MAINE REPORTS

138

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 1, 1941, to MAY 1, 1942

GAIL LAUGHLIN
REPORTER

PORTLAND, MAINE
THE SOUTHWORTH-ANTHOENSEN PRESS
Printers and Publishers
1943

THE SOUTHWORTH-ANTHOENSEN PRESS

PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. GUY H. STURGIS, CHIEF JUSTICE

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER

HON. GEORGE H. WORSTER

HON. HAROLD H. MURCHIE

JUSTICES OF THE SUPERIOR COURT

HON. ARTHUR CHAPMAN

HON. GEORGE S. EMERY

HON. HERBERT T. POWERS[1]

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

HON. RAYMOND FELLOWS

HON. ROBERT A. CONY

HON. NATHANIEL TOMPKINS[2]

[1] Retired July 1, 1941

[2] Appointed October 9, 1941

ACTIVE RETIRED JUSTICE OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

ATTORNEY GENERAL

HON. FRANK I. COWAN

REPORTER OF DECISIONS

GAIL LAUGHLIN

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

WILLIAM D. PORTER and BOSTON SAFE DEPOSIT and TRUST CO.

vs.

WILLIAM D. PORTER and MARY G. PORTER, IN EQUITY.

Hancock. Opinion, May 19, 1941.

Trusts. Construction, Interpretation, Deviation from express terms.

Under equity practice and the specific provisions of Section 36, Subdivision 10 of Chapter 91 of the Revised Statutes, 1930, the Supreme Judicial Court has authority to pass upon the questions raised by the presentation of a bill in equity seeking the construction and interpretation of the provisions of a trust indenture and praying for a deviation from the express terms of the trust.

The facts that all parties, including the guardian *ad litem* for possible remaindermen, join in the prayers of the bill seeking permission to deviate from the express terms of an irrevocable trust, and that no counsel appears in opposition to the granting of the prayers of the bill impose a duty of particular vigilance upon the court, as it is without the benefit of presentation by counsel from a different viewpoint.

The law grants no power to the parties to alter the terms of the trust, and their agreement that it should be done does not relieve the court of decision. Consent cannot enlarge nor objection limit the powers of the trustees.

If, owing to circumstances not known to the settlor and not anticipated by him, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust the court may, if necessary to carry out the purposes of the trust, direct or permit the trustee

to deviate from the terms of a trust and do acts which are not authorized or are forbidden by the terms of the trust.

Deviation from the express terms of a trust can be granted only upon a showing of extreme hardship, of virtual necessity, of serious impairment of principal, or of inability to carry out the purposes of the trust. The situation considered must present an emergency or exigency which menaces the trust estate and the beneficiary.

Deviation from the terms of a trust will not be permitted or directed merely because such deviation would be more advantageous to the beneficiaries than a compliance with its terms. The mere fact that such deviation would result in pecuniary benefit to the beneficiaries does not constitute such necessity as would justify a court of equity to modify the terms of a trust.

The case does not present any such exigencies in the administration of the trust as to demand a departure from the provisions of the instrument in order to conserve what might be considered a more expedient administration of the trust estate than that directed by the creator of the trust.

The phraseology of the trust indenture under consideration that trust funds invested in the purchase of bonds of any corporation be limited to first mortgage bonds upon which no default in payment of interest shall have occurred for a period of five years before the purchase thereof does not inhibit the purchase of first mortgage bonds until they have been outstanding without default in interest for at least five years before their purchase. Investment in first mortgage bonds of corporations which either by the original or refunding issue, have a clear record as to payment of interest without default for a period of five years before purchase and in which the ratio of value of mortgaged property to debt secured is at least equal to that in any precedent issue will meet the intent and requirement of the trust instrument. Clearly it is the history, record, management, successful operation and financial stability of a corporation which is intended to be tested; and security of principal and income of this form of mortgage bond is the real purpose in mind.

ON REPORT.

A bill in equity brought by the trustees named in a certain trust indenture asking that the court construe and interpret the provisions of the trust and that the court permit the trustees to deviate from terms of the trust with respect to investments and permit them to invest in such kind or type of security and in such manner as is permitted to trustees by the laws of this state and to invest in stocks both common and preferred. Cause returned to the court below for decree in accordance with the opinion and for determination as to costs and counsel fees. The case is stated in the opinion.

Verrill, Hale, Dana and Walker and
Robert Hale, of counsel, for plaintiffs.
Hale & Hamlin, for defendants.
William B. Nulty, for Guardian *ad litem, pro se.*

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

MANSER, J. In September, 1912, William D. Porter by voluntary written assignment and declaration transferred to a trust company, predecessor of the present trustees, securities of the face value of $140,000, in irrevocable trust for his own benefit, to receive the net income during his life, reserving the right to dispose of the trust property by will, or in event of his intestacy, in accordance with provisions stated in the trust declaration. Mary G. Porter, named as a defendant, is a sister of the settlor, and, under certain circumstances, entitled to the trust estate upon his decease.

In 1933 the settlor himself, and the Boston Safe Deposit and Trust Company, by appointment of the Probate Court, became successor trustees.

The authority of the trustees as to investment of the trust funds was defined and limited as follows:

> "to invest and reinvest the same and the proceeds therefrom, or any part thereof, and the interest and profits thereon, or any part thereof, only in the bonds of the United States or of any of the States of the United States, or in notes or bonds secured by first mortgage or trust deed on improved real property in any state, or in the bonds of any County, City, School District or other municipality in any State, or in the first mortgage bonds of any corporation of any State upon which no default in payment of interest shall have occurred for a period of five years before the purchase thereof; and to sell, assign, transfer, collect, sue for, foreclose, alter and change the investments of said estate."

There is now presented a bill in equity brought by the trustees, seeking the aid of the court, and as stated in the prayers of the bill, asking,

> "That it construe and interpret the provisions of said trust indenture and give the plaintiffs such instructions as may be deemed advisable and necessary with respect thereto.
>
> "That it permit a deviation from the terms of said trust indenture if the said trust indenture cannot be so construed as to permit of the purchase of new issues of corporate first mortgage bonds otherwise deemed by the plaintiffs to be suitable investments.
>
> "That the plaintiffs be empowered to deviate from terms of the trust with respect to investments permitted, and that they be empowered to invest in such kind or type of security and in such manner as is permitted to trustees by the laws of this state and that they be empowered to invest in stocks both common and preferred."

All parties, including the guardian *ad litem* for possible remaindermen, join in the prayers of the bill. The case has been argued *ex parte*, no counsel appearing in opposition to the granting of the prayers of the plaintiffs. This imposes upon the court the duty of particular vigilance, as it is without the benefit of presentation by counsel from a different viewpoint.

That the court has authority to pass upon the questions involved is well established under our equity practice and is specifically granted by R. S., Chap. 91, § 36 X.

Consideration will first be given to the prayer of the bill, asking for authority to deviate from the investment provisions to permit the trustees to have a wider scope of investment, and that corporation stocks in particular may be embraced therein.

The principles which must guide in determination are well settled.

They are tersely stated in Restatement of the Law of Trusts, Vol. I, § 167:

"(1) The Court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust."

(12b) "The court will not permit or direct the trustee to deviate from the terms of the trust merely because such deviation would be more advantageous to the beneficiaries than a compliance with such direction."

"*Illustration:*

13. A bequeaths money to B in trust and directs that the money shall be invested only in railroad bonds. Owing to developments in the electrical science and industry it appears that bonds of electric companies are as safe an investment as railroad bonds and yield a higher return. The court will not direct or permit B to invest in bonds of electric companies."

Elaboration of these statements is found in the recent works of Scott on Trusts and Bogert on Trusts, fortified with citation of many judicial decisions. Thus we find Scott quoting from *Curtiss* v. *Brown*, 29 Ill., 201, 230 as follows:

"Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust; and do with the fund what he would have dictated had he anticipated the emergency . . . . From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and

under our system of jurisprudence, that power is vested in the court of chancery."

This author also discusses the situation as to investment in corporate stocks as follows:

"A closer question arises where by the terms of the trust the trustee is forbidden to invest in shares of stock in jurisdictions in which the purchase of such shares would otherwise be a proper trust investment. In such a case the general principle as to permission to deviate from the terms of the trust seems to be applicable. If owing to circumstances not known to the settlor and not anticipated by him compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust, the court may permit a deviation from the terms of the trust."

See Scott on Trusts, pp. 838-841.

So Bogert on Trusts, under the sub-title "Alterations for Mere Convenience" in Vol. III, § 561, pp. 1798-99, says:

"This power to alter is, however, an emergency power, used to prevent a serious failure in trust accomplishment. It is not usable to gain for the cestui slight advantages or to remake the trust into a provision which the court deems better than the gift provided by the settlor. Thus, if a settlor has directed that the funds shall be invested in United States government bonds exclusively, the fact that such investments bring a very low rate of income at a given time will not ordinarily lead the court, on the application of the cestui, to direct the trustee to disregard the settlor's investment clause and to buy other legal investments which yield a higher rate. To follow the settlor's direction will give the cestui some income and all the benefit that the settlor intended him to have. The court will not employ its power of alteration in order merely to increase the

benefits for the cestui and to bring to him a gift which he thinks the settlor should have made him."

It is plain that the situation considered must present an emergency or exigency which menaces the trust estate and the beneficiary. Deviation can be granted only upon a showing of extreme hardship, of virtual necessity, of serious impairment of principal, or of inability to carry out the purposes of the trust.

We find the rule well stated by the annotator in Ann. Cas. Vol. XXXIX, p. 996, in a note to *Johns* v. *Montgomery*, 265 Ill., 21, 106 N. E., 497; L. R. A. 1916 B; 1073, as follows:

"Courts of chancery under their inherent jurisdiction to administer and protect trust estates have the power to break in on and change or modify the terms of a trust imposed by the person creating it, when by reason of necessity arising from unforeseen circumstances, the property held in trust may be lost or wholly fail to answer the purposes of the trust if such a power is not exercised."

"While the power to modify the terms of a trust under certain exceptional circumstances is generally recognized, the courts are slow to exercise it and will do so only when it clearly appears to be necessary."

"The mere fact that a different mode of administering the trust from that prescribed by its creator would result in pecuniary benefit or render its use and enjoyment more convenient to the cestui que trust does not constitute such a necessity as will justify a court of equity in modifying the terms imposed."

Again, in *Cary* v. *Cary*, 309 Ill., 330, 335, 141 N. E., 156, 158, the court said:

"Where a contingency arises, however, such that the estate may be totally lost to the beneficiaries of the trust, a court of equity will not permit such loss for lack of power to modify the terms of the trust. This trust was created by

the donor for the express purpose of providing an income for his grandson during his life and keeping the land together for the benefit of his heirs after the expiration of the trust. The trust will not be modified, in violation of the donor's intention, merely because the interest of the parties will be served by doing so, but only where such action is necessary to preserve the trust estate."

That our own court is in full accord with the foregoing statements of principles is evidenced by the opinions found in *Elder* v. *Elder*, 50 Me., 535; *Emery* v. *Batchelder*, 78 Me., 233 at 240, 3 A., 733; *Mattocks* v. *Moulton*, 84 Me., 545 at 551, 24 A., 1004; *Mann* v. *Mann*, 122 Me., 468, 120 A., 541.

In *Richardson* v. *Knight*, 69 Me., 285, for illustration, because of the showing that the retention of certain stocks would defeat the purpose of the testator, the court directed their sale and the investment in U. S. Bonds, bonds of any of the New England states, or first mortgages on income producing real estate.

That the provisions for investment of the trust property were well advised at the inception of the instrument, is not gainsaid. Neither is it contended that the field allowed for investment is now of such a character or so restricted that it jeopardizes the selection of sound securities at current yields. There appears to be no expectation of a distribution of the trust property in the comparatively near future, and consequently no likelihood that it will be necessary to sell securities at lower values. The increase of income appears to be the chief desideratum, and that solely for the convenience of the present beneficiary.

In argument, much stress is placed upon parlous present-day conditions and the world-wide dislocation of the economic structure, but though all may be constrained to agree, the question here is whether there exists a personal exigency as to the beneficiary of the trust which requires the intervention of

the court to authorize a substantial deviation in the terms of the trust to create a possible larger income.

The trust declaration shows that there is no occasion for retaining any of the principal in cash, and instead there is requirement that all funds be invested. But the trustees, of whom the settlor is one, complain that there is now approximately $42,000 of the trust res in idle funds because of the restrictions of the trust instrument. Yet within the permitted list of investments, it has been and is entirely feasible to make sound commitments, upon a basis which would add at least $1,000 annually to income — an increase of over thirty per cent.

As to the elements of emergency or exigency so far as the beneficiary is concerned, the record is entirely silent. The only information vouchsafed to the court is that the settlor decided to create a voluntary, irrevocable trust for his own benefit, that competent counsel prepared the trust document, that the trust has continued since 1912, that the settlor since 1933 has been a co-trustee. His deposition is before us. In it he discloses nothing about himself except that he has no profession. His age does not appear. It is not shown whether he is married or single, or that he has any financial responsibilities for others than himself. There is no representation as to his health, as to whether he has other property, or as to his ability to earn money by his own endeavors. He does say that "This fund is practically the biggest part of my livelihood" and that the income thereof is some $3,200 a year — and this despite the large proportion of uninvested, idle funds.

It is urged that present-day investment policies for trust funds regard preferred and common stocks as a backlog against anticipated inflation which, if it occurs, would adversely affect the value of low-yield bonds and at the same time increase living costs. The theory propounded is that with an increase in commercial and business activity there may be expected increasing dividend distribution, and purchases of common stocks would augment the trust income. It is unneces-

sary to analyze or discuss this theoretical situation, for reasons already stated.

There is suggestion by counsel that the consent of living parties in interest endows the court with authority to sanction the deviation. But here the parties are submitting to the court for its determination the questions presented. The law grants no power to the parties to alter the terms of the trust, and their agreement that it should be done does not relieve the court of decision. As well said in *City Bank Farmers Trust Co., Trustee* v. *Smith*, 263 N. Y., 292, 189 N. E., 222, 223, 93 A. L. R., 598, "Consent cannot enlarge nor objection limit the powers of the trustee."

To paraphrase the language of the court in *Gaines* v. *Arkansas Bank*, 170 Ark., 679, 280 S. W., 993 at 996, the case does not present any such exigencies in the administration of the trust as to demand a departure from the language of the instrument in order to conserve what the trustee and the beneficiaries and the court might think a more expedient administration of the trust estate than that outlined and directed by the creator of the trust.

The remaining question is the request for interpretation or construction of a clause of the trust instrument relating to a particular form of security permitted for investment. The language of the document in this respect is,

> "to invest and reinvest in [naming certain kinds of investment] or in the first mortgage bonds of any corporation of any State upon which no default in payment of interest shall have occurred for a period of five years before the purchase thereof."

During the past year counsel for the trust company has advised that this phraseology might be held to inhibit the purchase of such first mortgage bonds unless they had been outstanding, without default in interest, for at least five years before their purchase. Under current refinancing of many sound concerns by the redemption of outstanding issues and issuance

of new bonds at lower interest rates, a literal interpretation would prevent the substitution of a security of at least equal value as that surrendered, and issued by the same corporation whose called bonds fully met the test of soundness prescribed.

The court is of opinion that such construction is too narrow and is not in accordance with the intention as expressed in the instrument. Clearly it was the history, record, management, successful operation and financial stability of the corporation which was intended to be tested. Security of principal and income of this form of mortgage bond is shown to be the real purpose in mind.

In *Title Guarantee & Trust Co.* v. *Bedford,* 125 Conn., 349, 5 A. (2d), 852, 853, 122 A. L. R., 654, a similar situation was postured, where the trustees were authorized to invest in the "Preferred shares of industrial corporations, upon which the full prescribed dividend shall have been paid each year for five years next preceding such investment" and the question was whether it was permissible to invest in an issue which has replaced another, the difference being that the second issue bore a lower dividend rate. The court held that such new stock met the requirements of the instrument.

Confining authorization in this particular to investment in first mortgage bonds of corporations which, either by the original or refunding issue, have a clear record as to payment of interest without default for a period of five years before purchase, and in which the ratio of value of mortgaged property to debt secured is at least equal to that in any precedent issue, will meet the intent and requirement of the trust instrument.

The cause is returned to the court below for decree in accordance with this opinion, and for determination as to costs and counsel fees.

Mandate to issue accordingly.

JOSEPH DURSTIN

vs.

FREDERICK I. DODGE, DORIS A. LOBLEY and KENNETH SMALL.

Kennebec. Opinion, May 28, 1941.

Computation of Time in Reference to the Giving of Notice under Statutory Provisions.

Citation by an execution debtor served on execution creditor at 11:00 P.M. on December 29, 1939, for hearing at 2:00 P.M. on January 13, 1940, was seasonably served under the provisions of Section 52 of Chapter 124 of Revised Statutes, 1930, requiring that such citation shall be served "fifteen days at least before the time appointed for the examination."

The method of computing time where a process or notice is required to be served a certain number of days before the return day is not regulated by the Maine statutes and, by the weight of authority and in the absence of statute to the contrary, the whole of either the day of service or the return day is counted without regard to fractions of a day.

There is nothing in said Section 52 of Chapter 124 of Revised Statutes, 1930, to indicate that the legislature intended that each of the fifteen days should be a full day. The words "fifteen days at least" mean only that at least fifteen days' notice must be given, computed in the manner in which time is usually reckoned in connection with service of process and not fifteen days of twenty-four hours each before the hour fixed for the hearing.

Plaintiff's contention that the word "time" in the statute refers to the exact hour set for the hearing and that he was entitled to the equivalent of fifteen days' notice of twenty-four hours each before that hour is not well taken.

That the service was made at 11:00 P.M. is immaterial, for civil process may be lawfully served in the night-time.

ON EXCEPTIONS.

Action on a statutory six-months' bond executed by the defendant Dodge, with the other defendants as sureties thereon, pursuant to the provisions of Section 49 of Chapter 124 of Revised Statutes, 1930, to procure his release from arrest on an execution which had been issued against him in favor of the plaintiff. The case was heard by the presiding justice without a jury with right of exceptions reserved on questions of law, upon the agreement that if the citation by the execution debtor for

hearing was seasonably served upon the plaintiff, judgment should be rendered for the defendants; otherwise for the plaintiff. The sole issue was whether or not said citation was seasonably served under the statutory provision. The presiding justice ruled that the citation was not seasonably served and ruled for the plaintiff; and the matter was brought before the court on the defendants' exceptions. Exceptions sustained. Case is fully stated in the opinion.

Edmund S. Muskie, for plaintiff.

H. C. Buzzell and Clyde R. Chapman, for defendants.

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

WORSTER, J. On exceptions. This is an action on a statutory six-months' bond, executed pursuant to the provisions of R. S., Chap. 124, Sec. 49.

The only record presented is a copy of the bond and bill of exceptions, from which it appears, in substance and effect, that the action was heard by the presiding justice without the assistance of a jury, with right of exceptions reserved on questions of law, upon the agreement that if the citation hereinafter mentioned was seasonably served upon the plaintiff, then judgment should be rendered for the defendants; otherwise for the plaintiff.

The justice ruled that the citation was not seasonably served, and found for the plaintiff, and the matter is brought here on the defendants' exceptions.

It appears from the recitals in the bond that Frederick I. Dodge, one of the defendants, in order to procure his release from arrest on an execution which had been issued against him in favor of the plaintiff, gave him this bond, with the other defendants as sureties thereon.

Within the time limited in the bond, pursuant to its terms, and in accordance with the provisions of R. S., Chap. 124, Sec. 51, said Dodge applied for the benefit of the oath prescribed in

Section 55 of that chapter. If the proceedings therefor were valid, and the oath administered to him, as provided by statute, then the terms of the bond have been complied with, and the plaintiff cannot recover. But, in order to show that there was a valid hearing on the application made by Dodge for the benefit of such oath, it must appear that he caused to be served on the plaintiff "fifteen days at least before the time appointed for the examination" of the execution debtor, a citation to attend the examination as required by Section 52 of said chapter.

In the instant case, according to the bill of exceptions, it "was agreed that the officer made service of the citation on the creditor on December 29, 1939, for a hearing at two o'clock in the afternoon of January 13, 1940. The return of the officer serving the citation states no hour of the day on which the citation was served. At the hearing of the suit on the bond, the officer was permitted to testify that, in fact, the citation was served at about eleven o'clock in the afternoon of December 29th."

It is the contention of the plaintiff that, in proceedings arising under the poor debtor law, the words "day" and "twenty-four hours" are used synonymously.

In support of his contention, he calls our attention to R. S., Chap. 124, Sec. 4. But that does not assist us in solving the problem presented. There it is provided that a debtor, desiring to disclose after his arrest on a civil process under certain circumstances, must give notice of his intention so to do, to his creditor, "not . . . less than one day for every twenty miles' travel . . ."

It is apparent that the Legislature intended that not less than a full day's notice should be given in proceedings under that section. The words "not . . . less than one day" cannot be construed in any other way. But there is nothing in Section 52 to indicate that the Legislature intended that each of the required "fifteen days" should be a full day.

Plaintiff also calls our attention to R. S., Chap. 124, Sec. 24, as amended by Public Laws 1933, Chap. 239, which requires a

subpoena to be served on a debtor in disclosure proceedings brought against him "at least 24 hours before the time of said disclosure for every 20 miles' travel . . ." The fact that at least a twenty-four hour notice is required under this section has no tendency to show that a fifteen-day notice of twenty-four hours each is required under Section 52.

The plaintiff relies on *Fenlason* v. *Shedd et al.*, 109 Me., 326, 84 A., 409; *Westbrook Manufacturing Company* v. *Grant*, 60 Me., 88; and *Windsor* v. *China*, 4 Me., 298.

Fenlason v. *Shedd et al.*, was an action of trespass for an alleged illegal arrest for non-payment of taxes. The statute there provided that "if a person so assessed, for twelve days after demand, refuses or neglects to pay his tax and to show the constable or collector sufficient goods and chattels to pay it, such officer may arrest and commit him to jail . . ." The court held that the tax debtor could not lawfully be arrested until twelve full days had expired after the day of demand. That case is not in point here, but falls within the rule that where a person is given a certain number of days after an event in which to perform an act, he has up to the last minute of the last day in which to perform it. And so, of necessity, he is entitled to the required number of full days. See 26 R. C. L., pages 734, 744.

In *Westbrook Manufacturing Company* v. *Grant*, supra, the question was whether the attachment of the debtor's property made at 7 P.M., March 8, 1867, was dissolved by his bankruptcy proceedings commenced at 2: 50 P.M., July 8, 1867. The court held that 2: 50 P.M., March 8, was four months prior to 2: 50 P.M., July 8, and since the attachment was not made until 7 P.M., on March 8, it was within the four-month period, and was dissolved by the express provisions of the Bankruptcy Act.

It was there pointed out that the maxim that there is no fraction of a day is a self evident fiction, which is never allowed to operate against the right and justice of the case, and, therefore, does not apply to proceedings in bankruptcy, where the exact time the event occurred is made certain by the record.

But there is nothing in that decision to indicate that that maxim should not be applied in computing time of service of legal process. On the contrary, the court said:

> "It is undoubtedly a very useful maxim when properly applied, as in the service of legal precepts and notices generally . . . as it avoids the inconvenience of endeavoring to ascertain with precision at what hour of the day the precept or notice was served . . ."

That case does not support the plaintiff's position. It is a general rule that where conflicting claims of rival creditors depend upon priority of attachments made on the same day, or depend upon the exact time of the attachment as shown by the record, a day is not considered an indivisible point of time, but the exact hour must be considered in determining their respective rights. 26 R. C. L., page 737.

In the instant case, however, there are no conflicting claims to attached property, for no property was attached.

In passing, it is to be noticed that in *Westbrook Manufacturing Company* v. *Grant*, supra, the court apparently overlooked the statutory method of reckoning time in such a case. Under the Bankruptcy Act, the whole of July 8 should have been excluded, and the whole of March 8 included, but even if the time had been computed according to that rule, the result would have been the same. *Jones* v. *Stevens*, 94 Me., 582, 48 A., 170.

Windsor v. *China*, supra, was an action to recover for pauper support. The question was whether the defendant's written objection given to the plaintiff just before sunset on December 20, 1823, was given "within two months after" 10 A.M., October 20, 1823. It was held that the last named date should not be counted because expressly excluded by the word "after," as used in the statute. We are not concerned here with the effect of the word "after." Section 52 requires the citation to be served "fifteen days at least before the time appointed for the examination" of the debtor.

There is considerable conflict of authority as to the method of computing time where a process or notice is required to be served a certain number of days before the return day. There are decisions to the effect that both the day of service and the return day are excluded in numbering the days, but, unless required by statute, this method of computation gives the person served "parts of both those days beyond the time required by law" (*Bemis* v. *Leonard*, 118 Mass., 502, 507). By the weight of authority, in the absence of statute to the contrary, the whole of one of these days is counted, without regard to fractions of a day. 19 Encyc. Pleading & Practice, page 602; 8 Encyc. Law (2d ed.) page 739, and note entitled "Service of Process, Notices, or Pleadings" on page 740; see 21 R. C. L., page 1273; 62 C. J., page 996; *Second National Bank* v. *Leary*, 284 Mass., 321, 187 N. E., 611.

The method of computing time in such a case as this is not regulated by the Maine statute, and it is unnecessary to decide whether the day on which the service was made should be excluded from the computation, and the return day counted, or vice versa. For, whichever of these methods is adopted, it will be found that there were fifteen days' service of the citation. That the service was made at 11 P.M., is immaterial, for civil process may be lawfully served in the night-time. 21 R. C. L., page 1273; See *State* v. *Bennett*, 95 Me., 197, at page 200, 49 A., 867.

The fact that Section 52 requires the citation to be served fifteen days *at least* before the time appointed for the examination, does not call for the application of any different rule in reckoning the time. The use of the words "at least" is no indication of a legislative intent that a fifteen days' notice of twenty-four hours each must be given. The words "fifteen days at least" mean only that at least fifteen days' notice must be given, computed in the manner in which time is usually reckoned in connection with service of process. *Stroud* v. *Consumers' Water Co.*, 56 N. J. L. (27 Vroom), 422, 28 A., 578.

In *Stroud* v. *Consumers' Water Co.*, supra, it was held that a

notice given June 24, of an election to be held June 30, was seasonable under a statute requiring such notice to be published *at least* six days previous to the day of election.

In *Second National Bank* v. *Leary*, supra, the court decided that a writ returnable December 3 was properly served on November 26, under a statute which required it to be served "not less than seven . . . days before the return day."

And in *Loza* v. *Osmola*, 279 Mass., 220, 181 N. E., 125, it appears that the mortgagee was authorized, under the terms of the mortgage, to sell the mortgaged property at public auction "first giving five days notice in writing" to the mortgagor. It was decided that a valid sale of the property was held at 10: 30 A.M., November 1, pursuant to a notice given at 4: 50 P.M., October 27.

But, the plaintiff contends, in effect, that Section 52 requires a notice of fifteen days at least before the *time* appointed for examination, instead of before the day of examination; that time refers to the exact hour set for the hearing, and he argues that he was entitled to the equivalent of fifteen days' notice of twenty-four hours each before that hour. We think otherwise. *In re Espinosa's Estate and Guardianship*, 179 Cal., 189, 175 P., 896.

A similar contention was denied by the Michigan court, although it was conceded that under the law of that state the result would have been otherwise had the statute required the citation to be served a certain number of days before the *day* of hearing. *In re Miller's Estate*, 173 Mich., 467, 139 N. W., 17.

In the case last cited, it was held that a citation to appear at the probate court on September 18 was seasonably served on September 4, under a statute which required it to be served "not less than fourteen days before the time so appointed." Evidently there is a misprint in 139 N. W., on page 18, where the date of hearing appears as "September 17th." See the report of the case in 173 Mich., 467, and the statement concerning the case in *Ehinger* v. *Graham*, 155 N. W., 747, page 749.

In re Miller's Estate, the court said:

> "It is contended that, under the rule laid down by the court for the computation of time in such cases, this statute requires 14 full days before the day of hearing. We think counsel is in error in this contention. Had the statute provided that the citation should be served 14 days before the *day* of hearing instead of 14 days before the *time* of hearing, it would have required a service of 14 full days."

So a summons returnable February 18 was seasonably served February 12, under a statute which required it to be served "at least six days before the time of appearance mentioned therein." *Chaddock* v. *Barry*, 93 Mich., 542, 53 N. W., 785, 18 L. R. A., 337.

Notice of a hearing to be held by the state board of assessors on May 18 was seasonably published on May 13, under a statute which required the notice to be published "at least five days before the time at which such assessor is required to appear." *City of Port Huron* v. *Wright*, 150 Mich, 279, 114 N. W., 76.

The citation was seasonably served in the instant case, and the defendants' exceptions must be sustained.

Lane v. *Holman*, 145 Mass., 221, is not inconsistent with this conclusion, for the statute there construed is unlike the Maine statute. The Massachusetts statute required notice to be served on the debtor "allowing not less than three days before the time fixed for the examination, and at the rate of one day additional for every twenty-four miles' travel." It was held that a notice served on the debtor at Worcester at 10 A.M., November 17, to appear for examination at 9 A.M., November 20, at Clinton, fifteen miles distant, was not seasonably served. But, it is perfectly apparent from the opinion in that case that a different result would have been reached if the statute had been like ours, with no provision for additional time for travel, for the court there said:

"If, then, the statute had not required that additional time be given for travel, the service in this case would have been sufficient . . ."

Further discussion of the cases would serve no useful purpose.

Exceptions sustained.

MRS. MIKE MCLAUGHLIN *vs.* A. B. COHEN.

Aroostook. Opinion, June 3, 1941.

Fraud. Facts Necessary to be Shown to Maintain Action for Deceit.

Fraud is not presumed. The plaintiff had the burden of showing, among other things, not only that she was deceived by a false representation made by the defendant but that she was induced thereby to give credit or to part with property.

The right of a seller to assert title to property which has been delivered and bring an action to recover the possession thereof does not confer upon the seller the right to bring and maintain an action of deceit in the absence of any of the elements necessary to be shown in order to constitute deceit.

Where a seller, after delivery of the goods sold, accepts a check in payment thereof, which check is refused payment because of insufficient funds, the seller is not entitled to maintain an action for deceit against the buyer based on the giving of such check. Other remedies are available.

Section 14 of Chapter 138, Revised Statutes 1930, providing that the making, drawing, uttering or delivery of a check, payment of which is refused by the drawee for lack of sufficient funds, shall be prima facie evidence of intent to defraud if the maker or drawer shall not have paid the drawee or holder the amount due thereon within five days after receiving notice that such check has not been paid by the drawee, refers only to criminal proceedings and has no application to a civil action.

On exceptions by plaintiff to the acceptance of a referee's report. Action by plaintiff against the defendant for deceit. Referee reported that judgment should be for the defendant. The facts were not in dispute. Exceptions were reserved on questions of law. Sometime in May, 1930, the defendant purchased potatoes from the plaintiff, for which the defendant agreed to pay the plaintiff $1,500. In June, 1930, after the potatoes had been fully delivered, the defendant gave his check

for $1,500 to the plaintiff, but on presentation thereof to the bank on which it was drawn, payment was refused on the ground of insufficient funds. Of this fact the defendant was given immediate notice, but he did not within five days after receiving such notice, or ever, pay the amount of the check to the bank or to the plaintiff. Subsequently the defendant went through proceedings in bankruptcy. After his discharge in bankruptcy, the defendant acknowledged that he owed said check and made some payments on account thereof. Exceptions overruled. Case fully appears in the opinion.

Albert F. Cook, for plaintiff.

M. P. Roberts, for defendant.

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

WORSTER, J. On exceptions to the acceptance of a referee's report.

This is an action of deceit. Hearing was had before a referee, with the right of exceptions reserved on questions of law. The referee ruled that the action could not be maintained, and that judgment should be rendered for the defendant. The case is brought here on the plaintiff's exceptions.

The facts are not in dispute. Briefly stated, sometime in May, 1930, the defendant purchased potatoes of the plaintiff, for which the defendant agreed to pay the plaintiff $1,500, presumably in cash, as soon as they were delivered.

June 10, 1930, after the potatoes had been fully delivered, the defendant gave his check for $1,500 to the plaintiff, but on presentation thereof to the bank on which it was drawn, payment was refused on the ground of insufficient funds. Of this the defendant was given immediate notice, yet he did not, within five days after receiving such notice, pay the amount of the check to the bank or to the plaintiff.

March 13, 1934, the defendant paid $100 on account of said check. November 13, 1934, he filed a petition in bankruptcy. It

appears from the agreed statement that "the check in question was scheduled in the list of creditors," but the plaintiff did not prove her claim in the bankruptcy court. On February 21, 1935, the defendant received his discharge in the bankruptcy proceedings, and that discharge is pleaded here in defense, by way of brief statement, under the plea of the general issue. The plaintiff, however, by replication, contends that the defendant's "discharge in bankruptcy does not release him from liability on said check."

The record discloses that after the defendant received his discharge, he "acknowledged that he owed said check and promised to pay same as fast as he could," and, before this action was commenced, he paid on account thereof further sums aggregating $150. Since this suit was brought, he paid another $100.

But this is not an action on the check. This action is based on alleged fraud and deceit.

It is not alleged, however, that the defendant fraudulently obtained possession of the potatoes with a preconceived intention not to pay for them. It is only alleged, in substance, that on June 10, 1930, "after the said potatoes were fully delivered to said Cohen," he falsely and fraudulently pretended and represented that he had $1,500 on deposit in the bank on which the check in question was drawn, then well knowing that such was not the fact; that the plaintiff, believing said representation to be true, and relying thereon, was induced to, and did accept said check in payment of said potatoes, but payment of said check was refused because of insufficient funds, whereby the plaintiff lost the sum of $1,500.

It is apparent that the gravamen of the plaintiff's complaint is not that the defendant obtained the potatoes from the plaintiff by fraud and deceit; but that, after the potatoes had all been delivered to the defendant, the plaintiff was induced by alleged fraud on the part of the defendant, to accept his check in payment of the amount due for the potatoes, whereby she lost the purchase price thereof.

And the plaintiff contends that in the circumstances, the facts alleged make out a prima facie case of deceit under the provisions of R. S., Chap. 138, Sec. 14. But that statute has reference only to criminal proceedings. It has no application to a civil action like the instant case.

Berry v. *State*, 153 Ga., 169, 111 S. E., 669, 35 A. L. R., 370 (cited in 22 Am. Jur., 481), discussed by both counsel in their briefs, is not in point. That is not a civil case, but a criminal prosecution commenced by indictment, so it is unnecessary to discuss it here.

There is nothing in this record to indicate that, before the delivery of the potatoes, the defendant made any representations, express or implied, as to any check, or any bank deposit, or that he even intimated in any manner whatsoever that he contemplated paying by check instead of cash.

Fraud is not presumed, and here the plaintiff has the burden of showing, among other things, not only that she was deceived by a false representation made by the defendant, but that she was induced thereby to give credit or to part with property. *Eastern Trust & Banking Company* v. *Cunningham*, 103 Me., 455, 70 A., 17.

In the instant case, however, the referee found that:

> "... the defendant obtained possession of the property under his contract and agreement to pay in the future and not by reason of the issuance of the check. The defendant obtained no property by giving the check."

Notwithstanding this, the plaintiff, relying on *Eastern Trust & Banking Company* v. *Cunningham*, supra, contends that the giving of the check in the case at bar, without funds in the bank to meet the same, was a false representation that it was drawn against available funds, by means of which the plaintiff was defrauded, and so this action of deceit will lie.

That contention, on the facts presented, is not supported by the cited case, where the court said:

"The false representation relied upon here is the representation which ordinarily is implied by the drawer of a check when he delivers it to the payee, that it is drawn against available funds, or that there are funds in the drawee bank to meet it. The same implied representation arises when one deposits to the credit of his account in one bank his own check drawn upon another bank. Because of this implied representation, it is a fraud on the part of the drawer to draw a check upon a bank where there are no funds to meet it."

It there appeared that the plaintiff bank, believing and relying upon such false representations, was induced to, and did give a depositor money, or the use of money, on checks drawn by the latter and "kited" from one bank to another, when the depositor well knew there were insufficient funds in the banks on which the checks were drawn to meet them, and the court held that an action of deceit might be maintained by the defrauded bank.

That is not the instant case. In the case last cited, it appeared that the money, or the use of money, was obtained by checks. In the present case the referee found that "the defendant obtained no property by giving the check," and that finding is supported by the evidence. So the plaintiff has failed to show that she was induced by any alleged fraud to give credit, or part with any property.

But, the plaintiff claims that by accepting the check, she lost the $1,500 which should have been paid to her in cash, for the potatoes. That contention cannot be sustained. Before the bankruptcy proceedings were commenced, she had the right to sue on the check, or, after the check was dishonored, she might have brought an action to recover the purchase price of the potatoes, or on the check itself, at her option. 5 R. C. L., pages 544, 545.

The plaintiff, still further contending, claims, in substance, that the contract in the instant case was a single, entire one for

the sale of potatoes, to be paid for in cash after all had been delivered, and title was not to pass until they were paid for; that the check was accepted in payment upon condition that it would be paid upon presentation to the bank upon which it was drawn, and that title to the potatoes would not pass until the check was paid.

Young v. *Harris-Cortner Co. et al.*, 152 Tenn., 15, 268 S. W., 125, 54 A. L. R., 516, is cited in support of that contention. In that case, the action was not for deceit, but for the possession of cotton on the ground that the title had not passed because the checks given therefor had been dishonored. That is not in point here.

For the same reason, the plaintiff's contention is not supported by *Stone et al.* v. *Perry*, 60 Me., 48. That was an action of replevin.

Even assuming that where payment is not made on delivery of personal property sold for cash, the seller may assert his title thereto, in the absence of waiver (see *Pyrene Manufacturing Company* v. *Burnell et al.*, 127 Me., 503, 144 A., 649), yet the right to assert title to property which had been delivered, and bring an action to recover the possession thereof, does not confer upon the plaintiff the right to bring and maintain an action of deceit, in the absence of any of the elements necessary to be shown in order to constitute deceit.

It is unnecessary to discuss the cases further. The plaintiff, not having shown that she was defrauded of anything by the issuance of the check in question, cannot maintain this action of deceit against the defendant.

The conclusion of the referee is amply sustained by the facts set forth in the agreed statement which is incorporated in the record.

The plaintiff takes nothing by her exceptions.

Exceptions overruled.

CLAIRINA MARTIN *vs.* CITY OF BIDDEFORD.

York. Opinion, July 11, 1941.

Workmen's Compensation Act.

The finality of findings of fact by the Industrial Accident Commission applies to the usual phases of the issue as to whether an accident arose out of and in the course of employment.

The finding of fact by the Industrial Accident Commission that the injury which caused the death of the petitioner's husband arose out of and in the course of his employment is amply sustained by the evidence, it being shown that he was doing what he was required to do and following directions not only of his immediate superior but also of the employing authority.

An injury is received in the course of employment when it comes while the workman is doing the duty which he is employed to perform. It arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

The finding of fact by the Industrial Accident Commission that the deceased was not intoxicated at the time of the accident which caused his death was justified.

The plaintiff, upon the facts as found by the Industrial Accident Commission, is, under the provisions of Section 2, Subdivision VIII, Chapter 55, Revised Statutes 1930, conclusively presumed to have been wholly dependent upon her husband for support.

The allowance for burial expenses was made in accordance with Section 15 of Chapter 55, Revised Statutes, 1930, as amended by Section 7 of Chapter 276 of Public Laws of Maine, 1939; and the rules and formulae for computing compensation were properly applied and the amount allowed is correct.

Appeal from decree affirming decision of Industrial Accident Commission awarding compensation to the plaintiff, who is the widow of Henry Martin, deceased. Martin was a part-time laborer in the street department of the City of Biddeford, and a member of a crew of helpers engaged in sanding streets, said crew consisting of a truck driver and four helpers. The driver of the truck received instructions from the district road commissioner as to the streets to be sanded. The only instruction given the helpers was to go with the truck and work under the direction of the truck driver. After the streets assigned by the road

commissioner were sanded, the truck driver proceeded to a street not assigned, and, upon finding that it had been sanded, turned into a private driveway. As the truck turned into the private driveway, Martin fell from the truck and suffered injuries from which he died. At the time of Martin's death, Mrs. Martin was living apart from him. The Industrial Accident Commission found as a fact that, nevertheless, under the provisions of Subdivision VIII, Section 2, Chapter 55, Revised Statutes 1930, Mrs. Martin was wholly dependent upon her husband for support; also that Martin was not intoxicated at the time of the accident, as claimed by the defendant, and, further, that the injury which caused his death arose out of and in the course of his employment; and awarded compensation to Mrs. Martin. This decision was affirmed in the Superior Court. The defendant appealed. Appeal dismissed. The case fully appears in the opinion.

Robert A. Wilson, for plaintiff.

William P. Donahue and Louis B. Lausier, for defendant.

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

MANSER, J. This is an appeal from decree of a justice of the Superior Court, affirming decision of the Industrial Accident Commission, awarding compensation to petitioner.

The findings of facts, amply supported by the record, are in their essentials narratively stated as follows:

On February 23, 1940, Henry Martin was employed as a part-time laborer in the street department of the City of Biddeford. The city is divided, for street maintenance purposes, into districts, each supervised by a commissioner.

On the forenoon of that day, Martin was working in a crew engaged in sanding streets in District Number Four. The crew consisted of a truck driver and four helpers, of whom Martin was one. It was the custom in these sanding operations for the commissioner to give instructions to the truck driver as to the

streets to be sanded, and to allot the helpers from a large group available for selection and employment.

The men would board the truck at the city's garage, and, when the sanding was finished, would be let off the truck at the garage or such point on the way to the garage as would be nearest or most convenient to their homes. The truck driver did not undertake to carry any of these men to their homes; he himself kept the truck with him during the lunch hour.

On February 23, Martin went to work at seven o'clock in the morning as a member of the crew of helpers assigned to the truck driven by one Arthur Blais. Blais, as driver, received instructions from the commissioner; the helpers received no instructions other than to go with the truck. Blais was instructed to sand certain streets. Finishing those streets shortly before twelve o'clock, and having some sand left in his truck, Blais proceeded by the city garage to Washington Street to find out whether or not that street had been sanded, and if not, to do so, as he had done on previous occasions, although Washington Street was not on the list received on this particular morning. Finding that Washington Street had been sanded, Blais turned the truck into a private driveway. This was the first opportunity that the men had to get off the truck after the last of the sanding. As the truck went up over the ramp into the driveway, Henry Martin, who had been sitting on the side, lost his balance and fell over backward to the sidewalk. He fractured four ribs, sustaining a punctured pleura and lung, from which he died two days later, on February 25.

Upon these facts the defense contended that the injury was not received "by accident arising out of and in the course of his employment," and was, therefore, not compensable under R. S., Chap. 55, § 8.

Defense further contended that the death of Martin resulted from his intoxication while on duty, and compensation and benefits should have been denied under the provisions of R. S., Chap. 55, § 17.

The Commissioner in his findings noted that the physician who attended Martin after the accident, testified that there was a strong odor of liquor upon his breath, and other evidence that Martin drank a glass of ale about nine o'clock that forenoon. The record in this respect, not detailed by the commissioner, demonstrates that Martin was that morning selected and employed by the commissioner, that he was under the direct supervision of the truck driver and in close proximity to the other helpers. There is no testimony as to the man being at all intoxicated while about his work during the forenoon. The finding of fact against this contention of the defense was justified.

The petitioner, Clairina Martin, is the widow of Henry Martin, but defense contention is that the parties had been living apart for a period of six years and that the petitioner did not qualify as a dependent under R. S., Chap. 55, § 2, VIII, which, so far as applicable, reads as follows:

> "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
>
> (a) A wife upon a husband with whom she lives, or from whom she is living apart for a justifiable cause or because he has deserted her, or upon whom she is actually dependent at the time of the accident."

The facts in this connection are carefully reviewed by the Commissioner, and disclose that in February, 1934, Martin left his wife without cause. About two months thereafter he interviewed his wife solely for the purpose of making arrangements for the sale of a house which they owned. Except occasionally, when she met him on the street, Mrs. Martin did not see her husband until after his injury.

A number of months after he left, she went to work as a housekeeper in the family of a Mr. Berry. She kept house for him and his five children, Berry and his wife having been divorced prior to Mrs. Martin taking the employment there. In

addition, she worked at times and for varying periods in the York mill. In summation, the Commissioner found:

> "It is clear that the separation was initiated by the husband, and, apparently at least after the incident regarding the sale of the property, without intent of returning to his wife and children. It is equally clear that Mrs. Martin did not pursue her husband and beg him to return. But careful consideration of all the evidence leads us to conclude that, neither at its inception nor thereafter, did Mrs. Martin consent or acquiesce in her husband's separation.
>
> "Admittedly, Mrs. Martin was not at the time of her husband's accident living with him, or dependent upon his earnings for her support. We do find, however, that she comes within the class described in the statute as 'living apart (from her husband) for a justifiable cause or because he has deserted her,' and, hence, is conclusively presumed to be a dependent under the statute."

In arriving at this conclusion, the Commissioner made application of the legal principles enunciated in *Scott's Case*, 117 Me., 436, 104 A., 794; *Albee's Case*, 128 Me., 126, 145 A., 742; *Moody* v. *Moody*, 118 Me., 454, 108 A., 849; and *Ford* v. *Ford*, 143 Mass., 577, 10 N. E., 474, 475.

Stress was laid in argument, and examination was directed at the hearing, to the point that the petitioner took no steps toward securing a reconciliation, and evidenced no desire for restoration of the marital relations. In cross-examination, endeavor was made to secure an admission from the petitioner that she was satisfied to allow the separation to continue and would not have been willing to effect a reconciliation. She was asked, "If he had come back and asked you take him back, without making any promises to you, would you have taken him back?" She replied, "Well, probably. I don't know until we talked together. We don't know whether we would take him back or not because he never came back."

This particular situation is well taken care of in the opinion of Holmes, J. in *Ford* v. *Ford,* supra, as follows:

> "When one party terminates the cohabitation by desertion, the other is not bound to take any steps to restore it. . . . Conduct which in itself is proper cannot be made improper by inquiring what he would have done in an event which did not happen."

In the quarter century which has elapsed since the adoption of the Workmen's Compensation Act, its jurisprudence has become established in the sense that its philosophy, its administration, its system, and its principles have been analyzed, expounded and judicially applied with practical unanimity by all courts. Thus, with reference to the finality of findings of fact by the Commissioner, our own reports are replete with judicial decisions which need no citation except to call attention to the recent case of *Eddy* v. *Furniture Co.,* 134 Me., 168, where the question is reviewed. This also applies to the usual phases of the issue as to whether the accident arose out of and in the course of the employment. Repetition of the definitive declaration is hardly necessary, but is well stated by Rugg, C. J., in *McNicol's Case,* 215 Mass., 497, 102 N. E., 697, adopted by our own court in *Willette's Case,* 135 Me., 254, 194 A., 540, 541:

> "an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment."

The Commissioner ruled that the facts of the present case were in conformity to the rule thus stated.

In this case a further point not specifically passed upon below is raised by the defense to the effect that, though the rule might have application to the facts relative to the employment, had the employer been a private concern, different rules relative to contractual powers of agents of a municipality are applicable, and the following cases are cited in support of this contention: *Goodrich* v. *Waterville*, 88 Me., 39, 33 A., 659; *Morse* v. *Montville*, 115 Me., 454, 99 A., 438; *Power Co.* v. *Van-Buren*, 116 Me., 119, 100 A., 371; *Bangor* v. *Ridley*, 117 Me., 297, 104 A., 230.

The claim appears to be that the truck driver was instructed to sand certain specified streets, and after completing that work, had no authority to proceed to another street not within the list given him. The defense asserts that, as the truck driver had received no explicit direction to sand Washington Street, the helpers, though not shown to be aware of the fact and required to work wherever the driver directed, though being transported with the purpose of continuing their labor for shoveling sand remaining in the truck, though still within the work period for which they were being compensated, *ipso facto* lost their status as employees and are brought within the rule that he who deals with a municipality must do so at his peril. The factual situation does not support the legal contention. Martin and the other laborers were hired to sand streets as and where directed by their immediate superior. They were transported from place to place for that purpose. They were doing what they had been hired to do and following the directions, not only of their direct boss, but also of the employing authority. *Konopka* v. *Jackson Road Com.*, 270 Mich., 174, 258 N. W., 429; *Beer's Case*, 125 Me., 1, 130 A., 350.

Certain minor issues raised in defense are not discussed, as they were without merit and need no elaboration.

The findings of the Commissioner were warranted, and the

decree thereon is in accordance with established legal principles.

The allowance for burial expenses was made in accordance with R. S., Chap 55, § 15, amended by P. L. of Maine 1939, Chap. 276, § 7.

The rules and formulae for computing compensation were properly applied and there is no dispute as to the amount allowed.

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

ROSER LEONARD, a minor, by her father and next friend, ROSCOE LEONARD

vs.

BEATRICE CARMICHAEL.

ROSCOE LEONARD *vs.* BEATRICE CARMICHAEL.

Penobscot. Opinion, July 24, 1941.

Negligence. Measure of Damages.

The question of whether or not the defendant was negligent, and the question of the extent of Roser Leonard's injuries were factual matters to be determined by the referees, who heard the evidence.

The record reveals sufficient evidence to justify the decision of the referees that the defendant was liable.

It does not appear that the amount awarded for disbursements and expenses was excessive.

It cannot be said that the amount awarded for personal injuries was so clearly the result of bias, prejudice or sympathy as to require sustainment of defendant's exceptions.

Exceptions by defendant to acceptance of report of referees. Two actions. One action was by Roser Leonard, a minor, by her father and next friend, to recover damages for personal injuries, the other was by her father, Roscoe Leonard, to recover

for disbursements and expenses. At the time of the accident, the defendant, driving her own car, approached a rise in the road which for some distance obscured her view. A short distance beyond the rise, the eleven-year-old son of Roscoe Leonard was hauling his sister, twenty-one months old, plaintiff above, in a small cart. The father, from the opposite side of the road "screamed" to the boy to get off the road. In obeying the boy pushed the cart with his sister in it down into a ditch. The defendant applied her brakes, skidded, hit the cart and injured the child. The referees ruled for the plaintiff in each case. Case fully appears in the opinion. Exceptions overruled in both cases.

Michael Pilot, for plaintiffs.

Berman & Berman, of Lewiston, by Benjamin L. Berman, for defendant.

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

PER CURIAM.

On defendant's exceptions to acceptance of reports of referees in two negligence cases, one brought to recover damages for personal injuries to an infant and the other for the father's disbursements and expenses on account of the same. The referees awarded $7,500 to the child and $2,228 to the father.

At the time of the accident, June 21, 1939, the defendant was driving her car southerly on a highway in the Town of Hampden. She approached a rise in the road which for some distance obscured her vision ahead. A short distance farther on, the father was making a turn out of a driveway on her left to go down the road, his horse hitched to a jigger. On the opposite side of this road his eleven-year-old son was hauling his little sister, then twenty-one months old, in a small cart. The father, hearing but not seeing the automobile, "screamed" to the boy to get off the road, and he did, pushing the cart with the child in it down an embankment into the ditch. The defendant applied

her brakes, claimed to skid by reason of loose gravel in the road, bore to the right, then to the left, and again to the right, hit the cart, and then plunged into some alder bushes, having proceeded approximately three hundred feet from the top of the rise. The child, rendered unconscious, was taken to a hospital for first aid treatment. Later, she was operated on in a hospital in Boston.

These were the factual cases involving only familiar principles of the law of negligence. A study of the record reveals sufficient evidence to justify the reports of the referees as to liability.

As to damages, the plaintiffs claimed that the brain tissues on the left side of the child's head were injured, resulting in irregular convulsions, palsy, and hemiparesis, with "a distinct handicap of activity confined to the right side of the body, involving the arm and leg." Definite assurance of permanency of these conditions, or that the child's intellectual ability would be decreased in the future does not appear in the plaintiff's expert's testimony. The future was thought to be problematical.

The defendant denied such seriousness of result both present and prospective.

These also were factual matters for the referees. They saw the child, observed her condition, heard the testimony of witnesses who saw her in convulsions and at other times, and had the benefit of the expert medical testimony. No doubt the awards represented to them fair and reasonable compensation for the child's personal injuries. It does not appear that the award for disbursements and expenses was excessive. Even though we might not have awarded as much for the personal injuries as did these referees, yet we cannot say that the amounts awarded were so clearly the result of bias, prejudice, or sympathy as to require sustainment of the exceptions.

Exceptions overruled in both cases.

WESTBROOK TRUST COMPANY *vs.* GRACE R. SWETT.

Cumberland. Opinion, July 25, 1941.

Effect of Sustaining General Demurrer in Municipal Court. Correction of Erroneous Entries Must Conform to the Truth. Effect of Appeal to the Superior Court from Municipal Court.

The order of a trial judge in the Municipal Court sustaining defendant's general demurrer was not final and judgment for the defendant did not follow as a matter of course. Without an entry of judgment, the action stood on the docket of the Municipal Court unfinished, and plaintiff had a right to be heard on its motion to amend the declaration.

The Municipal Court, being a court of record, has power and authority over its own docket until a final and valid judgment is entered and, until then, can amend and correct entries erroneously and improvidently made in its docket so as to conform to the truth.

The power of correction does not extend beyond conformity to the truth and, since the trial judge did not at any time order judgment for the defendant, the entry "Judgment for the Defendant" on the Municipal Court docket lacked that conformity and had no authority in law or fact.

An appeal from a Municipal Court to a Superior Court vacates the judgment of the lower court and removes the whole case to the appellate court to be tried *de novo* upon both law and fact and for the rendition of the independent judgment of the appellate tribunal on the merits. The Superior Court should have heard the motion to correct the record of the Municipal Court anew and rendered its own independent judgment on the merits.

The stated conclusion of the Superior Court justice, upon dismissing the case, that the effect of dismissal was to sustain the ruling in the court below did not enlarge the scope or effect of the order of the dismissal. If this statement was intended to be an affirmance of the judgment of the inferior court it was unauthorized. Viewed as mere surplusage, as it must be, it was a nullity.

ON EXCEPTION.

Action of assumpsit against the endorser of a promissory note was brought in the Municipal Court of Portland. Defendant entered a general demurrer and her demurrer was sustained. The plaintiff moved to amend and the defendant filed written objections to the allowance of the amendment. By error the record was made to read "Nonsuit." Subsequently a motion by the defendant to correct the error was granted and

the record was made to read not only "Demurrer Sustained" but also "Judgment for the Defendant," though the trial judge did not then or later order judgment for the defendant.

An appeal taken to the Superior Court by the plaintiff was dismissed with a statement by the presiding justice that the effect thereof was to sustain the ruling below. Plaintiff excepted.

Exception sustained. Case fully appears in the opinion.

Udell Bramson, for plaintiff.

Milan J. Smith, for defendant.

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

STURGIS, C. J. This action of assumpsit against the endorser of a promissory note having been entered in the Municipal Court of the City of Portland, the defendant's general demurrer to the declaration was sustained, the plaintiff moved to amend and the defendant filed written objections to the allowance of the amendment. By error, the somewhat illegible endorsement of the trial judge indicating that the demurrer was sustained was misinterpreted and a "Nonsuit" was recorded. At a subsequent term, a motion by the defendant to correct the record was granted and the record made to read not only "Demurrer sustained," but also "Judgment for the Defendant," an entry which apparently had no warrant in law or fact. An appeal, properly filed and perfected was dismissed by the Superior Court. The case comes forward on an exception to this ruling.

Although the bill of exceptions is inartificially drawn and incomplete, it discloses that prejudicial errors have occurred in this case. Apparently in the Municipal Court, although the trial judge sustained the defendant's demurrer and made minutes of his ruling accordingly, he did not then or later order judgment entered for the defendant. The order sustaining the demurrer was not final and judgment for the demurrant did

not follow as a matter of course. Without an entry of judgment the action stood on the docket unfinished. *Littlefield* v. *Railroad Co.*, 104 Me., 126, 131, 71 A., 657; *Andrews* v. *Loveland*, 1 Col., 8; *Gates* v. *Hayner*, 22 Fla., 325; *Slagle* v. *Bodmer*, 58 Ind., 465; 6 Encyc. Pl. and Pr. 353. The plaintiff still had a right to be heard on its motion to amend its declaration. R. S., Chap. 96, Sec. 38; *Maine Central Institute* v. *Haskell*, 71 Me., 487; *Colton* v. *Stanwood*, 67 Me., 25, 27. See *Hare* v. *Dean*, 90 Me., 308, 38 A., 227.

We have no doubt that the Municipal Court, being a court of record, had power and authority over its own docket, at least until a valid, final judgment was entered, and until that time, could amend and correct entries erroneously and improvidently made in its docket so as to conform to the truth. *Myers* v. *Levenseller*, 117 Me., 80, 82, 102 A., 776; *Sawyer* v. *Bank*, 126 Me., 314, 138 A. It is not open to argument, however, that this power of correction does not extend beyond conformity to the truth. On this record the alleged corrected entry made in this case of "Judgment for the Defendant" lacks that conformity. The Municipal Court in granting the defendant's motion and directing the insertion of that entry in its records transcended its authority.

An appeal from a Municipal Court to a Superior Court vacates the judgment of the lower court and removes the whole case to the appellate court to be tried *de novo* upon both law and fact. In the case at bar, unless grounds for dismissing the appeal existed, which are not here made to appear, the Superior Court should have heard the motion to correct the record of the Municipal Court anew and rendered its own independent judgment on the merits. *Willet* v. *Clark*, 103 Me., 22, 67 A., 566. On this record the appeal was simply dismissed. The stated conclusion of the presiding justice that the effect of the dismissal was to sustain the ruling below does not enlarge the scope or effect of the order of dismissal. If intended to be an affirmance of the judgment of the inferior court it was unauthorized. *Morrill* v. *Buker*, 92 Me., 389, 392, 42 A., 796. See

35 Corpus Juris, 845, Sec. 590 and cases cited. Viewed as mere surplusage, as it must be, it is a nullity. The order of dismissal was error. The exception presented, being directed expressly to that order, is sufficient and must be sustained.

Exception sustained.

CITY OF LEWISTON *vs.* ALL MAINE FAIR ASSOCIATION.

Androscoggin. Opinion, July 26, 1941.

Property of Literary and Scientific Institutions.
Property Subject to Taxation. Property Exempt from Taxation.

The All Maine Fair Association is a scientific institution within the meaning of Paragraph III, Section 6 of Chapter 13, Revised Statutes 1930.

The property owned by the Association and occupied by it for its own purposes, including the land upon which its race track is laid out, the grandstand and the buildings used in connection with the operation of the annual agricultural fair, is not subject to taxation, even though the Association has sometimes allowed other persons or corporations temporarily and occasionally to use a part of said property for a rental; or the Association, itself, has occasionally used part of said property for purposes foreign to the conduct of its Fair, when this could be done without interfering with the general occupation and use of such property by the Association for its purposes.

The property of the Association which throughout the tax periods here involved remained unoccupied and unused for Association purposes was taxable.

Parcels of land owned by the Association which were let for ground rent to persons who maintained cottages thereon and a stable let for revenue to a riding master were not occupied by the Association for its own purposes and were taxable.

Property used by the Association for deriving revenue and for purposes alien to its own purposes as contemplated by the statute was taxable. Hence when a part of the exhibition hall was used as a skating rink, it was taxable during the time of such use.

When a tax is assessed in gross against an entire property, if any part of the property assessed is taxable, in an action of debt, judgment for the tax must be entered; hence the fact that part of the property upon which the taxes here in suit were assessed was exempt from taxation is not a defense in this action.

The inclusion of exempt property in assessment of taxes is overvaluation which can only be remedied by abatement proceedings, under Section 73 *et*

seq. of Chapter 13, Revised Statutes 1930; and the All Maine Fair Association cannot have the exemption to which it is entitled deducted from the taxes assessed against it and here in suit, but must seek the remedy by abatement proceedings.

In view of the indisputability of the facts disclosed by the record and the conclusions to be drawn therefrom, the correctness of the decision of the referees is one of law and the exception reserved to the acceptance of their report was for consideration of the Law Court.

On exceptions by plaintiff to acceptance of the report of referees. Action of debt by the City of Lewiston to recover taxes assessed in the years 1935, 1936 and 1937 against the All Maine Fair Association. A plea of general issue was filed and the case was referred under rule of court, with right of exception as to matters of law. The referees found for the Association. Exceptions sustained. Case fully appears in the opinion.

Thomas E. Delahanty, for plaintiff.

Frank W. Winter, pro se.

John G. Marshall, for defendant.

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

STURGIS, C. J. Action of debt by the City of Lewiston to recover taxes assessed in the years 1935, 1936 and 1937 against the All Maine Fair Association, a corporation located in Lewiston and organized under Chapter 70 of the Revised Statutes. A plea of the general issue having been filed and the case referred under rule of court, the plaintiff's exceptions to the acceptance of the report bring the case to the Law Court for review.

It is conceded that the taxes sued for were duly assessed in gross upon all the real estate of the Association, this action of debt in the name of the City of Lewiston was authorized, and the All Maine Fair Association is a scientific institution within the meaning of Par. III, Sec. 6, Chap. 13, R. S., which provides that included in the list of property exempt from taxation in this state is

> "The real estate of all literary and scientific institutions occupied by them for their own purposes or by any officer thereof as a residence . . . ; but so much of the real estate of such corporations as is not occupied by them for their own purposes shall be taxed in the municipality in which it is situated."

The defendant Association contends that all its property is exempt from taxation under this statute. The City of Lewiston insists that part of the property is not occupied by the Association for its own purposes and is taxable by virtue of the exception to the exemption provision.

It seems to be indisputably established by the record that the real purpose for which the All Maine Fair Association was incorporated was to conduct agricultural fairs at Lewiston and to that end it has acquired a large tract of land in that city with a race track, grandstand, stables and divers other buildings thereon which it occupies and uses generally as a fair ground upon which it holds its annual fairs and at other times, when the fair is not in progress, conducts or by concession or lease permits pari-mutuel horse races, rodeos, circuses, shows and amusements. In its exhibition hall, but in an addition to it originally erected for use as an automobile display room, a use long since discontinued, the Association has for some years operated a skating rink throughout the year for revenue and as a venture foreign to the carrying on of its annual fair. The Association has regularly let certain parts of the property, for ground rental, to sundry persons as lots upon which to erect and maintain cottages. A small parcel of the property has for years been let, for an annual rental, charged if not collected, as a site of a part of a victualing house which extends from adjoining lands into and upon the fair ground. At least one of the stables has been let outright for hire to other persons for their own exclusive use. A part of the land in the fair ground tract is vacant and neither occupied or used at all by the Association for its own purposes.

There can be no doubt that a part of the property of the All Maine Fair Association is exempt from taxation. The land upon which the race track is laid out, the grandstand and the buildings used in connection with the operation of the annual agricultural fair having been acquired and designed and always used in good faith for that purpose are not taxable. This is true even though the Association sometimes has allowed other persons or corporations to temporarily and occasionally use a part of the property for a rental or occasionally itself has used a part of it for purposes foreign to the conduct of its fair when this could be done without interfering with its general occupation and use of the same property. This is the rule of *Curtis* v. *Odd Fellows*, 99 Me., 356, 59 A., 518. And within it falls the use of the fair ground and its appurtenances for parimutuel horse races, rodeos, circuses, shows and amusements. These uses apparently have been temporary and occasional only and have in no way interfered with the general use and occupation of the fair grounds by the Association for its own dominant purposes.

On the other hand it clearly appears that part of the property of the Association was taxable each and every year in which the taxes here sued for were assessed. It is admitted by officers of the Association that in each of those years one or more parcels of land were let for ground rental to persons as lots upon which to maintain cottages already erected thereon. In the same years land was let to the victualer as part of the site of her building and rental was charged. In the years 1935 and 1936 a stable was let to a riding master who occupied it in those periods, had exclusive use of it and paid rental. All these lettings were for revenue and the properties included therein were clearly not occupied by the Association for its own purposes. *Foxcroft* v. *Campmeeting Association*, 86 Me., 78, 29 A., 951; *Foxcroft* v. *Straw*, 86 Me., 76, 29 A., 950. Throughout all the tax periods the vacant land in the fair ground tract remained unoccupied and unused for Association purposes. It was taxable. *Park Association* v. *City of Saco*, 127 Me., 136,

142 A., 65; *Curtis* v. *Odd Fellows*, supra, p. 359, 59 A., 518; *Phillips Academy* v. *Andover*, 175 Mass., 118, 123, 55 N. E., 841. To the foregoing properties must be added that part of the exhibition hall used in the year 1937 for a skating rink. The dominant use of this property was apparently independent and alien to the conduct of the annual fair. It was property "from which revenue is derived." It was not occupied by the Association for its own purposes as contemplated by the statute. It was in the category of the hostelries run for hire in *Park Association* v. *City of Saco*, supra.

In this proceeding, however, the All Maine Fair Association cannot have the exemptions from taxation to which it is entitled under Par. III, Sec. 6, Chap. 13, R. S., deducted from the taxes assessed against it and here in suit. The taxes were assessed in gross against the entire property. The inclusion of exempt property in such an assessment was overvaluation which can only be remedied by abatement proceedings under Sec. 73, *et seq.*, Chap. 13, R. S. When a tax is assessed in gross, if any part of the property assessed is taxable, in an action of debt, judgment for the tax must be entered. Overvaluation is not a defense. *Foxcroft* v. *Campmeeting Association*, supra; *Rockland* v. *Rockland Water Co.*, 82 Me., 188, 19 A., 163.

The case was referred with right of exceptions reserved as to matters of law. On the issue presented as to whether the All Maine Fair Association has so used any of its property as to deprive it of the exemption from taxation provided in Par. III, Sec. 6, Chap. 13, R. S., the referees found for the Association and reported accordingly. This finding was clearly wrong. In view of the indisputability of the facts and the conclusions to be drawn therefrom, the correctness of the decision of the referees is one of law and the exception reserved to the acceptance of the report by the Trial Court is open for consideration by the Law Court. *Hawkins* v. *Theater Co.*, 132 Me., 1, 164 A., 628; *Wells* v. *The City of Augusta*, 135 Me., 314, 196 A., 638.

Exceptions sustained.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE AUTO MUTUAL INDEMNITY COMPANY

vs.

TOWN TAXI COMPANY, INC.

Cumberland. Opinion, August 4, 1941.

Mutual Insurance Company Defined. Rights and Obligations of Members.

The Auto Mutual Insurance Company, being organized under the laws of New York, the New York court had jurisdiction over it and could lawfully and bindingly determine the necessity for an assessment and its amount.

Such a judgment, however, is not one *in personam* against a member of the company who has his residence outside of the State of New York.

In a subsequent action, brought in the jurisdiction where the defendant resides, to obtain a judgment *in personam* for an assessment, the defendant may set up personal defenses such as non-membership, or payment, or the statute of limitations.

Mutual insurance is that system of insurance by which the members of the association or company mutually insure each other. In a strictly mutual company there are no stockholders, but all who insure in a mutual insurance company are members of it, with all the rights, and subject to all the liabilities of membership. The ownership of the company is in its policyholders, and each member is both an insurer and an insured.

Acceptance of an application for insurance in a strictly mutual insurance company makes the applicant a member of the company.

The statutes of the state under whose laws a mutual insurance company is organized, relating to such corporations, the by-laws of the company and the contract define the rights and liabilities of the member as an insurer, while his rights and liabilities as an insured are defined by the contract; and a member of a mutual insurance company is bound to take notice of and observe its by-laws, of which he is presumed to have knowledge.

On report on agreed statement of facts. The plaintiff, Superintendent of Insurance of the State of New York, as liquidator of the Auto Mutual Indemnity Company, a corporation organized under the laws of New York, sued the defendant in assumpsit to recover the sum of $1,497.69, and interest, assessed against it as a policyholder in and member of the Auto Mutual Indemnity Company. In 1936 and 1937 the Indemnity Com-

pany, which was duly licensed to do business in Maine, by its agent in Portland, issued policies to the defendant. The by-laws of the Indemnity Company, in force when these policies were issued, provided that "The members of the corporation shall be the policy holders herein;" that "The Board of Directors shall make an assessment upon the members of the corporation when the cash funds of the corporation are less than the required reserve for unearned premiums, losses, and expenses;" that "The contingent mutual liability of the members for the payment of losses and expenses not provided for by the corporation shall not be less than an amount equal to twice the amount of, in addition to, the cash premiums written in the policy;" and that "Every member shall be liable to pay and shall pay his proportional part of any assessment which may be laid by the corporation in accordance with the law and his contract, covering any deficiency (excess of liabilities over admitted assets) if he is notified of such assessment within one year after the expiration or cancellation of his policy." In November, 1937, by order of the Supreme Court of New York, the Indemnity Company was dissolved and plaintiff was authorized to liquidate the business. In February, 1938, the court ordered an assessment on all members of record on November 10, 1937, of whom defendant company is admitted to have been one. Notices of hearings were given as provided by New York law, but defendant did not appear or file objections. Judgment for plaintiff. Case fully appears in the opinion.

Jacob H. Berman, Edward J. Berman, Sidney W. Wernick, of Portland and *Alfred C. Bennett* of New York City, for plaintiff.

Abraham Breitbard of Portland, for defendant.

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

HUDSON, J. Report from the Superior Court on agreed statement of facts. The plaintiff, Superintendent of Insurance of the State of New York, liquidator of the Auto Mutual In-

demnity Company, sues the defendant in assumpsit to recover the sum of $1,497.69 (and interest) assessed against it as a policyholder in and member of the Indemnity Company.

On June 26, 1936, the Indemnity Company, by its agent in Portland, issued its policy to the defendant with coverage from July 1, 1936 to July 1, 1937, providing for a total annual cash premium of $2,490. 87. On July 14, 1937, it issued a like policy to it to run from July 1, 1937 to July 1, 1938, for a total cash annual premium of $3,645.00. Both were issued and countersigned at Portland. It is stipulated that the Indemnity Company was duly authorized and licensed to do business in this state as a foreign mutual automobile casualty insurance company. It is conceded that the plaintiff has the right to sue this action in this jurisdiction.

The Indemnity Company was organized under the statute law of New York State. Under its by-laws in force when these policies were issued it was provided that "The members of the corporation shall be the policy holders herein"; that "The Board of Directors shall make an assessment upon the members of the corporation when the cash funds of the corporation are less than the required reserves for unearned premiums, losses and expenses"; that "The contingent mutual liability of the members for the payment of losses and expenses not provided for by the corporation, shall not be less than an amount equal to twice the amount of, in addition to, the cash premiums written in the policy"; and that "Every member shall be liable to pay and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with the law and his contract, covering any deficiency (excess of liabilities over admitted assets) if he is notified of such assessment within one year after the expiration or cancellation of his policy."

On the twenty-fourth day of November, 1937, pursuant to Article XI of the insurance law of the State of New York, the Supreme Court of that state ordered the Indemnity Company's dissolution, annulment of its charter, and transfer of

title of its assets to this plaintiff, who was authorized and directed forthwith to take possession of its property and liquidate its business.

On the seventh day of February, 1938, the court ordered an assesssment of forty per cent against all members of the Indemnity Company, against whom an assessment might have been levied on November 10, 1937. On August 12, 1938, it ordered payment of the assessments to the plaintiff on or before the nineteenth day of September, 1938, and in case of non-payment, that the assessed should show cause on the twenty-ninth day of September, 1938, why they should not be held liable to pay such assessments. It is admitted that the defendant company was of those so assessed and that the total of its assessment on the two policies amounted to $1,497.69.

Although notices for hearings on the petitions on which said orders were based were given in accordance with the provisions of the New York statutes, both by publication and mail with postage prepaid, yet this defendant did not appear before the New York court at any hearing nor file objections to such assessments nor in any way attack or contest the validity thereof.

The plaintiff concedes that no valid judgment *in personam* was recovered in the New York courts against this defendant. It does claim, however (and we think rightly), that the New York court, having jurisdiction of the corporation itself and its corporate matters, lawfully and bindingly determined the necessity for an assessment and its amount. *Childs* v. *Cleaves*, 95 Me., 498, 508, 50 A., 714; *Johnson* v. *Libby*, 111 Me., 204, 209, 88 A., 647; Ann. Cas. 1916 C 681.

In a subsequent action brought in the jurisdiction where the defendant resides to obtain a judgment *in personam* for an assessment, the defendant may set up personal defenses, such as non-membership or payment or the statute of limitations. *Childs* v. *Cleaves*, supra, on page 509, 50 A., 714.

In an article on the assessment system and its history in Vol. 23 of the *Harvard Law Review*, it is stated on page 44:

"A further proceeding is therefore necessary to render the assessment effective as a personal liability. The assessment fixes the *rate* of liability, but the *persons* who are liable have yet to be judicially ascertained. This is done in single actions at law brought against each alleged stockholder respectively. In each of these actions the plaintiff must establish that the defendant is in truth a stockholder, and show the number of shares held by him. The defendant, as has been shown, may bring forward any personal defence, though he may not attack either the necessity for or the extent of the assessment. In other words the assessment represents the measure of damages which will be applied if personal liability as a stockholder is established."

The general rule with citations from Maine and other states and the Federal courts is stated in 48 A. L. R., page 669 as follows: "It seems well settled that a decree assessing stockholders of an insolvent corporation is conclusive against nonresident stockholders, although not served with process within the state in which it was rendered or made parties to the proceedings, in so far as the necessity for such decree and the amount of the assessment are concerned, where, under the laws of the state, the court has jurisdiction to enter such decree, and its determination is conclusive as to such questions."

While the rule may have been applied more often in actions against stockholders where double liability, for instance, is sought and in actions against members of fraternal benefit companies, we see no controlling distinction between those cases and one, as here, to recover an assessment against a member of a mutual company. 48 A. L. R., 674, *et seq.*

On the back of one of these policies are printed these words:

"NOTICE TO POLICYHOLDERS

"1. The Insured is hereby notified that by virtue of this Policy he is a member of the AUTO MUTUAL INDEMNITY COMPANY and is entitled to vote either in person

or by proxy at any and all meetings of said company.

"2. The annual meetings are held at the Home Office of the Company in New York City on the second Tuesday of January in each year, at twelve o'clock noon.

"3. The contingent liability of the named Insured under this Policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the Insurance Law of the State of New York or of the State in which the Insured is domiciled and/or this policy is written,"

while on the other the words "or of the State in which the Insured is domiciled and/or this policy is written" in Paragraph 3 are omitted.

We consider that the words "Insurance Law" in Paragraph 3 have reference only to statutory law. As admitted by the defendant, there is no statutory law in Maine fixing limits as to contingent liability that would apply to these policies. That being so, the quoted additional words are inoperative and consequently Paragraphs 3 on the backs of both policies are identical in effect.

Insurance corporations are classified as stock, mutual, and mixed. In a strictly mutual company there are no stockholders. The ownership of the company is in its policyholders who are its members. A mixed company, as its name indicates, is one that has, at least in part, the nature of both stock and mutual companies, and in which a certain portion of the profits is divided among the stockholders and distribution of other funds made among the insured. Richards on the Law of Insurance, 4th edition, Sec. 5, pages 7 and 8.

In Sec. 146 of his work on insurance, Mr. May says:

"Mutual insurance, it is truly observed, is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. . . . They need

many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations toward his associates that he requires from them towards himself."

And in Sec. 548:

"The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company, and the participation of each member in the profits and losses of the business, in proportion to his interests. . . . He is at once insurer and insured."

Fraternal beneficiary associations are a specie of the mutual company as distinguished from the stock and function on the mutual plan for the sole benefit of their members. Richards, *supra,* Sec. 5.

"Mutual insurance is that system of insurance by which the members of the association or company mutually insure each other. A mutual company, therefore, is one in which the members are both the insurers and the insured." 21 Am. & Eng. Ency., Second Edition, page 253.

The insured in a mutual company holds his policy guaranteeing indemnity against loss "with a specific and limited fund out of which that indemnity is to be made good. . . . In another aspect he is a member of the corporation, made so by the very nature of the contract, and so declared by law. . . . In this relation, he is an insurer, and is affected by another and very different class of obligations." *Hill* v. *Baker,* 205 Mass., 303, 306, 91 N. E., 380, 381, 137 Am. St. Rep. 440.

"It follows from the very definition of mutual insurance that all who insure in a mutual insurance company are members of it, with all the rights and subject to all the

liabilities of membership; and membership dates in each case from the time when the insurance is effected. This is so as well when the premium is paid in cash as when a premium note is given." 21 Am. & Eng. Ency., *supra*, on pages 264 and 265.

That this Indemnity Company was strictly a mutual company as distinguished from a stock or mixed company appears in the record. No stock was issued; the policyholders, its members, completely owned its property; its members were both insured and insurers; as insured, they could collect for covered losses; as insurers, they were bound to contribute when necessity compelled assessments, legally made. As insurers they must bear their proportion of necessary assessments, not because they promised in so many words in the contract of insurance to pay assessments, but because they saw fit as policyholders to become members of a mutual insurance corporation operating under the assessment plan.

Acceptance of an application for insurance in a strictly mutual insurance company makes the applicant a member of the company. *Greenlaw* v. *Fire Insurance Company*, 117 Me., 514, 516, 105 A., 116.

The distinction between rights and liabilities "of the member as a member," that is, as an insurer, and as insured is noted in *Greenlaw* v. *Fire Insurance Company*, supra, where it is stated on page 521 of 117 Me., page 119 of 105 A.: "The statutes of the state relating to such corporations, *the by-laws of the company*, and the contract define the rights and liabilities of the member *as a member*" (Italics ours), while "His rights and liabilities *as insured* are defined by the contract." (Italics ours.)

Beneficiary fraternal organizations operate on the mutual plan. In *Patterson* v. *Golden Cross*, 104 Me., 355, 71 A., 1016, this court stated on pages 358 and 359:

"It had a right to impose terms and conditions upon those who sought membership. All applications must be

held to have been made subject to those terms and conditions."

To the same effect see *Gifford* v. *Benefit Association*, 105 Me., 17, 19, 72 A., 680; 17 Ann. Cas. 1173; *Grand Lodge of A. O. U. W.* v. *Conners et al.*, 116 Me., 224, 228, 100 A., 1022; *Wallace* v. *United Order of the Golden Cross*, 118 Me., 184, 187, 106 A., 713; *Grand Lodge of A. O. U. W.* v. *Penney*, 118 Me., 409, 411, 108 A., 355.

In *Treadway* v. *Hamilton Mutual Insurance Co.*, 29 Conn., 68, 69, it is held that a member of a mutual company is bound to take notice of and observe its by-laws. Also see *York County Mutual Fire Ins. Co.* v. *Knight*, 48 Me., 75, 79; *Schmidt* v. *German Mut. Ins. Co.*, 4 Ind. App., 340; 30 N. E., 939, 940; 14 *R. C. L.*, Sec. 109, page 935, 29 Am. Jur., Sec. 178, page 196.

Speaking of mutual companies, it is stated in 32 C. J., Sec. 67, pages 1018, 1019, 1020:

> "It is that form of insurance in which each person insured becomes a member of the company, and members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid on all members. . . . A mutual company is one in which the members are both the insurers and the insured; and the premiums paid by them constitute the fund which is liable for the losses and expenses, and they share in the profits in proportion to their interest, and control and regulate the affairs of the company. . . . A mutual company is somewhat of the nature of a partnership; insured becomes a member of the corporation by virtue of his policy, is entitled to a share of the profits, and is responsible for the losses to the extent of his premium paid or agreed to be paid. Yet an incorporated mutual company is not a partnership in the strict legal sense of the term."

While not necessary to have in the written contract of insurance an express promise to pay an assessment, notice of

the fact of a contingent liability, which had reference to enforcement of the right of assessment, appeared on the back of each policy. The policyholder was given notice of that liability and its extent, although as a member without such notice he would be chargeable with it. What safety for the insured in case of necessity for an assessment would there be if a member could defend on the ground that he did not know of the existence of an assessment by-law?

> "And though such constitution and by-laws may not be referred to in the certificate of membership, yet they are binding upon the members of the association, and constitute a part of the contract of membership. By becoming a member of a mutual association, such as the defendant in this case, one is conclusively presumed to know its constitution and by-laws; and if he fails to acquaint himself with them, he cannot escape their force and operation by setting up his want of actual knowledge of them, nor by showing that they were not referred to in the certificate held by him." *Clark* v. *Mutual Reserve Fund Life Association,* 14 App., D. C. 154; 43 L. R. A., 390, 395.
>
> "When a party takes out a policy, and the contract is complete, he becomes a member, and is bound by its rules and the provisions of the charter, which he is presumed to know." Vol. 2, May on Insurance, Sec. 552, p. 1255.

Also see Subsection (b), page 1108, Vol. 2, Cooley's Briefs on Insurance.

> "Therefore, by reason and by the great weight of authority, when properly levied, assessments constitute a collectible debt in favor of the association, regardless of whether the member has expressly promised to pay them or whether their nonpayment occasions forfeiture of his rights and insurance." Sec. 362, page 632, Richards on the Law of Insurance.

In *Wilson* v. *Union Mut. Fire Ins. Co.*, 77 Vt., 28; 58 A., 799, it is stated:

> "The members of a mutal company are presumed to have knowledge of its by-laws, and are bound by them."

But in argument it is claimed that this company had the right to issue both assessable and non-assessable policies. In the agreed statement it is stated:

> "The Certificate of Incorporation is silent in regard to the issuance of assessable or non-assessable policies. It neither expressly prohibits nor expressly permits the issuance of non-assessable policies."

There is nothing in this record to show that this company ever actually did or had the right to issue non-assessable policies. Under the by-laws of the company "Every member shall be liable to pay and shall pay his proportionate part of any assessment . . ." and every policyholder is a member. Hence, we see no warrant for the argument that this mutual company had any right whatsoever to issue a non-assessable policy.

Judgment for the plaintiff in the sum of $1,497.69, *with interest from August* 12, 1938, *date of demand.*

OGUNQUIT BEACH DISTRICT *vs.* WALTER M. PERKINS.

York. Opinion, August 26, 1941.

Boundary Reading "To the Ocean" Means to Low-water Mark.

A verdict of a jury on matters of fact, and even within their exclusive province, cannot be the basis of a judgment where there is no evidence of probative value to support it. The verdict in this case for the defendant falls within this rule and must be set aside on the general motion.

The Massachusetts Colonial Ordinance 1641-1647 is a part of the common law of Maine. Under this ordinance, when a grantor, owning both upland and adjacent beach or flats, by his deed designates a boundary as the

ocean and conveys to or by that boundary, nothing to the contrary appearing in the deed, the grant extends to low-water mark.

High-water mark, differing materially from low-water mark, as of common knowledge, it often does, in no way controls or determines the location of the low-water mark and cannot be used in place of low-water mark for the purpose of locating a grant or boundary.

As a general rule, where there is a conflict in the calls of a deed, courses and distances must yield to monuments, but there must be a conflict and in absence of proof thereof, the presumption is that no conflict exists.

Although the exact location and course of the low-water mark of the ocean which marked the eastern boundary of defendant's lot does not appear in the evidence, it must be presumed that the mark is not in conflict with the courses and distances given in the calls of the deeds by which defendant gained title to his land.

The easterly bound of the easterly lot of defendant, which adjoins the demanded premises must, on this record, be taken as a line beginning at the low-water mark of the Atlantic Ocean and thence running "north 7¾ degrees east one hundred feet," the course called for in the deed by which defendant acquired title to the lot, but subject now to allowance for accrued magnetic variation; and this bound fixes and determines the northerly line of that lot and of the lot in the same tier next westerly from it.

By the clear weight of the evidence this northerly line is the line described as the southerly bound of the demanded premises and by its establishment the plaintiff's contention that this is the true and correct location of the southern bound of the premises is sustained and its title to the land it here demands established.

The rule for determining and adjusting the side lines of shore or flats, by drawing a base line between the termini of the side lines at high water and lines projected at right angles thereupon at low-water mark, or for a hundred rods, which rule appears to be the basis of defendant's claim of title to the land in dispute has nothing to do with the location or fixing of the dividing line between them and the upland, or the terminus of a grant which extends to the ocean.

ON EXCEPTION BY PLAINTIFF. MOTION FOR NEW TRIAL. REAL ACTION TO RECOVER A PARCEL OF LAND.

The controversy was over a triangular parcel of land to which both parties claimed title. The Ogunquit Beach District, incorporated under the laws of Maine, was authorized to take by eminent domain for a public park, certain lands. Pursuant to such authority the District, by proper condemna-

tion proceedings duly recorded, acquired title to land which included the parcel in controversy. Defendant claimed to have previously acquired title to the land in dispute by deeds which established his title thereto. One of the calls in the deeds fixing one of the boundaries of defendant's land reads "south 82¼ degrees east—to the Atlantic Ocean," and another call reads "thence running north 7¾ degrees east by said Atlantic Ocean" etc. Defendant, in laying claim to the land in controversy, however, set up high-water mark of the Atlantic Ocean as the location of the eastern boundary of his land, and finding that the average high-water line at that point diverged more than twenty degrees easterly from the course given in his deed, turned a right angle from that high-water mark, and by so doing, moved his northerly bound far to the north of the line called in his deed. By connecting the terminus of his theoretical line with the true line he created the triangle in dispute. The jury found for the defendant. The plaintiff excepted and filed motion for new trial. Motion sustained. Case fully appears in the opinion.

Willard & Willard, for plaintiff.

Spinney & Spinney and Ray P. Hanscom, for defendant.

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

STURGIS, C. J. This is a real action to recover a parcel of land at Ogunquit Beach in the Town of Wells. A disclaimer narrows the controversy to an area, in the form of a triangle, to which each of the opposing parties claims title. On a plea of the general issue, the jury found for the defendant. The plaintiff brings the case forward on a general motion for a new trial and an exception.

The Ogunquit Beach District was incorporated in Chapter 105, Private and Special Laws, 1923, and there authorized to take by eminent domain, for the creation and establishment of a public park, certain lands including any real estate lying

between the thread of the Ogunquit River on the west and the Atlantic Ocean on the east and the boundary line of the Ogunquit Village Corporation on the north and the land of Walter M. Perkins on the south. Pursuant to the authority so conferred upon it, the Ogunquit Beach District, as of April 7, 1925, by proper condemnation proceedings duly recorded, acquired title to the lands enumerated in its charter, and particularly to a parcel described as follows:

> "Beginning at a point in the channel of the Ogunquit River at the Northwesterly corner of land of Walter M. Perkins, said point being 205 feet Northerly from the Northerly side line of the road leading from the Ogunquit Village to the Beach, and known as Bridge Street, measuring at right angles from said street; thence South 79° 18′ East by land of said Walter M. Perkins and parallel with said road to a stone monument set in the ground on the bank of said River; thence same course by land of Walter M. Perkins to a stone monument set in the ground at the top of the bank at the Beach; thence same course by land of Walter M. Perkins to the Atlantic Ocean; thence Northerly by said Ocean to land of said Edward R. Hoyt to a point which bears South 55° 48′ East from a stone monument set in the ground, standing at the top of the bank above the Beach; thence from said point North 55° 48′ West by land of the said Edward R. Hoyt to the last mentioned monument; which is North 27° 18′ East 562.3 feet from the second mentioned monument; thence same course by land of the said Edward R. Hoyt to a stone monument at the bank of the River; thence same course by land of said Edward R. Hoyt to the channel of said River; thence Southerly by channel of said River to point of beginning; containing 6 acres more or less."

This is the parcel of land which the Ogunquit Beach District describes with substantial accuracy in its writ and demands in this action. As recited in the taking, the southerly bound

of the parcel is the land of Walter M. Perkins, and he is the defendant in this action. The controversy is as to the location of the dividing line between the properties.

The land of Walter M. Perkins which marks the southerly bound of the demanded premises was acquired by him from Charles W. Tibbets of Dover, New Hampshire, by quitclaim deed of April 12, 1909, which conveyed two lots of land described as follows:

> "A certain tract of land situate at Ogunquit Beach in said town of Wells, County of York, and State of Maine, and bounded and described as follows, to wit: beginning at a stake and stones on the easterly side line of a proposed street called Ocean Avenue at the northwesterly corner of a tract of land belonging to said Walter M. Perkins; thence running south 82¼ degrees east by land of said Perkins to the Atlantic Ocean, thence running north 7¾ degrees east by said Atlantic Ocean, one hundred feet to a stake and stones and other land of said Tibbets, thence turning at right angles and running north 82¼ degrees west by other land of said Tibbets to said proposed street called Ocean Avenue, thence running south 28 degrees west by said proposed street called Ocean Avenue to point begun at, containing three-fourths of an acre of land more or less.
>
> "Also one other tract or parcel of land situate at said Wells and bounded and described as follows, to wit: beginning on the westerly side line of said proposed street called Ocean Avenue at a stake and stones at the northeasterly corner of a tract of land belonging to said Perkins, thence running north 82¼ degrees west by land of said Perkins to the thread of Ogunquit river; thence running north by the thread of said Ogunquit river 7¾ degrees east, one hundred feet to a stake and stones and other land of said Tibbets, thence running at right angles south 82¼ degrees east by other land of said Tibbets to

> said proposed street called Ocean Avenue, thence running south 28 degrees west by said proposed street called Ocean Avenue to point begun at, containing one-eighth of an acre of land more or less. It is hereby understood that said proposed street called Ocean Avenue is to be three rods wide and is hereby dedicated to public use and is to be a continuation of said street coming up from Bridge Street so called."

This was a tier of lots lying between the Ogunquit River and the Atlantic Ocean and, except as separated by Ocean Avenue, so called, the lots constituted and were held as one parcel. The side lines of these lots were run on the same course and, except as divided by Ocean Avenue, were each but an extension of the other. The location on the face of the earth of the easterly lot in this tier and its northerly bound determines the dividing line between the lands of the parties.

The easterly lot of Walter M. Perkins appears to have been a shore lot consisting of upland and beach or flats which had never been severed. By the calls of the deed, the southerly line of the lot ran "south 82¼ degrees east by land of said Perkins to the Atlantic Ocean." The "land of said Perkins" is located with convincing accuracy by the evidence in the case. It was a lot of land conveyed to the defendant, Walter M. Perkins, by Lizzie H. Jacobs of Wells by her several quitclaim deeds of September 16, 1905, and June 13, 1907, each conveying an undivided one-half of a parcel of land having as its southern bound Bridge Street, a country road leading through Ogunquit Village and of known course and location, and as its northern bound a line one hundred and five feet from and parallel with Bridge Street. Through the location of this lot of land it was clearly established at that trial that the southerly line of the easterly lot which Walter M. Perkins bought from Charles W. Tibbets was one hundred and five feet from Bridge Street, parallel thereto, and the course thereof designated in the deed corresponded, subject only to compass variation and declina-

tion, to the course of Bridge Street. This line ran to the "Atlantic Ocean," and the grantor owning both upland and flats or shore as he did, nothing to the contrary appearing in the deed, the grant extended to low-water mark.

Under the Massachusetts Colonial Ordinance 1641-1647, which is a part of the common law of Maine, it is settled that when a grantor owning both upland and adjacent beach or flats, by his deed designates a boundary as "the sea" or "the ocean" or an equivalent, and conveys "to" or "by" that boundary, nothing to the contrary appearing in the deed, the grant extends to low-water mark. *Winslow* v. *Patten,* 34 Me., 25; *Partridge* v. *Luce,* 36 Me., 16; *Pike v. Munroe,* 36 Me., 309, 58 Am. Dec., 751; *Babson* v. *Tainter,* 79 Me., 368, 10 A., 63; *Snow* v. *Mt. Desert Isl. Real Estate Co.,* 84 Me., 14, 24 A., 429, 17 L. R. A., 280, 30 Am. St. Rep., 331; *Proctor* v. *Railroad Company,* 96 Me., 458, 52 A., 933; *Dunton* v. *Parker,* 97 Me., 461, 54 A., 1115; *McLellan* v. *McFadden,* 114 Me., 242, 246, 95 A., 1025; *Com.* v. *Roxbury,* 9 Gray (Mass.), 451; *Boston* v. *Richardson,* 105 Mass., 351; *Shively* v. *Bowlby,* 152 U. S., 1, 14 S. Ct., 548, 38 Law Ed., 331. That is, to ordinary low-water mark. *Gerrish* v. *Proprietors of Union Wharf,* 26 Me., 384, 46 Am. Dec., 568. High-water mark, differing materially as, of common knowledge, it often does from that of low water, in no way controls or determines the location of the latter and cannot be used in place thereof for the purpose of locating the grant.

The next call in the deed by which Walter M. Perkins obtained title to his easterly lot is "thence running north 7¾ degrees east by said Atlantic Ocean one hundred feet to a stake and stones and other lands of said Tibbets." This bound purported to run at right angles to the southerly line of the lot and, subject to the courses, distances and monuments at the northerly terminus, by said "Atlantic Ocean." The designated monuments at the northerly terminus of this bound were not located at the trial and apparently cannot be found. The Atlantic Ocean we may assume has remained immotive,

and here again by force of the Colonial Ordinance of 1641-1647, it is its low-water mark which is the easterly bound of the lot. Although the exact location and course of this low-water mark does not appear in the case, it must be presumed that it is not in conflict with the courses and distances given in the call and the demandant is entitled to the benefit of the presumption. It is true that it is the general rule that, where there is a conflict, courses and distances in a call must yield to monuments. But there must be a conflict, and in absence of proof thereof, the presumption is that no conflict exists. *Hatcher* v. *Railway Company*, 109 Va., 357, 63 S. E., 999, 11 Corpus Juris Secundum, 692. On this record, the clear weight of the evidence establishes that the easterly boundary line of the easterly lot of Walter M. Perkins turned at right angles from the southerly line of that lot at the low-water mark of the Atlantic Ocean and from there ran "north 7¾ degrees east one hundred feet," a course now subject to allowance for accrued magnetic variation.

With the easterly bound of Walter M. Perkins's easterly lot thus located, the remaining calls of his deed, controlled by that location as they are, may readily be determined. The next call is "thence turning at right angles and running North 82¼ degrees west by other land of said Tibbets to said proposed street called Ocean Avenue, . . ." This line and its extension is the southern bound of the demanded premises. Turned at right angles from the easterly line of Walter M. Perkins's easterly lot which, as here established, originally ran on a course of north seven and three-quarters degrees east, this line necessarily ran on a course of north eighty-two and one-quarter degrees west, which is practically parallel with Bridge Street and, with due regard for distances already considered, lies two hundred and five feet therefrom. So run, all the calls in the deed by which Walter M. Perkins acquired his lots of land abutting on the demanded premises, which can now be discovered, are reconciled and the line accords with the corresponding line in the demandant's description filed in its condemnation pro-

ceedings and used in its writ to define the demanded premises. We are convinced that the clear weight of the evidence supports the demandant's contention that this is the true and correct location of the southern bound of its premises and that, on this record, it has established title to the land it here demands.

The tenant has taken possession of a triangular area lying just north of the dividing line between his lands and the demanded premises as here established and claims title, as he admits, by his plea of nul disseisin. He contended at the trial and in argument that he owned the land which bounded the demanded premises on the south and that his land extended to the low-water mark of the Atlantic Ocean. He, however, disregarded that natural boundary, rejected the call given in his deed for the eastern bound of his property, and with no support in reason or authority, set up high-water mark along his upland as the location of that bound, and finding that the mean or average high-water line at that point diverged more than twenty degrees easterly from the course given in his deed, turned a right angle from that high-water mark and thereby moved his northerly bound and the southerly bound of the demanded premises, which coincides with it, far to the north of the line called in his deed and established by the demandant. By connecting the terminus of his theoretical line with that of the true line, he created the triangle in dispute. His contentions on this point are fallacious and without merit. The patent error of his hypothesis is reflected in his conclusions. A careful examination of all the evidence in the transcript discloses no ground upon which his contention can be sustained. On the record, the tenant shows no title whatsoever to the triangular area he claims or any other part of the demanded premises.

We have not overlooked the tenant's citation of authority for his resort to high-water mark to establish the eastern bound of his lands. It is, of course, true that, in determining the side lines of shore or flats adjoining upland located on tidewater, under the Colonial Ordinance, a base line is usually

drawn between the termini of the side lines at high water and lines projected at right angles therefrom to low water or for a hundred rods, and, by a method of equalization, the side lines of the shore or flats are thereby established. *P. H. L. & H. Co.* v. *Swift,* 109 Me., 17, 82 A., 542; *Emerson* v. *Taylor,* 9 Me., 42, 23 Am. Dec., 531. This rule for determining and adjusting the side lines of shore or flats, however, has nothing to do with the location or fixing of the dividing line between them and the upland or the terminus of a grant which extends to the ocean. It seems apparent that the unwarranted invocation of this rule by the tenant lies at the very foundation of his claim of title to the triangular area in controversy. He used a base line drawn under the rule for determining the side lines of his shore or flats from which to project the side lines of his upland. For this there is no authority.

A verdict of a jury on matters of fact, and even within their exclusive province, cannot be the basis of a judgment where there is no evidence of probative value to support it. The verdict in this case for the tenant falls within this rule and must be set aside on the general motion. In view of this conclusion, it is unnecessary to pass upon errors of law alleged and raised on the exception or otherwise.

New trial granted.
Motion sustained.

W. PRICHARD BROWNE ET AL. *vs.* JAMES H. CONNOR ET AL.

Lincoln. Opinion, September 4, 1941.

Constitutionality of Section 16, *Chapter* 27, *of Revised Statutes* 1930. *Private Way Defined.*

The constitutionality of Section 16, Chapter 27, Revised Statutes 1930, providing that "the municipal officers of a town may on petition therefor . . . lay out, alter or widen town ways and private ways for any inhabitant or for owners of cultivated land therein, if such inhabitant occupies, or such owner has cultivated land in the town which such private way will connect with a town way or highway . . . and shall determine whether it shall be a

town way or a private way; and if a private way, whether it shall be subject to gates and bars," is the only issue before the court.

Under both federal and state constitutions private property cannot be taken without the owners' consent for private use.

If a statute violates any provision of the state or of the federal constitution, its antiquity will not save it.

In construing a statute the presumption is that the legislature, in enacting the statute, did not disregard constitutional prohibitions; and the language used by the legislature must be interpreted, if possible, in such manner as to sustain the enactment rather than to defeat it.

Though the way, laid out by authority of the statute, which is the subject of controversy in the matter before the court is denominated a private way and though laid out on the petition of the plaintiffs primarily for the benefit of their land, it connects with the public highway system, and the rights of the public in it are the same as in public ways. It is referred to as a private way not because the easement is the private right of the persons benefited but rather to distinguish it from that class of ways, the cost of which is met entirely from public funds. In spite of the provision authorizing the erection of gates and bars, the public would still have the right to use the way in the same manner as the parties who are primarily interested in it.

ON REPORT ON AGREED STATEMENT OF FACTS.

An action brought to recover damages for a nuisance as defined in Section 5 of Chapter 26, Revised Statutes, 1930, viz., the obstruction by defendants of a private way, the use of which was enjoyed by plaintiffs. The plaintiffs' land, which is cultivated, is bounded on three sides by water and on the fourth side by land of the defendants. Pursuant to the provisions of Section 16, Chapter 27, Revised Statutes, 1930, the plaintiffs petitioned the selectmen of the town to lay out a private way from the north boundary of their land over the adjoining land of defendants to the public highway. The selectmen granted their petition and proper steps were taken to establish such way. The defendants refused to permit the plaintiffs to improve or use the way and obstructed it by fences and other obstacles, claiming that the statute in question violates the provisions of the state and federal constitutions prohibiting the taking of private property without the owners' consent for a private use. Case remanded to the Su-

perior Court for the assessment of damages and entry of judgment for the plaintiffs with costs. Case fully appears in the opinion.

Francis W. Sullivan and Saul H. Sheriff, for plaintiffs.

Pattangall, Goodspeed and Williamson, for defendants.

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

THAXTER, J. This is an action brought under the provisions of R. S. 1930, Chap. 26, Sec. 19, to recover damages for a nuisance as defined in Sec. 5 of said chapter as amended by P. L. 1933, Chap. 106, to wit, the obstruction by the defendants of a private way, the use of which was enjoyed by the plaintiffs. The case is before us on report on an agreed statement of facts.

The parties are the owners of land at Southport. The plaintiffs' land, which is cultivated, is bounded on three sides by water and on the fourth side by land of the defendants. Pursuant to the provisions of R. S. 1930, Chap. 27, Sec. 16, the plaintiffs petitioned the selectmen of the Town of Southport to lay out a private way from the northeasterly boundary of their land over the land of the defendants to the town or public highway. Such petition received favorable consideration and the proper steps were taken to establish such private way. Exceptions were taken by these defendants to the allowance of the report of referees who assessed the damages in the sum of $750. These exceptions were overruled, *Connor et al.* v. *Inhabitants of Southport,* 136 Me., 447, 12 A., 2d 414, and judgment was entered for $750, together with costs, to be paid by these plaintiffs before the way might be used. The plaintiffs offered to pay the amount of this judgment but the defendants declined to accept the money, which was finally paid into court. The defendants have refused to permit the plaintiffs to improve or use the way and have obstructed it by fences and other obstacles.

The defendants claim to justify their actions on the ground that R. S. 1930, Chap. 27, Sec. 16, is unconstitutional, because, they assert, it violates the provisions of the state and federal constitutions in that it purports to authorize the taking of private property without the owner's consent for a private and not for a public use. The constitutionality of the statute is therefore the only issue before the court.

The statutory provision reads as follows:

> "The municipal officers of a town may on petition therefor, personally or by agency, lay out, alter, or widen town ways and private ways for any inhabitant or for owners of cultivated land therein, if such inhabitant occupies, or such owner has cultivated land in the town which such private way will connect with a town way or highway. They shall give written notice of their intentions, to be posted for seven days, in two public places in the town and in the vicinity of the way, describing it in such notice, and they shall determine whether it shall be a town way or a private way; and if a private way, whether it shall be subject to gates and bars."

The principle is too well settled to require citation of authority that under our constitutions, both federal and state, private property cannot be taken without the owner's consent for a private use under any circumstances.

If the statute here in question violates any provision of the state or of the federal constitution, its antiquity will not save it. At the same time we must, if possible, interpret the language which the legislature has used in such manner as to sustain the enactment rather than to defeat it. The presumption is that the legislature has not disregarded constitutional prohibitions. *State* v. *Rogers,* 95 Me., 94, 49 A., 564, 85 Am. St. Rep., 395; *Ulmer* v. *Lime Rock Railroad Co.,* 98 Me., 579, 57 A., 1001, 66 L. R. A., 387; *State* v. *Pooler,* 105 Me., 224, 74 A., 119, 24 L. R. A., N. S., 408, 134 Am. St. Rep., 543; *Laughlin* v. *City of Portland,* 111 Me., 486, 90 A., 318, 51 L. R. A., N. S., 1143.

The defendants claim that the private way to which the statute refers is for the exclusive use of the owners of the land benefited and their invitees. They point out that the statute designates it as a private way, that in this instance the expense of laying it out is to be borne not by the taxpayers but by the plaintiffs for whose use it is primarily established and that it is subject to gates and bars. But these considerations are not controlling.

Though denominated a private way and though laid out on the petition of the plaintiffs primarily for the benefit of their land, it connects with the public highway system and the rights of the public in it are the same as in such public ways. It is referred to in the statute as a "private way" not because the easement is the private right of the persons benefited but rather to distinguish it from that class of ways the cost of which is met entirely from public funds.

The legislature has provided in Section 20 that the damages for such a way as this shall be paid "by those for whose benefit it is stated in the petition to be, or wholly or partly by the town" . . . We cannot assume that the legislature would presume to authorize the payment of public funds for a way, the easement in which is regarded as the property not of the public but of private individuals. Furthermore, Section 19 provides for the discontinuance by a town of such a way, a provision utterly inconsistent with the defendants' claim that the easement is not a public use.

Ways laid out under statutory provisions analogous to ours have been held by the courts of other New England states to be public ways. *Denham* v. *County Commissioners,* 108 Mass., 202; *Flagg* v. *Flagg,* 16 Gray, 175; *Davis* v. *Smith,* 130 Mass., 113; *Metcalf* v. *Bingham,* 3 N. H., 459.

The purpose of the legislature in authorizing the town to determine whether a private way shall be subject to gates and bars was to provide a method by which the owners of the land affected could lessen the hazard of unwarranted or casual intrusion on their property due to it being opened to easy ac-

cess from the main highway. In spite of the erection of gates and bars the public would still have the right to use the way in the same manner as the parties who are primarily interested in it. *Wolcott* v. *Whitcomb*, 40 Vt., 40.

Counsel for the defendants rely on two cases decided by this court: *Paine* v. *Savage*, 126 Me., 121, 136 A., 664; 51 A. L. R., 1194; and *Haley* v. *Davenport*, 132 Me., 148, 168 A., 102. Neither case is in point. In each the question was whether, because of a general benefit to the public, private property belonging to one person could, without that person's consent, be taken by another for a private use, in one case, to facilitate the conduct of logging operations carried on by the defendant, in the other, to drain land owned by the defendant.

In accordance with the stipulation of the parties the entry will be:

Case remanded to the Superior Court for the assessment of damages and the entry of judgment for the plaintiffs with costs.

MAUD MCLELLAND *vs.* HELEN F. MORRISON.

York. Opinion, September 4, 1941.

Findings of Fact by Jury. Common Carrier.

The only issue before the jury was whether or not the defendant acted as a common carrier. The jury found that she did not.

The rule is too well settled to require reiteration that a jury's findings of fact are binding on this court and that a verdict will not be set aside unless it is manifestly wrong. A reading of the evidence shows that the jury was justified in finding that the defendant was not liable as a common carrier.

ON MOTION FOR NEW TRIAL BY PLAINTIFF.

The plaintiff sought to hold the defendant liable in damages for the loss by fire of goods which the defendant was transporting for the plaintiff from Kennebunk, Maine, to Wellesley, Massachusetts, in a truck owned by the defendant. There was

no claim of negligence and the only point in issue was whether or not the defendant acted as a common carrier. The jury gave a verdict for the defendant.

Motion overruled. Case appears fully in the opinion.

Gendron & Gendron, for plaintiff.

Willard & Willard, for defendant.

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

PER CURIAM.

In this case the plaintiff seeks to hold the defendant liable in damages for the loss by fire of goods which the defendant was transporting for the plaintiff from Kennebunk, Maine, to Wellesley, Massachusetts, in a truck owned by the defendant. After a verdict for the defendant, the case is brought forward on the plaintiff's general motion for a new trial.

There is no claim of negligence and the only point in issue before the jury was whether or not the defendant acted as a common carrier in transporting the plaintiff's goods. The jury found that she did not.

The rule is too well settled to require reiteration that a jury's findings of fact are binding on this court and that a verdict will not be set aside unless it is manifestly wrong. *Hatch* v. *Dutch,* 113 Me., 94 A., 487; *Stutz* v. *Martin,* 132 Me., 126, 167 A., 861; *Susi* v. *Davis,* 133 Me., 354, 177 A., 610, 97 A. L. R., 1222.

The defendant conducted a small trucking business mostly confined to Kennebunk and Kennebunkport. On a number of occasions she had moved the furniture and personal belongings of summer residents to and from their homes out of the state. The contract between these parties was oral, the defendant agreeing to transport certain goods for the sum of $25 from Kennebunk to Wellesley. A reading of the evidence satisfies us that the jury was justified in finding, if they were

not actually compelled to find, that the defendant was not liable as a common carrier.

Motion overruled.

MANUFACTURERS NATIONAL BANK
Executor of the Will of Herbert F. Shaw
vs.
ADELBERT S. WOODWARD.

Androscoggin. Opinion, September 13, 1941.

Wills. Construction. Authority of Towns to Receive Property in Trust. Policy of Law in Regard to Sustaining Trusts.

Construction of a will must be upon the entire instrument. Consolidated paragraphs of the will under consideration by the court showed an intent to create two trusts, with the Town of Mount Vernon as trustee of the tangible property and the executor trustee of the residue of the estate.

Under the provisions of Section 31, Chapter 4 of Revised Statutes, 1930, a town has ample authority to receive in trust either real or personal property bequeathed or devised to it by will.

The effect of separate votes at separate town meetings, first to accept a trust, and secondly to reconsider a vote of acceptance and reject a trust, is uncertain; but, if it be held that the consolidated effect of the action by the town constituted a rejection, it could not be held to be more than a refusal to act as trustee.

The policy of the law has long been liberal in sustaining trusts designed to carry into effect any public or charitable purpose.

Equity will not permit a trust to fail for want of a trustee, and, when the trustee named in a will refuses or fails to act, will name a trustee to act instead, so that the trust sought to be created by the terms of a will, may be carried into effect. This rule applies not only to charitable trusts but to any trust for a proper purpose.

The residue of the estate which, under the terms of the will, was payable to the executor as trustee should be paid by the executor to itself, and does not pass as intestate property to testator's heir-at-law.

ON REPORT.

Bill in equity for construction of a will reported to the court for final determination. The specific prayer of the bill was for instruction as to the disposition of the residue of an estate

where a trustee had qualified and the defendant, who is sole heir-at-law, claimed that the residue had become intestate property through failure of an intended trust and was payable to him. The testator gave his house and lot to the Town of Mount Vernon for use as a public library and provided that the residue of his estate should be kept as a permanent fund, the income of which should be used in keeping buildings in repair and purchasing suitable library books; and named plaintiff as executor and trustee of the fund. The town at a town meeting at first accepted the "provisions of the will" and at a later town meeting voted to "reject and decline Dr. Shaw's will." Defendant demanded payment to him of the residue of the estate on the ground of intestacy. The court ruled against defendant's claim and allowed the bill with costs. Case remanded in accordance with opinion. Case fully appears in opinion.

Frank T. Powers, for plaintiff.

George C. & Donald W. Webber, for defendant.

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

MURCHIE, J. In this case, reported to the court on bill, answer and replication (and a stipulation that the facts alleged in the pleadings, with a single exception not material to the issue, are true), the plaintiff, as executor under the will of Herbert F. Shaw, late of Mount Vernon, in the County of Kennebec, whose testamentary intent to make provision for a public library, to be maintained in said town, was expressed in his last will and testament in the words:

> "I give and bequeath to the Town of Mount Vernon, Maine, my house and lot, in Mount Vernon Village, for use as a public library, and whatever remains after other sums hereinafter to be named have been disposed of shall be kept as a permanent fund, the income of which shall be used in keeping the buildings in repair and purchasing

> suitable books for the library. With the house I wish the Town to have every thing which the buildings contain, except a few articles which are kept for storage, and which belong to Annie W. Fellows. I would like for my safe to be always kept in the house. The combination of the lock is set at 77-88-28-97."

seeks specifically to determine whether the residuum of the estate in its hands as executor shall be paid to itself as trustee under said will or pass, as intestate property, to the defendant, who is sole heir-at-law of the testator. In general terms the prayer also is for construction and interpretation of the passage quoted.

The will bears date of September 7, 1938, and was probated July 26, 1939. Complainant is the executor and trustee named in the will and has qualified in both capacities. Defendant is named in the will as beneficiary in a life estate of $5,000. He is entitled by descent to any intestate property.

Following the qualification of the complainant as executor, notice of the provisions of the will was given to the municipal officers of the town aforesaid, and a town meeting was held, or a series of such meetings, as hereinafter noted, to vote upon accepting or rejecting the bounty intended for the town and its inhabitants under said will. The proper effect of the town action with reference to the trust, or trusts, intended to be established by the testator, can only be determined by giving consideration to the rights of the voters in connection therewith.

Statutory authority permitting municipalities to accept money or legacy in trust, and to assume responsibility in connection with the administration thereof, dates back to 1873—Chap. 92 of the Public Laws of that year. The authorization there granted covered donations or legacies for any benevolent, religious or educational purpose. It was later extended to cover also "the erection and maintenance of monuments . . . public cemeteries and lots therein"—P. L. 1883, Chap. 106. The purpose of the extension, and the necessity of enabling

legislation for any acceptance by towns of property in trust, are apparent on examination of the decision of this court in *Piper, et al.* v. *Moulton, Exr., et als.*, 72 Me., 155, decided March 10, 1881, where a bequest of $100 to the inhabitants of a town to hold the same in trust forever, to apply the income to keep the testator's lot in good order and condition, was held void as creating a perpetuity which was not for a charitable use.

A more restricted authority had earlier been given in connection with public libraries, P. L. 1854, Chap. 106. That act, as originally written, conferred power upon towns to receive, hold and manage "any devise, bequest or donation for the establishment, increase or maintenance of a public library." There was no requirement of acceptance, or other action, on the part of the electors of the town, unless such requirement is implicit in a provision that the gift be received "in its corporate capacity." In 1887 (Chap. 93 of the Public Laws of that year), a substantially identical provision was enacted applicable to art galleries (as well as to public libraries), except that the words "accept by vote of the people thereof" were used in place of the words "receive in its corporate capacity" and the subject matter was limited to "land or land and buildings thereon." Supplemental provision was made in this enactment for similar acceptance of books, charts or maps "and any funds, the income of which to be used to purchase books, maps or charts, and keep the same in order." In the statutory revisions since that date, the provisions of these two separate acts have been consolidated in a single section, which, in that part which traces back to the 1854 act, substitutes the words "any town, as such, may receive" for the original language of the 1854 act which read "any . . . town . . . may receive in its corporate capacity."

The supplemental provision as to the acceptance of books, etc. and *funds* was dropped in the 1903 revision of the statutes, although there seems to have been no legislative action in the interval which laid the foundation for such a change. The

wording of this law as it stood in the 1903 revision (Chap. 57, Sec. 19) is identical with that in the 1916 revision (Chap. 4, Sec. 83) and in the current revision (R. S. 1930, Chap. 4, Sec. 31), and must govern the interpretation of the will now under consideration unless, as the defendant claims, this *library* statute should be disregarded and the provisions of R. S. 1930, Chap. 5, Secs. 90 to 95 inclusive be held controlling. Notwithstanding the fact that the particular section appears identically phrased in the last three revisions of the statutes, it should perhaps be noted that Chap. 183, P. L. 1909, which appears to have been enacted to authorize, in like manner, the receipt or acceptance of gifts or trusts intended for the benefit of public parks and playgrounds, later made a separate section, as appears in R. S. (1916), Chap. 4, Sec. 85, re-enacted the library provisions in the exact language of the 1903 revision, and that when the library laws were consolidated in 1921 (Chap. 210 of the Public Laws of that year), the same exact language was used once more (Sec. 36 of said chapter).

The claim of the defendant can be most succinctly stated by the quotation of a paragraph from the written brief submitted:

> "The Town of Mount Vernon has now by its vote unconditionally rejected and declined the gifts in the Shaw Will. It cannot be denied that the Town had a right to so decline. The Statute (see Section 92 of Chapter 5, Revised Statutes 1930) expressly recognizes the right of the Town to refuse and in fact makes its lawful consent a condition precedent to a good trust."

and a later summary of the same contention therein in the words:

> "That the Town . . . *under the express terms of the Statute* [Italics ours] and the well established common law had a clear right to refuse the devise of the real estate and the benefits as well as the duties and obligations associated with the trust of the residuary funds."

These assertions dismiss without consideration plaintiff's claims, that proper construction of the will shows that the paragraph under consideration was intended to accomplish a dual purpose, first, to make, to the town, *as trustee,* a devise and bequest of a lot of land, with the buildings thereon and the contents thereof (so far as such contents were the property of the testator), and second, to bequeath to the plaintiff, *as trustee,* the entire residue of the estate; and that both trusts were designed to serve the common purpose of providing a public library in the town.

The provisions of R. S. (1930), Chap. 4, Sec. 31, carry ample authority to the town to receive, *in trust,* either the real or chattel property, disposed of by the words,

> "I give and bequeath to the Town . . . my house and lot . . . for use as a public library"

and the later recital

> "with the house I wish the Town to have every thing which the buildings contain,"

or both that property and the residue of the estate, the disposition of which must be determined by construction of the words,

> "and whatever remains . . . shall be kept as a permanent fund, the income of which shall be used in keeping the buildings in repair and purchasing suitable books for the library"

and must be interpreted in the light of a later provision, specifically naming the plaintiff to administer the estate and trust,

> "For Executor of my will and Trustee of the fund herein provided, I appoint the Manufacturers National Bank."

The principle of law that construction of a will is to be upon the entire instrument, which principle has been so often expounded, and is so well established, as not to require any cita-

tion of authority, requires that the language before us for consideration be interpreted as showing intent to create two separate trusts, with the town as trustee of one and the plaintiff herein as trustee of the other. The specific prayer of the bill must therefore be answered by decree that the executor pay the residue of the estate to itself as trustee.

We pass now to a consideration of the trust wherein the town was named as trustee. Here we have the issue as to whether or not a vote of rejection by the town, or a failure, or neglect, to vote either to receive, or to accept, the bounty, assuming such action or lack of action, would serve to defeat the testamentary intent and create intestacy as to the particular property involved. Defendant, as a supplemental basis for his claim to the property comprised in both trusts asserts that the refusal of the town to accept the devise of the homestead has "removed and excluded any possibility of the carrying out of the trust."

It might well be doubted, upon all the facts, whether the town has, in either law or fact, rejected the trust. The record discloses that, in the first instance, a special town meeting was convened on September 25, 1939, at which the electors voted acceptance of the provisions of the will (whatever was carried thereby), and named a library committee. This meeting was recessed until the date of the following annual town meeting, to give opportunity for seeking construction of the will, to determine whether the limiting words as to the application of the trust income precluded payment therefrom of the expense of operation of the library. The plan was to adjourn the meeting without further action if such expense could be paid out of trust income (and let the acceptance stand as voted); otherwise, to reconsider the vote of acceptance and reject the trust. So far as the record discloses, the recessed meeting was never reconvened, nor was there either any article in the warrant for the annual meeting, or any action thereat, on the library question, although it may perhaps be said that intent to keep the question alive, and open, was evidenced by a vote to recess

that annual meeting to a fixed date. In the interval, the attempt of the town to secure construction of the will, as to the limitations on the use of income, failed and again, on the very day to which the recess had been taken, a new meeting was convened. Once again the voters assembled, not in adjourned or recessed meeting, but under a new warrant, and, in accordance with proper article therefor, they voted "to recind Art. 2 of Sept. 25, 1939 Meeting" (Article 2 of said meeting being the article under which the original vote of acceptance of the trust or trusts had been taken), and "to reject and decline Dr. Shaw will."

In this confusing scramble of municipal action it would be difficult, if it were material to the result, to determine the proper consolidated effect of the conflicting votes passed at separate and distinct meetings. If the first special meeting had been reconvened, on the adjourned date, readjourned, at that time, and again reconvened, on the date when the final vote was taken, it would undoubtedly be necessary to adjudicate the question as to whether rejection of the trust wherein the town was named as trustee would create intestacy as to *that trust property*. Such, however, is not in accordance with the record. The most striking feature of the entire case, manifest on a consideration of all the circumstances, lies in the obvious fact that, after three town meetings and a considerable amount of negotiation between the defendant and representatives of the town, the electors have never passed upon the issue of a choice between having the library provided for them under the Shaw will and having no library at all. The vote of rejection was induced by negotiations of the defendant which were not designed to cause the voters to decline to have *a* public library in the Dr. Shaw home, but rather to convince them that, by means of a negotiated intestacy which would pass all the property intended for both trusts to the defendant as heir-at-law, they might, through him, secure another and a different library, at the same location, with additional benefits in another regard. Incidentally the inheritance of the defendant

would have been quite considerably increased by comparison with that life estate in $5,000 which he would have taken under the terms of the will. If, in the parliamentary tangle in which the inhabitants of the town wound themselves while seeking to improve on their prospective bounty, there was any effective declination or rejection of anything, it can be considered, at the most, as a mere declination to hold the real and personal property trust as trustee. Should we assume that result to have been accomplished, the effect of such action upon the trust itself would have to be decided.

The policy of the law has long been liberal in sustaining trusts designed to carry into effect any public or charitable purpose. The tendency to liberality has been manifest not only in the legislative branch of the government, as evidenced by the series of enactments already referred to, but also on the part of the courts. The rule has long been established that no trust or bequest shall be permitted to fail for want of a trustee, and this principle is applicable not only to charitable trusts but to any which are sought to be established for a proper purpose. *Tappan, et als.* v. *Deblois, Adm.*, 45 Me., 122; *Preachers' Aid Society* v. *Rich, Exr.*, 45 Me., 552; *Swasey, Admr.* v. *The American Bible Society, et als.*, 57 Me., 523; *Childs, et als.* v. *Waite, Admr., et als.*, 102 Me., 451, 67 A., 311. Assuming for a moment that the action of the Town of Mount Vernon as heretofore taken at the meetings which have been held, or as it may hereafter be taken at a meeting to be convened to determine whether the voters will elect to "receive" the bequest of Dr. Shaw and hold the real and personal property demised to them in trust for the establishment of a public library, represents a refusal to act as trustee, equity, in accordance with the principle stated, will name a trustee to act in its stead, that the trusts intended to be established by this testator shall be carried into effect according to their terms.

Further consideration of the meaning and effect of the first paragraph of the instant will is not strictly necessary until the plaintiff herein, as trustee of the residuary estate, and the

town, or some substitute or successor, as trustee of the particular property constituting the separate trust, have had an opportunity to work out a plan, within such limitations as the restrictive words of the will impose, to accomplish properly the plain purpose of the testator. As was said by Mr. Justice Cornish (later Chief Justice of this court) in *The Webber Hospital Association, et als.* v. *McKenzie, Exrx. and Tr.*, 104 Me., 320 at 325, 71 A., 1032 at 1034:

> "A purpose so benevolent and an intention so clear ought to be upheld by this court unless prevented by positive and firmly established rules of law."

In that a case a fund, the amount of which is not disclosed in the opinion, was left in trust, no trustee being named, to be held until, with its accumulations, it amounted to $75,000, when the income was to be applied to the maintenance of a free hospital, and a stated part of the principal ($25,000) used, if necessary, for the construction thereof.

The necessity for the bringing of the present bill having originated in inducements offered to the Town of Mount Vernon by the defendant, to bring about an intestacy which would pass property to him by operation of law, and been definitely forced by him, through written demand for present payment to him of the residuary estate, there would seem to be no sound reason why his "costs" should be paid out of the estate.

The bill should be allowed, with costs, and the plaintiff instructed to proceed to close the administration of the estate in accordance with the construction of the will above outlined, any expense of the proceedings to the executor, not recoverable as costs from the defendant, including reasonable counsel fees, to be paid out of the principal of the residuary trust. The case is remanded for decree in accordance with this opinion, wherein costs and counsel fees shall be determined.

Decree accordingly.

MARGARET B. CONNOLLY, ADMINISTRATRIX,
OF THE ESTATE OF JOSEPH E. F. CONNOLLY
vs.
ARAM SERUNIAN.

Cumberland. Opinion, September 17, 1941.

Statute of Limitations. What constitutes Admissible Evidence of Residence or Domicile discussed.

Under Section 110, Chapter 95, R. S. 1930, which provides that "if a person is *absent from and resides out of the state after a cause of action has accrued against him,* the time of his absence from the state shall not be taken as a part of the time limited for the commencement of the action," mere absence from the state is not sufficient to suspend the operation of the statute of limitations. It must also appear that during such absence he established a residence without the state.

As used in this statute, the word "residence" is synonymous with "dwelling place" or home.

The debtor cannot have a residence without the state that will interrupt the running of the statute and at the same time have an established residence or home within the state.

Where the record showed that the defendant on each occasion when he was absent from the state severed all home ties, the finding of the referee that defendant had established a residence without the state after accrual of the action is justified.

The court below ruled correctly that original writs with returns of service thereon, taken from the files and records of the municipal court and offered by the defendant for the purpose of showing that the defendant was then in the jurisdiction were not admissible. A valid service could be made on a person temporarily in the state without any residence herein.

A written statement from the tax assessor's office in Portland showing that various parcels of real estate therein were assessed to the defendant, offered by defendant to prove his residence, was properly excluded, it not appearing that the defendant paid the taxes so assessed.

The fact that one is assessed for purposes of taxation does not give rise to any legal presumption that he has his residence or domicile in that place.

Also inadmissible to prove residence was a certificate from the board of registration of Portland showing that defendant was registered as a voter in Portland when there was no evidence that he actually voted in that city.

The decision of the referee appears to have been founded on ample, credible evidence and so, in the absence of any errors of law, must be upheld.

ON EXCEPTIONS.

Exceptions by defendant to acceptance of referee's report ruling for the plaintiff. Action on "account annexed" brought by Joseph E. F. Connolly against the defendant for services performed and disbursements made as attorney for the defendant. Upon Mr. Connolly's death, his wife, Margaret B. Connolly, as administratrix, was substituted as plaintiff. The only defense set up was the statute of limitations. There was an interval of more than eight years between the commencement of the action and its accrual. During that interval, the defendant had been absent from the state at two different times, which taken together, were sufficient to prevent the operation of the statute. Plaintiff claimed that the absences were of such character as under the statute, had that effect. It was held that they were of such character.

Exceptions overruled. Case fully appears in the opinion.

Arthur D. Welch and Walter G. Casey, for plaintiff.

Harry C. Libby, for defendant.

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

HUDSON, J. On exceptions to acceptance of referee's report. The action is on an "account annexed" wherein recovery is sought for services performed and disbursements made by Joseph E. F. Connolly as attorney for the defendant. It was brought by him, but upon his death his wife, Margaret B. Connolly, came in as administratrix to prosecute the action. The referee found for the plaintiff.

That the services were performed and disbursements made as set forth in the account is not denied. The only defense set up is the statute of limitations. Section 90, Chap. 95, R. S. 1930, provides:

> "The following actions shall be commenced within six years after the cause of action accrues and not afterwards.

* * *

"IV. Actions of account, of assumpsit or upon the case, founded on any contract or liability, express or implied."

Section 110 of said Chap. 95 provides:

"If a person is out of the state when a cause of action accrues against him, the action may be commenced within the time limited therefor, after he comes into the state; and, *if a person is absent from and resides out of the state, after a cause of action has accrued against him, the time of his absence from the state, shall not be taken as a part of the time limited for the commencement of the action. . . .*" (Italics ours.)

It is admitted that this action accrued on March 17, 1931. The writ dated September 29, 1939, there was an interim of eight years, six months, and twelve days from the accrual of the action to its commencement. The contention of the plaintiff is that during this period the defendant was absent from the state at two different times sufficiently long to prevent the operation of the statute. These absences were in Reno and Syria.

The purpose of the statute was early stated in *Crehore* v. *Mason,* 23 Me., 413, on page 416 as follows:

"Doubtless the mischief intended to be provided for was, that the statute would in certain cases commence running, while the holders of contracts could not commence suits upon them, or could not do it without being subjected to the inconvenience of doing it in another State."

And later, in *Drew* v. *Drew,* 37 Me., 389, on page 392:

"The object of this provision, obviously was, to prevent debtors, against whom the statute of limitations had begun to run, from departing from the State, and remaining abroad a sufficient length of time for the statute to run

out, and thus enable them to return and interpose this statute as a defence in bar."

Mere absence from the state is not sufficient. It must be accompanied by the establishment of a residence out of the state. *Drew* v. *Drew,* supra, on page 393. As stated in *Bucknam* v. *Thompson,* 38 Me., 171, on page 172, 61 Am. Dec., 237:

"In order to suspend the operation of the statute of limitations, after the cause of action has accrued, and the statute has begun to run, the person, who sets it up in defence, must not only be absent from, but reside without the State."

That the defendant was absent in Reno and in Syria is not controverted. The length of these absences, however, was in controversy as also whether a residence was established in either place. Although the referee made no special findings, necessarily he must have concluded that such residences were established. So far as the facts are concerned supporting his conclusions, his findings must stand if there is any credible evidence to support them.

The absence in Reno commenced shortly after an unsuccessful attempt by the defendant to obtain a divorce from his wife in Cumberland County. His son, witness for the plaintiff, testified that he did not believe his father remained in Portland, his then residence, after the divorce case in March, 1931. While there was some testimony from other witnesses (less likely to know) that he might not have departed until some two or three months afterwards, yet the record is sufficient to justify a finding by the referee that his then departure immediately followed March 17, 1931. The evidence as to the length of that absence was somewhat indefinite. It consisted of statements by witnesses that it was from six months more or less to a year. It the referee found that it was nine months, we think there was credible evidence for that finding.

The length of time he was in Syria was differently stated by

the witnesses. One said from one to two years, another about two years, and still another from June 29, 1936 to April, 1938. Although he applied for a passport on June 2, 1936, his son testified that he actually left Maine on June 29, 1936. The passport shows that he arrived back in the United States on December 7, 1937, so that he was out of this country, it would appear, one year, five months, and eight days. But it is not claimed that he then came to Maine. Just when is somewhat indefinite, the plaintiff claiming his arrival here might have been found to be as late as August 25, 1938, when the documentary evidence of a lease shows he was then in Maine, while the defendant contended he was here considerably earlier. The evidence does disclose that after his arrival in this country he went to Hartford, Connecticut, and conducted a business there for some months. A reasonable conclusion would be that he was absent from Maine from June 29, 1936 to sometime between March and August 25, 1938, and if it were to June 1, 1938, his absence on the Syrian trip would have been one year, eleven months, and two days in length.

As a consequence, if the referee found that he was absent in Reno nine months and in Syria one year, eleven months, and two days, he would have been out of the state two years, eight months, and two days, which would exceed the time of two years, six months, and twelve days, the period exceeding the six-year limitation from the time the action accrued to its commencement. Such an analysis would justify, so far as length of absence is concerned, the conclusion of the referee that the action was not outlawed.

But during these absences did the defendant establish residences? We repeat, the absence of the debtor must be more than a transient departure from his home on business or pleasure and a temporary sojourn out of the state. As used in this statute, the word "residence" is synonymous with "dwelling place" or "home"; such a residence must be in one place. The debtor cannot have a residence out of the state that will interrupt the running of the statute and at the same time have an

established residence or home within the state. *Drew* v. *Drew*, supra, on page 393. It is contended that after denial of divorce to him here in Maine he went to Reno to obtain one there. There was credible evidence in the case from which the referee properly could have drawn such an inference and have deduced that, that being his intention, he expected to and did establish a residence there for that purpose.

Having failed to obtain his divorce in Reno, he sought a separation in Syria. Counsel for the defendant claims that the record does not show that divorce proceedings were actually instituted either in Reno or in Syria, but that is not necessary, although probably there were such proceedings. The question is whether he established a residence for that purpose or any other. His son testified in answer to a question as to whether his father sought a divorce while in Syria, "Yes, sir."

So far as the record shows, when he left Maine, he severed on each occasion all home ties and even when he returned from Syria to this country he did not come to Maine for a while but established a business in Connecticut. These were facts properly for consideration by the referee and from which he could have found the establishment of residences both in Reno and in Syria.

The evidence also disclosed that on January 18, 1933 the defendant filed a petition in bankruptcy in the United States District Court, District of Maine, and that he was discharged in bankruptcy on October 27, 1933. It was claimed that the bankruptcy proceedings interrupted the running of the statute for that length of time, but that is not now necessary of decision here because that time is not required in addition to that spent by the absences above considered.

The exceptions also attacked certain rulings on admissibility of evidence. The defendant offered the testimony of the chief clerk of the municipal court for the City of Portland for the purpose of introducing original writs taken from the files and records of that court in three cases against the defendant by other parties than this plaintiff with the original returns of

service by the officers thereon to show that the defendant was then in Portland and was served with legal processes. The referee excluded these exhibits but informed the defendant's counsel that he could produce the officer who it was claimed served the writs. This was not done. We see no error in this ruling. If the officer had told a third party that he did serve writs on certain dates on this defendant, the third party could not testify to that fact because of the hearsay rule. The fact that a return of service was made makes it nonetheless hearsay so far as this action is concerned. Besides, a valid service could be made on a person temporarily in the state without any residence herein.

The defendant also offered in evidence a statement from the tax assessor's office in Portland showing that various parcels of real estate were assessed to the defendant from 1931 to 1939 inclusive. This evidence was excluded, and we think rightly. It does not appear that the defendant during those years was assessed as a resident or nonresident owner, and furthermore, it does not appear that the tax was paid. Cases cited by the defendant admitting facts of taxation on the question of residence were those where the taxes were paid. "The fact that one is assessed for purposes of taxation in a certain place does not give rise to any legal presumption that that place is his residence or domicile." Kennan on Residence and Domicile, page 96. Also see *Rockland* v. *Farnsworth,* 93 Me., 178, 44 A., 681; *Rumford* v. *Upton,* 113 Me., 543, at pages 545 and 546, 95 A., 226.

Also offered by the defendant was a certificate from the board of registration showing that the defendant was a registered voter in the City of Portland during the years 1931 to 1939 inclusive. This likewise was excluded. There was no evidence that, although registered, the defendant voted in Portland in any one of those years. The exclusion must be upheld. See *Somerville* v. *Smithfield,* 126 Me., 511, 140 A., 195; *Ellsworth* v. *Waltham,* 125 Me., 214, 132 A., 423; *Rumford* v. *Upton,* supra; *Monroe* v. *Hampden,* 95 Me., 111, 49 A., 604;

East Livermore v. *Farmington*, 74 Me., 154; and *Harpswell* v. *Phippsburg*, 29 Me., 313.

In conclusion we state that the decision of the referee appears to us to be founded on ample, credible evidence and so, in the absence of any errors of law, must be upheld. *Wentworth* v. *Whitney*, 133 Me., 513, 174 A., 461.

Exceptions overruled.

RELIABLE FURNITURE COMPANY

vs.

UNION SAFE DEPOSIT & TRUST COMPANY OF DELAWARE.

Cumberland. Opinion, September 17, 1941.

Ambiguities in Insurance Contracts.

Ambiguities in insurance contracts are resolved against the insurer.

Insurance contracts must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure.

While under the general law of suretyship, continuance in employment of an employee, after discovery of defalcation without making such discovery known to the surety is fraudulent and discharges the surety from liability, nevertheless, where, in a fidelity bond it is provided, as in the instant case, that the insurance "shall only terminate . . . as to any employee, by his retirement from the employ of the employer or upon discovery of loss through that employee" and the question is whether the words "upon discovery of loss" refer to a loss prior to or subsequent to the execution of the bond, there is ambiguity; and, the ambiguity being resolved in favor of the insured, the continuance in employment of the employee after discovery, subsequent to the execution of the bond, of loss through such employee prior to the execution of the bond does not terminate the insurance and the surety is liable for future losses.

ON EXCEPTIONS BY THE DEFENDANT.

Action on a fidelity bond, heard by a justice of the Superior Court without the intervention of a jury with right of exceptions reserved on matters of law. The trial justice ruled in favor of the plaintiff, to which ruling the defendant excepted.

An employee of the plaintiff, one Brennan, had, prior to the

execution of the bond, embezzled certain sums from the plaintiff. Plaintiff did not discover the embezzlement until after the execution of the bond. It did not notify defendant of the discovery and continued Brennan in its employ, accepting from him a note covering the amount embezzled by him prior to the execution of the bond, said note to be paid in weekly installments. Subsequent to the execution of the bond Brennan embezzled other sums. Plaintiff demanded reimbursement from the defendant for the amount of Brennan's embezzlements made during the period covered by the bond. Exceptions overruled. Case fully appears in the opinion.

Bernstein & Bernstein, for plaintiff.

William B. Mahoney, for defendant.

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

HUDSON, J. This is an action on a fidelity bond, heard by a justice of the Superior Court without the intervention of a jury, with right of exceptions reserved on matters of law, who ruled in favor of the plaintiff, to which ruling the defendant now presents its exceptions.

On January 30, 1939, the plaintiff had among others in its employ one Brennan. On that date the defendant executed and delivered to the plaintiff the bond sued on, by which the defendant promised "to pay to the RELIABLE FURNITURE COMPANY, Portland, Maine, as Employer, such pecuniary loss as the Employer shall sustain of money . . . by any act or acts of FRAUD, DISHONESTY, THEFT, EMBEZZLEMENT . . . directly or through connivance with others by any of the employees listed in the schedule forming part of this bond, while in any position or at any location in the employ of the employer; the liability of the Insurer for any employee not to exceed the amount specified in said schedule for such employee, to begin with the date set opposite the name of the employee and to terminate as hereinafter provided." Herein recovery is sought on account

of a pecuniary loss sustained through acts of larceny and embezzlement by Brennan while acting as manager for the plaintiff. He was one of those listed in the schedule forming part of the bond. It is admitted "that at the time of the execution and delivery of the bond the plaintiff had no knowledge of any acts of misconduct on the part of Brennan and acted in good faith."

The facts are not in dispute. On September 8, 1939, approximately seven months after delivery of the bond, the plaintiff discovered that Brennan, before its execution, had embezzled $1,050 from the company. Brennan admitted this and made a settlement therefor by giving his note to the company for $1,050 payable in weekly installments. He paid until December 13, 1939, when the plaintiff discovered that he had also embezzled other sums from it between January 30, 1939, and December 13, 1939, amounting to $443.11, of which $73.95 was embezzled prior to September 8, 1939. The defendant denies liability on account of the losses sustained subsequently to September 8, 1939, because of the discovery of the previous loss on that date. That that discovery was not communicated to the defendant is admitted. Instead thereof the plaintiff continued Brennan in its employment. Now it seeks reimbursement for the losses sustained by embezzlement by him since September 8, 1939, during the period covered by the bond.

The defense is twofold; first, that by reason of the wording of the bond, liability terminated on September 8, 1939, and second, that regardless of its language it is not liable because of established general principles of the law of suretyship.

The bond states:

> "5. This insurance as to any or all of the employees named in said schedule shall only terminate by . . ."
> "b. As to any employee, by his retirement from the employ of the Employer *or upon discovery of loss through that employee.*" [Italics ours.]

The plaintiff contends that the $1,050 loss by embezzlement prior to the execution of the bond, discovered on September 8, 1939, is not contemplated by 5-b.

Thus a question of construction arises. To what does the word "loss" refer? Did the parties contract that the insurance should terminate upon discovery of a loss sustained prior to the execution of the bond or not? With reference thereto the language in 5-b is indefinite. The surety might well have intended that it should refer to losses that happened any time before the execution of the bond, and yet the obligee might as well have understood from the language employed that there was no duty imposed upon it to inform of such a discovery to avoid termination of the insurance. Language of definite meaning is lacking. As stated in *Southern Surety Co.* v. *MacMillan Co.*, 58 F. (2d), 541, 546, it is to be noticed "that it" (the bond) "contains 'no express provision in the bond declaring that it shall be void if the notice of prior misconduct is not given.' Considering the care with which insurance contracts are drawn, the absence of such a common provision is significant." Ambiguities in an insurance contract are resolved against the insurer. "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted." *Barnes* v. *Insurance Company*, 122 Me., 486, 491, 120 A., 675, 676. Also see *Johnson* v. *Insurance Company*, 131 Me., 288, 292, 101 A., 496; *Russell* v. *Fire Insurance Company*, 121 Me., 248, 116 A., 554.

Employing this rule of construction and construing this language in this bond more strongly against the surety, we hold that discovery of a loss sustained by an embezzlement by

the employee before the effective date of the bond did not terminate the insurance. The parties saw fit to make a special contract in which was set forth those things which "shall only terminate" the insurance. To terminate it one of those things must occur, and here, as we construe the language of 5-b, there was no such occurrence. The insurance for future losses occurring during the life of the bond still obtained.

True, under the general law of suretyship (where no different provision appears in the bond, and here it does appear) it is well settled that in a case of continuing suretyship in a fidelity bond, the continuance in employment of the employee after discovery of defalcation without making such discovery known to the surety is fraudulent and discharges it from liability. Many cases outside this jurisdiction so hold. We have found none in Maine where there has been such a continuance in employment following discovery of a loss prior to the execution of the bond. Many years ago a leading case, much cited elsewhere, *Franklin Bank* v. *Cooper, Ex'r.*, 36 Me., 179, was decided by this court, but in that case the discovery was before the bond was given. There the action was on the bond of a bank cashier and it was claimed in defense that the directors of the bank had knowledge which they did not convey to the surety and so acted fraudulently in taking the bond, that knowledge not disclosed being that, at the time the bond was given, there was an existing deficiency in the accounts of the cashier.

This court then stated on pages 196 and 197:

> "It is not readily perceived how a person desirous of obtaining security can be considered to be guilty of a fraud in law by omitting to make known facts even of an important character, affecting the risk of the surety, when it does not appear, that he had an opportunity to do so. On the contrary when he does know such facts and has reason to believe, that they are not known to the proposed surety, if information be sought from him, or if he have a suit-

able opportunity, and the facts are of such a character, that they are not found in the usual course of that kind of business, and are such as to materially increase the risk, it is not perceived, that it is not a duty to make them known. . . .

"It is generally admitted, that an omission to communicate circumstances materially affecting the risk known to one party and unknown to the other, will destroy the validity of the contract, whenever the party having the knowledge is bound to communicate it. The difficulty consists in arriving at a correct conclusion under what circumstances one is so bound. He is so bound when his relations are such, that the other party is entitled to repose any particular confidence in him, and when inquiries are made of him respecting the suretyship. Is he not equally bound when he has a suitable opportunity to make them known?

". . . To receive a surety known to be acting upon the belief, that there are no unusual circumstances, by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

While Section 8 of the bond in recognition of the common law, as above stated, provides that knowledge by the employer at the time of the execution of the bond that theretofore the employee has committeed acts of "fraud, dishonesty, theft, embezzlement . . . while in the prior service of the employer" shall render the bond "void and of no effect from its original date," yet it does not provide that discovery of a loss following the bond's execution where the loss occurred prior thereto shall terminate the "insurance." Without such termination the bond remained in full force and effect as to later losses by larcenies and embezzlements, even though the

obligee discovered a prior loss by larceny and embezzlement and failed to report it to the surety.

We discover no error in the ruling of the justice below.

Exceptions overruled.

MURCHIE, J., CONCURRING IN RESULT. I concur in the opinion of the majority of the court that under the particular fidelity bond, discovery by the employer, after the beginning of the suretyship period, that an employee had embezzled funds prior to the commencement thereof, did not terminate the bond as to that particular employee. Such decision seems to come within the established rule that any ambiguity in the contract of a compensated surety shall be construed against the insurer. According to my view, however, the action of the plaintiff in diverting a part of the subsequent earnings of the employee to the liquidation of his prior default would have been, if properly pleaded, a *pro tanto* defense to any recovery for subsequent defalcations.

The case is absolutely without precedent in this, or any other, jurisdiction. The record discloses that the employee had stolen approximately $1,050 when the bond was written, and $73.95 in about seven months thereafter before discovery of his earlier dishonesty. The employer, upon such discovery, arranged to retain $20 per week from his salary, and an indeterminate amount in commissions, to apply upon his unbonded defalcations. In the ninety-six days following, and while $3.33 per day (disregarding commissions) was being diverted from his earnings, he stole an additional $363.16. His peculations in the seven-month period averaged about thirty-five cents per day, and in the ninety-six day period about $3.75 per day.

Recital in the majority opinion is that the employee "paid" whatever amount was recovered against the old default in the ninety-six day period. I do not so read the record. The facts as stated in the court below were that the plaintiff "took a note . . . and agreed to deduct . . . weekly . . . a certain amount." In the bill of exceptions the statement is that the "plaintiff . . .

took a note . . . and thereafterwards . . . did deduct the sum of $20 per week." To my mind there is a distinction between such facts and payment. The plaintiff was unwilling to trust the employee to make an agreed weekly payment out of his earnings, yet was willing to trust him, at the risk of his insurer, to handle money not his own. Had he been trusted to handle his own earnings and made voluntary payments on his old default, I would be in entire accord with the opinion, but I cannot subscribe to the view that a party insured can trust an employee at the risk of an insurer when unwilling to do so at his own.

The defendant having elected, however, to plead the action of the plaintiff as a termination of liability rather than in mitigation of damages, and having assented before the court below that if the plaintiff should be found entitled to recover for defaults subsequent to the discovery aforesaid, the amount of the recovery should be $443.11, I join in the mandate

Exceptions overruled.

ALPHONSE VEILLEUX *vs.* LEO J. ROSEN.

Androscoggin. Opinion, September 20, 1941.

Measure of Damages. Gross inadequacy must be shown to justify a new trial.

There is nothing in the evidence to indicate that bias or prejudice affected the verdict, and the damages awarded were not so grossly inadequate as to require a new trial.

ON MOTION FOR NEW TRIAL.

Action was for damages for injuries to the plaintiff received when a passenger in defendant's automobile. Defendant admitted liability, and only question was on plaintiff's contention that the damages awarded were inadequate. Motion overruled. Case fully appears in the opinion.

Brann, Isaacson & Lessard, for plaintiff.

Fred H. Lancaster, for defendant.

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

PER CURIAM.

The plaintiff was a guest passenger in the automobile of the defendant. He received physical injuries when the car driven by the defendant collided with the rear end of another car, and which resulted in his sustaining a transverse fracture of the lower jaw. This necessitated wiring to maintain immobilization. Plaintiff was hospitalized for seventeen days and undertook no work for twelve weeks, although he was married three weeks after the accident. He received a verdict of $771.95. Case came forward on plaintiff's motion for new trial upon the ground that the damages awarded were inadequate. Liability was conceded by the defendant. The medical, surgical and hospital bills amounted to $290.95. It was undisputed that services aggregating this sum were rendered but there was evidence tending to show that a portion of the amount was occasioned by a preexisting condition not affected by the accident.

In issue also was the probable loss in wages, resulting from the disability. This loss, under the evidence, was by no means capable of mathematical demonstration. Actual earnings prior to the accident were small. What income might have been received was somewhat in the realm of speculation.

Further contention of the plaintiff is that no appreciable sum was allowed for the element of pain and suffering. In accord with usual procedure all elements of damage are included in the single verdict, and the record affords no definite information as to the amount agreed upon in this particular. There was conflict in testimony upon the point, including evidence from expert sources that the accident was not of a character which caused much pain but was largely a matter of discomfort.

While the amount of the verdict appears comparatively small, there is nothing to indicate that it was not a well reasoned and considered judgment, taking into account all the

elements of damages. No bias or prejudice is shown to have affected the result, and the damages awarded are not so grossly inadequate as to require a new trial.

Motion overruled.

RUFUS GILES *vs.* LEVI R. PERKINS.

Penobscot. Opinion, October 4, 1941.

Contributory Negligence is for a Jury to Determine.
New Trial granted only when Prejudicial Error to the Complaining Party.

There was ample support for the finding of the jury, to whom the question of contributory negligence was presented, for the finding that the plaintiff exercised due care.

The principle that there must be prejudicial error to the complaining party to justify granting a new trial is inherent in our jurisprudence; and a new trial for inadequacy of damages will not be granted on the application of the party against whom the damages were awarded.

A motion for a new trial which asserts that the verdict is against the law and evidence is entitled to consideration upon all phases thereby included.

MOTION BY DEFENDANT FOR A NEW TRIAL.

An action for damages for personal injuries to the plaintiff due to being struck by a truck owned and driven by the defendant. Defendant claims that the plaintiff was guilty of contributory negligence; also that the verdict was against the law and the evidence; and further alleged as a ground for setting the verdict aside that the damages awarded the plaintiff were clearly inadequate.

Motion overruled. Case fully appears in the opinion.

Cecil H. Burleigh and Tupper & Harris, for plaintiff.

Benjamin W. Blanchard, for defendant.

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

MANSER, J. This is an action for damages arising from per-

sonal injuries to the plaintiff, a pedestrian, and sustained from being struck by a truck owned and driven by the defendant. Verdict was for the plaintiff in the sum of $600. The case comes forward on the ordinary motion by the defendant, seeking a new trial, on the grounds that the verdict was against law and evidence and the damages awarded were excessive.

As to liability, counsel for the movant relies solely upon the claim of contributory negligence on the part of the plaintiff. Examination of the record shows that a typical jury question was presented on this issue and there was ample support for the finding that the plaintiff was in the exercise of due care. It was not against the weight of evidence.

The other point argued for the defense is that the verdict for the plaintiff should be set aside because the damages awarded him were clearly inadequate, although the formal motion alleged them to be excessive.

It might well be contended that a party could not be heard to assert a reason diametrically opposite to that alleged in the record. The plaintiff, however, seeks no advantage from the incompatible allegation and argument, but counters the point actually raised. Having in mind that the motion also asserts that the verdict was against law and evidence and is entitled to consideration upon all phases thereby included, it is proper to pass upon the contention presented, that there may be clarification of judicial decision in this jurisdiction thereon.

It is true that our Court, in common with the major trend, has laid down the rule that even in tort cases, verdicts will be set aside when their manifest inadequacy demonstrates a clear disregard of testimony. *Leavitt* v. *Dow*, 105 Me., 50, 72 A., 735; 134 Am. St. Rep., 534; *Conroy* v. *Reid*, 132 Me., 162, 168 A., 215; *Chapman* v. *Portland Country Club*, 137 Me., 10, 14 A. 2d, 500. These cases are clearly distinguishable from the instant case.

The principle that there must be prejudicial error to the complaining party to justify granting a new trial is inherent in our jurisprudence.

In *Philbrook* v. *Burgess*, 52 Me., 271, 278, where the instructions to the jury were erroneous, the court observed:

> "But they were in favor of the defendant; and he cannot complain."

The same rule has application, whether the error be by the court or the jury. The exact statement is made in 29 Cyc., p. 848, and practically reiterated in 46 C. J., p. 290, §253, that a new trial for inadequacy of damages will not be granted on the application of the party against whom they were awarded. Cases in point are cited thereunder from many jurisdictions.

In the instant case, the position taken by the plaintiff is that if anyone is aggrieved, it is he, and he does not complain. The great weight of authority supports this position. It is well stated in *Wolf* v. *Goodhue Ins. Co.*, 43 Barb., 400, 405, as follows:

> "If the jury gave the plaintiff less than he was entitled to recover, upon the finding of the issues, that is an error of which the plaintiff, alone, can complain. If he submits to the verdict, the defendants can not be heard to insist that it shall be set aside because it is unjust to the plaintiff."

Motion overruled.

HARRY STERN *vs.* FRASER PAPER, LIMITED.

Penobscot. Opinion, October 6, 1941.

When Writ of Error Maintainable. Effect of failure to reserve right to except in matters of law in a civil action heard by the presiding justice in term time without a jury.

It is well settled in this state that when, by agreement, a jury trial is waived in a civil action, and a case is heard by the presiding justice during term time, exceptions will not lie to his rulings in matters of law if the decision is made and docketed during the term at which the case is heard unless the right to except in matters of law has been expressly reserved; and a plaintiff

not thus reserving right to except has no right to except to the final decision even if it is erroneous as a matter of law.

If the ruling of the presiding justice disallowing plaintiff's bill of exceptions was erroneous, and if, for any reason, plaintiff's bill should have been allowed, the disallowance thereof would not have deprived the plaintiff of his right to be heard thereon. He could have proceeded under the provisions of R. S. 1930, Sec. 24, Chap. 91, and Rule of Court 40, to establish the truth of his exceptions before the Supreme Judicial Court sitting as a court of law, which he made no attempt to do.

In this jurisdiction a writ of error cannot be maintained in a civil action if the plaintiff in error, being *sui juris,* had opportunity to have the original case reviewed, either on appeal or on bill of exceptions or on a writ of review.

The plaintiff in the instant case had opportunity, when he agreed to a jury-waived hearing of the original case, to reserve the right to except on all questions of law which might arise in the case. His failure to reserve such right to except was a waiver of that right, and the conclusion is irresistible that the opportunity to except to the final decision was waived and lost by the plaintiff solely because of his own fault.

The decision of the presiding justice in a jury-waived case is final and conclusive when supported by credible evidence, but when unsupported by any evidence, it is erroneous as a matter of law and reviewable on exceptions if the right to except has been reserved.

ON EXCEPTIONS BY PLAINTIFF.

Writ of error. Action of assumpsit. By agreement of parties the original action was heard by the presiding justice, without a jury, without reservation by either party of the right to except in matters of law. The decision was for the defendant and judgment was duly entered on the docket on the last day of the term, shortly before it adjourned. According to the record, because of lack of time, the clerk did not give the plaintiff notice thereof during the term, and it does not appear that the plaintiff had actual knowledge of the decision until after final adjournment. Immediately after adjournment, the plaintiff presented his bill of exceptions to the justice who heard the case. The bill was disallowed by written decree, which decree stated, among other things that "no right to exceptions was reserved to either party prior to the filing of the decision in the case."

The plaintiff then brought a writ of error claiming that there were errors in law and in fact sufficient to annul the

original judgment. The court below ruled otherwise and affirmed the original judgment. Plaintiff excepted. Exceptions overruled. The case fully appears in the opinion.

Stern & Stern, for plaintiff.

Perkins, Weeks & Hutchins, and

Henry J. Hart, for defendant.

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

WORSTER, J. On exceptions by plaintiff in error.

By agreement of parties, the original action of assumpsit, in which it is claimed an erroneous judgment was rendered, was heard during the November Term, 1939, of the Superior Court held at Bangor, within and for the County of Penobscot, by the presiding justice without a jury, without reservation by either party of the right to except in matters of law.

Decision was against the plaintiff, and judgment for the defendant was duly entered on the docket on the last day of that term, shortly before it was finally adjourned; but, according to the record, because of lack of time the clerk did not give the plaintiff notice thereof during the term, and it does not appear that the plaintiff had actual knowledge of the decision until after final adjournment. Immediately after adjournment, the plaintiff presented his bill to the justice who heard the case. The bill was disallowed by written decree, in which it is stated, among other things:

> "No right to exceptions was reserved to either party prior to the filing of the decision in the case.
>
> "The Plaintiff has presented exceptions to the findings of the Presiding Justice to the allowance of which objection is made by the Defendant. Under the circumstances I am compelled to disallow the exceptions as presented by the Plaintiff."

The plaintiff claims that the defendant did not raise the point that the right to except had not been reserved, but when the justice ruled that he was "compelled" to disallow the exceptions, there was nothing more that the plaintiff could then do to perfect his exceptions. If, for any reason, the bill should have been allowed, then the disallowance thereof would not have deprived the plaintiff of his right to be heard thereon. He could have proceeded under the provisions of R. S. 1930, Chap. 91, Sec. 24, and Rule of Court 40, to establish the truth of his exceptions before the Supreme Judicial Court sitting as a court of law. This he made no attempt to do, and so waived his exceptions, if he had any.

But the plaintiff had no exceptions which were allowable as a matter of right, for the right to except in matters of law had not been reserved by the plaintiff. It is well settled in this state that when, by agreement, a jury trial is waived in a civil action, and a case is heard by the presiding justice during term time, exceptions will not lie to his rulings in matters of law if decision is made and docketed during the term at which the case is heard, as was done here, unless the right to except in matters of law has been expressly reserved. *Reed* v. *Reed,* 70 Me., 504; *Frank* v. *Mallett,* 92 Me., 77, 42 A., 258.

The plaintiff, however, has brought a writ of error, claiming, in substance and effect, that there were errors in law or fact sufficient to annul the original judgment; and that he can maintain this writ of error because his right of exceptions was waived by his failure to expressly reserve that right, thus leaving no other remedy open to him. The court below ruled otherwise and affirmed the original judgment. The matter is brought here on the plaintiff's exceptions.

In this jurisdiction, a writ of error cannot be maintained in a civil action if the plaintiff in error, being *sui juris,* had opportunity to have the original case reviewed, either on appeal (*Howard* v. *Hill,* 31 Me., 420; *Lord* v. *Pierce et al.,* 33 Me., 350; *Monk* v. *Guild.,* 3 Metc., 372), or on a bill of exceptions (*Thompson* v. *Mason et al.,* 92 Me., 98, 42 A., 314; *Hersey* v.

Weeman, 120 Me., 256, 113 A., 394), or on a writ of review (*Denison* v. *The Portland Company,* 60 Me., 519).

So, if the plaintiff in error had opportunity to except to the final decision in the original case, he cannot maintain this writ of error. Did he have such a opportunity? We think he did.

It is the contention of the plaintiff that the original case was decided contrary to the undisputed evidence. Undoubtedly the decision of the presiding justice in a jury-waived case is final and conclusive when supported by credible evidence, but when unsupported by any evidence it is erroneous as a matter of law and reviewable on exceptions, if the right to except has been reserved. *Chabot & Richard Company* v. *Chabot,* 109 Me., 403, 84 A., 892.

That right, however, was not reserved in the case we are considering, and so, at the precise time the case was decided, the plaintiff had no right to except to the final decision, even if it were, as he claims, erroneous as a matter of law. That is not decisive here. Whether the plaintiff had such an opportunity to except as would prevent him from maintaining a writ of error, is not to be determined by merely considering the legal situation of the parties at the precise time the case was decided, but by considering the proceedings in the case as a whole.

Where a defendant, by counsel, appeared in an action pending before a justice of the peace, but voluntarily withdrew before he was defaulted and judgment entered against him, this court, in *Howard* v. *Hill,* supra, considered that such defendant had had an opportunity to appeal, and so could not maintain a writ of error. Although, because of his withdrawal, the defendant in that case was not in court at the time judgment was rendered against him so as to appeal therefrom, yet, as the court said, "At the time of his appearance the case was open"; but the opportunity then before him to contest the issues raised, and finally to appeal from any judgment which might be rendered against him, was waived and lost by his

own voluntary act before the judgment was entered. See, also, *Monk* v. *Guild,* supra.

When the plaintiff in the instant case agreed to a jury-waived hearing of the original action "the case was open" and the opportunity was then before him to reserve the right to except on all questions of law which might subsequently arise in the case. So, the plaintiff is considered to have had opportunity to except to the final decision in the original case. Failure to reserve the right to except was a waiver of that right. *Frank* v. *Mallet,* supra.

The conclusion is irresistible that the opportunity to except to the final decision was waived and lost by the plaintiff solely because of his own fault, of which he cannot now complain. Therefore, he cannot maintain this writ of error.

The plaintiff, contending further, lays great stress on *Putnam* v. *Churchill,* 4 Mass., 515, and *Jewell* v. *Brown,* 33 Me., 250. Neither case is in point here.

In *Putnam* v. *Churchill,* supra, it appeared that the original action was brought by Churchill against Putnam on a note. The latter obtained a continuance by an agreement, entered on the record, to the effect that he would not appeal from the judgment of the court, if one should be rendered against him. To his plea subsequently made, Churchill demurred, and finally recovered judgment against Putnam, who then sued out a writ of error. Decision turns on the point whether or not Putnam lost his right of appeal by his own fault. The court held, in effect, that Putnam ought not to be considered in fault where his right of appeal was waived by an agreement, entered on the record, to which Churchill himself was a party, stating, "Churchill is entitled to the full benefit of his agreement."

In the instant case, it is not even contended that the right of exceptions was waived by or lost to the plaintiff as the result of a contract with the defendant. Nor does it appear that the defendant was in any way responsible for the plaintiff's failure to reserve his right of exceptions.

In *Jewell* v. *Brown,* supra, it appears that the original action was brought before a justice of the peace, who had no jurisdiction over the defendant, to recover on a debt alleged to be due, not from him but from another. The defendant, not appearing, was defaulted and judgment was rendered against him. Thereupon he sued out a writ of error. The court held that the want of jurisdiction was not waived by default, and reversed the judgment on the ground that it was erroneous, and that the justice was without jurisdiction to render any judgment in the case. The court there said, page 252:

> "The rule, therefore, that a party who had the right of appeal, cannot bring error, is subject to qualifications. If he was not duly served with legal process, or was prevented from defending by fraud, or inevitable accident, or did not appear, when duly summoned, and an erroneous judgment has been rendered against him, on default, he may have remedy by a writ of error."

But in *Hersey* v. *Weeman,* supra, the court said, page 258:

> "This statement is to be taken with the further qualification that there has been no appearance by or for the defendant, in the original action, the defendant thereby submitting himself to the jurisdiction of the court."

The instant case does not fall within the qualification laid down in *Jewell* v. *Brown* and *Hersey* v. *Weeman.* Here the dedendant was not defaulted, but both parties appeared and stood trial in a court of competent jurisdiction, and there is not the slightest thing in this record tending to show that either party was prevented by fraud or inevitable accident from being fully heard.

Moreover, the defendant, in the action reviewed in *Jewell* v. *Brown,* did not appear and was not bound to appear. The proceedings in that original action were a nullity for want of jurisdiction, so it cannot be said that the defendant in that original case ever had opportunity to appeal from an erroneous judg-

ment in a court having jurisdiction of the parties; whereas, in the instant case, valid proceedings were had in a court of competent jurisdiction, at which the plaintiff appeared and had opportunity to except, which was waived and lost by his own fault, as we have already pointed out.

The conclusion we have reached renders it unnecessary to consider the merits of the original case, upon which we express no opinion, or to consider the other points argued, or to discuss the other cases cited in the briefs.

The mandate is

Exceptions overruled.

GEORGE ROBERTS, ADMINISTRATOR OF THE ESTATE OF RICHARD EDWARD ROBERTS

vs.

CHARLES NEIL.

Cumberland. Opinion, October 7, 1941.

Proper Procedure in Objecting to Instructions. Exception to General Rule.

Rule 18 of the Rules of Court defines the proper procedure by counsel claiming either that improper instruction has been given to a jury or that there has been any omission to charge on a particular point.

It is the duty of counsel to ask clearly what rulings he desires to be given and clearly indicate to what rulings he objects before the jury are sent out with the case. When the points relied upon by either party are thus clearly presented to the judge he is less likely to err.

Practice at variance with the rule of court, which in the respect noted represents merely the affirmance of established practice should not be encouraged.

It is only the exceptional case which will justify a new trial when proper practice has been disregarded.

An exception to the rule referred to, however, has become established when any instruction given is plainly erroneous or where it appears that the jury may have been misled by the charge as to the exact issue or issues to be determined.

The charge given in the instant case may well have induced the jurors to believe that determination of the exact time of the accident would be con-

clusive on the whole issue, and this coupled with the failure to give sufficient instruction that violation of the law of the road, while prima facie evidence of negligence, would defeat recovery only if it contributed proximately to the accident, brings the case within the exception.

GENERAL MOTION FOR A NEW TRIAL BY THE PLAINTIFF.

Action was brought by the administrator of the estate of a decedent whose death resulted from the impact of an automobile driven by the defendant against a mule-drawn vehicle in which said decedent was riding. There was conflict of testimony. Plaintiff's motion for a new trial, however, was based on the claim that the charge to the jury was misleading.

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

John G. Marshall, for the plaintiff.

Berman & Berman, of Lewiston, on brief, for the plaintiff.

Frank T. Powers, for the defendant.

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

MURCHIE, J. This case comes to the court on motion for a new trial filed by the plaintiff following a verdict for the defendant. Claim is that the verdict should be set aside because the charge of the presiding justice contained manifest errors in law which resulted in injustice to the plaintiff. The action was brought by the administrator of a decedent whose death resulted from the impact of an automobile driven by the defendant with a mule-drawn vehicle in which plaintiff's intestate was riding in the late afternoon on November 10, 1939.

It should be noted at the outset that no exceptions were taken by the plaintiff to any particular statement in the charge and that the plaintiff, who now complains of numerous omissions as well as of some misdirections therein, made no request either for the correction of any instruction given or for instructions upon any particular point.

Proper procedure, whenever in the trial of a case any improper instruction is given to a jury or there is any failure or omission to give appropriate instructions upon an issue which arises in the course of the proceedings, is definitely stated in Rule 18 of the Rules of Court, as follows:

> "Exceptions to any opinion, direction or omission of the presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived."

This rule, as was stated in *McKown* v. *Powers, et al.*, 86 Me., 291 at 296, 29 A., 1079, represents merely the affirmance of long standing practice and should be generally known among the practitioners before this court. The duty of counsel who claims to be aggrieved in any manner in a charge to the jury is, as stated in that case on page 295, to

> "clearly ask what rule he desires to be given, and clearly indicate to what rulings he objects, before the jury are sent out with the case. When the points thus relied upon by either party are thus clearly presented to the judge, and made known to the other side, the judge is less likely to err, and may be able to correct errors already made."

The court is of opinion that practice at variance with the rule aforesaid should not be encouraged, but a rather definite exception to the application of the rule has been heretofore developed in instances where a jury has been given instructions which were plainly erroneous or which justified belief that the jurors might have been misled as to the exact issue or issues which were before them to be determined. In *Pierce* v. *Rodliff*, 95 Me., 346, 50 A., 32, a motion was sustained because instruction had been given contrary to a definite statutory provision. In *State* v. *Wright*, 128 Me., 404, 148 A., 141, a like result was ordered on appeal because instruction had been given that there was no distinction between criminal and civil negligence. There was no specific exception on the point before

the court. *Inhabitants of Trenton* v. *City of Brewer*, 134 Me., 295, 186 A., 612, furnishes illustration of a verdict set aside on motion, not for any actual misdirection in the charge, but because of the omission to instruct with reference to a particular issue of fact which might have been controlling in favor of the defendant had decision thereon been made in accordance with his claim.

Enough has been said by the court in earlier decisions to indicate that it is only the exceptional case which will be found to justify a new trial when proper practice has been disregarded. Examples of this are found in the declarations that the practice of raising questions on a motion "is not to be encouraged" (*Pierce* v. *Rodliff*, supra, at 348), and that it "is not compatible with best practice" (*Inhabitants of Trenton v. City of Brewer*, supra, at 299). Determination need only be made as to whether the present case falls within the limits already established for application of the unusual rule. We believe that it does.

The facts disclose clearly that decedent, at the time of the accident, was standing in a dump-cart; that defendant's motor vehicle, traveling in the same direction, collided with the left rear wheel of the dump-cart in overtaking and attempting to pass; and that decedent was thrown from the vehicle by force of the impact and suffered injuries from which he died a few days later.

Stipulation was entered in the case that the sun set at the place of the accident on the particular day at 4: 20 o'clock, and the plaintiff makes no claim that the mule-drawn vehicle carried such a light as is required by statute to be lighted one-half hour after sunset (R. S. 1930, Chap. 29, Sec. 83).

The record discloses that there was a very clear conflict of testimony upon several questions of fact. The principal ones are: (1) whether the collision occurred before, or after, 4: 50 P.M., and (2) whether at the time of the collision it was light or dark. Lesser issues included questions as to whether the light on the defendant's motor vehicle, and others, were light-

ed, and whether or not defendant's vision was affected by the light of a vehicle approaching along the highway from the opposite direction.

In last analysis the contention of the plaintiff seems to be rather against the charge as a whole on the ground that it misled the jury to a belief that the single issue involved was the time of the accident, and that a finding that it occurred later than 4:50 P.M. should result in a verdict for the defendant than against any particular statements contained therein, although four separate excerpts (one quite long one) are quoted in the brief and much of the context thereof is referred to in more than one place in argument.

The general objection seems to be sound. It is well settled in our law that proof of violation of a statutory regulation is "prima facie evidence of negligence," *Tibbetts* v. *Harbach*, 135 Me., 397 at 403, 198 A., 610, 613, and cases therein cited, but it is equally well settled as noted in the same case, and supported by the citation of ample authority, that unless the act which represented the violation of the regulation "was a contributing proximate cause," it should carry no probative value and be disregarded.

In *Pierce* v. *Rodliff*, supra, the court stated that it was evident that the statutory provision which laid the foundation for sustaining the motion of the plaintiff "was inadvertently overlooked by the presiding justice." It seems obvious that the same thing is true with reference to the requirement of proximate causation in connection with the violation of a law of the road in this case. As the record is examined, this is not strange. Allegation in each of the four counts of plaintiff's writ is that the accident occurred at the hour of 4 P.M. "in the legal definition of time." The testimony shows a very considerable amount of evidence, given by witnesses for the plaintiff, which was designed to show that the impact occurred prior to 4:50 o'clock in the afternoon, and much of the testimony offered on behalf of the defendant was designed to show that the time was later. True there was a considerable amount of testimony

as to whether it was daylight or dark, but there is a clear impression, on a general reading of the declaration and the testimony, that time was a controlling element. This explains a statement made by counsel for the defense very shortly before the charge was delivered and not challenged by counsel for the plaintiff: "The case was tried on time."

It is clear that it may have been decided "on time"; that the jury may have been misled by the emphasis which the court placed on the time issue in his charge and felt that determination of that one issue was final. It is indubitable that there was no sufficient instruction that the test to be applied to the failure to have a light on the mule team, if it should be determined that the accident occurred after 4: 50 P.M., was whether or not it represented a cause which contributed proximately to the result. Rather the opposite was conveyed by the words:

> "There would be a presumption of negligence and there has been no attempt to overcome that presumption because the plaintiff claims that the collision occurred within the half-hour. That is the big question as I see it, and I think as counsel see it, for you to decide."

On the whole it seems apparent that the plaintiff has brought himself within the exception to the rule of safe and proper practice, and the mandate must be

Motion sustained.
New trial granted.

LINCOLN E. MCRAE

vs.

CAMDEN & ROCKLAND WATER COMPANY.

Knox. Opinion, October 13, 1941.

Discharge of water artificially collected by one on his own land upon the land of another.

It is a settled rule of law that if one artificially collects water on his own land and discharges it unlawfully upon his neighbor's property upon which

it would not have naturally fallen, he is liable for any resulting damages.

An allegation in a writ by plaintiff that defendant had maintained a pipe drain from a pit for a certain length of time and was in duty bound to keep it in repair does not constitute an admission that the defendant had the lawful right to establish and maintain said drain.

The measure of damages and whether or not the plaintiff did what should have been done to mitigate the damage were factual questions for the jury and subject to review only if manifestly wrong, as does not appear to be the fact in the instant case.

ON MOTION FOR NEW TRIAL.

Action to recover damages for injuries to plaintiff's golf course by overflow of water from land of defendant. Defendant had constructed a valve house over a pit dug in its own land and artificially collected surface water in the pit. Due to the plugging of a drain for carrying off water, fairways of plaintiff's golf course were damaged. Judgment for plaintiff. Motion for new trial by defendant overruled. Case fully appears in the opinion.

Frank A. Tirrell, Jr.,
Jerome C. Burrows, for plaintiff.

Alan A. Bird,
Alfred M. Strout, for defendant.

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

PER CURIAM.

Herein the plaintiff recovered a verdict for $2,000 for injuries to his golf course in Rockland. The defendant filed a general motion based on the usual grounds. The question is whether the verdict is manifestly wrong.

From the evidence the jury could have found that many years ago the defendant took title to a rectangular piece of land 25 by 40 feet in the midst of property owned by its grantor; that it built a valve house thereon over a pit dug in the ground; that in the fall of 1939 the defendant artificially col-

lected surface water in the pit to varying depths, it coming in around pipes or mains and by seepage; that previously for the purpose of draining the pit it had built a tile drain southwesterly an approximate distance of 150 feet to a point where it emptied into a rock drain, both drains being located on the plaintiff's premises; that early in December, 1939, the defendant's carpenter, while putting a new roof on the pump house, noticed a considerable depth of water in the pit and that apparently the drains were not functioning; that he observed outside, nearly if not quite at the end of the tile drain, an elevation of a few inches in the ground where water was boiling up, at which place he dug down and found the tile broken; that later this break was repaired by the defendant but the water still came to the surface and continued to overflow the plaintiff's property through the winter and spring until June, when an unsuccessful attempt was made by the defendant to relieve the situation by pumping from a large hole it dug for that purpose; that the break in the tile caused the rock drain to plug, as a consequence of which the water backed up and boiled to the surface of the ground even after the tile pipe was repaired and continued to flood large areas in fairways five and six of the plaintiff's course, causing the injuries for which damages are sought in this action.

The allegation in the writ that since the twenty-ninth day of November, 1938, the defendant maintained a pipe drain from the pit and that it was duty bound to keep it in repair does not constitute an admission that the defendant had the lawful right to establish and maintain said drain. The record does not disclose that it had acquired such right by grant, prescription, or otherwise.

In *Goodwin and Stewart* v. *Texas Co.*, 133 Me., 260, 176 A., 873, 874, it is stated on page 262:

> "It is a settled rule of law that no one may artificially collect water on his own land and discharge it unlawfully upon his neighbor's property upon which it would

not have naturally fallen, and if he does so he is liable for the resulting damages."

Also see *Smith* v. *Preston,* 104 Me., 156, on page 161, 71 A., 653.

The law as quoted is applicable to this situation. Here ample evidence there was to warrant the jury to find, as it must have found, that the defendant artificially collected water in the pit in its valve house and unlawfully discharged it upon the plaintiff's property where it would not have naturally fallen. In doing this it committed an actionable wrong. As to liability the verdict must stand.

But it is claimed that the verdict is excessive, particularly because the plaintiff did not do what he should have done to mitigate the damage. This raised factual questions for the jury, both as to what was done by way of mitigation and as to whether or not it was reasonably sufficient. That the damage occasioned by the flooding of fairways five and six was extremely serious amply appears in the evidence. Estimated cost of repairs (and there was no evidence to the contrary) ran from $2,000 to $3,500, consisting of plowing, harrowing, rocking, fertilizing, reseeding, levelling, and rolling, without mention of a less attractive and desirable course for play and loss of revenue, as to which there was considerable testimony. For an appreciable period only seven holes were playable. It has not been made to appear that the jury's assessment of $2,000 as damages is manifestly wrong.

Motion overruled.

E. FRANCES PAGE *vs.* NELSON BOURGON.

Hancock. Opinion, November 6, 1941.

Pleading. Cause of action cannot be changed by amendment. Effect of overruling demurrer at nisi prius.

The claim of ownership of property is entirely different from the claim of an easement.

Plaintiff having alleged in her original declaration that she was the owner in an easement in certain property, could not by amendment change her claim to one of ownership. Such proffered amendment was inconsistent with her original declaration and, in effect, set up a new and distinct cause of action.

When there is a ruling at *nisi prius* either sustaining or overruling a demurrer and exceptions are taken and allowed, the case should stand continued with no further action at *nisi prius* until a decision is handed down by the Law Court when, subject to the provisions of R. S. 1930, Chap. 96, Sec. 38, the plaintiff may amend if demurrer is sustained and declaration amendable, or the defendant may plead anew if it be overruled.

In the instant case, the defendant by pleading and going to trial waived his exception to the overruling of the demurrer, but not his exception to the allowance of the amendment.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL BY DEFENDANT.

Declaration was trespass quare clausum. Action was brought for "interference by defendant with plaintiff's enjoyment of an easement to take water from a well." The defendant demurred on the ground that trespass quare clausum is not a proper remedy to recover damages for interference with the enjoyment of an easement. The demurrer was overruled and defendant excepted. Then plaintiff was permitted to amend by changing her allegation from her claim of an easement to a claim that she was the owner of the well. The defendant excepted to the allowance of the amendment. He entered a plea and went to trial. The jury found for the plaintiff. Defendant excepted. Exception sustained. The motion for a new trial was not considered. The case fully appears in the opinion.

Clark & Silsby, for plaintiff.

Blaisdell & Blaisdell, for defendant.

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

THAXTER, J. The declaration in this case, though stated to be "in a plea of the case," was in fact trespass quare clausum. Cf. *Place* v. *Brann,* 77 Me., 342. The plaintiff claimed by her pleading that she had been for over a period of twenty years

next prior to the time the action accrued the "owner of a certain easement to take water of a certain well located at Bucksport, to wit, approximately sixty feet west of said Bridge Street and near or at the north line of said plaintiff's property. . . ." She then alleges that the defendant with force and arms and without notice or permission to or from the plaintiff entered the plaintiff's close and filled up said well with rock, bags and debris, and obstructed and prevented the plaintiff's access to it. The defendant demurred to the declaration, one ground being that trespass quare clausum is not a proper action for the recovery of damages for interference with the enjoyment of an easement. *Morgan* v. *Boyes,* 65 Me., 124; 19 C. J., 991; 47 A. L. R., 553, note. See also *Bale* v. *Todd,* 123 Ga., 99, 103, 50 S. E., 990; *McIntire* v. *Lauckner,* 108 Me., 443, 448, 81 A., 784; *Duncan* v. *Sylvester,* 24 Me., 482, 487, 41 Am. Dec., 400; *Trask* v. *Ford,* 39 Me., 437, 441; *Matthews* v. *Treat,* 75 Me., 594, 600; *Marshall* v. *Walker,* 93 Me., 532, 540, 45 A., 497. The court overruled the demurrer and the defendant excepted. Apparently the plaintiff was not altogether satisfied with the clearance thus given her and asked leave to amend her declaration. The proposed amendment did not, as we construe it, change the action from trespass quare clausum to case. Rather the plaintiff sought to extricate herself from her dilemma by eliminating her claim of an easement to take water from the well to one of ownership of the well. Over the defendant's objection the amendment was allowed and the defendant excepted. The case went to trial on the defendant's plea of the general issue and the jury found for the plaintiff. The case is now before us on the defendant's exceptions and general motion.

When there is a ruling by the court at *nisi prius,* either sustaining or overruling a demurrer, and exceptions are taken and allowed, the case should then be marked "Law" on the docket and stand continued with no further action taken at *nisi prius* until a decision is handed down by the Law Court on the issues raised by the demurrer, when, subject to the provisions of the

statute, R. S. 1930, Chap. 96, Sec. 38, the plaintiff may, if the declaration is amendable, amend if the demurrer be sustained, or the defendant may plead anew if it be overruled. *Tripp* v. *Park Street Motor Corporation,* 122 Me., 59, 118 A., 793. Such procedure was not in the instant case followed. The defendant entered a plea and went to trial. By so doing he waived his exception to the overruling of the demurrer as is clearly indicated in the opinion in the Tripp case, *supra.* He did not, however, waive his exception to the allowance of the amendment. *Gilbert* v. *Dodge,* 130 Me., 417, 156 A., 891. That exception and the motion are properly before us.

The defendant objects to the amendment because he says the plaintiff could not properly change her action from trespass to case. There seems to be ample authority for such contention. *Sawyer* v. *Goodwin,* 34 Me., 419; *Lawry* v. *Lawry,* 88 Me., 482, 34 A., 273. But the plaintiff has not by her amendment so changed her cause of action. Confused though the pleadings are, the declaration still seems to be one of trespass quare clausum. What the plaintiff has done has been to change the substance of her claim to fit her cause of action. This she clearly had no right to do. The plaintiff could not sue for one thing and recover for another, and an amendment which would permit her to do so is improper. *Robinson* v. *Miller,* 37 Me., 312; *Nickerson* v. *Bradbury,* 88 Me., 593, 34 A., 521. See also *Wyman* v. *Kilgore,* 47 Me., 184; *Gilman* v. *Cate,* 56 N. H., 160, for amendment held allowable. An easement is an incorporeal right and something entirely different from the ownership of the fee. The amendment was inconsistent with the declaration and in effect set forth a new and distinct cause of action.

As the defendant's exception must be sustained, there is perhaps no object in discussing the motion. But we might suggest that unless the jury understood the issue raised by the pleadings a great deal better than does this court, it is difficult to see how they could have arrived at an intelligible decision.

Exception sustained.

ISAAC M. BOOTHBY ET AL. *vs.* CITY OF WESTBROOK ET AL.

Cumberland. Opinion, November 13, 1941.

Authority of a city to regulate the keeping of explosive and illuminating substances discussed. Application of the Fourteenth Amendment guaranteeing equal protection of the law to such regulatory ordinances. "Property" defined. Province of equity jurisdiction. Injunction.

The general rule is that equity will not intervene to prevent the enforcement of a criminal or regulatory ordinance providing a penalty for its violation even though it be unconstitutional. But equitable jurisdiction exists when the prevention of such enforcement is necessary effectually to safeguard and protect property rights and there is not a plain, adequate and complete remedy at law.

Property is more than the mere thing which a person owns. It includes the right to acquire, use and dispose of it without control or diminution save by the law of the land; and the Constitution protects these essential attributes of property.

If the enforcement of a statute or ordinance which is repugnant to the Fourteenth Amendment will deprive the owners of land of their right to dispose of it for lawful purposes, the threat to enforce the regulation constitutes a continuing unlawful restriction upon their property rights, and if the owners have no remedy at law as complete, practical and efficient as that which equity can afford, relief by injunction may be granted.

The City of Westbrook, under the general authority conferred upon cities and towns by P. L. 1939, Chap. 102, Sec. 2, had the right, as a proper exercise of its police power, to pass an ordinance regulating the keeping of explosive and illuminating substances of the general scope and tenor of the ordinance found here.

It is fundamental, however, that a regulatory ordinance passed pursuant to a general legislative grant of power must be reasonable and not arbitrary and operate uniformly on all persons carrying on the same business under the same conditions.

In the enactment of such regulation, proper classification may be made, the legislation confined to a certain class or classes, different rules prescribed in favor of or against a class and discriminatory restrictions made or privileges extended provided the partiality shown and the discrimination effected are reasonable and rest on substantial differences and distinctions which have a valid and real relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

The inhibition of the Fourteenth Amendment that no person shall be deprived of the equal protection of the law is designed to prevent any person or class

of persons being singled out as a special subject for discriminating or favoring legislation.

In the Westbrook ordinance, in so far as fire protection is concerned, which is the sole legitimate purpose for which the ordinance could be enacted, no real and valid distinction between the businesses prohibited and those permitted by the exemption clause is discoverable.

The exemption of owners of filling stations from the regulatory provisions of the Westbrook ordinance solely because they were operating and their stations were in existence when the ordinance went into effect is an arbitrary discrimination between persons, firms and corporations carrying on the same business under substantially the same conditions and upon grounds which bear no reasonable relation to the legitimate purposes of the law. Its effect is to invest the owners of existing filling stations with a monopoly in the business in the restricted territory.

The ordinance is not reasonable within the meaning of the enabling act in which lies authority for its passage, and its arbitrary discriminations violate the Fourteenth Amendment.

ON APPEAL.

Appeal by the plaintiff from the Supreme Judicial Court in Equity, Cumberland County. Suit in equity brought by the owners of real estate in the City of Westbrook to enjoin the enforcement of a local ordinance which, by prohibiting the keeping of explosives for sale within 300 feet of a school-house where a school is regularly maintained, restricts the use of their land for this purpose. The sitting justice hearing the cause dismissed the bill.

The Westbrook City Council on December 14, 1939, passed an ordinance, approved by the Mayor, providing in Section 1 that "no person, firm or corporation shall keep on deposit or in storage at any point within three hundred feet of a school house where a school is regularly maintained, any gasoline, gunpowder, explosive oils or other dangerous substances to be sold and delivered at that point." In Section 2, however, the ordinance provided that its provisions should "not apply to owners of filling stations that are now legally established and in operation."

The plaintiffs owned a parcel of land situated within 300 feet of a school-house where a school was and is regularly main-

tained. Previous to the passage of the ordinance they had agreed with the Sun Oil Company to sell the land to it.The contract of sale had a proviso that it might be rescinded by either party if the Oil Company were unable to secure the necessary permits to carry on a gasoline and oil vending business. Enforcement of the ordinance would have precluded the issuance of the necessary permits and nullified the prospective sale.

Appeal sustained. Case remanded for entry of decree granting an injunction as prayed for in the bill. The case fully appears in the opinion.

Verrill, Hale, Dana & Walker,

Brooks Whitehouse,

Donald W. Philbrick, for plaintiffs.

Grover Welch,

Wade L. Bridgham, for defendants.

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

STURGIS, C. J. This is a suit in equity brought by the owners of real estate in the City of Westbrook to enjoin the enforcement of a local ordinance which, prohibiting keeping explosives for sale within 300 feet of a school-house where a school is regularly maintained, restrains the use of their land for this purpose. The sitting justice hearing the cause dismissed the bill, and the complainants appeal.

On December 14, 1939, the Westbrook City Council passed an ordinance approved by the Mayor on December 15, 1939, which reads as follows:

> "Ordinance Relating to the Keeping or Selling of Gasoline, Coal oils, burning fluids, naptha, benzine and all other explosive and illuminating substances. Be it ordained by the Aldermen of the City of Westbrook, in City Council Assembled:

"Sec. 1. No person, firm or corporation shall keep on deposit or in storage at any point within three hundred feet of a school house, where a school is regularly maintained, any gasoline, gun-powder, explosive oils or other dangerous substances to be sold and delivered at said point.

"Sec. 2. This ordinance shall not apply to owners of filling stations that are now legally established and in operation.

"Sec. 3. Whoever violates any of the provisions of this ordinance shall be subject to a fine of not more than twenty dollars."

In the light of the text and the title of the ordinance there can be no doubt that the Westbrook City Council in passing it attempted to exercise the authority to make and enforce ordinances or by-laws regulating the keeping or transporting of explosives and illuminating substances which is conferred upon cities and towns by P. L. 1939, Chap. 192, Sec. 2. The ordinance purports to be a fire prevention regulation as there authorized. It is not a zoning ordinance promulgated pursuant to or in conformity with the requirements of the statutes of this state authorizing cities, towns and village corporations to enact zoning ordinances and by-laws. R. S., Chap. 5, Secs. 137-144, and acts amendatory thereof.

The appellants, owning a parcel of land at the corner of Main and Pleasant Streets in Westbrook directly across from and within 300 feet of the building in which the Westbrook High School long has been and now is regularly maintained, on November 13, 1939, and prior to the passage of this ordinance, agreed in writing to sell this property to the Sun Oil Company for $6,500, subject to the right of either party to rescind the contract if the buyer, or seller of it, was unable to secure the necessary permits to carry on a gasoline and oil vending business. On application, the Sun Oil Company was granted a permit to erect a filling station on the land it had

arranged to purchase, but on the next day this ordinance was passed. It is conceded that the action of the Westbrook City Council resulted from the protests of interested citizens, and a reading of the record leaves no doubt that the real purpose of the regulation was to prevent the erection and maintenance of the filling station for which the Sun Oil Company had received a permit.

The Sun Oil Company is ready and willing to carry out its contract and acquire and pay for the land it agreed to buy, but its right of recission remaining still in force, it asserts its intention to refuse to complete the purchase if it cannot obtain the permits it needs to carry on a filling station business including the privilege of selling gasoline. Inasmuch as it is conceded that the City of Westbrook and its officials intend to enforce the ordinance, if it is valid and remains in force, the issuance of the necessary permits is precluded and the contract of sale will be nullified.

The Westbrook ordinance is assailed on the ground that, in exempting only the "owners of filling stations that are now regularly established and in operation" from its prohibition and denying to all other persons, firms or corporations the same right or privilege, the regulation is unreasonable and unlawfully discriminatory, transcends the legislative authority conferred on the city and denies the appellants the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The City of Westbrook questions the jurisdiction of the court to grant equitable relief even if the ordinance is invalid, and through counsel contends that no property rights of the appellants are invaded or jeopardized, and they have an adequate remedy at law.

It is well settled that the general rule is that equity will not intervene to prevent the enforcement of a criminal or regulatory ordinance providing a penalty for its violation even though unconstitutional. But a distinction obtains and equitable jurisdiction exists in such cases when the prevention of such prosecutions is necessary to effectually safeguard and

protect property rights and there is not a plain, adequate and complete remedy at law. *Hygrade Provision Co.* v. *Sherman,* 266 U. S., 497, 45 S. Ct., 141, 69 L. Ed., 402; *Packard* v. *Banton,* 264, U. S., 140, 44 S. Ct., 257, 68 L. Ed., 596; *Traux* v. *Raich,* 239 U. S., 33, 36 S. Ct., 7, 60 L. Ed., 131, L. R. A. 1916D, 545; 28 Am. Jur., 372. See *Chapman* v. *City of Portland,* 131 Me., 242, 160 A., 913.

Property is more than the mere thing which a person owns. It includes the right to acquire, use and dispose of it without control or diminution save by the law of the land, and the Constitution protects these essential attributes of property. If the enforcement of a statute or ordinance which is repugnant to the Fourteenth Amendment will deprive the owners of land of their right to dispose of it for lawful purposes, the threat to enforce the regulation constitutes a continuing unlawful restriction upon the property rights, and if the owners have no remedy at law as complete, practical and efficient as that which equity can afford, relief by injunction may be granted. *Buchanan* v. *Warley,* 245 U. S., 60, 38 S. Ct., 16, 62 L. Ed., 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201; *Terrace* v. *Thompson,* 263 U. S., 197, 44 S. Ct., 15, 68 L. Ed., 255. In the case at bar, the appellants desire to sell their land for a lawful purpose and, on this record, are prevented from consummating and enforcing a valid contract of sale therefor only by the ordinance here in question and the threat of its enforcement. In the light of the broad principles laid down in the cases cited, we think it should be held that a property right of the appellants is directly affected by the ordinance, and if the same is invalid, its enforcement should be restrained.There is no plain, adequate and complete remedy at law.

The City of Westbrook under the general authority granted by the statute undoubtedly had the right to pass an ordinance of the general scope and tenor found here. Authorized, reasonable regulations, not unlawfully discriminatory, which prohibit keeping oil, gasoline, gunpowder and other explosive and inflammable, and therefore dangerous, substances for sale

near churches, hospitals, schools and other buildings are invariably sustained as a proper exercise of the police power. *Pierce Oil Corp.* v. *City of Hope,* 248 U. S., 498, 39 S. Ct., 172, 63 L. Ed., 381; *Klever Karpet Cleaners* v. *Chicago,* 323 Ill., 368, 154 N. E., 131, 49 A. L. R., 103; *Cecil* v. *Toenjes,* 210 Iowa, 407, 228 N. W., 874; *Service Oil Co.* v. *City of Marysville,* 117 Kan., 514, 231 P., 1031, 43 A. L. R., 854; *Storer* v. *Downey,* 215 Mass., 273, 102 N. E., 321; *Ahoskie* v. *Moye,* 200 N. C., 11, 156 S. E., 130; *Morgan* v. *Collingswood,* 104 N. J. L., 13, 139 A., 718; *McIntosh* v. *Johnson,* 211 N. Y., 265, 105 N. E., 414, L. R. A. 1915D, 603; *State* v. *Combs,* 129 Ohio State, 251, 194 N. E., 875; *Burough* v. *Flenner,* 286 Pa., 193, 133 A., 30; *State* v. *Fleming,* 129 Wash., 646, 225 P., 647, 34 A. L. R., 500; 24 Am. Jur., 636; McQuillin Mun. Corp., Vol. 3, Sec. 1098.

It is fundamental, however, that a regulatory ordinance passed pursuant to a general legislative grant of power must be reasonable and not arbitrary and operate uniformly on all persons carrying on the same business under the same conditions. In the enactment of such regulations, proper classification may be made, the legislation confined to a certain class or classes, different rules prescribed in favor of or against a class and discriminatory restrictions made or privileges extended, provided the partiality shown and the discriminations effected are reasonable and rest on substantial differences and distinctions which have a valid and real relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The inhibition of the Fourteenth Amendment that no person should be deprived of the equal protection of the law is designed to prevent any person or class of persons being singled out as a special subject for discriminating or favoring legislation. *Colgate* v. *Harvey,* 296 U. S., 404, 56 S. Ct., 252, 80 L. Ed., 299; *Royster Guano Co.* v. *Virginia,* 253 U. S., 412, 40 S. Ct., 560, 64 L. Ed., 989; *State* v. *King,* 135 Me., 5, 188 A., 775; *In re Milo Water Co.,* 128 Me., 531, 149 A., 299; *State* v. *Latham,* 115 Me., 176, 178, 98 A., 578,

L. R. A., 1917A, 480; *Dirkin* v. *Paper Company,* 110 Me., 374, 386, 86 A., 320, Ann. Cas., 1914D, 396.

Tested by these rules, the vices of the Westbrook ordinance are apparent. In its general provisions it prohibits the sale of the enumerated explosives and inflammable substances by any person, firm or corporation within the limits of the proscribed areas. It includes the druggist, the grocer, the dealer in hardware and the garage keeper as well as the owner of a filling station. It prohibits not only the keeping for sale of gasoline but also "gunpowder" and "explosive oils" and "other dangerous substances," commodities which are kept, handled and sold by all manner of merchants, and traders in all kinds of establishments and places of business. From this general class of dealers in explosives is "singled out as a special subject for favoring legislation" owners of existing filling stations, while all others are forbidden to carry on the same business in the same place regardless of whether they are beginners in the field or are already in business in establishments representing comparable investments and as well constructed and fortified against fire and explosion. In so far as fire prevention is concerned, which is the sole legitimate purpose for which the ordinance could be enacted and is authorized, no real and valid distinction between the businesses prohibited and those permitted by the exemption clause is discoverable. Whether carried on in an existing filling station, in a new one, or in any other properly constructed building, the explosive business is the same and the fire hazard as great. Allowing the owners of existing filling stations to continue to operate certainly does not promote fire prevention. Exempting such owners from the provisions of the regulation solely because they were operating and their stations were in existence when the ordinance went into effect is, we think, an arbitrary discrimination between persons, firms and corporations carrying on the same business under substantially the same conditions, and upon grounds which bear no reasonable or real relation to the legitimate purpose of the law. Its effect is to invest the owners of existing filling

stations with a monopoly in the explosive business in the designated territory. We are convinced the ordinance is not reasonable within the meaning of the enabling act in which lies authority for its passage. Its arbitrary discriminations violate the Fourteenth Amendment.

The clear weight of authority condemns ordinances and by-laws of the type found here for unreasonableness and unlawful discrimination. These rulings are based on the view that municipal laws which prohibit the carrying on of a certain business in a designated locality but provide that the legislation shall not apply to a similar business already established there foster and permit monopoly and classify for the purpose of regulation without any reasonable relation to the end in view. *Standard Oil Co.* v. *City of Charlottesville*, 42 F. (2d), 88; *Gamage* v. *Masonic Cemetery Ass'n.*, 31 F. (2d), 308; *Ex parte Dondero*, 19 Cal. App., 66, 124 P., 884; *Tugman* v. *City of Chicago*, 78 Ill., 405; *People* v. *Kaul*, 302 Ill., 317, 134 N. E., 740; *Weadock* v. *Judge*, 156 Mich., 376, 120 N. W., 991, 132 Am. St. Rep., 527; *Town of Clinton* v. *Standard Oil Co.*, 193 N. C., 432, 137 S. E., 183, 55 A. L. R., 252; *Mayor* v. *Thorne*, 7 *Paige* (N. Y.), 261; 19 R. C. L., 812.

We are aware that *Sammarco et al.* v. *Boysa*, 193 Wis., 642, 215 N. W., 446, 55 A. L. R., 370, is in direct conflict with the authorities just cited. Although the case arrests attention, neither reason nor authority there stated is convincing warrant for departure from the majority rule. No more controlling are cases which sustain the validity of the tolerance of the continued existence of non-conforming structures and uses in zoning laws. Such legislation, although enacted in the exercise of the police power, is markedly different in principle and purpose from regulations of the type under consideration, and is governed by entirely different rules of law. It is the trend of judicial opinion that this distinction is real and must be recognized. *Standard Oil Co.* v. *City of Charlottesville*, supra; *Gamage* v. *Masonic Cemetery Ass'n.*, supra; *City of Aurora* v. *Burns*, 319 Ill., 84-98, 149 N. E., 784; *Elizabeth City* v. *Ayd-*

lett, 201 N. C., 602, 161 S. E., 78. That this distinction should be observed in this jurisdiction is patent. The exemption of existing non-conforming structures and uses from the provisions of zoning ordinances and by-laws is expressly sanctioned by the zoning statute. R. S. 1930, Chap. 5, Secs. 137-144, and acts amendatory thereof, *supra*. There is no authority for such exemption in the fire prevention statute. P. L. 1939, Chap. 192, Sec. 2. The failure to provide for the exercise of that right, we must assume, was intentional. This court cannot supply the omission by resort to construction. Under these statutes there is no warrant by analogy or otherwise for reading into a fire prevention regulation the special right to exempt non-conforming structures and uses given only to municipalities by the zoning law.

The Westbrook ordinance being void, its enforcement must be enjoined. The appeal is sustained and the case remanded to the court below for entry of a decree granting the injunctive relief to which the appellants are entitled.

So ordered.

WORSTER, J., dissents.

ABRAHAM PODOLSKY *vs.* PHILCO SHOE CORPORATION.

Penobscot. Opinion, November 19, 1941.

Finality of jury verdict on a question of fact.

In action for breach of contract, the questions of whether an employee was unjustly discharged, and, if so, the amount of the damages suffered, are questions of fact for the jury under appropriate instructions from the Court.

No exceptions having been presented, it is to be assumed that the jury were correctly instructed.

MOTION FOR NEW TRIAL BY DEFENDANT.

Action by a discharged employee to recover damages for an alleged breach of contract of employment by the defendant.

The jury returned a verdict for the plaintiff and assessed damages. Motion overruled. Case fully appears in the opinion.

PER CURIAM.

On motion. In this action the plaintiff seeks to recover damages for an alleged breach by the defendant of a written contract, wherein the plaintiff was employed by the defendant for a specified time. It is the contention of the plaintiff that he was discharged by the defendant without just cause, before the expiration of the time for which he had been employed; whereas the defendant claims, in effect and substance, that it justifiably discharged the plaintiff for incompetency.

The jury returned a verdict for the plaintiff in the sum of $1,350, and the defendant has brought the matter here on a general motion for a new trial, in the usual form.

The execution of the contract is not in dispute. Whether or not the plaintiff was discharged by the defendant without just cause, and if so, the amount of damages thereby suffered by the plaintiff, were questions of fact for the jury, under appropriate instructions from the court. Since no exceptions have been presented, it is to be assumed that the jury were correctly instructed.

And, after a careful consideration of the case, we cannot say that the verdict of the jury is manifestly wrong.

The mandate is

Motion overruled.

LEWIS G. TEWKSBURY *vs.* B. LAKE NOYES.

Hancock. Opinion, December 2, 1941.

Specific performance of oral contract for sale of corporation stock. Laches. Statute of Frauds.

On the issue raised by the denial of the defendant of the allegations of the bill, the question before the sitting justice was one of fact, and it is well settled that on such an issue his finding will not be reversed unless the party who appeals shows that it is manifestly wrong.

Specific performance was a proper remedy for breach of an oral contract for the sale of stock of a corporation when the contract was one whereby the

plaintiff was to become owner of a half interest in the business, which placed him in an advantageous position with respect to management and control and the stock had no market value, its true worth depending almost wholly on the success of the management of the business.

Laches cannot be predicated on passage of time alone. In addition there must be prejudice to the adverse party because of the delay, and for the delay there must be no reasonable excuse.

The statute of frauds is not a bar to the enforcement of an oral contract for the sale of corporation stock when numerous payments have been made on account of the purchase price and the receipts given for these payments, taken together, are sufficient memoranda to satisfy the statute.

A contract for the sale of one-half of the capital stock of a corporation, when payments of the same are to be made over such period of time as the buyer might require to pay the price in full, is properly construed to mean that the buyer is entitled to one-half of the stock issued and outstanding at the time when he elects to take delivery of the same.

APPEAL BY DEFENDANT.

Bill in equity by the plaintiff for the specific performance of an alleged contract for the sale to him of one-half of the stock of the Stonington Opera Company. The bill alleged that the defendant, acting through his son, entered into an oral contract with the plaintiff in October, 1927, under the terms of which the defendant agreed to sell to the plaintiff fifty per cent of the stock of the opera company, the payment for the same to be made over such a period of time as the plaintiff might require to pay the price in full. Payments were made by the plaintiff from time to time, in some instances payment being made by application of dividends on the stock received by him. The defendant claimed that specific performance was not a proper remedy; also that plaintiff was guilty of laches and further that suit was barred by the statute of frauds. The presiding justice entered a decree sustaining the bill. Case remanded to the sitting justice to determine the exact number of shares issued and outstanding and for the entry of a decree directing the defendant to assign to the plaintiff one-half of such shares on the payment of $3,611.96 with interest from February 3, 1941, to the date of payment,

less the plaintiff's costs. The case fully appears in the opinion.

Abraham M. Rudman,

Abraham Stern, for plaintiff.

William B. Blaisdell,

Peter Boiola, for defendant.

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

THAXTER, J. This bill in equity for specific performance of an alleged contract was heard by a single justice who entered a decree sustaining the bill and granting the relief prayed for. The defendant filed an appeal which is now before us.

The substance of the bill is that the defendant acting through his son, G. Howard Noyes as agent, entered into an oral contract with the plaintiff in October, 1927, under the terms of which the defendant agreed to sell to the plaintiff fifty per cent of the capital stock of the Stonington Opera Company, then represented by forty shares, for a price of $4,000.00; that payments were to be made in installments "over such a period of time as the plaintiff might require to pay said price in full," and interest was to be paid at six per cent; that April 1, 1928, one-half the dividends on the stock were paid to the plaintiff, in part by a check and in part by a credit, on account of the purchase price; that on October 9, 1928, the plaintiff paid to the defendant, through his agent, G. H. Noyes, $900.00, for which he received a receipt, the notation on which read "to date on a/c purchase half interest in Stonington Opera Company. Bal. due $3100.00"; that on January 18, 1929, the plaintiff paid $100.00 on account of interest, receiving a receipt from G. H. Noyes as agent for the defendant, the notation on which read "on a/c Opera Co. interests, making $1000.00 pd. on $4000.00 half interest. Interest paid to date"; that on February 10, 1932, there was a further payment of $540.00 for which a receipt was given by the agent with the notation, "in full for

interest on balance due for one-half interest up to Jany. 1, 1932. a/c now stands with $3000.00 due on principal."; that on June 4, 1935, there was a further payment by check of $900.00, the notation on which reads, "For interest and payment on principal on a/c purchase of half interest in stock of Stonington Opera Company," which check was endorsed "B. L. Noyes by G. H. Noyes." The bill then goes on to allege that the stock of the Stonington Opera Company was closely held and not listed and that the plaintiff has asked for the delivery of the stock in accordance with the agreement, on payment of the balance due, but that the defendant has refused to deliver the same.

The answer contains a plea setting up as a defense, firstly, laches, and secondly, the statute of frauds, the laches being based on the fact that the son, G. Howard Noyes, died in 1939, and due to that and to the delay by the plaintiff in bringing his bill, the defendant has been placed at a disadvantage in presenting his case. The answer to the merits denies the allegations of the bill except that the defendant refused to transfer the stock, such refusal being justified on the ground that he never made the agreement with the plaintiff as alleged and that he never authorized any person or persons to make it.

The sitting justice found that the allegations of the bill were true. He specifically called attention to the payment of one-half of the dividends to the plaintiff and to the payments which were made to the defendant on account of the purchase price; and it is apparent that, in the light of the documentary proof and the defendant's own testimony, he took very little stock in the claim of the defendant that he knew nothing about the agreement until after his son had died. It appeared that certain additional stock had been issued since the original agreement had been made, and the decree, which overruled the plea, ordered the defendant, on the payment of the balance due, which was found to be $3,611.96, to turn over to the plaintiff forty-eight and one-half shares, being one-half the total amount of stock found to be issued and outstanding.

On the issue raised by the denial of the defendant of the allegations of the bill, the question before the sitting justice was one of fact, and it is well settled that on such an issue his finding will not be reversed unless the party who appeals shows that it is manifestly wrong. *Androscoggin County Savings Bank* v. *Tracy*, 115 Me., 433, 99 A., 257; *Tebbetts* v. *Tebbetts*, 124 Me., 262, 127 A., 720; *Meader* v. *Cummings*, 131 Me., 445, 163 A., 792.

The plaintiff testified that from 1923 to 1927 he was in the business of exhibiting moving pictures in Stonington and that during the same period the Stonington Opera Company, of which the defendant was a stockholder, was displaying pictures in competition with the plaintiff. He testifies that in September, 1927, he entered into an oral agreement with George H. Noyes, who was acting as agent for his father. The essential terms of the agreement are stated by the plaintiff as follows:

> "A. We agreed, orally, that I should have fifty per cent of the stock of the Stonington Opera Company and that he and I should manage the affairs of the company; that I should close up my theater that I was operating personally and they would allow me four hundred dollars for closing that theater, to offset some liabilities which I had in the building, and that we start operating as partners in the corporation, starting October 1st, 1927."

Pursuant to this arrangement the plaintiff, according to his testimony, closed his own theater, was paid $400.00 in accordance with the agreement, and October 1, 1927, became general manager of the theater run by the Stonington Opera Company. George H. Noyes had charge of the mechanical operation and the finances, and both he and the plaintiff were paid $50.00 per month as salary, which was cut during the years when business was poor. The plaintiff says that B. Lake Noyes took part in at least some of the conferences when theater problems were discussed. G. Howard Noyes died before the filing

of the present bill and the defendant complains that he is at a great disadvantage in presenting his defense because his son is not here to testify as to his dealings with the plaintiff. There is, however, no vagueness in the plaintiff's testimony and there is substantial corroboration of it in the exhibits which have been offered in evidence. These show that the plaintiff over a period of years received one-half of the dividends declared by the corporation. One is a statement showing the application of one-half of the dividends of $300.00 declared for the first quarter of 1928. This shows a total dividend of $300.00 and the "proportion to L. G. Tewksbury $150.00," a deduction of $108.00 for interest on $3,600.00 paid the defendant, and a check to Tewksbury of $42.00 to settle the balance. Another exhibit is a receipt to the plaintiff dated October 9, 1928, showing $900.00 "to date on a/c purchase half interest in stock of Stonington Opera Co. Bal. due $3100.00." This receipt is signed "G. Howard Noyes." January 18, 1929, there is another receipt for $100.00 signed "B. L. Noyes, M. D. G. H. Noyes." This receipt bears the legend, "on a/c Opera Co. interests, making $1000.00 pd. on $4000.00 half interest. Interest pd. to date." February 10, 1932, there is another receipt for $540.00 for interest "on balance due for ½ interest up to Jany. 1, 1932, a/c now stands with 3000.00 due on principal." This is signed "B. L. Noyes, M. D. G. H. Noyes." June 4, 1935, the plaintiff drew a check for $900.00 to the order of the defendant bearing the notation that it was "For interest and payment on principal on a/c purchase of half interest in stock of Stonington Opera Co." This was endorsed "B. L. Noyes by G. H. Noyes" and deposited to the defendant's personal account.

All of this evidence substantiates the claim of the plaintiff with respect to the substance of his contract with G. Howard Noyes, the son. Had G. Howard Noyes been alive at the time of the trial, would he have repudiated an agreement which he had repeatedly acknowledged over his own signature?

The next claim of the defendant is that the son, if he assumed to make such an agreement, had no authority to do so.

The defendant testified that his son had free access to his books and had done everything he wanted to with them over a long period of years, in fact "for years before he ever went to the Opera Company." He drew money from his father's checking account and deposited money to it. The following testimony indicates clearly the extent of his authority.

"Q. As a matter of fact, you trusted your son explicitly, didn't you?

"A. Yes.

"Q. And you had given him unlimited authority to do about as he pleased in handling the affairs?

"A. In the managing of that thing and handling it that way, yes."

The record indicates not only that the defendant gave his son authority to act for him generally but that with respect to the theater transactions he knew what his son had done and accepted the benefits of the agreement which his son had made.

From the records of a directors' meeting of the Stonington Opera Company, attested by Estelle R. Noyes, the wife of the defendant, we find the following: "Treasurer, B. L. Noyes announced his present willingness, as he had offered several times before, to transfer to L. Tewksbury his full interest rights he had agreed upon 12 years ago per a verbal understanding made by him, in the presence of G. Howard Noyes to Tewksbury." The defendant admits that he was present at the meeting and that the record as kept by his wife is correct with the exception of the words, "in the presence of G. Howard Noyes to Tewksbury." We have, therefore, a clear admission here by the defendant that there had been a verbal agreement made by him twelve years before for the transfer of certain stock in the Opera Company to the plaintiff. He admits knowing that dividends were being paid to himself and to the plaintiff on the stock. Why, it may be asked, would he assent to the payment of such dividends if the plaintiff was not regarded as a stockholder? The defendant admits that at one time his son deliv-

ered to him a check of the Stonington Opera Company payable to L. G. Tewksbury and endorsed to the defendant and that this check was credited to the defendant's personal account and that in his personal check book there was an entry with respect to it, "L. G. Tewksbury, int. $146.50." What could the interest have been except on the loan which was for the balance of the purchase price of the stock? He admits that this entry is in his own handwriting with the exception of the word "interest." But he offers no explanation of why Tewksbury was paying him money if it was not for interest. It is incredible that payments should have been made by the plaintiff from time to time, one of $900.00, which were deposited to the defendant's personal account and that he knew nothing about them or why they were made. We do not think that further discussion of the evidence on this point is necessary. It amply supports the finding of the sitting justice.

Counsel for the defendant evidently recognized that some explanation of the dealings between the plaintiff and the defendant's son was required. And what do they say? They say that the plaintiff and the son joined together to perpetrate a fraud on the defendant. Repeatedly does the father through his counsel in their written argument charge his son with fraud. The inference is inescapable, say counsel, that the plaintiff "and George Howard Noyes were perpetrating a fraud on both the Stonington Opera Company and Dr. Noyes." We fail to find a shred of evidence to support this accusation. The father bemoans the fact that his son is dead and that he does not have his testimony as to the arrangement made with the plaintiff. On the other hand, the son is not here to refute the charge of fraud which the father now casts against him.

It seems clear to us that the contract was made as testified to by the plaintiff, that it was not vague or indefinite, that the father had repeatedly held the son out as his agent possessing wide authority, and that, in any event, the defendant is bound by the agreement, the benefits of which he has knowingly accepted. *City of Belfast* v. *Belfast Water Co.*, 115 Me., 234, 98

A., 738, L. R. A., 1917B, 908; *Wilkins* v. *Waldo Lumber Co.*, 130 Me., 5, 153 A., 191.

The defendant contends that specific performance is not a proper remedy for the breach of such an agreement as is set out in the bill. It is, however, hard to see how the plaintiff's loss could be compensated for by money damages. The contract was one whereby the plaintiff was to become the owner of a half interest in the business, which placed him in an advantageous position with respect to management and control. The stock had no market value and its true worth depended almost altogether on the success of its management. Under these circumstances, the law is clear that specific performance may be enforced. *General Securities Corporation* v. *Welton*, 223 Ala., 299, 135 So., 729; *Rimes* v. *Rimes*, 152 Ga., 721, 111 S. E., 34, 22 A. L. R., 1030. See *Draper* v. *Stone*, 71 Me., 175.

The sitting justice properly decided that there was no laches which would bar the relief sought by the plaintiff. "Laches cannot be predicated on passage of time alone." *Elston* v. *Elston & Co.*, 131 Me., 149, 156, 159 A., 731, 734. In addition, there must be prejudice to the adverse party because of the delay, and for the delay there must be no reasonable excuse. *Leathers* v. *Stewart*, 108 Me., 96, 101, 79 A., 16, Ann. Cases, 1913B, 366; *Duryea* v. *Elkhorn Coal & Coke Corp.*, 123 Me., 482, 124 A., 206; 10 R. C. L., 396, 402. There is no evidence that the plaintiff delayed bringing his bill because he was anticipating the death of the defendant's son, and from the evidence, as we read it, that unfortunate event worked to the plaintiff's rather than to the defendant's disadvantage. The ruling of the sitting justice was fully warranted.

The statute of frauds is not a bar. Numerous payments were made on account of the purchase price, and the receipts given for these, taken together, are sufficient memoranda to satisfy the statute. *Dean* v. *W. S. Given Co.*, 123 Me., 90, 121 A., 644; 27 C. J., 257-258.

The sitting justice correctly construed the contract as one for the sale of one-half the capital stock of the corporation, and

the fact that more shares were issued subsequent to the date of the contract is immaterial under the facts of this particular case. The plaintiff was entitled to one-half of the stock issued and outstanding at the time that he should elect to take delivery of the same. The sitting justice found that the plaintiff was entitled to 48½ shares on the payment of $3,611.96. The defendant owned or had the right to sell 49 shares, and possibly more, as substantially all the remaining shares were held by members of his family. The evidence is very confusing as to the number of shares outstanding. The parties at one time stipulated that there were 94, but this was apparently an error. The sitting justice found that there were 97. The de-defendant claims 96-11/100 and the stock record book would seem to support this figure. Whatever the figure may be, the plaintiff is entitled to receive from the defendant an assignment calling for the issuance to him of a certificate representing one-half the total stock issued and outstanding.

The appeal should be sustained and the case remanded to the sitting justice to determine the exact number of shares issued and outstanding, and for the entry of a decree directing the defendant to assign to the plaintiff one-half of such shares on the payment of $3,611.96 with interest from February 3, 1941, to the date of payment, less the plaintiff's costs.

So ordered.

HARRY STERN, PETITIONER *vs.* FRASER PAPER, LIMITED.

Penobscot. Opinion, December 4, 1941.

PER CURIAM.

This is a Petition to rectify alleged errors in the Opinion in the case of *Harry Stern* v. *Fraser Paper, Limited* argued before the Law Court at the June Term, 1941, and appearing in 138 Me., 98, and 22 A., 2d, 129.

A careful examination of the original case discloses no error

of law or fact in the Opinion rendered which requires correction.

Petition dismissed.
Motion denied.

MARCIA DAVIS *vs.* FRED SIMPSON.

MARCIA DAVIS *vs.* FRED SIMPSON.

Knox. Opinion, December 5, 1941.

Liability and rights of an unlicensed driver of an automobile. Contributory negligence a question of fact.

The right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute provided this disobedience in no way contributed to the injury.

An unlicensed operator of a motor vehicle is not a trespasser on the highway except as to municipalities, is entitled while thereon to observance of due care on the part of other travelers and may recover for injuries proximately caused by the negligent acts of another (not a municipality) unless his violation of law is a proximate cause of the accident; though such violation is prima facie evidence of negligence, which may be overcome by other evidence.

There is no governing distinction between the operation of a motor vehicle by a learner over fifteen years of age when accompanied by a licensed operator and operation by one not old enough, under the statute, to acquire a license to drive.

On all questions of fact, the decision of referees is final where their findings are supported by the evidence.

Whether or not the admitted violation of law in the instant case was a proximate cause of the accident was a practical question to be determined by the referees, as also were all facts bearing upon the question of contributory negligence. On the record their findings were justified.

ON EXCEPTIONS.

On exceptions by the defendant in each case to the acceptance of the report of the referees. Action for damages resulting from collision between an automobile driven by the plaintiff's daughter who was unlicensed to drive, and the automobile driven by the defendant. The plaintiff's daughter, fourteen years old, was driving accompanied by her mother who

was licensed. The daughter, though too young for a license was, however, considered to be a competent driver. The collision occurred at an intersection. Testimony as to who was to blame for the accident was conflicting. The cases were heard by referees who in each case decided that the plaintiff was entitled to judgment. Exceptions overruled in both cases. The case fully appears in the opinion.

Frank A. Tirrell, Jr., for plaintiff.

Zelma M. Dwinal, for defendant.

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

HUDSON, J. These cases involving an automobile collision at a street intersection in the town of Camden were heard by referees who reported that in each the plaintiff was entitled to judgment. Exceptions were taken to the acceptance of the reports. Presented are two questions: viz., whether the plaintiff had the status of a trespasser at the time of the accident and whether she was guilty of contributory negligence.

The plaintiff's unlicensed daughter, fourteen years old, was driving, accompanied by her mother who was licensed. R. S. 1930, Chap. 29, Sec. 39, provides:

> "No person shall operate a motor vehicle upon any way in this state unless licensed according to the provisions of this chapter; but the provisions of this section shall not prevent the operation of a motor vehicle by an unlicensed person, not less than fifteen years of age, if riding beside a licensed operator in said vehicle for the purpose of becoming familiar with the use and handling of a motor vehicle preparatory to taking out license for driving; and provided, further, that such unlicensed person has not theretofore had a license revoked, suspended, or finally refused."

Sec. 33 of said Chap. 29, as amended by Chap. 46 of the Public Laws of 1937, reads in part:

"Before the license is granted, an applicant shall be required to pass such physical examination and such examination by actual demonstration or otherwise as to his qualifications to operate a motor vehicle as the said secretary shall require; provided said secretary may waive such examinations in the case of applicants who have been duly licensed by this state to operate a motor vehicle during any one of the 3 preceding calendar years; and no license shall be issued until the said secretary is satisfied that the applicant is a proper person to receive it. No license shall be issued to any person under 15 years of age."

The plaintiff's daughter had not arrived at the age when she could lawfully learn to drive, but nevertheless she had been driving for over a year and was considered by her father, who ran a garage, and by her mother as well, to be a competent and experienced driver. There was no evidence to the contrary. But, at the time, she was not learning to drive, and consequently was acting in violation of law. It is not contended that she was the agent or servant of the plaintiff.

FIRST EXCEPTION. Was she a trespasser so that the duty of others lawfully on the highway, both to her and her mother, the plaintiff, was simply "to refrain from wilful and wanton injury"? The precise point seems not to have been determined in this state, but that one who operates *an unregistered motor vehicle* on the highway is not a trespasser was determined in *Cobb* v. *Power & Light Company,* 117 Me., 455, 104 A., 844. In the recent case of *Elliott* v. *Montgomery,* 135 Me., 372, 197 A., 322, this court, on page 375, quoted as follows from the opinion in the Cobb case:

"Such violation (of the registration statute) may, in certain cases be evidence of negligence but it is not conclusive. The application of this governing rule to the case at bar is obvious. The non-registration had no causal connection with the accident whatever. It no more contrib-

uted to the collision in this case than did the color of the car."

Thus, it is settled law in this jurisdiction that one operating an unregistered motor vehicle is not a trespasser and may recover for injuries proximately caused by negligent acts of another (not a municipality), unless his violation of law is a proximate cause of the accident, but such violation is prima facie evidence of negligence. ". . . the right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobeyance in no way contributed to the injury. He is not placed outside the pale of the law merely because he was committing a misdemeanor. That would be a wrong to the public, but not to the other party in the civil action." *Cobb* v. *Power & Light Company,* supra, on page 462, 104 A., 847.

In the Cobb case, *supra,* decisions from other states are cited, among which particularly is *Dudley* v. *Northampton Street Railway,* 202 Mass., 443, 89 N. E., 25, 23 L. R. A. (N. S.), 561, holding differently. Distinguished are *McCarthy* v. *Inhabitants of Town of Leeds,* 115 Me., 134, 98 A., 72, and *McCarthy, Adm'r* v. *Inhabitants of Leeds,* 116 Me., 275, 101 A., 448, L. R. A., 1918D, 671, both town cases for recovery of damages on account of defects in highways, where it was held that such were not maintainable, because they were statutory actions, and the rights of the traveling public and the liability of the municipality were limited.

The doctrine of the McCarthy cases, *supra,* is extended to the operation of an automobile on the highways *by an unlicensed operator* in *Blanchard* v. *Portland,* 120 Me., 142, 113 A., 18, where it is stated on page 145:

"It must follow that the highways of the State are closed alike to unregistered motor vehicles and to unlicensed operators. . . . in actions against towns to enforce a statutory liability for defects in the highways, it is not a question of causal connection in either case between the

violation of the statute and the happening of the accident; the unregistered car and the unlicensed operator are alike expressly forbidden by the statute to pass along the highway."

This court does not follow the Massachusetts decisions in holding "an unregistered car a trespasser and an outlaw, having no rights which even a negligent party is bound to respect, and to whose occupants no duty is owed by the traveling public except to refrain from wilful and wanton injury." *Cobb* v. *Power & Light Company,* supra, on page 458, 104 A., 845.

Note is taken that in the Cobb case mention is made of *Bourne* v. *Whitman,* 209 Mass., 155, 171, 95 N. E., 404, 35 L. R. A. (N. S.), 701, "where it was held that an operator who has violated the statute which provides that 'no person shall operate an automobile . . . unless specially licensed' etc., may recover in an action of tort, his unlawful act being regarded as punishable under another section of the statute, but not as rendering him a trespasser on the highway." *Cobb* v. *Power & Light Company,* supra, on page 459.

It would appear that there is at least an inferential dictum in the Cobb case, *supra,* that an unlicensed operator is not a trespasser on the highway except as to municipalities, and so is entitled while thereon to observance of due care on the part of other travelers.

We see no valid distinction between the case of an unregistered vehicle and an unlicensed operator which would justify holding the latter a trespasser and the former not. These statutes seek the same end, safety of travelers upon the highways, and should be attended, when violated, with like legal consequences. The violator of the license statute should not be held entitled to a less degree of care upon the part of other travelers than the violator of the registration statute.

The weight of authority it would seem is in accord with this view. In Sec. 141, 5 Am. Jur., it is stated on page 586, 104 A., 846:

"The fact that the operator of an automobile has no

> operator's license, as required by statute, does not, according to the majority view, bar recovery for an injury to him through the negligence of another where the lack of such license has no causal connection with the injury. . . . Even in Massachusetts, where the owner or operator of the unlicensed automobile cannot recover, the operator who has no license is not precluded from recovery by that fact alone; at least one who has employed an unlicensed person to operate the car is not precluded from recovery."

In Huddy, Encyclopedia of Automobile Law, 9th edition, it is stated in Vols. 1-2, Sec. 249, on page 482:

> "The general rule is that the non-registration is not a proximate cause of the injury and does not affect the right of recovery, but a contrary rule is adopted in Massachusetts and a few other States. The situation with reference to an unlicensed chauffeur is analogous, and it is to be expected that the courts will hold that the failure to procure a license will not preclude a recovery for injuries sustained while driving a motor vehicle. The courts so hold, as far as the statutes are similar."

Point is made by the defendant that there is a governing distinction between the operation of a motor vehicle by a learner over fifteen when accompanied by a licensed operator and operation by one not old enough under the statute to learn. But we do not see it. In each case it is a violation of law and each is governed by the general rule that violation of law simply raises a presumption of negligence which may be overcome by other evidence.

We are aware that in some jurisdictions it has been held that statutes prohibiting the operation of motor vehicles by children under a certain age constitute a legislative declaration that such are incompetent to drive on the public highways. We do not think our statute goes to that extent. As a matter of fact, it cannot be denied that the fifteenth birthday does not spell the difference between competence and incompetence.

One under fifteen, due to instruction, experience, and an automobile sense, may in fact be more competent than one over that age. Rather than declare the under-age operator a trespasser and "an outlaw" on the highway, we prefer to burden him only with the "presumption of negligence," as above stated, and then let the triers of facts determine whether the evidence in the case overcomes the presumption. As stated in *Tibbetts* v. *Harbach,* 135 Me., 397, 198 A., 610, on page 403:

> "In the last analysis, the violation is merely evidence to be considered with all other attending facts in determining whether the disobedient driver exercised due care in the operation of his vehicle under the circumstances."

In the instant cases the referees must have found that the admitted violation of the law was not a proximate cause of the accident. That was a factual question for them and in our judgment their finding is justified by the record.

Truly, when the owner of an automobile allows an inexperienced and unlicensed person to drive his automobile negligently in his presence and under his control, the owner is liable in damages proximately resulting as if it had been his own negligence. *Kelley* v. *Thibodeau* and *Kelley* v. *Same,* 120 Me., 402, 115 A., 162. But on the record in these cases, the referees would have been justified in finding, and no doubt did find, that the driver was competent and experienced. The defendant takes nothing under his first exception.

SECOND EXCEPTION. Was there contributory negligence? On the day of the accident, plaintiff and her daughter were on their way to a picnic, the daughter driving and sitting by the side of her mother, who was a licensed operator. The mother testified that she was not exercising control over her daughter's driving "because she knew how to drive. I didn't need to," and was permitting her to operate the automobile "in her own way."

They were proceeding easterly on Elm Street, which crosses Park Street, on which the defendant was traveling southerly.

The plaintiff's automobile had the right of way and yet its driver was duty bound to proceed with due care under the then attending circumstances. *Kimball* v. *Bauckman,* 131 Me., 14, 18, 158 A., 694; *Petersen* v. *Flaherty,* 128 Me., 261, 263, 147 A., 39; *Fitts* v. *Marquis,* 127 Me., 75, 140 A., 999.

On the westerly side of Park Street, a short distance northerly of the intersection, there was a stop sign. One's vision of Park Street for a considerable distance on his approach from Elm Street is only partly obstructed, not by a building there in the junction of the streets but by an embankment. The daughter testified that first she looked to the right and then to the left and did not see the approaching car of the defendant until she was within about two car lengths from the intersection.

The plaintiff mother testified ". . . I looked to the right on my side of the car to see if another car was approaching from that direction, and just as I turned to the left to look on the other side Leatrice started to scream and I saw that this car was coming from the left and we just smashed together." Both testified that their car was proceeding from twenty to twenty-five miles per hour, and that when the defendant's car was seen, it was from three to four car lengths northerly of the intersection and one car length northerly of the stop sign.

Whether the defendant stopped at the sign was in square conflict. The defendant claimed he did, but this was stoutly denied by the plaintiff and her daughter. There was testimony by a defense witness that after the defendant's automobile came to rest it was in low gear. However, the referees might well have considered it exceedingly improbable that, if the defendant had stopped at the sign, the collision would have happened, since the distance from the stop sign to the point of contact was so short and the possibility of stopping the defendant's car, starting from the stop sign, so easy of accomplishment. Apparently the referees found that the defendant did not stop. Defendant's vehicle, when first seen by

the plaintiff and her daughter, as above stated, was northerly of the stop sign, and they had a right to consider that the defendant would observe the law as to stopping, which would give the plaintiff's automobile time for safe entrance into the intersection. One "may assume, at all events, until the contrary appears, that approaching automobiles will be driven carefully. He is not bound to anticipate negligence on the part of their drivers." *Dill* v. *Androscoggin & Kennebec Railway Co.*, 126 Me., 1, on page 3, and cases there cited, 140 A., 909.

Whether the defendant's car was stopped at the signal or not was a question of fact for determination by the referees, as well as other facts bearing upon the question of contributory negligence. "In the reference of cases by rule of court, the decision of the referee upon all fact questions, where findings are supported by any evidence, is final." *Brunswick Coal & Lumber Co.* v. *Grows*, 134 Me., 293, 295, 186 A., 705, 706; *Benson* v. *Town of Newfield*, 136 Me., 23, 27, 1 A., 2d, 227. The burden upon the defendant to show there was no such evidence has not been sustained.

The entry will be,

Exceptions overruled in both cases.

ELLAINE DROUIN PRO AMI

vs.

ELLIS C. SNODGRASS COMPANY ET AL.

Cumberland. Opinion, December 12, 1941.

Workmen's Compensation.

When the decision of the Industrial Accident Commission is against the petitioner, the finding of facts are open to review.

Under the Workmen's Compensation Act, if death results from a personal injury to an employee received by accident arising out of and in the course of his employment, his children are conclusively presumed to be wholly dependent upon him for support if within Clause c, Par. VIII, Sec. 2, Chap. 55, R. S. as amended by Sec. 4, Chap. 276, P. L. 1939.

If a child, as defined by the statute, is living apart from the parent and the state of the child when the employed parent met with his accident is that of actual dependency in any way, the child is presumed to be wholly dependent.

The mere reception of assistance in the form of contributions or otherwise does not of itself create dependency under the statute. The controlling test is whether the assistance was relied upon by the claimant for his or her reasonable means of support and suitable to his or her position in life.

The term "actually dependent" means dependent in fact.

The burden of proving actual dependency in any way upon the parent at the time of an accident to him rests upon the claimant.

In the instant case actual dependency was not sustained by the evidence, which merely showed that the deceased employee had made small annual contributions in the form of gifts in or near the holiday season to his daughter through her grandmother and for a time had defrayed her expenses in a convent. The finding of the Industrial Accident Commission in this regard was not error.

A father is bound by law to support his minor children but dependency as known to the Workmen's Compensation laws is something different from the right to support or the duty of a parent to render it.

In the absence of express statutory authority therefor, a finding of dependency cannot rest on proof alone of the relation of parent and child but there must be some evidence of a reasonable probability and expectation that the obligation of the parent will be fulfilled.

Inasmuch as the legal liability of the deceased employee to support his minor child and the probability that he would fulfil this obligation apparently was not considered by the Industrial Accident Commission in the instant case and no evidence upon this issue was taken at the hearing, the case should be recommitted for further proceedings.

APPEAL BY THE PETITIONER FROM DECREE OF A JUSTICE OF THE SUPERIOR COURT AFFIRMING DECISION OF THE INDUSTRIAL ACCIDENT COMMISSION.

Action by the minor daughter of a deceased employee of the defendant for compensation under the provisions of the Workmen's Compensation laws. The father of the petitioner was injured in an accident arising out of and in the course of his employment and death immediately followed. The petitioner had lived since early infancy with her grandparents in Canada. Her father sent small amounts of money annually to the grandparents and at one time had paid for the maintenance of his daughter in a convent. The Commission concluded that the

daughter was not actually dependent upon her father for support at the time of the accident within the meaning of the provisions of the Workmen's Compensation Act and not entitled to compensation.

Appeal sustained. Decree of sitting justice reversed. Case recommitted for further proceedings. Case fully appears in the opinion.

Jerome G. Davian,

F. Harold Dubord, for plaintiff.

No attorney representing defendants on appeal.

Warren E. Belanger, for alleged dependent widow.

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

STURGIS, C. J. This is an appeal from the decree of a justice of the Superior Court affirming the decision of the Industrial Accident Commission.

It appears from stipulations made at the hearing that Rosaire Drouin formerly of Waterville was injured on the twenty-fifth day of April, 1940, in an accident arising out of and in the course of his employment by the defendant, the Ellis C. Snodgrass Company, and death followed immediately. He was survived by a widow, Yvonne Drouin, and a stepson, with both of whom he was living, and by a daughter, Ellaine Drouin, about fourteen years old, who was born of a former deceased wife and had lived since early infancy with the paternal grandparents in Canada. This girl, by her next friend, is the petitioner and appellant in this proceeding.

The Industrial Accident Commission found that the petitioner's mother having died in child birth, the infant, when a few days old, was taken by her father's parents to Canada and since that time has been cared for and supported by them in their home. Although the father, the deceased employee, sent small amounts of money annually to his mother and at one

time paid for the maintenance of the child for a year in a convent, he never otherwise supported his daughter. The conclusion of the Commission was stated as follows:

> "We are of the opinion and so find as a fact that the minor daughter, Ellaine Drouin, who was not living with her father at the time of his decease and in fact never lived with him, was not actually dependent upon him for support at the time of the accident within the meaning of the provisions of the Workmen's Compensation Act, and that the meager contributions which he sent to the grandmother from time to time were not relied upon for the support of his minor daughter, Ellaine, but were in the nature of gifts."

For failure to sustain the burden of proving her dependency the minor's petition for award of compensation was dismissed. The decree of the Commission being against the petitioner, the finding of facts is open to review. *Weymouth* v. *Burnham & Morrill*, 136 Me., 42-44, 1 A., 2d, 343; *Orff's Case*, 122 Me., 114-116, 119 A., 67. On the pleadings the petitioner's dependency is the only issue. *Weliska's Case*, 125 Me., 147, 131 A., 860.

Under the Workmen's Compensation Act, if death results from a personal injury to an employee received by accident arising out of and in the course of his employment, the dependents of the employee wholly dependent upon his earnings for support at the time of his accident are entitled to compensation. Sec. 14, Chap. 55, R. S. as amended by Sec. 6, Chap. 276, P. L. 1939. Children of the deceased employee are conclusively presumed to be wholly dependent upon him for support if within Clause c, Par. VIII, Sec. 2, Chap. 55, R. S. as amended by Sec. 4, Chap. 276, P. L. 1939, which in its material parts reads:

> "(c) A child or children, including adopted and stepchildren, under the age of 18 years or over said age but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living, or upon

whom he is or they are actually dependent in any way at the time of the accident to said parent, there being no surviving dependent parent.... In case there is more than one child dependent, the compensation shall be divided equally among them."

The conclusive presumption prescribed by the current statute is as in the original Act. P. L. 1919, Chap. 238. When no dependent parent survives a deceased employee, if a child, as defined, is living with the parent, the presumption of total dependency prevails. So, too, if a child is living apart from the parent and the state of the child when the employee met with his accident is that of actual dependency in any way. A child brought within this provision is presumed to be wholly dependent. This interpretation put upon the law in the beginning is still applicable. See *Weliska's Case,* supra.

The term "dependent" as used in the Workmen's Compensation Act has a well-known and accepted meaning. The mere reception of assistance in the form of contributions or otherwise does not of itself create dependency. The controlling test is was the assistance relied upon by the claimant for his or her reasonable means of support and suitable to his or her position in life. *Dumond's Case,* 125 Me., 313, 133 A., 736; *Henry's Case,* 124 Me., 104, 126 A., 286; *Weliska's Case,* supra. And "actually dependent" means "dependent in fact." *Muzik* v. *Erie R. Co.,* 85 N. J. L., 129, 89 A., 248, 249; *Miller* v. *Public Service Ry. Co.,* 84 N. J. L., 174, 85 A., 1030; 2 Words and Phrases, Perm. Ed., 240; 28 R. C. L., 770, Sec. 65. In the case at bar the burden of proving actual dependency in any way upon the parent at the time of his accident rested upon the claimant. It was not sustained by evidence which merely showed that the deceased employee had made small annual contributions in the form of gifts in or near the holiday season to his daughter through her grandmother and for a time had defrayed her expenses in a convent. The finding of the Industrial Accident Commission in this regard was not error.

It is argued orally and on the brief, however, that the legal obligation of a parent to support his minor child in itself establishes statutory dependency entitling the claimant to compensation. This contention is too broad. True it is that in this jurisdiction a father is bound by law to support his minor children. *Gilley* v. *Gilley*, 79 Me., 292, 9 A., 623; 1 Am. St. Rep., 307. And for failure to do so severe penalties are provided by statute, P. L. 1931, Chap. 204, Chap. 129, R. S. 1930, Secs. 44, 45. Dependency, however, as known to the Workmen's Compensation laws is something different from the right to have support or the duty of a parent to render it. In the absence of express statutory authority therefor, it is generally held that a finding of dependency cannot rest on proof alone of the relation of parent and child but there must be some evidence of a reasonable probability and expectation that the obligation of the parent will be fulfilled and thereby have some real as well as mere theoretical value. *Ocean A. & G. Corp.* v. *Industrial Comm.*, 34 Ariz., 175, 269 P., 77; *Colorado F. & I. Co.* v. *Industrial Commission*, 90 Col., 330, 9 P., 2d, 285; *Commission* v. *Downton*, 135 Md., 412, 109 A., 63; *Glaze* v. *Hart et al.*, 225 Mo. App., 1205-1211, 36 S. W., 2d, 684; *Sweet* v. *The Sherwood Ice Co.*, 40 R. I., 203, 100 A., 316; *Harding* v. *Compensation Com'r.*, 114 W. Va., 817, 174 S. E., 328; *Utah Fuel Co.* v. *Industrial Commission*, 80 Utah, 301, 15 P., 2d, 297, 86 A. L. R., 858; *Lloyd-McAlpine L. Co.* v. *Industrial Comm.*, 188 Wis., 642, 206 N. W., 914; 1 Honnold's Workmen's Comp., Sec. 82; 71 Corpus Juris, 531. The following cases relied upon in the claimant's brief are not in conflict with the general rule. *Kennedy* v. *Keller*, 225 Mo., App., 561, 37 S.W., 2d, 452; *Borgmeier* v. *Jasper et al.* (Mo.), 67 S. W., 2d, 791; *Martin et al.* v. *Narragansett E. L. Co.*, 49 R. I., 265, 142 A., 225.

The legal liability of the deceased employee to support his minor child and the probability that he would fulfill this obligation apparently was not considered by the Industrial Accident Commission in this case. Nor does the record show that evidence was taken upon this issue. To the end that these de-

ficiencies may be supplied the case should be recommitted to the Industrial Accident Commission for further proceedings. *Guthrie* v. *Mowry et al.*, 134 Me., 256, 184 A., 895; *Martin's Case,* 125 Me., 221, 132 A., 520; *Maxwell's Case,* 119 Me., 504, 111 A., 849; *McKenna's Case,* 117 Me., 179, 103 A., 69.

Appeal sustained.
Decree of sitting justice reversed.
Case recommitted for further proceedings.

STATE OF MAINE *vs.* ARTHUR F. COX.

Cumberland. Opinion, December 16, 1941.

Criminal Law. Self-defense. Instructions to the Jury.

Questions of fact, including the question whether or not a homicide was justified under a plea of self-defense, and the question of deliberation and premeditation are for the jury, under appropriate instructions from the court.

It is also for the jury to determine what part of the evidence presented at the trial was credible and worthy of belief, as well as the relative weight of the testimony.

In the instant case, under proper instructions by the court, the jury were warranted in finding that the respondent wilfully and deliberately killed the deceased, with malice aforethought.

The correctness of a judge's charge to the jury is not to be determined from isolated statements but from a consideration of the charge as a whole.

Where a man, armed with only a club or iron, attacks, on his own private premises, a stranger who is there, armed with a firearm, but not on official duty, and who has been ordered to leave the premises, the latter must, as a general rule, retreat when it is reasonably apparent to him as a reasonable man, that he can do so without increasing the danger to himself or to one he may then be lawfully defending, before slaying the assailant and if he does not so retreat, the killing cannot be justified under a plea of self-defense. The right to kill in self-defense is founded only on necessity, real or apparent.

Where the killer has a reasonable apprehension that his own life is in danger or that he is in danger of serious bodily injury, he has the right to defend himself even to the extent of taking the life of his assailant, but he should retreat if he can safely do so, and if he could have done so with reasonable

safety and fails to do so, but, instead, fires at his assailant with the intention of killing him or inflicting a mortal wound, the homicide is neither excusable nor justifiable.

Whether or not in the instant case, any attack was made by the deceased, or whether the respondent and his companion, at the time of the shooting were where they had a right to be, or whether the respondent should have retreated before firing, were all questions of fact for the jury under appropriate instruction from the court. Even if the jury found that the respondent had a right, then, to be on the premises of the deceased, that would not present an exception to the rule laid down.

A presiding justice may properly lay down the rule of law applicable to the facts as the jury may find them, and such instruction does not constitute an expression of opinion by the court.

An instruction by the court that an obligation rested upon the respondent to do what he reasonably could to avoid shooting did not inform the jury that a duty fell upon the respondent to entirely avoid using his revolver. The instruction as given fully protected the rights of respondent in this respect.

A presiding justice is not bound to repeat what has been substantially and properly covered in his charge to the jury, nor is he bound to adopt the particular language requested, if the jury had otherwise been properly instructed.

A requested instruction which is not in its totality sound law is properly withheld. It is no part of the duty of the court to eliminate errors in a requested instruction.

In determining the propriety of charge given, all parts of the charge must be taken into consideration. Merely calling attention to the existence or nonexistence of evidence is not an expression of opinion by the court, even though an inference may be drawn from an allusion to some obvious and indisputable fact.

It is too late, after verdict, to question, for the first time, the accuracy of any statement of fact in the charge to the jury.

It is proper for a judge to instruct a jury to apply to the testimony of witnesses the tests of consistency and probability by stating both affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them.

A presiding justice has a right to correct an instruction to the jury before they retire, and the jury are in duty bound to ignore any part of the charge withdrawn by the court. Therefore when the charge that the testimony of a certain witness was "important" was withdrawn before the jury retired and the importance of the testimony left to them, there was no merit in an exception thereto.

The court properly refused to instruct the jury that if they found one contention to be a fact, then "you will find" a certain further contention to be a fact, as the words "you will find" amounted to a command to the jury to find a fact, which the court could not properly command.

Danger apparent to the accused, in a prosecution for murder, is not the test to justify killing a man in alleged self-defense. The prevailing view in America, requires "a reasonable apprehension and belief such as a reasonable man would, under the circumstances, have entertained."

Even if the respondent was armed only for protection, as claimed by him, that would not be evidence that he did not have malice aforethought in shooting the deceased, since malice aforethought might have existed for the first time after he got into difficulties with the deceased and only a few moments before the fatal shots were fired.

The query by the court as to whether the refusal of the accused's companion to advise the authorities of what he understood the facts to be was for the purpose of shielding the accused was not an expression of an opinion by the court.

There was no error in the refusal of the court to instruct the jury that, if the jury found that the accused had previously been assaulted in a neighboring town, that fact should be considered in determining whether the accused believed that he was again in danger, in view of the charges given.

The court was not bound to give instruction dealing with any particular belief which the accused might have had when approached by the decedent.

Whether or not a mistrial should be ordered rests in the sound discretion of the presiding justice, whose decision will not be overruled unless manifest wrong or injury result. In the instant case, no manifest wrong or injury resulted from the rulings complained of.

In this state there is no statute or rule of court requiring the presiding justice, on motion, to segregate the witnesses during the trial. Whether or not the witnesses should be segregated in a given case rests in the sound discretion of the court, to whose ruling an exception will not lie unless it appears that there has been an abuse of discretion. The record in the instant case shows no abuse of discretion in the court's refusal to order the witnesses segregated.

There was no error in the refusal of the court to permit the playing before the jury of a phonographic record alleged to be similar to one previously attempted to be played in the deceased's garage, as no evidence was produced to show its bearing on the case.

It was not within the province of the court to tell the jury that they could "consider the fact that the defendant believed" any particular religious doctrine.

It is a well-settled general rule that a religious belief is not a defense to a prosecution for a violation of the law of the land.

ON APPEAL AND EXCEPTIONS BY THE RESPONDENT.

The respondent Cox was convicted of murder. Cox was a member of the sect known as Jehovah's Witnesses. He and a

fellow member, one Carr, went to North Windham and stopped in front of the garage of E. Dean Pray. Carr entered the garage and proposed to Pray that he, Carr, play a phonographic record containing a "message" put out by Jehovah's Witnesses. Pray drove Carr out of the garage and came toward Cox. While still on Pray's premises Cox killed Pray. Cox admitted that he killed Pray, but claimed that the killing was done in self-defense and defense of Carr. The sole question involved was whether, in view of all the testimony, which was conflicting, the jury was warranted in finding that Cox committed the homicide with malice aforethought, express or implied. The case fully appears in the opinion.

Exceptions overruled. Appeal dismissed. Motion for new trial denied. Judgment for the State. Case remanded for sentence.

Frank I. Cowan, Attorney General,

Albert Knudsen, County Attorney of Cumberland County,

Richard S. Chapman, Assistant County Attorney of Cumberland County, for the State.

Clarence Scott, of Old Town,

Charles W. Smith, of Biddeford,

Hayden Covington, of Brooklyn, New York, for respondent.

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

WORSTER, J. On appeal and exceptions.

At the September Term 1940, of the Superior Court held at Portland, in our County of Cumberland, the respondent, Arthur F. Cox, was indicted, tried and found guilty of the murder of E. Dean Pray, at Windham, Maine, on August 20, 1940. The case is brought here on appeal from the refusal of the presiding justice to grant the respondent's motion for a new trial, and on exceptions.

THE APPEAL.

On the appeal, the question is whether, in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the defendant committed the homicide with malice aforethought, express or implied. *State* v. *Mulkerrin,* 112 Me., 544, 92 A., 785.

The respondent admitted at the trial that he fired at Pray the shots which caused his death, but claimed that they were fired without malice aforethought, in self-defense, and in defense of his companion, Kenneth A. Carr.

The jury might have found, from the evidence, that Arthur F. Cox was forty-nine years old, five feet and seven inches tall, and weighed about one hundred twenty-four pounds; that he had worked as a machinist and toolmaker in various parts of the United States; that he belonged to a sect called Jehovah's Witnesses, and that, from 1907 until he came to Portland in 1940, he devoted his spare time to doing what is called by the members of the sect "witness" work. This work is done, in part at least, by the witness going from door to door in a community, with a phonograph and records, and a bag containing booklets and perhaps other literature pertaining to the work of that sect. A record bearing what is called a message is played on the phonograph to those who will listen to it, and booklets and literature are distributed to those who will receive them. On arrival in Portland during the first part of August, 1940, he became connected with the local company of Jehovah's Witnesses at that place, and thereafterwards, up to the time Mr. Pray was shot on August 20, Cox devoted his whole time to the work carried on by that sect, of which he says he was an ordained minister, with credentials to that effect, issued to him by the Watch Tower Bible and Tract Society, by J. F. Rutherford, President.

Testimony tends to show that at about 8:30 or 9 o'clock in the morning of August 20, Cox left the headquarters of the local company of Jehovah's Witnesses, at 1 Myrtle Street

in Portland, in company with Kenneth Carr and a woman named Verle Adams Garfein, for that part of Windham known as North Windham, to there do the work carried on by Jehovah's Witnesses. They traveled in Cox' car, which he drove. Each of them had a phonograph and at least one record, and a bag containing booklets and literature, and Cox had a map of the territory to be worked by them that day, which had been loaned to him by the person in charge at the headquarters at Portland. Cox also had in his bookbag a revolver (hereinafter sometimes referred to as a gun) which he had obtained during the previous month, and which because, he said, of an assault made on him in Portland, he had been carrying with him for about two weeks, for protective purposes.

Cox states that during the forenoon of August 20, while in a store in North Windham, he was told to get out of town in ten minutes. He then went back to a nearby information booth, where he had called earlier in the day, to see Mrs. Robbins, who was in charge of the booth, because, he said, "I had learned that there was a good deal of hostility there, and I wanted to know who could be depended upon to maintain the law and order there in case any disturbance arose for any reason." He did not find her until about two o'clock that afternoon, when she gave him the names of certain persons, including said Pray, who was then a deputy sheriff. Cox testified that at that time he had no knowledge that Pray had previously assaulted another Jehovah's Witness, or that one of them had been evicted by Pray by force, although Cox there learned from Mrs. Robbins that Pray had told them to get out of town. Cox did not go to see Pray, because he had heard that he was unfriendly, and since they were going down that way he knew that they would eventually call on him anyway.

According to Mrs. Robbins, Cox was nervous and perturbed when she saw him the second time. He was upset over something. He wasn't pleasant but he wasn't viciously angry; he wanted to see somebody in a hurry, somebody who had some

authority. She further testified, when questioned, as follows:

"Q. Did he say anything when you told him not to go down there, not to stay in town, not to go down to Pray's?

"A. He said if he started anything he could take care of him, because he had been ordered out of other towns and he knew how to take care of himself."

Cox, evidently referring to the threat he had received while in the store, testified that he told her "that we were going to finish this town in spite of some threats that had been made us."

Evidence indicates that after this conversation with Mrs. Robbins, Cox came out and got into his automobile, where Miss Garfein and Carr were waiting for him, drove a short distance in the direction of Portland, turned around, came back, and parked a little northerly of the booth, on the same side of the road. They then got out, and Miss Garfein took the easterly side of the road, while Cox and Carr crossed the road to make calls on the westerly side. Cox called at the Varney house, and Carr called at the home of Pray, which was the dwelling next northerly. Neither found anyone at home, and, coming from those houses, they met and walked along together, going northerly on the path which served as a sidewalk until they arrived at some point in front of Pray's garage, where Carr turned off to enter the garage. According to one witness, they parted half way between the pumps and the sign post. And it elsewhere appears that the easterly post, supporting the sign "Pray's Garage" is thirty feet and seven inches northerly of the center of the so-called "island" on which the pumps stood. Cox testified that he proceeded by the sign post a few steps and waited to see if Carr would get a reception.

According to the plan drawn to scale, which was used at the trial, the center of the pump island is about thirteen feet and nine inches westerly of an extension of the westerly line of the westerly graveled shoulder of the road. The southerly line of

the garage projected to the road would pass a little to the north of that island, the center of which is twenty-nine feet and five inches easterly of an extension of the easterly line of the garage.

This garage is irregular in shape, and is located on the same side of the road as the Pray house, and next northerly thereof. Its southerly line is about fifty feet long, and the end next to the street is about twenty feet wide.

It appears from the record that Carr entered the garage and proceeded toward the Varney automobile, which was standing in the southwesterly corner thereof, where it was being repaired. Pray was working underneath it and Varney was leaning in, assisting him. At the same time, Clyde M. Elder, an employee of Pray, was working underneath the Ward car, which was also standing in the rear of the garage, but northerly of the Varney car. Ward was standing near Elder. As Carr approached the Varney automobile, he had the phonograph on his arm, and said to Pray, "How do you do? I have a message here. Would you like to hear it?" Pray replied, "Go on. Get to hell out of here."

The respondent and his witness Carr do not agree with the witnesses for the State as to what then happened, especially as to when or where Pray got the tire iron, or as to the position, attitude and conduct of the parties at the time of the shooting and immediately before.

According to Carr's testimony, he turned to walk out when told to go. As he turned, Pray picked up a tire iron and when Carr had walked about fifteen feet, came up and put his hands on Carr's back, shoved him, and he went out. Pray pushed him four or five steps, gave him a shove and hit him with something. As Carr was going forward, he straightened up and swung around to defend himself. Pray was then about five feet behind him, with the tire iron raised, and said "he was going to knock our damned heads off." Just then Carr heard three or four shots and Pray started for the corner of the house, stumbling. When Carr straightened up he saw Cox standing

a little to his left and probably five or six feet from him. Pray was about six feet tall, and probably weighed one hundred eighty or one hundred ninety pounds, was swearing, raging mad, and close enough to strike Carr, but not to his knowledge within striking distance of Cox at any time that day.

According to testimony of Cox, he was standing between the road and a line drawn from the pumps through the easterly sign post, waiting to see if Carr would get a "reception." He saw Carr enter the garage and go to the rear of the building, and heard him say something. A man now known to have been Pray got out from underneath an automobile and said, "You can get to hell out of here." With a bar in his hand, Pray drove Carr out of the garage, and, said Cox, "it seemed as he got out to the door the man struck at him and hit him on the back or side here somewhere." When Cox saw Carr coming out of the garage, he thought Carr was in great danger and set the phonograph on the ground; both hands were free to operate the gun. Upon arriving at the door, Pray saw Cox, and said, "You get out of here, too," desisted in his attack on Carr, and in a white rage, with the tire iron in his hand, came on a tangent toward Cox just a second or two before Carr reached the pumps. When Pray, his arm upraised with the bar in his hand, had taken about four steps, Cox saw there was going to be danger, and was feeling in his bag. Pray said, "What have you got in that bag? . . . Give me that"; Cox said "Stand back" and when Pray was about six feet from him and within striking distance of Carr, Cox, fearing he would be killed or injured with the bar, fired the first shot point-blank at Pray, who did not take another step toward Cox but stood there with the bar in his hand. Cox said, "he was stunned, I guess, after the first shot." He stated that his "purpose was to make a thorough job of repelling," and he did not know the effectiveness of the gun he was using, so he fired two more shots because it appeared to him that it was necessary. Cox said, "There was danger. He had the bar up there in his hands" and also said he (Pray) "might have secured a weapon in a very short time

to destroy all three of us." At the time Cox fired he had not stepped back or started to leave. Cox said, after the shots were fired "I noticed that Pray was thoroughly repelled and there was no danger there, so I got down toward the car as rapidly as I could." Cox also testified that he did not go down to North Windham that day "asking for trouble"; that he had no ill-feeling or hatred toward Pray or anybody there.

The witnesses for the State give a different version of what happened, in some important particulars.

Francis H. Brown was seated about five feet inside the garage door when Carr entered. Brown testified that he saw nothing in Pray's hands when Carr was going out; that Pray put his hands—Brown thought both hands—on Carr's shoulders, and pushed him out the door; that when Carr got out to the pumps Pray told Cox and Carr to get out of there, and when neither moved, said "I will see about it," turned around, stepped three or four steps, picked up a tire iron inside of the garage and went just outside the door five or six feet, stopped, and said to Cox "What have you got in that bag there?" When Cox pulled out the gun Pray started forward, took four or five steps, and Cox shot him. Brown said it was hard to tell how many shots were fired—four or five—and that while Cox was shooting, Pray "turned around, kind of staggering and started for the front of his house."

Ellen Harriett Robbins, keeper of the information booth, anticipating there would be trouble, followed Cox and Carr at a distance. She testified that when Carr came out of the yard in a hurry, Cox took a few steps toward him, Carr turned around, and Cox started to shoot. At that time she had not seen Pray, because her line of vision was cut off by the porch or a part of the Pray house. From observations subsequently made, she testified that at the time of the shooting she could see, from the place where she was standing, ten feet westerly of the pumps, so if she could not then see Pray, he could not have been as near to Cox and Carr at the time of the shooting, as they testified he was.

She further testified the first time she saw Pray, he came out around the side of his house, and the next time she saw him he was on the ground where he had fallen.

Gertrude Ruth Pray, widow of the deceased, was sitting in an automobile parked northerly of the Pray house, between it and the garage. She testified that although she saw Carr enter the garage she did not see him come out, but saw him crossing the dooryard, walking rapidly toward Cox; they came together. Cox was in line of the pumps and sign post. Cox put his hand in his bag at the same time she saw Pray, who had taken about three steps outside the door and stopped. She did not hear anything said between them. Cox pulled the gun out of the bag, pointed it at Pray, and fired three or four shots. Pray turned partly around, dropped something, and ran toward the house, and when he got in front of the automobile in which she was sitting, she lost sight of him. She did not see Pray strike or attempt to strike anyone in that dooryard.

Clyde M. Elder testified that when he looked out from underneath the Ward automobile, where he was working when Carr entered the garage, he first saw Pray and Carr, together, in the garage, about eight or ten feet behind the Varney car, and approximately twenty-three or twenty-five feet from the the front door, for which they were headed. Carr was ahead and Pray closely following. Elder did not then see anything in Pray's hand, that he can remember. He did not see them when they reached the door. When Elder got within possibly six feet of the door, Cox was pretty well out by the road, probably in line with the pumps and the post that holds the sign. Pray was practically in the center of the dooryard, at a point marked on the plan which, according to plan measurements, is about thirteen feet and nine inches from the door. Elder stated that he couldn't tell whether Pray had anything in his hand at that time or not; after that Pray might have taken one step, but not more than two. As Elder walked out, Cox and Pray remained in the position just indicated. Elder heard Pray say

"And you get out of here, too. What have you got in that bag?" Then the firing began; he saw Cox fire several shots at Pray. Elder was then probably two steps or two and a half steps outside the garage. He stopped suddenly. Pray dropped back —stated in cross examination "a step or two" and in direct examination "three or four steps"—turned toward Elder, and was so near that Elder could probably have touched him if he had put out his hand. Elder ran toward a Ford automobile and he doesn't know in which direction Pray went but he staggered toward an automobile. He does not know where Carr was at the time of the shooting.

Perley W. Varney, who, with Pray, was working on an automobile when Carr entered the garage, testified he saw Pray pushing Carr by the shoulders while in the garage; that Pray did not have anything in his hands; that he saw Pray at the door, still walking; Carr was then ahead of him in the yard. When Varney got to the door, Pray was a few steps, say about ten feet, outside, standing still. He then had a tire iron in his hand, but Varney did not see him when he picked it up. At the same time, Varney places Carr somewhere near the pumps. When Pray was shot, he swung around, came toward Varney, who was standing about five feet from the southerly wall of the garage, and dropped the tire iron about ten feet from the door. Varney picked it up and ran after Cox and Carr; he caught up with them at the Cox car.

According to the testimony of both Elder and Varney, Pray, although loud and forceful, was not angry.

Deputy Sheriff McDonald testified that when he received the revolver from Varney, he examined it and found four shells had been fired and three had not.

Carr told Dr. Bickmore that evening that he had been hit with a piece of iron, but on examination the doctor found no marks or discolorations.

According to Carr's own testimony, he himself did not look for any marks, and does not know whether there were any or not.

Without further reviewing the testimony, which is voluminous, suffice it to say that a careful examination of the record discloses evidence from which the jury might have found that both Cox and Carr, at and immediately before the time of the shooting of Pray, were on his premises; that Pray had ordered both of them to leave; and that although they had had reasonable opportunity to do so without danger to themselves before Pray was shot, they had not done so; and that, at the time of the shooting, neither of them had the legal right to be on said premises; that whether they then had the legal right to be on the premises or not, it must have been reasonably apparent to Cox himself that he could have retreated without any increased danger to either himself or Carr before shooting Pray; that at the time of the shooting, Cox had no reasonable ground to believe that either he or Carr was in imminent danger of death or great bodily harm; and that, at the time the first shot was fired, Pray was in the neighborhood of fifteen or sixteen feet from Cox, and Carr was even farther away from Pray.

It is elementary law that questions of fact, including the question whether or not a homicide was justified under a plea of self-defense, and the question of deliberation and premeditation are for the jury, under appropriate instructions from the court. *People* v. *Koepping*, 178 N. Y., 247, 253, 70 N. E., 778.

It is also for the jury to determine what part of the evidence presented at the trial was credible and worthy of belief, as well as the relative weight of the testimony. *State* v. *Merry*, 136 Me., 243, 262, 8 A. (2d), 143.

Here we find that under proper instructions given by the court, the jury were warranted in finding that the respondent wilfully and deliberately killed Pray, with malice aforethought, which was fully and correctly explained to the jury, and so we would not be warranted in disturbing their verdict.

THE EXCEPTIONS.

The respondent excepted to certain instructions given, to

the refusal to give certain requested instructions, and to certain rulings made during the trial. Although he has presented thirty exceptions in all, yet only twenty-one were briefed in his written argument.

In discussing generally the law of self-defense, and what a slayer must do to justify the taking of human life, the court instructed the jury that:

> "He must retreat as far as he reasonably and safely can before taking his adversary's life."

That statement is challenged by the respondent's 13th exception.

The correctness of a judge's charge to the jury is not to be determined from mere isolated statements, but from a consideration of the charge as a whole. *State* v. *Benner,* 64 Me., 267, 291; *State* v. *Wilkinson,* 76 Me., 317, 323; *State* v. *Day,* 79 Me., 120, 125, 8 A., 544; *State* v. *Murphy,* 124 Conn., 554, 1 A. (2d), 274.

And this record discloses that in addition to the statement to which the above exception was taken, the court, at the request of the respondent, instructed the jury:

> ". . . that he is not bound to retreat when to retreat would be dangerous and quite as dangerous or more dangerous than it would be to remain where he is. He is not required to run himself into greater danger, by retreating, than already exists."

And the jury were further charged:

> ". . . that the mere fact that the defendant Arthur F. Cox did not retreat as approached by E. Dean Pray on the occasion in question, does not take away his right of self-defense if without such failure to retreat you otherwise find that he was justified in shooting in self-defense as hereinbefore instructed."

There is a very pronounced conflict of authority, and many

decisions, on the question whether or not a person must always retreat when practicable, before he can justify killing an assailant in self-defense, but no useful purpose can be served here by attempting to analyze and classify those decisions.

A reference is made to 30 C. J., page 67; 18 A. L. R., page 1279, note; 2 L. R. A. (N. S.), page 49, note; 3 L. R. A. (N. S.), page 535, note; and 26 Am. Jur., page 258, *et seq.* where the conflicting views are set forth.

Suffice it to say that after careful consideration, we have arrived at the conclusion that where a man, armed with only a club or iron, attacks, on his own private premises, a stranger who is there armed with a firearm, but not on official duty, and who has been ordered to leave, the latter must, as a general rule, retreat when it is reasonably apparent to him as a reasonable man that he can do so without increasing the danger to himself or to one he may then be lawfully defending, before slaying the assailant; and if the slayer does not do so, then the killing cannot be justified under a plea of self-defense. *Commonwealth* v. *Ware,* 137 Pa., 465, 20 A., 806; *Pugh* v. *State,* 132 Ala., 1, 31 So., 727; *People* v. *Johnson,* 139 N. Y., 358, 34 N. E., 920; *People* v. *Kennedy,* 159 N. Y., 346, 54 N. E., 51, 70 Am. St. Rep., 557.

But the respondent contends (exception 22) that at the time of the shooting he was where he had a right to be, and, therefore, was not required to retreat.

Whether or not, in the instant case, any attack was made by Pray, or whether Cox and Carr, at the time of the shooting, were where they had a right to be, and if so, whether Cox, under the rule above given, should have retreated before firing, were all questions of fact to be determined by the jury under appropriate instruction from the court.

Even if the jury found that Cox had a right to then be on the Pray premises, that would not present an exception to the rule above laid down. *People* v. *Johnson,* supra, where one convict killed another in prison; *State* v. *DiMaria,* 88 N. J. L., 416, 97 A., 248, aff. 90 N. J. L., 341, 100 A., 1071.

The respondent takes nothing by his 13th and 22d exceptions.

State v. *Carver,* 89 Me., 74, 35 A., 1030, relied on by the respondent, is not in point. That is not a homicide case.

We have not overlooked *Beard* v. *United States,* 158 U. S., 550, 39 Law ed., 1086, 15 S. Ct., 962; *Rowe* v. *United States,* 164 U. S., 546, 17 S. Ct., 172, 41 Law ed., 547; and *Brown* v. *United States,* 256 U. S., 335, 41 S. Ct., 501, 65 Law ed., 961, 18 A. L. R., 1276, cited by the respondent. It is to be noticed that the case at bar is unlike those cases. In the instant case, Pray was shot on his own premises. In the Beard case, the deceased was killed on the land of the slayer. In the Rowe case, the killing occurred in a hotel office. In the Brown case, the deceased was shot on a post-office site, where the respondent was superintending the excavation work. Moreover, it is to be noticed that in the Brown case, the slayer in fact retreated twenty or twenty-five feet to get the revolver with which he killed the decedent.

And when we consider that the right to kill in self-defense is only founded in necessity, real or apparent, (26 Am. Jur., page 249,) we feel that the most salutory rule, and the one most in accord with the principles of humanity, is the rule approved in *State* v. *DiMaria,* supra. It is there said:

> "The instruction complained of was that if the defendant had a reasonable apprehension that his own life was in danger or that he was in danger of serious bodily injury he had a right to defend himself even to the extent of taking the life of the decedent; but that the law required that he should retreat if he could safely do so, and that if he could have done so with reasonable safety and yet did not retreat, but instead fired at the deceased with the intention of killing him, or inflicting upon him a mortal wound, the homicide was neither excusable nor justifiable. The contention on the part of the plaintiff in error is that so much of the instruction as related to the

> obligation to retreat was harmful error; the true rule being, as he insists, that where a man who is in a place where he has a right to be is attacked by another he need not retreat, although a way to escape injury by doing so is open to him, but is entitled to stand his ground and kill his adversary in order to prevent his adversary from killing him or doing him serious bodily harm."

But the court held that the instruction complained of was justified.

The 16th exception is to a part of the judge's charge covering nearly three printed pages, parts of which are in accord with some of the respondent's contentions, to the giving of which it is not to be presumed he complains. The exception is too broad. The particular statement complained of should have been pointed out. But, considering the importance of the case, the contentions stated in the bill of exceptions will be considered.

In this part of the charge, the court said, among other things:

> "... Mr. Cox says that as Pray came out the door Pray addressed him and said, 'You, too, get out of here,' . . . Now, if that is the fact, the same duty devolved upon Mr. Cox to leave those premises as devolved upon Carr to leave the garage, and if that direction was given to him when Mr. Cox was some twenty-nine feet away from the door of the garage, it was his duty to comply with that order and leave the premises. He says that he did not; that he made no effort to leave . . ."

The respondent's contention that this statement amounted to an instruction that it was the duty of Cox to leave immediately cannot be sustained. The jury had been previously told that "Carr had a right to have a reasonable time in which to leave," and the effect of this charge is that Cox also had a reasonable time to leave, provided the jury should find that he

should have done so under instructions given in other parts of the charge, which must be considered as a whole.

Nor does this instruction constitute an expression of opinion by the court. A presiding justice may properly lay down the rule of law applicable to the facts as the jury may find them (*State* v. *Kimball,* 50 Me., 409, 418,) and that is just what the court did here.

This exception cannot be sustained.

So far as the 14th exception challenges the rule laid down by the court, relative to retreat, it avails the respondent nothing, for reasons already given.

Nor was there any error, as claimed in exception 23, in qualifying a requested instruction by adding, "The obligation to do what he reasonably could to avoid the use of his revolver existed." 30 C. J., page 73; 26 Am. Jur., pages 241, 257.

The court did not thereby inform the jury that a duty fell upon the respondent to entirely avoid using the revolver, but fully protected his rights in this respect by charging the jury that:

> "If . . . the defendant Arthur F. Cox was approached by the deceased E. Dean Pray in such a manner as to cause the defendant Arthur F. Cox to have in his mind a reasonable and well-founded belief that he was in danger of losing his life or in danger of suffering great bodily harm, then you will find that he was justified in shooting regardless of whether such danger was real or even though you of the jury may believe from after developments that the danger to Cox was only apparent and not real, because Arthur F. Cox was justified in acting on the facts as they reasonably appeared to him at the time of or before the shooting."

The court refused, except as already given, to give a charge similar in part to the one embraced in the last quotation, but to the effect that Cox was justified in shooting if he had a

reasonable and well-founded belief that Carr was in danger of losing his life or suffering great bodily harm. The exception (21) to that refusal cannot be sustained, for the jury were, in effect, so instructed, when they were charged:

> ". . . I instruct you that Mr. Cox had the same right to protect Mr. Carr's life, if it was threatened, as he would have to protect his own if threatened . . .
>
> "So, if you find from the testimony that Mr. Cox or Mr. Carr was in imminent danger of death or great bodily harm and if the elements of self-defense, under the rules which I have given you to apply, are found, then the respondent is entitled to a verdict of 'not guilty.' "

A presiding justice is not bound to repeat what has been substantially and properly covered in his charge to the jury, nor is he bound to adopt the particular language used in the requested instruction, if the jury had otherwise been properly instructed in accordance with law. *State* v. *Knight,* 43 Me., 11, 141; *State* v. *Pike,* 65 Me., 111; *State* v. *Smith,* 65 Me., 257, 269; *State* v. *Williams,* 76 Me., 480.

The respondent takes nothing by his 20th exception, which was to the refusal of the judge to charge the jury as follows:

> "You are instructed that the defendant and his companion, the witness Carr, had the right of a reasonable opportunity to depart or leave the premises peaceably after being told by Pray to leave, and if such opportunity was denied either of them by a sudden or fierce assault the defendant had a right to stand and defend as you are hereinafter instructed."

This request was properly refused, because the duty to retreat, when retreat should have been made, is absolutely ignored in the request. *Hill* v. *State,* 194 Ala., 11, 69 So., 941, 2 A. L. R., 509, 515.

A requested instruction which is not, in its totality, sound

law, is properly withheld. It is no part of the duty of the court to eliminate errors in a requested instruction. *State* v. *Cleaves*, 59 Me., 298, 303, 8 Am. Rep., 422.

After giving a requested instruction relative to distributing literature from house to house, the court added the following sentence, which is challenged by the respondent's 19th exception:

> "And you will also, in considering that, bear in mind that the respondent at the particular time when this trouble occurred was not himself distributing literature at the premises of Dean Pray."

It is too late, after verdict, to question for the first time the accuracy of any statement of fact in the charge to the jury. *State* v. *Wilkinson*, supra; *Smart* v. *White*, 73 Me., 332, 339, 40 Am. Rep., 356.

But, at the trial, the attorney for the respondent did not claim any misstatement of fact. He said:

> "We take exception to that remark as being an instruction to the jury that he didn't have a right to be on the premises when it was a place of business and any person had a right to come there, even to impart information."

That statement of counsel was wholly unwarranted. Neither that statement of the court, nor the charge as a whole, is susceptible of that construction.

Nor can the statement complained of in this exception be construed as an expression of opinion of the court.

Calling attention to the existence or non-existence of evidence is not exceptionable as an expression of opinion (*State* v. *Means et al.*, 95 Me., 364, 50 A., 30; *Coombs* v. *Mason*, 97 Me., 270, 54 A., 728) even although an inference may be drawn from an allusion to some obvious and indisputable fact (*State* v. *Lambert*, 104 Me., 394, 400, 71 A., 1092; *State* v. *Jones et al.*, 137 Me., 137, 16 A. (2d), 103).

There is no merit in this exception.

The 17th exception is to a part of the judge's charge covering the equivalent of a whole printed page, but we apprehend that the respondent only complains of that part printed in his brief, which is as follows:

> "All witnesses might readily have been confused as to the exact number. But the State says, as I understand it, that when they took the revolver from Mr. Cox there were four empty shells and three which had not been exploded, and the State says that he fired four times. He says he fired three. Now, one or two of those shots missed the mark apparently, because but two wounds were found in Mr. Pray. Does that fact, that certain of the shots missed, have or does it not have any effect upon the probability of the distance which the parties were apart when the shots were fired? If Mr. Cox, as he says he was, was firing point-blank at a man five or six feet away, is it likely that any of the shots would have missed? Or was he far enough away so that some of them did miss? I simply call your attention to these facts—to the testimony, rather—for what bearing it may have when you come to consider the case."

The respondent's contention that this was an expression of opinion by the court, and amounted to a permission to the jury to speculate because the evidence does not show which of the shots missed, cannot be sustained.

It is certainly proper for a judge to instruct a jury to apply to the testimony of witnesses the tests of consistency and probability, by stating both affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them. *State* v. *Day,* supra; *State* v. *Means et al.,* supra; *State* v. *Jones et al.,* supra.

And the court went no further than that in the charge complained of in this exception. He even premised that part of his charge which includes the part last quoted with the words "You may or may not regard it as bearing upon the facts in

the case," thus plainly indicating that he was expressing no opinion himself, but merely calling the attention of the jury to this aspect of the case, for their consideration, as he had a perfect right to do. The respondent takes nothing by this exception.

Respondent's 15th exception is to a statement in the charge that "the testimony of Mrs. Robbins is important"; but as soon as the attention of the judge was called thereto, and before the jury retired, he said:

> "I will withdraw that statement, if made, and state to the jury that the importance of that testimony is entirely for them. I did not intend to express any opinion as to its importance. That is a matter for the jury."

A presiding justice has a right to correct an instruction to the jury before they retire. *State* v. *Derry,* 118 Me., 431, 108 A., 568.

And in considering a case, the jury are in duty bound to ignore any part of the charge withdrawn by the court. *State* v. *Hood,* 63 W. Va., 182, 59 S. E., 971, 15 L. R. A. (N. S.), 448, 129 Am. St. Rep., 964.

The correction having been made, the jury could not have been misled, and the respondent's 15th exception is without merit. See *State* v. *Richards,* 85 Me., 252, 255, 27 A., 122.

The 25th exception is to the refusal of the judge to charge the jury as follows:

> "You are instructed that if under the instruction hereinbefore given you find or have reasonable doubt that the defendant was justified in firing the first shot, then you will find that he was justified in continuing to shoot until it was apparent to him that the real or supposed danger to his life and body had ceased."

And the 26th exception is to the refusal to give another instruction in the same language as the one last quoted, with

the exception that in place of the last six words, the following words were substituted:

"... the life and body of Kenneth Carr had ceased."

These requests were properly refused, because fatally defective, for the following reasons:

(1) The words "will find" as used in these requests, amounted to a command to the jury to find a fact. The court could not so command.

(2) Danger "apparent to him," as indicated in these requests, is not the test. What appears to be the prevailing view in America requires "a reasonable apprehension and belief such as a reasonable man would, under the circumstances, have entertained," to justify killing a man in self-defense. 26 Am. Jur., page 253.

(3) As drafted, the requests do not make sense. A reasonable doubt that the respondent was justified in firing the first shot could not possibly justify him in continuing to shoot.

Moreover, the respondent cannot complain of the refusal to give these instructions, because the court charged the jury that:

> "Arthur F. Cox was justified in acting on the facts as they reasonably appeared to him at the time of or just before the shooting."

The 27th exception is to the refusal of the presiding justice to charge the jury as follows:

> "You are instructed that if you believe from the evidence or have reasonable doubt that the defendant had been previously assaulted in Portland and was carrying the gun as a precaution against repetition of similar assault upon him, then you will consider such fact as evidence that he did not have malice aforethought in shooting E. Dean Pray on the occasion in question."

This instruction was properly refused, because the request is fatally defective. The use of the words "will consider" amounted to a command which the court could not properly give.

Moreover, even if Cox was armed only for protection when he went to North Windham, that would not be "evidence that he did not have malice aforethought in shooting E. Dean Pray on the occasion in question," for such malice aforethought might have existed for the first time after he got into difficulties on his arrival in the vicinity of the Pray garage, and only a few moments before the fatal shots were fired. *Allen* v. *United States,* 164 U. S., 492, 41 Law ed., 528, 17 S. Ct. Rep., 154; *Commonwealth* v. *Tucker,* 189 Mass., 457, 76 N. E., 127, 7 L. R. A. (N. S.), 1056; 26 Am. Jur., page 186 *et seq.*

The 18th exception is to that part of the charge where the court said:

> "And the fact that Mr. Carr declined at times to advise the authorities of what he understood the facts to be, is only admissible for one purpose — as bearing upon the interest he might have in the result. Was he trying by his silence to shield Mr. Cox, or not? If he was trying by that silence to shield him, was that because of the interest which he had in the case and the desire that Mr. Cox should escape punishment?"

At the trial, and before the jury retired, the attorney for the respondent said:

> "I take exception to the Court's instruction to the jury that they could consider the silence of Carr as evidence of the fact that he was shielding the defendant Cox, when the evidence does not show that he was, as being a comment upon the evidence—I mean as being an expression of opinion."

It is perfectly apparent that the jury were not told in that part of the charge last quoted that they could consider the

silence of Carr as evidence of the fact that he was shielding the defendant Cox. A mere reading of that quotation from the charge is sufficient to demonstrate the fact that no opinion whatsoever was expressed by the court therein, and since this exception was then limited to the claim that this charge constituted an expression of opinion by the court, it cannot be sustained.

The 28th exception is to the refusal of the presiding justice to charge as follows:

> "You are instructed that if you believe from the evidence or have reasonable doubt that the defendant had been previously assaulted in Portland by a man larger than he and who assaulted Cox and injured him, then you will have a right to take that into consideration in reaching a conclusion as to whether the defendant believed at the time E. Dean Pray started toward him that he was again in danger of receiving similar injury when approached by E. Dean Pray."

In support of this exception, the respondent relies on *State* v. *Doris*, 51 Ore., 136, 94 P., 44, 16 L. R. A. (N. S.), 660, 668.

In the case last cited, the defendant was asked what, if any, reason he had, at the time the deceased attempted to strike him, to think that he was in danger of receiving great bodily harm, and as to why he thought he had to be armed for his own protection, which, on objection, was excluded. And the court refused to give to the jury an instruction similar to the last mentioned request of the respondent in the instant case. On appeal, the court held that the evidence should have been admitted, and that an instruction of similar import to that requested should have been given.

But in the instant case, Cox was allowed to testify that he feared serious injury from the hands of Pray; that he had suffered injuries in an assault previously made on him in Portland by a large man, who finally got the worst of it when Carr came to Cox' assistance. Cox was also allowed to state why

and when he bought the revolver, and that since that assault he had been carrying it in his bag for protective purposes only.

And the court instructed the jury:

> "... that a person who arms himself not for the purpose of aggression but as precaution against possible attack and for the sole purpose of anticipated need for self-defense may use such arms in self-defense where he does nothing wrongful to provoke or cause the difficulty. . . . provided the other elements necessary to establish the right to self-defense exist."

The jury were further charged:

> ". . . that the mere fact that the defendant Arthur F. Cox had a gun or dangerous weapon and upon the occasion in question used it does not take away his right of self-defense, if without that fact you otherwise find that he was justified in shooting as hereinbefore instructed."

That part of the charge hereinbefore considered under the 14th exception was sufficiently broad to include all reasons which might have caused "Cox to have in his mind a reasonable and well-founded belief that he was in danger of losing his life or in danger of suffering great bodily harm," and the court was not in duty bound to give the requested instruction dealing with an alleged particular cause.

This exception cannot be sustained.

The 8th exception is to the refusal of the presiding justice to grant a motion for a mistrial, because the county attorney asked Carr: "You didn't have your gun with you that day, did you?" Upon the respondent objecting thereto, the court said: "The question may be struck out and the jury will disregard it." And it must be presumed that the jury followed that instruction. *Commonwealth* v. *Godis*, 266 Mass., 195, 196, 164 N. E., 923.

Whether or not a mistrial should be ordered rests in the sound discretion of the presiding justice, whose decision will

not be overruled unless manifest wrong or injury results. *State* v. *Steneck*, 118 N. J. L., 268, 192 A., 381, aff. 120 N. J. L., 188, 198 A., 848, cer. den., *Steneck* v. *State*, 305 U. S., 627, 83 Law ed., 401, 59 S. Ct. Rep., 89.

In the instant case, no manifest wrong or injury resulted from the ruling complained of. There was no abuse of judicial discretion. The ruling was right. There is no merit in this exception.

The 9th exception is to the refusal of the presiding justice to grant a mistrial on account of alleged prejudicial conduct of the county attorney in cross examining Cox relative to the purpose for which he obtained the revolver. In direct examination, Cox had testified, in substance, that he had obtained the revolver in Washington, D. C., the month before; that he purchased it because he and others were planning to drive by automobile to the Detroit convention of Jehovah's Witnesses, traveling day and night, and he wanted it "for protection against robbers and someone that might stop us on the way, interfere with us."

The following appears in the record of the cross examination of Cox by the county attorney:

> "Q. You didn't get that gun because you expected a little trouble out in Detroit, did you, Mr. Cox?
>
> "A. No, sir.
>
> "Q. There was, is it not true, considerable opposition . . ."

The attorney for the respondent having interrupted with an objection, the court said:

> "You have a perfect right to object."

The attorney for the state then asked Cox:

> "Q. Is this not true, Mr. Cox, that you took that gun with you to Detroit, not only for protection on the road, but for what protection you might need while in danger at the convention because of conditions in Detroit?"

Objection having been raised thereto, the court ordered the last part of the question struck out.

There was no error in refusing to grant a mistrial on this ground, and the respondent takes nothing by his 9th exception.

In this state there is no statute or rule of court requiring the presiding justice, on motion, to segregate the witnesses during the trial. Whether or not the witnesses should be segregated in a given case, rests in the sound discretion of the court, to whose ruling an exception will not lie unless it appears that there has been an abuse of discretion. *State* v. *Chapman,* 103 Conn., 453, 130 A., 899; *State* v. *Peters,* 90 N. H., 438, 10 A. (2d), 242; *Zoldoske* v. *State,* 82 Wis., 580, 52 N. W., 778, 786.

There was no error in the ruling in the instant case; the respondent's 2d and 3d exceptions cannot be sustained, for the record shows no abuse of discretion in refusing to order the witnesses segregated.

It appears that about a month before the shooting, a Jehovah's Witness named Gooch was playing a record in Pray's garage, when he was forcibly ejected by Pray, and the record broken. The respondent offered in evidence a similar record, and desired to have it played "before the jury to show that there is not one word on it that would incite any reasonable person to do violence." The record was excluded, and permission to play it before the jury was denied. To that ruling, the 7th exception is directed. The ruling was right. It does not appear that Pray even heard the words of the record Gooch played. Pray entered the garage while the record was being played, and apparently Gooch was ejected before it had been fully played. In any event, it would have no bearing on this case, because it does not appear that Pray knew that the record Carr offered to play was like the one Gooch had.

But the respondent was allowed to show, and did show, the details of the trouble Pray had with Gooch, at the time the latter played the record in the garage, and the jury were expressly charged that they could consider the fact that Pray

"had previously assaulted one of Jehovah's witnesses, and the fact that he had previously threatened to assault Jehovah's witnesses, as bearing upon the question of who was the probable aggressor upon the occasion in question."

The 30th exception is to the refusal of the presiding justice to charge the jury as follows:

> "You are instructed that you can consider the fact that the defendant believed that the ALMIGHTY GOD through His written Word the Bible taught the defendant that he should exercise his right of defense of himself while worshipping Almighty God from assaults, to show that he did not have malice aforethought."

The request was properly refused, because, as presented, it was premised upon a positive assertion of fact as to the belief of the respondent. It was not within the province of the court to tell the jury they could "consider the fact that the defendant believed" any particular religious doctrine.

Furthermore, the jury had been previously fully instructed as to the law of self-defense, and it is a well settled general rule that a religious belief is not a defense to a prosecution for a violation of the law of the land. 26 Am. Jur., page 229; *Reynolds* v. *United States,* 98 U. S., 145, 25 Law ed., 244; *State* v. *Sanford,* 99 Me., 441, 59 A., 597.

A further consideration of the case is unnecessary. After examining all of the exceptions, including those not specifically covered in the respondent's brief, we find none that should be sustained. The mandate is

Exceptions overruled.
Appeal dismissed.
Motion for new trial denied.
Judgment for the State.
Case remanded for sentence.

INHABITANTS OF THE TOWN OF WARREN

vs.

SAMUEL E. NORWOOD.

Knox. Opinion, December 20, 1941.

Tax Liens, Statutory Authority and Procedure Therefor.

Inasmuch as the case was heard by referees under a rule which reserved the right of exceptions on questions of law it was properly before the Supreme Judicial Court.

Unless a tax is properly assessed, no lien attaches to the property against which the tax is assessed. R.S. 1930, Chap. 13, Sec. 3.

The principle that strict compliance with the statutory requirements is necessary to divest property owners of their titles for non-payment of taxes has become firmly established by a long line of decisions.

In the absence of evidence to the contrary, it must be assumed that all action taken at the town meetings, in the instant case, was properly taken under the warrants by which they were convened. Such assumption comes within the rule that in the absence of evidence to show the contrary, it will be assumed that a town has proceeded in the usual and legal manner.

The requirements of the law as to description of the property against which a tax is assessed are merely for the purpose of providing that the property be identified with reasonable certainty.

No title can be held to have passed unless the statute under the provisions of which the title was allegedly passed represents a constitutional exercise of legislative power, but no question of constitutionality should be passed upon except when entirely necessary to a decision of the cause in which it is raised.

Definite restrictions upon legislative power are contained in the Constitutions of the United States and of this state and when such restrictions are pertinent to the facts of a given case it is the duty of the court to rule as to the constitutionality of the legislative action and a law to be valid must conform to the Constitution of the United States and to the Constitution of the state. The presumption is, however, in favor of the constitutionality of any duly enacted law, and the legislative power in the state is recognized to be absolute and all embracing except as expressly or by necessary implication restricted by constitutional provisions.

Legislative power is competent to provide for the enforcement of tax liens by the use of certificates without requiring that they be executed under seal. Provisions of the tax lien law (P. L. 1933, Chap. 244) establishing an additional method for the enforcement of tax liens show legislative intent to dispense with the use of deeds and the formalities incident thereto.

Neither the novelty of a legal form nor the name assigned to it can defeat the legislative intention which led to the establishment of such a form. Legislation must be tested by the purpose it is designed to serve and determination as to whether or not the substance of the act comes within the scope of legislative power or transcends legislative authority.

Those who act pursuant to a statute are not required to demonstrate that the provisions thereof are within legislative power. Rather it is for one who questions the validity of legislation on constitutional grounds to show that the particular enactment exceeds legislative power.

Only one whose rights are injuriously affected by the provisions of a statutory enactment which he claims exceeds legislative power has standing to raise the question of constitutionality. A taxpayer whose property is alleged to have been taken under the provisions of a statute providing for forfeiture of title to property because of non-payment of taxes comes within the rule.

Tax revenue is essential to the maintenance of government and legislative power should be construed liberally in testing the validity of any legislation designed to facilitate the collection of taxes legally imposed on property properly described. Summary process for such purpose is proper and there is no constitutional provision which requires either trial by jury or formal hearing in tax enforcement proceedings.

There is no requirement in fundamental law, either of this state or of the United States which prohibits legislative action establishing a policy that the taxpayer shall lose his entire property by failure to pay all taxes properly assessed thereon, provided that adequate provision is made to give the taxpayer opportunity for redemption. The language used by the legislature in the act under consideration shows such was clearly the legislative intention.

The tax title derived by compliance with the requirements of the law providing for the additional method for enforcing tax liens (P. L. 1933, Chap. 244) can be no better than the tax assessment on which it is based, and if that assessment is defective no title can accrue by going through the formality of recording a tax lien certificate.

ON EXCEPTIONS BY DEFENDANT.

Writ of entry by Inhabitants of the Town of Warren to assert title to two parcels of land claimed to have been acquired by enforcement of a tax lien. Proceedings were taken pursuant to the provisions of Chap. 244 of the Public Laws of 1933 as amended. The defendant challenged the sufficiency of the proceedings on several grounds including the validity of the election of certain town officials and of the assessment of the tax, the description of the land, and the alleged unconstitutionality

of the statute under which the proceedings were taken. The case was heard by referees who found for the plaintiff as to the first of the two parcels of land described in the writ. The defendant excepted to the acceptance of the report of the referees. Exceptions overruled. Case fully appears in the opinion.

Charles T. Smalley, of Rockland, for plaintiff.

Elisha W. Pike, of Rockland, for defendant.

SITTING: THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. By writ of entry, the plaintiff town here seeks to assert a title claimed to have been acquired under the operation of Chapter 244 of the Public Laws of Maine, 1933, as amended. The tax, on which the lien sought to be enforced is based, was assessed against defendant as owner of the property in 1937. The lien certificate expired August 18, 1939. The writ, dated April 3, 1940, was served April 5, 1940.

The statute was designed, according to legislative pronouncement incorporated therein, to provide a method, additional to those already established, for the enforcement of liens on real estate created by the assessment of taxes pursuant to Section 3 of Chapter 13 of the Revised Statutes (1930). Since the enactment of the statute, it has been thrice amended. No particular amendment is of importance in the present cause, but each change shows intention on the part of the legislature to extend the operation of the Act and make it more workable. Thus in 1935 (Chapter 28) the original restriction against use of the method by collectors of taxes in plantations was eliminated; in 1937 (Chapter 136) provision was made that notices by registered mail should be sufficient for non-resident owners; and in 1939 (Chapter 85), with other changes tending to simplification and eliminating differences in process for resident and non-resident proprietors, provisions were made for cases where the record owner against whom a tax was assessed died

prior to demand, where assessment was against the heirs or devisees of a deceased person, and where assessment was against someone other than the record owner.

The case was heard by referees under a rule which reserved the right of exceptions on questions of law and is properly before the court under that reservation. The referees found for the plaintiff as to the first of two parcels described in the writ. Objections to the acceptance of their report were seasonably filed by the defendant, and the report having been accepted, the case comes forward with the seven stated grounds of objection urged as the exceptions.

The record discloses that the tax was assessed prior to May 8, 1937; that it was committed to the collector of taxes, by warrant dated that day; that notice in writing was left at the home of the defendant on February 2, 1938, which, while no copy was retained by the collector, must be assumed to have contained the necessary recitals, i.e. the amount of the tax, a description of the property, an allegation that a lien was claimed, and a demand for payment within ten days, since defendant made no denial thereof, and his counsel has not challenged its sufficiency; that a certificate, in appropriate form, was recorded in the proper registry office, on February 19, 1938; and that a true copy thereof was filed with the town treasurer the same day.

The sixth alleged exception challenges the validity of the tax assessment. This is considered first because unless the tax was properly assessed, there was no tax lien to enforce and no one of the questions raised by the additional exceptions can be considered as pending before us for determination.

The principle that strict compliance with statutory requirements is necessary to divest property owners of their titles for non-payment of taxes has become firmly established by a long line of decisions running back to one rendered by our first Chief Justice at the beginning of our statehood, *Porter* v. *Whitney*, 1 Me., 306. For later cases, see *Brown* v. *Veazie*, 25 Me., 359; *Hobbs* v. *Clements*, 32 Me., 67; *Bowler* v. *Brown*, 84 Me., 376,

24 A., 879; *Baker* v. *Webber,* 102 Me., 414, 67 A., 144. In these cases the issue was between an individual claiming as purchaser at a tax sale and the owner against whom the tax was assessed, or one claiming under him, but the same principle, notwithstanding the implication in *Bowler* v. *Brown,* supra, that it was particularly applicable to controversies "between the purchaser at a tax sale, and the original owner," has been recognized where the issue was between the municipality and the assessed owner, *Inhabitants of Williamsburg* v. *Lord,* 51 Me., 599; *Inhabitants of Orono* v. *Veazie,* 57 Me., 517; *City of Old Town* v. *Robbins,* 134 Me., 285, 186 A., 663, or between a purchaser from the municipality, after the expiration of the redemption period, and the grantee of such owner, *Van Woudenburg* v. *Valentine,* 136 Me., 209, 7 A., 2nd, 623.

Defendant is entitled to the benefit of this principle, reasonably applied to the facts of the instant case. The exact limits of such application have never been defined, but numerous decisions reject tax titles, some on the ground of irregularity or deficiency in procedure following assessment of the tax, *Porter* v. *Whitney,* supra; *Brown* v. *Veazie,* supra; *Hobbs* v. *Clements,* supra; *Van Woudenburg* v. *Valentine,* supra; and others for invalidity in the assessment itself, *Inhabitants of Williamsburg* v. *Lord,* supra; *Inhabitants of Orneville* v. *Palmer,* 79 Me., 472, 10 A., 451; *Bowler* v. *Brown,* supra.

Allegation of the exception is that,

> "The assessment . . . was null and void, in that there was no legal Board of Assessors."

In the brief of counsel, and in the oral argument, the sole ground urged for this claim was election, at annual town meeting, of three assessors, including one C. T. Moody, and later election, at special town meeting held twenty-six days later, of P. D. Starrett "to fill vacancy caused by the resignation of C. T. Moody," with no evidence to establish the fact of resignation. To quote the exact claim, assertion in the brief was,

> "I submit that four assessors, is not a legal Board, and

the assessment made by all or any three of them is invalid and null and void."

Intention must be to allege that a board of four is not a legal board when voters originally elect a board of three, since it is plain under our statutes, which have remained unchanged upon the point for more than one hundred years (R. S. 1930, Chap. 5, Sec. 12) following a change from the original provision of "three or five meet persons, to be Assessors" (Laws 1821, Chap. CXVI, Sec. 1), that a town may properly elect a board of four if it desires. Whether or not the majority of a board may legally assess taxes, a question raised in *Jordan* v. *Hopkins,* 85 Me., 159, 27 A., 91, but not decided because participation by a selectman who had not been sworn as an assessor was held to invalidate the assessment, it seems unnecessary to decide in this case, since no authority is offered for the claim that a vacancy by resignation must be proved. In *Gould* v. *Monroe,* 61 Me., 544, this court recognized a vacancy in the office of collector of taxes on the basis of the refusal of the elected official to serve without evidence of such refusal, and cited with approval a Massachusetts case to the same effect, *Hays* v. *Drake,* 6 Gray, 387.

Neither in his principal brief nor oral argument did counsel for defendant offer any foundation for this sixth exception other than the foregoing, but as a reply brief he refers the court to R. S. 1930, Chap. 5, Sec. 5, which establishes governance for town meetings by a declaration that warrants therefor shall state in distinct *articles* the business to be transacted thereat and that "no other business shall be there acted upon." The transcript of testimony contains excerpts from the town records showing that the qualified inhabitants of the plaintiff town met pursuant to a "foregoing warrant" on March 1, 1937, and again on March 27, 1937, and under listed *article* numbers elected three selectmen and three assessors, a tax collector and a town clerk, at the meeting of March 1, and a "first assessor to fill vacancy etc.," at the meeting of March 27.

The transcript discloses that a book which contained the town records was presented before the referees and examined by counsel for defendant; that thereafter the validity of the election of the assessors and the tax collector, the election of the clerk, and the election and qualification of P. D. Starrett as assessor were questioned, and issue was raised as to the eligibility of the treasurer, elected the following year; that excerpts showing the election of the designated officers in 1937 were read into the testimony at the request of defendant's counsel, who expressly stated that he raised no objection "as to other matters appearing in the records of the town meeting"; and that his cross-examination of the town clerk related only to the method of voting, the qualification of the officers, and the eligibility of the treasurer. Had the book failed to support the recital, "Pursuant to the foregoing warrant," with which the record of each meeting commenced, or shown that action taken under any *article* exceeded that authorized thereunder, very simple questioning in cross-examination would have terminated the case in favor of defendant before the referees. In the absence of evidence to the contrary, we think it must be assumed that all action taken at the meetings was properly taken under the warrants by which they were convened. Such assumption comes within the rule that in the absence of evidence to show the contrary, it will be presumed that a town has proceeded in the usual and legal manner, *Mussey* v. *White,* 3 Me., 290; *Blanchard* v. *Dow,* 32 Me., 557; *Hathaway* v. *Inhabitants of Addison,* 48 Me., 440; *Inhabitants of Wellington* v. *Inhabitants of Corinna,* 104 Me., 252, 71 A., 889. The decision of the referees imports findings that the elections were valid and that the oaths administered were sufficient to qualify the elected officers. There is competent evidence in the record to support such findings. There is no merit in the sixth exception.

The tax assessment being valid, it becomes necessary to determine the issues raised with reference to the description of the locus. Regardless of descriptive sufficiency, no title can be held to have passed to the plaintiff unless the statute repre-

sents a constitutional exercise of legislative power, but long and thoroughly established practice dictates that no question of constitutionality shall be passed upon except when entirely necessary to a decision of the cause in which it is raised. 11 A. J., 720; *Payne* v. *Graham,* 118 Me., 251, 107 A., 709, 7 A. L. R., 516.

As to the adequacy of the description, the defendant alleges four grounds of exception. He first challenges that used in the inventory and valuation, relying, apparently, on the condition stated in the statute that the alternative remedy provided for the enforcement of tax liens shall be available only "if the inventory and valuation carries a description sufficiently accurate to identify the real estate taxed," and on authorities which make it clear that it is the assessment of a tax which lays the foundation on which any subsequent proceedings looking to the enforcement of the lien which that tax creates must rest. This issue is fundamental. *Greene* v. *Lunt,* 58 Me., 518; *Burgess* v. *Robinson,* 95 Me., 120, 49 A., 606. It represents a requirement which even legislative action cannot waive. Blackwell on Tax Titles, Par. 223. The assessment shown in the present record describes the locus by the abutters at the cardinal compass points, recites the acreage, and values separately the land and the buildings thereon. The information carried in the description book clearly identifies *some* particular property, and there is no suggestion in the testimony of such facts as were held to control against a similar description in *Burgess* v. *Robinson,* supra, that it might be applicable equally to other property. The detail given goes far beyond the requirement of identification with reasonable certainty declared requisite in the texts, Blackwell on Tax Titles, Par. 223; 26 R. C. L., 357; and held sufficient in decided cases, *Greene* v. *Walker,* 63 Me., 311; *Greene* v. *Lunt,* supra. Defendant takes nothing by his first exception that "there is no description of the real estate in the inventory and valuation, sufficiently accurate to identify it."

The second, third and fifth exceptions may be considered to-

gether. As in the first, it is apparent that defendant placed little reliance upon them since they were submitted without comment, either by way of argument or the citation of authorities, upon the basis that "the record speaks for itself." It speaks as definitely with reference to the second, third and fifth exceptions as to the first. The second, which challenges the lack of "evidence aliunde" to explain a "vague, uncertain and indefinite" description in the assessment is meaningless since the description there used requires no outside support or interpretation. The third and fifth are based on the fact that the description used in the proceedings subsequent to assessment "did not follow" the former, in the case of the lien certificate, or was "dissimilar," in the plaintiff's inventory and "valuation," by which presumably was meant the declaration in the writ. Examination of the three descriptions used discloses that the abutters were everywhere named the same, but where the description recited in the assessment stated that the lot was bounded North, East, South and West by named individuals, the later ones described it as bounded by "land of" the same named individuals and ushered in the cardinal points in each case by the words "on the." These variations come clearly within the rule laid down in *Greene* v. *Lunt,* supra, that proceedings to enforce a tax lien will not fail for defective description although the locus declared on is described "somewhat differently" in the assessment and in the writ, if the descriptions used are definite and have so much in common "as to satisfactorily lead to the conclusion that both refer to the same tract."

Defendant's remaining exceptions are the fourth, that in the act under consideration a lien certificate is made a mortgage by express provision of law, and is invalid as such because "without seal," and the seventh, which challenges the constitutionality of the statute. The latter is subdivided into two parts, one alleging that "a lien claim is not a mortgage and cannot be made one by legislative fiat," and the other that the law does not meet the requirements of "due process" under the constitutions of the United States and of this State. While the "fiat"

claim was expressly waived by counsel in the statement of his brief,

> "On mature consideration, I am of the opinion that it is competent for the Legislature to create a Statute mortgage which abrogates the common law requirements, although I contend that Chapter 244 did not intend to abolish the common law requirement of a seal,"

it may still, as thus restricted, tie into the fourth exception, that sealing is essential to constitute a valid mortgage, and will be considered in connection therewith.

Quotation of the pertinent words of the statute would seem to be a complete answer to the doubt about legislative intention. The act requires two things subsequent to assessment of a tax, both of which must be performed within carefully limited time intervals. The collector must give *a notice in writing* to the taxpayer and he must record *a certificate* in the registry of deeds. The details to be stated in notice and certificate are carefully enumerated. The only recital as to the *form* of either is that the certificate shall be *signed* by the collector. Previous to the enactment of the statute now under consideration, a tax lien on real estate was enforced by a "tax sale" and title passed by deed. Provision for enforcement by deed undoubtedly required all the usual and regular formalities incident thereto, including a seal. The present provision for enforcement by recording such an informal instrument as a certificate clearly evidences intent that the formalities of a deed are not requisite. The language of the act shows that the legislature was conscious of mortgages, as well as of liens (based on taxes, or otherwise), of attachments, and of other possible encumbrances. Section 1 does not purport to create a new lien or encumbrance. It recognizes that a lien attaches by law to real property as the result of the assessment of a tax thereon and provides for the enforcement of that lien by the filing of a *signed* certificate, if the tax remains unpaid after a stated interval. There is no mention of a seal, or of acknowledgment. There is no require-

ment for the naming of parties, for the recital of any consideration, for habendum or testimonium clauses, or for delivery. Legislative declaration is that the filing of the certificate shall be deemed to create and shall create a mortgage.

Neither the designation "mortgage," used by the legislative draughtsman, nor that of "statute mortgage," used by counsel for the defendant, seems entirely appropriate to describe either what the instrument is, or what it is intended to accomplish. The word mortgage, by general acceptation for many years, has come to have an established meaning which connotes not merely the transfer of a title which is defeasible upon the performance of a condition stated in the instrument of transfer, but, ordinarily, one which results from the volition of the owner of the property which is made subject to its terms. Nevertheless this Court has heretofore recognized that a tax deed, which cannot be said to represent a voluntary conveyance on the part of the owner of the property described therein, is, in principle, a mortgage. *Watkins et al.* v. *Eaton et al.*, 30 Me., 529 at 535 (cited and quoted with approval in *Loomis et als.* v. *Pingree et als.*, 43 Me., 299). Tax deeds, it is true, carry recital in their terms that the title conveyed is subject to defeasance, but they are neither delivered nor recorded in the title registry office until after the expiration of the statutory redemption period, R. S. 1930, Chap. 14, Sec. 81. The certificate required to be used under the present law by those who seek thereunder to enforce the tax lien which attaches to real property to secure the payment of a duly assessed tax is, without doubt, a new legislative creation which has no counterpart in earlier law. Neither the novelty of a legal form nor the name assigned to it can serve to defeat the legislative intention which induced establishment of such a form, even though it be a misnomer, which is not entirely clear in the present case. Legislation must be tested not by nomenclature, but by the purpose it is designed to serve and determination as to whether or not the substance of the act comes within the ambit of legislative power or transcends legislative authority.

The purpose of the legislation is manifest if reference is made to the comment of Mr. Justice Emery, later Chief Justice, in *Bowler* v. *Brown,* supra, page 379:

> "It is sometimes said that it is difficult to so assess a tax, and make a tax sale, as to pass a title to the purchaser. It should not be so. Every necessary step is named in the statute, and it is only necessary to have competent evidence that such steps were taken."

Inference from this statement is clear that when every act required by statute for the enforcement of a tax lien has been performed, title will pass. The acts required under the tax deed statute were numerous and varied. Those required under the new act are few and simple, and are designed to facilitate the passing of title to real estate in event of tax default. It remains to be considered whether it was competent for the legislature to provide for such passing without requiring the execution of a specialty and whether the enactment transcends constitutional inhibitions by a failure to provide due process.

At common law it was definitely established that title to realty could be conveyed only by instrument under seal, *Porter* v. *Read,* 19 Me., 363; *Manning* v. *Laboree,* 33 Me., 343; *Lovejoy* v. *Richardson,* 68 Me., 386; *Emerson* v. *Shores,* 95 Me., 237, 49 A., 1051, 85 Am. St. Rep., 404; *Brown* v. *Dickey,* 106 Me., 97, 75 A., 382; and that, to constitute a seal, there must be an impression — upon "wax" in earliest times, *Tasker* v. *Bartlett,* 5 Cush., 359; 4 Kent's Commentaries, 452 (9th Edition 526); and, later, upon "a wafer or other tenacious substance capable of being impressed," *McLaughlin* v. *Randall,* 66 Me., 226; *Bates* v. *Boston, etc. R. R. Co.,* 10 Allen, 251, and cases therein cited. The same requirement was applicable to corporate seals as to common seals, *Cram* v. *The Bangor House Proprietary,* 12 Me., 354; *Rangeley* v. *Spring,* 28 Me., 127; and to legal processes, such as warrants for arrest, *State* v. *Drake,* 36 Me., 366. That the strictness of the requirement might be changed by legislative enactment as to the particular

form which a seal should take has been assumed by the law-making body for many years, as will be noted by reference to the statutory provisions found in Paragraphs XVI and XVII of Section 6 of Chapter 1 (R. S. 1930), eliminating the requirement of wafer, wax or adhesive substance where a court seal is affixed or where instruments under seal are executed by a corporation, and legalizing for corporations the use of facsimile, engraved or printed seals. Legislative power to make such changes has long been asserted in many states — (See Kent's Commentaries, Vol. IV, 527, 9th Edition, and the footnote in *Commonwealth* v. *Griffith*, 2 Pick. 11, on page 17), and it seems to have been recognized by this Court in *Woodman* v. *York and Cumberland R. R. Co.*, 50 Me., 549; *McLaughlin* v. *Randall*, supra. A statement in the opinion in the last named case seems to carry recognition that the strict rules of the common law with reference to seals might well be changed by legislation:

> "How far the law requiring a seal upon deeds and other instruments, may be liberalized or otherwise, by future course of decision, or *by legislative enactment*, (italics ours) . . . , we cannot now anticipate, ..."

The ancient reasoning which laid the foundation for the strict rule (quoted with approval in *Jewell* v. *Harding*, 72 Me., 124 at 126), that a "seal attracts attention, and excites caution in illiterate persons, and thereby operates as a security against fraud," is clearly inapplicable to documents intended to expedite the collection of taxes.

The distinction as to legislative power between that conferred under the Constitution of the United States, where only the particular powers enumerated are vested in the legislative department, and that possessed under state constitutions generally, and particularly that of this State, has been frequently declared, although phrased differently by courts and writers. This Court has heretofore recognized the broad scope of legislative power, *Sawyer* v. *Gilmore*, 109 Me., 169, 83 A., 673; *Opinion of Justices*, 132 Me., 519, 174 A., 845, which was

last expressed in the words that it is "absolute and all-embracing except as expressly or by necessary implication restricted by the Constitution," *Opinion of Justices,* 137 Me., 350; 19 A., 2d, 53. In Cooley's Constitutional Limitations (7th Edition, page 242, 8th Edition, page 355), it is stated that, when a state law is attacked on the ground of unconstitutionality,

> "it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was vested in its creation."

There being no limitation, stated or implied, in either constitution which prohibits legislation to abrogate common law requirements in respect thereto, we apprehend there can be no doubt of adequate authority in the legislative department of government to give a certificate the effect of enforcing a tax lien without requiring that it be executed by sealing.

All preliminary questions incident to the claim that plaintiff has acquired title to the locus by enforcement of a tax lien having been resolved in favor of such claim, it becomes necessary to consider the constitutional question raised by the seventh exception. That the legislative branch of government under our tripartite system is subject to restrictions upon its authority, created by constitutional provisions, and that it is one of the proper functions of this Court to define the limits of legislative power, are principles too generally recognized to require the citation of authorities. The yardstick to be applied cannot be better stated than in the words of Chancellor Kent (Commentaries, Vol. I, page 500, 9th Edition), that a law to be valid "must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution" of the state, and that "if it infringes the provisions of either, it is so

far void." Steady obedience to "the requisitions of duty" require the Court, as aptly phrased by our first Chief Justice, to pronounce a statute which is "in violation of constitutional requirements or restraints" to be "unconstitutional and void," *Trustees New Gloucester School Fund* v. *Bradbury*, 11 Me., 118, at 126.

Those who act pursuant to a statute are not required to demonstrate that the provisions thereof are within legislative power. Rather it is for one who questions the validity of administrative acts on constitutional grounds to show that the particular enactment exceeds legislative power. Cooley's Constitutional Limitations, 7th Edition, 127, 8th Edition, 177. Necessarily, as this Court has heretofore declared in a case involving the identical statute now under consideration, he who raises the question must show that the act complained of "affects him injuriously, and actually deprives him of a constitutional right," *Inhabitants of Canton* v. *Livermore Falls Trust Co.*, 136 Me., 103 at 107, 3 A., 2d, 429, 431, and cases therein cited. That this defendant is "affected" is patent since it is his property which is claimed to have been taken pursuant to the act. He seeks to meet the burden of showing that he is deprived "of a constitutional right" by alleging a "summary forfeiture" of property "without due process of law" contrary to the Fourteenth Amendment to the Constitution of the United States and Section 6 of Article I of the Constitution of this State.

The swing of the pendulum presently is to increasing liberality in constitutional construction favorable to validity in legislative action over an ever broadening range. This tendency gives increased emphasis to that presumption of constitutionality, and inclination to recognize the validity of legislative acts in all doubtful cases, which have heretofore influenced this Court, *Lunt's Case*, 6 Me., 412; *Eames* v. *Savage*, 77 Me., 212. Recognition of the presumption has often been made in cases where the challenged act has been declared void, *Props. Kennebec Purchase* v. *Laboree*, 2 Me., 275, 11 Am. Dec., 79;

Trustees New Gloucester School Fund v. *Bradbury,* supra; *Bennett* v. *Davis,* 90 Me., 102, 37 A., 864; *State* v. *Butler,* 105 Me., 91, 73 A., 560, 24 L. R. A. (N. S.), 744; *Paine* v. *Savage,* 126 Me., 121, 136 A., 664, 51 A. L. R., 1194. With no thought of yielding to the theory of expediency which underlies the present trend, it seems proper to recognize the present legislation as valid within principles long established.

The statute is designed to facilitate the enforcement of tax liens; to speed the payment, and collection, of taxes; to furnish increased assurance of the regular flow of tax dollars into the coffers of municipal treasuries. From the very beginning of organized government it has been recognized that revenue is essential for its continued existence and taxation has been developed as the just, equal and regular method by which contributions should be exacted from persons and property to meet the expense of government. As Blackwell states in his Tax Titles (Vol. 1, page 16),

> "There must be interwoven in the frame of every government a general power of taxation. . . . A complete power, therefore, to procure a regular and adequate supply of revenue . . ."

In this State, the revenue necessary to maintain local government has been raised, since earliest times, both by poll taxes and by taxes on property, assessed locally under general authorization contained in the public laws or statutes. That this delegation of the taxing power by the legislature is a proper one has never been called in question so long as the constitutional mandate of equal apportionment and assessment has been observed (Section 8 of Article IX and amendment Article XXXVI), and the limitations as to the purposes for which taxes may properly be levied have not been transgressed. The right of the law-making body to provide by general law that the assessment of a tax on real estate creates a lien thereon has never been challenged. The present case does not involve either such issue. Defendant takes his present position, not against

the tax assessment, but against the method of enforcement of the tax lien, and in so doing, seems to recognize the validity of the general laws which delegate the authority to assess the tax and provide for the tax lien.

The law under consideration is challenged on two grounds, the first of which, that "a lien claim is not a mortgage and cannot be made one by legislative fiat," has already been considered in connection with the fourth exception, alleging impropriety in providing for the passage of title to real property without the use of a specialty. The second basis of the challenge is grounded in the well-recognized constitutional requirement of due process. Allegation of the exception is that due process requires

> "an opportunity for hearing as to the validity of a statute before private property can be taken by the State, County or City, for taxes."

The challenge is supported by the citation of two cases decided in this Court, two decisions in other jurisdictions, and 12 C. J., 1263. Of the cases cited only one, *Bennett* v. *Davis,* 90 Me., 102, 37 A., 864, dealt with legislation designed to facilitate tax collections by the enforcement of tax liens, and decision there did not hinge on the requirements of due process. The law there passed upon was declared unconstitutional under Sections 6 and 19 of the Declaration of Rights of our State Constitution (Article I), and the Fourteenth Amendment to the Constitution of the United States, as imposing a premium or price on the right to secure relief by legal process in its requirement that one seeking to contest the validity of a tax sale should deposit an amount equal to the tax involved plus interest and costs before beginning, or contesting, any action. The text in 12 C. J., 1263 deals only with special taxes and assessments and not with the collection of such taxes as come within the purview of the Tax Lien Law.

Due process, undoubtedly, as applied to legislation generally involves an opportunity for hearing, and more. This has

been decided on many occasions in this Court, as probably in all courts which operate subject to the supreme authority of the Constitution of the United States. As phrased by Mr. Justice Deasy in *Randall* v. *Patch,* 118 Me., 303, 108 A., 97, 98, 8 A. L. R., 65, wherein the two decisions from other jurisdictions cited in defendant's brief, *Rusk* v. *Thompson,* 170 Mo. App., page 76, 156 S. W., 64, and *Smith* v. *State Board,* 140 Iowa, 66, 117 N. W., 1116, were referred to for support:

> "Notice and opportunity for hearing are of the essence of due process of law."

It may be that the particular statement of the point in the exception ignores the generally accepted requirement of notice in recognition of the fact that the statute requires a particular form of notice ten days prior to the filing of the lien certificate and that the statutory form of notice was in fact given to the defendant in this case. Notwithstanding the failure on the part of the defendant to allege a deficiency of notice in the claims asserted before us, we shall seek to show hereafter that the notice required to be, and actually, given was more than sufficient to meet the requirements of due process in the particular field to which the legislation relates. It is very generally recognized both by text writers and decided cases that legislation designed to speed and secure tax collections is a thing apart and that an entirely different and lesser test of due process is to be applied in that limited field as distinguished from other laws of general application.

The issue in tax legislation regularly, as here, relates to the respective rights of a municipality and one of its taxpayers, or to the standing of the property of a taxpayer where there has been a default in the payment of the tax thereon. The immediate issue involves the value to a municipality of the security sought to be provided by the legislature for a small pro rata part of the general tax levy for 1937. The total levy covered the town's proportion of state and county taxes for the year and funds to meet the appropriations made by the qualified

voters. The taxpayer makes no suggestion that any part of the tax assessed to meet the municipal appropriations was for an improper purpose or that the amount levied against his property was in excess of the due proportional part thereof. Defendant had the right to have a judicial review of the valuation placed upon his property, R. S. 1930, Chap. 13, Secs. 73 *et seq.* He had the right, if any part of the levy was assessed for an improper purpose, to pay the tax and recover his payment with twenty-five per cent interest and costs, plus any damages sustained by him, by action at law, R. S. Chap. 14, Sec. 31. These statutory rights would seem to represent full assurance that machinery for the enforcement of tax liens could not operate against his property for more than his due equivalence of taxes or serve to retain any money which was paid by him against an illegal assessment. They seem to serve to meet fully the requirements of due process in the tax field.

In Cooley's Constitutional Limitations, it is stated (7th Edition, page 748; 8th Edition, pages 1103, 1104) that the legislature must have the right to determine what method shall be devised for the collection of taxes "subject only to such rules, limitations and restraints as the constitution of the State may have imposed." "Very summary methods," it is stated, "are sanctioned by practice and precedent" (citing cases). Process not substantially different from that authorized by the present act, except for waiver of the formality of a seal, a reduction in the acts to be performed by the tax authorities, an inconsiderable shortening of the time when forfeiture becomes absolute, and the change from a partial forfeiture to a total one which will be later discussed, has not only been in operation in this State over a long period of years, but has served as the foundation of title to real property after careful scrutiny by the court, *Greene* v. *Lunt,* supra; *Greene* v. *Walker,* supra. Cases almost without number wherein titles claimed under tax deeds have been rejected for failure of strict compliance with each and every statutory requirement carry a clear intimation that full compliance with all statutory requirements would

have vested a good title. (For examples, see cases cited under discussion of sixth exception.)

Chief Justice Appleton rather expressly recognized the validity of the tax sale law in *Inhabitants of Orono* v. *Veazie,* supra, at page 519, a case reported to the full court to determine whether a defendant might contest a writ of entry brought (as was the present suit) to recover possession of a tract claimed to have been acquired under a tax deed. There the issue was whether defendant might contest the suit without payment into court under the then statute, R. S. 1857, Chap. 6, Sec. 145, of an amount equal to the tax, charges and interest. Decision was that the cause should stand for trial notwithstanding default in such deposit, and comment was made,

> "There may be numerous sales and tax deeds. One deed may be valid and the others convey no title."

Such a deed, if valid, could convey no title unless the law which set up the machinery for its execution was in itself valid.

Blackwell in his Tax Titles (page 86) declares that it is within the legislative power to "enact the conditions of sale, and may provide as to the manner of all proceedings" designed to assure the payment and collection of taxes properly assessed against real estate adequately described if the legislation contains provisions for notice to the taxpayer and avoidance of all proceedings on payment of the tax. It is expressly stated, on the basis of many cases analyzed, that the process by which the taxpayer is deprived of his title on non-payment may be summary, and "need not involve any trial by jury nor any judgment."

The position of the text writers, with which the decisions of this Court seem to be in accord, is more than sustained in adjudicated cases in other jurisdictions. In *Newton et al.* v. *Roper et al.,* 150 Ind., 630, 50 N. E., 740, the court said, page 633:

> "The law . . . required . . . a notice . . . that . . . taxes were

> delinquent, and that a sale would be made. . . . It is true that the notice required to be published was that a public sale would be made, but the plainly written law further provided that a failure to sell . . . should forfeit the property. . . . The notice . . . constructively . . . charged him with notice . . . of the consequences. . . . The notice . . . was sufficient to advise him that his delinquency was subject to the summary remedies of the law."

In *Merchants Trust Co., Exr.* v. *Wright et als.,* 161 Cal., 149, 151, 118 P., 517, 519, it is stated that:

> " 'due process of law' . . . consists of the notice provided by law to be given to the delinquent taxpayer. . . . "

In *Maxwell* v. *Page,* 23 N. M., 356, 362, 363, 168 P., 492, 494, 5 A. L. R., 155, the court, after declaring that notice and opportunity for hearing "as to the amount of the charge," i.e., the tax, was the fundamental requirement, quoted with approval the language used in *Smith* v. *Cleveland,* 17 Wis., 556 (Reprint 573, 584):

> "The Legislature might have fixed the time and provided for a sale *without notice or advertisement.* They may, surely, by proper legislation in advance, guard against errors and cure mistakes when notice is required." (Italics above ours.)

In *Hagar* v. *Reclamation District No.* 108, 111 U. S., 701, 710, 4 S. Ct., 663, 28 Law Ed., 569, cited on the particular point with approval in *Turpin* v. *Lemon,* 187 U. S., 51, 23 S. Ct., 20, 47 Law Ed., 70, the court after noting that the valuation of property which was to be taxed according to value was a judicial act which in most states (of which Maine is one) provided machinery for the correction of errors stated, page 710:

> "The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it

may be followed if the tax be not paid, by a sale of the delinquent's property, is due process of law."

Finally, in *Messer* v. *Lang*, 129 Fla., 546, 556, 176 So., 548, 552, 113 A. L. R., 1073, the court indicates even that the right of redemption is not requisite to a tax enforcement statute by the words:

"The right to redeem at any time is nothing more than a gratuity which may be granted or withheld but if granted, may be restricted in the discretion of the Legislature."

These citations would seem to represent more than ample authority for the principle that the requirements of due process are altogether less strict in the testing of tax legislation than in any other field. The thought which underlies the principle was ably stated long since in this Court in *Roberts* v. *Moulton*, 106 Me., 174, at 176, 76 A., 283:

"Every taxpayer is held to know that if he does not pay the taxes assessed upon his real estate, it will be sold by the collector for non-payment of the tax, at the time and place fixed by statute."

This statement, written in 1909, might be paraphrased now to mean that any delinquent taxpayer who received notice that his taxes on a described parcel of real property were in arrears *and that a lien was claimed thereon* should be held to know that non-payment in ten days would result in the filing of *a tax lien certificate* which, after the expiration of eighteen months from the date of recordation, would forclose his right to redeem the property. Having assented to the amount of the tax by a failure to assert any right to partial abatement, and possessing still a right to recover the tax after payment, if he could show any part of the proceeds assessed for an improper purpose, such a delinquent should not be entitled to hearing before forfeiture of his title.

"The power to tax," says counsel for the defendant, "is the

power to destroy," quoting that greatest of constitutional jurists, John Marshall, fourth Chief Justice of the United States. Recognition of this principle would seem in itself to be sufficient to sustain the law now under consideration since such power would be futile unless it carried full authority to provide adequate machinery for the collection of the taxes imposed. As part of such machinery, our legislation has at all times during our statehood authorized forfeiture of titles to real estate on tax default. At the beginning, this was applicable only to the unimproved lands of non-resident proprietors, P. L. 1821, Chap. CXVI, Sec. 30. Remedy by early law against resident owners was by distraint of goods or chattels, and in default thereof, of the body (Section 26, same chapter). This remedy was available in case of non-payment *on demand,* than which no process could be more summary. Since 1844, we have had tax liens upon real property and the enforcement thereof by tax sales evidenced by tax deeds, R. S. 1930, Chap. 14, Secs. 72 *et seq.*, originally Chap. 123, P. L. 1844. Tax sale machinery was provided as an alternative to enforcement of tax liens by action at law, which defendant insists is the only proper method, since it alone provides "due process," i.e. hearing before a court, R. S. 1930, Chap. 14, Sec. 28. The 1933 law was enacted to provide an additional method—obviously an alternative to the tax sale. Experience had demonstrated that the tax sale method was both too slow and too uncertain to produce efficiently the objective which the legislature had in mind. The over-all period, ignoring minor variations from time to time in the statute and in the effective date because of adjournment of a tax sale from day to day, covered approximately two years and ten months from the tax day to which the assessment related, there being two full years allowed, following the sale, for redemption. Numerous cases, in addition to those already cited on particular points, had demonstrated the uncertainty of tax sale titles, since failure would result from non-compliance with any one of many acts specifically required to be performed by the municipal authorities. Intent of the new statute

obviously was to reduce the number of acts required on the part of such authorities and to shorten the period when forfeiture would become absolute. Comparative measurement of time is apparent if we note that procedure under the tax sale method on the particular tax lien involved in the present case would have vested title in the town not earlier than February 1, 1940, whereas under the act of 1933, such title became absolute, if at all, on August 18, 1939, a saving of between five and six months.

One additional feature of the new remedy remains for consideration, i.e. the abandonment by the Legislature of the long standing policy that a tax lien should be enforced so far, and only so far, as might be necessary to provide sufficient funds for the payment of tax, interest and charges. Our Tax Sale Law, R. S. 1930, Chap. 14, Sec. 72, traces back to a Massachusetts law passed March 16, 1785, in the provision that the sale shall cover so much of the real estate subject to the lien "as is necessary for the payment of said tax, interest and all the charges"; and it does not seem necessary to refer to the decisions of this Court which have interpreted that provision as requiring that the tax collector in making the sale shall sell the smallest *fractional part* of the property taxed necessary for the purpose. The decisions of this Court may be searched in vain for any judicial declaration indicating whether or not the policy so declared is a matter of policy only or was adopted in recognition of a supposed requirement of fundamental law, that the sale of anything more than the minimum interest necessary to serve the purpose would exceed legislative power. In the particular case, no question on this point is raised by the defendant, but notwithstanding that fact, it seems apparent that decision of the cause necessarily involves a determination as to whether the former rule has been grounded in policy or in recognition of fundamental law. We are not aware of any case in any jurisdiction where judicial declaration has intimated that a partial sale rule, either by the sale of a fractional interest in all the property or a sale of something less than all the property, is

constitutionally required. In the Fourth Edition of Cooley's work on Taxation, Vol. III, page 2830, Section 1430, it is stated that:

> ". . . In the absence of any statute limiting the officer's right to sell, to so much as would be requisite to pay the tax and charges, a restriction to this extent would be intended by the law."

This, we believe, must be intended only to indicate that where there is any ambiguity in a statute and doubt exists as to whether or not the legislative intention contemplated a total forfeiture or a partial one, the rule of strict construction against forefeitures will carry an implication that the least burden necessarily carried by the language used shall be imposed upon the taxpayer.

No case is cited by the writer and none has come to the attention of the Court where an undoubted legislative intent for total forfeiture has been held to infringe constitutional limitations. On the contrary, two decided cases in other jurisdictions seem to read quite definitely to the opposite effect. In *Fox* v. *Wright,* 152 Cal., 59, 91 P., 1005, a statute which provided for the sale of property at public auction to the highest bidder was held valid notwithstanding omission to provide that any excess in the sale price, over and above the accrued taxes, charges and penalties, should be paid over to the taxpayer; and the case was tried on a definite claim asserted by the taxpayer that the statute imposed an excessive burden for the support of government in violation of the constitutional mandate requiring uniformity in taxation and compelling an individual to bear only his proportionate share thereof. In the Indiana case, *Newton et al.* v. *Roper, et al.,* supra, the statute under consideration provided definitely that where delinquent lands were offered at public sale and not sold, they should "be considered forfeited to the state."

It should perhaps be noted in this connection that under our own law the tax lien which attaches to property by the mere

assessment of a tax thereon has at all times attached to the full title taxed, and that our legislation, the full history of which has been heretofore traced, has recognized that sale of all that is subject to the lien has been proper if no purchaser appeared at the sale to pay the necessary amount for something less than the entire property. We hold that there is no requirement in the fundamental law, either of this State or of the United States, which prohibits legislative action establishing a policy that the taxpayer shall lose his entire property by failure to pay all taxes properly assessed thereon, provided, as is the fact under the law in question, that adequate provision is made to give the taxpayer opportunity for redemption, and that the language used by the Legislature in the particular act shows that such was clearly the legislative intention.

It has heretofore been noted at the very outset of the consideration given to the sixth exception that in all cases involving property claimed under tax default, the assessment of the tax claimed to have created the lien is the first requisite to the vesting of a valid title. This fundamental is again stressed to call particular attention to the fact that the alternative or additional method for the enforcement of tax liens provided by P. L. 1933, Chap. 244, is not a cure-all for municipal officers. The tax title derived by compliance with its requirements can be no better than the tax assessment on which it is based; and if that assessment is defective, no title can accrue by going through the formality of recording a tax lien certificate. The process is available only as to property properly described and necessarily only if a lien has attached by proper assessment. Notice to the taxpayer is required both by delivery in hand, or at his last and usual place of abode, or by registered mail, and by record in the title registry office, and payment of the tax, with interest and costs, at any time during an eighteen-month waiting period, after record, assures the discharge of the lien. These "proceedings," with the protection afforded to the taxpayer by statute to protect himself against the payment of more than his due equivalence of the total tax levy and to test

the propriety of each and every item in the municipal appropriations, seem to this Court to represent ample protection of all his constitutional rights, and the mandate must be

Exceptions overruled.

WORSTER, J., does not concur.

ARTHUR W. VIGUE

vs.

WARD B. CHAPMAN AND INA T. CHAPMAN.

Somerset. Opinion, December 22, 1941.

Constitutional Law. Taxation. Tax Liens.

Long and thoroughly established practice dictates that no question of constitutionality shall be passed upon except when entirely necessary to a decision of the cause in which it is raised.

The first requirement of a valid tax is the due election and qualification of those who assess it.

The record of an election, if not impeached, implies a legal choice.

Strict compliance with statutory requirements is necessary to divest property owners of their titles for non-payment of taxes.

It is only by proper assessment that a lien can be created under the provisions of R. S. 1930, Chap. 13, Sec. 3, and unless a tax is properly assessed, it cannot create a lien available for enforcement by any form of process.

Legislative action adopted to regulate procedure in litigation relative to tax deeds does not apply with equal force to litigation over tax titles which depend on tax lien certificates.

Recitals in a tax deed are not evidence of the facts recited unless made so by statute; and legislative action would be necessary to give such effect to a tax lien certificate authorized by the terms of the present statute.

Assessment of a tax and commitment must be under the hands of the assessors, and without proof that such formalities have been complied with in the assessment of taxes and their commitment for collection, any title based on the enforcement of a tax lien must fail. In the instant case, the record is absolutely devoid of such proof.

ON REPORT.

Writ of entry by the plaintiff against the defendants to re-

cover a parcel of land claimed by the defendants under conveyance from the inhabitants of the town in which the property is situated, which conveyance was executed on the basis of a title alleged to have been acquired under the operation of the so-called Tax Lien Law, P. L. 1933, Chap. 244 as amended. The tax which was the basis of the lien was assessed against the plaintiff as a non-resident owner of the property. A lien certificate in appropriate form was filed in the proper registry office and the town officers took possession of the property and subsequently made conveyance thereof to the defendants by deed. The plaintiff's claim of title was based on the ground that town officials did not comply strictly with all the requirements of law necessary to enforce a forfeiture for non-payment of taxes and on the further ground that the statute in its application to the particular tax is unconstitutional. The question of the constitutionality of the statute was not considered as such consideration was deemed unnecessary to a decision of the cause since the proceedings taken to effect the forfeiture fell short of that strict compliance with statutory requirements necessary to divest owners of their titles for non-payment of taxes.

Judgment for the plaintiff. The case fully appears in the opinion.

Harvey D. Eaton, of Waterville, for plaintiff.

Harvey H. Brazzell, of Fairfield, for defendants.

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

MURCHIE, J. By writ of entry, the plaintiff here seeks to recover a parcel of land claimed by the defendants under conveyance from the inhabitants of the town in which the property is situate, executed on the basis of a title alleged to have been acquired under the operation of the Tax Lien Law, so-called, P. L. 1933, Chap. 244, as amended. The tax which laid the foundation for the lien was assessed against the plaintiff as

a non-resident owner of the property in 1937. A lien certificate in appropriate form was filed in the proper registry office April 4, 1938, and the record discloses that officers of the town took possession of the property October 4, 1939, and made conveyance to the defendants by deed dated March 2, 1940, which was recorded five days thereafter.

Plaintiff's claim of title is supported on the dual ground that the town officials did not comply strictly with all the requirements of law necessary to enforce a forfeiture for non-payment of taxes and that the statute in its application to the particular tax lien is unconstitutional because differences in statutory requirements applicable to resident proprietors, on the one hand, and to non-resident proprietors, on the other, represent a denial to the plaintiff, as a non-resident, of that *equal* process guaranteed by Article XIV of the Amendments to the Constitution of the United States wherein it is stated (Sec. 1) that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." While it is not material to the present cause, where the rights of the parties must depend on the efficacy of a tax lien certificate filed in 1938, it may be noted that the differences in process applicable, as the law was originally written, to resident and to non-resident owners was eliminated by P. L. 1939, Chap. 85.

In *Inhabitants of the Town of Warren* v. *Norwood,* recently decided in this Court, (138 Me., 180, 24 A., 2d, 229), the question of the constitutionality of the law here challenged, in so far as it applies to resident taxpayers, was considered and determined affirmatively. The instant case raises a constitutional issue which was not there determined, but the rule there recognized, that "long and thoroughly established practice dictates that no question of constitutionality shall be passed upon except when entirely necessary to a decision of the cause in which it is raised," seems to preclude a present consideration of the equal process issue, since the proceedings taken to effect the forfeiture so clearly fell short of that "strict compliance with statutory requirements" which is necessary "to

divest property owners of their titles for non-payment of taxes." *Porter* v. *Whitney,* 1 Me., 306; *Brown* v. *Veazie,* 25 Me., 359; *Hobbs* v. *Clements,* 32 Me., 67; *Bowler* v. *Brown,* 84 Me., 376, 24 A., 870; *Baker* v. *Webber, et al.,* 102 Me., 414, 67 A., 144; *Inhabitants of the Town of Warren* v. *Norwood,* supra.

The record discloses that plaintiff acquired title to the locus in November, 1924, and, so far as any testimony in the cause appears, he is still the owner of it, unless the proceedings of the town intended to work a forfeiture were effective. The testimony shows that the taxes assessed against the property for the years 1936, 1937, 1938 and 1939 have not been paid, and that the enforcement proceedings related to a tax in the amount of $10.60 assessed in the year 1937. The lien certificate recites that the tax was committed for collection on June 12, 1937, which date, assuming a valid assessment and such commitment, was within the statutory time limit for such recording.

As was stated in *Inhabitants of the Town of Warren* v. *Norwood,* supra, the first question for consideration in any case involving a tax forfeiture is the assessment of the tax itself, since it is only by proper assessment that a lien can be created under the provisions of R. S. 1930, Chap. 13, Sec. 3, and unless a tax is properly assessed, it cannot create a lien available for enforcement by any form of process. *Greene* v. *Lunt,* 58 Me., 518; *Burgess* v. *Robinson,* 95 Me., 120, 49 A., 606.

The first requirement of a valid tax is the due election and qualification of those who assess it. In *Inhabitants of the Town of Warren* v. *Norwood,* supra, the court held that when a party contesting the validity of tax proceedings challenges the election and qualification of designated officials, examines the municipal records, selects excerpts dealing with the matters in dispute to be read into the testimony, and states that he raises no issue "as to other matters," it may be assumed that all action at the meeting, other than that covered by the excerpts so selected and made a part of the testimony, was properly taken

under the warrant by which the meeting was convened. The principle thus enunciated represents little extension, if any, of the rule of liberal construction which has always been applied to town meeting records. Almost of necessity town meeting action is recorded occasionally by those having little of experience either in law or in the interpretation of statutes, and it would be unwise to require a too meticulous care with reference to detail. In each of several decided cases heretofore, a record presented in court showing entry that a named officer was "elected," "chosen" or "chosen by ballot" was held sufficient notwithstanding failure to recite that the election or choice was "by ballot" or that the officer elected by ballot was named "by major vote." In each case the principle was applied that the record of an election, if not impeached, imports a legal choice. *Mussey* v. *White, et al.*, 3 Me., 290; *Blanchard* v. *Dow*, 32 Me., 557; *Hathaway* v. *Inhabitants of Addison*, 48 Me., 440; *Gerry* v. *Herrick*, 87 Me., 219, 32 A., 882; *Inhabitants of Wellington* v. *Inhabitants of Corinna*, 104 Me., 252, 71 A., 889.

The transcript now under consideration contains no excerpt from the municipal records showing either the election or the manner thereof, but counsel for the defendants, who rely upon the tax enforcement proceedings, sought to prove all such facts by verbal evidence alone. The town clerk testified (presumably refreshing his recollection from the town records, although the transcript shows that he referred to the record book which he produced in court in only two places, which related to the election of selectmen and assessors in 1936 and to the posting of the warrant for the 1937 meeting) as to who had been elected selectmen and assessors in 1936; the date of the warrant for the 1937 meeting; the names of the signers thereof, the date of that meeting; and who were elected selectmen and assessors in that year, in 1938 and in 1939. He was not asked, nor did he testify, as to the method of election, and his testimony as to qualification was given merely in one affirmative answer to an inquiry, which on the record may have

referred merely to the selectmen elected in 1939, since that was the last definite item of testimony preceding it, "and they were duly qualified as such." Whether or not the policy of liberal construction should be extended to permit this first step in securing money to meet the expenses of govenment by taxation to be proved in so unorthodox a manner it seems unnecessary to decide, because defendants' case must fail in any event on grounds hereinafter stated.

The principle of liberal construction for municipal records has been matched by a liberal policy of legislation designed to furnish support for tax titles which dates back to the general revision of our tax laws in 1844 (Chap. 123 of the Public Laws of that year). The first machinery for tax sales of the real property of resident proprietors established a rule of practice (Sec. 16 of said Act) which is not substantially different from our present law as contained in R. S. 1930, Chap. 14, Sec. 87, except that since 1895 (P. L. 1895, Chap. 70), the collector's return to the town clerk, the latter's record thereof, and in cases where such record is lost, an attested copy of the same, have been constituted prima facie evidence of all the facts therein set forth. A prima facie case for a tax title, claimed under a tax deed, could be made out then, as now, by production of the deed itself, and proof of the assessment, the commitment, and compliance with the statutory requirements of advertising and sale. In the interval between 1844 and the present, the legislature attempted to provide an even more liberal rule by a requirement, declared unconstitutional in *Bennett* v. *Davis*, 90 Me., 102, 37 A., 864, that one who sought to contest the validity of a tax deed should, before proceeding, pay into court an amount equal to the tax involved, plus interest and costs. This provision was declared invalid on the ground that it interfered with the right of free and unrestricted access to the courts of justice. The rule of practice as to the requirements of a prima facie case however has been upheld. *Inhabitants of Orono* v. *Veazie*, 57 Me., 517.

Defendants here sought to prove by the testimony of the

town clerk, not only the matters hereinbefore referred to, which related to the election of the officers charged with the duty of assessing and collecting the tax, but also such facts as the assessment of the tax itself, the filing of the lien certificate, the taking of possession of the locus, and the sale of the property to defendants. No verbal proof, even, was offered that the assessors signed either a tax assessment or a warrant of commitment of the same to a collector of taxes. It seems apparent that counsel for the defendants relied on the assumption that a tax lien certificate produced in court would have the same effect in creating a prima facie case for the validity of the tax proceedings involved and in proving the facts of assessment and commitment as are carried by a tax deed and a collector's return by statute. We know of no rule of construction which would justify the court in saying that legislative action adopted to regulate procedure in litigation relative to tax deeds shall apply with equal force to litigation over tax titles which depend on tax lien certificates. It seems necessary that the court hold, as originally declared in tax deed cases and as still applicable thereto except as changed by the statute aforesaid, that the recitals in a tax deed *unless made so by statute* are not evidence of the facts recited. *Worthing* v. *Webster,* 45 Me., 270, 71 Am. Dec., 543; *Phillips* v. *Sherman, and others,* 61 Me., 548; *Nason* v. *Ricker,* 63 Me., 381. Legislative action will be necessary to give such effect to the tax lien certificate authorized by the terms of the statute now under consideration.

The testimony as to the assessment of the tax shows that a selectman, in stating the amount of the tax, referred to an assessment book which carried a reference to a property book at a stated page (1545), and that he produced from another book a sheet purporting to be the designated page which gave a description of property substantially like that used both in the lien certificate and in the subsequent deed from the inhabitants of the town of the defendants. It was developed in cross-examination that the book from which the particular page was taken had no title page (so far as the witness knew) and no sig-

nature. Witness explained that the book from which the sheet was taken, or in which it was contained, was not the "property book" referred to in the assessment book, but a transfer book, and that it was the practice of the town officers, when a particular parcel of property was sold, to transfer the sheet containing the description thereof "into this so-called dead file" or "transferred property file." The record is absolutely devoid of proof that the assessors of the Town of Fairfield in 1937 ever signed a tax assessment against the locus or against any other property, or that they ever signed a warrant committing any taxes for collection. Note is made in *Cassidy* v. *Aroostook Hotels, Inc.*, 134 Me., 341, 180 A., 665, of the statutory requirements contained in R. S. 1930, Chap. 13, Sec. 81, that assessment and commitment must be *under the hands* (italics ours) of the assessors, and without proof that such formalities have been complied with in the assessment of taxes and their commitment for collection, any title based on the enforcement of a tax lien must fail.

The case having been submitted on report for final determination in this Court upon so much of the evidence as is legally admissible, the mandate must be

Judgment for plaintiff.

FRANK L. GERRISH *vs.* GEORGE S. FERRIS.

Hancock. Opinion, January 2, 1942.

Negligence in Automobile Accident. Questions of Fact are for the Jury, under Proper Instructions.

The questions of negligence and due care are factual matters for the jury, under proper instructions by the court, and the jury finding in the instant case was warranted.

EXCEPTION AND MOTION FOR NEW TRIAL BY THE DEFENDANT.

Action for injuries by a pedestrian who was struck by a truck driven by defendant's employee, who was acting within the

scope of his employment when the accident occurred. The jury found for the defendant. Exception overruled. Motion for new trial overruled. Case fully appears in opinion.

Clarke & Silsby, of Ellsworth, for plaintiff.

Philip G. Willard,

Robert A. Wilson, of Portland, for defendant.

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

PER CURIAM.

In this action of negligence the plaintiff has the verdict and the case comes forward on the defendant's exception to the denial of his motion for a directed verdict and on a general motion for a new trial.

As the plaintiff, in the afternoon of January 15, 1940, was walking along the shoulder on the right side of the state highway known as U. S. 1 and in the Town of Hancock, he was struck by a truck driven by the defendant's employee which was travelling in the same direction and approached from the rear. The road was a black, hard-surfaced way twenty feet wide with gravel shoulders on each side but there were no sidewalks. The accident occurred in broad daylight and, although there was some mist, visibility was not materially impaired. The pedestrian was in plain sight of the driver of the truck and seen by him for a substantial period of time and distance before he was run down. Keeping at all times well out on the shoulder and several feet off the black road, he at no time looked back for automobiles approaching from the rear.

The jury were warranted in finding that the defendant's employee was driving down hill on a somewhat icy road which was banked in his lane so that the back end of his truck at times slipped towards the center of the way. To avoid this he kept his front wheels turned at an angle towards the shoulder at his right and although he saw the pedestrian walking along there

and had the full width of the way available for his use, suddenly without warning he drove his car out over the shoulder, hit the plaintiff and pinned him against a guard fence erected there beside the road. For this sudden turn and his operation of the truck in connection therewith the defendant's driver offers no satisfactory explanation.

It being conceded that the driver of the truck was acting within the scope of his employment when the accident occurred, his negligence, imputable to his employer, and the plaintiff's due care were questions of fact for the jury under proper instructions from the court. Neither issue can be resolved as a matter of law. The verdict was not manifestly wrong.

Exception overruled.
Motion overruled.

RALPH PLANTE

vs.

CANADIAN NATIONAL RAILWAYS AND EDGAR ST. LAURENT.

Androscoggin. Opinion, January 3, 1942.

Obstruction of Highway by Train, Negligence.
Separate Liability of Joint Tort-feasors.

Collision at a railroad crossing constitutes prima facie evidence of negligence on the part of the operator of a motor vehicle struck on the crossing by an approaching train or running into the side of a train standing upon or moving over such crossing.

The negligence of the operator of a motor vehicle is not imputable to a passenger in the motor vehicle.

The finding of a jury should stand unless clearly and unmistakably wrong, and in the absence of exceptions, it must be assumed that the findings were made after proper instruction upon the applicable law.

The statute (R. S. 1930, Chap. 64, Sec. 79) providing that railroads shall not "unreasonably and negligently obstruct railway crossings" fixes no time interval which if exceeded will represent an unreasonable and negligent obstruction.

The rule adopted by the railroad company that the highway must not be obstructed for more than five minutes at a time cannot be held to be an interpretation of the statute that anything in excess of a five-minute delay would be a violation of the law.

An unlighted train standing on a crossing at night constitutes a hazard to travellers and may impose an obligation to warn, if visibility is poor by reason of fog or equivalent circumstance.

The proper test as to the necessity for warning when a highway crossing is obstructed by an unlighted train at night is whether the railway employees, in the exercise of proper care, should recognize danger of collision with a highway vehicle operated by a person of ordinary prudence.

A finding of fact based on the assumption that it is the duty of the railway employees to warn of an obstruction of the highway by a train which should be visible to the operator of a motor vehicle properly equipped with lights and operated with due care in time to permit stoppage before collision is unmistakably wrong.

A verdict based upon negligence is wrong unless the relation of cause and effect between the negligent act and the accident is present.

Although at early common law it was undoubtedly an established principle that a joint verdict must stand or fall in its entirety, such holding does not now obtain in this state and the case of *Arnst* v. *Estes,* 136 Me., 272, is authority for the rule that one joint-defendant cannot complain because another, sued with him, has been properly found not liable on the facts.

It is established law in this state that process sounding in tort and instituted against plural defendants does not of necessity have to remain such during its full course, if the liability upon which the action purports to be grounded is several. A jury may separate the defendants and return a verdict which will exonerate one or more and find against another or others; or the Trial Court may separate them or the Supreme Judicial Court may act on its own initiative.

When a verdict which involves a finding of liability against two joint tort-feasors, correct as to one and improper as to the other, is brought before the Supreme Judicial Court on separate motions for new trial, it must be set aside as against the defendant not properly chargeable and permitted to stand as against the other.

Where a joint verdict is improper as to one defendant on the issue of liability and proper as to the other, and it is apparent that the damage award is excessive, a new trial will be ordered as to the defendant not chargeable, and, if the record presents no proper basis on which the Law Court may assess damages, a new trial, limited to the assessment of damages only, will be ordered as to the defendant liable.

MOTION FOR NEW TRIAL BY EACH DEFENDANT.

Action was brought by the plaintiff against the defendants

for personal injuries suffered by reason of a collision between the automobile of defendant Laurent, in which plaintiff was a passenger, and a train operated by defendant Canadian National Railways which was standing across the highway. The collision occurred late at night in midwinter. Visibility was good but the road slippery. The automobile was travelling at a rate of speed which was not less than twenty nor more than thirty miles per hour. The train had been stationary approximately ten minutes contrary to a rule of the defendant railway company forbidding obstruction of the highway for more than five minutes at a time. The jury found against both defendants. Each defendant, separately, filed a motion for a new trial. Verdict set aside as to Canadian National Railways and new trial granted. As to the defendant Laurent, a new trial was granted solely for the assessment of damages, the amount fixed by the jury being held to be excessive. The case fully appears in the opinion.

Berman & Berman, of Lewiston, for plaintiff.

Skelton & Mahon, of Lewiston, for defendant, Edgar St. Laurent.

Fred H. Lancaster, of Lewiston, and

H. P. Sweetser, of Portland, for defendant, Canadian National Railways.

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

MURCHIE, J. This case comes to the court on separate general motions for a new trial filed on behalf of both defendants following a verdict for the plaintiff for $600 against both defendants. There are no exceptions.

The material facts are not in dispute. From the evidence it definitely and clearly appears that the plaintiff, late at night in midwinter, was travelling as a passenger in an automobile, driven by the defendant St. Laurent, along a highway in the

City of Auburn, across which the defendant Canadian National Railways maintained a crossing at grade; that, within a few minutes prior to the time when the automobile reached the crossing, a special freight train, operating on a fixed daily schedule and approximately on time, was stopped there for the purpose of cutting out three freight cars and placing the same upon a siding; that the train was a relatively long one and extended more than seven hundred feet along the track both north and south of the highway; and that a refrigerator car about forty feet long and nine feet high, painted yellow with black lettering, extended across and completely blocked the highway. The night was clear but dark, and the road surface somewhat slippery. The plaintiff was not familiar with the crossing.

The evidence does not clearly establish how long the train had been stationary, or the condition of the paint on the refrigerator car, but it is entirely clear that the time interval was greater than that period of five minutes which the plaintiff claims to be controlling, and the jury would have been fully justified in finding that the particular car had not been freshly painted but presented that dingy, neutral appearance which is often noticeable in railway equipment.

The defendant St. Laurent was proceeding at a rate of speed variously estimated at from twenty miles per hour (or slightly under) to thirty. Called as a witness by the plaintiff, he estimated his own speed at "around twenty-five miles an hour." His automobile was in good condition, as were the lights. All persons riding in the car testified for the plaintiff, but no one, other than the defendant St. Laurent, saw the obstruction prior to the impact. He testified that he first saw it when within forty or fifty feet, but was unable to bring his car to a stop because of hard-packed snow and ice on the road surface.

The claim against the defendant St. Laurent is asserted on the ground that he neglected duties (1) to drive at a reasonable rate of speed, and (2) to keep reasonable watch for ob-

structing trains, with the vehicle under such control that it could be seasonably brought to a stop, and that against the defendant railway is based upon the breach of duties (1) to refrain from unreasonably obstructing the highway, and (2) to give warning, in case of obstruction, to highway traffic. The defendant St. Laurent, in his pleadings, asserts that the night was "dark, cloudy and stormy," but there is no support in the evidence for anything beyond the element of darkness. On the contrary, undisputed testimony shows that the night was clear and the visibility good.

The jury verdict imports findings of fact that the defendant St. Laurent and an employee of the defendant Canadian National Railways were severally guilty of acts of negligence; that their separate negligent acts contributed proximately to cause the injuries; and that the plaintiff was in the exercise of due care.

There is no sound basis for contesting the dual findings as to the negligence of the defendant St. Laurent and its causal connection with the accident. Collision at a railroad crossing constitutes prima facie evidence of negligence on the part of a traveler struck on the crossing by an approaching train, or running into the side of a train standing upon, or moving across one. *Heseltine* v. *Maine Central Railroad Co.*, 130 Me., 196, 154 A., 264; *Witherly* v. *The Bangor and Aroostook Railroad Co.*, 131 Me., 4, 158 A., 362. Whether excessive speed or failure to watch was the basis of the verdict, there was no evidence to refute the prima facie case against him, and it is entirely obvious that it was either the sole, or a substantial, proximate cause of the damage.

The same thing is true with reference to the finding as to due care on the part of the plaintiff since, as already noted, he was not familiar with the crossing and the facts do not indicate a degree of negligence on the part of the driver which should have charged him with responsibility to give warning or take any other action. Our court long since decided that the negligence of a driver could not be imputed to his passenger. *State*

of Maine v. *Boston and Maine Railroad Co.*, 80 Me., 430, 15 A., 36.

This leaves for determination the question of negligence on the part of the defendant railway and its causal connection with the injuries. Decision must be made within the established principles that a jury verdict should not be set aside unless it is "clearly and unmistakably wrong"; *McNerney* v. *Inhabitants of East Livermore*, 83 Me., 449, 22 A., 372, 373; *Searles* v. *Ross, et al.*, 134 Me., 77, 181 A., 820; *Marr* v. *Hicks*, 136 Me., 33, 1 A., 2d, 271; and that, in the absence of exceptions, it must be assumed that the findings were made after proper instruction upon the applicable law. *Frye* v. *Kenney*, 136 Me., 112, 3 A., 2d, 433. The finding of negligence may have been based on either the maintenance of an obstruction contrary to the regulation imposed by R. S. 1930, Chap. 64, Sec. 79, that railroads shall not "unreasonably and negligently" obstruct highway crossings, or the rule enunciated in *Richard* v. *Maine Central Railroad Co.*, 132 Me., 197, 168 A., 811, 812, that a stationary unlighted freight train upon a crossing at night creates "a hazard for travellers" which may impose a duty to warn.

As to the first ground, it is apparent from the record that the sole question is whether the train constituted an obstruction within the rule that violation of a regulation imposed by law creates a presumption of negligence. *Nadeau* v. *Perkins*, 135 Me., 215, 193 A., 877. There is no suggestion in the testimony of any unreasonable and negligent obstruction *in fact*. On the contrary, the evidence is undisputed that the train crew proceeded expeditiously to cut out the cars and place them upon the siding, and the plaintiff offers no authority for the claim, obviously implied in his examination of the conductor of the train, that the defendant railway could have conducted its transportation by stopping where no cars would have been left standing on the highway or by breaking the train at a second point to leave the crossing free. Paraphrasing

an earlier declaration of this court, the public benefit of rail transportation, "viz., quickness and economy" in handling freight, "would be greatly lessened" by the delay and expense involved in either such method. "The traveler upon the common road is not seriously inconvenienced by the railroad crossings." *Giberson* v. *Bangor & Aroostook Railroad Co.*, 89 Me., 337, 36 A., 400, 401.

Plaintiff's reliance on this point rests squarely upon the claim that the obstruction was negligent *in law* because the train had been standing on the crossing for more than five minutes. The statute fixes no time interval which if exceeded will represent an unreasonable and negligent obstruction. There has been no judicial determination upon the point. The claim is that a rule of the defendant, adopted for the government of its employees, which reads that a "highway must not be obstructed by switching operations for more than five minutes at a time," has measured off a five-minute interval as that obstruction which is inhibited by statute. For this extension of the principle declared in *Nadeau* v. *Perkins*, supra, the plaintiff offers as authority two cases decided in other jurisdictions and comment thereon in Wigmore's Evidence. The cases, *Chicago & A. Ry. Co.* v. *Eaton*, 194 Ill., 441, 62 N. E., 784, 88 Am. St. Rep., 161, and *Stevens* v. *Boston Elevated Railway*, 184 Mass., 476, 69 N. E., 338, support the principle that violation of a rule adopted in the interest of safety for third persons may be considered evidence of negligence, but there is nothing in the instant case to justify belief that the particular rule was adopted to serve any such purpose. It seems apparent that the rule proved was adopted to forestall the imposition of penalties under the statute. In *State of Maine* v. *Grand Trunk Railway of Canada*, 59 Me., 189, the only decided case which furnishes a direct interpretation of the legislation on the particular point, an indictment was held sufficient on allegation that, because of an unreasonable and negligent obstruction,

> "people . . . could not . . . go and return, pass and repass . . . along said highway, as they ought and were accustomed so to do, to the great damage and common nuisance"

of all citizens. The rule was clearly violated but the verdict must be held clearly and manifestly wrong if it was based upon a finding that the defendant's rule furnished statute interpretation that anything in excess of a five-minute delay would be a violation of law.

The alternative of basing liability on a failure to warn highway traffic requires consideration of the applicable law. The proper test as to the necessity for warning, when a highway crossing is obstructed by an unlighted train at night, is whether the railway employees, in the exercise of proper care, should recognize danger of collision with a highway vehicle operated by a man of ordinary prudence. This rule has often been declared. *Gilman* v. *Central Vermont Ry. Co.*, 93 Vt., 340, 107 A., 122, 16 A. L. R., 1102; *Philadelphia & Reading Ry. Co.* v. *Dillon*, (Del.), 114 A., 62, 15 A. L. R., 894; *St. Louis-San Francisco Ry. Co.* v. *Guthrie*, 216 Ala., 613, 114 So., 215, 56 A. L. R., 1110; *Trask* v. *Boston and Maine Railroad*, 219 Mass., 410, 106 N. E., 1022. In the two latter cases no violation of a statute was involved, but the cases can hardly be distinguished on that ground since the violation here relied on is not of a statutory regulation but merely of a rule which cannot be said to have been adopted to protect against crossing accidents. In *Richard* v. *Maine Central Railroad Co.*, supra, there was a heavy fog and visibility was poor. The decision in that case is authority for holding that failure to warn of an obstruction, when fog or some other equivalent circumstance obscures vision, may serve as the foundation of liability. It cannot be said to go further. Evidence by way of a plan and photographs shows that but for the darkness, the crossing would have been visible from a distance of upwards of three hundred feet. Statute requirement (R. S. 1930, Chap. 29, Sec. 82) is that such a motor

vehicle as that in which plaintiff was riding should be equipped with headlights

> "capable of furnishing light . . . to render any substantial object clearly discernible . . . two hundred feet directly ahead."

As to grade crossings, the statute further provides (Section 89 of the same chapter) for a further safeguard by way of reduced speed when a motor vehicle approaches within "one hundred feet from the nearest rail" of a crossing. Obviously there was no danger that a motor vehicle driven at proper speed, or under proper control, would run into the side of this train under the conditions prevailing, and the verdict, as to the defendant railway, must be set aside as manifestly wrong on the issue of negligence.

If a finding of negligence on the facts was proper, the same result would be inevitable since it is apparent, even with negligence assumed, that the case must fail on causation. Questions on either of these issues are generally considered as of fact rather than of law, *State of Maine* v. *Maine Central Railroad Co.*, 76 Me., 357, 49 Am. Rep., 622; *York* v. *Maine Central Railroad Co.*, 84 Me., 117, 24 A., 790, 18 L. R. A., 60; *Romeo* v. *Boston and Maine Railroad*, 87 Me., 540, 33 A., 24; *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me., 473, 59 A., 953; but this is limited by the rules declared in *York* v. *Maine Central Railroad Co.*, supra, that:

> "the act . . . may be so plainly and indisputably negligent *or otherwise*, that there can be no need to ask for the judgment of the jury upon the question" (italics ours),

and in *State of Maine* v. *Maine Central Railroad Co.*, supra, that a verdict based upon negligence is wrong if "the relation of cause and effect" between the negligent act and the accident is wanting. Plaintiff's injuries were caused by an automobile, the vision of the operator unobscured, being driven against the

side of a train which should have been seen in ample time to stop the vehicle before impact. The fact that the train had been standing upon the crossing for more than five minutes had no causal connection with the event.

This court has not heretofore had occasion to decide what action on its part is appropriate when a verdict against two alleged joint tort-feasors, entirely correct as to one and obviously erroneous as to the other, is brought before it on separate motions for new trial. Clearly under such circumstances it cannot be permitted to stand in its entirety since that would be palpably unjust to the defendant against whom no basis for liability had been established in the trial of the cause, and it would be equally unjust to the plaintiff to set it aside as against him whose negligence had been determined properly by the duly constituted fact finding body which passed upon the evidence.

In the technical procedure of the early common law, it was undoubtedly an established principle that a joint verdict must stand or fall in its entirety. 20 R. C. L., 224, Par. 9. There seems to be no occasion for multiplying authorities but it may be noted that the reason for, and lack of logic in, the rule, and the authorities on the subject, were quite thoroughly discussed by Chief Justice Shaw in *Bicknell* v. *Dorion, et al.*, 16 Pick., 478. Bacon's Abridgement, Tidd's Practice, Dunlap's Practice and other authorities, including an earlier Massachusetts case, *Sawyer* v. *Merrill,* 10 Pick., 16, all to the same effect and against the "splitting" of a verdict, are there cited and considered, and the rule of entirety rejected in recognition that the practice of granting new trials was founded "upon the broadest and most liberal principles of justice" and should be exercised in a manner "as unrestrained as possible." In the particular case, the process had named five defendants; the plaintiff had discontinued as to one, and on the trial of the remaining four, a verdict had been found in favor of two and against the other two. The latter prosecuted the case upon motions for a new

trial and in arrest of judgment. A new trial was ordered upon issues having no relation to the problem which now confronts us, but the court made it amply plain that the common law rule that a joint verdict could not be set aside as to a part of the defendants and permitted to stand against the others would not thereafter be recognized in the Commonwealth.

The Bicknell case, supra, does not quite reach the issue involved in the instant one. That case, like our own recent *Arnst* v. *Estes, et al.*, 136 Me., 272, 8 A., 2d, 201, presented only the issue as to whether a plaintiff might have a valid judgment on a verdict against part only of the defendants named in the process in which it was obtained. In the Massachusetts case, one named defendant was cleared by voluntary discontinuance of the plaintiff and two by the jurors who found liability only against a part of the group submitted on the case for their determination. In the Arnst case, the division was made, not by the plaintiff himself or by the jury hearing the cause, but by the justice presiding in the trial court who ordered a nonsuit as to one defendant and submitted the issue as to the liability of the single defendant remaining to the determination of the jury. Our late Chief Justice Dunn in the Arnst case analysed quite fully the nature of the liability of parties whose alleged acts of negligence are claimed to have contributed to produce an indivisible injury and the case recognizes that such liability is both joint and several. It seems unnecessary to review the general proposition again at this time. That case stands as authority for the rule that one joint-defendant cannot complain because another, sued with him, has been properly found not liable on the facts in the trial below. To this extent this court broke away from the full operation of the common law rule as far back as 1858 (or at least indicated its tendency so to do), when, in *Gillerson* v. *Small*, 45 Me., 17, instruction to a jury that it might find against one or more of the named defendants, according to the evidence, was held correct.

It is established law in this state that process sounding in

tort and instituted against plural defendants does not of necessity have to remain such during its full course if the liability upon which the action purports to be grounded is several. That a jury may separate the defendants and return a verdict which will exonerate one or more and find against another or others was recognized in approving the instruction given in the *Gillerson* case (although the jury then found against all the defendants named). The court may likewise separate them by ordering a non-suit as to one (or more). *Arnst* v. *Estes, et al.*, supra. It is stated in that case that a named co-defendant cannot complain because another named with him has been cleared of liability by "nonsuit, discontinuance or favorable verdict." This is in accordance with the practice as to judgments as stated in Vol. 11 of Encyclopaedia of Pleading and Practice, page 852, that

> "In an action of tort against several defendants the plaintiff may recover against so many of the defendants as the proof shows were guilty of the wrong, but the proof failing as to any of the defendants, those against whom there is no evidence are entitled to a verdict."

The mere statement of these principles seems to be a complete answer to the present problem. It is recognized that this court may approve action in the trial court which has converted a suit against more than one defendant, based on a claim of joint and several liability, into one where a verdict may properly be rendered against a single one on his several liability. What it may approve in the courts operating subject to its review, it is certainly competent to direct on its own initiative. The present verdict, on the issue of liability, must be set aside as to the defendant Canadian National Railways and permitted to stand as against the defendant St. Laurent. This action is in line with the trend generally prevailing to liberalize practice and procedure so as to give maximum consideration to the merits of cases presented to appellate courts. 20 R. C. L.,

224, Par. 9; *Sparrow* v. *Bromage,* 83 Conn., 27, 74 A., 1070, 27 L. R. A. (N. S.), 209, and annotation thereto, 19 Ann. Cas., 796.

Notwithstanding the verdict as to the one defendant is proper on the question of liability, it seems apparent that it is improper in that the award of damages made by the jury is excessive and so palpably so that this court should interfere. Plaintiff's out-of-pocket cost was $51, for medical services. He suffered no loss of earnings, or disfigurement. By his own testimony his pain and suffering can only be measured by the endurance of "five stitches" taken in his scalp; "an awful headache" for a week, and pain when the wound was washed "with iodine." There is nothing to suggest such a degree of suffering as would justify compensation amounting to $549. The award is unmistakably excessive and cannot be permitted to stand. "It is the duty of the court to see that what should be regarded as the ultimate bounds are not greatly overstepped." *Ramsdell* v. *Grady,* 97 Me., 319, 54 A., 763, 765; *O'Brien* v. *J. G. White & Co.,* 105 Me., 308, 74 A., 721. That the amount is only $600 is not controlling but rather the fact that it is entirely disproportionate to the damages suffered.

Since the verdict is so large as to require action on the part of this court, it remains only to be seen whether an adjustment can properly be made by ordering a remittur or if the facts should again be submitted to the judgment of a jury. The practice of ordering a motion dismissed unless the plaintiff by voluntary action remits a part of his verdict is too well recognized to require the citation of authorities. In like manner, the practice has been established, where this court did not feel justified on the record in attempting to assess the damages itself, of directing a new trial for that purpose only. *McKay* v. *New England Dredging Co.,* 93 Me., 201, 44 A., 614. Such seems to be the appropriate procedure here since the court by examination of the cold record and without opportunity to judge upon the matter by viewing the plaintiff himself upon the stand and actually hearing the testimony of his witnesses

has no sound basis for determining what would be a proper award, and the mandate will be

On the motion of the defendant Canadian National Railways
Motion sustained.
Verdict set aside.
New trial granted.

On the motion of the defendant Edgar St. Laurent
Motion sustained as to damages.
Verdict set aside.
New trial ordered for the assessment of damages only.

ISABELLE BOUCHARD

vs.

CANADIAN NATIONAL RAILWAYS AND EDGAR ST. LAURENT.

Androscoggin. Opinion, January 3, 1942.

Different Verdicts as to Liability of Joint Tort-feasors.

Although a jury verdict against two alleged joint tort-feasors has to be set aside as to one of the defendants because upon the record he is not properly chargeable with liability, it may stand as against the other if it appears that the jury has awarded compensation in an amount that represents a not unreasonable approximation of the damages suffered.

MOTION FOR NEW TRIAL BY EACH DEFENDANT.

Action for damage for personal injuries due to collision of automobile driven by defendant, Laurent, with train of defendant, Canadian National Railways. The jury found against both defendants. Verdict was set aside as to one defendant and new trial granted. As to the other defendant, the motion for a new trial was overruled. Reference is made to the case of Plante against the same defendants for a portion of the facts in this case. Other facts in the case appear in the opinion.

Motion for new trial by defendant Canadian National Railways sustained, verdict set aside and new trial granted. Motion for new trial by defendant Laurent overruled.

Berman & Berman, of Lewiston, for plaintiff.

Skelton & Mahon, Lewiston, for defendant, Edgar St. Laurent.

Fred H. Lancaster, Lewiston, and

H. P. Sweetser, Portland, for defendant, Canadian National Railways.

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

MURCHIE, J. The issues in this case are fully covered by the decision in the case of Plante against these same defendants decided today. The cases were tried and argued together. The verdict in this case, as in that, is clearly wrong on the issue of liability as to the defendant Canadian National Railways and must be set aside as to that defendant. It seems to be a proper verdict as to the defendant Edgar St. Laurent, both as to liability and damage, and will be permitted to stand as against him. It might well be argued that the award of $1,600 is a liberal one in view of the damages suffered, which involve no loss of earnings. Plaintiff's out-of-pocket cost was $110 for medical services, plus an item, not proved as to amount, for replacing glasses and procuring colored ones for temporary use. Her injuries included a split lip, a bruised knee, blackened eyes, broken glasses, and a fracture of the nasal bones which resulted in a "lump" on the right side of the nose, somewhat larger than the "little one" earlier located at the same spot. Plaintiff was under the care of a physician, to some extent, for about a month and a half. She endured "an awful lot of pains" on the day following the accident, and later occasional headaches, a nose which was "very, very sensitive" and some degree of nervousness. In such a case, much must be left to the good

judgment of a jury. It appears to the court that although the finding may reasonably be said to be on the high side, the jurors have discharged their duty with fidelity and reached a not-unreasonable approximation of the damage suffered. The mandate must be

On the motion of the defendant
Canadian National Railways
Motion sustained.
Verdict set aside.
New trial granted.

On the motion of the defendant
Edgar St. Laurent
Motion overruled.

CHARLES A. LAWRY *vs.* CLARENCE F. YEATON.

Somerset. Opinion, January 7, 1942.

Factual Issues for the Jury. Agreement as to Amount of Damages Amends Writ in that Respect.

Factual issues are for the jury. In the instant case the record of conflicting versions does not show that the jury erred.

MOTION FOR NEW TRIAL BY DEFENDANT.

Action for property damage alleged to have resulted from negligent operation of truck by defendant's admitted agent. The jury found for the plaintiff.

Motion for new trial overruled. Case fully appears in opinion.

James R. Desmond, Portland, for plaintiff.

Locke, Campbell & Reid, Augusta, for defendant.

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

PER CURIAM.

On defendant's general motion for new trial. The action is one of tort brought to recover property damages claimed to have resulted proximately from negligent operation of the defendant's truck by his admitted agent. The jury found for the plaintiff and assessed damages at $700, the amount agreed upon if liability were established. The insufficient ad damnum in the writ will be deemed to have been amended.

The only issues raised were factual and were peculiarly within the province of the jury. The applicable principles of law were not in controversy. The record, disclosing conflicting versions, does not show that the jury manifestly erred in accepting that of the plaintiff.

Motion overruled.

CLARENCE W. HALL *vs.* FRED L. EDWARDS.

Oxford. Opinion, January 12, 1942.

Slander per se. *Element of Mental Anguish; of Actual Malice; of Failure to Support Plea of Truth; of Defendant's Standing in the Community.*

The law is well settled that words referring to one as a thief are actionable *per se* and that it is not necessary for the person so referred to to prove special damages or actual malice in order to recover a substantial amount. Actual malice, however, may be shown for the purpose of enhancing damages.

In an action for slander, a jury is warranted in increasing an award because of the failure of a defendant to establish by evidence a plea of truth.

In an action for slander, the fact that the defendant was a man of standing in the community was a circumstance which the jury could justly take into consideration in making their award.

Mental anguish is a proper factor to be considered by the jury.

In an action for slander the facts that the defendant first made the charge complained of in an angry manner in a place frequented by the public, repeated the charge in the same manner on other similar occasions, never withdrew the charge or qualified it, and then at the trial of the cause pleaded the truth and failed to sustain his plea, constitute evidence from which the jury could find actual malice.

The facts that the charges made by the defendant were not taken seriously by

the neighbors and friends of the plaintiff and that they did not result in any very substantial damage to the reputation of the plaintiff among those who knew him or who lived in the same community must be taken into consideration in determining the amount of the award.

MOTION FOR NEW TRIAL BY DEFENDANT.

Action for slander. No serious dispute as to the salient facts. The defendant had on numerous occasions, in the presence of third persons, charged that the plaintiff had stolen the defendant's boards and had referred to him as a thief. Defendant never withdrew his charges, and at the trial of the cause pleaded their truth and failed to sustain his plea. The jury found for the plaintiff and fixed damages in the sum of $3,000. This award was held, in view of all the circumstances, to be excessive, and a new trial was ordered unless the plaintiff agreed to accept the sum of $2,000. The case fully appears in the opinion.

George A. Hutchins, Rumford,

Robert A. Smith, South Paris, for plaintiff.

Peter M. McDonald, and

Alfonso A. Alberti, Rumford, for defendant.

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

THAXTER, J. This is an action for slander. After a verdict for the plaintiff, the case is before us on a general motion for a new trial based on the usual grounds, that the verdict is against the law and the evidence, and that the damages are excessive.

A careful reading of the evidence shows no serious dispute as to the salient facts. The jury would have been warranted in finding that the defendant on several occasions and in the presence of third persons charged the plaintiff with having stolen the defendant's boards and referred to him as a thief. With a plea of the general issue, the defendant filed a brief statement setting forth that the statements made were privi-

leged and also claiming a justification on the ground that the accusation was true. There is no basis whatsoever for the claim of privilege and the jury appears to have been fully justified in finding, as of course they did find, that the charge made by the defendant was false. The only possible ground on which the defendant can legitimately attack the verdict is that the damages assessed by the jury are excessive.

The law is well settled that words such as were here found to have been used are actionable *per se* and that it is not necessary for the plaintiff to prove special damages or actual malice in order to recover a substantial amount. *True* v. *Plumley,* 36 Me., 466; *Davis* v. *Starrett,* 97 Me., 568, 55 A., 516; *Elms* v. *Crane,* 118 Me., 261, 107 A., 852. Actual malice may, however, be shown for the purpose of enhancing damages. *True* v. *Plumley,* supra; *Jellison* v. *Goodwin,* 43 Me., 287, 69 Am. Dec., 62; *Elms* v. *Crane,* supra. Also a jury is warranted in increasing an award because of the failure of a defendant to establish by evidence a plea of truth. *Smith* v. *Wyman,* 16 Me., 14; *Sawyer* v. *Hopkins,* 22 Me., 268; *Davis* v. *Starrett,* supra.

This particular defendant seems to have done about all that he could do to justify a jury in awarding a substantial sum against him. He first made the charge in an angry manner in a place frequented by the public; and on other similar occasions he repeated it in the same manner. He never withdrew it or qualified it; and then at the trial of the cause pleaded the truth, and failed to sustain his plea. There was evidence from which the jury could have found actual malice. Furthermore, the defendant was a man of standing in the community, according to his own statement worth over $300,000. This was a circumstance which the jury were justified in taking into consideration in making their award. *Humphries* v. *Parker,* 52 Me., 502. The plaintiff was an old man and there is evidence that the publicity which the defendant gave to the charge caused him real mental anguish. This was a proper factor to be considered by the jury. *Davis* v. *Starrett,* supra; *Sullivan* v. *McCafferty,* 117 Me., 1, 102 A., 324; *Elms* v. *Crane,* supra. An award of

exemplary damages was justified under such facts as these. *Harmon* v. *Harmon*, 61 Me., 233; *Sullivan* v. *McCafferty*, supra; *Elms* v. *Crane*, supra; *Stanley* v. *Prince*, 118 Me., 360, 108 A., 328.This is not such a case as *Stacy* v. *Portland Publishing Co.*, 68 Me., 279, which holds that punitive damages cannot be recovered where a jury finds that the only damages suffered were nominal.

In spite of all these elements of aggravation, there is one fact which we feel must be taken into consideration. The two men here involved had lived in the town of Bethel for very many years. They were both well known and there is no evidence whatsoever to indicate that the violent and unjustified language used by the defendant was taken very seriously by neighbors and friends in that community or that it resulted in any very substantial damage to the reputation of the plaintiff among those who knew him or who lived there. Under all the circumstances, we feel that the award of $3,000 cannot be justified. The sum of $2,000 will, in our opinion, amply compensate the plaintiff and will, to use the words of this court in another case, *Humphries* v. *Parker*, supra, "probably make the defendant wiser for the future."

If the plaintiff remits all of the verdict in excess of $2,000 *within thirty days after the rescript in this case is received, motion overruled; otherwise motion sustained, new trial granted.*

CALAIS HOSPITAL *vs.* CITY OF CALAIS.

Washington. Opinion, February 13, 1942.

Exemption from Taxation of Benevolent Institutions. Property exempt. Property Subject to Taxation.

Property of a benevolent institution acquired and designed and always used in good faith for its own purposes is exempt from taxation although occasionally used for purposes foreign to such purposes, when this could be

done without interfering with its general occupation and use of the same property.

An arrangement as to the use of one room in a building of an institution which benefited the institution in carrying forward its work without additional expense, which segregated no portion to the exclusive use of another, but left the institution in dominant control, did not constitute a use which is independent of and alien to the normal functions of the institution even though it was also of advantage to the person also using the room.

The burden is on the benevolent institution to establish its right to exemption.

The record clearly shows that the Calais Hospital is incorporated and conducted as a charitable and benevolent institution and that there is an actual appropriation of all its property for its own purposes.

APPEAL BY PLAINTIFF UNDER R. S. 1930, CHAP. 13, SECS. 73-78.

The tax assessors of the City of Calais assessed taxes on the property of the Calais Hospital for the year 1939. The hospital claimed that its property was exempt from taxation within the purview of R. S. 1930, Chap. 13, Sec. 6, Par. III, which provides that all of the property of charitable and benevolent institutions incorporated by the State shall be exempt from taxation. The assessors claimed that not all of the property of the hospital was occupied for its own purposes. The case was certified to the Supreme Judicial Court, upon report, for the rendition of such judgment as the legal rights of the parties required. Appeal was sustained. The case fully appears in the opinion.

Oscar H. Dunbar, Machias, for plaintiff.

Francis W. Sullivan, Portland, for defendant.

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

MANSER, J. This is an appeal under R. S., Chap. 13, Secs. 73-78, from the refusal of the assessors of the City of Calais to abate a tax of $540.00 assessed for the year 1939 upon the real estate of the appellant. The case is certified to this court upon report for the rendition of such judgment as the legal rights of the parties require.

In October, 1938, the Calais Hospital was incorporated under provisions of R. S., Chap. 70, as a charitable and benevolent institution, without capital stock, with no provision for dividends or profits, and for the purpose of owning, operating and maintaining a hospital and nurses' training school and a nurses' home. Seven physicians and eight other citizens of Calais and vicinity became Trustees of the institution.

Prior to this time, Dr. W. N. Miner was the owner of the real estate and a private hospital had been conducted by a corporation which owned the equipment, of which corporation Dr. Miner was the principal stockholder.

The new corporation purchased the real estate from Dr. Miner and the equipment from the former corporation for the sum of $30,000.00 and gave its mortgage for that amount to Dr. Miner, payable at the rate of $1,500.00 per year.The transaction was completed December 31, 1938, and the new corporation was in active charge and management from that time. The tax in question was assessed as of April 1, 1939.

The petition for abatement was based upon the claim that the appellant is a charitable and benevolent institution within the purview of R. S., Chap. 13, Sec. 6, Par. III, which provides exemption from taxation of real and personal property of all benevolent and charitable institutions incorporated by the State. This exemption is limited by the provision "but so much of the real estate of such corporations as is not occupied by them for their own purposes, shall be taxed in the municipality in which it is situated." A further amendment to the exempting statute above cited, found in P. L. 1939, Chap. 123, even if pertinent, is without application as it was not then in effect.

The questions for determination are:

Is the present hospital not only incorporated but also conducted as a charitable and benevolent institution, and is its entire real estate occupied for its own purposes?

In support of the claim for exemption, the appellant introduced testimony to the effect that no officer, trustee, physician or surgeon received any compensation from the hospital for

services; that the hospital was available for the patients of any physician or surgeon registered and in regular practice; that the plan of operation was essentially the same as that followed by the public hospitals throughout the State long established and recognized as charitable institutions; that the hospital received from the State in 1939 for several designated purposes nearly $11,000.00 out of total receipts of approximately $27,000.00. Of such State contributions $7,141.89 comes under the heading "Hospital Appropriation." The authorization for such allocation of funds by the State is found in P. L. 1933, Chap. 1, Sec. 12, which prescribes the procedure to be followed by any charitable or benevolent institution not wholly owned or controlled by the State in order to be entitled to participation in appropriations made for the purpose. It must be shown that the "persons receiving care were in need of such treatment, support or education; that they were not able to pay for the same; that the rates charged are not greater than those charged to the general public for the same service, and that the rates charged to those who are able to pay are not less than the cost of service rendered."

The record justifies the conclusion that this prescribed course was followed. The total amount received from paying patients was $15,001.01.

It further appears that an account was kept of services rendered all patients whether they were financially able to pay or not, but of $8,682.89 in unpaid accounts for 1939, $4,593.24 were regarded as uncollectible. In this connection, Dr. Miner, who was Treasurer and Manager, testified that "no patient was ever turned away from the hospital because of finances."

It does not appear of record that either a training school or home for nurses had been established in 1939, although contemplated by the statement of purposes of the corporation. These features, while tending to emphasize the character of such an institution, are not required as a qualification under the statutory exemption.

The appellee concedes that the hospital corporation, in its legal conception, is charitable.

The major premise in opposition upon the merits is that not all of the building is occupied by the hospital for its own purposes and consequently, under the limitation of the statute above recited, the portion not so used was taxable.

The case of *Ferry Beach Park Assn.* v. *City of Saco,* 127 Me., 136, 142, A., 65, which, like the instant case, was upon an appeal from refusal to abate taxes, and was before the court on report, raised the same issue. Upon examination of the record in that case, the Court found that the properties of the Association, other than a pavilion and a grove used for religious and educational purposes, were subject to taxation, and ordered an abatement upon the portion entitled to exemption.

In the case before us, however, the appellee asserts that because of the admitted fact that the Hospital did not bring in to the assessors a list of its property, not exempt from taxation, in accordance with the requirement of R. S., Chap. 13, Sec. 70, it has no right of appeal and the action of the assessors in refusing to make any abatement, even upon so much of the property as was clearly exempt, is final.The position of the Hospital is that it was unnecessary to file a list as the property was entirely exempt.

The statute is strict in this respect and the Court would have no authority to order an abatement even though the decision of the assessors was manifestly unjust, if any portion of the real estate, however small, was taxable. R. S., Chap. 13, Sec. 70, provides:

> "If any resident owner . . . does not bring in such list, he is thereby barred of his right to make application to the assessors or the county commissioners for any abatement of his taxes, unless he offers such list with his application and satisfies them that he was unable to offer it at the time appointed."

The appellee further asserts that the financial statement of

the Hospital for 1939 demonstrates that the institution was conducted upon a profit-making basis, notwithstanding the substantial State contributions, because there was paid to Dr. Miner upon the mortgage indebtedness the sum of $6,000.00, although but $1,500.00 was prescribed as an installment payment. The apparent surplus of receipts over operating expenses is logically accounted for, however, by the fact that part of the assets transferred to the new corporation were bills receivable in the sum of $9,241.36 and as the result of a determined effort a large portion of this sum was collected. In other words, an amount equal to the sum paid Dr. Miner upon his mortgage note was received from sources other than current income. The inference sought to be adduced is not tenable upon review of all the facts.

Recurring to the main contention of the appellee it is, in detail, that there was during 1939 a room in the hospital building used by Dr. Miner as his office in connection with his private professional practice for his personal gain, though without payment of rental by him to the Hospital; that this constituted the dominant use of that portion of the property, and thus subjected such portion to taxation.

The rule has been recently affirmed in *Lewiston* v. *All Maine Fair Association,* 138 Me., 39, 21 A., 2d, 625, in effect that property acquired and designed and always used in good faith for its own purposes remains exempt although occasionally used for the purposes foreign to such purposes, when this could be done without interfering with its general occupation and use of the same property.

So in *Curtis* v. *Odd Fellows,* 99 Me., 356, 59 A., 518, 519, it appeared that the building of the defendant was designed and intended for use by a fraternal order for its meetings and functions, that at times its halls and rooms were let to associate branches of the order, and on Sundays to the Christian Scientists, together with the fact that a single room was also let to the Christian Scientists for two hours a day. The furniture and fixtures throughout the building belonged to the defendant

and the entire building was at all times under its control, subject only to use as above stated. Light, as well as heat, was provided by the defendant when any part of the building was let. Of this situation the court said, page 358, that the defendant,

> "is not the exclusive occupant, and the plaintiff claims that the meaning of this clause of the paragraph is the same as if it read, 'so much of the real estate of such corporations as is not exclusively occupied by them for their own purposes, shall be taxed,' etc. But the legislature did not say this. If this had been its intention the adoption of one more word would have made such meaning clear, and we cannot believe that if this had been the intention of the legislature, this one word, which would have made the intention beyond all question, would have been omitted. And for other reasons we are of the opinion that it was not the intention of the legislature that only the real estate of such benevolent and charitable institutions as is occupied by them exclusively should be exempt from taxation."

There is further clarification in the following language of the court:

> "The decision of this question must undoubtedly depend very largely upon the facts and circumstances of each case. There may be cases where the use of the property of such an owner for other purposes is of such a dominant character, and the occupation by the owner for its own purposes is so incidental and trivial, or where the use of the property by the owner for its own purposes is so plainly an attempt to evade taxation, the substantial use and occupation being for other purposes, that such occupation would not be sufficient to make the property exempt from taxation under our statutes."

In the present case the question resolves itself into a factual determination concerning the use by Dr. Miner of the particu-

lar room, and whether it was such as to interfere with the general use and occupation of the building by the Hospital for its own dominant purposes.

The salient features are that Dr. Miner was the Treasurer and Manager of the Hospital and the room was his headquarters in connection with his service to the institution; there was no setting aside of the room for his exclusive personal use; it was of mutual convenience, enabling him to continue the practice of his profession, without detriment to Hospital service, but to its advantage, because of the greater facility afforded with reference to the performance of his managerial duties. The doctor received no compensation from the Hospital and the Hospital received no rental income. An arrangement as to the use of one room in the building which benefited the institution in carrying forward its work without additional expense, which segregated no portion to the exclusive use of another, but left the Hospital in dominant control, does not constitute a use which is independent of and alien to the normal functions of the Hospital, even though it was also of advantage to Dr. Miner.

True it is that the burden is on the Hospital to establish its right to exemption. *Camp Associates* v. *Lyman*, 132 Me., 67, 166 A., 59; *Bangor* v. *Masonic Lodge*, 73 Me., 428, 40 Am. Rep., 369. There was sufficient evidence it was incorporated and conducted as a charitable and benevolent institution, and that there was an actual appropriation of all its property for its own purposes. The real estate should not have been assessed, and the hospital is entitled to an abatement of the entire tax.

Appeal from decision of Assessors of Calais sustained.

Tax to be abated.

Judgment for appellant with taxable costs.

STATE *vs.* BOBB.

York. Opinion, February 14, 1942.

Criminal Law. Directed Verdict. Change of Venue. Joint Trial When Not Prejudicial to Defendants.

In a felony case, upon denial of a motion for a new trial after verdict, the procedure, authorized and controlled by statute, is by appeal and not by exception. In the instant case no appeal was taken; hence the Supreme Judicial Court was without jurisdiction to review the motion for new trial after verdict on exceptions to the refusal of the trial judge to grant such motion.

Exception to the refusal of the trial justice to direct a verdict accomplishes the result of obtaining a review by the Law Court.

The doctrine, obtaining in cases of misdemeanor, that if exceptions are taken to a denial to direct a verdict and, after a verdict of guilty, a motion for a new trial is presented and denied, the last is a waiver of the first, does not apply in felony cases; and in a felony case, the case is properly before the Supreme Judicial Court for review upon an exception to denial of a motion for an instructed verdict, though a motion for a new trial was subsequently made.

A respondent has no cause for complaint that proof adduced by the prosecution is insufficient when he himself furnishes the necessary evidence.

Whether or not the respondent was entitled to a directed verdict rests upon the answer to the question whether, in view of all the testimony, the jury was warranted in believing beyond a reasonable doubt, and so declaring by its verdict, that the respondent was guilty of the crime with which he was charged. Under this rule and upon the entire record, in the instant case, the jury was warranted in finding that the respondent was guilty of assault with intent to kill and that his defense of justification failed.

The matter of change of venue rests in the sound discretion of the Trial Court and the decision is final unless there is abuse of discretion. The record, in the instant case, evidences no abuse of discretion.

It is only when the Constitution and laws of a state deny or prevent the enforcement of equal rights to a party to a cause, as provided by the Constitution or laws of the United States, that the cause may be removed to a federal court.

In the instant case, the petition of the respondent itself explicitly avers that all of the civil rights of the respondent are secured to him by the Constitution and laws of Maine.

The grant or denial of a motion for separate trials, for persons jointly indicted, rests in the discretion of the Trial Court, and is reviewable only for

abuse of such discretion; and what constitutes abuse of discretion in denying separate trials depends upon the whole situation.

A denial of separate trials, when it is not clearly shown that defenses were necessarily antagonistic or that the defendants would be prejudiced by joint trial, is not error.

The rule of practice is firmly established that the admission or exclusion of photographs is within the discretion of the Trial Court and not to be disturbed on exceptions unless such discretion is abused.

It is a general rule that photographs offered as exhibits must show conditions existing at the time of the occurrence.

ON EXCEPTIONS BY THE RESPONDENT.

The respondent was tried upon a joint indictment against him and four others, charging them with assault with a dangerous weapon with intent to kill. The testimony in the case was conflicting. At the close of the evidence, the trial judge directed a verdict of not guilty as to the four other respondents. The jury returned a verdict of guilty as to respondent Bobb. The respondent filed exceptions on various grounds. All exceptions were overruled. Hudson and Worster, JJ., dissented in part, though concurring in the result. The case fully appears in the opinion.

Joseph E. Harvey,

Harold D. Carroll, Biddeford, for the State.

Hayden C. Covington, Brooklyn, N. Y.,

Clarence Scott, Old Town,

Charles W. Smith, Biddeford, for respondent.

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

MANSER, J. The respondent was tried upon a joint indictment against him and four other respondents, charging them with assault with a dangerous weapon with intent to kill one Dwight Robinson.

At the close of the evidence, a directed verdict of not guilty

was returned as to the other four respondents. No exceptions were reserved to the charge of the presiding Justice. Counsel for the respondents submitted in writing eighteen requests for instructions to the jury, all of which were substantially given, and counsel were afforded opportunity for further requests. A verdict of guilty was returned.

By a bill of exceptions the respondent undertakes to challenge the action of the trial court in the following matters:

1. Denial of motion for change of venue.
2. Denial of petition for removal of cause to United States District Court.
3. Denial of motion for severance and for separate trial.
4. Denial of motion for continuance.

5-10, inclusive. Exceptions to exclusion or admission of testimony of certain witnesses.

11-12. Exceptions to exclusion of certain exhibits offered.

13. Exception to denial of motion for instructed verdict.
14. Exception to denial of motion for new trial after verdict.

Exceptions four to ten, inclusive, were not argued or briefed, and counsel for the respondent, having informed the court that they were not relied upon, they are regarded as abandoned.

It becomes necessary to determine whether the procedure employed by exceptions thirteen and fourteen is effectual to bring forward for consideration the fundamental question of whether the evidence and the law of the case warranted conviction of the respondent.

At common law, the granting of a new trial in criminal cases rested wholly within the discretion of the presiding justice. In 1909 (P. L., Chap. 184) the legislature created a right of appeal in felony cases from the denial by the presiding justice of a motion for new trial after verdict. This statute is now embodied in R. S., Chap. 146, Sec. 27. In misdemeanors no appeal is provided and the decision of the presiding justice remains final. Here we have a felony case, but the procedure authorized

and controlled by statute is by *appeal* from the decision of the presiding justice, not by *exception* to his ruling. Consequently, this Court is without jurisdiction to review a motion for new trial after verdict on exceptions to the refusal of the trial judge to grant such motion. *State* v. *Kennison,* 131 Me., 494, 160 A., 201.

No appeal having been taken, there arises the question whether the respondent may rely upon his exception to the refusal to direct a verdict. This method, judicially sanctioned, accomplished the result of obtaining a review by the Law Court. *State* v. *Simpson,* 113 Me., 27, 92 A., 898; *State* v. *Bakerwicz,* 119 Me., 122, 109 A., 392; *State* v. *Lamont,* 129 Me., 73, 149 A., 629.

But in *State* v. *Simpson,* supra, in which the respondent was charged with a misdemeanor, it was held that, if both methods were used, the last was a waiver of the first. The reason for this was that the exception to refusal of the presiding justice to direct a verdict brought the case to the Law Court to obtain its decision as to the sufficiency of the evidence. If, however, respondent after verdict presented a motion for a new trial to the presiding justice, he thereby submitted the same question to the final determination of the trial judge, and it would be inconsistent to have a question thus finally adjudicated later passed upon and decided by a separate and distinct tribunal. This rule of waiver has been affirmed in *State* v. *Power,* 123 Me., 223, 122 A., 572, involving misdemeanor; *State* v. *DiPietrantonio,* 119 Me., 18, 109 A., 186; *State* v. *O'Donnell,* 131 Me., 294, 161 A., 802, and *State* v. *Davis,* 116 Me., 260, 101 A., 208, all felony cases. Upon careful consideration, it now appears to the Court that the reason for the rule as originally stated in the misdemeanor case of *State* v. *Simpson,* supra, does not obtain in felony cases. The statute, R. S., Chap. 146, Sec. 27, by its fiat says that the decision of the presiding justice in felony cases on a motion for a new trial is not final and that respondent may, by appeal, submit the question to the Law Court. Exceptions to refusal of directed verdict accomplish

precisely the same result. Therefore, in felonies, two methods are available to bring the issue to the attention of the appellate tribunal. Both are not necessary. It should not follow, however, that if there be error in perfecting the second method, it is fatal to the first.

It is now expressly held that the doctrine of waiver under such circumstances does not apply in felony cases. This effects a change in a rule of procedure. It may be noted, however, that the Court has never allowed a failure to comply with the former rule as laid down in *State* v. *Power,* supra, *State* v. *Di-Pietrantonio,* supra, *State* v. *O'Donnell,* supra, and *State* v. *Davis,* supra, to affect the rights of a respondent but has repeatedly considered the evidence to determine whether injustice would result therefrom.

It may be further noted in the opinion in *State* v. *Simpson,* supra, the court adverted to another rule announced in four early Maine cases but which has long since been modified with judicial sanction in felony cases. The statement reads:

> "This court has frequently held both in criminal and civil cases that the prosecution of a motion for new trial before the presiding Justice is a waiver of all rights of exception," citing *State* v. *Call,* 14 Me., 421; *Cole* v. *Bruce,* 32 Me., 512; *Dinsmore* v. *Weston,* 33 Me., 256; *Ellis* v. *Warren,* 35 Me., 125.

The last cited case was decided in 1852. Since the granting of appeals in all felony cases, however, it has become established practice for the court to consider felony cases on both appeal and exceptions. Instances are found in *State* v. *Friel,* 107 Me., 536, 80 A., 1134; *State* v. *Albanes,* 109 Me., 199, 83 A., 548; *State* v. *Howard,* 117 Me., 69, 102 A., 743; *State* v. *Brown,* 118 Me., 164, 106 A., 429; *State* v. *Mulkern,* 118 Me., 477, 105 A., 177; *State* v. *Sanborn,* 120 Me., 170, 113 A., 54; *State* v. *Dodge,* 124 Me., 243, 127 A., 899; *State* v. *Rogers,* 125 Me., 515, 132 A., 521; *State* v. *Wright,* 128 Me., 404, 148 A., 141; *State* v. *Morin,* 131 Me., 349, 163 A., 102; *State* v. *Dorathy,* 132 Me.,

291, 170 A., 506; *State* v. *Mosley*, 133 Me., 168, 175 A., 307; *State* v. *Cloutier*, 134 Me., 269, 186 A., 604; *State* v. *Sprague*, 135 Me., 470, 199 A., 705; *State* v. *Merry*, 136 Me., 243, 8 A., 2d, 143.

In conformity to the rule as now adopted, the record has been carefully reviewed.

The picture presented is that of the activities and experiences of a group or sect, of which the respondent was one, known as Jehovah's Witnesses. The situation, developed largely in recital by the defense, was, in effect, that the group first made its headquarters in Saco, Maine. The nature of the work carried on was the distribution of literature and magazines, house to house calls, with the playing of phonograph records and electrical transcriptions, and general dissemination of tenets and principles. In addition, there were study periods and conferences, meetings of workers and public gatherings. In Saco and later in Kennebunk, large signs were displayed upon the headquarters building, "Kingdom Hall of Jehovah's Witnesses," "Religion is a Snare and a Racket."

It became apparent that the methods used and the doctrines expounded met the disapprobation of some citizens, and aroused the ire of some members of the American Legion with particular reference to the attitude of the sect as to saluting the flag. It was asserted that the meeting place was subjected to acts of violence, including the throwing of rocks and defacement of the building, and that efforts were made to terrorize the group by threats of personal violence. It was claimed that repeated requests for police protection met with little favorable response. After some months, other headquarters were secured in an old building in Kennebunk, Maine, about ten miles from Saco. Here, comparative quiet existed for a short time, but again the fervor or militancy of the group aroused disfavor, and there were similar experiences as to the place of meeting and as to threats against the group. In addition, it was claimed that for a number of days several cars circulated around the building at various times with accompanying

threats from the occupants. On Memorial Day there was a further demonstration. It was not shown that the individuals who composed the group at Kennebunk were personally assaulted, with one exception.The wife of the respondent claimed that on one occasion literature in her hands was wrested from her and torn up. The group consisted of both men and women and they met almost every evening in the headquarters. Upon their insistent demand to local, county and state police authorities, the locality was at times patrolled, and this had the temporary effect of dispersing the crowd. It was claimed warning was received by the group that, on the evening of Saturday, June 8, 1940, serious trouble might be expected. A number of the men thereupon brought shot guns, rifles and ammunition to the building. Several of the men were stationed at various points about the grounds in the vicinity, where their own persons were not exposed, and some of them were provided with loaded guns. Notwithstanding the warning, a number of women of the sect came to and remained in the building, which had previously been provided with arrangements for switching on flood lights over the area. During the evening, it was represented that there was a procession of cars, which continued at intervals until near midnight. Two of the state police patrolled the district from time to time until then and there were no outbreaks. Shortly after 2 A.M., following a lull of about two hours, an automobile containing four young men stopped somewhere in the road opposite the hall.

From this point, there is material variance in the testimony for the State and for the respondent. Narratively, the testimony of the occupants of the car was to the effect that each one had gone to an all-night diner in the business section of Kennebunk, a short distance away, but not by design or arrangement with the others. There were about a dozen other people in the diner. There was no discussion as to the affairs of the sect and no suggestion as to visiting the premises. After a time one of the four said he had a bottle of gin and asked the others if they would like to have a drink. They went out to the

car, drove a short distance from the business center by Kingdom Hall and into a filling station yard, where three of the men drank the gin. They then started back. The owner of the car was not driving. Just after starting up, this owner said he would drive, and a passenger in the back seat also said that he needed to urinate. The driver stopped the car. The two men got out, one on the side toward Kingdom Hall and the other on the opposite side. Their testimony is that, while the owner of the car was in the act of closing the door, with his back towards Kingdom Hall, a volley of shots was fired. Two slugs penetrated his leg from the rear, one remaining imbedded, the other going through the knee, while a third burned the flesh on the side of the leg. Later it became necessary to amputate the leg. The driver, who was still at the wheel, received a shot in the hip. The glass of the windshield was broken by the gun fire and the side of the car showed evidence of penetration of shots. Robinson, the man who had received the shots in the leg, in some way scrambled into the car, which immediately drove on without Nadeau, the man on the other side of the car. Nadeau scurried after the car without success, but soon found a protecting hedge, behind which he lay until daylight. Such witnesses for the defense as were on the scene agree that the fleeting form of a man was seen chasing the car, and that all parties, including state highway officers who shortly arrived, were concerned about his disappearance.

The divergence as to the facts of the incident by the witnesses in defense was principally to the effect that at least three men got out of the car, advanced towards the building, that one was heard to make threats of a general character, and that rocks were thrown by one or more of the men toward the building.

Respondents expressed the belief that the car was one which had been there on other occasions and earlier on the same night. The claim of identification was a "choking" or "coughing" sound of the motor. There was no other recognition of the car by make, appearance or license number.

Mrs. Bobb testified that she had been instructed by her husband to switch on the flood lights when he called to her for the purpose, or when she heard shots. Hearing shots, the lights were turned on, and the men with the firearms testified that they saw the former occupants of the car rushing back toward it. Bobb, the present respondent, said that he did not aim at any of the men but that he shot at the car with the intent to hit the tires or otherwise disable it. While the night was dark, he had been stationed outside for hours and testified that his vision was adjusted to the darkness and he could see the men. There were lights on the car, though dimmed. Another one of the original respondents said that he shot up in the air in the direction of but higher than the car. There was no admission of shooting by any other respondent or witness, and one respondent asserted that he was armed only with a mop handle. Neither was it claimed that the alleged aggressors were provided with firearms or bludgeons but only with some rocks which they took from their pockets.

The defense was that there was lack of proof that the shots which struck Robinson were fired by Bobb; that the acts of all the members who were provided with firearms were legally justified in protection of their persons and that of their families and in protection of their property.

The record would justify the jury in finding that Bobb with Robinson in range of vision, fired directly at the side of the car where Robinson was standing, and that there was no positive evidence of a shot from any other firearm in that precise direction.

The court instructed the jury, *inter alia,* that it must determine whether, under the facts, danger was imminent or reasonably appeared to be so, and further, whether any possible assailant either had not advanced or else was retiring with his back to the respondents. The jury was further instructed that, if danger was not apparently imminent, the respondent would not be justified in shooting at retreating persons; that as to the asserted intent of Bobb simply to disable the car, the

jury must further determine whether Robinson was within range of the gun fire, and whether that fact was apparent to the respondent, under the rule that a man is responsible for the natural consequences of his act.

The charge of the presiding Justice to the jury as to the applicable principles of law was concededly correct.

At the close of the State's case, proof was lacking that this respondent fired the shots which took effect in the person of Robinson. No request was made for a directed verdict at that time, and deficiency of proof in that respect was supplied by the defense. A number of witnesses testified at length.

A respondent has no cause for complaint that the proof adduced by the prosecution is insufficient where he himself furnishes the necessary evidence. *State* v. *Joy*, 130 Me., 519, 155 A., 34.

The question, therefore, is whether in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict, that the respondent was guilty of the crime with which he was charged. *State* v. *Lambert*, 97 Me., 51, 53 A., 879; *State* v. *Priest*, 117 Me., 223, 103 A., 359; *State* v. *Papazian*, 124 Me., 378, 130 A., 129.

Under this rule and upon the entire record the conclusion of the jury was warranted that this respondent did commit an assault with intent to kill and that his defense of justification failed. The exception to denial of motion for directed verdict must be overruled.

EXCEPTION TO DENIAL OF MOTION FOR CHANGE OF VENUE.

Although the docket entries do not clearly indicate the fact, it was acknowledged by counsel on both sides that this matter was fully heard and argued. The statutory provision relating to change of venue, R. S., Chap. 96, Sec. 24, reads:

> "Any justice of the superior court, while holding a nisi prius term, on motion of either party, shall, for cause

shown, order the transfer of any civil action, or criminal case, pending in said court, to the docket thereof in any other county for trial, preserving all attachments."

This statute is declaratory of the common law power of courts of general jurisdiction, to transfer cases from one county to another, when it was necessary to do so in order to procure an impartial trial. *State* v. *Donnell,* 126 Me., 505, 140 A., 186.

As frankly admitted by counsel for the respondent, "the matter of change of venue rests in the sound discretion of the court." It appears from the entire record and information supplied by briefs of counsel, the only evidence presented was in the form of affidavits of four persons, two of whom were respondents.

Examination of these affidavits confirms the statement of the County Attorney in his brief, "Even if taken as true in their entirety, careful analysis of the affidavits filed by Respondent in support of said motion show, at most, sporadic acts of violence carried out by a few 'hot-heads,' but do not show widespread prejudice throughout the county such as would interfere with the obtaining of an impartial panel, or with the calm, orderly conduct of the trial."

The motion for change of venue alleges that the *Portland Press Herald* of June 10 and the *Boston Post* of June 11 contained statements of an inflammatory nature tending to connect respondents with a foreign agency and to label them as spies. This allegation of cause for change of venue can not be considered because the newspaper articles are not made part of the record and the Court is entirely uninformed as to their actual contents, and further there is nothing in the record disclosing that public hostility was thereby aroused. It would appear, therefore, that the usual rule applies as to matters for determination, addressed to the judicial discretion of the presiding justice, and that his decision is final unless there is an abuse of discretion. The cases cited in *State* v. *Donnell,* supra, of *Crocker* v. *Justices,* 208 Mass., 162, 94 N. E., 369, 21 An.

Cas., 1061; *Cochecho R. R.* v. *Farrington,* 26 N. H., 428; *State* v. *Albee,* 61 N. H., 423, 60 Am. Rep., 325, are applicable, and also *State* v. *Chapman,* 103 Conn., 453, 130 A., 899, 905. In the last cited case, the General Statutes, Sec. 6630, provide,

> "The judge holding any term of the superior court may upon motion order any criminal case pending in such court to be transferred to the superior court in any other county," 103 Conn., page 469.

Our statute is similar except that it actually specifies that it must be for cause shown. The court said, 130 A., 899, page 905; 103 Conn., page 470:

> "The power is one to be exercised with caution, and rests in the court's sound discretion, which is final, unless it appears clearly that it has exercised its discretion unreasonably, or, as it is often expressed, abused its discretion."
>
> "It is within the reasonable discretion of the trial court to grant a change of venue, when it clearly appears that a fair and impartial trial cannot be had in the county where the venue is laid in the indictment. The burden of showing this is upon the mover of the change of venue."

In *Cochecho R. R.* v. *Farrington,* supra, a civil case, the court said, page 445, that to require a change of venue on the ground that a fair trial cannot be had in the county, the fact alleged must be made conclusively to appear.

In *Crocker* v. *Justices,* supra, page 180, appears an interesting discussion of criminal processes, the right of accused to be tried by a jury of the vicinity and the correlative right to be tried elsewhere if only thus could an impartial tribunal be secured. The court concludes with the following:

> "That this question never has been presented for determination before (1910) is strong proof that there has been no occasion for the exercise of that power. Such a

> motion ought not to be granted upon mere suggestion, nor unless the reason for it is fully established. It is a jurisdiction which should be exercised with great caution and only after a solid foundation of fact has been first established. Manifestly it should be resorted to only in aid of justice, and it should not be permitted to be employed as an instrument of obstruction or as a means of delay."

There appears to be no abuse of discretion and this exception is without merit.

Exception to refusal to remove the case to the Federal Court.

Before the commencement of the actual trial but after the denial of the motion for a change of venue, a petition was presented in behalf of the then respondents for the removal of the case to the United States District Court under the provisions of Sec. 31 of the judicial code. (U. S. C. A., Title 28, Sec. 74.) The allegations in support of the petition were, in effect, that by reason of conspiracy on the part of public officials under the influence of enemies of the respondents, they are denied the equal protection of the laws and a fair jury trial and cannot defend themselves and their property, their right of freedom of speech, of press and of assembly, and of freedom to worship Almighty God, all of which above named rights are secured to each of them by the Constitution and laws of the State of Maine. It was also alleged that respondents were being prosecuted for acts which they say were in the exercise of the right of self-defense and the defense of property, and if the prosecutions are permitted to stand, they will be deprived of their civil rights.

It was also asserted in the petition that it was impossible for the respondents to secure a fair trial because of prejudice and publicity given the case and further that the jury had been selected in such manner as to deprive the respondents of their liberty without due process of law. It appears, however, that

the last assertion is not relied upon as the jury at the time had not been selected.

Respondent appears to have taken no action in the Federal Court under Sec. 32 of the judicial code, which provides that, when all the acts necessary for removal have been taken, the District Court may remove the proceedings in term time or vacation by a writ of habeas corpus.

In presenting the petition there was misconception as to the scope and purpose of the invoked federal statute. It is only when the Constitution and laws of the state deny or prevent the enforcement of equal rights secured to a party to a cause by the Constitution or laws of the United States that the cause may be removed. Here the petition itself explicitly avers that all of the civil rights of the respondents are secured to them by the Constitution and laws of the State of Maine. Complaint of conspiracy, prejudice and adverse publicity cannot avail as ground for removal. *Texas* v. *Gaines*, 2 Woods (U. S.), 342, Fed. Cas. No. 13847; Ex p. Wells, 3 Woods (U. S.) 128, Fed. Cas. No. 17386; *Kentucky* v. *Powers*, 201 U. S., 1, 26 S. Ct., 387, 50 Law Ed., 633, 5 A. & E. Ann. Cas., 692 and note pp. 704-6; U. S. C. A. Title 28, Sec. 74 and notes of decisions thereunder pp. 545-50. This exception must be overruled.

EXCEPTION TO DENIAL OF MOTION FOR SEPARATE TRIALS.

The record shows that before trial and after denial of motion for continuance, an oral motion for severance was made, denied and exception taken. Reliance is placed in respondent's brief on the opinion in *Brady* v. *U. S.* (Iowa) 39 F., 2d, 312. That case, however, is in full accord with the great weight of authority. It holds that the grant or denial of a motion for separate trials rests in the trial court's discretion and is reviewable only for abuse; that a denial of separate trials when it is not clearly shown that defenses were necessarily antagonistic or that the defendants would be prejudiced by joint trial is not error; further that what constitutes abuse of discretion in denying separate trials depends upon the whole situation in

each case. Here it is definitely shown that all of the respondents were engaged in a common enterprise. Their defense was that they were unitedly endeavoring to protect their persons and property and to repel invaders. The offense charged was committed when all were present. They were all witnesses for each other and for the present respondent. It was urged that this respondent was prejudiced when, at the close of the joint trial, the court instructed the jury to return not guilty verdicts as to the other respondents. The record, however, shows that the court used great care in instructing the jury with reference to this incident. The exception must be overruled on the ground that there was no abuse of discretion. *U. S.* v. *Ball*, 163 U. S., 662, 16 S. Ct., 1192, 41 L. Ed., 300; *State* v. *Soper*, 16 Me., 293, 33 Am. Dec., 665; *State* v. *Conley*, 39 Me., 78, at page 92; *Commonwealth* v. *Bingham*, 158 Mass., 169, 33 N. E., 341.

Exception to exclusion of certain photographs as exhibits.

All exceptions to the admission or exclusion of testimony are waived save as to certain photographs. Exhibits Nos. 10, 11 and 12 were photographs purporting to show some defacement of Kingdom Hall in Saco in October, 1939. Respondent was on trial for what occurred on June 9, 1940, a considerable time after the sect had transferred their activities to premises in Kennebunk. It was claimed that the exhibits were admissible to show the state of mind of the accused with respect to threatened attacks.

Exhibits Nos. 8 and 9 were two of a series of five photographs of Kingdom Hall in Kennebunk. One was withdrawn. Two, which were taken just before the events of June 9, 1940, were admitted, while Nos. 8 and 9 were excluded. The record discloses that the reason for exclusion was because they were taken after the event, and portrayed a changed condition unconnected with that event.

The rule of practice is firmly established here as elsewhere, that the admission or exclusion of photographs is within the

discretion of the court, not to be disturbed on exceptions unless abused. It is a general rule that photographs offered as exhibits must show conditions existing at the time of the occurrence. There is nothing to justify the finding of an abuse of discretion. *Rodick* v. *M. C. R. R.*, 109 Me., 530, 534, 85 A., 41, and cases there reviewed.

Upon full consideration the court is satisfied that the respondent received a fair and impartial trial, that the exceptions show no prejudicial error, and that the verdict was justified.

Exceptions overruled.
Judgment for the State.

HUDSON, J., dissenting in part.

While I concur in the result, I do not join in the majority opinion, because, in connection with the discussion of procedure therein, I do not assent to its statement "that the doctrine of waiver under such circumstances does not apply in felony cases."

For many years it has been well-established law in this state, both in misdemeanor and felony cases as well as in civil case procedure, that where an exception is taken to a refusal by the presiding justice to direct a verdict for the defendant and later, after verdict, a motion is addressed to the presiding justice to set the verdict aside, the exception is waived. *State* v. *Simpson*, 113 Me., 27, 92 A., 898 (misdemeanor); dictum in *State* v. *Davis*, 116 Me., 260, 101 A., 208 (felony); *State* v. *Di Pietrantonio*, 119 Me., 18, 109 A., 186 (felony); *State* v. *Power*, 123 Me., 223, 122 A., 572 (misdemeanor); *Mills* v. *Richardson*, 126 Me., 244, 137 A., 689 (civil case); *State* v. *O'Donnell, et als.*, 131 Me., 294, 161 A., 802 (felony); *Symonds* v. *Free Street Corp.*, 135 Me., 501, 200 A., 801, 117 A. L. R., 986 (civil case); *Inhabitants of Fort Fairfield* v. *Inhabitants of Millinocket*, 136 Me., 426, 12 A., 2d, 173.

Until now this court has made no distinction in this respect between misdemeanors and felonies. With reference to both,

decision has been that the filing of the motion after verdict addressed to the presiding justice constitutes a waiver of the exception to the refusal to direct a verdict. The majority opinion adheres to this principle as to misdemeanors, denies it as to felonies, and takes no position, as it was not necessary to take such, with reference to civil cases. With relation, however, to civil cases, I think the latest pronouncement of this Court may be found in *Inhabitants of Fort Fairfield* v. *Inhabitants of Millinocket*, supra, on page 428, where the court said:

> "The exception taken to the denial of the defendant's motion for a directed verdict and the general motion for a new trial raise the same question. That exception must be regarded as waived."

Also, as to waiver by motion for new trial, it is stated in Sec. 351 of 4 C. J. S., on page 769:

> "With respect to waiver by implication the general rule is that a party cannot make a motion for a new trial based on points raised by his bill of exceptions without waiving the exceptions, or, at least without expressly reserving them."

The annotator states in 17 A. L. R., on page 929:

> "And in Maine, it has been held that the refusal of the court to direct a verdict in favor of the accused is waived by the filing of a motion to set aside the verdict, the reason being that the same question, i.e., the sufficiency of the evidence, is raised by both," citing the Simpson, Davis, and Di Pietrantonio cases, supra.
>
> The O'Donnell case, supra, had not then been decided.

The effect of the majority opinion is to overrule the decisions on the point here discussed in *State* v. *Di Pietrantonio*, supra, and *State* v. *O'Donnell et als.*, supra, both felony cases in which the opinions, written by former Chief Justices of this Court, were signed unanimously by the members of the Court.

The reason advanced for overruling these cases is that in felony cases there is a statutory right of appeal to the Law Court from the refusal of the presiding justice to set the verdict aside, while formerly there was none; but the statute giving the right of appeal was enacted prior to the decisions above cited. It is not to be assumed that this statute was not then considered by the Court. That it was not overlooked in the Di Pietrantonio case, *supra*, is clear, because in the opinion specific mention is made of it. So, too, in the Simpson case, *supra*. Although the Simpson case related to a misdemeanor rather than a felony, the court stated broadly: "This court has frequently held both *in criminal and civil cases* that the prosecution of a motion for new trial before the presiding Justice is a waiver of all rights of exception . . . and the practice is now well settled." (Italics mine.) While the statement was dictum as to other than misdemeanors, yet it evidences the then opinion of the court that there was no distinction as to waiver between felonies and misdemeanors as now held by the majority of this Court.

The reason for waiver given in the decision in the Simpson case, *supra*, is stated in these words:

> "The only ground on which the verdict could be set aside was that the evidence was insufficient to support it; which was the precise point raised in the first request (meaning motion to direct a verdict for the respondent). If the evidence was sufficient the direction of a verdict had been properly refused. If the evidence was insufficient the verdict should have been ordered. It follows therefore that exactly the same question was presented to the determination of the presiding Justice by the motion, which would have been presented to the Law Court, on the first exception, and having failed on the motion the respondent cannot now be allowed to revive his exceptions and seek another tribunal."

Chief Justice Cornish, who had written the opinion in the

Simpson misdemeanor case, *supra,* also wrote the opinion in the Di Pietrantonio felony case, *supra,* and in the latter said: "The exception to the refusal of the court to direct a verdict in favor of the respondent was waived by the filing of the motion to set aside the verdict after it was rendered. Precisely the same question was raised by both," citing the Simpson case and also *State* v. *Davis,* supra, which, by way of dictum in a felony case, had followed *State* v. *Simpson,* supra.

The reasoning in these cases cited would seem to be as sound now as then in holding that the conduct of the defendant in presenting the same question a second time to the same presiding justice constituted a waiver of the exception taken to the former ruling. By such conduct he abandoned his right to prosecute his exception previously taken.

In the Simpson case, *supra,* two exceptions went to the Law Court, the first one being to the refusal of the presiding justice to direct a verdict for the defendant and the second to the refusal of the presiding justice to set the verdict aside. Both exceptions were overruled.

As to the first exception the Court said on page 28, 113 Me., page 899 of 92 A.:

> "Had the respondent stood upon his legal rights in prosecuting that exception he could have brought the case to the Law Court, and obtained its decision and opinion as to the sufficiency of the evidence. But subsequently the respondent abandoned that remedy and that course of procedure, and sought the decision and opinion of the presiding Justice upon precisely the same question. He filed a motion asking the presiding Justice to set aside the verdict."

The second exception was overruled as the court said on page 29, 113 Me.:

> "... because, as we have already said, exceptions do not lie to the refusal of a presiding Justice to grant a new

trial, it being a matter addressed to his judicial discretion."

This language was used in connection with a misdemeanor case, but the fact that in felony cases there is a right of appeal from the refusal of the presiding justice to set the verdict aside makes it nonetheless an abandonment or waiver of an exception taken to the previous ruling of refusal to direct a verdict. It is the adoption of the second procedure after verdict, whether single- or double-barrelled, that works the waiver. The fact that in felony cases the defendant has two bites at the cherry, first in having the presiding justice hear his motion to set the verdict aside and second, right of appeal from his decision, instead of having to rely only upon exceptions to the decision of the presiding justice refusing to direct a verdict, makes the adoption of such procedure, with right of appeal added, nonetheless a waiver of the exception to the refusal to direct a verdict.

The waiver takes place when the motion to set the verdict aside is filed, not later when it is ruled upon. The filing of the motion evidences the intention to abandon and is the conduct founding the waiver.

"The exception . . . was waived by the filing of the motion to set aside the verdict after it was rendered." *State* v. *Di Pietrantonio,* supra, on page 19 of 119 Me., page 187 of 109 A.

"The right to be heard on his exceptions, which he deliberately and completely waived when he chose to prosecute a motion for a new trial, cannot be restored merely because his motion proved ineffectual." *State* v. *Power,* supra, on page 224 of 123 Me., page 572 of 122 A.

"*Filing the motions* operated as a waiver of exceptions to the refusal to direct verdicts . . ." (Italics mine.) *State* v. *O'Donnell et als.,* supra, on page 295 of 131 Me., page 803 of 161 A.

The respondent, upon refusal of the motion to direct a verdict, had an option then to take and prosecute his exception before the Law Court, or later, after verdict of guilty, to file a motion to set it aside. As stated in the Simpson case, *supra:* "He must exercise his option and take one course or the other. He cannot take both. And having exercised his choice he is bound by the result."

A right abandoned or waived cannot be regained. *Libby* v. *Haley*, 91 Me., 331, 333, 39 A., 1004. Here it is claimed that the respondent, not appealing from the refusal of the presiding justice to order a new trial, as he had the right to appeal (instead thereof he excepted, a right not given by statute), could then, as a result of his own error of procedure, resort to the right of exception which theretofore he had abandoned and waived. No such right of resurrection of a dead exception is given by statute or otherwise, but such is now given in the case of a felony under this majority opinion.

An important element in the doctrine of waiver is intention to waive. It is not, however, a secret intention but "the intention to be gathered from the language and conduct of the party." *Smith* v. *Phillips National Bank*, 114 Me., 297, 302, 96 A., 217. But even if here the actual intention were to be discovered, would not the fact that there is in felony cases a statutory appeal from the refusal of the presiding justice to order a new trial make it all the more likely that there exists an actual intention to abandon the exception, for there would be not only the right to have the same question passed upon by the presiding justice on the motion for a new trial but to have the Law Court review that decision? The fact that in the case of a felony there is a statutory right of appeal, it would seem, therefore, instead of tending to indicate an actual intention to retain the exception, would naturally and with good reason indicate quite the contrary, for if by appealing he could have decision by the Law Court upon the latter ruling of the presiding justice, it would be futile and absolutely unnecessary then to prosecute his exception, where both the exception and the

appeal raise the same question. The fact that after the decision by the presiding justice denying a new trial he does not appeal but erroneously excepts to that ruling does not alter the situation. It doesn't seem logical nor legally possible that a right once lost by voluntary election can be revived by the possessor's own later procedural error. It is not a case of conditional waiver but one absolute.

In the majority opinion it is stated: "Since the granting of appeals in all felony cases, however, it has become established practice for the court to consider felony cases on both appeal and exceptions." And then is cited a list of cases. I think, however, an examination of these cases shows that in only three of them, namely, *State* v. *Brown,* 118 Me., 164, 106 A., 429; *State* v. *Mulkern,* 118 Me., 477, 105 A., 177, and *State* v. *Rogers,* 125 Me., 515, 132 A., 521, was an exception taken to the refusal to order a verdict. In all the other cases the exceptions were to rulings of the presiding justice that had to do with the admissibility of evidence, instructions given to the jury or refused to be given, or as to conduct of the trial, none of which raised the same question before the Law Court as that raised in the appeal. This I consider quite different from an exception to a refusal to order a verdict and an appeal from a refusal of a presiding justice to order a new trial, in both of which the same question is raised, which fact is instrumental in establishing the waiver.

Furthermore, all of the cases mentioned differ from the instant case in that in the latter no appeal was taken.

In the Brown, Mulkern, and Rogers cases, *supra* (the Mulkern case up on exceptions to refusal to order a verdict, to grant a motion in arrest of judgment, and on appeal under R. S. 1916, Chap. 136, Sec. 28, and the Rogers case up on exception to refusal to order a directed verdict and on motion for new trial on the ground of newly discovered evidence), while the exception was overruled in each case, there was no discussion of procedure, that is, as to whether the exception was properly presented, while in all of the cases hereinbefore mentioned in this

opinion where there was discussion it was unanimously held that because of waiver such exception could not properly come to the Law Court, and the latest expression to that effect in felony cases is found in *State* v. *O'Donnell,* supra, a recent case succeeding the Brown, Mulkern, and Rogers cases, *supra.*

The fact referred to in the majority opinion, that in many cases where waiver has been held, the Court, nevertheless, has reviewed the merits, in no way affects the reasoning of its decision on the doctrine of waiver. Here in this case we could, if we saw fit, adopt the same practice without overruling well-established law. This practice I prefer to follow. The applicability of Chap. 86 of P. L. 1941 I do not discuss for I do not deem it necessary.

So I concur in the result, but for reasons stated, do not sign the majority opinion.

WORSTER, J., dissenting in part.

I have reached the same conclusion as that reached by Mr. Justice Hudson, and concur in his opinion.

ANSEL HIGGINS *vs.* CARR BROTHERS COMPANY.

Cumberland. Opinion, February 25, 1942.

Fair Labor Standards Act.

The power of Congress extends not only to the regulation of transactions which are part of interstate commerce but to the protection of that commerce from injuries which result from the conduct of those engaged in intrastate operations.

The power of Congress to subject intrastate transactions to federal control on the ground that they affect interstate commerce is confined to transactions which directly affect such commerce, and, if their effect is merely indirect, the transactions remain within the domain of state power.

The hours and wages of the plaintiff while employed by the defendant employer in its purely intrastate activities had no direct relation to interstate commerce, and an attempt to fix such hours and wages according to standards set by the Fair Labor Standards Act of 1938 is not a valid exercise of federal power.

EXCEPTIONS BY THE PLAINTIFF.

The plaintiff sued for unpaid wages and overtime compensation alleged to be due him and for liquidated damages under the Fair Labor Standards Act of 1938. By consent of the parties the case was heard by the court with jury waived. When the wage and hour provisions of the Fair Labor Standards Act went into effect the defendant was selling and delivering merchandise to buyers in Maine and also in New Hampshire. At the end of ten weeks, the trade with buyers in New Hampshire was discontinued and all sales and deliveries were solely to retailers in Maine. The Trial Court ruled that during the ten weeks in which defendants carried on trade with New Hampshire the plaintiff was entitled to the benefits of the Fair Labor Standards Act and awarded him the amount due him both for wages and liquidated damages under the provisions of that Act. The court ruled, however, that when the defendant discontinued its New Hampshire trade and sold only to buyers in Maine it was engaged solely in intrastate commerce, although the merchandise which the defendant handled originated outside of Maine; and that during such time the plaintiff did not come within the provisions of the Fair Labor Standard Act.

Exceptions overruled. The case fully appears in the opinion.

Edward B. Perry, Portland, for plaintiff.

Francis W. Sullivan,

James R. Desmond, Portland, for defendant.

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

STURGIS, C. J. In this proceeding the plaintiff, Ansel Higgins, sues his employer, Carr Brothers Company, for unpaid wages and overtime compensation alleged to be due him with liquidated damages for the period from October 24, 1938, to July 24, 1940, under the Fair Labor Standards Act of 1938, 52. Stat. 1060; U. S. C. A. Tit. 29, Chap. 8. The plea was the

general issue with a brief statement denying that the employer and employee were engaged in interstate commerce at the time embraced in the declaration and that the Fair Labor Standards Act had been violated. By consent of the parties the case was heard by the court with jury waived and with the right to except as to matters of law reserved. The plaintiff presents his Exception to the decision filed.

The Fair Labor Standards Act of 1938, approved June 25, 1938, with exceptions not here of concern, fixes the minimum hourly wage and the maximum hours of the workweek of all employees who are engaged in commerce or in the production of goods for commerce. As defined, "commerce" means interstate commerce. (Section 3(b).)

The Act provides in Section 6(a), effective October 24, 1938, that such employees shall be paid,

> "(1) during the first year from the effective date of this section, not less than 25 cents an hour,
> "(2) during the next six years from such date not less than 30 cents an hour. . . ."

And in Section 7 (a), also effective on October 24, 1938, that no employer shall employ any such employee,

> "(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
> "(2) for a workweek longer than forty-two hours during the second year from such date, or
> "(3) for a workweek longer than forty hours after the expiration of the second year from such date,
> "Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Under Section 16 (b) any employer who violates Section 6 or 7 of the Act is "liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid

overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." In addition to any judgment awarded, the plaintiff or plaintiffs are entitled to the allowance of a reasonable attorney's fee and costs of the action.

Carr Brothers Company is a local corporation conducting a wholesale fruit, grocery and produce business in Portland. It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of the produce and fruit is processed, much of it sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser. When the wage and hour provision of the Fair Labor Standards Act went into effect the corporation was selling and delivering its merchandise not only to the local trade in Maine but also to retailers in various cities and towns in New Hampshire and the record indicates that a somewhat substantial part of what it bought in other states was intentionally destined for final transportation into New Hampshire after a temporary deposit or rest in its store or warehouse in Portland. At the end of ten weeks, however, this out-of-state trade was discontinued, and thereafter all sales and deliveries were solely to retailers in Maine.

The plaintiff, Ansel Higgins, was at first employed by Carr Brothers Company as night shipper, serving customers, putting up all orders and loading trucks including those used for out-of-state deliveries. He worked sixty-six hours a week for a wage of $16.00 in this service for the ten weeks in which trade in New Hampshire continued.The court below found and ruled that for this period the employee was entitled to the benefits of Section 6 (a), 7 (a) and 16 (b) of the Act and the defendant employer was liable to him for unpaid minimum wages and overtime compensation computed to be $31.70, together with

liquidated damages of equal amount, a $100 counsel fee and altogether $163.40. Standing alone this decision is not attacked mathematically or otherwise. It seems to have been fully warranted. The merchandise which Carr Brothers Company purchased in other states intended to be shipped into Maine, here rest temporarily only, and later go forward in transportation to New Hampshire remained in the "current" of interstate commerce, until it reached its ultimate destination. The continuity of the movement of the goods was never broken in Maine and did not then cease. *Swift & Co.* v. *United States,* 196 U. S., 375, 25 S. Ct., 276, 49 Law Ed., 518; *Stafford* v. *Wallace,* 258 U. S., 495, 42 S. Ct., 397, 66 Law Ed., 735, 23 A. L. R., 229; *Board of Trade of City of Chicago* v. *Olsen,* 262 U. S. 1, 35, 43 S. Ct., 470, 67 Law Ed., 839; *Binderup* v. *Pathe Exchange,* 263 U. S., 291, 44 S. Ct., 96, 68 Law Ed., 308. It is clear on the record, we think, that, the plaintiff employee, for the period that he was actively and regularly employed in putting up orders and loading trucks with merchandise for New Hampshire delivery, was engaged in commerce as defined by Section 3 (b) of the Fair Labor Standards Act and entitled to receive the benefits of the applicable provisions of the law.

The employee directs his exception to the denial, in the trial court, of his claim for unpaid minimum wages and overtime compensation alleged to be due him under Section 6 (a) and 7 (a) of the Fair Labor Standards Act during his further employment by the defendant corporation from early in January, 1939, until July 24, 1940, when he quit work. His employer had then discontinued its interstate sales and deliveries in New Hampshire and was carrying on a strictly local wholesale business. For the first three months of this period the employee continued to work as night shipper, putting up orders and loading trucks, but all for local delivery to retail dealers in Maine. During his subsequent employment he drove a light truck distributing merchandise to the same local trade. The employer was still buying in out-of-state markets but when the the shipments were unloaded into its store and warehouse in

Portland the merchandise was owned and held by it there solely for local sales and deliveries to domestic retail dealers for direct resale to consumers. With exceptions of minor importance and not here controlling, this status continued without interruption. The merchandise "was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states." Its interstate movement had ended. Subsequent local sales and deliveries were purely intrastate activities and in these this employee was solely engaged. *Schechter Poultry Corp.* v. *United States,* 295 U. S., 495, 543, 55 S. Ct., 837, 79 Law Ed., 1570; 97 A. L. R., 947; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S., 257, 267, 48 S. Ct., 107, 72 Law Ed., 270; *Public Utilities Commission* v. *Landon,* 249 U. S., 236, 245, 39 S. Ct., 268, 63 Law Ed., 577.

The employee, through counsel, argues, however, that, even though he was engaged solely in intrastate commerce in the latter periods of his employment by the defendant corporation, his hours and wages so adversely affected interstate commerce that they became subject to federal control under the Fair Labor Standards Act, and for violation thereof, recovery may be had as there provided. This contention did not prevail in the trial court and cannot here. It is, of course, a familiar principle that Congress may not only regulate transactions which are a part of interstate commerce but may also protect that commerce from injuries which result from the conduct of those engaged in intrastate operations. But it is elementary that in order to subject intrastate transactions to federal control they must *directly* affect interstate commerce and if their effect is merely *indirect* the transactions remain within the "domain of state power." It is well settled now that the hours and wages of persons employed in purely intrastate commerce have no direct relation to interstate commerce and an attempt to fix such hours and wages by regulation is not a valid exercise of federal power. *Schechter Poultry Corp.* v. *United States,* supra. See *Labor Relations Board* v. *Jones & Laughlin S. Corp.,* 301 U. S.

1, 29, 57 S. Ct., 615, 81 Law Ed., 893; *Carter* v. *Carter Coal Co.*, 298 U. S., 238, 309, 56 S. Ct., 855, 80 Law Ed., 1160; *United States* v. *Butler*, 297 U. S. 1, 75, 56 S. Ct., 312, 80 Law Ed., 477; 102 A. L. R., 914.

In *Schechter Poultry Corp.* v. *United States*, supra, the question of the right of federal control over the wages and hours of the defendant's employees under the Live Poultry Code, 48 Stat., 195, 196; 15 U. S. C. A., Sec. 703, was presented for determination. On a finding that the employees were handling poultry after it was received in interstate commerce into the defendant's slaughter house markets solely for sale to local retailers for resale, it was held that the employees were engaged in purely intrastate commerce, their hours and wages had no direct relation to interstate commerce, and the attempt through the Code to fix the hours and wages was not a valid exercise of federal power. In delivering the opinion of the Court, Mr. Chief Justice Hughes said:

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. . . . where the effect of intrastate transactions upon interstate commerce is merely indirect such transactions remain within the domain of state power. If the commerce clause was construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. . . .
>
> "It is not the province of the Court to consider the economic advantages or disadvantages of such a central-

> ized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state."

The decision in the Schechter case and the doctrines there enunciated are still in full force and effect despite unauthoritative advices to the contrary. On the point under consideration the factual situations there and here are entirely parallel and, despite the differences in the statutes under which government control of hours and wages in an intrastate business is attempted or invoked, the principles involved are the same. We find no valid ground upon which the case can be distinguished. The decision of the Supreme Court of the United States upon the question of the interpretation and application of the commerce clause of the Federal Constitution is conclusive and binding upon this court. We concur with the learned Justice presiding below that it cannot be held in this action that the hours and wages of the plaintiff employee while he was working in the defendant's purely intrastate business so affected interstate commerce that they are subject to federal control under the Fair Labor Standards Act.

No error in the rulings below being made to appear, the exception reserved must be overruled.

Exception overruled.

EDITH ESTABROOK *vs.* WALTER BARTON.

EDITH ESTABROOK *vs.* RYAN OF BOSTON, INC.

Sagadahoc. Opinion, March 2, 1942.

Negligence and Contributory Negligence Factual Issues. Prejudicial Error as Basis for New Trial.

It is indisputable that leaving an unlighted obstruction in a highway at night creates a hazard for travellers.

The question of defendants' negligence and of contributory negligence by the plaintiff were factual ones for the jury.

There must be prejudicial error to the complaining party to justify granting a new trial.

MOTION FOR NEW TRIAL BY BOTH PARTIES.

Plaintiff sought to recover for injuries suffered by her by reason of a collision late at night between her automobile and a truck then stationary on the highway, and which she alleged was unlighted. The only issues involved were whether the defendants were negligent and whether the plaintiff was guilty of contributory negligence, both of which were questions for the jury. The jury brought in a verdict for the plaintiff and awarded damages. The plaintiff moved for a new trial on the ground that the damages awarded were inadequate, but later withdrew her motion. The defendants had alleged that the damages were excessive, but, in pressing their motion for a new trial, urged that the damages were so manifestly inadequate as to evidence a compromise verdict. Motion was overruled. Case fully appears in the opinion.

Frank T. Powers, Lewiston, for plaintiff.

Charles T. Smith, Jr., Bath, for defendants.

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

PER CURIAM.

Plaintiff in these two cases seeks to recover separately from the operator of a motor truck, admitted to have been the servant and agent of the owner thereof at the time pertinent, and from such owner, for injuries suffered late at night on an October day when in driving her own automobile along a highway in Brunswick, she collided with that motor truck, then stationary thereon and, as she alleges, unlighted. The plaintiff suffered substantial injuries.

The cases come to this Court upon motions for new trial, filed by both parties. The motions of the defendants are in the usual form and are based upon the usual grounds. Those of the plaintiff allege that the damages assessed in her favor (she secured a verdict for $2000 in each case) are inadequate. The only issues to be determined, however, are those raised by the motions of the defendants, since the plaintiff at argument waived her claim that the awards were not sufficient.

The issues involve the questions whether the jury findings (1) that the defendants were negligent, and (2) that the plaintiff was not contributorily negligent, are properly supported by the testimony in the record.

There was a very distinct issue of fact before the jury as to whether or not defendant's truck was lighted. "It is indisputable that leaving an unlighted obstruction in a highway at night creates a hazard for travellers." *Richard* v. *Maine Central Railroad Company*, 132 Me., 197, 168 A., 811. The jury finding, which must have been that the truck was unlighted, has ample support in evidence.

A single fact involved in determining the issue as to contributory negligence on the part of the plaintiff presents also some conflict of testimony, i.e., the position of the truck laterally on the traveled part of the highway, but the whole picture of the conduct of the plaintiff prior to the impact of her vehicle against defendant's truck was presented to the jury. Whether the finding was based upon the jurors' acceptance of the testimony of the plaintiff that the unlighted truck occupied a considerable part of that portion of the highway on her

right hand side, as she was progressing, or a determination that under all the circumstances her driving met the requirements of due care regardless of the lateral position of the truck, it seems clear upon the authorities that the issue of contributory negligence was a factual one for jury determination. *Shaw* v. *Bolton*, 122 Me., 232, 119 A., 801; *Tomlinson* v. *Clement Brothers*, 130 Me., 189, 154 A., 355.

Defendants urge in argument, notwithstanding allegation in their motions that the damages awarded were excessive, that they were, on the contrary, so manifestly inadequate as to evidence compromise verdicts which, under the rule declared in *Chapman* v. *Portland Country Club*, 137 Me., 10, 14 A., 2d, 500, would entitle the defendants to new trials on the ground that they "must be considered invalid as a whole." In *Giles* v. *Perkins*, 138 Me., 96, 22 A., 2d, 132, this Court gave consideration to a similar argument advanced by a defendant who sought new trial, as is the case here, on allegation that the verdict challenged was excessive, but it there emphasized the principle that "there must be prejudicial error to the complaining party to justify granting a new trial," and left the verdict undisturbed. Such must be the result in the present cases. The verdicts, notwithstanding plaintiff's out-of-pocket cost was substantially more than half the amount awarded, must be accepted as representing the well-reasoned and considered judgment of the jury.

Plaintiff's motions having been withdrawn, the mandate in each case is

Defendant's motion overruled.

CLYDE F. FROST *vs.* CHAPLIN MOTOR COMPANY.

Cumberland. Opinion, March 3, 1942.

Bailment. Findings by Referee.

It is a general rule that findings of fact by a referee are final and conclusive if supported by evidence of real worth and probative value; but if there is no

evidence to support them or if the only inference to be drawn from the existing facts does not support the conclusion reached by the referee, then his decision is erroneous as a matter of law, and exceptions will lie to the acceptance if objection thereto is properly and seasonably made.

A bailment imports the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it.

As a general rule, a bailee may show, as an excuse for failure to redeliver, that the property was taken from his possession under process of law, provided he has done all that is required of him to protect his bailor's interest.

There is no principle of law better settled than that a breach by the promissor of his unconditional contract lawfully entered into is not to be excused by any act of his own or those in privity with him which prevented or rendered impossible the performance of his agreement.

Acceptance by the defendant as bailee of plaintiff's automobile for the purpose of lubricating it must be considered as an implied waiver of its right to attach the automobile to secure the payment of an old account.

ON EXCEPTIONS BY PLAINTIFF TO ACCEPTANCE OF REPORT OF REFEREE.

The plaintiff delivered to the defendant at its garage his automobile with instructions to lubricate it and have it ready for him later in the day. The defendant received the automobile on those terms. After the automobile had been lubricated but before the plaintiff returned for it the defendant caused it to be attached in an action against the plaintiff on an old account; and when the plaintiff demanded it, the defendant refused to deliver it. The plaintiff later recovered it by giving bond; and in this action sought to recover damages alleged to have been suffered by the failure of the defendant to deliver the automobile on demand. The referee decided in favor of the defendant. Plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Philip F. Thorne, Portland, for plaintiff.

Franklin R. Chesley, Portland, for defendant.

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

WORSTER, J. On exceptions to the acceptance of the report of the referee, who heard the case under a rule of reference issued out of the Superior Court, with the right of exceptions reserved on questions of law.

It is a general rule that findings of fact by a referee are final and conclusive, if supported by evidence of real worth and probative value. But, if there is no evidence to support them, or if the only inference to be drawn from the existing facts does not support the conclusion reached by the referee, then his decision is erroneous as a matter of law, and exceptions will lie to the acceptance of his report, if objection thereto is properly and seasonably made, as was done in the case at bar.

The material facts are not in dispute here, and so the question presented is whether the ruling of the referee was erroneous as a matter of law. We think it was.

In appears that sometime in the early part of the forenoon, on February 15, 1941, the plaintiff delivered to the defendant, the Chaplin Motor Company, at its garage, his automobile, with instructions, in substance and effect, to lubricate it and have it ready for him around noontime of that day. The defendant received the automobile upon those terms, and then accepted in payment for the lubrication to be made, a coupon from a book of coupons, which it had previously sold to the plaintiff, on credit. After the automobile had been lubricated, but before the plaintiff returned for it, the Chaplin Motor Company, without any change having taken place in the contractual relationship of the parties, caused the automobile to be attached at 11:15 A.M., on that day, in an action brought by it against the plaintiff on an old account. Afterwards, on the same day, the plaintiff demanded his automobile of the defendant. The latter refused to redeliver it. Five days later the plaintiff obtained it by giving the bond required by law to dissolve attachments of personal property. In this action, the plaintiff seeks to recover damages alleged to have been suffered by him because of the failure of the defendant to redeliver the automobile to him, on demand.

The delivery of the automobile to the defendant as aforesaid constituted a bailment. But the defendant contends, in effect, that notwithstanding the fact that the bailment had not been terminated, it had the statutory right to attach any non-exempt property of the plaintiff, including this automobile, then held by it as bailee, and, having caused the automobile to be attached, was excused from redelivering it to the plaintiff until such bond was given.The referee found for the defendant.

> "As a general rule a bailee may show, as an excuse for failure to redeliver, that the property was taken from his possession under process of law, provided he had done all that is required of him to protect his bailor's interest. . . ." 6 Am. Jur., page 225.

In this case, however, the automobile was not *taken from* the possession of the bailee, in the sense in which those words are used in the above quotation, but, on the contrary, it was *taken for* the benefit of the bailee, at its express direction, to satisfy any judgment and costs which it might recover against the bailor in an action brought against him on an old account, unconnected with the bailment.

Moreover, redelivery of the automobile was not impossible. The bailee could have discharged the attachment at any time (*Wheeler et al.* v. *Nichols*, 32 Me., 233, at 240; see, also, *Bachelder et al.* v. *Perley et al.*, 53 Me., 414), and then redelivered the automobile to the bailor, as required by the terms of the bailment.

A bailment is defined in 6 Am. Jur., page 141, as follows:

> "In its ordinary legal signification, which conforms to modern authorities and is substantially accurate, the term may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it."

But, even if a bailment cannot be considered a trust, in the technical sense of that word (see discussion in 6 Am. Jur., page 184 *et seq.*) yet, nevertheless, the Chaplin Motor Company cannot excuse or justify its own voluntary breach of its unconditional contract to lubricate and redeliver the automobile to the plaintiff, at the garage, on demand, merely by showing that said company, itself, had caused the automobile to be attached on a writ sued out by it against the plaintiff on an old account.

> "There is no principle of law better settled than that a breach by the promissor of his unconditional contract lawfully entered into is not to be excused by any act of his own or those in privity with him which prevented or rendered impossible the performance of his agreement." *Buchanan et al. v. Louisiana Purchase Exposition Co. et al.*, 245 Mo., 337, 149 S. W., 26, at page 28.

Indeed, in the circumstances of this case, the claim of the Chaplin Motor Company to the right to attach this automobile, during the bailment, is so utterly inconsistent with and contrary to its contractual duty and undertaking, as bailee, to lubricate and redeliver the automobile to the bailor, at the garage, on demand, that it must be considered that at the time of receiving the automobile, for the purpose aforesaid, the Chaplin Motor Company impliedly waived the right to cause such attachment to be made, during the bailment. And, having obtained possession of the automobile, on such implied waiver, the defendant is now estopped from setting up and relying upon such attachment as an excuse for the breach of its contractual duty to redeliver the automobile to the plaintiff.

This conclusion renders it unnecessary to consider the cases cited in the briefs and in the report of the referee.

The decision of the referee in favor of this defendant was erroneous as a matter of law, and the order of the presiding justice, accepting the referee's report, must be set aside.

Exceptions sustained.

S. D. WARREN COMPANY, APPELLANT

vs.

CHARLES W. FRITZ, ERNEST H. SMITH AND ERNEST H. EMERY,

ASSESSORS OF THE TOWN OF GORHAM, APPELLEES.

(TWO CASES.)

Cumberland. Opinion, March 6, 1942.

Tax-abatement Appeals. Dismissal of Case for want of Prosecution.

A tax-abatement appeal is a "case" within the meaning of Rule 41 of Rules of Court.

Rule of Court 41 has the force of law and is binding upon the court as well as upon the parties.

The purpose of Rule 41 is to prevent protracted litigation without just cause. It is apparent that to permit litigation in tax proceedings to be extended for a long period of time, without just cause, would be against public interest.

It is the duty of the parties in a case to look after their pending cases, ascertain what has been done with them and take such proper steps in connection therewith as may be required. The court is not charged with the duty of inspecting the docket and files each term to ascertain if any cases have been entered requiring notice, and issuing orders of notice of its own motion.

Appearance of tax assessors in the instant cases, after appeals had been dismissed, and the participation of their attorneys in proceedings in the cases did not cure all the defects and prior irregularities, nor operate as a waiver of all preliminary steps to a hearing on the merits; nor did the agreement of counsel for both parties, filed in the office of the Clerk of Courts, after dismissal of the appeal, that the entry of dismissal "be stricken off and the case restored to the docket" restore the case to the docket or give jurisdiction to the court.

There was nothing in the record to indicate that the entry of "Dismissed" made at the April term, 1938, was made in error or mistake. The entries on the docket were attested by the clerk and import verity, and, nothing appearing to the contrary, it is presumed that the entries were made with the sanction of the presiding justice and by his authority.

In this state, a tax-abatement appeal to the Superior Court is a judicial proceeding established by law and imports a state of facts which furnish an occasion for the exercise of the jurisdiction of a court of justice; otherwise the court could not grant relief and such a proceeding would be futile.

In a tax-abatement appeal, there are parties having adverse interests. That, itself, makes a case calling for the exercise of judicial power to properly dispose of the matter.

Whether or not there was sufficient cause to justify the continuance of the appeals in the instant cases was a question of fact for the then presiding justice.

Nothing appearing to the contrary, it is presumed that the "dismissed" appeals went to final judgment on judgment day of the term in which they were dismissed.

EXCEPTIONS BY THE APPELLANT.

The appellant excepted to the refusal of the justice presiding in the Superior Court to restore to the docket two tax-abatement appeals which had previously been dismissed. Said appeals had been taken to the Superior Court from the refusal of the tax assessors of the town of Gorham to abate the taxes which had been assessed against the company for the years 1933 and 1934. The appeals were entered at the May term, 1935, and were dismissed at the April term, 1938. Up to that time, no appearance had been entered for the assessors and no orders of notice had ever been issued.

Nothing further was done until the September term, 1938, when appearances for the assessors were entered on the docket for the first time. At that term pursuant to a written memorandum of agreement by counsel filed in the office of the clerk of courts the following docket entry was made in each of the appeals: "By agreement, entry of 'Dismissed' stricken off and case restored to docket."

No further steps were taken until March term, 1941, when the court, on the plaintiff's motions, continued the appeals to the June term following. At that term counsel for the assessors moved that both appeals be dismissed. At the hearing on these motions at the October term, 1941, the court ruled, in each proceeding, that the entry of the September term, 1938, that "by agreement, entry of 'Dismissed' stricken off and case restored to docket" did not restore the cause to the docket and ordered the appeals dismissed.

At the November term, 1941, the appellant filed motions

that the appeals be restored to the docket. The court denied the motions. The appellant excepted. Exceptions overruled in both cases. The cases fully appear in the opinion.

Bradley, Linnell, Nulty & Brown, Portland, for appellant.

Redman, White, Wiley & Winslow, Portland, for appellees.

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

WORSTER, J. On exceptions to the refusal of the justice presiding at the December Term, 1941, of the Superior Court held at Portland, within and for Cumberland County, State of Maine, to restore to the docket of that court, two separate tax-abatement appeals, which had been dismissed at a prior term of that court. Both appeals present the same questions of law, and will be considered together.

The appeals (one covering the 1933 taxes and the other the 1934 taxes) were taken to that court by the S. D. Warren Company, hereinafter called appellant, from the refusal of the tax assessors of Gorham in said county, hereinafter called appellees, to abate the taxes which had been assessed against that company by said Gorham. The appeals were entered at the May Term, 1935, and dismissed at the April Term, 1938. Up to the time of dismissal, no appearances had been entered for the appellees, and no orders of notice on the appeals have ever been issued.

Nothing further appears to have been done in court in connection with these appeals until the September Term, 1938, (the third term after they had been dismissed) when appearances for the appellees were entered on the docket for the first time. At that term, pursuant to the written memorandum of agreement of counsel then filed in the office of the clerk of courts, the following docket entry was made in each of the appeals: "By agreement entry of 'Dismissed' stricken off and case restored to docket." So matters stood until the March Term, 1941, when the court, on appellant's motions, contin-

ued the matters to the June Term following. At that term, new counsel appeared for the appellees, and moved that both appeals be dismissed, alleging, in substance and effect, among other things, that the entry of "Dismissed" was made at the April Term, 1938, under a rule of court for want of prosecution, and constituted final judgment; that the appeals "could neither be restored to the docket at a later term by agreement of counsel nor by the Court"; and, having been so dismissed, the power of the court to restore the appeals "to the docket had been exhausted and its jurisdiction thereover lost."

On these motions, hearing was had at the October Term of that year, whereupon the court ruled in each proceeding "that the entry of 'Sept. T. 1938, 8 D by agreement entry of "Dismissed" stricken off and case restored to Docket' did not restore the cause to the Docket and give jurisdiction to this Court thereof. For this reason the motion is granted and the appeal ordered dismissed." Apparently appellant's exceptions to these findings and rulings of the court were abandoned, for none are presented here, and the time for filing extended bills of exceptions has expired.

At the November Term, 1941, the appellant filed motions that these matters be brought forward and restored to the docket, for the reasons, briefly stated, that they had been "dismissed from the docket on the first day of the April Term 1938 under Rule #41 of the Rules of Court by mistake, the entry of 'Dismissed' being improvident and erroneous"; that such appeals do "not fall within the provisions of Rule #41 of the Rules of Court"; and because no notice of the tax appeal was ordered by the court or by any justice thereof in vacation as required by the provisions of R. S., Chap. 13, Sec. 77. After hearing, these motions were denied by the court, at the December Term, 1941, and the matters are brought here on the appellant's exceptions.

It is contended for the appellant that the entries of appearances for the appellees, after the appeals had been dismissed at the April Term, 1938, and the participation by their attor-

neys in the hearings on the motions for continuances at the March Term, 1941, cured all defects in process, summons, service and prior irregularities, and was a waiver of all preliminary steps to a hearing on the merits. That contention cannot be sustained. According to the unreversed decision of the nisi prius court at the October Term, 1941, which is still binding upon the parties, the entries at the September Term, 1938, did not restore the causes to the docket and give jurisdiction thereof to the court. And surely appearances and participation in proceedings over which the court then had no jurisdiction, are ineffective.

It is further contended that the court had power to restore these matters to the docket because it is claimed that the entries of dismissal made at the April Term, 1938, were improvident or made in error or by mistake. But these appeals were again dismissed at the October Term, 1941, as above stated, because, to repeat, "the entry of 'Sept. T. 1938, 8 D by agreement entry of "Dismissed" stricken off and case restored to Docket' did not restore the cause to the Docket and give jurisdiction to this Court thereof." Whether that decision was based upon the assumption that the entries of "Dismissed" made at the April Term, 1938, were made under the direction of the court, and so amounted to a final disposition of the matters; or upon a finding that the entries at the September Term, 1938, were made only by agreement of counsel without the sanction of the court, and therefore ineffective, does not appear, unless it is to be inferred from the words "by agreement," that the entries were made only by counsel, without any authority from the court to do so. Whatever may have been the reason, the fact remains that at the October Term, 1941, the appeals were dismissed, and it is too late now to attack the validity of those dismissals.

Even if the appellant could challenge the validity of the dismissals at the April Term, 1938, yet there is nothing in this record to indicate that the entries of "Dismissed" made at that term were improvident, or made in error or by mistake,

as claimed by it, unless inference to that effect can be drawn from the docket entries and papers on file. But they do not show that the dismissal entries made at that April Term were made in error or by mistake. On the contrary, the entries appear to have been made intentionally, and are attested by the clerk. The records of the dismissals made by him import verity (*Davis* v. *Cass et al.*, 127 Me., 167, 142 A., 377; *Karrick* v. *Wetmore, Admr. et al.*, 210 Mass., 578, 97 N. E., 92); and, nothing appearing to the contrary, it is presumed that the entries were made with the sanction of the presiding justice and by his authority (*Davis* v. *Cass et al.*, supra).

The appellant claims, however, that the record shows, as a matter of law, that the entries "Dismissed" made at the April Term, 1938, were improvident, erroneous, and made by mistake. Counsel on both sides have assumed that these appeals were dismissed at that term under Rule 41, and statements to that effect appear in motions filed in these matters. But it is not so stated on the docket. The entry in each appeal is "Dismissed." The reason for dismissal is not stated.

Assuming, however, that the appeals were dismissed under Rule 41, for want of prosecution, then the appellant contends that these appeals do not fall within that rule, and so they were improperly dismissed, because it is claimed that a tax-abatement appeal is not a "case" within the meaning of Rule 41 of the Rules of Court, (which is to be found in 131 Maine, page 512). We think otherwise.

So far as is pertinent here, that rule is as follows:

> "Cases, including libels for divorce, remaining on the docket for a period of two years or more with nothing done shall be dismissed for want of prosecution unless good cause be shown to the contrary."

It is pointed out for the appellant that the rule was amended in 1933, so as to include libels for divorce, from which it is apparently inferred that such libels are not "cases" and so the word "cases" is not used in the rule in a sense broad enough to

include such statutory proceedings as tax-abatement appeals. It is unnecessary to decide whether a libel for divorce is to be classed as a "case" or not, or to decide why those words were added. It may be said, however, that even before the amendment to the rule in 1933, this court said, in *Harmon* v. *Harmon*, 131 Me., 171, 159 A., 856, that "under our laws a libel for a divorce is regarded as a proceeding in a civil case." And, as early as 1847, it was said, in *Gold* v. *Vermont Central R. R. Co.*, 19 Vt., 478, that case in common parlance "has a more extended meaning than the word suit, or action, and may include application for divorce, applications for the establishment of high ways, applications for orders of support of relatives, and other special proceedings unknown to the common law . . ."

The primary meaning of the word case "according to lexicographers is cause. When applied to legal proceedings it imports a state of facts which furnish an occasion for the exercise of the jurisdiction of a court of justice." *Mather et al.* v. *Cunningham et al.*, 107 Me., 242, 78 A., 102; See also, *Cheney* v. *Richards*, 130 Me., 288, 155 A., 642; Vol. 1, Bouvier's Law Dictionary, Rawle's Revision, page 288; Black's Law Dictionary, second edition, page 173; *Smith et al.* v. *City of Waterbury et al.*, 54 Conn., 174, 7 A., 17; *Gold* v. *Vermont Central R. R. Co.*, supra; 10 C. J., page 1246; In re Sutter-Butte By-Pass Assessment No. 6, 190 Cal., 532, 213 P., 974; *Tutun* v. *United States*, 270 U. S., 568, 70 Law ed., 738, 46 S. Ct., 425; *Old Colony Trust Co. et al.* v. *Commissioner of Internal Revenue*, 279 U. S., 716, 73 Law ed., 918, 49 S. Ct., 499.

And so proceedings to validate an assessment by a drainage district (*In re Sutter-Butte By-Pass Assessment No.* 6, supra,) petitions for naturalization (*Tutun* v. *United States*, supra,) appeals for review of the decisions of the Board of Tax Appeals in internal revenue cases (*Old Colony Trust Co. et al.* v. *Commissioner of Internal Revenue*, supra,) and matters heard before railroad commissioners (*Smith et al.* v. *City of Waterbury et al.*, supra), are "cases."

There can be no question but that, in this state, a tax-abatement appeal to the superior court is a judicial proceeding established by law, and imports a state of facts which furnish an occasion for the exercise of the jurisdiction of a court of justice; otherwise the court could not grant relief, and such a proceeding would be futile. Nor can it be said that in such appeals there are no adverse parties. It appears here that a complaining tax payer is seeking an abatement of a tax, and is opposed by the authorized officials of the municipality claiming the tax. Certainly there are parties in these proceedings having adverse interests. That, itself, makes a "case" calling for the exercise of judicial power to properly dispose of the matter (see *Old Colony Trust Co. et al.* v. *Commissioner of Internal Revenue,* supra).

Nor does the fact that the statute provides for the trial of such appeals by the court without a jury "with the rights provided by law in other civil cases so heard" (R. S., Chap. 13, Sec. 77) and makes provision for filing exceptions "in the same manner and with the same effect as is allowed in the superior court in the trial of cases without a jury" (R. S., Chap. 13, Sec. 79), demonstrate that such appeals are not cases within the meaning of that rule of court. On the contrary, the very words "other civil cases" indicate that the legislature considered that a tax-abatement appeal was itself a "case." Had it not been so considered, the word "other" would not have been used, and the legislature would have merely conferred upon the parties the rights provided by law in civil cases so heard.

Evidently, in 1938, when it was unsuccessfully attempted to restore these appeals to the docket, after they had been dismissed, the appellant's counsel, themselves, considered that a tax-abatement appeal was a "case" for in the memorandum signed by them and the then counsel for appellees, and filed in the clerk's office, it was stated: "*Case* restored to docket." The italics ours.

And a tax-abatement appeal certainly falls within the spirit and purpose of Rule 41, which is to prevent protracted litiga-

tion without just cause. It is apparent that to permit litigation in tax proceedings to be extended for a long period of time, without just cause, would be against public interest, for municipalities depend upon the prompt payment of taxes for their maintenance, and would be hampered by long, unjustifiable delays in such matters.

So, on this point, we conclude that a tax-abatement appeal is a "case" within the meaning of Rule 41.

But the appellant contends that even if tax-abatement appeals do fall within that rule, yet these appeals were unlawfully dismissed at the April Term, 1938, because notice had not been ordered on them as required by statute, and so the court was not then in position to require the appellant to prosecute its appeals, and could not dismiss them for want of prosecution. The statute provides that notice on a tax-abatement appeal "shall be ordered by said court in term time or by any justice thereof in vacation." R. S., Chap. 13, Sec. 77. And where no notices have been ordered by a justice in vacation, as was the situation here, the statute undoubtedly requires the court to issue an order of notice on each appeal, upon request of the moving party. But the court is not charged with the duty of inspecting the docket and files each term to ascertain if any cases have been entered requiring notice, and issuing orders of notice, of its own motion, on all tax-abatement appeals found to have been entered. In any event, Rule of Court 41 has the force of law and is binding upon the court as well as the parties (*Cunningham* v. *Long*, 125 Me., 494, 135 A., 198; 14 Am. Jur., 561). The parties themselves, and their attorneys, have some duties to perform. They are charged with knowledge of the docket entries, and, in the absence of statute to the contrary, it is their duty to look after their pending cases, ascertain what has been done with them, and take such proper steps in connection therewith as may be required (see *Rosenbush* v. *Westchester Fire Insurance Company*, 227 Mass., 41, 116 N. E., 396; *McAllister* v. *Erickson*, 45 Idaho, 211, 261 P., 242).

If the docket entries had been examined, a notation of "no service" would have been discovered in each case, which would have been ample warning to the appellant that necessary steps remained to be taken in order to bring the appellees into court, although warning was not required. Yet the appeals were allowed to slumber for nearly three years, with nothing done, and if, as argued, they were finally dismissed under Rule 41, at the April Term, 1938, it was due to the lack of diligence on the part of the appellant, which cannot now be remedied. Moreover, the docket discloses that the appeals were dismissed on the first day of the April Term, 1938. So it must be presumed that the appellant had sufficient time during that term, while the court retained jurisdiction over its docket for that term, to have presented motions for the restoration of the appeals and the continuance thereof for any alleged cause it claimed to have had.

Whether or not there was sufficient cause to justify the continuances of these appeals at that time, was a question of fact for the then presiding justice (see *Hurley* v. *Farnsworth, Admx.*, 115 Me., 321, 98 A., 821).

Nothing appearing to the contrary, it is presumed that the "dismissed" appeals went to final judgment on judgment day of the April Term, 1938; and no error or mistake having been shown, the power of the court over these appeals was then exhausted. *Davis* v. *Cass et al.*, supra; *Karrick* v. *Wetmore, Admr. et al.*, supra; *Rosenbush* v. *Westchester Fire Insurance Company*, supra; *Cheney* v. *Boston & Maine Railroad*, 246 Mass., 502, 141 N. E.

The ruling of the court below, refusing to grant the appellant's motions to bring the appeals forward and restore them to the docket, was right.

The mandates are:

In case No. 1567 on the Superior Court Docket, and No. 259 on the Law Court Docket

Exceptions overruled.

In case No. 1568 on the Superior Court Docket, and No. 260 on the Law Court Docket

Exceptions overruled.

EINER J. PETERSEN'S CASE.

Cumberland. Opinion, March 10, 1942.

Workmen's Compensation Act.

An injury to an employee arises out of the employment, even though resulting from horse-play by a fellow employee, if such horse-play should have been foreseen by an employer, due to the fact that the employer knew of similar horse-play in the past. In such cases it becomes a natural incident of the work.

APPEAL BY THE EMPLOYER AND THE INSURANCE CARRIER.

The petitioner, while engaged in his regular work was attacked by a fellow employee in a spirit of horse-play. In the scuffle which followed the petitioner, who was an innocent victim, suffered a fracture of the skull. Skylarking and fooling were indulged in at the plant with full knowledge of the superintendent and foreman and the employee who caused the injury was a frequent offender.

Compensation was awarded the petitioner by the Industrial Accident Commission.

The employer and the insurance carrier appealed from the decree of the Commission.

Appeal dismissed. Decree affirmed.

The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman, and

Sidney W. Wernick, Portland, for the petitioner.

William B. Mahoney, Portland, for the appellants.

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

THAXTER, J. This Workmen's Compensation case is before this court on an appeal by the employer and the insurance carrier from a decree awarding compensation to the petitioner.

The facts found by the commissioner may be summarized as follows. The petitioner, while engaged in his regular work, was approached by a fellow employee named Poore, who, in a spirit of horse-play threw his arms about the petitioner who attempted to free himself. In the scuffle which ensued, both fell to the floor and the petitioner suffered a fracture of the skull. The commissioner specifically found that the petitioner was the innocent victim and that his only participation in the incident was to protect himself. This finding, counsel for the respondents concede, must be accepted by this court. The crucial part of the commissioner's finding is as follows:

> "While there is evidence that there was a sign posted at the plant expressly stating that there was to be no fooling, and testimony from employees that fooling was not allowed, and that employees were warned to that effect, nevertheless, our conclusion from the evidence taken in its entirety is that, in spite of the sign and the warnings, horseplay, skylarking, and fooling were indulged in at the plant with full knowledge of the superintendent and foreman, and that, upon occasion, both the superintendent and foreman had participated in it. The employee, Poore, was a frequent offender, and his proclivities for horseplay and fooling with his fellow employees were known, or should have been known, to the superintendent and foreman."

Counsel do not seriously argue that we must not also accept this finding. There was no evidence put in by the respondents and, in accordance with well established principles, we hold that there is sufficient legal evidence to sustain the finding.

Lynch v. *Jutras*, 136 Me., 18, 1 A., 2d, 221; *Kilpinen's Case*, 133 Me., 183, 175 A., 314.

The respondents argue that *Washburn's Case*, 123 Me., 402, 123 A., 180, 181, is decisive of this, and that under the principle of law there laid down the petitioner's claim must be dismissed.

Washburn's Case, as does this, involved an accident arising in the course of the employment. The injury was the result of horse-play or fooling by a fellow employee in which incident the petitioner was innocent of any blame. The opinion lays down the rule of law that under such circumstances the injury does not arise out of the employment. With that opinion, we heartily concur. But the case before us is different. The court there recognizes that the question before it is, to use the language of the opinion, whether "the chain of causation is unbroken and perfectly fitting," and holds that an injury resulting from the independent act of another employee disconnected from the performance of any duty of the employment does not "in legislative meaning arise out of the employment." That pronouncement is but a recognition of a principle well known in the common law, that one who may have been guilty of an original act of negligence is not liable for an injury related thereto if the independent act of a third person intervenes and is in fact the proximate cause of the damage suffered. It is to this analogous principle to which the opinion in *Washburn's Case* refers in discussing " the chain of causation." In the common law action, the causal connection considered is between the wrong and the injury, in the cases arising under the Workmen's Compensation Act it is between the employment and the injury. The principle involved, however, is essentially the same. But there is another common law principle equally well recognized which has its genesis in the very reason for the rule. It is that the first wrongdoer will not be excused if the intervening act should have been foreseen. *Lane* v. *Atlantic Works*, 111 Mass., 136; *O'Brien* v. *J. G. White &*

Co., 105 Me., 308, 74 A., 721; *Hawkins* v. *Maine & New Hampshire Theaters Co.*, 132 Me., 1, 164 A., 628; *Hatch* v. *Globe Laundry Co.*, 132 Me., 379, 171 A., 387. And in *Washburn's Case* the court said, page 406 of 123 Me., page 182 of 123 A., in discussing another case, *Trim Joint District School* v. *Kelley* (1914) A. C., 667, in which compensation was allowed for the death of a schoolmaster killed by two of his pupils: "Not infrequently, it may be added, becoming vigilance on the part of an employer, to whom the hazard is or ought to be known, averts disaster to his subordinate."

In the case before us, the commissioner has specifically found that horse-play and fooling were indulged in at the plant of this employer, that the employee, Poore, was a frequent offender, and that these facts were known or should have been known to the officials of the company. Citing numerous authorities, the commissioner ruled, and we think properly, that under such circumstances the injury arose out of the employment. Such holding in no respect violates the principle laid down in *Washburn's Case*.

This problem was discussed in a recent case. *Staubach* v. *Cities Service Oil Co.*, 126 N. J. L., 479, 19 A., 2d, 882, 883. The plaintiff brought suit under the Death Act, N. J. S. A. 2: 47-1, to recover for the death of her husband who was killed through the act of a fellow employee who in fun threw a liquid over him which caught fire from an acetylene torch. The gravamen of the action was, to quote the opinion, "that the company knew or should have known of the custom of the employees of throwing liquid at each other . . ." The trial judge dismissed the complaint and this ruling was affirmed on the ground that there was an exclusive remedy under the Workmen's Compensation Act. The court said, page 884 of 19 A., 2d,

> "It is true that an injury resulting from an assault occurring wilfully or sportively is not a compensable accident within the meaning of the workmen's compensation act. *Hulley* v. *Moosbrugger*, 88 N. J. L. 161, 95 A.

1007, L. R. A. 1916C, 1203; Honnold on Workmen's Compensation, Vol. 1 (1918) p. 440. It is also equally true that when an employer knows of the occurrence of such assaults in the past and fails to prevent their recurrence, so that a subsequent injury, resulting therefrom, may be said to have followed, in a given case, as a 'natural incident of the work' and to have been such that it would 'have been contemplated by a reasonable person,' then it may be said to have arisen not only in the 'course of' but also 'out of' the employment and to be compensable under the workmen's compensation act."

The doctrine of this case fully supports the ruling of the commissioner in the case now before us and is in accord with the decision of every case called to our attention where a similar question has been considered. *Mascika* v. *The Connecticut Tool and Engineering Co.*, 109 Conn., 473, 147 A., 11; *In Re Loper*, 64 Ind. App., 571, 116 N. E., 324; *Kokomo Steel and Wire Co.* v. *Irick*, 80 Ind. App., 610, 141 N. E., 796; *Stuart* v. *The City of Kansas City*, 102 Kan., 307, 171 P., 913; *White* v. *The Kansas City Stock Yards Co.*, 104 Kan., 90, 177 P., 522; *Glenn* v. *Reynolds Spring Co.*, 225 Mich., 693, 196 N. W., 617, 36 A. L. R., 1464; *State Ex Rel H. S. Johnson Sash & Door Co.* v. *District Court Hennepin County*, 140 Minn., 75, 167 N. W., 283, L. R. A., 1918 E., 502; *Socha* v. *Cudahy Packing Co.*, 105 Neb., 691, 181 N. W., 706, 13 A. L. R., 513; *Myott* v. *Vermont Plywood, Inc.*, 110 Vt., 131, 2 A., 2d, 204; *Clayton* v. *Hardwick Colliery Co.*, 85 L. J. K. B., 292, 9 B. W. C. C., 136.

Appeal dismissed. Decree affirmed. Reasonable counsel fee and costs to be allowed appellee to be fixed by the court below.

S. D. WARREN COMPANY, APPELLANT

vs.

INHABITANTS OF THE TOWN OF GORHAM ET AL., APPELLEES

Docket Below Number 5879.

S. D. WARREN COMPANY, APPELLANT

vs.

INHABITANTS OF THE TOWN OF GORHAM ET AL., APPELLEES

Docket Below Number 5880.

S. D. WARREN COMPANY, APPELLANT

vs.

INHABITANTS OF THE TOWN OF GORHAM ET AL., APPELLEES

Docket Below Number 5881.

Cumberland. Opinion, March 10, 1942.

Tax Abatement Appeals.

Although Section 77 of Chapter 13, R. S. 1930, provides that an appeal from the decision of tax assessors denying tax abatement "shall be entered at the term first occurring not less than thirty days after the assessors shall have given notice in writing of their decision" a premature entry will not be permitted to defeat jurisdiction of the appellate court but will be treated as though made on the proper day for entry, when all necessary steps have been taken to perfect the appeal.

The provision in Sec. 79 of said Chap. 13 that "Such appeal shall be tried at the term to which the notice is returnable, unless delay shall be granted at the request of such city or town for good cause," is directory only, not mandatory.

Jurisdiction of the appellate court is not defeated by reason of non-trial of the appeal at the return term.

The intent, rather than the letter of a statute, as the statute itself, read in the light of legislative purpose, expresses such intent, should prevail.

The true meaning of any clause or provision is that which best accords with the subject and general purpose of the statute.

A statute must be construed as a whole, and the construction ought to be such as may best answer the intention of the legislature.

EXCEPTIONS BY APPELLEES.

S. D. Warren Company appealed from decisions of the assessors of the Town of Gorham denying abatement of taxes assessed against the Company for the years 1935, 1936 and 1937. Notices of denials were given to appellant in December, 1938. Appeals therefrom were entered at the January term of the Superior Court. General appearance was seasonably filed by counsel for the Town, but nothing further was done until the March term 1941 when on appellant's motion the appeals were continued until the June term. In May, counsel for the Town moved to dismiss all three appeals, basing such motions on the grounds (1) that the appeals in two of the cases were prematurely entered (Sec. 77, Chap. 13, R. S. 1930); (2) that no one of the three appeals were tried at the return term (Sec. 79 of said Chapter). The motions were denied by the presiding Justice in the Superior Court, to which denial the appellees excepted. The case fully appears in the opinion.

Bradley, Linnell, Nulty & Brown, Portland, for appellant.

Redman, White, Willey & Winslow, Portland, for appellees.

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

HUDSON, J. These three appeals from decisions of town assessors denying tax abatements are based on Sections 76, 77, 79, and 80 of Chap. 13, R. S. 1930. They concern taxes assessed the appellant by the town of Gorham for the years 1935, 1936, and 1937. The denials were made and notices thereof to the appellant were given on December 5, 1938. Appeals therefrom were entered at the January term of the Superior Court, 1939. Service in each was ordered and complied with, following which, counsel for the town seasonably and without objection entered his general appearance in all three cases at the February term, 1939. Nothing further was done until the March term, 1941, when the appellant filed motions (which were

granted) for continuance of the appeals to the succeeding June term. On May 29, 1941, other counsel entered general appearances for the town and on June 23rd thereafter filed motions to dismiss all three actions on two grounds: first, that the appeals in two of the cases were prematurely entered to accord with said Sec. 77, and second, that no one of the three appeals was tried at the return term as claimed to be required by Sec. 79 of said statute. The Justice below denied the motions, to which rulings the exceptions now before us were taken, perfected, and presented.

ALLEGED PREMATURE ENTRY.

Sec. 77, supra, provides:

> "Such appeal shall be entered at the term first occurring not less than thirty days after the assessors shall have given to the appellant notice in writing of their decision upon his application for such abatement, and notice thereon shall be ordered by said court in term time or by any justice thereof in vacation, and said appeal shall be tried, heard, and determined by the court without a jury in the manner and with the rights provided by law in other civil cases so heard."

In the two cases of the asserted premature entries, the date of the statutory notice in writing to the appellant was December 5, 1938. The next term of the appellate court not less than thirty days after that date was its February term, 1939. The appeals, however, were entered at its preceding January term and there have remained ever since. Were the entries under these circumstances premature, with consequential defeat of jurisdiction of the appellate court?

The Maine statute authorizing such appeals was first enacted in 1895 (see Chap. 122, P. L. 1895). Apparently it was patterned after a Massachusetts statute enacted in 1890, see Acts & Resolves 1890, Chap. 127, Sec. 2, which provided:

> "Such appeal shall be entered in the office of the clerk

of said court at the return day first occurring not less than thirty days after the assessors have given to the appellant notice in writing of their decision upon his application for such abatement, and shall be tried, heard and determined by the court without a jury in the manner and with the rights provided by law in other civil cases so heard."

Following the enactment of the Massachusetts statute, the point of premature entry arose in the case of *National Bank of Commerce* v. *New Bedford*, 175 Mass., 257, 258, 56 N. E., 288, and therein Mr. Chief Justice Holmes said:

"But, so far as we can see, if this point is open to the respondent, the provision for entry at the return day first occurring not less than thirty days after notice is only for the convenience of the city or town concerned as party to the litigation, and does not go to the jurisdiction of the court in such a sense that the court is not at liberty to proceed with the case if an early entry is allowed to be made without objection. * * * We are aware of the strict rule that has been applied in some cases to an attempt to enter late when the party's rights are barred, but it does not seem to us that the same strictness should be extended to entries made too soon, when the right to enter is outstanding and a proper entry could be made if the party had notice that the letter of the law was insisted upon."

As to this pertinent point, this case was cited with approval in *Brodbine* v. *Inhabitants of Revere*, 182 Mass., 598, 66 N. E., 607, and in *Reardon* v. *Cummings, Admr.*, 197 Mass., 128, 129, 83 N. E., 361, 362 (an appeal from decision of commissioners in insolvency), where the Court said:

"That which has been done prematurely, which appears of record in perfect form for an entry on that day, except that it was done sooner than was required, should be treated as taking effect on that day,"

and in *Thayer Academy* v. *Assessors of Braintree,* 232 Mass., 402, 406, 122 N. E., 410, 411, another tax case, where the Court said:

> "Nor were the first and second petitions prematurely brought. It is true that each petition was entered before the next return day for the entry of actions in the superior court. But the record shows that on the regular return day at which the appeals could have been formally entered, all the necessary steps had been taken to perfect the appeals, and the entry should be treated as having been made on that day."

We have found no case in Maine holding that a premature entry of a tax appeal is destructive of jurisdiction. The case of *Webster* v. *County Commissioners,* 64 Me., 436, relied upon by the appellees, was one of a late rather than a premature entry, which we think is clearly distinguishable, as indicated by Mr. Chief Justice Holmes in *National Bank of Commerce* v. *New Bedford,* supra. Likewise, it was a late entry in *George H. Tuttle, Appellant* v. *County Commissioners,* 131 Me., 475, 164 A., 541, cited by the appellees.

We think that the January entries herein must "be treated as having been made" at the following February term and that consequently there was no violation of the statute so as to defeat jurisdiction of the appellate court.

NECESSITY OF TRIAL AT THE FEBRUARY TERM, 1939.

Sec. 79 of said Chap. 13 provides in material part:

> "Such appeal shall be tried at the term to which the notice is returnable, unless delay shall be granted at the request of such city or town for good cause; and said court shall, if requested by such city or town, advance the case upon the docket so that it may be tried and decided with as little delay as possible. * * * "

Question: Is that section mandatory or directory? Is it ab-

solutely essential that the trial take place at the return term else the appeal can never be heard thereafter? Is nothing left to the discretion of the presiding Justice? Did the legislature intend to deprive him of the control of his trial docket and forbid continuances of tax appeals for whatever reason, particularly where there might be, as here, a general appearance, at least an implied consent to a continuance, and in fact no insistence upon trial by either party? Strangely enough this point also arose in the New Bedford case, supra, and there the Court held that the trial need not be had at the return term. It is stated on page 259 of 175 Mass., on page 289 of 56 N. E.:

> "We do not care to say more of the respondent's position than that the provision for early trial is for the respondent's benefit, could be waived by it, and, even more plainly than that concerning entry, *does not go to the jurisdiction of the court.*" (Italics ours.)

At the time this case was decided, the trial section of the Massachusetts statute (Acts & Resolves 1890, Chap. 127, Sec. 4) was essentially like our Sec. 79, supra, and provided:

> "Such appeal shall be tried at the first trial term of said court for civil cases, unless delay shall be granted at the request of such city or town for good cause; and said court, and the supreme judicial court upon any appeal from any decision in any such case, shall, if requested by such city or town, advance the case upon the docket so that it may be tried and decided with as little delay as possible * * * "

But the appellees contend that the Massachusetts statute in other respects is unlike the Maine statute and so it would circumvent the decision in the New Bedford case, supra. Claimed distinctions are two: first, that under the Massachusetts statute payment of the tax was a condition precedent to the abatement, and second, that therein, if no abatement were granted, the city or town would be entitled to judgment for its

expenses and costs to be taxed by the court. While there may be these differences, we do not regard them as material to the decision, and it is to be noted that no mention of these provisions is made in any of the above cited Massachusetts cases.

While we have no Maine decision on the effect of non-trial at the return term with relation to the tax statute, yet we have one on a somewhat similar statute with regard to probate appeals in *Graffam* v. *Cobb,* 98 Me., 200, 56 A., 645, 646. There the statute read in part: " * * * and said petition shall be heard at the next term after the filing thereof," the petition referred to being one to allow an appeal where such was not taken because of accident, mistake, defect of notice, or otherwise, without fault on the part of the appellant. The Court said on page 204 of 98 Me., page 646 of 56 A.:

> "With respect to the purpose and effect of the statute requiring a hearing at the next term after entry, it is quite obvious that the legislature desired to impress upon the minds of the parties, as well as upon the court, the importance of an early settlement of all questions of which the probate court has jurisdiction. But it is familiar experience in the court that, without the fault of either party, circumstances often arise and events occur which render it impossible to have such a hearing at the first term without defeating the object for which this right of petition was given. The time of the hearing was not designed to be of the essence of the privilege granted so as to be a condition precedent to the enjoyment of the fruits of it. The statute was an instruction or direction given for the purpose of insuring a more prompt administration of the law. It must be construed to mean that the petition is cognizable and in order for hearing at the next term after filing, and that the parties are entitled to be heard at that term, unless in the exercise of a sound discretion, and in the furtherance of justice, the court for good and sufficient cause shall otherwise order. It would

be unjust to assume that the legislature was seeking to control the discretion of the court in the discharge of ordinary judicial functions. It did not intend to impose upon the court an imperative duty to order a hearing at the first term, even though it should appear that such a ruling would unmistakably work a manifest injustice. Nor is it necessary to impute to the legislature any such purpose. As an admonition to the parties and a direction to the court, the enactment affords full opportunity for the fulfillment of the legislative intention without invading the judicial province. It is more consonant with reason and justice, as well as constitutional law, to construe the statute in question as directory and not mandatory."

This language (mutatis mutandis) might well have been employed with reference to said Sec. 79. Its reasoning is as appropriate to the tax appeal as to the probate appeal section. The Graffam case has been cited with approval in *Gurdy, Appellant,* 103 Me., 356, on page 360, 69 A., 546.

No doubt the legislature deemed it desirable that appeals in tax abatement matters should be tried promptly and that there be no unreasonable delay in the litigation. But the question is whether it intended to deny the court the right to hear the tax appeal in all events unless at the return term.

"The real meaning of the statute is to be ascertained and declared even though it seems to conflict with the words of the statute." *Carrigan* v. *Stillwell,* 99 Me., 434, 437, 59 A., 683, 684, 68 L. R. A., 386; *Chase, Adm.* v. *Town of Litchfield,* 134 Me., 122, on page 128, 182 A., 921.

"The intent, rather than the letter of a statute, as the statute itself, read in the light of legislative purpose, expresses such intent, should prevail. * * * Spirit and purpose and policy are to be regarded. * * * The object the statute designs to accomplish serves oftentimes as a key to intricacies. The true meaning of any clause or provision is that which best accords with the subject and gen-

eral purpose of the statute." *Middleton's Case,* 136 Me., 108, on page 110, 3 A., 2d, 434, on page 435.

"In considering the action of the Legislature, the presumptions against unreason, inconsistency, inconvenience and injustices are not to be overlooked." *Brackett* v. *Chamberlain,* 115 Me., on page 340, 98 A., 933, on page 935.

"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." *Rackliff* v. *Greenbush,* 93 Me., 99, on page 104, 44 A., 375, 376; *Belfast* v. *Bath,* 137 Me., 91, on page 94, 15 A., 2d, 249.

When said Sec. 79 was enacted in 1895, we had a rule of court as to trials of cases which no doubt was well known to the lawyers in the legislature, namely, Rule of Court XXVIII (72 Me., 576), which provided:

"Any action shall be considered in order for trial at the return term, when the party desiring it shall have given written notice thereof to the adverse party ten days before the sitting of the court."

The practice then was to give the ten-day notice under this rule if a trial at the return term were to be had. The legislature may well have considered that in view of the rule it were better to enact said Sec. 79 and thus give the tax appeal the right of trial at the return term, without in any way intending to make the statute mandatory so as wholly to defeat later trial in case such were not then had.

Furthermore, when the right of appeal to the Court (then the Supreme Judicial Court) was granted by the legislature in 1895, it also enacted Sec. 5 of the same chapter, which gave

the appellate court the right "in its discretion" to appoint "a commissioner to hear the parties and to report to the court the facts, or the facts with the evidence," the report to be prima facie evidence of the facts thereby found. And now Sec. 80 of Chap. 13, R. S. 1930, immediately following said Sec. 79 under discussion, provides not only for the appointment of such a commissioner but for the reference of the tax appeal by the Court "to the board of state assessors, who shall hear the parties and report their findings to the court together with a transcript of the evidence," such report to be prima facie evidence of the facts thereby found.

Certainly it would be a far-fetched assumption that the legislature believed that the appointment of a commissioner or the reference to the board of state assessors would result always, if ever, in the filing of their report at the return term so as to permit the conclusion of the trial at that term,—that is, at the same term at which the commissioner was appointed or the reference ordered. Thus is indicated an intention not to make the trial at the return term imperative in all events.

For reasons stated, we construe said Sec. 79 as directory only and not mandatory.

Exceptions in all three cases overruled.

GILBERT V. PENNOCK AND EARLE T. PENNOCK

vs.

JERRY SMITH.

Aroostook. Opinion, March 11, 1942.

Exceptions as to Matters of Law where case submitted on agreed Statement of Facts.

Notwithstanding the rule that error does not lie against a judgment rendered upon agreed facts, the Supreme Judicial Court will consider an exception in such a case where the agreed statement contains a reservation of the right to except as to matters of law in the same manner as in cases decided at *nisi prius* under the provisions of R. S. Chap. 91, Sec. 26, where the right to except on questions of law is reserved.

Exceptions do not lie to the factual findings of a single justice unless such findings are made either without evidence to support them or contrary to the only proper inference to be drawn from the testimony.

Where the agreed facts support the allegations of plaintiffs' declaration and do not establish the allegations of pleadings in defense, the burden of proving which is on the defendant, decision for the plaintiffs cannot be disturbed.

EXCEPTIONS BY DEFENDANT.

Action by plaintiffs to recover from defendant a balance due on rental of a potato storage warehouse. The defendant by way of setoff sought to recover for a loss suffered by him by the freezing of potatoes stored in plaintiffs' warehouse. The money measure of the damage by freezing was agreed but the agreed facts did not disclose the nature of the alleged defect in the warehouse which the defendant claimed was the cause of the damage. Judgment was for the plaintiffs. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Frank E. Pendleton, Caribou, for plaintiffs.

David Solman, Caribou, for defendant.

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

PER CURIAM.

Plaintiffs bring this action to recover a balance of $500, and interest, on the rental of a potato storage warehouse occupied by the defendant for the seasonal year ending in the summer of 1941. Defendant occupied in the particular year under a verbal contract, but had been lessee under written annual leases during the three immediately preceding years. While properly subject matter for recoupment rather than for setoff, the defendant, with the consent of the plaintiffs, pleaded by way of setoff, inserted in a brief statement accompanying a plea of the general issue, that he had suffered damage during the particular year by the freezing of an unspecified quantity

of potatoes. It is apparent on the record that the parties joined in an effort to secure decision in this single case of both the plaintiffs' right to collect the rental balance and the defendant's right to recovery for the freezing of his stored product because of alleged defect *of some kind* in the warehouse.

The case was submitted to the justice presiding below on an agreed statement of facts which fixed the amount of the freezing damage at $325. Decision below was for the plaintiffs, without deduction of the damage claimed, and the defendant brings the case forward on an exception alleging that the legal effect of the agreed facts cannot sustain the ruling of law which denies his recoupment.

In *Warren* v. *Coombs,* 44 Me., 88, the principle was declared that error would not lie against a judgment rendered upon agreed facts. This was in accord with earlier cases decided in Massachusetts, *The Inhabitants of Alfred* v. *The Inhabitants of Saco,* 7 Mass., 380; *Carroll et al.* v. *Richardson,* 9 Mass., 329; *Wellington* v. *Stratton,* 11 Mass., 394, and was cited with approval in *Inhabitants of Richmond* v. *Toothaker et al.,* 69 Me., 451. Decision in *Warren* v. *Coombs,* supra, is entirely consistent with the earlier decision of this Court in *Proprietors of Roxbury* v. *Huston,* 39 Me., 312, which has ever since controlled our practice, that when cases are heard by a single justice without the aid of a jury, under the provisions of what is now R. S. (1930), Chap. 91, Sec. 26, his decision is final upon all questions of fact, and is not subject to exceptions upon rulings of law unless there has been an express reservation of the right to except. In the instant case, the parties incorporated a definite recital in their agreed statement of facts that the justice presiding at *nisi prius* should decide the case "with right of exceptions reserved as to matters of law." In sound reason, there can be no basis for denying to such a reservation equal effectiveness with a similar one noted on the docket when a case is submitted to decision by the justice presiding in accordance with the provisions of said statute. Foundation for the rule which underlies the decision in both the *Roxbury* and

the *Warren* cases noted lies in the fact that the parties voluntarily submitted their cases to the *final* adjudication of a selected tribunal. Such is not the case when the signed agreement of submission, or the docket entry showing such agreement, carries express stipulation that the right to except on questions of law is reserved.

Defendant's exception must fail, however, within the principle that exceptions do not lie to the factual findings of a single justice unless they are made either without evidence to support them or in opposition to the only proper inferences to be drawn from the testimony. *Ayer* v. *Harris*, 125 Me., 249, 132 A., 742; *Pratt* v. *Dunham*, 127 Me., 1, 140 A., 606. In the case under consideration, we have no occasion to consider either the weight or the inference of evidence. The facts, which are agreed, amply justify the finding made for the plaintiffs on the issue raised in their declaration. The defendant relies on his right to recoup a loss suffered because of a defect in the plaintiffs' warehouse. The burden of showing the existence of a defect, its kind, and that it not only might have been but was the cause of the damage suffered, rested upon him; and unless that burden could be met and carried, decision must be against him. The facts agreed upon do not meet such burden. Agreement is that the defendant would have testified, had the case been heard, that he had taken proper care of the warehouse and kept it properly heated at all times when heat was necessary; and that the plaintiffs had no knowledge either upon these points or as to the existence of any defect in the warehouse, or evidence to present in connection with any of such facts. This carries no admission even that a defect did in fact exist, and obviously could not present groundwork for decision that some alleged defect, whatever its undisclosed nature, was the cause of the damage suffered. Upon the agreed facts, the decision below was correct.

Exception overruled.

CITY OF WATERVILLE

vs.

KENNEBEC WATER DISTRICT, INHABITANTS OF THE TOWN OF FAIRFIELD AND FAIRFIELD VILLAGE CORPORATION.

Kennebec. Opinion, March 13, 1942.

Powers of a Public Utility Corporation Determined by its Charter. Method of Computing Depreciation.

The powers and duties of the Kennebec Water District in respect to its rate revenues and the determination of any distributable surpluses thereof are controlled by the applicable provisions of its Charter, original and amended.

The powers specifically enumerated and expressly granted to the District in its Charter and such incidental implied powers as are necessary to carry out its express powers and the object of its incorporation, all subject to the conditions and regulations imposed, are the measure of its authority.

In the Charter of the Kennebec Water District, the Legislature itself established the water rates to be charged and expressly limited the amount thereof to enough to provide for (1) the payment of the current running expenses for maintaining the water system and all necessary extensions and renewals, (2) the payment of interest on indebtedness and (3) each year a sum equal to not less than one nor more than three per cent of the entire indebtedness to be turned into a sinking fund to provide for the final extinguishment of the funded debt. Supplementing these limitations, provision is made for distributing any surplus of revenues which remain at the end of the year between the municipalities of the District.

The additional power granted to the District by Chap. 152, Sec. 3, Public and Special Laws, 1905, amending the Charter, and authorizing the issuance of bonds for, among other things, "making renewals, extensions, additions and improvements" was a power to be exercised as if contained in the original Charter. It was, however, permissive only as to renewals and extensions and in no way abrogated the right of the District to make such expenditures out of income as originally provided in the Charter. As to additions and improvements, the power given in the Amendment to issue bonds therefor is exclusive as there is no other provision for payment thereof.

While the Kennebec Water District and its Trustees are not expressly authorized in the Charter to make annual charges against current earnings from water rates for "depreciation," the deductions must be deemed to be included by implication in the powers granted.

The authority given in Paragraph I Section 11 of the Charter for the use of water rates "to pay the current running expenses for maintaining the water

system" was intended by the legislature to include any and all ordinary and proper expenditures in any year for not only the annual "upkeep" or "current maintenance" but also the "operation" of the system including any proper operating expenses.

It is not only proper for the officers of a public service corporation but it is their duty to make a yearly allowance of a certain sum or a per cent of the value of the fixed assets other than land for depreciation as an operating expense to be deducted from the gross income.

A water plant with all its additions begins to depreciate in value from the moment of its use and the company is entitled to earn a sufficient sum annually not only to provide for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their lives. The company is entitled to see that from its earnings the value of its property invested and used in the public service is kept unimpaired so that at the end of its useful life the original investment remains as it was in the beginning. It is not only the right of the company to make such a provision, but in the case of a public service corporation, its plain duty to the public.

When the legislature granted the Charter to the Kennebec Water District and provided that the current running expenses of maintaining, that is keeping up and operating the water system, should be paid from water revenues, it must be inferred that they intended that any and all proper items of operating expenses should be paid from that source. To include depreciation in operating expenses is but to extend the applicable charter provision to that which is but a species of its genus.

The amount of the annual allowance for depreciation is the subject of estimate and computation and theoretically it should be sufficient to replace the asset when it has ended its life of usefulness. In pratice this theory should be regarded in so far as the finances of the Utility permit.

There seems to be no hard and fast rule as to the method by which annual depreciation should be computed and several methods are used and approved. A rough estimate, an exact estimate based on frequent examinations of the plant and a determination of its "condition per cent," an arbitrary annual allowance, an annual sum determined by the "sinking fund" method, so called, which placed at compound interest at some selected rate, usually 4%, will amount to the original cost of the depreciated items at the end of their lives, or through the "straight line" method by dividing the costs of the items, less salvage, by the estimated years of their useful lives and charging the result currently as annual depreciation.

The important question in the case at bar is not by what method annual depreciation has been computed but whether the allowances which have been made were reasonable in amount having regard for the cost of current maintenance.

Inasmuch as depreciation is the loss not restored by current maintenance, in determining whether depreciation allowances are excessive, outlays for

maintenance must be considered. High maintenance costs tend to mean low depreciation requirements and vice versa.

While the Report on which this case comes forward indicates that outlays by the Utility for current maintenance including extensions and renewals have been substantial, it is not made to appear that they were excessive.

The fact that the fixed assets of the Utility have been kept and are today apparently in excellent condition indicates sound and prudent management but not that reasonable annual depreciation charges to meet the losses which have been restored by current maintenance should not have been made.

The Kennebec Water District is a public utility and subject in the matter of its accounting to the jurisdiction, control and regulation of the Public Utilities Commission of Maine. R. S. c. 62 § 15 et seq.

No sound basis is found in this Report for deeming excessive and reducing the annual depreciation charges which have been made by the Kennebec Water District since 1915 with the approval of the Public Utilities Commission and prior thereto, in the years here involved, of comparable amount.

Payment for "additions and improvements" through bonds is authorized in the amendment to the Charter found in P. & S. L. 1905 c. 152 § 3 but the cost of those items is not made a charge upon income in the form of rate revenues or otherwise. These are capital items and should be charged as such.

Additions to the plant to meet increased demands for water and the replacement of inadequate or worn out parts of the plant with something larger, more valuable or better suited to present needs or more economical to operate effecting new additions or alterations to the condition of the plant which are not mere acts of restoration involved in renewals or repairs come within the meaning of Additions and Improvements. In so far as the additions and substitutions are only renewals and repairs, the cost thereof is chargeable to earnings. Costs in excess thereof should be charged to capital.

Capital expenditures for Additions and Improvements to the plant cannot be deducted from rate revenues by the Kennebec Water District in determining its distributable annual surpluses.

The requirement in Paragraph III of Section 11 of the Charter that the Kennebec Water District shall establish rates for water service sufficient to provide each year a sum equal to not less than one nor more than three per cent of the entire indebtedness of the District to be turned into a sinking fund to provide for the final extinguishment of the funded debt is subject to the priority charges against rate revenue income of current running expenses, extensions and renewals and interest on indebtedness appearing in Paragraphs I and II of the Section and is conditional upon there being sufficient income remaining after the payment of the prior charges to meet the sinking fund requirement.

If in any year there is no available income for the purpose, and no sum can be set apart for the sinking fund, the deficiency is not a legal charge upon rate revenues of subsequent years.

Whenever there are rate revenues available, payments to the sinking fund should be made, at least to the amount of the minimum requirement of the Charter and rate revenue income available for that purpose cannot be lawfully diverted to other uses.

A Sinking Fund is a trust fund and bondholders are entitled to have its integrity maintained and to compel the restoration of moneys unlawfully diverted from it to other uses.

Water revenues actually in the possession of the Kennebec Water District and available after the payment of priority charges for transfer to its sinking fund must be considered impressed with a trust.

It was the equitable duty of the Trustees of the Kennebec Water District, if there were water revenues available for the purpose, to pay to or set aside for its sinking fund a sum equal to not less than one per cent of the entire indebtedness of the District or so much thereof as the available residue of rates would permit. For the purpose of arriving at the income surpluses of such years equity must regard as done that which ought to be done.

In determining an annual distributable surplus of income for any year actual current payments to the sinking fund charged to income must be given favorable consideration if they do not exceed the maximum amount authorized, and payments not made or charged equal to not less than one per cent of the indebtedness of the District or so much thereof as available rate revenue residues permit are to be treated as if made and charged.

By the provisions of Paragraphs I-IV of Section 11 of the Charter, the legislature must be deemed to have intended that rate revenues should be collected and disbursed on an annual basis and surpluses, if there are any, determined and distributed at the end of each year independent of those of all other years.

Annual water rate deficits, that is the amount by which the gross rate revenues in a given year fail to equal the deductions to be made before there is a surplus for distribution, cannot be cumulated by charging them to rate revenues of subsequent years in direct violation of the legislative mandate.

Computations based upon extracts from the books of the Kennebec Water District show, when due allowances are made for depreciation and sinking fund payments, that through the years 1912 to 1936, both inclusive, only in the year 1935 the Utility accumulated an annual surplus of rate revenues distributable among the municipalities composing the District under Paragraph IV Section 11 of the Charter.

This result is not at variance with the principle underlying the rate surplus provision of the Charter. There is not there authority for fixing rates calculated to provide a surplus, the provision being only intended to meet the impossibility of foretelling income with mathematical exactness.

It appearing that in 1935 the Kennebec Water District had a surplus of rate revenues in the amount of $2,970.28 after all priority charges against rates had been fully met and that the City of Waterville contributed 83.465 per cent and the Inhabitants of the Town of Fairfield, which has succeeded to the rights of the Fairfield Village Corporation, contributed 16.535 per cent to the gross earnings of the Kennebec Water District by way of water rates, these municipalities are entitled to share in the distributable surplus of that year upon that pro rata basis. It is the duty of the Kennebec Water District to pay $2,479.14 to the City of Waterville and $491.14 to the Inhabitants of the Town of Fairfield as their respective shares of that distributable surplus together with interest to each upon the amount of its share from the date of the entry of this Bill to the entry of Judgment.

The claims of these municipalities upon this distributable surplus are not barred by the statute of limitations or otherwise.

The accounts in this case being of great complexity and unduly difficult to determine and adjust in an action at law, jurisdiction in equity has been assumed.

ON REPORT.

Suit by the City of Waterville seeking an accounting by the Kennebec Water District and also to have the District declared a trustee for the City of any funds in its hands which remained in its hands from rate revenues over and above the cost of operations and other legitimate expenditures.

The Territory and the people constituting the City of Waterville and the Fairfield Village Corporation, by the provisions of Chapter 200, Private and Special Laws, 1899, were constituted a quasi municipal corporation under the name of Kennebec Water District for the purpose of supplying the inhabitants of the District and of the towns of Benton and Winslow and the municipalities with pure water for domestic and municipal purposes with authority to acquire the entire plant, property and franchises, rights and privileges of the Maine Water Company, an existing local public service corporation, and to exercise other enumerated rights of eminent domain. The management of the District was vested in a Board of Trustees who were authorized to issue bonds to pay for the property of the Maine Water Company and a new source of water supply, including the incidental expenses thereof but for no other purpose.

At the end of its first active fiscal year, April, 1905, the Kennebec Water District had completed its purchase of the property of the Maine Water Company, acquired a new source of water supply and made extensive additions and improvements which it carried on its books as betterments for all of which it was indebted on outstanding notes and open accounts. Under the authority granted to it in Chapter 152 of the Private and Special Laws of 1905 amending its Charter, the Kennebec Water District refunded its entire floating debt by a bond issue of $950,000 and, with assets of a book value of $968,060.10, its balance sheet showed a small book surplus. This, in general, was the financial structure of the District at the beginning of its public service.

During succeeding years its service was improved and extended and its assets increased. At the time of the institution of this suit the balance sheet showed a surplus of $159,522.29.

Its Charter provided that the board of trustees of the District should establish rates such as to provide sufficient revenue

> "I. To pay the current running expenses for maintaining the water system and provide for such extensions and renewals as may become necessary.
>
> II. To provide for payment of interest on the indebtedness of the district.
>
> III. To provide each year a sum equal to not less than one, nor more than three per cent of the entire indebtedness of the district, which sum shall be turned into a sinking fund to provide for the final extinguishment of the funded debt. The money set aside for the sinking fund shall be devoted to retirement of the district's obligations or invested in such securities as savings banks are allowed to hold."

The Charter further provided that,

> "If any surplus remain at the end of the year it shall be

divided between the municipalities composing the district in the same proportions as each contributed to the gross earnings of the district's water system, and in order that these proportions may be readily determined, all money received for water in each of said municipalities shall be entered in separate accounts so that the total amount thereof can be easily ascertained."

In this proceeding the City of Waterville sought an accounting and trusteeship of surplus funds. The Kennebec Water District submitted an account which, as made up, showed no substantial surplus existing at any time. The Inhabitants of the Town of Fairfield and the Fairfield Village Corporation, joined as defendants, failed to appear and decrees pro confesso were entered against them.

The City of Waterville introduced evidence to show an accrual of surpluses during the years 1912-1936 amounting to a total of $289,843.09.

The disparity in the accountings of the parties, in the main, grew out of conflicting contentions as to whether the Kennebec Water District in determining its distributable surpluses had authority to (1) deduct annual depreciation charges from its current revenues from water rates and if so in what amounts; (2) deduct from this income capital expenditures for Improvements and Additions to the plant; (3) deduct maximum authorized annual sinking fund appropriations regardless of actual amounts set aside and credited, and cumulate the same; and (4) cumulate any and all allowable deductions not taken, against subsequent surpluses.

The case was remanded for Decree in accordance with the opinion. The case fully appears in the opinion.

Pattangall, Goodspeed & Williamson, Augusta,

James L. Boyle, Waterville,

Edmund M. Sweeney, Waterville, for the plaintiff.

Skelton & Mahon, Lewiston, for defendants.

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

BARNES, C. J., sat at the argument but did not participate in the opinion.

STURGIS, J. The Territory and the people constituting the City of Waterville and the Fairfield Village Corporation, both in the State of Maine, by the provisions of Chapter 200 Private and Special Laws 1899 were constituted a quasi municipal corporation under the name of the Kennebec Water District for the purpose of supplying the inhabitants of the District and of the towns of Benton and Winslow and the municipalities with pure water for domestic and municipal purposes, with authority to acquire the entire plant, property and franchises, rights and privileges of the Maine Water Company, an existing local public service corporation, to take and hold the water of designated rivers and streams and their tributary lakes and any land and real estate necessary for purposes there enumerated and to lay and take up, repair and replace all necessary pipes, aqueducts and fixtures in and through the streets and highways of the District and of the towns of Benton and Winslow. The management of the District was vested in a Board of Trustees who were authorized to issue bonds to pay for the property of the Maine Water Company and a new source of water supply including the incidental expenses thereof, but for no other purpose.

After delays, the reasons for which are not here of concern, as of April 30, 1905, the end of its first active fiscal year, the Kennebec Water District had completed its purchase of the property of the Maine Water Company, acquired a new source of water supply and made extensive additions and improvements which it carried on its books as betterments, for all of which it was indebted on outstanding notes and open accounts. It had not at this time issued any bonds.

In Chapter 152 of the Private and Special Laws of 1905, the power of the Kennebec Water District to issue bonds under its Charter was broadened and it was granted the right to refund

its indebtedness and make temporary loans. The Amendment in part reads:

"Section 3. * * *

Section 10. The trustees of the district may for the purpose of paying any necessary expenses and liabilities incurred under the provisions of this act including the expenses incurred in acquiring the property of the Maine Water Company by purchase or otherwise, in securing sources of supply, taking water and land, paying damages, laying pipes, constructing, maintaining and operating a water plant, and making renewals, extensions, additions and improvements to the same, issue from time to time bonds of the district to an amount necessary in the judgment of the trustees therefor. * * *

Section 4. Said district is hereby authorized to refund its indebtedness from time to time in whole or in part as may seem best to the trustees and to borrow money temporarily for any of the legitimate purposes of the district."

Acting under this amendment, during the fiscal year ending April 30, 1906, the floating debt of the District was refunded by a bond issue of $950,000 and with assets of a book value of $968,060.10, its balance sheet showed a small book surplus. This, in general, was the financial structure of the Kennebec Water District at the beginning of its public service.

It is not necessary to follow and review in detail the subsequent growth and progress of the District. It has been developed into a water system of large proportions completely modern and in first class condition. Its service has been improved and extended and is of a high order. As of December 31, 1936, the end of its then current fiscal year, its balance sheet showed that its total assets had increased to $1,763,281.41. Its bonded indebtedness had been reduced to $850,000.00. Among its liabilities are listed Long Term Debt Retired Through Surplus $336,000, Sinking Fund Reserves

$176,988.24. Other Permanent Reserves $10,000 and Reserve for Depreciation $189,861.24. A Surplus (Profit and Loss) of $189,522.39 is reported. This was the financial status of the District according to its current balance sheet when this proceeding was instituted.

The income of the Kennebec Water District, in the main, comes from water rates paid by private and public consumers. These rates by the terms of its Charter were to be established and disbursed by the Board of Trustees in accordance with the following formula:

> "Section 11. All individuals, firms and corporations, whether private, public or municipal, shall pay to the treasurer of said district the rates established by said board of trustees for all water used by them, and said rates shall be uniform in their application within the district. Said rates shall be so established as to provide revenue for the following purposes:
>
> I. To pay the current running expenses for maintaining the water system and provide for such extensions and renewals as may become necessary.
>
> II. To provide for payment of interest on the indebtedness of the district.
>
> III. To provide each year a sum equal to not less than one, nor more than three per cent of the entire indebtedness of the district, which sum shall be turned into a sinking fund to provide for the final extinguishment of the funded debt. The money set aside for the sinking fund shall be devoted to retirement of the district's obligations or invested in such securities as savings banks are allowed to hold.
>
> IV. If any surplus remain at the end of the year it shall be divided between the municipalities composing the district in the same proportions as each contributed to the gross earnings of the district's water system, and in order that these proportions may be readily determined, all

> money received for water in each of said municipalities shall be entered in separate accounts so that the total amount thereof can be easily ascertained."

No question as to the fairness of the rates established under this provision is raised here. Complaint is that Clause IV of Section 11 has never been complied with and surpluses remaining at the end of many years have never been divided.

In this proceeding in Equity the City of Waterville seeks an accounting by the Kennebec Water District and prays that it be declared a trustee, for the complainant and all others entitled thereto, of the funds representing the surplus of its rate revenues remaining at the end of each year of its operations and of all moneys diverted without authority from its surpluses. The Kennebec Water District in its Answer, denying generally the allegations of the Bill, pleads the statute of limitations and submits an account of its annual receipts and disbursements, which, as made up, shows no substantial annual surpluses ever existed or accumulated. To this Replication was filed. The Inhabitants of the Town of Fairfield and the Fairfield Village Corporation, joined as defendants, having failed to appear, decrees pro confesso have been entered against them.

The City of Waterville introduces the yearly balance sheets of the Kennebec Water District, supplemented by accountants' schedules and computations based on an examination of the corporate books and records, which purport to exhibit, in accordance with accepted accounting rules and practices, the accrual of annual surpluses of rate revenues during the years 1912-1936 inclusive, amounting in the aggregate to $289,-843.09 which are distributable among the municipalities composing the district under Paragraph IV Section 11 of the Act of Incorporation. Arrayed against this audit are computations compiled by the Kennebec Water District, which based on different accounting methods, if found tenable, refute the contentions of the City of Waterville and the conclusions of its

accountants, that any substantial annual rate revenue surpluses ever came into existence, accumulated or are distributable.

The disparity in the accountings of the parties, in the main, grows out of conflicting contentions as to whether the Kennebec Water District in determining its distributable surpluses has had authority to (1) deduct annual depreciation charges from its current revenues from water rates and if so in what amount; (2) deduct from this income capital expenditures for Improvements and Additions to the plant; (3) deduct maximum authorized annual sinking fund appropriations regardless of actual amounts set aside and credited, and cumulate the same; (4) cumulate any and all allowable deductions not taken, against subsequent surpluses. These and incidental questions of lesser magnitude are all controlled by the applicable provisions of the Charter, original and amended. The powers there specifically enumerated and expressly granted to the Water District and such incidental implied powers as are necessary to carry out its express powers and the object of its incorporation, all subject to conditions and regulations imposed by the Charter, are the measure of its authority. *Gardiner Trust Co.* v. *Augusta Trust Co.*, 134 Me., 191, 182 A., 685; *Hyams* v. *Old Dominion Co.*, 113 Me., 294, 93 A., 747; *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Me., 43; *Brown* v. *Little*, 269 Mass., 102; *Davis* v. *Old Colony R. Co.*, 131 Mass., 258; 2 *Pond, Public Utilities Fourth Ed.*, 898; 13 *Am. Jur.* 770.

In the Charter, the Legislature, as already seen, itself established the water rates to be charged by this Utility and expressly limited the amount thereof to enough to provide for (1) the payment of the current running expenses for maintaining the water system and of necessary extensions and renewals, (2) the payment of interest on indebtedness and (3) each year a sum equal to not less than one nor more than three per cent of the entire indebtedness to be turned into a sinking fund to provide for the final extinguishment of the funded debt. Supplementing these limitations provision is made for divid-

ing any surplus of revenues between the municipalities of the district. This charter regulation of rates and express limitations upon their uses is the prototype and in harmony with the policy of the Legislature of this State in granting charters for municipal water districts. In five sessions, 1905-13, eighteen charters were granted and in all, excluding the provision for payments for extensions and renewals out of income, the limitations upon the purposes for which rates could be charged were similar and uniformity in this respect has since continued. *Knowlton* v. *Farmington Village Corporation,* P. U. R. 1918 E 884.

The provision here that extensions and renewals may be paid for out of income is practically sui generis. The same provision appears in the Charter of the Augusta Water District, Private and Special Laws 1903 Chapter 334. But in later water district charters it is eliminated. See Charter of Portland Water District, Private and Special Laws 1907 Chapter 433. In the later charters the propriety of treating such expenditures as proper charges to rate revenues seems to have been questioned and financing them as capital charges through bond issues is approved and generally made mandatory.This change of Legislative policy was incorporated into the Charter of this Water District at the very beginning of its active operations by the Amendment appearing in the Private and Special Laws 1905 Chapter 152 Section 3 which, as already recited, permitted the issuance of bonds for "making renewals, extensions, additions and improvements," a power thereafter to be exercised as if contained in the original Act. *State* v. *Leo,* 128 Me., 441, 148 A., 563; *Commonwealth* v. *Howes,* 270 Mass., 69; *United States* v. *LaFranca,* 282 U. S., 568, 51 S. Ct., 278; *Endlich Int. Stat.,* ‡294. A power permissive, however, as to "renewals and extensions" and in no way abrogating the right of the corporation to make such expenditures out of income, but mandatory as to "additions and improvements" for which no other provision for payment is made.

DEPRECIATION.

What, then, is the power of the Utility and its Trustee, in respect to making annual charges against its current earnings from water rates for "Depreciation"? While the deduction is not in terms authorized by the Charter, it must be deemed to be included by implication in the powers granted. The first purpose for which revenues from water rates can be used as there stated in Paragraph I Section 11 is of this tenor:

> "to pay the current running expenses for maintaining the water system and provide for such extensions and renewals as may become necessary."

The expression "current running expenses," we think, is intended to include any and all ordinary and proper expenditures in any year. "Maintaining" is a word of broad signification and when applied to the subject matter to which it here relates, and with no other provision therefor appearing, must be held to include not only the annual "upkeep" or "current maintenance" but also the "operation" of the system. *Roberts* v. *City of Los Angeles,* 7 Cal. (2), 477, 488, 61 P (2), 323; *Peo.* v. *Clark,* 296 Ill., 46, 53; *Peo.* v. *A. T. & S. F. Ry. Co.,* 300 Ill., 415, 417, 133 N. E., 250; *Boston Petitioners,* 221 Mass., 468, 475; *Saltonstal* v. *Railroad,* 237 Mass., 391, 397; *Insurance Co.* v. *Wayne,* 75 Ohio St., 451, 472; 26 *Words and Phrases, Perm. Ed.,* 80. We have no doubt that by this provision the Legislature intended to make current maintenance and any other proper operating expenses primary charges upon rate revenues with special authority for including the cost of necessary "extensions and renewals" in the charge.

It is well settled that it is not only proper for the officers of a public service corporation but it is their duty to make a yearly allowance of a certain sum or a per cent of the value of the fixed assets, other than land, for depreciation as an operating expense to be deducted from the gross income. An instructive discussion of this accounting principle appears in 19 *Fletcher Encyclopedia Corporation Perm. Ed.* Sec. 9259, where we read:

"Theoretically, the values of the fixed assets of a corporation are constantly depreciating, through age, use and obsolescence and there will be a time when they must all be replaced and only the real estate will have a substantial value. There is a school of thought that contends that, in a large group of properties, where repairs and replacements are constantly being made, the value of the property is constantly being kept up to at least the original book figures of value and that, when you also take into consideration the element of appreciation in the value of certain of the items, there is no necessity for any annual charge for depreciation. * * * It is the general consensus of accounting opinion, however, that an annual charge should be made on the books of every corporation to cover the depreciation of fixed assets, and every soundly managed corporation will be found to pursue that practice. As to the amount to be charged for depreciation, accountants will differ. Theoretically, the annual charge should be such an amount as will be sufficient to replace the asset when it has passed its life of usefulness. * * *

The depreciation charge is generally shown on the assets side of the ledger under the fixed assets account, the undepreciated value of the assets being shown, then the deduction for depreciation and the remainder, after the deduction for depreciation, being set forth as the asset value of the property. * * * Some accountants, however, follow the method of showing the depreciation account on the liabilities side of the balance sheet as a depreciation reserve. In such case the fixed assets will appear on the assets side of the sheet at their undepreciated value and the depreciation items will appear on the liabilities side under the heading 'Reserve for Depreciation'."

In *Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1, 29 S. Ct., 148, that Court said:

"A water plant, with all its additions, begins to de-

preciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued the only method of providing for the replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization,—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both."

In *Lindheimer et als.* v. *Illinois Tel. Co.*, 292 U .S., 151, 54 S. Ct., 658, Chief Justice Hughes, in delivering the opinion, said:

"Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order

to maintain the integrity of the investment in the service rendered. The amount necessary to be provided annually for this purpose is the subject of estimate and computation. * * * In the process of current maintenance 'new parts' are 'installed to replace old parts' in units of property not retired. Such 'substitutions or repairs' are separate from the amounts which figure in the depreciation reserve. The distinction between expenses for current maintenance and depreciation is theoretically clear. Depreciation is defined as the expense occasioned by the using up of the physical property employed as fixed capital; current maintenance, as the expense occasioned in keeping the physical property in the condition required for continued use during its service life. But it is evident that the distinction is a difficult one to observe in practice with scientific precision, and the outlays for maintenance charged to current expenses may involve many substitutions of new for old parts which tend to keep down the accrued depreciation."

We have not overlooked the argument that while it is conceded that an annual allowance for depreciation may be made and charged to operating expense by a public service corporation under present-day accounting rules, that principle had not been judicially recognized when the Charter of the Kennebec Water District went into effect. It is common knowledge, however, and verified in the record, that long prior to 1899 when the Charter was enacted the practice had been generally approved and adopted by accountants. In *San Diego Land & Town Co.* v. *National City,* 174 U. S., 739, 19 S. Ct., 804, the question had then already been raised and in an opinion handed down on May 22, 1899, the propriety of an annual depreciation charge by a water company serving the public was judicially recognized. This case and the conclusion there reached upon this question is quoted with approval in *Kennebec Water District* v. *Waterville,* 97 Me., 185, 54 A., 6, which

bears date of December 27, 1902. If we assume, which we cannot, that the Legislature, when it granted this Charter, did not know of this practice, it must be inferred that when it provided that the current running expenses of maintaining, that is keeping up and operating the water system, should be paid from water revenues, they intended, that any and all proper items of operating expense should be paid from that source. To include depreciation in operating expenses is but to extend the applicable charter provision to that which is but a species of its genus. *Hurley* v. *Thomaston,* 105 Me., 301; *Endlich Int. of Statutes* Sec. 112; 59 *Corpus Juris,* 973.

The amount of the annual allowance for depreciation is the "subject of estimate and computation." Theoretically the annual charge should be "sufficient to replace the asset when it has passed its life of usefulness." In practice this theory should be regarded in so far as the finances of the utility permit. There seems to be no hard and fast rule, however, as to the method by which annual depreciation should be computed. Several methods are used. A rough estimate, an exact estimate based on frequent examinations of the plant and a determination of its "condition per cent," an arbitrary annual allowance, an annual sum determined by the "sinking-fund" method, so called, which placed at compound interest at some selected rate, usually 4%, will amount to the original cost of the depreciated items at the end of their lives, or through the "straight-line" method by dividing the costs of the items, less salvage, by the estimated years of their useful lives and charging the result currently as annual depreciation. By any of these methods in modern practice the depreciation charges are usually credited to a "Reserve for Depreciation" to appear on the liabilities side of the balance sheet. It is common knowledge that this form of accounting is currently required by the Interstate Commerce Commission, the United States Treasury Department and by the Public Utilities Commission of this State. Accounting for annual depreciation through the fixed assets account and a Surplus is not generally approved.

But the important question here is not by what method annual depreciation has been computed by the Kennebec Water District but whether the allowances which have been made were reasonable in amount, having regard for the cost of current maintenance. "Depreciation is the loss, not restored by current maintenance * * *. * * * and the outlays for maintenance charged to current expenses may involve many substitutions of new for old parts which tend to keep down the accrued depreciation." *Lindheimer et als.* v. *Illinois Tel. Co.*, supra, "Since depreciation is the loss, not restored by current maintenance it is axiomatic that high maintenance cost means low depreciation and vice versa." *Gas Co.* v. *Texarkana,* 17 Fed. Supp., 447, 462. As to outlays for current maintenance including Extensions and Renewals, the Report indicates that they have been substantial but, in so far as is made to appear, not excessive. The fixed assets have been kept and are today apparently in excellent condition. This indicates sound and prudent management. It does not indicate that reasonable annual depreciation charges to meet the loss resulting from "wear and tear, decay, inadequacy and obsolescence" which has not been restored by current maintenance should not be made. The Kennebec Water District is a public utility and subject in the matter of its accounting to the jurisdiction, control and regulation of the Public Utilities Commission. R. S. c. 62 ¶15 et seq; *Eaton* v. *Thayer,* 124 Me., 311. Since 1915, with the approval of the Commission, the District has annually charged $15,000 to operating expense for depreciation and credited the same to a Reserve for Depreciation. Before that time, in years with which we must be concerned, comparable annual depreciation charges were made and accounted for through Surplus. The difference in accounting methods is not important. The approval of annual depreciation charges by the Public Utilities Commission cannot be disregarded and prior charges can properly be examined as to their reasonableness in the light which that approval reflects. Notwithstanding assertions to the contrary, we find no sound basis in this Report for reducing the

annual depreciation charges which have been made by the Kennebec Water District.

ADDITIONS AND IMPROVEMENTS.

In the original Charter of the Kennebec Water District there was no express provision for payment of the cost of necessary "additions and improvements." In the amendment, P. & S. L. 1905 c. 152 §3 payment therefor through bonds was authorized but the cost of those items has never been made a charge upon income. They are capital items and should be charged as such. Additions to the plant to meet increased demands for water and the replacement of inadequate or worn out parts of the plant with something larger, more valuable or better suited to present needs or more economical to operate effecting new additions or alterations to the condition of the plant which are not mere acts of restoration involved in renewals or repairs come within the meaning of ADDITIONS AND IMPROVEMENTS. In so far as the additions and substitutions are only renewals and repairs, the cost thereof is chargeable to earnings. Costs in excess thereof should be charged to capital. This is the uncontradicted result of the definitions and explanations of the terms by the eminent engineer and accountants who were heard in this case. We find no support for the contention advanced that capital expenditures for Additions and Improvements to the plant should be deducted from rate revenues by the Kennebec Water District in determining its distributable annual surpluses.

SINKING FUND.

In Paragraph III of Section 11 of its Charter, the Kennebec Water District is required through its Board of Trustees to establish rates for water service sufficient to provide each year a sum equal to not less than one nor more than three percent of the entire indebtedness of the District to be turned into a sinking fund to provide for the final extinguishment of the funded debt. This obligation is, of course, subject to the

priority charges against rates for current running expenses, extensions and renewals, and interest on indebtedness appearing in Paragraphs I and II of the Section and is conditional upon there being sufficient rate revenue remaining after the payment of the prior charges to meet the sinking fund requirement. If in any year there is no available income from rates for the purpose, no sum can be set apart for the sinking fund and although its impairment by such a default may be repaired by increased payments in succeeding years not exceeding the maximum allowed by the Charter and out of available rate revenues of the years then current, no deficiency in the sinking fund payment of a year can be made a direct charge upon rate revenues of any other year. *Opinions of Justices,* 5 Metc. (Mass.), 596, 600; 19 *Corpus Juris Secundum,* 784. However, when there are rate revenues available, payments to the sinking fund should be made, at least to the amount of the minimum requirement of the Charter and income available for that purpose cannot be lawfully diverted to other uses. A Sinking Fund is a trust fund and bondholders are entitled to have its integrity maintained and to compel the restoration of moneys unlawfully diverted from it to other uses. *Equitable Trust Co.* v. *Green Star S. S. Corporation,* 291 F., 650; *Brown* v. *Penna. Canal Co.,* 244 F., 980; *Truby* v. *M. & T. Trust Co.,* 253 N. Y. S., 108. We do not think it an undue strain upon equity to here consider water revenues actually in the possession of the Kennebec Water District and available after the payment of priority charges for transfer to its sinking fund as within the sinking fund trust. On this view, each year it was the equitable duty of the Trustees of the Water District, if there were water revenues available for the purpose, to pay to or set aside for its sinking fund a sum equal to not less than one per cent of the entire indebtedness of the District or so much thereof as the available residue of rates would permit. In determining the annual distributable surplus of income for any year we must "regard as done that which ought to be done" and actual authorized current payments to the sinking

fund must be given favorable consideration, and payments not made or charged, equal to not less than one per cent of the indebtedness of the District or so much thereof as available rate revenue residues permit, must be treated as if made and charged. In this accounting the Water District is entitled to credit for what it did pay and what, by the mandate of its Charter, it ought to have paid.

Cumulation of Deficits.

Counsel for the Kennebec Water District asserts the right of the Utility to cumulate its annual water rate deficits, if there be such, and offset them against any surpluses of rate revenues in subsequent years. As explained on the brief, the term "deficit" as here used does not refer to "operating at a loss" but to the amount by which the gross rate revenues in a given year fail to equal the deductions to be made before there is a surplus for distribution. This claim of right to cumulate deficits cannot be sustained. A reading of Pars. I-IV of Sec. 11 of the Charter convinces this Court that the Legislature intended that rate revenues should be collected and disbursed on an annual basis and surpluses, if there are any, determined and distributed at the end of each year independent of those of all other years. To cumulate rate deficits, or really surplus deficits, and charge them to rate revenues of later years would directly violate the legislative mandate as we interpret it.

Miscellaneous.

In view of the conclusions which have been reached upon the major issues actually involved in this case it is unnecessary to discuss or pass upon the propriety and legality of various income and capital expenditures which are sharply criticized but do not materially affect the right of the City of Waterville or other municipal members of the District to share in surpluses of rate revenues in the periods when the expenditures were made. No more is it necessary to determine whether there

should be added to allowable deductions for Extensions and Renewals certain items classified as Additions and Improvements by some of the accountants. They, too, seem to be immaterial here. Upon the pleadings the only question that need be decided is whether there has been any surplus of rate revenues in any year, and the aggregate thereof, which the Kennebec Water District ought to distribute to those entitled thereto under the provisions of the Charter, with appropriate accompanying provisions as to payment.

Tabulations have been prepared which portray the results of the application of the conclusions which have been reached in this case. As it is conceded that until 1912 no annual distributable surplus of income existed, we begin with that year. Figures used as a basis of computation are taken from extracts from the books of the Water District prepared by its officers and by accountants which on this record must be accepted as correct. The computations include only income from rate revenues and do not include incomes upon sinking fund investments which belong to that fund and to its beneficiaries, or other income items which have no proper place in the determination of distributable annual surpluses under Paragraph IV Section 11 Chapter 200 P. & S. L. 1899. Inasmuch as under Paragraph IV Section 11 it is only when "any surplus remain at the end of the year it shall be divided" accounting periods of less than a year are not and cannot be, on the data at hand, considered separately but are made a part of the account for the following year. The computations in the form of tabulations are as follows:

COMPUTATIONS OF SURPLUS OR DEFICIT OF ANNUAL INCOMES FROM RATE REVENUES.

	1912	1913	1914	1915
Book Net Profit	25,302.97	18,606.94	24,280.94	24,584.33
Depreciation	15,458.91	10,383.84	16,000.00	15,617.50
	9,844.06	8,223.10	8,280.94	8,966.83

Extensions and Renewals	880.77	2,405.58	15,921.43	3,035.86
	8,963.29	5,817.52	*7,640.49	5,930.97
Sinking Fund Reserve	9,500.00	9,500.00	9,500.00	9,500.00
*Red	*536.71	*3,682.48	*17,140.49	*3,569.03
	1916	1917	1918	1919
Book Net Profit	31,808.79	30,324.85	40,198.17	24,290.63
Depreciation	***17,500.00	15,000.00	22,500.00	15,000.00
	14,308.79	15,324.85	17,698.07	9,290.63
Extensions and Renewals	3,774.54	12,634.73	4,048.74	4,457.35
	10,534.25	2,690.12	13,649.33	4,833.28
Sinking Fund Reserve	**11,083.33	9,500.00	14,250.00	9,500.00
	*549.08	*6,809.88	*600.67	*4,666.72

***Allocation of $2500 **Allocation of $1583.33 *Red

In 1915 the fiscal year was changed to begin and end on June 30th whereas prior thereto April 30th had been the date and, as a result, two additional months must be accounted for and equitably pro rata allowances for depreciation and payments to Sinking Fund, although not actually made, allocated to this interim period. Due regard for the right of the Utility and the Public to preserve the integrity of the property devoted to the public service and the Bondholders, the integrity of the sinking fund, equitably demands this allocation as against an apparent surplus existing only by reason of the hiatus in accounting periods and in no event distributable until the end of the year. If the moneys represented by these allocations have been diverted by the Utility, restoration to the proper accounts should be made and adjustments made accordingly. To allow the moneys to be divided as a distribut-

able surplus of rate revenues has no warrant in law or equity. For convenience the period between April 30 and June 30, 1915, is included in the account for the year 1916 and made a part thereof. A similar situation arose in 1917-1918 when the fiscal year was changed and made to correspond with the calendar year. This time six months intervened between fiscal years and that period is included in the 1918 computation.

	1920	1921	1922	1923
Book Net Profit	4,466.63	332.46	32,599.06	44,887.44
Depreciation	15,000.00	15,000.00	15,000.00	15,000.00
	*10,533.37	*14,667.54	17,599.06	29,887.44
Extensions and Renewals	9,854.06	20,658.52	8,104.26	23,940.75
	*20,387.43	*35,326.06	9,494.80	5,946.69
Sinking Fund Reserve	0,000.00	0,000.00	9,720.00	10,380.00
*Red	*20,387.43	*35,326.06	*225.20	*4,433.31

	1924	1925	1926	1927
Book Net Profit	39,687.24	46,291.90	53,025.00	32,320.78
Depreciation	15,000.00	15,000.00	15,000.00	15,000.00
	24,687.24	31,219.90	38,025.00	17,320.78
Extensions and Renewals	16,605.26	19,761.35	19,350.02	34,457.76
	8,081.98	11,458.55	18,674.98	*17,136.98
Sinking Fund Reserve	20,760.00	19,586.67	19,000.00	19,000.00
*Red	*12,678.02	*8,128.12	*325.02	*36,136.98

During this period in 1924 and thereafter, payments at the rate of at least 2% annually were credited to the Sinking Fund Reserve and paid apparently in so far as possible out of available rate revenues with resort to Profit and Loss for the balance as and when necessary. The account of 1927 is incom-

plete and computation for that year is necessarily in part estimate but it is conceded that there was no distributable surplus of rates that year.

	1928	1929	1930	1931
Book Net Profit	47,537.66	51,218.44	47,777.18	46,454.44
Depreciation	15,000.00	15,000.00	15,000.00	15,000.00
	32,537.66	36,218.44	32,777.18	31,454.44
Extensions and Renewals	19,690.59	23,270.27	19,829.25	19,992.94
	12,847.07	12,948.17	12,947.93	11,461.50
Sinking Fund Reserve	19,000.00	19,000.00	21,583.33	17,000.00
*Red	*6,152.93	*6,051.83	*8,635.40	*5,538.50

	1932	1933	1934	1935
Book Net Profit	47,360.80	55,334.99	49,776.41	52,034.23
Depreciation	15,000.00	15,000.00	15,000.00	15,000.00
	32,360.80	40,334.99	34,776.41	37,034.23
Extensions and Renewals	18,670.94	15,878.12	16,406.03	8,563.95
	13,689.86	24,456.87	18,370.38	28,470.28
Sinking Fund Reserve	19,125.00	25,500.00	25,500.00	25,500.00
*Red	*5,435.14	*1,043.13	*7,129.62	2,970.28

	1936
Book Net Profit	50,013.89
Depreciation	15,000.00
	35,013.89
Extensions and Renewals	10,955.29
	24,058.60
Sinking Fund Reserve	25,500.00
*Red	*1,441.40

Since 1933 the Kennebec Water District has annually taken and credited to its Sinking Fund Reserve the maximum 3% allowance therefor authorized in Paragraph IV Section 11 of its Charter, $850,000 being the amount of its outstanding funded debt during this period.

The Complainant's contention that annual surpluses of income, aggregating $289,843.09, have been accumulated by the Kennebec Water District through the years 1912-1936 and are now distributable, is not tenable. This purported aggregate of surpluses is obtained in major part by disregarding all annual depreciation allowances, which cannot be sanctioned, and consistently adding to record Book Net Profits, income items foreign to current rate revenues from which alone distributable annual surpluses can arise under the Charter. As the computations exhibited show, the only annual surplus of rate revenues which the Kennebec Water District may be called upon to divide accumulated in 1935, a year in which all priority charges against earnings had been fully met. This result is not at all at variance with the principle underlying the rate surplus provision of the Charter. As is well said in relation to a similar provision in the Act incorporating the Portland Water District, "There is a provision in the Portland charter for dividing any surplus among the cities constituting the district but it is obvious that this cannot be authority for fixing rates calculated to provide a surplus. It is intended only to meet the impossibility of foretelling income with mathematical exactness." *Knowlton* v. *Farmington Village Corp.*, supra. This, we think, is a correct interpretation of the legislative policy disclosed in the provisions of Section 11 Chapter 200 as to rates and the division of any surplus thereof among the municipalities composing the Kennebec Water District. The right of the municipalities to share in annual rate surpluses extends only to actual surpluses over and above prior authorized charges upon the rates arising out of the "impossibility of foretelling income with mathematical exactness." No managerial policy

or accounting practice can be allowed to abridge or enlarge this right. The Charter on this point is mandatory.

It appearing that in 1935 the City of Waterville contributed 83.465 per cent and the Inhabitants of the Town of Fairfield, which has succeeded to the rights of the Fairfield Village Corporation, contributed 16.535 per cent to the gross earnings of the Kennebec Water District by way of water rates, these municipalities are entitled to share in the distributable surplus of that year upon that pro rata basis under P. & S. L. 1899 c. 200 ‡11 Paragraph IV. Their claims therefor are not barred. It is the duty of the Kennebec Water District, therefore, to pay $2,479.14 to the City of Waterville and $491.14 to the Inhabitants of the Town of Fairfield as their respective shares of that distributable surplus. Interest upon the amount of each share, from the date of entry of the Bill to entry of Judgment, should be allowed.

The accounts in this case being of great complexity and unduly difficult to determine and adjust in an action at law, jurisdiction in equity has been assumed. *Pomeroy's Eq. Jur.* ‡1421, 1 *Am. Jur.*, 301, *Whitehouse Eq. Pr. First Ed.*, 120. Compliance with the stipulations of the Certificate of the Report requires that the case be remanded to the Supreme Judicial Court sitting in Equity, from which it originated, for a Decree in accordance with this Opinion. The Complainant should be allowed its costs on this Report and in the court below but only as against the Kennebec Water District.

Case remanded for Decree in accordance with this Opinion.

BARNES, C. J., sat at arguments but did not participate in the opinion.

JOSEPH J. MCNIFF

vs.

TOWN OF OLD ORCHARD BEACH ET AL.

JOSEPH J. MCNIFF

vs.

CLINTON C. MEWER, AGENT, ET AL.

York. Opinion, March 23, 1942.

Workmen's Compensation Act.

The burden of proof is upon the employee to show that the injury for which compensation is sought was suffered as the result of an industrial accident within the purview of the Workmen's Compensation Act. Compensation cannot be awarded upon the possibility, or upon evenly balanced chances that the occurrence was an accident.

Notwithstanding that a factual finding by the Accident Commission against a petitioner is not conclusive, the Commissioner who holds the hearing relative to an industrial accident is the trier of the facts and it is his province to determine what testimony produced before him is convincing.

It would be usurpation for the Law Court to say that any particular evidence in the record should have been accepted as establishing a particular alleged fact, or that any general or indefinite evidence should be considered as carrying a clear inference directly opposed to the finding made by the Commissioner.

APPEAL BY PLAINTIFF.

The plaintiff was employed by the town of Old Orchard Beach and was engaged in shoveling sand and peat from a deep ditch and pitching it up approximately nine feet. While so doing a femoral hernia developed. Plaintiff claimed that this constituted an industrial accident within the purview of the Workmen's Compensation Act. Medical testimony in the case was conflicting.

The two petitions were filed and heard together and both were dismissed in a single decree by both the Industrial Accident Commission and the Superior Court. The plaintiff appealed.

Appeal dismissed. Decree affirmed.

The case fully appears in the opinion.

Thomas F. Sullivan, Biddeford, for the plaintiff.

William B. Mahoney, Portland, for defendants.

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

MURCHIE, J. This appeal from a *pro forma* decree entered by a justice of the Superior Court under the Workmen's Compensation Act brings to the Court the question of the right of an employee to recover compensation for disability resulting from a femoral hernia under either of two petitions, one filed against the town in which he was employed on July 12, 1941, the date of the alleged injury, and the other against the agent for that town, wherein identical allegation is that accidental injury was caused by shoveling sand and peat in a ditch and throwing it up nine feet onto a platform.

The petitions were filed and heard together. They were dismissed in a single decree both by the Industrial Accident Commission and in the Superior Court, and the appeal brings both of them to this Court although a stipulation entered before the Accident Commission recites that the appellant was an employee of the town and that the petition against the agent should be dismissed without prejudice. As to that petition, appeal must be dismissed since the stipulation establishes the fact that the petitioner was not at the time of the alleged accident an employee of the agent named therein as his employer.

The case requiring consideration arises on the petition which names the town as the employer and involves the single issue as to whether the injury described therein was suffered as the result of an industrial accident within the purview of the Workmen's Compensation Act.

On this issue the employee has the burden of proof: *Westman's Case,* 118 Me., 133, 106 A., 532; *Mailman's Case,* 118

Me., 172, 106 A., 606; *Dulac* v. *Dumbarton Woolen Mills et al.*, 120 Me., 31, 112 A., 710; *White* v. *Eastern Mfg. Co. et al.*, 120 Me., 62, 112 A., 841; *Johnson* v. *State Highway Com.*, 125 Me., 443, 134 A., 564; *Paulauskis' Case,* 126 Me., 32, 135 A., 824; *Ferris' Case,* 132 Me., 31, 165 A., 160; and notwithstanding the general rule declared in the statute, as in decided cases, that the factual findings of the Industrial Accident Commission shall be final in the absence of fraud, R. S. 1930, Chap. 55, Sec. 36; *Mailman's Case,* supra; *Gauthier's Case,* 120 Me., 73, 113 A., 28; *Gray* v. *St. Croix Paper Co. et al.*, 120 Me., 81, 113 A., 32; *Brodin's Case,* 124 Me., 162, 126 A., 829; *Martin's Case,* 125 Me., 49, 130 A., 857; *Weliska's Case,* 125 Me., 147, 131 A., 860; *Butts' Case,* 125 Me., 245, 132 A., 698; *Mamie Taylor's Case,* 127 Me., 207, 142 A., 730; *Farwell's Case,* 128 Me., 303, 147 A., 215, the finding now under consideration, stated in the decree of the Commission in the words:

> "From the evidence, it seems to us unlikely that the hernia was the result of any strain or intra-abdominal pressure resulting from the throwing of the shovelful of dirt to the surface of the ground at the time he (the appellant) felt the pain. It seems to us * * * more probable that it came about gradually over a period of some considerable time * * * than that it was referable to a single exertion, or even the exertion of a single day; and we so find."

is reviewable within the exception that a finding of fact which is *against* a petitioner, and which therefore is based upon decision that the burden of proof as to a particular fact alleged has not been satisfied, is not conclusive. *Orff's Case,* 122 Me., 114, 119 A., 67; *Farwell's Case,* 127 Me., 249, 142 A., 862; *Ferris' Case,* supra; *Weymouth* v. *Burnham & Morrill Co. et al.*, 136 Me., 42, 1 A., 2d, 343.

The controlling factor in the instant case lies in the obvious correctness of the decision of the Commissioner who heard the cause. The record discloses that on the day of the alleged acci-

dental injury, the appellant had been working at the particular job less than two weeks. His own testimony is very positive that his condition was all right when he went to work on the day in question and that the hernia resulted "then and there" when he pitched up a particular shovelful of heavy sand. The medical testimony, however, is all of contrary import. The surgeon who "repaired" his hernia testified only that it was possible it resulted from "the accident"; that he could not answer as to whether that was probable although there was a probability of it; and that it was *reasonably certain* the condition was caused *by the employment.* This is not to say that it was caused by the exertion applied to the lifting or pitching of a particular shovelful, or even by the accumulation of the liftings and pitchings of a particular day. Medical testimony offered in defense by a physician, admitted by appellant's counsel to be qualified, was that it was impossible for the employee to start with a normal femoral canal when lifting a shovelful of dirt and have a hernia by the time he had pitched it up; that femoral hernias develop by gradual stretching of the peritoneum over a weak spot in the abdominal wall; that such development could not occur in a few minutes, or even a few hours, "from scratch"; and that development in the particular case was "a matter of weeks, on the inside, and might be a good deal longer than that."

This testimony obviously, from the language used by the Commissioner in declaring his finding, is that which he believed carried that trustworthiness, weight and credibility which were necessary to make it convincing. *Mailman's Case,* supra; *Hull's Case,* 125 Me., 135, 131 A., 391. The case is strikingly like that presented in *Middleton's Case,* 136 Me., 108, 3 A., 2d, 434, where no medical testimony was available to determine whether the hernia alleged as the basis of the disability for which compensation was sought was the recurrence of an old one, which had resulted from industrial accident, or a new and different one. Compensation cannot be awarded upon the possibility, or upon evenly balanced chances, that the oc-

currence was an accident. *Syde's Case,* 127 Me., 214, 142 A., 777; *Ferris' Case,* supra.

Final decision in *Farwell's Case* (127 Me., 249, 142 A., 862; 128 Me., 303, 147 A., 215) which twice came before this Court on decisions against the petitioner and was twice sent back to the Industrial Accident Commission because the decisions there showed that the evidence had been misunderstood, or had been misinterpreted to draw an obviously erroneous inference (neither of which is the case here), is not opposed to this general rule. In the second of the *Farwell* cases, supra, the opinion noted that while the decision of the Commission recited certain testimony, it did not state that any was rejected, nor was there any inference of such rejection. Here it is clear that the positive testimony of the employee that injury resulted from the pitching of a particular shovelful of sand was rejected *in toto* and that the medical testimony as to possibilities and probabilities did not, in the opinion of the trier of the fact, satisfy the burden of proof. For this Court to interfere and say either that the testimony of the interested layman should be accepted as conclusive or that such indefinite affirmative medical testimony as was presented carried a necessary inference exactly opposite to that drawn by the Commissioner would be that very "usurpation" in which Mr. Justice Deasy in *Orff's Case,* supra, speaking for an unanimous Court, said we should not indulge.

Appeal dismissed.
Decree affirmed.

STATE OF MAINE *vs.* RALPH A. PEACOCK.

Penobscot. Opinion, March 24, 1942.

Uniform Flag Act. Construction of Penal Statute.

It is well settled that a penal statute must be construed strictly. A statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used.

The very essense of the statutory offense of mutilating or casting contempt upon the flag of the United States (R. S. 1930, Chap. 128) is its publicity.

The statute is designed to prevent that which would shock the public sense and because of the publicity would be likely to result in breaches of the peace.

In this case it is held that the charge to the jury ignored the distinction between what is public and what is private.

EXCEPTIONS BY THE RESPONDENT.

The respondent was indicted for a violation of Section 3 of the Uniform Flag Law. (R. S. 1930, Chap. 128). The jury brought in a verdict of guilty. There was sufficient evidence that the respondent by his words and acts had showed contempt for the flag but the question as to whether he spoke or acted *publicly* was not put clearly before the jury. Exceptions sustained. The case fully appears in the opinion.

Randolph Weatherbee, County Attorney Penobscot County and

John H. Needham, Assistant County Attorney, for the State.

Hayden Covington, Brooklyn, N. Y.

Clarence Scott, Old Town, Maine.

Ewing Baskette, Lexington, Ky., for respondent.

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

THAXTER, J. The respondent was indicted for a violation of Sec. 3 of the Uniform Flag Law. Rev. Stat. 1930, Chap. 128. The section in question, referring to our flag or any representation thereof, reads as follows:

"*Mutilation.* No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

The indictment charges that the respondent "on the thirtieth day of June in the year of our Lord one thousand nine hundred and forty at Plymouth in the County of Penobscot, aforesaid, did then and there publicly, by word and act, cast contempt upon the flag of the United States of America, by then and there saying, 'What is the flag anyway? It is nothing more than a piece of rag. If I had an American flag here now I would strip it up and trample it under my feet,' and by then and there moving his hands in front of him as though he were tearing an object, and by then and there stamping his feet on the floor as though he were stamping upon an object, against the peace of the state, and contrary to the form of the statute in such case made and provided." There was a verdict of guilty, and the case is now before this court on exceptions.

The respondent on June 30, 1940, called at the home in Plymouth of Herbert J. Tozier to seek his signature to a petition. He was invited in and it was during the course of the ensuing interview, at which a relative of Tozier's named Moore was present, that the jury as indicated by their verdict apparently found that the respondent spoke the words and did the acts attributed to him in the indictment. An exception was taken to the portion of the judge's charge which relates to the question whether the words were uttered and the acts were done publicly. This is the only exception which we shall consider.

We are concerned with the violation of a penal statute, and the rule of law is well settled that such a statute must be construed strictly. The rule is well stated in *State* v. *Bunker,* 98 Me., 387, 389, 57 A., 95, 96, as follows: "A statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used." See to the same effect *Campbell* v. *Rankins,* 11 Me., 103; *State* v. *Wallace,* 102 Me., 229, 66 A., 476; *State* v. *Peabody,* 103 Me., 327, 69 A., 273. This well established principle is in no respect modified by the provisions of Sec. 6 of the statute with which we are here concerned which

provides as follows: "This chapter shall be so construed as to effectuate its general purpose and to make uniform the laws of the states which enact it." This is but a declaration of a fundamental principle applicable to all statutory construction.

What, therefore, is the general purpose of our statute?

It is apparent that the very essence of this offense is its publicity. The statute is designed to prevent that which would shock the public sense, and because of the publicity accompanying it would be likely to result in breaches of the peace. In condemning only what may be publicly said or done, the law recognizes the futility of attempting, with respect to such a matter as this, to control what one may say or do under other circumstances. In this respect, the offense is similar to the common law crime of affray, and in our own state to the various offenses concerning intoxication and other analogous crimes in which the publicity given to the act is an essential element. *State* v. *McLoon,* 78 Me., 420, 6 A., 601; 19 C. J., 797; 28 C. J. S., 560. In *State* v. *McLoon,* the opinion makes it perfectly clear that intoxication alone, reprehensible as it is, is not an offense, unless accompanied by the elements of publicity set forth in the statute.

The jury were fully warranted in finding that this respondent by his words and acts showed contempt for the flag of our country which those of us who believe in liberty so dearly love. The question before the jury was, did he speak or act "publicly"?

On this point, the judge charged the jury as follows:

> "I am going to add something else to what I have said to you, and it relates to my definition of the term 'publicly,' as it is used in the statute and I will say to you that if the acts are performed or the words are spoken in a place where persons have opportunity to come and that there are persons there other than the person uttering the words or doing the acts and with the intent of exhibiting the contempt which he feels for the flag, and that the

words are heard by or the acts seen by others there present, they are done publicly, as the term is used in the statute."

Counsel for the state interpret this charge in the only way in which in our opinion it can be interpreted. What it means, they say in their brief, is that "if the words are spoken, or the acts done, in the presence of other people with the intention of exhibiting to the other people a contempt for the flag, the State contends that the words and acts are done publicly." A careful reading of the entire charge shows no qualification of the language to which exception is taken. In fact, this portion of the charge is but a reiteration of almost identical language which the presiding justice used previously which is preceded by the following interpretative statement: . . . "To get the meaning of the term we have to, sometimes, go to the purpose of the particular statute in which the term is used, and I apprehend that the Legislature in passing this statute intended, in a broad, general way not to prevent an individual from giving vent to animosity which he has in regard to the flag, no matter how contemptuous it may be, if he does so in private. The statute does not include that at all, but the broad, general intent is to prevent him from exhibiting that contempt to other persons . . . ."

It seems to us that the charge as given ignores altogether the distinction between what is public and what is private. The rule is not whether the words are spoken or the acts are done in the presence of others in a place where persons have an opportunity to come. Such a test would bring within the statutory prohibition conduct which might take place privately and secretly without any publicity whatsoever. For all practical purposes, the word "publicly" is read out of the statute by the charge. At least the definition of it as given to the jury is not in accord with the common understanding of the term as it is used in every-day life and is unsupported by the decision in any decided case.

Exceptions sustained.

PETER BRIOLA

vs.

J. P. BASS PUBLISHING CO., FRANK J. BASS AND DELMONT T. DUNBAR.

Hancock. Opinion, March 25, 1942.

Elements of Libel. Distinction between Libel and Slander. Issue raised by Demurrer.

There is a distinction in the requirements necessary to maintain an action of libel and in those essential in an action of slander. A charge which is published in writing is regarded as carrying more weight than one which is made verbally.

It is not necessary in a case of libel that the charge import a crime, nor is it essential that special damage be alleged. The question is, do the printed words, if believed, naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefit of public confidence and social intercourse?

The issue raised by the demurrers is one of law; and it cannot be held as a matter of law that the language contained in the article claimed to be libelous does not render the defendants liable in damages.

EXCEPTIONS BY PLAINTIFF.

Action for libel based on an article appearing in the Bangor Daily Commercial. The declaration was in four counts, to each of which the defendants filed a special demurrer. The demurrers were sustained. The plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Peter Briola, Ellsworth, and

Blaisdell & Blaisdell, Ellsworth, for the plaintiff.

Fellows & Fellows, Bangor, for the defendants.

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

THAXTER, J. The plaintiff, an attorney at law, has brought an action for libel against the J. P. Bass Publishing Co., the

owner and publisher of the Bangor Daily Commercial, against Frank L. Bass, the managing editor, and against Delmont T. Dunbar, a reporter of the newspaper, who wrote the article which the plaintiff claims is libelous. The declaration is composed of four counts in two of which the whole article is set forth, in the others only those parts which are regarded as essential. One count in each class relates to the injury alleged to have been done to the plaintiff as an individual, the others to the injury done to him as an attorney and counselor at law. The allegations in each count setting forth the alleged libelous matter are in substance the same.

The article which has given offense to the plaintiff related to his testimony in a case pending in the Superior Court which was heard by referees at Auburn. The essential part of the alleged libelous matter is set forth in the plaintiff's declaration as follows:

> "Evidence closed on the direct testimony of Peter Briola, Ellsworth Attorney, in the $10,000 suit of Brann and Isaacson of Lewiston against the City of Ellsworth for alleged breach of contract, with Mr. Briola depositing the parentage of the child nobody cares to claim,—the idea to hire Brann and Isaacson—squarely in the lap of the absent councillor, Myron R. Carlisle. This came in the nature of surprise testimony, for Mr. Briola had previously stated in public and in the presence of this writer that councillor C. M. Gott made the motion at that now famous meeting. 'Who made the motion to hire Brann and Isaacson' asked Mr. Isaacson, acting for the firm of which he is a member? 'Myron R. Carlisle,' replied Mr. Briola, never raising his eyes from the floor.' (meaning the plaintiff had falsified in court and thereby committed the crime of perjury)—in the report of Attorney Isaacson's allegations, in his opening, the report in part is as follows, to wit: 'Ellsworth finding itself faced with the probability of exceeding its debt limit, if indeed it had

not already done so, he stated, approached his firm through the City Solicitor, Peter Briola with the idea that they use their influence and experience through previous dealings with the RFC, to have the amount of the mortgage materially reduced,—to be specific by $55,000 (Mr. Briola said $60,000)' (meaning to convey the impression by said parenthesis that the plaintiff had falisfied in court)."

To each count of the declaration, a special demurrer was filed. To the ruling of the presiding justice sustaining these demurrers, the plaintiff filed exceptions which are now before us.

In so far as we regard the special grounds for the demurrers as of importance, they set forth that the article does not contain anything defamatory to the plaintiff; that the language used is not libelous and does not bear the interpretation placed on it by the plaintiff; that it does not import a charge of moral turpitude nor tend to expose the plaintiff to public hatred, contempt, or ridicule, or deprive him of the benefit of public confidence and intercourse; that it does not tend to degrade the plaintiff or to indicate that he will suffer loss in his character, property, business or profession; that no special damage is alleged; and that the words do not import a criminal charge or one of moral turpitude.

There is one matter to be disposed of at the outset. The defendants claim that the bill of exceptions is not in proper form and does not set forth the issue to be decided by this court. We do not understand on what ground this contention is based. The ruling sets out the plaintiff's declaration and the demurrers, the ruling of the presiding justice in sustaining the demurrers, and the claim that the plaintiff was aggrieved thereby. We do not see what more is necessary to present to this court a clean-cut issue of law.

It is too well settled to require extended citation of authority that there is a distinction in the requirements necessary to maintain an action of libel and in those essential in an action

of slander. A charge which is published in writing is regarded as carrying more weight than one which is made verbally. It is accordingly not necessary in a case of libel that the charge import a crime, nor is it essential that special damage be alleged. The question is, do the printed words, if believed, "naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefit of public confidence and social intercourse?" *Tillson* v. *Robbins,* 68 Me., 295, 301, 28 Am. Rep., 50.

The issue raised by the demurrers is one of law; and we cannot hold as a matter of law that the language contained in the article in question does not render the defendants liable in damages.

The case of *Bearce* v. *Bass,* 88 Me., 521, 34 A., 411, 51 Am. St. Rep., 446, is clearly distinguishable. The question there was whether the language complained of was fair and reasonable criticism of work done by the plaintiff in the construction of a public building. In holding that it was nothing more than fair comment and hence privileged, the court makes this significant distinction, page 542: "But, when the comment or criticism of the man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous."

The plaintiff in his innuendo claims that the language used charges him with perjury. If, however, it should be found that the words are libelous on their face, even though they do not go so far as to impute a crime, the innuendo may be regarded as surplusage. 13 Enc. of Pleading & Practice, 56; 33 Am. Jur., 221.

Exceptions sustained.

SAMUEL GASS, DOING BUSINESS AS PENOBSCOT WRECKING CO.

vs.

FREDERICK ROBIE.

Penobscot. Opinion, March 25, 1942.

Automobile Law Applicable to Transfer of Ownership of Motor Vehicle from a Partnership, upon Dissolution, to one of the partners, who continues the business.

The automobile license and plates issued to a partnership doing business under a trade name are not available to a member of the partnership who takes over the business upon the dissolution of the partnership and continues to do business under the same trade name; and he must register the automobile in his own name and procure new plates. (R. S. 1930, Chap. 29, Section 29, and Section 60 as amended by Chap. 222, Public Laws, 1939.

EXCEPTION BY PLAINTIFF.

Action in assumpsit by the plaintiff to recover the fee paid for the registration of a motor vehicle. The plaintiff was a member of a partnership doing business as Penobscot Wrecking Company. On December 14, 1940, the partnership paid the registration fee for 1941 on a motor vehicle owned by the partnership. The partnership was dissolved December 26, 1940, and the plaintiff became the sole proprietor and continued to do business under the same name as that used by the partnership, and used the automobile plates issued on the application of the partnership. In January he was notified that the partnership registration should be cancelled and that he as an individual should apply for a new registration and pay the required fee. He filed the new application and paid the fee required under protest. In his suit he sought to recover the fee paid by him in January as an individual. At the close of the plaintiff's case, the Court granted a non-suit. The plaintiff filed an exception. Exception overruled. The case fully appears in the opinion.

Stern & Stern, Bangor, for the plaintiff.

Frank I. Cowan, Attorney General, and

Randolph Weatherbee, County Attorney Penobscot County, for the defendant.

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

MANSER, J. An application under the motor vehicle laws for dealer's registration and plates for use during 1941 was received at the office of the Secretary of State December 14, 1940 from the partnership of Maurice Gass and Samuel Gass, doing business under the trade name of Penobscot Auto Wrecking Co. The required fee of $60 was paid. On December 26, 1940 the partnership was dissolved and notice of dissolution filed for record in the Town Clerk's office in Orono, Maine, where the business was conducted. Maurice Gass withdrew and Samuel Gass became the sole proprietor. From then on, the latter conducted the business under the trade name theretofore used by the partnership. It does not appear that notice was given to the office of the Secretary of State of the change in ownership. On January 2, 1941 there was received by Samuel Gass the registration certificate and automobile plates issued in compliance with the application filed by the partnership. Samuel Gass used these plates until January 16, 1941. On January 14 a letter was sent from the office of the Secretary of State to Samuel Gass, stating that it was learned the partnership had been dissolved and that he intended to do business as an individual under the same trade name, and in such case it was necessary that the original registration be cancelled and application made for a new registration enabling Samuel Gass, as an individual, to secure the required plates. Such new application was made, the fee of $60 paid under protest, and the new plates were used thereafter.

The present suit is an action of assumpsit brought by Samuel Gass against Frederick Robie as an individual and not in his official capacity as Secretary of State. The account annexed to the declaration is as follows:

"To money paid by the plaintiff to the defendant upon defendant's demand as secretary of State for issuance of a second set of 1941 dealer's registration plates to said Penobscot Auto Wrecking Company, of which plaintiff is and has been the sole owner since December 26, 1940, which money was exacted from the plaintiff by the defendant wrongfully and without lawful authority and which money was paid by the plaintiff to the defendant under protest ..... $60.00."

The omnibus or money counts, so-called, are also made a part of the declaration, but without any specification thereunder.

At the close of the plaintiff's case, the Court on motion of the defendant granted a nonsuit, and the case comes forward on exception to this ruling.

It is to be noted that the claim is not for a return or reimbursement of the original fee paid by the partnership, but for the second fee of the same amount paid by Samuel Gass individually. The theory of the plaintiff appears to be that Samuel Gass, as sole proprietor but continuing the business formerly conducted by the partnership under the same trade name, was entitled to retain and use the first registration and plates issued to the partnership after it had gone out of existence, and that the requirement of a new registration was an improper exaction by Frederick Robie acting as an individual but under color of authority as Secretary of State.

Judicial declaration has provided interesting discussion concerning whether a partnership is a legal entity distinct from and independent of the persons composing it. Our Court said in *Woodman* v. *Boothby*, 66 Me., 389:

"A firm is to be regarded as a distinct personality. The firm has its estates and its liabilities separate from that of its several members."

Said Emery, J., in *Haggett* v. *Hurley*, 91 Me., 542, 40 A., 563, 41 L. R. A., 362:

"Again, in a partnership there is a notion of an entity apart from the individual partnership."

There are some definitions of a partnership as constituting a status which may vary under different conditions. The record in this case, however, presents no such question. The partnership became non-existent. The plaintiff and Maurice Gass flatly declared, as appears by the certificate filed in the Town Clerk's office in compliance with R. S., c. 44, §4, that the partnership was dissolved and the further certificate filed by plaintiff under §5 of that statute stated that he was the sole proprietor. These certificates appear as exhibits in the record.

Upon the dissolution of the partnership and the transfer of the interest of one partner to the other, the joint property becomes the latter's individual estate. *Howe* v. *Lawrence*, 9 Cush., 553, and cases cited in note, 57 Am. Dec., 73. Thereafter, there can be no doubt that the plaintiff though conducting the business under the same trade name, was a legal entity separate and distinct from the former partnership.

R. S., c. 29, §60, as amended and effective at the time of the transaction under review, provides:

"Every manufacturer or dealer in new or used motor vehicles or trailers, may, instead of registering each vehicle owned or controlled by him, make application upon a blank provided by the secretary of state for a general distinguishing number, color or mark. The secretary of state if satisfied with the facts stated in the application, may grant the application and issue to the applicant a certificate of registration, containing the name, place of residence, and address of the applicant, and the general distinguishing number, color, or mark assigned to him and made in such form as the secretary of state may determine, and all vehicles owned or controlled by such applicant shall be regarded as registered under such general distinguishing number, color, or mark until sold,

exchanged, or operated for hire. The annual fee for every such certificate of registration shall be $60."

The registration in this case was for the year beginning January 1, 1941. At that time the partnership which had made application for registration had been dissolved. It did not own or control the motor vehicles to be registered. The plaintiff, Samuel Gass, did. No statutory provision is pointed out or found which authorizes the transfer by the partnership of the registration and plates issued on its application, or gives to the new owner the right to use the same. As the partnership was not in existence in 1941, the Secretary of State acted in accordance with his duty in requiring by his letter of January 14, 1941 that the "Dealer's plates and registration number 299 be returned to this department for concellation."

The cases cited by plaintiff, in which it is held that unwarranted, arbitrary, coercive action on the part of public officers, remove from such officers the protection of the law, are without application. The Secretary of State, in the present instance, was performing the duty required of him by law. By voluntary act, the title to motor vehicles was transferred from one party to another, and it became necessary for the new owner to procure registration for the year during which he was in complete ownership and control.

By R. S., c. 29, §29, the Secretary of State is obliged to collect "all fees required for licensing and registering all vehicles and operators, and shall forthwith transmit the same to the treasurer of state." As to whether any method exists by which the partnership can obtain partial or complete return or reimbursement from the State for the fee voluntarily paid by it, and which because of the transfer of vehicles was not of avail to such partnership, is admittedly not before the Court.

The nonsuit was properly ordered.

Exception overruled.

PEOPLE'S SAVINGS BANK *vs.* FRANKLIN R. CHESLEY.

Cumberland. Opinion, April 28, 1942.

Statute Governing Proceedings Against Attorneys at Law for Payment of Collections of Claims Construed.

Proceedings against an attorney at law for failing to account for and pay over a claim left with him for collection or settlement are governed by R. S. 1930, Chapter 93, Sections 32 et seq.

Said statute contains no provision for a discharge of the motion of a claimant or a rule to show cause issued thereon as matter of discretion.

Nor does the statute limit invocation of the summary relief it affords to cases of bad faith but contemplates its application whenever the client in full compliance with its requirements brings his claims for money or any valuable thing collected by the attorney in his professional capacity to the court and demands relief.

Sections 32 and 33 of Chapter 93 are purely remedial and a request, in the instant case, for a ruling in the trial court that said section 32 is a penal statute and should be construed strictly was properly refused. That part of the statute is strictly remedial, and while it should not be given a forced construction and extended beyond its obvious import, it must be interpreted so as to effectuate the purpose of its enactment.

A statute which is both remedial and penal is to be construed in its respective parts accordingly.

The ruling of the trial judge that the instant proceeding as brought under Section 32 of the statute is not a quasi criminal complaint and the allegations in the motion by which it was initiated need not be proved beyond a reasonable doubt was not error. The requirement of proof beyond a reasonable doubt as in criminal cases does not prevail on civil proceedings.

It is in Section 35 of the statute that the penal provisions of the law appear and these do not follow a remedial decree as a matter of course but are effective only to compel performance of the decree and penalize disobedience. Their enforcement must be in independent proceedings separate and distinct from that which remedial relief is afforded.

The proceedings in the stage to which it had advanced on the record is purely civil in its nature and a criminal character cannot be attached to it by reason of the authority found in Section 35 of the statute for the imposition of penalties in case of nonperformance of the decree of the court.

Proceedings for contempt based upon failure to comply with the orders or decrees of court are civil and not criminal. Proceedings for disbarment of attorneys at law are also civil in character.

A request for a ruling on the question of variance between pleading and proof of descriptive allegations or the degree of proof requisite which does not point out the ground upon which complaint is made or that the ruling requested was material does not present exceptionable error and an allowance of the exception by the presiding Justice does not cure this defect.

Error cannot be predicated upon the failure of the trial judge to declare a fatal variance between the allegations of the motion for the issuance of a rule and the proof adduced when it appears that the proof substantially supports the allegations and the Respondent could not have been surprised or misled to his prejudice in his defense upon the merits.

Error, if there be such, in rulings upon issues of fact or law which is in the exceptant's favor is immaterial.

The claims left with an attorney at law for collection or settlement for which he must account under the statute include those representing a demand of a right or a supposed right and are not limited solely to legal and enforcible claims.

The evidence indicates that the officials of the People's Savings Bank, the complainant in this proceeding, had a justified belief that the claim which they left with the Respondent for collection was one of right and collectible.

In a case of this kind no exception lies to the refusal of the trial judge to find facts as requested.

Nor can a trial judge be compelled to give a ruling upon the effect of a single disconnected fact and this rule cannot be avoided by multiplying requests until they cover the several material facts involved in the decision of the case.

Declarations of law which are inapplicable to, inconsistent with or contradictory to facts found by the Court are immaterial and improper and should not be given although announcing a correct principle of law.

A consideration of all the evidence indicates that the material allegations of the motion filed in this proceeding were supported by plenary and convincing proof and it was not error to refuse to rule as requested that the Petitioner had not sustained the burden of proof which rested upon it.

Comment and discussion by the trial judge in the course of findings of fact made, upon which the decision rendered was not based, do not constitute exceptionable error.

When a trial judge sitting without a jury has arrived at a correct result the processes of reasoning which led him there are immaterial.

The trial court was vested with jurisdiction over the proceedings by R. S. c. 93 §§ 32, 33, compliance with the statutory requirements was sufficient and the exercise of jurisdiction was not error.

It not appearing that the findings of fact made by the trial judge are unsupported by evidence and contrary to the only inferences to be drawn from the testimony or that the decree in any part was based on an error of law, the

general Exception to the decree cannot be sustained. Procedural errors therein must be deemed unimportant under P. L. 1941, Chapter 86.

ON EXCEPTIONS.

Action by the People's Savings Bank of Lewiston against Franklin R. Chesley, a duly admitted and practicing attorney at law in Maine, to compel an accounting and payment by him of money alleged to have been collected by him for the complainant but payment of which was refused by him after demand by the complainant. A Rule to Show Cause was issued, the respondent filed an Answer and without objection to the jurisdiction of the court proceeded to trial on the issues raised by pleadings and proof. The case was heard before a justice of the Superior Court without a jury, who gave judgment for the petitioner. The respondent excepted. Exceptions overruled. Case fully appears in the opinion.

Ralph W. Crockett, Lewiston, for Petitioner.

Franklin R. Chesley, Portland,

Frank T. Powers, Lewiston, for Respondent.

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

MANSER, J., did not participate.

STURGIS, C. J. In this proceeding brought in the Superior Court, the People's Savings Bank of Lewiston seeks to compel an accounting and the payment of moneys alleged to have been collected for it but withheld after demand by the Respondent, a duly admitted and practicing attorney at law of this State. A Rule to show cause having issued, the Respondent filed an extended Answer and without objection to the jurisdiction of the court to entertain the Motion and render summary judgment, proceeded to trial on the issues raised by pleadings and proof. The Respondent's Exceptions to an adverse decree bring the case to the Law Court.

An attorney at law is at common law answerable to the summary jurisdiction of the courts for any dereliction of duty and may be compelled to account for and pay over moneys or property belonging to his client which he has received in his professional capacity and withholds after due demand but, while on any prima facie showing that the attorney is wrongfully withholding moneys indisputably belonging to the client, the courts will issue a summary rule, by the weight of authority if it subsequently develops that the purpose of the proceeding is but to determine disputed rights and credits and that the attorney has acted in good faith and without dishonesty, the proceeding will be dismissed and the client remanded to his ordinary remedies at law. *Re Paschal,* 10 Wall. (U. S.), 483, 19 Law Ed., 992; *Strong* v. *Mundy,* 52 N. J. Eq., 833, 31 A., 611; *Gross* v. *Vogel,* 187 N. Y. S., 660; *In Re Kennedy,* 120 Pa., 497, 14 A., 397; *Peirce* v. *Palmer,* 31 R. I., 432, 77 A., 201, Ann. Cas., 1912 B, 181; *Burns* v. *Allen,* 15 R. I., 32, 23 A., 35; 2 Am. St. Rep., 844. At common law whether in a particular case the matter should be summarily dealt with rests in the sound judgment and discretion of the trial court. *Charest* v. *Bishop,* 137 Minn., 102, 162 N. W., 1063; *Schell* v. *New York City,* 128 N. Y., 67, 27 N. E., 957; *Anderson* v. *Bosworth,* 15 R. I., 443, 8 A., 339; 5 *Am. Jur.,* 345.

Proceedings against attorneys at law for payment of collections, however, have long been governed by statute in Maine. P. L. 1895, Chapter 96. The current law is found in Revised Statutes, Chapter 93, the pertinent provisions of which read:

> "Sec. 32. If an attorney at law receives money or any valuable thing on a claim left with him for collection or settlement, and fails to account for and pay over the same to the claimant for ten days after demand, he is guilty of a breach of duty as an attorney; and such claimant may file in the office of the clerk of the superior court in the county where such attorney resides a motion in writing, under oath, setting forth the facts; and thereupon any justice

of the superior court in term time or in vacation shall issue a rule, requiring the attorney to appear on a day fixed and show cause why he should not so account and pay, and to abide the order of such justice in the premises; which shall be served by copy in hand at least five days before the return day.

"Sec. 33. If he then appears, he shall file an answer to such motion, under oath, and such justice may examine the parties and other evidence pertinent thereto. If he does not appear and answer, the facts set forth in the motion shall be taken as confessed; and in either case such justice shall render such decree as equity requires.

"Sec. 35. If the attorney does not perform the decree of such justice he shall be committed for contempt until he does, or is otherwise lawfully discharged; and his name shall be struck from the roll of attorneys."

The Maine statute does not entirely conform to the common law rules applicable to such proceedings. Providing for the filing of a motion in writing under oath by the claimant and for the issuance of a rule to show cause, it requires the attorney, if he appears, to answer under oath, authorizes an examination of the parties and their pertinent evidence and directs that such a degree as equity requires shall be rendered either on issue joined or on default of appearance and answer. There is no provision here for discharge of the motion and rule as a matter of discretion. Compare *Felton* v. *Smith*, 52 Ga. App., 436, 183 S. E., 634. Nor does the statute limit invocation of the summary relief it affords to cases of bad faith but, in terms, seems to contemplate its application whenever the client, in full compliance with its requirements brings his claim for money or any valuable thing collected by the attorney in his professional capacity to the court and demands relief. See *Union Bldg. & Sav. Ass'n.* v. *Soderquist*, 115 Iowa, 695, 698, 87 N. W., 433.

Furthermore, the statute is both remedial and penal. While

Sections 32 and 33 are summary in their procedural requirements insuring prompt and effective action upon claims within their scope, the relief granted is only through such decree as equity requires. That it is intended that the attorney's every right and duty, legal and equitable, shall receive fair consideration and be given the effect that equity and good conscience demands cannot be doubted. The right of the client is no less. They both must do and can receive equity and no more. These parts of the statute are purely remedial. It is in Section 35 that the penal provisions of the law appear. These do not follow a remedial decree as a matter of course but are effective only to compel performance of the decree and penalize disobedience. The enforcement of the penalties provided in this statute must be viewed, we think, as independent proceedings separate and distinct from that in which remedial relief is afforded and, by analogy, subject to the rules laid down in *Cheney* v. *Richards,* 130 Me., 288, 292; 155 A., 642.

It is neither practical nor necessary to attempt here to recite the multitude of facts, conceded and controverted, which are disclosed by the voluminous transcript of the evidence made a part of the Bill of Exceptions and reviewed at length in the extended decision filed in the case. For the instant purposes it is sufficient to record that the Justice presiding in the court below found that the Petitioner, the People's Saving Bank of Lewiston, as of May 16, 1938, employed the Respondent, a local attorney at law, then practicing in Boston, at his request and upon his agreement to make no charge therefor, to collect $1,108.25 from the Reorganization Managers appointed in connection with the liquidation of the National Surety Company of New York or from the National Bondholders Corporation, its final liquidating agent, or from both, and on or about March 28, 1940, the Respondent collected the money from the National Bondholders Corporation, receiving its certified checks therefor, and forthwith, without justification in fact or law, claimed the money to be his own property, withheld for a time information from the People's Savings Bank that he

had made the collection and when demand for a remittance was made deliberately and willfully refused to account for the collection or pay the proceeds thereof to the Bank. The decision was that equity required the Respondent to account for the $1,108.25 which he had collected and pay the same to the People's Savings Bank within sixty days from the date of the filing of the Decree with interest at 6% per annum from March 30, 1940, together with costs of court. The Bank's contention that the Respondent should account for the collection of another claim of $775 against the same parties was denied.

The primary defense interposed by the Respondent was that having a personal claim against the Reorganization Managers of the National Surety Company, and indirectly, against the National Bondholders Corporation, its liquidating agent, for additional compensation for services rendered in the course of liquidation proceedings, by authority of the People's Savings Bank he attempted a joint collection of his and its claims, brought an action for conspiracy against the Reorganization Managers on his own behalf and finally effected a compromise whereby he collected his own claim but not that of the Bank. The Respondent further asserted that the Bank agreed that in making the joint collection his claim for compensation should first be satisfied in full out of any moneys received and conceding that a joint collection was made insisted that his compensation exhausted it and left nothing for the Bank. Suffice it to say that these defensive contentions were rejected by the Justice presiding as unsupported in law or fact and on this record this Court is convinced that this was with full warrant.

After the hearing the Respondent made multiple requests for declarations of law and presents thirty-six exceptions based thereon in part. The Exceptions have all been carefully examined and are found to be without merit. A general discussion of some of the more important questions of law raised only will prove profitable and need be made.

A request that Section 32 of Chapter 93 of the Revised Statutes relating to summary proceedings against attorneys

for withholding collections is a penal statute, should be construed strictly and not extended beyond its obvious import was properly refused. That part of the statute, as already pointed out, is strictly remedial and, while it should not be given a forced construction and extended beyond its obvious import, it must be interpreted so as to effectuate the purpose of its enactment. A statute which is both remedial and penal is to be construed in its respective parts accordingly. *Wadsworth* v. *Marshall,* 88 Me., 263, 270, 34 A., 30, 32 L. R. A., 588; *Endlich on Int. of Stat.,* Sec. 332; *Sutherland, Statutory Construction* Vol. II Sec. 337.

The trial judge ruled correctly that the instant proceeding as brought under Section 32 of the statute is not a quasi criminal complaint and the allegations in the motion by which it was initiated need not be proved beyond a reasonable doubt. The proceeding in the stage to which it has advanced on the record is for the recovery of the actual amount of money equitably due the Petitioner and is purely civil in its nature. A criminal character cannot be attached to it by reason of the authority found in Section 35 of the law for the imposition of penalties in case of non-performance of the decree of the court. Proceedings for contempt based upon failure to comply with the orders or decree of court are viewed in this jurisdiction as civil and not criminal. *Cheney* v. *Richards,* supra, Proceedings for disbarment are also civil in character. *Penobscot Bar* v. *Kimball,* 64 Me., 140, 147; *Matter of Mayberry,* 295 Mass., 155, 166, 167, 3 N. E., 2d, 248. The requirement of proof beyond a reasonable doubt as in criminal cases does not prevail in civil proceedings.

No prejudicial error is made to appear in the denial of a request for a ruling on the question of variance between pleading and proof of descriptive allegations or the degree of proof requisite. Not pointing out the ground upon which complaint is made or that the ruling requested was material, exceptionable error is not presented on the point and allowance by the presiding Justice does not cure this defect. *Wilson* v. *Simmons,*

89 Me., 242, 258, 36 A., 380. Nor is error found in the failure to declare a fatal variance between the allegations of the motion for the issuance of a rule and the proof adduced. The proof here substantially supports the allegations and it does not appear that the Respondent could have been surprised or misled to his prejudice in his defense upon the merits. If there be any variance it cannot be deemed material. *Emery* v. *Wheeler,* 129 Me., 428, 431, 152 A., 624; *Sposedo* v. *Merriman,* 111 Me., 530, 90 A., 387. For the reasons stated Exceptions 1, 2, 3 and 13 cannot be sustained.

As the case was decided the question of law raised by Exception 5 was immaterial and the facts upon which the request purported to be based equally so.

The errors alleged in Exceptions 10, 16 and 17 are directed to failures to rule that the word "claim" as used in the statute means a legal and enforcible claim for that which is the property of the client. This contention here has support neither in reason nor authority. In its ordinary and usual sense the term "claim" imports a demand of a right or a supposed right. *Webster's Int. Dict.,* 2nd Ed.; *McDowell* v. *Brantley,* 80 Ala., 173, 177; *Life Ins. Co.* v. *Smith,* 179 Ark., 164, 15 S. W., 2d 321; *Marsh* v. *Benton County,* 75 Iowa, 469, 470, 39 N. W., 713; *B. & M. R. R. Co.* v. *Abink,* 14 Nebr., 95, 15 N. W., 317. That the People's Savings Bank supposed they had a right of recovery against the Reorganization Managers of the National Surety Company and its liquidating agent, the National Bondholders Corporation, permits of no doubt. The Respondent repeatedly advised the Bank, in his capacity as its attorney, that it had a valid claim against one or both of these parties, and was directly responsible for a justified belief upon the part of the officials of the Bank that the claim was of right and collectible. The word "claim" as used in the statute must be accorded its common meaning. *Revised Statutes,* Chapter 1, Section 6.

Many of the requests for rulings of law were in fact requests for findings of particular facts and rulings thereon. No Excep-

tion lies to the refusal to find a fact as requested. *Mitchell* v. *Mitchell*, 136 Me., 406, 11 A., 2d, 898. Nor can a trial judge be compelled to give a ruling upon the effect of a single disconnected fact. This rule cannot be avoided by multiplying requests until they cover the several material facts involved in the decision of the case. *Smith* v. *Import Drug Co.*, 253 Mass., 368, 149 N. E., 118. Furthermore, declarations of law which are inapplicable to, inconsistent with or contradictory of facts found by the Court are immaterial and improper and should not be given although announcing a correct principle of law. *Maine Candy & Products Co.* v. *Turgeon*, 124 Me., 411, 130 A., 342; *Hooper* v. *Cuneo*, 227 Mass., 37, 40, 116 N. E., 237. Without specific enumeration, all Exceptions, except those not elsewhere specifically considered, are governed by these rules and present no exceptionable errors.

Exceptions 14 and 15 relate to the failure of the Justice presiding to rule that the Petitioner had not sustained the burden of proof which rested upon it. A consideration of all the evidence clearly indicates that the material allegations of the Motion were supported by plenary and convincing proof.

Error is alleged in Exceptions 33 and 34 as a result of comment and discussion indulged in by the trial judge in the course of his findings of fact. It does not appear that the decision rendered was based at all thereon. If it were, it is the ruling and not the reasons therefor to which Exceptions lie. When the trial judge, sitting without a jury, has arrived at a correct result the processes of reasoning which led him there are immaterial. *Estabrook* v. *Motor Co.*, 137 Me., 20, 15 A., 2d., 25, 129 A. L. R., 1268.

The final general Exception 36 to the decree entered is not sustained. It cannot be held on this record that the findings of fact made are unsupported by evidence and contrary to the only inferences to be drawn from the testimony or that the decree in any part was otherwise based upon an error of law. Absolved from these errors, the decree must stand. *Richards* v. *Libby, Ex'r.*, 136 Me., 376, 10 A., 2d, 609, 126 A. L. R., 1215;

Pratt v. *Dunham,* 127 Me., 1, 140 A., 606; *Ayer* v. *Harris,* 125 Me., 249, 253, 132 A., 742. Procedural errors in the Exception are here deemed unimportant. P. L. 1941 c. 86.

It appearing that the trial court was vested with jurisdiction over the proceedings by R. S. c. 93 §§ 32, 33, compliance with the statutory requirements was sufficient and the exercise of jurisdiction was not error the Exceptions are overruled.

Exceptions overruled.

RULES OF COURT

STATE OF MAINE

Superior Court. December 15, 1941.

All of the Justices of the Superior Court concurring, the following Rule of Court is established.

Rule 43 of the Revised Rules of the Supreme Judicial and Superior Courts, 129 Me., 519, as amended under date of February 26, 1934, 132 Me., 526, and as amended under date of August 18, 1934, 133 Me., 540, is amended so as to read as follows:

The stated days of the terms of the court in the several Counties of the State on which final action may be had on petitions for naturalization as provided by Federal law are hereby fixed as the third day of the January, April, June and September terms, the second day of the March term and the first day of the November term in Androscoggin County; the second day of each term in Aroostook County; the third day of the February and October terms and the first day of the May term in Franklin County; the second day of the April term and the first day of the September term in Hancock County; the third day of the February term and the second day of the April, June and October terms in Kennebec County; the second day of the February term and the third day of the May and November terms in Knox County; the second day of each term in Lincoln County; the third day of the March term and the second day of the June and November terms in Oxford County; the second day of the January and September terms, the first day of the April term and the third day of the November term in Penobscot County; the second day of the March term and the third day of the September term in Piscataquis County; the first day of the January term, the third day of the June term

and the second day of the October term in Sagadahoc County; the third day of the January and May terms and the second day of the September term in Somerset County; the first day of the January term, the third day of the April term and the second day of the October term in Waldo County; the first day of each term in Washington County; and the second day of the January and May terms and the third day of the October term in York County.

The time for the naturalization hearings to be held on the first and second days of the terms as hereinbefore provided shall be 2:30 o'clock in the afternoon and for those hearings on the third day of the terms shall be 11:00 o'clock in the forenoon.

GUY H. STURGIS,
Chief Justice, Supreme Judicial Court.

STATE OF MAINE

Supreme Judicial Court. February 6, 1942.

All of the Justices of the Supreme Judicial Court concurring, the following Rules of Court are established.

Rule 1 of the Revised Rules of the Supreme Judicial Court, 129 Me., 523, is amended so as to read as follows:

Applications for admission to the bar may be heard by single Justices of the Supreme Judicial Court at any regular or special session thereof.

Rule 2 of the Revised Rules of the Supreme Judicial Court, 129 Me., 523, is amended so as to read as follows:

Regular sessions of the Supreme Judicial Court may be held on the first Tuesday of each month, with the exception of June, July, August and December in any county whenever such sessions become necessary for the presentation of matters and transaction of business within the exclusive jurisdiction of said

court or within the concurrent jurisdiction of the Supreme Judicial and Superior Courts, and process may be made returnable to the Supreme Judicial Court on said dates. Special sessions of the Supreme Judicial Court for the transaction of any business within its jurisdiction may be held in any county at any time whenever the Chief Justice determines that public convenience and necessity so require.

GUY H. STURGIS,
Chief Justice of the Supreme Judicial Court.

STATE OF MAINE.

SUPREME JUDICIAL COURT *and* SUPERIOR COURT.

Augusta, January 7, 1943.

All of the Justices concurring the following Rules of Court are established.

The Revised Rules of the Supreme Judicial and Superior Courts as recorded in Volume 129 Me., 503, are amended by adding thereto Rule 19A of the following tenor:

19A

RESTRICTION UPON MARKING CASES "LAW"

No case at law in which a report of the evidence is required for the Law Court shall be marked "Law" until such report has been filed.

Rule 22 of the Revised Equity Rules, 129 Me., 531, as amended January 28, 1933, is further amended by adding after the word "consent" in the ninth line thereof the words "or special order of court."

GUY H. STURGIS, *Chief Justice.*

HONORABLE LUERE B. DEASY

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT AT PORTLAND, JUNE 4, 1941, IN MEMORY OF

HONORABLE LUERE B. DEASY

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT

BORN FEBRUARY 8, 1860 DIED MARCH 13, 1940

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

The Exercises were opened by HON. ARTHUR W. PATTERSON of the Hancock Bar Association who addressed the Court as follows:

MAY IT PLEASE THE COURT:

In presenting the resolutions of the Hancock County Bar Association, it is my privilege to pay a brief tribute to former Chief Justice Luere B. Deasy. My tribute must be that of a younger man, who came to the bar when Justice Deasy was in the flower of his strength, a brilliant lawyer, and without doubt one of the most able advocates who ever appeared in the courts of Maine. Within a few years he was raised to the bench, but I had opportunity to observe him both in the preparation and trial of cases, and I was impressed, not only by the brilliance and ability shown in court, but by the thoroughness and attention to detail that were characteristic of Judge Deasy in every cause in which he was interested or with which he was associated.

Other men who were his contemporaries can speak more fittingly of his work in life, so I shall touch upon the facts but

briefly. He was born in Gouldsboro, in Hancock County, educated at the State Normal School in Castine and at Boston University Law School, and practiced in Bar Harbor until he was called to the bench in 1918. He served as a Justice of the Supreme Court until October 12, 1929, when he became Chief Justice. On February 7, 1930, he retired as Chief Justice, and resumed the practice of the law in Bar Harbor. He died in Portland on March 13, 1940, at the age of eighty, survived by his wife, two daughters, and four grandchildren. During his career he held various positions of importance in business, professional and community life. He was for many years president of the Bar Harbor Banking and Trust Company, and for a long time he was president of the Bar Harbor Board of Trade.

At the time of his appointment to the bench he was president of the Hancock County Bar Association, and from 1909 to 1911 he was president of the Maine State Bar Association, of which he was a charter member. He belonged to numerous organizations and clubs, had travelled extensively both in North and South America, and of necessity was a man who had many contacts.

He was liked instinctively, and not only did one like him but one respected him. He possessed a fine sense of humor, and a keen wit. These qualities not only made him a delightful conversationalist, but as well, one of the leading after dinner speakers, not only in Maine, but in the east. Nevertheless, though he probably saw the humorous side to almost every situation, he never used humor in an unkind way, and in the mood of whimsy he never lost his dignity. As a public speaker he was in great demand, because he had the gift of true oratory, and the ability to make clear his points, handle complicated matters without becoming involved, and to hold the attention and interest of those to whom he spoke.

Judge Deasy was a man who respected precedents, but who did not follow them slavishly, or if he believed they were not logical. In a sense he was a pioneer. He commenced practice in Bar Harbor when that community was young as a great

summer resort. He was a leader in the development of Bar Harbor, and he reaped the rewards which come often time to leaders and pioneers, but no one grudged him the rewards of success because everyone knew that for all he received he had freely and worthily given. As a public-spirited man, he gave much time to community service. He was charitable, but wished no publicity given to his benevolences.

There was nothing mediocre about this man. He was distinguished in the law — as counsel and advocate, and later as an eminent judge. He was successful in his business ventures. He read widely. He was a scholar. In speaking or writing he had the gift of expression. He possessed, in addition to his learning, the transcending quality of common sense. He had sympathy, and understanding, and he was kindly, and always fair.

He knew the needs of the people — the great, inarticulate masses, who will always need someone to speak for them. He realized, too, that men and empires are tomorrow's dust. Presumably he thought he could be of more service in his profession than had he chosen to make politics his career, though he did serve in the Maine Senate, and became its president during his last term. Had he chosen political life, doubtless he would have gone far. But he preferred to follow the law, in which he served well the interests of his clients, saw justice done, and, very properly, in his profession reached the heights.

Because of his many splendid qualities, he will be remembered. Because of the fine things he did in life, his memory is respected and honored, now that he has gone. Said Marcus Aurelius:

> "... all the attributes of the body are as a river, all of the mind as a dream and a vapour; life is a war, and a sojourn in a strange land, and fame after death is mere oblivion."

There is much meaning in this philosophy; man should not exalt himself unduly. But most of us prefer to believe, with Plato:

> "Thou are not dead, ... thou are flown unto a land much fairer than our own."

HON. RAYMOND FELLOWS, Justice of the Superior Court, then paid the following tribute:

MAY IT PLEASE THE COURT:

Whatever it is, life is a strange condition. We each arrive in it mysteriously, and, so far as we know, without a settled state of choice respecting it. We find our feet after a short period, and start on the road to learning and experience. We pass through endless events, accomplishments, failures, joys, sorrows. All of us are on same adventure, but the course for each is uncharted, and no two trips are alike. We have our own individual journey and we each preserve our own individuality. We function more or less imperfectly and ineffectively, although some we meet have brains that seemingly operate with absolute precision. We associate with each other through choice or chance or environment. To some we are magnetically drawn, some we tolerate, and by others we are repelled. Finally, at some unknown time and under unexpected circumstances, comes disappearance. It is a startling development that ends the journey. There is no escape and no opportunity to evade the conclusion. It is a strange career for each and all of us. It is a pilgrimage that is interesting, though impossible to understand. We begin without our consent, we travel together and separately with little power to guide the course, and finally against our wishes we are closed to existence. An indistinct picture in the mind of some acquaintance is all that remains to prove that we have ever been.

We expect that we go on.

The idea of a future existence is no more wonderful than the man-made miracle of radio. Where we go, or how, we cannot guess. We have no memory here of any former past, and we perhaps take no memory with us to the future. We have faith. We have a faith that the Book of Books tells us "is the substance of things hoped for, the evidence of things not seen."

Such is life; and such a philosophy, better expressed, have we heard from the lips of our friend, Luere B. Deasy. We have

been journeying with him, and what a wonderful companion have we had to travel with! What wit, what philosophy, what a source of inspiration and of joy! He had no equals, no competitors, and there are none to succeed him. He was, for a generation, my father's intimate friend; and I have therefore known him since I first started on this life adventure. In my boyhood it was impressed upon my mind that "Deasy is the best lawyer that you will ever be acquainted with," and only a year last spring, Judge Deasy said to me, "I admired Oscar Fellows more than any man I have ever known." The love of each of these men for the other has been, and will be, one of life's best and dearest memories.

Chief Justice Deasy was the most entertaining company that any individual ever chanced upon in a long lifetime. He forever sparkled with the electricity of a keen, quick wit; and he illustrated his fascinating conversation with a multitude of pointed stories that boiled and bubbled with his chuckles and twinkled with his eyes. He never lacked an enthusiastic and laughter-filled audience. In the serious hours, whether in the court-room or while engaged in matters that required careful thought, the strain of concentration was relaxed when he saw, or when he thought, of something absurd or ridiculous.

A few years ago, while he was ill in a Boston hospital, he learned that his daughter — then in Paris — had been sent for. He requested an immediate cable to her, advising her to remain where she was, because he said, "On her account I have indefinitely postponed the funeral."

L. B. Deasy was one of Maine's great lawyers. I early knew this was true from every report; but I did not know, until I started in the practice of the law and was sometimes in the opposition, how great he really was. He knew his opponent's case as well as his own. He anticipated every move upon the legal checkerboard from declaration to disappointment. His examinations and cross-examinations filled every gap that it was humanly possible to fill. He seemed to know the law by intuition and his arguments were the masterpieces of a bril-

liant advocate. The only consolation that his opponents many times had, was the fact that his skill and ability were great enough to cause defeat. Juries are apt to side with the inexperienced and incapable, and Hancock County jurors have been known to remark that "Deasy was probably right but we refused to have him pull wool over our eyes." His legal practice was most extensive. His ability, his fairness, his integrity and his unlimited acquaintance — in Maine and in those other states that furnish the summer colony of Bar Harbor — brought to him a wealthy clientage. No case of any moment came to trial in Hancock County, during his years of practice, that did not have Lawyer Deasy on one side or the other.

The appointment in 1918 of Mr. Deasy to the Supreme Judicial Court, and his appointment as Chief Justice in 1929 were considered by both lawyer and layman as fitting, proper, and more than justly deserved.

Judge Deasy never attended college. If he had, he might not have been able to apply himself with the industry that he exercised throughout his whole life. Colleges sometimes give full and complete courses in mental laziness, and "Commencement" is in fact the *end*. The man who never had opportunities exerts himself to make them. Judge Deasy's opinions have the clarity and conciseness of a Gettysburg Address, and one does not have to turn to the conclusion to learn what has been decided. Through the course of instruction that he gave to himself, he was able to convey his ideas to others.

At *nisi prius* terms, formerly held by members of the Supreme Court, it was a pleasure to practice before him. His years in the "pit" had made him see the viewpoint of the trial lawyer. He was patient, quiet, and allowed the attorney to conduct his own case in his own way. His instructions to juries were in such simple and ordinary language that each member of the panel knew what was necessary to be decided and how the law should be applied. He knew, too, how to shade expression and emphasis when he believed justice demanded, as many of us know through bitter experience; then when the

verdict was rendered, he would offer consolation by saying, "You had no right to win and you couldn't beat fourteen of us."

All lawyers have attended exercises such as these, and have listened to the friendly eulogy where love has blinded the senses and a man has been pictured who never did exist, or, as Judge Deasy once said concerning a similar occasion, "His own wife could not find any part of him for perfumery." Here and now, however, is one of the few instances where high commendation is not disproportionate to truth; and even an enemy (if he had one) could heartily endorse and echo our honest and deserved praise.

Our late Chief Justice was a rare combination of the highest intellectual ability and the calmest judgment. He was at once the good father, the kind husband, the beneficial citizen, the safe and steady friend. He was — and this is the highest praise — he was Luere B. Deasy at all times and under all circumstances. Here was inspiration and example! "When comes such another?"

Hon. Louis C. Stearns, President of the Maine State Bar Association, spoke as follows:

May it please the Court:

In my capacity as president of the Maine State Bar Association, it is my pleasure and privilege to add the tribute of that body to these memorial exercises for our late Chief Justice, Luere B. Deasy, and to perpetuate in the permanent records of this court, the Association's appreciation of and affection for our late fellow-member. I use the latter term advisedly for irrespective of his elevation to the bench, and later his appointment as Supreme Justice and Chief Justice, Luere B. Deasy remained always our fellow member.

My brief remarks will not pertain particularly to our brother as a good busines man, lawyer or jurist, but will relate chiefly to his contact with and service to the association.

According to the records, the Maine Bar Association was incorporated by Special Act of the Legislature, by Chapter 167 of the Private and Special Laws of 1891. Organization under the Act was had on March 19, 1891. Luere B. Deasy was one of the original associates. In February of 1902, he became third vice-president of the association. In February of 1904 he was elected first vice-president and he continued in that office until January, 1909. At our meeting in that year he was elected president to succeed Orville D. Baker who had become deceased on the sixteenth day of August, 1908. To refresh the memory of our living members of that occasion, and try to draw a portrait of our brother on that day, may I quote briefly from the record of that meeting:

> "The Vice-President: Brothers of the Bar — Since the last meeting of the Association, the President Orville Dewey Baker in the plentitude of his splendid powers, entered into his final rest. In assuming, as Vice-President, the place which he would have filled so gracefully if present, I deem it proper to ask you to pause for one moment in reverent respect of his memory.
>
> "I do not propose to speak in his eulogy: Another voice far more competent will do that. I merely pause before beginning the business of the day that we may silently and lovingly lay upon the bier of that great lawyer, who was also our brother and our friend, fair flowers from memory's garden."

At our meeting in January of 1913, Brother Deasy delivered eulogies for Franklin A. Wilson and Herbert M. Heath, both past presidents of the Association. His remarks on that occasion were gracious, sincere, and as always, seemed to ring from the heart. That eulogy gives us a yardstick by which we may rightfully measure him, for its essence is found in this sentence:

"No words of mine can add aught to the reputations which they, by their lives, their words and their works, built in the sight of all men."

At our meeting in January of 1921, which was held in celebration of the first century of jurisprudence of the State of Maine, he made a response in his own whimsical manner which will remain always a bright spot in the lives of those who were privileged to hear it. Then, junior justice, he called attention to the idiosyncrasies of his associates, but ended as always with true eloquence and a tribute to them.

Again in 1928 at the biennial meeting he delivered an address of a more serious tenor, but nevertheless filled with wit, on the law of Maine in its substance, and possible changes therein.

I am mentioning in detail these various responses and addresses to bring back to all of you a recollection of Brother Deasy's efforts to build up and strengthen this Association.

Brother Deasy was appointed justice of the Supreme Judicial Court on September 25, 1918. His membership in our Association then automatically ceased, to be resumed on invitation in January, 1925. During the intervening years, however, his interest in the Association never lagged as is indicated by his typical response to the Association's invitaion to resume his membership. In reply to that invitation, Justice Deasy wrote in part as follows:

"I have never ceased to be a member."

Chief Justice Deasy's contacts with us were not confined to these formal functions I have mentioned. He was essentially a sociable man. As plain Brother Deasy, or as Justice, or Chief Justice Deasy, he often availed himself of an opportunity to meet the bar at its informal gatherings. On such occasions his sparkling wit, his humorous repartee, or his serious conversation was a magnet which drew old and young, eminent and obscure within his circle.

In the Maine Reports from Volume 117 to Volume 128, I

found some one hundred and fifty-seven opinions drawn by him on a variety of subjects. His clear statement of issues involved, his plain and concise language, and his direct conclusions must always be noted and admired by lawyers and laymen alike.

Many of these opinions will serve as plain and well defined guideposts for lawyers in search of the right road to follow so long as reports are read.

Luere B. Deasy's life was one of accomplishment. He bore ill health with fortitude; he achieved success with modesty. To the bar of this state he added lustre — to the bench he brought a simple, unassuming dignity, ability to see the right, and courage to carry it out.

To the memory of such a man, this Association of Maine Lawyers deems it an honor to participate in these exercises.

Hon. William R. Pattangall, a former Chief Justice of the Supreme Judicial Court then said:

May it please the Court:

I am conscious of a high honor having been conferred upon me in being permitted to pay tribute to the memory of former Chief Justice Deasy this afternoon. He moved my admiration, respect and regard as have few men with whom I have come in contact. He possessed the essential qualities of greatness, intellectual honesty, courage, integrity and a brilliancy of intellect unexcelled by any man of my acquaintance. His broad conception of life, his knowledge of human nature, his innate sense of justice, his power of analysis, the breadth and depth of his philosophy marked him as one who towered above his associates, with whom, nevertheless, he mingled with unaffected modesty on a common plane.

I shall not infringe upon the ground covered by others today by attempting a biographical sketch of Judge Deasy. That field has been fully covered. Nor shall I dwell upon his remarkable ability as a lawyer, an advocate and a jurist. He had no

superior in his generation in any of these lines of endeavor. No abler lawyer, no more effective advocate, no finer example of a just and learned judge, either at *nisi prius* or in appellate work lived in Maine during my time.

I desire to speak, not at too great length I hope, of his career as separate from his work at the bar and on the bench. I first met him nearly half a century ago, just before I was admitted to the bar, during the political campaign of 1892. Grover Cleveland was then, for the third time, the Democratic candidate for President. Charles F. Johnson of Waterville, later to represent Maine in the United States Senate for six years and later appointed to the United States Circuit Court, was the Democratic candidate for Governor of Maine. Among the supporters of these candidates, leading their party in eastern Maine, were a remarkable coterie of men, one of whom was our former Chief Justice, who took an active part in presenting their cause to the people. Accompanying him were Hon. Arno W. King of Ellsworth, Hon. George M. Hanson of Calais, and Hon. John B. Madigan of Houlton, all of whom afterwards became honored members of this court, joined by leading members of the bar of that section, such as Henry Hudson of Guilford, John Varney and Patrick H. Gillen of Bangor, John Scott of Patten, Archibald McNichol of Calais, John F. Lynch of Machias, John C. Talbot of East Machias, Samuel D. Leavitt of Eastport and others of the same type who will be recalled by those whose memories revert to that period in the history of our state. Those were the golden days of Jeffersonian Democracy.

No man addressed the voters of Maine in that campaign more earnestly, intelligently and effectively than Judge Deasy. I had the pleasure of presiding over one of the meetings at which he spoke, and from that time to the time of his death, our acquaintance, although not unduly intimate, continued, and my regard for him increased with each passing year.

He was a delegate to the National Democratic Convention in 1896. He left Maine to go to that convention, a believer in

bimetalism and inclined toward the support of restoring silver to its historic position as basic currency, but the debates that ensued at Chicago convinced him that the platform there adopted by his party and the candidates nominated by it failed to represent the best ideals of Democracy and, declining to embrace the doctrines of Populism, he returned to Maine an advocate of the gold standard.

I had been with him in 1892. I was with him in 1896 and 1900. In 1904 we separated politically only to come together again after thirty years in 1934. It is not a small thing for a man in Maine as well known and as prominent as Judge Deasy even then was to change his party affiliations, but he never lacked the courage of his convictions and never attempted to conceal his beliefs. From that time on he was identified with the Republican Party. It was not until 1906, however, that he appeared as a candidate for public office. In that year he was nominated for the state senate and during the sessions of 1907 and 1909 he was the leader of that branch of the legislature.

A student of the legislation of that period will find his impress on the statutes then passed, and will discover a line of sound progress and thoughtful conservatism marking his work as a lawmaker.

It does not detract from the great service which he later rendered his state, first as an Associate Justice and finally as its Chief Justice, to say that Maine and the nation suffered a loss when he abandoned a political career to follow his profession and lead first at the bar and then on the bench. Had he represented his district in the House of Representatives, he would have been a worthy successor to Thomas B. Reed. Had he been elevated to the Senate of the United States, he would have filled with honor the seat occupied by George Evans, by Hannibal E. Hamlin, by William Pitt Fessenden, by James G. Blaine. He would have been a leader in that greatest of parliamentary bodies.

One who follows the course of those opportunists who have gained prominence in the affairs of the nation by catering to

the passing thoughtlessness of organized minorities for the sake of advancing their personal political fortunes, and who advocate the violation of any and every fundamental principle of sound government in order to receive the plaudits of the multitude, may well regret that the great brain, the strong mind, the high integrity of Judge Deasy might not have been called to the service of his country during the series of crises which have disturbed the world for the last quarter of a century.

His ideas of government were sound. He believed in the principles laid down in the State and Federal Constitutions. His mind was as free from the heresies which confuse the reasoning of those unable to resist the fallacies of today as is the air of his native state free from the miasma of the tropical jungle.

He accepted truth without effort and rejected falsehood involuntarily. He hated sham and pretense and hypocrisy. He loved right and worshipped justice. He was incapable of deceit or subterfuge. His thoughts ran along straight lines toward unavoidable conclusions. A master of English, his style in speech and writing was clear and simple, his meaning never obscured by words used for the purpose of displaying the extent of his vocabulary.

He was neither a coward nor a time server. He followed the dictates of his own conscience and his own judgment and surrendered neither to the care of any men or group of men. The world would have been the gainer if his voice could have been heard in the discussion of national and international problems, the solution of which has vexed the minds of those entrusted with the responsibility of solving them. His clear logic, his keen wit, his intellectual power, would have illuminated the public debates of his time, had his active life been devoted to governmental work. In that line he would have achieved even more than national distinction.

As it was, he lived a wonderfully full and useful life. He carved out his own career. Self-made, self-educated, without

the adventitious aid of a college training he was by reason of his wide reading and his ability to understand that which he read one of the best educated men of my acquaintance; and by his own unaided efforts he became the great lawyer and great jurist that he was, an honor to the bar and bench of Maine.

He was a great man. His memory will long be held dear by those who knew him and will be kept alive as splendid tradition by those who succeed him. He will live in the future as John Marshall lives, as Story lives, as Chief Justice Shaw of Massachusetts and Chief Justice Peters of Maine live. Loved and honored in his lifetime by all of us, we pay homage today to his memory, not in words of fulsome praise which he would have despised but in honest, sincere appreciation of his splendid qualities, his great brain and heart, his friendliness, his loyalty, to all that he was and still is, if immortality is real and not a dream.

HON. JOHN A. PETERS, Judge of the District Court of the United States, addressed the Court as follows:

MAY IT PLEASE THE COURT:

The first time I ever saw my friend Luere Deasy was in 1886 when he was addressing with noticeable vigor a small group of fellow Democrats in Ellsworth, urging them to stand firm in the coming election and exhorting them to emulate the example of Arnold Winkelried who gathered the spears to his breast when facing inevitable defeat in battle.

The fact that I should remember that incident and that speech through all these years shows the powerful personality of the man, and illustrates the effect he had on his hearers even at his then early age.

The mellifluous words of some orators ring pleasantly in the ears of their hearers without making a lasting impression on the brain. Without using the obvious arts of oratory Mr. Deasy always accomplished the purpose of the orator by the lucidity of his statement, the logic of his argument and the

earnestness of his address. In his prime there was no more effective user of the public spoken word in Maine. The most striking feature of his speeches was emphasis. Having made a point, sharp and clear cut, he drove it home with the blows of a blacksmith. It could not be shaken loose from the mind.

In his lighter addresses he flavored his speech with such delicious humor that his hearers were entranced, but in jury trials — where he made his reputation as a trial lawyer of the first rank — he went straight to the business in hand. He penetrated the minds of the jury by lucid statement and clear logic, and obtained their verdict by the smooth flow of convincing argument, always dwelling with unforgettable emphasis upon the crucial points in the case.

The blows he struck his adversary were hard and painful — but never below the belt. He well understood the importance of thorough preparation, and the value of a picturesque presentation of evidence. In those days when the sporting element of a jury trial was a more prominent feature than now, his scintillating talent had its best background in a packed court room. Even witnesses who had been badly mangled at his hands in the course of the event, admired the effectiveness of his approach and felt no personal bitterness because he was never cruel or unfair. Frequently the losing party against whom he tried the case would endeavor to engage the services of Mr. Deasy in another law suit.

Curiously enough he was unaware for many years of his real power as a speaker and a pleader at the bar. Settling in Bar Harbor as soon as admitted to the bar in 1883, he soon associated with himself a brilliant young lawyer of that time, John T. Higgins, who himself carried sufficient self-confidence for both members of the partnership. A sudden growth in the popularity of the great summer resort where they did business resulted in bringing much litigation to the firm, which was largely handled by Mr. Higgins who tried most of the many court cases that came to their office. The senior partner, modest and retiring by nature, without a particle of vanity or jealousy in

his make-up, was glad enough to see his junior take the prominent place and gather the laurels, and years after Mr. Higgins died, at an early age, spoke of him as the most brilliant person he had ever met. He was mistaken. He underestimated his own talents. He himself was the more brilliant of the two, as well as the more substantial in ability. Beginning the trial of cases alone about 1890 Mr. Deasy almost at once became a leading figure at the bar in his county and presently over the state. His well merited reputation grew with his successes over the years until, in September, 1918, he had to choose between an appointment to the bench of your court and the offer of a retainer which would have meant a fee of around $50,000, in an important will case then about to be tried at Bangor. The opportunity for service on the bench appealed to him more than money, and he joined that body of able and distinguished gentlemen constituting the Supreme Judicial Court of Maine and added to its reputation for learning and sound judgment in a brilliant service of nearly a dozen years.

Of his work on the bench as Justice, and, for a short time before he retired, as Chief Justice, it is for others more closely associated with his work to speak. I knew him better at home and in the environment where, to his neighbors, the performance of his judicial duties, after his appointment, seemed something apart that should not interfere with his more important functions of leading citizen and public counsellor and friend; for in that community where he resided for nearly fifty-seven years he became an institution — an institution commonly but respectfully and affectionately referred to as "Deasy." Contrary to the proverb, he was a prophet with honor in his own country. His high character, ability and kindliness were recognized and appreciated — and also made use of — by his fellow citizens. If a library, museum or a bridge was to be dedicated, a visiting statesman or delegation welcomed, or a great event to be commemorated, it was always Deasy who was called upon to represent the town or the state, and he never failed to respond, and to do full justice to the occasion — in

fact, so adequately and artistically did he do these things that he furnished a considerable surprise at times to eminent visitors who came to that summer resort from great seats of learning and important centers in other parts of the country. A master of the light address and after dinner speech, he was a brilliant star on all occasions when they were in order.

His real service to the community, however, was of a more substantial and less showy character.

His sound advice and good judgment were constantly sought and used in large enterprises, both public and private. He was a leading figure in the principal bank of his town for fifty years — as president for half that time — until he went upon the bench. The most important business and charitable organizations of the community were eager to obtain the benefit of his talents and his name. He was a tower of strength in the numerous philanthropic activities of the locality which never sought his aid in vain, holding among other similar positions, the chairmanship of the local branch of the American Red Cross for more than twenty years. He was an asset to his town and state more valuable than property — an asset impossible to duplicate.

His early sporadic ventures into politics ended with his leaving the Democratic party in 1896 at Chicago — where he had been a delegate to the convention which nominated Bryan on a free silver platform — and his joining the Republican group, after the Gold Democratic platform, on which he stood for a while, sank under his feet.

For ten years he kept clear of politics, and devoted himself to his profession and his other interests with conspicuous success; but in 1906 he was moved to run for the Maine Senate. I well recall the county convention (an institution, now, alas! defunct) at which, after a hard fight, he was nominated by one vote. His victory at that time was largely due to a rousing speech in his behalf by Arno W. King, a member of the convention whose career was singularly parallel to that of Judge Deasy, they having studied law together in Judge Emery's

office, practiced law successfully in the same county, left the Democratic party at the same time, and later sat on the same bench, though not simultaneously. Following his nomination, Mr. Deasy was elected to the Senate of the Seventy-third Legislature, and to the same body in the Seventy-fourth Legislature, when he was president of the Senate and when it so happened that he and I occupied quarters together at the Augusta House and continued a close and friendly association that had begun twenty years previously and lasted until his death.

Although a new member of the Seventy-third Legislature, Mr. Deasy became at once one of its leading figures, not surpassed in influence or esteem by any other member of either body in a total group which contained an unusually large number of the able and influential men of the state — among others, who later held office, three future governors and a future United States senator who was afterward judge of the United States Circuit Court of Appeals.

The work of a legislator was most agreeable to Senator Deasy, which meant that he was admirably adapted to it. His clarity of mind and good judgment, his readiness and effectiveness in debate, together with a most attractive facility in wit and kindly humor marked him from the beginning as a notable addition to the many distinguished sons of Maine who have served in its legislative halls.

From the first day of the session, when he untangled a legal snarl relating to the returns of an election, to its last day — when he made a touching and effective speech in defense of a state officer who while ill in bed and unable to defend himself had been the subject of proposed censorious legislation, he was a shaper of legislative action, and always in the right direction.

His argument on constitutional law was largely responsible for the defeat of an important, and as many thought, iniquitous measure connected with the railroads, the passage of which would have placed upon Maine the stigma of repudiating its contracts.

His humorous attack, mixed with sound legal argument,

laughed out of court what was said to be the shortest bill ever introduced in a general court; a bill reading in its entirety, "The dog is a domestic animal."

He voted, but did not speak, for a bill to remove the State Capital to Portland. Possibly the arguments for that proposition were not so strong as the ties of friendship with many good Portland citizens of that period.

It is a remarkable fact, in view of the many debates he took part in, that every proposition he favored in argument was passed, and every proposition he opposed in argument was refused a passage.

As president of the Senate in the Seventy-fourth Legislature he made a distinguished record, and incidentally, was largely responsible for a piece of constructive legislation that has been of great value to the state, representing a new departure in legislative fields — the creation of the Maine Forestry District.

This invasion of the political field by Mr. Deasy was only for a brief period, but was highly successful. Had he chosen to continue in that line he would have gone far, and in all probability made his mark in the U. S. Senate. Instead he chose to devote himself to his large private practice, and for another ten years he was content to function as a country lawyer, adorning and enchanting the reputation of that highly useful group in our form of society.

The year of his accession to the bench was a notable one in the history of this court as well as an important one for the four gentlemen who were appointed justices in the year 1918 — Dunn, Morrill, Wilson and Deasy, making the greatest change in personnel of the court that ever occurred in any one year.

During the years that Judge Deasy sat upon the bench he added to the strength and prestige of the court, not only by his character, learning and clarity of mind, but by that peculiar kind of wisdom we refer to as hard common sense, and which is not always — as in his case — the companion of learning.

He was also one of the most popular of judges, wholly democratic, hugely enjoying social contacts with lawyers and others while on the circuit, telling numerous whimsical anecdotes to embellish his always sparkling speech. He had a mind of many compartments, not all of which were reserved for the law. His sensitive appreciation of literature gave him the stimulus and enjoyment that others get from the physical exercise he never indulged in. I well recall that he once repeated to me a few lines from Thackeray which he said he regarded as the finest sentence of written prose in the English language.

He had a mind perfectly open to argument, and with little pride of opinion, but he was naturally on the conservative side of any proposition such as a suggested change of procedure. Not long before he died I asked his views on a proposed change in federal court rules making the time for arguments to the jury conform to the new state practice where the time is divided into three parts, counsel for the moving party having the last ten minutes. Judge Deasy wrote me:

> "The new practice you mention was instituted after I passed away. I hardly think that I should like it. It must require a timekeeper and a stop watch in addition to other court officers. Some difference should still be maintained between a trial and a horse race."

He disliked watches. The members of the Seventy-fourth Senate, who gave him a handsome one, might be surprised to learn that he regarded the carrying and winding of a watch as an unnecessary burden.

Time will not permit elaboration on the life or the qualities of this unusual man. Perhaps a long, close friendship does not make the best perspective for that purpose; but my judgment that he was a man not only with a great intellectual endowment, with most attractive personal traits, but one whom Nature had moulded with an uncommonly fine grain, will be concurred in by all who knew him. By environment, training

and outward appearance he should have been a "run-of-the-log," down East, country lawyer; but he was not. He was unique. One recognized the influence of an exotic strain. His alert and facile mind, delicate and sensitive; his scintillating wit and imagination, with a sound and powerful mental equipment, ready for instant use — while a combination not unknown in our native stock — is usually found in a less stagnant breed.

It always seemed to me that a mixture of French blood might be the explanation, but it was that other Celtic strain that has infused imagination and buoyancy into our national blood stream for a hundred years. Also another illustration of the opportunity this country has offered to the ambitious immigrant, with profit to itself. When the grandparents of Luere Deasy came to Canada, from Ireland, in 1837, they little thought that one of the two small sons they brought with them would shortly run away to sea, after the early deaths of his parents and, finding friendly and charitable people in Maine, would grow up there to become the father of a future Chief Justice of that state; but such was the fact.

The future jurist tried being a sailor, like his father, who was a master of ships, but he was naturally a lawyer. The law afforded the best field for the development and expression of his talents. Quick of apprehension, sound of judgment, felicitous in expression, with natural feeling for the basic principles of the law, he found his foreordained niche.

In the history of the state his name will be written with those of its great lawyers and judges. His life sheds lustre upon the administration of justice and will be an inspiration for the bench and bar as long as this is a government by laws and not by men.

The response for the Court was by CHIEF JUSTICE GUY H. STURGIS:

MEMBERS OF THE COMMITTEE OF THE HANCOCK BAR:

This court is deeply impressed by the splendid resolutions and expressions of admiration, esteem and respect for Honorable Luere B. Deasy, former Chief Justice, which you have presented here this afternoon. In these tributes to his memory, you who were his life-long friends and knew him best, have expressed our thoughts in words more eloquent than we could command. You have portrayed his life, his character and his achievements with fidelity and sincerity. The picture you have painted is complete and no adornment that we might put upon it could add to its verity and lustre. Although we realized that the years were weighing heavily upon him and that the ebbing of the tide could not long be delayed, his death came as a distinct shock and we mourned and yet shall mourn his passing. Today we reverently join with you in doing honor to his memory.

It was on September 25, 1918, that Judge Deasy was appointed an Associate Justice of the Supreme Judicial Court of Maine. A widely known and successful practitioner of the law, a skilful advocate, a wise counsellor, legislator, banker and businessman, he brought to the bench a capacity for judicial service born of experience possessed by few men.

In his time the Justices of the Supreme Judicial Court still held trial terms in all the counties of the state. He presided at *nisi prius* with ability and impartiality. He was courteous, kindly and just. His charges to the juries were concise and forceful. He was not a martinet for his very presence spelled order and decorum and without effort on his part it always prevailed. His arrival on the circuit was a gladsome event and his terms will long remain a cherished memory in the hearts of the lawyers of Maine.

In the law court the logic of Judge Deasy's reasoning fortified as it was by the wealth of his experience, the breadth of his knowledge and the soundness of his judgment, usually carried conviction and always commanded careful and receptive at-

tention from his Associates. He never was a theorist but always sound and practical. He never was a radical but always progressive and, unafraid, dared to travel unknown paths and blaze new trails. He moved the current of our law forward and always upward. His first opinion, *Lambert* v. *Lambert*, 117 Me., 471, was issued on November 19, 1918, less than two months after he came upon the bench. His last opinion, *Amey* v. *The Lumber Company*, 128 Me., 471, bears date of January 3, 1930, just a week before he finally retired from the Court. His written opinions, appearing in twelve volumes of the Maine Reports, expressed in clear, simple and apt language, show not only his wide knowledge of the law, but his keen analytical mind and thorough acquaintance with men and their affairs. They constitute a most valuable contribution to the jurisprudence of this state and an enduring monument to his name and fame as a jurist.

Judge Deasy was not Chief Justice for a very long time. He was appointed on October 12, 1929, and having lived his three score years and ten, on February 7, 1930, resigned. In that brief period he presided at two terms of the Law Court, filled his *nisi prius* assignments and wrote six major opinions. During this same period the new judicial system went into effect and upon him fell the burden of starting it upon its journey. His term of office was extremely arduous. We knew that his labors were unduly taxing his strength and that only his great courage and unconquerable will permitted him to carry on. We rejoiced that it was his privilege to step aside and make assurance doubly sure that his alloted years might be many and in them he should find rest, contentment, and a measure of good health.

"No more for him life's stormy conflicts,
Nor victory nor defeat — no more time's dark events,
Charging like ceaseless clouds across the sky."

To him peace and rest at length had come and all the days' long toil was ended.

Gentlemen, your tributes of love and respect for Chief Justice Deasy are gratefully received by the court and will be ordered spread upon the records. And as a mark of honor and esteem, this court will now adjourn for the day.

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Pennock v. *Smith*, 303.

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Proceedings against an attorney at law for failing to account for and pay over a claim left with him for collection or settlement are governed by R. S. 1930, Chapter 93, Sections 32 et seq.

Said statute does not limit the invoking of the summary relief it affords to cases of bad faith but contemplates its application whenever the client in full compliance with its requirements brings his claim for money or for any valuable thing collected by the attorney in his professional capacity to the court and demands relief.

The claims left with an attorney at law for collection or settlement for which he must account under the statute include those representing a demand of a right or a supposed right and are not limited solely to legal and enforcible claims.

Sections 32 and 33 are purely remedial and should not be construed as penal and in proceedings brought under them the allegations need not be proved beyond a reasonable doubt. Said statutes, however, while they should not be given a forced construction nor extended beyond their obvious import, must be interpreted so as to effect the purpose of their enactment.

It is in Section 35 of the statute that the penal provisions of the law appear and these do not follow a remedial decree as a matter of course but are effective only to compel performance of the decree and penalize disobedience. Their enforcement must be in independent proceedings separate and distinct from that by which remedial relief is afforded.

People's Savings Bank v. *Chelsey*, 353.

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The power of Congress extends not only to the regulation of transactions which are part of interstate commerce but to the protection of that commerce from injuries which result from the conduct of those engaged in intrastate operations.

The power of Congress to subject intrastate transactions to federal control on the ground that they affect interstate commerce is confined to transactions which directly affect such commerce, and, if their effect is merely indirect, the transactions remain within the domain of state power.

Higgins v. *Carr Brothers Company*, 264.

CONSTITUTIONAL LAW.

Under both federal and state constitutions private property cannot be taken without the owners' consent for private use.

If a statute violates any provision of the state or of the federal constitution, its antiquity will not save it.

In construing a statute the presumption is that the legislature, in enacting the statute, did not disregard constitutional prohibitions; and the language used by the legislature must be interpreted, if possible, in such manner as to sustain the enactment rather than to defeat it.

Browne v. *Connor,* 63.

The inhibition of the Fourteenth Amendment that no person shall be deprived of the equal protection of the law is designed to prevent any person or class of persons being singled out as a special subject for discriminating or favoring legislation.

Proper classification may be made, different rules prescribed and discriminatory restrictions made or privileges extended without violation of the Constitution, provided the partialities shown and the discriminations affected are reasonable and rest on substantial differences which have a valid and real relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Boothby v. *City of Westbrook,* 117.

Definite restrictions upon legislative power are contained in the Constitutions of the United States and of this state and when such restrictions are pertinent to the facts of a given case it is the duty of the court to rule as to the constitutionality of the legislative action and a law to be valid must conform to the Constitution of the United States and to the Constitution of the state. The presumption is, however, in favor of the constitutionality of any duly enacted law, and the legislative power in the state is recognized to be absolute and all embracing except as expressly or by necessary implication restricted by constitutional provisions.

Those who act pursuant to a statute are not required to demonstrate that the provisions thereof are within legislative power. Rather is it for one who questions the validity of legislation on constitutional grounds to show that the particular enactment exceeds legislative power.

Only one whose rights are injuriously affected by the provisions of a statutory enactment which he claims exceeds legislative power has standing to raise the question of constitutionality.

Town of Warren v. *Norwood,* 180.

No question of constitutionality shall be passed upon except when entirely necessary to a decision of the cause in which it is raised.

Vigue v. *Chapman,* 206.

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S. D. Warren Company v. *Assessors of Gorham,* 279.

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Page v. *Bourgon,* 113.

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The general rule is that equity will not intervene to prevent the enforcement of a criminal or regulatory ordinance providing a penalty for its violation even though it be unconstitutional. But equitable jurisdiction exists when the prevention of such enforcement is necessary effectually to safeguard and protect property rights and there is not a plain, adequate and complete remedy at law.

Boothby v. *City of Westbrook et al.,* 117.

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Original writs with returns of service thereon, taken from the files and records of the municipal court and offered by the defendant for the purpose of showing that the defendant was then in the jurisdiction are not admissible. A valid service could be made on a person temporarily in the state without any residence herein.

A written statement from the tax assessor's office in Portland showing that various parcels of real estate therein were assessed to the defendant, offered by defendant to prove his residence, was properly excluded, it not appearing that the defendant paid the taxes so assessed.

Connolly v. *Serunian,* 80.

EXCEPTIONS.

It is well settled in this state that when, by agreement, a jury trial is waived in a civil action, and a case is heard by the presiding justice during term time, exceptions will not lie to his rulings in matters of law if the decision is made and docketed during the term at which the case is heard unless the right to except in matters of law has been expressly reserved; and a plaintiff not thus reserving right to except has no right to except to the final decision even if it is erroneous as a matter of law.

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The statutes of the state under whose laws a mutual insurance company is organized, relating to such corporations, the by-laws of the company and the contract define the rights and liabilities of the member as an insurer, while his rights and liabilities as an insured are defined by the contract; and a member of a mutual insurance company is bound to take notice of and observe its by-laws, of which he is presumed to have knowledge.

Pink v. *Town Taxi Co.*, 44.

Ambiguities in insurance contracts are resolved against the insurer.

Insurance contracts must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure.

Where words in an insurance contract are susceptible of two interpretations, that which will sustain the insured's claim must be adopted.

Reliable Furniture Co. v. *Union Deposit & Trust Co.*, 87.

JOINT DEFENDANTS.

Although at early common law it was undoubtedly an established principle that a joint verdict must stand or fall in its entirety, such holding does not now obtain in this state and the case of *Arnst* v. *Estes*, 136 Me., 272, is authority for the rule that one joint-defendant cannot complain because another, sued with him, has been properly found not liable on the facts.

It is established law in this state that process sounding in tort and instituted against plural defendants does not of necessity have to remain such during its full course, if the liability upon which the action purports to be grounded is several. A jury may separate the defendants and return a verdict which will exonerate one or more and find against another or others; or the Trial Court may separate them or the Supreme Judicial Court may act on its own initiative.

When a verdict which involves a finding of liability against two joint tort-feasors, correct as to one and improper as to the other, is brought before the Supreme Judicial Court on separate motions for new trial, it must be set aside as against the defendant not properly chargeable and permitted to stand as against the other.

Plante v. *Canadian National Railways et al.*, 215.

Although a jury verdict against two alleged joint tort-feasors has to be set aside as to one of the defendants because upon the record he is not properly chargeable with liability, it may stand as against the other if it appears that the jury has awarded compensation in an amount that represents a not unreasonable approximation of the damages suffered.

Bouchard v. *Canadian National Railways et al.*, 228.

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Laches cannot be predicated on passage of time alone. In addition there must be prejudice to the adverse party because of the delay, and for the delay there must be no reasonable excuse.

Tewksbury v. *Noyes*, 127.

LIBEL.

There is a distinction in the requirements necessary to maintain an action of libel and in those essential in an action of slander. A charge which is published in writing is regarded as carrying more weight than one which is made verbally.

It is not necessary in a case of libel that the charge import a crime, nor is it essential that special damage be alleged. The question is, do the printed words, if believed, naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefit of public confidence and social intercourse?

Briola v. *Bass et al.*, 344.

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Under Section 110, Chapter 95, R. S. 1930, which provides that "if a person is *absent from and resides out of the state after a cause of action has accrued against him*, the time of his absence from the state shall not be taken as a part of the time limited for the commencement of the action," mere absence from the state is not sufficient to suspend the operation of the statute of limitations. It must also appear that during such absence he established a residence without the state.

Connolly v. *Serunian*, 80.

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Whether or not a mistrial should be ordered rests in the sound discretion of the presiding justice, whose decision will not be overruled unless manifest wrong or injury result.

State v. *Cox*, 151.

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An unlicensed operator of a motor vehicle is not a trespasser on the highway except as to municipalities, is entitled while thereon to observance of due care on the part of other travelers and may recover for injuries proximately caused by the negligent acts of another (not a municipality) unless his violation of law is a proximate cause of the accident; though such violation is prima facie evidence of negligence, which may be overcome by other evidence.

Whether or not a party was guilty of contributory negligence is a question of fact.

Davis v. *Simpson*, 137.

A verdict based upon negligence is wrong unless the relation of cause and effect between the negligent act and the accident is present.

The negligence of the operator of a motor vehicle is not imputable to a passenger in the motor vehicle.

Plante v. *Canadian National Railways et al.*, 215.

The questions of negligence and due care are factual matters for the jury, under proper instructions by the court.

Gerrish v. *Ferris*, 213.

NEW TRIAL.

A new trial will not be granted when there is nothing to indicate that bias or prejudice affected the verdict and the damages awarded are not so grossly inadequate as to require a new trial.

Veilleux v. *Rosen*, 94.

The principle that there must be prejudicial error to the complaining party to justify granting a new trial is inherent in our jurisprudence; and a new trial for inadequacy of damages will not be granted on the application of the party against whom the damages were awarded.

A motion for a new trial which asserts that the verdict is against the law and evidence is entitled to consideration upon all phases thereby included.

Giles v. *Perkins*, 96.

It is only the exceptional case which will justify a new trial when proper practice has been disregarded.

An exception to the rule referred to, however, has become established when any instruction given is plainly erroneous or where it appears that the jury may have been misled by the charge as to the exact issue or issues to be determined.

Roberts v. *Neil*, 105.

NOTICE.

The method of computing time where a process or notice is required to be served a certain number of days before the return day is not regulated by the Maine statutes and, by the weight of authority and in the absence of statute to the contrary, the whole of either the day of service or the return day is counted without regard to fractions of a day.

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Browne v. *Connor*, 63.

PROPERTY.

Property is more than the mere thing which a person owns. It includes the right to acquire, use and dispose of it without control or diminution save by the law of the land; and the Constitution protects these essential attributes of property.

Boothby v. *City of Westbrook*, 117.

PUBLIC UTILITIES.

A public utility is subject in the matter of its accounting to the jurisdiction, control and regulation of the Public Utilities Commission of Maine. R. S. c. 62 § 15 et seq.

Waterville v. *Kennebec Water District et al.*, 307.

RAILROADS.

The statute (R. S. 1930, Chap. 64, Sec. 79) providing that railroads shall not "unreasonably and negligently obstruct railway crossings" fixes no time interval which if exceeded will represent an unreasonable and negligent obstruction.

The rule adopted by the railroad company that the highway must not be obstructed for more than five minutes at a time cannot be held to be an interpretation of the statute that anything in excess of a five-minute delay would be a violation of the law.

An unlighted train standing on a crossing at night constitutes a hazard to travellers and may impose an obligation to warn, if visibility is poor by reason of fog or equivalent circumstance.

The proper test as to the necessity for warning when a highway crossing is obstructed by an unlighted train at night is whether the railway employees, in the exercise of proper care, should recognize danger of collision with a highway vehicle operated by a person of ordinary prudence.

A finding of fact based on the assumption that it is the duty of the railway employees to warn of an obstruction of the highway by a train which should be visible to the operator of a motor vehicle properly equipped with lights and operated with due care in time to permit stoppage before collision is unmistakably wrong.

Plante v. *Canadian National Railways et al.*, 215.

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City of Lewiston v. *All Maine Fair Association*, 39.

Property of a benevolent institution acquired and designed and always used in good faith for its own purposes is exempt from taxation although occasionally used for purposes foreign to such purposes, when this could be done without interfering with its general occupation and use of the same property.

The burden is on the benevolent institution to establish its right to exemption.

Calais Hospital v. *City of Calais*, 234.

TAX LIENS.

Unless a tax is properly assessed, no lien attaches to the property against which the tax is assessed. R. S. 1930, Chap. 13, Sec. 3.

Legislative power is competent to provide for the enforcement of tax liens by the use of certificates without requiring that they be executed under seal. Provisions of the tax lien law (P. L. 1933, Chap. 244) establishing an additional method for the enforcement of tax liens show legislative intent to dispense with the use of deeds and the formalities incident thereto.

Town of Warren v. *Norwood*, 180.

The first requirement of a valid tax is the due election and qualification of those who assess it.

It is only by proper assessment that a lien can be created under the provisions of R. S. 1930, Chap. 13, Sec. 3, and unless a tax is properly assessed, it cannot create a lien available for enforcement by any form of process.

Vigue v. *Chapman*, 206.

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The principle that strict compliance with the statutory requirements is necessary to divest property owners of their titles for non-payment of taxes has become firmly established by a long line of decisions.

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State v. *Bobb*, 242.

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McRae v. *Camden & Rockland Water Company*, 110.

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Manufacturers National Bank v. *Woodward*, 70.

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State v. *Cox*, 151.

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When the decision of the Industrial Accident Commission is against the petitioner, the finding of facts are open to review.

Under the Workmen's Compensation Act, if death results from a personal injury to an employee received by accident arising out of and in the course of his employment, his children are conclusively presumed to be wholly dependent upon him for support if within Clause c, Par. VIII, Sec. 2, Chap. 55, R. S. as amended by Sec. 4, Chap. 276, P. L. 1939.

If a child, as defined by the statute, is living apart from the parent and the state of the child when the employed parent met with his accident is that of actual dependency in any way, the child is presumed to be wholly dependent.

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