireguard. The board of fire commissioners has certified to the competency of the fireguard. The fireguard cannot be discharged by the manager without permission from the board of fire commissioners. The manager is not the master and the fireguard is not a servant. See *Durkin* v. *Kingston Coal Co. et al.*, 171 Penn. 193, which was an action of negligence for injury to a coal miner brought against the mine owner. The statute provided that no person "shall be permitted to act as mine foreman" until after examination by an examin-

ing board created by the state and a certification as to qualification by the mine inspector appointed by the governor. The statute required all mine owners and operators to "employ" a certified mine foreman under penalty of a fine of twenty-five dollars per day. The duties of the mine foreman are prescribed by the act and the owners or operators of the mines can not interfere with his duties. The act provides that "for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any . . . mine foreman a right of action shall accrue to the party injured against said owner or operator for any direct damage he may have sustained thereby." The court, holding that the mine owner was not liable in spite of the statute making him liable for the negligence of the certified mine foreman, said: "This statute regarded as a whole is an extraordinary piece of legislation. Through it the law-makers say to the mine owner, 'you can not be trusted to manage your own business. Left to yourself you will not properly care for your own employees. We will determine what you shall do. In order to make certain that our directions are obeyed we will set a mine foreman over your mines with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employees. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines you shall pay for. If, notwithstanding our certificate he turns out to be incompetent or untrustworthy you shall be responsible for his ignorance or negligence.'" The statute was held to be unconstitutional so far as it purported to make the mine owner liable for the negligence of the certified foreman.

The respondent contends that if the provisions of Section 5 are held to be valid such determination will require us to approve the constitutional soundness of all legislation which may assume to fix by statute the wages of private employees when the performance of their duties has any relation to

public safety, as, for example, the wages of locomotive engineers, motormen, chauffeurs and the like; and finally that we must approve legislative regulation of the wages of any class of workmen with which the General Assembly may see fit to deal. Such argument is clearly specious. All such private employes and workmen are servants of a private master performing such master's business in accordance with the master's direction. That the safety of the public frequently depends upon the proper performance of their duties is merely an incident of their occupation. A fire inspector stationed in a theatre is not engaged in the service of a private master. He is performing the duties prescribed by law under the direction of a public board. His duty is to the public. The public is the master and it is for the public as represented by the law-making power of the State to fix his compensation and to regulate the terms of his employment. No principle is better settled than that compensation for the performance of public duties may be fixed by law whether such compensation is paid from the public treasury or charged against the business in relation to which it is to be performed.

The burden upon the theatre manager consists in being obliged to pay the compensation of the fireman or fireguard stationed in his theatre; it is a matter of no consequence to him, and it has no bearing upon the reasonableness of the charge or the constitutionality of the act whether he be required to pay said compensation to the city and the city pay the fireman or inspector, or that the manager be directed to pay the fireman or inspector directly. The manner of payment is a matter of detail, the vital consideration is whether such manager should be compelled to pay the charge at all. There is a long line of decisions holding that whenever any business or line of business affects the public health, safety, morals or welfare, thereby becoming a proper subject for police regulation, the fees and charges for inspection or otherwise for protecting the public against the dangers incident to such business may be imposed upon the

business itself, regardless of whether any special franchise or privilege had been conferred upon such business, or that it was one affected with a public interest or was one merely of private interest.

In *Willis* v. *Standard Oil Co.*, 50 Minn. 290, it was held that a statute requiring illuminating oil which was held for sale to be first inspected, and fixing the fees for inspection, was a valid exercise of the police power, and the court said: "On its face the act is a *bona fide* police regulation, a proper inspection law and not a law levying a tax. What is a reasonable fee for inspection under such laws must depend largely upon the sound discretion of the legislature having reference to all the circumstances and necessities of the case; and unless it is manifestly unreasonable in view of the purpose of the law as a police regulation, the court will not adjudge it a tax."

In *Consolidated Coal Co.* v. *The People*, 186 Ill. 134, the court held "that under the police power the legislature has the right to provide for the inspection of mines and that it also has the right to place the burden of the expense of such inspection upon the mine owners," and that a law was not in violation of the Fourteenth Amendment of the Constitution of the United States as one denying equal protection of the laws or taking property without due process of law because it did not lay down proper rules for its impartial execution in fixing fees to be charged upon a basis of the number of men employed, size of the mine or "some definite circumstance or condition," and fixing a reasonable number of inspections to be made annually by which the exercise of an arbitrary discretion might be avoided. The inspection fee was fixed at not less than six dollars nor more than ten dollars a visit. By statute it became the inspector's duty to inspect "as often as he may deem necessary and proper" and "at least four times a year."

In *City of New Orleans* v. *Kee*, 31 So. (La.) 1014, the court held an ordinance constitutional which provided for inspection of laundries and required the laundry to pay the

inspection fee. In *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455, a statute was held to be valid which required steamship vessels to submit to inspection and pay a fee therefor.

In *Baldwin* v. *Louisville and Nashville R. R. Co.*, 7 L. R. A. (Ala.) 266, an act made it a misdemeanor for any railroad to have in its employ any engineer, fireman, brakeman, conductor, gateman, signal-man, &c. who did not "possess a certificate of fitness therefor in so far as color blindness and visual powers are concerned" issued by a medical examiner provided for by the act. The railroad company was obliged to pay the examination fee fixed by the act as three dollars. The plaintiff brought suit to recover from the railroad his fees for examining in his capacity as medical examiner employees of the defendant. The court held that the act was not in violation of the Fourteenth Amendment.

In *People* v. *Harper*, 91 Ill. 357, the court held an act constitutional which created a board with powers to fix the fees for inspecting grain. In *Louisiana State Board* v. *Standard Oil Co.*, 31 So. 1015, the court held that the act which required the plaintiff board to inspect coal oil throughout the state by reasonable implication confers upon the board authority to exact an inspection fee from the dealer in oil. In *Nashville &c. Railroad* v. *Alabama*, 128 U. S. 96, the court considered the provision of a statute requiring a railroad to pay a fee fixed at three dollars for the examination of certain of its employees as to color blindness and visual powers and held the same to be constitutional as not depriving such railroad of property without due process of law. In *Smith* v. *Ala.*, 124 U. S. 465, the plaintiff in error, a locomotive engineer, had been convicted of operating a locomotive without a license prescribed in a statute which required all engineers to be examined by a state board of examiners as to their fitness to operate locomotives and forbade the operation of a locomotive by an engineer, not possessing such license, on the main line for the purpose of hauling passengers or freight. The examination fee was

fixed at three dollars which was required to be paid by the engineer. The court held that the act did not contravene the Constitution of the United States and that the statute was valid under the police power of the state. Upon the point now under consideration see *Charlotte &c. R. R.* v. *Gibbes*, 142 U. S. 386; *Daniels* v. *Hilgard*, 77 Ill. 640; *People* v. *Smith*, 108 Mich. 527; *People* v. *Squire*, 107 N. Y. 593; *State* v. *Murlin*, 137 Mo. 297; *Commonwealth* v. *Bonnell*, 8 Phila. Rep. 534; *Davis Coal Company* v. *Polland*, 158 Ind. 607. A somewhat novel case of a law aiming to protect the public against the dangers incident to a business is considered in *State* v. *Cassidy*, 22 Minn. 312. An act making it an offence to sell spirituous liquors without having a special license (in addition to all other licenses) for which a fee of ten dollars must be paid "to establish a fund for the foundation and maintenance of an asylum for inebriates" was held to be a valid exercise of the police power. In *Noble State Bank* v. *Haskell*, 219 U. S. 104, the court considered a statute of Oklahoma which provided for a levy upon all banks existing under the laws of the state an assessment of a percentage of each bank's average deposits to pay the loss arising to depositors in banks which might become insolvent. The court sustained the constitutionality of this statute, and held that when the legislature of Oklahoma declared that said regulation was a necessary safeguard to banking the court cannot say that it is wrong. Upon petition for rehearing the court said, 219 U. S. at p. 580, "We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation, but on this point we have nothing to say, as it is not our concern."

It is no just criticism of the amount of compensation fixed by law for public office or public service that perhaps some person may be found in the community who will undertake to perform it for less. The provisions of Section 5 wherein the General Assembly in its legislative discretion has fixed three dollars per day as the compensation of a fire-

guard cannot be regarded as unconstitutional because the respondent before the passage of the act was able to make an arrangement with Mr. Gallagher to act for two dollars per day. Such a principle if adopted by this court would lead to a declaration of the unconstitutionality of a great number of acts of the General Assembly in which a fee is fixed or compensation provided for the performance of some public act.

We have in this State many statutes providing for inspection and inspection fees. See the following chapters of General Laws, 1909. Chapter 220 requires the insurance commissioner to examine insurance companies and the insurance company to pay the commissioner the expense of such examination. Chapter 157 provides for the inspection and branding of beef and pork and fixes the fees which are to be paid by the dealer and retained by the inspector and imposes penalties in certain cases for sale without inspection. Said Chapter 157 and Section 6 of Chapter 30 were amended by Chapter 1026 of the Pub. Laws, 1914, by fixing a salary for the state inspector and providing that the inspection fees should be turned over to the general treasurer but the cities and towns may still elect inspectors of beef and pork and "provide for their compensation by salary or fees." Chapter 158 provides for the inspection of hides and leather, fixes the inspector's fees which are to be paid by the owner and retained by the inspector. Chapter 159 provides for the inspection of lime, fixes the inspection fees to be paid by the burner of the lime and retained by the inspector and imposes a penalty for selling or exporting lime not branded by the inspector. Chapter 160 provides for the inspection of fish, fixes the inspection fees to be paid by the owner and retained by the inspector and imposes a penalty for selling fish not inspected and branded. Chapter 161 provides for the inspection and survey of lumber shipped into this State, fixes the fees to be paid by the owner and retained by the inspector and imposes a penalty for dealing in such lumber which has not been inspected and surveyed. Chapter 162 provides for the inspection of hoops, fixes the

fees to be paid by the owner and retained by the inspector and imposes a penalty for shipping hoops which have not been inspected. Chapter 163 provides for the inspection of scythe-stones, fixes the fees to be paid by the owner and retained by the inspector and imposes a penalty for selling or exporting scythe-stones which have not been inspected. Chapter 164 provides for the inspection of salaratus, soda and cream of tartar, fixing a fee for inspection and certificate of analysis which is to be paid by the dealer and retained by the inspector and imposes a penalty for selling such articles when impure. Chapter 165 provides for the measure and sale of grain, meal and salt, fixes the fees to be paid by the owner and retained by the official measurer and imposes a penalty for the sale of such articles from a vessel or rail-road car in quantities greater than twenty-five bushels without having the same duly measured and duly certified by the official measurer. Chapter 166 provides that "all cotton sold in this state, unless specially agreed, shall be weighed" by the official weigher; said chapter fixes the fees which are to be paid by the owner and retained by the weigher. Chapter 170 provides for the inspection, sale and keeping of inflammable and explosive fluids, fixes the fees to be paid by the dealer and retained by the inspector and imposes penalties for keeping or selling certain petroleum oils and products thereof which have not been inspected. Chapter 171 provides for weighing of neat-cattle, fixes the fees for weighing, one-half of which shall be paid by the seller and one-half by the buyer, to be retained by the town weigher and imposes a penalty on persons "slaughtering or weighing any neat-cattle, and being obliged to account for the same to the owner or seller thereof as aforesaid, who shall not weigh and account" for all "parts of such cattle denominated weighable as aforesaid." Chapter 194 provides for sealing of weights and measures, fixes the fees which are to be paid by the owner and retained by the official sealer and imposes a penalty for using weights or measures which have not been sealed. Chapter 195 provides for gauging,

fixes the fees to be paid by the owner and retained by the gauger and imposes a penalty for selling commodities by gauge or gauge-marks not made by an official gauger.

Perhaps the market man like the theatre manager would prefer to have his business inspected and regulated by his own servant. We have no doubt that the market man could save a considerable expense by having his large number of weights and measures sealed by one of his employees possessing the requisite skill. It is probable that such market man could arrange with his employee to do the work for a compensation much less than the statutory fee of the public sealer. That fact however has no bearing upon the question of the constitutionality of the statute relating to the sealing of weights and measures. It is the policy of the law to surround a public official with a degree of independence the better to enable him faithfully to perform his duties to the public.

My conclusion that Section 5 provides for the performance by the fire inspector of a public duty and not of a private service for the theatre manager is really determinative of the questions before us because, as I have already said it is undoubtedly within the power of the General Assembly to fix the compensation and regulate the employment of this public inspector. I will, however, consider at length the contention of the respondent that the provisions fixing the compensation of this public servant at three dollars per day, providing that his salary shall not be reduced by the theatre manager and that he may not be discharged by the theatre manager are entirely arbitrary and have no reasonable relation to the protection of audiences in theatres in the city of Providence.

For the proper understanding of the cases in which a party has questioned the constitutionality of legislation purporting to be enacted under the police power, the distinction between the question of legislative *power* and the matter of legislative *policy* must always be borne in mind. Mr. Justice HUGHES in *Chicago &c.* v. *McGuire,* 219 U. S. at p.

569, says: "The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." In *McLean* v. *Arkansas*, 211 U. S. 547, the court said, "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

Courts as evidenced by their opinions in many cases have scrutinized very carefully the claims that legislation in question before them was within the scope of the police power. When, however, it has been determined that the matter as to which regulation has been provided did have such a relation to the public health, safety, morals and welfare as to present a proper occasion for the exercise of the police power then it has been recognized that a very wide discretion rests in the legislature in determining the policy or the methods to be employed in its exercise. In *Holden* v. *Hardy*, 169 U. S. 366, at page 397, the court said: "Though

reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government." In speaking of the limits of judicial discretion the court in *Wilson* v. *New*, 243 U. S. 332, at p. 359, said: "While it is a truism to say that the duty to enforce the Constitution is paramount and abiding, it is also true that the very highest of judicial duties is to give effect to the legislative will and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of legislative discretion to influence our opinion or to control judgment."

This principle has been adopted by this court without a contrary opinion down to the present time.

In *East Shore Land Co.* v. *Peckham*, 33 R. I. 541 at 548, this court said: "All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt."

In *State* v. *Kofines*, 33 R. I. 211, at 218, the court said: "A reasonable doubt is to be resolved in favor of the legislative action, and the act sustained. Cooley on Constitutional Limitations, p. 252 and cases cited. 'Before an act is declared to be unconstitutional it should clearly appear that it cannot be supported by any reasonable intendment or allowable presumption. *People* v. *Supervisors of Orange*, 17 N. Y. 235, 241 . . . Therefore it is incumbent upon the respondents to satisfy this court beyond all reasonable doubt that the act in question is unconstitutional in the particulars complained of.'"

The opinion of this court in *Cleveland* v. *Tripp*, 13 R. I. 50, at 65, was as follows: "Our conclusion is, that the complainants are not entitled to relief. We have reached this conclusion not without much hesitation, but in obedience

to the rule that a statute duly enacted, however questionable it may be in point of constitutionality, is not to be pronounced void for unconstitutionality until the court is clearly convinced of it."

In the *Opinion to the Governor*, 24 R. I. 603, 606, this court said: "Both this court in *State* v. *Peckham*, 3 R. I. 289 and the Supreme Court of the U. S. in *Munn* v. *People*, 94 U. S. 113, have declared that the legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it is to be presumed that it did exist."

We will now consider the policy or the method adopted by the General Assembly in Section 5 for the purpose of guarding the safety of audiences in theatres in the city of Providence. It would tend to a better understanding of this policy of the General Assembly if we should note the historical development in this State of legislation of this character. By Sec. 5, Chap. 131, Gen. Laws, 1909, it was provided that the board of fire commissioners, or in case there was no such board, the chief of the fire department, in every city should station in every theatre during the time any audience was present therein a fireman and the licensee of the theatre should pay such city for the attendance of said fireman two dollars for every day during which a performance should be given in such theatre. By reason of the great increase in the number of theatres in the city of Providence the demands upon the fire department by reason of the assignment of firemen for service in the theatres became so great that by Chapter 1366, Pub. Laws, 1916, it was provided that, instead of a fireman being stationed by the board of fire commissioners in each theatre in the city of Providence, the licensee of such theatre should "employ" a suitable person approved by said board who should be stationed in such theatre, who should there perform the duties prescribed by said board and who should have no other duties, whose continuance in service depended

upon the continued approval of the board and who should not be discharged by said licensee except with the prior approval of said board. The next change came in the January session, 1919, when by Chapter 1780 of the Public Laws it was provided that the proprietor of a theatre in Newport should pay three dollars per day instead of two dollars per day to the city for the services of a fireman stationed in a theatre. By the provisions of Chapter 1780, Public Laws, 1919, Section 5 was again amended to the form in which it now stands, the essential parts of which have been quoted above. It cannot be questioned that by the original provisions of Section 5 a city fireman stationed in a theatre was not the servant of the theatre manager but was a person performing a public function and for that public service it was within the power of the legislature to compel the theatre manager to pay the city. This is in accord with the cases cited above. For the reasons that we have named the city was relieved of the duty of assigning members of the fire department for service in theatres and the theatre manager was permitted to select a person who should act as a fireguard in his theatre but with great particularity the duties of the fireguard or inspector so selected are designated and his relations to the fire board are defined. It is clear that the legislature intended that in every respect save in the method of selection the fireguard should exactly take the place of the city fireman. Everything that the city fireman had formerly done the fireguard must do; and the exclusive oversight and control which the board of fire commissioners had over its fireman was continued in it over the fireguard selected by the theatre manager. If, instead of permitting the theatre manager to select a person for the approval of the board, the statute had provided that the theatre manager should choose for service in his theatre one from a body of theatre fire inspectors first selected and established by the board of fire commissioners would the situation have been different? In either case the manner of selection would be an immaterial circumstance. The

essential matter in determining the legal status of the fire-guard in his relations to the theatre manager is the nature of his service. It was unmistakably public service formerly performed by the public fireman. The inspector is exercising a public function and discharging a public duty. There can be no question that for that public duty the legislature might fix the compensation. At first in its discretion the legislature did not fix the compensation but left it to such arrangement as should be made between the theatre manager and the inspector. Later in its discretion the legislature saw fit to name the minimum amount of compensation which the fire inspector should receive for his public service and further provided that the same should not be reduced without the prior approval of the board of fire commissioners. This court should not assume that these later provisions were enacted from any desire on the part of the legislature either to benefit the person, who might act as fire inspector, or to oppress the theatre manager; but we should assume that such provisions, in the judgment of the General Assembly, had a direct bearing upon the efficiency of the fire inspectors and hence upon the safety of theatre audiences in Providence. In accordance with the universally accepted doctrine all presumptions must be in favor of the validity of legislative action and if upon any view such action would be justified it should be permitted to stand. That has always been the position of this court. It was said in the *Opinion to the Governor*, 24 R. I. 603, "If a state of facts could exist which would justify legislation it is to be presumed that it did exist." The determination as to the reasonableness of the provisions as to compensation and whether they have a fair connection with the efficiency of fire inspectors depends upon a knowledge of the facts regarding the situation, and what experience has shown to the public authorities in the city of Providence. This knowledge can be gained only by investigation. The legislature can make such investigation; this court cannot. *People* v. *Smith*, 108 Mich. 527; *Horton*

v. *Old Colony Bill Posting Co.*, 36 R. I. 507. After the General Assembly has made its investigation and determined upon the regulations which in its judgment are desirable and tend to promote the public safety this court should not oppose to that judgment of the legislature, based upon such investigation, the Court's conclusions founded entirely upon conjecture as to the situation. It was stated to us in argument that at the hearing before the committee of the General Assembly it appeared that a certain theatre manager in Providence desired to be relieved of the presence of an inspector who appeared to said manager to be too zealous in insisting upon an observance of the directions which the fire board had made for the public safety; but whose conduct and service had the full approval of said board. The manager was unable to discharge the inspector directly but accomplished the same indirectly by reducing his compensation to such a low figure that the inspector was forced to resign. Upon this the legislature in its discretion, in order that the personal interests of a inspector should not make him seek the favor of a theatre manager rather than zealously observe the directions of the fire board, fixed upon three dollars per day as a fair and reasonable minimum compensation for such inspector in Providence and provided that such compensation should not be reduced save with the approval of the board of fire commissioners. Now we will not accept that statement made by counsel before us, although not contradicted, as being an exact statement of the facts nor as representing the reason that caused the legislature to adopt said provisions, but we will receive it as part of an argument by the State setting forth a possible situation which might confront the public authorities in Providence and might appeal to the discretion of the General Assembly. It is surely a state of facts which could exist and as we have said in the *Opinion to the Governor*, 24 R. I. 603, "If a state of facts could exist which would justify legislation it is to be presumed that it did exist."

It has been suggested that the provisions as to salary particularly the provision that the salary should not be reduced without the approval of the fire board, are entirely unnecessary provisions; that the object of the legislation which is to protect the safety of audiences would be as adequately secured if these provisions were omitted. It has been urged that if an inspector appears to the board of fire commissioners to be unfaithful it may require his removal and the selection of another man; and that to give to said board rather than to the theatre licensee control over his salary is entirely unnecessary. The value of this method of protecting a theatre audience depends upon the efficiency of the inspection. It requires no argument to establish the proposition that it will tend to that efficiency if the inspector is in every way dependent upon the board and all his interests compel him to a faithful and painstaking observance of their directions, rather than that as to his personal interest he should look to the theatre manager whose notions of necessary regulation may not be in accordance with that of the fire board. If in that divided loyalty his desire to obtain the favor of his paymaster leads him to be lax in his duty to the public it is not enough to say that for that laxity he may be removed for before the inefficiency may be discovered by the board a serious tragedy may have occurred. The suggestion of a lack of necessity for any of these regulations is entirely irrelevant to the consideration of the constitutionality of the section in question. Whether or not a given regulation shall appear to a court to be necessary or unnecessary is not the criterion of constitutionality. The regulations which should be prescribed to effect a given purpose are matters addressed to the wide powers of discretion and judgment possessed by the General Assembly and it is no valid objection to a regulation that its necessity should not be apparent to some mind which is not fully informed as to the situation and the particular purpose which is behind the regulation. If it was for the members of a court to prescribe the policy

and method of regulation they might adopt an entirely different scheme. They might be of the opinion that the plan of the legislature is practically faulty and ill-advised; that it will quite likely fail of its purpose or that some of its details are unnecessary but for any or all of these reasons the legislation in question should not be declared unconstitutional unless the provisions are without doubt unrelated to the matter under consideration and so clearly unreasonable and arbitrary as to be oppressive. Our fundamental test must be applied. If a state of facts could exist which would justify the regulation it is to be presumed that it did exist. In the case dealing with billboard advertising in the city of Providence, *Horton* v. *Old Colony Bill Posting Co.*, 36 R. I. 507, the ordinance under consideration was passed in accordance with the authority given by statute to the city council of Providence to regulate such outdoor advertising "in order to preserve the health, safety, morals and comfort of the inhabitants of this state." This was a delegation to said city council of a part of the police power of the State. An examination of said ordinance discloses a number of regulations which are not apparently necessary for the preservation of the health, safety, morals and comfort of the inhabitants of the State. As to a number of the provisions this court was not free from doubt even as to their reasonableness, yet they were approved. The court held that "In view of the fact that the lawmaking body has far more opportunity to ascertain and meet the public need than the court can have, and in view of the wide latitude permitted the legislative branch in determining the public needs and the appropriate remedies, the court should uphold the limitations on size" (of billboards) "imposed by this section, which in our opinion are not clearly unreasonable," and the court quoted with approval the language of the opinion *In re Wilshire*, 103 Fed. 620, as follows: "I entertain a good deal of doubt in respect to the reasonableness of the maximum limitation placed upon the structures in question by the municipal authorities of the

city of Los Angeles, but the fact that this doubt exists is sufficient reason for the court to decline to adjudge the ordinance invalid. It is only in clear cases that such a judgment should be given."

In the foregoing part of the opinion I have dealt with the respondent's various contentions that said Section 5 deprives the respondent of its liberty and property without due process of law. We find no validity in any of them. They are all based upon its misconception that the relation of the theatre licensee to the fire inspector is that of master and servant; whereas in fact and law the fire inspector is a public servant performing public duties, which it was clearly within the power of the State to regulate and for which it might fix a compensation, and charge the payment of the same upon the theatre manager whose business was the subject of the regulations.

The respondent's contention is that inasmuch as said Section 5 does not operate uniformly upon all the theatres in the State the act is therefore in violation of Article I, Section 2 of the Constitution of Rhode Island which declares that "the burdens of the state ought to be fairly distributed among its citizens" and is in violation of the Fourteenth Amendment to the Constitution of the United States which requires that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

The respondent contends that said Section 5 imposes an unequal burden on him in the conduct of his business, in other words, imposes a heavier burden upon his theatre and all other theatres situated in the city of Providence than it imposes on the same business in other cities. It is not suggested that the act is invalid because it operates only as to cities and does not apply to the towns and yet some of our towns have thickly populated and congested centers in which theatres are conducted. In Providence, the largest city in the State, we have special provisions for supplying

fireguards or fire inspectors for the theatres. No fireguard is required for theatres situated in towns. In the cities of Pawtucket and Cranston theatres must pay the city two dollars per day for a regular fireman stationed in the theatre; theatres in Newport pay the city three dollars per day for a regular fireman; theatres in Providence and Newport pay the same amount. In Providence, Woonsocket, and Central Falls theatre licensees must "employ" a suitable person approved in Providence by the board of fire commissioners and in Woonsocket and Central Falls by the chief of the fire department. In Providence the theatre must pay whatever price may be necessary which shall not be less than three dollars per day to secure a competent person approved by the board of fire commissioners.

The statute makes three classes of theatres and imposes a slightly different burden on each class, Providence and Newport in one class, Pawtucket and Cranston in another class and those in Woonsocket and Central Falls in a third class. The Providence class differs from the Woonsocket and Central Falls class in that the Providence theatre must pay the fireguard at least three dollars per day and such fireguard is not permitted to have any other duties whereas in the Woonsocket and Central Falls class no minimum fee is fixed and the fireguard is not forbidden to have other duties.

It is to be noted that the act applies equally to all theatres in the city of Providence.

Said Section 5 is not in conflict with the Constitution of Rhode Island, Article I, Section 2, which reads as follows: "All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens."

In the case of *In re Dorrance Street*, 4 R. I. at 249, AMES C. J., in discussing the last clause of the foregoing section said: "We will not stop to notice the very general language and declaratory form of this clause; setting forth

principles of legislation rather than rules of constitutional law—addressed rather to the general assembly by way of advice and direction, than to the courts, by way of enforcing restraint upon the lawmaking power. We do not mean to say that a law, purporting to impose a tax or burden of some sort upon the citizen may not be in its distribution of the burden, both in design and effect, so outrageously subversive of all the rules of fairness, as not to come so far within the purview of this general clause, as to enable the court to save the citizen from oppression by declaring it to be void. But evidently a wide discretion with regard to the distribution of the burdens of state amongst the citizens was intended to be reposed in the general assembly by the will of the people, as signified in this clause of the constitution. The form is 'ought to be,' the word is '*fairly*' distributed, not 'equally' even—unless equality be fair, which it is not always in any sense, and never is in some senses; and especially, the words are not 'equally upon property,' or words to that effect, as in the constitution of Louisiana." . . . "All taxation is more or less unfair, and in any proper sense, even unequal. Perfect fairness would be, to make all those who are benefited by the burdens of the state to bear them, and to extend the burden in due proportion to every person according to this benefit." Of course it is not only impracticable but impossible to frame and enforce laws which do exact justice to all. Our statute requiring motor vehicles to be registered and licensed is a good example. In order to maintain and improve our state highway system a tax is imposed on motor vehicles; no similar tax is imposed on horse-drawn vehicles using and impairing the highways. And again, the annual tax itself is graduated according to the horse-power of the motor vehicle without any reference whatever to the time or distance which motor vehicles travel on the highways; motor trucks, particularly those transporting heavy loads, probably do far greater damage to the highways than do pleasure motor vehicles which are required to pay a registration fee (dependent

upon horse-power) ranging from $5 to $25, while commercial motor vehicles, and motor trucks regardless of the horse-power thereof pay a fee of $7; but such legislation has been held to be not unconstitutional. *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160. While the Fourteenth Amendment to the Federal constitution provides that no state shall deny to any person within its jurisdiction the equal protection of its laws this provision has been uniformly held to be entirely consistent with the power of a state legislature to make classification as to the subjects of legislation provided all members of a class are treated equally. The following language was quoted with approval by this court in *Sayles* v. *Foley, Blomquist*, 38 R. I. p. 491: "In *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 576, it is stated: 'This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority.' In *Kidd* v. *Ala.* 188 U. S. 730, 733, the court says: 'We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis,' " (citing cases). See also *Horton* v. *Old Colony Bill Posting Co.*, 36 R. I. 507; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *Mc. Laughlin*, 236 U. S. 385; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224; *International Harvester Co.* v. *Missouri* 234 U. S. 199; *St. John* v. *New York*, 201 U. S. 633, 637.

Mr. Justice VAN DEVANTER, in discussing the power of the legislature to make classification, said in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. at p. 78, "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws,

but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary," citing,—'*Bachtel* v. *Wilson*, 204 U. S. 36, 41; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Munn* v. *Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615."

As was said in *Heath & Milligan* v. *Worst*, 207 U. S. at p. 354: "A classification may not be merely arbitrary but necessarily there must be great freedom of discretion, even though it result in 'ill-advised, unequal and oppressive legislation.' "

In *State* v. *Read, supra* (12 R. I. 137), this court held valid a statute making a very novel classification in reference to the use of land within one mile of an outdoor meeting held by any religious society. The statute prohibited all persons other than the religious society except "innkeepers, grocers or other persons from pursuing their ordinary business at their usual place of doing business" and persons selling victuals in their usual place of abode from selling food or other merchandise within one mile of such meeting. The act was unnecessary to prevent the sale of intoxicating liquors as at the time of its passage statutes were in force, with penalties more severe, prohibiting the sale of intoxicating liquors. To sell food on one's property (except "in his usual place of abode") within one mile of an out-door meeting held by any religious society is made a misde-

meanor by the statute unless the sale be made with the consent of the society. Had the society consented to the acts complained of the defendant would have been guilty of no offence. Giving the society the right to consent to such sales might be regarded as tantamount to creating a monopoly in the sale of food, &c., and hence creating a favored class. The statute prohibited all persons other than the society within one mile radius of the meeting from using their property in a particular manner without consent of the society. The statute imposed an unequal burden upon one class of land owners. It says in substance, whenever a religious society shall spread its tent in a community and hold its meetings or holds its meetings out of doors in such community that all land owners within one mile of such meeting lose the right, while such meeting is being so held, to use their property in the same manner as they may lawfully use it before the meeting commenced and after it ended. Shore resorts, county fairs and even the same religious societies when holding their meetings in a church edifice are not similarly protected from encroachment. But as the act applied to all religious societies it was upheld as a valid exercise of the police power of the state.

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, it was held that "a state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax 'planters and farmers grinding and refining their own sugar and molasses,' deny sugar refiners the equal protection of the laws within the Fourteenth Amendment."

In *Holden* v. *Hardy*, 169 U. S. 366, an act limiting labor in mines only to eight hours a day was held a valid exercise of the police power and not in violation with the Fourteenth Amendment.

In *McLean* v. *State of Ark.* 211 U. S. 539, the court refused to hold that a legislative act requiring coal to be measured for payment of miners' wages before screening to be an unreasonable police regulation and held that the act was

not unconstitutional under the due process or the equal protection clause of the Fourteenth Amendment and held that it was not an unreasonable classification to divide coal mines into those where less than ten miners are employed and those where more than that number are employed and that a state police regulation is not unconstitutional under the equal protection clause of the Fourteenth Amendment because applicable only to mines where more than ten miners are employed.

In *Louisiana St. Board of Health* v. *Standard Oil Co.*, 31 So. 1015, the court considered an act which required the inspection of coal oil "in every city and town of not less than two thousand inhabitants except the city of New Orleans." Inspection in the latter city had been provided for by a special act. The court assumed that there was no question as to the constitutionality of the act under consideration.

In *Minn. Ry.* v. *Beckwith*, 129 U. S. 26, a statute providing that if live stock strayed upon railroad tracks, by reason of there being no fence, where the railroad had the right to fence, and were injured or killed, the railroad should be liable for the damage, and if such corporation neglects to pay the value of damage done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, "such owner shall be entitled to recover double the value of the stock killed or damages caused thereto" was held not to be in violation of the equal protection clause of the Fourteenth Amendment. And in *Mo. Pacif. R. R. Co.* v. *Humes*, 115 U. S. 512, a similar statute was held to be a valid police regulation as it provided against accident to life and property.

Mountain Timber Co. v. *Washington*, 243 U. S. 219. The Washington Workmen's Compensation Act provided for the creation of a state fund for compensation of workmen injured and dependents of workmen killed in employments classed as hazardous and abolished (except in certain cases) the action at law by employees against employers for damage due to negligence. The different hazardous industries were

classified. The scheme was to tax each employer engaged in a given class in proportion to his payroll to meet the loss in such class. Held that the act did not violate the Fourteenth Amendment. To the same effect see *Sayles* v. *Foley, Blomquist*, 38 R. I. 484.

In *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188, the N. Y. Workmen's Compensation Act, requiring the employer to secure the compensation required by the act to injured employees and their dependents by insurance or by deposit of securities with the state commissioner was held valid as not denying the equal protection of the laws.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, the court sustained an Oklahoma statute which levied upon all banks existing under the laws of the state an assessment of a percentage of the bank's average deposits to pay the loss of depositors in insolvent banks.

In *Minn. Iron Co.* v. *Kline*, 199 U. S. 593, an act provided that in actions of negligence for personal injuries against railroads the negligence of a fellow servant was no defence. Held not in violation of the Fourteenth Amendment and not class legislation. To the same effect see *Mo. Pac. R. R. Co.* v. *Mackey*, 127 U. S. 205. In *Lieberman* v. *Van de Carr*, 199 U. S. 552, a statute prohibiting the sale of milk without a permit from the state board of health was held not in violation of the Fourteenth Amendment as depriving persons in that business of their property without due process of law or denying them the equal protection of the laws.

In *Chicago &c. R. R. Co.* v. *McGuire*, 219 U. S. 549, the court, in an opinion by Mr. Justice HUGHES, considered the validity of a statute limiting the rights of railroads and their employees to contract. The act applied to railroad corporations only. It was held that the "state has power to prohibit contracts limiting liability for injuries made in advance of the injury received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received

after the contract," and that such a statute does not impair the liberty of contract, take property without due process of law or deny equal protection of the law in violation of the Fourteenth Amendment.

In *N. Y.* v. *Squire*, 145 U. S. 175 (107 N. Y. 593), it was held that an electrical commission act, to regulate electric light, power, etc., companies, violated no contractual rights of the corporation and was not in violation of the Fourteenth Amendment, that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The board of commissioners was authorized to assess the several corporations affected by the act to pay the expenses and salaries of the board. The act was held to be not unconstitutional notwithstanding the fact that it applied only to cities with a population of more than five hundred thousand.

In the case of *In re Williams, Petr.*, 79 Kas. 212, the petitioner was convicted of selling powder in violation of a statute which provided "it shall be unlawful for any individual, firm or corporation to sell, offer for sale or deliver for use at any coal-mine or mines in the State of Kansas, black powder in any manner except in original packages containing twelve and one half pounds of powder, said package to be securely sealed," &c. The act applied to no explosive except black powder and was limited to coal mines, but the court held that the statute did not violate the state constitution or the equal protection clause of the Fourteenth Amendment. The court quoted with approval from *Minn. R. R. Co.* v. *Beckwith*, 129 U. S. 26, 29, as follows: "But the clause (of the fourteenth amendment) does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases,

providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society."

See also *State* v. *Cassidy*, 22 Minn. 312; *Charlotte &c. R. R.* v. *Gibbes*, 142 U. S. 386; *Davis Coal Co.* v. *Polland*, 158 Ind. 607; *State* v. *Murlin*, 137 Mo. 297; *Gundling* v. *Chicago*, 177 U. S. 183; *Dayton Coal & Iron Co.* v. *Barton*, 53 S. W. (Tenn.) 970; *Harbison* v. *Iron Wks.* 103 Tenn. 421, 53 S. W. 955; *Daniels* v. *Hilgard*, 77 Ill. 640; *W. W. Cargill Co.* v. *Minn.*, 180 U. S. 452; *People* v. *Smith*, 108 Mich. 527; *Opinion to the Governor, in re Met. Park Loan*, 34 R. I. 191.

Suppose the legislature instead of passing the act in question, classifying the theatres of the state according to cities, had passed a general enabling act authorizing the various cities to adopt ordinances for the protection of audiences in theatres against fire. Each city pursuant to such authority might adopt an ordinance, to meet the needs of the particular city, different from that adopted for every other city, and yet each ordinance would be valid provided it was fair and reasonable. It is axiomatic that the legislature can do that which it can delegate others to do. Each city would be permitted a wide latitude in determining its peculiar needs and appropriate remedy. Had each of our several cities passed an ordinance identical with the provisions of said Section 5 as applicable to such city, could it be said that any one of such ordinances was clearly unfair and unreasonable?

Pub. L. Chap. 542, passed at the January session, 1910, was "An act authorizing cities and towns to regulate certain out-door advertising." Pursuant to this act the city of Providence passed Chap. 443 (1910) of the ordinances of the city of Providence which ordinance provided with great detail for the regulation of billboards and out-door advertising. Said ordinance did not affect all classes equally. It pro-

hibited the advertising of intoxicating liquors within two hundred feet of a school house or church. It required billboards on roofs of buildings to be constructed, in one section of the city, of incombustible materials and contained no such requirement for other sections of the city. The enabling act and the ordinance passed pursuant thereof each defines the term "out-door advertising," and provides that the term "shall not include advertising located upon private property and relating exclusively to the business conducted on such property or the sale or rental thereof, or advertising in or upon the cars and stations of any common carrier." If it is unnecessary to regulate out-door advertising relating to the business conducted on the property where the advertisement is located it is not entirely clear why it should be necessary to regulate such advertising when it does not relate to the business conducted on such property; but the act affected equally all persons similarly situated and in *Horton* v. *Old Colony Bill Posting Co., supra,* this court held that the enabling act and ordinance were each valid and were not obnoxious to either the Constitution of Rhode Island, Article I, Section 10 or the Constitution of the United States, Article XIV of Amendments, Section 1, as depriving a person of his property without due process of law nor as denying to a defendant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Said Section 5 operates alike upon all theatres in the city of Providence and it can by no means be said to be clearly unfair or unreasonable in its provisions applying to theatres in the city of Providence. Indeed, with the present high price of wages it would seem that the respondent is fortunate if he can obtain for three dollars a qualified and duly approved fireguard to be in attendance on his theatre throughout the day and evening performance.

The respondent's other claims of unconstitutionality in Section 5 have been sufficiently answered in the foregoing. We may add that as to Article I, Section 10 of the Constitu-

tion of Rhode Island it has been held in numerous cases that it is a provision guarding the rights of persons accused of crime and that the rights of property of other persons are guarded by other clauses of the consitution of this State or by the provisions of the Federal constitution. *State* v. *Keeran*, 5 R. I. 497; *State* v. *Armeno*, 29 R. I. 431; *State* v. *Rosenkrans*, 30 R. I. 374; *State* v. *Hand Brewing Co.*, 32 R. I. 56; *East Shore Land Co.* v. *Peckham*, 33 R. I. 541. In *Reynolds* v. *Randall*, 12 R. I. 522, the court said that "grammatically the provisions there seem to apply only in favor of persons accused of crime" yet in that case the court appears to give it a somewhat broader application.

In my opinion said Section 5 is not invalid for any of the reasons urged against it by the respondent.

SWEETLAND, J. I have examined the opinion of Mr. Justice VINCENT and that of Mr Justice RATHBUN. From such examination it appears to me that the opinion of Mr. Justice VINCENT fails to appreciate the legal nature of the relation between a theatre licensee and a fire inspector which has been created by the statutory provision in question. Particularly is it to be regretted that in a vital matter, involving public safety, the majority should disregard the principles, heretofore prevailing in this State, by which the constitutional validity of statutory enactments ought to be tested. The recognition and application of those principles appear to me to be essential to the preservation of the proper balance between the respective powers and functions of those coördinate departments of our government, the General Assembly and the Supreme Court. I unreservedly concur in the comprehensive opinion of Mr. Justice RATHBUN.

Elmer S. Chace, Henry C. Cram, Ellis L. Yatman, for complainant.

Alexander L. Churchill, Philip C. Joslin, John E. Bolan, for defendant.

JOHN MINGO *vs.* RHODE ISLAND COMPANY.

MARCH 5, 1920.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(*1*) *New Trial. Verdict Contrary to Law.*

On hearing of motion for new trial before the trial judge on the ground that the verdict is contrary to law, the only question open for consideration is whether the jury accepted and followed the law as stated by him at the trial.

(*2*) *New Trial. Verdict Contrary to Law.*

An error of law of the trial court cannot be reviewed by him on motion for new trial claiming that the verdict is against the law.

(*3*) *New Trial. Exceptions. Verdict Contrary to law.*

Where no exception was taken to the charge of the trial judge, and no request to charge differently was made, such charge is the law of the case and the question that the verdict was contrary to the law cannot be raised on bill of exceptions since the question was not properly brought upon the record.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and overruled.

SWEENEY, J. This case is reported in 41 R. I. 423. Subsequently it came on for trial in the Superior Court and the jury returned a verdict for the plaintiff. It appeared from the plaintiff's testimony that two of the defendant's trolley cars collided at a switch with such force, that one of them swung around and hit a coal truck which the plaintiff was driving, throwing him from his seat to the ground, thereby severely injuring him. The testimony introduced by the defendant only related to the nature and extent of the injuries sustained by the plaintiff. The defendant claimed as a result of the plaintiff's testimony, that he was barred from maintaining his action because the testimony showed that there was no *bona fide* agreement between him and his employer that the money received by him under the provisions of the Workmen's Compensation Act was to be returned to his employer if damages were obtained by him from the defendant. The trial justice duly instructed the jury about the issues involved in the case, and the law

applicable thereto, in accordance with the opinion of this court. The jury returned a general verdict in favor of the plaintiff, and found specially that the plaintiff himself, or through an attorney duly authorized for that purpose, did make an agreement to pay back to his employer any monies paid by the employer for compensation before the agreement of July 23, 1917. The defendant duly filed a motion for a new trial which was denied by the trial justice and the defendant then duly brought his bill of exceptions to this court.

The only exceptions claimed at the hearing before this court were the 5th, 6th and 8th; the other five exceptions being waived.

The 6th exception is to the effect that the trial justice erred in denying the defendant's motion for a new trial on the ground that the verdict is contrary to law. The trial court may grant a new trial for any reason for which a new trial is usually granted at common law, other than error of law occurring at the trial. Sec. 12, Chap. 298, Gen. Laws. On the hearing of a motion for a new trial before the trial
(1) judge on the ground that the verdict is contrary to law, the only question open for him to consider is whether the jury accepted and followed the law as stated by him at the trial. *Greene* v. *R. I. Co.*, 38 R. I. 17; *Musk* v. *Hall*, 34 R. I. 126. Any error of law of the trial court cannot be reviewed by him on a motion for a new trial claiming that the verdict is against the law. *Ralph* v. *Taylor*, 33 R. I. 503; *Reid* v.
(2) *R. I. Co.*, 28 R. I. 321.

Under this ground that the verdict is contrary to the law, the defendant claims that this court should re-examine the question of law heretofore decided by it and overrule its former opinion. We cannot consider this question because it is not claimed in the bill of exceptions. The statute provides that the bill of exceptions shall "state separately and clearly the exceptions relied upon; but no exception shall be stated therein to any ruling or decision upon any question of law theretofore certified to and decided by the supreme

court in the cause." Sec. 17, Chap. 298. Under our statute errors of fact and errors of law are brought to the Supreme Court for review by a bill of exceptions. These errors must be founded upon the record and stated with sufficient particularity to present clearly the questions intended to be raised. *Moore* v. *Stillman*, 28 R. I. 483; *Enos* v. *R. I. Sub. Ry. Co.*, 29 R. I. 297. Questions of law not properly brought upon the record by exception will not be considered by the court on a petition for a new trial. *Phillips* v. *Shackford*, 21 R. I. 422. Where a claim or defense available at the trial of a cause is not presented at the trial, and no ruling of the court is asked for in relation thereto, it cannot be the subject of a petition for a new trial. *Jones* v. *Henault*, 20 R. I. 465.

The trial justice having instructed the jury in the law applicable to the case in accordance with the opinion of this court, and no exception having been taken to such charge by the defendant, and no request to charge differently having been presented to said trial justice, and the questions now sought to be raised not being properly brought upon the record, the defendant cannot now be heard on any claim
(3) of exceptions to said charge, or be heard in opposition to the law as stated in it, as it has been held that the right of exception to an incorrect statement of law is regarded as waived unless exception is taken thereto, and that a charge to which there is no exception is the law of the case. If the defendant wished to have the jury instructed according to its theory of the law applicable to the case it was its duty to have requested such instructions in order to bring the matter of law upon the record, or to have claimed exceptions to so much of the instructions given as it considered erroneous. *Miller* v. *Phillips*, 39 R. I. 416; *Sheldon* v. *Wilbur*, 32 R. I. 192; *Covell* v. *Carpenter*, 24 R. I. p. 1.

The 5th and 8th exceptions are to the effect that the trial justice erred in denying the defendant's motion for a new trial on the grounds that the verdict, and the special finding of the jury, are contrary to the evidence and the weight

thereof. The jury was carefully and fully instructed in the law relating to the issue as to whether or not there was a *bona fide* agreement between the plaintiff and his employer that the plaintiff would proceed and recover damages from the defendant and repay any money he might receive from his employer under the provisions of the Workmen's Compensation Act. The jury found specially that there was such an agreement, and the trial justice has stated in his rescript that the jury was warranted in finding that a *bona fide* agreement was made.

This court has carefully read and considered all of the testimony relating to the matter of the agreement in question, and there being ample testimony to support the verdict, and nothing in it to indicate an exception to the rule as adopted in many cases, including *Wilcox* v. *R. I. Co.*, 29 R. I. 292, *Tavares* v. *Dewing*, 39 R. I. 174, all of the defendant's exceptions are overruled, and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff.

William H. McSoley, for plaintiff.
Clifford Whipple, Alonzo R. Williams, for defendant.

CHARLES N. GRATTAGE *vs.* SUPERIOR COURT.

MARCH 5, 1920.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Rathbun, JJ.

(*1*) *Divorce. Allowance Pendente Lite. Execution.*

An order for alimony *pendente lite* is included within the provisions of Sec. 14, cap. 247, Gen. Laws, 1909, relative to relief by execution against a respondent in divorce proceedings who is in default.

(*2*) *Divorce. Alimony Pendente Lite. Execution.*

Where an order for alimony *pendente lite* was made and thereafter on hearing on the merits the petition for divorce was dismissed and after such dismissal affidavits were filed under Gen. Laws, 1909, cap. 247, sec. 14, showing that respondent was in arrear for a period of twenty-four weeks prior to the dismissal of the petition and execution issued:—

Held, that the execution was properly issued, for the extent of the obligation and the time for its discharge had been fixed by the court, and until such order was changed the legal obligation continued and was not dependent on further proceedings in the divorce action and consequently was not affected by the decision.

CERTIORARI. Heard and writ dismissed.

STEARNS, J. The proceeding is by writ of *certiorari* to the Superior Court. The facts are as follows: On the 11th of November, 1918, Ena Grattage filed in the Superior Court a petition for divorce from her husband, Charles N. Grattage, and on the same day she also filed a petition for the allowance of counsel and witness fees and for support *pendente lite*. On the 16th day of November an order was entered directing Charles N. Grattage to pay to said Ena Grattage a certain sum for counsel and witness fees and six dollars a week for her support *pendente lite*.

On the 11th of July, 1919, after a hearing on the merits, the petition for divorce was denied and dismissed. On the 29th of November, 1919, affidavits were filed in the Superior Court in accordance with the provisions of Sec. 14, Chap. 247, Gen. Laws, 1909, whereby it appeared that said Charles N. Grattage had not fully complied with the order for the payment of alimony and was in arrears for the period of twenty-four weeks prior to said 11th day of July, and that on said day the sum of $144 was due and has not yet been paid. December 3, 1919, an execution by order of the Superior Court was issued against the goods and chattels of Charles N. Grattage and for want thereof against his body; on the same day Grattage was taken into custody by the sheriff and thereafter by order of a justice of the Superior Court was paroled in the custody of his counsel until further order of the court.

The petitioner claims that the action of the Superior Court was erroneous for two reasons.

First. The court in the circumstances had no jurisdiction at any time to issue an execution for alimony *pendente lite*. The argument is that the remedies provided by Sec.

14, Chap. 247 (formerly Public Laws, Chap. 971, April 2, 1902) are applicable in the case of allowance made to the wife, only to such allowance as is made to enable her to prosecute or defend the suit for divorce and do not extend to an allowance for alimony *pendente lite*. The language of the statute permits this construction and if the question of the proper construction of the statute were before this court for the first time much might be said in favor of such a construction. The petitioner however concedes that the uniform construction of bench and bar since the enactment of the act for a period of some eighteen years has been adverse to his claim. The clause in question has been held
(1) uniformly by the court to include allowances for alimony *pendente lite*. *Mowry* v. *Bliss*, 28 R. I. 114; *Mowry, Petitioner*, 28 R. I. 242; *Wagner* v. *Wagner*, 26 R. I. 27.

In the cases cited the court based its action on the broad construction of the statute by which alimony was included therein, and the question of the meaning of the statute was apparently considered both by court and counsel as so well settled as to require no particular consideration. In *Mowry* v. *Bliss*, *supra*, at p. 117, speaking of the provisions in question, this court said, "This amendment was probably enacted to meet the objection raised by this court in *Vine* v. *Vine*, 21 R. I. 190, as follows: 'A decree for an allowance *pendente lite* is an interlocutory decree, subject to revocation or modification at any time by the court which made it, and consequently cannot be the foundation of an action as upon final judgment.' " The statute now provides an additional remedy at law either by suit, as on a judgment for debt, or by execution without suit, on order of the court for amounts of allowance due and unpaid. One purpose of the act doubtless was to relieve the courts from the burden of numerous proceedings in contempt and to provide a simple and effective remedy at law for the enforcement of an allowance, the amount of which was fixed and certain. As the statute is remedial in its nature, it is to be construed liberally. *Thrift* v. *Thrift*, 30 R. I. 357. Practice and ac-

quiescence for a number of years have fixed the construction (*Stuart* v. *Laird*, 5 U. S. 299) and we think an order for alimony *pendente lite* is included within the provisions of Section 14.

(2) Second. That the Superior Court had no jurisdiction to order the issuance of the execution after the termination of the original proceeeding in divorce by the final decision thereof on July 11, 1919. The petitioner relies on the case of *In re Thrall*, 12 App. Div. (N. Y.) 235, (affirmed by the Court of Appeals in 153 N. Y. 644).

In the *Thrall* case the petition was brought by the wife against her husband to obtain a separation upon the ground of cruel treatment. After a hearing, the husband was ordered to pay to his wife the sum of $50 a week for her support and maintenance until the final termination of the action or the further order of the court. After making some payments, the husband made a general assignment for the benefit of his creditors and no further payments were made to the wife. Some few months after the assignment the action for separation was duly discontinued and shortly thereafter the wife presented to the assignee her claim for alimony which had accrued up to the day preceding the discontinuance of the action for separation. It was held that this claim was properly disallowed by the assignee, that the wife had no right to compel the defendant in the divorce suit to pay this alimony, the petition having been discontinued. At p. 237 the court says, "All proceedings to compel the payment of alimony *pendente lite* must be taken in the action in which the order for alimony was granted; and there being no action, the order for the payment of alimony necessarily fell."

In *Hayes* v. *Hayes*, 150 App. Div. (N. Y.) 842, the court follows the decision in the *Thrall* case but refers to the later case of *Shepard* v. *Shepard*, 99 App. Div. 308 and states that the decisions are irreconcilable in the Appellate Division. *Contra* see *O'Neill* v. *O'Neill*, 100 Iowa, 743; *Woodward* v. *Woodward*, 84 Mo. App. 328.

The question however must be determined by a consideration of the provisions of our statutes. Divorce in this State is purely a statutory proceeding (*Sammis* v. *Medbury*, 14 R. I. 214), and the procedure follows the course of equity so far as the same is applicable (Gen. Laws, Chap. 289, Sec. 1); the proceeding of divorce is comprehensive in its nature, including therein the decision in regard to the custody and support of minor children as well as temporary and permanent alimony. Upon consideration of the general terms of the statutes, it is apparent that it was the intention of the legislature that the procedure was to be regulated by the courts to whom was given a wide discretion in the selection of remedies, both legal and equitable, suitable to secure proper relief in any case. Divorce proceedings are a distinct class in their nature and process, in part legal and in part equitable, as reference to some of the decided cases shows.

An appeal does not lie from a final decree of the Superior Court in a petition for divorce, whereby the petitioner is granted a divorce and an allowance and is given the custody of her minor children. *Fidler* v. *Fidler*, 28 R. I. 102.

A petition for divorce is a "civil action" within the meaning of Gen. Laws, 1909, Chap. 298, Sec. 8, to this extent, that a decision upon a petition for divorce before entry of final decree is properly brought before this court for review by the legal remedy of a bill of exceptions. *Thrift* v. *Thrift*, *supra*.

In *Mowry* v. *Bliss*, 28 R. I. 114, it was held that the respondent in a petition for divorce who was committed to jail on an execution for alimony *pendente lite* was not entitled to the benefit of the poor debtor's oath, as he was imprisoned not simply for debt but also for failure to comply with the order of the Superior Court for the payment of alimony. As he was liable to imprisonment on execution for failure to comply with the order of the court and also upon process for contempt in equity proceedings the court held that the law relating to poor debtors did not apply to such a case.

A decree for alimony however may be properly entered after entry of final decree of divorce has been entered and from such decree an appeal under Gen. Laws, 1909, Chap. 289, Sec. 34, can be taken to this court; the court as a part of its jurisdiction in divorce and alimony has all the equity powers suitable to the determination of the property rights involved in the award of alimony. *Warren* v. *Warren*, 36 R. I. 167; *Phillips* v. *Phillips*, 39 R. I. 92.

In *Wilford* v. *Wilford*, 38 R. I. 55, a petition for alimony was filed more than twelve months after the entry of a final decree for divorce. It was held that the petition for permanent alimony although incidental to and consequent upon a divorce was independent therefrom to this extent, that the same might be filed at any time after entry of final decree, subject to the defences of laches or waiver.

In the case at bar the respondent was ordered to fulfill an obligation imposed upon him by law, namely, to provide for the support of his wife. At the time of the hearing on the petition he was in default but made no application to the court for a modification of the order for alimony. The petitioner was a creditor of the respondent to this extent that she was entitled to bring a suit at law as for a debt or to have an execution at law issue against the respondent. The extent of the obligation and the time for its discharge had been fixed by the court; until this order was changed by the court the legal obligation of the respondent to his wife was established and was not dependent on further proceedings in the action for divorce and consequently is not affected by the decision in this cause on the petition. The execution properly issued.

The writ of *certiorari* is dismissed and the record in the cause entitled *Ena Grattage* v. *Charles N. Grattage* sent to us by the Superior Court is remitted to said court.

Cooney & Cooney, for petitioner.

Quinn & McKiernan, for respondent.

SPENCER B. HOPKINS, Trustee *vs.* AMELIA H. B. CURTIS *et al.*

MARCH 5, 1920.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) *Trusts. Wills.*

On bill in equity seeking construction of testamentary trust; alleging that the real estate was depreciating in value and could not be partitioned equitably; the court determines the *quantum* of the estate now held by the trustee and finds that under the circumstances of the case, the trustee should be authorized to sell and convey the real estate comprising the trust property and to reinvest and dispose of the proceeds in accordance with the opinion.

BILL IN EQUITY for construction of testamentary trust. Certified under Gen. Laws, 1909, cap. 289, sec. 35.

VINCENT, J. This is a suit in equity brought by Spencer B. Hopkins in his capacity as trustee under the will of James Barnes, late of Providence, for instructions. The respondents are an aged daughter of the testator and her husband, a granddaughter of the testator and the husband of a deceased daughter of the testator, who is made a party respondent both individually and as administrator, because of an interest which he may possess under Section 4, Chapter 1787 of the Public Laws, 1919, giving to a surviving husband certain rights for life or in fee in the real estate of his deceased wife, subject to the rights of creditors of the wife's estate.

All the respondents have admitted the truth of the allegations of the bill and join in the prayer thereof, and the case, being ready for final hearing and decree, has been certified to this court for final determination under General Laws, 1909, Chapter 289, Section 35.

James Barnes died in 1872 and his will, made in 1864, was admitted to probate on July 30, 1872. His will provided that all of his estate be vested in trustees and that, "for and during the term of her natural life, or so long as she shall remain my widow, and unmarried, all the rents, profits, income, and dividends of said property and estate, (over and above the proper and necessary expenses of taking care of the same,) shall be paid from time to time, and as often as

once in Three Months, to my wife, Eliza Barnes, for her use, and to be applied in her discretion, to the maintenance, education, and support of our children, Henrietta E. Barnes, Eliza A. Barnes, Amelia H. Barnes, and James A. Barnes, and in case of the marriage of my said wife, Eliza Barnes, after my decease, then she is to receive for her own sole and separate use out of such rents, profits, income, and dividends, the sum of One Hundred Dollars in each year of her natural life thereafter (should the same amount to that sum,) and the balance thereof in such case shall be distributed as hereinafter provided in the event of her decease, viz.:

(1) "After her decease, said rents, profits, income, and dividends shall be equally divided among my said children, or such as then survive, and the lawful issue (if any) of such as may have deceased, and in the case of my said daughters shall be paid to them upon their sole and separate receipt without regard to their husbands, should they or either of them then be married, and upon the decease of either of our said children, one fourth part of said property and estate then remaining shall be conveyed to and vested in his or her heirs at law; provided, however, and my will further is, that as soon as my said son, James, shall have arrived at the age of Thirty years, or so soon thereafter as his mother shall have married or deceased, his one fourth part of said property and estate shall be conveyed to and vested in him for his sole and separate use."

A further provision of the will authorizes and empowers the trustee or trustees in their discretion to sell and convey all or any part of said property and estate and the proceeds to reinvest as they shall think fit.

The only son, James Alfred Barnes, died without issue in his minority, prior to the death of his mother who deceased about 1890. The testator's daughter Amelia married Edward Curtis and they are survived only by Amelia H. B. Curtis, a grandchild of the testator, and a respondent herein. Another daughter, Eliza, died in October last, having no issue, and survived by her husband, Robert B. Strong, who

has answered individually and as administrator upon his wife's estate. Henrietta E. Barnes Foster is the only living child of the testator and with her is joined her husband, Joseph W. D. Foster.

The bill alleges that the trust property consists of real estate which cannot be equitably partitioned among the parties interested therein; that it does not produce an income commensurate with its value; that it is depreciating in value and expensive to maintain.

The complainant prays this court to construe the will of the said James Barnes as to the *quantum* of the estate now held by him as trustee thereunder; to determine as to his power to sell the trust property, his power to terminate the trust and also for instructions regarding his duties as to the disposition of the estate and funds in his hands and finally to determine the rights of the several parties respondent, Amelia H. B. Curtis, Henrietta E. B. Foster, Joseph W. D. Foster, husband of Henrietta, and Robert B. Strong, surviving husband of Eliza A. Barnes Strong now deceased.

Bearing in mind that of the four children of James Barnes, the testator, only one, Henrietta E. Barnes, the wife of Joseph W. D. Foster, is now living; that James A. Barnes died during his minority and without issue; that Amelia H. Barnes and her husband Edward Curtis are both deceased being survived by one daughter Amelia H. B. Curtis, one of the respondents; and that Eliza A. Barnes is deceased without issue leaving a husband, Robert B. Strong, we conclude,

1. That upon the death of James A. Barnes his one-fourth interest in the trust estate became vested in three equal parts of one-twelfth each of the whole estate in his sisters, Henrietta E. B. Foster, Eliza A. B. Strong and Amelia H. B. Curtis, the mother of the respondent of the same name, free from the trust.

2. That upon the death of Amelia H. B. Curtis her one-fourth interest in the trust estate and her one-twelfth share which came to her from her brother, James, became vested

in her daughter, Amelia H. B. Curtis, one of the respondents, and that the latter thereupon became the owner of four twelfths of the whole estate.

3. Upon the death of Eliza A. B. Strong her one-fourth interest in the trust estate became vested in two equal parts of one-eighth each in Henrietta E. B. Foster and the respondent Amelia H. B. Curtis free of the trust. The one-twelfth however which came to the said Eliza A. B. Strong from her brother, James, must be held by the trustee subject to such disposition thereof as may be made by the probate court under Section 4, Chapter 1787 of the Public Laws of 1919 affecting the rights of the husband Robert B. Strong.

The respondent Amelia H. B. Curtis is therefore entitled to the four-twelfths inherited from her mother, Amelia H. B. Curtis, and one-eighth inherited from her aunt Eliza A. B. Strong, in all eleven twenty-fourths of the estate free from the trust.

The respondent Henrietta E. B. Foster is entitled to one-twelfth inherited from her brother, James, and one-eighth inherited from her sister Eliza or five twenty-fourths in all free from the trust.

The original one-fourth or six twenty-fourths placed in trust for the benefit of Henrietta E. B. Foster must remain in the hands of the trustee the income to be paid to her during her life and upon her decease to be conveyed to her heirs at law free from the trust.

We think that the trustee under the circumstances of the case, as presented to us, should be authorized and empowered to sell and convey the real estate which comprises the trust property and to reinvest one-fourth part of the proceeds and dispose of the remainder thereof in accordance with this opinion.

The parties may present to this court a form of decree in accordance herewith.

Mendell W. Crane, for complainant.

Thomas A. Berry, for certain respondents.

Edward M. Sullivan, John J. Sullivan, for Amelia H. B. Curtis.

G. M. SCOTTI *vs.* DISTRICT COURT OF TENTH JUDICIAL DISTRICT.

MARCH 12, 1920.

PRESENT: Sweetland, C. J, Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) *Oral Statement of Facts in District Court.*

Where an oral statement of facts was agreed upon in a district court by the attorneys for the parties, as such statement was not in writing the court could not certify the action to the Supreme Court under Gen. Laws, cap. 298, sec. 4, and therefore it retained jurisdiction of the action.

(2) *Oral Statement of Facts. Decision.*

An oral agreement on a statement of facts in a district court by attorneys for the parties to a cause precludes the necessity of proving such facts and such admission binds the parties and the court is warranted in entering a decision thereon.

(3) *Certiorari.*

Certiorari lies to review the action of an inferior tribunal taken without jurisdiction or in excess of its jurisdiction and not to correct error in the exercise of jurisdiction. The scope of the writ has never been extended to the consideration of alleged error for the correction of which other remedy is expressly provided.

CERTIORARI. Heard on petition for writ and writ issued and dismissed.

SWEENEY, J. This is a petition for a writ of *certiorari* to be directed to the District Court of the Tenth Judicial District ordering said court to certify for our inspection its record relating to an action, entitled "Piemont Winery *v.* G. M. Scotti," to the end that so much of said record as may be found to be illegal may be quashed. The writ of *certiorari* was issued as prayed for, and said record has been certified to us.

It appears from an inspection of said record that the original writ of summons in said case was duly entered in said district court July 19, 1918, answered by the defendant, and continued. The case was thereafter continued *nisi* until November 19, 1919, when the attorneys for the parties signed an agreement stating that the case be assigned for trial December 2, 1919. The record also shows that December 2, 1919, the case was "Submitted on oral statement of fact—continued to Dec. 16, 1919 for decision, briefs to be filed Dec. 9, 1919. Dec. 16, 1919, decision for plff for

$178.44 debt 3.50 costs. L. J. Tuck Justice." Among the papers in the case is a translation of the contract between the parties, and a brief filed December 9, 1919, in behalf of the defendant Scotti, in which he claimed that the contract was illegal because it required him to engage in an unlawful business in this State.

(1) The petitioner avers that at the trial in the district court, counsel for both sides orally agreed on a statement of facts, without calling any witnesses or presenting any sworn testimony, and he now claims that the action of the court, in entering decision for the plaintiff without any sworn testimony being presented, was illegal. As the statement of facts agreed upon in open court by the attorneys representing the parties was oral, and not in writing, the district court could not certify the action to the Supreme Court under the provisions of Section 4, Chapter 298, General Laws, 1909, and therefore it retained jurisdiction of the action.

(2) It is well established law that admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the case; and the admission of material facts, when made by attorneys in the trial of the case, precludes the necessity of proving such facts. 1 Greenl. Ev. secs. 186, 205; 1 R. C. L. Sec. 4, page 469; *Tananevicz* v. *Lamczyk*, 134 Ill. App. 135; *Lewis* v. *Sumner*, 13 Met. 269. Courts are warranted in acting upon the admissions of counsel in the trial of a case. They are officers of the court and represent their clients and their admissions thus made bind their principals. *Pratt* v. *Conway*, 148 Mo. 291.

(3) The primary purpose of a writ of *certiorari* is to review the action of an inferior tribunal taken without jurisdiction, or in excess of the jurisdiction given to it, and ordinarily such a writ does not lie to correct error in the exercise of jurisdiction. The scope of the writ has never been extended to the consideration of alleged error for the correction of which other remedy is expressly provided. *Cohen* v. *Superior Court*. 39 R. I. 272; *Parker* v. *Superior Court*, 40 R. I. 214.

The district court having jurisdiction of the case, and the attorneys for the parties orally agreeing, in open court, on a statement of facts sufficient to enable the court to apply the law as it determined it to be, the action of the district court in rendering its decision in said case on the day appointed, was legal. If the defendant was aggrieved by this decision he had the privilege of claiming a jury trial within two days after the decision was made. As the extraordinary writ of *certiorari* does not lie where the law has expressly provided such a simple, clear and complete remedy for the aggrieved party, as in this case, the writ of *certiorari* is dismissed, and the record and papers in the case, entitled *Piemont Winery* v. *G. M. Scotti*, sent to us by said district court are remitted to said court.

Pettine & De Pasquale, for petitioner.
Thomas P. Corcoran, for respondent.

OPINION OF THE JUSTICES OF THE SUPREME COURT RENDERED TO THE GOVERNOR, *in re* ASSESSMENT OF WOMEN FOR POLL TAX.

MARCH 5, 1920.

(*1*) *Constitutional Law. Taxation. Poll Taxes. Women Voters.*

Women who, if registered, would be entitled to vote for electors of president and vice-president of the United States are not liable for assessment for poll taxes.

SUPREME COURT.

March 5, 1920.

To His Excellency R. Livingston Beeckman, Governor of the State of Rhode Island and Providence Plantations:

We have received from Your Excellency a request for our written opinion upon the following questions, viz.:

"1. Are women, who, if registered, would be entitled to vote for electors of president and vice-president of the United States under the provisions of Chapter 1507 of the

Public Laws, passed at the January session, A. D. 1917, liable for assessment for poll taxes in the year A. D. 1920, under the provisions of Section 2, Article VII of the amendments to the Constitution of Rhode Island, and Chapter 59 of the General Laws as amended by Chapter 1091 of the Public Laws, passed at the January session, A. D. 1914?

"2. Are such women liable for assessment for such poll taxes annually thereafter?"

The court answers the above questions as follows:

1. The first question we answer in the negative.
2. The second question we answer in the negative.

Section 1 of Article VII of the Amendments of the Constitution of Rhode Island provides that the registered voter who has duly registered "shall have a right to vote in the election of all civil officers and on all questions in all legally organized town or ward meetings" with the exception that such voter shall not be allowed "to vote in the election of the city council of any city, or upon any proposition to impose a tax or for the expenditure of money in any town or city."

Section 2 of said article requires each city and town to assess annually "every person who, if registered, would be qualified to vote," as a registry voter, "a tax of one dollar, or such sum as with his other taxes shall amount to one dollar."

After the adoption of said Article VII it was no longer necessary for the registry voter, as a condition precedent to the right to vote, to first pay a registry tax or have the same remitted. Said Section 1 gave the right to vote as a registry voter to "Every male citizen of the United States of the age of twenty-one years," having the necessary residence in this State and in the town or city in which he may offer to vote, providing such male citizen duly registers for the purpose of voting in such city or town. Said Section 1 confers upon said male citizens the right to vote as registry voters, and said Section 2 requires that a tax be assessed

upon the same male citizens mentioned in said Section 1, who if duly registered would be entitled to vote as registry voters.

The language of said Section 2 is, "The assessors of each town and city shall annually assess upon every person who, if registered, would be qualified to vote, a tax of one dollar," &c. The phrase "every person" is qualified by the language "who, if registered, would be qualified to vote." The phrase "every person" as qualified means "Every male citizen of the United States of the age of twenty-one years, who has had his residence and home in this state for two years, and in the town or city in which he may offer to vote six months next preceding the time of his voting." Said Section 2 authorizes the assessors to assess a poll tax upon no person except those upon whom said Section 1 confers the constitutional right to vote as registry voters, providing such persons duly register. Women who, if registered, would be entitled to vote for electors of president and vice-president of the United States are not voters within the meaning of Article VII of the Amendments of the Constitution of Rhode Island.

It is clear that Article VII of the Amendments to the Constitution of Rhode Island confers no authority for assessing a poll tax upon women who, if registered, would be entitled to vote for electors of president and vice-president of the United States.

No authority can be derived for assessing a poll tax upon such women from Chapter 59 of the General Laws of 1909 as amended by Chapter 1091 of the Public Laws of 1914.

Section 1 of said Chapter 59 is as follows: "Section 1. The assessors of taxes of each town and city shall, at the time of the annual assessment of town and city taxes therein, respectively, assess against every person in said town or city, who if registered, would be qualified to vote, a tax of one dollar, or so much thereof as with other taxes shall amount to one dollar."

It is interesting to note how closely said Section 1 of Chapter 59 follows the language of Section 2 of Article VII of the Amendments to the Constitution of Rhode Island. Said Chapter 59 simply provides for the assessment, collection and remission of the tax required by Section 2 of said Article VII. In other words, said Chapter 59 provides only for carrying into effect Section 2 of said amendment to the Constitution of Rhode Island.

Said Chapter 1091 amends said Chapter 59 only to the extent of requiring an assessment of a poll tax "to be applied to same purpose against every other male person of the age of twenty-one years or over, who is not a citizen of the United States, and who has had his residence in said town or city for six months next preceding such assessment."

WILLIAM H. SWEETLAND,
WALTER B. VINCENT,
CHARLES F. STEARNS,
ELMER J. RATHBUN,
JOHN W. SWEENEY.

DAVID KORN *vs.* SEACONNET COAL COMPANY.

MARCH 17, 1920.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(*1*) *"Lever Act." Coal Administration.*

Fuel administrators, under the so-called "Lever Act," were invested with plenary powers enabling them to determine in their discretion to whom any coal brought into this State should be delivered without regard to the claim of any party who might be the consignee thereof; therefore when such administrator by written order diverted certain coal from plaintiff to defendant, and it did not appear that any other order regarding such coal was given the railroad company or to the defendant, it was immaterial what may have been the conversation between plaintiff and the administrator subsequent to the order to the railroad company, since it was the final intention of the administrator from the facts that the original order should stand and defendant had the right to take the coal at the wholesale price at the mines.

ASSUMPSIT. Heard on exceptions of plaintiff and overruled.

VINCENT, J. This is an action of assumpsit brought to recover the value of a certain quantity of coal and is now before us on the plaintiff's exceptions to the rulings of the Superior Court in the admission and exclusion of testimony and to the direction of a verdict in favor of the plaintiff for a sum which the plaintiff deems to be inadequate.

Both of the parties to the suit were dealers in coal in the city of Providence in December, 1918, and in the purchase and disposition of their stock in trade were under the supervision and direction of the Rhode Island State Fuel Administrator appointed in pursuance of an act of Congress, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," popularly known as the "Lever Act."

In December, 1918, the defendant advised the fuel administrator that it was not receiving its proper allotment of coal and the fuel administrator upon investigation being satisfied that such was the case and that a quantity of anthracite coal which should have gone to the defendant had been sold to the plaintiff, thus giving the latter more than his proportionate share, issued the following order under date of December 11, 1918, and sent the same to the general agent of the New York, New Haven and Hartford Railroad Co.

"Dear Sir:—

Will you please divert to the Seaconnet Coal Co., South Providence, R. I. the next ten (10) cars of Domestic Anthracite which come to South Providence for David Korn.

Thanking you for an acknowledgment of this communication, we are

Very truly yours,

(H. METCALF.)

Director of Distribution Division.
Federal Fuel Administration for Rhode Island."

On December 13, 1918, ten cars of anthracite coal arrived at the South Providence yard consigned to the plaintiff and in accordance with the above order they were turned over to the defendant. As to nine of these carloads the defendant sent a check to the plaintiff, which check the plaintiff received and cashed. The price paid to the plaintiff for the coal contained in the nine cars was the wholesale or mine price, which was the cost thereof to him. The defendant also paid the freight thereon. The remaining car, No. 35,747, contained 37 long tons plus 1,200 pounds or 42 short tons plus 224 pounds. The defendant paid the freight on this car No, 35,747 at the same time that it paid the freight on the other nine cars. It is this coal which is the subject of the present controversy.

After the issuance of the foregoing order diverting this car of coal to the defendant the plaintiff met Mr. John T. Wilson, a deputy fuel administrator, and made certain representations to him regarding it. There is some testimony that these representations were to the effect that the coal in this particular car was not the kind of coal to which the defendant company was entitled. There is some conflict of testimony as to what was said at this interview between the plaintiff and the fuel administrator, the former claiming that it was agreed definitely that the car of coal should go to him while the latter states that he only agreed to re-divert the coal to the plaintiff in the event that he found his representations concerning it to be correct, but as he found them to be untrue he did not change the original order nor did he advise the railroad company or the defendant of any change in or modification of the same.

In our view of the case this conflict of testimony is of no
(1) importance. The purpose of the so-called "Lever Act," was, among other things, to conserve and equitably distribute a restricted supply of coal among dealers in that commodity and through them to the public. To effectively carry out such purpose fuel administrators were invested with plenary powers enabling them to determine, in their

discretion, to whom any or all coal brought into this State should be delivered without regard to the claim or claims of any party or parties who might be the consignee or consignees thereof. The carload of coal in question was thus diverted from the plaintiff, to whom it had been consigned, to the defendant and such diversion is not disputed. The plaintiff claims however that at a subsequent interview with the fuel administrator this carload of coal was turned back or re-diverted to him and that consequently he is entitled to recover from the defendant the retail price of the coal in Providence rather than the wholesale price which he had become obligated to pay, or had paid, for it at the mines.

If we assume that the fuel administrator agreed to turn over the carload of coal to the plaintiff, as the latter claims, such an agreement would not preclude the former from placing it elsewhere in the further exercise of his discretion and it is for that reason that the conflict of testimony as to what was said between the plaintiff and the fuel administrator becomes of no importance.

In dealing with these matters it appears to have been the practice of the fuel administrator, at least in cases where there was to be a diversion from the original consignee, to send to the carrier receiving and having possession of the coal a written order stating the quantity to be diverted and the respective names of the consignee and the party to whom delivery should be made. This course was pursued in reference to the ten carloads consigned to the plaintiff, one of which is the subject of the present controversy, and the plaintiff and defendant were notified of the action of the fuel administrator. It does not appear that any other order regarding this coal or any part thereof was given to the railroad company or that notice of any further order was given to the defendant. It seems to us that whatever may have been the conversation between the plaintiff and the fuel administrator, subsequent to the order to the railroad company, it was the final intention of the fuel administrator that the original order should stand and that the

carload of coal in question should be delivered to the defendant and that such final intention must be held to prevail.

The defendant company had the right to take the coal upon the order of the fuel administrator and so far as appears it did so take it at the wholesale price at the mines without any notice of the plaintiff's claim. It was not guilty of any tortious act. We think that the amount awarded to the plaintiff in the Superior Court based on the price of the coal at the mines is all that he is entitled to receive.

The plaintiff has waived his first exception. The second exception, relating to the exclusion of the "General Orders, Regulations and Rulings of the United States Fuel Administration," we find to be without merit. The third exception to the direction of a verdict has already been discussed.

The plaintiff's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict as directed.

Bellin & Bellin, John F. Harlow, Jr., for plaintiff.

Howard Sheffield, Charles R. Haslam, for defendant.

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2. While the court has the power under Gen. Laws, 1909, cap. 289, §§ 30-33, in a proper case either to hear further testimony upon appeal, in case of "accident or mistake or erroneous ruling excluding evidence in the superior court" or to remit a cause for the purpose of taking further testimony in the Superior Court in cases where justice requires such action, the determination of the question rests upon the peculiar circumstances of the particular case and no general rule has been or can be arrived at.
3. The statutes relative to an appeal in equity plainly imply that in the usual case, an appeal is to be treated in the appellate court not as a proceeding *de novo* for a retrial of the cause but as a proceeding for the purpose of reviewing the errors stated in the appellant's reasons of appeal. *Shepard* v. *Springfield Ins. Co.*, 174.

See NEW TRIAL, 1-2.
PUBLIC UTILITIES, 1-5.
See TRIAL, 4.

ASSIGNMENT OF WAGES.

1. Defendant on account of a loan from his employer gave a receipt, "Received from X. Co. $50 against which I pledge my wages until paid back. They to retain $2 per week or more if they see fit."

Two attachments of the personal estate of defendant in the hands of the employer were made and in each case after the attachment, the garnishee deducted $2 from the amount of wages due and paid over the balance to defendant and made a return of "no funds."

Held, that the agreement was in effect an assignment of wages and not being recorded was invalid as against the attaching creditor, and further it was fraudulent against creditors.

Held, further, that it was the privilege and duty of the garnishee within a reasonable time after the attachment to elect whether or not it would set-off its claim against defendant's claim, and its action in paying over part of the wages to defendant was an election not to set-off and an admission of indebtedness to the amount of the funds turned over. *Trottier* v. *Foley*, 422.

ASSIGNMENT TO TRIAL.

See JUDGMENT, 8.

ATTACHMENT.

1. Record title to premises being in D. L., action was brought and the interest attached under the name of E. L. The officer's return showed that service was made upon the defendant named in the writ but the return did not show that the person served as E. L., was in fact D. L.

Held, that the record failing to show that D. L. was actually served with process, the further proceedings under execution sale were fatally defective. *Peck* v. *Levesque*, 53.

See RECEIVERS, 2-3.
See ASSIGNMENT OF WAGES, 1.

AUDITOR.

1. Where parties have by agreement under the provisions of Gen. Laws, cap. 293, referred a cause to an auditor, the decision of the Superior Court on his report is *final*, and not subject to review *by any means*. *Broley* v. *Superior Court*, 253.

AUTOMOBILE GARAGES.

1. Ordinance of the city of Pawtucket, cap. 166, in relation to the erection etc., of automobile garages, provided that "*at the hearing*," owners of land within a radius of 200 feet might file objections, etc.

A hearing was had upon an application, the record concluding, "Hearing closed. Attorneys given one week to file briefs on the question of including street areas. Decision reserved."

Within the week an additional remonstrance was filed.

Held, that the last remonstrance was not filed within the time prescribed, as the hearing had been concluded and the only question remaining was one of law. *Maynard* v. *Vigeant*, 386.

AUTOMOBILES AND MOTOR TRUCKS.

1. Where plaintiff's carriage was struck from behind by defendant's automobile, as a matter of law a special finding that plaintiff was acting in disregard of Pub. Laws, 1914, cap. 1028, requiring every vehicle to display a light between certain hours is not conclusive upon the question of his right to recover. The absence of lights may have or may not have a causal relation to the collision, depending upon the condition of the light in the highway in the neighborhood of the place of the accident. *Surmeian* v. *Simons*, 334.

See MUNICIPAL CORPORATIONS, 1–5.

See NEGLIGENCE, 2.

AWARD.

See CONSTITUTIONAL LAW, 1.

BAIL.

1. By Gen. Laws, 1909, cap. 324, § 2, it is provided that bail in a civil action may discharge himself by committing his principal to jail; by paying or tendering the costs which have accrued; by leaving with the keeper of the jail a certified copy of the original writ and by giving to the plaintiff or his agent or attorney of record notice in writing of the time and place of the commitment within six days after making the same.

Held, that the performance of each of the acts so required was essential and was an indispensable prerequisite to the discharge of the bail.

Held, further, that the provision in regard to the six days applied only to the giving of notice and was a limitation of time imposed on the bail and there was nothing in the statute to warrant the implication that this provision was intended to effect a stay of proceedings by the plaintiff for such time after commitment of the principal.

2. Where in an action of *scire facias* against bail, defendant was defaulted, plaintiff was entitled under Gen. Laws, 1909, cap. 294, § 1 to have judgment entered at once and the liability of the bail was established by the entry of judgment, and if the bail desired to discharge himself from liability the burden was upon him to take the prescribed statutory procedure before the final entry of judgment, and only the complete and timely fulfillment of all the conditions imposed by statute upon him before the entry of final judgment would discharge him, but when judgment has been duly entered the power of the bail to discharge himself had ceased.

3. Gen. Laws, 1909, cap. 324, § 2, provides as one of the conditions by which bail in a civil action may discharge himself from liability, "paying or tendering to the creditor or his attorney the costs if any which shall have *accrued* on a writ of *scire facias* against him."

Held, that the costs which have accrued before judgment need not be taxed by the court in the first instance but bail must pay the same or make sufficient tender. *Mcran* v. *Goularte*, 112.

BALLOTS.

See ELECTIONS, 1–8.

BANKS AND BANKING.

1. An action to recover a deposit cannot be maintained against a bank which had taken over the assets of a former bank where plaintiff had originally made the deposit, where there is no evidence that the amount deposited by plaintiff ever came into the possession of defendant nor any evidence tending to show that defendant assumed all the obligations of the first bank or any obligations other than those arising from its undertaking to deal with the deposits coming into its possession.

2. Where plaintiff made a deposit in a bank which subsequently transferred its assets to another bank and went out of existence but prior to such transfer the first bank paid out the deposit to someone having possession of the pass book, the second bank cannot be held liable by plaintiff as the trustee of a fund which never came into its possession. *Myers* v. *Washington Trust Co.*, 91.

BLASTING.

See EXPLOSIVES, 1–2.

BRIDGES.

See MUNICIPAL CORPORATIONS, 1–5.

CARRIERS.

1. The closing of the gates at a railroad crossing is simply one means of notifying a traveller of danger and the traveller cannot rely exclusively on the fact that the gates are open, but must to some extent use his senses before going on to the railroad track.

2. The fact that crossing gates are open is an important fact for consideration in the determination of the question whether due care was exercised by a traveller. The weight properly to be given to such fact necessarily will vary in different cases and will be affected by different considerations. If the facts are controverted or if fair-minded men could draw different conclusions from facts which are not controverted the question of contributory negligence would be properly submitted to a jury.

3. In an action for death of plaintiff's intestate caused by a collision at a grade crossing, evidence considered and

Held, that as plaintiff had failed to show that deceased was in the exercise of due care, a nonsuit was properly granted. *Geoffroy* v. *N. Y., N. H. & H. R. R. Co.*, 20.

4. In applying the doctrine of the last clear chance, the duty of one party to take action to avert the consequences of the negligence of the other, does not arise until the peril of the negligent party is or should be apparent to the other.

5. Where intestate was driving an automobile truck along a highway in a country district, at a speed of six or seven miles an hour, and at a distance of 200 feet from the tracks of an electric road had an unobstructed view of the tracks, for about 1,200 feet in the direction a car was approaching at a high rate of speed, and in fact saw the car, but without changing his speed crossed the easterly track and drove upon the westerly track where he was struck by the car, the negligence of intestate being admitted, in applying the doctrine of the last clear chance, to these facts, the motorman was entitled to assume that intestate saw the car and would stop before reaching a position of danger, and intestate must be held as a matter of law to have been still in a place of safety until he had reached a position quite near the westerly track and until he had passed that point the motorman was under no obligation to take action for his safety. *Fillmore* v. *R. I. Co.*, 102.

6. Where a motorman of an electric car sees a person on or approaching the track he ordinarily has a right to act on the assumption he is in possession of his faculties and will exercise reasonable care and in such case the motorman is not bound to anticipate that such person will stay on or get on the track and to take steps to avoid injuring him, by slackening the speed or stopping the car until it becomes reasonably apparent that he cannot or will not get out or keep out of the way and if in view of his right to act on such assumption the motorman exercises reasonable care and caution to warn such person of his peril and to slacken the speed or if necessary stop the car in time to avoid injuring him, but is unable to avert an accident by reason of such person's remaining on or near the track the carrier is not liable for the resulting injuries. *Halliday* v. *R. I. Co.*, 350.

CERTIFICATION OF QUESTION.

See MUNICIPAL CORPORATIONS, 1.

CERTIFICATION OF CONSTITUTIONAL QUESTION.

See JURORS, 2.

CERTIORARI.

CHARGE TO JURY.

See CONTRACTS, 4.

COMPROMISE.

See NEW TRIAL, 1.

CONSTITUTIONAL LAW.

See JURORS, 1-2.

CONTRACTS.

1. Where a vendor after disposing of the good will of a business interfered with the vendee's rights and sought to divert the business from the vendee, for his own benefit, such action amounts to a violation of the contract on his part, and he is not entitled to recover that portion of the contract price appertaining to the good will. *Ferris* v. *Pett*, 48.

2. Owing to difficulties about payment resulting in the stopping of work by a sub-contractor the contractor gave to the sub-contractor an order upon the owner of the premises for a sum to be due under the contract between the owner and the contractor.

The sub-contractor secured orders from time to time from the architects on the owner for money due the contractor, which were endorsed over by the contractor to the sub-contractor and paid by the owner. It appeared in the testimony for the sub-contractor in his action against the owner that the latter stated when presented with the order, "Go ahead and finish the work; as long as you have that paper I will pay you."

Held, that from the facts there was no novation, but simply an expression of willingness to accept the order. *Montanari* v. *Ind. Trust Co.*, 221.

3. Although a contract is to be performed in a particular State, yet if it is part of an illegal combination to secure control of a product and raise its price to all buyers in the United States, it is within the prohibition of the anti-trust act.

4. The issue in an action being whether or not the contract was part of a conspiracy between the parties to obtain a monopoly of a commodity and sell it at an unreasonable profit in violation of the common law, of the Sherman anti-trust act and of the statutes of the State, the court in one portion of the charge submitted to the jury the question of whether or not there was between the parties an illegal combination to create a monopoly; in another portion it took from them the issue of illegal combination by instructing them that there was no evidence of a conspiracy between the parties to restrain trade.

Held, that, in order to justify the finding of a conspiracy it is not necessary that the proof should be by direct evidence, but the jury may base such finding upon inferences fairly to be drawn from the facts and circumstances in evidence when such inferences amount to more than a conjecture and are of such a conclusive nature as to furnish the burden of proof required of the defendant in the case.

Held, further, that the issue of illegal combination should have been submitted to the jury, and the charge that there was no evidence of an illegal combination to create a monopoly constituted reversible error which was not cured by the contrary instructions in the general charge.

5. The illegality in a contract in restraint of trade consists in the intent to establish a monopoly and to control prices and the plan of the parties for gathering in the profit is merely an unimportant detail. *McNear* v. *Amer. & British Mfg. Co.*, 302.

6. Instructions that the Anti-Trust Statute does not apply to an act between private parties unless the contract sued on itself contains provisions in violation of that statute and that "there are no provisions in the contracts in suit which violate any statute against restraints in trade and monopolies," took from the jury the issue of whether or not the contracts were invalid by reason of the provisions of the anti-trust act and constituted reversible error, for such contracts should be found to be illegal if they were entered into in furtherance of a combination which was itself illegal under the Act, although the contracts on their face contained no provision indicating such illegality.

7. Where the issue was whether or not the contract was part of a conspiracy between the parties to obtain a monopoly, refusal to charge that "if you find from the evidence that the contracts sued upon were entered into as a part of a scheme to artificially raise the price of quicksilver, then your verdict must be for the defendant" and "if the plaintiff knew the purpose for which the defendant was purchasing the quicksilver and that purpose was so to control the market that it could raise the price of quicksilver, the verdict must be for the defendant" was error, for courts will not enforce contracts tainted with illegality, and an illegal combination of which the contract was a part may be set up as a defence it its enforcement. *McNear v. Amer. & British Mfg. Co.*, 302.

See BANKS AND BANKING, 1.

See FRAUDS, STATUTE OF, 10.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1.

CORPORATE EXCESS.

See TAXATION, 1.

COSTS.

1. Where on a bill for specific performance, a transcript was prepared by agreement of parties, after the hearing on the original bill, and used at request of the parties, by the trial court to assist him in his decision of the cause, and under agreement by parties to share the expense which respondent failed to keep, complainant paying the whole cost, respondent was properly charged in the bill of costs with one-half of the cost of the transcript. *Bright v. Wilcox*, 404.

SEE BAIL, 1–3.

SEE TRIAL, 1–4.

CRIMINAL LAW.

1. The pending of a criminal complaint against a respondent in a district court under which he is held to bail, is not a bar to an indictment by a grand jury for the same offence, but the grand jury may exercise its powers under Gen. Laws, 1909, cap. 273, § 15, independently and without giving consideration to any proceeding which may have been instituted or may be pending in a district court. *State v. Robbins*, 213.

2. Voluntary intoxication is not a defence to any crime actually committed, but where a particular intent is charged which aggravates the offence actually committed and enlarges it into a greater offence, drunkenness may be offered to negative the specific intent but only when it is of such a degree as to completely paralyze the will of the respondent, take from him the power to withstand evil impulses and render his mind incapable of forming any sane design. *State* v. *Vanasse*, 278.

See EVIDENCE, 5.

DAMAGES.

See NEW TRIAL, 7.

DECISION OF DISTRICT COURT.

See TRIAL, 7.

DEEDS.

1. Where a deed described a person by a different name than the one she was known by and she could neither read nor write and executed the deed by making her mark, such instrument in itself does not furnish satisfactory evidence of an intention on her part to change her name or that she knew that it had been incorrectly stated in the instrument. *Peck* v. *Levesque*, 53.

See EQUITY, 1.

DIVIDENDS.

See WILLS, 9–12.

DIVORCE.

1. Gen. Laws, 1909, cap. 247, § 3, provides that "whenever in the trial of any petition for divorce from the bond of marriage, it shall be alleged in the petition that the parties have lived separate and apart from each other for the space of at least ten years, the court may in its discretion enter a decree divorcing the parties from the bond of marriage."

Held, that as the court cannot exercise its discretion without first ascertaining that the parties come within the statutory provision, where the evidence fails to establish such fact the court is without jurisdiction to do any thing except dismiss the petition, leaving the petitioner free to file another petition on similar grounds, when the statutory period has expired.

2. The granting of a divorce under Gen. Laws, 1909, cap. 247, § 3 (living separate and apart for ten years) does not depend upon the previous conduct of the petitioning party, and while testimony of a recriminating character may be admitted it should not be binding upon or control the action of the court, but may be considered by way of aiding the court in the exercise of its discretion. *Guillot* v. *Guillot*, 230.

3. Gen. Laws, 1909, cap. 297, § 1, of relief within one year after judgment, does not apply to a petition for divorce as no judgment can be entered therein.

4. After entry of a final decree in an uncontested petition for divorce, respondent cannot obtain relief under Gen. Laws, 1909, cap. 297, § 3, allowing relief on petition filed within one year to persons aggrieved by any order, decree, decision or judgment, where from accident, mistake, unforeseen cause or lack of evidence newly discovered they have failed to claim or prosecute an appeal or bill of exceptions or motion or petition for new trial, since petitioner having taken no exceptions could not through accident, &c.: have failed to file a bill of exceptions, which is the appropriate way to review questions of law in divorce petitions. *Scolardi* v. *Scolardi*, 456.

5. An order for alimony *pendente lite* is included within the provisions of Sec. 14, cap. 247, Gen. Laws, 1909, relative to relief by execution against a respondent in divorce proceedings who is in default.

6. Where an order for alimony *pendente lite* was made and thereafter on hearing on the merits the petition for divorce was dismissed and after such dismissal affidavits were filed under Gen. Laws, 1909, cap. 247, § 14, showing that respondent was in arrear for a period of twenty-four weeks prior to the dismissal of the petition and execution issued:—

Held, that the execution was properly issued, for the extent of the obligation and the time for its discharge had been fixed by the court, and until such order was changed the legal obligation continued and was not dependent on further proceedings in the divorce action and consequently was not affected by the decision. *Grattage* v. *Superior Court*, 546.

EASEMENTS.

1. One having a right of way by necessity over land of his grantor to a highway cannot use such right of way for the purpose of ingress and egress to other land acquired from another grantor, but contiguous to the first parcel, as such use increases the burden beyond the servitude lawfully created.

2. Where one has a right of way by necessity over land of his grantor to a highway, the placing of a gate of light construction easily opened on the end of the way at the highway, by the owner of the fee, is not an unlawful interference with the use of the way.

3. Where there was no evidence that a gate was an unreasonable obstruction to the use of a right of way it was not error to direct a verdict for the owner of the servient tenement. *Chenevert* v. *Larame*, 426.

ELECTIONS.

1. Where a voter after making a cross in the square at the right of a name, blackened the square with his pencil partially concealing the cross, and placed a cross in the square opposite the name of another candidate, while the act may not have been with any actual wrongful intent, the ballot was rendered capable of identification and was properly rejected.

2. A ballot containing a cross entirely without the circle and in the blank space between the circle and the emblem was properly rejected.

3. On a ballot the voter placed a cross in the circle and also a cross in the square opposite each name on the party ticket. The crosses opposite the names bore evidence of an attempt to erase them, although they were visible.

On the same ballot the voter failed to vote in the square assigned for voting on a proposition submitted to the electors, but instead partially blotted out with his pencil the word "no."

Held, that the ballot was properly rejected as bearing distinguishing marks.

4. A ballot which contained two very fine and somewhat dim pencil marks, apparently inadvertent touches of the pencil during the operation of marking the ballot was entitled to be counted.

5. Ballots, one of which contained a cross within the circle and a pencil mark in the immediate vicinity of the circle, and another whereon there was a somewhat faint pencil line extending across the circle, the circle not having been used, the voter placing crosses in the squares at the right of the names, were entitled to be counted, the marks apparently being inadvertently made during the marking of the ballots. *Sprague* v. *Town West Warwick*, 8.

6. A town council sitting as a board of canvassers counted the votes for town council, and found that there had been no election for the office of first councilman. The other four new members qualified. On *certiorari*, certain ballots rejected by the board of canvassers were found to be legal ballots.

Held, that the members of the former town council still comprised the board of canvassers upon whom devolved the duty to complete their record in the respects indicated by the court.

7. Where six ballots were rejected by a board of canvassers as bearing identification marks, and on *certiorari* the court found that three of such ballots were improperly rejected, no claim being made as to any other ballots, the count as to the other ballots stands, and the only matter devolving on the board of canvassers is to deal with the ballots improperly rejected and to make its declaration in accordance with the opinion of the court. *State* v. *Town of West Warwick*, 13.

8. Where a voter had drawn a wavering line through the name of a candidate upon the ballot, and placed a cross in the square at the right of the name of the opposing candidate, although the line at one point was sufficiently depressed to clear one of the letters in the first name but preserved its contact with all of the other letters, it was a substantial compliance with Gen. Laws, R. I., 1909, cap. 11, § 46, providing "To cancel a name . . . the voter shall draw a pencil mark through the full name." *Mercurio* v. *Board of Canvassers*, 17.

9. Under the provisions of Cons. R. I. Art. VII of Amendments, Sec. 1, "no person shall at any time be allowed to vote in the election of the city council of any city . . . unless he shall within the year next preceding have paid a tax assessed upon his property therein . . . ," the payment within the year of a tax which was in arrears and as to which the tax payer was in default before the beginning of such year, is not sufficient. *Andrews* v. *Sullivan*, 36 R. I. 137, explained.

10. Gen. Laws, 1909, cap. 7, § 22, as amended by Pub. Laws, cap. 640, approved August 22, 1910, providing that no person claiming the right to vote upon payment of a tax, for members of a city council shall be admitted to vote by the boards of canvassers, unless upon the production of a certificate that before the sixth day preceding the day of such voting he has paid

such tax assessed against him for and within such year, is not unconstitutional as being in derogation of Cons. R. I. Art. VII of Amendments, Sec. 1, providing that "no person shall at any time be allowed to vote in the election of the city council of any city . . . unless he shall within the year next preceding have paid a tax assessed upon his property therein . . ." *King* v. *Board of Canvassers*, 41.

11. Under the provisions of Cap. 8, Gen. Laws, 1909, "Of canvassing the Rights and Correcting the Lists of Voters," and of cap. 10, "Of the Manner of Conducting Elections," the requirement that boards of canvassers shall prepare voting lists for the use of election officers in the conduct of elections and the provision that no person shall vote at an election unless his name appears upon such a voting list, are clearly mandatory, but the provision of Cap. 7, Sec. 2, that a citizen of foreign birth shall file with the town clerk proof that he is a citizen of the United States at least five days before any meeting of the board of canvassers, is *directory*, and if notwithstanding the failure of such citizen to file the required proof the board of canvassers place his name on the list and he votes, if the voter is otherwise qualified, his vote will be held a valid vote, and the election of such voter to a civil office will not be disturbed under the provisions of Cons. R. I., Art. IX, Sec. 1. *Bryer* v. *Sevigney*, 187.

12. Women who, if registered, would be entitled to vote for electors of president and vice-president of the United States are not liable for assessment for poll taxes. *Opinion of the Justices*, 558.

EQUITY.

1. Complainant claimed that during negotiations which resulted in the purchase of a lot on a recorded plat, respondents' agents represented that all lots on a portion of such plat were subject to the same restrictions contained in complainant's deed and would be sold subject to such restrictions. On bill seeking to restrain respondent from conveying certain lots free from restrictions:—

Held, that, no actual fraud being established, complainant was not entitled to enforce an oral agreement to establish restrictions which would be negative easements in respondent's land; this coming within the prohibition both of the Statute of Frauds and the Statute on Conveyance of Estates.

Held, further, that the equitable rule that part performance will take a contract out of the statute of frauds, did not apply, since this was not a suit to obtain or reform a deed, but one to enforce an oral contract. *Ham* v. *Massasoit Co.*, 293.

2. Where in a decree for specific performance no time was specified within which payment to the vendor was to be made and the amount to be paid by the vendee was undetermined and left to the decision of a master and neither party made any effort to press the suit before the master, there being no evidence that the delay worked any disadvantage to the respondent, complainant is not barred from his right to the performance of the decree

on the ground of laches, for mere delay to enforce a right is not laches. *Bright* v. *Wilcox*, 404.

3. A suit brought in Washington county for specific performance of a contract to convey land, is of such a nature that it could properly be heard and decree entered in Providence county and where this was done by express request of the parties, one of them cannot thereafter be heard to object to such action. *Bright* v. *Wilcox*, 404.

See CONSTITUTIONAL LAW, 1.

See INTEREST, 2.

EQUITY PLEADING.

1. The office of a cross-bill is to obtain affirmative relief upon the case stated in the bill and not to obtain relief as to other matters.

2. Allegations of matters rendered necessary by the answer to a bill in equity, should be made by way of amendment to the bill and not by replication, under equity rule No. 24. *Peck* v. *Levesque*, 53.

EVIDENCE.

1. A party is not prejudiced by the admission of questions which are not answered. *Dawley* v. *Congdon*, 64.

2. On the issue as to whether a will as found by the executor was the complete will of testatrix, or whether a clause had been removed therefrom, and such clause had not been revoked by testatrix and should be probated as a part of the will, a carbon copy of the will made at the time the will was typewritten, in the office of the attorney who prepared the will, furnished secondary evidence of high probative value as to the contents of the clause as it stood in the will when the same was executed. *Dawley* v. *Congdon*, 64.

3. On the issue as to whether a clause had been removed from a will by testatrix or by her direction, it was proper to show the relations which existed to the death of testatrix between her and the legatee named in said clause and also the relations existing between her and the others of her next of kin, and whether the same reasons which impelled the gift when the will was made continued up to the time of the testatrix's death.

4. Where a will after its execution was left in the possession of testatrix and was found among her effects after her death, the inference arises that the removal of a portion of the instrument was the act of testatrix with intent to revoke the clause, but such presumption would yield to such proof to the contrary as the jury would be justified in regarding as clear and satisfactory. This evidence might be either direct or circumstantial. *Dawley* v. *Congdon*, 64.

5. A sentence for crime or misdemeanor may be shown to affect a witness' credibility, under Gen. Laws, 1909, cap. 292, § 43, whether such sentence is based upon a verdict or plea of guilty or upon a plea of *nolo contendere*. *State* v. *Vanasse*, 278.

EXCEPTIONS.

claimed that such allowance was irregular or prejudicial to his client, to raise such question without further delay and where he waited at least three months, until such lapse of time had rendered it impossible to establish through the recollection of the court and counsel for appellant definitely and conclusively the procedure which was followed, a motion to dismiss the bill will be denied.

4. Since neither the trial court nor the clerk is required by law to make written record of the facts relative to fixing a time for hearing on allowance of a bill of exceptions or of the giving of the notice to parties of the hearing, where bills are allowed on oral statement of counsel to the court, either the court or clerk should make a record of the giving of notice, of the appearance of parties or their waiver of the right to formal notice and to be heard.

5. Where the appellant's bill of exceptions and transcript were properly allowed within the statutory time, appellant was under no duty to see that the trial justice gave the appellee a hearing and notice thereof, but it was within the power of appellee if he had followed the record to have made timely objection to the action of the court in allowing the bill and transcript without a hearing, and a statutory remedy was provided by Gen. Laws, 1909, cap. 298, § 21, for his relief. As appellant followed the travel of the case and appellee did not, if either party is to suffer from failure of the court to observe statutory conditions it should not be appellant. *Hambly* v. *Bay State Ry. Co.*, 106.

6. An exception to a refusal to grant a new trial cannot be considered, in the absence of a complete transcript of the evidence presented at the trial. *Larisa* v. *Tiffany, T. T.*, 148.

7. The benefit of exception to objectionable evidence is not lost because counsel did not object upon the instant and move that the case be passed; where the witness closed his evidence very shortly thereafter, and counsel immediately made his motion in the absence of the jury. *Demara* v. *R. I. Co.*, 215.

8. Where after demurrer had been sustained to two of three counts of a declaration plaintiff filed an amended declaration on which he went to trial, and a verdict was directed in favor of defendant to which no exception was taken, an exception to the ruling sustaining the demurrer to the original declaration will not be considered, as the original declaration is superseded by the amended declaration. *Neri* v. *R. I. Co.*, 229.

9. Where the power of the trial judge has absolutely and entirely ended, as by his elevation to the Supreme Court, the filing of a petition to establish the truth of exceptions prior to the expiration of the period of twenty days prescribed by Gen. Laws, 1909, cap. 298, § 21, is not premature.

10. After reciting various steps taken by the appellant a petition to establish the truth of exceptions continued "in order to establish the truth of said exceptions and the correctness of said transcript of testimony."

Held, that from the whole paragraph it sufficiently appeared that appellant was asking for a hearing for the purpose of establishing the truth of exceptions and transcript rather than for a final hearing upon exceptions which had neither been allowed or established.

11. An affidavit to a petition to establish truth of exceptions under rule 13 which concluded "the plaintiff's ground of exception is the decision of the trial justice upon the admission or regulation of certain testimony as shown by the bill of exceptions annexed hereto" is adequate, the intention being to direct the attention of defendant to the bill for the information to which under the rule he would be entitled.

12. On a petition to establish truth of exceptions the affidavit of counsel did not mention the transcript of testimony, but the stenographer filed an affidavit that "the transcript made by me is a true record according to my notes."

Held, that the affidavit was sufficient *prima facie*, to establish the correctness of the transcript. *Reddington* v. *Getchell*, 439.

13. Where a question is admissible, a party takes nothing by his objection to the question and his exception to an irrelevant and prejudicial answer, but if it was considered after such answers had been stricken out that the jury would be improperly influenced, a motion to take the case from the jury should have been made, and refusal of such motion could be reviewed on exception. *Messler* v. *Williamsburg Fire Ins. Co.*, 460.

14. Where no exception was taken to the charge of the trial judge, and no request to charge differently was made such charge is the law of the case and the question that the verdict was contrary to the law cannot be raised on bill of exceptions since the question was not properly brought upon the record. *Mingo* v. *R. I. Co.*, 543.

See AUDITOR, 1.

EXECUTION SALE.

See ATTACHMENT, 1.

EXECUTIONS.

See DIVORCE, 5–6.

EXPLOSIVES.

1. Gen. Laws, 1909, cap. 50, § 21 authorizes town councils to prescribe rules and regulations governing the use of explosives for any and all purposes which includes their use for blasting.

2. While a town council is authorized under Gen. Laws, 1909, cap. 50, § 21, to prohibit the use of explosives for blasting in the absence of a license, it is also true that the power to make rules and regulations under Section 29 of the same chapter carries with it, at least impliedly, the power also to require a license. *Cruise & Smiley Co.* v. *Town Council*, 408.

FIREMEN.

See CONSTITUTIONAL LAW, 2.

FOREIGN CORPORATIONS.

See RECEIVERS, 1.

FRAUD.

See STATUTE OF FRAUDS, 10.

FRAUDS, STATUTE OF.

1. A memorandum under the statute of frauds is insufficient in an action against the person to be charged, where it is not signed by the seller and he is not mentioned therein either by name or by any description by which he can be identified and it refers to no other writing by which he can be identified.

2. Where the memorandum under the statute of frauds does not mention the name of the vendor and there is no description of him therein, oral testimony to show who he is, is inadmissible.

Where there was nothing in the memorandum by way of description of the vendor, nor any reference to any check or checks to be given in payment or to any other paper or document, parol testimony was inadmissible to show that the payee of two checks accepted as payments under the memorandum was the vendor, so that the checks and memorandum could be read together as comprising the memorandum required by the statute of frauds.

3. Where husband and wife, owners of the property in question declared upon an agreement for the purchase of the same, checks payable to the husband and claimed by him to have been given as payments under a memorandum of sale without any evidence that he was the "lawfully authorized" agent of his wife to make sale of her property, fail to show that the husband and wife were the vendors of the property, even were parol evidence admissible in the condition of the memorandum for the purpose of identifying the vendors. *Di Santis* v. *Cannata*, 118.

4. The statute of frauds (Gen. Laws, 1909, cap. 283, § 6,) does not require that the agent signing the memorandum, shall be acting under written authority but such authorization may be by parol and the authority to make a contract for the sale of real estate confers authority to sign the memorandum.

5. In an action to recover damages for breach by defendant of a contract to convey real estate the memorandum for sale was as follows:—"Aug. 17 1916 Received of X., $25 to bind the bargain for the sale of Harry Noorigian Brick store and land at 46 Blackstone St. to X. Said deposit to be forfeited to Harry Noorigian in the failure of X to purchase said property on August 25 1916. Ballance due $1975

J F GREENE agt. for H NOORIGIAN."

Held, that a memorandum was sufficient if from a consideration of the whole contract it could be gathered that it was the intention of one party to convey and of the other to purchase, regardless of apt words expressing the agreement of the parties to sell and to buy.

6. If the description of the subject-matter of the agreement between the parties is so uncertain and indefinite that it cannot be applied exclusively to any specific land, parol evidence cannot be received to complete the description; but if the description is definite though requiring extrinsic evidence to identify the land which it represents, parol evidence may be received for that purpose.

INSOLVENCY.

See RECEIVERS, 2–3.

INSURANCE.

FIRE.

1. X. being the owner of property subject to a first mortgage to A. and a second mortgage to B. conveyed the property to B. and B. executed a transfer of his second mortgage and note to X. but the note was not endorsed and it did not appear whether the transfer and note were ever delivered to X. X. had spent about $600 in improvements on the property while he owned it. *Held*, that X. had an equitable interest in the property to the extent of the amount expended by him in improvements, which claim would be recognised and protected in equity and having such equitable interest he had an insurable interest therein.

2. Under a policy payable to X. as first mortgagee and to Y. as second mortgagee, after the death of X., Y by survivorship may maintain an action under the "loss payable" clause in his own name without joinder of the executor of X.

3. In an action by mortgagee under the "less payable" clause of a fire insurance policy, request of defendant to charge that "the insurable interest of plaintiff is limited to the amount of his mortgage note—only one-third of this can be recovered from the company together with interest" was properly denied, for the action was on the contract made by defendant with mortgagor and it was the interest of the mortgagor which was insured and not of the mortgagee who under the loss payable clause was simply the appointee of insured to whom payment was to be made of any loss due under the policy and whose right to recover was subject to be defeated by any defence valid against the mortgagor.

4. In a fire insurance policy the property was described as a "three story frame dwelling house and additions with shingle roof occupied for dwelling house purposes," and it appeared that the building contained about nine tenements with a room on the lower floor which had at one time been used as a store previous to the time the property was bought by the last owner, and thereafter used as a bed room until about a week prior to the fire. *Held*, that the purpose for which the building was designed was immaterial. The property when insured was used as a dwelling house and continued to be used exclusively as such.

5. In the description of property under a policy of fire insurance the test is, not what was the use for which the building was originally designed, but what was the actual use which was made of the building at the time the insurance was taken out and during the time covered by the policy.

6. Where a proof of loss although somewhat informal concluded "any other information that may be required will be furnished on call and considered a portion of these proofs," it was sufficient to comply with the requirements of the policy and if defendant desired more detailed inform-

INTENT.

INTEREST.

2. Where under the original decree granting relief, the amount of payment was not determined and no time limit for hearings before a master or for payment was fixed, and the responsibility for delay in pushing the further proceedings rested equally upon both parties, respondent is not entitled to interest on the purchase price. *Bright* v. *Wilcox*, 404.

INTOXICATION.

See CRIMINAL LAW, 2.

JUDGMENTS.

1. Under Gen. Laws, 1909, cap. 46, §§ 12, 13, 14, relative to the satisfaction of a judgment against a town or city, a town or city treasurer is not personally responsible or primarily liable to pay the judgment in the first instance. *Barber* v. *Barber*, 32 R. I. 266, so far as inconsistent with the foregoing but not otherwise, overruled.

2. While a town is required to be sued by an action against the town treasurer in his official capacity, such suit is in substance and legal effect a suit against the town and the judgment is as much a judgment against the town as if it were required that the suit be brought against the town in its corporate capacity and name.

3. A judgment against a town treasurer cannot be collected by execution as there is no requirement or provision of law for the issue or service or return of execution in such a case.

4. Mandamus is the only proceeding by which a judgment against a town treasurer may be enforced either against the town treasurer or against the town. The writ of mandamus in such case is in the nature of the statutory writ of execution and is legally equivalent thereto.

5. After a suit against a town treasurer in his capacity as such has proceeded to judgment, it is not necessary to summon in his successor in office within one year in order to keep the judgment alive in case the town treasurer against whom the judgment was rendered ceases to hold office and a successor is elected and qualified before the judgment is paid, but a judgment against a town treasurer is equally binding against his successor in office by reason of his representative capacity in succession to the town treasurer against whom the judgment was rendered and in privity with him, and mandamus properly lies against him to compel action to provide for payment of the judgment.

6. While mandamus properly lies against a town treasurer to enforce settlement of a judgment either by the town treasurer or the town, the fact that the town treasurer has not sufficient funds in his hands to satisfy and pay the judgment affects the nature of the relief which should be asked and granted and such being shown to be the fact the relief sought should be action by the town treasurer under Gen. Laws, 1909, cap. 46, § 13, so that a tax should be levied. *Richmond* v. *Kettelle*, 192.

7. Gen. Laws, 1909, cap. 294, § 1, providing that "judgment shall be entered on the seventh day following the day of the rendition of the verdict or the decision of the court, unless some motion operating as a stay be filed, &c.,"

must be construed in connection with cap. 298, § 17, relating to procedure in prosecuting a bill of exceptions, and therefore a judgment may be entered at the end of the seventh day, but not before, and the clerk in making the record of judgment on the eighth day made the entry on the first day on which he was authorized by statute to act.

8. April 2, plaintiff was nonsuited; April 10, the clerk made the record, "judgment entered for defendant; April 9, the parties executed an agreement, "default removed, case assigned for trial June 25." The next entry on the record was "April 10, by agreement of counsel default heretofore entered removed and case assigned for trial to June 25." This last entry was made without order from the court. On October 27, the court assigned the case to trial.

Held, that an act of the court being required to set aside a judgment it was error to assign the case to trial as there was nothing to try. *Way* v. *Superior Court*, 444.

See BAIL, 1–3.

See STATUTE OF LIMITATIONS, 1.

JURISDICTION.

See NEW TRIAL, 4–5.

JURORS.

1. Pub. Laws, 1918, cap. 1677, § 23, relative to the service of persons drawn as grand and petit jurors, is not obnoxious to Cons. R. I. Art. I, § 7.

2. A motion to quash an indictment on the ground that the grand jury was not impaneled in accordance with the statute, must in the first instance be presented to the Superior Court and is not properly before the appellate court upon the certification of a constitutional question which formed another ground of the motion to quash. *State* v. *Visciani*, 419.

LACHES.

See EQUITY, 2.

LAST CLEAR CHANCE.

See CARRIERS, 4–5.

"LEVER ACT."

See FUEL ADMINISTRATION, 1.

LIGHTS.

See AUTOMOBILES AND MOTOR TRUCKS, 1.

LIMITATIONS, STATUTE OF.

1. A part payment does not interrupt the statute of limitations in the case of a judgment. *Garabedian* v. *Avedisian*, 78.

MANDAMUS.

1. Mandamus will not lie to control the exercise of a discretionary power by a public official. *Cruise & Smiley Co.* v. *Town Council*, 408.

See JUDGMENTS, 4.

MECHANIC'S LIEN.

1. Where a dealer had a running account with a contractor and delivered materials for use by the contractor which were charged on his general account with the knowledge on the part of the dealer that the materials might be used by the contractor on any one of several different jobs, the credit was given solely to the contractor without reference to the use which was to be made of the materials, and knowledge subsequently acquired by the dealer that some of the materials were used in the construction of the house of the respondent did not entitle him to a lien. *Grimwood* v. *Greene*, 225.

See INTEREST, 1.

MINORS.

See PLEADING AND PRACTICE, 1.

See WORKMEN'S COMPENSATION ACT, 3–5.

MUNICIPAL CORPORATIONS.

1. The question whether it is the duty of a town to keep its bridges in repair and in safe condition for the passing thereon of motor trucks of the weight of ten tons, is a mixed question of law and fact; whether such weight is a reasonable one being a question of fact to be submitted to the jury under proper instructions. *Smith* v. *Howard*, 126.

2. Municipal corporations are under the statutory duty of maintaining public bridges of sufficient structural stability and in such a state of repair that they will sustain the weight of such loads as in the circumstances may reasonably be placed upon them. What is reasonable care required of a town or city in the circumstances of a particular case and what is reasonable weight in a vehicle are questions of fact for the jury.

3. As to a defect in a highway or bridge, which would be as likely to cause injury to an ordinary horse-drawn vehicle as to an automobile, a municipal corporation under its statutory obligation to keep such highway or bridge in repair, will be equally liable for damages to an automobile or to an ordinary vehicle, resulting from such defect.

4. The question as to the obligation of a municipal corporation in the absence of special statutory provisions, to keep its highways and bridges in such condition that automobiles may not be exposed to the liability to injuries peculiar to that type of vehicles, *is not decided*.

5. On question certified for determination:—

Held, that subject to the ordinary rules as to negligence of the parties, and the statutory provisions as to the obligations of towns, a town was liable for injury to plaintiff's motor truck resulting from a defect in or from the insufficiency of a bridge, provided it was found that the use of a vehicle and

load of ten ons weight was reasonable upon the kind of bridge which the town should maintain at said location. *Smith* v. *Howard*, 126.

6. An action properly lies in favor of a husband against a town to recover damages which he has suffered in consequence of personal injuries sustained by his wife through the negligence of the town in failing to keep its highway safe and convenient for travel. *Larisa* v. *Tiffany*, *T. T.*, 148.

7. Gen. Laws, 1909, cap. 46, § 15, "If any person shall receive or suffer bodily injury or damage to *his property* by reason of defect, want of repair or insufficient railing, in or upon a public highway . . . in any town which is by law obliged to repair and keep the same in a condition safe and convenient for travelers . . . he may recover of such town the amount of damages sustained thereby . . . " confers the right of action for damages to every species of property, including the loss by the husband of the services of his wife and also his expenses for the care of his wife occasioned by her injuries.

8. The word "property" used without limitation is one of broad meaning. The exclusive right to a thing constitutes property in that thing, and the thing may be tangible or intangible. *Larisa* v. *Tiffany*, *T. T.*, 148.

See JUDGMENTS, 1–6.

NAME, CHANGE OF.

See DEEDS, 1.

NEGLIGENCE.

1. The question of contributory negligence is one for the jury unless it clearly appears that the only proper inference from the undisputed facts is that in the circumstances of the case a person of ordinary prudence would not have acted as did the plaintiff. *Jacobson* v. *O'Dette*, 447.

2. The driver of an automobile who crosses an intersecting street without taking any observation, except looking straight ahead, when had he looked before attempting to cross he must have seen defendant's automobile coming at right angles but a short distance from him at a rapid rate of speed, is guilty of contributory negligence. *Jacobson* v. *O'Dette*, 447.

See EVIDENCE, 7–8.

FOR CASES CONCERNING STEAM AND ELECTRIC ROADS, See CARRIERS.

FOR CASES CONCERNING AUTOMOBILES, See AUTOMOBILES AND MOTOR TRUCKS.

NEW TRIAL.

1. Where evidence as to the liability of a defendant was conflicting, it cannot be said that the prejudice arising from placing before the jury evidence as to an attempted settlement by defendant, might not have been the determining factor by which a verdict was found for the plaintiff, in spite of the charge of the trial court to disregard it, and under such circumstances a new trial will be granted. *Demara* v. *R. I. Co.*, 215.

2. When contrary instructions are calculated to confuse and mislead a jury they constitute reversible error. It cannot be left to the jury to reconcile conflicting statements of law and it is impossible for the appellate court to determine in accordance with which of two inconsistent statements their verdict has been reached. *McNear* v. *Amer. & British Mfg. Co.*, 302.

3. While the denial of a motion for new trial is a formal approval of a verdict, yet where it is evident from the decision of the justice that the verdict in the opinion of the trial court failed to do justice between the parties and would have been set aside had the court felt it was possessed of the power to do so, the conclusion of the justice cannot be given the weight and consideration to which it might otherwise be entitled. *Syme* v. *McNeil*, 325.

4. The finding of the trial judge upon the validity of a jury's verdict is not binding upon the appellate court but the court will examine the transcript of evidence and if it appears that the determination of the trial judge upon the weight of the evidence was clearly wrong or that his decision was not made upon conflicting testimony but was based upon a misconception of the evidence his decision will not be approved; but in the ordinary case where such justice has approved or set aside a verdict in accordance with his view as to the value of evidence clearly conflicting his determination will be regarded as of great persuasive force.

Following the rule established in *Wilcox* v. *R. I. Co.*, 29 R. I. 292, and *McMahon* v. *R. I. Co.*, 32 R. I. 237.

5. When the evidence before a jury is conflicting upon the issues, a review of the decision of the justice presiding either approving or setting aside the verdict is not a question of law. Such review does not come before the appellate court by virtue of the constitutional provision giving it final revisory and appellate jurisdiction upon all questions of law and equity, but its jurisdiction is entirely statutory, conferred as part of the procedure by which a party may test the validity of a jury's verdict. *Surmeian* v. *Simons*, 334.

6. Where a case was submitted to a jury upon the question, among other issues, of the last clear chance, which was not involved in the case, and the court cannot determine from the rescript of the justice on which phase of the case he sustained the verdict, the plaintiff's testimony on the question of due care being unsupported, a new trial will be ordered, the decision of the court if based on the theory of the last clear chance adding nothing to the verdict. *Halliday* v. *R. I. Co.*, 350.

7. While in a suit to recover compensation for personal injuries, pain and suffering, when the extent of the injury has been established, it is peculiarly within the province of the jury to determine the amount of the award, yet when it appears to the justice presiding that the amount of the verdict is based upon a finding as to the extent of injury which is unsupported by the evidence, or when such amount is grossly excessive upon any possible finding regarding the extent of the injury, it is the duty of the justice to grant a new trial, as the amount of the award is not based on the evidence. *Di Vona* v. *Lee, C. T.*, 375.

8. On hearing of motion for new trial before the trial judge on the ground that the verdict is contrary to law, the only question open for consideration is

Held, that the pleadings of plaintiff were defective in not alleging that *at the time of the accident*, defendant did not have the certificate, but such defect was amendable. *Taglinette* v. *Sydney Worsted Co.*, 133.

2. In an action on a policy of fire insurance, on the issue whether there had been a failure of an appraisal through fault of defendant, plaintiff's declaration alleged that the plaintiff and defendant each selected a competent and disinterested appraiser. Plaintiff introduced a letter written by him to defendant, which was competent for the purpose of showing a demand for a new appraisal but which assumed that defendant did not appoint a competent and disinterested appraiser.

Held, that the plaintiff had removed the issue as to the competency of defendant's appraiser by his allegation as to his competency and refusal to charge as requested by defendant that the jury must assume that defendant's appraiser was competent and disinterested, since plaintiff had admitted these facts, constituted reversible error. *Messler* v. *Williamsburg Fire Ins. Co.*, 460.

See ATTACHMENT, 1; EVIDENCE, 14; EXCEPTIONS, 1, 8.

See RECEIVERS, 1.

POLICE COMMISSIONERS, BOARD OF.

See POLICE OFFICERS.

POLICE OFFICERS.

1. Where a police officer was suspended pending investigation of charges, the fact that he was acquitted under an indictment for an offence forming the basis of some of the charges, does not prevent the Board of Police Commissioners from proceeding thereafter with the hearing of the charges for violation of rules of the department but it is not only their right but their duty to make the investigation before reinstating the officer, unless they are satisfied he had no criminal intent in his acts.

2. Rule 12 of the Rules and Regulations of the Board of Police Commissioners of the City of Providence authorizing the Board in its discretion to punish police officers by various penalties on conviction by the Board of any legal offence is not in violation of Gen. Laws, 1909, cap. 50, § 30.

3. Rule 2, Section 6 of the Rules and Regulations of the Board of Police Commissioners of the City of Providence, requiring a written complaint to be filed within 24 hours of the suspension of a police officer, does not prevent the amplification later of the original charges properly filed in compliance with the rule, such amplification being in the nature of a bill of particulars based upon additional information.

4. Where no rule of the Board of Police Commissioners of the City of Providence or any statute of the State requires the Board to act upon charges against a police officer while he was not seeking a hearing, it was proper for the Board to continue the hearing while the officer was awaiting trial on a criminal charge, and the jurisdiction of the Board over the charges is not lost for want of prosecution. *Keats* v. *Board Police Com'rs*, 240.

lant, unless the case were one where in the opinion of the justice, public safety or danger of irreparable injury required an immediate suspension of the effect of the appeal, until the parties could be heard on the question of permanent suspension.

4. Where without notice to appellant, an order was entered by a single justice of the Supreme Court, under provisions of Public Utilities Act, Section 35, granting suspension of the effect of an appeal from an order of the Public Utilities Commission to continue until determination of the appeal, the order will be vacated so far as it grants a permanent suspension, but as the justice had general jurisdiction over the application, the order although made without notice will be treated as valid until set aside. *Public Utilities Commission* v. *R. I. Company*, 379.

5. Upon hearing by full court, after notice to parties, of the motions of respondent street railway, that appeals from the order of the Public Utilities Commission should not operate as a stay of said order.

Held, that the objections to the order could only be determined upon hearing upon the merits of the appeals, and in the meantime none of such appeals should operate as a stay. *Public Utilities Commission* v. *R. I. Co.*, 394.

QUESTION FOR JURY.

See NEGLIGENCE, 1.

RECEIVERS.

1. Receivers of a foreign corporation which has not filed the power of attorney under Gen. Laws, 1909, cap. 300, §§ 42-44, cannot maintain in the courts of this State an action to recover money arising out of a contract made by the corporation within this State. *Frank* v. *Broadway Tire Co.*, 27.

2. State taxes being debts of a public character are entitled to preference in the liquidation of a corporation by a receiver appointed under Gen. Laws, 1909, cap. 213, § 27, as amended.

3. Under the provisions of Gen. Laws, 1909, cap. 213, § 27, as amended by Pub. Laws, cap. 780 (1911-1912), a petition was filed for the appointment of a receiver and the dissolution of a local corporation. Insolvency was alleged. The decree appointing the receiver instructed him to "take possession of the assets . . . carry on the business . . . liquidate its assets and distribute the same ratably among its creditors."

Prior to the appointment of the receiver an attachment had been placed on the stock and fixtures of the company by a creditor. Upon demand made by the receiver the property under attachment was surrendered to him by the deputy sheriff. The value of the property attached was greater than the amount of the claim.

Held, that the attachment of the creditor was not vacated by the appointment of the receiver.

Held, further, that the decree of the court directing the receiver to take possession of the assets and carry on the business, of necessity required that the receiver should be allowed to take possession of the property attached.

tion ceased to be the owner of such property and consequently was not entitled to a deduction for the value thereof. *Washburn Wire Co.* v. *Board of Tax Commrs.*, 32.

2. The payment of an overdue tax under protest is not such a voluntary payment as would preclude a taxpayer from recovering it back upon showing its illegality, although no levy or threat to levy had been made or any suit instituted or threatened for its collection.

3. Payment of a tax to the collector constitutes payment to the town and an action to recover a tax paid under protest on account of illegality may be maintained against the town treasurer without affirmative proof that the money was paid over by the collector to the town treasurer.

4. A protest to the payment of taxes in order to be effective should point out with reasonable certainty the defect or error upon which such protest is based. *Rumford Chemical Works* v. *Ray*, 19 R. I. 456, and *Whitford, Bartlett & Co.* v. *Clarke*, 33 R. I. 331, in so far as they hold that a protesting taxpayer is not required to state the grounds of his protest, overruled. *Albro* v. *Kettelle* 270.

See ELECTIONS, 9–10; RECEIVERS, 2–3.

THEATRES.

See CONSTITUTIONAL LAW, 2.

TIME.

See AUTOMOBILE GARAGES, 1.

TOWN COUNCILS.

See EXPLOSIVES, 1–2.

TOWN TREASURER.

See JUDGMENTS, 1–6.

TRANSCRIPT OF TESTIMONY.

See TRIAL, 1–4.

TRIAL.

1. Where a verdict had been set aside by the trial justice and the exceptions of plaintiff to such decision overruled and the case remitted to the Superior Court where on a second trial a verdict was returned for plaintiff, the allowance of the cost of the transcript of testimony at the first trial, used in the proceedings on the bill of exceptions, as a part of the taxed costs of the case, was discretionary with the Superior Court.

2. No notice to the opposing party is required under the statute, of an application for an allowance of the costs of a transcript of testimony.

3. While it is better practice to give notice to the opposing party of an application for the allowance of the costs of a transcript of testimony, particularly in a case where the application is made to a judge who did not preside at the trial, and while the fact that no notice had been given in some

circumstances might warrant the finding that there had been an abuse of discretion in granting the motion, yet, in a case where the record was such as to present a fairly complete history of the case, the decision of the justice who heard the motion and allowed the costs of the transcript will not be disturbed.

4. Where a motion for the allowance of the costs of a transcript of testimony was made to a justice who was not the one who presided at the trial, and the motion was granted, such motion being addressed to his discretion, his decision is not subject to review by another justice. *R. I. Company* v. *Superior Court*, 5.

5. Where an oral statement of facts was agreed upon in a district court by the attorneys for the parties, as such statement was not in writing the court could not certify the action to the Supreme Court under Gen. Laws, cap. 298, sec. 4, and therefore it retained jurisdiction of the action.

6. An oral agreement on a statement of facts in a district court by attorneys for the parties to a cause precludes the necessity of proving such facts and such admission binds the parties and the court is warranted in entering a decision thereon. *Scotti* v. *District Court*, 556.

7. It is competent for a judge of a district court at any time to amend his decision by amplifying it if necessary to conform to Gen. Laws, 1909, cap. 288, Sec. 20, in regard to noting his conclusions of law and fact, as of the date of the decision so as to show whether such decision was based wholly upon facts or upon conclusions of law. *Trottier* v. *Foley*, 389.

TRUSTS.

1. Where testator created a trust in favor of the daughters of the original trustee as a class with power in the father, who was named as trustee, to apportion the fund equally or otherwise as he should deem for the best interest of the class, and with power of appointment in the original trustee to designate a new trustee by will or otherwise who should hold the trust estate subject to such condition not incompatible with the intent of the will as the original trustee might prescribe, and the original trustee died without executing the power or making a new appointment, the power given the original trustee to apportion the trust estate among his daughters as he saw fit was a special discretionary one, personal to him and not annexed to the trust itself, and cannot be exercised either by a substituted trustee appointed by the court nor by the court, but the general intention of testator will not be permitted to fail and a division of the trust estate among the members of the class will be ordered in accordance with the most equitable rule which in this case is that of equality. *Hazard* v. *Bacon*, 415.

See BANKS AND BANKING, 1.

VERDICT, DIRECTION OF.

1. On a motion to direct a verdict all evidence in favor of the party against whom the motion is directed, must be taken as true and he is entitled to

since both the wife of testator and J. predeceased testator, the gift passed to the descendants of J. living at the death of testator *per stirpes* and not *per capita*.

4 In a bequest of personalty the word "issue" is more readily construed as a word of purchase than it is in a devise of realty. "Issue" used in a will as a word of limitation is not equivalent to "heirs" but to "heirs of the body."

5. An estate in fee simple is not to be cut down to a lesser estate by subsequent ambiguous words unless the will shows a clear intention in the testator to do so.

6. The word "issue" is in its nature ambiguous. It may be of purchase or of limitation and its use alone would be insufficient to reduce the explicitly devised estate in fee simple to an estate tail. *R. I. Hospital Trust Co.* v. *Bridgham*, 161.

7. The rights of an appointee under the exercise of a power are to be sought in the construction of the instrument creating the power and if such instrument be a deed or contract the exercise of the power and the rights of the appointee depend upon the construction which should be given to such deed or contract.

8. Under the terms of a contract between donor and an insurance company an annuity in trust was created, by which an annuity was to be paid to donor for life and after her death to X. for life and after the decease of the survivor of donor and X., then to Y. for life, and upon the decease of the survivor of these three, the principal sum to be paid to the executors or administrators of the survivor, in trust to be disposed of as X. might by will appoint and in default of appointment to the heirs of Z.

At the time of making the contract donor was domiciled in Massachusetts, the contract was made there, the trust fund was located there and was to be administered there by a Massachusetts corporation. The donee of the power was also domiciled in Massachusetts, and died there leaving a will which did not by any specific provision exercise the power but which contained a residuary clause.

Donor established a domicile in Rhode Island and died there leaving a will probated there.

Held, that the parties intended to make a contract governed by the Massachusetts law and that donor intended to create a power of appointment in X. which should be exercised in accordance with the law of that state and the subsequent change of domicile of donor in no way affected the construction to be given the contract.

Held, further, that under the Massachusetts rule the power was exercised by the residuary clause. *Harlow* v. *Duryea*, 234.

9. The expressed intention of a testator in his will as to the disposition of extraordinary dividends, governs.

10. Ordinary dividends, regardless of the source whence, or the time when the fund was accumulated, go to the life tenant.

11. Capital assets in liquidation are capital, and not income, as between life tenants and remaindermen.

12. Where a stock dividend was declared against surplus accumulated before the death of testator, and instead of distributing the stock among the stockholders the corporation sold it and distributed the cash received in the form of extraordinary cash dividends, such dividends go to the *corpus* of the trust and not to the life tenants. *R. I. Hospital Trust Co.* v. *Peckham*, 365.

13. Residuary clause of will provided, "I give to B. and C. the income from the residue of my estate both personal and real, share and share alike, during their lifetime, and at their deaths, I give and bequeath all the residue of my estate both personal and real to the X. Public Library as a memorial." B. deceased, and upon the question as to the application of that one-half of the income during the life of C.:—

Held, that under Gen. Laws, 1909, cap. 252, § 1, it manifestly appeared that the intention of testatrix was that B. and C. should take the income as joint tenants and the entire income should be paid to C. as surviving beneficiary. *Monroe for an Opinion*, 412.

14. On bill in equity seeking construction of testamentary trust; alleging that the real estate was depreciating in value and could not be partitioned equitably; the court determines the *quantum* of the estate now held by the trustee and finds that under the circumstances of the case, the trustee should be authorized to sell and convey the real estate comprising the trust property and to reinvest and dispose of the proceeds in accordance with the opinion. *Hopkins* v. *Curtis*, 552.

See VERDICT, DIRECTION OF, 2; EVIDENCE, 2–4.

See TRUSTS, 1.

WRITS OF ERROR.

1. Where no record appears, other than the decision noted on the writ to show what the "conclusions of law and fact" of a judge of a district court, were, as it does not appear from the record whether such decision was based wholly upon facts or upon conclusions of law, a writ of error will not lie to review such decision.

2. Upon a writ of error, questions of law and not errors of fact are reviewable *Trottier* v. *Foley*, 389.

WORDS AND PHRASES.

"DEBT OR DEMAND," See POOR DEBTOR'S OATH, 1.

"HEIRS AT LAW," See WILLS, 1–2.

"ISSUE," See WILLS, 3–4.

"NEXT OF KIN," See WILLS, 1–2.

"PROPERTY," See MUNICIPAL CORPORATIONS, 8.

WORKMEN'S COMPENSATION ACT.

1. By *dependency* under the Workmen's Compensation Act, is intended a reliance for support upon the earnings of a workman at the time of the injury which resulted in his death and not at any time thereafterwards. It is therefore to the time of the injury alone that the court should look in

See PLEADING AND PRACTICE, 1.