MAINE REPORTS

137

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 28, 1940 TO MAY 1, 1941

WALTER M. TAPLEY, JR.

REPORTER

PORTLAND, MAINE

THE SOUTHWORTH-ANTHOENSEN PRESS

Printers and Publishers

1942

THE SOUTHWORTH-ANTHOENSEN PRESS

PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. CHARLES P. BARNES, CHIEF JUSTICE[1]

HON. GUY H. STURGIS[2]

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER

HON. GEORGE H. WORSTER

HON. HAROLD H. MURCHIE[3]

[1] Resigned July 31, 1940

[2] Appointed Chief Justice August 8, 1940

[3] Appointed August 8, 1940

JUSTICES OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER[1]

HON. ARTHUR CHAPMAN

HON. GEORGE L. EMERY

HON. HERBERT T. POWERS

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

HON. RAYMOND FELLOWS

HON. ROBERT A. CONY[2]

[1] Resigned August 31, 1940, and appointed Actived Retired Justice September 1, 1940

[2] Appointed October 31, 1940

ACTIVE RETIRED JUSTICE OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

ATTORNEY-GENERAL

HON. FRANZ U. BURKETT TO JANUARY 1, 1941

HON. FRANK I. COWAN FROM JANUARY 1, 1941

REPORTER OF DECISIONS

WALTER M. TAPLEY, JR.

TABLE OF CASES REPORTED

Y

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

LAURA H. PATTEN *vs.* JOSEPHINE DENNISON.

Cumberland. Opinion, June 28, 1940.

TROVER. PLEDGES.

Trover is a possessory action wherein the plaintiff must show that he has either a general or special property in the thing converted and the right to its possession at the time of the alleged conversion.

Where owner pledged diamond as security for a loan, and it was not shown that owner fulfilled the terms of the pledge, owner could not compel return of the diamond or have damages for its conversion without proof of compliance with the conditions under which the diamond was pledged.

In action of trover for conversion of a diamond pledged to secure a debt, defendant had a right to rely upon lack of proof of possessory right in plaintiff notwithstanding that there was no evidence to show that defendant, as pledgee, took required statutory action to sell the diamond and terminate plaintiff's right therein.

Where it appears that no testimony admitted or excluded over objections of plaintiff had any relation to the vital issue of plaintiff's right to possession the failure to present exceptions properly did not disadvantage the plaintiff.

On exceptions. Action of trover to recover damages for the conversion of a diamond. Directed verdict for the defendant. Plaintiff files exceptions to directed verdict and also to rulings as

to the admissibility of evidence. Exceptions overruled. Case fully appears in the opinion.

Udell Bramson, for plaintiff.

Cook, Hutchinson, Pierce & Connell, for defendant.

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

MANSER, J. This is an action of trover to recover damages for the conversion of a diamond alleged to be of the value of $1,500. The plea was the general issue. At the close of the testimony for the plaintiff, the defendant rested her case, and the court on motion directed a verdict for the defendant. The case comes forward on exceptions to this ruling, and also on exceptions to rulings as to the admissibility of evidence.

It was incumbent on the plaintiff to show that she had either a general or a special property in the diamond, and further that she was at the time of the alleged conversion, entitled to its possession.

> "Trover is a possessory action wherein the plaintiff must show that he has either a general or special property in the thing converted and the right to its possession at the time of the alleged conversion." *Weed* v. *Railroad Co.*, 124 Me., 336, citing *Jones* v. *Cobb*, 84 Me., 153; *Weeks* v. *Hackett*, 104 Me., 264; *Gilpatrick* v. *Chamberlain*, 121 Me., 561.

As to the possessory right, she utterly failed. It appears that in 1923 a Mrs. MacDonald, mother of the defendant, loaned to the plaintiff a considerable sum of money and took a mortgage on certain real estate as security for the loan. In connection with this transaction, the plaintiff testified that she pledged the diamond to Mrs. MacDonald.

> She said, "I let her have the diamond until I was able to redeem the property, but it wasn't included in the mortgage."

There was no evidence of redemption of the real estate from the mortgage. It appears that in 1925, upon request, Mrs. MacDonald

rendered to the plaintiff an account, showing that there was then due on the loan more than $4,500, but there is not the slightest indication or assertion that payment or tender of payment was ever made. Lacking any evidence of fulfillment of the terms of the pledge, the plaintiff fails to make a prima facie case. She cannot compel a return of the pledge, or have damages for its conversion, without proof of compliance with the conditions which she shows to have been existent by her own testimony. *Bank* v. *Jackson*, 67 Me., 570.

While the defendant introduced no evidence to show that the pledgee took the required statutory action to sell the pledge, and terminate the plaintiff's right therein (R. S., Chap. 105, Secs. 80, 81), yet the defendant has a right to rely, as she did in this case, not upon her own claim of title but upon the lack of proof of a possessory right in the plaintiff.

The exceptions with regard to rulings as to admissibility of testimony are entirely ineffectual under the well-established rules. They fail to disclose what evidence was admitted or excluded. The only statement in the bill relative thereto is as follows:

> "During the trial the plaintiff excepted to certain rulings of the presiding Justice as to the admissibility of certain evidence."

Perusal of the entire record discloses that failure to present these exceptions properly did not disadvantage the plaintiff, as it appears that no testimony admitted or excluded over objections of the plaintiff had any relation to the vital issue of her right to possession.

The entry will be

Exceptions overruled.

DONALD DALTON, PRO AMI *vs.* OLIVE M. McLEAN,
ADM'X OF THE ESTATE OF ARNOLD T. McLEAN.

DOROTHY DALTON *vs.* OLIVE M. McLEAN,
ADM'X OF THE ESTATE OF ARNOLD T. McLEAN.

EDWARD DALTON *vs.* OLIVE M. McLEAN,
ADM'X OF THE ESTATE OF ARNOLD T. McLEAN.

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EDWARD DALTON *vs.* OLIVE M. McLEAN,
ADM'X OF THE ESTATE OF ARNOLD T. McLEAN.

FRANK DALTON, PRO AMI *vs.* OLIVE M. McLEAN,
ADM'X OF THE ESTATE OF ARNOLD T. McLEAN.

WILLIAM DALTON *vs.* OLIVE M. McLEAN,
ADM'X OF THE ESTATE OF ARNOLD T. McLEAN.

Aroostook. Opinion, June 29, 1940.

COURTS. STATUTES, CONSTRUCTION OF. CONSTITUTIONAL LAW.

The doctrine is now well settled that whether a claim for damages for a tort survives the death of the tort-feasor is determined by the law of the place of wrong.

A statute providing for the survival of an action against the estate of a deceased person, according to weighty authority, does create a new cause of action.

The recognition and enforcement by one sovereignty of the laws of another is not a matter of absolute right but rests on comity.

The duty to enforce a right validly created by the law of New Brunswick is not obligatory if such enforcement is contrary to public policy or imposes an unjust burden on the citizens of Maine.

Unless from the terms of a statute it is clear that the legislature intended it to be retroactive, it is not the policy of our law to treat it so.

A retroactive provision is valid only when it relates to a remedy and not to a substantive right.

On report. Actions by plaintiffs, residents of New Brunswick against administratrix of the estate of Arnold T. McLean, late of Aroostook County, Maine, for injuries sustained in an automobile collision in the Province of New Brunswick. Cases reported from Superior Court for the County of Aroostook on agreed statement of facts. Judgment for the defendant. Cases fully appear in the opinion.

Fellows & Fellows, for plaintiffs.

James E. Mitchell, for defendant.

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

THAXTER, J. There are involved here seven different actions. They are before us on report on an agreed statement of facts. On August 17, 1937, Arnold T. McLean, a resident of Aroostook County in the State of Maine, was driving an automobile in Newcastle in the Province of New Brunswick. A collision took place with another automobile in which four of the plaintiffs were riding. The plaintiffs are all residents of New Brunswick. McLean was injured and died the next day. The defendant was appointed administratrix of his estate by the Probate Court in Aroostook County. On December 7, 1938, within twelve months after the qualification of the defendant as administratrix proofs of claim were filed against McLean's estate by these plaintiffs in which damages were claimed because of McLean's alleged negligence. These actions were commenced against the administratrix within twenty months after her qualification. It is agreed that at the time of the accident and when McLean died there was no law of New Brunswick providing for the survival of such actions as these and that they did not survive and no suits could then have been maintained in said province. The sole question before us is whether the actions can be maintained in this state. Under the stipulation it is agreed that if the actions are not maintainable judgment shall be entered for the defendant in each case; if they can be maintained there shall be judgment for the plaintiffs and the cases shall be remanded for a hearing in damages.

At common law such actions as these did not survive. See *Hooper* v. *Inhabitants of Gorham*, 45 Me., 209, 213. But this rule has now

been changed by statute in this state. R. S. 1930, Chap. 101, Sec. 8.

The doctrine is now well settled that whether a claim for damages for a tort survives the death of the tort-feasor is determined by the law of the place of wrong. Restatement, Conflict of Laws (1934) Sec. 390; *Ormsby* v. *Chase*, 290 U. S., 387, 54 S. Ct., 211; *Needham* v. *Grand Trunk Railroad*, 38 Vt., 294; *Orr* v. *Ahern*, 107 Conn., 174, 139 A., 691; *Kertson* v. *Johnson*, 185 Minn., 591, 242 N. W., 329; *Friedman* v. *Greenberg*, 110 N. J. L., 462, 166 A., 119. For cases supporting an analogous doctrine see *Winslow* v. *Tibbetts*, 131 Me., 318, 162 A., 785; *Pringle* v. *Gibson*, 135 Me., 297, 195 A., 695.

Plaintiffs' counsel do not seriously contend that the law is otherwise, but base their right to recover on a statute enacted by the Legislative Assembly of the Province of New Brunswick on April 6, 1939. This act provides for the survival of actions such as those now before us. Section 4 reads as follows:

> "4. No proceedings shall be maintainable in the Courts of the Province in respect of a cause of action which by virtue of this Act has survived against the estate of a deceased person, unless either, —
> (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
> (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation."

It should be noted that the present actions were not brought within the limitation of time imposed by this section, but section 8 of the act makes this limitation inapplicable to proceedings "commenced at any time up to the first day of October, 1939," and these actions, commenced July 11, 1939, are within this exception.

Section 10 which the plaintiffs claim is applicable to the suits before us reads as follows:

> "10. This Act shall be deemed to have had effect as from the first day of July, 1937, but no proceedings shall be maintainable in any Court in the Province in respect of any cause of

action which arose before the first day of January, 1939, unless the consent of a Judge of the Supreme Court to the bringing of such proceedings be first had and obtained."

No action was instituted by any of these plaintiffs in the courts of New Brunswick, but they claim that the courts of this state must recognize the retroactive provision of this section and treat the statute as if it had been in force from July 1, 1937.

They suggest that the retroactive feature is valid and must be recognized by this court because the New Brunswick act did not create a new cause of action but merely provided "a new remedy to enforce a former liability — plainly existent and justly due." There is weighty authority, however, to the effect that such a statute as this does create a new cause of action. In *Davis* v. *New York & New England Railroad Co.*, 143 Mass., 301, page 305, 9 N. E., 815, page 819, the court in discussing the effect of a statute providing for the survival of an action in favor of an estate said: "While the action for personal injury is spoken of as surviving, as there previously was no responsibility to the estate, the statute creates a new cause of action. It imposes a new liability, and does not merely remove a bar to a remedy such as is interposed by the statute of limitations, which, if withdrawn by the repeal of the statute, would allow an action to be maintained for the original cause."

But regardless of the merits of this question there is a more fundamental reason why these plaintiffs cannot maintain their actions.

The recognition and enforcement by one sovereignty of the laws of another is not a matter of absolute right but rests on comity. "It is devised altogether from the voluntary consent of the latter, and is inadmissible, when it is contrary to its known policy or prejudicial to its interests." Story, Conflict of Laws (7th ed. 1872) 32. And the same author says further, page 33: "In regard to the question, how far one country will afford redress for the violation of contracts, or the commission of torts, or any other duty committed in a foreign forum, it must, in the first instance, be mere matter of discretion with the nation where such redress is sought; . . . "

The rule is nowhere better stated than in *Saul* v. *His Creditors*, 5 Mart. (N. S.), 569, cited by Story and other text-writers. Porter,

J., referring to the discussions of old writers says, page 596: "They seem to have forgotten, that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances, which can not be reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her citizens: that whether they do or not, must depend on the conditions of the country in which the foreign law is sought to be enforced — the particular nature of her legislation — her policy — and the character of her institutions. That in the conflict of laws, it must often be a matter of doubt which should prevail, and that whenever that doubt does exist, the court which decides, will prefer the law of its own country, to that of the stranger."

Conceding that it is ordinarily our duty to enforce a right validly created by the law of New Brunswick, yet such action is not obligatory, if such enforcement is contrary to our public policy or imposes an unjust burden on the citizens of our state. *Pringle* v. *Gibson*, supra; *Long* v. *Hammond*, 40 Me., 204; *Hilton* v. *Guyot*, 159 U. S., 113, 16 S. Ct., 139; *Loucks* v. *Standard Oil Company of New York*, 224 N. Y., 99, 120 N. E., 198; *Brown* v. *Perry*, 104 Vt., 66, 156 A., 910.

In the light of this discussion let us consider the New Brunswick statute. In so far as it provides for the survival of actions such as these there is no possible ground for a refusal by the courts of the State of Maine to enforce it, particularly since the policy which it adopts is in accord with our own. The difficulty comes with the retroactive provision of the law.

At the time of the death of defendant's intestate on August 18, 1937, no valid claim growing out of the accident could have been asserted against his estate by any one of these plaintiffs. This was also true when the claims were filed on December 7, 1938. It was the duty of the administratrix of his estate at that time, if properly advised as to the law, to treat those claims as invalid and unenforceable. Could a statute of New Brunswick subsequently passed create a liability against the estate of a decedent which did not exist either at the time of death, or when the administratrix was appointed, or when the purported claim was filed? Under such circumstances as this must the administration of an estate here be held open on the

possibility that the foreign sovereignty may pass such an act as is here before us? Unless from the terms of a statute it is clear that the legislature intended it to be retroactive, it is not the policy of our law to treat it so. *Miller* v. *Fallon*, 134 Me., 145, 183 A., 416. And a retroactive provision is valid only when it relates to a remedy and not to a substantive right. *Miller* v. *Fallon*, supra, 147; *Coffin* v. *Rich*, 45 Me., 507. Must we under the doctrine of comity give effect to a retroactive provision of a foreign statute when to do so would seriously interfere with the orderly settlement of an estate being administered in one of our own probate courts? It is clear that the Legislative Assembly of New Brunswick recognized that the enforcement of the retroactive feature of the act might work hardship, for it is provided that under it proceedings cannot be maintained in respect of any cause of action in the Province which arose prior to January 1, 1939, without first obtaining the consent of a judge of the Supreme Court. Obviously, this is a provision inapplicable if suit is brought in Maine, and the result is that one of our own citizens sued here is denied a safeguard which the statute gives to a citizen of New Brunswick sued in a court of the Province.

A decision of Lord Penzance indicates that the principle contended for by these plaintiffs would not be sustained by the English courts. *Lynch* v. *The Provincial Government of Paraguay*, L. R. 2, P. & D. 268. A resident of Paraguay died leaving personal property in England. After his death the Government of Paraguay by decree provided that the property of the deceased should become the property of Paraguay. Under this decree Paraguay claimed the property of the deceased in England. The court conceded that the succession to personal property in England of a person dying domiciled abroad was governed exclusively by the law of the domicile. Refusing, however, to recognize the retroactive feature of the Paraguay law, the court held that the law as it existed at the time of death controlled. The reasoning of the court is applicable to the case before us. It said, pages 271-272: "But it was ingeniously argued that the decree in question has by the law of Paraguay a retrospective operation, and that, though the decree was, in fact, made since the death, it has by the law of Paraguay become part of that law at the time of the death. In illustration of this view it was suggested, that if the question were to arise in a court of Paraguay such court

would be bound by the decree, and therefore bound to declare the provisions of the decree to be effective at and from the time of the death. This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, for those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law."

For the reasons heretofore given we hold that under the principle of comity the courts of Maine are not obliged to give effect to the retroactive feature of the New Brunswick statute. Since these claims except for such provision did not survive by the law of New Brunswick where the causes of action arose, the entry in each case must be,

Judgment for the defendant.

AGNES S. CHAPMAN *vs.* PORTLAND COUNTRY CLUB.

ARTHUR CHAPMAN *vs.* PORTLAND COUNTRY CLUB.

Cumberland. Opinion, July 12, 1940.

DAMAGES. NEW TRIAL.

In a jury-tried negligence case, it is the duty of the jury, under proper instructions from the court, to determine, from the evidence, whether or not the defendant is liable, and if it finds against him, then to assess damages for the

plaintiff. In such a case, each litigant is, of right, entitled to a verdict representing the actual judgment of the jury, uninfluenced by bias, accident or mistake.

When the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted.

On motions for new trials. Actions, tried together, by Agnes S. Chapman and Arthur Chapman against Portland Country Club to recover damages for personal injuries sustained by Agnes S. Chapman, for expenses incurred, and for loss of services and consortium. The jury returned verdict for each plaintiff. Defendant filed motions for new trials and plaintiffs filed motions for new trials on grounds that damages awarded were inadequate. In *Agnes S. Chapman* v. *Portland Country Club*; plaintiff's motion sustained; defendant's motion sustained; new trial granted. In *Arthur Chapman* v. *Portland Country Club*; plaintiff's motion sustained; defendant's motion sustained; new trial granted. Cases fully appear in the opinion.

Forrest E. Richardson,
Richard S. Chapman, for plaintiffs.
Verrill, Hale, Dana & Walker, for defendant.

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

WORSTER, J. On motions for new trials. These two actions were tried together.

In the case of *Agnes S. Chapman* v. *Portland Country Club*, the plaintiff seeks to recover damages for personal injuries sustained by her on account of the alleged negligence of the defendant.

In the case of Arthur Chapman against the same defendant, the plaintiff seeks to recover, as husband of said Agnes S. Chapman, for expenses incurred and which may be incurred by him in the future, for medical and nursing services for his wife, and for damages suffered by him for his loss of her services and consortium, as a result of such injuries received by her.

The jury returned a verdict for each plaintiff; thereupon the defendant filed motions for new trials on the usual grounds, exclusive

of any claims that the damages were excessive; and the plaintiff in each case filed a motion for a new trial on the ground that the damages awarded were inadequate.

In a jury-tried negligence case, it is the duty of the jury, under proper instructions from the court, to determine, from the evidence, whether or not the defendant is liable, and if it finds against him, then to assess damages for the plaintiff. In such a case, each litigant is, of right, entitled to a verdict representing the actual judgment of the jury, uninfluenced by bias, accident or mistake.

But the damages awarded in the instant cases are so excessively inadequate as to plainly indicate that the jury may have made a compromise.

And it is well settled in this state, whatever may be the law elsewhere, that:

> ". . . when the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted." *Conroy* v. *Reid*, 132 Me., 162, at 166, 168 A., 215.

Here we are unable to say whether the jury compromised as to the defendant's liability, or as to the amount of damages awarded, or both; and so the verdicts must be considered invalid as a whole. And since the verdicts are wholly invalid, the contentions of the plaintiffs that the cases be sent back for new trials on the question of damages only, cannot be sustained.

Therefore, without considering the merits of the cases, the mandates are:

In the case of *Agnes S. Chapman* v. *Portland Country Club*,

Plaintiff's motion sustained.
Defendant's motion sustained.
New trial granted.

In the case of *Arthur Chapman* v. *Portland Country Club*,

Plaintiff's motion sustained.
Defendant's motion sustained.
New trial granted.

GOODRIDGE, ADM'X ET AL.,

APPELLANTS FROM DECREE OF THE JUDGE OF PROBATE FOR CUMBERLAND COUNTY IN THE MATTER OF THE WILL OF MR. PHILIP GOODRIDGE, DECEASED.

Cumberland. Opinion, July 15, 1940.

WILLS. COSTS. STATUTES, CONSTRUCTION OF.

Costs in contested probate cases and other civil cases are allowable only by virtue of statute.

Costs allowable under Sec. 38 *of Chap.* 75, *R. S.* 1930, *rest in the discretion of the court.*

"Costs" as used in Sec. 38 *of Chap.* 75, *R. S.* 1930 *does not include expert witness fees and does not include attorneys' fees because "costs" as used in this statute means taxable costs as ordinarily taxed.*

Under this statute authorizing allowance of costs in contested probate court cases to be paid by the parties or by the estate, allowance of costs rests in the discretion of the court, but the discretion does not extend to items of asserted costs that are not ordinarily taxed as taxable costs.

One testifying as an expert in Probate Court may recover reasonable compensation for such service from the party who uses him in that capacity.

The language of Sec. 7 *of Chap.* 126, *R. S.* 1930 *does not permit a construction giving authority for the allowance of expert witness fees in the Probate Court, either original or appellate. The only authority for the allowance of expert witness fees is when an expert testifies "at the trial of any cause, civil or criminal, in said Supreme Judicial Court or the Superior Court," and the words "the Superior Court" as used in this statute do not refer to the Superior Court sitting as Supreme Court of Probate.*

On exceptions. Probate Court decreed approval and allowance of the will of Philip Goodridge, late of Portland, from which an appeal was taken to the Supreme Court of Probate. The appellate court affirmed the decree below and upon the petition of the appellant

praying for allowance of expert witness fees, ruled and ordered that they be paid out of the estate. To the ruling exceptions were taken. Exceptions sustained. Decree below reversed in so far as it allowed payment of expert witness fees. Case fully appears in the opinion.

Harry L. Cram,
Charles E. Gurney, for exceptant.
Clifford E. McGlauflin,
Daniel C. McDonald, for contestants.

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

HUDSON, J. On exceptions to a ruling of law by a justice of the Superior Court sitting as Supreme Court of Probate.

The Probate Court decreed approval and allowance of the will of Philip Goodridge, late of Portland, from which an appeal was taken to the Supreme Court of Probate. The appellate court affirmed the decree below and upon the petition of the appellant praying for allowance of expert witness fees, ruled and ordered that they be paid out of the estate. To this ruling exceptions were taken and perfected.

The only question is whether the Supreme Court of Probate has the right to allow expert witness fees as costs.

Costs in contested probate cases exist only by statute. *Hiltz, Appellant,* 130 Me., 243, 245, 154 A., 645. Also, costs in other civil cases are allowable only by virtue of statute (*Maine Bank* v. *Osborn,* 13 Me., 49, 51; *Freeman* v. *Cram,* 13 Me., 255, 260; *Mudgett* v. *Emery,* 38 Me., 255) and have statute regulation. *Fuller* v. *Miller,* 58 Me., 40; *Stilson* v. *Leeman,* 75 Me., 412; *Watson* v. *Delano,* 86 Me., 508, 30 A., 114.

Section 38 of Chap. 75, R. S. 1930 provides:

> "In all contested cases in the original or appellate court of probate, costs may be allowed to either party, to be paid by the other, or to either or both parties, to be paid out of the estate in controversy, as justice requires; and executions may be issued therefor as in courts of common law."

Costs allowable under this statute rest in the discretion of the court. *Peabody* v. *Mattocks,* 88 Me., 164, 167, 33 A., 900. It had

been so held in *Alvord* v. *Stone*, 78 Me., 296 where it was stated on page 299, 4 A., 697:

> "Neither party has a legal right to costs. The whole subject of costs rests in the discretion of the courts. The power of the court is precisely the same as in equity."

However, to determine the extent of this granted discretion, it is necessary to construe the word "costs" as it is used in the statute. Does it include expert witness fees? We think not. In *Hiltz, Appellant*, supra, our court held that it did not include attorneys' fees, because "costs" as used in the statute means taxable costs as *ordinarily* taxed. To the same effect is *Brown* v. *Corey*, 134 Mass., 249, in which the court declared on page 251 that the Probate Court "has not the power in contested probate cases to award counsel fees *or other expenses* as 'costs;' . . ." (Italics ours.)

While it is true, as stated in the *Peabody* and *Alvord Cases*, supra, that the whole subject of costs rests in the discretion of the court, yet the court does not have the right to extend its discretion over items of asserted costs that are not ordinarily taxed as taxable costs. For instance, it would not be within the discretion of the court to allow a non-expert witness an amount *per diem* in excess of the fixed statutory fee, although the court felt that justice required that that be done in the particular case. Other costs in probate litigation, such as expense incurred by the use of an expert either in preparatory investigation or in testifying in court, is as much without the pale of the statute as fees of counsel.

This does not mean, however, that one testifying as an expert in Probate Court may not recover reasonable compensation for such service from the party who uses him in that capacity. *Gordon* v. *Conley et al.*, *O'Neil* v. *Conley et al.*, *Twitchell* v. *Conley et al.*, 107 Me., 286, 78 A., 365.

Not until 1909 did we have any statutory provision for the payment of expert witness fees. See Chap. 195, P. L. 1909. That statute as amended now reads:

> "Witnesses in the supreme judicial court or the superior court *or in the probate courts* and before a trial justice or a municipal court, shall receive two dollars, and before referees, audi-

tors, or commissioners specially appointed to take testimony, or special commissioners on disputed claims appointed by probate courts, one dollar and fifty cents, or before the county commissioners one dollar, for each day's attendance and six cents a mile for each mile's travel going and returning home; *but the court in its discretion, may allow at the trial of any cause, civil or criminal, in said supreme judicial court or the superior court, a sum not exceeding twenty-five dollars per day for the attendance of any expert witness or witnesses at said trial, in taxing the cost of the prevailing party*; but such party or his attorney of record, shall first file an affidavit, during the term at which such trial is held, and before the cause is settled, stating the name, residence, number of days in attendance, and the actual amount paid or to be paid each expert witness, in attendance at such trial. And no more than two dollars per day shall be allowed or taxed by the clerk of courts, in the costs of any suit, for the per diem attendance of a witness, unless the affidavit herein provided, is filed, and the per diem is determined and allowed by the presiding justice." (Italics ours.) Sec. 7, Chap. 126, R. S. 1930.

Having concluded that these expert witness fees are not allowable under Sec. 38 of Chap. 75, R. S. 1930, *supra*, are they recoverable under said Sec. 7? By this statute the legislature first fixed the *per diem* fees of *non-expert witnesses* "in the supreme judicial court or the superior court or in the probate courts and before a trial justice or a municipal court . . . and before referees, auditors, or commissioners specially appointed to take testimony, or special commissioners on disputed claims appointed by probate courts . . . or before the county commissioners" and then proceeded to authorize within the court's discretion the allowance of *expert witness fees* not in excess of twenty-five dollars per day, but only "in said supreme judicial court or the superior court. . . ."

The language of this statute does not permit a construction giving authority for the allowance of expert witness fees in the Probate Court, either original or appellate. The only authority for the allowance of expert witness fees is when an expert testifies "at the trial of any cause, civil or criminal, *in said supreme judicial*

court or the superior court . . .," and the words "the superior court" as used in the statute we hold do not refer to the Superior Court sitting as Supreme Court of Probate. We think that is manifest from the mention of the Probate Courts in the first clause of the statute and the significant non-mention of Probate Courts in the later clause having to do with fees of expert witnesses.

It may also be stated that under this statute, if expert witness fees were taxable, they could be taxed only in the "costs of the prevailing party." Here the party seeking the allowance of these fees prevailed neither in the original nor in the Supreme Court of Probate.

The entry must be,

Exceptions sustained. Decree below reversed insofar as it allowed payment of expert witness fees.

DELLA SPRINGER *vs.* JOHN P. BARNES.

ROBERT AMACHER, AN INFANT UNDER THE AGE OF TWENTY-ONE WHO BRINGS THIS ACTION BY DELLA SPRINGER, HIS MOTHER AND NEXT FRIEND

vs.

JOHN P. BARNES.

Penobscot. Opinion, July 17, 1940.

NEW TRIAL. ASSAULT AND BATTERY.

In action to recover for assault allegedly committed on a party by a police officer, who sought to eject him from basketball game, on boy's failure to heed warning to cease encroaching on playing floor, it was error to instruct that as a matter of law authority of officer to restrain boy ended immediately on parties leaving room where basketball game was in progress and that from then on what officer did was unlawful since the matter was a question for the jury.

A general motion ordinarily does not reach a defect in the judge's charge but where manifest error in law has occurred at the trial of a case and injustice inevitably results, the law of the case may be examined on a motion for a new trial on the ground that the verdict is against the law.

On exceptions and general motion. Two actions, one brought by Robert Amacher, a minor, the other by Della Springer, who seeks to recover for the loss of services of her son and for medical expenses. The suits grew out of an assault alleged to have been made on the boy by the defendant, a police officer of the City of Bangor. On exceptions and motion, after presiding justice directed verdict in favor of each of the plaintiffs. Exceptions and motion sustained and new trials granted in each case. Cases fully appear in the opinion.

Clinton C. Stevens, for plaintiffs.

Charles P. Conners, for defendant.

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

THAXTER, J. We are concerned here with two actions, one brought by Robert Amacher, a minor, the other by Della Springer, his mother, who seeks to recover for the loss of services of her son and for expenses in curing him of injuries. The suits grew out of an assault alleged to have been made on the boy by the defendant, a police officer of the City of Bangor.

The defendant had been detailed to keep order at a basketball game which was played in a room on the third floor of the city hall. The plaintiff, Amacher, a boy in his first year at the Bangor High School, was a spectator at the game. He had entered the room from the fire escape without paying admission; but the fact that he was a trespasser was not known to the defendant at the time the difficulties here involved arose. The plaintiff appears to have encroached on the playing floor at the game and was warned by the defendant to stand back. He did not obey, and the defendant took him by the arm to eject him. After removing the boy from the hall, the officer led him down the first flight of stairs to the second floor. Here according to the officer's story the boy pulled away, and in running down the next flight of stairs, fell and broke his ankle. The boy states that the

officer pushed him down the stairs. Just before this incident the boy apparently asked the officer where he was going to take him and was told that he was going to be taken to the police captain so that this official could talk to him. Whatever may have been the original intent a jury would have been warranted in finding that after the injury this plan was abandoned, and that the boy went voluntarily to the police office asssisted by the officer and was finally taken home in a police automobile, and that after the accident he was in no sense under arrest.

At the close of the evidence the court directed a verdict for the plaintiff, Amacher, leaving to the jury only the assessment of damages. The presiding justice instructed the jury that the officer was within his rights in removing the boy from the assembly hall provided undue force was not used, but that beyond the limits of that room his authority to restrain him ended. The court charged that the officer was guilty of an assault and battery for such restraint as he placed on the boy thereafter. The jury were instructed that the plaintiff was entitled to nominal damages if the injury was caused by his own bravado or recklessness but to substantial damages if it was received in an effort to escape from a restraint which the court held was unlawful. In the suit by the mother the jury were told that if nominal damages only were given to the boy, the mother would not be entitled to recover because she had suffered no loss arising from the unlawful restraint, but that if substantial damages were given to the boy, the mother was entitled to recover the expenses which she had incurred in curing him. There was a verdict for substantial damages in each case. The case of the boy is before us on exceptions to the direction of a verdict in his favor and to the instruction that the defendant was guilty of an assault and battery on him. The case of the mother is brought forward on a general motion.

The exceptions must be sustained. It was error to instruct the jury that as a matter of law the authority of the officer to restrain the boy ended immediately on their leaving the room where the game was in progress, and that from then on what the officer did was unlawful. Assuming as the judge did that the officer, irrespective of his intention ultimately to take the plaintiff to police headquarters, did have the right to remove him, it was a question for the jury to determine whether or not in the proper exercise of that authority he

was justified in taking him as far as the second floor of the building or even farther. To tell the jury that he had authority to remove him from the hall and not from the immediate environs was error.

Just why the case of the mother should have been brought here on a motion and not on exceptions is not clear. It would be an anomaly for the mother to recover unless the boy should be entitled to a verdict. The charge in so far as it applies to the suit of the mother is as erroneous as in the case of the son. A general motion ordinarily does not reach a defect in the judge's charge. Where, however, manifest error in law has occurred in the trial of a case and injustice inevitably results, the law of the case may be examined on a motion for a new trial on the ground that the verdict is against the law. *State* v. *Wright*, 128 Me., 404, 406, 148 A., 141; *Pierce* v. *Rodliff*, 95 Me., 346, 348, 50 A., 32; *Simonds* v. *Maine Tel. & Tel. Co.*, 104 Me., 440, 443, 72 A., 175.

In the case of Robert Amacher the entry will be,

Exceptions sustained.
New trial granted.

In the case of Della Springer the entry will be,

Motion sustained.
New trial granted.

JUNE E. ESTABROOK *vs.* WEBBER MOTOR COMPANY.

CURTIS G. ESTABROOOK *vs.* WEBBER MOTOR COMPANY.

Penobscot. Opinion, July 27, 1940.

PLEADING. NEGLIGENCE. EXCEPTIONS.

A motion to amend declarations is not a correct method to pursue to secure a review and reconsideration of a judicial decision that declarations are insufficient, notwithstanding that motion to amend may have seemed more convenient and less expensive.

Amendments to declaration, seeking recovery for injuries sustained as result of alleged latent defects in automobile, containing a fuller statement of plaintiffs' claims by reiteration, does not cure defect in original declarations consisting of failure to state definitely the defects.

The declaration must state a good cause of action, and there must be an averment of all those facts which it is necessary should be proved to entitle the plaintiff to a verdict.

A good declaration in an action of negligence ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others.

Under the established rules of common law pleading in civil actions the plaintiffs' declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and it must set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits.

The plaintiff is required to state the facts constituting the negligence complained of only so far as they appear to be properly within his knowledge; and therefore, as an exception to the rule that he is required to set forth the act or omission which constitutes the negligence complained of with a reasonable degree of certainty and particularity, it is also a well-settled rule that, where the facts pertaining to the negligence are peculiarly within the knowledge of the defendant and are such that plaintiff cannot be expected to know them, such facts may be alleged with less certainty and particularity than would otherwise be necessary. In such a case it is sufficient to allege the act or omission constituting the negligence complained of in a general way, and the particulars of the negligent act or omission which caused the injury need not be alleged.

The mere fact that a car leaves the road while being operated by one of the plaintiffs raises no presumption or inference of a latent defect as against a distributor of said car.

When facts could have been ascertained by plaintiff, a general allegation of negligence is not sufficient; in such a case it must be alleged with reasonable certainty in what respect defendant was negligent. The defendant is entitled to receive fair notice by the declaration of the claim he is required to defend.

Two elements must be found to exist in order to sustain exceptions. One is that the ruling complained of was wrong, and the other that the party was aggrieved.

Exceptions will not lie to reasons given for the ruling by a presiding justice but only to the ruling itself.

On exceptions. Actions for injuries sustained as a result of alleged latent defects in an automobile sold to Curtis G. Estabrook,

one of the plaintiffs, which automobile some five months later, while being driven by the other plaintiff, June E. Estabrook, left the road, turned over and caused personal injuries. Plaintiffs' amendments to the declaration were disallowed, and plaintiffs excepted. Exceptions overruled. Cases fully appear in the opinion.

Stern & Stern, for plaintiffs.

James M. Gillin,

Myer W. Epstein, for defendant.

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

MANSER, J. These two cases have previously been considered as to the sufficiency of the declarations in the plaintiffs' writs. Special demurrers were filed and sustained and this court overruled exceptions. 136 Me., 233; 7 A., 2d, 894. The plaintiffs then offered amendments, identical in language, so the two do not need separate consideration. Upon objections the amendments were disallowed, and the cases again come forward on exceptions.

The actions are for injuries sustained as a result of alleged latent defects in an automobile sold to Curtis G. Estabrook, one of the plaintiffs, which automobile some five months later, while being driven by the other plaintiff, June E. Estabrook, left the road, turned over and caused personal injuries.

In the former decision, the court pointed out that it is not sufficient to allege merely that a machine which causes injury is defective, and before being required to answer, the defendant was entitled to a definite statement as to the defects, and that to be so informed is not a technical requirement, but a fundamental right. The original declaration upon the point under consideration charged that the defendant on the eighteenth day of May, 1932,

> "did negligently and carelessly sell and furnish the plaintiff with the said Ford automobile, and did negligently and carelessly service the said Ford automobile, which said Ford automobile the said defendant did then, there, and thereafter negligently and carelessly cause and permit to have and contain certain latent defects in the steering gear thereof, and also in other respects; so that, thereafter and heretofore, to wit on the 13th

day of October, 1932 . . . by reason of the said qualities and defects that made said instrumentality dangerous, which qualities and defects the defendant knew, or should have known if in the exercise of due care, the said Ford automobile became suddenly and without warning unmanageable," etc.

The proffered amendment to be appended to the original count was as follows:

"And the plaintiff further alleges and avers that the aforesaid latent defects which made said automobile an imminently dangerous instrumentality and which caused it to become suddenly and without warning unmanageable and uncontrollable were not and could not become known to the plaintiff by the exercise of due care which due care the plaintiff has at all times exercised; but that said latent defects were known to the defendant or could and should have been known to the defendant by the exercise of due care in the performance of its duties aforesaid; that from the nature of this case and the machine involved these facts were then and there and at all times peculiarly within the knowledge or notice of the defendant, and it is not within the power of the plaintiff to specify further than in the foregoing declaration in what particulars the defendant was negligent, except to say that the defendant having knowledge or notice of said latent defects, in negligent disregard of its aforesaid duties, did then and there negligently sell and furnish the said imminently dangerous instrumentality, and did then and there and thereafter negligently cause and permit said automobile to have and contain the said latent defects, and did then and there and thereafter negligently misrepresent said automobile as being free from said latent defects and as being fit to buy, drive, and ride in."

In both written and oral arguments for the plaintiffs, counsel contended that the original declarations were sufficient and that the former decision was wrong. Emphasis was placed on the allegation that the defendant sold to the plaintiff a dangerous instrumentality with latent defects of which the defendant knew or should have known, and that the court failed to consider such allegation.

This is obviously not the correct method to pursue to secure a review and reconsideration of a judicial decision. The correct method is pointed out in *Summit Thread Co.* v. *Corthell*, 132 Me., 336, 171 A., 254, and the reason stated in the brief that "It seemed more convenient and less expensive to move to amend" does not constitute a valid ground for departure from established procedure.

Further, it is contended that the amendments are allowable because they contain a fuller statement of plaintiffs' claims, citing *Anderson* v. *Wetter*, 103 Me., 257, 69 A., 105. They do by reiteration, but do not rectify the particular insufficiency pointed out in the former decision.

Reliance is placed upon the case of *Flaherty* v. *Helfont*, 123 Me., 134, 122 A., 180, as authority for the rule that, in cases of instrumentalities whose dangerous qualities are latent and not obvious, manufacturers, vendors or distributors who intentionally or negligently fail to inform persons dealing with them of such qualities, are liable for injuries caused thereby to persons whose exposure to the danger could reasonably be contemplated, and that automobiles may become such instrumentalities through latent defects in brakes, steering gear or in other respects. The court in that case was stating a substantive rule of law and not passing upon the sufficiency of pleading, which was not in issue.

Examination of the cases cited by the court to the principles laid down in the above case reveals that the defects complained of were definitely asserted by the respective plaintiffs.

In *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed., 878, the complaint alleges that spokes in the wheel of the vehicle were made from dead, dozy and rotten timber, unfit for the purpose, and their strength further weakened by holes bored therein.

So in *Collette* v. *Page* (R. I.), 114 A., 136, allegation was that the automobile was in a dangerous state of repair on account of bolts being loose, which ordinarily made the radius rod of the automobile secure.

Again, in *Texas Co.* v. *Veloz*, 162 S. W., 377, claim was that the automobile was in bad repair in that the tires were punctured and there was a defect in the carburetor, causing the car to run at a rapid and excessive rate of speed.

In *MacPherson* v. *Buick Motor Co.*, 217 N. Y., 382, 111 N. E.,

1050, it is shown that the complaint was that the spokes of one of the wheels were made of defective wood and crumbled into fragments.

In *Olds Motor Works* v. *Shaffer*, 145 Ky., 616, 140 S. W., 1047, the defective condition complained of was the unsafe attachment of a rumble seat to a tool box so that the box split, causing the accident.

None of these cases support the plaintiffs' contention that specific allegations as to defective condition are unnecessary.

There is, however, a new element in the proposed amendments, which, though not commented upon by counsel on either side, requires consideration. It is the allegation, not contained in the original declaration, that the latent defects "were not and could not become known to the plaintiff by the exercise of due care," and "It is not within the power of the plaintiff to specify further than in the foregoing declaration in what particulars the defendant was negligent."

Does this allegation sufficiently excuse the plaintiffs from setting forth the particular defects? To determine this question the court must first have regard to the recognized requirements of pleading in this jurisdiction. Beginning with *Foster* v. *Beaty*, 1 Me., 304, the court said:

> "The declaration must state a good cause of action, and there must be an averment of all those facts which it is necessary should be proved to entitle the plaintiff to a verdict."

Again, in *Ouelette* v. *Miller*, 134 Me., 162, 183 A., 341, 343, the court quoted from *Boardman* v. *Creighton*, 93 Me., 17, 44 A., 121, as to the requisites of a good declaration in an action of negligence as follows:

> "It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others."

In *McGraw* v. *Paper Co.*, 97 Me., 343, 54 A., 762, it was alleged that the plaintiff was set to work upon a machine called a barker and the defendant was charged with negligence in "that said barker was

then and there defective and dangerous, and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards." The court held:

> "Good pleading requires in such case a definite statement of the particular defect, so far as it may be practicable to state it, which caused the injury, to the end that the defendant may know what claim he is to meet, and to which the evidence is to be directed. There may be cases of a complicated machine, where it may not be practicable or even possible to allege with certainty the identical defect causing the injury, but even in such case it may be stated in sufficiently specific terms to indicate to the defendant the charge he is called upon to meet,— or the difficulty may be obviated by several counts, with such variations as circumstances may require."

In *Sessions* v. *Foster*, 123 Me., 466, 123 A., 898, 899, the court stated:

> "But under the established rules of common law pleading in civil actions the plaintiff's declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and it must set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits, in order that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court that is to give judgment. . . . It is not enough to refer to matters in an uncertain, doubtful and ambiguous manner, as a kind of general dragnet to meet whatever evidence may be presented."

Such are the general rules as to the necessity of particularity in pleading as laid down in our own decisions.

Attention must now be directed as to whether the amended declarations comply "with that degree of certainty of which the nature of the matter pleaded reasonably admits," and contain "a definite statement of the particular defect, so far as it may be practicable to state it." In 45 C. J., 1084, Sec. 654, is a comprehensive statement in the following language:

"Plaintiff is required to state the facts constituting the negligence complained of only so far as they appear to be properly within his knowledge; and therefore, as an exception to the rule that he is required to set forth the act or omission which constitutes the negligence complained of with a reasonable degree of certainty and particularity, it is also a well settled rule that, where the facts pertaining to the negligence are peculiarly within the knowledge of the defendant and are such that plaintiff cannot be expected to know them, such facts may be alleged with less certainty and particularity than would otherwise be necessary. In such a case it is sufficient to allege the act or omission constituting the negligence complained of in a general way, and the particulars of the negligent act or omission which caused the injury need not be alleged. Where, however, the facts could have been ascertained by plaintiff, he must allege with reasonable certainty in what respect defendant was negligent; and it has been held that the mere fact that defendant has complete knowledge concerning the instrumentality which caused the injury does not relieve plaintiff from setting out the particulars in which defendant was negligent in respect of such instrumentality."

Applying the principles thus set forth, it is evident that when special demurrers are interposed in cases of this character, it is not merely the allegation of knowledge as to latent defects by the defendant and want of such knowledge by the plaintiffs which solves the question, but whether such allegation is sufficient or instead more particulars should be required, considering the nature of the matter pleaded.

From the entire declaration is to be obtained the salient facts. It is set forth, in effect, that the defendant was a distributor of Ford automobiles and sold a new de luxe roadster to one of the plaintiffs. The car was delivered and was in the possession and use of the plaintiffs for five months, when suddenly one day the car became unmanageable, left the road and overturned. The claim of negligence is that the defendant caused and permitted the car to have "certain latent defects in the steering gear thereof and also in other respects."

The defendant, by demurrer, raises the issue that it should not be compelled to meet any such vague charge. The mere fact that the car left the road while being operated by one of the plaintiffs raises no presumption or inference of a latent defect. Negligence of the operator might be inferred under the doctrine of *res ipsa loquitur* as held in *Chaisson* v. *Williams*, 130 Me., 341, 156 A., 154, and *Shea* v. *Hern*, 132 Me., 361, 171 A., 248. Inspection and examination of the car, and its mechanical condition, after the accident, with the resultant information thereby obtainable, was entirely open to the plaintiffs, who had exclusive possession. That such examination was undertaken, with negative results, is not alleged. Instead, after a lapse of five years and ten months, suit is instituted not against the manufacturer, but against a sales agent in Bangor, alleging indefinitely a latent defect, of which "the defendant knew, or should have known."

We agree with the principle as stated in *Kelly* v. *Davis*, 48 R. I., 94, 135 A., 602. There the court said:

> "the case stated is that the defendant left his motor running when he stopped and as a consequence the automobile, without the interposition of any human agency, started in motion and ran into plaintiff. In an action for negligence, the declaration must allege the facts which are the basis of defendant's supposed duty to plaintiff, and the breach of such duty. When, as in this case, the facts could have been ascertained by plaintiff, a general allegation of negligence is not sufficient; in such a case it must be alleged with reasonable certainty in what respect defendant was negligent. The defendant is entitled to receive fair notice by the declaration of the claim he is required to defend."

We do not need to endorse or subscribe to the rule adopted in the Georgia court which holds that specification of the particulars of the negligence relied on cannot be avoided by an allegation that the plaintiff has been unable to ascertain the particular acts of negligence causing the injury, and that on account of the manner in which the injury was inflicted they were matters more peculiarly within the knowledge of the defendant than of the plaintiff. This is laid down in *Hudgins* v. *Coca Cola Bottling Co.*, 122 Ga., 695, 50 S. E., 974, citing a line of former decisions of that court. The rule of

res ipsa loquitur not being applicable, there is, however, force in the question propounded in the above case:

> "What proof of negligence could be offered when he (plaintiff) avers that he cannot, for want of information, allege any specific act of negligence?"

In any event, the plaintiffs should show that they come clearly within exception to the well-settled rule requiring particularity in specification of acts of negligence or defective conditions. They have made no attempt to do so in this case but instead from the facts they do allege appear to be chargeable with the means of knowledge and their bare assertion of lack of information cannot control.

It is deemed proper to comment as to the record with relation to the ruling of the presiding justice. It is noted that the presiding justice in his extemporaneous observations indicated that he believed the amendment undertook to introduce a new cause of action, and apparently based his decision largely upon that ground. The reasoning might well be open to argument, but it is the decision and not the reason given therefor which is the determining factor. Two elements must be found to exist in order to sustain exceptions. One is that the ruling complained of was wrong, and the other that the party was aggrieved. In these cases neither element is present. Exceptions are not claimed and would not lie to reasons given for the ruling, but only to the ruling itself. When the presiding justice has arrived at a correct result, the process of reasoning which brought him thereto is without significance. To hold otherwise would be trifling with judicial procedure. *Gordon* v. *Conley*, 107 Me., 286, 78 A., 365; *Mencher* v. *Waterman*, 125 Me., 178, 132 A., 132, and cases there cited.

Exceptions overruled.

SUSAN LUTICK *vs.* WALTER SILEIKA.

Oxford. Opinion, August 6, 1940.

TRUSTS. WILLS. EQUITY.

In order to impress trust on realty on ground of oral contract to devise realty in consideration of services, more than mere non-performance of such contract must be shown, and it must appear that plaintiff, in performance of and because of the contract, was compelled to and in fact did change her condition in such manner and to such an extent that in the circumstances, failure to devise the property amounted to fraud on plaintiff.

Where no findings of fact were filed by sitting justice, entry of final decree for plaintiff imported a finding of all subsidiary facts necessary to support such decree.

The general rule is that a finding of fact by a sitting justice, based on evidence, is final and conclusive; but, if a final decree is not supported by evidence of real worth and probative value, or if it is based on an error of law, it cannot be sustained on appeal.

On appeal. Action in equity by Susan Lutick against Walter Sileika to impress trust on realty. Decree in favor of plaintiff. Defendant appeals. Appeal sustained. Decree below reversed. Case remanded for decree in accordance with this opinion. Case fully appears in the opinion.

Theodore Gonya, for plaintiff.

Peter M. MacDonald,

Locke, Campbell & Reid, for defendant.

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

WORSTER, J. On appeal in equity.

The defendant, as residuary devisee under the will of Michael Ramaika, deceased, acquired certain real estate, worth about $1,000, which Ramaika in his lifetime called his "home," and which

the plaintiff claims, in substance and effect, Ramaika had promised to leave to her as a reward for services rendered to him.

She now seeks to have that real estate impressed with a trust in her favor, and prays that the defendant be ordered to convey it to her. The sitting justice so ordered, and the defendant appealed.

That justice might have found from the record in this case, as follows:

Ramaika died July 10, 1939, having never married. His will, executed June 8, 1937, has been allowed and admitted to probate. He was the plaintiff's godfather, and cousin of her father, Joe Lutick, in whose home Ramaika boarded from 1910 until 1928, when he built and moved into a house on the lot of land that he had purchased, adjacent to Lutick's premises.

In December, 1929, Ramaika was very ill with diabetes, and was taken to a hospital where he remained about three and one-half months. He was then taken to the Lutick home. At that time he was confined to his bed, and required considerable care, not only on account of his diabetic condition, but also because of a carbuncle on his back, which "was constantly draining" and had to be frequently dressed, and because he often fouled his bed.

He had great affection for the plaintiff, whom, at times, he called daughter. She was then about seventeen years of age, and a sophomore in the high school. Having received instructions from the nurses as to insulin injections and diabetic diet, she took care of him from the time of his arrival at the Lutick home from the hospital, in March, 1930. In a few days, however, Ramaika was told that he would have to go back to the hospital, because the work was too much for her. This he did not want to do, and then it was that he promised her that if she would take care of him "until he was able to get on his feet," he would fully reward her by leaving his home to her when he died. Whereupon the plaintiff, relying on that promise, properly took care of him for about ten weeks in all, and "until he was able to get on his feet," in the sense those words were used by him, in his promise to her. He then returned to his own home, but even after that the plaintiff continued, for a while, to render him some assistance.

And, from the record, the justice might very properly have concluded that an oral contract had been entered into by and between

Ramaika and this plaintiff, as claimed by her; that it had been fully performed on her part; and that he did not leave the property to her as he had agreed to do, thus breaking his contract.

But, in order to fasten a trust on this real estate in favor of the plaintiff, something more must be shown than the mere non-performance by Ramaika of his contract to devise such property to her.

It must appear that the plaintiff, in the performance of her contract, and because thereof, was compelled to, and in fact did, change her condition in such a manner and to such an extent that, in the circumstances of the case, Ramaika's failure to devise the property to her amounted to a fraud on her.

In *Pelletier* v. *Deering*, 131 Me., 462, at 468, 164 A., 195, the court said:

> "There are, however, limitations upon the right to equitable relief in cases of this kind. If the promisee under an agreement such as is found here has changed his condition and relation so that a refusal to complete would be a fraud upon him and there is present no inadequacy of consideration nor circumstances nor conditions rendering the claim inequitable, if the courts of law afford no adequate remedy, a court of equity will construe the agreement as binding the property of the testator or intestate so as to fasten or impress a trust on it in favor of the promisee. . . . If these essential equitable requisites are lacking, the remedy is at law."

Whether or not, in order to carry out her part of the contract, this plaintiff did change her condition, within the meaning of the rule just quoted, was a question of fact for the sitting justice. No findings of fact were filed, but the entry of the final decree in her favor imports a finding of all subsidiary facts necessary to support such decree.

Undoubtedly, the general rule is that a finding of fact by a sitting justice, based on evidence, is final and conclusive; but, on the other hand, if a final decree is not supported by evidence of real worth and probative value, or if it is based on an error of law, it cannot be sustained on appeal.

In the instant case, there is no evidence whatsoever that the plain-

tiff ever changed her condition in the sense that word is used in the foregoing rule. Moreover, other than the performance of the actual services required of her in taking care of Ramaika, the plaintiff did not change her condition at all.

At the time the contract was made, she was living at home with her father and mother, and attending high school; and during the ten weeks that she took care of Ramaika, she continued to live at home and attend high school, as before. The mere fact that she worked hard, and had to and did give up some social activities during that comparatively short time, did not constitute such a change.

And so the evidence, considered in the light most favorable to the plaintiff, does not, as a matter of law, entitle her to the relief granted by that decree.

It is unnecessary to consider the effect of the provisions of Subsection VII of Section 1 of Chapter 150 of the Laws of Maine, 1935, because they do not apply to agreements made prior to July 1, 1935, so have no bearing on this case.

The decree appealed from, being unsupported by the evidence, and based on error of law, is plainly wrong, and cannot be sustained.

The mandate is

Appeal sustained.
Decree below reversed.
Case remanded for decree in accordance with this opinion.

HUBBARD C. NEWELL *vs.* NELLIE P. STANLEY.

Cumberland. Opinion, August 7, 1940.

REFERENCE AND REFEREES. COSTS. WITNESSES.

In the absence of statute, expert witness fees cannot be allowed to the prevailing party and included in his taxable costs.

Referees appointed under rule of court, by agreement of the parties, undoubtedly act judicially, but they are not the court. They constitute a special tribunal of the parties' own choosing, whose report must be accepted by the court before any judgment can be rendered thereon.

A hearing before referees is not a trial of a cause in the Superior Court within the meaning of R. S. 1930, *Chap.* 126, *Sec.* 7.

Revised Statutes 1930, *Chapter* 96, *Section* 160, *only applies where the report of referees is accepted.*

Revised Statutes 1930, *Chapter* 96, *Section* 160, *only applies to those costs which the clerk himself might tax in the first instance. It does not apply to expert witness fees, for in no case can they be included by the clerk in the taxable costs of the prevailing party until after they have been determined and allowed by the presiding justice.*

Referees have no power to allow expert witness fees and include them in the costs of reference, by virtue of the provisions of R. S. 1930, *Chap.* 126, *Sec.* 8.

Revised Statutes 1930, *Chapter* 96, *Section* 144, *pertaining to recovery of quarter costs in certain cases, in actions in court, excepts reference cases from the quarter-costs rule.*

Where referees have actually allowed plaintiff's costs in their report it is equivalent to an explicit refusal to allow the plaintiff any further or other costs than those mentioned in their report.

By agreeing to an unrestricted, unlimited reference of a case to referees under rule of court, plaintiff waived all the statutory rights which he might have had to expert witness fees and costs of court had the case been tried in court.

On exceptions. On motion by plaintiff to presiding justice requesting allowance of expert witness fees for two witnesses who had testified at the hearing of the case before referees. Motion denied. Exceptions by plaintiff. Exceptions overruled. Case fully appears in the opinion.

Bradley, Linnell, Nulty & Brown, for plaintiff.

Pattangall, Goodspeed & Williamson, for defendant.

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

WORSTER, J. On exceptions to the refusal of the presiding justice to allow expert witness fees for two witnesses who had testified at the hearing of this case before referees.

This is an action of assumpsit on an account annexed, to recover the balance due for labor and materials furnished in and for the construction of a house and garage, and for certain other items which it is unnecessary to mention here.

The writ was entered at the October Term, 1939, of the Superior Court in our County of Cumberland, and at the same term, by agreement of the parties, the action was referred to referees, to whom a rule of reference was issued under the provisions of R. S. 1930, Chap. 96, Sec. 94.

After hearing the case, the referees found for the plaintiff in the sum of $12,467.21, and made a report of their decision to that court at its January Term, 1940.

At said January Term, and after the report of the referees had been made as aforesaid, the plaintiff filed a motion in that court, under oath, addressed to the justice of the Superior Court, praying for the allowance of expert witness fees for two builders and contractors who, it appears from the motion, had testified for the plaintiff at the hearing before the referees. It is claimed by the plaintiff that each of these witnesses was in attendance at that hearing for three days, and that it is necessary for him to pay each of them, as an expert witness, the sum of $25.00 a day, or a total of $75.00 each.

No hearing was had on the motion at that term of court, but the matter came on to be heard at the next term, when the presiding justice made an order thereon, which reads as follows:

> "Upon consideration of the foregoing, motion is denied, no expert witness fees allowed."

Thereupon, the plaintiff duly excepted, and presents here his bill of exceptions, which has been "allowed if allowable" by the presiding justice.

It is stated in the bill that:

> "The sole question before the Superior Court on Plaintiff's Motion for allowance of expert witness fees was whether or not the Superior Court had power in this case to allow expert witness fees. . . .
>
> "The Superior Court dismissed Plaintiff's Motion on the ground that it had no jurisdiction to allow expert witness fees in this case which had been heard by Referees."

In the absence of statute, expert witness fees cannot be allowed to the prevailing party and included in his taxable costs. 15 Corpus Juris, page 131; 20 Corpus Juris Secundum, page 477. See, also,

Goodridge, Adm'x et al., Appellants from Decree of Judge of Probate, 137 Me., 13, 14 A., 2d, 501.

But the plaintiff claims that the court now has jurisdiction to allow expert witness fees in such a case as this, under the provisions of R. S. 1930, Chap. 126, Sec. 7, which reads as follows:

> "Witnesses in the supreme judicial court or the superior court or in the probate courts and before a trial justice or a municipal court, shall receive two dollars, and before referees, auditors, or commissioners specially appointed to take testimony, or special commissioners on disputed claims appointed by probate courts, one dollar and fifty cents, or before the county commissioners one dollar, for each day's attendance and six cents a mile for each mile's travel going and returning home; but the court in its discretion, may allow at the trial of any cause, civil or criminal, in said supreme judicial court or the superior court, a sum not exceeding twenty-five dollars per day for the attendance of any expert witness or witnesses at said trial, in taxing the costs of the prevailing party; but such party or his attorney of record, shall first file an affidavit, during the term at which such trial is held, and before the cause is settled, stating the name, residence, number of days in attendance, and the actual amount paid or to be paid each expert witness, in attendance at such trial. And no more than two dollars per day shall be allowed or taxed by the clerk of courts, in the costs of any suit, for the per diem attendance of a witness, unless the affidavit herein provided, is filed, and the per diem is determined and allowed by the presiding justice."

It is to be noted that under this statute expert witness fees can be allowed only "at the trial of any cause, civil or criminal, in said supreme judicial court or the superior court. . . ." *Goodridge, Adm'x et al., Appellants from Decree of Judge of Probate*, supra.

But, the plaintiff argues, a hearing before referees, serving under a rule of reference issued out of the superior court, is a trial in the superior court, within the meaning of this statute, so far as the provision relative to expert witness fees is concerned. This contention cannot be sustained.

Referees appointed under a rule of court, by agreement of the

parties, undoubtedly act judicially, but they are not the court. They constitute a special tribunal of the parties' own choosing, whose report must be accepted by the court before any judgment can be rendered thereon. *Perry* v. *Ames, Appellant*, 112 Me., 202, 91 A., 931; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171; *Kliman* v. *Dubuc*, 134 Me., 112, 182 A., 160.

And since referees are not the court, it necessarily follows that a hearing before them is not a trial of a cause in the superior court, within the meaning of this statute.

The plaintiff, however, urges that since the report of the referees has been filed in court, in this case, he is entitled to have the court pass upon his prayer for the allowance of expert witness fees. In support of this contention, he cites R. S. 1930, Chap. 96, Sec. 160, which provides that:

> "When . . . a report of referees is accepted, in an action, either party on application to the court, may have the costs recoverable taxed by the clerk, and passed upon by the court during the term. . . ."

That statute is not in point here. It only applies where the "report of referees is accepted," but there is nothing in the instant case to show that the report of the referees ever has been accepted.

In fact, it is conceded by the defendant that it has not been accepted, for he states in his brief:

> "The Report was filed just prior to adjournment of the January Term and has not yet been allowed."

Moreover, even if the report had been accepted, that statute would not support the plaintiff's contention, because it only applies to those costs which the clerk himself might tax in the first instance. It does not apply to expert witness fees, for in no case can they be included by the clerk in the taxable costs of the prevailing party until after they have been determined and allowed by the presiding justice. R. S. 1930, Chap. 126, Sec. 7.

Nor have the referees power to allow expert witness fees and include them in the costs of reference, by virtue of the provisions of R. S. 1930, Chap. 126, Sec. 8. The section last cited is the general statute authorizing the taxation of costs, exclusive of expert wit-

ness fees, for the prevailing party in an action in court, and it is provided therein that:

> "No referee shall allow costs in any proceedings in excess of the above provisions."

But the plaintiff also relies on a provision in R. S. 1930, Chap. 96, Sec. 144, which reads as follows:

> "On report of referees, full costs may be allowed, unless the report otherwise provides."

This is the closing sentence in the section dealing with the recovery of quarter costs in certain cases, in actions in court, and its only purpose is to except reference cases from the quarter-costs rule. So that statute is not in point here. See *Stevens* v. *Spear*, 82 Me., 184, 19 A., 157.

Moreover, the referees actually have allowed costs in their report. It is therein stated that:

> "The Plaintiff is allowed costs of this reference in the sum of $16.90 . . . and costs of court as computed by the Clerk of Courts."

This is equivalent to an explicit refusal to allow the plaintiff any further or other costs than those mentioned in their report.

In any event, by agreeing to an unrestricted, unlimited reference of this case to referees under a rule of court, the plaintiff waived all the statutory rights which he might have had to expert witness fees and costs of court had the case been tried in court. *Robinson* v. *Chase*, 115 Me., 165, 98 A., 483.

And, having voluntarily submitted his case to the decision of referees, as a special tribunal, the plaintiff must be content to forego his claim for expert witness fees, which that tribunal had no power to allow, and did not allow.

The presiding justice had no jurisdiction to grant the plaintiff's motion.

There was no error in the ruling complained of.

Exceptions overruled.

AGNES A. PLUMMER *vs.* JAMES L. PLUMMER.

Cumberland. Opinion, August 12, 1940.

DIVORCE.

Apart from statute the question of alimony cannot be raised after a decree of divorce is granted, if it was in issue at the hearing and was omitted from the decree without fraud or mistake.

Statutes which authorize modifications of decrees as to alimony or support do not apply where no alimony is granted in the decree.

The sole power of the court over divorce is derived from statute.

Apart from the inherent right to annul a decree because of fraud, the court, unless possibly when it reserves the right to revise an award of alimony, has no power except as given by statute to alter a decree of divorce in any particular after the adjournment of the term of court at which it was entered.

The amendments to statute P. L. 1937, *Chap.* 7, *P. L.* 1939, *Chap.* 271, *giving Superior Court the right at any time to "alter, amend or suspend a decree for alimony or specific sum when it appears that justice requires" are not retroactive.*

On report. Suit for divorce by Agnes A. Plummer against James L. Plummer, wherein decree was entered for libelant without provision for alimony or support. Petitioner filed petition to amend or alter decree by ordering defendant to pay her alimony. On report with stipulation that if as a matter of law the petitioner may not sustain her petition the entry shall be, "petition denied"; but that if as a matter of law the petitioner has the right to maintain her petition, the case is to be remanded to the Superior Court for a hearing on the merits. Case remanded to the Superior Court for an entry "petition denied." Case fully appears in the opinion.

Jacob H. Berman,
Edward J. Berman, for petitioner.
Richard E. Harvey,
Frank P. Preti, for respondent.

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

THAXTER, J. At the January Term, 1933, of the Superior Court for the County of Cumberland this petitioner, Agnes A. Plummer, obtained a divorce from this respondent, James L. Plummer. By the terms of the decree the care and custody of a minor child, Lewis L. Plummer, were given to the petitioner and the father was ordered to pay $10 per week for the support of the child. There was no award to the petitioner of any sum either for alimony or support and there is no claim that such omission was through fraud, accident, or mistake. The child attained his majority December 29, 1939. The husband, James L. Plummer, has remarried. February 2, 1940, the former wife filed a petition in the Superior Court for the County of Cumberland which alleges that conditions have altered and that she is in dire need of support. She prays that the court may alter or amend the decree of divorce entered in 1933 by ordering the husband to pay to her such sum of money as the court deems proper for her support or as alimony. The case is before us on report under a stipulation that if as a matter of law the petitioner may not sustain her petition the entry shall be "petition denied"; but that if as a matter of law the petitioner has the right to maintain her petition, the case is to be remanded to the Superior Court for a hearing on the merits.

Counsel profess to bring before this court the question whether the Superior Court may under the facts set forth amend or alter a decree of divorce by ordering the former husband to contribute to the former wife's support or to pay her alimony.

Strictly speaking this is not a petition to review and alter a decree relating to alimony. There was no decree entered on the subject. And as was said in *Henderson* v. *Henderson*, 64 Me., 419, 420, where a similar question was before the court: "What is there to be reviewed?" The general rule is that apart from statute the question of alimony cannot be raised after a decree of divorce is granted, if it was in issue at the hearing and was omitted from the decree without fraud or mistake. *Henderson* v. *Henderson*, supra; *Marshall* v. *Marshall*, 162 Md., 116, 159 A., 260; *Bassett* v. *Bassett*, 99 Wis., 344, 74 N. W., 780; *McClure* v. *McClure*, 4 Cal. (2d), 356, 49 P.,

2d, 584; 17 Am. Jur. 494. Furthermore statutes which authorize modifications of decrees as to alimony or support do not apply where no alimony is granted in the decree. *Howell* v. *Howell*, 104 Cal., 45, 37 P., 770; *Bassett* v. *Bassett*, supra; *Cameron* v. *Cameron*, 31 S. D., 335, 140 N. W., 700; *Moross* v. *Moross*, 129 Mich., 27, 87 N. W., 1035; *Harner* v. *Harner*, 255 Mich., 515, 238 N. W., 264; *Herbert* v. *Herbert*, 221 Mo. App., 201, 299 S. W., 840; *Kelley* v. *Kelley*, 317 Ill., 104, 147 N. E., 659; Note 83 A. L. R., 1250. See also *Henderson* v. *Henderson*, supra.

There is a further reason why the petitioner cannot prevail. The sole power of our court over divorce is derived from statute. *Henderson* v. *Henderson*, supra; *Stratton* v. *Stratton*, 73 Me., 481; *Jones* v. *Jones*, 136 Me., 238, 8 A., 2d., 141. Apart from the inherent right to annul a decree because of fraud, *Holmes* v. *Holmes*, 63 Me., 420; *Lord* v. *Lord*, 66 Me., 265, the court, unless possibly when it reserves the right to revise an award of alimony, has no power except as given by statute to alter a decree of divorce in any particular after the adjournment of the term of court at which it was entered. *Stratton* v. *Stratton*, supra.

The amendments to our statute, P. L. 1937, Chap. 7, P. L. 1939, Chap. 271, giving to the Superior Court the right at any time to "alter, amend or suspend a decree for alimony or specific sum when it appears that justice requires" are not applicable, even if otherwise relevant to the problem before us, for their provisions are not retroactive. *White* v. *Shalit*, 136 Me., 65, 1 A., 2d, 765. The provisions of R. S. 1930, Chap. 73, Sec. 11, therefore govern the rights of this petitioner. She does not bring herself within the statutory requirements in at least one particular. She must show that "justice has not been done through fraud, accident, mistake, or misfortune." There is no pretense that the decree in this case was obtained "through fraud, accident, mistake, or misfortune." The basis of her claim is that conditions have altered and that she is now in need of support. The statute applicable here does not provide for a review or modification of the decree under such circumstances.

Case remanded to the Superior Court for an entry "petition denied."

FRANZ U. BURKETT, ATTORNEY-GENERAL, BY INFORMATION,

PETITIONER FOR MANDAMUS, HERBERT W. LEACH, RELATOR

vs.

FREDERICK ROBIE, SECRETARY OF STATE.

Penobscot. Opinion, August 21, 1940.

MANDAMUS. ELECTIONS.

Exceptions to ruling of justice of Superior Court denying peremptory writ of mandamus and quashing alternative writ of mandamus, could be certified directly to the chief justice of the Supreme Judicial Court under the provisions of R. S. 1930, *Chap.* 116, *Sec.* 18.

The procedure for determining the result of a primary election, and ascertaining the names of candidates of the various parties to be voted for at a state election, is regulated and defined by statute.

Under statutes, secretary of state has no voice in the determination of what votes or ballots shall be counted in a primary election. That is no part of his duty, and he has no right or authority to reject or count ballots. It is the duty of the governor and council to ascertain the candidates who have received the highest number of votes cast by their respective parties.

One cannot be properly ordered in a mandamus proceeding to perform an act which plain duty does not require him to perform, nor can a writ of mandamus be issued commanding the absolute performance of an act which the respondent has no power to perform.

The secretary of state cannot be required to violate his statutory duty. The function of mandamus is to enforce obedience and not disobedience of the law.

On exceptions. Proceedings in mandamus to compel the secretary of state to reject and not count certain votes which had been cast at the primary election held June 17, 1940, for the nomination of candidates to be voted for at the state election to be held in September, 1940, and to compel the Secretary of State to issue to Herbert W. Leach a certificate that he had received the nomination of the Re-

publican party for the office of county commissioner for the County of Penobscot. The peremptory writ was denied and the alternative writ was quashed. Herbert W. Leach brings exceptions. Exceptions overruled. Case fully appears in the opinion.

Arthur L. Thayer,
Ross St. Germain, for relator.
Harold Towle, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. On exceptions by relator to the ruling of a justice of the Superior Court denying the peremptory writ and quashing the alternative writ which had been issued on a petition for mandamus to compel the secretary of state, of the State of Maine, to reject and not count certain votes which had been cast at the primary election held in this state on June 17, 1940, for the nomination of candidates to be voted for at the state election to be held in September, next; to compel said secretary to issue to the relator a certificate that he had received the nomination of the Republican party for the office of county commissioner for the County of Penobscot; and to enjoin the issuance to Walter F. Ulmer of a certificate that he had been nominated by that party to that office. The last mentioned prayer, however, is not stated as a ground of complaint in the alternative writ which was issued.

The exceptions in this case have been certified directly to the chief justice under the provisions of R. S. 1930, Chap. 116, Sec. 18. Although the peremptory writ was not issued, this form of procedure has judicial sanction. *Nichols* v. *Dunton*, 113 Me., 282, 93 A., 746; *Lawrence* v. *Richards*, 111 Me., 95, 88 A., 92.

At the primary election, the relator, Herbert W. Leach, and certain other persons who need not be named here, were candidates for the nomination by the Republican party for the office of county commissioner.

After the primary election had been held, the governor and council, pursuant to the provisions of R. S. 1930, Chap. 7, Sec. 16, as amended by the P. L. 1931, Chap. 75, opened, compared, and tabulated the votes which had been returned. From that tabulation it ap-

pears that Walter F. Ulmer received the highest number of votes of the Republican party for nomination for that office, and that the relator received the next highest number.

Subsequently, the governor and council, on a recount of the ballots so far as they related to those cast for the relator and Walter F. Ulmer, acting under the provisions of R. S. 1930, Chap. 7, Sec. 17, supplemented by Sec. 17-A, P. L. 1933, Chap. 217, found and ascertained that Walter F. Ulmer had received the highest and the relator the next highest number of votes cast by the Republican party for the nomination, notwithstanding errors found and corrected.

It is the contention of the relator that on the recount, the governor and council counted sixteen (16) disputed ballots for Walter F. Ulmer which should not have been counted for him; and if they had not been so counted, the relator, and not Walter F. Ulmer, would have received the highest number of lawful votes cast, which would have entitled the relator to a certificate of nomination by the Republican party for that office.

In the petition, as originally presented, the petitioner prayed that the governor and council be commanded to reject and declare invalid such disputed votes and that the same should not be counted for said Walter F. Ulmer, but that prayer, on motion by the petitioner, was stricken out, and the governor and council were not named as parties in the alternative writ, which was issued against the secretary of state only. Therefore, it is unnecessary for us to decide whether the action of the governor and council in determining the result of a primary election and their decision as to candidates receiving the highest number of votes cast, can be reviewed by the court. That question is not before us, for this proceeding as now postured is against the secretary of state only.

The procedure for determining the result of a primary election, and ascertaining the names of candidates of the various parties to be voted for at a state election, is regulated and defined by statute. R. S. 1930, Chap. 7, Sec. 16, as amended by P. L. 1931, Chap. 75, reads as follows:

> "The governor and council, by the first Tuesday of July in each year in which a primary election is held hereunder, shall open and compare the votes so returned hereunder, and have

the same tabulated, and forthwith thereafter have forwarded to each candidate a copy of said tabulations of his precinct or district, and may receive testimony on oath to prove that the return from any city, town, or plantation does not agree with the record of the vote of such city, town, or plantation in the number of votes or the names of the persons voted for, and to prove which of them is correct; and the return, when found to be erroneous, may be corrected by the record. No such correction can be made without application within fourteen days after the returns are opened and tabulated, stating the error alleged, nor without reasonable notice thereof given to the person affected by such correction, and during said fourteen days any person voted for may personally, and by or with counsel, examine said returns in the presence of the governor and council, or either of them, or any member of the council, or the secretary of state. The person having the highest number of votes for nomination to any office shall be deemed to have been nominated by his political party for that office, provided that he or she shall have received at least as many votes as would be required to place his or her name on the primary election ballot by petition, and provided further that when a tie shall exist between two or more persons for the same nomination by reason of said two or more persons having at least as many votes as would be required to place his or her name on the primary election ballot by petition, and having an equal and the highest number of votes for nomination by one party to one and the same office, the secretary of state shall give notice to the several persons having the highest and equal number of votes to attend at the office of the secretary of state at a time to be appointed by said secretary, who shall then and there proceed publicly to decide by lot which of the persons so having an equal number of votes shall be declared nominated by his party with like effect as if there had been no such tie. To ascertain what persons have received the highest number of votes, the governor and council shall count and declare for any person all votes appearing by said returns to have been intentionally cast for him, although his name upon the return is mis-

spelled or written with only the initial or initials of his christian name or names, or with wrong initials or otherwise as the case may be; and they may hear testimony upon oath, in relation to such returns, in order to get at the intention of the voters and shall decide accordingly. When a return is defective by reason of any informality, an attested copy of the record may be substituted therefor.

"The secretary of state shall enter in a register of nominations, to be kept by him for the purpose, the nominations for each party so ascertained, and shall forthwith notify by registered mail each person who is so nominated."

And it is provided in R. S, Chap. 7, Sec. 17 that:

"Upon written application filed with the secretary of state within ten days after the returns are opened and tabulated, alleging that the return or record of the vote cast in any town does not correctly state the vote as actually cast in such town, and specifying the offices as to which such errors are believed to have occurred, the secretary of state shall direct such clerk to forward to him forthwith the ballots cast in said town. The governor and council in open meeting shall examine the ballots cast in said town, and returned to the secretary of state, and if such return or record is found to be erroneous the return shall be corrected in accordance with the number of ballots found to have been actually cast in said town; but no such examination of the ballots shall be made without reasonable notice to all candidates upon the ballot for the offices specified in the application as to which such errors are alleged to have occurred, stating when and where such examination will be made and affording such candidates a reasonable opportunity to be present in person or by counsel at such examination and be heard in relation thereto."

By P. L. 1933, Chap. 217, Sec. 17-A is added to the above-quoted section:

"In the examination of ballots upon application as provided in the preceding section and in section 55 of chapter 8, the gov-

ernor and council upon making corrected returns may in their discretion accept such facts as the candidates involved shall agree upon."

It is apparent from the statutes quoted that the secretary of state has no voice in the determination of what votes or ballots shall be counted. That is no part of his duty, and he has no right or authority to reject or count ballots. It is the duty of the governor and council to ascertain the candidates who have received the highest number of votes cast by their respective parties.

One cannot be properly ordered in a mandamus proceeding to perform an act which plain duty does not require him to perform (*Webster* v. *Ballou*, 108 Me., 522, 524, 81 A., 1009), nor can a writ of mandamus be issued commanding the absolute performance of an act which the respondent has no power to perform. *Chapman, Attorney General* v. *Snow et al.*, 135 Me., 134, 190 A., 636. Therefore, the prayer of the petitioner that the secretary of state be compelled to reject and not count certain votes must be denied.

The governor and council, in the discharge of their official duties, having ascertained that Walter F. Ulmer had received the highest number of votes cast at said primary election for nomination by the Republican party for the office of county commissioner, it became the duty of the secretary of state under the statute to make the proper record thereof and to issue to him the certificate or notice of nomination. The secretary of state cannot be required to violate his statutory duty. The function of mandamus is to enforce obedience and not disobedience of the law.

The conclusion reached that mandamus will not lie makes it unnecessary to consider other exceptions reserved.

Exceptions overruled.

PERCY GRAHAM *vs.* GEORGE M. LOWDEN.

Lincoln. Opinion, August 28, 1940.

PLEADING AND PRACTICE. NUISANCE.

Laying several injuries or kinds of damage resulting from a single wrongful act in one count is not duplicity. A declaration is not double because more than one cause of action is set forth in one count provided not more than one independent and sufficient ground is therein alleged in support of a single demand.

In this case the pleader has set forth a single demand for recovery of damages for the creation and maintenance of a nuisance which he alleges has caused injury both to his fee and the right of way that goes with it. To support the demand, both the injuries must be proven. Either one might support a different and less demand but not that which is claimed.

Where a single transaction such as the erection and maintenance of a building is relied upon as the basis of recovery, there is no duplicity even though the facts show liabilities for which separate causes of action could not be joined.

A continuing encroachment by an adjoiner upon the land of another by erecting and maintaining a building thereon without right is, at common law, not only a trespass but also a private nuisance.

The obstruction of a right of way which is a mere easement is also a common-law nuisance, but it is the obstruction of a private way established under R. S., Chap. 27, *Secs.* 16-18 *which is a statutory nuisance.*

In action on the case for nuisance, a single plea is sufficient to traverse a declaration alleging that adjoining property owner, to injure plaintiff, had erected a building on plaintiff's land and right of way, and several and distinct answers were not required to traverse declaration.

It is not necessary to allege special damage where nuisance complained of is private. It is where the nuisance is a public one that special damage must be alleged and proved.

On exceptions. Action on the case for nuisance. At the return term, a special demurrer to the declaration for duplicity was filed

and overruled. Demurrant filed exceptions. Exceptions overruled. Case fully appears in the opinion.

Perkins & Perkins, for plaintiff.

Tupper and Harris,

Roy A. Hanson, for defendant.

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

STURGIS, J. Action on the case for nuisance. At the return term, a special demurrer to the declaration for duplicity was filed and overruled. The demurrant brings the case to the Law Court on exceptions.

The gist of the declaration is that the plaintiff, Percy Graham, is the owner of a lot of land in the Town of Boothbay with the buildings thereon with an adjoining right of way extending from the road leading from East Boothbay to Ocean Point to the waters of Linekin Bay, and that the defendant, George M. Lowden, to injure and vex the plaintiff and exclude him from the use and enjoyment of his property, has erected a building on both the plaintiff's land and his right of way. The declaration consists of one count.

The claim of the defendant is that there is duplicity in the declaration because two distinct causes of action and two demands for damages are joined in the same count. This is not necessarily so. There is a distinction between combining in one count several causes of action and duplicity. Laying several injuries or kinds of damage resulting from a single wrongful act in one count is not duplicity. A declaration is not double because more than one cause of action is set forth in one count provided not more than one independent and sufficient ground is therein alleged in support of a single demand. *National Bank* v. *Nickerson*, 106 Me., 502, 76 A., 937; *Platt* v. *Jones*, 59 Me., 232, 242; see *Wolfe* v. *Beecher Manfacturing Co.*, 47 Conn., 231; *Atlantic Coast Line R. Co.* v. *Inabinette*, 32 Ga. App., 246, 250, 122 S. E., 902; 49 Corpus Juris 161; 7 Encyc. Pl. & Pr. 238. Here, the pleader has set forth a single demand for recovery of damages for the creation and maintenance of a nuisance which he alleges has caused injury both to his fee and the right of way that goes with it. To support the demand, both the injuries

must be proven. Either one might support a different and less demand but not that which is claimed.

Nor is the contention sound that there is duplicity in the declaration because the damage to the plaintiff's land can only be recovered in *trespass quare clausem fregit*, and his action for damages to his right of way is case and statutory. If there was this distinction between remedies to be invoked in separate actions for the injuries alleged, it would not make this declaration double. Where a single transaction such as the erection and maintenance of a building is relied upon as the basis of recovery, there is no duplicity even though the facts show liabilities for which separate causes of action could not be joined. *Atlantic Coast Line R. Co.* v. *Inabinette*, supra.

However, a continuing encroachment by an adjoiner upon the land of another by erecting and maintaining a building thereon without right is, at common law, not only a trespass but also a private nuisance. *Milton* v. *Puffer*, 207 Mass., 416, 93 N. E., 634; 1 Am. Jur. 514; 29 A. L. R., 839 Note. And the obstruction of a right of way which is a mere easement is also a common-law nuisance. *Sutherland* v. *Jackson*, 32 Me., 80. It is the obstruction of a *private way* established under R. S., Chap. 27, Secs. 16-18, which is a statutory nuisance. R. S., Chap. 26, Sec. 5, as amended by P. L. 1933, Chap. 106.

Nor is there merit in the argument advanced on the brief that the declaration can be traversed only by several and distinct answers. A single plea is sufficient.

While not clearly open on this demurrer, counsel on the brief for the defendant argues that special damage should have been alleged. This is unnecessary when the nuisance complained of is private. It is where the nuisance is a public one that special damage must be alleged and proved, as in *Holmes* v. *Corthell*, 80 Me., 31, 33, 12 A., 730, cited.

The special demurrer filed in the Trial Court was properly overruled.

Exceptions overruled.

BARNES, C. J., having retired, did not join in this opinion.

BATES STREET CIGAR AND CONFECTIONERY CO.

vs.

HOWARD CIGAR COMPANY, INC.

Sagadahoc. Opinion, August 28, 1940.

BANKRUPTCY. EXCEPTIONS.

An agreed statement on which the ruling below was based is a part of the bill of exceptions and the facts there stated alone are open to consideration on review. They cannot be supplemented by additional facts agreed upon in the briefs of counsel.

Although no enforcible judgment can be rendered against one who has received a discharge in bankruptcy, yet a special judgment with perpetual stay of execution may be entered for the purpose of perfecting a right of action against sureties secondarily liable.

When an exception is directed generally and indiscriminately to the judgment below and does not state upon what exceptionable ground it is based, it does not comply with the law.

On exceptions. Action of assumpsit upon an account annexed by Bates Street Cigar and Confectionery Co. against Howard Cigar Company, Inc. To review judgment entered, defendant files exceptions. Exceptions overruled. Case fully appears in the opinion.

Edward W. Bridgham,

Harold J. Rubin, for plaintiff.

John P. Carey, specially for defendant.

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

STURGIS, J. This action of assumpsit upon an account annexed was heard by a justice at *nisi prius* with jury waived and upon an agreed statement of facts. On April 17, 1939, the writ issued, attachment of personal property was made and a bond with personal

sureties given to release the attachment. R. S., Chap. 95, Sec. 84. At the June Term, 1939, of the Superior Court for the County of Sagadahoc, which was the return term, bankruptcy was suggested as provided by R. S., Chap. 96, Sec. 74, and the case was continued on the docket. Thereafter on June 12, 1939, the defendant, Howard Cigar Company, Inc., was adjudicated a bankrupt and on September 8, 1939, following, received its discharge. At the October Term, 1939, of the Superior Court, discharge in bankruptcy was pleaded in bar and a certificate of discharge filed. On the agreed statement, containing the facts which have been related and no more, the following ruling was made:

> "ORDERED, that the Plaintiff recover judgment against the Defendant for the sum of Six Hundred Seventy-one Dollars and Eighty-eight cents ($671.88), with interest thereon from the date of the writ; and it is further
>
> "ORDERED, that there be a perpetual stay of proceedings and execution upon the judgment."

The case comes forward on exceptions.

The agreed statement on which the ruling below was based is a part of the bill of exceptions and the facts there stated alone are open to consideration on this review. They cannot be supplemented by additional facts agreed upon in the briefs of counsel. *Allen* v. *Lawrence*, 64 Me., 175. In the case presented, it is not made to appear that the secondary liability of the sureties upon the bond given to release the attachment of the defendant's personal property was reduced or avoided by bankruptcy under Bankruptcy Act, Sec. 67, as amended June 22, 1938, 3 Federal Code Annotated, Title II, Bankruptcy, Chap. 7, Sec. 107a. Although no enforcible judgment can be rendered against one who has received a discharge in bankruptcy, yet a special judgment with perpetual stay of execution may be entered for the purpose of perfecting a right of action against sureties secondarily liable. *Smith* v. *Davis, French, Trustee*, 131 Me., 9, 158 A., 359; *Dunham Bros. Company* v. *Colp*, 125 Me., 211, 132 A., 388.

Furthermore, the bill of exceptions is incomplete and insufficient. The plaintiff's writ, agreed statement, pleadings and docket entries

are made a part of it, but a copy of the writ is not included in the printed case. The exception reserved is in this form:

> "The defendant excepts to the Court's order that judgment be entered for the plaintiff and prays that its exception claimed may be allowed, it being aggrieved thereby."

The exception is directed generally and indiscriminately to the judgment below. It is not stated upon what exceptionable ground it is based. Such an exception does not comply with the law. *Wallace* v. *Gilley*, 136 Me., 523, 12 A. (2d), 416; *Gerrish, Ex'r* v. *Chambers*, 135 Me., 70, 79, 189 A., 187; *Dodge* v. *Bardsley*, 132 Me., 230, 169 A., 306.

Exceptions overruled.

BARNES, C. J., having retired, did not join in this opinion.

GLADYS B. DOYLE *vs.* ELMER L. WILLIAMS, TRUSTEE ET AL.

No. 471

GLADYS B. DOYLE *vs.* ELMER L. WILLIAMS, TRUSTEE ET AL.

No. 472

Aroostook. Opinion, August 28, 1940.

MORTGAGES. EQUITY.

In mortgagor's proceeding for redemption of trust mortgage given to defendant, as trustee, for mortgagor's unsecured creditors, a finding that defendant's responsibility as trustee was only such as arose in the simplest of mortgages on real estate between parties thereto was error where mortgage was an ordinary mortgage deed of trust given by mortgagor to secure mortgagor's unsecured debts.

Under a mortgage deed of trust, for benefit of unsecured creditors, the trustee is the agent of both parties and required to act with utmost good faith and impartiality as regards both the debtor and the creditor. He is bound to look to the

interests of both parties. He is not trustee solely for the mortgagee or for the creditors secured thereunder.

A bill in equity brought by a mortgagor of real estate to enforce his right to redemption from a mortgage under R. S., Chap. 104, *Sec.* 15, *cannot be entertained without full compliance with all statutory prerequisites. It must be alleged and proved that the redemptioner has demanded an accounting of the mortgagee or person claiming under him and the latter has unreasonably refused or neglected to render such account in writing, or in some other way by his default, has prevented the plaintiff from performing or tendering performance of the condition of the mortgage. The demand for an account must be made upon the party having the legal record title to the mortgage. If there is a valid assignment and transfer of the mortgage and the redemptioner has due notice by record or otherwise thereof, he must demand an account from the assignee and bring his bill against him. It is only when such an assignment has not been recorded or notice of it given that a demand for an account upon the mortgagee alone is sufficient. If the assignment of the mortgage is absolute and the redemptioner has notice, the mortgagee is not a necessary party. But if the assignment leaves an interest in the mortgagee which will be affected by the decree, as when he has been in possession and received rents and profits or other moneys, he must be joined as a party defendant and the court will not proceed in his absence.*

Equity is always liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result.

On appeals. Two proceedings in equity for the redemption of mortgages given by the complainant, Gladys B. Doyle, to the defendant, Elmer L. Williams, as trustee, which are held by the defendant, the Aroostook Trust Company, under recorded assignments. The cases were heard together by a single justice sitting in equity, and from decrees of dismissal with costs. Appeals are duly claimed and entered. In Docket No. 471 — appeal sustained. Cause remanded for further proceedings in accordance with this opinion. In Docket No. 472—appeal dismissed. Decree below affirmed. Cases fully appear in the opinion.

Albert F. Cook,
Herschel Shaw, for plaintiff.
Pendleton & Rogers, for defendants.

SITTING: STURGIS, THAXTER, HUDSON, MANSER, JJ.

STURGIS, J. These are proceedings in equity for the redemption of mortgages given by the complainant, Gladys B. Doyle, to the de-

fendant, Elmer L. Williams, as trustee, which are now held by the defendant, the Aroostook Trust Company, under recorded assignments. The cases were heard together by a single justice sitting in equity, and from decrees of dismissal with costs, appeals are duly claimed and entered.

DOCKET NO. 471.

On May 26, 1932, the complainant, Gladys B. Doyle, gave the defendant, Elmer L. Williams, as trustee for her unsecured creditors nine promissory notes of that date payable to him as trustee, all aggregating $20,151.15 but severally for the amounts due her respective creditors, and as security gave the trustee a mortgage on all her real estate subject to prior liens then of record or otherwise in existence. During the year of 1934, payments were made on account of the trust mortgage debt and these were divided *pro rata* among the creditors. No further payments were made, and on April 29, 1937, the trustee began foreclosure and a week later took possession of the farm as mortgagee.

At or about the same time, the trustee, acting in behalf of his employer, the Armour Fertilizer Works, which had a branch office in Presque Isle and was one of the creditors secured by this mortgage, in collaboration with the president of the Aroostook Trust Company of Caribou, another secured creditor and the holder of a first mortgage on the Gladys B. Doyle farm, obtained an agreement from the creditors who were beneficiaries under the trust mortgage to compromise their claims for approximately sixty-seven per cent of their then face value, and arranged with the Aroostook Trust Company to take over the trust notes and mortgage at face value with rights of foreclosure accrued, and advance therefor sufficient money to make the settlement with the creditors and pay back taxes and insurance premiums. As a part of this arrangement, a purchaser of the mortgaged premises for $25,000.00 was found by the Aroostook Trust Company, which agreed to make conveyance if and when it obtained title under the trust mortgage and its foreclosure, and he was made a tenant of the farm by the trustee as mortgagee in possession.

The compromise with the creditors secured by the trust mort-

gage was effected and, the Aroostook Trust Company having advanced $11,491.38 for that purpose and assumed the payment of back taxes and insurance premiums amounting to about $6,000.00, according to the pleadings, on November 17, 1937, Elmer L. Williams as trustee assigned the trust mortgage and the notes secured thereby to the Aroostook Trust Company, and on December 6, 1937, the assignment was recorded. The trust mortgage, however, was not a first lien on the mortgaged premises. They were subject in part to a first mortgage held by the Aroostook Trust Company on which more than $4,000.00 was due, and to the prior lien of a mortgage given to the Armour Fertilizer Works by Gladys B. Doyle on May 26, 1932, on which $3,507.60 was unpaid, and the assumption of these senior encumbrances was made a part of the consideration for the assignment of the trust mortgage to the Aroostook Trust Company. The first mortgage held by the bank was left outstanding of record and has neither been released nor foreclosed. The amount due on the mortgage of the Armour Fertilizer Works, on which foreclosure had been begun, was paid, and, as the pleadings show, on November 17, 1937, that mortgage was also assigned to the Aroostook Trust Company by the holder of record.

This proceeding in equity to redeem this trust mortgage given by Gladys B. Doyle to Elmer L. Williams, trustee, on May 26, 1932, is brought under R. S., Chap. 104, Sec. 15, which provides:

> "Any mortgagor, or other person having a right to redeem lands mortgaged, may demand of the mortgagee or person claiming under him a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and if he unreasonably refuses or neglects to render such account in writing, or, in any other way by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited . . . , and therein offer to pay the sum found to be equitably due, or to perform any other condition, as the case may require; and such offer has the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such

tender, and thereupon he shall be entitled to judgment for redemption and costs."

In an attempt to comply with the statute, the complainant here avers that as mortgagor, on October 22, 1937, she demanded of the defendant, Elmer L. Williams, the trustee of the mortgage which she had given him for the benefit of her unsecured creditors, a true account of the sum due on the mortgage and of the rents and profits received and money expended on repairs and improvements, if any, but he has unreasonably refused and neglected to render such an account. She offers to pay to the mortgagee or his assignee such sum as may be found to be equitably due.

As to the defendant, Elmer L. Williams, trustee, the mortgagee, the record shows that pursuant to the complainant's demand for an accounting, on November 20, 1937, he made and delivered to her an account stating that $21,860.57 was due on the notes and mortgage as of that date. In this account, interest accruals and insurance premium payments were added to the original debt and credit was given for payments received and for rental to be paid by the tenant. No credit was given for waste charged by the mortgagor during the possession of the mortgagee and his tenant, nor for the reduction of the mortgage debts effected by the compromise of the claims of the creditors secured by the mortgage. It is to obtain such credits and be allowed to redeem on payment of the mortgage and debts secured thereby so reduced that the mortgagor, Gladys B. Doyle, brings her bill in equity.

At the hearing before the sitting justice, the issues raised and determined did not extend beyond the correctness of the accounting of Elmer L. Williams, trustee, as the original mortgagee. As to that, a finding was made that the mortgagee had not committed waste, had made due allowance for his use and occupation while in possession of the premises, and although the mortgage was given to him as trustee for the mortgagor's unsecured creditors, no fiduciary relation was created thereby, and his responsibility to the mortgagor being only such as arises in the simplest of mortgages on real estate between the parties thereto, he could not be held to account for the reduction in the mortgage debt which he had procured. Upon these findings, the ruling was that the mortgagee had not unreasonably

refused or neglected to account or in any other way prevented the mortgagor from redeeming, and a decree dismissing the bill was entered.

It is the opinion of this court that the finding below that the responsibility of the defendant, Elmer L. Williams, as trustee of the mortgage which the complainant, Gladys B. Doyle, gave to him for the benefit of her unsecured creditors was only such as arises in the simplest of mortgages on real estate between the parties thereto was error. The evidence bearing upon this question, when carefully analyzed, shows clearly that this was an ordinary mortgage deed of trust given by the mortgagor to secure the debts which she owed her unsecured creditors. There is no convincing proof that anything else was intended. It was not an unconditional deed of trust to raise funds for the payment of debts and an absolute and indefeasible conveyance for the purposes of the trust, but a conveyance by way of security only and subject to a condition of defeasance. Under it, the trustee was the agent of both parties and required to act with utmost good faith and impartiality as regards both the debtor and the creditor. He was bound to look to the interests of both parties. He was not trustee solely for the mortgagee or for the creditors secured thereunder. *Ainsa* v. *Trust Company*, 174 Cal., 504, 163 P., 898; *Gray* v. *Robertson*, 174 Ill., 242, 51 N. E., 248; *Ventres* v. *Cobb*, 105 Ill., 33; *Reynolds* v. *Waterville*, 92 Me., 292, 305, 306, 42 A., 553; *Bell* v. *Trust Company*, 282 Penn., 562, 569, 128 A., 494; *Morriss* v. *Insurance Company*, 90 Va., 370, 18 S. E., 843; *Schroeder* v. *Theater Company*, 175 Wis., 79, 184 N. W., 542; 3 Jones on Mortgages (8th ed.), Sec. 2292.

The finding below that waste had not been committed and a proper allowance had been made for use and occupation were warranted in fact and law and should not be disturbed. The mortgagor is entitled, however, to a further consideration of her claim that she should be permitted to redeem her mortgage upon payment of the balance found due thereon after the discount obtained from her creditors by Elmer L. Williams, trustee, is allowed as a credit. This question should be determined in accordance with the law as here stated. Ordinarily, it could be passed upon on this appeal where all questions presented by the record are open for consideration and such decree is to be directed as the whole case requires. *Trask* v.

Chase, 107 Me., 137, 77 A., 698; *Woodman* v. *Butterfield*, 116 Me., 241, 101 A., 25; R. S., Chap. 91, Sec. 53. Omissions in the pleading and proof however, make it impossible to decide the question on its merits at this time.

As this court has recently pointed out, a bill in equity brought by a mortgagor of real estate to enforce his right to redemption from a mortgage under R. S., Chap. 104, Sec. 15, cannot be entertained without full compliance with all statutory prerequisites. *Fogg* v. *Twin Town Chevrolet, Inc.*, 135 Me., 260, 194 A., 609, and cases cited. It must be alleged and proved that the redemptioner has demanded an accounting of the mortgagee or person claiming under him and the latter has unreasonably refused or neglected to render such account in writing, or in some other way by his default, has prevented the plaintiff from performing or tendering performance of the condition of the mortgage. The demand for an account must be made upon the party having the legal record title to the mortgage. *Stone* v. *Locke*, 46 Me., 445; 2 Jones on Mortgages (8th ed.), Sec. 1433. If there is a valid assignment and transfer of the mortgage and the redemptioner has due notice by record or otherwise thereof, he must demand an account from the assignee and bring his bill against him. It is only when such an assignment has not been recorded or notice of it given that a demand for an account upon the mortgagee alone is sufficient. *Mitchell* v. *Burnham*, 44 Me., 286; Jones on Mortgages, *supra*. If the assignment of the mortgage is absolute and the redemptioner has notice, the mortgagee is not a necessary party. But if the assignment leaves an interest in the mortgagee which will be affected by the decree, as when he has been in possession and received rents and profits or other moneys, he must be joined as a party defendant and the court will not proceed in his absence. *Beals* v. *Cobb*, 51 Me., 348; Storey's Equity Pleading, Secs. 189, 190, 191; 42 Corpus Juris, 434, n. 85.

The complainant admits in her pleading that she had notice, at least by record, of the assignment of the trust notes and mortgage to the Aroostook Trust Company by the mortgagee, Elmer L. Williams, as trustee, as of November 17, 1937, and that the assignment was recorded on December 6, 1937, thereafter. But she does not aver in her bill in equity entered in the Supreme Judicial Court for the County of Aroostook on January 20, 1938, or in any way prove

that she made a demand for an accounting upon the assignee, or it, as the owner of record of the mortgage, unreasonably refused or neglected to account. The Aroostook Trust Company does not adopt as its own the accounting of the mortgagee, Elmer L. Williams, trustee, and by its pleadings denies all knowledge thereof. As the case stands, for this defect in pleadings and failure of proof the complainant is not entitled to have her bill to redeem this mortgage entertained.

Equity, however, is always liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result. *Fogg* v. *Twin Town Chevrolet, Inc.*, 135 Me., 444, 448, 199 A., 265. If this bill be dismissed for the defects in pleading and proof which appear, the mortgagor will be barred from redeeming her real estate from this mortgage. The time allowed by the statute for filing a new bill in equity has expired. It may be that, by amendment, the mortgagor can introduce allegations respecting a demand upon the Aroostook Trust Company, assignee of the mortgagee, and on hearing submit proof in accordance therewith which will cure all defects. If so, the mortgagor would be entitled to a final determination on the merits and according to law of her rights of redemption under the mortgage. The cause will be remanded that opportunity may be given for such amendment and support thereof by proof. Failing so to do, the bill in equity must be dismissed.

Appeal sustained.
Cause remanded for further proceedings in accordance with this opinion.

DOCKET NO. 472.

In the spring of 1932, the complainant, Gladys B. Doyle of Caribou purchased one hundred tons of commercial fertilizer from the Armour Fertilizer Works, which had a branch office in Presque Isle, and on May 16, 1932, gave her note for $3,800.00 therefor, making the same payable to the defendant, Elmer L. Williams, as trustee for the Armour Fertilizer Works by which he was employed. On May 26, 1932, thereafter, she secured her note by a mortgage on all her real estate which she here seeks to redeem.

The many incidents and circumstances attending the execution of this mortgage and the collateral transactions which were involved need not here be recited. The mortgage debt not having been paid, on April 29, 1937, foreclosure was begun. On September 18, 1937, the mortgage was assigned to the Armour Fertilizer Works, reassigned on October 15, 1937, to Armour & Company of Delaware, and thereafter on November 17, 1937, assigned to the Aroostook Trust Company, a defendant in this cause. All assignments were duly recorded.

On December 16, 1937, pursuant to a demand by the mortgagor, the Aroostook Trust Company, as assignee of this mortgage, made and delivered an account of the sum it claimed to be due on the mortgage debt. Payments made and rents and profits received were accounted for and interest accrued was added to the mortgage debt. A credit of $2,000.00 was given for a potato house which had belonged to the mortgagor and had come into the possession of the mortgagee or the assignees. A balance of $1,476.32 was stated in the account to be due.

At the hearing on the bill in equity brought to redeem this mortgage under the provisions of R. S., Chap. 104, Sec. 15, it was stipulated and agreed that the account rendered by the Aroostook Trust Company was in all respects correct except as to the allowance for the potato house. As to that, the sitting justice found that the credit of $2,000.00 allowed therefor in the account was its full and fair value and there had been no unreasonable refusal or neglect to account as required by the statute. A decree dismissing the bill with costs was entered.

We find no ground upon which this appeal can be sustained. The entry must be

Appeal dismissed.
Decree below affirmed.

HARRY W. SNELL ET AL. *vs.* GEORGE A. LIBBY.

Somerset. Opinion, August 29, 1940.

TAXATION. EXECUTION.

A suit for taxes brought by the collector, upon which nine-tenths of the judgment debtor's property was sold, was simply an action of debt and not a special proceeding to enforce the statutory lien on the real estate for the taxes.

It is well settled that where real estate has been attached and the attachment preserved, an execution levied under a judgment recovered in the suit operates as a lien from the date of the attachment and has priority over all the intervening encumbrances. A title obtained by a levy duly made takes effect by relation as of the time when the attachment was made and operates as a statute conveyance made at that time.

By the weight of authority, a sheriff cannot sell on execution less than the entire estate which is bound by the lien of the attachment and has been seized. When the defendant in execution owns the entire fee, the officer cannot sell an undivided interest and thus make the purchaser a tenant in common with the defendant in execution. The character of the debtor's estate cannot be so changed at the pleasure of the judgment creditor or of the sheriff.

It is a cardinal rule that an execution sale of an undesignated part of a large tract of land, there being no means of distinguishing the portion sold from the residue, is void.

Under provisions of R. S. 1930, *Chap.* 13, *Sec.* 3; *Chap.* 14, *Sec.* 28, *mortgagee of premises sold on execution is not entitled to notice and joinder as a party defendant in an action to enforce the collection of a tax assessed on the mortgaged property.*

The tax lien takes precedence over all other claims on the real estate and continues in force until the tax is paid.

The interest of a mortgagee cannot under any circumstances or by any proof be made superior to the lien for taxes. Except for the statute and as therein expressly provided, he is not entitled to notice and joinder as a party defendant in an action to enforce the collection of a tax assessed on the mortgaged property.

The tax judgment rendered by a court of general jurisdiction is not open to collateral attack.

Under the statutes land may be assessed either to the owner or the person in possession on the first day of April and the assessors may continue to assess the

same person to whom it was last assessed although the ownership or occupancy is changed, unless previous notice is given of such change and of the name of the person to whom it has been transferred or surrendered.

Exceptions do not lie to reasons given for a ruling, but only to the ruling itself.

On exceptions. Real action to recover possession of land and buildings in St. Albans, Maine. Case was heard by referee under rule of court with right to except to questions of law reserved. On issues raised by a plea of *nul disseizin*, the tenant prevailed. Plaintiff excepts to acceptance of referee's report. Exceptions overruled. Case fully appears in the opinion.

Frank L. Ames, for plaintiffs.

Clayton E. Eames, for defendant.

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

STURGIS, J. This is a real action to recover possession of land and buildings in St. Albans, Maine. The case was heard by a referee under rule of court with right to except to questions of law reserved. On issues raised by a plea of *nul disseizin*, the tenant prevailed. The case comes forward on exceptions to the acceptance of the report.

The material facts involved in the case are not in controversy. The demandant, Harry W. Snell, formerly owned and had the entire title to the real estate described in the writ. On June 25, 1925, he mortgaged the premises to the demandant, Ralph H. Dyer, who thereafter on May 26, 1936, foreclosed for breach of condition and the mortgagor's right of redemption expired. Ralph H. Dyer claims title and right of possession under this foreclosure. On what ground Harry W. Snell bases his joinder as a demandant does not appear.

The record shows that while Harry W. Snell owned the demanded premises he failed to pay the taxes assessed thereon for the years 1917 to 1922 inclusive, and the tax collector of St. Albans brought suit, on September 3, 1923, made a general attachment of the demanded premises, and in due course thereafter recovered judgment and execution issued. In levying the execution, the officer seized "all the right, title and interest" which Harry W. Snell, the

judgment debtor, had in the demanded premises, which then as at the time of attachment was the entire title thereto, but at the sale on May 9, 1925, sold and gave a sheriff's deed for only the right, title and interest which the execution debtor had "in and to nine-tenths of the whole of the premises." The purchaser, on March 18, 1931, quitclaimed his interest in the property to the tenant in this action, who claims to have acquired thereby title to nine-tenths of the demanded premises.

The referee properly found that the suit for taxes brought by the collector of St. Albans, upon which nine-tenths of the judgment debtor's property was sold, was simply an action of debt and not a special proceeding to enforce the statutory lien on the real estate for the taxes. R. S., Chap. 13, Sec. 3; R. S., Chap. 14, Sec. 28. And he ruled that the execution sale was valid, and by virtue of the priority of the attachment made in the suit in which the execution issued, the title of the tenant in nine-tenths of the judgment debtor's property, which is the premises demanded here, is superior to that of the demandant, Ralph H. Dyer, under the foreclosure of his mortgage. There was no error in the ruling as to the priority of the levy. It is well settled that where real estate has been attached and the attachment preserved, an execution levied under a judgment recovered in the suit operates as a lien from the date of the attachment and has priority over all intervening encumbrances. A title obtained by a levy duly made takes effect by relation as of the time when the attachment was made and operates as a statute conveyance made at that time. *First National Bank of Salem* v. *Redman*, 57 Me., 405; *Brown* v. *Williams*, 31 Me., 404; *Nason* v. *Grant*, 21 Me., 160; 23 C. J., 511; R. S., Chap. 90, Sec. 31.

It is the opinion of this court, however, that for other reasons this sheriff's sale was void and the tenant has no title thereunder. The attachment and the seizure on execution were both of "all the right, title and interest" which the judgment debtor had in the real estate upon which the levy was made, which was the entire fee. The officer, at the direction of the creditor or for other reasons which do not appear, sold only the right, title and interest which the debtor had in nine-tenths of the property. If this can be construed as an execution sale of a common and undivided nine-tenths interest in the debtor's lands, it is void. The debtor owned the entire fee. By

the weight of authority, a sheriff cannot sell on execution less than the entire estate which is bound by the lien of the attachment and has been seized. When the defendant in execution owns the entire fee, the officer cannot sell an undivided interest and thus make the purchaser a tenant in common with the defendant in execution. The character of the debtor's estate cannot be so changed at the pleasure of the judgment creditor or of the sheriff. *Jewett* v. *Whitney*, 43 Me., 242; *Willbanks* v. *Untriner*, 98 Ga., 801, 25 S. E., 841; *Wheatley* v. *Tutt*, 4 Kan., 166; *Reigle* v. *Seiger*, 2 P. & W. (Penna.), 340; *McGlauflin* v. *Shields*, 12 Penna., 283; 25 American & English Encyc. (2nd Ed.), 748; 23 Corpus Juris 621.

Moreover, the sheriff's deed purporting to convey nine-tenths of the execution debtor's property does not state that the interest sold was undivided. Nor does it show if a divided interest was sold, in what part of the lands seized it is located. It is a cardinal rule that an execution sale of an undesignated part of a large tract of land, there being no means of distinguishing the portion sold from the residue, is void. 2 Freeman on Executions (3d Ed), Sec. 281; 23 Corpus Juris 621. See *Keaton* v. *Forrester*, 63 Ga., 206. Compare *Larrabee* v. *Hodgkins*, 58 Me., 412.

The case discloses, however, that the tenant in this action claims title to the demanded premises under another sheriff's deed. In the year 1931, Harry W. Snell was still in possession of his real estate as mortgagor. The tax for that year was not paid and the collector of taxes of St. Albans then in office brought an action of debt for the collection of that tax and the enforcement of the lien therefor given by the statute. R. S., Chap. 13, Sec. 3. A special attachment was made, judgment obtained, and execution taken out, upon which on April 8, 1933, the officer making the levy sold the property. All proceedings in connection with this sale appear to have been in strict compliance with the statute providing for the enforcement of such a tax lien. R. S., Chap. 14, Sec. 28. This time, the execution debtor's entire estate was seized and sold and the purchaser having received his deed, in due course quitclaimed the property, which was the demanded premises, to the tenant in this action.

The demandant, Ralph H. Dyer, in his attack upon this sheriff's sale, shows that in the suit for the 1931 tax on the demanded premises, although he was the mortgagee of record, he was not made a

party or served with process, the mortgagor, Harry W. Snell, against whom the tax was assessed being the only defendant named and summoned. This non-joinder and failure of service, he claims, invalidates the tax lien sale, and the acceptance of the report of the referee ruling adversely on this point is included in the errors alleged.

In R. S., Chap. 14, Sec. 28, authorizing the enforcement by an action of debt of the lien for taxes created by Sec. 3, Chap. 13, R. S., it is provided that:

> "Such action shall be begun by writ of attachment commanding the officer serving it to specially attach the real estate upon which the lien is claimed, which shall be served as other writs of attachment to enforce liens on real estate. . . . If no service is made upon the defendant, or if it shall appear that other persons are interested in such real estate, the court shall order such further notice of said action as appears proper, and shall allow such other persons to become parties thereto. If it shall appear upon trial of said action that such tax was legally assessed on said real estate, and is unpaid, and that there is an existing lien on said real estate for the payment of such tax, judgment shall be rendered for such tax, interest, and costs of suit against the defendants and against the real estate attached, and execution issued thereon to be enforced by sale of such real estate in the manner provided for a sale on execution of real estate attached on original writs."

Also that:

> "Any person interested in said real estate may redeem the same at any time within one year after the sale of the same by the officer on such execution, by paying the amount of such judgment and all costs on such execution with interest at the rate of ten per cent a year."

As a reading of this tax lien enforcement statute makes apparent, the only provision therein for joinder of or notice to those interested in the real estate upon which the tax is laid, other than the person against whom the tax is assessed, is that when it shall appear that such other persons are interested the court shall order such notice

of the action as appears proper and allow them to become parties. Neither here or elsewhere in the statutes is express direction found for service of process upon and joinder of a mortgagee as an interested third party unless and until the court takes action. Such a direction cannot be implied. The tax lien takes precedence over all other claims on the real estate and continues in force until the tax is paid. R. S., Chap. 13, Sec. 3. The interest of a mortgagee cannot under any circumstances or by any proof be made superior to the lien for taxes. Except for the statute and as therein expressly provided, he is not entitled to notice and joinder as a party defendant in an action to enforce the collection of a tax assessed on the mortgaged property. *People* v. *Weber*, 164 Ill., 412, 416, 45 N. E., 723. In the case at bar, the mortgagee apparently failed to protect his mortgage either by making known to the court having jurisdiction over the tax lien proceedings that he was an interested party or by redeeming the real estate from the tax sale as provided by the statute. He must now abide the consequences of his failure so to do. Title to the whole of the mortgaged premises, which are the demanded premises, passed to the purchaser through the sheriff's sale and by mesne conveyance thereafter vested in the tenant. There was no error in the ruling of the referee that the title obtained by the tenant through the 1931 tax lien sale has precedence over that of the demandant, Ralph H. Dyer, under his mortgage.

The other objections to the acceptance of the report, upon which the demandant bases his exceptions are without merit. The contention that there were errors in the assessment of the 1931 tax which invalidate the execution sale made to enforce the lien of that tax, and with it the title which the tenant has thereunder, cannot be sustained. Evidence tending to show error in the assessment was excluded by the referee as inadmissible and no exception was reserved. If the evidence were in the case, the demandant could not maintain his challenge. The tax judgment rendered by a court of general jurisdiction is not open to this collateral attack. *Gibbs* v. *Southern*, 116 Mo., 204, 22 S. W., 713. See 34 Corpus Juris 516 and cases cited.

Nor was there error in the ruling that the taxation of the demanded premises to Harry W. Snell after the real estate had been sold on execution in the tax suits did not constitute a waiver of the

sales and nullify such title as passed thereunder to the purchaser and his privies. The record shows that Harry W. Snell remained in possession after the execution sales either as mortgagor or tenant or agent of the mortgagee of the premises, and until 1934, a tax upon the land was each year assessed against him. In this state under the statutes, land may be assessed either to the owner or the person in possession on the first day of April and the assessors may continue to assess the same to the person to whom it was last assessed although the ownership or occupancy is changed, unless previous notice is given of such change and of the name of the person to whom it has been transferred or surrendered. R. S., Chap. 13, Secs. 9 and 26. It not appearing that notice was ever given to the assessors of St. Albans of the change of ownership resulting from the sales on execution which have been here reviewed, the land was properly taxed to Harry W. Snell as the person in possession. The claim that such an assessment by waiver or otherwise destroys the validity of sales on execution to enforce the collection of prior taxes or liens therefor finds no support in reason or authority.

Regardless of the reasons therefor, which have been carefully considered, the ruling of the referee was that "neither plaintiff" (that is, demandant) is entitled either jointly or severally to recover any portion of the demanded premises as against the defendant . . . and judgment should be rendered for the defendant." On this record, that ruling was correct. The tenant, George A. Libby, obtained title to the whole of the demanded premises under the sheriff's sale of April 8, 1933, on execution taken out on judgment entered in the proceedings to enforce the lien of the 1931 tax assessed against the premises. That he failed to gain title to a nine-tenths divided or undivided interest in the lands under the sheriff's sale on execution to enforce the collection of the 1917-1922 taxes is not of consequence, and the erroneous reasoning of the referee on that question is immaterial here. Exceptions do not lie to reasons given for a ruling, but only to the ruling itself. It would be trifling with judicial procedure to set aside the report of a referee, in which he had ruled correctly, for errors which can in no way affect the ruling and are not prejudicial.

There was no error in the acceptance of the report of the referee by the Trial Court.

Exceptions overruled.

JOHN J. BARRON, ADMINISTRATOR
OF THE ESTATE OF MARGARET MCFADDEN

vs.

C. EVERETT BOYNTON

AND

ALICE BUXTON BOYNTON.

Cumberland. Opinion, September 7, 1940.

BILLS AND NOTES. STATUTE OF LIMITATIONS.

A promissory note payable on demand is due instantly and the statute of limitations begins to run from its date.

It is a well-established rule that in the construction of a note the intention of the parties is to control if it can be legally ascertained by a study of the entire contents of the instrument with no part excluded from consideration, and anything written or printed on the note prior to its issuance relating to its subject matter must be regarded as a part of the contract and given due weight in its construction.

When there is a patent ambiguity in the note, it is competent for the court to determine from the paper itself, in the light of the circumstances in which it was given, what was the actual intention of the parties.

As installment payments required by terms of note became due, a cause of action accrued and the statute of limitations ran against each from such maturity.

An action on note payable in installments, which had no acceleration of maturity provisions, was barred only as to installments which were due and unpaid for more than six years prior to commencement of action.

On exceptions. Action of assumpsit on a promissory note. At return term of the Superior Court for the County of Cumberland defendant, C. Everett Boynton was defaulted. Defendant Alice Buxton Boynton having filed a plea of general issue and for a brief statement of special matter of defense, pleaded the statute of

limitations. Case was referred under rule of court with right to except as to questions of law. Referee, after hearing, reported that defendant, Alice Buxton Boynton, was entitled to judgment. Objections duly filed were overruled, the report accepted and exceptions reserved. Exceptions sustained. Case fully appears in the opinion.

Harry C. Libby, for plaintiff.

George W. Weeks, for defendants.

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

STURGIS, C. J. In this action of assumpsit on a promissory note, at the return term of the Superior Court the defendant C. Everett Boynton was defaulted and, the defendant Alice Buxton Boynton having filed a plea of general issue and for a brief statement of special matter of defense pleaded the statute of limitations, the case was referred under rule of court with right to except as to questions of law. The referee, after hearing, reported that the defendant Alice Buxton Boynton was entitled to judgment. Objections duly filed were overruled, the report accepted and exceptions reserved.

The note in suit, in its pertinent parts, is of the following tenor:

"$3286.31 Portland, Me. Oct. 2nd. 1931

ON DEMAND for value received We promise to pay to the order of Mrs. Margaret McFadden of Portland, Me., Thirty two hundred eighty six and 31/100 Dollars with Interest at the rate of 5 per cent. per annum, for such time as said principal sum or any part thereof shall remain unpaid,

* * * * * *

Interest to be paid on the first day of each month

Monthly payments to be Fifty dollars each month

Collateral: — House and land at 19 Cottage Farms — Cape Elizabeth, Me.

* * * * * *

C. Everett Boynton
Alice Buxton Boynton."

On the back of the instrument appears a record of payments on account of principal and interest, the payments on principal being in part in monthly installments of $50 each and thereafter until August 23, 1933, in larger and smaller amounts, as a rule sufficient in the aggregate to meet the installment provisions of the note.

The defense relied upon before the referee and on this review is that the note in suit was simply a demand note dated October 2, 1931, and action thereon against the defendant Alice Buxton Boynton as co-maker not having been begun until November 6, 1939, as the writ shows, it is barred by the statute of limitations. R. S., Chap. 95, Sec. 90. As the record reads, it must be assumed that this was the ground upon which the referee found that the defendant Alice Buxton Boynton was entitled to judgment. The correctness of that ruling depends upon the maturity of the note in suit. If it was simply a demand note, the ruling was correct. It is well settled in this state that a promissory note payable on demand is due instantly and the statute of limitations begins to run from its date. *Sanford* v. *Lancaster*, 81 Me., 434, 17 A., 402; *Ware* v. *Hewey*, 57 Me., 391; *Young* v. *Weston*, 39 Me., 492. It is the opinion of the court, however, that a proper construction of the language of the note indicates it is not simply a note payable on demand, but an installment note calling for monthly payments of $50 each until the full amount of the debt is satisfied.

It is a well-established rule that in the construction of a note the intention of the parties is to control if it can be legally ascertained by a study of the entire contents of the instrument with no part excluded from consideration, and anything written or printed on the note prior to its issuance relating to its subject matter must be regarded as a part of the contract and given due weight in its construction. *Waldo Co.* v. *Downing*, 131 Me., 410, 163 A., 787; *Alden* v. *Machine Company*, 107 Me., 508, 511, 78 A., 977; *Gas Company* v. *Wood*, 90 Me., 516, 520, 38 A., 548; *White* v. *Cushing*, 88 Me., 339, 34 A., 164; *Wheelock* v. *Freeman*, 13 Pick. 168; *Barnard* v. *Cushing*, 4 Metc., 230; *Costelo* v. *Crowell*, 127 Mass., 293. When there is a patent ambiguity in the instrument, it is competent for the court to determine from the paper itself, in the light of the circumstances in which it was given, what was the actual intention of the

parties. *Nichols* v. *Frothingham*, 45 Me., 225; *Waldo Co.* v. *Downing*, supra.

Applying these rules to the instant case, an examination of the entire text of the note in suit in its material parts leads to the conclusion that the plain intent of the parties was that the makers of this note were to have time in which to liquidate their obligation and not be compelled to pay the entire debt on demand. The note was for a substantial amount and apparently it was intended that collateral security should be furnished. By the express terms of the contract, interest was to be paid the first day of each month, and "Monthly payments [were] to be Fifty dollars each month." And finally, the parties themselves treated the paper as an installment note as the payments credited on the back of the instrument witness. These facts, we think, clearly warrant the construction which we have placed upon this note. It is in accord with the view taken on substantially analogous facts in *Trigg* v. *Arnott* (Cal. App.), 71 P. (2d), 330; see Brannan's Neg. Inst. Law (6th ed.), 197.

The note has no acceleration of maturity provision. As installment payments required by its terms became due, a cause of action accrued and the statute of limitations ran against each from such maturity. *Burnham* v. *Brown*, 23 Me., 400; see *Levee* v. *Mardin*, 126 Me., 133, 135, 136 A., 696. Those which became due and remained unpaid within the six-year period prior to November 6, 1939, the date of the writ, were not barred by the statute of limitations. They aggregate a substantial sum of money for which the defendant, Alice Buxton Boynton, is liable on this record. The acceptance of the report of the referee ruling that she was entitled to judgment was error.

No question except as to the maturity of the note and the bar of the statute of limitations as specially pleaded having been raised before the Law Court, the entry must be

Exceptions sustained.

EDNA H. KIRK, ALLEGED DEPENDENT WIDOW OF CHARLES M. KIRK

vs.

YARMOUTH LIME COMPANY AND TRAVELERS INSURANCE COMPANY.

Androscoggin. Opinion, September 10, 1940.

WORKMEN'S COMPENSATION ACT.

In compensation proceedings, where there is no factual dispute, the issue raised, being one of law, is reviewable by the Law Court.

The provisions of the Workmen's Compensation Act must be liberally construed in favor of the workman and those dependent upon him.

In Maine an "independent contractor" is not an "employee" within the meaning of the Workmen's Compensation Act.

Under provisions of Workmen's Compensation Act determination of whether compensation claimant was an "employee" or an "independent contractor" depends upon who had the right to direct and control the work of the claimant.

The commonly recognized tests to determine whether compensation claimant is an "employee" or an "independent contractor" are the existence of a contract for performance by a person of a certain piece or kind of work at a fixed price; the independent nature of his business or his distinct calling; his employment of assistants with the right to supervise their activities; his obligation to furnish necessary tools, supplies, and materials; his right to control the progress of the work except as to final results; the time for which the workman is employed; the method of payment, whether by time or by job; and whether the work is part of the regular business of the employer; however, no one of these tests is conclusive.

On appeal. Proceedings under Workmen's Compensation Act by Edna H. Kirk, alleged dependent widow of Charles M. Kirk, against Yarmouth Lime Company, employer, and the Travellers Insurance Company, insurance carrier. From decree of a justice of the Superior Court confirming decree of Industrial Accident Commission awarding compensation to the petitioner, the defendants appeal.

Appeal dismissed. Decree below affirmed with costs. Case fully appears in the opinion.

Barnett I. Shur,
Hyman Jacobson, for petitioner.
William B. Mahoney,
James R. Desmond, for respondents.

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

HUDSON, J. Appeal by defendants from decree of a justice of the Superior Court confirming decree of Industrial Accident Commission awarding compensation to the petitioner.

There is no factual dispute. The issue raised, being one of law, is reviewable by this court. *Murray's Case,* 130 Me., 181, 184, 154 A., 352; *Clark's Case,* 124 Me., 47, 50, 126 A., 18.

In dealing with the Workmen's Compensation Act, its provisions must be liberally construed in favor of the workman and those dependent upon him. *Murray's Case,* supra, on page 184; *Wardwell's Case,* 121 Me., 216, 116 A., 447.

The petitioner is the dependent widow of Charles M. Kirk who died on November 10, 1938, at North Turner while operating a Chevrolet dump truck owned by him. It went off the road, collided with a tree, tipped over, and killed Mr. Kirk instantaneously.

His employer, the Yarmouth Lime Company, had contracted with the Agricultural Adjustment Administration for the reclamation and removal of waste lime and for its delivery in such quantities and to such farms in the counties of Androscoggin, Sagadahoc, Oxford, Cumberland and York as might be designated by the state executive officer of the Agricultural Adjustment Administration. Deliveries were a part of the company's regular business. It had no trucks of its own, but made arrangements with various owners, including Mr. Kirk, for the use of their trucks in making the deliveries. The truck drivers were not carried upon the payrolls of the company, but a record of payments to them was entered in a separate book.

The employment of Kirk was effected by his brother-in-law, one Davis. The company agreed to pay Kirk $1.50 a yard for each cubic

yard of lime hauled, wherever its destination within said counties and regardless of the amount of mileage involved in the haul. He commenced work November seventh; he hauled four loads on the seventh, four on the eighth, three on the ninth, and on the tenth was returning from the delivery of his second load when the accident happened.

The size of the load and its destination in each instance were designated by the company. In loading, use was made of the defendant's shovel and conveyor. No control was exercised by it over the actual operation of the trucks on the highway or over the route selected, but upon request, the company would assist drivers in mapping out the shortest route. When taking their loads, the drivers receipted for them and were given receipts by the company to be signed by the persons to whom deliveries were to be made. The unloading was done by the drivers and in most instances they returned the signed receipts.

As to time Mr. Kirk's employment was indefinite. Any time he was subject to discharge and could quit at his pleasure. The drivers took their loads in turn and if there were no deliveries to be made on any day, they had no work from the company and it sustained no liability as a consequence thereof. Kirk did not agree to deliver any gross amount of lime.

The only question before us is whether Mr. Kirk at the time of the accident was an employee or an independent contractor. The commission determined his status to be that of an employee.

Under the Workmen's Compensation Act, an employee is defined to be "every person in the service of another under any contract of hire, express or implied, oral or written," with certain exceptions not here applicable. Par. II, Sec. 2, Chap. 55, R. S. 1930, as amended. It is well settled in this state that an independent contractor is not an employee within the meaning of this Act. *Clark's Case*, supra; *Mitchell's Case*, 121 Me., 455, 118 A., 287.

As to what constitutes an independent contractor as distinguished from an employee has been before this court several times.

In *McCarthy* v. *Second Parish of Portland*, 71 Me., 318, decided before the enactment of the Workmen's Compensation Law, the court said on page 321:

"True, the law makes a master responsible for the negligence of his servant, but the employment of one who carries on an independent business, and in doing his work does not act under the direction and control of his employer but determines for himself in what manner it shall be carried on, does not create the relation of master and servant, and this responsibility does not attach."

In *Mitchell's Case*, supra (a Workmen's Compensation case), the court, speaking of the question of whether one were an employee or an independent contractor, said on page 461: "The determination of this question depends upon who had the right to direct and control the work of the claimant," and in applying the law to the facts in that case, added:

"Was he a law unto himself responsible only for results, or was he subject to the dictation of the superintendent of the quarry? Clearly the latter. He hauled the boiler from whatever place and to whatever place the master directed. He hauled the water in the same way. He obeyed orders. He was not working for himself but for the Quarry Company, and he was paid not by the job but by the hour like any other employee. Under the well-settled principles of law he could not be regarded as an independent contractor." *McCarthy* v. *Second Parish*, 71 Me., 318; *Keyes* v. *Baptist Church*, 99 Me., 308.

In *Clark's Case*, supra, it is stated on page 50:

"If the employer has authority to direct what shall be done, and when and how it shall be done, and to discharge him disobeying such authority and direction, and if the employer would be liable to third persons for misconduct of the worker, the other party to the relationship is an employee. . . .

"Whether payment is to be by the piece or the job or the hour or the day is indicative but not decisive. . . .

"What is controlling is whether the employer retained authority to direct and control the work, or had given it to the claimant."

In *Murray's Case*, supra, this court quoted this language from *Brown* v. *Smith* (Ga.), 22 Am. St. Rep., 463:

"One who contracts with another to do a specific piece of work for him and who furnishes and has the absolute control of his assistants and who executes the work entirely in accord with his own ideas or with a plan previously furnished by the person for whom the work is done without being subject to the latter's orders as to the details of the work, with absolute control thereof, is not a servant of his employer but is an independant contractor."

And from *Tuttle* v. *Embury-Martin Lumber Co.* (Mich.), 158 N. W., 878, this:

"The test of the relationship is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent."

On page 186 in *Murray's Case*, supra, it is stated:

"An independent contractor must have under the employment some particular task assigned to him which he has a right to complete and is under obligation to complete, and must be subject to no control in the details of its doing."

And on page 187:

"One of the means of ascertaining whether or not the right to control exists is the determination of whether or not if instructions were given they would have to be obeyed."

Citing *Messmer* v. *Bell* (Ky.), 117 S. W., 348, the court quoted as follows from that case:

"The power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists. While it is not the sole test, it is the best test upon the question of control."

In *Murray's Case*, supra (perhaps the leading case in Maine on the question of law now before us), our court enumerated on page 186 eight recognized tests as follows:

"(1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer."

However, no one of these tests is conclusive.

The commission applied these tests to the facts in this case and thereby found as a matter of law that Mr. Kirk was an employee and not an independent contractor and so awarded compensation to the petitioner, the dependent widow.

The commission committed no error. We think it is impossible essentially to distinguish the facts in this case from those in some of the cases cited *supra*. In the *Murray Case*, supra, the petitioner was engaged in unloading coal from railroad cars at the defendant's mill, receiving compensation of twenty cents per ton. There was no definite period of employment; he was subject to discharge at any time without consequent liability. All of the tools and appliances used by him were furnished by the employer. Although he had the right to hire assistants, actually did, supervised their work, paid them out of what he received as compensation, and although the only exercise of control over him was that with relation to place of unloading, yet the court held him to be an employee.

In the *James A. Mitchell Case*, 130 Me., 516, 154 A., 184, Mitchell was employed by the defendant to haul gravel in connection with road construction work. The hiring was for no definite time and no stated amount did Mitchell agree to haul. He was paid by the hour. The employer had the right to direct Mitchell in the place, manner, and method of his work except in the detail of the actual operation of the truck. The court held that although Mitchell's usual business was that of trucking (true, to be considered with other facts in determining his status), he was an employee within the meaning of the Workmen's Compensation Act and

not an independent contractor. That case was held to be indistinguishable from *Dobson's Case*, 124 Me., 305, 128 A., 401, and the earlier *Mitchell Case*, and so now we cannot distinguish the instant case from either of the cited *Mitchell Cases*, the *Dobson Case*, or the *Murray Case*.

But counsel for the defendants claim that the fact that the employer informed Kirk that it would be necessary for him to file an application for a license under our contract carrier statute (Chap. 259, P. L. 1933, as amended) and that he did actually apply for the same (although it is not claimed that he ever received it) manifests an intention to engage in this work as an independent contractor. While this has some bearing upon the issue and must be given proper consideration, yet it is not conclusive. Whether Kirk was an employee within the meaning of the Workmen's Compensation Law or not is a question of law. One might actually intend to enter into an independent contractual relationship and still the terms of the employment be such that the law would determine his status as that of an employee, but here we doubt if the application for this license would evince any real intention of becoming an independent contractor. The idea originated with the employer, the petition for application was filed practically upon its order, and it may well be that Kirk applied for the license so as to be sure of obtaining the employment with no actual intention to become or even considering that he would become an independent contractor rather than an employee.

The real question is: Did Kirk take an independent job or did he, in the language of the statute, engage "in the service of another under any contract of hire?" We think the latter. As stated in the earlier *Mitchell Case*, supra, he was not working for himself but for the company and in the performance of that work he was sufficiently under the control and direction of his employer to take him out of the category of independent contractor.

The application of the *Murray Case* eight tests, aforesaid, to the facts in this case warranted the commission in determining the status of Kirk to be that of an employee.

Appeal dismissed. Decree below affirmed with costs.

ELLEN H. PARKER ET AL.

APPELLANTS FROM DECREE OF JUDGE OF PROBATE

IN RE: ESTATE OF MILES ROBINSON PARKER.

Androscoggin. Opinion, September 10, 1940.

BASTARDS.

The presumption that a child born during wedlock is the child of the husband and legitimate is one of the strongest known to the law, and will not fail unless common sense and reason are outraged by holding that it abides.

Proof of mother's adultery is not in itself sufficient to rebut it.

On report. Proceeding in the Superior Court for the County of Androscoggin in the matter of the estate of Miles Robinson Parker, deceased, wherein Ellen H. Parker et al., appealed to the Superior Court from decree of Judge of Probate. Case remanded to the Supreme Court of Probate for the entry of a decree denying the appeal of Ellen H. Parker and affirming the decree of the Probate Court. Case fully appears in the opinion.

Seth May, for appellants.

Clifford & Clifford, for appellees.

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

THAXTER, J. Ellen H. Parker, the widow of Miles R. Parker, was appointed administratrix c.t.a. of his estate by the Probate Court for the County of Androscoggin. Miles R. Parker had been previously married to one Geneva Owen Parker, against whom he filed a divorce libel on December 22, 1924, alleging as a cause for divorce cruel and abusive treatment. A decree of divorce was entered at the September Term, 1925, of the Supreme Judicial Court for the County of Androscoggin. Previously on July 26, 1925, a child

had been born to the wife and was named Miles R. Parker. October 6, 1925, Miles R. Parker executed his will under the terms of which he left his entire estate to his mother, Etta Merrill Parker. In this will he recited the fact that he had been divorced on October 1, 1925, from Geneva Owen Parker who had prior to the filing of the decree given birth to a male child described as "Miles Robbins Parker." The testator's mother died in April, 1935. He married the appellant, Ellen H. Parker, May 8, 1926 and died November 7, 1937, without having changed his will. The widow claimed her distributive share. She was appointed administratrix c.t.a., and on the settlement of her final account filed a petition setting forth that there remained in her hands for distribution the sum of $2,328.59. Of this amount she claimed to be entitled to one-half, or $1,164.30; she asked that the balance be divided equally between three uncles and an aunt of the testator. A decree was entered ordering that two-thirds of the balance in the hands of the administratrix, or $1,552.40, be paid to Miles R. Parker, the son of the testator, and the balance of $776.19 be paid to the widow, the appellant. From this decree the widow and the other heirs enumerated in her petition for distribution filed notice of appeal. An appeal bond was filed only by Ellen H. Parker and her appeal was the only one properly before the Supreme Court of Probate. It is sufficient, however, to dispose of the issue raised, which is whether Miles R. Parker, born July 26, 1925, was the son of the testator or was illegitimate.

The case with the consent of the parties is before this court on report under a stipulation and an agreement that the testimony and exhibits presented at the hearing before the Judge of Probate on the allowance of the will, with the exception of the testimony of O. E. Hanscom, shall be a part of the report.

The appellant contends that the child is not the son of the testator. As a basis for her claim she says that the mother made two different statements as to when the child was begotten, one that it was while she was living in Greene in September, 1924, and the other that it was in October, also that she told a Mrs. Trask on December 1, 1924, that she had been carrying the child three months. The appellant calls attention to testimony showing that the wife left her husband the first part of September; that she kept company with another man; that she was seen with this man in September and

October under circumstances claimed to be compromising; that she did not notify her husband of the birth of the child; that in a divorce libel which she filed she did not ask for support of the child; that the testator had claimed that it was not his child; that neither she nor Vallerand, her second husband, ever made any request of the testator for support for the child. The appellant argues that this evidence is sufficient to overcome the presumption that the child, though born in wedlock, was the child of Miles R. Parker, the testator.

The presumption that a child born during wedlock is the child of the husband and legitimate is one of the strongest known to the law, and in the words of Cardozo, C. J., "will not fail unless common sense and reason are outraged by holding that it abides." *Matter of Dindlay*, 253 N. Y., 1, 8, 170 N. E., 471; *Hubert* v. *Cloutier*, 135 Me., 230, 194 A., 303. Proof of the mother's adultery is not in itself sufficient to rebut it. *Grant* v. *Mitchell*, 83 Me., 23, 21 A., 178.

The evidence, which it is claimed by the appellant in this case rebuts the presumption, utterly fails to do so, even if we disregard the controverting testimony which shows that after the wife left her husband and returned to her father's house the husband visited her on a number of occasions during September, October, November and December, 1924, that they were on terms of friendly intimacy, and that he stayed there during a part at least of several nights. And in addition there is the testimony of the wife herself that her husband did have access to her during such time. Not only is the presumption of legitimacy not rebutted but the evidence taken as a whole tends to establish that the boy born July 26, 1925, was in fact the child of Miles R. Parker.

Case remanded to the Supreme Court of Probate for the entry of a decree denying the appeal of Ellen H. Parker and affirming the decree of the Probate Court.

BARNES, C. J., having retired, did not join in this opinion.

TIMOTHY L. DONAHUE

vs.

CITY OF PORTLAND, A. EDWIN SMITH AND RALPH D. BROOKS.

Cumberland. Opinion, September 11, 1940.

MUNICIPAL CORPORATIONS. INTOXICATING LIQUORS.

To be enforceable, municipal ordinances must be reasonable, and not repugnant to law.

In determining the validity of municipal ordinances, their reasonableness will be presumed.

The power of the courts to declare municipal by-laws, enacted under general authority, invalid, if they are unreasonable, is unquestioned. It is a power, however, to be cautiously exercised. When doubt exists, it should be resolved in favor of the validity of the by-law.

Whether a particular ordinance is unreasonable and therefore void, is a question to be determined by all the circumstances of the city, the objects to be attained, and the necessity which exists for the ordinance.

The reasonableness or sufficiency of an ordinance or by-law is not to be tested always by its application to extreme cases.

Where party attacking municipal inspection fee offered no evidence touching cost of inspection, trial and reviewing courts had right to assume, absent contrary evidence, that fee was reasonable.

As a general rule, it may be stated that there is a presumption in favor of the validity of an ordinance passed in pursuance of statutory authority, and every presumption is to be made in favor of the constitutionality of such an ordinance, and it will not be declared unconstitutional without clear and irrefragable evidence that it infringes the paramount law.

It is still the duty of the city fathers to safeguard the health of those who purchase food and drink of a victualer, by rigid requirements as to sterilization of drinking glasses, and probably by repeated inspection of the quarters of the licensee.

On appeal. Bill in equity brought by the plaintiff against the City of Portland, *et al.*, to enjoin defendants from enforcing a portion of a city ordinance of the City of Portland. From an adverse decree plaintiff appeals. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Verrill, Hale, Dana & Walker, for complainant.

W. Mayo Payson, for respondents.

SITTING: BARNES, C. J., THAXTER, HUDSON, MANSER, WORSTER, JJ.

BARNES, C. J. On appeal by plaintiff. This bill in equity, filed on June 30, 1938, was brought by the plaintiff, owner and operator of a restaurant, in the City of Portland, engaged in the business of dispensing food, beer and ale, who represents himself as the holder of a state license for the sale of malt beverages, under the provisions of Chap. 268, P. L. 1933, Chap. 201, P. L. 1937, and Chap. 118, P. L. 1939, and lastly, if at all, by virtue of Chapter 160 of the Private and Special Laws of 1917, wherein it is provided that "The municipal officers of the City of Portland are hereby authorized to grant licenses for the following businesses and purposes for such periods of time and in accordance with such rules and regulations not inconsistent with law, and upon payment by the licensee of such fees as the city council of said city may make and establish by ordinance, to wit: . . . victualers . . ."

Plaintiff complains of unjust treatment of himself and his business under an ordinance, passed October 18, 1937, by the City Council of the City of Portland, being the municipal officers of said City of Portland, which, with omission of no consequence, reads as follows:

> "Section 1. In accordance with Chapter 213 of the Private and Special Laws of 1915 as amended by Chapter 160 of the Private and Special Laws of 1917, the following fees are hereby fixed and determined by the City Council of Portland, and no person shall carry on any business herein named within the City of Portland without having procured a license and having paid to the City Clerk therefor the fee hereby fixed, viz:
>
> . . . .
>
> . . . .

Victualer —	without beer	$10.00 per annum
	with beer	35.00 " "
	advertising victualer with beer	1.50 " "

"Section 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed."

He alleges that the ordinance "imposes an extra tax or fee of $26.50" per annum, on the business of a victualer selling beer, and for that reason "is discriminatory, unauthorized, illegal and void."

With the city are joined the city clerk and the chief of police.

Plaintiff prays that a permanent injunction enjoining the defendants and each of them and all persons acting in concert with them from enforcing that portion of the ordinance which imposes an extra tax or fee on the business of a victualer selling beer may issue. And that the plaintiff may have such other and further relief as the nature of the case may require.

Respondents deny that the ordinance in so far as it imposes a higher fee on the business of a victualer serving food "with beer," is a tax on the business of selling beer; that the ordinance is discriminatory, unauthorized, illegal and void; that its enforcement will cause great and irreparable injury etc., and further answering say: "— that as a class victualers serving beer and ale to their customers require and need from said respondent, City of Portland, much more supervision and regulation than such victualers as do not serve beer and ale to their customers, wherefore a greater expense is imposed upon said City of Portland for such supervision and regulation."

To be enforceable, municipal ordinances must be reasonable, and not repugnant to law. *State* v. *Starkey*, 112 Me., 8, 90 A., 431; *Lewiston* v. *Grant*, 120 Me., 194, 113 A., 181.

In determining the validity of municipal ordinances, their reasonableness will be presumed. *Etchison* v. *Frederick City*, 123 Md., 283, 91 A., 161.

But the power of the court to declare municipal by-laws, enacted under general authority, invalid, if they are unreasonable, is unquestioned.

It is a power, however, to be cautiously exercised. When doubt exists, it should be resolved in favor of the validity of the by-law. *State* v. *Small*, 126 Me., 235, 137 A., 398.

"Whether a particular ordinance is unreasonable and therefore void, is a question to be determined by all the circumstances of the city, the objects to be attained, and the necessity which exists for the ordinance." *Chicago & A. Railway Co.* v. *City of Carlinville*, 103 Ill., App. 251; *City of Scranton* v. *Straff*, 28 Pa., Supr. Ct. 258.

"The reasonableness or sufficiency of an ordinance or by-law is not to be tested always by its application to extreme cases." *Comm.* v. *Cutter*, 156 Mass., 52, 29 N. E., 1146.

Where party attacking municipal inspection fee offered no evidence touching cost of inspection, trial and reviewing courts had right to assume, absent contrary evidence, that fee was reasonable. *Salt Lake City* v. *Bennion Gas & Oil Co.*, 80 Utah, 530, 15 P., 2nd 648.

As a general rule, it may be stated that there is a presumption in favor of the validity of an ordinance passed in pursuance of statutory authority.

"Every presumption is to be made in favor of the constitutionality of such an ordinance, and it will not be declared unconstitutional without clear and irrefragable evidence that it infringes the paramount law." *St. Johnsbury* v. *Aron*, 103 Vt., 22, 151 A., 650.

As said by this court in *Randall* v. *Tuell*, 89 Me., 443, 36 A., 910, "The statute is explicitly prohibitory, and the license required is clearly for the protection of the public and to prevent improper persons from engaging in a particular business."

It is still the duty of the city fathers to safeguard the health of those who purchase food and drink of a victualer, by rigid requirements as to sterilization of drinking glasses, and probably by repeated inspection of the quarters of the licensee.

In theory, the ordinance, with consequent inspection, is necessary to lessen and hold in check diseases communicable to human beings, and it would seem that all reasonable men, at all informed as to transmission of germs of disease, will agree that a fee in the amount levied in this case is not unreasonable in amount to insure continuous inspection and effectual supervision over what may be a large business of serving beer with victuals.

Appeal dismissed.
Decree below affirmed.

CHARLES W. WOOD, JR., PRO AMI *vs.* JOSEPH BALZANO.

CHARLES W. WOOD *vs.* JOSEPH BALZANO.

Cumberland. Opinion, September 11, 1940.

REFERENCE AND REFEREES. NEGLIGENCE. MOTOR VEHICLES.

Questions of fact are decided and settled by referees, and such decision will not be disturbed if supported by any evidence of probative value.

Where exceptions are taken to referee's report exceptant must show that as a matter of law the facts did not warrant an award against him.

In backing a closed car great vigilance is required, of the driver, to comply with the rule of reasonable care.

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

No hard and fast rules as to the care of children can be laid down and the financial condition of the family, and the other cares devolving upon the parents are not to be ignored.

On exceptions. Actions heard together before a referee for damages for personal injuries to infant plaintiff and expenses incurred in connection therewith, by his father. Defendant filed written objections to the reports of the referee in favor of the plaintiffs, and the cases come forward on exceptions to the acceptance of the reports, on the question of liability, no objection being made as to the amounts awarded. Exceptions overruled. Cases fully appear in the opinion.

Bernstein & Bernstein, for plaintiffs.

I. Edward Cohen, for defendants.

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

MANSER, J. These actions, heard together before a referee, are for damages for personal injuries to the infant plaintiff, and ex-

penses incurred in connection therewith, by his father. The defendant filed written objections to the reports of the referee in favor of the plaintiffs, and the cases come forward on exceptions to the acceptance of the reports, on the question of liability, no objection being made as to the amounts awarded.

The minor plaintiff, a child of four years, was quite seriously injured, when an automobile operated by the defendant was being backed out of a dooryard where the boy was at play with other children. Questions of fact are decided and settled by referees, and such decision will not be disturbed if supported by any evidence of probative value. *Hincks Coal Co.* v. *Milan et al.*, 135 Me., 203, 193 A., 243; *Richardson* v. *Lalumiere*, 134 Me., 224, 184 A., 392.

The issues before the referee were negligence on the part of the defendant, and the claim by the defendant that there was imputable negligence on the part of the parent for leaving the child in a place of danger. The exceptant must show that as a matter of law the facts did not warrant an award against him.

From the preponderance of evidence, the referee would be justified in finding the following situation:

The families of both plaintiff and defendant lived in a six tenament house in Portland. In the rear was a court or yard of comparatively small area, commonly used as a playground by the children in the block. There were six children in the plaintiff's family, ranging in age from ten downward. There were at least a dozen other children living in the tenement house. The plaintiff child, and two older sisters, then ten and eight years of age respectively, were playing in the yard, together with other children, in all ten or twelve. The mother had been back and forth in the yard, with an eye to the safety of her children, but a few minutes before the accident had returned to the house to attend to some household duties. The defendant and another young man had been cleaning an automobile belonging to defendant's mother, which was parked in the same yard. He knew that the children were running about the yard, playing tag and hide and seek and if some vanished momentarily, they reappeared with equal celerity. There was evidence that the boy subsequently injured was most of the time sitting down and playing in the sand with another boy a year younger. Upon completion of his work on the car, the defendant and his companion,

entered the car and defendant undertook to back it out of the yard to the street. There was testimony that the defendant blew the horn, but two older children said they did not hear it. The defendant said he was looking into the rear vision mirror, but obviously could not see a small child on the ground in the rear of the sedan car. The infant plaintiff was struck and his leg run over, receiving a "crushing blow," as described by the physician, while the car was still in the yard but approaching the inside edge of the sidewalk. The defendant stopped his car upon hearing a shout from passing pedestrians. The defendant was not starting out on a trip. He testified that he intended merely to park the car beside the street curb.

On the question of negligence of the defendant under such circumstances, our court has said:

> "The court should establish as a law the rule which prevents injury or loss of life rather than that which invites or even permits it. This rule is based upon reason and public policy."
>
> "Prudent drivers neither kill children nor injure men, except at very rare intervals, and then only in cases of unavoidable accident or contributory negligence." *Savoy* v. *McLeod*, 111 Me., 234.

Common experience has demonstrated that in backing a closed car the driver is greatly restricted, if not entirely prevented from seeing objects below the rear window and in close proximity to the car. Under such circumstances great vigilance is required to comply with the rule of reasonable care.

> "In fact, it has been said to be imprudent to back an automobile out of a garage across the sidewalk without taking extra precautions to avoid running down passers-by. Especially where the view is obstructed is it necessary to take extra precautions." 5 Am. Jur., Automobiles Sec. 332.

So in the Vermont case of *Crossman* v. *Perkins*, 101 Vt., 94, 141 A., 594, where a motor truck was backing out of a driveway into the street, the court said:

> "He had no right to assume that the road was clear, but was bound to be vigilant, watchful and to have anticipated and expected the presence of others."

Here the defendant knew a considerable group of small children was playing about the yard, even though momentarily out of sight. The referee, guided by the rules stated, would be justified in deciding that sufficient precautions were not taken, and even that it would have been entirely reasonable for the defendant to have required his companion to stand upon the ground and act as a lookout.

As to imputable negligence of the parent, our court has adopted the rule stated in Thompson on Negligence, Vol. 1, p. 306, in *Grant* v. *Bangor Ry.*, 109 Me., 133, 83 A., 121:

> "Small children have a right to light, air and exercise and the children of the poor cannot be constantly watched by their parents."

> "No hard and fast rules as to the care of children can be laid down and the financial condition of the family, and the other cares devolving upon the parents are not to be ignored."

This is reiterated in *Farrell, pro ami* v. *Hidish*, 132 Me., 57, 165 A., 903.

In this case the mother may well have considered that her three children were in a place of comparative security, and her concern in going out from time to time was to see that they remained within its confines.

The defendant fails to show that the referee erred as a matter of law in making awards for the plaintiffs. In each case the entry will be:

Exceptions overruled.

(BARNES, C. J., having retired, did not join in this opinion.)

BELFAST *vs.* BATH.

Sagadahoc. Opinion, September 17, 1940.

PLEADING AND PRACTICE. STATUTES, CONSTRUCTION OF.

The clerk of courts is an officer elected by the voters of a county. He serves as clerk for the Supreme Judicial and Superior Courts and the Board of County Commisioners in connection with their work and jurisdiction in such county. He is essentially a county officer. While the legislature might conceivably clothe him with authority in connection with a court of state-wide jurisdiction, outside of his own county, yet such intent is not implicit in the language employed in the statute under consideration. It would be inconsistent with the provision of R. S. 1930, *Chap.* 95, *Sec.* 2.

Inconsistency is not to be presumed because of somewhat loose or ambiguous phraseology, but must be clearly and definitely shown.

A statute must be construed as a whole, and the construction ought to be such as may best answer the intention of the legislature. Such intention is to be sought by an examination and consideration of all its parts, and not from any particular word or phrase that may be contained in it.

A writ entered in court must show on its face one of two things: that it was issued by the clerk of courts for the county where it is entered; or that it was issued by the clerk of courts for another county and made returnable where entered.

On exceptions. Action by the City of Belfast against the City of Bath for pauper supplies. The validity of the writ was attacked by a motion to dismiss. The motion was overruled, and the case comes forward on exceptions. Exceptions sustained. Case remanded for dismissal in accordance with stipulation. Case fully appears in the opinion.

Clyde Chapman, for plaintiff.

Edward W. Bridgham,

John P. Carey, for defendant.

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

MANSER, J. This is an action for pauper supplies. The validity of the writ was attacked by a motion to dismiss. The motion was overruled, and the case comes forward on exceptions. It appears from the record that a Superior Court writ, in the form established by Laws of Maine, 1821, Chapter 63 and still existent, was issued in blank to counsel for the plaintiff. The writ was signed and sealed by the clerk of courts of Waldo County. A declaration, properly setting forth the cause of action, was then attached. The writ was dated and made returnable to the succeeding term of the Superior Court to be held in Sagadahoc County. There is no question as to the regularity of the procedure thus far outlined.

The basis of the motion to dismiss was that the writ as issued from the clerk's office bore the printed caption "State of Maine, Waldo, ss." The name of the county "Waldo" was then stricken out and the name of the county "Sagadahoc" inserted in its place. Contention is that the writ so changed was then ostensibly signed by the clerk of Sagadahoc County when in fact it was signed by the clerk of Waldo County.

Writs are the ordinary instrumentalities to initiate the procedure in civil cases. Originally, the Supreme Judicial Court included among its functions the trial and disposition of civil and criminal cases at *nisi prius* terms. The statutory provision which applied to the issuance of writs in that court is found in R. S. 1916, Chap. 86, Sec. 2, as follows:

> "All civil actions, except *scire facias* and other special writs, shall be commenced by original writs; which, in the supreme judicial court, may be issued by the clerk in term time or vacation. . . . A writ issued by the clerk of any county, may be made returnable in any other county in which the action might be legally brought."

In the revision of 1930, the legislature, giving recognition to the fact that jurisdiction of the trial of civil cases had been transferred from the Supreme Judicial Court to the Superior Court, eliminated the words "supreme judicial" and inserted in place thereof the word "superior" in all instances throughout the entire Revised Statutes which had to do with Trial Court procedure. Thus we find that R. S. 1916, Chap. 86, Sec. 2, noted above, becomes R. S. 1930,

Chap. 95, Sec. 2, and reads exactly the same except for such substitution.

The authority to issue writs from the clerk's office of the Supreme Judicial Court, returnable in any other county in which the action might be legally brought, originated in 1864. See P. L. 1864, Chap. 224. This authority, thus granted, continued without change through the revisions of 1871, 1883, 1903 and 1916 and, as before stated, appears in R. S. 1930, Chap. 95, Sec. 2, with the substitution noted.

In the formation and development of the Superior Court system by successive statutory enactments, single and separate county courts were first created designated as Superior Courts until, in 1919, there were four in number. They were organized to relieve the Supreme Judicial Court of a portion of its *nisi prius* work in their individual counties, and each was limited in jurisdiction to its own county. The statute read as follows:

> "Each justice of a superior court shall establish a seal for his said court; all writs and processes issuing from any superior court shall be in the name of the state, of the usual forms, bearing the teste of the justice thereof under the seal of said court; they shall be signed by its clerk and obeyed and executed throughout the state, and may be made returnable in the superior court of any other county in which the action might be legally brought." R. S. 1916, Chap. 82, Sec. 88.

Then came the enactment of P. L. 1929, Chap. 141, which created the state-wide jurisdiction of the Superior Court, relieved the Supreme Judicial Court entirely from the work of *nisi prius* terms and transferred those functions to the Superior Court. The comparable provision of the statute, above quoted, now appears in R. S. 1930, Chap. 91, Sec. 19, as follows:

> "The justices of the superior court shall establish a seal for said court and all writs and processes therefrom shall be in the name of the state, in the usual form, bearing the teste of any justice of said court, under the seal of said court; they shall be signed by any one of its clerks and obeyed and executed throughout the state, and may be made returnable in the su-

perior court in any other county in which the action might be legally brought."

It is claimed that the legislative intent, disclosed by the above provision, was to enlarge and extend the authority of a clerk of the Superior Court so that he may sign writs which purportedly issue from a county other than his own.

The clerk of courts is an officer elected by the voters of a county. He serves as clerk for the Supreme Judicial and Superior Courts and the Board of County Commissioners in connection with their work and jurisdiction in such county. He is essentially a county officer. While the legislature might conceivably clothe him with authority in connection with a court of state-wide jurisdiction, outside of his own county, yet such intent is not implicit in the language employed in the statute under consideration. It would be inconsistent with the provision of R. S. 1930, Chap. 95, Sec. 2. Inconsistency is not to be presumed because of somewhat loose or ambiguous phraseology, but must be clearly and definitely shown.

In discussing the interpretation of statutes, the court in *Smith* v. *Chase*, 71 Me., 164, said:

> "Such a construction must prevail as will form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration. The context, and the course of legislation, as matter of history often throw light upon the meaning and application of terms used in the statutes."

And, again, in *Rackliff* v. *Greenbush*, 93 Me., 99 at 104, 44 A., 375, 376:

> "A statute must be construed as a whole, and the construction ought to be such as may best answer the intention of the legislature. Such intention is to be sought by an examination and consideration of all its parts, and not from any particular word or phrase that may be contained in it. This is the guiding star in the construction of any statute."

It must be kept in mind that R. S., Chap. 95, Sec. 2, provides that:

> "A writ issued by the clerk of any county may be made returnable in any other county in which the action might be legally brought."

and that R. S., Chap. 91, Sec. 19, though providing that "all writs and processes . . . shall be signed by any one of its clerks" still retains the further provision identical in effect that they "may be made returnable in the superior court in any other county in which the action might be legally brought."

If by reason of a vacancy in the office of clerk of courts in any county a writ cannot be issued from the court in that county, ample opportunity is afforded to procure writs issued by the clerk in any one of the other fifteen counties, and they may be made returnable in the county where the action is to be entered. We hold, therefore, that a writ entered in court must show on its face one of two things: that it was issued by the clerk of courts for the county where it is entered; or that it was issued by the clerk of courts for another county and made returnable where entered. In the record appears the stipulation that if the exceptions are sustained the case shall be dismissed.

The entry will be

Exceptions sustained.
Case remanded for dismissal in accordance with stipulations.

(BARNES, C. J., having retired, did not join in this opinion.)

STATE OF MAINE *vs.* ARTHUR DUMAIS.

Androscoggin. Opinion, September 18, 1940.

CRIMINAL PLEADING. BRIBERY.

Solicitation of a felony is an offense indictable at common law.

The common understanding of the word "offer" is verified by the dictionaries as "to bring to or before"; "to hold out to"; "to proffer"; "to make a proposal"; "to essay the accomplishment of."

When it is alleged that the respondent offered to do something of advantage to another, provided he received in return a bribe, no uncertainty could have resulted in the mind of the respondent that he was charged with solicitation of a bribe.

The word "or" as used in statute making it an offense for an executive, legislative, or judicial officer to accept a bribe in connection with "any matter pending, or that may come legally before him in his official capacity," is disjunctive, and the corrupt act may occur when a matter is pending, or, instead, it may be with reference to a matter that may come legally before him.

The indictment should state all the elements necessary to constitute the offense, either in the words of the statute or in language which is its substantial equivalent.

The indictment should state facts, not state conclusions, and it must contain a statement of all the facts and it need contain nothing more.

The rule is established that, when a single fact is alleged with time and place, the words "then and there" subsequently used as to occurrences of other facts, as to the crime or a part thereof, refer to the same point of time, and necessarily import that the two were coexistent, and it is sufficient if these words are repeated to every other material fact set up in the indictment.

In the crime of bribery, intent is a necessary element.

If the intention with which an act is done be material to constitute the offense charged, such intention must be truly laid in the indictment; and it must be laid positively; and the want of a direct allegation of any thing material, in the description of the substance, nature, or manner of the offense, cannot be supplied by any intendment or implication whatsoever.

On report. Indictments charging respondent with soliciting a bribe and with bribery. Respondent challenged sufficiency of indictments. As to indictment for solicitation of a bribe, indictment held sufficient. Case remanded for trial. As to indictment for bribery, both counts of indictment held insufficient. Case remanded for entry quashing the indictment in accordance with the terms of the report. Cases fully appear in the opinion.

Edward J. Beauchamp, County Attorney, for State.

Israel Alpren,

Benjamin L. Berman, for respondent.

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

MANSER, J. The sufficiency of two indictments is challenged and the questions of law involved are reported to the court for determination. The first indictment is at common law, alleging in substance that the respondent, while a member of the School Committee of Lew-

iston, solicited a bribe from a candidate for appointment as janitor of a school building in return for his vote and influence in furtherance of such appointment.

Solicitation of a felony is an offense indictable at common law. *State* v. *Beckwith*, 135 Me., 423, 198 A., 739. The first objection is that the language of the indictment does not clearly state that the initiative was taken by the respondent, while the criminality of solicitation is because the respondent sets a scheme in motion and creates in the bribe-giver a willingness to bribe. The phraseology used was that the respondent "feloniously and corruptly did offer and agree to vote for" Joseph Galarneau as janitor, "provided the said Joseph Galarneau would pay to the said Arthur Dumais the sum of three hundred dollars in money for his vote," etc.

The wealth of the English language does not restrict the pleader to the use of a particular word, such as the word "solicit," if the meaning of the term used is clear and explicit. The common understanding of the word "offer" is verified by the dictionaries as "to bring to or before"; "to hold out to"; "to proffer"; "to make a proposal"; "to essay the accomplishment of."

When it is alleged that the respondent offered to do something of advantage to another, provided he received in return a bribe, no uncertainty could have resulted in the mind of the respondent that he was charged with solicitation of a bribe.

Further objecting, and using as a premise that, when an indictment is for solicitation, the person accused of the offense is entitled to know the specific felony which it is alleged he solicited, the respondent here says that the statutory crime of bribery is not sufficiently set out. The statute involved is R. S., Chap. 133, Sec. 5. The particular objection is that the statute requires that the bribe must be in connection with "any matter pending, or that may legally come before him in his official capacity." It is asserted there is want of specific averment that the matter was pending, and further failure to use the word "legally." It is true there is no averment that the matter was then pending. Instead, it is alleged that the appointment of a janitor "would come before the meeting of the Superintending School Committee which meeting was to be held on or about April 8, 1936, for the purpose of appointing a janitor," etc. The statute clearly covers bribery, (1) "in any matter pending," (2) "or that

may come legally before him." The word "or" in this connection is disjunctive. The corrupt act may occur when a matter is pending, or instead, it may be with reference to a matter that may come legally before him. The State is not limited to proof that the matter is then pending. It may allege and prove the alternative, as was undertaken in this instance.

In *State* v. *Clark*, 86 Me., 194, 29 A., 984, there was considered the phraseology of the statute providing a penalty for cruel treatment of a horse by a person "having the charge or custody thereof" and objection was made that the complaint did not charge the defendant with having the charge and custody of the horse. The court said that, while the words "charge" and "custody" are frequently used as synonymous, "they are placed in the statute, however, disjunctively and, in such cases, need not be conjunctively averred, and cannot be disjunctively averred."

Again, the respondent says that, as the statute uses the word "legally," it must be used in the indictment.

> "The indictment should state all the elements necessary to constitute the offense, either in the words of the statute or in language which is its substantial equivalent." *State* v. *Bushey*, 96 Me., 151; *State* v. *Hussey*, 60 Me., 410.

The indictment alleges the election and qualification of the respondent as a member of the superintending school committee, an executive office under the laws of the State of Maine; that, as such, he was then and there by law charged with the selection of suitable persons to serve as janitors in the care, maintenance, and upkeep of school buildings; that the Jordan School building was one of the public school buildings of the city; that Joseph Galarneau was a candidate for appointment as janitor of said building; that the respondent "feloniously and corruptly did offer and agree to vote for and help further the appointment of the said Joseph Galarneau as janitor of the said Jordan School building when the matter would come before the meeting of the Superintending School Committee, which meeting was to be held on or about April 8, 1936, for the purpose of appointing a janitor for the said Jordan School building," etc.

This phraseology, says the respondent, does not appraise him

that the matter may come legally before him in his official capacity. The word "legally" does not appear. In *State* v. *Robbins*, 66 Me., 324 at 328, the court said:

> "It is undoubtedly the safer course to follow the language of the statute in describing the offense charged in the indictment. But it has been repeatedly held that words equivalent in their meaning to those in the statute may be used."

The indictment should state facts not state conclusions. *State* v. *Bushey*, supra. It must contain a statement of all the facts and it need contain nothing more. Bishop on Criminal Procedure, 2d ed., Sec. 331. The cases of *State* v. *Beason*, 40 N. H., 367, and *State* v. *Flagg*, 50 N. H., 321, cited by the respondent in support of the contention that the word "legally" was essential, were decided in accordance with this principle. Both reviewed indictments for obstructing an officer in the service of "legal process." The court held that the indictment "must state the process to be legal, *or so describe it that it shall appear to be so.*" (Italics ours.)

The real question is whether there is a sufficient allegation of facts to show that the offense was within the statutory definition. In the last analysis, having stated all the facts which constitute the transaction, it is for the court to determine whether the appointment of a janitor was a matter which would "legally" come before the respondent in his official capacity. As said in the English case, decided in 1779, *The King* v. *Lyme Regis*, 1 Doug., 149:

> "It is one of the first principles of pleading, that you have only occasion to state facts; which must be done for the purpose of informing the Court, whose duty it is to declare the law arising upon these facts."

In this particular of the indictment, all the elements necessary to criminality have been specified.

Another alleged defect is that it fails to state properly the specific time and place when the criminal acts occurred. But one time and place were alleged. Thereafter, the occurrences and acts as set forth are linked with that time and place by the use of the authenticated phrase "then and there." The rule is established that, when a single fact is alleged with time and place, the words "then and there"

subsequently used as to occurrences of other facts, as to the crime or a part thereof, refer to the same point of time, and necessarily import that the two were coexistent. *State* v. *Hurley*, 71 Me., 354; *State* v. *Willis*, 78 Me., 70, 2 A., 848; *State* v. *Mahoney*, 115 Me., 251, 98 A., 750; *Turns* v. *Commonwealth*, 47 Mass., 224, 234; *State* v. *Hand*, 58 A., 641, 71 N. J. L., 137; and it is sufficient if these words are repeated to every other material fact set up in the indictment. *Palmer* v. *People*, 138 Ill., 356, 28 N. E., 130.

The indictment for solicitation of bribery is held to be sufficient.

Indictment for Bribery

Objections similar to those raised in *State* v. *Vallee*, 136 Me., 432, 12 A., 2d., 421, are there analyzed and determined to be untenable.

The attention of the court, however, is called to the contention that criminal intent on the part of the respondent is not specifically alleged in either count. In the crime of bribery, intent is a necessary element. The statute, R. S., Chap. 133, Sec. 5, under which the indictment is drawn, is as follows:

> "Whoever gives, offers or promises to an executive, legislative or judicial officer, . . . any valuable consideration or gratuity whatever, or does, offers or promises to do, any act beneficial to such officer, with intent to influence his action, vote, opinion or judgment, in any Matter, etc.; and whoever accepts such bribe or beneficial thing, in the manner and for the purpose aforesaid . . . shall be punished."

The indictment, with respect to the element of intent, is as follows:

First Count

> "contriving and intending the duties of his said office and the trust and confidence reposed in him, all as aforesaid, to prostitute and betray, did then and there, unlawfully and corruptly agree to accept and receive a promise of one Joseph Galarneau to pay him, the said Arthur Dumais, the sum of three hundred dollars in money as a bribe to influence and induce the said Arthur Dumais to assist in his said office in procuring the se-

lection of said Joseph Galarneau as janitor of said Jordan School building, against the peace of the State and contrary to the statute in such case made and provided."

Second Count

"contriving and intending the duties of his said office and the trust and confidence reposed in him, all as aforesaid, to prostitute and betray, did then and there unlawfully and corruptly receive from one Joseph Galarneau the sum of one hundred dollars in money as a bribe and pecuniary reward to influence and induce the said Arthur Dumais to assist in his said office in continuing the said Joseph Galarneau in his employment as janitor of the said Jordan School building, the said Joseph Galarneau having been appointed as janitor of the said Jordan School building on the eighth day of April, A. D. 1936, against the peace of the State and contrary to the form of the statute in such case made and provided."

It is recognized that the averments used in both counts follow the language employed in *State* v. *Miles*, 89 Me., 142, 36 A., 70; and *State* v. *Martin*, 134 Me., 448, 187 A., 710, but in neither case was the point specifically raised or considered. The allegation of the indictment is the receipt of a bribe and pecuniary reward "to influence and induce." It does not say "*with intent* to influence and induce."

In *State* v. *Beattie*, 129 Me., 229, 151 A., 427, the court quoted from *Commonwealth* v. *Shaw*, 7 Metcalf, 57 as follows:

"If the intention with which an act is done be material to constitute the offense charged, such intention must be truly laid in the indictment; and it must be laid positively; and the want of a direct allegation of any thing material, in the description of the substance, nature, or manner of the offence, cannot be supplied by any intendment or implication whatsoever."

See also *Galeo* v. *State*, 107 Me., 474 at 479, 78 A., 867; *State* v. *Strout*, 132 Me., 134, 167 A., 859; *State* v. *Faddoul*, 132 Me., 151, 168 A., 97.

It is the opinion of a majority of the court that, under the rule of precision emphasized in recent decisions in our state, cited *supra*,

there was failure to sufficiently allege the necessary element of intent, which cannot be cured by implication.

The entry in case No. 2566, being the indictment for solicitation of a bribe, will be

Indictment held sufficient.
Case remanded for trial.

The entry in case No. 2567, being the indictment for bribery, will be

Both counts of indictment held insufficient.

Case remanded for entry quashing the indictment in accordance with the terms of the report.

(DUNN, C. J., having deceased, did not join in this opinion.)

(BARNES, C. J., having retired, did not join in this opinion.)

STATE OF MAINE *vs.* ARCHIE RUVIDO.

Knox. Opinion, September 20, 1940.

STATES. INTERNATIONAL LAW. FISH.

The sovereignty of nations bordering on the sea does not stop at the shore, but that for some distance at least it extends over and under the ocean.

On the American Revolution dominion over these waters became vested in the several states, and there it still remains except in so far as they may by the constitution have surrendered such control to the federal government.

The jurisdiction of the United States courts over these waters in admiralty and maritime causes, and the powers given to Congress under the commerce clause of the Constitution still leave the authority of the several states substan-

tially unimpaired. The State of Maine still is sovereign over the seas which wash its coast and may if it sees fit deny to non-residents the right to fish in these waters.

As between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within the limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish like lobsters, or fish attached to or imbedded in the soil.

The legislature by its act cannot extend the jurisdiction of the state beyond the limits generally recognized by law.

The sovereignty over territorial waters exists even though the state has never seen fit to define their limit.

On report. Respondent was arraigned in the municipal court for the City of Rockland, on complaint charging violation of P. L. 1937, Chap. 32. Respondent pleaded not guilty, after a hearing was found guilty and sentenced, and then filed an appeal which was duly entered in the Superior Court for the County of Knox. Case reported on an agreed statement of fact. Judgment for the State. Case fully appears in the opinion.

Jerome C. Burrows, County Attorney for the State.

Philip G. Willard, for respondent.

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

THAXTER, J. The respondent, a resident of Boston, in the Commonwealth of Massachusetts, was the captain of a fishing schooner and was charged in a complaint issued from the municipal court of the City of Rockland with a violation of P. L. 1937, Chap. 32, the essential part of which reads as follows:

> "The taking or fishing for by a non-resident of the state of Maine, for commercial purposes, any kind of ground fish, by hook, line, trawl or in any other manner, within the territorial waters of the state between the 1st day of April and the 1st day of November in each year for a period of 5 years, is hereby prohibited."

The offense is set forth in the complaint as follows:

"Charles W. Carver of Rockland complains on August 12th, 1939, that Archie Ruvido of Boston, Massachusetts, on a certain day between the First day of April and the First day of November, A. D. 1939, to wit, on the 12th day of August, A. D. 1939, in the waters of Penobscot Bay near Seal Island, in the County of Knox aforesaid, did fish for and take for commercial purposes ground fish by means of beam trawler, said waters of Penobscot Bay near Seal Island being within the territorial waters of the State of Maine against the peace of the State and contrary to the form of Statute in such case made and provided."

The respondent was arraigned in the municipal court, pleaded not guilty, after a hearing was found guilty and sentenced, and then filed an appeal which was duly entered in the Superior Court for the County of Knox. The case is reported to this court on an agreed statement of fact.

It is admitted that the respondent, being a non-resident, did on the twelfth day of August, 1939, fish for and take for commercial purposes ground fish by means of a beam trawler at a point off the coast of Maine, said point being between one and three miles north northeast of an island known as Seal Island, which point is marked on a chart of "Penobscot Bay and Approaches," which is made a part of the agreed statement.

The primary question reserved for the consideration of this court is whether the offense was committed within the territorial waters of the State of Maine over which the state has general jurisdiction and sovereignty. Also this court is asked to determine whether the State has under the provisions of the statute here involved assumed jurisdiction and sovereignty over such waters; also whether the statute is not void or inoperative by reason of the uncertainty of its provisions.

If the court shall determine these issues in favor of the State, an entry is to be made "Judgment for the State," otherwise the entry is to be "Complaint Dismissed."

From earliest times it has been conceded that the sovereignty of nations bordering on the sea does not stop at the shore, but that for

some distance at least it extends over and under the ocean. Such control has been regarded as necessary for the security of those living on the coast and as proper to assure the full enjoyment by them of the land which they inhabit. On the American Revolution dominion over these waters became vested in the several states, and there it still remains except in so far as they may by the Constitution have surrendered such control to the federal government. 1 Moore, A Digest of International Law, 702, H. R. Doc., No. 551, 56 Cong., 2d Sess. But the jurisdiction of the United States courts over these waters in admiralty and maritime causes, and the powers given to Congress under the commerce clause of the Constitution still leave the authority of the several states substantially unimpaired. The State of Maine, therefore, still is sovereign over the seas which wash its coast and may if it sees fit deny to non-residents the right to fish in these waters. Gould, Waters (1883) 331; *McCready* v. *Commonwealth of Virginia*, 94 U. S., 391; *Corfield* v. *Coryell*, 4 Wash., C. C. 371, Fed. Cas. No. 3230; *Bennett* v. *Boggs*, 1 Baldw., C. C. 60, Fed. Cas. No., 1319; *Haney* v. *Compton*, 36 N. J. L., 507; See *Dunham* v. *Lamphere*, 3 Gray, 268, 275, 276.

The problem, however, which we have to settle is the extent of the waters over which this state may exercise its authority.

Grotius laid down the doctrine that territorial rights extended over as much of the sea as could be defended from the shore. Grotius, The Law of War and Peace, Book II, Chap. 3, Secs. 13-14. Other tests have been suggested but this general principle has remained dominant through the centuries. In 1703 Bynkershoek fixed the limit as a marine league or three miles from the coast, a distance which was then the range of cannon shot. 1 Moore, *supra*, at 699. In spite of the lengthening range of artillery this has remained the test generally applied to the present day.

Our shore in the State of Maine is fringed with thousands of islands, many of which are large and the homes of varied industries, others so wild and inaccessible that they seldom feel the tread of human feet. All are, however, an integral part of our state and to a greater or less extent, as bulwarks against the sea, form our harbors and the calm reaches through which commerce flows up and down our shore. It is, therefore, important for us to know that in determining the extent of our control over the water, these islands are re-

garded as natural appendages of the mainland and as a part of our coast as that word is used in the books. Wheaton, Elements of International Law (Edited by George Grafton Wilson 1936, Part II, Sec. 178): *The Anna*, 5 C. Rob. Adm. Rep. 385. See *In Re Marincovich*, 48 Cal. App. 474, 192 P., 156, which holds that the sovereignty of the State of California extends for a distance of three miles around Catalina Island, which is twenty-one miles from the mainland.

To what extent the jurisdiction of a state extends to bays enclosed by headlands within its borders is still an open question. Wheaton, *supra*, Sec. 188, expresses the rule as follows: "Thus, in respect to those portions of the sea which form the ports, harbors, bays, and mouths of rivers of any State where the tide ebbs and flows, its exclusive right of property, as well as sovereignty, in these waters, may well be maintained, consistently with both the reasons above mentioned, as applicable to the sea in general. The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other State or person, which, as we have already seen, constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land, which has already been appropriated by a particular people." This text is in accord with an opinion of Attorney General Edmund Randolph of May 14, 1793 (see 1 Moore, *supra* at 735 *et seq.*), holding that the waters of Delaware Bay are United States territory. See also the report of the Second Court of Commissioners of Alabama Claims in the case of *Stetson* v. *United States*, digested in 1 Moore, *supra* at 741-743, holding that the waters of Chesapeake Bay are within the territory of the United States. See also Note 46 L. R. A., 271. It has been held that the Bay of Monterey and the Bay of San Pedro are territorial waters of the State of California. *Ocean Industries Inc.* v. *The Superior Court of Santa Cruz County*, 200 Cal., 235, 252 P., 722; *United States* v. *Carrillo*, 13 F. Supp., 121. In the attempt to settle the dispute over the Northeastern Fisheries the unratified treaty of 1888 provided that in determining what were exclusively British waters under the convention of October 20, 1818, the three

marine miles under that convention should be measured at bays from a straight line drawn across the part nearest the entrance, at the first point where the width did not exceed ten marine miles. On the other hand in 1886 Mr. Bayard, Secretary of State, in a letter to the Secretary of the Treasury (Wharton, A Digest of the International Law of the United States [1886] 107-108) used the following language: "So far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign."

In view of all this confusion perhaps the safe guide to follow is found in the following language of the court in the case of *Commonwealth* v. *Manchester*, 152 Mass., 236, 240, 25 N. E., 113, 116: "We regard it as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within the limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish like lobsters, or fish attached to or imbedded in the soil."

What are the facts of the present case?

It was on the outer rim of Penobscot Bay that the respondent was found fishing in violation, as the State claims, of our statute. Both shores of this bay and the large river which forms its headwaters are entirely within our borders. As the river widens into the bay we find many islands. The mainland from the City of Belfast to Rockland and beyond along the Muscle Ridge Channel extending for a distance of approximately twenty-five miles, is the westerly shore of the bay. The mainland extends for a distance of about six miles on the easterly side ending at Cape Rosier. From there on for

nearly twenty miles southerly the easterly shore is formed by many islands among which are the large islands of Deer Isle and the Isle Au Haut. Vinalhaven and North Haven Islands, which are practically one with a narrow passage between them, lie in almost the exact center of the bay between the mainland on the west and the Isle Au Haut on the east. That part of the bay northerly of a line drawn from the mainland below Rockland to the southerly end of Vinalhaven Island and from there to the Isle Au Haut might properly be called the inner bay extending about twenty-five miles from north to south and at its southerly end about eighteen miles from east to west. Farther toward the open ocean in an arc of about seven miles from the center of the southerly line of the inner bay are groups of small islands, Green Island, Matinicus, Ragged Island, Wooden Ball, and Seal Island with which we are concerned the most easterly of the group. At no point is the distance more than six miles between any of these islands or between them and another group which lies close to the mainland on the west, except at the easterly end where the distance between Seal Island and the Isle Au Haut is a little over seven miles. This wide passage forms the easterly entrance to Penobscot Bay. In the center of this wide circle of islets which are the outer bulwark protecting the bay to some extent against the battering of the ocean and about three miles seaward from the outer one of the group lies Matinicus Rock with its lighthouse directing the mariner on his homeward voyage to the westerly openings of the bay on his left and to the easterly entrances on his right.

It is difficult to conceive of a body of water more clearly defined by nature than this, or more easily patrolled and protected by the state which controls its shores. All the islands which surround it are within the State of Maine. The mariner who passes through any of these channels almost instinctively feels himself within our domain. If there is to be with respect to bays any extension of the minimum limit of territorial waters, as laid down in *Commonwealth* v. *Manchester*, supra, it should certainly be applied to this body of water. But it is not necessary for us to decide at this time this interesting question. It is admitted that this respondent was fishing for ground fish within less than three miles of the shore of Seal Island which is a part of the State of Maine and within the County of Knox. Regardless of whether all of Penobscot Bay as such is a part of the terri-

torial waters of this state, the respondent while he was within three miles of Seal Island was fishing within our territorial waters as they have been defined by all text writers. The case now before us cannot be distinguished from *In Re Marincovich*, supra. The doctrine there laid down is in accord with well-settled principles. We therefore hold that the act complained of did take place within the territorial waters of this state over which it has jurisdiction and sovereignty.

The other contentions of the respondent need but passing comment.

He complains because he says this state has not by statute, as has Massachusetts, defined its territorial limits on the coastal waters. Such a statute, however, would be only declaratory of the law. A man cannot "add one cubit unto his stature," and the legislature by its act cannot extend the jurisdiction of the state beyond the limits generally recognized by law. The sovereignty over territorial waters exists even though the state has never seen fit to define their limit. The State of Maine has exercised this authority as to portions of these waters. *McClain* v. *Tillson*, 82 Me., 281, 19 A., 457; *State* v. *Thompson*, 85 Me., 189, 27 A., 97. There is no reason why it may not assume control over all. This was certainly the intent of the legislature in enacting the statute here in question.

The respondent claims further that the statute is void for indefiniteness, because it applies to "territorial waters" without defining them. So far as the description of the offense goes, it seems explicit. A statute applicable to the state as a whole is not, however, void because a boundary may be in dispute and there is a consequent doubt of sovereignty over a particular area. And an exercise of control over territorial waters is not void because there may be uncertainty how far they extend. Are not the general statutes of this state applicable to all places within its boundaries and are not territorial waters within those bounds?

In accordance with the stipulation the entry will be

Judgment for the State.

(BARNES, C. J., having retired, did not join in this opinion.)

ANNIE LAURA ROSE, ADMINISTRATRIX

ESTATE OF JACOB W. SILLIKER

vs.

GEORGE H. OSBORNE, JR.

Androscoggin. Opinion, October 5, 1940.

TRUSTS. COSTS.

Where presiding justice was acting in accordance with suggestion of Supreme Court in amending original decree entered in a proceeding to recover savings accounts which administratrix claimed were the property of the estate, and administratrix had not received proceeds of accounts, though more than five years had elapsed from time that Supreme Court ruled that administratrix was entitled to deposits, certification by presiding justice, pursuant to statute, that exceptions filed to amendment of decree were frivolous and intended for delay, was proper.

On exceptions. Suit in equity by Annie Laura Rose, Administratrix of the estate of Jacob W. Silliker against George H. Osborne, Jr., to recover the proceeds of three savings accounts which originally stood in the name of Jacob W. Silliker wherein a final decree was entered. On motion to amend the original decree by adding thereto an order that defendant assign to the plaintiff two accounts belonging to the estate, the decree was amended, and defendant brings exceptions. Exceptions overruled with treble costs. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiff.

Ralph W. Crockett, for defendant.

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

THAXTER, J. In one form or another this case has already been before this court four times. *Rose* v. *Osborne*, 133 Me., 497, 180 A., 315; *Rose* v. *Osborne*, 135 Me., 467, 199 A., 623; *Rose* v. *Osborne*,

136 Me., 15, 1 A., 2d, 225; *Rose* v. *Osborne*, 136 Me., 393, 11 A., 2d, 345. A history of the litigation will be found in the last opinion. The litigation arose through the attempt of the plaintiff as administratrix of the estate of Jacob W. Silliker to recover three savings bank deposits which the plaintiff claimed were the property of the estate. In the first opinion this court held that two of them belonged to the estate, the other to the defendant. The subsequent litigation arose over the attempts of the plaintiff to reach the deposit admittedly belonging to the defendant to make good withdrawals which the defendant had made for his own account from the other two. A final decree was filed on the original bill June 22, 1938. Though this decree settled the ownership of the three deposits, there was in it no order that the defendant assign to the administratrix the deposits which belonged to the estate. The final opinion, 136 Me., 393, 11 A., 2d, 345, concerned a supplemental bill brought by the plaintiff to reach the proceeds of the third deposit and also to compel an assignment of the other two. It was held that this bill, being for a new cause of action would not lie. The court did, however, say, 11 A., 2d, 348:

> "Besides seeking to have a trust impressed upon the defendant's account in the Savings Bank of New London, plaintiff asks that the accounts in the two other banks be transferred or assigned to her in their depleted state. This relief should not be granted on this bill. The single Justice has already decreed, as above noted, that the defendant pay the amounts due on said accounts to her. An amendment of that decree by the single Justice could be made to accomplish an assignment of the accounts themselves to the plaintiff without enlarging, limiting, or modifying the scope of the mandate in the original bill or hindering or delaying its execution."

Following the above suggestion counsel for the plaintiff on February 16, 1940, filed a motion to amend the original decree by adding thereto an order that the defendant assign to the plaintiff the two accounts belonging to the estate. The motion was granted and the decree so amended. To the allowance of such amendment the defendant filed exceptions which are now before us on a certification by the presiding justice, in accordance with the provisions of R. S.

1930, Chap. 91, Sec. 68, that the exceptions are frivolous and intended for delay.

There is no merit in the exceptions. In allowing the amendment the presiding justice was acting in accordance with the suggestion of this court. The defendant complains because of the attempt of the plaintiff by a new action, instituted since the last opinion was rendered, to reach the proceeds of the third account and to the granting by the court of a temporary injunction against the transfer of such account. This is an independent proceeding with which we are not here concerned.

We concur in the view of the presiding justice that these exceptions are frivolous and intended for delay. More than five years ago this court ruled that this plaintiff was entitled to these deposits. She has not got them yet. It is high time that there should be an end to frivolous proceedings the only purpose of which seems to be to delay the administration of justice.

Exceptions overruled with treble costs.

STATE OF MAINE *vs.* RAYMOND F. CUSHING.

Aroostook. Opinion, October 14, 1940.

LICENSES. CEMETERIES. CRIMINAL PLEADINGS.

Title to a burial lot is a legal estate, and the interest is a property right entitled to protection from invasion, but only in a restricted sense does it constitute an interest in real property.

Legislation called "Blue Sky Laws" is so-called because it tends to stop the sale of stock that represents nothing but blue sky — nothing terrestrial or tangible.

The purpose of the Blue Sky Law is to protect the public against fraud, deception, and imposition by purchases from unregistered dealers.

Under Blue Sky Law making it unlawful for an unregistered dealer to sell a document of title to or certificate of interest in realty, the validity of the title or interest is not an essential element of the offense, and sale of indenture by un-

registered dealer was sale of a document of title to realty within statute regardless of whether the indenture conveyed or affected some actual title to or constituted and created some actual interest in realty, or of whether the description of the realty in the indenture was sufficient to convey.

To constitute an offense under the Blue Sky Law the sale of a document of title or certificate by an unregistered dealer must be accompanied by or connected in some manner with a "contract, agreement or conditions (other than a policy of title insurance issued by a company authorized to do a title insurance business in the State of Maine), under the terms of which the purchaser is insured, guaranteed or agreed to be protected against financial loss or is promised financial gain."

Where agreement was fully executed on the part of the purchasers, and the seller having received payment, it would not lie in seller's mouth to say that the contract was invalid for lack of the purchasers' signatures.

It was not essential that indictment contain allegations that granting corporation owned and had the right to convey the property it sold, or that respondent was its president and had authority to execute the document for and on behalf of the corporation as the validity of the title was not in issue.

Non-essential elements of an offense need not be alleged.

An allegation is not duplicitous where the alternatives being descriptive of only one thing and there being no contradictory terms and only one offense being alleged.

On exceptions. Respondent indicted by the grand jury of Aroostook County for violation of Sec. 162 of Chap. 57, R. S. 1930, charging the respondent with selling without registration as a dealer securities as defined in Sec. 165 of said chapter as amended by Chap. 240, P. L. 1933. Respondent filed a special demurrer including a general demurrer, to the overruling of which he excepted. Exceptions overruled. Respondent to stand trial. Case fully appears in the opinion.

Parker P. Burleigh, County Attorney for the State.

James M. Gillin, for respondent.

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

HUDSON, J. Indicted by the grand jury of Aroostook County for violation of Sec. 162 of Chap. 57 of R. S. 1930, the respondent

filed a special demurrer including a general demurrer, to the overruling of which he excepted.

By the indictment the State sought to charge the respondent with selling without registration as a dealer securities as defined in Sec. 165 of said chapter as amended by Chap. 240, P. L. 1933. The amendment by Chap. 117, P. L. 1939 postdates the alleged commission of the offense.

Boiled down, it is charged that the respondent on September 18, 1937, being a dealer within the provisions of the statute, sold to Elmer G. Norbeck and Walter L. Norbeck for $2,000 cash "a document of title to or certificate of interest in" certain real estate in Calais: viz., burial lots. Then follows a copy of the indenture of sale claimed by the State to constitute the document of title or certificate of interest. It is dated November 18, 1937, and is signed "Hillcrest Memorial Park by Raymond F. Cushing, Its President."

It is also alleged that the demised lots were located only on an unrecorded map of Hillcrest Memorial Park, which map was then in the possession of the respondent; that the sale and purchase of this document of title or certificate of interest were accompanied by and connected with a certain agreement in writing (other than a policy of title insurance) promising financial gain to the Norbecks. Then is set forth a copy of the agreement dated "18 day of Sept. A.D. 193 ," which purports to be between Grand View Corporation and the Norbecks, but was signed only by Grand View Corporation by Raymond Cushing, President. By it the Norbecks agreed to purchase eight lots, namely: 41 to 48 inclusive, each lot containing four units, located in Section A in Hillcrest Memorial Park in Calais, and to pay $2,000 for the same. The agreement did not state whether this amount was to be paid cash down or not, but did provide that "after payment has been made in full as aforesaid, GRAND VIEW agrees to cause to be conveyed to the PURCHASER from HILLCREST MEMORIAL PARK, the said lots hereinabove described. . . ." In the indenture, bearing date of November 18, 1937, set forth in full in the indictment, the receipt of the consideration was acknowledged.

These words appear in the agreement: "Lots to be resold within thirty months at not less than $125 $\frac{00}{xx}$ Per unit of four Graves."

Then the indictment alleges that the respondent, although a

dealer under the law, was not registered, and that the securities that the respondent was engaged in selling were documents of title to or certificates of interest in real estate. Then follow denials that the respondent came within certain exceptions in the statute.

At the outset the respondent claims that the indictment does not set forth a *document of title to* or *certificate of interest in* real estate within the meaning of the statute. He argues "that no document could be considered one such unless it actually either conveyed or affected title to real estate, or was a certificate of an actual interest in real estate." He insists that if a grantor has no title the document is not one of title and that this indictment is insufficient in that it does not "plainly indicate and show" that the document did "convey or affect some actual title to, or constitute and create some actual interest in real estate."

We do not so interpret the statute. It does not say "valid" documents of title to or "valid" certificates of interest in real estate or documents of "valid" title to or certificates of "valid" interests in real estate. True, language of the statute refers to title and to interest but it pertains as well to bad as to good title or interest.

Here it should be stated that the respondent does not claim that the demise of these burial lots did not concern *real estate.*

> "The lot owner's title to the lot is a legal estate, and his interest is a property right entitled to protection from invasion, but only in a restricted sense does it constitute an interest in real property." 14 C. J. S., Sec. 25, on page 85. Also see *Gowen* v. *Bessey*, 94 Me., 114, 116 and 10 Am. Jur., Sec. 22, pages 503-505.

It has been said that such legislation is called "Blue Sky Laws" because it tends to "stop the sale of stock that represents nothing but blue sky — nothing terrestrial or tangible" (37 C. J. ,page 270, footnote 39) ; that it pertains to "speculative schemes which have no more basis than so many feet of blue sky" (*Idem*) ; and that its violators "became so barefaced that it was stated that they would sell building lots in the blue sky in fee simple." (*Idem*).

Considering the purpose of the Blue Sky Law to protect the public against fraud, deception, and imposition by purchases from unregistered dealers, it would seem it could at least in part accomplish

that purpose by prohibiting the sale by an unregistered dealer of a document or certificate purporting to convey title when actually the seller has no title. The legislature no doubt realized that it would be as fraudulent to sell a worthless indenture as a worthless stock and that there was as much need to require the registration of a dealer in the one case as in the other. What the dealer sells is not the actual title but the document or certificate; another is the grantor. The gist of the charge against this respondent is that without registration as a dealer he sold this document of title to or certificate of interest in real estate, not that he, as owner of the fee, sold real estate. Title is not a material issue.

Next the respondent complains that the indenture is not a document of title to or certificate affecting real estate because the description of the real estate therein is insufficient to convey. While we think it is sufficient (see *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Me., 219; *Palmer* v. *Dougherty*, 33 Me., 502, 506; *Talbot* v. *Copeland*, 38 Me., 333, 341; *Chesley* v. *Holmes*, 40 Me., 536, 546; and *Bradstreet* v. *Winter*, 119 Me., 30, 38, 109 A., 482), yet, even if it were not, for the reason previously given that it need not be a valid indenture, we hold it would be a document of title or certificate of interest within the meaning of this statute.

To constitute an offense under this statute, the sale of such a document or certificate by an unregistered dealer must be accompanied by or connected in some manner with a "contract, agreement or conditions, (other than a policy of title insurance issued by a company authorized to do a title insurance business in the state of Maine,) under the terms of which the purchaser is insured, guaranteed or agreed to be protected against financial loss or is promised financial gain." The respondent contends that the indictment does not set forth any such accompanying contract agreement or conditions promising financial gain. We think otherwise. The indenture of November 18, 1937 was in pursuance of the agreement of September 18th theretofore and in that agreement it was stated: "Lots to be resold within thirty months at not less than $\$125\frac{00}{xx}$ Per unit of four Graves." From this agreement and consummating indenture, both of which are set forth in full in the indictment, it appears that the purchasers paid $2,000.00 for eight lots which contained thirty-two units, four units in each lot. So for each unit the

cost to them was $62.50. Upon a resale for not less than $125.00 per unit, no matter how many graves there might have been in each unit, they would receive $4,000.00, or 100% on their investment. Thus it seems perfectly clear that there is set forth in the indictment a promise of financial gain which did accompany the sale of these lots.

The respondent claims, however, that the language referred to is "ambiguous in that it fails clearly to indicate which of the parties named in the document was thereby to be obligated. It might have been the undertaking of either." Taking into consideration the whole context, we fail to discover such ambiguity.

This agreement is attacked by the demurrer for another reason, namely: that while purporting to be bilateral, it was signed only by the seller, the Grand View Corporation by its president, and that this fact makes the agreement void. This contention cannot be upheld. The agreement was fully executed on the part of the purchasers, and the seller having received payment, it would not lie in its mouth to say that the contract was invalid for lack of the purchasers' signatures.

> ". . . any writing signed by one party and orally assented to by the other binds both, except so far as the Statute of Frauds provides the contrary. Indeed any written contract though signed by one party only, binds the other if he accepts the writing." Vol. 1, Williston on Contracts, page 157, Sec. 90a. Also see *Portland Terminal Co.* and *Maine Central Railroad Co.* v. *Boston and Maine Railroad*, 127 Me., 428, 435 *et seq.*; *Inhabitants of South Berwick, Petitioners*, v. *County Commissioners*, 98 Me., 108, 111, 112.

It was not essential that the indictment contain allegations that the granting corporation owned and had the right to convey the property it sold, or that Mr. Cushing was its president and had authority to execute the document for and on behalf of the corporation, for as already stated, the validity of the title was not in issue. Nonessential elements need not be alleged. *State* v. *Gilman*, 96 Me., 431, 52 A., 920.

Another ground of demurrer was that the indictment is duplicitous in alleging that the respondent sold a certain security, to wit: "a document of title to *or* certificate of interest in, certain real es-

tate" (italics ours). The alternative being descriptive of only one thing and there being no contradictory terms and one offense only being alleged, the allegation is not duplicitous. *State* v. *Willis*, 78 Me., 70, 72, 73, 2 A., 848.

Another ground was that the indictment fails to allege that the respondent, as a dealer in securities as defined in said statute, did by direct solicitation sell to the Norbecks any security on November 18, 1937, the date of the asserted document of title to or certificate of interest in real estate. The indictment did allege such a sale as of September 18, 1937, and being a specific date within the Statute of Limitations, time not otherwise being material, the allegation is sufficient.

Still another ground was that the indictment is duplicitous and uncertain in that it describes the real estate as being "shown on the map of said Hillcrest Memorial Park in the possession of" said Hillcrest Memorial Park, alleged in the indictment to be a corporation, and also as "being located only on an unrecorded map of said Hillcrest Memorial Park, which map was then in the possession of the respondent." It is noted, however, that the indenture, that is, the document of title, purports to have been signed by the grantor's president and hence the allegation that the map was in the possession of the corporation and of its president is neither duplicitous nor uncertain.

All of the many grounds of demurrer, both as to form and substance, have been carefully considered and in none of them do we find merit. The ruling below must be sustained.

Exceptions overruled.
Respondent to stand trial.

(BARNES, C. J., having retired, did not join in this opinion.)

ANNETTE H. HOWE *vs.* THERESA HOUDE.

Oxford. Opinion, October 15, 1940.

DIRECTED VERDICT.

It is well settled that a verdict should not be ordered for the defendant by the Trial Court when, taking the most favorable view of the plaintiff's evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds.

On exceptions. Action by guest passenger against driver of car to recover damages for personal injuries. At close of plaintiff's case, the defendant, without offering any evidence, rested and moved for directed verdict. Motion granted. Plaintiff filed exceptions. Exceptions sustained. Case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

William B. Mahoney, for defendant.

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

STURGIS, J. In this action brought by Annette H. Howe of Hartford, Connecticut, to recover damages for personal injuries received on July 6, 1939, while riding along the highway in St. Frederick, P. Q., as a guest passenger in an automobile driven by Theresa Houde of Rumford, Maine, at the close of the plaintiff's case, the defendant, without offering any evidence, rested and moved for a directed verdict. The motion was granted and an exception allowed.

It is well settled that a verdict should not be ordered for the defendant by the Trial Court when, taking the most favorable view of the plaintiff's evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds. *Collins* v. *Wellman*, 129 Me., 263, 151 A., 422; *Young* v. *Chandler*, 102 Me., 251, 66 A., 539.

A careful study of the record convinces this court that it was for the jury to say whether in this case the defendant had been negligent and the plaintiff had exercised due care. The defendant was not entitled to a directed verdict.

Only one side of the case having as yet been heard, it seems best not to recite or discuss the facts. The entry is

Exception sustained.

(BARNES, C. J., having retired, did not join in this opinion.)

FRANZ U. BURKETT, ATTORNEY-GENERAL,

PETITIONER FOR WRIT OF QUO WARRANTO

ON RELATION, HERBERT W. LEACH *vs.* WALTER F. ULMER.

Penobscot. Opinion, October 21, 1940.

QUO WARRANTO. OFFICERS.

In this jurisdiction, although proceedings in quo warranto *have usually been begun by filing an information, the ancient practice of making application for a writ of* quo warranto *by petition is recognized and, by implication, authorized.*

The writ of quo warranto *or an information in the nature thereof issues in behalf of the State against one who claims or usurps a public office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney-general on his own motion or at the relation of any person, but on his official responsibility.*

At common law, private individuals without the intervention of the attorney-general could not, either as of right or by leave of court, institute quo warranto *proceedings. This rule has been modified in this state only to the extent that when in* quo warranto *proceedings the title to office in a private corporation is involved the attorney-general need not be a party thereto.*

At common law, quo warranto *proceedings to try the title to an office are confined to public offices.*

Unless authorized by statute, the State does not inquire by quo warranto *into the title to a private office, and the attorney-general in its behalf can intervene in matters of this nature only so far as they relate to public offices.*

The term "public office" implies a delegation of a portion of the sovereign power to, and the possession of it by the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office.

A party nomination at a primary election is not a "public office," the title to which the State, by its attorney-general, could try by quo warranto.

Quo warranto proceedings by attorney-general, on the relation of Herbert W. Leach, against Walter F. Ulmer, to determine the nomination in the primary election of June 17, 1940, of the candidate of the Republican Party for the office of county commissioner for the County of Penobscot. The Superior Court dismissed the petition and denied the writ of *quo warranto*, and the relator brings exceptions. Exceptions overruled. Case fully appears in the opinion.

Ross St. Germain,

Arthur L. Thayer, for relator.

Harold A. Towle, for respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

STURGIS, C. J. This is a proceeding begun by a petition for a writ of *quo warranto* brought by the attorney-general of Maine on the relation of Herbert W. Leach of Charleston to determine the nomination in the primary election of June 17, 1940, of the candidate of the Republican Party for the office of county commissioner for the County of Penobscot. Notice having been duly ordered, at the hearing before the Superior Court in vacation, the justice presiding dismissed the petition and denied the writ. Exceptions to this ruling were reserved.

The relator, Herbert W. Leach, and the respondent, Walter F. Ulmer, and nine other persons, were candidates for this nomination, and when the governor and council had counted and tabulated the votes cast and returned and had found that Walter F. Ulmer had received 2051 votes, Herbert W. Leach 2040 votes, and each of the

other candidates a smaller number, they declared that Walter F. Ulmer had been nominated. The complaint here made is that the governor and council counted and tabulated sixteen defective and illegal ballots for Walter F. Ulmer which should have been rejected, leaving the total legal votes cast for him only 2,035 in number, which was less than the 2,040 votes received by Herbert W. Leach and did not make him the nominee of his party for the office of county commissioner.

In this jurisdiction, although proceedings in *quo warranto* have usually been begun by filing an information, as the reported cases show, the ancient practice of making application for a writ of *quo warranto* by petition is recognized and, by implication, authorized. R. S., Chap. 116, Sec. 21. This statutory provision has made no change in *quo warranto* as known to the common law. *Davis, ex parte*, 41 Me., 38, 57.The writ of *quo warranto* or an information in the nature thereof issues in behalf of the State against one who claims or usurps a public office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney-general on his own motion or at the relation of any person, but on his official responsibility. *Prince* v. *Skillin*, 71 Me., 361. At common law, private individuals without the intervention of the attorney-general could not, either as of right or by leave of court, institute *quo warranto* proceedings. *Rice* v. *National Bank of the Commonwealth*, 126 Mass., 300. This rule has been modified in this state only to the extent that when in *quo warranto* proceedings the title to office in a private corporation is involved the attorney-general need not be a party thereto. R. S., Chap. 116, Sec. 22.

At common law, *quo warranto* proceedings to try the title to an office are confined to public offices. *State* v. *North*, 42 Conn., 79; *Com.* v. *Dearborn*, 15 Mass., 125; *Haupt* v. *Rogers*, 170 Mass., 71, 48 N. E., 1080; Mechem on Public Officers, Sec. 479; High's Extraordinary Legal Remedies, Sec. 625; 51 C. J., 317 and cases cited. Unless authorized by statute, the State does not inquire by *quo warranto* into the title to a private office, and the attorney-general in its behalf can intervene in matters of this nature only so far as they relate to public offices. *Attorney-General* v. *Drohan*, 169 Mass., 534, 48 N. E., 279.

In the early *Opinion of the Justices*, 3 Me., 481, in reference to public office, it was said: "We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office." In 22 Ruling Case Law, 374, we read: "One of the most important criteria of a public office is that the incumbent is invested with some of the functions pertinent to sovereignty, for it has been frequently decided that in order to be an office the position must be one to which a portion of the sovereignty of the state, either legislative, executive, or judicial, attaches for the time being. The performance of an executive, legislative, or judicial act is therefore a recognized test of a public office." And in *Attorney-General* v. *Drohan*, supra, that court, in defining a public office, said: "We think that it is one whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested." It is such an office which properly comes within the legitimate scope of *quo warranto*. High's Extraordinary Legal Remedies, Sec. 625.

Party nominees, however elected or designated, do not represent the State, nor are their duties in their nature public, involving the exercise of any of its sovereign power. They perform no executive, legislative or judicial acts. Their duties pertain to the party to which they belong and which alone is interested in their proper performance. No one could seriously contend that all the public, and particularly those of opposite or different political faith, are interested in their candidacies. The essential characteristics of a public office as defined are lacking.

Our examination of available authorities discloses that in the case of *In re Bewley*, 245 N. Y. S., 105, on the premise that a party nomination at a primary election is not a party position, it was held that the right to a nomination at a primary cannot be tested by *quo warranto*. And in *State* v. *Carrington*, 194 Iowa, 785, 190 N. W., 390, the dismissal of a petition for *quo warranto* to determine the right of the respondent to the Republican nomination for supervisor at a primary election was affirmed on the grounds that such a contest, under the statutes of that state, was not a proper subject of

quo warranto proceedings and judicial cognizance thereof was impractical if not impossible. But in *State* v. *Fernandez*, 106 Fla., 779, 143 So., 638, that court, under local statutes of different tenor expressly providing that primary contests shall be determined in the same manner as contests over the results of general elections, held that *quo warranto* should be extended so as to test the validity of a nomination in a primary election. And in *Jarman* v. *Mason*, 102 Okla., 278, 229 P., 459, under a statute similar to that of Florida, a resort to *quo warranto* to determine a primary contest was approved. It should be noted, however, that the Oklahoma statute has since been changed, and in *Dabney* v. *Hooker*, 121 Okla., 193, 249 P., 381, it is held that the nomination of a political party for public office cannot be contested in that jurisdiction by the civil action in the nature of *quo warranto* there substituted for the ancient writ.

We find in the decisions just reviewed no precedent for holding that a party nomination at a primary election is a public office which alone, at common law, comes within the legitimate scope of *quo warranto*. Those which deny that the remedy is available in primary contests are based on other grounds. The cases which support the view that a contest for a primary nomination may be determined in *quo warranto* proceedings are controlled by local statutes which do not exist and have no counterpart in this jurisdiction. In this state, there is no statute authorizing judicial cognizance of primary contests by *quo warranto*. The rules of the common law govern. Tested by those rules, a party nomination in a primary election is not a public office, the title to which the State, by its attorney-general, can try by *quo warranto*. On this ground, the ruling below is affirmed and the exceptions reserved overruled.

Exceptions overruled.

HARLAN P. FORD

vs.

INHABITANTS OF TOWN OF WHITEFIELD.

Lincoln. Opinion, October 22, 1940.

REFERENCE AND REFEREES. PLEADINGS.

The court alone, not referee, has authority to allow amendment of declaration. Parties to an action may not by agreement empower referees to determine issues not covered by pleadings.

Orderly procedure requires that the pleadings should set out the cause of action and define the issue.

Parties cannot by agreement confer jurisdiction on the referee to determine any matter which may arise between them.

On exceptions to allowance of referee's report, Law Court can consider only pleadings set out in record.

On exceptions. Action for breach of an express contract. Case tried before referee who found for plaintiff. Defendant filed written objections to the report and exceptions were taken to the acceptance of it. Exceptions sustained. Case fully appears in the opinion.

Philip Lamb, for plaintiff.

Nelson & Nelson, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

THAXTER, J. This is an action brought for the breach of an express contract to build a road in the Town of Whitefield. According to the terms of the contract as set forth in the declaration the plaintiff agreed to furnish certain gravel and the defendant agreed to build the road. The declaration alleges that the gravel was furnished but that the defendant committed a breach of the contract by not building the road.

The referee found for the plaintiff. The defendant filed written objections to the report and exceptions were taken to the acceptance of it. The fifth objection alleges that there was no evidence produced to justify the referee's finding either on the basis of a conditional gift by the plaintiff of the gravel or on the basis of the contract as alleged.

It is apparent that the evidence does not warrant a finding for the plaintiff on an express contract. Plaintiff, however, calls attention to the following stipulation of counsel: "It is further stipulated that under the pleadings the question of whether or not plaintiff is entitled to recover either on an express or an implied contract may be determined."

It is unnecessary to decide whether the evidence would have been sufficient had the declaration been amended, for no amendment was offered. The court alone has authority to allow an amendment. *Bailey* v. *Laughlin*, 131 Me., 113, 159 A., 561. It is true that in the case cited there is an intimation that an amendment may be allowed by the referee with the consent of the parties. This language does not, however, mean that the authority for the allowance is derived from the referee. In any event the opinion does not intimate that without the filing of the amendment the parties may by agreement empower the referee to determine issues not covered by the pleadings. Orderly procedure requires that the pleadings should set out the cause of action and define the issue. The parties cannot by agreement confer jurisdiction on the referee to determine any matter which may arise between them.

This very case is an illustration of the confusion which is likely to result if we accept as proper the anomalous procedure which these parties sought to adopt. The referee to use his own language construed the stipulation to mean that "regardless of the pleadings, the referee was to pass upon the merits of the case and make such findings as the facts warranted." This is no more nor less than saying that he could make findings without any pleadings at all; and it is significant that the findings in this case do not disclose what was the basis for the judgment to be rendered or even whether it was to be founded on contract or on tort.

This court can consider only the pleadings which are set out in the record. It is clear that the evidence does not sustain the allega-

tions of the declaration and that the fifth objection to the allowance of the referee's report was properly taken.

Exceptions sustained.

J. HERBERT WAKEM,

RECEIVER OF THE CARIBOU NATIONAL BANK,

vs.

THE INHABITANTS OF THE TOWN OF VAN BUREN.

Aroostook. Opinion, October 24, 1940.

TOWNS. MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW.

The evident purpose of a constitutional debt-limit provision is to prevent the abuse of municipal credit, which might result in ruinous taxation, and to protect the tax payers and their property.

The constitutional debt-limit is an absolute bar to an action against a town or any of its indebtedness which falls within the constitutional prohibition, even although the debt may have been incurred for a most worthy cause and under urgent and pressing necessity.

The validity of a municipal debt upon which an action is brought, so far as the limitation of indebtedness is concerned, must be determined as of the time when the debt was incurred.

Unless otherwise provided in the constitution, a debt of a municipality, valid when incurred, will not be rendered invalid by the mere failure of the municipal officers to pay it out of the proper tax money when collected.

It is a general rule that a reenactment, in substantially the same language, of a constitutional provision which had been previously construed and explained by the court, carries with it the same meaning previously attributed by the court to the earlier provision, in the absence of anything to indicate that a different meaning was intended.

A constitutional provision should receive such a liberal and practical construction as will permit the purpose of the people therein expressed to be carried out, if such a construction is reasonably possible.

The constitutional provision that debt limit should not apply to temporary loans to be paid out of money raised by taxes during year in which they are made was adopted for practical purpose of enabling towns and cities up to their debt limit to borrow money in anticipation of taxes already assessed, so that they might be able to continue to carry on their necessary governmental activities, and the constitutional provision does not deal with effect of a failure to pay within the year.

In construing constitutional provision that debt limit did not apply to temporary loans to be paid out of money raised by taxes during year in which they are made, it is not to be assumed that adopters of constitution intended that such temporary loans, valid when made, should become invalid if not actually paid out of money raised by taxes during year in which they were made, in absence of apt words indicating such intention.

On report on an agreed statement of facts. Action of assumpsit by J. Herbert Wakem, as receiver against Inhabitants of the Town of Van Buren to recover on a note. Case remanded to court below with the mandate that judgment be entered for the plaintiff against the defendant in accordance with this opinion. Case fully appears in the opinion.

David Solman, for plaintiff.

Harry C. McManus,

Nathaniel Tompkins, for defendants.

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

WORSTER, J. On report, on an agreed statement of facts. This is an action of assumpsit brought by the receiver of The Caribou National Bank against the Inhabitants of the town of Van Buren, on its promissory note given to said bank. The defendant contends that this action cannot be maintained because the loan for which the note was given was, and is in excess of the constitutional debt limit of that town; and that, even if it once had validity as a temporary loan in anticipation of taxes, yet at the time the action was brought, it could not have been, and cannot now be considered as falling within any exception to the constitutional debt-limit provision.

It appears that on April 30, 1926, said town, pursuant to authority granted by a vote of its inhabitants at a town meeting held

on March 31, 1926, borrowed of The Caribou National Bank the sum of $10,000, as a temporary loan, in anticipation of taxes, and gave therefor the note in suit. According to that vote, the loan was "to be paid for out of money raised by taxes during the current year," meaning the municipal year beginning in March, 1926; and a statement to that effect appears in the certificate written underneath the note, and signed by the municipal officers.

The note and certificate are as follows:

"$10,000.00 Van Buren, Maine April 30, 1926.

Nine months after date the Inhabitants of the Town of Van Buren promise to pay to the order of Caribou National Bank at any Bank, Ten Thousand Dollars.

Value received.

John B. Pelletier
Joseph J. Cyr
F. D. Goud

Selectmen of Town of Van Buren
Guy S. Cyr

Treasurer of Town of Van Buren"

"The above is a te(r)mporary loan issued under authority granted at the annual Town Meeting of the Inhabitants of the Town of Van Buren, held on March 31st, 1926, and is to be paid out of money received from taxes assessed during the Municipal year beginning March, 1926, and we certify that the same is a legal obligation of the Inhabitants of said town of Van Buren.

John B. Pelletier
Joseph J. Cyr
F. D. Goud

Selectmen of Town of Van Buren
Guy S. Cyr

Treasurer of Town of Van Buren."

It is provided, among other things, in Article XXXIV of the Amendments to the Constitution of Maine, that:

> "No city or town having less than forty thousand inhabitants, according to the last census taken by the United States, shall hereafter create any debt or liability, which single or in the aggregate, with previous debts or liabilities shall exceed five per centum of the last regular valuation of said city or town; provided, however, . . . that the adoption of this article shall not be construed as applying . . . to temporary loans to be paid out of the money raised by taxes during the year in which they were made."

The evident purpose of such a debt-limit provision is to prevent the abuse of municipal credit, which might result in ruinous taxation, and to protect the tax payers and their property. I Dillon on Municipal Corporations (5th ed.), section 191, page 342; 6 McQuillin on Municipal Corporations (2d ed.), page 9.

And it is an absolute bar to an action against a town on any of its indebtedness which falls within the constitutional prohibition, even although the debt may have been incurred for a most worthy cause and under urgent and pressing necessity. *Blood* v. *Beal*, 100 Me., 30, 60 A., 427.

At the time the loan was made for which the note in this action was given, the town of Van Buren was indebted in an amount in excess of its constitutional debt limit, and all persons then dealing with the town were charged with notice of that fact. *Merrill* v. *Harpswell*, 120 Me., 25, 112 A., 834; *German National Bank* v. *Covington*, 164 Ky., 292, 175 S. W., 330, 332; McQuillin on Municipal Corporations (2d ed.), volume 6, page 7, note; Id., volume 3, section 1268.

So no recovery can be had here unless this loan falls within the "temporary loan" proviso in the constitution. By the express terms of Article XXXIV, the debt-limit provision has no application to temporary loans to be paid out of the money raised by taxes during the year in which they were made.

When this loan was made in 1926, it was only a temporary one, to be paid out of taxes raised during the municipal year beginning in March, 1926. But the defendant contends that since it was not paid

in that year out of the money raised by taxes during the year in which the money was borrowed, it lost its character as a temporary loan, leaving it only an ordinary town debt in excess of the debt limit of the town, and therefore now unenforcible.

The validity of a municipal debt upon which an action is brought, so far as the limitation of indebtedness is concerned, must be determined as of the time when the debt was incurred. *Addyston Pipe & Steel Company* v. *City of Corry*, 197 Pa. St., 41, 46 A., 1035, 80 Am. St. Rep., 812; *Scranton Electric Company* v. *Borough of Old Forge*, 309 Pa., 73, 163 A., 154.

And, unless otherwise provided in the constitution, a debt of a municipality, valid when incurred, will not be rendered invalid by the mere failure of the municipal officers to pay it out of the proper tax money when collected. See note, 92 A. L. R., page 1312; *Athens National Bank* v. *Ridgebury Township*, 303 Pa., 479, 154 A., 791, cited with approval in *Scranton Electric Company* v. *Borough of Old Forge*, supra.

In *Athens National Bank* v. *Ridgebury Township*, supra, the court said:

> "The loans were none the less valid because the supervisors used the current revenue for other purposes than their repayment."

And in a somewhat analogous case, the court, in *City of Cedar Rapids* v. *Bechtel*, 110 Iowa, 196, 81 N. W., 468, said:

> "It is true, there was a misappropriation of a part of the current revenue of the years 1894 to 1898, inclusive; but such wrongful act on the part of the officers of the city cannot, under the agreed facts in this case, affect the validity of these warrants."

Therefore, since the debt in the instant case was valid when made, the plaintiff's action thereon will lie, unless recovery is barred by some constitutional provision.

The defendant contends that it is so barred, and, in support of this contention, relies on *Blood* v. *Beal*, supra, in which it is said:

> ". . . if such a loan although temporary in its inception, or any part thereof, is carried over, in any form, into the next

municipal year, it then loses its temporary character and becomes a debt or liability of the city within the prohibition of the above amendment."

In that case, the proviso relative to temporary loans in anticipation of taxes, as it was then stated in Article XXII of the Amendments to the Constitution, was explained and its meaning established.

About six years after that decision was rendered, Article XXII was amended by the adoption of Article XXXIV, which also contains provisos relative to temporary loans in anticipation of taxes. We need consider, however, only that proviso which is included in the foregoing quotation from Article XXXIV, which the defendant claims is similar to the proviso included in Article XXII, and, he urges, should receive the same construction given to the last mentioned proviso in *Blood* v. *Beal*, supra.

It is a general rule that a reenactment, in substantially the same language, of a constitutional provision which had been previously construed and explained by the court, carries with it the same meaning previously attributed by the court to the earlier provision, in the absence of anything to indicate that a different meaning was intended. 6 R. C. L., section 49, page 54; 16 C. J. S., page 76; 11 Am. Jur., page 684; Wichita Falls, use of *Whitham & Co.* v. *Williams*, 119 Tex., 163, 26 S. W. (2d), 910, 79 A. L. R., 704; *Sexauer et al.* v. *Star Milling Company*, 173 Ind., 342, 90 N. E., 474, 26 L. R. A. (N. S.), 609; *Banks* v. *State*, 207 Ala., 179, 93 So., 293, 24 A. L. R., 1359; *Cannon* v. *May et al.*, 35 S. W. (2d), 70.

The only difference between these provisos is that in Article XXXIV the comma which appeared after the word "taxation" in Article XXII is omitted, the word "taxes" is substituted for "taxation," the word "the" is inserted before the word "money," and, in the last line, "were" is used in place of "are." These changes do not, of themselves, indicate that the people intended this proviso in Article XXXIV should have any different meaning than had been previously given to the proviso in Article XXII by the court in *Blood* v. *Beal*, supra.

Nor is there anything in the preamble of the act (Chapter 221, Resolves of Maine, 1911), by which Article XXXIV was submitted

to the people for adoption, to indicate any different intention on the part of the legislature. The amendment proposed in that preamble deals exclusively with an additional proviso relative to the debt limit of cities having a population of forty thousand inhabitants or more, which does not affect the situation here.

But even if the proviso now under consideration should be construed as having the same meaning which was given to the proviso in Article XXII by the court in *Blood* v. *Beal*, supra, that would not be decisive here. The issue presented here is not the same as the issue presented in *Blood* v. *Beal*. There the question was whether or not a previous temporary loan made in anticipation of taxes, but not paid during the year in which it was made, should be added to other debts of the city in determining whether or not a later proposed indebtedness was in excess of the city debt limit, and the court held that it should be so added.

That is not the question before us. The issue here is not whether this loan to the town of Van Buren should be added to other debts in order to determine whether or not some later indebtedness exceeds the debt limit, but whether an action will lie on the note which was given for the temporary loan.

The defendant further relies on *Doland* v. *Clark et al.*, 143 Cal., 176, 76 P., 958, in which the California court said:

> "It was evidently the intention of the framers of the Constitution to make the income and revenue of each year pay the indebtedness and liabilities incurred during such year, and that the revenues and income of a subsequent year should not be applied to pay liabilities of a past fiscal year."

That constitution, however, is unlike ours. It is expressly provided in the California constitution that no city "shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it in such year."

In *City of Springfield* v. *Edwards*, 84 Ill., 626, and in *Law et al.* v. *The People*, 87 Ill., 385, also cited by the defendant, the debt-limit provision in the Illinois constitution was considered. It is recited in that constitution as follows:

> "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted, in any

manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein . . ."

With reference to the Illinois constitution, the court, in *City of Springfield* v. *Edwards*, supra, said:

"The prohibition is against becoming indebted — that is, voluntarily incurring a legal liability to pay, 'in any manner or for any purpose,' when a given amount of indebtedness has previously been incurred."

But neither the constitution of California nor that of Illinois contains any recital to the effect that the debt-limit provision did not apply to temporary loans to be paid out of money raised by taxes during the year in which they were made, as does the constitution of Maine, and so the three cases last cited are not in point.

A constitutional provision should receive such a liberal and practical construction as will permit the purpose of the people therein expressed to be carried out, if such a construction is reasonably possible.

In 11 American Jurisprudence, at page 675, the rule is laid down as follows:

"Constitutions are to be construed in the light of their purpose and should be given a practical interpretation so that the plainly manifested purpose of those who created them may be carried out."

It is evident that this proviso was adopted for the very practical purpose of enabling towns and cities up to their debt limit to borrow money in anticipation of taxes already assessed, in order that they might be able to continue to carry on their necessary governmental activities. The proviso deals with a necessary condition of the undertaking into which a borrowing town must enter, in order to make a valid loan. It does not deal with the effect of a failure to actually perform that condition. Although a town making such temporary loans must, of course, undertake to pay them out of the money raised by taxes during the year in which they were made, as was done in this case, yet there is nothing in the proviso to the effect that such

temporary loans will become invalid if not so paid, and we cannot read such a provision into the constitution. See *City of Georgetown* v. *Elliott et al.*, 95 Fed. (2d), 774.

Moreover, to do so would be to seriously impair, if not utterly defeat the purpose of the proviso. A right to borrow money is of no practical importance if no one will lend. And it is not to be expected that financial institutions, owing to their stockholders the duty of making loans in a businesslike way, or individual money lenders, would lend money to towns or cities if the mere failure to make seasonable payments out of the proper tax money would render the loans invalid. The adopters of this proviso could not have intended to destroy the practical effect of the proviso they adopted. So, in construing this provision, it is not to be assumed that they intended such temporary loans, valid when made, should become invalid if not actually paid out of the money raised by taxes during the year in which they were made, in the absence of apt words indicating such intention. And no such words were used.

In *City of Georgetown* v. *Elliott et al.*, supra, an action was brought against the City of Georgetown, South Carolina, on its note for $8,000, dated September 15, 1931, which contained its general promise to pay, and recited that it was issued for money borrowed for corporate purposes in anticipation of the municipal taxes for the current year. The declaration contained no allegation that the taxes for 1931 had been collected, or that they were available for the payment of the note.

The constitution of that State, after limiting the amount of bonded debts of municipalities, contained the following provision:

> "Provided, That this Section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes."

The city made the point that the note was not a general obligation of the city, but was payable only out of the taxes for that year. The court, however, held that it was a valid indebtedness of the city, for which a general judgment could be rendered, even although there was no allegation or proof that taxes available for payment

had been collected from a levy in the year in which the note was issued, and quoted with approval from the unreported case of *Citizens and Southern National Bank of Savannah* v. *The City of Florence*, as follows:

> " 'It is argued, however, that tax anticipation notes must be payable out of the taxes pledged, and if for any reason these taxes fail or are dissipated, the holder of the note can collect nothing from the city. I cannot accede to this proposition. The framers of the Constitution, when they permitted tax anticipation notes, must be deemed to have known something of the practical effect that such a construction of the law would have upon the credit of the city. The holders of these notes are not responsible for the action of the city authorities in taking the taxes which were pledged for the notes and using them for other corporate purposes. This the holders of the notes could not prevent, nor were they required to stand guard over the collections and insist as each collection came in on its being applied to their notes. That would be utterly impracticable. The city authorities are not their agents, but the agents of the people of Florence. They had a right to assume that the city officials would not unlawfully divert these pledged taxes. To hold that because the city officials have taken the pledged taxes and used them for other corporate purposes, the city thereby escapes liability, would render these tax anticipation notes unsalable. No business man would lend money on such notes.' "

Therefore, the defendant's temporary loan in anticipation of taxes, having been validly made, was not rendered invalid by the mere failure of the municipal officers to pay it out of the money raised by taxes during the year in which it was made.

We find that the interest on said note from the date of its maturity up to September 1, 1932, has been overpaid to the extent of $4.88; and on March 2, 1935, the defendant paid $350 on the principal of said note.

We further find that the plaintiff is entitled to recover of the defendant the sum of $10,000, with interest thereon at the rate of six per centum per annum from September 1, 1932, to the date on which judgment shall be entered in this case in the court below,

after deducting therefrom said sum of $350, with interest thereon at the rate of six per centum per annum from March 2, 1935, to the date of the rendition of such judgment, and said sum of $4.88.

The case is remanded to the court below with the mandate that judgment be entered for the plaintiff against the defendant in accordance with this opinion.

So ordered.

(BARNES, C. J., having retired, did not join in this opinion.)

STATE OF MAINE

vs.

MILDRED A. JONES AND DANA E. HOWLAND.

Franklin. Opinion, October 30, 1940.

CRIMINAL LAW.

Exceptions to the whole charge, stating merely that charge was an "argument for the State instead of a statement of the law" and "prejudicial to the rights of the respondents," were insufficient.

When the legislature, in defining the respective functions of the court and of the jury in the trial of a case, laid down the inhibition that the judge must not express opinion on arising issues of fact, it went no further in its meaning than that he should refrain from speaking of the facts in manner implying his utterance is entitled to obedience. He must separate the questions of law from the questions of fact, and thus disunited send the questions of fact to the province of the jury, free from authoritative verbal invasion by himself.

A judge presiding is not merely to see that a trial is conducted according to certain rules, and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He should make the jury understand the pleadings, positions and contentions of the litigants. He may state, analyze, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solutions of seeming difficulties. He should do all such things as in his

judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment.

It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact; nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact.

On exceptions. Respondents indicted and tried before a jury on indictment charging lewd and lascivious cohabitation. Respondents took exceptions to the charge of the presiding justice. Exceptions overruled. Judgment for the State. Case fully appears in the opinion.

Hubert Ryan, County Attorney for the State.

Currier C. Holman, for defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. Upon completion of the evidence in the trial of the respondents upon an indictment charging them with lewd and lascivious cohabitation, and the charge of the presiding justice, the following exceptions were taken:

"The respondents object to the whole charge as it is an argument for the State instead of a statement of the law.

"That the charge was prejudicial to the rights of the respondents."

Exceptions such as these have been characterized as serving only as a dragnet with the apparent hope that something might be brought to light and made use of as a valid cause of complaint. *State* v. *Reed*, 62 Me., 129. Exceptions to "all matters stated in the charge" are criticised in *State* v. *Pike*, 65 Me., 111. In *Macintosh* v. *Bartlett*, 67 Me., 130, the court said:

"Sufficient warning has been given that this court is not disposed to entertain exceptions thus taken."

In *Harriman* v. *Sanger*, 67 Me., 442 at 445, the court gave notice that,

"This mode of practice, long ago condemned by several of the most respectable courts of the land, and properly characterized by this court in *State* v. *Reed*, 62 Me., 129, 135, will be tolerated no longer."

To the same effect, see *Bacheller* v. *Pinkham*, 68 Me., 253; *Crosby* v. *Railroad Co.*, 69 Me., 418; *McKown* v. *Powers*, 86 Me., 291 at 296, 29 A., 1079.

In *Hamlin* v. *Treat*, 87 Me., 310 at 315, 32 A., 909 at 910, in which the defendant presented a general bill of exceptions embracing more than one-half of the entire charge and claiming an expression of opinion by the presiding justice upon issues of fact, the court said:

"It is unnecessary to say that this method of spreading out a whole charge, or even to the extent as disclosed in this case, is not countenanced by the court, and were we to consider the exceptions in reference to this mode of practice they would fall within that class of cases which characterize such a bill of exceptions as irregular."

The respondents are not of right entitled to be heard. The exceptions are insufficient. They are within the category concerning which there has been emphatic pronouncement by the court heretofore. A well-marked course has been laid down to follow by statute (R. S., Chap. 91, Sec. 24), Rule of Court XVIII and decisions.

The court, however, is conscious that, notwithstanding the failure to present a proper bill of exceptions, yet the Constitution of Maine, Article I, Sec. 6, guarantees to the accused in all criminal prosecutions, the right to an impartial trial. The legislature has provided, R. S., Chap. 96, Sec. 104, that the expression of opinion upon questions of fact by the presiding justice is sufficient cause for a new trial upon exceptions. This is undoubtedly an additional safeguard to assure, beyond peradventure, the constitutional guaranty.

Without intending to indicate the course which the court may see fit to follow in the future in cases not properly presented, but in order that the respondents may be fully protected in their rights, the court is constrained to proceed in the present case to a consideration of the objections which the respondents have faultily attempted to raise. It would appear that the real intention was to assert a vio-

lation on the part of the presiding justice of the provisions of the statute cited *supra*, through some expression of opinion as to issues of fact in his charge.

This statute reads as follows:

> "During a jury trial the presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case, but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such expression of opinion is sufficient cause for a new trial, if either party aggrieved thereby and interested desires it; and the same shall be ordered accordingly by the law court upon exceptions."

It has been a part of our law since 1874. It has received judicial construction in many cases since.

Without attempting novelty of expression, but summarizing judicial declaration as to fundamental concepts concerning the function, responsibility and duty of a judge presiding over a jury trial, we reiterate and emphasize that:

> "When the Legislature, in defining the respective functions of the court and of the jury in the trial of a case, laid down the inhibition that the Judge must not express opinion on arising issues of fact, it went no further in its meaning than that he should refrain from speaking of the facts in manner implying his utterance entitled to obedience. He must separate the questions of law from the questions of fact, and thus disunited send the questions of fact to the province of the jury, free from authoritative verbal invasion by himself. But it never was intended that a Judge should sit listlessly by, fulfilling duty as though he were administering the rules in a contest for superiority by chance and skill, utterly powerless to aid in the ascertainment of truth as the underlying essential to a proper verdict. Far from it. The Legislature meant that, in the employment of the experience of his career, he should make the positions and contentions of the litigants clear, by stating, analyzing, comparing and explaining the evidence, by stripping it of extraneous considerations, pointing out any seeming contradictions, resolving it into its simplest elements, supple-

menting all by definition of the law's governing power, that the jury with discerning appreciation might come to a correct result, and the gladsome light of jurisprudence shine on undimmed." *Benner* v. *Benner*, 120 Me., 468, 115 A., 202.

"A judge presiding in a court of justice occupies a far higher position and has vastly more important duties than those of an umpire. He is not merely to see that a trial is conducted according to certain rules, and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He is sworn to 'administer right and justice.' He should make the jury understand the pleadings, positions and contentions of the litigants. He may state, analyze, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment. He is to see that no injustice is done." *York* v. *Railroad Co.*, 84 Me., 117 at 128, 24 A., 790, 793.

"The presiding justice, in addition to his duty of instructing the jury upon the law, should aid them by re-calling and collating the details of testimony and resolving complicated evidence into its simplest elements.

"He can properly instruct the jury to apply to the testimony of witnesses the tests of consistency and probability and aid them in arriving at the truth, — the fact in issue, — by stating both affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them." *State* v. *Means*, 95 Me., 364, 50 A., 30.

"It does not follow that the judge has *expressed* an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact; nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact." *McLellan* v. *Wheeler*, 70 Me., 285.

"Nor does it follow that there is an expression of opinion upon any issue of fact merely because the presiding justice may see fit to call the jury's attention to certain questions of fact by way of interrogatories addressed to them upon matters important for their consideration in arriving at a correct conclusion upon the main question. A statute like this, if it is to be held as not trenching upon the prerogative of the court, must be strictly construed." *State* v. *Day*, 79 Me., 120 at 125, 8 A., 544, 545.

The court has given further expression to the principles above stated in *Bradstreet* v. *Bradstreet*, 64 Me., 204; *State* v. *Benner*, 64 Me., 267 at 289, 291; *State* v. *Smith*, 65 Me., 257; *Grows* v. *Railroad Co.*, 69 Me., 412; *Murchie* v. *Gates*, 78 Me., 300 at 306, 4 A., 698; *State* v. *Richards*, 85 Me., 252, 27 A., 122; *Jameson* v. *Weld*, 93 Me., 345 at 357, 45 A., 299; *State* v. *Mathews*, 115 Me., 84, 97 A., 824; *Allard* v. *LaPlain*, 125 Me., 44, 130 A., 737.

The record of the testimony brought forward with the exceptions clearly points to the guilt of the parties. The charge stated the factual issues with clarity, giving both versions wherever there was conflict. No complaint is made of misstatement. Neither is there complaint that the rules of law applicable were not carefully given. The charge properly impressed upon the jury its duty and obligation in determining the issues of fact.

It is in accordance with our procedure that the jury shall have the benefit of an orderly and clear presentation from the presiding justice of the factual issues and that attention shall be called to reasonable inferences deducible from existent circumstances. It is the fault or the misfortune of the respondents themselves that the facts, when arrayed in logical order and relation, should be convincing of guilt.

It is the authoritative expression of the opinion of the presiding justice himself on issues of fact, which is the extent and limit of the statutory prohibition, and that has not been violated.

Entry will be

Exceptions overruled.
Judgment for the State.

PHILIP GOLD *vs.* PORTLAND LUMBER CORP.

Cumberland. Opinion, November 6, 1940.

NEGLIGENCE. MOTOR VEHICLE. NEW TRIAL.

When verdict is directed for defendant, the evidence must be viewed by the Law Court, in the light most favorable for the plaintiff.

Chap. 29, *Sec.* 7 *of R. S.* 1930 *does not afford an inflexible standard by which to decide questions which arise over collisions at intersections, does not confer the right of way without reference to the distance of the vehicles from the intersection point, their speed, and respective duties, and does not give precedence under all circumstances to a vehicle on the right against one from the left. Always the approach to an intersection must be attended with the use of reasonable watchfulness and caution so as to have such approaching vehicle under control and, where a collision is indicated, the driver who can do so by the exercise of ordinary care should avoid doing injury although it necessitates yielding his right of way and a violation of this law of the road is prima facie evidence of negligence.*

A driver approaching an intersecting street, where there is no stop sign, is not compelled to stop for a motor vehicle approaching on his right too far away to reach the intersection until he has crossed. The law of the road applies only when the motor vehicle approaching on the right travelling at a lawful rate of speed will enter the intersection before he can cross and a collision might follow if he did not stop or slow down.

If there is doubt that a safe crossing may be made, reasonable care requires the driver of a motor vehicle coming into an intersection from the left to stop.

Whenever it is the duty of a person to look for danger, mere looking will not suffice. One is bound to see what is obviously apparent. If the failure of a motor vehicle operator to see that which by the exercise of reasonable care he should have seen is the proximate cause of an injury to another, he is liable in damages for his negligence.

At an obstructed intersection of a highway, speed in excess of fifteen miles per hour was prima facie evidence that it was neither reasonable nor proper.

There is negligence only when there is an omission to see that which by the exercise of reasonable care should have been seen.

It is only when it is possible of actual demonstration that the plaintiff is guilty of contributory negligence that he should be denied the right to go to the jury.

On exceptions. Action by Philip Gold against Portland Lumber Corp. for damages resulting from collision between motor vehicles at an intersection. A verdict was directed for defendant. Plaintiff filed exceptions. Exceptions sustained. New trial granted. Case fully appears in the opinion.

Robert A. Wilson,
Edward I. Gold, for plaintiff.
Robinson & Richardson, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

HUDSON, J. This is a street intersection case in which the plaintiff seeks to recover from the defendant for property damage and personal injuries received January 4, 1940, in a collision between a one and one-half ton Chevrolet truck driven by the plaintiff's agent (the plaintiff, however, riding with him) and a lumber truck driven by the defendant's agent. Neither agency is denied. The plaintiff's truck was proceeding southerly on Wilmot Street in the City of Portland and the defendant's, easterly on Lancaster Street. These streets cross at right angles and form an obscured intersection (Sec. 69 [b] 2, Chap. 29, R. S. 1930).

In the Trial Court, a verdict for the defendant was ordered, to which ruling the plaintiff excepted. This ruling was based upon the conclusion of the justice that the plaintiff's driver was guilty of contributory negligence as a matter of law. In our consideration, the evidence must be viewed in the light most favorable for the plaintiff. *Collins* v. *Maine Central Railroad Co.*, 136 Me., 149, 151, 4 A., 2d, 100.

By Sec. 7 of Chap. 29, R. S. 1930, it is provided:

> "All vehicles shall have the right of way over other vehicles approaching at intersecting public ways from the left, and shall give the right of way to those approaching from the right; except that traffic officers stationed at such intersections may otherwise regulate traffic thereat."

Years ago this court held that this "law of the road" creating the right of way is not absolute, does not afford an inflexible standard

by which to decide questions which arise over collisions at intersections, does not confer the right of way without reference to the distance of the vehicles from the intersection point, their speed, and respective duties, and does not give precedence under all circumstances to a vehicle on the right against one from the left. Always the approach to an intersection must be attended with the use of reasonable watchfulness and caution so as to have such approaching vehicle under control and, where a collision is indicated, the driver who can do so by the exercise of ordinary care should avoid doing injury although it necessitates yielding his right of way. *Fitts* v. *Marquis*, 127 Me., 75, 77, 140 A., 909. A violation of this law of the road is prima facie evidence of negligence. *Dansky* v. *Kotimaki*, 125 Me., 72, 130 A., 871. A driver approaching an intersecting street (there being no stop sign) is not compelled to stop for a motor vehicle approaching on his right too far away to reach the intersection until he has crossed. The law of the road applies *only* when the motor vehicle approaching on the right travelling *at a lawful rate of speed* will enter the intersection before he can cross and a collision might follow if he did not stop or slow down. *Petersen* v. *Flaherty*, 128 Me., 261, 263, 147 A., 39; *Gregware* v. *Poliquin*, 135 Me., 139, 142, 190 A., 811.

In the latter case it is stated on page 142:

> "If there is doubt that a safe crossing may be made, reasonable care requires the driver coming in from the left to stop."

And on page 143:

> "Whenever it is the duty of a person to look for danger, mere looking will not suffice. One is bound to see what is obviously apparent. If the failure of a motor vehicle operator to see that which by the exercise of reasonable care *he should have seen is the proximate cause of an injury to another*, he is liable in damages for his negligence." (Italics ours.)

Did the application of these principles of law to the facts, considered most favorably for the plaintiff, warrant the direction of the verdict for the defendant? So considered, it appeared that the plaintiff's truck reached the intersection first, and there at "its corner" the plaintiff's driver looked right or westerly on Lancaster

Street and saw no approaching vehicle within one hundred feet. He then proceeded some four or five feet into the intersection at about ten miles per hour, when, looking again to the right, he saw the defendant's truck ten or fifteen feet away coming at about thirty miles per hour. The trucks collided a bit into the southeast quarter of the intersection. Contact was between the left forward part of defendant's and the right side of the plaintiff's truck. At such an obstructed intersection, speed in excess of fifteen miles per hour was prima facie evidence that it was neither reasonable nor proper. Sec. 4, Chap. 213, P. L. 1939.

Was the plaintiff's driver guilty of contributory negligence as a matter of law? The defendant so asserts, but does not claim that the plaintiff personally was negligent. He says, in effect, that the collision happened so soon after the plaintiff's driver claims to have looked to his right that the defendant's truck must then have been visible; that either he did not look at all or, if he did, he saw not that which he should have seen.

The rule as stated in the *Gregware* case, *supra*, is that there is negligence only when there is an omission to see that which by the exercise of reasonable care *should have been seen.* Whether the defendant's truck should have been seen or not is dependent upon circumstances. Pertinent questions were: Did the plaintiff's driver look? Did he look attentively? When did he look? Where then was he relative to the intersection? If he looked was he at a place where he had plain vision? How fast was he driving? If he looked, where then was the defendant's truck? Was it visible? Whether so or not, how far away was it and how fast was it coming? Did he actually see it, or, if not, should he have seen it? These were factual questions about which there was conflict of testimony. It may well be that most favorable light thrown on the plaintiff's testimony reveals that the plaintiff in fact did not see the defendant's truck when he looked, because then it was not in sight.

But counsel for the defendant produces a comparative computation to show that the defendant's truck must have been visible. On the other hand, plaintiff's counsel submits figures to show that at the rate of speed the defendant's truck was approaching there was plenty of time for it to reach the point of collision after the plaintiff had looked and had not seen it coming. But such computations are

not decisive unless the basic figures are correct in fact. Here they relate to distance, speed, and time, all matters of estimate and not one definitely known. The jury would not have been compelled to find that either driver was absolutely correct in his statement as to them. We cannot say that the jury, considering the testimony most favorably for the plaintiff, could not have found that plaintiff's driver, reaching the intersection first, actually did in the exercise of due care look to his right and fail to see the defendant's truck because it was not then in vision and that although not then visible, it was in fact coming at such speed that it had sufficient time to reach and collide with the plaintiff's truck when and where it did.

According to the plan, Wilmot Street in width is twenty-seven and a half feet and Lancaster, thirty-six feet ten inches. For the defendant's truck, at thirty miles per hour, to cover the one hundred feet on Lancaster Street plus one-half the length of the intersection, it would have required between two and two and one-half seconds, while for the plaintiff's truck to cross one-half of Lancaster Street in the intersection at the estimated rate of ten miles per hour, would have taken only between one and one and one-third seconds.

But the plaintiff's driver, when he entered the intersection, had the right to assume, with no knowledge to the contrary, that any truck approaching on his right would not exceed the lawful speed there of fifteen miles per hour. At such speed it would have taken the defendant's truck in excess of five seconds to reach the point of collision, thus giving the plaintiff's truck ample time for crossing and avoiding collision.

So on these estimated figures, as testified to by the plaintiff's driver, the jury might have found that he was in the exercise of due care when he entered this intersection.

It is only when, as in the *Gregware* case, *supra*, it is possible of actual demonstration that the plaintiff is guilty of contributory negligence that he should be denied the right to go to the jury.

New trial ordered.
Exceptions sustained.

GEORGE M. GRAFFAM *vs.* CASCO BANK & TRUST COMPANY.

Cumberland. Opinion, November 7, 1940.

EXCEPTIONS. APPEAL. TRUSTS.

Where a cause is tried by a presiding justice without the intervention of a jury in accordance with statute, exceptions to the justice's rulings in matters of law do not lie, unless there has been an express reservation of the right to except.

The parties may agree that the presiding judge shall hear the cause, and upon hearing decide the facts, reserving by express stipulation the right to except to his ruling as to any question of law which may arise.

A certificate by justice who has presided without the intervention of a jury, that exceptions have been reserved, is conclusive, in absence of anything in the bill of exceptions to the contrary.

Where counsel for both parties have obviously laid the groundwork for coming to the Law Court on exceptions, the practice of agreeing to the bill of exceptions "as to form only" is proper.

The indorsement "seen and agreed to as to form only" does not bring before a justice, to whom a bill of exceptions is presented for allowance, the question whether the docket entry by which the cause was submitted to him, reserved the right of exceptions, and the better practice, where no such reservation has in fact been noted, is to object to the allowance and call direct attention to the docket omission.

Findings of fact by a justice sitting without a jury so long as they find support in evidence are final.

The issue as to whether or not the record in a cause finds support is a question of law and if there is no evidence to support the findings of such facts as must necessarily have formed the basis of the judgment the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is error of law, to correct which exceptions will lie.

On exceptions. Case heard before a justice of the Superior Court, without jury, acting pursuant to Section 26 of Chapter 91 of the Revised Statutes 1930. Judgment ordered for the plaintiff for the full amount of the draft on which suit is based. Defendant files ex-

ceptions to the finding and ruling of the justice. Exceptions sustained. Case fully appears in the opinion.

Franklin R. Chesley,
Lloyd LaFountaine, for plaintiff.
Woodman, Skelton, Thompson & Chapman, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. The defendant brings this case before the court on exceptions to the finding and ruling of a justice of the Superior Court, acting pursuant to Section 26 of Chapter 91 of the Revised Statutes (1930), who decided the cause without the aid of a jury and ordered judgment for the plaintiff for the full amount of the draft on which the suit is based.

The plaintiff asks that the exceptions be overruled on the authority of *Frank* v. *Mallett*, 92 Me., 77, 42 A., 238, 239, where defendant, after exceptions alleged by him had been disallowed, sought to have them established in this court, in accordance with the provisions of what is now Section 24 of Chapter 91. His petition was dismissed in accordance with the well-established rule of law that "when a cause is tried by the presiding justice without the intervention of a jury," in accordance with the statute now in question, "exceptions to his rulings in matters of law do not lie, unless there has been an express reservation of the right to except."

This rule dates back to 1855 when, shortly following the enactment of the statute, originally found in Section 12 of Chapter 246 of the Public Laws (1852), it was first declared by a member of the court who had served prior to his judicial appointment as chairman of a commission authorized by the legislature to consider and report upon the consolidation of the District and Supreme Judicial Courts in language which may be considered as a reliable exposition of the legislative purpose:

> "The obvious intention of the Legislature, was to make the adjudication of the presiding Judge final and conclusive. This section confers on the presiding Judge the power to determine all causes, when both parties agree and enter their agreement

upon the docket, and that he shall direct what judgment shall be entered up. No exceptions are given in terms and the whole language of the Act shows none were intended. The design was to make his decision the end of all controversy, not that the losing party, after having agreed to submit to the decision of the Judge, and that he should direct what judgment should be entered up, should be permitted indefinitely to renew litigation. The decision of the presiding Judge in all matters of law or fact, submitted to his determination under this section, is final."

* * *

"The parties may agree that the presiding Judge shall hear the cause, and upon hearing decide the facts, reserving by express stipulation the right to except to his ruling as to any question of law which may arise." *Proprietors of Roxbury* v. *Huston*, 39 Me., 312.

In the application of this precedent the court has heretofore determined that the certification of exceptions by the justice hearing a cause shall be conclusive in this respect in the absence of anything in the bill of exceptions to show the contrary. *Dunn* v. *Motor Co.*, 92 Me., 165, 42 A., 389; *State* v. *Intox. Liquors*, 102 Me., 385, 67 A., 312; *Waterville Realty Co.* v. *City of Eastport*, 136 Me., 309, 8 A., 2d, 898. The record before us is silent on the point but we note that thirteen exceptions on questions of evidence were taken in the course of the hearing and that counsel for the plaintiff who state in their brief, as the record supports, that the bill of exceptions was agreed to by them "as to form only" were allowed ten of them. In a case where counsel for both parties so obviously laid the groundwork for coming to this court on exceptions, this practice seems obviously just and proper. The endorsement "seen and agreed to *as to form only*" can hardly be expected to bring before a justice, to whom a bill of exceptions is presented for allowance, the question as to whether or not the docket entry by which the cause was submitted to him reserved the right of exceptions. We think the better practice in any case where no such reservation had in fact been noted would be to object to the allowance and call direct attention to the docket omission.

The defendant alleges eleven exceptions, the second and third of which claim error on the part of the justice who heard the cause in finding, respectively, that the draft sued on was a sight draft and that the defendant wrongfully released the bill of lading which was attached thereto. The other exceptions are not material to the issue before this court but it may be proper to note that the finding which is alleged and excepted to in the first is not necessarily involved in the decision of the cause and that those subsequent to the third relate to facts upon which the evidence was conflicting where the determination of the sitting justice, who had opportunity to appraise the testimony as it came from the mouths of witnesses, would be final. It has long been definitely established as law in this state that "findings of fact by a Justice sitting without a jury so long as they find support in evidence are final." *Ayer* v. *Railway Co.*, 131 Me., 381, 163 A., 270, 271 and cases therein cited. Under the decisions of this court the issue as to whether or not the record in a cause "finds support" is a question of law and "if there is no evidence to support the findings of such facts as must necessarily have formed the basis of the judgment . . . the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is error of law, to correct which exceptions will lie." *Chabot & Richard Co.* v. *Chabot*, 109 Me., 403, 84 A., 892.

The decision here recites no factual findings but it must be based, as the second and third exceptions allege, either upon a finding of fact that the draft in question was a sight draft or upon a ruling of law that it should have been handled by the defendant as such. This court may properly disregard the former since a copy of the draft is in evidence and recites the terms of payment clearly in the words "Net cash ten days from arrival." The issue arises under the third exception which alleges error of law in the finding that the defendant "wrongfully released the bill of lading attached to the draft."

The action is assumpsit, brought by the plaintiff in his capacity as trustee for a manufacturer, to recover on a draft delivered to the defendant bank for collection with a bill of lading attached. Plaintiff was acting under a three-party trust agreement, of which defendant had full knowledge, which recited a purpose to secure all credit advanced to the manufacturer; conferred authority on the trustee to pledge "sight drafts with bills of lading attached" with

the defendant bank as collateral; directed that products be shipped "sight draft attached to bill of lading"; and vested all proceeds of the trust, after the payment of all credit secured, in the manufacturer upon his certification that no expenses remained unpaid. Copies of the trust agreement (which appears by the exhibit not to have been actually signed by the plaintiff), the draft, and the invoice which accompanied the draft and bill of lading, and which states the terms in substantial conformity with the terms of payment of the draft in the words "Net ten days from arrival," are in evidence. The record discloses that the plaintiff trustee used the treasurer of the manufacturer as his agent for transactions with the defendant bank, including the delivery of the draft which is the subject matter of this suit; that that draft was originally forwarded by the defendant to its agent with instructions to deliver the attached bill of lading "only on payment"; and that the bill was subsequently released against acceptance of the draft when the treasurer-agent called attention to the ten-day terms of the draft and invoice. Testimony was given, and not controverted, that the operations of the manufacturer produced a profit under the trust, notwithstanding the non-payment of the particular draft, but that the manufacturer made no certification as to the payment of expenses in accordance with the provision of the trust above noted.

Upon these facts it is apparent that the decision below was based upon a ruling of law that the provisions of the trust instrument required that the defendant handle the particular draft as a sight draft notwithstanding the credit terms stated in the draft and invoice. Defendant's third exception raises squarely, within the rule laid down in *Sardine Co.* v. *Olsen*, 117 Me., 26, 102 A., 797, the question of error of law in the interpretation of that document. The decision can only be supported if, as a matter of law, the defendant was limited to extending credit to the trustee against *sight* drafts or, accepting drafts which on their face extended credit, to handling such as if they were drawn at sight.

We do not believe, upon a consideration of all the facts, that such an interpretation was either necessary or proper. Not only was the purpose of the trust a limited one which the evidence discloses has been fully accomplished, but the record discloses that the limitation imposed upon the trustee for negotiating loans upon the basis of

sight drafts and the direction that shipment be made *sight* draft attached to bill of lading were written into the instrument at the request of the defendant bank which was named therein as the agency where the borrowings of the trustee were to be made. On the record this limitation was waived by the defendant at the request of the trustee and the manufacturer, who became the sole beneficiary of the trust when all outstanding credit became fully paid, expressed in the first instance by delivery to the defendant bank of a time draft actually signed by the trustee and reaffirmed by that beneficiary prior to the release of the bill of lading on acceptance of the draft.

The manufacturer, who is now the sole beneficiary of the trust, will become entitled to the entire proceeds thereof upon certification to the trustee of the facts disclosed in the record. It would be an anomaly to permit the plaintiff, notwithstanding his own assent to the use of a time draft, to recover of this defendant, for the benefit of a cestui who as against the defendant is clearly barred from retaining it, the amount of the draft in question. Under these circumstances we believe a proper construction of the trust instrument is that the word "sight" was not intended to be a limitation for the benefit of the cestuis que trustent, but was incorporated in the instrument for the convenience, if not for the protection, of the defendant and imposed no limitation except one which the defendant, at the request of the trustee and beneficiary certainly, if not at the request of the trustee alone, was fully entitled to waive. The mandate must be

Exceptions sustained.

MAINE UNEMPLOYMENT COMPENSATION COMMISSION

vs.

ANDROSCOGGIN JUNIOR, INC.

MAINE UNEMPLOYMENT COMPENSATION COMMISSION

vs.

EDWARD M. HEALY.

MAINE UNEMPLOYMENT COMPENSATION COMMISSION

vs.

E. J. CONQUEST.

Kennebec. Penobscot. Opinion, November 7, 1940.

UNEMPLOYMENT COMPENSATION LAW. MASTER AND SERVANT.

CONSTITUTIONAL LAW.

A company that employs labor for purpose of construction of its plant is an "employer" under the Unemployment Compensation Law so as to be required to contribute to unemployment compensation fund, since act makes no distinction between employees who work on original construction and those who labor.

The carry-over provision of Unemployment Compensation Law requiring one who has contributed to unemployment compensation fund as an employer to file a written application for termination of coverage before a certain date, or his status as an employer under the act will be continued, is reasonable and proper considering the beneficial effect of this carry-over provision in simplifying and lessening the work of the Unemployment Compensation Commission without unduly burdening the employer and at the same time giving the employer full protection.

When a statute imposing or enforcing a tax or other burden on the citizen, even in behalf of state, is fairly susceptible of more than one interpretation, the court will incline to interpretation most favorable to the citizen.

The Unemployment Compensation Law may be regarded as enacted in the interest of public welfare in providing for assistance to the unemployed and so be entitled to receive a liberal interpretation. Relief for unemployment is a public purpose.

A statute is unconstitutional as denial of "equal protection of the law," where statute creates purely arbitrary distinction, unwarranted by actual differences which, without proper distinction, favors some persons or classes over others in like circumstances.

While it is true that a corporation is a separate entity from its stockholders, yet it is apparent that the legislature, when it enacted the Unemployment Compensation Law, intended to go behind the corporate veil and discover actuality and if it were found that the company, although a corporation, were one so controlled, compel contribution.

The legislature in enacting the Unemployment Compensation Law had the general power to recognize the consequences of common control in appropriate circumstances and disregard the corporate entity.

The Unemployment Compensation Law taxing employers having eight or more employees, and not those having a less number, is not invalid on ground that the rule of eight constitutes an unconstitutional discrimination.

On report. Actions by the Maine Unemployment Compensation Commission against Androscoggin Junior, Inc., against Edward M. Healy and against E. J. Conquest, to recover contributions allegedly due under the Unemployment Compensation Law. Judgments for plaintiff. Cases fully appear in the opinion.

John S. S. Fessenden, Assistant Attorney-General, for plaintiff.

Nelson, Wilson & Nelson, for defendants.

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

HUDSON, J. On report. These three actions, based on Sec. 14 (b) of the Maine Unemployment Compensation Law (P. L. 1935, Chap. 192, as amended), were brought for the purpose of collecting unemployment contributions. It is stipulated that in each due notice was given and payment demanded.

The Healy Cases

For many years before 1936, Mr. Healy owned and operated a boys' camp known as Camp Androscoggin. That year he and two of his camp counsellors organized a corporation known as Androscoggin Junior, Inc., for the purpose of creating and operating a separate camp for younger boys. Mr. Healy was to continue to

carry on the senior camp as before and the corporation was to maintain and operate the junior camp.

The capital stock authorized was $50,000, consisting of five hundred (500) shares of the par value of $100 each. Its officers consisted of three directors, president, vice-president, treasurer, secretary, and clerk. Under its by-laws, it was provided that the board of directors had the power to fill vacancies and declare dividends, as well as to control and manage the business. The president, Mr. Healy, was the "chief executive officer and head of the Company" and in the recess of the board of directors was given the general and active management of the company's business and affairs. Without the order of the board, duly entered in the minutes, no agreement, contract, or obligation (other than a check) for more than $100 could be made. Checks were to be signed by the treasurer and countersigned by the president and notes, signed by the president or vice-president and the treasurer. All contracts required the signature of the president. The three incorporators were elected directors.

Of the stock issued, Mr. Healy received one hundred and thirty-five (135) shares and the two counsellors, thirty-two and one-half (32½) each, so that Mr. Healy owned sixty-seven and one-half per cent (67½%) of the outstanding stock.

In January, 1937, the company employed men to clear land preparatory to erecting necessary buildings for the camp. In April, 1937, it contracted for the erection of the buildings. It opened for business on June 30, 1937. During 1937, sixteen of the thirty-two weeks in which the company employed eight or more employees were entirely devoted to building the camp and in preparing to go into the business of operating; ten, to conducting the camp and closing it for the winter; and the remaining six, to preparing ground for the season of 1938.

In 1938, the company did not employ eight employees so as to come under the law of eight under the act. Nor did Mr. Healy, as proprietor of the senior camp, in 1937 or 1938 employ eight workmen. If he and the company were treated as a single unit, eight or more persons were employed in 1937 but not in 1938.

The company's contributions for 1937 were paid. The plaintiff now seeks to recover contributions from the company for the year 1938. The plaintiff's contention is that it is entitled to recover these

contributions from the company because it was an employer under the act in 1937 and continued to be an employer in 1938 since it failed to terminate its status as provided in Sec. 8 (b) of the statute. (Also see Sec. 19 [f] [6].)

From Mr. Healy it claims the right to recover contributions in 1937 because, although he did not employ eight or more under the act that year, he had common control of both camps and it says that they constituted an employing unit which, considered as a single unit, employed eight or more in 1937. As to 1938, it contends that Healy was an employer because he failed to terminate his liability as provided in Sec. 8 (b) of the statute. (Also see Sec. 19 [f] [6].)

The defendants in each case pleaded the general issue and specially that if they were indebted as plaintiff declared under the statute, the statute was in violation of the State and Federal Constitutions.

Section 7, Contributions, (a) Payment (1) provides:

"On and after January 1, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 19 [g]) occurring during such calendar year. . . ."

Section 19, Definitions (d) provides:

" 'Contributions' means the money payments to the state unemployment compensation fund required by this act.

"(e) 'Employing unit' means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1935, had in its employ 1 or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains 2 or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act. . . .

"(f) 'Employer' means: (1) Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of 20 different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, 8 or more individuals (irrespective of whether the same individuals are or were employed in each such day);

* * * *

"(4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls 1 or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, or interests, or both, would be an employer under paragraph (1) of this subsection:

* * * *

"(6) Any employing unit which, having become an employer under paragraph (1), (2), (3) or (4), has not, under section 8, ceased to be an employer subject to this act; . . . ."

Paragraph (g) (1) of said Sec. 19 provides:

"Except as otherwise provided in this subsection (g), 'employment' means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied."

In Par. (g) (6), it is stated that:

"Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that

"(A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

"(B) such service is either outside the usual course of the business for which such service is performed, or that such serv-

ice is performed outside of all the places of business of the enterprise for which such service is performed; and

"(C) such individual is customarily engaged in an independently established trade, occupation, profession or business."

Defending counsel first argues that the company did not remain an employer under the act and was "not required to contribute thereunder for two consecutive years where the operation of its business at no time" came "within the terms of the Act and the only basis for its inclusion thereunder" was "distinctly non-repetitious employment, exclusively devoted to organization and construction in the first year of its existence," and if so, that the act is unconstitutional.

Thus at the outset the question is raised whether a company that employs labor for the purpose of construction of its plant is an employer under the act. The statute makes no distinction between employees who work on original construction and those who labor in the plant's subsequent operation. Considering the purpose of the act and the benefits expected to be conferred, we do not consider that the legislature intended that there should be any such distinction. An employee out of work is as much in need of assistance through the agency of this law whether he has ceased working on original construction or in later operation. Section 19 (g) (1) states that, "Except as otherwise provided in this subsection (g), 'employment' means service," and we fail to see how this work in original construction comes within any exception in subsection (g).

The 1937 contribution, however, was paid. What is sought here from the company is payment for 1938, during which year it was not an employer under the rule of eight. For 1938 it can be held to contribute only if by operation of the law it was then an employer. The plaintiff says it was, because of Sec. 8 (b), which provides a right for the company before a certain date to file a written application for termination of coverage, which it failed to do. Failure so to do continued its status as an employer under the act for 1938, although that year it did not actually employ the required eight either alone or jointly with Mr. Healy in his operation of the senior camp.

This carry-over provision of said Sec. 8 (b) we consider reason-

able and proper. It is somewhat analagous to the statutory duty placed upon inhabitants to make and bring in true and perfect lists of their taxable estates else be barred from making application to the assessors or county commissioners for abatement of taxes. Section 70, Chap. 13, R. S. 1930, as amended. Considering the beneficial effect of this carry-over provision in simplifying and lessening the work of the commission without unduly burdening the employer and at the same time giving it full protection, we hold that the statute is reasonable and unobjectionable.

While it is true "that when a statute imposing or enforcing a tax or other burden on the citizen even in behalf of the State is fairly susceptible of more than one interpretation, the court will incline to the interpretation most favorable to the citizen" (*Millett* v. *Mullen*, 95 Me., 400, 415, 49 A., 871, 873), yet we do not consider that this statute as attacked is "fairly susceptible of more than one interpretation" so as to come within that principle of law. Besides, it may be regarded as enacted in the interest of the public welfare in providing for assistance to the unemployed and so be entitled to receive a liberal interpretation. 59 C. J., Sec. 656, pages 1105, 1106. Relief of unemployment is a public purpose. *Carmichael et al.* v. *Southern Coal & Coke Co.*, 301 U. S., 495, 515, 57 S. Ct., 868.

It is contended that "an older company in exactly the same field under exactly the same conditions as to employment (perhaps a competitor) would pay no tax whatsoever during the period in question" and that consequently the law works a discrimination and so is unconstitutional. But the fact is that the classes are different. The law makes no discrimination between two old or two new companies. This court recently, in the case of *State of Maine* v. *King*, 135 Me., 5, 188 A., 775, has discussed at length the law relating to reasonable classifications. It is stated in that case on page 19:

> "It must be borne in mind that discrimination alone is not sufficient to render the Act unconstitutional under the Fourteenth Amendment. In order thus to void it, its provisions must . . . create a discrimination, unwarranted by actual differences, so that the statute is purely arbitrary and effects legislation which unreasonably and without proper distinction favors some persons or classes over others in like circumstances."

We consider the classification to be neither arbitrary, unreasonable, nor unjust, so as to offend either the State or Federal Constitution.

In the action against Healy, it is contended that no contribution is recoverable because in neither 1937 nor 1938 did he as an individual employ eight or more and that he does not come under the provisions of Sec. 19 (f) (4) either as an owner or as a controller of one or more other employing units.

The plaintiff does not claim that Healy owned the company but that he controlled it within the meaning of said Sec. 19 (f) (4). The control required is not necessarily that legally enforcible. It may be otherwise. It is a matter of actual control. Mr. Healy, who had run the senior camp for years and who in 1936 with the two counsellors caused to be created the new corporation to operate the junior camp, was elected president, a director, and was the owner of the majority of the corporate stock. As president he was "the chief executive officer and head of the Company." By-laws, Article IX, Section 1. Financially he had more in the corporation than either of the other stockholders. Owning the majority of the stock, he could control the election of the company's officers and determine its policies through the agencies of those so elected. Taking all the facts into consideration, particularly Mr. Healy's relations with the two counsellors before the organization of the company and the fact that they had received their training under him who had carried on a boys' camp business for more than twenty years, it is but natural to conclude that they regarded him as the one whose voice in the conduct of the company's affairs should govern. We find that he controlled this corporation within the meaning of the statute.

While it is true that a corporation is a separate entity from its stockholders, yet it is apparent that the legislature, when it enacted this statute, intended to go behind the corporate veil and discover actuality and if it were found that the company, although a corporation, were one so controlled, compel contribution. Otherwise, an individual intending to carry on a business of considerable magnitude, requiring the employment of many more than eight, could organize several corporations, each employing less than eight, escape contribution, and deprive many employees of the benefits intended by the act.

In *Coffin et al.* v. *Rich*, 45 Me., 507, a statute was held constitu-

tional that provided that stockholders should be personally liable for debts contracted by the corporation following the enactment of the statute. Also see *Eames* v. *Savage*, 77 Me., 212, 219; 34 Harvard Law Review, 584; 27 Harvard Law Review, 386; 42 Harvard Law Review, 955; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S., 257, 31 S. Ct., 387; *Chicago-Milwaukee Railroad Co.* v. *Minneapolis Civic & Commerce Association*, 247 U. S., 490, 38 S. Ct., 553. In the latter case, the court said on page 501:

> "In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

In *Unemployment Compensation Com'n* v. *City Ice & Coal Co.*, 216 N. C., 6, 3 S. E. (2d), 290, the court stated on page 292:

> "It regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance."

Counsel for the plaintiff in his brief has well stated:

> "The Legislature recognized the obvious possibility of evasion by splitting one's establishments. In certain types of business, particularly those where labor costs represent a large part of the total expenses of operation, and where efficiency would not be materially impaired by the division of the unit, an employer might find it quite profitable to split his establishments into several smaller units, each employing not more than seven employees. Surely the Legislature would not be powerless to avoid this rather obvious type of evasion. Assuming the statute as a whole is valid, any provision reasonably designed to avoid possible evasion is justified."

In line with the cases cited, we hold that the legislature had the general power to recognize the consequences of common control in appropriate circumstances and disregard the corporate entity.

Section 19 (f) (4) does not require that the employing units whose employees together make up the eight must be carrying on the same

business, but simply that the units be owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests. In *McMaster Inc. et al.* v. *Daniel et al.* (South Carolina, a Court of Common Pleas case decided in 1938), the court states:

> "Even if the partnership was a separate business from that of the corporation it would still fall within the classification set out in the Act. The partnership was clearly 'controlled by the same interest' as the corporation."

Also see *Gibson Products Co., Inc. of Tulsa et al.* v. *Murphy et al.*, 186 Okl., 714, 100 P. (2d), 453.

The defense does not contend that the rule of eight constitutes an unconstitutional discrimination. Had that claim been made, authority is to the contrary. *Carmichael et al.* v. *Southern Coal & Coke Co.*, supra; *Howes Brothers Co.* v. *Massachusetts Unemployment Compensation Commission*, 296 Mass., 275, 5 N. E. (2d), 720; *Gillum* v. *Johnson*, 62 P. (2d), 1037; *Tatum* v. *Wheeless*, 178 So., 95; *W. H. H. Chamberlin, Inc.* v. *Andrews*, 2 N. E. (2d), 22; *Beeland Wholesale Co.* v. *Kaufman*, 174 So., 516; and *Madden* v. *Commonwealth of Kentucky*, 309 U. S., 83, 60 Sup. Ct., 406.

The Conquest Case

Herein the plaintiff seeks to recover contributions under the Unemployment Compensation Act for the calendar years 1936, 1937, and 1938 (the total principals of which amount to $90.58), together with interests on the same.

The record discloses that Mr. Conquest, a resident of Bangor, during the above-named years was the owner of his home and two tenement houses and also was a stockholder in three corporations. From time to time he employed carpenters to repair his houses. One of them at times worked in and about his dwelling-house mowing the lawn, taking care of the grounds, and doing odd jobs and chores and in addition thereto did similar work upon the premises of the tenement houses. The carpenters also built an office for him on his homestead property.

During these years he was the owner of approximately one-half of the outstanding stock in one corporation and of one-third in each of the other two, all three corporations engaged in the business of

selling automobiles, accessories, etc. He was the president and general manager of these companies and, it is conceded, formulated their policies. The corporate was wholly independent from his tenement house business.

In his personal business at no time since January 1, 1936 (when the Unemployment Compensation Law became effective) had he employed eight or more workmen so as to come under the act. But the plaintiff claims, nevertheless, that he is liable for personal contribution because of the provisions of Sec. 19 (f) (4) above quoted: that is, as the controller of these employing units. That he owned and controlled the real estate business is undisputed and taking this case for decision on facts as well as on law (it having been reported to us), we are convinced and hold that he was actually the controller of the corporate businesses within the meaning of said statute as we have heretofore construed it in this opinion.

The defendant particularly claimed that the employment of the carpenters and others who worked in the real estate business was "merely incidental to his ownership of his real estate" and so does not come within the law. He relies on the recent opinion of this court in *Maine Unemployment Compensation Commission* v. *Maine Savings Bank*, 136 Me., 136, 3 A., 2d, 897. In that case a savings bank by its agent or agents made contracts with individuals, partnerships, or corporations engaged in one or more of the building trades for repairs, improvements, and alterations to parcels of real estate acquired by it by the foreclosure of mortgages thereon or upon judgments to secure debts owed to the bank. These contractors in turn employed laborers to do the work contracted. We held that under these circumstances no contribution was payable under the act (see Sec. 19 [e]) because the work done was not part of the bank's usual business which was banking, and that this work was merely incidental to the banking business. But here, on the contrary, Mr. Conquest owned and let these tenement houses as part of his usual business.

Conclusion

In all three of these cases, it is conceded that the amounts of the contributions as set forth in the writs are correct and that the contributions, if due, were payable on the several dates set forth in the

writs and are subject to interest at the rate of one per cent per month thereafter until paid. The plaintiff in each of these three cases is entitled to judgment and the mandates must be:

(1) *In Maine Unemployment Compensation Commission* v. *Androscoggin Junior, Inc., Law Court Docket No.* 605, Nisi Prius *Docket No.* 276, *judgment for the plaintiff in the sum of* $106.90, *together with interest at the rate of* 1% *per month from and after the date on which each component part of said total amount was due and payable as prescribed by the Commission.*

(2) *In Maine Unemployment Compensation Commission* v. *Edward M. Healy, Law Court Docket No.* 606, Nisi Prius *Docket No.* 277, *judgment for the plaintiff in the sum of* $411.28, *together with interest at the rate of* 1% *per month from and after the date on which each component part of said total amount was due and payable as prescribed by the Commission.*

(3) *In Maine Unemployment Compensation Commission* v. *E. J. Conquest, Law Court Docket No.* 1010, Nisi Prius *Docket No.* 5845, *judgment for the plaintiff in the sum of* $90.58, *together with interest at the rate of* 1% *per month from and after the date on which each component part of said total amount was due and payable as prescribed by the Commission.*

BARNES, C. J., having retired, did not join in this opinion.

EDITH N. ROGERS *vs.* BIDDEFORD & SACO COAL CO.

York. Opinion, November 9, 1940.

NEW TRIAL. EASEMENTS. EXCEPTIONS.

Except where there is a statute applicable to a special case the authority of a justice of the Superior Court on motion to set aside a verdict and grant a new trial in a civil action is now governed by provisions of R. S. 1930, *Chap.* 96, *Secs.* 59 *and* 60, *as amended.*

On motion to set aside verdict and grant a new trial, a justice of the Superior Court can act only when the motion is based on an alleged cause of action shown by the evidence presented at the trial and in all other cases the motion comes to the Law Court for determination at first hand.

Where motion for new trial was not founded on an alleged cause shown by the evidence presented at the trial, it was improperly presented to the trial judge and exceptions would not lie to the overruling of the motion.

A plaintiff cannot recover in a real action without proving the title to the premises as alleged in the declaration.

An easement is an incorporeal right not capable of seizin.

The purpose of a real action is to recover possession of land. It is not a proper remedy for one who seeks to recover for the disturbance of the enjoyment of an easement.

On exceptions. Real action by Edith M. Rogers against Biddeford & Saco Coal Co. Verdict for defendant. Plaintiff filed exceptions to refusal of the presiding justice to grant special motion for a new trial and refusal of justice to give requested instruction. Exceptions overruled. Case fully appears in the opinion.

John P. Deering,
William H. Stone, for plaintiff.
Willard & Willard,
Louis B. Lausier, for defendant.

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

THAXTER, J. This is a real action which was tried before a jury. After a verdict for the defendant it is brought before this court by the plaintiff on a bill of exceptions.

It concerns a twenty-foot strip of land lying between lots owned by the plaintiff on the south and by the defendant on the north. The plaintiff alleges that she was lawfully seized in fee of the premises within twenty years and that the defendant illegally entered and disseized her. The plea is the general issue with a brief statement setting up a prior judgment. The presiding justice decided this issue of *res adjudicata* in favor of the plaintiff and ruled that she had made out a prima facie title by the deeds which she had offered in evidence. The only question submitted to the jury was whether the defendant had gained title by adverse possession. This issue the jury found in favor of the defendant and this finding is not challenged here either by exceptions or by a general motion.

The exceptions which are before this court relate to two distinct matters. The exception which we shall consider first was taken to the refusal of the presiding justice to grant a special motion for a new trial addressed to him based on an alleged disqualification of a juror.

Except where there is a statute applicable to a special case, as in R. S. 1930, Chap. 96, Sec. 111, the authority of a justice of the Superior Court on motion to set aside a verdict and grant a new trial in a civil action is now governed by the provisions of R. S. 1930, Chap. 96, Secs. 59 and 60 as amended by P. L. 1939, Chap. 66. See *White* v. *Andrews*, 119 Me., 414, 416, 111 A., 581. It is pointed out in *Brown* v. *Moore*, 79 Me., 216, 9 A., 355, that the legislature has restricted the inherent power of the trial judge in this respect. It is clear from the provisions of sections 59 and 60 that he can act only when the motion is based on an alleged cause shown by the evidence presented at the trial. In all other cases except as above noted the motion comes to the Law Court for determination at first-hand. See *State* v. *Dodge*, 124 Me., 243, 246, 127 A., 899. In the case now before us the motion, since it was not founded on an alleged cause shown by the evidence presented at the trial, was improperly presented to the trial judge. Exceptions do not lie to the overruling of it.

The plaintiff also excepted to the refusal of the presiding justice

to give a requested instruction. This instruction was to the effect that under the provisions of the deed from Page to McMullen, from whom through various conveyances the plaintiff derived her title, a common passageway or easement twenty feet in width and extending from the northwesterly corner of lot 13 on said Page's Plan to the Atlantic Ocean was created for the benefit of the owners of the land lying on each side thereof and that "this common passageway or easement is now owned in common by the plaintiff and the defendant." This is the land which the plaintiff in her declaration claimed that she owned in fee. The presiding justice had previously ruled that the plaintiff did not have such an easement. It is not altogether clear whether an exception was taken to such previous ruling but in the view which we take of this case it is immaterial whether there was or not.

It is settled law in this jurisdiction that a plaintiff cannot recover in a real action without proving the title to the premises as alleged in the declaration. *Hamilton* v. *Wentworth*, 58 Me., 101; *Rawson* v. *Taylor*, 57 Me., 343; *Stetson* v. *Grant*, 102 Me., 222, 66 A., 480; *Stutz* v. *Martin*, 132 Me., 126, 167 A., 861; R. S. 1930, Chap. 118, Sec. 8. The plaintiff alleged in her declaration that she had an estate of fee simple in the premises and she could not have recovered by showing that she had an easement. The requested instruction was therefore properly refused.

But there is a more comprehensive reason for overruling the exceptions. An easement is an incorporeal right not capable of seizin. See *Hicks Bros.* v. *Swift Creek Mill Co.*, 133 Ala., 411, 418, 31 So., 947; *Gray* v. *City of Cambridge*, 189 Mass., 405, 415, 76 N. E., 195. How then could the plaintiff be disseized? The purpose of a real action is to recover possession of land. It is not a proper remedy for one who seeks to recover for the disturbance of the enjoyment of an easement. Such is the well-established rule of law. *Provident Institution for Savings* v. *Burnham*, 128 Mass., 458; *Callaway* v. *Forest Park Highlands Co.*, 113 Md., 1, 77 A., 141; *Wood* v. *Truckee Turnpike Co.*, 24 Cal., 474; *Child* v. *Chappel*, 9 N. Y., 246; *Smith* v. *Wiggin*, 48 N. H., 105; 7 Enc., Pl. & Pr. 276; 17 Am. Jur. 925; 20 C. J., 1282. See also *LeBlond* v. *Town of Peshtigo*, 140 Wis., 604, 610, 123 N. W., 157.

Since the plaintiff could not have recovered even if she had had an easement, there could have been no prejudicial error in the refusal of the trial judge to charge that she had one.

Exceptions overruled.

BARNES, C. J., having retired, did not join in this opinion.

CENTRAL CAB CO. ET AL. *vs.* CITY OF PORTLAND ET AL.

Cumberland. Opinion, November 13, 1940.

ORDINANCES. MOTOR VEHICLES.

Provisions of city ordinance, prohibiting standing of taxicabs and public vehicles on one-way streets or streets subject to limited parking regulations, do not constitute abuse of "police power," vested in municipalities by statute, to make and enforce ordinances regulating vehicles in public streets.

On report. Suit in equity by the Central Cab Company and another against the City of Portland, the Town Taxi Company, and others to declare a city ordinance regulating taxicabs and certain orders of the city council void, enjoin defendant taxi company from exclusive use of stands assigned to it under such orders, and enjoin other defendants from enforcing the ordinance and orders. Case fully appears in the opinion.

Arthur D. Welch, for plaintiffs.

W. Mayo Payson, Corporation Counsel,

Ralph M. Ingalls, for defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. This case was reported to the court for determination on the pleadings and an agreed statement of facts. It originated

in a bill in equity filed by two corporations organized to engage in the business of operating taxicabs and actually so engaged in the defendant city. The bill names as parties defendant, in addition to the City of Portland, its city manager, the several members of its city council, its chief of police, and a competitor in the taxicab business, Town Taxi Co.

The prayers of the bill are that an ordinance of the defendant city for the regulation of taxicabs and public vehicles, adopted May 1, 1939, and certain orders of said council passed pursuant thereto on June 19, 1939, which assigned fourteen (14) taxicab stands to the use of five (5) taxicab owners or operators, including one of the plaintiffs and the corporate defendant, be declared void; that said corporate defendant, Town Taxi Co., be enjoined from the exclusive use of the stands assigned to it under the terms of said orders; and that the other defendants be enjoined against the enforcement of said ordinance and orders.

Treated collectively said orders authorized the plaintiff Central Cab Co. to occupy two (2) stands exclusively and to alternate with the defendant Town Taxi Co. in two (2) additional ones; assigned seven (7) stands for the exclusive occupation of the defendant Town Taxi Co. and authorized it to alternate with said plaintiff in the two (2) additional ones aforesaid; and assigned the remaining three (3), one (1) each, to three persons who are not parties to the cause. No stands were assigned to the plaintiff Yellow Taxi Co. The stands assigned exclusively to the plaintiff Central Cab Co. are at two (2) hotels. Those designated for the exclusive use of the defendant Town Taxi Co. include four (4) at three (3) hotels. The two (2) stands in which these operators are directed to alternate are at a sixth hotel.

The agreed statement of facts recites that plaintiffs Central Cab Co. and Yellow Cab Co. have five (5) and three (3) cabs respectively available for service in the defendant city; that the defendant Town Taxi Co. has sixteen (16) such cabs; that hotels are important points of origin for taxicab business along with bus terminals, railroad stations and steamboat wharves; and that Congress Street from State Street to Myrtle Street is the principal retail commercial district in the defendant city. Neither the agreed statement nor the orders of the city council which are in question and which are set forth in full in the record disclose which, if any, of the stands

are within the principal retail commercial district aforesaid.

It should be noted at the outset that an ordinance of substantially identical import, enacted by the same authority for the regulation of the same municipal problem, has heretofore been before this court (*Chapman* v. *City of Portland*, 131 Me., 242, 160 A., 913, 914) and been upheld as a proper exercise of the police power conferred by the legislature upon all cities and towns of the state under the terms of R. S. 1930, Chap. 5, Sec. 136, Par. IX, to make and enforce by suitable penalties ordinances for the regulation of vehicles in the public streets. The present ordinance, it is true, goes somewhat beyond that which was before the court in the earlier case in that it prohibits taxicabs and public vehicles from standing on one-way streets or on streets where limited parking regulations are in effect, but these additional limitations are altogether insufficient to constitute an abuse of the police power which the decision therein recognized as vested in the municipalities of the state by the statute noted.

In the *Chapman Case*, supra, as in the instant one complaint was made that the ordinance delegated to abutting property owners the authority to designate who, among licensed public vehicle operators, should have the right to occupy the public street in front of their premises. That case was reported to the court after demurrer for determination of all questions of law raised in plaintiff's bill. This case comes to the court under an agreed statement of facts in which the plaintiffs subscribe to a recital that the "City Council has refused to accept any consent (to the establishment of a taxicab stand) from an abutting owner which was conditioned upon the occupancy of the taxi stand consented to by a taxicab company specified in such consent." The present case, on this point certainly, is altogether stronger for the defense. There the court relied on the rule that there could be no presumption that public officers would exceed their authority or be arbitrary in the exercise of it. Here the plaintiffs themselves subscribe to the fact that this particular abuse has not been committed.

In the *Chapman Case*, supra, the court declared that even if the provision of the ordinance complained of was unconstitutional and void, the plaintiff would not be entitled to relief by injunction unless he showed that, by the enforcement of it, he would suffer "an irreparable injury to his property or property rights" and had no ade-

quate remedy at law therefor or that a multiplicity of suits would result. The present bill contains numerous and varied allegations, including those of unreasonableness, of inequality and of discrimination as to the action and purpose of the defendant City and its council in the enactment and administration of the ordinance in question; of unfair, unjust, and monopolistic control conferred or intended to be conferred upon the defendant Town Taxi Co. thereby; of irreparable injury to the plaintiffs and their property; and of the danger of a multiplicity of suits; but not only is there no evidence of these facts which if existent to the extent alleged might lay the foundation for equitable relief, but the agreed facts furnish no basis for a finding that any of these allegations have been proved. On the record, the plaintiffs must be found to be asking the relief sought on the simple mathematical basis that said plaintiffs, jointly, having eight (8) cabs available for service, have been assigned four (4) taxicab stands at three (3) hotels with exclusive stand privileges at two (2), whereas the corporate defendant Town Taxi Co., with sixteen (16) cabs so available, has been assigned among nine (9) taxicab stands, six (6) stands at five (5) hotels giving exclusive stand privileges at three (3). This numerical difference cannot be held to lay proper foundation for equitable relief and the judgment must be

Bill dismissed.

FIRST AUBURN TRUST CO.

vs.

ADA C. BUCK AND MABEL K. WELLMAN.

Androscoggin. Opinion, November 15, 1940.

ATTACHMENTS. MORTGAGES.

Registry laws are designed for the protection of innocent parties, and should be so construed as to effect that object, and not operate an injustice.

When a generic term is used in a statute and there is a literal deficiency because of such generality, aid is afforded in construction by the history of the statute, the cause for its enactment, the mischiefs to be cured, the result to be attained, the spirit and intent of the legislature, and whether the term used has acquired a settled meaning through judicial interpretation.

In the ordinary acceptance of the word, a deed is an instrument conveying real property. At common law a mortgage is regarded as a conditional conveyance, vesting the legal title in the mortgagee.

A mortgage of land, as usually drawn, is in form a deed of warranty with a condition subsequent defining the means by which the grantor may defeat the conveyance. The legal title, therefore, passes immediately upon the delivery of the mortgage; and the mortgagee is regarded as having all the rights of a grantee in fee, subject to the defeasance.

Upon the delivery of a mortgage of real property, the legal title and right of possession, unless otherwise agreed, vest in the mortgagee subject to the defeasance.

If there be a trespass which constitutes an injury to the realty, the mortgagee can maintain an action of trespass quare clausum, the legal title being in him.

On report. Real action to foreclose mortgage given by Mabel K. Wellman to First Auburn Trust Co. Conditional judgment for the plaintiff for the amount due under its mortgage against both defendants. Case fully appears in the opinion.

George C. Wing, Jr., for plaintiff.

Frank W. Linnell, for defendant, Buck.

Pattangall, Goodspeed & Williamson, for defendant, Wellman.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. This case comes forward on report. It is a real action to foreclose a mortgage given by the defendant Wellman to the plaintiff. The defendant Buck claims title superior to that of the plaintiff, by reason of an attachment upon the real estate, subsequent judgment obtained, and the transfer of the real estate to her by sheriff's deed.

The chronology of the various steps in the proceedings is as follows:

1936

August 22 Mortgage from defendant Wellman to Trust Co., executed and delivered.

November 28 Attachment of real estate made by officer on writ of defendant Buck, against defendant Wellman.

November 30 Record in Registry of Deeds of real estate mortgage.

December 2 Filing of certificate of attachment in the Registry of Deeds under R. S. 1930, Chap. 95, Sec. 63.

The only issue submitted for determination is whether the real estate mortgage to the plaintiff, recorded after the attachment of the property by the defendant Buck, but before the filing of the certificate of attachment in the Registry of Deeds, takes precedence over the attachment.

The statute, R. S. 1930, Chap. 95, Sec. 63, so far as it relates to the issue, is as follows:

> "No attachment of real estate on mesne process creates any lien thereon, unless the nature and amount of plaintiff's demand is set forth in proper counts, or a specification thereof is annexed to the writ, nor unless the officer making it, within five days thereafter, files in the office of register of deeds in the county or district in which some part of said estate is situated, an attested copy of so much of his return on the writ, as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable. If the copy is not so filed within five days, the attachment takes effect from the time it is filed, if before the entry of the action, although it is after service on the defendant. . . . Provided, however, that all recorded deeds take precedence over unrecorded attachments."

It is the concluding proviso which is the crux of the matter.

It is the contention of the defendant Buck that the legislative intent was to give precedence to deeds but not to mortgages.

In considering this question, the purpose of the recording acts as judicially ascertained and defined, is valuable in arriving at a conclusion.

It is well stated in *Jordan* v. *Keen*, 54 Me., 417 at 421:

> "It is within the memory of many of us, when no record was required of the attachment of real estate. Secret attachments were very common, and often not known or disclosed, until a levy on execution was made. In order to protect, particularly subsequent bona fide purchasers, the Legislature, in 1838, provided for the record of attachments in the registry of deeds. This operated to remedy the chief objection to secret attachments."

This case was decided in 1868. The statute at that time did not contain the proviso in question. That enactment followed in 1873, by P. L. of that year, Chap. 128, in these terms:

> "All recorded deeds shall take precedence over unrecorded attachments, and so much of section fifty-six, chapter eighty-one of the revised statutes (1871) as is repugnant to this act, is hereby repealed."

Thus is shown a continuing legislative intent to protect, as practical experience demonstrated to be advisable, the interest of innocent parties without notice of undisclosed attachments. So we find judicial interpretation continues to hold and emphasize that,

> "Registry laws are designed for the protection of innocent parties, and should be so construed as to effect that object, and not operate an injustice." *Swift* v. *Guild*, 94 Me., 436, 47 A., 912.

And again,

> "The statute is for the benefit and protection of all persons who have any interest in examining the record title to property to which they may thereafter become owner, either in whole or in part, absolutely or otherwise." *Banton* v. *Shorey*, 77 Me., 48.

It is to be borne in mind that, in making an attachment of real estate, there need be no overt act on the part of the officer. He does not go upon the land or make any seizure. He simply writes a return upon the writ itself. No notice need be given to anyone at the time of the attachment, and the statute allows a period of five days

for filing the certificate of attachment in the registry. Meanwhile, the owner may have sold the property to a bona fide purchaser or conveyed it in mortgage as security for money then loaned. As the statute stood before the enactment of the proviso under consideration, no search of the record title, however painstaking and accurate, could guarantee to such purchaser or mortgagee security against an undisclosed attachment already made but not recorded. It was to avoid this result that the proviso was enacted. This is conceded by the defendant as to unconditional deeds, but denied as to mortgages.

When a generic term is used, applying in this instance to "all deeds," and there be literal deficiency because of such generality, then aid is afforded in construction by the history of the statute, the cause for its enactment, the mischief to be cured, the result to be attained, the spirit and intent of the legislation, and whether the term used has acquired a settled meaning through judicial interpretation. *Mansur* v. *Co. Com'rs*, 83 Me., 514, 22 A., 358; *Holmes* v. *Paris*, 75 Me., 559; *Haggett* v. *Hurley*, 91 Me., 542, 40 A., 561; 25 R. C. L., Statutes, Sec. 236.

Enough has been said concerning these elements save as to the doctrine established in this state as to the nature of a real estate mortgage and whether or not it comes within the designation of a deed.

In the ordinary acceptance of the word, a deed is an instrument conveying real property. At common law a mortgage is regarded as a conditional conveyance, vesting the legal title in the mortgagee. Such has been the accepted doctrine in this state since it became a separate commonwealth. *Blaney* v. *Bearce*, 2 Me., 132.

In *Gilman* v. *Wills*, 66 Me., 273, it was pointed out that:

> "A mortgage of land, as usually drawn, is in form a deed of warranty with a condition subsequent defining the means by which the grantor may defeat the conveyance. The legal title, therefore, passes immediately upon the delivery of the mortgage; the mortgagee is regarded as having all the rights of a grantee in fee, subject to the defeasance."

Again, in *Cook* v. *Curtis*, 125 Me., 114, 131 A., 204, 205, the court said:

> "It is familiar and settled law in this State, that upon the delivery of a mortgage of real property, the legal title and right of possession, unless otherwise agreed, vest in the mortgagee subject to the defeasance, *Allen Co.* v. *Emerton, et al.*, 108 Maine, 221, 224; *Am. Ag. Chem. Co.* v. *Walton*, 116 Maine, 459."

In *Wiring Co.* v. *Electric Light Co.*, 84 Me., 284, 24 A., 848, is found a flat statement, having pertinence, as follows:

> "The rule admitting copies of deeds in real actions applies with the same force to mortgages as it does to absolute deeds. The plaintiff's claim is not directly under the mortgage, but under a deed from the mortgagee. A mortgage is a deed."

The mortgagee of real estate has by statute the right to immediate possession of the premises, when there is no agreement to the contrary. R. S., Chap. 104, Sec. 2. If there be a trespass which constitutes an injury to the realty, the mortgagee "can maintain an action of trespass quare clausum, the legal title being in him." *Leavitt* v. *Eastman*, 77 Me., 117.

Accordingly we hold that the recorded mortgage of real estate in this case takes precedence over the unrecorded attachment of the defendant Buck.

The sale on execution was made and the sheriff's deed executed to defendant Buck on February 15, 1940. Consequently by virtue of R. S., Chap. 90, Sec. 40, the right of the defendant Wellman to redeem from such sale has not yet expired. The plaintiff is entitled to a conditional judgment for the amount due under its mortgage against both defendants. Judgment may be entered below accordingly.

So ordered.

WINFIELD G. SMALL, ADMINISTRATOR *vs.* CLARA NELSON.

Kennebec. Opinion, November 27, 1940.

GIFTS.

Whenever the relations between two persons are such that one is completely dependent and relies upon and necessarily reposes confidence in the other, a fiduciary or confidential relation exists and the law implies a condition of superiority held by the one over the other so that in every transaction between them in the nature of a deed, gift, contract, or the like by which the superior party obtains a possible benefit, the existence of undue influence and the invalidity of the transaction is presumed and the burden of proof is cast upon the one who receives the benefit to show by clear evidence that he or she acted with entire fairness and the other party acted independently with full knowledge and of his own volition free from undue influence.

On motion. Action of general assumpsit by Winfield G. Small as administrator of the estate of John Small to recover moneys belonging to the intestate which, in his lifetime, came into the possession of Clara Nelson. Verdict for plaintiff in the sum of $938.80. Defendant filed general motion for a new trial. Motion overruled. Case fully appears in the opinion.

McLean, Fogg & Southard, for plaintiff.

Locke, Campbell & Reid, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

STURGIS, C. J. This is an action of general assumpsit brought by Winfield G. Small as administrator of the estate of John Small, late of China, Maine, deceased, to recover moneys belonging to the intestate which, in his lifetime, came into the possession of Clara Nelson and were appropriated to her own use. The declaration is, in form, a count in indebitatus assumpsit with specifications alleging that the moneys were fraudulently obtained by undue influence. The plea is the general issue with specifications that all of the moneys which came into the defendant's possession, and were retained by

her, were gifts from the intestate. After verdict against her for $938.80, the defendant filed a general motion for a new trial.

The transcript of the evidence shows that the decedent, John Small, was a bachelor about ninety years old, who, having lived alone on his farm in China the greater part of his life, sometime in November, 1937, having become enfeebled by age and afflicted with a complication of diseases including a rectal cancer, came to live and end his days in the family of the defendant, Clara Nelson, who was his cousin, had lived with him when she was a child, and with whom through the years he had maintained most friendly relations. Although his next of kin were four nephews and nieces, apparently he was on more intimate terms with and had more affection for his cousin and, when he broke down and could no longer take care of himself, desired and sought her care and attention.

In March of the spring of 1938, the old gentleman was so incapacitated that he became bedridden and remained so until the following July 10, 1938, when he died. During this period, the defendant prepared his food, attended to his personal needs, and, with the assistance of her husband and other persons who came in on call, had the entire care of her cousin. In course of time, it became necessary for her, under the direction of the family physician, to apply a local anaesthetic to relieve the pain of his cancerous condition, and finally an opium alkaloid known as codeine was substituted and its use continued until the end. Some of his nephews and nieces occasionally called to see him but their visits were more or less formal and of short duration. It was the defendant upon whom he depended for the care and attention which his condition demanded, and it was upon her alone he relied for any necessary or desired advice or assistance in his property or other personal affairs.

The intestate was not a wealthy man. His farm upon which he had lived was worth about $1,500.00, it is stated, and when he came to live with his cousin he had a little more than $1,300.00 in the Augusta Savings Bank. This, except for furniture of small value, was all the property he owned. On April 12, 1938, a month after he became bedridden, with the assistance of Clara Nelson and her husband he drew $100.00 from his savings account and used it for current expenses. On June 28, he drew $300.00 more out of the bank and gave it to his cousin. And on July 6, 1938, by an order payable to

Clara Nelson and drafted by her husband, which bore the legible but scrawly signature of John Small, she drew out of the bank the $938.80 which remained on deposit, took possession of it, and now claims that he gave it to her. The personal representative of the intestate brings this action to recover back these moneys which made up and were withdrawn from his savings account in the Augusta Savings Bank.

The evidence clearly warrants the finding which the jury evidently made that the $100.00 which John Small drew out of the bank on April 12, 1938, was not appropriated by the defendant, Clara Nelson, and she is not accountable therefor. The withdrawal of the $300.00 made on June 28, 1938, and the subsequent gift of the money to his cousin was also deemed valid by the jury, and it cannot be held that their finding in this regard was manifestly wrong. There is evidence in the case which indicates that, although at that time the intestate was very ill and in a weak mental and physical condition, this gift was voluntary and free from undue influence.

As we read the record, however, we find that the condition of the intestate appears to have been quite different when, eight days later, on July 6, 1938, and only four days before he died, the defendant, Clara Nelson, withdrew the last of his moneys from the savings bank and took it into her possession. He had been failing rapidly for several days and, by reason of his age, the ravages of his diseases and the continued use of opiates, appeared at times to be in a stupor and was extremely weak in mind and body. This was his condition when his cousin withdrew this money from the bank. Her testimony regarding the incident is as follows:

"Q. Tell about that order, how did he happen to give that order to you?

A. Well, I had got my work done and I was in the bedroom. And he said, I would like for you to come in, I would like to talk with you. I said, is there anything you want uncle John, — well, if he didn't I thought that there was something that he wanted for himself. And I set down so I could hear what he was saying. I put my chair side of his bed. And he said to me, I am a pretty sick man and I am not going to live long. Now, he said, I would like you to go to

the Augusta Savings Bank and draw out every dollar there is in the bank and put it in the bureau. I said to him, — my husband was going to the village, — I want Mr. Nelson to hear this. He was up the road, and I called him back so he could hear, and he came back. . . . I said, come in, uncle John wants to talk with you. So he came in. And he came in the room and Mr. Small repeated to him just what he said to me, every word. And I told him, when I was talking with him, I said, you may need that uncle John, you may feel better. And he said, Oh, no, all will come straight and all good. That is just what he said.

Q. After that conversation, did you go to Augusta?
A. Yes, sir.
Q. And get the money?
A. Yes, sir.
Q. What did you do with the money?
A. I got that money; it was done up, all done up in paper and all sealed up. And I carried it to him and I said, uncle John here is that money, this is your money, take it. And he said, take it it is yours individually.
Q. What did you do with the $928?
A. I put it in the bureau drawer, right in his room.
Q. After he died, what did you do with it?
A. I took it to the bank.
Q. And deposited it?
A. Yes, sir.

* * * *

Q. In whose name did you deposit the money?
A. My own. Just as he told me to in my name. It is the Federal Bank in Waterville."

This claim of the defendant, Clara Nelson, that her cousin gave her the entire balance of his savings account finds no corroboration in the record. Her husband does state that she called him into John Small's sick room and he heard the old gentleman say that he wanted her to go to the bank and draw out every dollar there and bring it back, but he does not confirm her assertion that, when the money was produced, it was given to her as her own. Assuming,

however, that the intestate made a gift of all that remained of his savings to the defendant, as she claims, and she put it into the bureau drawer of his room, over which she and not he had actual control, and thereafter treated it as her own, this alone does not establish a valid gift.

Whenever the relations between two persons are such that one is completely dependent and relies upon and necessarily reposes confidence in the other, a fiduciary or confidential relation exists and the law implies a condition of superiority held by the one over the other so that in every transaction between them in the nature of a deed, gift, contract, or the like by which the superior party obtains a possible benefit, the existence of undue influence and the invalidity of the transaction is presumed and the burden of proof is cast upon the one who receives the benefit to show by clear evidence that he or she acted with entire fairness and the other party acted independently with full knowledge and of his own volition free from undue influence. *Gerrish, Ex'r* v. *Chambers*, 135 Me., 70, 189 A., 187; *Mallett* v. *Hall*, 129 Me., 148, 150 A., 531; *Eldridge* v. *May*, 129 Me., 112, 150 A., 378; *Burnham* v. *Heselton*, 82 Me., 495, 500, 20 A., 80; *Woodbury* v. *Woodbury*, 141 Mass., 329, 5 N. E., 275.

In the case at bar, there can be no doubt that a confidential relation existed between the intestate, John Small, and his cousin, Clara Nelson, and the gift of the last of his moneys, which she here claims he made to her, is governed by the rules just stated. Guided by these rules, the jury found that the gift was void. There is evidence tending to show that the intestate was grateful for the services his cousin was performing, and on occasions had indicated an intention to give all his property to her when he died, but that he knowingly of his own volition made the gift in controversy in accordance with that intention and as a partial predistribution of his estate or as compensation for her care and ministrations remained to be proved. It was for the jury to weigh the evidence and determine whether it overcame the presumption that the gift was invalid. Apparently, they were convinced that the gift was tainted with undue influence. It cannot be held on this record that the verdict was clearly wrong.

Motion overruled.

HENRY L. BURNHAM *vs.* CLYDE B. HOLMES.

Waldo. Opinion, November 30, 1940.

DEDICATION. WAYS.

What is a "reasonable time" for acceptance of offer of dedication so as to constitute property a street must be determined by facts and circumstances of each case, and application of principle must be made, not at time of attempted acceptance, but when issue arises for determination.

On exceptions. Plaintiff brings this case before the court on exceptions to the ruling of a justice of the Superior Court accepting the report of a referee. Hearing was held under a rule of reference which reserved the right of exceptions as to questions of law to both parties and is properly before the court under that reservation. Action is case to recover damages for, and secure the abatement of an alleged nuisance. Plaintiff filed exceptions to the ruling accepting the report of the referee. Exceptions overruled. Case fully appears in the opinion.

Verrill, Hale, Dana & Walker, for plaintiff.

McLean, Fogg & Southard, for defendant.

SITTING: STURGIS, C. J., THAXTER, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. The plaintiff brings this case before the court on exceptions to the ruling of a justice of the Superior Court accepting the report of a referee. Hearing was held under a rule of reference which reserved the right of exceptions as to questions of law to both parties and is properly before the court under that reservation.

The action is case to recover damages for, and secure the abatement of, an alleged nuisance. Plaintiff alleges the erection and maintenance by the defendant of structures located within the limits of a two-rod strip of land which he claims is a public highway, created as such by dedication of the owner and acceptance of the municipality. The referee found as a question of fact that there was an offer of dedication in 1769 but ruled as matter of law that the attempted ac-

ceptance, which did not occur until 1808, was not made within a reasonable time and that the plaintiff failed to show that the defendant at any time "obstructed a public highway." Plaintiff duly filed objections to the acceptance of the report on the ground, among others not of importance in a decision of the cause, that the referee erred in holding and ruling that the way in question had never been validly accepted "as a public way."

The locus is the easterly end of a two-rod strip extending from what is now Northport Avenue, in the City of Belfast, to the shore at what, on the plan which is in evidence and the preparation of which represents the offer of dedication of the way, is identified as Passagassawakeag Bay. Plaintiff is the owner of the remainder after certain life estates in the property which abuts said strip on the north and claims in his declaration that his property line extends to the middle of that strip. Defendant owns the property southerly of the strip and occupies that part of the strip which is in issue, claiming as alleged in his pleadings to be the owner thereof by prescription. The record contains no evidence that any highway, or private way, for the accommodation of travel was ever in fact constructed upon the ground; that any vehicular traffic has ever passed over it; or that it was ever in fact used, or usable, for public access between Northport Avenue and either the plaintiff's property or the shore by pedestrians although the plaintiff testified that he "used it to walk back and forth to the shore a great many times through a great many years" which ranged, from his testimony, approximately from 1885 to 1898. The alleged obstructions were placed in the locations complained of in 1908, and immediately thereafter. The writ is dated September 7, 1939.

Plaintiff's declaration alleges that he is entitled to a right of way over the strip, which he described as a "thoroughfare" and that some of the obstructions complained of extend beyond the middle line of the strip and onto the side thereof which adjoins his property. While these allegations do not necessarily involve the question of a public way (unless by the use of the word "thoroughfare" which Webster defines as "a frequented way or course; especially, a road or street by which the public have unobstructed passage"), the statement of counsel for plaintiff at the hearing, the conduct thereof, the findings of the referee which note that the plaintiff makes no

contention that there was a private way, and the exceptions claimed and allowed show clearly that it is on the basis of a public way, as distinguished from a private one, that recovery is sought.

The pertinent statutory provision is (R. S. 1930, Chap. 26, Sec. 5), that "the obstructing or encumbering by . . . buildings, or otherwise, of highways, private ways, streets, alleys . . . are nuisances" within limitations and exceptions not here of importance. Obstruction of a private way under this statute constitutes a nuisance equally with like obstruction of a public one. The difference in the instant case is grounded in the answer of the defendant claiming maintenance of the structures alleged to constitute obstructions for more than twenty years prior to the bringing of the action, a fact clearly established by the record. Plaintiff apparently recognizes that important rights, as against individuals, may be lost by adverse enjoyment for a period of more than twenty years and relies on the rule that this principle is not applicable to public highways. *Knox* v. *Chaloner*, 42 Me., 150; *Stetson* v. *Bangor*, 73 Me., 357; *Inh. Charlotte* v. *Pembroke Iron Works*, 82 Me., 391, 19 A., 902.

Plaintiff's action must fail if the ruling of the referee is sound, that acceptance of an incipient dedication of streets to the public is not made within a reasonable time where upwards of thirty-eight years intervenes between the offer of dedication and the attempted acceptance, or that such an acceptance shall not operate to give land status as a public street where, following such acceptance or attempted acceptance, the land is not usable as a highway in its natural state, there is no opening of a highway, no work of construction to put it in condition for travel, and no actual use of it as a public way, in more than a half century following.

The exact term during which an incipient dedication may be held to be effective to constitute property as a street upon acceptance has never been determined by this court, either directly or indirectly. Indirectly, issues somewhat analogous have been before the court in two instances. In *Kelley* v. *Jones*, 110 Me., 360, 86 A., 252, the plaintiff sought to recover an undivided interest in a triangular piece of land substantially covered by buildings but forming a part of an area which was the subject matter of an earlier offer of dedication for highway purposes. In that case the offer of dedication was

made in 1832 and plaintiffs claimed title under a recorded deed given more than forty years prior to the commencement of the action. There was no evidence that the offer of dedication had ever been accepted by the public or the municipality, and the court, finding for the plaintiff in a case submitted on report, noted that in the over-all period of more than eighty years, there was no evidence that the public made any use whatever of the land in controversy which would indicate an acceptance of dedication. Recovery on the part of the plaintiff was permitted in a later case (*Harris* v. *South Portland*, 118 Me., 356, 108 A., 326, 328), where an appellant from the decision of municipal officers refusing to award damages for land taken for highway purposes because of an offer of dedicacation of the land in question made upwards of fifty years prior to the taking, by the sale of lots with reference to a plan delineating the land as a street, was awarded substantial damages in this court. Appellant in that case founded his claim of title on the erection of a fence enclosing the locus in question forty-three years prior to such opening and the continuous maintenance of the fence and use of the land during that full period of time by himself and his predecessor in title.

In *Harris* v. *South Portland*, supra, the court noted that the lapse of time between the erection of the fence which enclosed the tract in question and the "taking" of the land for highway purposes exceeded the maximum period of forty years provided by statute, now contained in R. S. 1930, Chap. 27, Sec. 108, for legalizing structures erected in public ways or for the loss by adverse possession of rights of way in streets actually laid out, and observed that it would hardly seem reasonable to allow a longer time for a municipality to determine whether or not it would accept an offered dedication. What we believe to be the most appropriate rule or, perhaps more accurately stated, the proper principle, namely recognition that there should be no general rule in such cases, was expressed by Chief Justice Cornish in that case in the words "What is a reasonable time must be determined by the facts and circumstances of each particular case." The application of this principle must be made not at the time of attempted acceptance but when the issue arises for determination, and it seems to this court that the facts and circumstances here involved — the lapse of more than thirty-eight years

before any attempt at acceptance, the passing of approximately seventy-five years following nominal acceptance without any use, and the over-all interval of more than one hundred and thirty years before the assertion of any claim of public right — fully justify the final determination of the referee that in the cause "the plaintiff (has) failed to show that the defendant (has) at any time obstructed a public highway."

The issues attempted to be raised by the additional exceptions being unimportant in the view of the case herein stated, the entry must be

Exceptions overruled.

ALFRED C. PERHAM ET AL.

vs.

HARRY M. VERRILL, CONSERVATOR ET AL.

Oxford. Opinion, December 24, 1940.

MORTGAGES. SPECIFIC PERFORMANCE.

The rule that a mortgage and debt secured thereby are inseparable is limited to such debt as is identified in notes described in a mortgage so that assignee thereof may properly be held to have notice in instrument itself as to identity and amount of obligations secured.

Where mortgagor, who was directly indebted to bank on notes exceeding $5,000.00 *and was liable to bank as indorser on notes representing* $8,568.41, *owed by a company, gave bank a mortgage on land as security for notes on which mortgagor was signer or indorser, and bank simultaneously executed a contract agreeing to release part of land when amount of mortgagor's indebtedness had been reduced* $5,000.00, *and bank, before assigning mortgage to co-defendant, sold company's notes, and face of mortgage did not give notice of notes to assignee, mortgagor was entitled to specific performance of contract by bank and co-defendant, under circumstances.*

On appeal. Action by Alfred C. Perham *et al.*, against Harry M. Verrill, Conservator *et al.*, for specific performance. Decree by a

justice of the Superior Court ordering specific performance. Defendants appeal. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Robert B. Dow,
Albert J. Stearns, for plaintiffs.
Sherman I. Gould,
Charles H. Shackley, for defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. The defendants bring this cause before the court on appeal from a decree of a justice of the Superior Court ordering specific performance of a contract entered into February 7, 1933, between Alfred C. Perham, one of the plaintiffs, and Casco Mercantile Trust Company. The conservator of said Trust Company and the assignee of the contract are joined as parties defendant.

The issue involves the contractual obligation created by an undertaking which reads "Casco Mercantile Trust Company hereby agrees that whenever the amount of the indebtedness of said Alfred C. Perham shall have been reduced in the sum of five thousand dollars of principal from the present amount due without the sale of any of the real estate mortgaged, that it will release to Josephine I. Perham, if living, . . . his homestead stand." The contract was executed concurrently with a mortgage which gave said Trust Company security on several parcels of land including said "homestead stand." In May, 1937, the defendant, United Feldspar Corporation, assumed all the obligations of said Trust Company under the contract when it purchased all notes then held by said conservator which were secured by said mortgage and acquired the mortgage itself by assignment.

The bill is dated April 15, 1938. The Josephine I. Perham named in the contract is one of the parties plaintiff and one of the prayers of the bill, as originally drawn, was for the appointment of a suitable person to act for the defendant United Feldspar Corporation to release and convey to her the property in question. An amendment allowed by a justice of the Supreme Judicial Court on April 22, 1938, substituted a prayer that the court declare it impressed

with a trust for her benefit and appoint a suitable person as an officer of the court to release it to her. The case was referred to and heard by a master, to whose findings exceptions were duly filed on behalf of the defendants. The appeal is from a decree which overrules the exceptions, approves the master's report, sustains the plaintiff's bill, and orders specific performance in accordance with the amended prayers.

The facts disclose that on the day of the execution of the contract the plaintiff, Alfred C. Perham, gave to said Casco Mercantile Trust Company the mortgage above referred to, wherein the condition stated was that it should be void if *he* paid "any and all notes on which his name appears either as a signer or endorser which are now held by said Casco Mercantile Trust Company or any renewals thereof" with interest and costs of collection. Additional language provided for the payment of any additional notes "cashed" by the mortgagee but this language is unimportant since there is no evidence that any additional items were so "cashed." Said Perham was then directly indebted to said Trust Company on notes amounting to $5,027.50 and he was liable to it as endorser on notes in the aggregate principal amount of $21,668.41. The endorsements were for the accommodation of Harold C. Perham on $13,100.00 of his own notes dated in 1927 and 1928 and on notes of Trenton Flint & Spar Company endorsed by him representing $8,568.41 which were dated in 1929.

The case contains no suggestion that the mortgagor has paid the notes secured by the mortgage, which would be necessary to satisfy the condition thereof, or that he has personally made payments sufficient to reduce the principal of the secured debt by five thousand dollars or more, which would clearly meet the requirements of the contract. Plaintiffs rely on the fact that said Trust Company, prior to the assignment of the mortgage, sold the notes of Trenton Flint & Spar Company aforesaid, with certain other obligations of said company of which it was also the owner, to a purchaser having no claim to the benefit of the mortgage and thereby reduced the indirect liability secured by the mortgage. Thus the issue is presented as to the true meaning and effect of the entire transaction of February 7, 1933, constituted by the concurrent execution of the mortgage and agreement aforesaid.

The preambles of the contract recite that the plaintiff, Alfred C. Perham, executed the mortgage "on all of his real estate . . . to secure any and all indebtedness on which he is or may be held" *by the bank* and that the bank had agreed to release a portion of the real estate "when the amount of his *present* indebtedness shall have been *reduced* five thousand dollars" (all italics ours). The master found (1) that the real estate referred to in the agreement was restricted to that enumerated in the mortgage, (2) that the reduction called for in the agreement related to a reduction in either the direct or the indirect liability of the mortgagor, i.e. to his indebtedness, to the mortgagee rather than to his general indebtedness, and (3) that the sale of the Trenton Flint & Spar Company notes constituted a reduction in his indirect principal indebtedness in the amount of $8,568.41. Defendants filed exceptions to the report, alleging that the first two findings were erroneous interpretations of the legal meaning of the terms of the agreement and that the third was not supported as a question of fact by the evidence and that it was unauthorized as a conclusion of law "inasmuch as said transaction in no way reduced the indebtedness . . . but was merely a transfer of the same" to a new creditor. Additional findings are alleged in the exceptions and challenged on stated grounds but they are not material to the issue which is before the court for determination.

Defendants rely on the two principles of law (a) that payments made on a note are to be applied first to the payment of interest and only thereafter to a reduction in principal and (b) that a mortgage is inseparable from the debt which it secures, so that notwithstanding the assignment of a part thereof without the mortgage, the whole debt continues to be secured thereby and any assignee holds the lien as trustee for the owners of the entire indebtedness secured.

Relying on the principle first stated, defendants requested of, and secured from, the master a supplemental report which set forth findings that the notes included items amounting to $14,284.59 over and above the notes endorsed by the plaintiff, Alfred C. Perham, and that the full purchase price was applied against the book value of those additional items and to reimbursement for taxes and insurance premiums paid. This principle of law is immaterial in this case, since there is no suggestion that the proceeds of the sale were intended to be applied in any manner to a reduction in either the in-

terest or the principal of any of the obligations of Trenton Flint & Spar Company. When the sale had been consummated, Trenton Flint & Spar Company owed to the new owner of its obligations exactly the amount which prior to the sale it had owed for principal and interest to the seller, and it necessarily follows that said Trenton Flint & Spar Company was not thereafter indebted to said seller on those notes, either for unpaid principal or accrued interest. Casco Mercantile Trust Company, as the then owner of the mortgage, had no claim against the plaintiff, Alfred C. Perham, on his endorsement of these particular notes of that company.

The issue must depend upon the application of the second principle of law above stated to the particular facts and circumstances of the instant case. Treating of the mortgage alone it is clear that the only right of the mortgagor or of his co-plaintiff is to satisfy the condition stated in the deed, by paying all the liabilities secured, either direct or indirect, and have the lien discharged. As distinguished from such a situation, the facts here show that the rights of the plaintiffs were substantially increased by the separate concurrent agreement and it is undoubtedly true thereunder that said plaintiffs would be entitled to have a designated part of the mortgaged premises released to the plaintiff, Josephine I. Perham, notwithstanding the fact that a substantial part of the secured debt remains unpaid if the indebtedness has been "reduced in the sum of five thousand dollars of principal . . . without the sale of any of the real estate mortgaged." The record discloses, particularly in the cross-examination of plaintiffs' witnesses and in the claims of the parties submitted in their briefs, that by this reference to a sale of any of the mortgaged property it was not intended that any sale would close the door on plaintiffs' rights but merely that the proceeds of any partial sale applied to a reduction of the debt should not be considered as contributing pro tanto to the five thousand dollar reduction. Sale of a part has been made but the parties are agreed that neither the fact of sale nor the application of the proceeds shall be considered to affect the present problem.

Defendants, as heretofore noted, challenge the findings of the master that (1) the real estate intended to be covered by the language of the agreement "without the sale of any of the real estate mortgaged" is restricted to the several items of real estate enumer-

ated in the mortgage executed concurrently with the agreement, and that (2) the indebtedness intended to be covered by the language of the agreement "the amount of the indebtedness of said Alfred C. Perham shall have been reduced" refers to his specific indebtedness to the mortgagee, as erroneous interpretations of the legal meaning of the terms. At the outset it seems best to say that those findings represent to this court interpretations which are entirely correct. The pith of the problem lies in the test of the third finding of the master above stated which defendants challenge as unsupported in fact and unauthorized in law.

The rule stated in *Moore* v. *Ware*, 38 Me., 496, upon which defendants rely as supporting the principle that a mortgage and the debt secured thereby are inseparable, is limited we believe to such debt as is identified in the notes described in a mortgage so that the assignee thereof may properly be held to have notice in the instrument itself as to the identity and amount of the obligations secured. It was said in that case

> "By the assignment of the mortgage the defendant (assignee) was notified of every thing which appears therein. He was informed by that mortgage that it was given for the security of six notes, two of which were overdue if outstanding, and of the other four he purchased one, which, with the three remaining, had not then become payable. And the presumption was, that the three last named were unpaid. He therefore could not be treated as a purchaser without notice."

Similar facts were involved in cases decided in this court which have cited that case as authority, *Webster* v. *Calden*, 56 Me., 204 at 211; *Holway* v. *Gilman*, 81 Me., 185 at 188, 16 A., 543. The mortgage here in issue could give to an assignee on its face no notice as to any particular note or notes secured or intended to be secured thereby, nor can it fairly be said that the notes of Trenton Flint & Spar Company, about which the issue revolves, were intended to be secured by the instrument. Rather it was intended to secure the liability of Alfred C. Perham as endorser thereon.

This view of the case is supported by the recitals of the preambles of the agreement before noted. Under the particular facts it seems unnecessary to decide whether or not the limitation therein

stated with reference to the *present* indebtedness operates by a declaration of intention to restrict the more general language of the undertaking itself since there have been no accretions to the then debt held *by the bank* except by way of unpaid interest. Defendants in effect request interpretation that notwithstanding the preamble recital that the purpose of the mortgage was to secure the debt held *by the bank*, the test of the contractual obligation of the mortgagee and its assignee should be made with reference to general and not to specific indebtedness. Two very simple illustrations will demonstrate the unsoundness of this position. If it be assumed that the undertaking of the bank related to the general indebtedness of the mortgagor rather than to his specific indebtedness to it, it would follow that if the mortgagor then owed unsecured indebtedness to some outside creditor or creditors in an amount in excess of five thousand dollars, or even to many times that amount, the plaintiff, Josephine I. Perham, would have become entitled to have the property in question released to her on a net reduction of five thousand dollars in the unsecured indebtedness of the mortgagor, and this would be true even though she, as one of the unsecured creditors, was the beneficiary of the payment effecting such reduction. Again, if such interpretation be accepted, it will inevitably follow that the holder of the mortgage at foreclosure will take title to the mortgaged premises and must use the proceeds of either the redemption or sale thereof for the pro rata benefit of itself and the holder of the particular Trenton Flint & Spar Company notes on which the mortgagor was liable by endorsement.

Such was clearly not the intention of the parties when the mortgage was given, nor when the sale of those notes was made prior to the assignment of the mortgage. We do not believe that the rule of *Moore* v. *Ware*, supra, should be extended to cover liabilities not identified in the mortgage instrument by a description sufficient to charge the assignee with notice that the same were directly secured thereby.

Appeal dismissed.
Decree below affirmed.

AUGUSTA Y. ROBERTS *vs.* FOREST R. ROBERTS.

Cumberland. Opinion, January 6, 1941.

DIVORCE.

Recitals in Florida divorce decree that constructive notice by publication was given libelee are not conclusive and binding upon Maine Court, yet in the absence of the record of the Florida case, and of any contradicting evidence, the presumption is that constructive notice was given as stated in decree, and that it was authorized by the statutes of Florida.

Whether libelee established a domicile in Florida, or only pretended to do so for the sole purpose of obtaining a divorce, intending to return to Maine as soon as that object was accomplished, was a question of fact for the trial court.

There is nothing in Chap. 73, *Sec.* 12, *R. S., to prevent a man leaving his wife in the state of their matrimonial domicile for justifiable cause, and, after establishing a bona fide domicile in another state, from maintaining divorce proceedings there in accordance with the laws of that state. If husband obtains such divorce in a sister state only on constructive notice to the wife, who continues to reside in the state of matrimonial domicile without any actual knowledge whatsoever of the proceeding, that would not be conclusive and binding upon the courts in the state of matrimonial domicile under the full faith and credit clause of the Federal Constitution, and may be collaterally attacked by her.*

The courts of the state of matrimonial domicile may, however, recognize such judgment of divorce granted in a sister state, as a matter of comity.

Before such divorce is recognized as a matter of comity, something more than the mere domicile of the spouse who procured it must be considered. The rights of the wife who continues to dwell in the state of matrimonial domicile must also be considered and safeguarded. And if it should appear that she is an innocent party, and that the recognition of such foreign divorce would work an injustice to her, it should not be recognized as a matter of comity.

The courts of matrimonial domicile, which is retained by a wife innocent of matrimonial wrong, who was deserted by her husband, will not recognize on the ground of comity a divorce secured by him in another state without actual notice to her, although constructive notice had been given pursuant to the statutes of the state where the divorce was granted.

Exceptions lie to a decision of a presiding justice based in part upon an error of law.

On exceptions. Libel for divorce by Augusta Y. Roberts against Forest R. Roberts. Libel heard by the presiding justice without the assistance of a jury. Libel dismissed and denied. Libelant filed exceptions. Exceptions sustained. Case fully appears in the opinion.

Harry C. Libby, for libelant.

Verrill, Hale, Dana & Walker, for libelee.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

WORSTER, J. On exceptions. Libel for divorce heard by the presiding justice without the assistance of a jury. At the hearing the libelant relied principally on her allegation of utter desertion by the libelee without reasonable cause, continued for three consecutive years next prior to the filing of the libel, which, if proved, is a ground for divorce in Maine. The libelee set up in defense a decree of divorce from her, obtained by him on March 11, 1938, in a Florida court, which, unaccompanied by a copy of the record of the proceeding in which it was made, was admitted in evidence without objection.

Sometime after the parties were alleged in the libel to have been married in Woodstock, New Brunswick, they came to Portland, Maine, to reside, and were living there together on November 7, 1934. On that day the libelee left the libelant and they have never lived together since that time. After going to various places, the libelee arrived in Florida about October 20, 1937, where he obtained what he then supposed to be permanent employment. He claims that thereafterward he established a bona fide residence in that state, and that, at the expiration of the required length of time, he commenced the divorce proceeding in which the decree was obtained.

No notice of that proceeding was personally served on the libelant, who continued to reside in Maine, which is the last matrimonial domicile of these parties. She had no knowledge that her husband had applied for a divorce until long after the decree was made and filed. It does appear, however, from the recitals in the decree, that constructive notice by publication was given to her. While those recitals are not conclusive and binding upon this court (*Gregory* v. *Gregory*, 78 Me., 187, 3 A., 280, 57 Am. Rep., 792), yet in the absence of the record of the Florida case, and of any contradicting

evidence, the presumption is that constructive notice was given as stated in the decree, and that it was authorized by the statutes of that state. 17 Am. Jur., Divorce and Separation, Sec. 742, page 559.

But the libelant contends that this libelee never established a bona fide residence in Florida, and for that reason the court there never acquired jurisdiction.

Undoubtedly the residence of this libelee, in good faith, in Florida, was necessary to give the court there jurisdiction to grant him a divorce, for this libelant did not live there.

Whether or not the libelee established a domicile in Florida, or only pretended to do so for the sole purpose of obtaining a divorce, intending to return to Maine as soon as that object was accomplished, was a question of fact for the trial court. And there is testimony here which, if believed, supports the finding of the presiding justice that this libelee was a bona fide resident of Florida.

The case of *Usen* v. *Usen*, 136 Me., 480, 13 A. (2d), 738, 128 A. L. R., 1449, relied on by the libelant, is not in point.

In that case it was held that a citizen of this state who had not gained a bona fide residence in Florida was properly enjoined from prosecuting a divorce proceeding in a court in that state, against his wife, who was a resident of Maine.

This point avails the libelant nothing.

She further contends that the divorce is invalid, and of no force and effect in this state, because obtained in contravention of the provisions of R. S., Chap. 73, Sec. 12, which reads as follows:

> "When residents of the state go out of it for the purpose of obtaining a divorce for causes which occurred here while the parties lived here, or which do not authorize a divorce here, and a divorce is thus obtained, it shall be void in this state; but in all other cases, a divorce decreed out of the state according to the law of the place, by a court having jurisdiction of the cause and of both parties, shall be valid here."

There is nothing in that statute to prevent a man leaving his wife in the state of their matrimonial domicile for justifiable cause, and, after establishing a bona fide domicile in another state, from maintaining divorce proceedings there in accordance with the laws of that state. *Gregory* v. *Gregory*, 76 Me., 535.

If, however, the husband obtains such divorce in a sister state only on constructive notice to the wife, who continues to reside in the state of matrimonial domicile without any actual knowledge whatsoever of the proceeding, as in the case at bar, that would not be conclusive and binding upon the courts in the state of matrimonial domicile under the full faith and credit clause of the Federal Constitution, and may be collaterally attacked by her. *Gregory* v. *Gregory*, 78 Me., 187, 3 A., 280, 57 Am. Rep., 792, *supra*; *Perkins* v. *Perkins*, 225 Mass., 82, 113 N. E., 841, L.R.A., 1917B, 1028; 17 Am. Jur., Divorce and Separation, Sec. 751, page 565.

The courts of the state of matrimonial domicile may, however, recognize such judgment of divorce granted in a sister state, as a matter of comity. See discussion in 17 Am. Jur., Divorce and Separation, Sec. 752, page 565, *et seq.* and cases there cited.

But before such divorce is recognized as a matter of comity, something more than the mere domicile of the spouse who procured it must be considered. The rights of the wife who continues to dwell in the state of matrimonial domicile must also be considered and safeguarded. And if it should appear that she is an innocent party, and that the recognition of such foreign divorce would work an injustice to her, it should not be recognized as a matter of comity.

In *Perkins* v. *Perkins*, supra, it was held that the courts of matrimonial domicile, which is retained by a wife innocent of matrimonial wrong, who was deserted by her husband, will not recognize on the ground of comity a divorce secured by him in another state without actual notice to her, although constructive notice had been given pursuant to the statutes of the state where the divorce was granted.

The contentions of the libelant in the instant case that she was innocent of any matrimonial wrong, and had been utterly deserted by the libelee, were questions of fact which should at least have been considered and passed upon by the trial court, in deciding whether or not the divorce granted by the Florida court should be recognized as a matter of comity, but no finding is recorded on that issue. Apparently the presiding justice considered that it was not necessary to do so, and proceeded on the erroneous theory that if this libelee was a bona fide resident of Florida, that was the only thing necessary to be considered as a basis for recognizing and giving effect to such divorce decree, for he found as follows:

". . . that the libelee, at the time of securing a divorce in the state of Florida, was a bona fide resident of that state and the decree secured there is valid and binding.

"For that reason, the libel is dismissed and denied."

Exceptions lie to a decision of a presiding justice based in part upon an error of law. See *Enoch C. Richards Company* v. *Libby, Ex'r*, 136 Me., 376, 10 A. (2d), 609.

For these reasons, mandate is

Exceptions sustained.

STATE OF MAINE *vs.* WILLIAM KOUZOUNAS.

York. Opinion, January 8, 1941.

EVIDENCE. WITNESSES. CRIMINAL LAW.

A witness cannot be cross-examined on collateral matters for the purpose of subsequently contradicting and impeaching his testimony in relation to such collateral matters.

Evidence relevant and material, although drawn out by the cross-examiner, may be contradicted. If a fact educed by cross-examination may be shown in evidence for any purpose independently of the contradiction, it is not collateral. To be collateral it must be a fact not bearing on the issue.

Testimony relating to something that transpires after the alleged commission of the offense does not necessarily make it collateral.

Conduct of a party tending to show improper motives, or improper practices, with respect to a suit, is admissible.

On exceptions. Respondent convicted of the crime of arson. Respondent presents exceptions relating to the admissibility of certain rebuttal testimony by the State. Exceptions overruled. Case fully appears in the opinion.

Joseph E. Harvey, County Attorney for the State.

Willard & Willard,

Ralph M. Ingalls, for respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

HUDSON, J. Convicted of arson, the respondent presents exceptions relating to the admissibility of certain rebuttal testimony by the State. He had denied in cross-examination that following his arrest he went to Portland for the purpose of consulting counsel with one Nadeau, who had so testified for the State. It was permitted to rebut this denial by the evidence of the consulted attorney.

The contention is that the cross-examiner elicited a collateral fact binding upon the State without right of contradiction.

> "It is true that a witness cannot be cross-examined on collateral matters for the purpose of subsequently contradicting and impeaching his testimony in relation to such collateral matters. . . ." *State* v. *Priest*, 117 Me., 223, 230; *Bessey* v. *Herring*, 121 Me., 539, 541; *Finn* v. *New England Tel. & Tel. Co.*, 101 Me., 279, 281; *State* v. *Benner*, 64 Me., 267, 287; *Davis* v. *Roby*, 64 Me., 427, 430; *Brackett* v. *Weeks*, 43 Me., 291, 293; *State* v. *Sargent*, 32 Me., 429, 431; *Page* v. *Homans*, 14 Me., 478, 483; *Ware* v. *Ware*, 8 Me., 42, 52-55.

The rule applies only to collateral facts. Evidence relevant and material, although drawn out by the cross-examiner, may be contradicted. If a fact educed by cross-examination may be "shown in evidence for any purpose independently of the contradiction," it is not collateral. To be collateral it must be "a fact not bearing upon the issue." *Finn* v. *Telephone Company*, supra, pages 281, and 282.

Was this testimony collateral? Relation to something that transpires after the alleged commission of the offense does not necessarily make it collateral, as, for instance, in *State* v. *Priest*, supra, evidence was held not to be collateral which had to do with a conversation between the respondent and a State's witness following the death of the victim, because it "pertained directly to his conduct" (meaning the respondent's) "in connection with the crime for which he was being tried."

The fact of going to Portland to see the attorney, if true, pertained to the respondent's conduct. Nadeau had testified that the respondent had asked him if he had told on him, to which the reply

was yes; that the respondent, offering him money, asked him to change his testimony, and he assented, following which the respondent took him to Portland for consultation with the attorney. The State contends that the purpose of the consultation was "to fix the case," that is, to frame a defense. Conduct of a party "tending to show improper motives, or improper practices, with respect to a suit," is admissible. *Littlefield* v. *Cook*, 112 Me., 551, 555, 92 A., 787, 789. While mere consultation with an attorney is not sufficient to show an improper motive or practice, yet it may take place under circumstances that would warrant a jury in finding the act as conduct indicative of guilt. The weight of the evidence, of course, is for the jury. We do not consider that on this record the objection of collaterality is sustainable.

Exceptions overruled.

FRANZ U. BURKETT, ATTORNEY-GENERAL EX REL.

vs.

ERNEST L. BLAISDELL ET AL., IN EQUITY.

Kennebec. Opinion, January 16, 1941.

MUNICIPAL CORPORATIONS. TOWNS. MANDAMUS.

When demurrers to bill were sustained by Trial Court without opinion and bill was dismissed, plaintiff could properly appeal from dismissal decree.

Contention that attorney-general did not have right to institute suit in equity would be considered by Law Court on appeal although contention was raised by briefs of counsel instead of by pleadings since jurisdictional questions will be considered when called to attention of Law Court, although informally.

In cases of quasi municipal corporations, such as water districts which are not financed by taxation but by rates paid by individual consumers, and where the interest of taxpayers is negligible, proceedings in equity should not be entertained when brought by taxpayers alone.

The attorney-general, on relation of citizens and taxpayers of Rome was proper party plaintiff to suit in equity against town tax collector and selectmen to com-

pel payment to town by collector of money allegedly collected as automobile excise taxes from inhabitants of town and diverted to collector's private use, where town officers upon whom rested responsibility of compelling collector to account refused to perform their duty.

When all parties were before the court in suit in equity against town tax collector and selectmen to compel collector to pay town money allegedly collected as autombile excise taxes and diverted to collector's private use, relief would not be denied on ground that plaintiff had adequate remedy at law by petition for mandamus against selectmen directing them to perform their duty by instituting action against collector.

Although mandamus might lie, the fact that a court of chancery has already acquired jurisdiction of the subject-matter of the application will constitute a bar to the application for the writ.

Where malfeasance of a public officer, the breach of a public trust, the withholding of public funds is asserted, proceedings in equity will lie, when brought by the proper party, to relieve against the consummated wrongful act, and to provide the remedy by compelling restitution.

On appeal. Equity action by Franz U. Burkett, Attorney-General, on relation of ten citizens and taxpayers of the Town of Rome against the tax collector and selectmen of the town seeking payment by the tax collector of a sum paid him in excise taxes and unlawfully converted by him. Demurrers filed to bill were sustained and the bill dismissed. Appeal from dismissal decree filed. Bill dismissed as to defendants George H. LeBarron, Earle Ladd and Paris Mosher. Appeal sustained and decree reversed as to defendant Ernest L. Blaisdell. Case remanded. Case fully appears in the opinion.

Harvey D. Eaton, for plaintiff.

F. Harold Dubord,

H. C. Marden, for defendants.

SITTING: STURGIS, C. J., THAXTER, MANSER, WORSTER, JJ.

MANSER, J. The bill in this case alleges facts which call to the attention of the court the following situation:

A tax collector of Rome, Maine, collected automobile excise taxes from a number of inhabitants of the town, for a period of five years, and did not pay the same over to the town. The money thus lawfully exacted from automobile owners has been diverted to the private use

of the collector. The town has been deprived of funds which should have been available for municipal purposes. The taxpayers and inhabitants have correspondingly suffered. The town officers, upon whom rested the responsibility of compelling the collector to account for such collections, have refused to do their duty.

The present proceedings were instituted by the attorney-general on relation of ten citizens and taxpayers of the town. The defendants are the tax collector and the selectmen of Rome. The relief sought is the payment by the tax collector of the sum unlawfully converted by him, coupled with a prayer for general relief.

To the bill demurrers were filed by the several defendants. Assigned as causes for demurrer were that the plaintiffs had an adequate remedy at law and that they have not stated a case which entitles them to relief in equity. The demurrers were sustained without opinion, and the bill dismissed with costs. The case comes forward on appeal from the dismissal decree. Such procedure has judicial sanction, *Masters* v. *VanWart*, 125 Me., 402, 134 A., 539.

No specific cause of demurrer is alleged as to the right of the attorney-general to institute the action, but much stress is laid upon that element in the briefs of opposing counsel. This contention should have been raised properly by the pleadings, but jurisdictional questions will be considered when called to the attention of the court, although informally. *Powers* v. *Mitchell*, 75 Me., 364; *Power Co.* v. *Railroad*, 113 Me., 103, 93 A., 41.

Dillon, in his valuable treatise on municipal corporations, discusses the subject with great lucidity, and collates the decisions and authorities. Dillon, Mun. Corp., Secs. 1573-1588, inclusive. The author sums it up as follows:

> "But it is substantially agreed that any taxable inhabitant, or perhaps any citizen of the municipality, has such an interest to prevent or to avoid illegal or unauthorized corporate acts that he may be a relator, on whose application the proper public officer of the Commonwealth may, on behalf of the public, file the requisite bill in cases which fall within the jurisdiction of equity, to enjoin the menaced illegal or wrongful act, or if it has been consummated, to have relief against it." Sec. 1586.

> "That, in the absence of special controlling legislative pro-

> vision, the proper public officer of the Commonwealth, which created the corporation and prescribed and limited its powers, may, in his own name, or in the name of the State, on behalf of residents and voters of the municipality, exercise the authority, in proper cases, of filing an information or bill in equity to prevent the misuse of corporate powers, or to set aside or correct illegal corporate acts." Sec. 1587.

While it may be true that such actions are rarely brought, the reason we may hope is that the occasion rarely arises when officials condone the wrongful acts of their associates and refuse to bring them to book. Such a state of affairs can exist only through sympathy for a defaulting official, or indifference to principles of public integrity. Judicial authority, however, abundantly exists that courts inherently have the right to correct such abuses and that the attorney-general, without statutory authority, is the proper party to present them for consideration.

Our court has already adopted the view that in cases of quasi municipal corporations, such as water districts which are not financed by taxation but by rates paid by individual consumers, and where the interest of taxpayers is negligible, proceedings in equity should not be entertained when brought by taxpayers alone. It points out that a water district, as to rates, service and issues of securities, is under the jurisdiction of the Public Utilities Commission. *Eaton* v. *Thayer*, 124 Me., 311, 128 A., 475, 476. The court states squarely, however,

> "We think that this court has full jurisdiction in equity over this corporation and its trustees, but that the proceeding should be instituted by the Attorney General, not by individual rate payers."

Further, the court in the above case quotes Judge Dillon, Sec. 1577, to the effect that the attorney-general, upon relation of persons interested, has authority to bring cases of equitable cognizance, and which affect the public, to prevent municipal corporations from exceeding their lawful authority or to have their illegal acts set aside or corrected. It then concludes with reference to the issues there raised,

"It cannot be presumed that the Commission and the Attorney General will fail to act in a proper case."

Counsel for the defense apparently misconstrue the reasoning of the opinion in *Miller* v. *Grandy*, 13 Mich., 540, to which reference is made in the *Eaton Case*, supra. They argue that the attorney-general is merely a nominal party, that the real parties are the ten taxpayers, and consequently the observations of the court in the cited case are pertinent, to the effect that a single voter or taxpayer has no voice in public affairs and can exercise his influence only by his vote, and must therefore bow to the common will, in the instant case, the misapplication of public funds. The controlling statement, however, and the conclusion arrived at is that

"whenever redress is attainable, it must be sought for by some other minister than a self-appointed private party, in whom the people or their agents have not vested any such supervisory power."

Adhering to the requirement that in cases of remedial relief, the attorney-general, upon relation of persons interested, must institute the proceedings as laid down in *Eaton* v. *Thayer*, supra; *Tuscan* v. *Smith*, 130 Me., 36, 153 A., 289, and *Bayley* v. *Wells*, 133 Me., 141, 144, 174 A., 459, the logic of Cooley, J., in *Attorney General* v. *Detroit*, 26 Mich., 263, 264 although *obiter dictum*, is cogent. He says:

"The right of the attorney general to proceed in equity to enjoin an abuse of corporate power, consisting in the appropriation of corporate funds in a manner not justified by law, appears to me to rest in sound principle. The municipality and its citizens are not alone concerned in such an abuse; the corporate powers have been conferred by the state, with such restrictions and limitations as were thought important, some of which were imposed for the protection of the corporators against unjust and oppressive action of officials, and others from considerations of general public policy. It can never be admitted that because the corporation and its members in general, or even all of them, consent to or connive at the setting aside of these restrictions and limitations, the state, which

deemed them important, shall not be at liberty to complain, for this would be to annihilate the just and necessary supremacy of the state, and to make the corporators sole judges of what franchises they should exercise, and what powers the corporation should possess over them."

Again, in *Land, Log & Lumber Co.* v. *McIntyre*, 100 Wis., 245, 75 N. W., 964, 69 Am. St., 915, the reasoning is pertinent:

"So the rule is firmly established that where a cause of action exists in favor of a corporation, whatever be its proper remedy, if its governing body refuses to proceed, justice cannot thereby be defeated, for those upon whom the injury indirectly falls may obtain redress in equity. It certainly would be a strange situation if unfaithful officials could plunder a county in the manner alleged in the complaint and be free from danger of being compelled to return their ill-gotten gains, or make good the injury caused by their corrupt conduct, because they had retired from office and the corporation, through its proper officers, unjustly refused to prosecute them. The intelligence and wisdom of the lawmakers, and the boasted power of courts of equity to lay hold of situations where legal remedies stop, and prevent a failure of justice flowing from defective legal remedies, are not rightly subject to such criticisms."

We hold that the attorney-general, ex relatione, is a proper party plaintiff.

Objection is made that redress is not obtainable in equity, because there is an adequate remedy at law. The suggested remedies are:

1. Enforcement of R. S., Chap. 5, Sec. 32, providing a forfeiture of not exceeding $20 for the neglect of a town officer to perform his duty. Such forfeiture is recoverable in an action of debt in the name and to the use of the town by the treasurer. When, under the allegations of the bill, it is apparent that the town itself has a legal remedy for the *entire* amount misappropriated, and refuses to institute it, it is trifling with the gravity of the occasion to say that the town, its citizens and taxpayers, have an adequate remedy for the loss sustained upon the chance or supposition that the town, condoning the

wrong through its failure to act, might be induced to institute legal process to obtain a negligible forfeiture, in lieu of the total sum due.

2. Call of special town meeting under the provision of R. S., Chap. 5, Sec. 4, as amended by P. L. 1933, Chap. 198. The substance of this law is that such meeting may be called upon written application to a justice of the peace of not less than ten per cent of the registered voters. Such meeting, if called, could only direct the selectmen to perform their duty or uphold them in their dereliction. The right to the payment of the money withheld is absolute. It does not depend upon the whim of the electorate. The reasoning quoted from *Attorney-General* v. *Detroit*, supra, sufficiently answers this contention.

3. Petition for mandamus against the selectmen directing them to perform their clear duty. Inasmuch as the selectmen are not charged with any personal default, presumably this means they may be ordered to institute legal action against the collector. As said in Dillon, Sec. 1586:

> "There is no doubt but that the corporation may in its own name bring suits, in proper cases, to be relieved against illegal, unauthorized, or fraudulent acts on the part of its officers. Since, however, experience has shown how liable these corporations are to be betrayed by those who have the temporary management of their concerns, it would never do, we think, for the courts to hold that relief against illegal or wrongful acts can be had only by an authorized suit brought by and in the name of the corporation."

The mandamus, as suggested, would but authorize and direct such a suit. Here all the parties are before the court. The powers of courts of equity are broad enough to fit such a situation as this, which requires remedial relief. Furthermore, though mandamus might lie under circumstances of this kind, we agree with the commentator in 89 Am. Dec. 722 in his note to *Dane* v. *Derby*, 54 Me., 95, there reported, that

> "the fact that a court of chancery has already acquired jurisdiction of the subject-matter of the application will constitute a bar to the application for the writ."

Upon the authority of the cases cited to this rule the foregoing statement is reiterated in the text of 18 R. C. L., Mandamus. 50 Spelling on Extraordinary Relief, Vol. 2, Sec. 1376, puts it thus:

> "The familiar principle then applies, that as between courts of co-ordinate powers, that first acquiring jurisdiction of a cause and being fully empowered to afford complete relief, will not be disturbed or interfered with, but allowed to retain jurisdiction and determine the controversy. From these observations we deduce the conclusion that a showing that a court of equity has already acquired jurisdiction of the same subject-matter embodied in the application for the mandamus, and has full power to grant relief, or to compel specific performance of the thing sought, is a complete bar to the exercise of the jurisdiction by mandamus."

Counsel cite *Attorney General* v. *Boston*, 123 Mass., 460, as authority that the proceeding should be by mandamus. On the contrary, the court, in speaking upon the point, clarifies the ruling in *Attorney General* v. *Salem*, 103 Mass., 138, and says:

> "The true ground upon which that decision rests is that, when no misapplication of funds held upon a public trust and no nuisance to the public are shown, the appropriate remedy to compel performance of a duty imposed upon a corporation by statute is not by decree in equity, but by writ of mandamus at common law."

Here is asserted the malfeasance of a public officer, the breach of a public trust, the withholding of public funds. Under such circumstances, proceedings in equity will lie, when brought by the proper party, to relieve against the consummated wrongful act, and to provide the remedy by compelling restitution. It is not damages which are asked for, but, so far as appears, a specific sum which belongs in the treasury of the town, collected by a public officer and unlawfully retained, with the connivance of the governing board.

If the plaintiff can prove his allegations, he is entitled to a remedy in equity.

There appears, however, to be no sufficient justiciable ground for

sustaining the bill against the selectmen of Rome named as defendants. They are not charged with actual malfeasance.

The entry will be

Bill dismissed as to defendants George H. LeBarron, Earle Ladd and Paris Mosher.

Appeal sustained and decree reversed as to defendant Ernest L. Blaisdell.

Case remanded.

LAFORGE ET AL.

vs.

LEBLANC AND COMMERCIAL CASUALTY INSURANCE CO.

IN EQUITY.

Penobscot. Opinion, February 3, 1941.

INSURANCE. EQUITY. ACTIONS.

In suits in equity, where there are several different parties but the same res is the subject of the litigation, or when there is such identity in the nature of the proceeding, the interests of the parties or the relief to be afforded as to require or render highly expedient a unification of divers proceedings, an order of consolidation in appropriate instances may bring all into one suit.

Where there is no relation of trust between the assured and the insurer, the general rule obtains that he who asserts fraud must prove it by clear and convincing evidence.

On appeal. Bill in equity brought by plaintiffs against defendant insurance company and another to reach and apply insurance money to payment of losses in an automobile accident by personal injury to the various plaintiffs who had secured final judgments against defendant LeBlanc. Finding was for plaintiff and decree

entered accordingly. Defendant Commercial Casualty Insurance Co. filed appeal. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

John H. Needham, for plaintiffs.

William S. Cole, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. On appeal by defendant insurance company. This is a bill brought under R. S., Chap. 60, Secs. 177-180, to reach and apply insurance money to payment of losses occasioned in an automobile accident by personal injury to the various plaintiffs, who had secured final judgments against the defendant LeBlanc aggregating $11,426.40. The insurance coverage was $10,000.00. The court below found for the plaintiffs and that each of them was entitled to .87507% of the judgments, which percentage aggregated $10,000.00, and decree was entered accordingly.

There were three separate bills by different groups of plaintiffs, of whom there were eight in all. Answers and replications were filed.

There were motions for consolidation by the plaintiffs in the three separate suits and an interlocutory order providing therefor. No objection to this course of procedure appears to have been made below and none is argued here. Inasmuch as there is no statute in this jurisdiction having general application to consolidation of causes in equity and no judicial ruling thereon by this court, and further as the method of procedure is squarely before the court in the present case, it is deemed advisable to give it consideration. In the earlier chancery practice there appears to have been some conflict of opinion and some divergence of practice. As said in *Burnham* v. *Dalling*, 16 N. J. Eq., 310 (1863), the earlier books of equity practice are silent on the subject. In Daniell's Chancery Pl. & Pr., 5th ed., Vol. 1, p. 797, there appears in the text the following:

> "Neither in the Court of Chancery nor in the Court of Exchequer has the practice prevailed of compelling the plaintiff to consolidate his different suits against several defendants."

The annotation to this text shows that in some of the early English

chancery cases, the practice of consolidating causes was recognized at one time, but afterwards disapproved.

The annotation to *Logan* v. *Mechanics' Bank*, 58 Am. Dec. 512 (1853) also speaks of the former practice, and then says:

> "This rule has, however, been changed, and instances of the consolidation of suits in equity are numerous, and it has been held that the rules for consolidation are alike in law and equity; *Beach* v. *Woodyard*, 5 W. Va., 231; *Wyatt* v. *Thompson*, 10 Id., 645. Federal courts also may order consolidation of actions: Desty's Federal Procedure, sec. 921."

The federal statutes relating to the judiciary have the following provision:

> "Sec. 921. When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

In the Century Digest under the title Action, In chancery, Sec. 625, it is stated the rule as now generally adopted in most jurisdictions is that,

> "A court of equity has inherent power to order a consolidation of causes in its discretion."

Cited in support are *Burnham* v. *Dalling*, 16 N. J. Eq., 310; *Woodburn* v. *Woodburn*, 123 Ill., 608; 14 N. E., 58, 16 N. E., 209; *Patterson* v. *Eakin*, 87 Va., 49, 12 S. E., 144.

There is an informative discussion by Rugg, C. J., in *Lumiansky* v. *Tessier*, 213 Mass., 182, 99 N. E., 1051, 1054, as to the consolidation of causes, both at law and in equity. Concerning the latter, the opinion says:

> "In suits in equity, where there are several different parties but the same *res* is the subject of the litigation, or where there is such identity in the nature of the proceeding, the interests of

> the parties or the relief to be afforded as to require or render highly expedient a unification of divers proceedings, an order of consolidation in appropriate instances may bring all into one suit."

The only statutory provisions in Maine relating to consolidation of causes, have to do with mechanics' liens, R. S., Chap. 105, Secs. 35 and 42. That legislative authority in such cases may have been deemed advisable arises from the fact that these provisions authorize the consolidation of two or more proceedings, either at law or in equity, pending at the same time in whatever court or courts, to enforce liens on the same building. That the power is inherent in the court itself, without legislative sanction, in the ordinary equity procedure, is laid down in 1 C. J. S., Actions, Sec. 110:

> "A consolidation in equity is therefore ordinarily proper wherever the subject matter involved and relief demanded in the different suits make it expedient for the court, by hearing them together, properly to determine all of the issues involved and adequately adjudicate the rights of the different parties."

See also I Am. Jur., Actions, Sec. 92.

Undoubtedly there has existed in this state some uncertainty with respect to equity procedure as to consolidation of causes. This may have arisen in part from the fact that, as to actions at law, our practice has been limited to permitting or ordering several cases relating to the same subject matter to be tried together. *Field* v. *Lang*, 89 Me., 454, 36 A., 984. It may be noted, however, that in equity, consolidation has been recognized by the court, as appears from *Cushman Co.* v, *Mackesy*, 135 Me., 294, 195 A., 365.

The court adopts as a proper exercise of discretion by the presiding justice, the rule as quoted above from *Lumiansky* v. *Tessier*, supra.

Considering now the case upon its merits: The bills all alleged that, while defendant LeBlanc was operating his car on June 26, 1938, a collision occurred with a car operated by James R. Ballard, one of the plaintiffs, as a result of which the plaintiffs sustained personal injuries; that the plaintiffs brought separate actions against LeBlanc, and recovered judgments thereon; that on May

4, 1938, the defendant insurance company issued to LeBlanc its automobile liability insurance policy; that the policy was in full force and effect on the date of the accident; that the insurance company had seasonable notice of the accident and of the injuries and damages sustained. Prayers in the bills were that the plaintiffs be found entitled to the insurance money to be applied to their respective judgments and that the insurance company be ordered to pay them the same.

The appellant insurance company denied that the policy was in full force and effect, and also set up as substantive defense that

> "the defendant LeBlanc had no insurable interest in the automobile,
>
> "that no premium was ever paid for the policy,
>
> "that on June 17, 1938 (nine days before the accident LeBlanc voluntarily surrendered the policy to the Company's agent for flat cancellation as of the date of issue and it was so cancelled, that LeBlanc, having been adjudicated a bankrupt (June 7, 1938) subsequently undertook to assume liability to assist the plaintiffs to obtain their judgments and that there is fraud and collusion between the judgment creditors and the defendant LeBlanc."

The statute R. S., Chap. 60, Sec. 177, makes the liability of an insurer absolute except under the conditions set forth in Sec. 180. Fraud and collusion constitute a statute designated defense. The statute provides and it is, of course, clear that to establish liability there must be a policy in full force and effect.

The issues, therefore, are narrowed to the defenses outlined above. The presiding justice found as to fraud and collusion that "the case is absolutely barren of any evidence of this kind."

The averment that LeBlanc, "having been adjudicated a bankrupt, subsequently undertook to assume liability to assist the plaintiffs to obtain their judgments" appears ambiguous, but it apparently means that LeBlanc virtually acknowledged liability for the accident and interposed no real defense to the actions at law. As there is no relation of trust between the assured and the insurer, the general rule obtains that he who asserts fraud must prove it by

clear and convincing evidence. *Strout* v. *Lewis*, 104 Me., 65, 71 A., 137; *Liberty* v. *Haines, Adm'r*, 103 Me., 182, 68 A., 738. The record shows and the company admits that prompt notice of the accident was given, that the summonses served on LeBlanc in the actions at law were promptly turned over to the company; that the company denied any responsibility under the policy, but offered to defend, provided it was without prejudice to its claim of non-liability. The company did not defend and the record is silent as to whether there were actual trials or how the damages were assessed. No complaint is made as to the amount of the awards.

The intimation that because LeBlanc was adjudicated a bankrupt three weeks before the accident, he was therefore actuated by a desire to avoid personal loss and so was motivated to assist the plaintiff, lacks convincing force. Regardless of a man's financial standing, he may be expected to rely upon his insurance coverage to save himself from such personal loss.

It does not appear, nor is it claimed that the adjudication in bankruptcy *ipso facto* worked a surrender or forfeiture of the policy. Under "Conditions," paragraph F, in the policy, it is provided:

> "if, however, the named Insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall if written notice be given to the Company within thirty days after the date of such death or adjudication, cover (1) the named Insured's legal representative as the named Insured, and (2) subject otherwise to the provisions of Paragraph III, any person having proper temporary custody of the automobile, as an Insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication."

Paragraph III relates to the persons who may be considered as Insured and has no application to the issue here.

LeBlanc was adjudicated a bankrupt June 7, 1938. The company received written notice thereof June 11, 1938. The accident happened June 26, 1938. The first meeting of creditors was set for June 23, 1938, but it does not appear from the record whether a

trustee was then appointed, or that any demand had been made upon LeBlanc to surrender possession of the automobile. By stipulation it is shown that the car was listed as an asset in the bankruptcy schedules and valued at $400.00 and that a financing corporation was listed as a secured creditor by conditional sale thereof, for a balance of $380.00.

LeBlanc testified that he was in possession and control of the car and the record does not negate the claim. The accident happened before the expiration of the thirty days mentioned in paragraph F of the policy, and the court below was apparently justified in finding that LeBlanc was a "person having proper temporary custody of the automobile, as an Insured."

Another contract provision is, in effect, that the policy remains in force under the conditions stated, "unless canceled" and the company claims that on June 17, 1938, the policy "was voluntarily surrendered for flat cancellation as of the date of issue and it was so cancelled."

The presiding justice was justified in his finding that LeBlanc "did not voluntarily surrender the policy for the purpose of cancellation but upon the other hand negotiated concerning the continuing of it, and was later notified by the insurance company, in writing, that he could keep the policy."

An unsigned letter from the general agent, dated June 11, 1938, referred to the bankruptcy notice just received, demanded that LeBlanc bring in policies on two trucks owned by him and also the policy in question, which he announced he intended to cancel as of date of issue.

While the policy contained no authority for such arbitrary cancellation, it appears that LeBlanc surrendered the truck policies, but negotiated for a continuance of the one in question, and on June 24, 1938, the general agent wrote LeBlanc a letter, saying, "It is quite agreeable to me that you should keep the policy on your own car dated May 4. Please let me know if I can expect a check for the full balance of $23.80 before July 4, or if you prefer to pay $7.13 down and make five monthly payments of $3.75 each." On June 27, 1938, the agent accepted $7.13 and gave receipt "*continuing in force* Policy 15799 from date hereof on account." There certainly appears to be no surrender or cancellation by agreement, and no waiver of the

policy provision, "This policy may be canceled by the Company by mailing written notice to the named Insured at the address shown in this policy, stating when not less than five days thereafter such cancellation shall be effective." No such notice was actually given.

A reason asserted for the claim that LeBlanc had no insurable interest in the car appears from a bill of sale dated January 3, 1936, but not recorded until October 19, 1937, from Adolphe E. LeBlanc, to whom the policy was issued, of certain motor vehicles, including the car in question, and certain store equipment, in which his son, Wilfred LeBlanc, is named as vendee. Defense claims this constituted a transfer of title. The car, however, was not purchased by Adolphe LeBlanc until August 26, 1937.

LeBlanc's explanation is: That he had been in the grocery business several years, times got pretty hard and he had the bill of sale drawn up, but did not feel like having it recorded until he had to. Conditions went from bad to worse and in October, 1937, he had it recorded, thinking that creditors might not be so apt to close him up. He received no consideration, never delivered either the bill of sale or the chattels to Wilfred, and continued in possession and control himself. He listed all the articles in his bankruptcy schedule as his own assets. The car was purchased by him, he always had possession, paid the excise taxes and had it registered in his own name.

Though his formulated intention to delay or hinder his creditors was not commendable, it was futile, and the court below was justified in finding that he never parted with title.

There is also interjected in defense that the car was financed by a loaning agency without the knowledge of the insurer. It is not claimed that this was in violation of the terms of the policy, but that LeBlanc had no title to the car and so had no insurable interest. This does not follow. He had a property right, coupled with possession, control and right to use. He could protect himself from liability for accidents occurring during such use.

Again, the claim that the premium being unpaid, the policy was not in force, is of no avail. It is clear from the agent's letter of June 11, 1938, that the policy was issued on credit.

Exception was taken to the exclusion of a letter written to LeBlanc by counsel for the company on December 8, 1938, long after the accident and after suits had been brought. It was clearly a self-

serving document, reciting the position taken by the company, and alleged conversations with LeBlanc.

The findings of the presiding justice appear to be fully justified and his rulings of law sound. There is no merit in the appeal.

The entry will be

Appeal dismissed.
Decree below affirmed.

PUBLIC UTILITIES COMMISSION *vs.* F. GILBERT CONGDON.

Cumberland. Opinion, February 11, 1941.

PUBLIC UTILITIES COMMISSION. MOTOR VEHICLES.

Section 10 (a) of the Motor Carrier Act is entirely free from technical words or phrases and must be construed according to the common meaning of the language.

One does not receive property from or deliver it to himself when it is already in his possession. The words "receive" and "deliver," in themselves, indicate a transfer of possession from one person, firm or corporation to another. The same is true of "participate." By all definitions, it means to take part or have a share in common with others in something.

The legislature did not intend to include within the exemption provisions of Section 10 (a) of the Motor Carrier Act a local motor carrier of property for hire and the vehicles which he operates, when and while, through a mere transfer of the property from one of his trucks to another, they are being used to extend his carriage of freight and merchandise beyond the specified termini or pick-up or delivery points which he is authorized to serve as a certified common carrier.

Exceptions do not lie to reasons given for a ruling but only to the ruling itself.

If decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason.

On exceptions. Proceedings by the Public Utilities Commission against F. Gilbert Congdon, wherein the commission suspended a certificate that had been issued authorizing F. Gilbert Congdon to operate motor vehicles as a common carrier of freight and merchan-

dise for hire. Respondent brings exceptions. Exceptions overruled. Case fully appears in the opinion.

Frank M. Libby, for Public Utilities Commission.

Carl C. Jones,

Richard K. Gould, for respondent.

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

STURGIS, J. The Public Utilities Commission of Maine having suspended the certificate which it had issued to F. Gilbert Congdon of Portland, Maine, authorizing him to operate motor vehicles on the public ways as a common carrier of freight or merchandise for hire, exceptions alleged, having been duly allowed and certified, are before the Law Court for determination.

Under Sections 2-9 inclusive, of Chapter 259 of the Public Laws of 1933 as amended, known as the Motor Carrier Act, the operation of motor vehicles upon any public way in the business of transporting freight and merchandise for hire as a common carrier over regular routes between points within the state, without a certificate from the Public Utilities Commission declaring that public necessity and convenience require and permit such operation, is prohibited. All persons, firms or corporations operating or causing the operation of motor vehicles transporting freight or merchandise for hire upon the public ways within the state, other than common carriers over regular routes and subject to an exception not here of moment, are declared to be "Contract Carriers" and prohibited from operating or causing to be operated such motor vehicles without having obtained a permit from the Public Utilities Commission in the manner and subject to the limitations there prescribed. The Public Utilities Commission is authorized to make necessary rules and regulations and to suspend the certificate of a common carrier or the permit of a contract carrier for any violation thereof or of the Act. In Section 10 (A) of the Motor Carrier Act as amended by P. L. 1935, Chap. 146, the operation of motor vehicles for the local transportation of property for hire within limits there defined and subject to certain prohibitions is exempted from the foregoing provisions of the statute.

The agreed statement of facts which accompanies the bill of exceptions shows that the respondent, F. Gilbert Congdon, has for many years been engaged in the trucking business in Portland and has maintained there a regular and established place of business. Since the enactment of the Motor Carrier Act, he has not only operated motor vehicles in the business of transporting freight and merchandise for hire as a common carrier over regular routes between points within the state under a common carrier certificate, but has also operated local pick-up and delivery trucks for the transportation of property for hire in the City of Portland and within fifteen miles thereof, for which he holds no certificate or permit. He has filed a schedule of rates applicable to his long-haul business under his common carrier certificate by concurring in the "Commercial Motor Vehicle Association of Maine, Class and Commodity Rate Tariff MPUC No. 1," in effect by authority of the Public Utilities Commission, and by filing in his own behalf an additional commodity tariff.

During the month of January, 1940, F. Gilbert Congdon transported for hire sundry shipments of merchandise from Augusta, Camden and Hiram to Westbrook, a city adjoining Portland and within fifteen miles therefrom but not a specified pick-up or delivery point in any scheduled routes over which he was authorized to operate motor vehicles under his common carrier certificate or a point of service included in the rate tariffs in which he concurred and filed. In handling these shipments, he hauled the merchandise to Portland from the points of origin in one or more of his vehicles which had been certified by the Public Utilities Commission, transferred it there to one of his local pick-up and delivery trucks and completed the transportation by making delivery to the consignee at point of destination. Through waybills from point of origin to destination were delivered to the shippers. The rates charged were, in each instance, in accordance with the applicable minimum established rates. On account of the transportation of these shipments, on April 22, 1940, the respondent's common carrier certificate No. 90, then in force, was suspended for thirty days.

The Public Utilities Commission, as we understand its decision and the reasons therefor as therein stated and argued on the brief, suspended F. Gilbert Congdon's common carrier certificate be-

cause, under its interpretation of the Motor Carrier Act, in transporting the several shipments here involved from Portland to Westbrook, the operation of the motor vehicles which he used was not within the exemption of Section 10 (A) of the Act but within its prohibitions, and without a certificate or permit therefor, the operation was a violation of the law.

Section 10 (A) of the Motor Carrier Act as amended by P. L. 1935, Chap. 146, reads as follows:

> "There shall be exempted from the provisions of the foregoing sections . . . the operation over the highways of motor vehicles while being used within the limits of a single city or town in which the vehicle is registered by the secretary of state or in which the owner maintains a regular and established place of business, or within 15 miles, by highway in this state, of the point in such single city or town where the property is received or delivered, but no person, firm or corporation may operate, or cause to be operated, any motor vehicle for the transportation of property for hire beyond such limits without a certificate of public convenience and necessity or a permit to operate as a contract carrier; nor may any such person, firm or corporation participate in the transportation of property originating or terminating beyond said limits without holding such a certificate or permit unless such property is delivered to or received from a carrier over the highways operating under a certificate or permit issued by the commission or a steam or electric railway, railway express or water common carrier; . . . ."

Other exemptions there enumerated are not here of concern.

The Public Utilities Commission advance as the primary reason for their decision that the respondent's local trucks, while delivering the merchandise in Westbrook which he had brought to Portland from Augusta, Camden and Hiram in his long-haul certified trucks, were not being used within fifteen miles by highway of the point in the state where the property was "received or delivered," nor did he "participate" in the transportation of property originating or terminating beyond the limits within which he was authorized to operate as an exempt carrier which was "delivered to or received from" a carrier over the highways operating under such a certificate or

permit issued by the commission. The precise point made is that the words "*received or delivered*," and "*delivered to or received from*," and "*participate*," as used in this statute, have reference only to a receipt from and a delivery to or a participation with another person, firm or corporation and do not apply to a mere transfer of property already in transportation from one truck to another owned by the same carrier. Applying this construction of the law to the instant facts, the Public Utilities Commission insist that the respondent did not "*receive*" the property he transported to Westbrook in Portland, where it was transferred from his certified motor vehicles to his pick-up and delivery trucks, but at the points of origin of the shipments in Augusta, Camden and Hiram, and in transferring the shipments from his long-haul certified vehicles to his pick-up and delivery trucks, he did not "participate" in a transportation with nor was the property "received" from a carrier operating under a certificate or permit within the meaning and intent of Section 10 (A) of the Motor Carrier Act.

We think this construction of Section 10 (A) of the Motor Carrier Act by the Public Utilities Commission is correct. The enactment is entirely free from technical words or phrases. It must be construed according to the common meaning of the language. R. S., Chap. 1, Sec. 6 I; *Terminal Co. and Railroad Co.* v. *Railroad*, 127 Me., 428, 144 A., 390; *State* v. *Blaisdell*, 118 Me., 13, 105 A., 359; *Thurston* v. *Carter*, 112 Me., 361, 92 A., 295. One does not receive property from or deliver it to himself when it is already in his possession. The words "receive" and "deliver," in themselves, indicate a transfer of possession from one person, firm or corporation to another. The same is true of "participate." By all definitions, it means to take part or have a share in common with others in something. Words & Phrases, First Ed., Vol. 6, 5185; Webster's New International Dictionary (Second Ed.). We cannot assume that the legislature intended to use these words in a strained or inappropriate sense. Taken in their meaning as commonly understood and defined, they indicate clearly that the legislature did not intend to include within the exemption provisions of Section 10 (A) of the Motor Carrier Act a local motor carrier of property for hire and the vehicles which he operates, when and while, through a mere transfer of the property from one of his trucks to another, they are

being used to extend his carriage of freight and merchandise beyond the specified termini or pick-up or delivery points which he is authorized to serve as a CERTIFIED COMMON CARRIER. In making such an extension of service, the operation of the pick-up and delivery trucks of the local carrier without a certificate or permit is a violation of the Motor Carrier Act. Whether, under Section 10 (A) of the Act, the carrier can, within the specified termini or pick-up and delivery points of his scheduled routes as a certified common carrier, use his local trucks, without a certificate or permit, merely to pick up or deliver his long-haul loads and not to unlawfully extend his transportation thereof, although argued on the brief, is not in issue and is not here decided.

The Public Utilities Commission, however, found and stated another reason for their decision. In earlier cases, they had ruled that under Section 10, Chap. 259, P. L. 1933, the original enactment of the exemption provision of the Act, a local motor vehicle carrier might operate at will without being subjected to the regulatory features of the law so long as he confined his operations exclusively within the city where his vehicles were registered or he maintained a regular and established place of business, but if he was given a permit to extend his operations beyond those limits, he would also require a permit to operate within them. In re John W. Kingston, X No. 48, Maine P. U. C. Decisions; In re Sumner C. Leighton, X No. 303, Maine P. U. C. Decisions. This ruling remained in force when the exemption provision of the Motor Carrier Act was amended and re-enacted as Section 10 (A), Chap. 146, P. L. 1935. As stated in the record, it "has been consistently followed in all cases." And in conformity with it, on April 20, 1939, the Public Utilities Commission mailed out notices to all motor vehicle common carriers, in part, of the following tenor:

> "The Commission is of the opinion that a correct interpretation of said section 10 (A) exempts the operation of the motor vehicles of the purely local carrier and does not exempt the operation of the vehicles of the long haul carrier operating under a certificate issued by the Commission.
>
> "Therefore motor vehicle common carriers operating under and by virtue of a certificate issued by this Commission must

> discontinue the above practice and may serve, with their own vehicles, only such points as appear on the schedules attached to their certificates and may serve other points only by transfer with other motor vehicle common carriers having a right to serve such other points."

An exception is expressly reserved to the apparent incorporation of these rulings into the decision here on review.

We do not think that Section 10 (A) of the Motor Carrier Act exempts only "the operation of the motor vehicles of the purely local carrier" and not those "of the long haul carrier operating under a certificate." While, as already pointed out earlier in this opinion, the statutory exemption does not apply to the operation of the vehicles of a carrier for which he has no certificate or permit when they are being used to extend his own long-haul business, we are not of opinion that other motor vehicles which he owns and operates in purely local transportation for hire as defined in Section 10 (A) are thereby excluded from the exemption provision, or by the fact that the local carrier is also a common carrier operating under a certificate or permit issued by the commission. We find no such express or implied exclusion in the Motor Carrier Act. The fact that the respondent operated local pick-up and delivery trucks owned by him in transporting the shipments of merchandise in controversy from Portland to Westbrook when and while he was also a common carrier operating under a certificate issued by the Public Utilities Commission was not a valid reason for suspending his certificate. Exceptions do not lie, however, to reasons given for a ruling, but only to the ruling itself. If the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. *Snell* v. *Libby*, 137 Me., 62, 15 A. (2d), 148; *Helvering* v. *Gowran*, 302 U. S., 238, 245, 58 S. Ct., 154.

Upon this record, the respondent F. Gilbert Congdon violated the Motor Carrier Act of this state, and the suspension of his certificate as a motor vehicle common carrier therefor by the Public Utilities Commission was warranted. The exceptions reserved cannot be sustained. The mandate is

Exceptions overruled.

BARNES, C. J., having retired, does not join in this opinion.

EVERETT E. WILLEY

BY HENRY E. WILLEY, PRO AMI

vs.

MAINE CENTRAL RAILROAD COMPANY.

HENRY E. WILLEY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion, February 18, 1941.

NEGLIGENCE. RAILROADS. EVIDENCE. EXCEPTIONS.

In reviewing exception to orders of nonsuit, testimony was viewed most favorably for plaintiff.

There can be no negligence where there is no duty and a declaration without allegation of facts sufficient to reveal the duty is defective and demurrable.

Where railroad company had knowledge of the habit of school children to cross its tracks between street crossings, to which it made no express objection, this fact alone would not justify an inference of an implied invitation.

A railroad company owes a trespasser no duty save to refrain from wantonly or wilfully injuring him.

Where evidence is barren of any proof that after defendant actually saw or should have seen plaintiff in his perilous position on the track, it failed in any way to exercise due care to avoid the accident, there would be no evidence in the case to justify the jury in finding any subsequent and independent negligence upon the part of the defendant necessary for application of the last clear chance doctrine.

In action involving injuries to child struck by work engine while crossing railroad tracks between street crossings, exclusion of evidence showing conditions at some one of three street crossings in the vicinity, but at no one of which it was claimed the accident happened, was not error.

Failure to maintain gates at a given crossing could have no bearing on an issue of negligence with regard to an accident occurring elsewhere. Such evidence would be irrelevant and immaterial.

Where a writing is shown to a witness for refreshment, whether written by him or not, which when made or shortly thereafter while the facts are still within his

memory he then knew contained a correct statement, he may testify as to its contents if material even though at the time of testifying he has no independent recollection of the facts therein stated.

An exceptant is bound to see that the bill of exceptions includes all that is necessary to enable the Law Court to decide whether the rulings, of which he complains, were or were not erroneous.

A bill of exceptions must affirmatively show the grievance. It cannot be left to inference.

On exceptions. Actions by Everett E. Willey, by Henry E. Willey, his next friend, for personal injuries, and by Henry E. Willey for expenses, against the Maine Central Railroad Company. Plaintiffs nonsuited. Exceptions filed by plaintiffs to orders of nonsuit and to exclusions of testimony. Exceptions overruled. Case fully appears in the opinion.

Stern and Stern, for plaintiffs.

Perkins & Weeks,

Frank Fellows, for defendant.

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

HUDSON, J. The plaintiffs except to orders of nonsuit and exclusions of testimony. The occasion of these actions was a lamentable accident that occurred on the twenty-fifth day of April, 1939, on the main line of the defendant company in the City of Brewer. Everett, six years old, who sues by next friend, was run over by its work train engine and received serious injuries necessitating the amputation of his right leg below his knee. For his personal injuries his suit is brought. His father, Henry, sues to recover expenses.

All directions herein given are taken from a sketch (no plan in the record), Plaintiffs' Exhibit No. 2, not drawn to scale nor purporting to show exactly the points of compass. If "north" as therein it appears is not correctly indicated, still there would be no relative change of position which would affect the issues in this case.

The accident happened about twenty minutes of one in the afternoon as Everett was on his way to school. His home was on the southerly side of Parker Street west of side track No. 5. Parker Street, running generally east and west, crosses this side track, and

a very short distance to the east the Bucksport branch, and a bit farther east the main line of the defendant company running from Bangor to Calais. Parker Street is located between two other streets, Wilson on the south and Center on the north. At all three of these street crossings were silent flashing signals then operating and manipulated by the defendant's employee, one Crocker, who for that purpose had a shack at the southeast corner of the Parker Street crossing. At its northeast corner was a switch, where the Bucksport branch left the main line proceeding southwesterly. The accident did not take place at any one of these street crossings but on the main line between Parker and Center Streets probably about 165 feet northerly of the shack and from 130 to 150 feet northerly of Parker Street crossing.

In the immediate vicinity of the place of accident there was a path running generally east and west. Whether it crossed the main line was in dispute, but taking the testimony most favorably for the plaintiffs, as here we must, it will be assumed that it did extend on both sides of the track. From it the path led easterly through a field and was used by children in going to and from school. Westerly of where it was claimed the path crossed the main line were two coal cars on track No. 5. The distance at this point between track No. 5 and the main line was approximately twelve paces.

Everett was in his first year in the Page School located near the high school some six or seven hundred feet easterly of the main line. After noon dinner at home, he went out to play with some other boys a bit older and then they started for school. Instead of going by Parker Street over the railroad crossing they took a short cut not on any street and when they had reached a pile of ties or sleepers on the easterly side of the main line just southerly of the path, Everett decided to go back to a neighbor's house to get his mask which he had forgotten. This was a cloth affair with eye-holes in it. (He had it on at the time of the accident.) Having gotten it, he started back for school by the same route. When he reached the coal cars on track No. 5, he went around their north end and there he observed the work train which, in order for a regular train to pass on the main line, had been switched onto the Bucksport branch. He said it was standing still "Down by the switch," but when he started from the coal cars to go across the main line, it had started and was distant

from him about eleven paces. Then he was about the same distance from the main line. Nevertheless, he continued on, thinking he had time to cross in safety. He tripped on the easterly rail, fell down, and while down was run over by the engine.

This work train, besides the engine and caboose, had some fourteen or fifteen cars and for a crew, besides the engineer and the fireman, a conductor and two brakemen. At the time of the accident, Crocker was in his shack performing his duties as signal tender. According to his testimony, when the engine proceeding at five or six miles an hour passed by him its bell was ringing, but whether it was ringing when the boy was hit he could not say for certainty because of the noise of the train between.

The record discloses that the locus of the accident was in an industrial portion of the city somewhat residential, and that with knowledge of Mr. Crocker very many children of all ages (many of whom, including Everett, had been warned by him) in going to and from school crossed these tracks wherever they saw fit and without express objection upon the part of the railroad company. Everett admitted, however, that he knew it was dangerous to go across the tracks except at crossings and that his father and mother had told him not to cross at other places.

The contention of the plaintiffs is that Everett had the status of an implied invitee to whom the defendant owed the duty of due care, while the defendant asserts that he was only a trespasser or at most a bare licensee to whom the company owed the duty simply to refrain from wilful, wanton, or reckless acts of negligence. Of that kind of negligence we find no evidence in this record. The railroad company defends the orders of nonsuit in particular on the ground that it breached no duty owed to Everett. "There can be no negligence where there is no duty." *Bowden* v. *Derby*, 97 Me., 536, 539, 55 A., 417, 418; *Leighton* v. *Wheeler*, 106 Me., 450, 452, 76 A., 916. And a declaration without allegation of facts sufficient to reveal the duty is defective and demurrable. *Hone et al.* v. *Presque Isle Water Company*, 104 Me., 217, 71 A., 769.

Plaintiffs' counsel relies upon the decision in *Collins* v. *Maine Central Railroad Company*, 136 Me., 149, 4 A. 2d, 100. He contends that the facts in this record pictured a situation from which the jury could have found that the railroad company impliedly invited

Everett to cross the tracks where he made his attempt so to do. But we think otherwise and consider the Collins case distinguishable. That was a *street railroad crossing* accident case; this is not. There a particular way was concerned that to the knowledge of the railroad company had been in general use by the public as a railroad crossing, on which the railroad itself had done work for the benefit of the travelling public: it had graded and planked it. This court said on page 153 of 136 Me., on page 103 of 4 A., 2d,

> "Our conclusion, then, is that, while an unobjected use by the public of a railroad crossing alone is not enough to establish an implied invitation, there may be facts as to its construction, maintenance, and use that will warrant a jury in finding such an invitation and such facts present, as said in *Black* v. *Central R. Co.*, supra, 'a question for the jury under proper instructions. . . .'"

In that case it appeared that the company itself had done something to create "appearances" reasonably interpretable as an invitation for use by the public. The most that the facts here warrant as a finding is that the railroad company had knowledge of the habit of these school children to cross these tracks between street crossings, to which it made no express objection, but that alone would not justify an inference of an implied invitation. In *Chenery* v. *Fitchburg Railroad*, 160 Mass., 211, 35 N. E., 554, cited in the Collins case on page 151, the presiding justice refused to instruct that if people were in the habit of using the crossing and the defendant had made no objection the plaintiff was not a trespasser, and the court upheld such refusal.

In *Copp* v. *Maine Central Railroad Company*, 100 Me., 568, 62 A., 735, the plaintiff was walking along the defendant company's railroad track when she was overtaken and injured by the defendant's locomotive. This court said on page 569 of 100 Me., on page 735 of 62 A.,

> "To extricate herself from the position of a trespasser upon the track, she showed that other persons *frequently and even habitually walked upon the tracks at that place without being forbidden by the defendant company.*" (Italics ours.) "This however did not give her any right to walk on the track. Not

only was the railroad company entitled to the exclusive use of its track between crossings and stations as this place was, but she was forbidden by statute to walk upon it. R. S., ch. 52, sec. 77. That the defendant company did not prosecute violators of this statute did not legalize her act nor protect her from its consequences."

And again on page 570 of 100 Me., on page 736 of 62 A.,

"Of course, even if she were a trespasser, the defendant company's servants could not lawfully disregard her presence on the track and recklessly run over her, *but, even if she were a licensee as she claims, they owed her no special duty of care such as they owed to those whose right or duty it was to be on the track.*" (Italics ours.)

Said Sec. 77 of Chap. 52 now appears unchanged in effect in Sec. 67 of Chap. 64, R. S. 1930 and reads: "Whoever without right, stands or walks on a railroad track . . . forfeits not less than five dollars, nor more than twenty dollars, to be recovered by complaint. . . ." Sec. 66 of Chap. 64, R. S. 1930 denies recovery against a railroad company on account of one who is killed while walking or being on its road contrary to law, or to its valid rules and regulations.

In *Kapernaros* v. *Boston & Maine Railroad*, 115 Me., 467, 99 A., 441, 442, a child not quite two years old was killed while playing on the defendant's railroad track at a point other than at a crossing. It was claimed that the child reached the track by pursuing a well-defined path leading from the lot occupied by his parents. Referring to the two statutes above cited, this court held that the child was a trespasser and said: "Being a trespasser, the defendant owed the plaintiff no duty save to refrain from wantonly or wilfully injuring him."

Established law in this state requires us to hold that on this record there is no fact foundation for according Everett any status other than a trespasser or at most a bare licensee.

But should the cases have been submitted to the jury on the question of last clear chance? We think not, for the reason that the evidence is barren of any proof that after the defendant actually saw or should have seen Everett in his perilous position on the track, it

failed in any way to exercise due care to avoid the accident. No evidence in the case would have justified the jury in finding any subsequent and independent negligence upon the part of the defendant necessary for application of the last clear chance doctrine.

The plaintiffs have failed to show error under their twelfth exception as to orders of nonsuit.

Of the remaining eleven exceptions, ten of them, as stated in the plaintiffs' brief "present essentially the same questions of law and may be considered together. The evidence offered was 'for the purpose of showing the nature of the crossing and the notice to the railroad at a hearing subsequently for the purpose of changing that protection.'"

The first question objected to and excluded was: "How were those gates operated, manually or automatically?" referring to gates formerly at Parker Street crossing.

The second question excluded related to former gates at the Center and Wilson Street crossings.

The third exception is to the ruling of the presiding justice striking from the record testimony previously admitted that there had been gates at Parker Street crossing.

The fourth exception is to the exclusion of this question to Mr. Willey: "When you first moved there was the crossing the same as it is now?" having reference to the Parker Street crossing. The purpose of this question no doubt was to show that previously there had been gates which later were removed. The removal was by order of the Public Utilities Commission and the gates were supplanted by another permitted method of protection.

The fifth exception is extremely vague and does not appear to result from a ruling on any particular question but from what was said in colloquy between the court and the attorney. The court then expressed the opinion that up to that time in the trial it had not been shown where the boy was when he was hurt. Then followed a discussion as to what inferences might be drawn in that regard.

The sixth exception is to a statement by the court that "the offered evidence as to the proper condition of the crossing or the protection thereof is excluded upon the ground that no evidence yet has been submitted to show where this boy who was injured was crossing the track, whether it was at the crossing or where it was, and there-

fore the evidence as to the crossing at this time is not admissable."

The seventh exception also resulted from a colloquy (no specific question excluded) and related to a statement of the attorney that he would offer evidence to show "the knowledge and notice of the company of the conditions at this crossing, and not only at the crossings but between them and all over the place described in the declaration." This was not definitely ruled out by the court. It stated: "If that evidence is admissible at all it will be later in the case after it has been shown where the boy was injured."

By the eighth exception the plaintiffs attack the exclusion of testimony as to the conditions at the Wilson Street crossing before the accident.

The ninth exception is to the exclusion of a question to Mr. Willey as to his having seen children "along the streets and crossing the streets there . . . a year or two before the accident, or three or four years before the accident."

The tenth exception is to the exclusion of this question asked Mrs. Willey: "From June, 1938, until the time of this accident as you had observed it, how many men had been stationed at those crossings at Parker Street, Wilson Street and Center and Jordan Street, do you know?" Following its exclusion, counsel for the plaintiffs said: "I offer to prove there was only one. I would like to offer evidence for the record." The court then said: "I think you might offer it by some witness who knows more about it than this woman." Then followed questions and answers as to her means of knowledge. Whereupon she was permitted to state with reference to these street crossings that for a year before the accident she never saw anyone there. Thus, the evidence sought to be introduced, first excluded, was let in and consequently plaintiffs were not prejudiced.

The purpose of the offer of all of this excluded testimony, excepting a part of that embraced in exception seven, was to show conditions at some one of the three street crossings in that vicinity, but at no one of which did the accident happen. As to exception seven, it will be noted that evidence relating to conditions between crossings (where it should appear that the accident happened) was not excluded. As a matter of fact, no specific question was before the court requiring a ruling. What the judge did was to indicate a ruling if and when a question should be asked.

But dealing with the question raised by the exceptions as to the admissibility of conditions at the railroad crossings at no one of which it was claimed the accident took place, we feel that the ruling of the presiding justice excluding such testimony was right. If the accident had happened on a railroad crossing which the boy was lawfully using and so was entitled to the exercise of due care upon the part of the defendant, the then conditions at that crossing and the knowledge of the defendant as to facts bearing upon what protection should have been afforded by the defendant in its exercise of due care would have been admissible. It cannot be denied that the function of gates is to protect those using the particular crossing where the gates are installed. The failure to maintain gates at a given crossing, it would seem, could have no bearing on an issue of negligence with regard to an accident occurring elsewhere. Such evidence would be irrelevant and immaterial.

Not here necessary for decision because this accident did not happen at a railroad crossing, *quaere* whether evidence of a prior protective means afterwards supplanted by another at a crossing would be admissible as an admission of negligent protection at the time of a later accident at such crossing? *Menard* v. *Boston & Maine Railroad Company*, 150 Mass., 386, 388, 23 N. E., 214; and *Tyler* v. *Old Colony Railroad Company*, 157 Mass., 336, 32 N. E., 227, seem to answer no.

We find no merit in exceptions one to ten inclusive.

The remaining eleventh exception is to the refusal of the presiding justice to allow plaintiffs' witness, Mrs. Willey, although she did not seek so to do, to refresh her recollection as to what another witness for the plaintiffs, Mr. Crocker the signal tender, had said in his shack a few days after the accident "with reference to what the engineer and fireman were doing in the engine." That proffered as a means of refreshment was an unsigned writing claimed to be under the hand of the plaintiffs' attorney and to contain an accurate statement of what Mr. Crocker then and there said. The court denied the right of refreshment. It having ruled that Mr. Crocker was a hostile witness, the plaintiffs were attempting to show that he had given a different version on the stand from that which appeared in the writing.

Where a writing is shown to a witness for refreshment, whether

written by him or not, which when made or shortly thereafter while the facts are still within his memory he then knew contained a correct statement, he may testify as to its contents if material even though at the time of testifying he has no independent recollection of the facts therein stated. *Chamberlain* v. *Sands et al.*, 27 Me., 458, 466. Also see *Bradley* v. *Davis*, 26 Me., 45, 54; *State* v. *Lull*, 37 Me., 246, 248. In *Pierce* v. *Bangor & Aroostook Railroad Company*, 94 Me., 171, on page 177, 47 A., 144, on page 146, this court stated:

> "A witness may be allowed to assist his memory by referring to writings, 'where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct.' 1 Greenleaf on Evidence, Sec. 437."

Also see *Guiffre* v. *Carapezza*, 298 Mass., 458 (1937), 11 N. E., 2d, 433; *Kinsey, Appellant* v. *State of Arizona, Respondent*, 65 P. (2d), 1141 (Arizona) (1937); for annotation see 125 A. L. R., 80 *et seq.*

Mrs. Willey did not testify that at the time the writing was made or soon thereafter she knew the contents to be correct. She did not even testify that she read it herself or heard it read. Thus, the foundation for the use of the writing as a refreshment was not properly laid to comply with the rule as stated in the above-cited cases.

Furthermore, the writing is not printed in the bill of exceptions nor made a part thereof. Whether an examination of it would disclose any contradictions in what was said by Mr. Crocker on the stand and in the shack we cannot determine. It is not before us.

> "The document in question is not made a part of the bill of exceptions by direct quotation, nor is it incorporated therein by reference. It did not become a part of the evidence. It is not, therefore, included in the blanket clause which made the evidence in the case a part of the bill. It is the well settled rule in this state, too well settled to be now shaken, that the excepting party in his bill of exceptions must set forth enough to enable the court to determine that the point raised is material and that the ruling excepted to is both erroneous and prejudicial,

or he can take nothing by his exceptions." *Sawyer* v. *Hillgrove*, 128 Me., 230, 232.

Also see *Gross* v. *Martin*, 128 Me., 445, 446, 148 A., 680; *Pike* v. *Crehore*, 40 Me., 503, 512.

The fact that the attorney read a sentence or two from an unmarked and unidentified paper relating to the ringing of the bell and the positions of the brakemen (nothing read had to do with the question asked and objected to as to what the engineer and fireman were doing in the engine) did not divulge what it was claimed Mr. Crocker then said in the shack for comparison with what he later said on the witness stand. Inspection of the whole writing might well reveal no contradictions. *Gross* v. *Martin*, supra, 128 Me., at page 446, 148 A., 680.

An exceptant "is bound to see that the bill of exceptions includes all that is necessary to enable us to decide whether the rulings, of which he complains, were or were not erroneous." This writing "should have been printed as a part of the bill of exceptions." *Gross* v. *Martin*, supra, 128 Me., at page 446, 148 A., at page 681. A bill must affirmatively show the grievance. It cannot be left to inference. *State* v. *Wombolt*, 126 Me., 351, 353, 138 A., 527; *State* v. *Dow*, 122 Me., 448, 449, 120 A., 427. The plaintiffs take nothing under exception eleven.

Exceptions overruled.

WATTS DETECTIVE AGENCY, INC.

vs.

INHABITANTS OF COUNTY OF SAGADAHOC.

Sagadahoc. Opinion, February 19, 1941.

COUNTY ATTORNEYS. COUNTY COMMISSIONERS. STATUTES, CONSTRUCTION OF.

The office of county attorney is the creature of the legislature. It exists only by virtue of the statute, which fixes its tenure, prescribes its duties and determines its compensation.

The county attorney is not a common-law officer; he cannot exercise common-law powers as the attorney-general is authorized to do.

The county commissioners are under duty to determine in advance, so far as practicable, the financial requirements, to provide the necessary funds, and to control expenditures.

Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercises the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs.

Under the procedure adopted in this state, and under the statutes regulating the same, the sheriff's department was, originally and primarily, charged with the duty of criminal investigation.

The employment of detectives cannot be considered as within the scope of "actual expenses incurred by county attorneys."

In construing statute, such a construction must prevail as will form a consistent and harmonious whole.

Interpretation of statutes which tends to coördination of the work of separate departments, each having duties to perform in the enforcement of law, is a compliance with the rule of reasonable construction, rather than one which leads to confusion.

As a general rule, in the absence of a statute, a prosecuting attorney cannot bind the county by a contract or for expenses without authority from the county board.

The principles of law as to implied contract arising from the rendition of services or quantum meruit, *are without application in dealing with municipalities or political divisions of the state.*

On report. Action by Watts Detective Agency, Inc., against Inhabitants of County of Sagadahoc for services and expenses in connection with a criminal investigation. Judgment for defendant. Case fully appears in the opinion.

McLean, Fogg & Southard, for plaintiff.

Pattangall, Goodspeed & Williamson, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. The issue in this case, which comes up on report, is whether the county of Sagadahoc is under legal obligation to pay the plaintiff detective agency for services and expenses of its operatives in connection with the investigation of an alleged crime. The county attorney arranged for the employment without consultation with the county commissioners and without their knowledge. After detectives had been at work for about three weeks, an account of the plaintiff of $2,092.00 was presented by the county attorney to the county commissioners. Action on the matter was deferred while the commissioners sought legal advice. They then declined to pay the bill, which had increased to $2,618.96, the amount in suit.

The contentions of the plaintiff are:

The county attorney is a county officer.

He is required to prosecute criminal cases and to diligently and faithfully inquire into all violation of law.

His duty implies the power to employ reasonable assistance.

Revised Statutes, Chap. 91, Sec. 89, specifically authorizing the attorney-general to employ detectives, does not deny or abrogate the authority of the county attorney to do so.

The county commissioners ratified the contract.

The defense contends:

The county attorney, though elected by the voters of the county, is attorney for the state within the county; he prosecutes for the state, receives his salary from the state, and is under the direction of the attorney-general.

His duties and powers are determined and circumscribed by the statutes.

The legislature has specifically granted to the attorney-general, by himself or through the several county attorneys, the right to employ detectives, and has provided for the payment of such services by the state upon presentation of bills properly avouched by the attorney-general.

The county commissioners have charge of the business and financial affairs of the county, must estimate its annual expenses and provide for their payment by taxation, and have the duty to pass upon contracts involving the expenditure of money.

The facts in the case show that a restaurant keeper was found

dead in his establishment, and his money was missing. Some of the money was found in the possession of a man who worked at the restaurant. The county attorney communicated with the attorney-general and was informed that he had unlimited authority to hire detectives. With the implications and inferences to be drawn from this statement, we are not concerned in the decision of this case. It is not claimed that the attorney-general, with a state fund at his disposal for the employment of detectives, assumed authority to charge the county of Sagadahoc with the expense, without the authorization of the county commissioners.

There is nothing in the record which would justify the contention of ratification of the employment by the county commissioners.

The issue is, therefore, resolved into the question: Can a county attorney, acting on his own authority, and without authorization or sanction of the county commissioners, incur liability upon the county to such extent as he may deem advisable, in the employment of detectives for criminal investigation?

The answer is to be determined by the applicable statutes of this state, and their reasonable interpretation.

Our court held in *Rounds, Petitioner* v. *Smart*, 71 Me., 380 at 384:

> "The office of county attorney is the creature of the legislature. It exists only by virtue of the statute, which fixes its tenure, prescribes its duties and determines its compensation."

In *State* v. *Fisheries Co.*, 120 Me., 121, 113 A., 22, 23, it was held that the county attorney is not a common-law officer; that he cannot exercise common-law powers as the attorney-general is authorized to do; and

> "The county attorney is the sole creature of the statute. His duties are prescribed by the statute, enlarged only by the additional duties incidental and necessary to carrying out those prescribed."

Revised Statutes, Chap. 93, Secs. 15-24, contains the principal provisions relating to county attorneys. Section 16 prescribes the duties in civil matters, and requires that:

"The county attorney in each county shall appear for the county, under the direction of the county commissioners, in all suits and other civil proceedings in which the county is a party or interested."

Section 17, having reference to duties in criminal matters, reads as follows:

"The county attorney shall attend all criminal terms held in his county, and act for the state in all cases in which the state or county is a party or interested, and unless he makes an order of dismissal as hereinafter provided, shall diligently and without delay prosecute to final judgment and sentence, all criminal cases before the superior court of his county, and in the absence of the attorney-general from a term in the county, shall perform his duties in state cases under directions from him, in the county, and he shall appear and act for the state with the attorney-general, in the law court, in all state cases coming into said court from his county;"

The general duties of the county commissioners are found in R. S., Chap. 92, Sec. 10, as follows:

"The county commissioners shall make the county estimates and cause the taxes to be assessed; examine, allow, and settle accounts of the receipts and expenditures of the moneys of the county; represent it; have the care of its property and management of its business; by an order recorded, appoint an agent to convey its real estate; lay out, alter, or discontinue ways, and perform all other duties required by law."

The foregoing section is a condensation of the original provision of R. S. 1841, Chap. 99, Sec. 3. Illustrative are the clauses:

"to make estimates to be laid before the legislature, of the sums, which may from time to time, be necessary to be assessed for defraying county charges, and to take the necessary and legal measures for apportioning and assessing the same."

This, in connection with the remaining provisions, serves to clarify the responsibility of county commissioners, and demon-

strates their duty to determine in advance, so far as practicable, the financial requirements, to provide the necessary funds and to control expenditures. Without some measure of such control, estimates and budgets would be a worthless formality and the taxpayers would be subject to such expenditures as every county officer might regard suitable for the department with which he was concerned.

In 15 C. J., Counties, Sec. 102, we find the general rule stated:

> "Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercises the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs."

See also *Cumberland* v. *Pennell*, 69 Me., 357.

The relation of the sheriff's department to investigation of criminal cases and enforcement of law has place for consideration in the determination of the question presented.

While in the earlier statutes there was lack of specification as to the duties of sheriffs in criminal cases, it was finally expressed by P. L. 1872, Chap. 62. The enactment was evidently deemed advisable with particular reference to the enforcement of the prohibitory liquor laws, but it had general application. It read as follows:

> "Sect. 2. It shall be the duty of sheriffs and their deputies, diligently and faithfully to inquire into all violations of the laws of the state, within their respective counties, and to institute legal proceedings against violations or supposed violations of law, and particularly the laws against the illegal sale of intoxicating liquors, and the keeping of drinking houses and tippling shops, gambling houses or places, and houses of ill fame, either by promptly entering a complaint before a magistrate competent to examine or try the offense charged, and execute such warrants as may be issued on such complaints, or by furnishing the county attorney promptly and without delay, with the names of alleged offenders, and of the witnesses."

This law was amended in 1891, P. L., Chap. 132, Sec. 7, by inserting

in the first line after the words "Sheriffs and their deputies" the words "and county attorneys." The law now is embraced in R. S., Chap. 137, Sec. 28. It still retains the requirement that sheriffs "shall furnish the county attorney promptly and without delay, with the names of alleged offenders, and of the witnesses."

Further in the 1872 enactment was an additional provision as to the correlative duties of county attorneys, which is included in all subsequent revisions and is now found in R. S., Chap. 137, Sec. 31, as follows:

> "County attorneys shall cause to be summoned promptly before the grand jury all witnesses whose names have been furnished them by any sheriff or his deputies, as provided in section twenty-eight, and shall faithfully direct inquiries before that body into violations of law, prosecute persons indicted, and secure the prompt sentence of convicts."

It thus appears that under the procedure adopted in this state, and under the statutes regulating the same, the sheriff's department was, originally and primarily, charged with the duty of criminal investigation.

The statutes with reference to expenditure of money by county attorneys appear to be restrictive and relate to specific matters. R. S., Chap. 93, Sec. 16, concerning his services in civil matters provides:

> "For the services herein mentioned the county attorney shall receive no compensation other than the salary from the state, except actual expenses when performing said services, the same to be audited by the county commissioners and paid from the county treasury."

In the next section, 17, concerning criminal matters, it is provided:

> "but no additional compensation shall accrue to the county attorney by the discharge of such duties."

Another example of control of expenditure through specific legislation is shown in the statute regulating clerk hire for various county officers, and fixing the amount of compensation. This is found

in R. S., Chap. 125, Sec. 46, and, as there appears, in but three counties of the state is clerk hire allowed for county attorneys.

It is urged that R. S., Chap. 148, Sec. 1, grants general authority to a county attorney for the expenditure of money, and that this is sufficient to cover the employment of investigators. The statute reads:

> "The superior court shall allow bills of costs accruing therein, but all other costs and expenses in criminal cases shall be audited by the commissioners of the county where they accrued, including actual expenses incurred by county attorneys in the performance of their official duties, payment of which is hereby expressly provided."

In the light of all the general subject-matter legislation, this contention cannot be upheld, and the employment of detectives cannot be considered as within the scope of "actual expenses incurred by county attorneys."

The various enactments of the legislature relating to the offices of county attorney, sheriff, county commissioners and attorney-general, their respective powers, duties and responsibilities, and the restrictions imposed, are all material for consideration in order to arrive at a reasonable construction, for the intent of the legislature, thus disclosed, is the law. *Lunn* v. *Auburn*, 110 Me., 241, 85 A., 893.

> "Such a construction must prevail as will form a consistent and harmonious whole." *Rackliff* v. *Greenbush*, 93 Me., 99, 44 A., 375, 376.

The duties of these officers are in great measure co-related. The interpretation contended for by the plaintiff takes from the prudential officers control of large expenditures, endows two distinct agencies with the right to incur expense for the same purpose, without mutual action, and results in conflict of authority and loss to taxpayers.

Interpretation of statutes which tends to coördination of the work of separate departments, each having duties to perform in the enforcement of law, is a compliance with the rule of reasonable construction, rather than one which leads to confusion.

The instant case illustrates such a situation. The four detectives

employed by the county attorney made reports to him. The sheriff's office had nothing to do with them. Men were used from that department in investigation work but not in coöperation with others. The attorney-general assigned a man from the state highway department to make some investigation. He apparently worked separately. The police department of the City of Bath had a man watching the restaurant. Nothing came of these unrelated efforts and there was no indictment.

In the field of investigation, it may well be found advisable, in the larger and more populous centers, and with the sanction of the county commissioners, that one or more experienced investigators should be attached to the sheriff's department, and that the county attorney, as the prosecuting law officer, should collaborate with that department by suggestions as to the conduct of the investigation, the evidence required and the methods to be employed. Such appears to be the intendment of the statutes in this state.

In cases of inquests by medical examiners in homicides, the county attorney or attorney-general is required to take part. The court is not called upon here to determine the extent of the authority of a county attorney to incur expense in that connection, as there is no record that any such proceeding was taken. The statutory provision relating thereto and referred to by counsel for the plaintiff as indicating implied powers of a county attorney appears in R. S., Chap. 151, Sec. 5. It may well be cited, however, as an additional instance of the legislative will to prescribe specific instructions under particular circumstances.

Decisions in other states are, of course, dependent on the particular statute of each jurisdiction, but as stated in 18 C. J., 1313,

> "As a general rule, in the absence of a statute, a prosecuting attorney cannot bind the county by a contract or for expenses without authority from the county board."

Finally in the development of procedure for the investigation of crimes, the attorney-general was accorded the right to employ detectives at the expense of the state. This provision was first made in 1901. P. L., Chap. 162, Sec. 2. It now appears as R. S., Chap. 91, Sec. 89, and is as follows:

> "The attorney-general may, by himself or through the several county attorneys or other officers of the state, employ such detectives or other persons, offer rewards or use other means that he may deem advisable, for the detection, arrest and apprehension of persons who commit crime in this state."

Appropriation of $1,500.00 for the purpose was originally fixed by the succeeding section. The appropriation was increased to $7,500.00 by P. L. 1917, Chap. 283; to $12,500.00 by P. L. 1919, Chap. 229. By P. L. 1929, Chap. 185, instead of a specific sum, it was provided that:

> "Such sum as may be appropriated for said purpose may be expended under the direction of the attorney general."

and now by R. S., Chap. 91, Sec. 90, a blanket appropriation is authorized for purposes of the attorney-general's department, including the employment of detectives.

A considered purpose is thus disclosed to invest the office of attorney-general with the power and authority to employ detectives at the expense of the state, whenever in his judgment the occasion warrants. It is further made clear that upon his authorization county attorneys may avail themselves of such service, without expense to their counties. If the personnel of the sheriff's department is not sufficient to cope with a particular situation, the statute makes provision for proper investigation through the chief law officer of the state, who is himself charged with the assistance of and instructions and advice to county attorneys. R. S., Chap. 91, Secs. 86, 87.

The principles of law as to implied contract arising from the rendition of services or *quantum meruit*, are without application in dealing with municipalities or political divisions of the state. *Power Co.* v. *Van Buren*, 116 Me., 119, 100 A., 371; *Michaud* v. *St. Francis*, 127 Me., 255, 143 A., 56; *Buzzell* v. *Belfast*, 131 Me., 185, 160 A., 21; *Tractor Co.* v. *Anson*, 134 Me., 329, 186 A., 883.

Our conclusion is, therefore, that the plaintiff is not entitled to recover, and in accordance with the stipulation, the entry will be

Judgment for defendant.

LEROY ELSEMORE *vs.* INHABITANTS OF THE TOWN OF HANCOCK.

Hancock. Opinion, March 4, 1941.

SCHOOLS AND SCHOOL DISTRICTS. CONTRACTS.

It is essential that there be some definite requirement of notice for meetings of school boards, since such a board is a deliberative body, every member of which is entitled to be present at every meeting to counsel and advise on any and every action which the committee is required or authorized by law to take.

Every contract touching matters within the police power must be held to have been entered into with the distinct understanding that the continuing supremacy of the State, if exerted for the common good and welfare, can modify the contract when and as the benefit of that interest properly may require.

Where the contract is to do acts which can be performed, nothing but the act of God or of a public enemy or the interdiction of the law as a direct and sole cause of the failure will excuse the performance.

Town did not terminate its liability, to a teacher in a free high school, under a contract by vote at town meeting to abolish the school.

On exceptions. Action of Leroy Elsemore against Inhabitants of the Town of Hancock, to recover damages for breach of contract of employment to teach in high school of the town. Heard before referee. Report of referee awarded damages to plaintiff. Defendant excepts to the ruling of a justice of the Superior Court accepting report of referee. Exceptions overruled. Case fully appears in the opinion.

Charles J. Hurley, for plaintiff.

Blaisdell & Blaisdell, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. The defendant brings this case before the court on exceptions to the ruling of a justice of the Superior Court accepting the report of a referee awarding damages of $775 to the plaintiff.

Hearing was held under a rule of reference which reserved the right of exceptions to both parties as to questions of law, and the case is properly before the court under that reservation.

The action is case to recover damages for breach of a contract under which the plaintiff alleges that he was employed to teach the high school in the defendant town during the school year 1939-1940. The alleged contract is an oral one made between the superintendent of schools and the plaintiff on the basis of authorization claimed to have been voted at a meeting of the superintending school committee held May 3, 1939. Defendant relies on the fact that said meeting was not legally convened because of the lack of proper notice to all members of the school board and that it was conducted in the absence of a member who in fact received no *actual* notice prior to the time for which the meeting was called. No question is raised but that if defendant is answerable in damages, the amount of the award is a proper one.

The referee found, as a matter of law, that the meeting in question was not a legal meeting and, as a matter of fact, that, subsequent to the employment, the action of the superintendent of schools in engaging the services of the plaintiff for the ensuing school year had been ratified by the school board; that "there was an actual approval of the nomination of the plaintiff as teacher by the school board"; and that "a valid contract was entered into and that there was a breach of that contract."

Defendant's objections to the acceptance of the report of the referee and the exceptions to the decree of acceptance challenge the findings that there was a valid contract between the parties and a breach thereof on the part of defendant on grounds which, variously phrased in nine (9) stated objections, are founded on two basic theories; first, that ratification of a contract for teaching in a town school on the part of a member of a school board not bound by the action of a committee meeting, prior at least to such time as performance might have begun, or partial payments have been made, or benefits have been accepted by the town, must be express, or evidenced by definite acts of recognition or acquiescence; and second, that assuming a valid contract to have been entered into between the parties, subsequent action of the town abolishing the high school operated as an automatic revocation thereof, and, to refer to the

argument of counsel rather than to the formal language of the exceptions, that any contract to teach in a free high school must be presumed to be entered into by a teacher subject to an implied understanding that a vote of the electors legally convened in town meeting abolishing the school will terminate it without liability on the part of the town. Since the latter principle can be of importance only if there was a valid subsisting contract between the town and the plaintiff prior to the town meeting of July 24, 1939, it seems advisable first to determine that question.

The record clearly discloses that the superintendent of schools attempted to convene a meeting of the school board in the defendant town on May 3, 1939; that prior to the time of the meeting, or attempted meeting, notice was *actually given* to two members of the school board and *left verbally* at the home of the third who was out of town; that this notice did not in fact reach that member; that he did not return home until after the meeting; that he did not attend the meeting; that he learned of the meeting the day following; and that for a period of more than two months thereafter, he made no effort to determine the purpose for which the meeting had been called or what business had been transacted at it. Whether or not, willy-nilly, he was a party to conversations about the purpose of the meeting and the business transacted thereat, with the superintendent of schools and one of his associates, is a matter of conflict in the testimony, as will hereafter be noted.

The record further discloses that at said "meeting" the superintendent of schools, in accordance with his statutory duty (R. S. 1930, Chap. 19, Sec. 70e), recommended to the school board the employment of the plaintiff and three other teachers. The record is silent as to whether or not these additional teachers were employed, as was the plaintiff, in reliance on the approval given by the two members of the school board who were present at the meeting, but the school year by universal custom commences in September annually and carries through to the following June, and there is no question raised but that all the teachers approved, or intended to be approved, by committee action at the meeting of May 3rd were employed for the ensuing school year and rendered service during that year in accordance with contracts entered into on the basis of authorization similar to that of the plaintiff's. That the schools in

the defendant town did operate on the basis of contracts based on such approval may reasonably be inferred from the fact that the record discloses no appointment of substitute teachers pursuant to the provisions of Chapter 19 above referred to which, as amended by Chapter 9 of the Public Laws of 1935, authorizes the appointment of such substitutes by the commissioner of education in case of failure of the superintendent of schools and the superintending school committee "to legally elect a teacher."

The ruling of the referee that there was no legal meeting of the school board on May 3rd necessarily carries the inference that a meeting of a school board in this state cannot be legally convened except by notice which in fact reaches each and every member thereof, and negatives the right to convene a meeting by notice left at the usual place of abode of a committee member. It is of course essential that there be some definite requirement of notice for meetings of school boards, since such a board is a deliberative body, every member of which is entitled to be present at every meeting to counsel and advise on any and every action which the committee is required or authorized by law to take, but a requirement that no meeting of a school board may be legally convened until and unless notice thereof is given to each member personally would be a serious handicap in the operation of our schools and would inevitably throw a heavy burden on the commissioner of education under the 1935 law above noted. It is unnecessary in this case that there be either ratification or repudiation of that ruling since there are ample facts in the record to justify the finding of fact made by the referee that the action of the superintendent of schools in employing this plaintiff on the basis of the approval voted at the "meeting" of May 3rd was ratified. Mr. Eugene Chamberlain, the school board member whose absence from the meeting lays the foundation for defendant's claim, was at the time serving his second year as a member of that board. He testified that he learned of the meeting on May 4th when his wife told him that another member of the board had called at the house and "said they were going to have a meeting"; that he made no effort to see the superintendent of schools or either of his colleagues on the board thereafter; that he did not see the superintendent of schools from that date until the twenty-fourth day of July following; that he never talked over the employment of any teachers; that when he

learned of the employment of the plaintiff, or of his "reelection" at the meeting of May 3rd, he "neither objected or approved" and, explaining his answer "Possibly" to an inquiry as to whether he had any objection, he stated,

> "As a matter of fact, I had been notified there was to be a special town meeting to discontinue the school and that put a different light on the whole thing."

The record discloses a clear conflict of testimony between the statements of Mr. Chamberlain, on the one hand, and those of another member of the school board, Mr. Brenton, and the superintendent of schools, on the other, as to discussions of school matters between May 4, 1939 and July 24, 1939. The finding of the referee carries the necessary inference that his decision of fact is based on his rejection of the testimony of Mr. Chamberlain in this regard and his acceptance of the testimony of the other parties, and the testimony of those other parties, if believed, fully justifies a finding of facts that constitute legal ratification.

Defendant claims that notwithstanding the contract on which plaintiff relies was entered into between the parties (if the fact shall so be determined), that contract was terminated, without liability on the part of the town, by the vote to abolish the free high school which plaintiff, under the contract, was to teach. The case contains a stipulation, entered by agreement of counsel, which reads

> "It is agreed that there was a special town meeting held in the town of Hancock, July 24th, 1939. One of the articles in the warrant, to wit article 4, was 'to see if the town will vote to discontinue the High School and to transfer the unexpended balances to the secondary tuition account.' On that article it was 'Voted to discontinue the High School, and Voted unexpended balances be transferred to the secondary tuition account.'"

Under this stipulation counsel for defendant argues, as heretofore noted, that any contract to teach in the high school must be presumed to have been entered into subject to an implied understanding that the contract might be abrogated, without liability on the part of the town, by the action so taken.

That there is a principle of law which recognizes implied understandings of this nature, and the effect of happenings beyond the control of the contracting parties which render performance of contract obligations impossible, is beyond question. Illustrations are available in public service law, where the State in the exercise of its sovereign power imposes regulations, non-existent at the time of the making of a contract, which in the exercise of its police power, compel modification in a contract price or terms; and in personal service contracts, or contracts dealing with particular properties, where either the death or incapacity of the individual, or the destruction of the property, renders performance impossible without default on the part of either contracting party.

The sovereignty rule has been recognized in this state in *In Re Guilford Water Co.*, 118 Me., 367 at 372, 108 A., 446, 449, where the court said,

> "The rule is general, that every contract touching matters within the police power, must be held to have been entered into with the distinct understanding that the continuing supremacy of the State, if exerted for the common good and welfare, can modify the contract when and as the benefit of that interest properly may require."

This case, which contains a review of the authorities on this aspect of public service law, clearly sets forth the necessity for the rule of a distinct or implied understanding in all contracts having to do with services in this particular field.

That the same principle is applicable to contracts involving personal services was recognized by this court in *Dickey* v. *Linscott*, 20 Me., 453, where a laborer, undertaking to work for a period of months, covering principally the season when farming was impossible, was incapacitated by illness for the major part of that period. There the court declared,

> "But in a contract for the performance of personal manual labor, requiring health and strength, we think it must be understood to be subject to the implied condition, that health and strength remain. If by the act of God, one half or three fourths of the strength of the contracting party is taken away, per-

> formance to the extent of his remaining ability, would be hardly thought to entitle him to the compensation for which he may have stipulated, while an able bodied man. There may be cases where the hazard of health is assumed by the employer. This might be regulated by known and settled usage. Generally, however, the right to wages depends upon the actual performance of labor. On the other hand it is not expected, that the laboring party should be subjected to any other loss, where his inability arises from the visitation of Providence."

The limits of the principle, that a breach of contract may result from a direct and sole cause for which neither party is responsible so that a right of action to recover damages does not arise from the breach, within which principle the implied understanding rule clearly falls, were aptly phrased by the Utah Court in *McKay* v. *Barnett*, 21 Utah, 239, 60 P., 1100, 1102, reported and annotated in 50 L. R. A., 371. There the court said,

> "Where the contract is to do acts which can be performed, nothing but the act of God or of a public enemy or the interdiction of the law as a direct and sole cause of the failure will excuse the performance. This principle is elementary."

The facts in that case involved a teaching contract, which had been interrupted by a school closing, ordered because of the prevalence of contagious disease. The court, noting that the school board might in its contract "have stipulated that the plaintiff should have no compensation during the time the school should be closed" on any such account, held that, not having done so, it could not deny compensation during the closed period.

In *Abrams* v. *Board of Education*, 230 Ky., 151, 18 S. W., 2d, 1000, 1001, a school closing which resulted from destruction of the building by fire was under consideration, and the court, holding the teacher entitled to recover compensation, declared,

> "The destruction of a building by fire is not a vis major, but is a character of misfortune that may be anticipated, and one that could have been provided for in this contract, if the parties had intended for the teacher's salary to cease upon the school being suspended thereby. In the absence of such stipulation, the

failure of the board to furnish another house . . . constituted a breach of contract."

Annotations carrying the citation of numerous authorities in cases where teaching contracts were interrupted or terminated by school closings on account of disease, or by the destruction of buildings by fire, are to be found in the annotation of *McKay* v. *Barnett*, supra, and in 6 A. L. R., 744. The cited cases show the general rule to fall within the limits stated in the above quotation from that case.

The contract here in question is one to which the defendant town became a party, through the action of that authority duly constituted by law to engage its teachers. Just as the contract came into existence by action of an agent of the town, so the defendant claims that termination resulted, and without liability, by the action of another town agency, the town meeting.

The instant case does not fall within the principle of implied understandings heretofore discussed. No *vis major* is involved. There is no suggestion of a stipulated limitation that the contract, which was verbal, should be ineffective if the voters of the town should elect to discontinue the school. To hold that the sovereignty rule, which avoids a contract made either between individuals or corporations, or between an individual or corporation and a municipality, by the sovereign exercise of police power, is applicable to the present facts would be a great extension of the rule for which no precedent has been called to our attention. Assuming authority to be vested in the voters of a town to discontinue a free high school at will, where no contract rights are involved, we do not believe it should be permitted, as one of the parties to a valid contract, to avoid its contractual obligations by such roundabout action.

Defendant offers no authority to support its claim that a town may abolish its high school, notwithstanding a contract to teach therein, except such inference as flows from the use of the word "may" in Section 91 of Chapter 19 of the Revised Statutes of 1930, used in connection with the authorization for towns to raise money to maintain free high schools, as against the word "shall," used in Section 16 of the same chapter, which imposes the requirement that towns raise and expend money for the support of common schools. It seems unnecessary to determine in the present case whether or not

the supervision and management of free high schools, vested in the superintending school committee by the provisions of Section 90 of Chapter 19, give that committee the same control as to discontinuance of free high schools, or changes in their location, which is applicable to schools generally under Section 2 of said chapter. For the purposes of the present case, it is enough to say that the Town of Hancock, which became party to a contract for teaching in its free high school, did not terminate its liability under that contract by vote at town meeting to abolish the school, and the entry must be

Exceptions overruled.

ROBERT N. MILLER ET AL.

vs.

FERROCARRILL DEL PACIFICO DE NICARAGUA.

Cumberland. Opinion, March 4, 1941.

EVIDENCE. INTERNATIONAL LAW. PLEADING.

That some foreign governments own and operate railroads is so well known that the Law Court takes judicial knowledge of that fact.

Plaintiffs must be considered as admitting that defendant was an instrumentality of the Republic of Nicaragua for they allege in their declaration that "it developed that defendant was an instrumentality of the Nicaraguan Government," and they are bound by that allegation.

An action cannot be maintained in Maine courts against a foreign government, or against any of its departmental agencies, through and by which such government discharges its governmental activities, if that government, by proper procedure, objects to the maintenance of the action.

Whether or not a defendant in a given case is a departmental agency of a foreign government, and whether or not the action is maintainable, can be determined by the court if the issue is therein raised as a judicial question, only in

those cases where the matter has not already been settled as a political question by the executive branch of the federal government through diplomatic channels.

The objection to the maintenance of an action against a Maine corporation on the ground that the corporation was an instrumentality of the Republic of Nicaragua could not be successfully raised by the corporation.

The right to immunity from suit may be claimed for the foreign government by its accredited and recognized representative, with the sanction of that government.

Objection may properly be raised through diplomatic representations to the end that, if that claim was recognized by the executive department of the federal government, it might be set forth and supported in an appropriate suggestion by the attorney general, or some law officer acting under his direction.

Where claim of the Republic of Nicaragua has already been recognized and allowed by the executive branch of the federal government, it would be the duty of the court to grant the immunity prayed for upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.

Where the Assistant United States Attorney for Maine appeared by permission of court in an action against a Maine corporation for legal services rendered in connection with a claim for refund of taxes and, acting under instructions from the Attorney General, showed that the executive branch of the federal government had recognized the corporation as an instrumentality of the Nicaraguan government in connection with refund claim and in a treaty, it was the court's duty to dismiss the action, even though no suggestion of dismissal was made, without proceeding to trial on issues of fact raised by suggestion of immunity from suit which had been filed in behalf of Nicaragua, since the matter had become a "political question" and was not a "judicial question."

The proper dismissal of an action is not affected by the reason given for the dismissal.

On exceptions. Action to recover, of the defendant, compensation for legal services rendered in connection with claim for refund of taxes. Action dismissed. Plaintiff filed exceptions to ruling of dismissal. Exceptions overruled. Case fully appears in the opinion.

McLean, Fogg and Southard, for plaintiffs.

Verrill, Hale, Dana & Walker, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

WORSTER, J. On exceptions. The plaintiffs, attorneys at law, seek to recover of the defendant compensation for legal services

rendered it in connection with the claim for refund of taxes hereinafter mentioned.

Objection to the maintenance of the suit having been raised on behalf of the Republic of Nicaragua, on the ground that the defendant was one of its instrumentalities, the action was dismissed in the court below, and the matter is brought here on plaintiffs' exceptions to that ruling.

The defendant is a Maine corporation, organized under the general corporation law of this state, with an authorized capital stock of $3,300,000. It appears from its corporate certificate that, among other purposes, it was organized, stated very briefly, to acquire, construct and exploit any railway or steamship lines within the Republic of Nicaragua, and to perform all acts, operations and contracts in connection therewith, and in order to carry out said purposes, to acquire, own and exploit, in whole or in part, and under any legal title, any concessions, rights and properties which the company may acquire from the Republic of Nicaragua, or from any company, enterprise or individual. The corporation was also authorized to make, issue and sell, pledge or otherwise dispose of promissory notes, bills of exchange, checks, drafts and other evidences of indebtedness, whether secured or unsecured, and to do and enter into all civil and mercantile acts and contracts for the carrying out of the company's purposes, including the issue of mortgage bonds or obligations.

The defendant having paid to the United States taxes amounting to approximately $641,115, employed the plaintiffs to obtain a repayment of said sum by way of refund. Then, as alleged in the plaintiffs' declaration:

> ". . . it developed that defendant was an instrumentality of the Nicaraguan Government and that that Government owed the United States approximately $484,000, and that the United States would not pay any tax refund in approximately the sum of $641,115 without offsetting the amount owed to it by said government of Nicaragua; that it seemed advisable to plaintiffs to settle on that basis, to wit, have $484,000 debt owed to the United States paid up, plus receiving a cash payment from the United States of the balance of tax refund; that

> the plaintiffs negotiated this settlement to the point where the settlement was practically completed when the Nicaraguan Government, unbeknown to the plaintiffs, sent a special agent to the United States to handle the matter and said special agent took up the negotiations where they had been carried by said plaintiffs, and without allowing them to participate in said negotiations, prevailed upon the Department of State to cause the United States Government and the Government of Nicaragua to enter into a treaty under which there would be an offsetting of the two claims, one against the other, and the payment of a cash refund to the Government of Nicaragua in the amount of $72,000, which treaty was executed on April 14, 1938 and pursuant to said treaty the claims were offset and $72,000 was duly paid by the United States; that said settlement, as affected by said treaty, resulted in a money benefit to the defendant of $556,000. . . ."

That some foreign governments own and operate railroads is so well known that we take judicial knowledge of that fact. *Oliver American Trading Co., Inc.* v. *Government of the United States of Mexico et al.*, 5 F. (2d), 659; *Mason* v. *Intercolonial Railway of Canada*, 197 Mass., 349, 83 N. E., 876, 16 L. R. A. (N.S.), 276, 125 Am. St. Rep., 371, 14 Ann. Cas., 574.

And the plaintiffs must be considered as admitting, at the very outset, that, in connection with the claim for refund of taxes, the defendant was an instrumentality of the Republic of Nicaragua, for they allege in their declaration that "it developed that defendant was an instrumentality of the Nicaraguan Government," and they are bound by that allegation. 20 Am. Jur., Evidence, section 630, page 532 *et seq.*

An action cannot be maintained in our courts against a foreign government, or against any of its departmental agencies, through and by which such government discharges its governmental activities, if that government, by proper procedure, objects to the maintenance of the action.

Whether or not a defendant in a given case is such a departmental agency of a foreign government, and whether or not the action is maintainable, can be determined by the court if the issue is therein

raised as a judicial question, only in those cases where the matter has not already been settled as a political question by the executive branch of our government through diplomatic channels.

In the instant case, objection to the maintenance of this action, on the ground that the defendant was an instrumentality of the Republic of Nicaragua, was presented to the court below in three different ways:

(1) By the defendant.

This question, however, cannot be successfully raised by the defendant corporation. *Kunglig Jarnvagsstryelsen* v. *Dexter & Carpenter, Inc.*, 32 F. (2d), 195. Certiorari denied. 50 S. Ct., 32, 280 U. S., 579, 74 Law Ed., 629.

(2) By the duly accredited Minister of the Republic of Nicaragua to the United States, who appeared as a friend of the court and formally stated the Republic's objection to the maintenance of the action on the ground above mentioned, supported by his affidavit that he was authorized so to do.

The right to immunity from suit may be claimed for the foreign government by its accredited and recognized representative, with the sanction of that government. Re Muir, 254 U. S., 522, 41 S. Ct., 185, 65 Law Ed., 383.

(3) By the Assistant United States Attorney for the District of Maine, who appeared as *amicus curiae* by permission of court, and, acting under instructions from the Attorney General of the United States, at the request of the Secretary of State of the United States, represented to the court the position of the Nicaraguan government as made through the diplomatic channels of the Department of State of the United States.

Objection may properly be raised through diplomatic representations "to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction." Re Muir, *supra*.

But the plaintiffs contend that there is nothing in the case to show that this claim of the Republic of Nicaragua has ever been recognized and allowed by the executive department of this government. We think otherwise.

The record in the instant case discloses that the Nicaraguan Legation, on behalf of its government, notified the Secretary of State of the United States of the pendency of this action, and requested the Secretary of State to inform the court that

> ". . . the defendant in this action is an instrumentality of the Government of Nicaragua and that the Nicaraguan Government does not consent to the prosecution of this action in the courts of the United States and that in view of these circumstances the Court mentioned should refuse further to entertain prosecution of the action and order it dismissed."

Thereupon, the Secretary of State sent a written communication to the Attorney General of the United States, a copy of which is before us, in which it is stated, among other things, that "in relation to the foregoing the Legation makes the following statements." This was followed by a recital of the facts presented by the Legation, in which appears the following paragraph:

> "The defendant corporation was and is, in fact, an instrumentality of the Government of Nicaragua, and has been so recognized by Your Excellency's Government, in connection with the said claim for refund of taxes, and in the treaty itself."

A copy of the claim of the Legation, including the statement just quoted, relating to the recognition by this government, was incorporated by the Secretary of State in the communication sent by him to the Attorney General of the United States, requesting him to "instruct the appropriate United States Attorney to appear before the Court at this hearing and to represent to the Court the position of the Nicaraguan Government as above set forth."

It is apparent that that "position of the Nicaraguan Government as above set forth," which was to be presented to the court at the request of the Secretary of State, was twofold. It was not only claimed by that government that the defendant was and is an instrumentality of the Republic of Nicaragua, but that the defendant has been so recognized by our government "in connection with the said claim for refund of taxes, and in the treaty itself."

Whether or not that statement, relative to the recognition by this government and to the treaty, was true, was peculiarly within the

knowledge of the executive department of our government. If it had been untrue, the Secretary of State would not have permitted such an assertion of fact concerning the alleged conduct of our government in an international affair to be incorporated in his communication, designed to be ultimately presented to the court for action, without denial or explanation. The mere fact that such a statement was incorporated by the Secretary of State in his communication, without any comment whatsoever thereon, must be taken as a tacit assent to the truth of that statement.

And so we conclude that it appears that the executive branch of this government has not only recognized and allowed the claim made by the Republic of Nicaragua, to the effect that this defendant was an instrumentality of that Republic in connection with said claim for refund of taxes, but that that fact had been recognized by our government in a treaty, which is, perhaps, the most solemn form of recognition.

And since this claim of the Republic of Nicaragua has already been recognized and allowed by the executive branch of our government, it would be the duty of the court to grant the immunity prayed for "upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction." *Compania Espanola, etc.* v. *The Navemar*, 303 U. S., 68, 58 S. Ct., 432, 82 Law Ed., 667.

But the plaintiffs, relying on the case of *Lamont et al.* v. *Travelers Insurance Company et al.*, 281 N. Y., 362, 24 N. E. (2d), 81, further contend that the action should not have been dismissed because neither the Attorney General of the United States nor the Assistant United States Attorney for the District of Maine suggested a dismissal. It is not necessary that a suggestion of dismissal should have been made by either of them.

The instant case is unlike the *Lamont Case.* In that case, and in *Hannes* v. *Kingdom of Roumania Monopolies Institute* (1940), 20 N. Y. S. (2d), 825, although acting at the suggestion of the Secretary of State, the Attorney for the United States was very careful to present to the court what amounted to nothing more than a mere plea of immunity made by the foreign government, thus raising only an issue of fact to be decided by the court; for, in each of those cases, it was explicitly stated that the matter was presented

"for such consideration as the Court may deem necessary and proper." It is no wonder that the court concluded from that presentation, so carefully and qualifiedly made, that the executive branch of our government had not indicated that it had taken any position as to the foreign government's claim of sovereignty, but had left the issue to be determined by the court on the facts and the law.

In the case at bar, however, no question is raised by the Attorney for the United States for judicial determination. On the contrary, in effect, by way of suggestion, he called the attention of the court to the fact that the executive branch of our government, which is supreme in its own sphere, had already acted in the matter, and that the claim made by the Republic of Nicaragua "through the diplomatic channels of the Department of State of the United States" to the effect that the defendant corporation was and is, in fact, an instrumentality of the government of Nicaragua, had already been recognized by the government of the United States in connection with said claim for refund of taxes, and in the treaty itself.

It having been shown by that suggestion, appropriately made, that the executive branch of government had already acted in the manner aforesaid, it became the duty of the court to dismiss the action for that reason, without proceeding to trial on the issues of fact raised by the suggestion of immunity from suit which had been filed in court in behalf of the Republic of Nicaragua. It had become a political and not a judicial question. The action was properly dismissed. The proper dismissal of the action is not affected by the reason given for the dismissal. *Snell* v. *Libby*, 137 Me., 62, 15 A. (2d), 148; *Helvering* v. *Gowran*, 302 U. S., 238, 58 S. Ct., 154, 82 Law Ed., 224; *J. E. Riley Invest. Co.* v. *Commissioner of Int. Rev.*, 311 U. S., 55, 61 S. Ct., 95, 85 Law Ed., 35.

Since the case was properly dismissed because of the action taken by the executive branch of the government, it follows that the court had no jurisdiction to pass upon the contention of the plaintiffs to the effect that the Republic of Nicaragua had waived its claim of immunity from suit by employing as its instrumentality this defendant, which, under the general corporation laws of this state, may sue and be sued, and so that question is not properly before us. Therefore, the case of *Coale et al* v. *Societe Co-operative Suisse des*

Charbons, Basle et al., 21 F. (2d), 180, and that of *United States* v. *Deutsches Kalisyndikat Gesellschaft et al.*, 31 F. (2d), 199, and similar cases relied on by the plaintiffs, where the claim of immunity from suit was raised by the foreign government as a judicial question to be decided by the court, are not in point.

Plaintiffs take nothing by their exceptions.

The mandate is

Exceptions overruled.

ALEXANDRA E. MOORE, LELA EMERY MARQUISE DE TALLEYRAND, AND AUDREY PRINCESS ANNA ILYINSKY

vs.

THOMAS EMERY, JOHN J. EMERY, JR., AND GIRARD TRUST COMPANY.

Hancock. Opinion, March 12, 1941.

TRUSTS. WILLS. EQUITY.

Equity as a necessary adjunct to its control over trusts has assumed jurisdiction to instruct or direct a fiduciary, whether an executor or a trustee, as to his duties in the administration of the estate committed to his care. The directions are given where the fiduciary is in doubt as to the proper performance of his duties because it is recognized that he should not in such cases be required to act at his peril.

Courts will not construe will during the existence of a particular estate to determine future rights, whether event which may give rise to future controversy is certain to happen, as death of a life tenant, or depends on a state of facts which is contingent and uncertain.

The donee of a power of appointment does not hold title to the property which is subject to the power, but merely acts for the donor in the disposition of it.

Where donee of power of appointment may appoint to anyone including himself the power is general, if only to a class the power is special. If the special power permits the donee to bar one or more members of the class from receiving a por-

tion of the property it is exclusive; if every member of the class is entitled to some portion, the power is said to be non-exclusive.

Inclination of courts has been in cases of doubt to construe powers as non-exclusive.

The principle of a court, in construing a will, is to determine the intent of the testator which must be found from the particular language which he has used read in connection with the will taken as a whole and in cases of doubt in the light of the surrounding circumstances.

On report. Bill in equity brought by Alexandra E. Moore *et al.*, asking for a construction of certain clauses of the will of John J. Emery, deceased. Case remanded to the sitting justice for a decree in accordance with this opinion. Case fully appears in the opinion.

David O. Rodick of
Deasy, Lynam, Rodick & Rodick, for complainants.
Maurice Bower Saul and Raymond M. Remick of
Saul, Ewing, Remick & Saul
Frank W. Gray, for respondents.
Harold H. Murchie, for the Guardian *ad litem.*

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

THAXTER, J. This case is before us on report. Alexandra E. Moore, Lela Emery Marquise de Talleyrand, and Audrey Princess Anna Ilyinsky now known as Princess Dimitri Djordjadze, three of the children of John J. Emery, late of Bar Harbor, bring a bill in equity asking for a construction of certain clauses of his will. Coupled with the prayer for construction is one that the Girard Trust Company, the trustee under the will and a defendant in this action, be instructed as to the proper disposition of cash received from the sale of stock warrants and rights and as to the status of certain stock dividends including fractional shares and script received by it as trustee. The defendants named in the bill are two sons of the testator, and the Girard Trust Company. A guardian *ad litem* was appointed to represent and act for the minor children of the children of the testator and all issue not in being of the children of the testator. The defendants named in the bill and the guardian

ad litem filed answers, and joined in the prayer of the bill for construction of the will and for instructions to the trustee.

A review of the facts is necessary for a solution of the issues properly presented by the pleadings.

John J. Emery died September 5, 1908, leaving a large estate. His will was admitted to probate in Hancock County November 4, 1908. His widow, Lela A. Emery, waived the provisions of the will in her favor and elected to take by descent in accordance with the provisions of R. S. 1903, Chap. 77, Sec. 13. She is therefore not concerned with the present litigation. At the age of eighteen she had married Mr. Emery who was then fifty-eight. In 1902, possessed of a very large estate, he drew his own will and died six years later at the age of seventy-three, leaving two sons and three daughters, the youngest of whom, Audrey, was born two years after the execution of the will. The testator was not a lawyer and his attempt to draft a very complicated will to give effect to certain dispositions of his property which he did want and to prevent its passing in certain ways which he did not want has posed for his children many problems, some immediate, some remote or contingent, but all of which they have bundled up with more or less despair and present to this court for solution.

Under the provisions of the will, Thomas J. Emery his brother, was appointed executor, and the Girard Trust Company was named trustee. He gave to his widow the use of certain real estate and personal property so long as she should remain his widow, and, after providing for a number of bequests not of importance in this proceeding, gave the balance of the estate to the trustee. One third of the income remaining in the hands of the trustee with the exception of income on accumulations was to be paid to the widow until the time when what was called in the twenty-third clause of the will the "final distribution" of the estate should be made. As the widow waived the provisions of the will for her benefit, they are not of importance except in so far as they may throw light on the general purposes which the testator had in mind.

He then directed in clauses nine and ten that on any son reaching the age of twenty-one years the trustee should set apart for him the sum of $50,000.00 in trust and should pay the income to him. He then in clauses eleven and twelve made a similar provision for each of

his daughters. In clause thirteen he provided that on a son reaching the age of thirty years, or if he should marry at an earlier age with the consent of his mother or guardian, an advancement was to be made to him of $150,000.00. A similar provision in clause fourteen was made for each daughter; but instead of her share being paid outright it was to be held in trust during her life and she was to receive only the income. By the provisions of clause sixteen whenever a son should reach thirty-five years of age a further advancement was to be made to him of $150,000.00. A similar provision by clause seventeen was made for each daughter; but as in the case of the first advancement her share was to be held in trust. The eighteenth clause of the will provides for the termination of the above special trusts for the daughters. It reads as follows:

> "The special trusts created in clauses 11th, 12th, 14th and 17th of this will shall terminate at the death of each daughter. Each daughter is hereby given the power to dispose of by will the principal of the trusts created in her favor, provided it be bequeathed to my descendants. At the death of each daughter of mine, I direct my Trustee to pay or transfer so much of my estate as may be held in special trust for the said daughter, to the executor or executors of the will of said daughter to be disposed of as provided in such will to my descendant or descendants. If a daughter of mine die intestate leaving issue, I direct my Trustee to pay the principal of her special trusts to her legal representative. If any of my daughters die intestate and without issue, the special trusts created in her favor shall revert to my estate."

The next clause of the will is significant as showing the fear which the testator had that a daughter's husband might obtain control of the money paid to her. It directs that payments by the trustee shall be made so far as possible by direct communication with the daughters and "free from the control of any husband."

Clause twenty provides that until the "final distribution" so called any surplus income of the principal trust as distinguished from the special trusts above mentioned shall be added to the principal as accumulations. But there is a proviso that in case of misfortune suffered by any child advancements could be made by the

trustee to such child or to his or her children from this accumulated income, such advancements to be charged against the share of such child in final distribution.

By the provisions of clause twenty-five the trust fund of $50,000.00 set up for each son when he should reach the age of twenty-one years was to be paid to each when he should reach the age of thirty-nine years. When this has been done it should be noted that each son will have received outright $350,000.00 and similarly each daughter, when she shall have arrived at the age of thirty-five years, will have received a like amount to be held for her in trust during her life, she to have the right to dispose of the principal by will as provided in the eighteenth clause of the will.

By clauses twenty-three and twenty-four the will provides for what the testator calls "the final distribution of my estate." What is the principal trust, being the balance of the estate in the hands of the trustee is to be disposed of in the following manner. When the youngest surviving son arrives at the age of forty years, the trustee is directed to appraise the estate, to add thereto the sum of any advancements made to any children or their issue, including therein all payments made to the sons, and the value of the special trusts set up for the daughters, "and then to divide the sum total produced by this addition into as many equal parts as I may leave children living at the time of the arrival of my youngest son at the age of forty years and including as representing one equal part the issue of any child who may have deceased, and also one equal part to my widow, if she be then living, and thereupon to pay and transfer to each of my sons one of the said equal parts, or so much property as will equal one of the said equal parts, deducting from each share so paid or transferred, the sum of the advancements made to him. One equal share shall be allotted to my widow and one equal share shall be allotted to each daughter and one equal share shall be allotted to the issue of any deceased child of mine, after deducting from the share of each the sum of all advancements and of special trusts for her benefit to each daughter or to the issue of any child who may have deceased. Upon such distribution of my estate all rights of my widow under clause 7th of this will shall cease and determine, but the right to use and occupy my residences as provided shall continue until her death or remarriage."

The twenty-fourth clause of the will, which provides for the termination of the trusts set up in the twenty-third clause reads as follows:

> "I hereby direct that the shares in this division allotted to my widow and to my daughters shall be held by my Trustee for them during their lives for their benefit, the income to be paid to each and at the death of each the principal shall pass to my descendants only, and in the manner, in equal or unequal shares, and at the time prescribed in the wills of each one. In the event of my widow or daughter or daughters dying intestate, the share of each so dying shall be distributed among my descendants only, and equally according to the statutes then in force."

It is perhaps well to call attention to the twenty-sixth clause of the will which expresses the intention of the testator to treat all of his children exactly alike, except of course with respect to the control by the daughters over the principal of their shares. The twenty-eighth clause of the will also makes plain the testator's purpose that the issue of a deceased child is to succeed to the rights of the parent.

The real problems which the parties desire solved, in so far as the construction of the will is concerned, arise primarily over the meaning of the eighteenth clause of the will which provides for the disposition of the special trusts set up for the daughters and over the twenty-fourth clause which provides for the disposition of the trusts set apart for them under the twenty-third clause. As has been pointed out, we are not concerned with the widow's share as she waived the provisions of the will.

In 1921 a bill in equity was brought in the Supreme Judicial Court in Hancock County seeking a construction of clause twenty which provides for the accumulation of income and to determine if the provisions of clause twenty-three relating to the termination of the main trust were illegal. An agreement was reached between all the parties and a decree was entered April 14, 1923, providing that all future income from this so-called main or principal trust should be distributed quarterly until the final distribution of the estate should take place as provided in the twenty-third and twenty-fourth

clauses of the will. The decree also provided that all the income which prior to that date had been accumulated should be held in separate trusts to be known as "Accumulation Trusts," and that the income from each should be paid to each of the respective beneficiaries quarterly until the death of a beneficiary or until January 28, 1938, whichever event should first occur, the date fixed being the time when the youngest son would reach the age of forty years, the date set in the will for the so-called final distribution. The principal of each accumulation trust was then to be paid over to each beneficiary outright and free of all trusts excepting that as to the daughters there was to be deducted an amount sufficient to set up the special trusts, the final payment to establish the trust for the youngest daughter being due January 4, 1939, when she would reach the age of thirty-five.

This summary indicates the problems created by the terms of the will. But that is not all. The plaintiffs allege on information and belief that the trustee of the main and special trusts has received in cash from the sale of rights to subscribe and warrants approximately $120,000.00 and that there is a doubt whether this money is principal or income within the meaning of the will. Also it is alleged that there are in the inventory of the main trust stock dividends, including fractional shares and script, some of which were declared out of current earnings and some as a redistribution of capital, and that a controversy has arisen as to whether these are principal or income. The bill prays for a determination of these questions. The Girard Trust Company in its answer admits these allegations of the bill and joins in the prayer.

The bill in equity was filed November 7, 1938, and was amended July 26, 1939. A hearing was had March 28, 1940, at which time the cause was reported to this court. The bill shows that all of the children of the testator have survived and the time for the so-called final distribution has arrived. At the time of the hearing we discover from the testimony of Mr. Grimes, the assistant trust officer of the Girard Trust Company, that the situation with respect to the estate was substantially as follows:

Including the special trusts, the accumulation trusts set up under the decree of April 14, 1923, and the trusts provided for in the so-called final distribution, the Girard Trust Company was trustee of

sixteen separate trust funds totalling $13,190,189.39. Mr. Grimes' figures do not exactly check but this is substantially the correct amount. These would be apportioned among the children of the testator as follows:

For Thomas:

1. One-fifth part of the general trust	$1,275,036.02
2. Accumulation Trust	1,072,220.72
3. One-fifth of fund representing proceeds of corporate distributions where apportionment between principal and income is in doubt, approximately	24,000.00
	$2,371,256.74

For John J., Jr. the amount would be as follows:

1. One-fifth part of the general trust	$1,275,036.02
2. Accumulation Trust	1,396,362.00
3. One-fifth of fund representing proceeds of corporate distributions where apportionment between principal and income is in doubt, approximately	24,000.00
	$2,695,398.02

For Alexandra the set-up would be as follows:

1. One-fifth part of the general trust	$1,275,036.02
2. Accumulation Trust	1,120,929.43
3. One-fifth of fund representing proceeds of corporate distributions where apportionment between principal and income is in doubt, approximately	24,000.00
4. Special trusts under clauses 11, 14 and 17 of the will	350,000.00
	$2,769,965.45

For Lela the amounts would be as follows:

1. One-fifth part of the general trust	$1,275,036.02
2. Accumulation Trust	1,001,785.44
3. One-fifth of fund representing proceeds of corporate distributions where apportionment between principal and income is in doubt, approximately	24,000.00
4. Special trusts under clauses 11, 14 and 17 of the will	350,000.00
	$2,650,821.46

For Audrey it would be:

1. One-fifth part of the general trust	$1,275,036.02
2. Accumulation Trust	1,053,711.70
3. One-fifth of fund representing proceeds of corporate distributions where apportionment between principal and income is in doubt, approximately	24,000.00
4. Special trusts under clauses 12, 14 and 17 of the will	350,000.00
	$2,702,747.72

As the two sons are entitled to their shares outright, it makes no difference to them whether the amounts approximating $24,000.00 in the share of each represent income or principal. Depending on the construction placed on the powers of appointment given to the daughters under the eighteenth and twenty-fourth clauses of the will, the sons may have an interest in the proper allocation of these amounts set off for the daughters. The really important question in the case, however, concerns the ultimate disposition of the special trusts set up for the daughters under the eleventh, twelfth, fourteenth and seventeenth clauses of the will and of the general trusts set up for them under the twenty-third clause. The eighteenth clause provides for the disposal of the principal of the special trusts, the twenty-fourth clause for the disposal of the principal of the general trusts.

Before considering the many problems raised by these provisions of the will, let us consider that part of the bill which seeks instructions for the trustee relative to the status of stock dividends of corporations, including fractional shares and script, and of the cash received from the sales of warrants and rights to subscribe.

Equity as a necessary adjunct to its control over trusts has for a long time assumed jurisdiction to instruct or direct a fiduciary, whether an executor or a trustee, as to his duties in the administration of the estate committed to his care. The directions are given where the fiduciary is in doubt as to the proper performance of his duties because it is recognized that he should not in such cases be required to act at his peril. In cases of trusts such power was expressly given to courts of equity in this state prior to the enactment of the P. L. 1874, Chap. 175, conferring general equity powers. See R. S. 1871, Chap. 77, Sec. 5. The essential part of this provision relating to the grant of powers now reads as follows, R. S. 1930, Chap. 91, Sec. 36, X: "To determine . . . in cases of doubt, the mode of executing a trust. . . ." It was a right primarily given to the fiduciary for his protection and there are authorities which hold that the bill can be brought only by the fiduciary. *McAllister* v. *Elliott*, 83 N. H., 226, 140 A., 708, 65 C. J., 682. In the bill now before us, the request for instructions is made not by the fiduciary but by certain beneficiaries who combine a prayer for construction of the will with one for instructions to the trustee based in no sense on any ambiguity in the will but on doubts as to the status of certain assets received by the trustee since the trusts were established. The procedure is unusual. If all requisite facts were before us, it may be that in view of the answer of the trustee this court would give the instructions. But we do not decide this procedural question; for on other grounds we must decline to answer.

The plaintiffs in their bill allege on information and belief that the trustee has received over $120,000.00 from the sale of rights to subscribe and from the sale of warrants and that in the inventory of the main trust there are certain stock dividends, including fractional shares and script, some declared out of current earnings and some as a redistribution of capital. The court is then asked to determine whether such cash and the stock dividends, fractional shares and script declared out of current earnings are principal or

income. Nothing is said in the prayer as to the stock dividends which constituted a redistribution of capital. The answer of the trustee admits these allegations of the bill and joins in the prayer including a prayer for instructions as to the status of the stock dividends, fractional shares, and script which were a redistribution of capital.

This court in *Thatcher* v. *Thatcher*, 117 Me., 331, 104 A., 515, clearly laid down the general rule applicable to stock dividends. The opinion given in that case may contain the answers to all the inquiries addressed to us. But counsel for the Girard Trust Company urge upon us that the court in the Thatcher case was laying down the rule which should apply "under all ordinary circumstances" and that there may be here circumstances calling for the application of a different doctrine. They argue that a dividend might be in form a stock dividend but in reality a payment with all the incidents of cash and intended by the corporation as such. What, they ask, shall the trustee do under these circumstances? Furthermore, they admit that whether there should be an exception to the general rule depends, not only on whether the dividend is paid out of accumulated earnings, but also on whether those earnings had accumulated prior or "subsequent to the creation of the trust or the acquisition of shares by the trustee." Restatement, Trusts (1935), Sec. 236.

There is not a single fact set forth in the record to indicate whether any of the cash or dividends held by the trustee come within any of the exceptions to the rule of the Thatcher case suggested by the trustee. The trustee poses for us certain supposititious problems and asks us for instructions what to do in those cases. We see no reason why we should be called on to reassert the general rule already laid down by this court, nor should we be called on to enunciate any qualification of it without knowing that to do so will solve some actual and immediate problem of the trustee.

The trustee may at any time bring a bill setting forth specifically and in necessary detail the facts which give rise to the request for instructions. Until that procedure is followed we must decline to answer the questions propounded. The universal practice in such a case is well stated in *Equitable Trust Co.* v. *Pyle* (Del. Ch. 1938), 2 A. (2d), 81. The court, to use its own language, page 83, declined "to assume a state of facts not shown to exist and then proceed to express an opinion thereon."

This brings us to the prayers for the construction of the will. These should be divided into two classes. In the first one are those wherein the plaintiffs ask as to the meaning of the language in the eighteenth and twenty-fourth clauses of the will giving to them the power to dispose of the corpus of the trusts. In the second are those wherein this court is asked to decide what will happen in various contingencies on the death of a life tenant. We shall consider the second group first.

In the first place, the plaintiffs desire to know the meaning of the phrase in the eighteenth clause of the will "if any of my daughters die intestate and without issue the special trusts created in her favor shall revert to my estate," and particularly if that contingency arises whether the principal of each trust becomes intestate property of John J. Emery.

Secondly, they wish to be informed as to the meaning of the word "equally" as used in the twenty-fourth clause, their desire being to find out how the principal of a trust set-up for a daughter will go if a daughter should die intestate.

Thirdly, they desire to know the meaning of the word "issue" under the eighteenth clause of the will, and particularly whether, if a daughter should die intestate with issue, the issue would take the entire principal of the trust.

Fourthly, they want this court to tell them the nature and extent and interest of the executors and administrators of a daughter in a trust, if a daughter should die without exercising the power of appointment given to her under either the eighteenth or the twenty-fourth clause of the will.

Fifthly, they want to know whether under the eighteenth clause of the will a husband of a daughter would take any part of the trust fund of the daughter if the daughter should die intestate leaving issue.

Sixthly, they ask whether if a daughter dies leaving a will but without exercising the powers granted her under the eighteenth or twenty-fourth clauses of the will of the testator she dies intestate as that word is used in those provisions. In other words, they want to be informed whether the word "intestate" as there used refers to a failure to exercise the power or whether it means dying without leaving a will.

In these prayers and certain additional general ones the plaintiffs are asking this court to determine what will happen at the termination of the life estates set up for a daughter, if the daughter fails to exercise the powers of appointment given her under the will. One event is certain but remote; the other may never happen at all.

With a unanimity seldom found elsewhere in the law, courts have consistently refused during the existence of a particular estate to construe wills in order to determine future rights, and it makes no difference whether the event which may give rise to a future controversy is certain to happen, as the death of a life tenant, or depends on a state of facts which is contingent and uncertain. *Huston* v. *Dodge*, 111 Me., 246, 88 A., 888; *Connolly* v. *Leonard*, 114 Me., 29, 95 A., 269; *McCarthy* v. *McCarthy*, 121 Me., 398, 117 A., 313; *Minot* v. *Taylor*, 129 Mass., 160; *Coghlan* v. *Dana*, 173 Mass., 421, 53 N. E., 890; *Hall* v. *Cogswell*, 183 Mass., 521, 67 N. E., 644; *Wheaton* v. *Batcheller*, 211 Mass., 223, 97 N. E., 924; *May* v. *May*, 167 U. S., 310, 323, 17 S. Ct., 824; *Walker* v. *First Trust & Savings Bank*, 12 F. (2d), 896; *Cowles* v. *Cowles*, 56 Conn., 240, 13 A., 414; *Eaton* v. *Eaton*, 88 Conn., 269, 91 A., 191; *Bridgeport Trust Co.* v. *Bartholomew*, 90 Conn., 517, 97 A., 758; *Brinn* v. *Brinn*, 213 N. C., 282, 195 S. E., 793; *Strawn* v. *Trustees of the Jacksonville Female Academy*, 240 Ill., 111, 88 N. E., 460; *Gafney* v. *Kenison*, 64 N. H., 354, 10 A., 706; *Goddard* v. *Brown*, 12 R. I., 31; *In Re Berlin's Estate*, 6 N. Y. S. (2d), 1005; *Archambault's Estate*, 232 Pa., 344, 81 A., 314; *Straus's Estate*, 307 Pa., 454, 161 A., 547; *Warren's Estate*, 320 Pa., 112, 182 A., 396; *Quigley's Estate*, 329 Pa., 281, 198 A., 85; *Morse* v. *Lyman*, 64 Vt., 167, 24 A., 763; Gardner on Wills, 356-357; Page on Wills (2d), Sec. 1402; Pomeroy Eq. Jur. (4 ed.), Sec. 1157.

A glance at these cases will indicate the reluctance of courts to construe a will in order to decide any question which does not relate to some certain and immediate problem facing either a beneficiary or a fiduciary of an estate.

In *Huston* v. *Dodge*, supra, the court was asked by the trustees of the residue of an estate to construe certain clauses of a will. The court refused to answer those questions which related to matters which were contingent. One of these concerned the disposition of a farm which the testator left to his nephew for life with remainder to

his nephew's son, Isaac, with a proviso that if Isaac should die before his father, the remainder should go to the then living children of the father. The court was asked to decide where the remainder would go in case Isaac and all the other children should die before the father. The court held that the trustees had no present interest in the question and would have none at all unless the remainder should at some future time fall into the residue. The court laid down the general principle in the following language, page 248: "The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is about to arise, until it is imminent. Then if the trustee needs present advice to know how to meet the contingency, it will be given to him. Then the parties interested in the issue can be heard under the conditions and circumstances as they may exist at that time. They should not be prejudiced. Nor should there be any judgment until there is occasion for it."

The other two cases from our own court are to the same effect.

In *Strawn* v. *Trustees of Jacksonville Female Academy*, supra, the court said, page 118: "Courts of equity will never entertain a suit to give a construction to or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain."

In *Minot* v. *Taylor*, supra, a trustee under a will brought a bill for instructions. The question was whether a remainder after a life estate was void for remoteness. The court held that the trustee could not properly ask for instructions until the death of the life tenant. Referring to the question asked, the court said, page 164: "It may involve the rights of persons not now in being, and does not affect the present duty of the trustees."

In *Warren's Estate*, supra, the court held that when life estates were validly appointed it would not pass on the validity of the remainders before the termination of the life estates. It is interesting to note that the Girard Trust Company, one of the present defendants, was a party in this case.

Counsel do not cite in their voluminous briefs any of the above cases. That the question was in mind, however, is evident for in complainants' brief there is an argument which seeks to justify the appeal to the court to settle these many contingent problems.

In the first place it is argued that the statute giving to the court the power to construe wills should be given a liberal interpretation. Conceding this to be true, it does not justify this court in ignoring well-settled principles established by courts generally and particularly by our own court. None of the cases cited by counsel would warrant this court in acceding to their requests. In each of the Maine cases cited, *Baldwin* v. *Bean*, 59 Me., 481 ; *Haseltine* v. *Shepherd*, 99 Me., 495, 59 A., 1025, and *Richardson* v. *Richardson*, 80 Me., 585, 16 A., 250, the problem was one of immediate concern to the parties before the court.

In the second place the amendment to the bill in equity alleges that it is necessary, in order for the plaintiffs to determine whether or not they should exercise the powers of appointment granted to each under the eighteenth and twenty-fourth clauses of the will, to know to whom the property would go if they should fail to exercise such powers. But this court is not called on to decide in advance every future question which may arise under a will merely because to do so may be helpful to a beneficiary or other interested party in determining a present course of conduct. That is the province of counsel. Furthermore either a duty is imposed on each daughter to exercise the powers granted, or if not, a privilege is certainly given to each to direct the ultimate disposition of the principal of the trusts ; and it may well be a question whether this court is called on to construe a will and to give advice on the assumption that that duty will not be carried out or that that right will not be exercised.

We therefore must refuse to construe those portions of the will which provide for the disposition of these trusts in case the plaintiffs should fail to exercise the powers of appointment. The other prayers of the plaintiffs are of a different nature. We are asked as to the extent of the authority given to the daughters under the eighteenth and twenty-fourth clauses of the will to dispose of the principal of the trusts. In order that they may properly exercise these powers they are entitled to an answer to these prayers. Particularly they ask whether the powers are general or special, and if special whether they are exclusive or non-exclusive.

Though the will of the testator is inartificially drawn, his purpose is clear to set up for each daughter certain trusts under the terms of which each beneficiary would ultimately be entitled to the income of

her share for life. Likewise it is clear that he gave to each the power within certain limits to direct by will how the principal of her share should go. In attempting to determine the scope of this right, we must bear in mind that the donee of a power of appointment does not hold title to the property which is subject to the power, but merely acts for the donor in the disposition of it. In the ordinary case, therefore, the property is regarded as passing from the donor of the power to the person appointed by the donee to receive it. *Hogarth-Swann* v. *Weed*, 274 Mass., 125, 174 N. E., 314.

Powers of appointment may be roughly divided into two classes, general and special, and the special into two groups, exclusive and non-exclusive. If the donee of the power may appoint to anyone including himself the power is general, if only to a class the power is special. If the special power permits the donee to bar one or more members of the class from receiving a portion of the property it is exclusive; if every member of the class is entitled to some portion, the power is said to be non-exclusive.

Each of the daughters of John J. Emery, the testator, is empowered by her will to dispose of the principal of the trusts set up for her benefit, provided the property is given to his "descendants." Counsel for the plaintiffs do not contend that these powers are general. They do argue, however, that a daughter being within the designated class, has a right to appoint to her own estate; and secondly they claim that the powers are exclusive.

There can be no doubt what the testator means by "my descendants." He used these words in their ordinary sense to denote his issue however remote. It is apparent from his will that he contemplated that his property would be used for many years for the comfort and enjoyment of those of his own blood. It is true that he gave to the sons their shares outright; but he postponed the final distribution to them until they became of mature years. Though his daughters were very young when he drew his will and when he died, he knew that the time would come when they would marry and there was always present in his mind the fear that their husbands might obtain control of the property which he desired them to have. He accordingly left their shares in trust, and even imposed the duty on the trustee to prevent in so far as possible any husband from obtaining even the income. He was much more alert in foreseeing the problems which

would beset his children than he was skilful in providing for their solution. But the general intent which he had in mind is clear, and to hold that a daughter has the power to appoint by will to her own estate would give to her a control over her share which it was the obvious purpose of the testator to prevent. For an analogous case see *Abbott* v. *Danforth*, 135 Me., 172, 192 A., 544, in which this court gave effect to the testator's true intent in preference to adhering slavishly to a mere formalism. We therefore hold that a daughter does not have the right to appoint to her own estate.

Are the powers of appointment exclusive?

Courts seem to be in great confusion in determining whether powers are exclusive or non-exclusive. This is in part due to certain incidents of non-exclusive powers which have a very direct relation to the case now before us. If the appointment to be valid must include all members of the class, a question immediately arises, in what proportions must they share? At law any share however nominal was sufficient. But it was recognized that for all practical purposes there would be no such thing as a non-exclusive power if the donee could by the allotment of a purely nominal amount such as $1.00 satisfy the requirement that all members of the class must be included. Equity, therefore, intervened and held that the share given to every member of the class must be substantial and not illusory. Thus was developed the doctrine of illusory appointments. For a discussion of this subject see *Kemp* v. *Kemp*, 5 Ves. Jr., 849. The common-law rule had the advantage of being certain; the equitable doctrine raised many problems. These are well stated by Sir William Grant, the Master of the Rolls, in *Butcher* v. *Butcher*, 9 Ves. Jr., 382, 391-393: "It is impossible to have considered a case of this kind with a view to its decision, without wishing, that Judges in Equity had either never assumed control over the execution of discretionary powers; or had laid down rules, by which their successors might be guided in the exercise of that jurisdiction. To say, that under such a power an illusory share must not be given, or, that a substantial share must be given, is rather to raise a question than to establish a rule. What is an illusory share, and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune, which is the subject of the power? If so, what is the sum, that must be given, to exclude the interference of the

Court? What is the limit of amount, at which it ceases to be illusory, and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole, or of the share, that would belong to each upon an equal division?" Most serious of all is that there is no rule to guide the donee of the power, who must, at the risk of having the whole appointment fail, determine in advance what the court is going to decide are the limits of the discretion given to him. The dissatisfaction became so acute that the whole doctrine of illusory appointments was abolished in England by statute and courts were left where they were before equity intervened. Lord St. Leonards Act, 1 Wm. IV, Chap. 46. It is interesting to note that this act bears the name of the author of the most authoritative text-book on this subject. In this country some courts have adopted the doctrine of illusory appointments. *Barrett's Ex'r* v. *Barrett*, 166 Ky., 411, 179 S. W., 396; *New* v. *Potts*, 55 Ga., 420; *Herrick* v. *Fowler*, 108 Tenn., 410, 67 S. W., 861; and see *Melvin* v. *Melvin*, 6 Md., 541, 550; *Portsmouth* v. *Shackford*, 46 N. H., 423, 427; *McCamant* v. *Nuckolls*, 85 Va., 331, 338, 12 S. E., 160. Other courts have refused to accept it. *Hawthorn* v. *Ulrich*, 207 Ill., 430, 69 N. E., 885; *Lloyd* v. *Fretz*, 235 Pa., 538, 84 A., 450. And see *Lines* v. *Darden*, 5 Fla., 51; *Fronty* v. *Godard*, 1 Bail Eq., 517, 530 (S. C., 1833). See cases collected in note L. R. A., 1916, d 498. In *Ingraham* v. *Meade*, 3 Wall., Jr., 32, the court said, page 40: "However much the chancellor may laud his great principle that equality is equity; how does he know that even extreme inequality was not the very purpose and object of the power." In the instant case, if we should hold the powers non-exclusive, all of these difficulties would be accentuated because the class designated may well be a large one before the power granted to a donee can become operative.

Strangely enough the inclination of courts has been in cases of doubt to construe powers as non-exclusive. *Kemp* v. *Kemp*, supra; *Alexander* v. *Alexander*, 2 Ves. Sr., 640; *Hawthorn* v. *Ulrich*, supra; *Degman* v. *Degman*, 98 Ky., 717, 34 S. W., 523; *Faloon* v. *Flannery*, 74 Minn., 38, 76 N. W., 954; *Melvin* v. *Melvin*, supra; *Varrell* v. *Wendell*, 20 N. H., 431; *Cameron* v. *Crowley*, 72 N. J., Eq., 681, 65 A., 875; *McKonkey's Appeal*, 13 Pa., 253; *Cathey* v. *Cathey*, 28 Tenn., 468. In all but two of these border line cases the

class was a limited one confined to children or grandchildren, immediate objects of a testator's regard, and there is accordingly some reason for holding that it was the intent of the testator that all should share. It is also important to note that in one other, *Hawthorn* v. *Ulrich*, the court though holding the power non-exclusive, refused to apply the doctrine of illusory appointments.

On the tendency to construe powers as non-exclusive the court in *Barrett's Ex'r* v. *Barrett*, supra, page 415, makes the following pertinent observation: "It seems to us . . . , that a careful review of the English authorities will produce the conviction that the mischief arose, not from any fault of the illusory appointment doctrine, or of the rules establishing the distinction between powers exclusive and non-exclusive, but rather because of a too liberal construction of certain powers of appointment as non-exclusive, when in point of fact the evident intention of the testator was to grant an exclusive power."

In re Veale's Trusts, 4 Chap., Div. 61 (affirmed 5 Chap., Div. 622), is peculiarly applicable to the situation before us. A testatrix bequeathed a fund to her daughter for life and after her death "to and amongst my other children or their issue, in such parts, shares, and proportions, manner and form, as my said daughter Mary Elizabeth Veale shall by deed or will direct, limit, and appoint. . . ." It was held that the power was exclusive. Jessel, M. R., one of the greatest equity judges, points out the almost insuperable difficulties if the donee of a power of appointment must include every member of an indefinite class such as issue or descendants who may be living at the death of the donee; and then he argues that a power is exclusive "when the objects of it are not readily ascertainable, or, as in this case, cannot possibly be ascertained."

On this general subject see Restatement, Property (1940), Sec. 360.

The guiding principle of a court in construing a will is to determine the intent of the testator, which must be found from the particular language which he has used read in connection with the will taken as a whole and in cases of doubt in the light of the surrounding circumstances. There is no particular magic in isolated phrases. Language which may mean one thing when applied to one state of facts may have to be interpreted differently when applied to an-

other. Precedents are of less importance than elsewhere in the law; and to quite an extent each case must be considered by itself. As Judge Powers has well said in *Bradbury* v. *Jackson*, 97 Me., 449, 456, 54 A., 1068, 1070: "No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another." These principles are fully discussed in *Abbott* v. *Danforth*, supra. See also *In re Veale's Trusts*, supra, 65.

As we read the will of this testator and consider something of his family, his environment, and his manner of life, we learn much more than the mere words tell. We sense both high hopes and deep forebodings, and withal a spirit of justice tempered with affection for a family whom he knew he would probably leave when they were very young. From such an approach, it is not difficult to determine what he desired when he gave to his daughters the right by will to dispose of the principal of these trusts to his descendants.

There is a difference in the language used in the eighteenth and twenty-fourth clauses conferring the power on the daughters. This does not, however, appear to have any particular significance. In the eighteenth clause the power is given to dispose of the principal by will, "provided it be bequeathed to my descendants." In the twenty-fourth clause it is provided that "the principal shall pass to my descendants only, and in the manner, in equal or unequal shares, and at the time prescribed in the wills of each one." Nor in the view we take of the will is the phrase "in equal or unequal shares" conclusive as indicating that he intended every descendant to take a part.

When the testator drew his will he was a man sixty-seven years old, wealthy, experienced, and confident of his own judgment. He had married a young wife who was then but twenty-seven and they had four children. His oldest daughter was eight, his youngest hardly more than a year old, and one child was not born. He knew well the dangers to which this family would be subject in dealing with a very large estate. But he wished them to have it. Substantially all of it he left in trust. Relatively small amounts were to be given to the sons at various times, but when the youngest son should reach forty they were to have their shares outright. In the case of both the sons and the daughters, however, the greater part of the income was

to accumulate until the time set for distribution to the sons. Had this provision not been modified by the decree of this court entered in 1923, the estate now would amount to far more than the $13,000,000.00 involved in the litigation before us. His will indicates clearly that he had the same feeling of affection for all his children and wished to treat them and all children subsequently born in exactly the same way. That purpose appears by implication throughout the will and is expressly stated in the twenty-sixth clause. "It is my intention," he says, "that all my children shall share equally in my estate." He was determined in so far as he could accomplish it, however, that his property should pass from his children to his children's children and so on. He was apparently willing to trust his sons when they should reach mature years to handle their own shares. In the case of his daughters, he feared the influence of their husbands; and therefore they were to have no control over the principal. He did not, however, wish to deprive them of the right which the sons had to direct the disposition of it by will but he restricted their power so that they could only give their shares to his descendants. What he may have expected of his sons, he required of his daughters. Subject to that limitation it is apparent that sons and daughters were on the same footing. As he drew his will, he realized that the ultimate distribution from his children might not take place for seventy-five years or even longer, and he wisely did not attempt to control this right of disposal, except in so far as he imposed the restriction on the power of his daughters. Knowing that the power of a daughter could only be exercised by will, it surely was not his purpose to require her to disperse her share among what might be at the time of her death a very large group, some of whom she might neither care about nor even know. It was not the father's intent to so restrict a daughter's power that she could not appoint her share to her issue if she wished. The meticulous care which the testator took to set apart a separate share for each child and to provide that in case of the death of a child "prior to the falling in of any trust . . . the issue of such child shall share in such distribution," is utterly inconsistent with the claim of counsel for the sons that the power of appointment is non-exclusive. If the power is non-exclusive and the doctrine of illusory appointments applies, consider the situation when the first daughter dies. If she

exercises the power given her, she must by will give a substantial amount to each surviving brother and sister and to each of their issue, for they are all descendants and would be members of the class. Under such a construction the interest of her own children would be dissipated to favor those who already have their own portions. It would be hard to imagine a more inequitable result nor one which was farther from the expressed and implied purpose of the testator. If he had intended to bind the daughters by such a rigid rule, he could just as well have settled himself how the remainder would go after the death of a life tenant. That he did not do so shows that he trusted to the unfettered judgment of the daughters to dispose of the principal of the trusts to his descendants in the light of events which he could not anticipate. His thoughts were apparently in accord with those of Lord Mansfield who in his will summed up his purpose as follows: "Those who are dearest and nearest to me best know how to manage and improve, and ultimately in their turn to divide and subdivide, the good things of this world which I commit to their care, according to events and contingencies which it is impossible for me to foresee, or trace through all the mazy labyrinths of time and chance."

We therefore hold that under the eighteenth and twenty-fourth clauses of the will of John J. Emery each of his daughters has a power to appoint to the descendants of the testator the principal of the trusts set up for her benefit and that such power is exclusive in the sense that she has the right to limit the distribution to such member or members of the class as she may see fit.

Case remanded to the sitting justice for a decree in accordance with this opinion; reasonable counsel fees and fees for guardian ad litem *to be charged against the various trusts to be fixed by him in accordance with the interest of the respective parties in the issues properly presented to this court.*

BARNES, C. J., having retired, did not join in this opinion.

LEONARD A. PIERCE AND JAMES M. PIERCE
TRUSTEES UNDER THE WILL OF CLARENCE H. PIERCE

vs.

MILDRED M. ADAMS.

Aroostook. Opinion, March 14, 1941.

MORTGAGES.

Whether certain land was covered by mortgage described as "my homestead farm" was required to be determined by ascertaining intention of the parties as expressed in mortgage in light of circumstances existing at time it was made.

A mortgage of "my homestead farm" in a certain town, in the absence of any qualifying words, is sufficiently definite to cover the whole farm without further description, where its location and the land of which it is composed can be ascertained.

The description of real estate appearing in some existing instrument or record may be incorporated in a mortgage by reference.

Where a mortgage or deed contains a specific and definite grant of land by such descriptive words as "my homestead farm," or by some specific name by which it is known, so that it can be located, the title to the whole described or named parcel will pass, in the absence of anything in the deed itself indicating a different intention, although less than the whole parcel was covered by the description in the instrument or record to which only a bare reference was made.

A different intention is not usually to be inferred from a mere recital of the purpose of the grantor to convey the same premises which had been conveyed to her by a certain deed which did not include the whole property; for, as a general rule, a specific grant is neither enlarged nor limited by such a recital. The same rule prevails even if a bare reference to such other deed was made for a particular description of the premises conveyed.

On exceptions. Real action by Leonard A. Pierce *et al.*, trustees under the will of Clarence H. Pierce, against Mildred M. Adams to obtain possession of certain real estate in Smyrna in the County of Aroostook. Cause heard before the presiding justice without a jury, with right of exceptions reserved on questions of law. Defendant

filed exceptions. Exceptions overruled. Case fully appears in the opinion.

Bernard Archibald,
Aaron A. Putnam, for plaintiffs.
Walter A. Cowan, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.; MURCHIE, J., DISSENTING.

WORSTER, J. On exceptions. This is a real action to obtain possession of certain real estate in Smyrna in the County of Aroostook, consisting of the west half of lot numbered four, range four, and also a seven-rod strip off from the west side of the east half of said lot, excepting one acre in the southwest corner of lot 4. The cause was heard by the presiding justice without a jury, with right of exceptions reserved on questions of law.

Both parties claim title to said premises under Florence J. Adams.

The plaintiffs claim under a mortgage given by said Adams to Clarence H. Pierce, in 1922. After the death of Pierce, the mortgage was foreclosed by the executors of his will, by publication, in 1934, and the premises were conveyed by them to themselves as trustees, in 1939. The defendant claims under a deed to her from said Adams, dated April 18, 1935.

If the demanded premises were a part of the "homestead farm" of said Adams when the mortgage was given, and were covered thereby, then the plaintiffs are entitled to possession thereof; otherwise not.

The real estate is described in the mortgage as follows:

> "My homestead farm in said Smyrna, being the same conveyed to me by my husband, Charles B. Adams, late of said Smyrna by his deed dated March 14, 1914, recorded in Aroostook Registry of Deeds, at Houlton, in Vol. 273, Page 432, to which deed and the deeds and references therein referred to reference is hereby made for a more particular description of the premises hereby conveyed."

Whether the demanded premises were therein included, and covered thereby, must be determined by ascertaining the intention of the parties as expressed in said mortgage, in the light of the cir-

cumstances existing at the time it was made. *Perry* v. *Buswell*, 113 Me., 399, 94 A., 483.

At the time this mortgage was executed, and for a long time prior thereto, Florence J. Adams owned the whole of said lot 4, of which the demanded premises are a part, together with the adjacent fourteen-acre lot in the southwest corner of lot 3, excepting only a one-acre lot in the southwest corner of lot 4 with which we are not concerned. She acquired this property by separate deeds of several parcels, from different grantors. That part thereof constituting the demanded premises was formerly the farm of Isaac L. and Arabella M. Adams, and was conveyed by them to said Florence J. Adams in 1899, after her marriage to Charles B. Adams, who then, and until 1914, owned the adjoining farm. In that year, he conveyed that farm of his to his wife, by his deed described in said mortgage. Thereafterwards she carried on both farms, which she had acquired as aforesaid, as one farm, and was doing so at the time she executed this mortgage of "my homestead farm."

Undoubtedly, a mortgage of "my homestead farm" in a certain town, in the absence of any qualifying words, is sufficiently definite to cover the whole farm without further description, where its location and the land of which it is composed can be ascertained, although such a brief description of property may not be the best and safest form of conveyancing.

Leaving for later consideration the reference to the deed and the record thereof, there are no qualifying words in the instrument before us, to indicate any intention on the part of the grantor to convey in mortgage anything less than the whole of "my homestead farm." If the grantor had intended to mortgage only a part thereof, or so much thereof as was conveyed to her by her husband, she would naturally have so stated. Her failure to indicate her intention to convey only a part tends to show that she intended to convey the whole farm in mortgage, although she referred only to the deed she received from her husband.

That she did not always give all of the sources of her title to this combined property when called upon to state how she acquired it, is definitely shown by the record. In 1934, she made an application to the Federal Land Bank for a loan. That application was admitted in evidence without objection, and is before us. It appears from her

answers therein, and from the sketch of the property included, that she claimed that all of the premises acquired by her as aforesaid constituted but one parcel, and that all of said premises had been conveyed to her by said Charles B. Adams, by his deed described in the mortgage. No mention was made in the application of the deed to her of the demanded premises, although they were definitely included in the sketch or plan of the farm, and the acreage given in the application covered all of the property conveyed to her as aforesaid by both deeds.

But the defendant, nevertheless, contends that the expression "my homestead farm" in said mortgage was expressly qualified and limited by the clause "being the same conveyed to me by my husband, Charles B. Adams, . . . by his deed" dated and recorded as stated in the mortgage "to which deed . . . reference is hereby made for a more particular description of the premises hereby conveyed" so that all that was actually covered by the mortgage were the premises deeded to said Florence J. Adams by said Charles B. Adams as aforesaid.

Among the cases supporting the defendant's contention are *Barnard* v. *Martin*, 5 N. H., 536, and *Woodman* v. *Lane*, 7 N. H., 241, both of which were criticized by the court in *Melvin* v. *Proprietors*, 5 Metc., 15, 38 Am. Dec., 384.

The defendant, however, specially relies on *Allen* v. *Allen*, 14 Me., 387. In that case, the land was described in the deed as "my homestead farm, situated in said Jay, being lot No. 13, in range 4," and the court held that the title to only lot 13 passed thereby, although the grantor occupied other land adjacent thereto.

That case is unlike the case at bar. While the grantor in the *Allen* case purported to convey "my homestead farm" yet by designating the lot number, such "definite boundaries" were thereby pointed out in the deed that the property intended to be conveyed could "be located with entire precision." There the intention to limit the "homestead farm" to lot 13 was not left to a bare reference, but was disclosed on the very face of the deed itself.

Not so in the instant case. No "definite boundaries" of "my homestead farm" are pointed out on the face of this mortgage, so that the property covered thereby could "be located with entire precision," as was done in the deed of the *Allen* case.

Here it can only be ascertained that Charles B. Adams conveyed to Florence J. Adams less than the whole of the farm then occupied by her, by resorting to the deed or record to which reference was made.

Of course the description of real estate appearing in some existing instrument or record may be incorporated in a mortgage by reference. That is well settled. But where a mortgage or deed contains a specific and definite grant of land by such descriptive words as "my homestead farm," or by some specific name by which it is known, so that it can be located, the title to the whole described or named parcel will pass, in the absence of anything in the deed itself indicating a different intention, although less than the whole parcel was covered by the description in the instrument or record to which only a bare reference was made. *Keith* v. *Reynolds*, 3 Me., 393; *Drinkwater* v. *Sawyer*, 7 Me., 366; *Crosby* v. *Bradbury*, 20 Me., 61; *Andrews* v. *Pearson*, 68 Me., 19; *Jones* v. *Webster Woolen Company*, 85 Me., 210, 27 A., 105; *Meir-Nandorf* v. *Milner*, 34 Idaho, 396, 201 P., 720; *Lodge's Lessee* v. *Lee*, 6 Cranch, 237, 3 Law Ed., 210; *Trott* v. *Joselyn et ux.*, 222 Mich., 452, 192 N. W., 536.

A different intention is not usually to be inferred from a mere recital of the purpose of the grantor to convey the same premises which had been conveyed to her by a certain deed which did not include the whole property; for, as a general rule, a specific grant is neither enlarged nor limited by such a recital. *Smith* v. *Sweat*, 90 Me., 528, 38 A., 554. See, also, *Jones* v. *Webster Woolen Company*, supra.

And the same rule prevails even if a bare reference to such other deed was made for a particular description of the premises conveyed. *Crosby* v. *Bradbury*, supra.

In the case last cited, it was held that a deed of "a certain saw mill site in Levant village" with other property, "meaning to convey . . . all the premises" in a certain other described deed, "reference thereto for a more particular description of said premises," will pass the mill and land thereunder, notwithstanding the grantor acquired by the deed to which reference was had, but a part of the premises upon which the mill was erected.

The opinions in *Allen* v. *Allen*, supra, and *Crosby* v. *Bradbury*, supra, were both written by Chief Justice Weston, and the distinc-

tion between the two cases is recognized in *Stewart* v. *Davis et al.*, 63 Me., 539, and in *Perry* v. *Buswell*, supra.

The instant case falls within the rule laid down in *Crosby* v. *Bradbury*, supra, and there is ample evidence in the record to sustain the finding of the presiding justice, that

> "There can be no doubt that Florence J. Adams understood that her entire farm was included in the Pierce mortgage . . . that the title to the entire lot Four passed by the Pierce mortgage in accordance with the intention of the parties at the time it was executed."

We find no merit in the exceptions, and the mandate is

Exceptions overruled.

DISSENTING OPINION

MURCHIE, J. I regret that I am unable to concur in the opinion of the majority, that the mortgage under consideration, dated April 29, 1922, covered not only a tract of eighty-seven acres, which the mortgagor had acquired March 14, 1914, under the deed identified and referred to therein "for a more particular description of the premises" mortgaged, but also a tract of eighty-six acres, title to which had come to her, from a different grantor, December 27, 1899. The decision seems to me to run counter to a well-considered line of authorities which are founded on principles long established and generally accepted.

The basic rule, undoubtedly, as stated in the majority opinion, is that intention, at the time of the execution of an instrument of conveyance, is the controlling consideration in the construction thereof. *Allen* v. *Allen*, 14 Me., 387; *Field* v. *Huston*, 21 Me., 69; *Hathorn* v. *Hinds*, 69 Me., 326; *Ames* v. *Hilton*, 70 Me., 36; *Perry* v. *Buswell*, 113 Me., 399, 94 A., 483.

The issue hinges solely on the tests to be applied in determining intention, and, implicit therein, what consideration is to be given to an earlier conveyance, clearly identified in the words of description, and therein referred to, for a "more particular description of the premises" conveyed.

Numerous rules for determining intention are declared in the texts and sanctioned by decided cases. The bed-rock of all was expressed by Blackstone in the words that "construction be made upon the *entire* (italics mine) deed, and not merely upon disjointed parts of it." Volume 1, Book II, Par. 517, Jones Edition. The Massachusetts Court, in *Salisbury* v. *Andrews*, 19 Pick., 250, phrased the same rule,

> "Every . . . word . . . shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, . . . or description . . . *every word* shall be presumed to have been used for some purpose, and *shall be deemed to have some force and effect*, if it can have." (All italics mine.)

Our own court, as late as 1915, *Perry* v. *Buswell*, supra, declared to the same effect,

> ". . . the expressed intention . . . gathered from all parts of the instrument, *giving each word its due force*. . . . It is the intention effectually expressed, not merely surmised." (Italics again mine.)

The words of description in the instant mortgage are quoted in full in the majority opinion. The exact construction there declared would have resulted if more than forty words of that description had been omitted, namely:

> "by his deed dated March 14, 1914, recorded in Aroostook Registry of Deeds, at Houlton, in Vol. 273, Page 432, to which deed and the deeds and references therein referred to reference is hereby made for a more particular description of the premises hereby conveyed."

All these words, representing more than two-thirds, in bulk, of the language used to identify the property mortgaged, seem to be brushed aside as entirely meaningless surplusage.

The principal of incorporation by reference was early recognized in, and has long had the sanction of, this court. *Field* v. *Huston*, supra; *Marr* v. *Hobson*, 22 Me., 321; *Pierce* v. *Faunce*, 37 Me., 63; *Brown* v. *Holyoke*, 53 Me., 9. Under that principle, heretofore, a

recorded conveyance, properly identified and referred to in a later one, has been held, always, to be part and parcel of that later one, as fully, and as effectually, as if set forth at length therein. As a precursor to the formal promulgation of this principle, the court had previously declared, in *Drinkwater* v. *Sawyer*, 7 Me., 366, that,

> "A purchaser looks to the terms in which his purchase is described, rather than to the source from which his grantor derived title, *unless reference is made to a prior deed for a description of the premises.*" (Italics mine.)

That the foundation of the principle lies deep at the roots of that very intention, which is the controlling consideration, is clear from language, phrased differently, but reiterating an identic meaning, in several of the cited cases:

> "From the whole deed . . . , it was the manifest expectation of the parties, that resort to other means of determining . . . the land embraced would be necessary, and we entertain no doubt, that it was the intention . . . , that all the land described in the deed referred to should be conveyed." *Marr* v. *Hobson*, supra, at 328.

> "there is no reference to any deed, and the want of any such reference by date, names of the parties to it, or otherwise, leaves a just inference that no such deeds were present or examined, and that no confidence was placed in the reference to the records to ascertain the extent of the estate conveyed." *Field* v. *Huston*, supra, at 72.

> "There is no declaration that the conveyance . . . was to be resorted to for the purpose of fixing boundaries or to make the description more certain and particular." *Hathorn* v. *Hinds*, supra, at 332.

> "when it appears that it was so intended . . ." *Perry* v. *Buswell*, supra, at 402.

The negation of Mr. Justice Shepley in *Field* v. *Huston*, supra, seems charged with meaning, and, while clearly having no authoritative effect, suggests strongly that reference to a deed, which is de-

scribed with accuracy, carries the clear inference that it was physically present and examined when the reference was made. The record in the instant case discloses that the description attempted to be incorporated conveyed a tract made up of a half-lot (less a seven-rod strip), and fourteen acres out of the adjoining lot, and that it gave the source of title of the then grantor.

That there are limitations on the efficacy of incorporation by reference is beyond doubt. Decided cases show clear distinctions between *general* and *specific* descriptions, and hold that those which are specific control those which are general. *Keith* v. *Reynolds*, 3 Me., 393; *Child* v. *Ficket*, 4 Me., 471; *Thorndike* v. *Richards*, 13 Me., 430; *Allen* v. *Allen*, supra; *Crosby* v. *Bradbury*, 20 Me., 61; *Hathorn* v. *Hinds*, supra; *Brunswick Savings Institution* v. *Crossman*, 76 Me., 577; *Jones* v. *Woolen Co.*, 85 Me., 210, 27 A., 105; *Brown* v. *Heard*, 85 Me., 294, 27 A., 185; *Smith* v. *Sweat*, 90 Me., 528, 38 A., 554; *Perry* v. *Buswell*, supra.

The majority opinion founds decision, perhaps equally, on the potency of a *specific* description, and on the binding force of a factual finding in the Trial Court, although the latter is referred to only in a single short phrase in the closing paragraph. It holds that the words "my homestead farm" constitute a "specific and definite grant", which renders futile any attempt to incorporate a description by reference, no matter how meticulous the care with which the instrument containing it is identified, or how positive the declaration of intent that it be referred to for descriptive purposes. It cites no precedent, either for giving a definite legal signification to the words "my homestead farm", or for enlarging the rule of the controlling force of specific descriptions so as to emasculate that of incorporation by reference. In *Andrews* v. *Pearson*, 68 Me., 19, one of seven cases cited to illustrate the controlling force of specific descriptions (and the only one which deals with "farm" property), the identical words here under consideration were followed by language locating, and reciting the acreages of, several parcels said to comprise it. One parcel was recited to contain "12½ acres", where in fact it contained twenty-five. The court, remarking that the farm was one of "ancient and well defined boundaries", which could hardly be claimed in the instant case, where the eighty-seven-acre tract and

the eighty-six-acre tract had been in common ownership less than nine years, declared,

> "No one can read the description . . . and doubt that it was the intention . . . that the whole farm should pass."

In the deed then under consideration there was no reference whatsoever to any earlier conveyance. There the issue was entirely between the descriptive words "my homestead farm" and an acreage recital, long recognized as one of the least important for determining intention. 8 A. J., 790, Par. 63; 16 A. J., 601, Par. 289.

Opposed to *Andrews* v. *Pearson*, supra, as to the *general* or *specific* nature of descriptive words such as "homestead farm", or specific names, by which property is known, "so that it can be located" (to use the words of the majority opinion), are authorities in our own court, and elsewhere. *Thorndike* v. *Richards*, supra; *Allen* v. *Allen*, supra; *Stewart* v. *Davis*, 63 Me., 539; *Shaw* v. *Bisbee*, 83 Me., 400, 22 A., 361; *Smith* v. *Sweat*, supra; *Taylor* v. *Mixter*, 28 Mass., 341; and even *Perry* v. *Buswell*, supra, on which the majority so extensively relies. In that case the words "my homestead place", clearly comparable with the present "my homestead farm", were not only recognized as constituting merely a *general* description, but their lack of that controlling force which is carried by a *specific* description was emphasized by the statement,

> "It may be that the words 'my homestead place', or the reference, either, alone, ought not to overcome the limitation. . . . But the use of both . . . lends so much weight to . . . intention . . . , we think it . . . decisive."

The majority opinion distinguishes the case of *Allen* v. *Allen*, supra, from the instant one by a recital that the intention to limit a "homestead farm" to a named lot was disclosed, in that case, "on the very face of the deed itself" and "not left to a *bare* reference", To my mind not only is the word "bare" a misnomer to designate so explicit a reference as that before the court, but the recitals in the two instruments are so similar that the same law should govern the construction of both. In each case the party signing the instrument of conveyance owned a tract which could be described, properly, as a

homestead farm, yet a part thereof might be described in like manner with equal accuracy. In the early case the words "being lot thirteen in range four", following the words "my homestead farm", although no plan was identified or referred to for purposes of description, were held to restrict the conveyance to the smaller tract because the lot designation, ushered in by use of the word "being", disclosed an intention to restrict the operative effect of the general words to such part of the "homestead farm" as might be contained within limits thereafter to be determined by reference to a plan. In the present case the *same* descriptive words, followed in the *same* way by the same restrictive word "being", are in turn followed by a complete, definite, and accurate identification of a recorded conveyance, and an express declaration that the purpose of identification and reference is "for a more particular description" of the property intended to be covered by the general descriptive words. A quotation from the opinion in the earlier case will illustrate how nearly on all-fours the recitals in one are with the recitals in the other,

> "That there might be no mistake, as to what the homestead he conveyed included, he gave it definite boundaries. They were such, as can be located with entire precision. The land thus described, was his homestead; but it would seem, not the whole of it. The term unexplained, would be understood to mean the whole, but explained, the conveyance embraces only the homestead within the limits given, if any regard is to be paid to the intention of the grantor, which is too plainly expressed to be misunderstood."

Point is made in the majority opinion, phrased in language similar to that used in *Perry* v. *Buswell*, supra, which dealt with very dissimilar facts, that the absence of such qualifying words as "a part of", or "so much thereof", prior to the general descriptive words, "tends to show" an intent to convey "the whole farm". Like the words earlier quoted herein from Mr. Justice Shepley in *Field* v. *Huston*, supra, the words so adapted have no authoritative force. It may be noted further that they were used, not to restrict the force and effect of an incorporated reference, but to give added force and effect to the combined power of the words "my homestead farm" *and*

such a reference. The court there dealt with the restrictive effect of a *general* recital, ushering in the words of description, that the property conveyed was in a named town whereas the *whole* farm, all of which was described in the incorporated deed, was partly in an adjoining one. That the word "being", used to usher in a reference, has long been considered to imply a restriction limiting the effect of a description, even a specific one, by the bounds incorporated, was recognized by Chief Justice Weston in *Crosby* v. *Bradbury*, supra, where he said,

> "The reference contains no negative words, that the grantor conveyed only what Garland had in that deed conveyed to him; *although that would have been the fair implication*, if no discrepancy of description had been disclosed. . . ." (Italics mine.)

This case (*Crosby* v. *Bradbury*), cited in the majority opinion, remains to be considered. So far as I am aware, it is the only one heretofore decided in this court where a reference clearly made and definitely referred to "for a more particular description" has been declared ineffective *as against anything short of a metes and bounds description.* The descriptive words there used were "a certain saw mill site" and the limitation, asserted on the basis of an incorporated reference, would have cut out of the conveyance a part of the land under the mill. Earlier decisions in this court, and elsewhere, had already given to such words a definite signification in law which constituted them as the equivalent of a specific description (*Maddox* v. *Goddard*, 15 Me., 218; *Whitney* v. *Olney*, 3 Mason, 280), and the decision was that the reference "should not be permitted to restrict a description, so definite, tangible and perfect, as" found in the words "saw mill site".

The majority opinion notes that the mortgagor acquired title to the "several" parcels of which the entire farm was composed by "separate" deeds. The "several" parcels included half a particular lot (less a single acre), and seven acres adjoining off the other half of the same lot, which parcels made up the eighty-six-acre tract conveyed to her in 1899, and that other half (less the seven acres aforesaid), and fourteen acres off an adjacent lot, which parcels made up the eighty-seven-acre tract conveyed to her in 1914 and described in the deed attempted to be incorporated.

The alternative ground of the majority opinion lies in the established rule that where a case is heard without the intervention of a jury, factual findings of the justice below are final, if supported by evidence in the record. *Ayer* v. *Railway Co.*, 131 Me., 381, 163 A., 270, *and cases cited therein.* As to this ground, perhaps, it is enough to say that, as I read the cases, established principles leave here no loophole for a factual finding on evidence of supposed intent. Expressed intent was clear, that the property described was that eighty-seven-acre tract acquired in 1914.

In my earlier consideration of this cause, it had seemed to me that the exceptions might properly be overruled on the ground of their insufficiency. The essential recitals in the bill of exceptions are, that the defendant excepts to the "finding and judgment", that the "finding" is made a part of the bill, and that the defendant considers herself "aggrieved by the aforesaid finding and judgment". Here is no specification as to whether the basis of the claim is an implied ruling that determination of intent shall be based on collateral evidence, rather than on proof as to the property conveyed by the incorporated deed, or determination of the fact of intention without evidence. Here again is no specification of the particular question as to the interpretation of a written document which is requisite to bring that issue of construction before the court within the rule laid down in *American Sardine Co.* v. *Olsen*, 117 Me., 26, 102 A., 797. The majority of the court, however, has treated the bill of exceptions as if both issues were properly before us. Because of that fact, no attention is here paid to the question of procedure.

On the authority of our own decided cases, it seems to me that the action of the court below, in its failure to rule that the incorporated reference controlled the amount of property conveyed by a clear indication of the intention of the mortgagor in that regard, represents exceptionable error, and that the entry should be

Exceptions sustained.

STATE OF MAINE *vs.* JAMES DALE IRONS.

York. Opinion, March 18, 1941.

CRIMINAL LAW.

Where record on appeal from order denying motion for new trial by one convicted of crime contains full transcript of testimony taken before jury and on such motion, question is whether presiding justice's decision was wrong in view of all the evidence in case and that presented on the motion.

The tests to be applied to newly discovered evidence to determine whether or not it lays a proper foundation for granting a new trial are that the evidence is such as will probably change the result if a new trial is granted; that it has been discovered since the trial; that it could not have been discovered before the trial by the exercise of due diligence; that it is material to the issue, and that it is not merely cumulative or impeaching.

On appeal. Respondent was convicted of the crime of rape. Following conviction respondent filed motion for new trial. On denial of motion appeal filed. Motion overruled. Appeal dismissed. Judgment for the State. Case fully appears in the opinion.

Joseph E. Harvey, County Attorney for the State.

Sewall, Varney & Hartnett,

Henry M. Fuller, for respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.; WORSTER, J., concurs only in the result stated in the mandate.

MURCHIE, J. This case comes to the court on appeal by a respondent convicted in the Superior Court under an indictment alleging rape. Following conviction, he filed a motion for a new trial in the usual form, which was later supplemented by a motion adding to the allegations that the verdict was against the law, the evidence and the weight of the evidence, two additional reasons as follows:

"4. Because said defendant did not have time to adequately prepare his defense, because he was notified of the holding of the trial only one day in advance, to wit, Tuesday, the sixteenth day of January, 1940, and said trial was held on the following day, Wednesday, the seventeenth day of January, 1940.

5. Because the said defendant has since the date of the trial made diligent search for new and other evidence, which was impossible for him to do prior to trial because of lack of sufficient time for preparing therefor, and said defendant has discovered one, Ralph W. Cummings, a disinterested person of York, who has knowledge of certain material and appurtenant facts pertaining to the conduct and whereabouts of the defendant at the time the alleged misconduct of the defendant was alleged to have taken place, and in support of said motion and said newly discovered evidence, hereto is annexed the affidavit of said Ralph W. Cummings as to the material evidence for the defendant's defense, which through no fault of the defendant was not produced at his trial."

Neither the first supplemental allegation nor the routine declarations of the usual motion for a new trial were pressed by counsel for the respondent. At his insistence that "The sole question . . . is the correctness of the . . . ruling on the supplementary motion . . . on newly discovered evidence," in which position counsel for the State joined, we have disregarded technical procedural questions and limited consideration to the single point alleged in paragraph numbered 5 above. It is unfortunate that on this ground also his motion includes a recital that the impossibility of obtaining the *new* evidence in question was "*because of lack of sufficient time for preparing*" for the trial (italics ours), since this may seem to relate back to the recital that he did not have time to prepare his defense "because he was notified of the holding of the trial only one day in advance." The indictment alleges an offense committed on December 3rd and the trial was held on the 17th day of the following month. The record shows that the respondent was confronted by the parents of the alleged victim the very evening of the event and then definitely accused of the assault so that it is clear by any test that practically one and one-half months were available to him for prep-

aration. The case contains no suggestion that the respondent made any attempt in the Trial Court to secure more time for investigation.

The record contains a full transcript of the testimony taken out before the jury, which returned a verdict of "guilty," and of that taken out on the supplemental motion. In such a case, as has heretofore been stated by this court, the question must be whether or not the decision of the presiding justice, from which the appeal was taken, was wrong "in view of all the evidence in the case and that presented on the motion." *State* v. *Dodge*, 124 Me., 243, at 246, 127 A., 899, at 901.

London v. *Smart*, 127 Me., 377, at 379, 143 A., 466, quotes with approval the tests enumerated in Ruling Case Law (20 R. C. L., 290) to be applied to newly discovered evidence to determine whether or not it lays a proper foundation for granting a new trial. These tests are (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching. It may be doubtful if the so-called newly discovered evidence in this case meets the test that it could not have been discovered before the trial by the exercise of due diligence. If the allegations of the first supplemental reason above quoted be interpreted literally, it may appear that the respondent made no effort to prepare his defense until after he was notified that the trial was to be held on the succeeding day, but the record itself, in the evidence taken out before the justice who heard the motion, discloses that it was not in fact discovered until after the trial and creates a reasonable inference that due diligence could not have produced it earlier. Accepting that record as satisfying the two tests of discovery and diligence, it remains only to apply the other three, and for this purpose an analysis of the testimony in the Trial Court is a necessary preliminary.

The record shows that the issue before the jury was clearly and narrowly drawn. Many facts are not in any manner in dispute, and these may be enumerated as follows: The respondent resided in York Village. The victim, whose home was in Eliot, approximately five miles distant from the home of the respondent, had worked in his

home as a combined domestic and nursemaid for three weeks prior to the event. On each Sunday the respondent had driven her from his home to her own sometime in the afternoon, and had called for her at her home in the middle of the evening. On the day in question, he had taken her to her home around three o'clock in the afternoon, and had arranged to call for her somewhat earlier than usual in order that she might be back at his house in time to permit him and his wife to attend a moving picture show. The victim left her home that evening, her clothing in proper array, at a time fixed by her and her father as between half past six o'clock and seven, in an automobile which called for her. She returned approximately within an hour, her clothing and person in disorder, in a physical condition, disclosed by the examination of a physician less than two hours after her return, which is consistent with her testimony. The evidence of the physician unquestionably proves that, whether the cause of that condition was rape or an act committed with her consent, and whether or not this respondent was a party to it, the experience through which she had recently passed was the first of its kind in her lifetime.

On these undoubted facts, the issue of guilt or innocence on the part of this respondent depended almost entirely on the testimony of the victim herself, although it may be said that there was some possible corroboration of her story in the testimony of her father, who claimed to identify the motor vehicle in which his daughter left her home shortly before the occurrence as that of the respondent. The testimony of the victim is definite and positive, that the respondent called for her at the prearranged time, and that instead of proceeding to drive her to his home, he drove his automobile into a little-used highway along the line of travel between the two homes and there committed the assault. The verdict necessarily involves a finding that the respondent at the time in question was away from his home long enough so that he could make two round trips between the two homes, traveling a distance of approximately twenty miles, in addition to the time necessary for the detour and assault.

The defense, in addition to the denial of the respondent, is based entirely on the claim of an alibi, wherein his own statement that he was at home at the time the assault, if there was an assault, must have been committed, and for a matter of hours prior to the time

thereof, and thereafter, until the parents of the victim called at his home to accuse him, he was not out of the house for a period of more than approximately ten minutes, an interval obviously insufficient to provide time for the trip and assault, is supported by the testimony of two additional witnesses. It is corroborated *directly* by his wife, who supports his "ten-minute" claim, and *indirectly* by a neighbor who states that he called at her home to procure milk at exactly quarter past seven. According to the testimony of the victim, he had procured this milk and had it in the automobile with him when he called at her house between half past six and seven o'clock.

On these conflicting stories the jury which heard the witnesses and had opportunity to observe them on the stand declined to accept the testimony of the respondent, his wife and the neighbor, and clearly accepted in full the testimony of the victim. Perhaps it may be assumed that the jurors found corroboration for her story, not only in the evidence of her father, heretofore noted, but in the fact that she correctly described the manner in which the respondent was dressed that evening, and that her departure from home came at the very time which by respondent's own story had been fixed as the time when he was to call for her.

The so-called newly discovered evidence is the testimony of an employee of the neighbor-witness who states that he was in the barn to which the garage of the respondent was attached from about seven o'clock to a quarter of eight in the evening when the offense is alleged to have been committed; that when he entered the barn, he noticed that the car of the respondent was in the garage, and that he later heard someone come out of respondent's house, get into respondent's car, drive off somewhere and return "in about five minutes." The door of the barn in which this witness was at work, taking some equipment off a truck located therein, was closed, and counsel for the respondent stated for the record, when the evidence was taken out, that no claim was made that this witness saw the respondent at any time during that interval. On cross-examination, this witness admitted that he identified the automobile of the respondent only from the fact that it was located in respondent's garage.

The justice who heard the testimony offered in support of the supplementary motion presided at the trial before the jury. Like the members of the jury, he was enabled to observe the conduct and de-

meanor of the witnesses on the stand, and to some extent had a better means of weighing the value of the evidence than is possible from examination of the transcript of the testimony. Careful consideration of all the evidence in the case and of that taken out on the motion seems to indicate that judgment on his part, that it did not meet the test of creating a probability that it would alter the verdict, is correct. In *Parsons* v. *Railway*, 96 Me., 503, page 507, 52 A., 1006, page 1007, where a new trial was granted, the court interpreted the requirements of this particular test as follows:

> "The true doctrine is, that before the Court will grant a new trial upon this ground, the newly-discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial."

This court has heretofore declined to grant a new trial in a case where the newly discovered evidence involved the claim that one of two witnesses on a very material point, the value of whose testimony depended on his ability to identify the respondent, was quoted after the conviction as saying that he must have been mistaken in his identification, *State* v. *Beal*, 82 Me., 284, 19 A., 458.

Bearing in mind that the jury had before it corroboration of respondent's statement that he had not been away from home more than ten minutes (which might have been considered biased testimony because of the relationship of the witness to the accused), and of his statement as to the time when he called for the milk (which came from a presumably disinterested witness), it is unlikely that the *new* evidence, with no positive identification of respondent's automobile and no pretense of identification of the respondent himself, would have changed the verdict; and it seems to this court that the action of the justice who heard the motion, particularly in view of the fact that the new evidence has no value except on the assump-

tion that it was the respondent himself who, at the particular time stated, drove his motor vehicle out of his garage and returned within a few minutes, was proper.

Motion overruled.
Appeal dismissed.
Judgment for the State.

JASPER HENDERSON *vs.* GEORGE RITCHIE.

Aroostook. Opinion, March 22, 1941.

CONTRACTS. ASSUMPSIT.

Where the claim of the owner of an automobile for pay for the damage to it, although believed at the time by the parties to be doubtful, was honestly made and settled in good faith, the settlement, which must be viewed as a compromise, was a sufficient and valid consideration for the defendant's promise to pay for the repairs.

Where motorist collided with cow on highway and defendant who owned cow was advised by state police officer that in accidents which he investigated animal owners assumed responsibility, instructions that if, on strength of statement of owner of cow to pay for repairs if statement of officer was correct, motorist took automobile to garage and had it repaired, then defendant was liable to motorist in amount of repairs, was not erroneous on ground that the promise was not absolute but conditional.

On motion and exception. Action of assumpsit by Jasper Henderson against George Ritchie on an alleged contract to pay for repairs on an automobile owned by plaintiff. Verdict for plaintiff. Defendant filed general motion for a new trial and an exception to the charge of the jury. Motion for new trial overruled. Exception overruled. Case fully appears in the opinion.

James P. Archibald, for plaintiff.

Pendleton & Rogers, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

STURGIS, C. J. This action of assumpsit comes forward for review on a general motion for a new trial and an exception to the charge to the jury.

Although there is some conflict in the testimony, the jury were warranted in finding that on July 22, 1939, the plaintiff's automobile was damaged in a collision with the defendant's cow, which was running at large in the highway. On demand for a settlement, being advised by a state police officer that in accidents which he had investigated, "The man who owned the animal took the responsibility," the defendant told the owner of the car, "If that is the case, take your car up to Harmon's and get it fixed and I will pay for it." The repairs were made at the designated garage at a cost of $173.02, but the owner of the cow refuses to pay the bill. The verdict was for the plaintiff for the full amount of the cost of the repairs.

The motion for a new trial cannot be granted. There can be no doubt that the claim of the owner of the automobile for pay for the damage to it, although believed at the time by the parties to be doubtful, was honestly made and settled in good faith. The settlement, which must be viewed as a compromise, was a sufficient and valid consideration for the defendant's promise to pay for the repairs. *Melcher* v. *Insurance Company*, 97 Me., 512, 517, 55 A., 411; *Merriman* v. *Thomas*, 133 Me., 326, 328, 177 A., 615.

The exception is directed to that part of the charge of the presiding justice in which he instructed the jury that:

> "If you believe that this statement was made by Mr. Ritchie to the officer, 'If that is the case you take your car up to Harmon's Garage and get it fixed and I will pay for it,' on the strength of that the plaintiff took his car to Harmon's garage and had it fixed, then the defendant is liable to the plaintiff in the amount in the sum of $173.02."

The error in this instruction claimed here is that, even if the jury should decide that the defendant made the statement to the state highway officer as related, they might also find that the promise to pay for the repair of the damaged automobile was not absolute, but conditional.

We do not think the contention made on this point is tenable. There was a conflict in the evidence as to what the defendant said

when he was called upon to pay for the damages to the automobile, but that question is not open on this branch of the case. If he made the statement attributed to him by the state highway officer, he unequivocally promised to pay for the repairs made necessary by the collision with his cow, and no reasonable inference to the contrary can be drawn from his words. With no question of sufficiency of consideration for the promise left in doubt on the record, the instruction as to liability as a matter of law was not error. *Horigan* v. *Chalmers Motor Company*, 111 Me., 111, 114, 88 A., 357.

Motion for new trial overruled.
Exceptions overruled.

UNITED STATES OF AMERICA, APPELLANT FROM DECREE OF JUDGE OF PROBATE, IN RE ESTATE OF CHARLES W. MORSE.

Sagadahoc. Opinion, April 2, 1941.

EXECUTORS AND ADMINISTRATORS. GUARDIAN AND WARD. PROBATE COURTS. STATUTE OF LIMITATIONS.

The limitation of R. S., Chap. 101, *Sec.* 15, *providing that actions not commenced within twenty months after the qualification of the administrator of an estate, does not have application against the federal government.*

It is for the Probate Court by proper proceedings to require a guardian to present a true account showing receipts and disbursements in behalf of his ward, when it is called to the attention of the Judge of Probate that there may be funds for which the guardian has failed to account.

When a person is appointed as the executor or administrator of an estate, who is himself debtor to the estate, the debt is not extinguished and such personal representative must account for the same as assets in his hands.

A decree of the Judge of Probate showing that the guardian of a deceased ward had not failed to account for anything could not be attacked so long as it stood in an entirely separate proceeding in the same court in an endeavor to charge the

deceased ward's administrator with a devastavit because he failed to account for assets alleged to have been in guardian's hands, but the amount due from the guardian to the estate was required to be judicially determined in the regular and proper way by proceedings in the Probate Court provided for that very purpose.

The Probate Court has exclusive jurisdiction, subject to appeal to the Supreme Court of Probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative. If a devastavit exists, it is the duty of that court to compel the executor to account for the amount lost to the estate by his fault. The Probate Court is invested with ample power in these respects.

Notwithstanding the resignation of the executor, he can still be cited into the Probate Court, and required to account for the matters claimed, if liable therefor. It can only be done in that court.

A ward cannot maintain an action against his guardian, respecting matters of his estate, until there has been a final accounting by the guardian and the balance due has been determined in the Probate Court and the administrator of a deceased ward, as his personal representative, is vested with no greater rights.

On exceptions. Proceedings in the matter of the estate of Charles W. Morse, deceased, wherein Harry F. Morse, as administrator filed his final account. The United States of America filed an appeal from the decree of the Judge of Probate claiming that it was a judgment creditor of the estate and was aggrieved by the decision. To decree of the Supreme Court of Probate affirming the decree of the Judge of Probate the United States of America filed exceptions. Exceptions sustained as to the allowance of the administrator's account, and the case remanded to the Probate Court for appropriate action. Case fully appears in the opinion.

John D. Clifford, Jr., U. S. Attorney,
Edward J. Harrigan, Asst. U .S. Attorney, for appellant.
Edward W. Bridgham,
John P. Carey, for appellee.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. On exceptions to decree of the Supreme Court of Probate affirming the decree of the Judge of Probate in Sagadahoc County.

The matter under consideration by the Judge of Probate was the final account of Harry F. Morse as administrator of the estate of Charles W. Morse. By the decree the administrator was found chargeable with assets as of the date of the death of decedent of the value of $9,755.21. The administrator was allowed for sundry payments $1,080.52, but was not allowed for items charged by him for services, or for fees of counsel. To the balance of the net estate, the Judge of Probate added interest at six per cent from the date of the appointment of the administrator to the date of the decree, so that the total sum with which the administrator was found chargeable was $11,887.22. The administrator took no appeal from this decision.

The United States of America, hereinafter designated as the Government, filed an appeal claiming that it was a judgment creditor of the estate, and was aggrieved by the decision.

The situation, so far as can be ascertained from the confused and jumbled record presented to the court, is as follows: In 1920 Charles W. Morse became surety on a bond given to the United States Emergency Fleet Corporation, which later became the basis of liability to the Government. In September, 1926, Harry F. Morse was appointed guardian of his father, Charles W. Morse, who had become *non compos*. When the guardian was appointed, the ward had no assets of his own, but under the will of his wife, Clemence C. Morse, who had recently died, was entitled during his lifetime to the income upon the residue of her estate after provision for bequests and annuities. The inventory filed in the estate of Clemence C. Morse showed personal assets of but $18,309.00. In July, 1927, Jennie R. Morse, a sister of Charles W. Morse, died and later in that year, equity proceedings were commenced, to recover assets held by the administrators of the Jennie R. Morse estate assertedly belonging to the estate of Clemence C. Morse. After a considerable time, an adjustment was made, as a result of which the Clemence C. Morse estate received additional assets. On settlement of her estate, the Probate Court on October 6, 1931 made an order of distribution, under which Charles W. Morse became entitled to the income for life on the residue, amounting to $175,918.00.

Aside from the income from the Clemence C. Morse trust fund, the guardian of Charles W. Morse received from the estate of

Charles H. Morse, by order of distribution dated July 5, 1932, assets appraised at $14,610.00.

Charles W. Morse died January 12, 1933. Harry F. Morse, his former guardian, was appointed administrator of his estate, and qualified May 2, 1933.

Harry F. Morse, as guardian, did not file any inventory until April 11, 1933. It appears that the assets included therein were the securities received from the Charles H. Morse estate.

On June 13, 1933, the Probate Court allowed the first and final account of Harry F. Morse, as guardian. This account showed the assets mentioned above, the income thereon, and amounts paid out which appear to be for certain expenses incurred on behalf of the ward during the year 1932 and until his death in January, 1933. They aggregate $1,943.00 and the balance of $13,079.00 was turned over by Harry F. Morse, as guardian, to himself as administrator of the estate of Charles W. Morse.

It is thus apparent that the guardian did not account for any income received from the Clemence C. Morse trust fund.

A few months after the appointment of Harry F. Morse as administrator, he filed an inventory showing the same securities which were turned over from the Charles H. Morse estate, and received by him as guardian, and appraised at the same values. On October 14, 1933, the Government filed a claim against the estate in the amount of $52,149.00.

It does not appear from the record that during the lifetime of Charles W. Morse, his *guardian* knew that the Government was a creditor of his ward, or that he had been apprised of the fact when he settled his guardian's account.

No further action was taken by the Government to prosecute its claim against the estate until August 5, 1937, more than four years after the administrator qualified. R. S., Chap. 101, Sec. 15, provides that actions not commenced within twenty months after the qualification of the administrator, are barred. The administrator evidently assumed that the claim of the Government could not be enforced because of this statutory bar. Such limitation, however, does not have application against the Government. The case of *U. S.* v. *Summerlin*, 310 U. S., 414, 60 S. Ct., Rep. 1019, is decisive upon that point. Judgment was entered in the District Court for the

Government on February 9, 1939, for rising $52,000.00. On March 11, 1939, the administrator filed an amended account in the Probate Court, supplementing one filed August 1, 1935, which had not been acted upon. The original account showed an intended distribution to the four children of the decedent of the residue of the estate. The amended account corrected the values placed upon the securities and added a charge for administrator's commission of $450.00 and for legal services and disbursements of $3,000.00. The corrections in asset values were allowed but the additional charges were disallowed.

It must be borne in mind that it is the account of the *administrator* which is under attack. The gist of the complaint made by the Government is that the *guardian* of Charles W. Morse must have received for some period during the lifetime of the latter, income on approximately $176,000.00 at least, as to which there was no accounting by the guardian in the Probate Court. Without any procedure to compel a true accounting by the guardian, the Government insists that the administrator should be found liable on settlement of his account for breach of duty to collect from the guardian sums received by him.

In defense upon the facts, the administrator asserts as a general statement that all income received from the Clemence C. Morse trust fund had been expended for the maintenance, support, comfort and convenience of his father, Charles W. Morse, during his lifetime, and that there was nothing left to be turned over from the guardian to the administrator. He testified that he filed his original account as administrator upon the assumption that there was no valid claim outstanding on the part of the Government, and that the heirs, being the only persons interested in the estate of his father, were satisfied that there was no unused income left from the trust fund.

The Judge of Probate made a finding in effect that the administrator was not chargeable in his account with sums received by the guardian and not accounted for, and based his finding upon the ground that there was "no evidence to show that these sums (representing unused income) were ever in his possession after his appointment as administrator." The account was then allowed, with the deductions already noted. On appeal, the case was submitted upon the record of the hearing in the Probate Court, and the decree of the Judge of Probate was affirmed without opinion.

The Judge of Probate evidently relied upon a literal construction of R. S., Chap. 76, Sec. 56, which reads:

> "Every executor and administrator is chargeable in his account with all goods, chattels, rights and credits of the deceased, which come *to his hands* and are by law to be administered, whether included in the inventory or not";

The real question is whether the administrator is chargeable in his probate account with assets which it is claimed were received by a former guardian of the decedent, who had failed to include such assets in his account, and after such account had been settled in the Probate Court. Under the decree approving the account, the guardian was found chargeable only with the sum which he turned over to the administrator. With that decree in full force and effect, would the administrator have the right to sue the guardian (assuming they were separate persons) and undertake to procure a judgment in a common-law court in face, and in spite of that decree? Instead, would he not be obliged to have the guardian cited into the Probate Court for a full and complete accounting of his stewardship?

It is for the Probate Court by proper proceedings to require the guardian to present a true account showing receipts and disbursements in behalf of his ward, when it is called to the attention of the Judge of Probate that there may be funds for which the guardian has failed to account. His decision would then be perpetuated by a written decree which would annul, modify or confirm the former action. The sum with which the guardian is finally charged, it would then be the duty of the administrator to collect, and if he failed to do so, both the guardian and the administrator would be liable upon their official bonds. If this is not so, we should be confronted with the anomalous situation that the Probate Court, in the settlement of the account of the administrator, charged him with a devastavit for failure to collect assets from the guardian which, under the decree allowing the guardian's account, did not exist.

The principles which govern this situation are clearly distinguishable from those enunciated by many authorities, including our own court in *Hodge* v. *Hodge*, 90 Me., 505, 38 A., 535, and *Stewart* v. *Hurd*, 107 Me., 457, 78 A., 838, and which in effect hold that

when a person is appointed as the executor or administrator of an estate, who is himself debtor to the estate, the debt is not extinguished and such personal representative must account for the same as assets in his hands. In this case the administrator, as an individual, was not indebted to the estate. If there were funds which were in the hands of the guardian of the decedent, disclosed or adjudicated, it would be the duty of the administrator to collect and account for them.

The point here is that the amount due from the guardian to the estate must be judicially determined in the regular and proper way by proceedings in the Probate Court provided for that very purpose. So long as the decree of the Judge of Probate stands, showing that there is nothing unaccounted for by the guardian, such decision cannot be attacked in an entirely separate proceeding in the same court in the endeavor to charge the administrator with a devastavit because he failed to account for assets now alleged to have been in the hands of the guardian.

Counsel for the Government cite *Graffam* v. *Ray*, 91 Me., 236, 39 A., 569, as decisive on the point that the Probate Court, as here, is the proper forum for the litigation of a devastavit issue. In that case, the executor of a will failed to collect certain choses in action existing, in favor of the testator, and permitted them to become barred by the statute of limitations. Suit was brought by a residuary legatee in an action at common law and for his own use. It was held that,

> "The Probate Court has exclusive jurisdiction, subject to appeal to the Supreme Court of Probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative. If a devastavit exists, it is the duty of that court to compel the executor to account for the amount lost to the estate by his fault. . . . The Probate Court is invested with ample power in these respects.
>
> "Notwithstanding the resignation of the executor, he can still be cited into the Probate Court, and required to account for the matters claimed, if liable therefore. *Robinson* v. *Ring*, 72 Maine, 143. It can only be done in that court. *Potter* v. *Cum-*

mings, 18 Maine, 58; *Judge of Probate* v. *Quimby*, 89 Maine, 576."

In the cited case, the question involved was the failure of the executor to collect assets. There is no disagreement with the principle that the procedure must properly be in the Probate Court, or that it has exclusive jurisdiction to compel a proper accounting, but the accounting in reality complained of here is that of the guardian, and until there has been appropriate action to alter the decree of the Probate Court in that respect, the issue cannot be tried out upon the administrator's account.

It is also urged that the case of *Mann* v. *Baker*, 142 N. C., 235, 55 S. E., 102, is a close parallel to the situation at bar, in that the second administrator failed to collect sums which came into the hands of the previous administrator, and was charged with his failure to effect this collection. That case, however, shows that the amount which the second administrator failed to collect was the proceeds of real estate of the intestate sold by the first administrator *under decree of court* and which sum appeared in his *recorded return* to the court. Thus it becomes apparent that the original administrator stood charged by the Probate Court with a definite sum, which it was the duty of the second administrator to collect. Here the Probate Court has determined what sum should be turned over by the guardian to the administrator, that sum has been received by the administrator and accounted for by him, and the account of the guardian stands unattacked and unreversed.

It is a well-established rule that a ward cannot maintain an action against his guardian, respecting matters of his estate, until there has been a final accounting by the guardian, and the balance due has been determined in the Probate Court. *Hopkins* v. *Erskine*, 118 Me., 276, 107 A., 829; *Thorndike* v. *Hinckley*, 155 Mass., 263, 29 N. E., 579; 28 C. J., Guardian and Ward, p. 1245; 25 Am. Jur., Guardian and Ward, p. 98. In *Murray* v. *Wood*, 144 Mass., 195, 10 N. E., 822, 824, the court held that,

"until the amount has been determined in the Probate Court, an action cannot be maintained, either at law or in equity, in the name of the ward against a former guardian to recover what is due on a settlement. As this amount had not been determined in

> the Probate Court, and as no suit had been brought and no judgment obtained upon the bond, the plaintiff had, when she presented her claim, no provable debt against the estate in insolvency."

So in *McLane* v. *Curran*, 133 Mass., 531, it was held that a guardian cannot, during the existence of that relation, maintain an action against his ward for necessaries furnished to him, even if the guardian has no property of the ward in his possession, and the court further pointed out that,

> "But even if the guardianship has come to an end, until at least an account has been settled in the Probate Court, and it has there been found that something is due from the ward, no such action can be maintained. The accounts between them are to be adjusted with all the facilities there offered for convenient settlement, and they are each to be held to the responsibilities growing out of the relation in which they have been placed by the action of that tribunal. It is for their mutual protection that this should be so, and that, before any rights are sought to be enforced elsewhere, the extent of such rights should be there determined. No action can be brought against a guardian by his late ward, to charge him in an action for money had and received. It is necessary for the protection of the guardian to hold that the remedy of the ward is by proper proceedings in the Probate Court, and thereafter by action on the probate bond."

So in *Cobb* v. *Kempton*, 154 Mass., 266, 28 N. E., 264, 265, it was held that a cause of action against a guardian for failure to account for money received by him as guardian, does not come into existence until there has been a decree of the Probate Court upon the account of the guardian, determining the sum due. The court said:

> "This particular cause of action for failure to pay over a definite amount found due on the settlement of the account came into existence after the decree allowing the account. Until then the guardian was not liable to an action for the money."

If the ward is bound to seek his remedy in the Probate Court for an accounting by his guardian, the administrator of a deceased

ward, as his personal representative, is vested with no greater rights.

It might be claimed that the instant case presented a distinction, upon the contention that the administrator, having succeeded himself as guardian, knew that as such guardian he had not made a proper accounting, and therefore cannot defend a charge of devastavit, but the only logical and proper way, open to all parties in interest, is first to take the proper steps to show that the guardian is actually accountable to the estate for assets remaining in his hands, notwithstanding his approved account of record. The dereliction, if any, is thus traced to its source, the probate account of each fiduciary is subject to correction, the liabilities of all responsible parties, including the sureties on both official bonds, are thereby fixed and determined.

While the administrator is not chargeable with a devastavit until it has been finally determined by proper Probate Court procedure that the guardian failed to account for assets in his hands, the court below was not justified in allowing the account of the administrator when it was brought to its attention that there might be other assets found to be due to the estate upon a true accounting by the guardian. The account of the administrator should have been held open, pending the judicial determination of that question upon proper proceedings in the Probate Court against the guardian. For this reason, the exceptions must be sustained as to the allowance of the administrator's account, and the case remanded to the Probate Court for appropriate action.

So ordered.

STATE OF MAINE *vs.* GEDEON VALLEE.

Androscoggin. Opinion, April 13, 1941.

CRIMINAL LAW. EVIDENCE. BRIBERY.

In prosecution of county commissioner for using his influence to secure employment of a certain individual as a janitor in return for money, testimony of an-

other county commissioner to show that such individual was employed by the county commissioners as alleged in indictment was not objectionable on ground that the acts of the board could only be proved by the official records, where no entry had been made on the subject.

A motion for a new trial after verdict raises the same question as a motion for a directed verdict and is a waiver of an exception taken to the prior ruling.

In prosecution of county commissioner for using his influence to secure employment of an individual in return for $5.00 monthly, it was not necessary for the State to prove that the sum of $5.00 was paid rather than some other sum. The material question is not the amount of the bribe but whether a bribe was given.

Where jury, after retiring and starting their deliberations, returned to the courtroom and at foreman's request direct testimony of State's witness was read on a certain phase of the case, it was within the presiding justice's discretion whether to grant defendant's request to have the cross-examination of the witness read, where foreman stated that he did not desire to have cross-examination read and defendant could not complain unless such discretion was abused.

The credence to be given to witnesses, the resolving of conflicts in testimony, and the weight to be given to it, are all matters for the jury to settle.

On appeal and exceptions. Respondent was convicted of exerting his influence as county commissioner for money to obtain employment for certain individual as janitor in the county building. Respondent presented a motion for a new trial to the presiding justice which was denied and appeal taken. Also respondent took exceptions to various rulings of the court. Exceptions overruled. Appeal dismissed. Judgment for the State. Case fully appears in the opinion.

Edward J. Beauchamp,
Armand A. Dufresne, Jr., for State.
Berman & Berman (Lewiston, Maine),
Adrian A. Cote, for respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

THAXTER, J. The respondent was indicted for a violation of the provisions of R. S. 1930, Chap. 133, Sec. 5. The indictment is in three counts. The first alleges the acceptance by the respondent, Vallee, who was a county commissioner of Androscoggin County, of a promise by one St. Pierre to pay Vallee five dollars a week during

the time that St. Pierre should be acting as janitor in the county building, the said St. Pierre knowing that the respondent was a county commissioner and having the intent to influence his action in the matter of employing St. Pierre as a janitor, a matter which was to come before the respondent in his official capacity, the said respondent having the intent under the influence of said promise to vote for St. Pierre as janitor. The second count sets forth the same corrupt agreement and charges that the respondent in discharge of it did accept from St. Pierre on June 12, 1935 and on divers other days and times while he was acting as janitor of said building the sum of five dollars in pursuance of the corrupt agreement. The third count charges that the respondent on said date and at divers other times did accept the sum of five dollars from St. Pierre in consideration of which payment having the intent to keep by his vote the said St. Pierre in the employment of the County of Androscoggin as janitor. Demurrers were filed to this indictment which were overruled and on exceptions being taken to this court all counts in the indictment were held good. *State* v. *Vallee*, 136 Me., 432, 12 A., 2d, 421. The respondent was tried and convicted. The case is now before us on exceptions and on an appeal from a ruling of the presiding justice denying the respondent's motion for a new trial.

EXCEPTIONS

Exception 1. The State, in order to show that St. Pierre was in fact employed by the Board of County Commissioners as a janitor as alleged in the indictment, offered the testimony of Henry O. Cloutier another member of the board as to what transpired at a meeting of the board. The testimony was objected to on the ground that the acts of the board could be proved only by the official records. The evidence was admitted and an exception taken. The ruling was correct. This is not a case where oral evidence is offered to contradict a record, for no entry whatever was made on the subject. Nor is it a case such as *Small* v. *Pennell*, 31 Me., 267, in which the validity of an act depends on a proper record. The material question was whether St. Pierre was employed as a janitor and what part the respondent played in procuring him the position. It would be a sad commentary on the law if a respondent should es-

cape punishment because no record was kept of his misdeeds. For cases and authorities indicating that such evidence is admissible see *Whiting* v. *City of Ellsworth*, 85 Me., 301, 27 A., 177; *Duluth, South Shore & Atlantic Ry. Co.* v. *Douglas County*, 103 Wis., 75, 79 N. W., 34; *County of Vermilion* v. *Knight*, 2 Ill., 97; *Jordan & McCallum* v. *Oseola County*, 59 Ia., 388, 13 N. W., 344; *Western Paint & Chemical Co.* v. *Board of Com'rs of Washington County*, 171 Okla., 302, 42 P., 2d, 533; McQuillan, Municipal Corporations (1939), Sec. 654.

Exception 2. The respondent excepted to the refusal of the court to direct the jury to bring in a verdict of not guilty. The motion for a new trial after verdict raises the same question as the motion for a directed verdict and is a waiver of the exception taken to the prior ruling. *State* v. *O'Donnell*, 131 Me., 294, 161 A., 802.

Exception 3. The respondent excepted to the following portion of the charge of the presiding justice:

> "Under the other counts it is necessary for the State to prove, and prove beyond every reasonable doubt, that Gedeon Vallee was the duly elected and qualified and acted as a County Commissioner at or about the dates alleged, and that on or about the time as alleged Alfred St. Pierre was selected as janitor as a result of the promise and that Gedeon Vallee received from St. Pierre the sum of five dollars or any sum in pursuance and as a result of that agreement."

The respondent claims that it was necessary for the State to prove that the sum of $5.00 mentioned in the indictment was paid and that proof of any other sum would not warrant a conviction. The only case cited by counsel in support of such a contention is *State* v. *Martin*, 134 Me., 448, 187 A., 710. That does not seem to be in point. The material question is not the amount of the bribe but whether a bribe was given. *Stovall* v. *State*, 104 Tex. Cr. Rep., 210, 283 S. W., 850; 9 C. J., 412; 11 C. J. S., 866. This exception is without merit.

Exception 4. The respondent waives this exception.

Exception 5. After the jury had retired and started their de-

liberations they returned to the courtroom and the foreman requested that the testimony of St. Pierre, Cloutier and the respondent be read on a certain phase of the case. The reporter read the testimony of Cloutier and of the respondent on this point and the direct testimony of St. Pierre. Before the jury again retired counsel for the respondent requested that the cross-examination of St. Pierre on this same phase be read. It was claimed that the cross-examination contradicted his direct testimony. The court asked the foreman if the jury desired such testimony read. The foreman replied in the negative stating that the points the jury had in mind had been covered. The court refused to grant the request that this portion of the testimony be read, and the respondent took an exception.

The inquiry addressed by the court to the foreman of the jury was not for the purpose of leaving to the jury the decision of the question, but to find out for the benefit of the court in making a ruling whether the jury had been sufficiently informed. If we lay down the rule that a respondent under such circumstances as this can compel as a matter of right the reading of testimony relating to a certain point, it is apparent that the deliberations of a jury might be long delayed for no court would feel safe in reading anything less than the whole of such testimony. What shall be done under such circumstances as this must be left to the sound discretion of the presiding justice. A respondent can complain only when such discretion is abused. *People* v. *Kasem*, 230 Mich., 278, 203 N. W., 135; *Byrd* v. *State*, 90 Tex. Cr. Rep., 418, 235 S. W., 891; *Jarvis* v. *Commonwealth*, 245 Ky., 790, 54 S. W., 2d, 307; *State* v. *Manning*, 75 Vt., 185, 54 A., 181. In the case before us, the record does not tell us what the particular testimony was which was read to the jury, and neither do the exceptions point out what if any portion of the cross-examination contradicted this undisclosed phase of the direct testimony. The respondent shows no abuse of the court's discretionary power.

THE APPEAL

In support of the charges in the indictment we have the testimony of St. Pierre. It is corroborated by the testimony of two other wit-

nesses at least to the extent that money was paid by St. Pierre to the respondent and one of them testifies to an incriminatory statement by the respondent. Counsel for the respondent argues that the testimony of St. Pierre is vague and evasive, and that he fails to remember important details. The same general attack is made on the testimony of the other witnesses. An explanation of the payment of the money is that St. Pierre was repaying the respondent for a loan. The credence to be given to witnesses, the resolving of conflicts in testimony and the weight to be given to it, are all matters for the jury to settle. We cannot say that the verdict of the jury was not warranted.

Exceptions overruled.
Appeal dismissed.
Judgment for the State.

LOUIS J. BRANN, PETER A. ISAACSON

AND

ALTON A. LESSARD

vs.

CITY OF ELLSWORTH.

Androscoggin. Opinion, April 15, 1941.

REFERENCE AND REFEREES. MUNICIPAL CORPORATIONS.

Where evidence before referees was objected to by the defendant and was admitted de bene *by the referees under stipulation of the parties to the effect that if the referees found, after all the evidence was in, that said parol evidence was legally admissible, it would be considered with all of the evidence in the case, otherwise it would be rejected, and there is nothing in the record to show that the referees rejected it, and without a formal ruling by the referees excluding the evidence the exceptants have nothing on which to base their objections.*

Statement by referees that "the plaintiffs have failed to establish by a fair preponderance of the competent evidence that they have a valid and enforceable claim" does not constitute a rejection of the evidence offered.

The City of Ellsworth had power to act only in accordance with the terms of its charter granted by the legislature and it was therefore necessary for the plaintiffs in this action for breach of alleged contract of employment, in order to maintain their claim, to establish that the agreement as set forth in the declaration was approved by the city council, by ordinance, order or a resolve adopted at a valid meeting, or that there was a subsequent ratification of it under the same conditions.

The resolving of conflicts in the evidence and the weight to be given to the evidence were for the referees.

So long as referees' finding is founded on any credible testimony the Law Court cannot set it aside.

On exceptions. Action of assumpsit brought by the plaintiffs against the City of Ellsworth to recover for the breach of an alleged contract. Case tried before referees with right of exceptions reserved. Referees found for the defendant. Written objections filed to the acceptance of the report, to the overruling of these, to the acceptance of the report, and to an alleged exclusion of evidence, the plaintiffs filed exceptions. Exceptions overruled. Case fully appears in the opinion.

Brann, Isaacson & Lessard,
Berman & Berman (Lewiston, Maine), for plaintiff.
Clarke & Silsby, for defendant.

SITTING: THAXTER, HUDSON, WORSTER, MURCHIE, JJ.

THAXTER, J. This is an action of assumpsit brought by the plaintiffs, who are attorneys-at-law, against the City of Ellsworth to recover for the breach of an alleged contract.

The writ as amended alleges that the defendant entered into an agreement for the purchase of a certain lot of land on which the Ellsworth City Hall Building was to be erected subject to a certain mortgage to be given by the Ellsworth Municipal Building Corporation to the Ellsworth Rehabilitation Corporation in an amount to be ascertained in accordance with the costs of erecting said City Building, which amount was ascertained to be $111,000; that the defendant encountered certain legal and financial difficulties, and entered into an agreement with the plaintiffs to employ them as attorneys-at-law "to act as counsel to assist the City Attorney of said

defendant in negotiating with the Reconstruction Finance Corporation, which corporation had advanced the necessary funds to the Ellsworth Rehabilitation Corporation for the erection of said City Hall Building, towards securing a reduction of the mortgage indebtedness on said land and City Hall Building, and to secure to said City full title to said land and buildings free and clear of all encumbrances, for a sum of money less than said $111,000, and agreed to pay to your said plaintiffs the sum of $10,000 and expenses when the services in connection with such negotiations were completed."

The defendant pleaded the general issue with a brief statement setting forth that the agreement of the city concerning the Ellsworth City Hall was void, and that the city was not obligated upon any mortgage indebtedness to the Reconstruction Finance Corporation and had no interest in receiving a reduction of the mortgage indebtedness.

A hearing with the right of exceptions reserved was had before referees who found for the defendant and ruled as follows:

> "The Referees report that the plaintiffs have failed to establish by a fair preponderance of competent evidence that they have a valid and forcible claim against the defendant City of Ellsworth, for legal services in connection with the mortgage debt upon its municipal building and which is the basis of this suit. Therefore, the defendant is entitled to judgment."

Written objections were filed to the acceptance of the report, and to the overruling of these and to the acceptance of the report, the plaintiffs filed exceptions which are now before us.

One objection relates to an alleged exclusion of certain evidence, the others to the substance of the findings which it is claimed are not supported by any competent evidence.

The plaintiffs have no valid ground to complain because of the referees' ruling on the admissibility of evidence. The plaintiffs, in order to show that a resolution was passed to employ the plaintiffs and to show the terms of the employment, offered parol evidence of the business claimed to have been transacted at an alleged meeting of the city council of the defendant held December 19, 1938. The action of the referees with respect to this proffered evidence is set forth in the bill of exceptions in the following language: "This evi-

dence was objected to by the defendant and was admitted *de bene* by the referees, under stipulation of the parties to the effect that if the referees found, after all the evidence was in, that said parol evidence was legally admissible, it would be considered with all of the evidence in the case, otherwise it would be rejected." Assuming the admissibility of the evidence, there is nothing in the record to show that the referees rejected it. Without a formal ruling by the referees excluding the evidence the plaintiffs have nothing on which to base their objection. *Dudley* v. *Poland Paper Co.*, 90 Me., 257, 261, 38 A., 157. Counsel in their brief argue that the statement by the referees, that "the plaintiffs have failed to establish by a fair preponderance of the *competent evidence* that they have a valid and enforceable claim," constitutes a rejection of the evidence offered. We cannot see how it is any more a rejection of the evidence than it is a recital that they considered it.

The city had power to act only in accordance with the terms of its charter granted by the legislature. Under the provisions of this, the members of the city council were constituted the municipal officers of the city and were given all the powers usually exercised by such officials. The charter specifically provides, Priv. & Sp. Laws 1933, Chap. 34, Art. II, Sec. 7, that the city council "shall act only by ordinance, order or resolve . . . ." It was therefore necessary for the plaintiffs, in order to maintain their claim, to establish that the agreement as set forth in the declaration was approved in the prescribed manner at a valid meeting or that there was a subsequent ratification of it under the same conditions. *Jordan* v. *School District No.* 3, 38 Me., 164; *McCoy* v. *Briant*, 53 Cal., 247; *City of Bryan* v. *Page & Sims*, 51 Tex., 532; *Paul* v. *City of Seattle*, 40 Wash., 294, 82 P., 601; McQuillan, Municipal Corporations, Secs. 1281, 1360; 19 R. C. L., 1075.

The plaintiffs claim that there was a special meeting of the city council on December 19, 1938, at which the contract was approved and that in any event the agreement was subsequently ratified. Art. II, Sec. 6 of the charter requires that notice of a special meeting shall "be served in person upon, or left at the usual dwelling place of each member of the council and of the city manager." The referees could have found from the evidence that the required notice was not in fact given but that certain of the members were summoned by

telephone; that at least one of the members, Mr. Higgins, did not receive the telephone notice and was not in fact present; that another member, Mr. Carlisle, regarded the meeting simply as a conference; and that the clerk was told that he need not attend. There is some conflict in the testimony on certain of these points. The resolving of such conflicts and the weight to be given to the evidence was for the referees. The evidence would have justified a finding that there was no valid meeting when the contract in question was considered, and likewise that there was no ratification of it. The payment of $500, which it is claimed shows a recognition of the contract, was in fact not made directly to the plaintiffs and falls far short of showing an unequivocal ratification.

The referees have not indicated on what ground they based their finding. So long, however, as it is founded on any credible testimony this court cannot set it aside.

Exceptions overruled.

FRED W. STODDARD *vs.* PUBLIC UTILITIES COMMISSION.

Kennebec. Opinion, April 15, 1941.

PUBLIC UTILITIES COMMISSION. INJUNCTION. EQUITY.

The powers of the Public Utilities Commission are derived wholly from statute. If it exceeds its authority it acts without jurisdiction and its orders are of no effect and are subject to collateral attack, but it does not follow that in every such instance a remedy exists in equity by injunction.

The enforcement of an invalid order of a Public Utilities Commission may not be enjoined as a matter of right but injunction is available unless another and exclusive remedy is provided by law.

The doctrine that equity may interfere to enjoin the enforcement of a void law, ordinance or order is not absolute, but is subject to the qualification that the failure to act will result in irreparable injury to the plaintiff's property or property rights, and that there is no adequate remedy at law.

Where a party is given a special remedy by statute, there is no reason which justifies the interposition of equity. The statutory remedy is exclusive.

On report. Plaintiff brings bill in equity against Public Utilities Commission to enjoin the enforcement of a rule of this commission known as Regulation 1 K. Case remanded to the sitting justice for the entry of a decree dismissing the bill. Case fully appears in the opinion.

Locke, Campbell & Reid, for plaintiff.

McLean, Fogg & Southard,

Frank E. Southard, Jr., for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

THAXTER, J. The plaintiff brings this bill in equity to enjoin the enforcement of a rule of the Public Utilities Commission known as Regulation 1 K. The case is before us on report on bill, answer, replication and agreed statement.

The plaintiff is a contract carrier who has been doing a trucking business in the state since 1929. In 1933 the legislature took the first step to bring this class of corporations under the control of the Public Utilities Commission. Public Laws 1933, Chap. 259. Under the provisions of Sec 5A of this act, all such carriers were required to obtain a permit to operate within the state. Section 5C, the so-called "grandfather clause," provides that the permit shall "be granted as a matter of right when it appears to the satisfaction of the commission, after hearing, that the applicant has been regularly engaged in the business of a contract carrier as herein defined within this state, from the first day of March, 1932, and in such cases, operation may lawfully be continued pending the issuance of such permit, provided application therefor is made within fifteen days from the effective date of this act." The plaintiff, claiming to be entitled to a permit under this provision of the act, filed an application June 28, 1933. January 26, 1934, the Public Utilities Commission filed a decree certifying that he was a contract carrier and entitled to a permit "covering the transportation of shipments between First National Stores located in Maine, and such other traffic wherein it is indicated that said National Stores is either the consignor or consignee, subject however to the rate provisions contained in Section 5, Paragraph D, Chapter 259, Public Laws of 1933." A permit was issued in

accordance with this decree as of December 30, 1933 "authorizing said applicant to operate a motor vehicle or motor vehicles as a Contract Carrier within the general area and/or for the general purpose within which and for which said applicant has been regularly engaged in transporting freight or merchandise for hire over the highways of this state from March 1, 1932 to June 30, 1933, the effective date of said Chapter 259." Neither an exception nor an appeal was taken to the order of the commission. Renewal permits were granted from year to year in slightly different form but carrying the same general provisions. In the permit issued February 26, 1940, and running to March 1, 1941, the limitation imposed on the plaintiff is set forth as follows: "To transport commodities between First National Stores located in Maine; and to transport such other traffic between points in Maine where it is indicated that the First National Stores is either the consignor or consignee."

Regulation 1 K adopted in 1935 sets forth the limitations under which such permits to that time had been issued and the limitations under which all such subsequent permits were issued. It provides that permits shall be limited as follows:

> "Within the general area and/or for the general purposes within which and for which said applicant has been regularly engaged in transporting freight or merchandise for hire over the highways of this State from March 1, 1932, to June 30, 1933, the effective date of said Chapter 259."

December 21, 1939, the plaintiff filed a petition before the Public Utilities Commission "for the purpose of clarifying their existing permit; also for the purpose of altering, amending or setting aside the decree of the commission dated January 26, 1934; also the right to secure return loads along routes traveled under present permit as it may be clarified."

The aim of the plaintiff was to get rid of the limitation provided in the permit. A hearing was had on this petition which was denied. The present bill in equity was shortly thereafter filed.

The plaintiff contends that under "the grandfather clause" he was entitled to a permit giving him the right to operate without limitation of routes and that he had the right to haul to any consignee or from any consignor. He claims that he is entitled to an in-

junction against the commission because it was without jurisdiction to impose the limitations to which he objects.

We shall not discuss the merits of the plaintiff's contention because it is clear that the remedy which he seeks is not open to him.

It is of course true that the powers of the Public Utilities Commission are derived wholly from statute. If it exceeds its authority it acts without jurisdiction and its orders are of no effect and are subject to collateral attack. See *S. D. Warren Co.* v. *Maine Central Railroad Company*, 126 Me., 23, 25 ,135 A., 526. But it does not follow that in every such instance a remedy exists in equity by injunction. The plaintiff cites 51 C. J., 84-85 as authority for the principle that equity may enjoin the enforcement of an invalid order of a Public Utilities Commission but overlooks the qualification that such relief is not a matter of right but is available "unless another and exclusive remedy is prescribed by law." The legislature has provided another and exclusive remedy. Revised Statutes 1930, Chap. 62, Sec. 63, as amended provides that "Questions of law may be raised by alleging exceptions to the ruling of the commission on an agreed statement of facts, or on facts found by the commission . . . ." The doctrine that equity may interfere to enjoin the enforcement of a void law, ordinance or order is not absolute but is subject to the qualification that the failure to act will result in irreparable injury to the plaintiff's property or property rights and that there is no adequate remedy at law. See *Chapman* v. *City of Portland*, 131 Me., 242, 245, 160 A., 913. Where a party is given a special remedy by statute as is here provided there is no reason which justifies the interposition of equity. The statutory remedy is exclusive. *Sykes* v. *Jenny Wren Co.*, 78 Fed. (2d), 729.

An analogy may be found in those cases which hold that certiorari is not open to one who attacks the validity of the proceedings of a tribunal if the question was open on appeal or by exceptions. *Inhabitants of Phillips* v. *County Commissioners of Franklin County*, 83 Me., 541, 22 A., 385; *Devereaux* v. *Public Utilities Commission*, 125 Me., 520, 134 A., 545. In *Miller* v. *Wiseman*, 125 Me., 4, page 8, 130 A., 504, page 506, the court said: "Whenever it is shown that the inferior court or tribunal has no jurisdiction of the subject-matter, and the question is not open on appeal, the court will not refuse the writ." It would seem to follow from this

doctrine that if the question is open on appeal or by exceptions such procedure must be followed to the exclusion of any other.

The failure of this plaintiff to pursue the remedy provided by the statute does not justify him in proceeding by bill in equity to enjoin the commission.

Case remanded to the sitting justice for the entry of a decree dismissing the bill.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

MILDRED I. HEATON, LIBELANT *vs.* ALFRED HEATON, LIBELEE.

ALFRED HEATON, LIBELEE *vs.* MILDRED I. HEATON, LIBELANT.

York County. Decided August 12, 1940. A hearing was had before a justice of the Superior Court on a libel and a cross-libel for divorce. Mildred I. Heaton filed a libel for divorce against Alfred Heaton alleging as grounds for divorce cruel and abusive treatment and non-support. Alfred Heaton in his libel charged adultery. The cases are before us on exceptions by the wife to the rulings of the court granting a divorce to the husband and denying one to her, and on exceptions to the exclusion of certain questions asked by her attorney.

Findings of fact by the presiding justice are not reviewable by this court. When he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence, there is an error of law which this court will consider. *Bond* v. *Bond*, 127 Me., 117, 129, 141 A., 833. A reading of the evidence shows no such error here.

A witness for the husband who testified to seeing the wife lying on a bed with a man was asked as to the size of the bed. The question was excluded and an exception taken. The question was relatively unimportant and it is not shown that the ruling was prejudicial. The exception must be overruled.

The wife was asked in rebuttal whether the husband had contributed to her support. The question was excluded on the ground that the witness had gone into the matter in her main testimony and that it was not proper rebuttal. The ruling was correct. Exceptions

overruled. *Thomas F. Sullivan*, for libelant. *Waterhouse, Spencer & Carroll*, for libelee.

FRANZ U. BURKETT, ATTORNEY-GENERAL,

BY INFORMATION, PETITIONER FOR MANDAMUS,

SHERWOOD ALDRICH, RELATOR

vs.

FREDERICK ROBIE, SECRETARY OF STATE.

Penobscot County. Decided August 21, 1940. Exceptions to ruling below quashing alternative writ and denying peremptory writ in mandamus proceedings brought to compel the Secretary of State of Maine to certify the nomination of the relator in the primary election of June 17, 1940, as candidate of the Republican party for representative to the legislature from the class towns of Topsham, Woolwich, Phippsburg, West Bath, and Arrowsic, and for other incidental relief. For the reasons stated in *Burkett, Attorney-General (Leach Relator)* v. *Robie*, the exceptions must be overruled. Exceptions overruled. *Ellis L. Aldrich, Sherwood Aldrich*, for relator. *Edward Bridgham*, for defendant.

FRANZ U. BURKETT, ATTORNEY-GENERAL,

BY INFORMATION, PETITIONER FOR MANDAMUS,

FRANK O. DUNTON, RELATOR

vs.

FREDERICK ROBIE, SECRETARY OF STATE.

Penobscot County. Decided August 21, 1940. Exceptions to ruling below quashing alternative writ and denying peremptory

writ in mandamus proceedings brought to compel the Secretary of State of Maine to certify the nomination of the relator in the primary election of June 17, 1940, as candidate of the Republican party for county attorney of the County of Sagadahoc, and for other incidental relief. For the reasons stated in *Burkett, Attorney-General (Leach Relator)* v. *Robie*, the exceptions must be overruled. Exceptions overruled. *Frank O. Dunton, Ellis L. Aldrich*, for relator. *John P. Carey, Ralph O. Dale*, for defendant.

OTTO L. MYSHRALL

vs.

DELIMA GADBOIS AND METROPOLITAN LIFE INSURANCE COMPANY.

Kennebec County. Decided September 5, 1940. This is an appeal from a decree of a sitting justice overruling the appellant's general and special demurrer to a bill in equity and directing the appellant to answer further, which she has not done, but has presented her appeal directly to the Law Court without proceeding to final decree. This she may not do.

A decree overruling a demurrer is only an interlocutory decree and an appeal therefrom cannot be brought forward to the Law Court until after final decree is made. R. S. 1930, Chap. 91, Sec. 55. *Masters* v. *Van Wart*, 125 Me., 402, 134 A., 539. Appeal dismissed without prejudice. *A. Raymond Rogers*, for plaintiff. *Arthur J. Cratty, F. Harold Dubord*, for defendants.

STATE OF MAINE *vs.* GEORGE F. BEETY.

York County. Decided September 26, 1940. On exception. At the close of the testimony at the trial of the respondent on a complaint charging him with the unlawful sale of intoxicating

liquor, he seasonably moved the presiding justice to order the jury to return a verdict of not guilty. That motion was overruled, and the respondent excepted. The jury returned a verdict of guilty, and the case is brought here on the respondent's exception.

It is his contention that the evidence in support of the prosecution was so weak that the presiding justice should have instructed the jury to return a verdict of not guilty. He invokes a familiar rule of law, which is stated in *State* v. *Davis*, 116 Me., 260, 101 A., 208, as follows:

> "When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty."

But the evidence was not so weak and defective in the instant case as to bring it within that rule. There was direct and positive evidence in support of the charge in the complaint which is ample to sustain the verdict rendered.

The respondent, however, attacks the credibility of the principal witness for the State, and also urges that his testimony cannot be accepted and believed for the further reason that it was directly contradicted by a number of witnesses who testified for the respondent.

It is unnecessary to cite authorities to sustain the proposition that the credibility of witnesses and the weight to be given to their testimony should be left to the determination of the jury, under proper instructions from the court.

There was no error in the ruling made. The issue was one of fact, and the case was properly sent to the triers of fact.

The mandate is: Exception overruled. Judgment for the State. *Joseph E. Harvey*, County Attorney, for State. *Harry E. Nixon*, for respondent.

MORRIS LERMAN *vs.* GEORGE C. O'DONNELL.

Cumberland County. Decided November 1, 1940. In this action of negligence, the defendant has the verdict and the case comes forward on the plaintiff's general motion for a new trial.

The plaintiff was injured in the evening of October 21, 1939, in a motor truck collision on the state highway in the Town of Cumberland when the light truck loaded with junk which he was driving met a heavy duty truck operated by the defendant's employee and the cars came together. There is a sharp conflict in the evidence as to the position of the trucks on the highway when the collision took place, and the credibility of the witnesses called to the stand on the one side and the other is of vital importance. The case presents issues of fact peculiarly within the province of the jury to determine. On the record brought forward, it cannot be held that the verdict was manifestly wrong. Motion overruled. *Jacob H. Berman, Henry N. Taylor, Augustus G. Glen, Sidney W. Wernick*, for plaintiff. *William B. Mahoney*, for defendant.

RUDOLPHE BEAUCHESNE *vs.* RAYMOND L. SARGENT.

ALFRED BEAUCHESNE *vs.* RAYMOND L. SARGENT.

GEORGE OUELLETTE *vs.* RAYMOND L. SARGENT.

LEO N. CYR *vs.* RAYMOND L. SARGENT.

OVILA CYR *vs.* RAYMOND L. SARGENT.

Penobscot County. Decided November 6, 1940. These five actions, tried together, result from a collision in the village of Carmel on November 27, 1938, between a Chevrolet master sedan owned and operated by Leo N. Cyr, one of the plaintiffs, in which the other plaintiffs were riding, and a tractor truck trailer towing

a disabled tractor unit. The towing tractor, owned by the defendant, was operated by his agent. The fact of agency was admitted.

The jury rendered verdicts for all of the plaintiffs in amounts ranging from $500 to $8,000. The defendant presents general motions for new trials on the usual grounds.

Only questions of fact were in issue. The defendant frankly stated in his brief: "The only negligent act alleged is the relative position of the cars at the time of impact. . . ." The claim of the plaintiffs was that the defendant's truck was driven "to the left across the center line of the road, and ran head on into the plaintiff's car," while it was proceeding with due care on its own side. This was stoutly denied by the defendant.

Thus was presented a factual issue, one peculiarly proper for settlement by the jury. See *Lerman* v. *O'Donnell*, 137 Me., 329, 16 A., 2d, 109. The testimony was conflicting. The jury had the benefit of seeing and hearing the witnesses on both sides and found for the plaintiffs. Careful study of the record convinces us that there was sufficient credible evidence to justify it in finding negligence upon the part of the defendant's agent and the exercise of due care by all of the plaintiffs. On liability the verdicts are not so manifestly wrong as to warrant setting them aside.

The damages awarded, while in two of the cases somewhat generous, are not in any action "so clearly excessive" as to warrant the granting of the motions. In those in which the larger verdicts were rendered, the evidence discloses that the plaintiffs therein not only suffered very serious injuries (some were permanent) but were put to large expenditures on account of medical services and hospitalization, besides sustaining heavy losses in earnings.

Nothing in the record tends to indicate that the jury, in determining liability and damages, was improperly influenced. Its verdicts should stand as rendered. All motions overruled. *James M. Gillin*, *Bourgeois & Bourgeois*, for plaintiffs. *William S. Cole*, for defendant.

ANNIE M. SCOTT, PET'R FOR REVIEW *vs.* ROMEO ST. PIERRE.

Kennebec County. Decided November 25, 1940. On exceptions to the granting of a petition for review, brought under R. S., Chap. 103, Sec. 1, Par. II. The statute reads as follows:

> "Any justice of the superior court may grant one review in civil actions, . . .
>
> II. When the petitioner shows that a witness testified falsely to material facts against him in the trial of the action, whereby he was surprised, and was then unable to prove the falsity, but has since discovered evidence, which with that before known, is, in the opinion of the court, sufficient proof that the testimony was false; or if the witness has been convicted of perjury therefor."

A careful study of the record compels the conclusion that the petitioner failed to establish any one of the required statutory elements, and instead that the offered proof negatived them.

It is the general rule that the granting of a review under the foregoing section is discretionary, and exceptions will not be sustained as to findings of fact, but only upon rulings of law. When, however, the case is barren of proof of the statutory requirements, and there is nothing to justify the decision, the ruling below is one contrary to law and is an abuse of discretion. Exceptions sustained. *McLean, Fogg & Southard*, for petitioner. *Locke, Campbell & Reid*, for respondent.

BERNARD A. BOVE, ASSIGNEE

vs.

FRANK FEROCI AND MARIA FEROCI.

Cumberland County. Decided December 26, 1940. On exceptions by defendants to acceptance of report of referee, right of exceptions in matters of law having been reserved. Assumpsit on a promissory note dated May 2, 1932, signed by the defendants as

makers and payable to Dirigo Trustees, trustees for an unorganized association. The plaintiff sues as assignee.

One Siciliano, its treasurer and a shareholder in the association, was indebted to the defendants. A loan, evidenced by the note sued, was obtained from the association and the money so obtained was paid to them in discharge of their indebtedness against Siciliano.

In defense it was contended that following the assignment liability on this note was extinguished by a settlement between Siciliano and the plaintiff in pursuance of a vote to deduct from their "personal shares" as shareholders their liabilities to the association and that the assignee "should secure copies of each account against each shareholder."

With the assistance of an auditor, an unsigned written account between the association and Siciliano was made up, included in which, as a charge against Siciliano, was the amount due on this note. The plaintiff contended, however, that the account was not agreed upon and never became effective as a settlement.

Thus a single issue *of fact* was raised for decision by the referee. He found that no settlement was made. Facts found in reference under rule of court are final when supported by any evidence. *Benson* v. *Town of Newfield*, 136 Me., 23, 1 A., 2d, 227, and cases cited therein. The record reveals ample testimony to support the finding of fact by the referee.

It should be noted that the exception charging gross negligence and prejudice upon the part of the referee was withdrawn. Exceptions overruled. *Eugene F. Martin*, for plaintiff. *Milan J. Smith*, *Bartolo M. Siciliano*, for defendants.

CALVIN L. STINSON, APPELLANT

vs.

JESSE W. TAYLOR, COMMISSIONER OF LABOR.

IN RE WAGE BOARD

Kennebec County. Decided January 28, 1941. This is an appeal from the decision of a justice of the Superior Court in an ac-

tion brought by the Commissioner of Labor and Industry to enforce the minimum fair-wage rates established for women and minors employed in the Fish-Packing Industry of Maine.

An incomplete record shows that on March 21, 1940, a wage board appointed and acting under the provisions of Chap. 289, P. L., 1939, filed with the commissioner of labor and industry its report, findings and determinations as to minimum fair-wage rates to be paid women and minors employed in the industry of packing of fish and fish products, and the commissioner, having made service thereof as required by law, on April 26, 1940, instituted court action to enforce the rates. A petition for stay of proceedings and hearing having been filed, the justice of the Superior Court to whom it was presented denied the stay and affirmed the rates. The petitioner appealed.

Authority for the action taken by the commissioner is found in Section 12 of the Act, which reads:

> "If at any time after a report of a wage board, containing findings and determinations as to minimum fair-wage rates, has been filed with the commissioner, and has been served by him as provided in section 10 hereof, and any employer or employers affected thereby, have failed for a period of 2 months to pay such minimum fair-wage rates, the commissioner shall thereupon take court action to enforce such minimum fair-wage rates. The commissioner shall file in the office of the clerk of the superior court for Kennebec county the record of hearing before the wage board, together with its report, findings and determinations as filed with the commissioner, and his certificate of service on employers. A justice of the superior court, unless application for stay of proceedings and for hearing shall have been filed in the office of said clerk of the superior court for Kennebec county and shall have been allowed by a justice of the superior court or the supreme judicial court, shall render, within 30 days after the filing of the papers with the said clerk of the superior court as aforesaid, his decision affirming or disaffirming the minimum fair-wage rates stated in the report, findings and determinations of the wage board, . . ."

The language of the legislature in enacting Section 12 of this

wage act, as it may be termed, is clear and unambiguous. The failure of an employer in the fish-packing industry for two months to pay the minimum fair-wage rates reported by a wage board is expressly made a condition precedent to court action to enforce the rates. This provision is, in terms, mandatory and compliance with it seems necessary in order to confer jurisdiction upon the tribunal to which the action may be presented. We find nothing in other parts of the statute which militates against this view.

A justice of the Superior Court, in enforcing minimum fair-wage rates under the wage act, exercises a special and limited jurisdiction which is purely statutory and not according to the common law. It is well settled that in such cases, unless there is strict compliance with conditions precedent prescribed by the statute, the court is without jurisdiction and the proceeding is a nullity. *Stidham* v. *Brooks* (De. 1), 5 A. (2d), 522; *Sumner* v. *Milford*, 214 Ill., 388, 394, 73 N. E., 742; *Strom* v. *Lindstrom*, 201 Minn., 226, 275 N. W., 833; *Gates* v. *State*, 128 N. Y., 221, 28 N. E., 373; *Holden* v. *Campbell*, 101 Vt., 474, 144 A., 455; *State ex rel Conners* v. *Zimmerman*, 202 Wis., 69, 231 N. W., 590; 15 Corpus Juris 797. The provisions of the statute cannot be changed by the consent of the parties, nor can lack of jurisdiction be waived. A want of jurisdiction is fatal in every stage of the cause and is always open for consideration by the court. *Cushman Co.* v. *Mackesy*, 135 Me., 490, 200 A., 505; *Darling Automobile Co.* v. *Hall et al.*, 135 Me., 382, 197 A., 558; *Milliken* v. *Morey*, 85 Me., 340, 27 A., 188; *Powers* v. *Mitchell*, 75 Me., 364; *Stidham* v. *Brooks*, supra.

In the case at bar, the record does not show that any employer in the industry of packing of fish and fish products affected by the minimum fair-wage rates reported by the wage board failed for a period of two months, or even at all, to pay such wages after service of the report as required by law. The record does show, as already stated, that, within less than one month after the report was filed and had been served, action to enforce the rates was taken. It is the opinion of this court that the justice of the Superior Court taking cognizance of this action was without jurisdiction and any and all proceedings connected therewith are a nullity.

In view of our conclusion that the court below was without jurisdiction, it is unnecessary to consider or determine other questions

raised by the appeal. The mandate is Appeal sustained. Case remanded for dismissal for want of jurisdiction. *Blaisdell & Blaisdell*, for appellant. *Franz U. Burkett*, Attorney-General, *John S. S. Fessenden*, Assistant Attorney-General, for Wage Board.

LOUISE ELIAS *vs.* CARL GREENE.

Penobscot County. Decided March 25, 1941. The plaintiff brought suit to recover for damages to her automobile resulting from a collision with a car driven by the defendant. The case was heard by the court with right of exceptions reserved. The presiding justice found for the plaintiff and the case is before us on exceptions by the defendant. The defendant claims that there is no evidence that negligence of his was the proximate cause of the damage.

The plaintiff's car driven by her son was proceeding in a southerly direction on a highway known as Route No. 15 in Bucksport. The defendant was proceeding in a northerly direction on the same road. The defendant according to his story had been proceeding for some time behind an automobile which just prior to the collision started to slow down. The defendant says that he put on his brakes and his car skidded on the ice and snow which covered the roadway and that he slid to his left and collided with the car of the plaintiff which was proceeding on its own right-hand side of the road.

Whether the defendant was driving at an appropriate rate of speed and in a careful manner in view of the condition of the highway were questions of fact. *Marr* v. *Hicks*, 136 Me., 33, 1 A., 2d, 271; *Frye* v. *Kenney*, 136 Me., 112, 3 A., 2d, 433. Findings of fact by a single justice if supported by credible evidence are final. *Ayer* v. *The Androscoggin & Kennebec Railway Co.*, 131 Me., 381, 163 A., 270; *Sanfacon* v. *Gagnon*, 132 Me., 111, 167 A., 695. Exceptions overruled. *Randolph A. Weatherbee*, *Frederick B. Dodd*, for plaintiff. *Fellows & Fellows*, for defendant.

EVERETT E. WILLEY BY HENRY E. WILLEY, PRO AMI

AND

HENRY E. WILLEY, PETITIONERS

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided May 1, 1941. This is a petition and motion to rectify alleged errors in the opinion in the cases of *Everett E. Willey by Henry E. Willey, pro ami* v. *The Maine Central Railroad Company* and *Henry E. Willey* v. *The Maine Central Railroad Company* argued before the Law Court at the December Term, 1940, and appearing in 137 Me., 223 and 18 A., 2d, 316.

A careful examination of the original cases discloses no error of law or fact in the opinion rendered which requires correction. Petition dismissed. Motion denied. MURCHIE, J., did not participate in this opinion. *Stern and Stern*, for plaintiffs. *Perkins & Weeks*, *Frank Fellows*, for defendant.

QUESTIONS AND ANSWERS

QUESTION SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE JUNE 20, 1940, WITH THE ANSWER OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta

June 20, 1940.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions of law hereinafter propounded are important, and that it is upon a solemn occasion,

I, Lewis O. Barrows, Governor of Maine, respectfully submit the following statement of facts and question, and ask the opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT

On May 23rd, 1940, a Special Session of the Legislature was convened by Proclamation issued by me, the said Lewis O. Barrows, Governor, on the 16th day of May, 1940. On June 7th, 1940, after having passed several acts and resolves and provided for the appointment of two committees to make further study of certain matters of State business, both branches of the Legislature passed

an Order which provided that when the Senate and House adjourned, they adjourn to meet on Monday, July 22nd, 1940, at 3 o'clock in the afternoon, Eastern Standard Time, and on said June 7th, 1940 both branches of the Legislature adjourned to the date fixed in said Order.

Since the date of said adjournment to July 22nd, 1940 certain matters involving State defense and improvement of military facilities of the State have arisen which in my judgment create an emergency and extraordinary occasion and make necessary immediate convening of the Legislature for consideration of these matters. My authority as Governor to convene a session of the Legislature while another special session of the Legislature previously called by me is in recess having been questioned, and important questions of law having arisen relative to the Constitutional rights, powers and duties of the Governor and the Legislature in this situation,

NOW THEREFORE

I, Lewis O. Barrows, Governor of Maine, respectfully request an answer to the following question:

QUESTION

When an extraordinary occasion arises, has the Governor the power and authority to convene the Legislature in special session during a recess of a special session previously called by him?

Respectfully submitted,

S/ LEWIS O. BARROWS

Governor

TO HIS EXCELLENCY, LEWIS O. BARROWS, GOVERNOR OF MAINE:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us, bearing date of June 20, 1940.

QUESTION:

When an extraordinary occasion arises, has the Governor the power and authority to convene the Legislature in special session during a recess of a special session previously called by him?

ANSWER:

We answer this question in the affirmative.

Very respectfully,

CHARLES P. BARNES
GUY H. STURGIS
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER
GEORGE H. WORSTER

Dated June 20, 1940.

QUESTION SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE JULY 22, 1940, WITH THE ANSWER OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta

July 22, 1940.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions of law hereinafter propounded are important, and that it is upon a solemn occasion,

I, Lewis O. Barrows, Governor of Maine, respectfully submit the following statement of facts and question, and ask the opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT

On June 27, 1940, the legislature enacted and the governor approved an act entitled: "AN ACT Authorizing a Bond Issue for Military Expenses" a copy of which act is attached hereto. This act became a law when approved, by virtue of its character as emergency legislation.

Among other provisions, the act authorizes the treasurer of state under the direction of the Governor and council, to issue from time to time serial coupon bonds in the name and behalf of the state to an amount not exceeding $2,000,000. (Section 2.)

By the terms of Section 5 the proceeds of such bonds are to be kept distinct from other moneys of the state and shall not be available for any other purpose than that expressed in the act. Section 1 sets forth the purposes for which such proceeds may be expended. The purposes are as follows:

> ". . . for the purpose of suppressing insurrection, repelling invasion, or for purposes of war, especially for the building and improvement of armories, for the building and/or improvement of airports, including municipally owned airports, for military purposes, for expenses incurred on behalf of the state or in cooperation with the federal government in improving military efficiency, and procuring military equipment, and obtaining and/or improving lands and buildings for military purposes, up to an amount not exceeding $2,000,000, to be charged to the proceeds from the sale of the bonds authorized in section 2 hereof."

The legislature found and recited as a fact (among others) in the emergency preamble the following:

> "Whereas, without adequate military preparations the danger of war is imminent, and the legislature considers that these facts warrant the incurring of indebtedness by the state under the provisions of section 14 of Article IX, of the constitution as amended for the purposes of war."

In section 2 of the act it is provided:

> "Said bonds, together with the proceeds thereof, shall be designated as State of Maine war bonds for the purposes set forth in this act, and shall be deemed a pledge of the faith and credit of the state. . . ."

By virtue of the several provisions of this act the Treasurer of State has offered on the financial markets of the United States a bond issue in the amount of $1,000,000, the date of issue being set as of August 1, 1940, and the Treasurer of State has asked for bids upon the same to be opened at his office in Augusta, July 23, 1940.

The question has been raised whether the bonds being offered by the Treasurer of State, will be a valid obligation of the State of

Maine. Such question of doubt materially affects the price at which said bonds will sell and may affect the entire issue in so far as to defeat or materially retard the purposes for which said bonds are offered.

NOW THEREFORE

I, Lewis O. Barrows, Governor of Maine, respectfully request an answer to the following question:

QUESTION

Is the Act, Chapter 120 of the Private and Special Laws of 1939 (Special Session) constitutional, and would bonds issued by virtue of its provisions, be valid?

Respectfully submitted,

S/ LEWIS O. BARROWS

Governor

TO HIS EXCELLENCY, LEWIS O. BARROWS, GOVERNOR OF MAINE:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us, bearing date of July 22, 1940.

QUESTION:

Is the Act, Chapter 120 of the Private and Special Laws of 1939 (Special Session) constitutional, and would bonds issued by virtue of its provisions, be valid?

ANSWER:

There being nothing to the contrary in the enacting part of the statute (Chapter 120, P. & S. Laws of 1939, Special Session) and it being unambiguous, the law raises a presumption that the legislature determined the existence of those facts necessary to sustain the validity of the statute under Article IX, Section 14 of the Constitution, as amended.

We therefore advise that the statute is constitutional and bonds issued by virtue of its provisions would be valid.

Very respectfully,

CHARLES P. BARNES
GUY H. STURGIS
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER
GEORGE H. WORSTER

Dated July 22, 1940.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FORTY

S.P. 757—L.D. 1247

AN ACT Authorizing a Bond Issue for Military Expenses

EMERGENCY PREAMBLE. Whereas, recent events have shown that all nations desirous of safety and independence must be adequately and immediately prepared for war in order to protect their sovereignty; and

Whereas, the State of Maine has not provided for the minimum of essential peace time national guard provisions; and

Whereas, recent events have shown that speed is the essence of modern war; and

Whereas, Maine must provide immediately funds to properly house military property, train troops, provide airports, and aviation facilities to be in position to coöperate effectively with federal plans; and

Whereas, without adequate military preparations the danger of war is imminent, and the legislature considers that these facts warrant the incurring of indebtedness by the state under the provisions of section 14 of Article IX, of the constitution as amended for purposes of war; and

Whereas, in the judgment of the legislature these facts create an emergency within the meaning of section 16 of Article XXXI of

the constitution and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MAINE, as follows:

Sec. 1. EXPENDITURES FOR MILITARY PURPOSES, AUTHORIZED. The governor, with the advice and consent of his council, may draw his warrant upon any money in the treasury available and not otherwise appropriated, for the purpose of suppressing insurrection, repelling invasion, or for purposes of war, especially for the building and improvement of armories, for the building and/or improvement of airports, including municipally owned airports, for military purposes, for expenses incurred on behalf of the state or in coöperation with the federal government in improving military efficiency, and procuring military equipment, and obtaining and/or improving lands and buildings for military purposes, up to an amount not exceeding $2,000,000, to be charged to the proceeds from the sale of the bonds authorized in section 2 hereof.

Sec. 2. ISSUE OF BONDS TO PROVIDE FUNDS FOR THE AFORESAID PURPOSES. The treasurer of state is hereby authorized, under the direction of the governor and council, to issue from time to time serial coupon bonds in the name and behalf of the state to an amount not exceeding $2,000,000, payable serially at the state treasury within 20 years from date of issue, at a rate of interest not exceeding 2½% per year, interest payable semi-annually, and signed by the treasurer of state, countersigned by the governor and attested by the state auditor, with the seal of the state affixed. After 5 years after issue, these bonds shall be redeemable by the state on any interest date in such amounts as may be determined by the governor and council at 102 and accrued interest. The coupons attached to said bonds shall bear the facsimile of the signature of the treasurer of state; and such bonds and coupons shall be of such denominations and form and upon such terms and conditions not inconsistent herewith as the governor and council shall direct. Said bonds, together with the proceeds thereof, shall be designated

as State of Maine war bonds for the purposes set forth in this act, and shall be deemed a pledge of the faith and credit of the state, and when paid at maturity or otherwise retired shall not be reissued.

Sec. 3. RECORDS OF BONDS ISSUED TO BE KEPT BY STATE AUDITOR AND TREASURER. The state auditor shall keep an account of such bonds, showing the number and amount of each, the date of countersigning, the date when payable and the date of delivery thereof to the treasurer of state, who shall keep an account of each bond, showing the number thereof, the name of the person to whom sold, the amount received for the same, the date of sale and the date when payable.

Sec. 4. SALE, HOW NEGOTIATED; $2,000,000 APPROPRIATED. The treasurer of state may negotiate the sale of such bonds by direction of the governor and council, but no such bond shall be loaned, pledged or hypothecated in behalf of the state. The proceeds of the sales of such bonds, which shall be held by the treasurer of state and paid by him upon warrants drawn by the governor and council, are hereby appropriated to be used solely for the purposes set forth in this act. The proceeds of said bonds may be expended during the fiscal year ending June 30, 1941, and the fiscal year ending June 30, 1942, but any balance unexpended shall not lapse but shall be carried forward to the same account to be used only for the purposes set forth herein.

Sec. 5. PROCEEDS OF BONDS NOT AVAILABLE FOR OTHER PURPOSES; MUST BE KEPT SEPARATE FROM OTHER FUNDS; ACCRUING INTEREST ON DEPOSITS APPLIED TO PAY INTEREST ON BONDS. The proceeds of all bonds issued under the authority of this act shall at all times be kept distinct from other moneys of the state, and shall not be drawn upon or be available for any other purpose. So much of the same as from time to time may not be needed for current expenditures shall be placed at interest, and the income derived therefrom shall be devoted to the payment of accruing interest on said bonds, and the treasurer of state shall include in his annual report a statement of all moneys so placed at interest, and of all interest collected and disbursed as herein provided.

Sec. 6. INTEREST, HOW MET. Interest due or accruing upon any bonds issued under the provisions of this act shall be paid by the treasurer of state from any money in the state treasury not otherwise appropriated; upon warrants drawn by the governor and council therefor.

Sec. 7. DISBURSEMENT OF BOND PROCEEDS. The state military defense commission created by the 89th legislature is hereby charged with the duty of directing the expenditures authorized in Section 1 hereof, and it is hereby authorized to coöperate with the federal government for the achievement of the said purposes.

It is hereby declared to be the intent of the legislature to authorize the appropriation of not to exceed $2,000,000 by the provisions of this act.

Sec. 8. BID REQUIREMENTS MODIFIED. Owing to the emergency requiring this legislation, it shall not be necessary to advertise for bids, for construction purposes or for purchase of supplies required or authorized under this act, for a longer period than ten days, notwithstanding any provision of law to the contrary.

Sec. 9. DEFINITION. Wherever in this act the words "military purposes" appear, they shall mean any purposes that will aid in facilitating the preparation for or conduct of war whether for defense or offense or whether on land, sea, or in the air.

EMERGENCY CLAUSE. In view of the emergency set forth in the preamble, this act shall take effect when approved.

QUESTION SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE DECEMBER 4, 1940, WITH THE ANSWER OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta

December 4, 1940.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the question of law is important, and that it is upon a solemn occasion, I, Lewis O. Barrows, Governor of Maine, respectfully submit the following statement of facts and question, and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT

At the September election of 1936, Honorable Harold E. Cooke of Gardiner was elected Judge of the Probate Court of Kennebec County for a term of four years, and on the first day of January, 1937 he entered upon the duties of his office. At the September election of 1940, said Honorable Harold E. Cooke was re-elected Judge of the Probate Court of Kennebec County for another term of four years, beginning January 1, 1941. He died on the first day of December, 1940.

QUESTION

What vacancy, or vacancies, in the office of Judge of Probate of Kennebec County are caused by the death of Judge Harold E. Cooke, and how may the same be lawfully filled?

Respectfully submitted,

S/ LEWIS O. BARROWS

Governor

To his Excellency, Lewis O. Barrows, Governor of Maine:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us bearing date of December 4, 1940.

QUESTION:

What vacancy, or vacancies, in the office of Judge of Probate of Kennebec County are caused by the death of Judge Harold E. Cooke, and how may the same be lawfully filled?

ANSWER:

The death of the Honorable Harold E. Cooke of Gardiner on the first day of December, 1940, he having been elected Judge of the Probate Court of Kennebec County at the September election of 1936 for a term of four years and having also been re-elected at the September election, 1940, to that office for another term of four years beginning January 1, 1941, created a vacancy in presenti in the office to which he was elected in September, 1936, and will create a vacancy on and after January 1, 1941 in the office to which he was elected at the September election of 1940.

In Article VI, Section 7, of the Maine Constitution dealing with judges and registers of probate and vacancies in their terms of office, it is stated in the second sentence:

> "Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid, at the September election next after their occurrence; and in the meantime, the Governor, with the advice and consent of the Council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January *thereafter*."

As to the present vacancy, we are of opinion that it may be lawfully filled by the appointment by the Governor, with the advice and consent of the Council, of an incumbent whose term will expire at midnight, December 31, 1940.

As to the future vacancy, we are of opinion that pending an election to fill the same at the September election, 1942, the Governor, with the advice and consent of the Council, may appoint an incumbent who shall hold his office until the first day of January, 1943.

In arriving at our conclusion, we have invoked well settled rules of construction that "the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter," and that the "constitution is to be construed, when practicable, in all its parts, not so as to thwart, but so as to advance its main object, the continuance and orderly conduct of government by the people."

Very respectfully,

GUY H. STURGIS
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER
GEORGE H. WORSTER
HAROLD H. MURCHIE

Dated December 5, 1940.

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, FEBRUARY 14, 1941, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

IN SENATE

February 14, 1941.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

WHEREAS, it appears to the Senate of the 90th Legislature that the following are important questions of law and the occasion a solemn one, and

WHEREAS, a Resolve has been introduced into the Senate entitled "Resolve Proposing Amendments to the Constitution Repealing the Constitutional Provisions Relating to the Office of Treasurer of State and Ratifying and Approving a Legislative Enabling Act Providing for Appointment of the Treasurer upon Approval of this Resolve" (a copy of which resolve marked Legislative Document 49 is herewith enclosed and made a part hereof) proposing an amendment to the Constitution of Maine to remove therefrom all provisions relative to the election, tenure and qualifications of the treasurer of state, and

WHEREAS, the amendment so proposed will be submitted to the people, if said resolve is finally passed, on the 2nd Monday in September next and, if accepted by them, will then become a part of the Constitution, and

WHEREAS, in anticipation of the adoption of said Amendment a bill has been introduced into the Senate entitled "An Act Creating a Bureau of the Treasury and Assigning Certain Duties Thereto" (a copy of which act marked Legislative Document 46 is herewith enclosed and made a part hereof) under the terms of which the treas-

urer of state is appointed by the commissioner of finance with the approval of the governor and council, and which act according to its terms is to become effective upon approval by the people of the aforesaid Resolve, and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed act, now therefore, be it

ORDERED: That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

QUESTION 1

Where the Constitution provides for the tenure of office, qualifications, and mode of election of a state officer but contains no express prohibition of legislation with regard to such tenure, qualifications or election, would it be a constitutional exercise of the legislative power to pass, concurrently with a resolve proposing an amendment to the constitution removing therefrom the provisions relative to the election, tenure of office and qualifications of such officer, an act providing a different mode of election and a different tenure of office, which act is not to become effective until and unless such resolve is adopted by the people?

QUESTION 2

If the provisions for ratification of Legislative Document 46 were omitted from Legislative Document 49 and the act and resolve finally passed by the legislature and the resolve adopted by the people, would Legislative Document 46 then become effective according to its terms as a valid and constitutional exercise of the legislative power?

QUESTION 3

If the legislature has not the power to pass the act set forth in Question 1 and the act is unconstitutional, can such unconstitutionality be cured by including in the resolve amending the Constitution as set forth in Question 1 an express provision ratifying and approving such act?

QUESTION 4

If Legislative Document 49 as now written were to be finally passed by the legislature and adopted by the people, would the provisions of Section 4 thereof cure any want of power in the legislature to pass Legislative Document 46 and make that act then effective as a valid law?

In Senate Chamber February 14, 1941
Read and Passed.
ROYDEN V. BROWN
Secretary

A true copy of Senate Order

Attest:
ROYDEN V. BROWN
Secretary.

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by Senate Order of February 14, 1941, and understanding from the preamble and Legislative Documents submitted that the questions have reference to the office of Treasurer of State, respectfully submit the following answers.

Question 1.

Where the Constitution provides for the tenure of office, qualifications, and mode of election of a state officer but contains no express prohibition of legislation with regard to such tenure, qualifications or election, would it be a constitutional exercise of the legislative power to pass, concurrently with a resolve proposing an amendment to the Constitution removing therefrom the provisions relative to the election, tenure of office and qualifications of such officer, an act providing a different mode of election and a different tenure of office, which act is not to become effective until and unless such resolve is adopted by the people?

Answer 1.

Article XXVII of the Amendments to the Constitution of Maine provides:

> "The treasurer shall be chosen biennially, at the first session of the legislature, by joint ballot of the Senators and Representatives in convention, but shall not be eligible more than six years successively."

It is, of course, well settled that legislative power is measured by limitation, not by grant, and is absolute and all-embracing except as expressly or by necessary implication restricted by the Constitution. *Sawyer* v. *Gilmore*, 109 Me., 169, 180; *Opinion of Justices*, 132 Me., 519; Cooley's Constitutional Limitations, 8th Ed., Vol. 1, Page 348. A prohibition by necessary implication is as effective as an express prohibition.

We are of opinion that Article XXVII of the Amendments to the Constitution of Maine, clear and unambiguous in language, is mandatory and, by necessary implication, not only absolutely prohibits filling the office of State Treasurer by any method of selection not there prescribed, but is also a complete inhibition against the enactment of legislation to that end, even conditionally. *Opinion of Justices*, supra. This question is answered in the negative.

Question 2.

If the provisions for ratification of Legislative Document 46 were omitted from Legislative Document 49 and the act and resolve finally passed by the legislature and the resolve adopted by the people, would Legislative Document 46 then become effective according to its terms as a valid and constitutional exercise of the legislative power?

Answer 2.

We answer this question in the negative.

Question 3.

If the legislature has not the power to pass the act set forth in Question 1 and the act is unconstitutional, can such unconstitu-

tionality be cured by including in the resolve amending the Constitution as set forth in Question 1 an express provision ratifying and approving such act?

Answer 3.

We answer this question in the negative.

Question 4.

If Legislative Document 49 as now written were to be finally passed by the legislature and adopted by the people, would the provisions of Section 4 thereof cure any want of power in the legislature to pass Legislative Document 46 and make that act then effective as a valid law?

Answer 4.

We answer this question in the negative.

Very respectfully,

GUY H. STURGIS
JAMES H. HUDSON
HARRY MANSER
GEORGE H. WORSTER
HAROLD H. MURCHIE

Dated February 26, 1941.

Answers of Justice Sidney St. F. Thaxter to Questions Submitted by the Senate of Maine to the Justices of the Supreme Judicial Court of Maine, February 14, 1941

To the Honorable Senate of the State of Maine:

The undersigned respectfully submits the following answers to the Questions upon which advisory opinions of the Justices of the Supreme Judicial Court were requested in Senate Order of February 14, 1941.

When I find myself in disagreement with all my associates I have some hesitation ordinarily in giving expression to the reasons for my own conclusion. In this instance, however, the individual opinion of each justice is asked for, and though I should prefer to defer to the views of those who at all times command my respect, I feel that my duty demands that I set forth the reasons for my answers to the questions submitted. This action is perhaps more than ever required because of the fact that I joined in the opinion submitted to the Honorable Senate of the State on December 15, 1933. *Opinion of the Justices*, 132 Me., 519.

I can see no difference in principle between the first and second questions now presented to us and the first question which was answered at that time. A more thorough study of the problem has, however, convinced me that the opinion to which I then gave my adherence should be modified.

I concur in what was then said that legislative power is "absolute and all embracing except as expressly, or by necessary implication, restricted by the Constitution." The opinion then delivered properly makes no distinction whether the restriction is express or implied. It is a prohibition in either case. When therefore the Constitution of Maine, by the provisions of Art. V, Part 4, as amended by Art. XXIII and by Art. XXVII, provides that the Treasurer of State shall be chosen "by joint ballot of the Senators and Repre-

sentatives in convention," there is a prohibition against his being chosen in any other way.

The aim of the proposed resolve to amend the constitution, Legislative Document No. 49, is to remove this prohibition on legislative action by the simple process of striking out the constitutional provision providing for the election of the Treasurer of State by a joint convention of the Senators and Representatives. If the amendment should be adopted the whole matter could then be taken care of by legislative enactment.

It seems to me to be highly desirable that the legislature should have the right to enact a law anticipating a constitutional change and contingent on it. The problem presented by the questions submitted to us is one example of the importance of such a right; for, even though the resolve provides for the temporary holding over by the old Treasurer of State, it is obvious that new machinery should be ready to function immediately on the adoption of the constitutional amendment which does away with the old organization. After all the purpose of our constitution, in addition to providing for the protection of individual rights, is to establish rules for the orderly administration of the affairs of state. Constitutional provisions are not necessarily self-executing and it is often essential to have enabling acts to make effective the will of the people. It is certainly a common-sense view to hold that the legislature may provide such enactments to take effect concurrently with the adoption of the constitutional amendment. I have found nothing in the constitution of this state which holds invalid such a reasonable procedure and every court but one which has considered the question concedes that it is proper. The desirability of such power is well illustrated by the situation which arose at the time of the adoption of the 18th amendment to the federal constitution. Prior to such amendment Congress had no power to prohibit the manufacture and sale of intoxicating liquor for beverage purposes within the states. On the date when such prohibition became effective under the terms of the amendment it became mandatory on Congress to do so. If Congress could not have passed valid enabling statutes to take effect at the same time as the prohibition established by the amendment, we should have had at least some period of time when there would have been no machinery to carry out the people's mandate. That Con-

gress had such power was settled by the case of *Druggan* v. *Anderson*, 269 U. S., 36. It is true that the court was there dealing with a statute which was passed after the adoption of the amendment and before the time when the acts against which the amendment was directed became unlawful under its terms. I can see, however, no difference in the result between that situation and one where the taking effect of the statute is contingent on the adoption of the amendment. It is apparent that the Supreme Court of the United Sates saw no distinction; for in a dictum in the opinion in this case Justice Holmes, speaking for a unanimous court, said: "Indeed, it would be going far to say that while the fate of the Amendment was uncertain, Congress could not have passed a law in aid of it, conditioned upon the ratification taking place."

I am unwilling to deny to the legislature of this state the same power in this respect which the Supreme Court has said was vested in Congress, a power which has also received general recognition by state courts.

I therefore answer the first question in the affirmative. For the same reasons I answer the second question in the affirmative. In the light of my answers to these questions, it becomes unnecessary to answer three and four.

Very respectfully,

SIDNEY ST. F. THAXTER

Dated February 26, 1941.

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 14, 1941, WITH THE OPINIONS OF THE JUSTICES THEREON

STATE OF MAINE

IN SENATE

March 14, 1941.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Whereas, it appears to the Senate of the 90th Legislature that the following is an important question of Law, and the occasion is a solemn one, and

Whereas, a bill is before the Senate for consideration permitting Indians to vote in state wide elections, and

Whereas, the question has been raised as to the constitutionality of this act because of the status of the Indian and the question of his eligibility to vote while enjoying privileges of the treaties between his tribe and the State of Maine, now therefore be it

ORDERED, That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution on this behalf, an opinion on the following question: "If by legislative enactment a poll tax should be imposed upon Indians living on reservations within the state, would said poll tax be such a tax as within the meaning of Section 1 of Article II of the Constitution that it would entitle Indians, subject to such tax, to vote?"

In Senate Chamber March 14, 1941
Read and Passed
ROYDEN V. BROWN
Secretary

A True Copy of Request and Endorsement Thereon.

Attest: ROYDEN V. BROWN
Secretary of the Senate.

To the Honorable Senate of the State of Maine:

The undersigned Justices of the Supreme Judicial Court, having considered the question upon which their advisory opinions were requested by Senate Order of March 14, 1941, inform the Honorable Senate that we are of opinion that it is not within the scope of our duty to answer this question in view of the fact that Senate Paper 486 entitled "An Act Permitting Indians to Vote in State Elections," to which the interrogatory refers, not only does not conform with or justify the Question submitted but is inherently illegal and insufficient.

Very respectfully,

Guy H. Sturgis
Sidney St. F. Thaxter
James H. Hudson
Harry Manser
George H. Worster
Harold H. Murchie

Dated March 19, 1941.

CHARLES JOHN DUNN

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA

MARCH 14, 1941, IN MEMORY OF

HONORABLE CHARLES JOHN DUNN

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT

Born July 14, 1872. Died November 10, 1939.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

HON. GEORGE F. EATON, of the Penobscot Bar Association addressed the court as follows:

MAY IT PLEASE THE COURT:

The Penobscot Bar Association in remembrance of the life and service of CHARLES J. DUNN, late Chief Justice of this court, has appointed a committee to prepare and present resolutions formally expressing the grief of the Association in his untimely death and the respect and veneration held for his memory. To this duty the committee also bring a deep and profound sense of personal loss and sorrow.

For over twenty years the doorway to the chambers of Justice DUNN in the Penobscot County Court-house, first as an Associate Justice and later as Chief Justice, stood open to all members of the

Bar for friendly, kindly, considerate and wise counsel and advice. Nearly every member of the local Bar had come to take it for granted that this doorway would ever remain open. Now it is closed in death.

In preface to the resolutions of respect which we shall offer, it seems proper to record briefly some biographical details of Chief Justice DUNN's life and to say something of the kind of man he was.

CHARLES J. DUNN was born in the State of Michigan on July 14, 1872, and died at his home in Orono, Maine, on November 10, 1939, while in the full performance of his exacting duties as Chief Justice. The years between, numbering sixty-seven, had been active and filled with achievement. His early education was obtained at Bluehill Academy in Maine and in Poughkeepsie, New York. His legal education started with the reading of law in the offices of the Honorable E. E. Chase in Bluehill and of Messrs. Hale and Hamlin in Ellsworth. He carried the remembrance of these associations with him through life and often spoke with deep feeling of respect for the men with whom he was so closely associated in his early years. His love of Hancock County and its people was deep-rooted and often expressed.

His active practice of law, however, began in Penobscot County at Orono in 1892 and from that year until the day of his death, he was diligently and continually active in the legal and civic life of his town, county and state. He had a strong sense of public duty and always gave most diligent and devoted service in any public office to which he was called. He served for many years as moderator of the town-meetings held in Orono. He served a term as a member of the state House of Representatives in the years 1901 and 1902. In his early years he also took an active part in party politics, representing his party as a delegate to state conventions and in 1908 as a delegate at large at the Republican National Convention at Chicago, Illinois.

From 1903 to 1911 he served as Judge of the Old Town Municipal Court. He brought to this office the same energy and the same conscientious attention to detail that he was later to bring to his duties in higher judicial office. His judicial duties were to him serious obligations and he devoted to them all his attention and effort. He had very few outside recreations. The law, its study and ad-

ministration, were to him matters of deep thought and serious consideration. He felt compelled to solve a legal situation correctly and took no rest until he had done so to his entire satisfaction.

For a number of years he served as Treasurer of the University of Maine and received from it in 1920 the degree of LL.D in recognition of his learning and judicial attainments.

In 1896 he married Alice Isabel Ring of Orono, Maine, who survives him. Two daughters also survive him, Barbara and Lillian, the former is Mrs. E. R. Hitchner of Orono, Maine, and the latter Mrs. Howard A. Sayford of Bloomfield, New Jersey. His family always had his loyalty and deep affection.

In religion he was a Universalist and at the time of his death and for several years prior he had been serving as President of the Maine Universalist Convention.

On February 6, 1918, at the age of forty-five, he was appointed an Associate Justice of the Supreme Judicial Court and since that date the history of his judicial thought and activity is written in the Maine Reports and in the minds and hearts of the lawyers and judges of Maine. His appointment as Chief Justice came on July 18, 1935, and he continued in the active exercise of the duties of that office until the day of his death. When we think of him, it is especially these last twenty-one years in high judicial office that come to mind.

In the earlier years of his judicial office before the Superior Court system was state-wide, he often sat at *nisi prius* in the trial of causes between party and party as did the other members of the court. In later years his duties were concerned with the Law Court, hearings in equity and court matters and the administrative duties of his office. In all these matters his sense of fairness was strong and his constant aim was to accomplish justice.

In fact, CHARLES J. DUNN, as a member of this court, possessed all the attributes we associate with the ideal judge. He was of imposing stature and of great dignity, of genial and friendly manner, and not failing in that sense of humor which is so essential in positions of power. He was an indefatigable worker and yet never seemed to lack time to devote to the problems of others which came before him in a daily procession, sometimes in the formal course of court procedure, but more often in the informal sanctity of his judicial chambers. He was ever willing to help the younger members of the

Bar in their efforts to penetrate the maze of judicial procedure. To him was given ability to tear aside the veil of obscurity which seems to hide the goal of justice from the novitiates, and outline the problems of procedure with clarity. Better than that, to him was given the kindly thoughtfulness which led him to dedicate the use of his clarity of thought for the benefit of all who sought his wisdom.

The ancient landmarks of judicial decisions were to him the foundations of the law. There was nothing of the radical in his thought. He possessed a deep and unyielding pride in the reputation of the court over which he presided, and jealously fought for that reputation to the end that the decisions of the Maine courts should be respected and revered as "good law" everywhere. A thorough student of the law and gifted with a retentive memory, he found in the recesses of his own mind an index to the Maine Reports which permitted him with unerring accuracy to reach to his book shelves for the volume and page which contained the answer to legal problems. His attainments were such that the indefinable line of justice between man and man was visible to him and he became an efficient instrument in the cause of justice.

He was a thorough student of language and his powers of expression found new and unusual words in the many opinions which he has furnished us in the Maine Reports. Conservative in all other ways and fundamentally conservative in thought and act, yet with the pen he became radical in his choice of words. Not his were the trite expressions of others, but always was his language clothed in inimitable style. If CHARLES J. DUNN had hobby aside from the law, this was it.

Thus he stood and walked and presided among us. Thus he won the respect and esteem of the Bar and the people of Maine. Thus he became an ornament to his profession and to the state which he served. Thus he lived, thus he died, and we who remain, as day by day goes by, appreciate more and more the qualities and talents which he so freely made available to us, because they are ours no more.

And so, may it please the Court, for the Penobscot Bar Association we respectfully offer the following resolutions:

RESOLVED that in the death of Chief Justice CHARLES J. DUNN the State of Maine has lost the services of a great jurist; of one

who in his lifetime performed his duties with fidelity, and by his character, industry and learning impressed his personality upon our laws.

RESOLVED that as members of the legal profession we deeply feel the loss of his friendly counsel, and now formally express the love we felt for the man and the respect held for his memory.

RESOLVED that these resolutions be presented to the Court with the request that they be entered upon its permanent records and that a copy be sent to his widow in token of our respect and sympathy.

GEORGE F. EATON
BALLARD F. KEITH
JAMES E. MITCHELL

For Penobscot Bar Association

HON. LOUIS C. STEARNS, President of the Maine State Bar Association then addressed the Court:

MAY IT PLEASE THE COURT:

As a representative of our State Bar Association, it becomes my privilege to pay tribute to the memory of our late Chief Justice, CHARLES JOHN DUNN, who was an active member of our Association from February 11, 1903, until his elevation to the Bench. If some personal note should appear in my remarks, I crave the indulgence of this court.

My acquaintance with Justice DUNN began in the fall of 1902, while I was still at college, and that acquaintance subsequently developed into a deep friendship. While he was a practicing attorney, it was, at times, my good fortune to be his associate, and at other times, I was his adversary. My recollections of these episodes, whether as an associate or an adversary, have always been memorable and pleasant.

CHARLES J. DUNN entered into the practice of law in 1892. Before a Justice of our Court, he pledged himself thus:

"I, CHARLES J. DUNN, solemnly swear, that I will do no falsehood, nor consent to the doing of any in Court, and if I know

of an intention to commit any, I will give knowledge thereof to the Justices of the Court, or some of them, that it may be prevented; I will not, wittingly or willingly, promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; that I will delay no man for lucre or malice, but will conduct myself in the office of an Attorney within the Courts, according to the best of my knowledge and discretion, and with all good fidelity, as well to the Courts, as to my clients, SO HELP ME GOD."

That solemn oath was ever afterwards his guiding star during his long years of practice and service on the Bench.

To Justice DUNN the Bar was an honorable brotherhood. He sought most earnestly to preserve and enhance the high standards of that brotherhood, and his efforts were always to further that cause.

I would particularly like to emphasize the service rendered by the deceased as a member of this court to the Bar. During that period in which he acted as a Justice, and subsequently, when he became Chief Justice, his chambers were open alike to lawyer and layman throughout the day. His work as Justice of this Court was not confined to the daylight hours, for, frequently during the silent watches of the night he reasoned his opinions to a conclusion in the confines of his own home. Many of his free hours were spent in discussing legal problems with the members of the Bar.

His opinions were first written in long-hand; his vocabulary and phraseology were extensive and unusual, and for this reason those opinions were characteristic and often the subject of comment.

Chief Justice DUNN's interest in the younger members of the Bar was not alone professional, but personal. He was somewhat like a miner seeking precious metal and when he struck legal capacity and sterling character in some young attorney, it gave him great pleasure. The young lawyer with a fair future stretching before him, or the briefless barrister with mediocre prospects seeking his advice, received the same clear and courteous counsel. He unceasingly urged the younger members of the Bar to read law, and to apply knowledge thus acquired in practice; and when a brief, a bill in equity, or a decree was presented to him couched in lawyer-like form,

he felt fully repaid for his efforts. His criticism of legal papers and procedure, while clear and sound, was seldom caustic. He tried to impress upon the younger man that success in the profession is not measured by money accumulated, but rather by fair and honest results obtained for his client. He was emphatic in his condemnation of any lawyer who violated his oath for his own advantage or that of his client.

Chief Justice DUNN's high position in our state did not make of him a recluse. He was an outstanding personality in any gathering. He enjoyed an extensive acquaintance with judges, lawyers and laymen within and without the state. He had a keen sense of humor and he was a charming social companion. His infectious smile was an inspiration to his many friends.

Most men at some period in life suffer disappointment and disillusionment. If our Chief Justice did have such periods, as no doubt he did have, he did not complain but endeavored to perform his duties to the best of his ability.

His love for his profession was exceeded only by affection for his family and his home, and this latter was but another workshop.

After years of worthy practice, he achieved the highest honor attainable to a lawyer in this state. He became Chief Justice of our Supreme Court.

Chief Justice DUNN died as he would have wished to die—in the performance of his duties. His death, however, occurring in the prime of his life was a great loss to our state, to the Bench, and to this Association.

When the Scribe writes "it is finished" our sorrow may be somewhat lightened by the realization and the appreciation of the achievements of CHARLES J. DUNN as an individual and as an honored member of our courts. Our Historian may not record him as the greatest of our long line of Justices, but he may properly say "This was a kindly man, with human faults and frailties, but wholly imbued with the desire to render justice betwixt man and man, tempered always with mercy and humanity."

Doctor ARTHUR A. HAUCK, President of the University of Maine, was the next speaker:

MAY IT PLEASE THE COURT:

I am grateful for the privilege of joining with the Court and the Bar of Maine in paying tribute to the life and public services of Chief Justice CHARLES J. DUNN. Others will tell of his achievements as a distinguished member of his profession. I wish to speak in appreciation of his services as a good citizen and a friend of youth.

Judge DUNN established a law office in Orono in 1892, and early in his career showed an interest in the welfare of the community which never lessened when he was called to assume larger responsibilities. For many years he served as Judge of the Municipal Court of Old Town and for a long period as the Town of Orono's moderator and as the chairman of its budget committee. He represented the Orono district in the legislative session of 1901-1902. His public service extended beyond the State. In 1908 and 1916 he attended the Republican National Convention as delegate-at-large. Shortly before his death his upright character, sound judgment, and high standing in his profession were recognized by nomination to the Board of Mediation of the National Labor Relations Board.

Some years ago Judge DUNN, on his nomination to the office of Town Moderator, expressed his conception of public service in the following words:

> "There is no remorse so deep, so penetrating, so inveterate, as that which comes from the consciousness that one has failed at a supreme moment to avail himself of an opportunity to perform a real and needful public service, and there is no happiness more sustaining, more enduring or more unselfish than the consciousness that one has worthily met the responsibilities upon him."

Judge DUNN's leadership in community affairs was not limited to affairs of government. I know from personal experience that his door at home or office was never closed to those who sought his counsel or help on any problem of personal or public concern. He exerted his influence to keep industry active in the town. A devoted member of the congregation of the St. John's Universalist Church

of Orono, he was chosen President of the Maine Universalist Convention in 1936, and as Vice-President of the National Convention in 1938.

Judge DUNN was a friend of youth and used his influence for the advancement of education in his home community and throughout the state. He was a Trustee of Westbrook Junior College, and for thirty years was identified with the University of Maine. The following tribute was written by the President of the Board of Trustees, Edward E. Chase, for the permanent records of the University, in recognition of Judge DUNN's outstanding service to the institution:

> "On behalf of the University his labor was long, diligent, and earnest. He was Treasurer of the University from 1909 to 1923, and upon his retirement from that office he was elected by the Trustees as Treasurer Emeritus, and served until his death as a member of the Finance Committee. During the financial emergency arising out of war conditions in 1918, he, together with certain trustees, pledged his personal credit in order to secure funds to finance the operations of the University. It was due in large part to his active interest that substantial endowment gifts were made to the University, and to his prudence and sagacity in investment that these trust funds survived, intact and unimpaired, the financial storm and stress of later years.
>
> "In other fields his recognized merit and ability brought him to high position in civic leadership and authority, with onerous duties and high responsibilities; but in spite of countless obligations elsewhere he always assumed gladly the burdens which his constant advisory affiliation with the University imposed upon him. He was proud of the progress made by the University during his long connection with its affairs, and the University is proud of his participation in its achievement."

Among the many honors which came to Judge DUNN, none were prized more highly than the awards of the honorary degree of Doctor of Laws by the University of Maine and Colby College.

Speaking for the University and for the citizens of Orono, speaking for the wider community of the State of Maine, I say of Judge DUNN that he was a true friend of youth, a devoted public servant, and a great citizen.

HON. RAYMOND FELLOWS, Justice of the Superior Court, then addressed the Court:

MAY IT PLEASE THE COURT:

CHARLES J. DUNN was an extraordinary man. I use the word "extraordinary" advisedly. I use it as Noah Webster would have used it, or as Chief Justice DUNN himself would use it. Extraordinary means extra-ordinary. It means beyond, or out of, the common order. It signifies the unusual. Judge DUNN exceeded the "common degree." He did not fit the ordinary measure. He was remarkable. He was rare.

American boys, bound for the high places of the world, usually have a life like this: First one sees them in a small town or on a farm, doing the chores of boyhood, and in the winter months floundering through the snow to the common public school where they learn to read, to write, and to cipher. This stage brings them perhaps to the sixteenth or eighteenth year, when something occurs—the reading of a book, a conversation with a friend, or the coming of a superior teacher—which causes them to fall in love with knowledge. Then with all the ardor and resolution which distinguishes the Yankee race, they proceed to gratify the new-born passion by devouring all the books they can procure. From desultory reading they advance to systematic study, and so work their way to an education, and march on to distinction in practical affairs, or in a profession.

So it was with CHARLES J. DUNN. As a boy he lived and went to school in Bluehill, Maine. He read law with good lawyers of Bluehill and Ellsworth. His education, however, was the education he obtained himself. He was self-taught and he had an excellent teacher. He was much better than "well read." He was in truth and in fact educated.

He did not have what is commonly called the "benefit" of a college course. If he had, he might not have had the necessary personal

stimulus to read and to think without ceasing, and for a lifetime. Colleges cut and polish some diamonds, but they destroy others. When I consider how the modern statute prohibits the self-educated from ever again becoming a member of the Bar, I fear that in the future we shall be deprived of the services of too many men who would be deeply read, with a wealth of good sense through personal experience. These are too often the men who would be the ablest of lawyers and, perhaps, become Chief Justices.

Chief Justice DUNN was blessed with a phenomenal memory. What he read he remembered. Not only did he remember *what*, but he remembered *where*. He was willing at all times to share his knowledge, and he was never too busy to answer. His door was ever unlocked, and no timid tap for admission was by him expected. He was glad to tell the young, or the old, lawyer that "you will find something about it in such a volume and I believe on such a page." He was never at a loss to suggest some starting point or to give some guide.

His opinions in our Maine Reports are monuments to his industry and to his love for shades of meaning. To understand some of his statements of the law one must follow the old rule that "a good student should be as long in reading as the author was in writing." His use of the English language is striking, but the uncommon words always carry within their definition the exact meaning that he intended to convey.

He believed that the court should be loyal to the law as proclaimed by constitution, by statute, and by long accepted judicial opinion. He regarded the constitution as the supreme guide—but it was the constitution as construed by a Marshall. He often expressed much impatience and great regret that a few modern members of the judiciary seem willing to stretch construction to satisfy public opinion. He knew the ancient landmarks, "which they of old time have set in thine inheritance," and he resisted, as the scripture commands, any modern doctrine that attempts their removal.

The Chief Justice possessed in full measure all good human characteristics, but the dignity of the court was never for a moment forgotten. He enjoyed a good story. He urged and promoted frequent social gatherings of the Bench and Bar, and he never himself failed in attendance. He was approachable, kind, and gracious to

layman and lawyer, on the Bench and off, yet his natural impressiveness permitted no one to forget the respect due to the judicial office.

Many of us had the opportunity to know him as the careful practicing attorney. We knew him as a dignified and learned judge. We have known him in the court-house and in the gathering of good fellowship. We have enjoyed his hospitality and that of his delightful wife and family. He is still with us in pleasing memory, although we no longer have his physical presence. He will be with us, and with all the lawyers of the future, so long as his carefully carved legal monuments endure.

HON. JOHN A. PETERS, Judge of the District Court of the United States, spoke as follows:

MAY IT PLEASE THE COURT:

Twenty years ago in June my predecessor in office, Judge Hale, who was then about to complete his twenty years of service on the Bench, stood before this court, then sitting in the persons of Mr. Chief Justice Cornish, and Justices Spear, Philbrook, Dunn, Wilson, and Deasy, on a similar occasion, and said that he was paying a tribute of respect and affection to a friend of fifty years, a former Chief Justice of this court, one of Maine's most distinguished jurists —the late Lucilius A. Emery.

It was quite appropriate that Judge Hale should speak on that occasion, as both he and his old friend traced their long association back to the same little law office in Ellsworth in Hancock County where Judge Hale began—and also ended—his preparation for admission to the Bar, and where Judge Emery began his long and successful career as a jurist—the law office of Hale and Emery, from which have come three of the Chief Justices of your court, Emery, Deasy and Dunn.

I assume that my invitation from your committee to be here today results from my friendship of fifty years with the late Chief Justice DUNN and an association that traces back in its beginnings to that same small town, though not the same office.

I am sure that not a few of the fine qualities of my valued friend,

CHARLES DUNN, owed at least their development and rounding-out to the environment where he spent a year or more in study before his admission to the Bar at the incredibly early age of nineteen years and seven months, in February, 1892.

A law office like the one I refer to is not unknown in Maine by any means, but it is becoming unique. Opened over a hundred years ago and still upholding the traditions of the fine lawyers who labored there, including the founder, Thomas Robinson, and then Eugene Hale, his brothers Frederick and Clarence, Mr. Emery, till he went upon the Bench, Hannibal Emery Hamlin for the last fifty-six years of his life—an office having the same appearance and even, largely, the same furniture as at first; what a place for the eager and impressionable mind of the eighteen-year-old boy coming from the still smaller town of Bluehill, to absorb the traditions of rugged honesty, industry, caution, fidelity to the interests of clients, and knowledge of the fundamental principles of the law, which were always characteristic of that office! They were equally characteristic of CHARLES DUNN, emphasized and fixed as permanent qualities by his connection with a place so admirably adapted to his nature and taste. He was always greatly affected and influenced by places and environments, especially in the early part of his life. Although he lived more years in Orono than anywhere else and was a loyal and patriotic citizen of that town, I think it never occupied the place in his fond remembrance that he kept for Bluehill where he lived as a boy, and Ellsworth where he went to become a man. The old office there was ever an unfading picture in his mind. His interest in localities in general was a part of his wide knowledge and appreciation of history, and especially legal and political history.

In the autumn of 1939 Judge DUNN and I happened to be together on the train from Portland to Bangor. He told me about the old court-house at Pownalboro, now Dresden, on the Kennebec River, and pointed it out from the car, exciting my interest to the extent that I wrote him for more information. Characteristically he went to the bottom of the matter and spared no trouble or pains to give me the information I wanted—more than I asked for. It seems that he and Judge Cornish had visited the building and as I could well understand, knowing his temperament, it made a great impression on Judge DUNN.

Only nine days before his death he sent me two old photographs which I shall always treasure, one of the old court-house and one of the nearby residence called the Bowman house. He wrote to me:

> "There should come to your desk in the course of a few days a photograph of the Pownalboro court house at Dresden where sittings were held in the Revolutionary period. The building was erected by the Plymouth Company in 1760. It is that at which you and I glanced from the train window recently.
>
> Judge Bowman was kinsman of John Hancock. John Adams, as attorney for the Plymouth Company, attended once. James Sullivan's initial effort in the trial of cases was in Pownalboro.
>
> Among other names of mention are those of William Cushing, Theophilus Parsons, Nathan Dane, Robert Treat Paine, the Sewalls, Quincys and Sumner.
>
> To Pownalboro all the citizens of Maine from the Kennebec to the St. Croix came for the transaction of legal business."

That incident and that letter typify the man who wrote it. He wanted to assist a friend who had asked for something—although only casually and for information. He lost no time in doing it. He did it thoroughly and completely. He did it purely from a spirit of kindness and friendliness. It displayed his deep interest in history and biography and his accurate knowledge of lawyers and law subjects connected with early times in Maine.

You gentlemen of a court of last resort, sitting only in banc, do not come much in contact with the people. I have heard Judge Anderson, formerly of the Circuit Court of Appeals in this circuit, vigorously maintain that the most important courts in the country are the police and other lower trial courts with which the people come into immediate contact and observe the kind of justice that is there handed out on the spot.

It is, of course, most important, not only that people get what you think is justice, but that they recognize it as such and see it dispensed in their own courts in such a manner as to inspire confidence in the way the machinery revolves. There is a good deal in that. Judge Dunn thought so too. He was once Judge of the Municipal

Court in his home town of Orono, and gained the respect and confidence of the people, both personally and by the conduct of his office, especially by his considerate and helpful attitude toward all comers, no matter what their station in life. His court was a peoples' court where they could go at any time and be sure of respectful attention and a full and fair hearing. His punctiliousness in this respect was notable and added to the reputation and value of every court that he was connected with.

The spirit of kindly helpfulness was one of the most endearing qualities of Judge DUNN. The desire to do good and aid his fellow men was a part of his nature. If a young lawyer perplexed by some legal difficulty, took his troubles to Judge DUNN he simply could not help dropping his own work and giving his whole attention to the problem till it was solved. Members of the Bar in Bangor will testify that Judge DUNN's assistance was freely given to both old and young attorneys, sometimes to those who, if more considerate, might well have relieved the Judge of the labor of investigation which he was so willing to undertake. It is said that he never turned away from the door of his dwelling any man or woman who wanted help—and they were many. He patiently considered every application for assistance or advice and always did what he thought most helpful under the circumstances.

This continual generosity of time and talent, given so unselfishly, brought no visible reward, except once. The bread cast upon the waters returned in good measure on one occasion, most unexpectedly. Among other things he generously did for the benefit of the public was to serve on the local draft board for the first World War. His untiring and conscientious labors in that connection brought him in contact with Governor Milliken who, greatly appreciating his services and knowing his reputation for ability and character, offered him an appointment as Justice of the Supreme Judicial Court of this state early in 1918. This was a complete surprise to Judge DUNN, an honor wholly unsought, but one well earned and fully justified by his qualities as a man and his standing at the Bar and in the state.

Of his work on the Bench during nearly twenty-two years, first as Associate Justice and after his well-deserved promotion to the Chief Justiceship, there are others better qualified to speak than I. Our

paths diverged about the time he went on the Bench. I think I was never in the same court-room with him but once, and that was on the occasion of the dedication of a new court-house in our common county of Hancock. That, of course, was a joyous event for both of us, as we recalled the establishment of the courts in that old county and talked of the giants of the Bar in early days. However, it is not necessary for me to pore over books or ask questions to know that whatever CHARLES DUNN did as a Judge or an individual, he did with honesty, intelligence, care and courage. I am sure that his extraordinary industry and love for his work would lead him to do more than his share of any task that came before the court or any other body with which he was connected.

His devotion to duty was so strong and his interest in his profession so absorbing that he had no time for recreation; but if he had any time he would not have used it for that purpose. He held to the somewhat rugged and old-fashioned idea that eight o'clock in the morning must find him at work in his office, summer and winter; that appointments must be scrupulously kept, and that pleasure should never interfere with business.

Although of robust physique, he preferred study and the reading of books to any form of out-of-doors activity. His pleasure in books was enhanced by the fact that he had an unusually fine and retentive memory which gradually became a storehouse of information, not only as to law cases and decisions in the reports, great numbers of which he could recall at will and cite even the volume and page, but as to history and political events in general.

Never actively in politics, except to the extent of serving one term in the legislature, just forty years ago, he was intensely interested in political subjects and never lost his concern for the political fortunes of his friends and the success of the political party to which he always belonged. I think he probably could name both the successful and the unsuccessful candidates for high office in this state and in the nation for the last fifty years. A memory such as his is a great asset to a lawyer and a judge, as it was to him.

In any appraisal of the life of our departed friend I think it would be said that he was by natural inclination, no less than by training, a lawyer. Unfortunately we sometimes see members of our profession who we think would have done well to engage in some other occupa-

tion, and many lawyers do make their profession a stepping stone to other and more profitable fields; but no one who knew Judge DUNN could ever disassociate him from the realm of jurisprudence. He lived and moved and had his being in that sphere. He loved the law. To him as to Lord Coke, it was "a gladsome light." He died while in active pursuit of his profession, as I think he would have wished.

On an occasion like this, one can place on record but a brief and incomplete estimate of such a full and active life as was that of him who has left us. We can pay our tribute to the man. His work as an able, honorable and faithful servant of the public will speak for itself.

A man of probity and courage. A faithful friend. A just and upright judge, one "that walketh uprightly, worketh righteousness, and speaketh truth in his heart." Such was CHARLES J. DUNN.

HON. GEORGE H. WORSTER, Associate Justice of the Supreme Judicial Court, next paid the following tribute to the memory of Judge DUNN:

MR. CHIEF JUSTICE AND GENTLEMEN OF THE BAR:

I have listened attentively to the resolutions presented on the death of the HON. CHARLES J. DUNN, sixteenth Chief Justice of the Supreme Judicial Court of the State of Maine. The recital of his achievements and the eulogies pronounced by you have again awakened our memory of that fateful November day in 1939, when, at the very height of his career, he was suddenly stricken with a fatal illness while actively engaged in discharging the important and exacting duties required of the Chief Justice.

And now, once more, the painful realization is forced upon us that never again will we feel his firm handclasp, and hear that cordial invitation so familiar to his friends, "come in and sit."

His mortal remains are now resting in an old cemetery located in Bangor, in the state of his adoption, overlooking the waters of the Penobscot River, which, while living, he so much admired. But as sweetly sings the poet in the Psalm of Life,

"Dust thou art, to dust returnest,
Was not spoken of the soul,"

and today the spirit of CHARLES J. DUNN, unconfined by walls of clay, still lives. It has been beautifully said,

"To live in hearts we leave behind, is not to die."

Loving hands have erected a monument at his last earthly resting place as a memorial, but he already had, and still has, a memorial more impressive and more enduring than the most perfect shaft of marble could possibly be—a memorial composed of the many opinions written by him with the most painstaking care during the nearly twenty-two years he adorned the Bench of the Supreme Judicial Court. These opinions, now an integral part of the law of this state, are incorporated in the twenty volumes of the Maine Reports beginning with Volume 117, and have been, and for many years to come will be cited and quoted as precedent and authority, not only by the court of this state, but by the courts of other jurisdictions. In these opinions will be revealed to those who come after us, and who never knew him, something of his rugged self-reliant character, something of his intellectual power and ability, something of his constant purpose and determined effort to see to it that justice be done between party and party. What a memorial! The spoken word is soon forgotten but the written word lives on through the ages. Although Judge DUNN is dead, yet today, line by line he speaks to us from the printed page, still in part directing our thinking, and affecting in a wholesome manner our conduct of affairs.

But, notwithstanding all these things, the memory of him that will linger the longest with his friends is not the memory of his achievements and successes in life, but the memory of those personal qualities which went to make up his real personality—a personality which impressed itself on all those with whom he came in touch, and of which I myself was deeply conscious.

CHARLES J. DUNN, always a courteous and considerate gentleman, was endowed by the Creator with a well-balanced mind and a large amount of practical common sense. That mind he developed and trained by diligent study of the law until he not only acquired great legal learning and acute legal perception, but also the ability to think clearly and to reach conclusions by processes of sound and convincing reasoning.

He did not, however, limit his studies to legal subjects. He always

had a great thirst for all kinds of knowledge, and was constantly seeking and acquiring new facts and new truths which he carefully stored away in his mind until it became a veritable storehouse of priceless treasure, which was safely kept against the hour of need by a very retentive memory.

He had a broad and varied experience in life. Student, lawyer, legislator, twice a delegate of his political party to its national convention where he served in committee with men of distinction, judge of a municipal court, Associate Justice of the Supreme Judicial Court, and finally its Chief Justice. And in his stride ever onward and upward, he acquired and retained the friendship and confidence of men holding high positions of honor and trust in the state and the nation.

Judge DUNN was a brilliant conversationalist. His great command of language, keen sense of humor, and narrative power, made him a capable and entertaining speaker, to whom it was always a pleasure to listen.

He was a worker and kept his mind ground to a keen edge by working almost constantly, with practically no vacations, and with but little if any relaxation. To him this was possible, only because of his love for his work and his strong constitution. He really loved to work, and appeared to be the happiest when working the hardest. After an adjournment of a *nisi prius* term of court at which he had presided, in those days when the justices of the Supreme Judicial Court were on the circuit, he spoke of his return to his office desk, loaded as it was with important and complicated matters to be attended to, as his vacation.

Difficulties did not overwhelm him but rather challenged him to greater effort. There was no task too great, no work too hard, no day too long, to daunt him. Not only were the hours of the day spent in labor, but even the hours of repose were invaded, as the pencil and paper on his bedside stand bore mute witness.

His work, however, was not all done in discharging the duties of his own office, as many well know. So far as was consistent with his position, he helped others to bear their burdens, even at the expense of great labor and inconvenience to himself, which he always tried to minimize. And this assistance was rendered in such a prompt and cheerful manner as to make the seeker for help feel that Judge

DUNN really welcomed the task of helping to solve the problem presented.

He was a very reserved and undemonstrative man and always bore himself with becoming dignity. Perhaps that is the reason why strangers, seeing him at a time when he was carrying unusually heavy burdens, sometimes thought him cold and austere, but they did not really know the man.

Years of constant work on complicated problems, days spent in anxiously seeking truth and justice through the maze of conflicting evidence by closely following the paths of cold, logical reasoning, all the while bearing heavy and ever-changing responsibilities, have a tendency to stamp on the face of any judge an expression of great seriousness.

But as rooms filled with warmth and cheer are often found concealed behind cold gray walls of stone, so beneath the grave countenance of Judge DUNN there always glowed a warm affection for his fellow men, in whose highest welfare he had a constant, never-failing interest, and for whose suffering he had a sincere sympathy which was often expressed in very material and helpful ways.

He was always interested in all well-considered efforts for civic improvements, in the education of the youth of our state, in those institutions striving to alleviate pain and suffering, and in those other institutions endeavoring to lift mankind to a higher level. His interest in local affairs will not soon be forgotten by his fellow townsmen. The University of Maine will ever bear witness to his interest in the cause of education through the long years of his service as its treasurer and one of its trustees. He will be remembered as a Trustee of Westbrook Seminary, now Westbrook Junior College, and also as a Trustee of the Eastern Maine General Hospital, and the Universalists are not unmindful of his labors as president of the Maine Universalist Convention.

Judge DUNN was first appointed an Associate Justice of the Supreme Judicial Court in 1918, and was twice reappointed, so three times he took the oaths required to qualify him for that position, and later took the oaths required to qualify him as the Chief Justice of this court. He took all of those oaths seriously. To him they were sacred. They were not mere words necessary to be said in order to enter upon the discharge of the duties of an office. They were all of

that and more. To him they were the words of a solemn covenant on his part, which he never for a moment forgot. Even when heart-strings were pulling, ignoring paths of expediency which led not to ultimate justice as he saw it, we heard him say again and again that decision must be made by him under his official oath. And he had the courage to do it. He was never lacking in courage. Although he knew that he would be left standing alone, that never deterred him in the slightest from performing his full duty as he saw it.

If duty were personified, then it could be truthfully said that Judge DUNN was a devout disciple of Duty. When stricken in his last illness, surrounded by those who were striving to alleviate his pain, his first thought was not of himself but of his official appointments, which, in spite of his intense suffering, he felt it was his duty to keep. That was characteristic of the man. All through his judicial career, he put duty first—personal convenience and health second.

He was a man of high ideals and of the utmost integrity, and with all the strength of a virile man he hated dishonesty, fraud and injustice, which, however well hidden behind a screen of pretense, he was quick to discern and bring to light in a masterful way.

Judge DUNN was not only an able, outstanding jurist, learned in the law, but he carefully administered justice in an impartial manner to the high and the low.

He was patient at hearings held before him, even under trying circumstances, and always gave close attention to the evidence and arguments of counsel. Then he had a way of cutting through it all to the very heart of the matter, revealing the vital issues involved, however much they may have been obscured. And the decision which followed was not made until all aspects of the case had been duly considered in light of the controlling authorities and precedents.

He was a learned, just and upright judge; and what finer epitaph could be written at the close of a long judicial career?

Today the Bench and Bar of the State of Maine do well to pause in their labors to pay honor to his memory and mourn his passing; and the State he loved and served so long and with such fidelity may truthfully say of him:

"Well done, thou good and faithful servant."

Hon. James H. Hudson, Justice Supreme Judicial Court, then presented a poem, dedicated to the memory of Judge Dunn and written by his Secretary, Ina L. Brown, which he was asked to read:

Charles J. Dunn—A Portrait

He walked with his head slightly bowed
As though in meditation; he moved slowly
And methodically, but with his mind
Far off in some inward soliloquy—
Some problem, perchance, of pitiful mankind
Made his to solve, in justice and in truth.

He seemed, at times like these, austere,
Reserved and unapproachable, but truly
He was none of these. Dignified, yes;
But underneath, his heart was tenderness
Itself, for illness, for poverty, for sin,
And gentle toward the erring and the weak.

He loved all little children, and knew
A pity for such of them as were alone,
Afflicted and unfortunate. He gave freely
To aid and alleviate their suffering.
Courtliness was his; an old-time gallantry;
A reverence for age, and thoughtfulness.

At work, all else forgotten, he became
A master-mind; his clarity of brain,
His deftness at the turn of written word,
His memory, retentive, keen and deep,
Envied by many and eclipsed by few—
The scales of justice balanced in his hand.

He stood for right, as he believed it;
He never forsook honest convictions
For fear or favor. Lost causes were his;

And the standard of freedom and liberty
His under which to serve, unquestioning
In devotion, in faith and in humility.

His hoard of knowledge was unplumbed,
And compassed many realms of learning
Besides the law, which was his life—his pride.
His store of anecdote, with cherished bits
Of pathos and of humor, were revealed
To many, pausing for a space, to sit.

Once his friend, his loyalty was sure,
And his a depth of sentiment, unseen
Except by those who loved him. Many a man
The world counts great was proud to shake his hand
And claim acquaintance, yet he never seemed
To realize that he, too, was counted wise.

He had a youthful idealism—
A profound admiration for those of early days
Who had struggled and won a place among the great;
And to his mind the greatest of them all
Was the gaunt, ungainly Liberator,
The patient-faced, tragic Lincoln, who gazed

Compassionately at him from the walls
Of his office—an inspiration and a help
When he too became weary and bewildered.
For under his own calm exterior
Dwelt a personality half-shy, half-lonely,
Who reached out for friendliness and cheer.

No suppliant for aid met cold response
Or departed without succor and relief;
No plea for help but struck a hidden chord;
And no favor ever asked in honesty
Went unanswered. His the boon to give
In time, in money, in labor and in deed.

He had a keen interest in America,
A devotion to his State, an obligation
Of service which never lessened or failed
Up to his last breath and waking moment.
He was a man to be revered, to be admired,
To be lived up to as a lawyer and a judge.

But I like best to remember him
Not as a grave judge, a dignified gentleman—
But as a man who loved his home, his friends,
His family—whose kindly smile gave cheer—
Whose boyish chuckle lingers in my mind—
Whose spirit and whose courage never dies.

Response for the Court by Chief Justice GUY H. STURGIS:

GENTLEMEN OF THE BAR:

The justices of this court reverently and with full accord join with you in laying upon the altar of the memory of Chief Justice CHARLES J. DUNN the splendid tributes of love and respect which have been so graciously and eloquently expressed in the resolutions and addresses presented here to-day. Upon pages that will endure, these tributes will be enrolled that all may come to know our beloved friend as we have known him, a Christian gentleman, a public-spirited citizen, an eminent and successful lawyer, an able and just judge who, having reached the pinnacle of his judicial career, brought to the office of Chief Justice of this court not only great ability, learning and sound judgment, but also an abiding sense of right and wrong which wrought in him a profound conviction that the cold logic of the law and the inflexible rules of its creation must at all times give way to equity and good conscience when the demands of justice dictate.

The death of CHARLES J. DUNN, the sixteenth Chief Justice of the State of Maine on November 10, 1939, at his home in Orono, was an event for which the court, the Bar and the people of the state were wholly unprepared and the announcement of it brought universal grief and sincere expressions of regret. To us who were his associ-

ates on the Bench, whose affection and admiration for him as a man and as a magistrate were unbounded, the tragedy of his untimely demise and the shock of its coming is an ever present sorrow which time only can assuage. His death was indeed sudden, but we rejoice in the thought that it was merciful in the brevity of its pain and suffering, that he was gathered to his eternal rest in the very midst of the judicial labor he loved so well, and to which unsparingly and with utter disregard of his own health and strength he devoted his very life. We believe that he died as he would have chosen to die.

On February 6, 1918, Judge DUNN was named an Associate Justice of the Supreme Judicial Court of the State of Maine by Governor Carl E. Milliken. The Bench upon which he took his seat consisted of Chief Justice Leslie E. Cornish and Associate Justices Albert M. Spear, Arno W. King, George E. Bird, George F. Haley, George M. Hanson, Warren C. Philbrook and himself, justices whom many of us knew and revered. It was as an associate of these mighty men that Judge DUNN began his judicial life. His legal training and experience had been broad and of a high order. He had studied and practiced law with and among the leaders of the Bar of Eastern Maine. He had worshiped at the shrines of an Appleton, a Peters, an Emery, and a Wiswell, and with a personal and professional acquaintance with them taken to himself not a little of their wisdom, philosophy and abounding knowledge of the law. The influence of that association remained with him throughout his life.

Although Judge DUNN was a dignified and reserved man, he was always a courteous and gracious gentleman and his thoughtfulness of and consideration for others was unbounded. He understood human nature and knew his fellow men, their strength and their weaknesses. He could read beneath the surface and discern real worth, whatever be its guise, and as readily recognize and reject that which was false, dross and without merit. He was, above all, a student not only of the law but of literature in all its branches. Possessed of a remarkably accurate and infallible memory, the writings of the dramatists, the essayists, the historians and of all standard authors old and new were to him an open book and at his ready command for reference or quotation. His knowledge of the law was profound. As he read the authorities, the rules there settled and the principles enunciated were indelibly stamped upon his memory. A

case analyzed and studied was never forgotten, and its title, the book and the page could be stated with rare error when occasion demanded. He was as well acquainted with the text-writers and their monumental expositions of the law. It is needless to say that the manner of man that he was when he came to this court enabled him to forthwith gain the respect and confidence of his associates and from the beginning to be accepted as a worthy member of that great tribunal.

For twelve years, Judge DUNN traveled the circuit of this state and held *nisi prius* terms in each and every county thereof. He presided with dignity and ease. He ruled promptly and decisively. He was impartial and always just to all parties and their counsel. His charges to the jury were direct, forceful and enlightening. Sustainable legal error in his rulings was indeed rare.

He was especially fitted and adapted to the work of the Law Court. There, his broad learning and scholarly attributes came into full play. His research of authorities was never exhausted until all the law in point and of record had been examined, analyzed and with thoughtful discrimination applied to the pending question before him. His literary style was that of an individualist. His opinions were written "in choice word and measured phrase" and his manner of expression was somewhat unusual, and yet the words he chose were always apt and his expression, when carefully analyzed, invariably proved to be an accurate and sound statement of the law.

In almost twenty-two years upon the Law Court, he delivered two hundred and eighty-one opinions, all strong and convincing. They are the imperishable monuments of his judicial career. His first published opinion is *LeClair* v. *White*, 117 Me., 335, a petition for habeas corpus forward on exceptions, involving the right of the respondent to be held to answer on presentment or indictment of a grand jury and not otherwise under the due process clause of the Constitution of the United States. One of his leading opinions is *Manufacturing Company* v. *Benton*, 123 Me., 121, an appeal from an assessment of taxes wherein he restated for the court the settled rule of this jurisdiction that water power in and of itself is not taxable and that a petitioner for an abatement of taxes must show that his property is overrated, that the valuation laid thereon by the assessors having reference to just value is manifestly wrong, or that

an unjust discrimination denying the equal protection of the laws existed. In a careful review of pertinent authorities, learned and exhaustive, he wrote the holding that the complaining petitioner was not denied his constitutional guaranties. In his opinion in *Chaisson* v. *Williams*, 130 Me., 341, he defined at length the application of the doctrine of *res ipsa loquitur* as applied in cases of injury to invited guests caused by the operation of automobiles, held that the invocation of the doctrine in that instant case was warranted and that a verdict founded on that rule of evidence could not be disturbed. This opinion is accepted as a leading case in this country by the annotators and has been cited with approval times without number. In *Arnst* v. *Estes and Harper*, 136 Me., 273, he clarified the confusion and apparent conflict in the authorities as to the joint and several liability of tort-feasors whose negligence without personal concert or common design concurs in producing a single indivisible injury .The last opinion he wrote was *State* v. *Colin R. Dunn*, 136 Me., 299. It was issued only a few days before he died. It concerns the sufficiency of a statutory criminal indictment. It confirms the assertion that the scope of his judicial thought, study and pronouncements was broad and most inclusive.

It was on July 18, 1935, that Judge DUNN was appointed Chief Justice by Governor Louis J. Brann, and it was in that office he served until he died. It is needless to say that during that period his general judicial service was of the same strong and uniform character which had marked his long years upon the bench. Loved as a man and admired and respected for his great learning, broad experience and sound judgment by all of his associates, tendered the loyalty and coöperation that was his due, I am confident that, could he speak, he would say to us to-day that these last years of his life were happy days filled to overflowing with the contentment that comes to a man who is privileged to live and work in a calling to which he is devoted, to be the recipient of the highest judicial honor within the gift of his state, to have the respect in unstinted measure of all people, and to have made a record upon the pages of judicial history in which he might well take pardonable pride. Chief Justice CHARLES J. DUNN will always be remembered as one of the ablest Chief Justices of the Supreme Judicial Court of Maine.

The resolutions offered by the committee and endorsed by the

heartfelt remarks of all who have spoken are most gratefully accepted by the court and will be entered upon our records. As a further tribute of respect to the memory of Chief Justice DUNN, this court will now adjourn for the day.

Ordered that the foregoing report be recorded in the Maine Reports.

Supreme Judicial Court

by GUY H. STURGIS

Chief Justice

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Watts Detective Agency v. *Inhabitants of County of Sagadahoc*, 233.

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The county commissioners are under duty to determine in advance, so far as practicable, the financial requirements, to provide the necessary funds, and to control expenditures.

Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercise the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs.

Watts Detective Agency v. *Inhabitants of County of Sagadahoc*, 233.

CRIMINAL LAW.

Exceptions to the whole charge, stating merely that charge was an "argument for the State instead of a statement of the law" and "prejudicial to the rights of the respondents," were insufficient.

When the legislature, in defining the respective functions of the court and of the jury in the trial of a case, laid down the inhibition that the judge must not express opinion on arising issues of fact, it went no further in its meaning than that he should refrain from speaking of the facts in manner implying his utterance is entitled to obedience. He must separate the questions of law from the questions of fact, and thus disunited send the questions of fact to the province of the jury, free from authoritative verbal invasion by himself.

A judge presiding is not merely to see that a trial is conducted according to certain rules, and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He should make the jury understand the pleadings, positions and contentions of the litigants. He may state, analyze, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment.

It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact; nor because an inference favorable or unfavorable

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An easement is an incorporeal right not capable of seizin.

The purpose of a real action is to recover possession of land. It is not a proper remedy for one who seeks to recover for the disturbance of the enjoyment of an easement.

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ELECTIONS.

The procedure for determining the result of a primary election, and ascertaining the names of candidates of the various parties to be voted for at a state election, is regulated and defined by statute.

Under statutes, secretary of state has no voice in the determination of what votes or ballots shall be counted in a primary election. That is no part of his duty, and he has no right or authority to reject or count ballots. It is the duty of the governor and council to ascertain the candidates who have received the highest number of votes cast by their respective parties.

Burkett, Atty.-Gen. v. *Robie, Secretary of State*, 42.

EQUITY.

A bill in equity brought by a mortgagor of real estate to enforce his right to redemption from a mortgage under R. S., Chap. 104, Sec. 15, cannot be entertained without full compliance with all statutory prerequisites. It must be alleged and proved that the redemptioner has demanded an accounting of the mortgagee or person claiming under him and the latter has unreasonably refused or neglected to render such account in writing, or in some other way by his default, has prevented the plaintiff from performing or tendering performance of the condition of the mortgage. The demand for an account must be made upon the party having the legal record title to the mortgage. If there is a valid assignment and transfer of the mortgage and the redemptioner has due notice by record or otherwise thereof, he must demand an account from the assignee and bring his bill against him. It is only when such an assignment has not been recorded or notice of it given that a demand for an account upon the mortgagee alone is sufficient. If the assignment of the mortgage is absolute and the redemptioner has notice, the mortgagee is not a necessary party. But if the assignment leaves an interest in the mortgagee which will be affected by the decree, as when he has been in possession and received rents and profits or other moneys, he must be joined as a party defendant and the court will not proceed in his absence.

Equity is always liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result.

Doyle v. *Williams*, 53.

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as a lien from the date of attachment and has priority over all the intervening encumbrances. A title obtained by a levy duly made takes effect by relation as of the time when the attachment was made and operates as a statute conveyance made at that time.

By the weight of authority, a sheriff cannot sell on execution less than the entire estate which is bound by the lien of the attachment and has been seized. When the defendant in execution owns the entire fee, the officer cannot sell an undivided interest and thus make the purchaser a tenant in common with the defendant in execution. The character of the debtor's estate cannot be so changed at the pleasure of the judgment creditor or of the sheriff.

It is a cardinal rule that an execution sale of an undesignated part of a large tract of land, there being no means of distinguishing the portion sold from the residue, is void.

Under provisions of R. S. 1930, Chap. 13, Sec. 3; Chap. 14, Sec. 28, mortgagee of premises sold on execution is not entitled to notice and joinder as a party defendant in an action to enforce the collection of a tax assessed on the mortgaged property.

Snell et al. v. *Libby*, 62.

EXECUTORS AND ADMINISTRATORS.

When a person is appointed as the executor or administrator of an estate, who is himself debtor to the estate, the debt is not extinguished and such personal representative must account for the same as assets in his hands.

Notwithstanding the resignation of the executor, he can still be cited into the Probate Court, and required to account for the matters claimed, if liable therefor. It can only be done in that court.

U. S. of America, Appellants — In re Morse Estate, 302.

GIFTS.

Whenever the relations between two persons are such that one is completely dependent and relies upon and necessarily reposes confidence in the other, a fiduciary or confidential relation exists and the law implies a condition of superiority held by the one over the other so that in every transaction between them in the nature of a deed, gift, contract, or the like by which the superior party obtains a possible benefit, the existence of undue influence and the invalidity of the transaction is presumed and the burden of proof is cast upon the one who receives the benefit to show by clear evidence that he or she acted with entire fairness and the other party acted independently with full knowledge and of his own volition free from undue influence.

Small, Adm'r v. *Nelson*, 178.

GUARDIAN AND WARD.

INTERNATIONAL LAW.

MANDAMUS.

MORTGAGES.

it is known, so that it can be located, the title to the whole described or named parcel will pass, in the absence of anything in the deed itself indicating a different intention, although less than the whole parcel was covered by the description in the instrument or record to which only a bare reference was made.

Pierce et al. v. *Adams*, 281.

MUNICIPAL CORPORATIONS.

To be enforceable, municipal ordinances must be reasonable, and not repugnant to law.

In determining the validity of municipal ordinances, their reasonableness will be presumed.

The power of the courts to declare municipal by-laws, enacted under general authority, invalid, if they are unreasonable, is unquestioned. It is a power, however, to be cautiously exercised. When doubt exists, it should be resolved in favor of the validity of the by-law.

Whether a particular ordinance is unreasonable and therefore void, is a question to be determined by all the circumstances of the city, the objects to be attained, and the necessity which exists for the ordinance.

The reasonableness or sufficiency of an ordinance or by-law is not to be tested always by its application to extreme cases.

Where party attacking municipal inspection fee offered no evidence touching cost of inspection, trial and reviewing courts had right to assume, absent contrary evidence, that fee was reasonable.

As a general rule, it may be stated that there is a presumption in favor of the validity of an ordinance passed in pursuance of statutory authority, and every presumption is to be made in favor of the constitutionality of such an ordinance, and it will not be declared unconstitutional without clear and irrefragable evidence that it infringes the paramount law.

Donahue v. *City of Portland et al.*, 83.

The constitutional provision that debt limit should not apply to temporary loans to be paid out of money raised by taxes during year in which they are made was adopted for practical purpose of enabling towns and cities up to their debt limit to borrow money in anticipation of taxes already assessed, so that they might be able to continue to carry on their necessary governmental activities, and the constitutional provision does not deal with effect of a failure to pay within the year.

Wakem, Receiver v. *Inhabitants of Town of Van Buren*, 127.

In cases of quasi municipal corporations, such as water districts which are not financed by taxation but by rates paid by individual consumers, and where the

interest of taxpayers is negligible, proceedings in equity should not be entertained when brought by taxpayers alone.

Burkett, Attorney General, Ex Rel. v. *Blaisdell et al., In Equity*, 200.

The City of Ellsworth had power to act only in accordance with the terms of its charter granted by the legislature and it was therefore necessary for the plaintiffs in this action for breach of alleged contract of employment, in order to maintain their claim, to establish that the agreement as set forth in the declaration was approved by the city council, by ordinance, order or a resolve adopted at a valid meeting, or that there was a subsequent ratification of it under the same conditions.

Brann et al. v. *City of Ellsworth*, 316.

NEGLIGENCE.

The mere fact that a car leaves the road while being operated by one of the plaintiffs raises no presumption or inference of a latent defect as against a distributor of said car.

Estabrook et al. v. *Webber Motor Company*, 20.

In backing a closed car great vigilance is required, of the driver, to comply with the rule of reasonable care.

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

No hard and fast rules as to the care of children can be laid down and the financial condition of the family, and the other cares devolving upon the parents are not to be ignored.

Wood, Pro Ami et al. v. *Balzano*, 87.

Chapter 29, Sec. 7 of R. S. 1930 does not afford an inflexible standard by which to decide questions which arise over collisions at intersections, does not confer the right of way without reference to the distance of the vehicles from the intersection point, their speed, and respective duties, and does not give precedence under all circumstances to a vehicle on the right against one from the left. Always the approach to an intersection must be attended with the use of reasonable watchfulness and caution so as to have such approaching vehicle under control and, where a collision is indicated, the driver who can do so by the exercise of ordinary care should avoid doing injury although it necessitates yielding his right of way and a violation of this law of the road is prima facie evidence of negligence.

A driver approaching an intersecting street, where there is no stop sign, is not compelled to stop for a motor vehicle approaching on his right too far away to

NEW TRIAL.

NUISANCE.

A continuing encroachment by an adjoiner upon the land of another by erecting and maintaining a building thereon without right is, at common law, not only a trespass but also a private nuisance.

The obstruction of a right of way which is a mere easement is also a common-law nuisance, but it is the obstruction of a private way established under R. S., Chap. 27, Secs. 16-18 which is a statutory nuisance.

Graham v. *Lowden*, 48.

ORDINANCE.

Provisions of city ordinance, prohibiting standing of taxicabs and public vehicles on one-way streets or streets subject to limited parking regulations, do not constitute abuse of "police power," vested in municipalities by statute, to make and enforce ordinances regulating vehicles in public streets.

Central Cab Co. et al. v. *City of Portland et al.*, 169.

PLEADING AND PRACTICE.

A motion to amend declarations is not a correct method to pursue to secure a review and reconsideration of a judicial decision that declarations are insufficient, notwithstanding that motion to amend may have seemed more convenient and less expensive.

Amendments to declaration, seeking recovery for injuries sustained as result of alleged latent defects in automobile, containing a fuller statement of plaintiffs' claims by reiteration, does not cure defect in original declarations consisting of failure to state definitely the defects.

The declaration must state a good cause of action, and there must be an averment of all those facts which it is necessary should be proved to entitle the plaintiff to a verdict.

A good declaration in an action of negligence ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others.

Under the established rules of common-law pleading in civil actions the plaintiffs' declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and it must set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits.

The plaintiff is required to state the facts constituting the negligence complained of only so far as they appear to be properly within his knowledge; and therefore, as an exception to the rule that he is required to set forth the act or omis-

sion which constitutes the negligence complained of with a reasonable degree of certainty and particularity, it is also a well-settled rule that, where the facts pertaining to the negligence are peculiarly within the knowledge of the defendant and are such that plaintiff cannot be expected to know them, such facts may be alleged with less certainty and particularity than would otherwise be necessary. In such a case it is sufficient to allege the act or omission constituting the negligence complained of in a general way, and the particulars of the negligent act or omission which caused the injury need not be alleged.

When facts could have been ascertained by plaintiff, a general allegation of negligence is not sufficient; in such a case it must be alleged with reasonable certainty in what respect defendant was negligent. The defendant is entitled to receive fair notice by the declaration of the claim he is required to defend.

Estabrook et al. v. *Webber Motor Company*, 20.

Laying several injuries or kinds of damage resulting from a single wrongful act in one count is not duplicity. A declaration is not double because more than one cause of action is set forth in one count provided not more than one independent and sufficient ground is therein alleged in support of a single demand.

In this case the pleader has set forth a single demand for recovery of damages for the creation and maintenance of a nuisance which he alleges has caused injury both to his fee and the right of way that goes with it. To support the demand, both the injuries must be proven. Either one might support a different and less demand but not that which is claimed.

Where a single transaction such as the erection and maintenance of a building is relied upon as the basis of recovery, there is no duplicity even though the facts show liabilities for which separate causes of action could not be joined.

In action on the case for nuisance, a single plea is sufficient to traverse a declaration alleging that adjoining property owner, to injure plaintiff, had erected a building on plaintiff's land and right of way, and several and distinct answers were not required to traverse declaration.

It is not necessary to allege special damage where nuisance complained of is private. It is where the nuisance is a public one that special damage must be alleged and proved.

Graham v. *Lowden*, 48.

A writ entered in court must show on its face one of two things: that it was issued by the clerk of courts for the county where it is entered; or that it was issued by the clerk of courts for another county and made returnable where entered.

Belfast v. *Bath*, 91.

Orderly procedure requires that the pleadings should set out the cause of action and define the issue.

Ford v. *Inhabitants of Town of Whitefield*, 125.

PROBATE COURTS.

PUBLIC UTILITIES COMMISSION.

QUO WARRANTO.

In this jurisdiction, although proceedings in *quo warranto* have usually been begun by filing an information, the ancient practice of making application for a writ of *quo warranto* by petition is recognized and, by implication, authorized.

The writ of *quo warranto* or an information in the nature thereof issues in behalf of the State against one who claims or usurps a public office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney-general on his own motion or at the relation of any person, but on his official responsibility.

At common law, private individuals without the intervention of the attorney-general could not, either as of right or by leave of court, institute *quo warranto* proceedings. This rule has been modified in this state only to the extent that when in *quo warranto* proceedings the title to office in a private corporation is involved the attorney-general need not be a party thereto.

At common law, *quo warranto* proceedings to try the title to an office are confined to public offices.

Unless authorized by statute, the State does not inquire by *quo warranto* into the title to a private office, and the attorney-general in its behalf can intervene in matters of this nature only so far as they relate to public offices.

Burkett, Atty-Gen. v. *Ulmer*, 120.

RAILROADS.

Where railroad company had knowledge of the habit of school children to cross its tracks between street crossings, to which it made no express objection, this fact alone would not justify an inference of an implied invitation.

A railroad company owes a trespasser no duty save to refrain from wantonly or wilfully injuring him.

Failure to maintain gates at a given crossing could have no bearing on an issue of negligence with regard to an accident occurring elsewhere. Such evidence would be irrelevant and immaterial.

Willey v. *Maine Central Railroad Company*, 223.

REFERENCE AND REFEREES.

Referees appointed under rule of court, by agreement of the parties, undoubtedly act judicially, but they are not the court. They constitute a special tribunal of the parties' own choosing, whose report must be accepted by the court before any judgment can be rendered thereon.

A hearing before referees is not a trial of a cause in the Superior Court within the meaning of R. S. 1930, Chap. 126, Sec. 7.

SCHOOLS AND SCHOOL DISTRICTS.

SPECIFIC PERFORMANCE.

STATES.

STATUTES, CONSTRUCTION OF.

STATUTE OF LIMITATIONS.

TAXATION.

The tax judgment rendered by a court of general jurisdiction is not open to collateral attack.

Under the statutes land may be assessed either to the owner or the person in possession on the first day of April and the assessors may continue to assess the same person to whom it was last assessed although the ownership or occupancy is changed, unless previous notice is given of such change and of the name of the person to whom it has been transferred or surrendered.

Snell et al. v. *Libby*, 62.

TORTS.

The doctrine is now well settled that whether a claim for damages for a tort survives the death of the tort-feasor is determined by the law of the place of wrong.

Dalton et al. v. *McLean*, 4.

TOWNS.

The evident purpose of a constitutional debt-limit provision is to prevent the abuse of municipal credit, which might result in ruinous taxation, and to protect the tax payers and their property.

The constitutional debt-limit is an absolute bar to an action against a town or any of its indebtedness which falls within the constitutional prohibition, even although the debt may have been incurred for a most worthy cause and under urgent and pressing necessity.

The validity of a municipal debt upon which an action is brought, so far as the limitation of indebtedness is concerned, must be determined as of the time when the debt was incurred.

Unless otherwise provided in the constitution, a debt of a municipality, valid when incurred, will not be rendered invalid by the mere failure of the municipal officers to pay it out of the proper tax money when collected.

Wakem, Receiver v. *Inhabitants of Town of Van Buren*, 127.

The attorney-general, on relation of citizens and taxpayers of Rome was proper party plaintiff to suit in equity against town tax collector and selectmen to compel payment to town by collector of money allegedly collected as automobile excise taxes from inhabitants of town and diverted to collector's private use, where town officers upon whom rested responsibility of compelling collector to account refused to perform their duty.

When all parties were before the court in suit in equity against town tax collector and selectmen to compel collector to pay town money allegedly collected as automobile excise taxes and diverted to collector's private use, relief would not be denied on ground that plaintiff had adequate remedy at law by petition for

TROVER.

TRUSTS.

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APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

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