MAINE REPORTS

141

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 24, 1944 to DECEMBER 21, 1945

GAIL LAUGHLIN
REPORTER

PORTLAND, MAINE
THE SOUTHWORTH-ANTHOENSEN PRESS
Printers and Publishers
1946

Entered According to the Act of Congress

BY

HAROLD I. GOSS

SECRETARY OF STATE FOR THE STATE OF MAINE

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. HAROLD H. MURCHIE

HON. ARTHUR CHAPMAN[1]

HON. NATHANIEL TOMPKINS[2]

[1] Retired August 5, 1945

[2] Appointed August 23, 1945

ACTIVE RETIRED JUSTICE OF THE SUPREME JUDICIAL COURT

HON. ARTHUR CHAPMAN

JUSTICES OF THE SUPERIOR COURT

HON. GEORGE L. EMERY[1]
HON. EDWARD P. MURRAY
HON. ALBERT BELIVEAU
HON. RAYMOND FELLOWS
HON. ROBERT A. CONY[2]
HON. NATHANIEL TOMPKINS[3]
HON. ARTHUR E. SEWALL
HON. EARLE L. RUSSELL[4]
HON. EDWARD F. MERRILL[5]
HON. ROBERT B. WILLIAMSON[6]

[1] Died October 2, 1944
[2] Died January 1, 1945
[3] Appointed to Supreme Judicial Court August 23, 1945
[4] Appointed December 27, 1944
[5] Appointed February 1, 1945
[6] Appointed September 5, 1945

ACTIVE RETIRED JUSTICE OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

ATTORNEY GENERAL

HON. FRANK I. COWAN to JANUARY 2, 1945
HON. RALPH W. FARRIS from JANUARY 2, 1945

REPORTER OF DECISIONS

GAIL LAUGHLIN

TABLE OF CASES REPORTED

H

J

K

L

P

R

S

T

U

W

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

PHILIP C. HOYT ET AL.

vs.

HAROLD H. HUBBARD ET AL.

York. Opinion June 24, 1944.

Wills. Probate Courts. Jurisdiction of Law Court. Executors and Administrators.

The legislature created the Probate Court and gave it exclusive original jurisdiction over the particular matters herein presented, and carefully specified its procedure.

The equity Court in Maine, although possessing full chancery powers, cannot exercise concurrent jurisdiction with courts of probate upon matters specifically and exclusively within the jurisdiction of such Probate Courts; and it had no jurisdiction in the instant case, and, therefore, the bill was dismissed, even though no objection to the jurisdiction of the Law Court was raised by the defendants.

Under the general rule of law and equity, when the legislature has created rights and prescribed the mode of exercising them and afforded ample remedy for their breach, those modes and remedies are exclusive of any remedy in equity.

ON REPORT.

A bill in equity by the residuary legatees under the will of Nettie L. Chase praying that the Court decree that all

claims against the estate of the testatrix were then barred under the statute of limitations and that the executors be ordered to file a final account and make distribution.

The testatrix died in Florida and her will was probated in that state. Two of the defendants were executors of her will and three other defendants were persons employed as counsel by the executors. Part of the estate was situated in Maine but the executors did not procure ancillary administration in Maine. Held that the Court was without jurisdiction in the matters presented. Bill dismissed. The case fully appears in the opinion.

Robert H. Doe, Franklin, Massachusetts, for the plaintiffs.

Wesley M. Mewer, for the defendants.

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

MANSER, J. This is an equity action which comes forward on report. The facts and circumstances shown in the record by admissions, stipulations, or evidence, may be summarized as follows:

Nettie L. Chase died in Miami, Florida, on May 8, 1938. Her will, dated November 20, 1937, was probated in Dade County, Florida, December 17, 1938. Included therein are specific bequests and one specific devise. Personal property, constituting two of the bequests, has been turned over to the legatees. The other, the gift of an automobile, appears to have become inoperative. The devise was also anticipated by a deed to the beneficiary during the lifetime of the testatrix. The plaintiffs, Philip C. Hoyt and Ethel L. Springer, are the residuary legatees under the will. The defendants are the executors and three persons who acted for them as counsel. From an inventory and appraisal filed in July 1939, it appears that the personal property in Florida consisted of the items specifically bequeathed and other property valued

at $55. The bulk of the estate of the testatrix consisted of a note secured by mortgage on real estate in Maine and two separate parcels of real estate including buildings located at Old Orchard, Maine. Wesley M. Mewer, as attorney, collected the mortgage note and remitted the net proceeds of $2,871.31 direct to the executors in Florida.

The sole probate account by the executors in Florida filed in 1942 shows as assets only the proceeds of the mortgage note, and that appears simply as an item of cash on deposit in a designated Miami bank.

At some time, the date of which is not definitely fixed, an authenticated copy of the will and probate thereof was filed in the Probate Court for York County, but no other proceedings were then instituted for ancillary administration. In 1940, on petition of the plaintiffs, an ancillary administrator was appointed in York County. He filed a petition for license to sell real estate to pay debts. The debts listed included only real estate tax liens, fire insurance premiums and inheritance taxes. Funds, taken from the proceeds of the mortgage notes, were forwarded by the executors to pay these debts, and the ancillary administrator filed his first and final account showing the receipt and distribution of the sum, which account was allowed.

The executors, acting without appointment or authority granted by the Probate Court in Maine, have conveyed one parcel of real estate in Maine for $2,200. After the deduction of expenses, unpaid taxes, etc., a balance of $1,808.20 was deposited in the Saco and Biddeford Savings Institution. The attorneys for the executors in Florida have received, with the approval of the Probate Court, $600 for services, and Mr. Mewer has received $500, which was taken from the sum deposited in the Saco Bank.

It further appears that, at the time of the death of the testatrix, there were outstanding notes, given a comparatively short time prior thereto, aggregating $2,810.80. One

creditor, holding a note for $500, has been paid. Another has filed a claim in the Florida Court for $1,582.80 with interest. The other two claims, one of $228 to Harold H. Hubbard, an executor, and the other to Barton D. Hubbard for $500 have not been filed and no proceedings have been taken thereon.

The plaintiffs, claiming title to the remaining parcel of real estate in Maine as residuary legatees, have undertaken to convey the same by deed.

The executors assert their right and intention to pay the notes still outstanding, and it appears to be their position that after this is done and they and their attorneys have been compensated in full for their own services and expenses, there will be no residue for distribution.

The plaintiffs seek relief in this proceeding by including in the prayers of the bill requests that the Court, in effect, determine that all claims against the estate have been barred by the special statute of limitation both in Maine and in Florida; that the executors be ordered to file a final account in the Florida Court and make distribution of the estate; that the executors shall file an account with this Court as to property in Maine; that the executors be ordered to convey the remaining real estate to the grantee named in the conveyance already executed by the plaintiffs.

The plaintiffs contend that the equity court has authority to grant this relief because all the defendants have appeared and answered, have raised no objection as to jurisdiction but have joined the issues presented on their merits. A further claim is that practically all the remaining assets are in Maine, either in the form of cash or real estate.

The fact that the defendants, three of whom are nonresident, have submitted to the jurisdiction, does not endow the equity court with power to grant relief unless it also has jurisdiction of the subject matter.

It is obvious that all the causes of complaint have to do

with the administration of the estate of Nettie L. Chase, both in Florida and in Maine. In this state the judge of probate has jurisdiction of all matters relating to the settlement of the estates of deceased persons who, at the time of their death, were inhabitants or residents of his county, or who, not being residents of the state, died leaving estate to be administered therein. R. S. 1930, c. 75, 89. Likewise, it appears from the record that the County Judge of Dade County has similar jurisdiction in the domiciliary state. The plaintiffs have presented none of the matters as to which relief is now asked to the court or courts specially clothed with authority for the purpose. The present proceeding was not initiated in the Probate Court or brought therefrom by appeal. Neither can it be contended that the issues here presented come within the provisions of R. S. 1930, c. 91, §36, Par. X, which give to the equity court original jurisdiction to determine the construction of wills and the mode of executing trusts.

The legislature did not create a separate tribunal for the particular matters here under consideration, and carefully specify its procedure unless it intended it to have exclusive jurisdiction over the subject matter in the first instance. There is no reason why the equity court of Maine, though now possessing full chancery powers, should exercise concurrent jurisdiction with courts of probate upon matters specifically embraced within their authority.

See Whitehouse Equity Practice, single volume edition, §35, and the same author in his amplified edition, Vol. 1, §218.

So in *Hawes* v. *Williams,* 92 Me., 483, 43 A., 101, 104, the plaintiff brought a bill in equity as administrator d. b. n. of the widow of the deceased to collect her share from the heirs who had received the money and the court said:

> "His remedy is in the probate court, where such matters are heard and determined. He sues for a distributive

share of an estate. Such action does not lie before the amount to be distributed has been ascertained in the probate court."

In *Graffam* v. *Ray*, 91 Me., 234, 39 A., 569, the Court said:

"The Probate Court has exclusive jurisdiction, subject to appeal to the Supreme Court of Probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative. . . . The Probate Court is invested with ample power in these respects."

Again, in *Loggie* v. *Chandler*, 95 Me., 220 at 226, 49 A., 1059 at page 1061, we find the rule stated:

"It is also a general rule of law and equity that when the legislature has created rights, and prescribed the mode of exercising them and afforded ample remedies, not equitable, for their breach those modes and remedies are exclusive of any remedy in equity."

It is noted that no objection, by demurrer or otherwise, was raised by the defendants to the question of jurisdiction, but as held in *Loggie v. Chandler*, supra, though a cause in equity has been heard upon the bill, answer and evidence, and reported to the Law Court without any demurrer filed, yet if the court finds the allegations in the bill insufficient to grant the relief prayed for, it may *suo moto* dismiss the bill for that reason.

The entry must be

Bill dismissed.

UNITED FELDSPAR & MINERALS CORPORATION
AND LAURA E. PINKHAM

vs.

HARRY E. BUMPUS AND LAURA J. BUMPUS.

Androscoggin. Opinion, June 28, 1944.

Parties. Assignments. Joinder. Landlord and Tenant. Liability of Lessee Acquiring Title by Reversion.

While a single individual may not be both plaintiff and defendant in an action at law, process which violates that principle may be amended by striking out a person so named as a plaintiff.

A plaintiff's omission to file an assignment of a non-negotiable chose in action, or a copy thereof, pursuant to R. S. 1930, Chapter 96, Section 154, if not challenged by a plea in abatement, is cured by the introduction of the assignment in evidence.

The acquisition of title to a reversion by one of the lessees does not discharge entirely the liability for rent of such lessee but only to the extent of the fractional ownership in the title.

Upon the severance of a reversion following a leasehold estate the rental accruing thereafter is apportionable among the owners in accordance with their interests.

The rights of such owners are several not joint and may not be prosecuted by two or more of such owners in a joint action.

Misjoinder of plaintiffs is not waived by failure to raise the issue in answer or demurrer.

ON EXCEPTIONS.

Action, as originally instituted, by five persons alleging themselves to represent the entire title to premises leased by their predecessors in title to the defendants for a long term, seeking to recover as rental the royalty payable for minerals removed under the lease during a period of slightly

less than six years. The five included one of the defendants but she and two others discontinued as plaintiffs prior to trial. Thereafter the suit disclosed two tenants in common claiming to own twenty-one undivided thirtieths of a severed reversion following a leasehold estate seeking recovery from the lessees of that fractional share of the reserved rental.

The declaration alleged that the plaintiffs had acquired from their predecessors in title the right to collect the rental accrued prior to their acquisition of ownership, and assignments running to one of them were introduced in evidence covering a part of his alleged fractional ownership. No evidence was presented that the other plaintiff was either the owner of any part of the title or the assignee of a right to collect any part of the rent. Judgment for defendants. Plaintiffs filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Clifford & Clifford,

Walter L. Gray,

Raymond Burdick, New York City, for the plaintiffs.

George C. Wing, Jr., for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. In the Superior Court this case was tried, with another in which the plaintiffs sought recovery under R. S. 1930, Chap. 109, Sec. 20 against the defendant Laura J. Bumpus alone, by a single Justice without the aid of a jury, pursuant to R. S. 1930, Chap. 91, Sec. 26, with the right of exceptions reserved as to matters of law. The record presents the pleadings, docket entries and decision of that other case as well as the one under consideration, but the companion case was not argued and everything in the record and the transcript of the evidence and exhibits which re-

lates solely to it is entirely disregarded in deciding the exceptions presented in this case, wherein the plaintiffs seek to establish the liability of the defendants as lessees under a lease dated June 1, 1927, granting them the exclusive right to carry on mining operations on the demised property during a term of 50 years. The rental reserved was to be computed on a royalty basis measured by the quantity of minerals removed. It is not disputed that the defendants occupied under the lease and removed the quantity of minerals stated in the account annexed during the period of time therein set forth, nor do the defendants claim that any part of the rent or royalty payable thereon has been paid.

Subsequent to the execution of the lease the title of the two lessors named therein is alleged to have become vested in five owners, all of whom were named as parties plaintiff at the time of the service of the writ. Three of the five, including the defendant Laura J. Bumpus, were stated to hold title to three undivided thirtieth parts of the leased property each, and the declaration recites that their titles were acquired as heirs-at-law of Sybil E. Cummings, one of the lessors. These three discontinued as plaintiffs on their own motion prior to hearing of the cause. The plaintiffs presented no direct evidence to prove the death of Sybil E. Cummings and the only indirect testimony thereof is language in one of the muniments of title of the corporate plaintiff indicating that Allen E. Cummings, her co-lessor, is the administrator of her estate.

The declaration alleges that the remaining twenty-one undivided thirtieth parts of the title to the premises is held by the present plaintiffs, and was so held during all the time when the minerals for which the royalty sought to be recovered was being removed under the lease, twenty parts by United Feldspar & Minerals Corporation and one part by Laura E. Pinkham. The record contains no evidence showing the acquisition of any part of the title to the leased

premises by Laura E. Pinkham, either through grant or by descent, and nothing to establish the identity of the heirs-at-law of Sybil E. Cummings, if her death could be considered as proved by the indirect evidence already noted.

Documents sufficient to demonstrate that the title owned by Allen E. Cummings at the time of the execution of the lease was acquired by the corporate plaintiff on January 2, 1940, were introduced in evidence, but these account for only fifteen undivided thirtieth parts of the entire title. A quit claim deed from the same grantor who conveyed that interest to that plaintiff's immediate predecessor in title, running to that predecessor and purporting to convey all right, title and interest in the premises which he had earlier acquired from Edith Eleanor Stearns and Adelia Abbie Waterhouse (the latter under a deed then unrecorded) can hardly be said to account for five undivided thirtieth parts additional, the persons named not being identified as owners of the property and a written endorsement showing on the back of the deed — "Stearns & Waterhouse 2 15th".

The process as served was not maintainable because Laura J. Bumpus was named as both plaintiff and defendant and it is established law that the same individual may not be both in an action at law. *Portland Bank* v. *Hyde et al.*, 11 Me., 196; *Denny et al.* v. *Metcalf*, 28 Me., 389; *Blaisdell et al.* v. *Pray et al.*, 68 Me., 269; *Hayden et al.* v. *Whitmore et al.*, 74 Me., 230.

This bar to the action was eliminated when Laura J. Bumpus, as already noted, discontinued as a plaintiff, it being proper under R. S. 1930, Chap. 96, Sec. 12, to strike out plaintiffs by amendment. It was decided in *Doherty et al.* v. *Bird et al.*, 116 Me., 416, 102 A., 229, that a plaintiff may be stricken out by amendment, and it cannot be material that the striking out originated in a motion of the parties eliminated to discontinue as plaintiffs rather than in a motion to

amend filed by the parties who continued the prosecution of the claim.

When the suit had been stripped down to an action by two plaintiffs seeking to recover twenty-one thirtieths of the rental, if that result may be assumed to have been accomplished by the striking out of three plaintiffs alleged to own nine undivided thirtieth parts of the title without amendment of the account annexed to the writ, the process was still subject to the technical objection that the plaintiff, United Feldspar & Minerals Corporation, was in fact, although the declaration alleges to the contrary, relying upon a non-negotiable chose in action assigned to it without filing the assignment or a copy thereof with its writ in accordance with the plain requirement of R. S. 1930, Chap. 96, Sec. 154. This omission, however, must be challenged by a defendant who desires to take advantage of it by a plea in abatement, *Weed* v. *Boston & Maine Railroad,* 124 Me., 336, 128 A., 696, and no such plea having been filed in the cause the deficiency was eliminated by the introduction in evidence of all assignments necessary to prove that the plaintiff in question had become the owner of the right to collect that half of the rental applicable to the share of the lessor, Allen E. Cummings, in the property at the time the lease was given, accruing prior to the date of its ownership thereof.

When the reversion following a leasehold estate is severed the rental reserved in the lease accruing thereafter is apportionable among the owners in accordance with their interests. 36 C. J., 380, Par. 1249; 7 R. C. L., 912, Par. 113; 14 Am. Jur., 163, Par. 97; *Bowser* v. *Cox,* 3 Ind. App., 309, 29 N. E., 616, 50 Am. St. Rep., 274; *Cole* v. *Patterson,* 25 Wend. (N. Y.), 456. In *Kimball et al.* v. *Sumner et al.,* 62 Me., 305, it was declared that while tenants in common must always join in an action for injury to real property, because any damage thereto would be common to their estates, and must

either join or sever in actions *ex contractu*, according to the terms of the contract sued, when their title had been acquired subsequent to the execution of a contract they might be considered as having an option either to join or sever. In *Eveleth* v. *Sawyer*, 96 Me., 227, 52 A., 639, it was stated that this suggested right of election was subject to objection, but the point there raised, that any particular contract must entitle parties having similar interests under it to proceed either jointly or separately, has no application to the present facts. The contract under consideration was joint when made but the reversion was severed and the right to recover rent became apportionable when Allen E. Cummings conveyed his half of the title and again when the interest of Sybil E. Cummings passed by descent, if it did, to her heirs-at-law.

It seems unnecessary to consider the effect of the alleged acquisition by the defendant Laura J. Bumpus of three undivided thirtieth parts of the title which the declaration alleges vested in her as an heir-at-law of Sybil E. Cummings. If we assume the death of that lessor and the fact that Laura J. Bumpus was one of her heirs-at-law entitled to that share in her property which would represent three thirtieths of the entire title, she was not liable after such acquisition for the entire rent nor was she entirely discharged from all liability as one of the lessees, "but only *pro tanto*." 16 R. C. L., 939, Par. 446; 32 Am. Jur., 376, Par. 458; *Nellis* v. *Lathrop*, 22 Wend, (N. Y.), 121, 34 Am. Dec., 285.

When the case was heard the plaintiff United Feldspar & Minerals Corporation was possessed of a right in severalty to collect from the defendants that half of the accrued rental which its ownership of the earlier title of Allen E. Cummings represented, which right, as to the time prior to its acquisition of title, passed to it under assignments relating thereto. If it was in fact the owner of an additional five undivided thirtieth parts of the title and the assignee of the right to rental therefor prior to acquisition thereof, to make up the

full share it was alleged in the declaration to own, its evidence on the point was not so clearly sufficient that a decision to the contrary could be declared error of law.

Counsel for the plaintiffs frankly admitted at oral argument of the exceptions that no title in the plaintiff Laura J. Pinkham had been proved, and under the present process whereby the owner and assignee of a part is seeking to pursue its several right jointly with another person owning no part of the title, there is a misjoinder of plaintiffs which is a bar to the action. Such is the rule at common law, 39 Am. Jur., 994, Par. 119. A misjoinder of plaintiffs is not waived by failure to raise the issue in answer or demurrer, 47 C. J., 220, Par. 425 c; *Wintergerst* v. *Court of Honor,* 185 Mo., A., 373, 170 S. W., 346. The result would have been no different had the title alleged in Laura J. Pinkham been proved. Claims which are several cannot be united in a single action since a judgment for one of plural plaintiffs severally would not correspond with the declaration. *Ellison et al.* v. *New Bedford Five Cents Savings Bank,* 130 Mass., 48; *Adams et al.* v. *Richardson et al.,* 268 Mass., 78, 167 N. E., 254. The issue presented below was whether the two plaintiffs who continued to prosecute the action to its close were entitled to a joint judgment and decision contra presents no error.

Exceptions overruled.

ANDRE E. CUSHING
TREASURER OF PENOBSCOT COUNTY
vs.
JOHN L. BABCOCK AND CITY OF BANGOR.

Penobscot. Opinion, July 5, 1944.

Constables. Police Officers. Fees from State.

An order of the City Council of Bangor providing "that no employee of the City of Bangor shall be allowed any compensation for the arrest of any person, or for the commitment of any person to any state institution, except the actual expense incident thereto" means that the City itself will not allow compensation to any of its employees for arrest or commitment to any state institution, but the City is not entitled to fees earned by a constable although he is a police officer of the City of Bangor.

The defendant Babcock in delivering prisoners to state institutions represented the State of Maine and was entitled to receive from the treasury of Penobscot County the amount of the fees earned by him as provided in R. S. 1930, Chapter 5, Sections 12, 14, for services rendered.

The correctness of the award to the defendant the City of Bangor for so much as it had advanced to the defendant Babcock for expenses was not before the Law Court inasmuch as such provision was not prejudicial to the appellant and was not objected to by the defendant Babcock.

ON APPEAL BY THE CITY OF BANGOR.

An action in equity by the plaintiff in his capacity as Treasurer of Penobscot County to compel the defendants to interplead and present their respective claims to a fund in his hands. The defendant Babcock was a police officer of the City of Bangor and was also a constable. While holding these positions he removed prisoners to state institutions in compliance with precepts issued by the Bangor Municipal Court. His fees for such services were payable from the treasury of

Penobscot County. The City of Bangor made claim upon the County for the fees. Babcock also laid claim to them. The judgment awarded to the City of Bangor the amount advanced by the City to Babcock for expenses and the balance to Babcock. The City of Bangor appealed. Appeal dismissed. Decree affirmed. The case fully appears in the opinion.

Randolph A Weatherbee, County Attorney for the plaintiff.

Michael Pilot, for the defendant, Babcock.

B. W. Blanchard, for defendant, City of Bangor.

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

CHAPMAN, J. This is an action in equity by the plaintiff in his capacity as Treasurer of Penobscot County to compel the defendants to interplead and present their respective claims to a fund amounting to $287.84 in the hands of the plaintiff in his said capacity. The case comes to this court upon appeal by the City of Bangor from the decree of the sitting Justice who heard the case.

It was not in dispute that the City of Bangor, acting through its city council, passed an order in the following terms:

> "ORDERED, That no employee of the City of Bangor shall be allowed any compensation for the arrest of any person, or for the commitment of any person to any state institution, except the actual expense incident thereto."

This order was in effect at the time of the occurrence of the following facts.

The defendant, Babcock, was a police officer of the City of Bangor, holding such position in accordance with the provisions of the charter of the city. He was also a constable elected

in accordance with the provisions of R. S. 1930, Chapter 5, Sections 12, 14.

While holding these positions, in compliance with precepts issued by the Bangor Municipal Court, Babcock on several occasions removed prisoners from the court to state institutions. He made return of execution of these precepts as constable. The Bangor Municipal Court approved the statutory fees charged and the County Commissioners for Penobscot County ordered the same paid to Babcock; whereupon the City of Bangor made claim upon the county for the fees, basing its claim upon the provisions of the order above quoted. The Justice interpreted the order to mean that the city itself will not allow any compensation to any of its employees for arrest or commitment to any state institution.

The Justice was correct in his interpretation. The only effect of such order was to prevent the payment from the City Treasury for the service of such precepts. It was well within the authority of the Police Department for the City of Bangor to prevent the performance of the service by one of its officers, if such performance would interfere with the duties which he was bound to render to the city; but if the officer were allowed to execute the precepts and did so, he was entitled to the statutory fees and the same, approved by the Bangor Municipal Court which had issued the precepts, were payable to him from the Treasury of Penobscot County. In the execution of the precepts he represented the State of Maine and was not answerable to the City of Bangor.

Cobb v. *City of Portland,* 55 Me., 381; 92 Am., Dec., 598; *Andrews* v. *King et als,* 77 Me., 224; *State ex rel Anderson* v. *Fousek,* 91 *Mont.,* 448, 84 A. L. R. 303, 8 P. 2d. 791.

The Justice in his finding stated that, of the total amount of $287.84 which had been charged as fees by the officer and approved by the Bangor Municipal Court, the sum of $13.65 covered actual expense of the officer, which sum had been

advanced by the City of Bangor to the officer and which sum the officer admitted was due from him to the city. The Justice, distinguishing this item from the remaining sum of $274.19, found that this sum of $274.19 should be paid by the plaintiff in his capacity as Treasurer of Penobscot County to the said Babcock; and that the sum of $13.65 should be paid to the City of Bangor. The decree entered so ordered.

Whether the City of Bangor was entitled to the provision in the decree that the plaintiff should pay to it the sum of $13.65 or that it was a matter entirely between the City of Bangor and Babcock is not before us. Such provision was not prejudicial to the appellant and is not objected to by Babcock.

We find no error in the decree in respect to the issues before us. The entry must be:

Appeal dismissed.
Decree affirmed.

ARTHUR W. LEEK

vs.

BETTY COHEN.

Penobscot. Opinion, July 8, 1944.

Master and Servant. Scope of Employment. Evidence.

An employer is liable for damage caused by the negligence of an employee so far and only so far as it arises in the course of his employment and within the scope of his authority.

Whether an employee is acting within the scope of his employment at any particular time and place is, under proper circumstances, a question of fact for jury determination.

The question whether undoubted facts justify a finding that an employee at a particular time and place was acting within the scope of his employment is for determination by the court.

An employer is not liable for the negligence of an employee who has deviated from the course of his employment occuring prior to the time when the purpose of his deviation has been accomplished.

Factual finding that the person operating defendant's motor vehicle in the instant case was acting within the course of his employment had no support in competent evidence.

Omission to produce as witnesses two girls who were riding in defendant's taxicab at the time of the accident carries no greater inference against the defendant than against the plaintiff.

ON MOTION FOR NEW TRIAL.

Action to recover damages alleged to have been suffered by plaintiff as a result of collision between his motor vehicle and a taxicab owned by defendant and driven by one of her employees at the time of the accident. At the time of the accident the driver of defendant's taxicab and a fellow employee were driving two girls to a restaurant for breakfast. The employees had finished their regular day's work and

were using the taxicab for the ostensible purpose of looking for a lost hub cap; but, at the time of the accident, they were not proceeding toward the place where the search was to be made. The jury awarded damages to the plaintiff. Defendant moved for a new trial. Motion sustained. Verdict set aside. New trial granted. The case fully appears in the opinion.

Edward Stern, for the plaintiff.

Michael Pilot, for the defendant.

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

MURCHIE, J. The defendant here, after jury verdict awarding $800 to the plaintiff, brings the case forward on a general motion for new trial but does not contend that the allegation of excessive damages can be sustained. The case must be resolved on the question of liability.

The only factual issue involved is whether two girls who were riding in one of defendant's taxi-cabs with two of her employees when the driver thereof negligently collided with a motor vehicle owned and operated by the plaintiff were passengers of the defendant. If so, the accident might be considered as occurring within the scope of the employment of that driver. Counsel for the plaintiff argues that they were because the employees referred to them as "passengers" in statements made to police officers shortly after the accident. They designated them in the same manner in their testimony given at the trial, but it is very clear on the record that they were being driven to a restaurant for breakfast as personal guests of the driver and his fellow employee and not as passengers of the defendant. Both men testified that one of the girls sat in the front seat with the driver and the other in the rear seat with his companion, notwithstanding the latter in his statement to the police had indicated that

he was riding in the front seat. Confronted with his contradictory statement in cross-examination, he insisted that his verbal testimony was correct and that he might have made the earlier misstatement as a result of nervousness.

The men had driven taxi-cabs for the defendant prior to the accident, their working hours being from 7 o'clock in the evening to 7 o'clock in the morning, and their presence in one of her cabs at 7:45 A.M. when the accident occurred is accounted for by the fact that one of them in his night driving on the immediately preceding 12-hour shift had lost a hub-cap at or near Bull's Eye Bridge, so-called, in Bangor, and had been directed to go out and look for it in the early morning.

The testimony offers no explanation of the reason why the employee who was told to search for the hub-cap during his working hours started on the errand after his day's work was complete, but the jurors might have inferred that his time was fully occupied to the end of his day on his employer's work. If this be assumed, however, there is no basis for a finding that he was so engaged when plaintiff suffered his damage.

The evidence is undisputed that on the morning of the accident the defendant's employees, who had just completed their regular day's work, decided to go together to hunt for the hub-cap. Before starting on the mission, however, they went from the defendant's place of business on Park Street to Essex Street to pick up two girl friends and take them to Pilot's Grill for breakfast. There is no suggestion of competent evidence that the girls were passengers of the defendant or of any fact from which an inference to that effect might properly be drawn, nor could it reasonably be said that one intending to travel from the defendant's office to Bull's Eye Bridge might head for his destination by going either to Essex Street or by driving out Hammond Street to Pilot's Grill.

The principles of law governing the liability of a master for damage caused by the negligence of his servant are thoroughly established. The fundamental rule, as aptly stated in *Copp* v. *Paradis*, 130 Me., 464, 157 A., 228, is that the master is liable for any negligence of a servant arising in the course of his employment and within the scope of his authority. Implicit in the statement of the rule are the limitations that a master is not responsible for all the acts of one who is his servant or for any beyond the scope of the defined field.

Whether or not a servant in performing a particular act at a definite time and place was acting within the scope of his employment is under proper circumstances a question to be determined by the trier of facts. *Good* v. *Berrie*, 123 Me., 266, 122 A., 630; *Pearl* v. *Cumberland Sand & Gravel Co.*, 139 Me., 411, 31 A. (2d), 413; *Stevens* v. *Frost*, 140 Me., 1, 32 A. (2d), 164. As stated in the last cited case, however, it is for the Court to say whether the evidence adduced in a particular case would warrant affirmative finding on the fact. Here there is no such evidence. Defendant's employees were operating her motor vehicle to play about on a frolic of their own, using a profession of intent to act upon her business as an excuse for using her taxi-cab. The intention to look for the master's hub-cap when the frolic ended, to which one of the employees testified and which the other did not deny, does not change the fact that until that end was reached, they were headed elsewhere than on the master's business. They were entertaining friends of their own. In *Pearl* v. *Cumberland Sand & Gravel Co.*, supra, where an employee deviated slightly from the business of his master, factual finding that the purpose of his deviation had been accomplished and the course of his employment resumed was held to be justified by the testimony. Here the deviation was not slight but substantial, and there is no basis for a claim that its purpose had been satisfied when the negligence and resulting damage occurred.

The plaintiff urges that defendant's failure to testify in her own behalf, or to produce either those of her employees who were at her place of business when the ones whose activities are in issue drove away therefrom on the morning of the accident, or the girls who were in her cab when it occurred, imports that she prefers all adverse inferences properly deducible therefrom to any definite testimony such witnesses might have been able to present on her behalf. For this contention the recent cases of *Devine* v. *Tierney et al.*, 139 Me., 50, 27 A. (2d), 134, and *Bubar* v. *Bernardo*, 139 Me., 82, 27 A. (2d), 593, are cited as authority. It seems sufficient answer as to the employees that persons who did not witness the accident could have no knowledge of facts of controlling value and that the omission to present the girls as witnesses can carry no greater inference against the defendant than against the plaintiff.

On the record factual finding that the person operating defendant's motor vehicle when plaintiff was damaged in collision therewith was an employee of the defendant acting within the scope of his authority and in the course of his employment has no support in competent evidence.

Motion sustained.
Verdict set aside.
New trial granted.

ERNEST PARADIS *vs.* ELIZABETH THORNTON.

Androscoggin. Opinion, July 8, 1944.

Real Estate. Brokers' Commissions.

The words "sale" and "sell" in contracts between real estate salesmen and the owners of property who employ them have well defined meanings that do not restrict them to cover executed sales alone. The words "to sell" or "to make a sale" in such contracts mean to furnish the owner of the property with a purchaser "able, ready and willing" to buy on that owner's terms.

ON EXCEPTIONS.

Action by the plaintiff to recover a commission on the sale of real estate of the defendant. On September 11th the plaintiff had presented a customer "able, ready and willing" to buy the property at defendant's figure, but, upon request for the papers required for drafting the deed, the defendant refused to complete the trade because a competitor of the plaintiff had previously presented a customer willing to buy but whose ability to buy depended on his ability to raise money for the purchase price. On September 13th, the customer presented by plaintiff's competitor had secured the money necessary and defendant sold the property to him and paid the competitor a commission. The referee to whom the case was referred found for the plaintiff. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Armand A. Dufresne, for the plaintiff.

Clifford & Clifford, for the defendant.

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

PER CURIAM.

Defendant's exceptions to the acceptance of a referee's report awarding plaintiff a commission on the sale of real estate, the right to except on questions of law having been reserved, allege seven grounds of error, but all of them must be held groundless if the record contains competent evidence that the plaintiff sold the property in question.

There is no conflict of testimony as to the meaning and effect of the words exchanged between the parties to express their contractual undertaking, although they do not agree upon the phrasing. It is undoubted that on plaintiff's solicitation of an opportunity to sell defendant's tenement house when other agents were already working on it, there was mutual understanding that he should be one of several salesmen and that the agent who made a sale should get the commission.

The conversation between the parties took place in early August. On September 11th the plaintiff took a prospective customer to the premises, went over them with the defendant and the prospect, and accepted a cash payment on account in a transaction which fixed the selling price at the figure authorized by defendant. Upon request for the papers which would permit the drafting of a deed, the defendant refused to complete the trade because another of her agents had tentatively arranged a sale several days earlier conditional upon the ability of the intended purchaser to raise a part of the purchase price on a mortgage loan and defendant had agreed to wait until September 13th for decision as to whether the loan would be available.

On September 13th the loan was arranged and defendant sold the property under the tentative sale, paying a commission to plaintiff's competitor who had produced the purchaser

thereunder. She now contends that her conversation with plaintiff contemplated a completed sale with deed delivery and payment of the purchase price, and that if the plaintiff did not so understand it there was no meeting of the minds and no contract.

The words "sale" and "sell" in contracts between real estate salesmen and the owners of property who employ them have well defined meanings that do not restrict them to cover executed sales alone. As stated in *Walker et al. v. Russell,* 240 Mass., 386, 134 N. E., 388, the words "to sell" or "to make a sale" in such contracts mean to furnish the owner of property with a purchaser "able, ready and willing" to buy on that owner's terms. The plaintiff was entitled to his commission if he found such a purchaser before any of his competitors and the referee found that he did. A competitor, it is true, had earlier found a prospect who was "ready and willing" to buy, but that intended customer was not "able" to do so and had not committed himself to pay the purchase price on September 11th when the plaintiff negotiated a sale of property then unsold. Having done so, he is entitled to the agreed compensation.

Exceptions overruled.

CHARLES ROSENBLOOM *vs.* OLGA LONDON.

Cumberland. Opinion, July 19, 1944.

Real Estate Brokers. Commissions.

The rule is well settled that to entitle a real estate broker to his commission he must produce a customer ready, able and willing to buy on the terms furnished by the owner.

ON MOTION FOR NEW TRIAL.

Action by plaintiff to recover a commission on real estate. The plaintiff produced a customer who was willing to buy but who was unable to meet the terms of the owner. The jury found for the defendant. Plaintiff moved for a new trial. Motion overruled. The case fully appears in the opinion.

Harry E. Nixon, for the plaintiff.

Isaac Edward Cohen, for the defendant.

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

PER CURIAM.

This is an action to recover a real estate commission. After a verdict for the defendant the case is before us on a general motion by the plaintiff for a new trial.

The defendant who desired to sell certain real estate owned by her listed it for sale with the plaintiff, a real estate broker. The price was $3,500 of which $500 was to be paid down. The balance presumably was to be on a mortgage. The plaintiff produced a purchaser who was willing to buy the property and a payment of $50 was made leaving a bal-

ance of $450 to be paid in cash. The deal fell through because the purchaser expected to finance the purchase by assuming certain mortgages, which were on the property, and by giving to the defendant a third mortgage for the balance. There is no evidence whatever that the defendant ever agreed, either with the real estate broker or with the purchaser, to accept a third mortgage as part of the payment of the purchase price.

The rule is well settled that to entitle a real estate broker to his commission he must produce a customer ready, able and willing to buy on the terms prescribed by the owner. *Smith* v. *Lawrence,* 98 Me., 92, 56 A., 455; *Grant* v. *Dalton,* 120 Me., 350, 114 A., 304.

The jury found that the plaintiff produced no such purchaser and the verdict is amply supported by the evidence.

Motion overruled.

MANUFACTURERS NATIONAL BANK
TRUSTEE UNDER THE WILL OF HERBERT F. SHAW
AND
CARLETON E. TURNER, HELEN C. CUSHMAN AND
MARJORIE R. MOORE, TRUSTEES UNDER THE WILL OF
HERBERT F. SHAW
vs.
ADELBERT S. WOODWARD.

Androscoggin. Opinion, July 26, 1944.

Charitable Trusts.

Equity will authorize a deviation from the details prescribed by a testator for the administration of a trust provided for in his will.

It is a natural and necessary branch of the jurisdiction over charitable trusts that the means or details prescribed for the administration of such a trust should be subject to be molded so as to meet any exigency which may be disclosed by a change of circumstances and to relieve the trust from a condition which imperils or endangers the charity itself or the funds provided for its endowment and maintenance.

ON REPORT.

Bill in equity to determine whether the terms of a charitable trust may be so modified as to prevent its failure. By the terms of his will Herbert F. Shaw gave his house and lot in trust to the town of Mount Vernon for use as a library and provided that the residue of his estate be kept as a permanent fund the income from which to be used to keep the buildings in repair and to buy suitable books for the library. The bill alleged that the trust would fail unless a part of the income be used for maintenance, such as the employment

of a librarian and a janitor and to pay for heat, light and insurance. Held that the evidence sustained the allegations of the bill. Case remanded to sitting justice for a decree in accordance with the opinion. Costs and reasonable counsel fees to be fixed by the sitting justice, paid by the trustees and charged in their probate account. The case fully appears in the opinion.

Frank T. Powers, for the plaintiffs.

George C. and Donald W. Webber, for the defendant.

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

THAXTER, J. This bill in equity is before us on report. Three times before, problems arising out of the effort of Herbert F. Shaw to provide by his will for a public library for the Town of Mount Vernon, have been before this court. The first case was dismissed without a consideration of the merits. The issues raised by the others have been decided. *Manufacturers National Bank, Executor,* v. *Woodward,* 138 Me., 70, 21 A. (2d), 705; *Manufacturers National Bank et al.* v. *Woodward,* 140 Me., 117, 34 A. (2d), 471. The first of these latter two arose out of the declination by the town to act as trustee under the will, which gave the testator's land and house with its contents to the town as trustee and the residue of the estate to the bank as trustee, both of which trusts were designed "to serve the common purpose of providing a public library in the town." It was held that the trust would not be permitted to fail because of the refusal of the town to accept the trust. The case was remanded for a decree appointing new trustees. These were appointed and the second of these cases, reported in 140 Me. 117, 34 A. (2d), 471, was brought by these trustees and by the bank seeking a construction of the first clause of the will. The essential part of this clause reads as follows:

> "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."

The court was asked whether the will could be so interpreted as to permit the use of the income of the fund for the necessary expenses in equipping and operating the library. We held that no foundation was laid for such an interpretation, for the bill did not allege and there was no evidence that the trust would fail if such deviation was not permitted. Following the direction of this court the bill was dismissed but such dismissal was without prejudice to the right of the plaintiffs to bring another bill seeking relief on any proper equitable ground, either under the rule of *cy pres* or in accordance with the doctrine approved in *Porter* v. *Porter*, 138 Me., 1, 20 A. (2d), 465, that the mode of administering a trust may be deviated from where to do so is necessary to carry out the purpose of the creator of the trust.

The present bill, brought by the same parties, alleges that there is no money and no prospect of obtaining any for the running expenses of the library such as the payment for a janitor and librarian, for fire insurance and for heat and light, and that the trust will fail unless the trustees are permitted to use a part of the income of the fund for these purposes. The evidence sustains these allegations.

The contention of the defendant is that it will take so large a part of the income to pay for maintenance that there will not be a sufficient amount left for the purchase of books and that the real purpose of the testator will be defeated by such suggested modification of the terms of the will. We do not think that this result will follow. On the con-

trary we are of opinion that, if the primary requirement of maintenance is taken care of, money will be forthcoming for the purchase of suitable books. The basic contention of the defendant is that there can be no deviation from the express provisions of the will because this gift was not for a general charitable purpose, but rather was limited to a particular object, and must therefore be carried out strictly according to the terms as expressed by the testator.

In our opinion the primary intent of the testator was to establish a public library in the Town of Mount Vernon. The giving of his house and lot and the establishment of the trust fund were the means to carry out such purpose. Under such circumstances it is well settled that equity will apply the rule of *cy pres* to prevent a failure of such general charitable intent. *Snow et al.* v. *The President and Trustees of Bowdoin College et als.*, 133 Me., 195, 175 A., 268, and cases therein cited. In applying such rule the court may be called upon, not only to deviate from the particular means which the testator has prescribed to carry out his wishes, but may apply the gift to a different object of a similar character. *Jackson* v. *Phillips*, 14 Allen, 539; *Snow et al.* v. *The President and Trustees of Bowdoin College et als.*, supra, 200, and cases therein cited.

It necessarily follows that if the court may, to prevent a failure of a charitable trust, apply the gift to a different object of a similar character, it may modify the method prescribed by the testator for carrying out the specific object. It is doubtful if such procedure represents a true application of the rule of *cy pres*, for a deviation from the express terms of the grant is often permitted to prevent the failure of a trust which is not charitable. See *Porter* v. *Porter*, supra, and authorities therein cited. See the following authorities as illustrating the distinction between the use of the *cy pres* power of the court and the modification which equity sanc-

tions of the method designated by the creator of the trust for its administration. *Dunn* v. *Ellisor,* 225 Ala., 15, 141 So., 700; *Shannon* v. *Eno,* 120 Conn., 77, 179 A., 479; *Crerar* v. *Williams,* 145 Ill., 625, 34 N. E., 467, 21 L. R. A., 454; *Webb* v. *Webb,* 340 Ill., 407, 172 N. E., 730, 71 A. L. R., 404; *National Bank of Greece* v. *Savarika,* 167 Miss., 571, 148 So., 649; *Lackland* v. *Walker,* 151 Mo., 210, 52 S. W., 414; *City of Philadelphia* v. *The Heirs of Stephen Girard,* 45 Pa., 9, 84 A. M. Dec., 470; *City of Providence* v. *Payne,* 47 R. I., 444, 134 A., 276; *Tincher* v. *Arnold,* 147 Fed. 665, 7, L. R. A. N. S., 471, 8 Ann. Cas. 917; 11 C. J., 358; 14 C. J. S., p. 510, Sec. 50.

In *Stevens* v. *Smith,* 134 Me., 175 (183 A., 344) the court at page 178 quotes with approval the following language from the case of *Lackland* v. *Walker,* supra:

> " 'It is a natural and necessary branch of the jurisdiction over charitable trusts that the means or details prescribed for the administration of such a trust should be subject to be molded so as to meet any exigency which may be disclosed by a change of circumstances, and to relieve the trust from a condition which imperils or endangers the charity itself, or the funds provided for its endowment and maintenance.' "

The case of *Tincher* v. *Arnold,* supra, raises almost exactly the same question as is now before us. A testator devised and bequeathed the residue of his estate to trustees to manage and when a fund of a stated amount had been accumulated to erect a building to be used as a school for the purpose of educating boys between the ages of 12 and 18 years who were unable to educate themselves, and then directed that the remainder of the fund should be kept at interest and the net income used "for the purpose of paying teachers employed in said school." One of the questions before the court on a bill in equity brought by the heirs-at-law to have the

residuary clause of the will held void was, to use the language of the court in its opinion, whether "the will imperatively requires all income to be used for teachers' wages, leaving nothing for other things absolutely essential, such as heating, lighting, care of the schoolhouse, repairs, taxes, and board and clothing of the boys." The court held that education was the dominant purpose of the charity and that to prevent the failure of that purpose the court would permit the use of a portion of the income for essential maintenance. The court said, page 673:

> "The whole income cannot be applied, as literally directed, to teachers' wages, since there can be no teaching without other things. To earn wages, or have education, or carry on the designated school, or make it in any degree successful, or even tolerable, there must be heat, and light, and paid labor. To mention education, a school, a building, and teachers, is to impliedly mention those things essential to their success, if not to their very existence. A literal, iron-bound construction makes the plan impossible, and defeats it. A liberal one saves it, through a mere change of detail, and thus gives effect to the testator's worthy purpose. *'Qui haeret in litera, haeret in cortice.'*
>
> "A limited application of the equitable rule of *cy pres* or the so-called 'doctrine of approximation,' is relied on for permitting a change of plan, by which the income, restricted by the will to teachers' wages, may be partly applied to other expenses necessarily preceding them. This is on the theory that the testator's main purpose was education, and that he could not have intended to so limit and hamper the use of the money as to defeat the very object designed. This dominant purpose to found a school and furnish the means of education being clear, imperfect or impossible details of method may be cor-

rected, so long as the main object — education — is secured and preserved."

In the case now before us it is the duty of the court, in accordance with these well recognized principles, to so vary the method prescribed for carrying out this trust that the underlying wish of the testator to provide a library for the Town of Mount Vernon may be fulfilled. To that end the case should be remanded to the sitting justice with directions to order that so much of the net income of the trust fund as is not necessary for the repair of the buildings and for the purchase of suitable books shall be used to pay for general maintenance of the buildings, such as heat, light, and insurance and also for the payment of the wages of a janitor and librarian. If at a later time conditions change so that it is advisable that the amounts allotted for these purposes shall be altered, the door of the court is open to any interested party to seek such modification of the method adopted as will carry out the benevolent purpose of the testator. *Snow et al.* v. *The President and Trustees of Bowdoin College et al.*, supra.

Case remanded to sitting justice for a decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by the sitting justice, paid by the trustees and charged in their probate account.

CARROLL H. WENTWORTH ET AL.

vs.

PHILIP F. CHAPMAN ET AL.

Cumberland. Opinion, August 5, 1944.

Evidence.

Carbon copies of letters written by plaintiffs' attorney to the defendant Chapman constituted secondary evidence and under Rule of Court XXVII were not admissible unless previous notice had been given to produce the originals, which was not done. Furthermore said letters contained self-serving statements. Their admission in evidence was erroneous and prejudicial.

ON EXCEPTIONS.

Action on the case by plaintiffs to recover dividends alleged to have been unlawfully voted and wrongfully and illegally paid to stockholders of Preble Corporation. Action was stayed on ground that defendant Chapman was in the military service. Later, on motion of plaintiffs the order staying proceedings was ordered vacated and the case set for trial. Defendants excepted. One exception was to the admission of evidence. Exception sustained. The case fully appears in the opinion.

Franklin R. Chesley, for the plaintiffs,

Frank H. Haskell,

Chapman & Chapman, by *Clark D. Chapman,* for the defendants.

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

PER CURIAM.

The issues raised by the exceptions herein originate in an action on the case brought by the plaintiffs against the defendants Philip F. Chapman et al., former directors of the Preble Corporation, to recover dividends alleged to have been unlawfully voted and wrongfully and illegally paid to stockholders by said Preble Corporation in violation of Chap. 51, Sec. 34, R. S. 1916. The writ, dated September 30, 1943, was returnable to the November term, 1943, of the Superior Court for Cumberland County. Defendant Chapman appeared specially by attorney and filed a motion requesting the presiding Justice to stay further proceedings in said action (as provided in the Soldiers' and Sailors' Civil Relief act of 1940, October 17, 1940, Chap. 888, Sec. 201, 54 Stat. 1178-1181, 50 U. S. C. A. Appendix Par. 521), for the reason, as stated in the exceptions, "that he is in the military service of the United States and is unable to properly prepare and present his defense in said action."

The motion was granted and the action was stayed until further action of the Court. This decision was rendered on November 29, 1943. On the first day of the December term, 1943, to wit, December 7th, the plaintiffs filed a motion to vacate the order and decree staying said proceedings. Following hearing on the motion to vacate the said order filed at said December term, the Judge then presiding ruled that the said Chapman is a Temporary Coast Guard Reservist and is not entitled as such to the benefits of the Soldiers' and Sailors' Civil Relief Act, and ordered that said stay order, dated November 29, 1943, be vacated, and the Court then further ordered that said case be in order for trial at the February term of the Superior Court within and for said County of Cumberland on the first Tuesday of February, A. D. 1944.

The defendants present exceptions to five rulings of the Court below, viz., (1) admission of evidence, (2) that the

said Chapman is not in the military service of the United States and is not unable properly to prepare and present his defense in said action, (3) sufficiency of probative evidence in support of ruling that said Chapman is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act, (4) constitutionality of said Act as against the claim that "it abridges his" (Chapman's) "privileges and immunities as a citizen of the United States," and (5) the vacating and overruling of the previous order granting a stay of said action.

Of these exceptions, only the first requires consideration. This raises the admissibility of certain carbon copies of letters written by plaintiffs' attorney to defendant Chapman. These copies constituted secondary evidence, and under Rule of Court XXVII were not admissible, unless previous notice had been given to produce the originals, which was not done. Futhermore, the letters contained self-serving statements. We consider the admission of this evidence erroneous and prejudicial.

Exceptions sustained.

GRACE N. JOHNSON

vs.

MAINE CENTRAL RAILROAD CO.

Lincoln. Opinion, August 14, 1944.

Railroads. Evidence. Negligence. Due Care. Exceptions.

The long established "look and listen" rule is not confined to those who are conversant with the situation and know the location of railroad grade crossings.

The law requires that railroads exercise care and prudence commensurate with the degree of danger involved.

The railroad could not be deemed negligent in complying with order of Public Utilities Commission.

In the instant case unlowered gates could not be held to constitute an invitation to plaintiff to proceed inasmuch as she did not see the gates.

There was plenty of evidence, in the instant case, that the plaintiff was oblivious to admonitory signals which could clearly be seen and heard; and if weather conditions were such that she could not hear or see them it was incumbent on her, in the exercise of due care, to stop temporarily.

Conduct on the part of the plaintiff in the instant case, without which the accident would not have happened, fell short of that of the typically prudent man, alert for safety.

Testimony as to knowledge of other accidents which had previously occurred at this crossing was inadmissible. It is well settled that in cases of negligence the evidence must be confined to the time, place and circumstances of the injury.

Testimony as to whether there were lights and signals on both sides of the track at other crossings was inadmissible.

Evidence of the opinion of a proffered witness that the method of protection at the crossing was inadequate was inadmissible, opinion evidence being admissible only when the question at issue is such that the jury are incompetent to draw their own conclusions from the facts.

Doubt as to the regularity of exceptions may be regarded as waived when they are argued on both sides, even though not seasonably filed or assented to by opposing counsel and have only a qualified endorsement by the presiding justice.

ON EXCEPTIONS.

Action to recover damages for personal injuries sustained by the plaintiff as a result of a collision between her automobile and a train of the defendant at a grade crossing. The plaintiff, a summer visitor in Maine, testified that she was unfamiliar with the locality, that weather conditions were such that vision was obscured and that she was entirely unaware of the crossing or of the approaching train. Testimony for the defendant was to the effect that there were flashing lights, a standard railroad sign 259 feet from the crossing, a pole bearing the sign "railroad crossing" that the engine whistled twice and the engine bell was ringing continuously, that, though the gates were not lowered, that was by order of the Public Utilities Commission, the gates being lowered only during the time when freight switching was being done. The court ordered a verdict for the defendant. The plaintiff filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Harvey D. Eaton,

Arthur Garfield Hays, New York, for the plaintiff.

Perkins, Weeks & Hutchins, for the defendant.

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

MANSER, J. This action is for personal injuries sustained as a result of a railroad grade crossing accident. At the conclusion of the evidence, the court ordered a verdict for the defendant. The case comes forward on exceptions to that ruling and exceptions to the exclusion of certain evidence.

The plaintiff was operating a Ford coupe and the collision occurred with a steam passenger railroad train at the Main Street crossing in Wiscasset on the morning of June 26, 1938. The plaintiff sustained grievous injuries. The train, consisting of engine, baggage car, two coaches and three sleeping cars (not occupied), was being operated from Portland to Rockland, and was scheduled to stop at the Wiscasset station, about 800 ft. beyond the crossing. The plaintiff had started out at about 5:30 A.M. standard time from a place near Thomaston, and had just crossed the bridge over the Sheepscot River entering Wiscasset. This bridge is a long one, 22 ft. wide, and runs straight towards the crossing and at right angles thereto. There is a slight 1% down grade for about 900 ft. to the proximity of the crossing, where the road levels off. The roadway of the bridge is of asphalt planking, and from the bridge is of bituminous construction. There are buildings in the vicinity of the crossing, one located 17 ft. south of the tracks on one side of the road, and another 25 ft south on the other side. The distance between the two buildings is 50 ft.

The plaintiff alleges due care on her part, and that the railroad was negligent because of a lack of suitable and sufficient signs, signals and warnings to approaching travelers.

According to the undisputed testimony, the visual evidences of the railroad crossing at grade were as follows:

Two parallel sets of railroad tracks; a standard railroad sign erected under State direction 259 ft. from the crossing; a pole carrying cross bars, bearing the sign "Railroad Crossing"; a flashing signal, having six lights, with oscillating arm and disc swinging thereunder; railroad gates or bars extending upwards; a gateman's shanty, and finally the train itself approaching at a speed of from 8 to 10 miles per hour, but somewhat obscured by the buildings near the crossing.

The audible evidences were: Engine whistle started at the whistling post, a thousand feet away, and a second time

when in closer proximity to the crossing; the engine bell, operated automatically by air valve, and ringing continuously from the whistling post until the accident had taken place; a gong attached to a wigwag signal and ringing steadily; the noise of a steam passenger train in operation.

The plaintiff, possessed of normal vision and hearing, was oblivious of all these portents of peril until the forward part of the engine passed in front of her car, when it was but a few feet away. The collision immediately followed.

The plaintiff was a summer visitor who was unfamiliar with the highway route, having passed over it but once and then travelling in the opposite direction. Her explanation of her failure to apprehend any of the signals of an approaching train directly crossing her line of travel was that weather and road conditions prevented. She asserts that it was raining hard, that it was misty and foggy, that she was peering ahead to keep on the highway, that she had previously passed over a long bridge which had metal expansion joints every 52 ft. and which caused a recurrent thumping sound, and that as a result of all these factors, she had slowed down to a speed of 20 miles per hour. She contends that she was not chargeable with any want of due care under the circumstances.

It is true that ofttimes safety methods are designed, as for instance by the abolition of grade crossings, to prevent accidents which might otherwise be caused by the failure of travelers to make use of their normal faculties. The State, however, permits grade crossings in many places, even in congested areas, and travelers must expect to find them throughout the country districts. The law does require that the railroads exercise care and prudence commensurate with the degree of danger involved. *Dyer* v. *M. C. R. R. Co.*, 120 Me., 154, 113A., 26; *Smith* v. *M. C. R. R. Co.*, 87 Me., 339, 32 A., 967.

Under ordinary circumstances, it might have been argued

that where there were gates installed at a crossing, which were not lowered at the time a train approached the crossing, such open gates invited passing, while closed gates might have prevented it. In the present instance, however, the plaintiff did not see the gates at all, so she cannot complain that she was thus led into peril. The record also shows that a short time before, the Public Utilities Commission had issued an order for this particular crossing, directing that the railroad "continue to operate and maintain an automatic signal with circuit control except that said signal shall be cut out and in lieu thereof continue manually operated double gates during such hours of the day as freight train switching movements are being made over the crossing, or within the circuit controlling the automatic signal. All train or car movements shall be restricted to not more than ten miles per hour."

This evidently was to dispense with the automatic audible signals at times when they would otherwise continue to operate over considerable periods, and be a cause of annoyance to persons in the vicinity. In any event, the railroad cannot be deemed negligent for complying with an order of the supervisory State authority.

Counsel for the plaintiff insists that greater precautions should have been taken by the railroad to protect travelers ignorant of the proximity of the railroad tracks and obliged to cope with rain, wind, fog and mist. The only conclusion that can be reached from the testimony is that, either her mind was so absorbed with the difficulties of operating her car under the circumstances, which made her oblivious to sounds and signals clearly heard by others much farther away from the scene, or that weather conditions were such that she should have stopped and waited for them to clear, as is sometimes necessary in severe temporary storms.

It is also claimed by counsel that the view of the plaintiff was restricted by buildings in the near vicinity to the cross-

ing, by the general background of trees and foliage on the sides of the road beyond the crossing, by advertising signs and the upward slope of the road in the distance. The plaintiff testified that she took note of a sign and of the product advertised thereon, and she also saw some silver-covered oil tanks. It is thus apparent that her sight was not blinded, but that she failed to see signs that were of far greater importance to her traveling safety. Neither does it explain nor excuse her failure to hear.

The "Look and Listen" rule is firmly established in this State. In the case of *Borders* v. *B. & M. R. R.*, 115 Me., 207, at 211, 98 A., 662, 664, and which hinged upon the absence of a gateman whose duty it was to operate the railroad gates, the general rule is well stated as follows:

> "The defendant contends further, in effect, that even if the flagman was absent, due care on the part of the plaintiff required him to listen, and to look, and if he could not see, to stop, before he reached the crossing, and particularly so, because it was a "blind crossing." Though negligence is a question for the jury, when the facts are in dispute, or when intelligent and fair minded men may reasonably differ in their conclusions, yet, because the inference of negligence in such cases is so indisputable, the rule is firmly established in this State and elsewhere that it is as a matter of law negligence per se for one to attempt to cross a railroad track without first looking and listening for a coming train if there is a chance for doing so. . . . It is the duty of the traveler to listen and to look, and if obstacles prevent his looking, he should stop if there is any room for doubt. The rule of due care is not satisfied with any lesser degree of watchfulness. And if all travelers observed this rule the number of railroad crossing accidents would be re-

> duced to a negligible minimum. In this case the plaintiff did not look until too late." See also cases cited.

If she had listened, she could indubitably have heard warnings which a number of witnesses testified were clearly audible, and whose testimony is not denied.

The "Look and Listen" rule is not confined to those who are conversant with the situation and know that a railroad crosses the highway in that location. Travelers from other States who are not familiar with the territory are not immune from the operation of this rule. As well might it be said that a Maine automobilist in Boston could drive through red stop lights on the streets and claim that he was absolved from responsibility because he was looking at something else and did not see the signal.

In *Witherly* v. *B. & A. Ry.*, 131 Me., 4, 158 A., 362, 364, the accident happened at night, and our Court said that this fact furnished no excuse.

> "A greater degree of precaution must be exercised when darkness throws a mantle over vision."

The Court also called attention to the fact that the plaintiff appeared to have been heedless of admonitory signs and that "He could not abandon circumspection, and, injury befalling him, charge his delinquency to the railroad."

A further observation of this Court is pertinent to the present situation:

> "It is unmistakably apparent that conduct on the part of the plaintiff, without which the accident would not have happened, fell short of that of the typically prudent man, alert for safety. Both authority and common sense bar him from recovery. Plaintiff was rightly condemned of negligence, as a matter of law. No legal principle compels a judge to allow a jury to render a merely idle verdict."

EXCEPTIONS TO EXCLUSION OF EVIDENCE.

Consideration will be given to evidence excluded, although exceptions relating thereto were not seasonably filed, were not assented to by counsel for the defendant, and received only the qualified endorsement of the presiding justice "Allowed, if allowable." The exceptions were argued on both sides, and doubt as to their regularity may be regarded as waived.

Counsel for the plaintiff asked a physician, who testified concerning her injuries, "Have you knowledge of other accidents that occurred at this crossing prior to the Johnson accident?"

The train conductor was asked, in cross-examination: "At any of these crossings, these so-called blind crossings, are there lights and signals on both sides of the track?"

The same witness was asked in further cross-examination: "Isn't the removal of gates where there is no train man to tend them, isn't that a better protection?"

The foregoing questions were excluded and exceptions taken. Such testimony is clearly inadmissible under our evidentiary rules.

> "It is a well settled and familiar rule that in cases of negligence the evidence must be confined to the time and place and circumstances of the injury." *Damren* v. *Trask*, 102 Me., 39. See also 52 C. J., Railroads, §1991.

As to the first and second questions in particular, we find in *Parker* v. *Pub. Co.*, 69 Me., 173, the following:

> "Such evidence tends to draw away the minds of the jury from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party, having no notice of such a course of evidence, is not prepared to rebut it."

Further,

> "If evidence of this character is receivable contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them."

Again, as to the third question, it was not germane to the facts here existent. As before noted, the plaintiff had testified that she saw no gates and no admonitory signals. Again, the railroad was required by the order of the P. U. C. to use gates at certain times during the day and not to use them at other times, and cannot be charged with negligence for its compliance with such order.

The plaintiff, at the close of the defendant's case, made an offer to produce a witness who, it was said, would testify that in his opinion the method of protection at the crossing was not adequate. This proffer was rejected and the evidence excluded.

There is plausibility to the contention that the opinion of an expert witness on scientific matters may tend to enlighten the minds of the jury as to things not within their ken. Such opinions may, in the discretion of the presiding Justice, be admitted.

When the facts and rules of law applicable thereto are plain, they do not require expert opinions which may lead to an exposition of methods that would transcend the legal duty of the defendant and so becloud rather than illuminate the issue. Here the circumstances and conditions were such that men of ordinary experience and intelligence might be presumed capable of drawing conclusions from evidence of eye witnesses without the assistance of expert testimony. The issue here was whether, as a fact, the admonitory signals were sufficient to warn a traveler exercising due care for his own protection. Such traveler is not entitled to have such

measures taken or devices used as would save him from the consequences of his own negligence.

In *State* v. *Watson,* 65 Me., 74, the Court quoted as the rule, that

> "The only cases in which opinion is evidence are those where the nature of the question involved is such that the jury are incompetent to draw their own conclusions from the facts without the aid of persons possessing peculiar skill and knowledge respecting such facts."

See also *Conley* v. *Gas Light Co.,* 99 Me., 57, 58 A., 61.

Of the same general character was the request of counsel for the plaintiff to introduce a subsequent supplemental order of the Public Utilities Commission, directing a change in the safety devices, by the elimination of gates and the installation of an additional automatic flasher light signal. Under the rules stated with reference to the first three exceptions, such evidence was likewise inadmissible.

All exceptions overruled.

CITY OF AUGUSTA

vs.

INHABITANTS OF THE TOWN OF MEXICO.

Kennebec. Opinion, August 22, 1944.

Paupers. Statutes. Legislative Intent.

Following the amendment of R. S. 1930, Chap. 33, Sec. 1, Par. III, by P. L. 1933, Chap. 203, Sec. 3, the pauper settlement of an illegitimate child derived at birth from its mother follows and changes with her subsequent pauper settlements, where there has been neither emancipation nor acquisition by the child of a new pauper settlement in its own right.

In the construction of statutes, the intention of the legislature governs.

There is a recognized principle that settlement of children should follow that of the parent responsible for their support.

Omission of words, in an amending statute appearing in the amended statute raises an inference that a change in the law was intended.

A settlement may be acquired derivatively as well as otherwise.

The amendment of 1933 was not confined to prospective operation.

ON REPORT.

Action by plaintiff to recover for supplies furnished to a pauper alleged to have his pauper settlement in the defendant town. The principle question involved was whether the pauper settlement of an illegitimate child continues to be that derived at birth from the mother or follows her subsequent pauper settlements previous to the acquisition by the child of a pauper settlement in its own right. In the instant case, the mother's pauper settlement at the time of the birth of her illegitimate child was in Augusta. Subsequently she married a man not the child's father whose pau-

per settlement, at the time the supplies were furnished, was in the town of Mexico, which then became the settlement of the mother. Held that since sine the enactment of Chapter 203, P. L., 1933, Section 3, the child takes newly derived pauper settlements of its mother as they come into existence until the child acquires another in its own right. Case remanded to Court below for entry of judgment for plaintiff. The case fully appears in the opinion.

George H. Hunt, for the plaintiff.

Fred E. Hanscom, for the defendant.

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

HUDSON, J. This pauper case is reported upon an agreed statement of facts. The principal question is whether the pauper settlement of an illegitimate child derived at birth from its mother follows and changes with her subsequent pauper settlements. Herein there was neither emancipation nor acquisition by the child of a new pauper settlement in its own right.

R. S. 1930, Chap. 33, Sec. 1, Par. III, provided that "Illegitimate children have the settlement of their mother, *at the time of their birth* . . . " (Italics ours.) But this statute was amended by P. L. 1933, Chap. 203, Sec. 3, to read as follows: "Illegitimate children have the settlement of their mother. . . ." Prior to this amendment it is conceded that an illegitimate child took the pauper settlement of its mother at birth, and that that settlement remained until it gained one in its own right, even though the mother subsequently acquired another. *Hallowell* v. *Augusta,* 52 Me., 216, 219; *Houlton* v. *Lubec,* 35 Me., 411, 413; and *Biddeford* v. *Saco,* 7 Me., 270, 272.

In the case at bar, the mother's pauper settlement at the

time of the birth of the child, the pauper, was in Augusta, and consequently it took its settlement in that city. Subsequently the mother married one not the child's father, whose pauper settlement, when the supplies were furnished in 1939 and 1940, was in the town of Mexico, which then, by reason of the marriage, became the settlement of the mother. The claim of the plaintiff is that under the law as amended the child's settlement followed that of its mother and so was in Mexico. The defendants, however, insist that in spite of the amendment it remained in Augusta, the mother's settlement at the time of the child's birth.

Thus we must decide whether the amendment of 1933 changed the existing law. We seek the intention of the legislature, for that is fundamental in the construction of statutes. *Guilford* v. *Monson,* 134 Me., 261, 265, 185 A., 517.

The only change in the reading of the statute when amended was the deletion of the words "at the time of their birth." It is said that this was simply a striking of surplusage without change of meaning. We do not think so. Before the amendment the pauper settlement taken by the child was only that of the mother at the time of birth. The statute fixed the time and place when and where it was taken and as taken it remained. The effect of omitting the words "at the time of their birth" was to remove the specific time when and place where the child first took its settlement and leave it so that it had the settlement of the mother at any and all times prior to its emancipation or acquisition of a settlement in its own right.

Thus by the amendment was established in this regard the same law for the illegitimate child with relation to the mother's pauper settlement that obtained for a legitimate child with relation to its father's settlement. As a legitimate child follows its father's pauper settlement, so under the amendment an illegitimate child would follow its mother's settlement. Giving the illegitimate child the pauper settle-

ment of the mother not only at birth but later when and if changed would tend to prevent their separation when being relieved from distress and preserve intactness of the family. To prevent such separation and to accord the illegitimate child the same privilege that the legitimate had we think was the reason for the amendment.

Furthermore, it "recognizes the underlying principle that settlement of children should follow that of the parent who was responsible for their support." *Guilford* v. *Monson*, supra, on page 264. Following the marriage of this pauper's mother, the mother still had the duty to support her illegitimate child.

Omission of words in an amending statute appearing in the amended statute raises an inference that a change in the law was intended. *Guilford & Sangerville Water District* v. *Sangerville Water Supply Co., et als.*, 130 Me., 217, 222, 154 A., 567, and cases therein cited. Also see *Opinions of Justices*, 46 Me., on page 578. The Court must not assume that such omission was accidental and then by construction insert what may have been omitted by design. *Union Ins. Co.* v. *Greenleaf*, 64 Me., 123, 129. It belongs to the legislature to supply an accidental omission. *Kelton* v. *Hill*, 59 Me., 259, 261. We regard the omission of these words in the instant case intentional and for the purpose of changing the law for the benefit of illegitimate children, as above indicated.

Chap. 33, Sec. 3, R. S. 1930, as amended by Chap. 113, P. L. 1937, reads in part as follows:

> "Settlements acquired under existing laws, remain until new ones are acquired or until lost under the provisions of this section. Former settlements are defeated by the acquisition of new ones."

The defendants contend that the pauper herein never *acquired a settlement in its own right* and consequently that

the settlement it derived from its mother at birth remained, although the mother's settlement changed.

But a settlement may be *acquired* derivatively as well as otherwise. The defendants construe the words "remain until new ones are acquired" as not embracing a settlement acquired by derivation. The statute does not so state. If that construction were accepted, then a legitimate child of a father having a derived pauper settlement in the state would continue to retain its settlement as taken at birth and not follow its father's settlement subsequently acquired by derivation. Such is not the law.

In the instant case there was no new settlement gained by the pauper itself as distinguished from a derivative settlement. We are dealing only with two claimed derived settlements, the one at birth from its mother and the other derived later from its mother upon its mother's marriage. It is not a question of loss of the first derived settlement by reason of a later one acquired by the pauper in its own right, but whether the second alleged derived pauper settlement in the defendant town defeated the first derived settlement in the plaintiff town.

In *Inhabitants of Albany* v. *Inhabitants of Norway,* 107 Me., 174, 77 A., 713, the child pauper, a minor, was born in the plaintiff town. Its parents were divorced, and custody was decreed to the mother. At that time neither parent had a pauper settlement in this state, and the father did not subsequently acquire one. Following the divorce, the mother married again, and her second husband had a pauper settlement in the defendant town. They too were divorced and afterwards the mother, during the minority of the child, married her third husband, whose pauper settlement was in the plaintiff town. The pauper was a minor at the time the supplies were furnished and had not gained a settlement in its own right. The Court held that in spite of the statute now appearing in Chap. 33, Sec. 3, R. S. 1930, as amended, relied

upon by the defendants herein, the first derived settlement by the child from its mother followed the subsequently derived settlements of the mother, and so gave judgment for the defendants.

We hold that an illegitimate child when born not only has the then pauper settlement of the mother but, since the amendment of 1933, takes newly derived settlements of the mother as they come into existence until the child acquires another in its own right.

The defendants also contend that the amendment in 1933 had only prospective operation and so did not alter the status of settlements already existing at the time of its passage. But "Such is not the law." *Inhabitants of the Town of Mercer* v. *Inhabitants of the Town of Anson,* 140 Me., 214, 36 A. (2d), 255; *Inhabitants of the City of Hallowell* v. *Inhabitants of the City of Portland,* 139, Me., 35, 26 A., (2d), 652.

In accordance with the stipulation, liability of the defendants having been established, this case is remanded to the Court below for entry of judgment for plaintiff in the amount of $152.46 and costs.

So ordered.

DISSENTING OPINION.

MURCHIE, J. I am unable to persuade myself, notwithstanding a real effort to do so induced by the fact that my associates are unanimous in the view, that the Legislature intended P. L. 1933, Chap. 203, the third section of which is construed by them without reference to other changes made by the Act in our pauper law, to provide that an illegitimate child should follow a settlement of its mother derived by her through marriage. In my view the intention, as part of a general policy that the settlement of every member of a family should follow the family head, was that an illegiti-

mate child should follow its unmarried mother. The marriage of a mother does not make her illegitimate child a member of the family of the husband.

The majority opinion is grounded in the established principles that legislative intention governs the construction of statutes and that deletion of words shows intent to change existing law, but it ignores the principles that intention should be sought by construing enactments as entireties, *Smith* v. *Chase*, 71 Me., 164; *Berry* v. *Clary et al.*, 77 Me., 482, 1 A., 360; *State* v. *Frederickson*, 101 Me., 37, 63 A., 535, 6 L. R. A. N. S. 186; *Inhabitants of Guilford* v. *Inhabitants of Monson*, 134 Me., 261, 185 A., 517, "taking all sections . . . and construing them together", *Comstock's Case*, 129 Me., 467, 152 A., 618, and that our "pauper statute is one body of law", *Inhabitants of Friendship* v. *Inhabitants of Bristol*, 132 Me., 285, 170 A., 496.

The opinion declares that the purposes of the amendment of R. S. 1930, Chap. 33, Sec 1, Par. III, were to "preserve intactness" for a family comprising a husband, wife and illegitimate child and "accord the illegitimate child the same privilege" as the legitimate, and supports the construction declared as recognizing "the underlying principle that settlement of children should follow that of the parent who was responsible for their support", citing the *Guilford* case, supra.

This underlying principle dictated no legislation in this State for more than a century prior to the enactment of P. L. 1929, Chap. 191, wherein earlier language giving legitimate children the settlement of the father if he had one in the State was qualified restrictively to exclude a child given into the custody of its mother by divorce decree. It was applied restrictively in the *Guilford* case to exclude the child of a living father divorced from his wife from that direct stepfather control established by P. L. 1933, Chap. 203, Sec. 2, and abandoned by P. L. 1935, Chap. 186. It is used by the majority of the Court to enlarge rather than restrict a field

defined by legislation in something less than clear and unambiguous terms.

Our pauper law from 1821 to 1933 provided that the settlement of a wife and a legitimate child should follow the husband and father only if he had one in the State, although he was responsible for the support of both regardless of his settlement. By judicial construction, it gave a legitimate child by derivation any settlement which its widowed mother derived from its stepfather, *Inhabitants of Parsonsfield* v. *Inhabitants of Kennebunkport*, 4 Me., 47, although the marriage imposed no liability on that stepfather for its support, *Inhabitants of Dennysville* v. *Inhabitants of Trescott*, 30 Me., 470. From 1857 to 1933 it made the settlement of an illegitimate child unchangeable from birth to majority or emancipation, although the mother responsible for its support might change her own.

Prior to the enactment of P. L. 1933, Chap. 203, a municipality might have been holden for the support of a wife and the legitimate child of her husband, although not for that of the husband and father. It was bound to provide for the support of a wife and stepchild having no living father, although the stepfather whose settlement imposed the liability did not stand in *loco parentis* to the child. It was not obligated for the support of an illegitimate child although the mother responsible therefor might have had a settlement within its borders for many years acquired either directly or by derivation from a husband.

P. L. 1933, Chap. 203, Secs. 1 and 2 changed R. S. 1930, Chap. 33, Sec. 1. Pars, I and II, so as to vest complete direct control of the settlement of wife, legitimate child and stepchild having no living father in the husband, father and stepfather. Sec. 1 deprived a married woman of the capacity to have any settlement except by derivation from a husband. Sec. 2 deprived her of the capacity to control the settlement of her legitimate child and terminated that double deriva-

tion which had previously operated to give the stepchild the settlement of its stepfather through her. Sec. 3 changed R. S. 1930, Chap. 33, Sec 1, Par. III so as to make the settlement of an illegitimate child changeable and vest direct control thereof in the unmarried mother. That this control was not intended to be so complete as to have the child follow a derived settlement seems apparent in the language of Sec. 1 which draws a distinction between a married woman and a "woman over 21 years of age, having no husband."

Section 1 purports to give capacity to the latter to acquire a settlement of her own, although she possessed it before passage of the Act. See R. S. 1930, Chap. 33, Sec. 1, Par. VI. Recital to that effect, declaratory of existing law, in an act giving the head of a family comprising a husband, his wife and a stepchild having no living father complete direct control over the settlement of himself, his wife and stepchild, convinces me that the amendment of R. S. 1930, Chap. 33, Sec. 1, Par. III, contained in P. L. 1933, Chap. 203, Sec. 3, was intended only to give an unmarried mother who was the head of a family and over 21 years of age corresponding control over the settlement of herself and her illegitimate child.

In the *Guilford* case, supra, on which the majority opinion depends for its assertion of an underlying principle, it is expressly stated that construction should conform to established principles of law and obviate "anomalous and absurd situations." These are the very reasons which impel me to record my dissent for it was our law prior to 1933 that one marrying the mother of an illegitimate child was not obligated for its support and that the burden thereof did not fall on the town wherein the husband had his settlement. Neither of these principles has been changed by clear and unequivocal language. To me construing one section of a legislative act to change well-established law by giving an illegitimate child a pauper settlement through that

very system of double derivation which another section abolishes for a legitimate child who might be its half-brother is anomalous and absurd, and presents concurrent amendments to our pauper law as "an incongruous, arbitrary and exceptional conglomeration" when they might be made "a consistent and harmonious whole" by limiting the application of the amended R. S. 1930, Chap. 33, Sec. 1, Par. III, to the illegitimate children of that "woman over 21 years of age, having no husband" who is indentified in section 1 as one of the persons to whom the legislation as a whole was especially intended to relate. The *Smith* and *Guilford* cases supra, carry declaration that consistency and not conglomeration should be the objective of all statutory construction.

The Legislature which enacted P. L. 1933, Chap. 203 appointed a recess committee to study our pauper laws. Its report to the succeeding Legislature is found in Legislative Document No. 622 of the 87th Legislature. It seems fair to assume that the abandoment of stepfather control over the settlement of legitimate children, carried by P. L. 1935, Chap. 186, was intended to continue the attempt made in 1933 to provide a uniform and readily applicable basis for determining the settlements of paupers by eliminating from the control of the head of a famly all the members except a wife and his own children. If this was the intention in 1935, it is apparent that the members of the 87th Legislature did not construe the 1933 law, in the enactment of which many of its members participated, as it is now interpreted by the Court majority.

EARLE TOBEY

vs.

JOSEPH POULIN.

Somerset. Opinion, August 22, 1944.

Receivers. Judicial Sales. Collateral Attack.

A receiver's sale is a judicial sale and the receiver acts only as an officer of the court, sells as and for the court, and sales conducted by him must be confirmed in order to be valid.

It is a general rule that a sale by a receiver is not complete and binding until the same is subsequently reported and confirmed by the court.

If an offer for property in the hands of a receiver is reported to the court and a sale to that purchaser in exact compliance with the offer is authorized the order is deemed an acceptance of the offer and a confirmation of the sale and no other and further confirmation is necessary.

If a purchaser at a receiver's sale refuses to pay the purchase price as ordered and agreed, it is the duty of the receiver to report the default to the court, which, if the sale has been confirmed, may order the purchaser to complete payment and hold him in contempt for noncompliance with the order, or order a resale, charging him with any deficiency in the original sale price which may arise, or not, as discretion dictates.

If a resale is not ordered made at the risk of the first purchaser he is not liable for any loss on the sale which may result.

The Supreme Judicial Court for the County of Kennebec had the power and authority in the proceedings for the liquidation of the Augusta Trust Company to order the receiver to resell the Jones farm, so-called, on the failure of the first purchaser to make payments as required by its decree and his agreement, and to order a resale would seem to have been an exercise of sound discretion and good judgment.

Inasmuch as the Supreme Judicial Court for the County of Kennebec had jurisdiction over the subject matter and all interested parties, its decree ordering a resale of the Jones farm was a final and conclusive judgment.

If there was irregularity or improvidence in the entry of that decree or its execution, the appropriate method of obtaining relief was by proper

proceedings in that Court; and an independent collateral action for that purpose does not lie and cannot be entertained.

As the instant case was a collateral attack upon the decree of resale by the Supreme Judicial Court for the County of Kennebec, the appeal taken below was sustained.

On Appeal.

Bill in equity to compel the defendant to convey a certain farm to the plaintiff. In the course of the liquidation of the Augusta Trust Company by the Supreme Judicial Court for the County of Kennebec, the receivers were authorized to sell the Jones farm, so-called, owned by the bank to the plaintiff or his nominee for $1,500, payable $500 down and $20 a month thereafter with interest at 6 per cent on unpaid balances, plus taxes and insurance. For the next two years and a little more plaintiff paid the required monthly installments, interest and part of the insurance premiums but neither the taxes nor the down payment. Although plaintiff was advised by the receiver that he must comply with the terms of the order of sale, or the property would be resold, he made no payments and was notified that the farm would be resold. Subsequently, the Supreme Judicial Court which had ordered the sale of the property to the plaintiff authorized the receiver to resell the property to the defendant. In this independent action in another court, the plaintiff sought to compel the defendant to convey the property to him. The court below sustained the bill and ordered a conveyance of the property to the plaintiff. Defendant filed an appeal. Appeal sustained. Case remanded for entry of decree dismissing bill with costs. The case fully appears in the opinion.

Harvey D. Eaton, for the plaintiff.

Jerome G. Daviau, for the defendant.

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

STURGIS, C. J. In the course of the liquidation of the Augusta Trust Company in proceedings in equity in the Supreme Judicial Court for the County of Kennebec, the receivers were authorized by decree of August 19, 1940, to sell the Lillian Jones farm, so-called, in Fairfield, and owned by the bank, to one Earle Tobey or his nominee, for $1,500 payable $500 down and $20 a month thereafter, with interest at 6 per cent on unpaid balances, plus taxes assessed and insurance premiums. This decree was issued pursuant to an offer already submitted by Tobey, and on his agreement to forthwith comply with the terms of the order of sale, on October 7, 1940 the receivers allowed him to take possession of the farm. For the next two years and a little more he paid the required monthly installments on the purchase price, interest as it accrued, and part of the insurance premiums but none of the taxes and in spite of repeated demands by the receivers never made his down payment.

In January 1943, Tobey was advised, by the receiver then in office, that he must comply with the terms of the order of sale at once or the property would be resold, but he made no further payments and the receiver, being informed that in addition to these defaults he had been cutting off wood and timber and selling it on his own account, on June 3, 1943 notified him the farm would be resold the next week and ordered him to vacate the premises. At this time Tobey had paid $632.81 on account of the purchase price, interest and insurance premiums but there was a balance of $1,279.32 and two years' taxes due, no part of which he has since offered to pay to the receiver.

Following these events the receiver apparently reported to the Supreme Judicial Court, which had authorized the sale to Earle Tobey, that he had failed to make the pay-

ments required by its decree and his agreement, and asked for authority to accept the offer of one Joseph Poulin who had learned that the farm was about to be resold because of the default of the purchaser and agreed to buy it on terms set forth in the petition. The following decree, ordering a resale in compliance with the offer reported, was then on June 14, 1943 issued:

"*Supplementary Decree.*

It is hereby ORDERED, ADJUDGED AND DECREED:

That John E. Nelson, the duly appointed and legally qualified receiver of the Augusta Trust Company, is hereby authorized and empowered:

To sell to Joseph Poulin, or his nominee, the Jones farm, so-called, in Fairfield, Maine, for $1,150 plus two years' taxes."

The resale was made in accordance with the decree and the receiver delivered his deed to the purchaser. But Tobey the first purchaser remains in possession of the premises and refuses to quit.

In this independent action in equity in another court, forward on appeal, Earle Tobey seeks to compel Joseph Poulin to convey the Jones farm to him on allegations that, by reason of his agreement with the receivers of the Augusta Trust Company, his continued possession, and payments on account of the purchase price, he is entitled to complete his purchase and Poulin bought the farm from the receiver with notice of his rights. He offers to repay all moneys expended and prays that the property be impressed with a trust and ordered transferred to him by proper deed of release. The pleadings in defense and the proofs show, as already related, that the plaintiff Tobey attempted to buy the Jones farm pursuant and subject to a decree of the Su-

preme Judicial Court for Kennebec County, in proceedings for the liquidation of the Augusta Trust Company, and by reason of his failure to pay the purchase price as and when required and agreed, by decree, in the same proceedings, a resale of the property to the defendant Poulin was ordered and completed. The court below sustained the bill brought in this action with costs and ordered a conveyance of the Jones farm in accordance with the prayers. The defendant filed an appeal.

It is elementary that a receivers sale is a judicial sale and the receiver acts only as an officer of the court, sells as and for the court, and sales conducted by him must be confirmed by the court in order to be valid. I Clark on Receivers (2d Ed.) §482, et seq.; 45 Am. Jur., §385, et seq. While it is the general rule that a sale by a receiver is not complete and binding until the sale is subsequently reported and confirmed by the court, if an offer for property in the hands of a receiver is reported to the court and a sale to that purchaser in exact compliance with the offer is authorized, the order is deemed an acceptance of the offer and a confirmation of the sale and no other and further confirmation is necessary. *Files* v. *Brown,* 124 Fed., 133, 138; *In re Denison,* 114 N. Y., 621, 21 N. E., 97; *Yount* v. *Fagin,* et al. (Texas Civ. A) 244 S. W., 1036,1041; 53 Corpus Juris, 212. Confirmation of receivers sales by either of these methods has long been accepted as proper practice in this jurdisdiction.

It is also well settled that if a purchaser refuses to pay the purchase price as ordered and agreed, it is the duty of the receiver to report the default to the court, which, if the sale has been confirmed may order the purchaser to complete payment and hold him in contempt for noncompliance with the order, or order a resale, charging him with any deficiency in the original sales price which may arise, or not, as discretion dictates. The right of the court to re-

sell at the first purchaser's risk, when he fails to comply with the terms of the sale in making payment, is an implied condition of every judicial sale, which usually is enforced but may be disregarded. If a resale is not ordered made at the risk of the first purchaser he is not liable for any loss on the sale which may result. 2 Daniell's Chancery, Pleading & Practice (6th Am. Ed.), pp. 1281, 1282; 31 Am. Jur., Judicial Sales, §249 et seq.; *Mount* v. *Brown*, 33 Miss., 566, 69 American Decisions, 362n; 35 Corpus Juris, 118 and cases cited; *Howison* v. *Oakley*, 118 Ala., 215, 23 So. 810; *Mariners Savings Bank* v. *Duca*, 98 Conn., 147, 118 A., 820; *Phelan* v. *Downs*, 69 N. Y. S., 375; *Camden V. Mayhew*, 129 U. S. 73, 9 S. Ct., 246, 32 L. Ed 608.

In the light of the rules stated, the Supreme Judicial Court for the County of Kennebec clearly had the power and authority in the proceedings for the liquidation of the Augusta Trust Company there pending, to order the receiver to resell the Jones farm, so-called, to Joseph Poulin on the failure of Earle Tobey to whom it had already been sold, to make payments as required by its decree and his agreement. As it is clear, in the case here made, that at that time the purchaser was far in arrears in his payments and indicated neither ability nor intention to cure his defaults, no reason for permitting or directing him to complete his purchase is made to appear and to order a resale would seem to have been an exercise of sound discretion and good judgment. The order cannot be set aside in this action.

When the Supreme Judicial Court for the County of Kennebec ordered a resale of the Jones farm, of repeated mention, having jurisdiction over the subject matter and all interested parties its decree was a final and conclusive judgment of the same force and effect as any other final adjudication of a court of competent jurisdiction. Under it the first purchaser lost his right to complete his purchase of the prop-

erty and the new purchaser acquired title to it under the decree ordering a resale. If there was irregularity or improvidence in the entry of that decree or its execution, the appropriate method of obtaining relief is by proper proceedings in the court entering the decree and an independent collateral action for that purpose does not lie and cannot be entertained. High on Receivers, §196; 31 Am. Jur., 526, §235n; 35 Corpus Juris, 17n.

As the instant action can only be viewed as a collateral attack upon the decree of resale of June 14, 1943, of the Supreme Judicial Court for the County of Kennebec the appeal taken in the court below must be sustained and the case remanded for entry of decree dismissing the bill with costs.

Appeal sustained.
Case remanded for entry of decree dismissing bill with costs.

RAYMOND A. REMICK, PETITIONER

vs.

JUNE B. ROLLINS.

Knox. Opinion, August 31, 1944.

Divorce. Modification of Decree. Judicial Discretion

In matters of the importance indicated in the instant case, the interest of the parties having regard to due judicial procedure, should be safeguarded by a hearing where all the facts are made a matter of record.

Established practice gives parties a right to assume that no change will be made on an issue which is not formally presented to the Court by the petition or pleadings.

Upon the record as presented the Court below exceeded its authority and its discretion.

ON EXCEPTIONS.

Proceedings by plaintiff for modification of a divorce decree. The lower court substituted for the original decree a decree making radical changes as to property rights and other important changes, some of which were not prayed for in plaintiff's petition. The presiding justice made no finding of fact and the record failed to show all the facts. Defendant filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Alan L. Bird, for the petitioner.

Charles T. Smalley, for the respondent.

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

PER CURIAM.

June B. Remick was granted a decree of divorce from her husband, Raymond A. Remick, on May 11, 1943. The decree contained the following provision:

> "That the said June B. Remick, libellant, recover against the said Raymond A. Remick, libellee, the sum of fifty thousand dollars, as a specific sum in lieu of alimony, together with reasonable counsel fees.
>
> "The parties having agreed upon the transfer to the libellant of certain real estate, execution to issue in the sum of forty-three thousand two hundred dollars, against the said Raymond A. Remick."

On January 21, 1944, Raymond A. Remick instituted proceedings, asking that the decree be amended as to the payment of a specific sum in lieu of alimony. Hearing was had by the presiding Justice on March 1, 1944 in vacation. A decree was filed March 25, 1944, as follows:

> "I hereby ORDER, ADJUDGE AND DECREE that the said decree rendered on the eleventh day of May, A. D. 1943, as relates to the payment of the sum of Fifty Thousand Dollars ($50,000) due as a specific sum in lieu of alimony to be paid by petitioner be suspended and that said decree rendered on the eleventh day of May, A. D. 1943 be and hereby is changed and amended so as to read as follows:
>
> That a divorce from the bonds of matrimony, be had by the said June B. Remick, Libellant, from and against the said Raymond A. Remick, Libellee, for the cause of cruel and abusive treatment, and further that the custody of Raymond A., aged 4 and Peter H., aged 1½ years, minor children of the said parties be and is granted to the said June B. Remick until the further

order of court subject to the following conditions: Libellee to pay to libellant the sum of fifty dollars each month for the support of said children; father to have the right of visitation and to have said children visit him at reasonable times and places."

In terms, the second decree is substituted for the first. It makes no provision whatever for the payment of any sum for alimony or in lieu thereof and gives no recognition to the fact that real estate valued at $6,800 has been transferred by the libellee to the libellant, nor to the payment, made by agreement of the parties, as alleged in the petition of approximately $2,000 by monthly installments in the interim between the dates of the decrees, nor to the order of the court for execution to issue.

In matters of the importance here indicated, the interests of the parties, having regard to due judicial procedure, should have been safeguarded by hearing where all the facts were made a matter of record. The testimony of witnesses was not stenographically reported, and the presiding justice made no findings of fact.

The record, as it stands, lacks justification for the elimination of important property rights, and puts into the realm of dubiety those formerly adjudicated, as the decree does not definitely determine them.

There was no prayer in the petition to change any provision of the original decree as to custody and visitation of the children, but the new decree makes an alteration in that respect. Established practice gives parties a right to assume that no change will be made on an issue which is not formally presented to the court by the petition or pleadings.

Upon the record as presented, the court exceeded its authority and its discretion.

Exceptions sustained.

PORTLAND TERMINAL COMPANY

vs.

LEO P. HINDS, JOHN A. LESTER AND CHARLES S. CUSHING

ASSESSORS FOR THE CITY OF PORTLAND.

Cumberland. Opinion, September 1, 1944.

Taxation.

In this State the full power of taxation is vested in the legislature and is measured not by grant but by limitation, and no tax assessment against other than the owner of the property is valid except by authority of legislative enactment.

Real estate, for the purpose of taxation, includes all lands in the State and all buildings erected on or affixed to the same.

The interest of the owner of a building is a property right separate and distinct from the ownership of the land and, for purposes of taxation, a lessee is the owner of the building and to such lessee the building is taxable

While, for general purposes, a building under such lessee is in this jurisdiction considered personalty by R. S. 1930, Chapter 13, Section 3, as amended by P. L. 1939, Chapter 210 and P. L. 1942, Spec. Session Chapter 317, Section 4, the building is real estate for the purposes of taxation and taxable to the building owner.

ON EXCEPTIONS.

Under the provisions of each of forty-one leases from the Portland Terminal Company, a railroad corporation, to various lessees, buildings located upon land of that corporation were owned and occupied by the respective lessees. All but one of these leases were revocable, and it was provided therein that the lessee should have the right to remove buildings upon the termination of the lease. The other lease

was for a stated period, and it was provided therein that at the termination of the lease, the building should become the property of the lessor. A part of the buildings were located upon the railroad right of way of the corporation; others were outside thereof.

The Assessors for the City of Portland wherein the land was located, taxed each of the buildings to the Portland Terminal Company under claim that the building was a part of the real estate and taxable with the land to the owner of such land.

The Portland Terminal Company appealed from the refusal of the Assessors to abate so much of the taxes as were assessed against the buildings, to the Superior Court, and the Court sustained the appeal. The appellees filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Edward W. Wheeler,

Frank A Farrington, for the appellant.

W. Mayo Payson, Portland Corporation Counsel for the appellees.

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

CHAPMAN, J. The above case comes to this court upon exceptions by the appellees to the decree of the Superior Court sustaining the appeal of the appellant from the refusal of the appellees, in their capacity as assessors for the City of Portland, to grant an abatement of taxes assessed against it.

The essential facts are as follows. Upon land owned by the appellant, the Portland Terminal Company, a railroad corporation, were forty-one buildings owned by parties other than the appellant and occupied by such owners. These

buildings were established and maintained by the respective owners upon land leased by the Portland Terminal Company to such owners. As to all but one of the buildings, the lease of the land occupied by the building was revocable by the lessor, and the building was removable by the lessee at the termination of the lease. In the excepted case the lease was for a stated term which had not expired at the time of the assessment which is in question, and the building was to remain the property of the lessee during the term of the lease and, at its expiration, to become the property of the lessor. This lease only was recorded in the Cumberland Registry of Deeds.

A part of the buildings were upon land within the located right of way of the Portland Terminal Company as a railroad corporation. Other buildings were upon land outside such railroad location. So much of the land as was located within the right of way was exempt from taxation by reason of R. S. 1930, Chap. 12, Sec. 29. That which was without the right of way was taxable in the same manner as other real estate. R. S., Chap. 13, Sec. 4.

Fourteen of the buildings were in existence in 1927 and, in that year, were assessed to the respective owners all of whom, with one exception, were other than the Portland Terminal Company. Since 1927 all of the fourteen buildings have been assessed to the Portland Terminal Company.

In 1938 the building owned by the Portland Terminal Company was conveyed by that corporation; but ownership of the land on which it was located was retained.

Twenty-seven of the said forty-one buildings were erected subsequently to 1927 by the respective owners. In each case application for building permit was made to the Inspector of Buildings for the City of Portland, which application included the name of the contractor, the name and address of the owner of the building, the location of the land on which the building was to be erected and the nature of its con-

struction. This information was, in each case, communicated by the Inspector of Buildings to the Assessors for the City of Portland.

For the year 1942 these forty-one buildings were assessed to the Portland Terminal Company. Upon the land itself, which was within the right of way, no tax was assessed. On the land outside of the right of way tax was assessed, together with that assessed upon the building. The Portland Terminal Company paid the taxes so assessed and filed with the Assessors application for abatement of so much of the said taxes as were assessed against the buildings, on the ground that it was not the owner or occupant of the buildings.

The Assessors denied the application, whereupon the Portland Terminal Company filed its appeal to the Superior Court. The justice of that court sustained the appeal and to that ruling the Assessors filed exceptions to this court.

Examination of the statutes relative to taxation discloses that R. S., Chap. 13, Sec. 3, provides as follows:

> "Real estate, for the purposes of taxation, except as provided in section six, includes all lands in the state, . . . and all buildings erected on or affixed to the same, ..."

Amendments by Chap. 210, P. L. 1939, and Chap. 317, Sec 4, P. L. 1942, Sp. Sess., add to this statute the following:

> "Buildings on leased land or on land not owned by the owner of the buildings, when situated in any city, town or plantation shall be considered real estate for purposes of taxation and shall be taxed in the town, city or plantation where said land is located; but when such buildings are located in the unorganized territory they shall be assessed and taxed as personal property in the place where located on April 1st annually."

In the solution of the problem submitted, we are bound

by certain principles universally recognized in all jurisdictions. First among these principles is that all taxing power in the municipality is derived from legislative enactment, there being no such thing as taxation by implication. 61 *Corpus Juris,* 81.

Our highest court has said:

"The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

Meriwether v. *Garrett,* 102 U. S., 472, 501, 26 L. Ed. 197

Our own court likewise has said:

"In this State the full power of taxation is vested in the Legislature and is measured not by grant but by limitation."

Opinion of Justices, 123 Me., 573, 121 A., 902, 904.

As a corollary to this principle, no tax assessment against other than the owner of the property is valid except by authority of legislative enactment.

Morrill v. *Lovett,* 95 Me., 165, 49 A., 666, 56 L. R. A., 634.

Further:

"It is well settled and familiar law that statutes imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not to be extended by implication beyond the clear import of the language used."

Commonwealth v. *Hutzler,* 124 Va., 138, 97 S. E., 775, 776.

By R. S., Chap. 13, Secs. 9 and 25, property of the kind under consideration is taxable to the owner or the party in possession. Admittedly the appellant was not in possession.

If the buildings were taxable to the appellant, it was by reason of its ownership of the land upon which they were located.

The exact issue presented has not been previously before this court. The question has been passed upon, however, in other jurisdictions and although the tax statutes of the different states are not the same, we believe that the principle upon which the decisions have been based is applicable to the case before us.

Opposite results have been reached in the adjudicated cases, but the courts of those jurisdictions have been, for the most part, in agreement that the conclusion reached depends upon the view taken as to the nature of the interest of the building owner. In those jurisdictions where the interest of the building owner is considered a mere contractual right operative only between the parties thereto, it has been generally held that the building is taxable to the lessor as the owner of the entire property while in those jurisdictions where the interest of the building owner attains to the status of a separable and distinct estate, the building is taxable to the building owner. This reasoning would seem to be a logical application of the rule that property is taxable to its owner.

The appellees have cited in support of their contention a line of cases in Massachusetts, namely, *Milligan* v. *Drury*, 130 Mass., 428; *McGee* v. *Salem*, 149 Mass., 238, 21 N. E., 386; and *Mass. General Hospital* v. *Belmont*, 238 Mass., 396, 131 N. E., 72.

That court held that the building is taxable as a unit with the land to the landowner and, considered only from that conclusion, the cases are authority for the position of the appellees; but the conclusion arrived at is definitely based upon the view of that court, often referred to as the Massachusetts Rule, that any agreement between the landowner and the building owner as to the status of the building

owner's interest as a separate estate, is operative only as between the parties to that agreement. It was pointed out in *Peaks* v. *Hutchinson*, 96 Me., 530, 53 A., 38, 59 L. R. A. 279, that our court has not accepted this view as to the nature of the building owner's interest.

In *Mesta Machine Company Case*, 347 Penn. St., 191, 32 A., 2d 236, also cited by the appellees, the same conclusion was reached, as in the Massachusetts cases, where the United States Government installed machinery in a mill. Although it was agreed between the owner of the mill, which also owned the land on which it was located, and the Federal officials, that the machinery should remain the personal property of the United States, it was held that the machinery was part of the real estate and taxable as a part thereof to the landowner; but, as in the Massachusetts cases, the reasoning was upon the view that, except as between the parties to the agreement, there was no interest in the machinery separable from the real estate. The rule in Pennsylvania as to the general nature of the interest in buildings and fixtures is similar to that in Massachusetts. *Hoskin* v. *Woodward*, 45 Penn. St., 42.

In *Comstock* v. *Waterford*, 85 Conn., 6, 81 A., 1059, 37 L. R. A. N. S., 1166, likewise cited by the appellees, the same conclusion was reached as in the Massachusetts and Pennsylvania cases. However, the Connecticut court, in *Parker* v. *Redfield*, 10 Conn., 490 and *Russell* v. *City of New Haven*, 51 Conn., 259, had held that a building located under like conditions to the present case is taxable to the owners of the building.

It is true that the land in each of these cases was exempt from taxation, but this fact had no part in the result arrived at. The reasoning set forth at length in the *Russell* v. *City of New Haven* case was that the building was "absolutely owned by the lessee" and therefore taxable to him. The court said:

"The party is not taxed as lessee but as owner."

The earlier cases were not referred to in the *Comstock* v. *Waterford* case. We think that this case is of questionable value because the court, after having adopted a rule of such far-reaching importance upon careful and extended reasoning, disregarded the rule without reconsideration thereof or giving reasons why it should be ignored.

In *Andrews et al* v. *The Auditor, etc.*, 28 Grat., (Va.), 115, also cited by the appellees, there is dicta to the effect that the building is taxable to the landowner. That question, however, was not before the court. The decision was that a building owned by a party other than the landowner and exempt from taxation is not taxable to the landowner. Moreover, the court in the opinion said:

> "It is a principle firmly settled by numerous decisions, that where a building is erected by one man, on the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it."

As opposed to the conclusion reached in the cases cited by the appellees, there are several cases in which, on the ground that the interest of the lessee in a building or fixtures erected under agreement with the lessor is a distinct and separable estate, it has been held that such building or fixtures are taxable to the lessee as owner thereof. Such a case is *People, ex rel. Muller* v. *B'd of Assessors*, 93 N. Y., 308. In that case the lessor's land on which the building was located was exempt from taxation, but it is apparent that that fact did not affect the court in arriving at its conclusion. The court reasoned as follows:

"The title and ownership of permanent erections by

one person upon the land of another, in the absence of contract rights regulating the interests of the respective parties, generally follows and accrues to the holder of the title of the land, but it is perfectly competent for parties by contract to so regulate their respective interests that one may be the owner of the building and another of the land. (People, ex rel. Van Nest, v. Commr's., 80 N. Y., 573; Smith v. Benson, 1 Hill, 176.) Whether their respective interests under general principles of law, be termed real estate or personal property is entirely immaterial to the question under discussion. The only inquiry at present is whether a several interest may be owned by different persons in the same premises which may be assessed to its several owners.

"This question has been recently quite frequently decided in this State, and is no longer open to debate. (People v. Van Nest, supra; People, ex rel. D. & F. R. R. Co., v Cassity, 46 N. Y., 46; People, ex rel. N. Y. El. R. R. Co., v. Commissioners of Taxes, 82 id. 460.)"

This principle was approved in *People ex rel. H. R. Day Line* v. *Franck*, 257 N. Y., 69, 177 N. E., 312.

We believe this reasoning to be sound and the decision is of weight with us inasmuch as the view of the New York court relative to the general status of the building owner's interest is, unlike that of Massachusetts, the same as that of Maine. *Smith* v. *Benson*, 1 *Hill*, 176; *Peaks* v. *Hutchinson*, supra.

Coming to the same conclusion as *People, ex rel. Muller* v. *B'd of Assessors*, supra, are: *Jetton* v. *University of the South*, 208 US., 489, 28 S. Ct., 375, 52 L. Ed. 584; *Pipe Line Co.* v. *Berry*, 53 N. J. L., 212, 21 A., 490; *State ex rel.* v. *Mission Free School*, 162 Mo., 332, 62 S. W., 998; *Ada County* v. *Bottolfsen*, 61 Idaho 363, 102 Pac. (2d), 287; *East Tennessee, V. & G. Ry. Co.* v. *Mayor, etc., Morristown*,

35 S. W., 771 (Tenn.); *State ex rel. Hansen S. Co.* v. *Bodden,* 166 Wis., 219, 164 N. W., 1009.

We believe that the buildings such as are under consideration constitute a property right distinct from that of the landowner, *Peaks* v. *Hutchinson,* supra. As property, these buildings were taxable irrespective of whether they were real estate or personal property, R. S., Chap. 13, Sec. 2. In this state, for general purposes, such buildings are considered personal property, *Peaks* v. *Hutchinson,* supra; *Simpson* v. *Emery,* 134 Me., 213, 183 A., 842; but it is within legislative authority, for the purpose of taxation, to provide that real estate shall be assessed as personalty or that personalty shall be taxed as realty. *Cooley on Taxation,* 4th ed., Volume 3, Sec. 1065; *Jetton* v. *University of the South,* supra. We believe that R. S., Chap. 13, Sec. 3 made such buildings taxable as real estate wherein it provided that:

> "Real estate, for the purposes of taxation, . . . includes all lands in the state, . . . and all buildings erected on or affixed to the same, ..."

This did not, however, change the interest of the building owner in any other respect. The building was still a property right and must be taxed to the owner in the absence of legislative enactment otherwise.

As to whether such a building was, for the purpose of taxation, to be considered personal property or real estate, there has apparently been uncertainty. The briefs of counsel so indicate, and likewise the history of the taxation of the property in question as disclosed by the agreed statement submitted. It is also apparent that there are difficulties in taxation of such property as personalty. It would seem entirely consistent with the situation that existed, for the Legislature to enact the amendments of 1939 and 1942 definitely providing that such buildings should

"be considered real estate for the purposes of taxation."

There is nothing in such language to indicate any intention upon the part of the Legislature to affect the nature of the building owner's interest other than to make certain that, for the purposes of taxation, it be considered real estate.

We make no distinction between the buildings located within the railroad right of way of the appellant and those located outside thereof. In either case, the building owner has a property right taxable to him as owner. Nor do we make a distinction in regard to that building located on the land, the lease of which provided that, at the termination of the lease, the building should become the property of the lessor. During the term of the lease, the lessee was the owner of the building and to him it was taxable. *People, ex rel. Muller* v. *B'd of Assessors,* supra; *Russell* v. *City of New Haven,* supra.

Nor do we find, from examination of our other tax statutes, anything to indicate that the Legislature intended that the amendatory enactments should carry meaning beyond the apparent import of the language used. If there are difficulties in enforcing taxation of a building upon leased land as real estate, as suggested by counsel for the appellees, resort must be had for correction by legislative action.

The justice of the Superior Court was correct in his ruling sustaining the appeal.

Exceptions overruled.

MORRIS PERLMAN

vs.

SKOLNICK BUILDING CORPORATION.

Cumberland. Opinion, September 28, 1944.

Master and Servant. Evidence.

There was no showing that any responsible officer of the defendant corporation knew that plaintiff was working at home on Sundays and evenings as alleged in his pleadings and on the stand and agreed to pay him for such work. Therefore, assuming that plaintiff did work at home Sundays and evenings as alleged in his pleadings and on the stand, he was not entitled to receive pay for such work in addition to his regular wages.

The record disclosed no necessity for any substantial amount of the Sunday and evening work and plaintiff's assertions as to its performance received no confirmation in the testimony of witnesses or in the memorandum presented by the plaintiff.

Acceptance by the plaintiff without protest of the pay tendered him each week which did not include pay for overtime, and his failure to claim pay for the alleged overtime work until he was discharged irresistibly led to the conclusion that he understood that any work performed at home on Sundays and in evenings would be covered by his regular wages.

The plaintiff's claim that he worked at home Sundays and evenings during the entire period of his employment was not reasonable or probable. Furthermore, it was clearly established that he was expressly forbidden to work on the job on Sundays unless directed to do so and for such authorized work he was paid.

ON MOTION FOR NEW TRIAL.

Action to recover amount claimed to be due plaintiff as employee of defendant corporation. The demand was for expenditures for traveling expenses and for overtime work on Sundays and holidays and in evenings, the total of the claim being $1,738.29. On trial the jury returned a verdict in plain-

tiff's favor for $1,305.66. The defendant filed its general motion for a new trial. Motion sustained. New trial granted. The case fully appears in the opinion.

Berman & Berman, Portland,

Sidney W. Wernick, for the plaintiff.

Bernstein & Bernstein, for the defendant.

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

STURGIS, C. J. In this action Morris Perlman, an engineer for the Skolnick Building Corporation engaged in the construction of Federal Housing Project, Me., 17038 at South Portland, Maine, recovered a verdict and the defendant corporation brings forward its general motion for a new trial.

The plaintiff was employed in New York on October 3, 1942 for an indeterminate period at an agreed wage of $100 a week for two weeks and $125 a week thereafter and on a forty-eight hour weekly basis with time and one-half for overtime, arrived in South Portland three days later and worked until June 9, 1943 when he was given a check for his last week's pay and discharged. The next day he returned the check with a demand for $760.34 for alleged services in New York, traveling expenses to South Portland, overtime on Sundays and holidays, and his last week's pay. He then made oath to this claim reduced to $746.31 by the elimination of traveling expenses, filed it with the federal engineer in charge, and on the refusal of his employer to honor his demands increased his claim to $1,738.29 by making minor changes in some items and adding charges of $971.10 for evening overtime work, and brought suit. On trial a verdict of $1,305.66 was returned by the jury.

In the court below the plaintiff testified that he worked

three days in New York before he came to South Portland, was promised free transportation and, beginning with the first week after he arrived, worked Sundays and holidays on the job, Sundays and evenings at home studying his field notes making computations and revising and correcting plans, and regular hours through the last week he was employed and for all this he had not been paid. While the plaintiff's statement that he worked three days in New York and was promised his traveling expenses is categorically denied and open to doubt the allowance of these charges, correctly computed, cannot be rejected as manifestly wrong. He is also entitled to recover his last week's wages which, subject to required social security and federal tax reductions, remain unpaid. But, in so far as the verdict below included the plaintiff's charges for overtime on Sundays, holidays and evenings, it has no reasonable warrant in the evidence.

It is clearly established that the plaintiff was expressly forbidden to work on the job on Sundays unless directed to do so and for those authorized he was paid. No more does he justify his charges for time and one-half on Christmas and New Years for which, although he was not required to work, he received regular pay. And his claim, that he worked the many Sundays and evenings at home alleged in his declaration, is entitled to as little credence. While it may have been convenient and perhaps profitable for this engineer to now and then finish his day's work or prepare for the morrow on Sundays and evenings at home, that this occurred day in and day out and week after week, bears neither the impress of reason or probability. Necessity for any substantial amount of extra work of this kind cannot be found in the record and his assertions that he performed it have no confirmation of convincing worth. The memorandum of his time which he exhibits on its face refutes its verity as a record of original entries, and his witnesses through lack of knowledge are as unimpressive.

But assuming that the plaintiff did work Sundays and evenings at home as he alleges in his pleadings and on the stand, he cannot on this record recover pay for that service in addition to his regular wages. He not only does not show that any responsible officer of the Skolnick Building Corporation knew that he was working at home and agreed to pay him for it as overtime, but his conduct leaves no doubt that he understood any such work would be covered by his regular wages and for it he expected no extra compensation. The disclosure of the record that without protest he accepted the pay tendered him each week, which did not include this overtime, and never claimed it until he was discharged and then in inconsistent and pyramided demands, leads irresistibly to that conclusion and compels rejection of this part of the plaintiff's demand. *Fitzgerald* v. *Paper Company*, 96 Me., 220, 52 A., 655; *Robinette* v. *Hubbard Coal Min. Co.*, 88 W. Va., 514, 107 S. E., 285, 25 A. L. R., 212; 35 Am. Jur., 499nn; 39 Corpus Juris, 157nn.

Although the general verdict returned in this case shows on its face that some of the plaintiff's claims for compensation were rejected and those allowed are not defined it exceeds the aggregate of all for which he can here recover and must be set aside.

Motion sustained.
New trial granted.

ROUJINA MANSOUR ROUKOS
APPELLANT FROM DECREE OF JUDGE OF PROBATE
IN RE ESTATE OF MANSOUR HANNA
ROUKOS.

Kennebec. Opinion, October 24, 1944.

Probate Courts.

The Probate Court is a statutory court and must exercise the jurisdiction vested in it by the statute and in the manner prescribed therein. A failure to comply with the admonition of the statute will lay its decree open to direct attack.

There was strong evidence that the decree sought to be annulled was not in accordance with the statute but rather the result of inadvertence and mistake and that the dismissal of the petition on the ground that there was no evidence to sustain it was error.

ON APPEAL AND EXCEPTIONS.

Petition brought in the Probate Court by the widow of a decedent to annul a decree of that Court granting a license to sell all of the real estate of the decedent to pay debts. Allegations in the petition that the decree of the Probate Court was the result of proceedings not in accord with the provisions of the statute were not denied. However, the petition was dismissed by the Judge of Probate. The petitioner appealed to the Supreme Court of Probate. The presiding justice of that court issued a decree dismissing the petition on the ground that there was no evidence in its support. Petitioner filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Alfred A. Matthieu,

William H. Niehoff, for the appellant.

Gordon F. Gallest,

Harvey D. Eaton, for the appellees.

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

CHAPMAN, J. Mansour Hanna Roukos, otherwise known as Mansour John Roukos, died February 3, 1940, testate, leaving a widow, the appellant in this action, and a brother and sister. Upon probate of the will the widow waived the provisions thereof and, by reason of such waiver, took the same share in the real estate of her deceased husband as is provided by law in intestate estates. R. S. 1930, Chap. 89, Secs. 13, 14.

By Sec. 1, I, of the same chapter, a widow of a person deceased intestate, leaving kindred but no issue, takes one-half interest in the real estate, subject to the payment of debts; but, in any event, one-third interest free from payment of debts.

The inventory of the estate disclosed two parcels of real estate, one of which was appraised at $6,300, subject to a mortgage of $600, and the second at $3,000, subject to a mortgage of $1,100, making a total equity in the real estate of $7,600.

The executor of the estate presented to the Probate Court under the provisions of R. S. 1930, Chap. 85, Sec. 1, I, a petition alleging that the personal estate was insufficient to pay the debts of the deceased's funeral expenses, legacies and expenses of sale and administration and for the erection of a suitable marker or gravestone; and that it was therefore necessary to sell some part of the real estate and, further, that the residue would be greatly depreciated by the sale of

any portion thereof. It was asked that license issue to make sale of the whole of the said real estate.

The petition stated that the debts of the estate amounted to $352.50 and that the expenses of sale and administration would amount to $600,—a total of $952.50. It further stated that the value of the personal estate was $67.16. The petition was granted and a license issued for the sale of all of the real estate subject to the right of the widow.

R. S. 1930, Chap. 85, Sec. 1, so far as it applies to a consideration of the case, provides as follows:

> "Sec. 1. Judges of probate, who have jurisdiction of the estate may license the sale, mortgage, lease, or exchange of real estate and any interests therein, in whatever county situated, in the following cases, on application:
>
> I. Of executors and administrators, including public administrators, for power to sell so much of such estate of the deceased as is necessary to pay debts, funeral charges, legacies, expenses of sale and administration, and for the erection of a suitable marker or gravestone.
>
> "III. Of executors, administrators, or guardians, when it appears by the petition and proof, that the residue would be greatly depreciated by a sale of any portion under the foregoing authority, to sell the whole, or such parts thereof as will not injure the residue."

Sale was made to Nimon Rokos Heed and Mary Rokos Heed, the defendants in this action, and certificate of sale of two-thirds, undivided, of the real estate of the deceased testator for the sum of $2,800 was returned into the Probate Court. Subsequently, the purchasers of the two-thirds inter-

est brought petition in the Probate Court for partition of the said properties. The widow appeared in opposition and claimed that the license and sale which had been granted were invalid.

The petition was granted, the court holding that the decree was not open to collateral attack; whereupon the present action of petition to annul the decree granting license to sell the real estate was filed. The Probate Court denied the petition and, upon appeal to the Supreme Court of Probate, the decision of the Judge of Probate was sustained whereupon exceptions to his ruling brought the matter to this court.

The statute above quoted is the authority for a Probate Court to assume jurisdiction when allegation is made of the insufficiency of personal property to pay debts, etc., and to authorize the sale of all of the real estate upon allegation that the residue would be greatly depreciated by a sale of any portion. The petition for license to sell contains these allegations and the court had jurisdiction to take consideration of the matter and issue decree. It appearing upon the face of the records of the Probate Court that the statutory requirements as to procedure had been complied with, the decree was not open to collateral attack. It was entitled to full force and credit so long as it remained of record as the decree of the court. This court so decided when the case was formerly before us upon exceptions to the decree of the Probate Court granting to the purchasers of the real estate their petition for partition. *In re Roukos' Estate,* 140 Me., 183, 35 A. (2d), 861.

However, the Probate Court having taken jurisdiction of the matter, was bound to proceed, as a fact, to exercise that jurisdiction in accordance with the admonition of the statute. The Probate Court is a statutory court and must exercise the jurisdiction vested in it by the statute and in the manner prescribed therein. *Snow* v. *Russell,* 93 Me., 362, 374, 45

A., 305, 74 Am. St. Rep. 350; *Thompson, Appellant,* 116 Me., 473, 476, 102 A., 303. A failure to comply with the admonition of the statute will lay the decree open to direct attack.

The present action is such attack. It claims that the decree was not the result of consideration of the matter in accordance with the requirements of the statute in that no proofs in support of such decree were received by the Judge of Probate.

The contention of the respondents is that the decree in the Probate Court was upon a matter within its jurisdiction, and cannot be impeached. Neither in any of the proceedings upon the record presented nor in the brief of counsel for the respondents is claim made in justification of the decree on its merits.

The bill of exceptions allowed by the Presiding Justice of the Supreme Court of Probate discloses that the petition to annul set forth every step in the progress of the case from the beginning of administration in the Probate Court and that certified copies of all papers in the court below were presented and received at the hearing by the Presiding Justice in consideration of the case. All papers so presented in the Supreme Court of Probate and all docket entries in that court and in the Probate Court were printed and made a part of the bill of exceptions.

Counsel for the respondents in their brief claim that the certified copies of the proceedings in the Probate Court were before the Supreme Court of Probate for the limited purpose of "assisting the court to understand the background of the case" and "not as evidence." This is not in accordance with the statement in the bill of exceptions allowed and signed by the Presiding Justice. We are bound to give credit to the statements contained in such a bill of exceptions. *Colby* v. *Tarr,* 139 Me., 227, 29 A. (2d), 749. The record does not show objection raised by the appellees to the allowance of the bill of exceptions. It must be considered that in the rec-

ord presented the Presiding Justice had evidence before him. The decree of the Presiding Justice of the Superior Court, sitting in the Supreme Court of Probate, contained the following statement:

> "The case comes before the Superior Court, being the Supreme Court of Probate, on the original petition, the amendment, and the decree of the Judge of Probate upon said petition. No evidence was offered in support of said petition.
>
> "IT IS THEREFORE ORDERED ADJUDGED AND DECREED that said appeal be and hereby is dismissed for lack of evidence to support said petition."

It is apparent that the ruling was based upon the failure to present evidence extraneous of the complete record of the steps taken in the proceedings in the Probate Court.

The matters appearing upon the record are of such nature that, unexplained, they cannot fail to produce the conviction that the decree did not represent a judgment of the court founded upon proofs as required by the statute. Unexplained, the records of the Probate Court together with the allegations of the petition, required the judge to deny the petition to sell both parcels. According to the inventory, sworn appraisers appointed by the Probate Court appraised one parcel of real estate at $1,900 and the other parcel at $5,700. The discrepancy between the value of the personal property and the debts was $285.34. To that it was necessary to add an estimate of the expense of sale and of the administration. The estimate of $600 for these expenses was grossly in excess of a fair estimate.

As the matter was presented to the Judge of Probate, in all reasonable expectation a two-thirds interest of either parcel of real estate would sell for more than enough to meet the

debts and all expenses. The descriptions of the parcels of real estate, presented in the petition to sell, indicated upon their face that there was no connection between the parcels that would cause the value of one to be depreciated if the other parcel was sold. Yet decree was entered for the sale of both parcels and a two-thirds interest in real estate valued, according to the inventory at $7,600, was sold for $2,800 and return made to that effect, an amount slightly more than one-half the value of the interest sold, upon the basis of values stated in the inventory.

It is true that the values set by the appraisers may have been incorrect, but the contents of the inventory which had been accepted by the court could not be entirely disregarded. Because of the importance of correct values in the inventory in assessing the inheritance tax, it is significant that no move was made to correct the inventory if the values put upon the real estate by the appraisers were so excessive as would be indicated by the sale price. Likewise the indication upon the face of the petition to sell that there was no connection between the parcels such that would cause the residue to be depreciated by a sale of any part, was for his consideration.

If there was explanation that would justify a different interpretation of the situation disclosed to the Judge of Probate upon presentation of the petition to sell the real estate, the respondents have not seen fit to disclose the same. They likewise have failed to deny the allegations contained in the petition to annul. It was for the interest of the executor and the grantees, the defendants in the case, to offer any explanation that would rebut such a lack of justification for the decree as appears upon the face of the proceedings, and their failure in these respects cannot be disregarded.

Corrections of the ordinary mistakes of a tribunal in the interpretation of law or findings of fact should be sought in appropriate appellate procedure; but the Probate Court in common with all courts has authority to rectify its own mis-

takes if the act complained of is the result of procedure not in accordance with its authority or is so the result of inadvertence or mistake that it is in truth not the act of the court. 31 *Am. Jur., Judgments,* Sec. 716; *Waters* v. *Stickney,* 12 Allen, 1, 90 Am., Dec. 122; *Harris* v. *Starkey,* 176 Mass., 445, 57 N. E., 698, 79 A. M., St. Rep., 322.

The information contained in the record before the Presiding Justice and existence of a decree so inconsistent with the matters upon the record and apparently so contrary to equity and justice, unexplained, was ample evidence that the decree was not the result of the procedure prescribed by the statute, but rather the consequence of inadvertence and mistake.

For these reasons the Presiding Justice was in error in dismissing the petition for want of evidence. The exceptions must be sustained.

Exceptions sustained.

HELENA C. ROGERS, INDIVIDUALLY,
AND AS EXECUTRIX UNDER THE WILL OF DAVID WALTON

vs.

ARTHUR WALTON AND EDWARD WALTON,
INDIVIDUALLY, AND AS TRUSTEES UNDER THE
WILL OF ANNIE WALTON.

Androscoggin. Opinion, October 24, 1944.

Wills.

The statute giving to the equity court jurisdiction to construe wills should be liberally interpreted to the end that litigation may be prevented, multiplicity of suits avoided, and title to property, both real and personal, promptly settled.

A bequest or devise to an estate is not necessarily void where the intent of the testator can be determined.

The intent of the maker of a will is to be determined from the language used, however inartificial it may be, and the language of the will should not be construed in its technical sense where it is apparent that the testator did not so use it.

ON REPORT.

Suit in equity by the plaintiff as executrix of the will of David Walton and in her own right as sole beneficiary under his will for the construction of the will of his mother, Annie Walton. Under the terms of the mother's will her three sons, one of whom was David Walton, were appointed executors and trustees. Subsequent to the death of his mother, David Walton died without leaving a widow or issue. His will was duly allowed and the plaintiff under its terms was appointed executrix. She is also sole beneficiary. She claimed that by the terms of his mother's will David Walton's estate

was entitled to share in the estate of his mother. Held that she had a right to bring suit for the construction of Annie Walton's will and that it was the intent of Annie Walton to give to each son a one-third interest in the trust fund which could pass as his property under his will. Case remanded to the sitting justice for a decree in accordance with the opinion. The case fully appears in the opinion.

Fred H. Lancaster,

Marguerite L. O'Roak, for the plaintiff.

Berman & Berman, Lewiston, for the defendant.

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

THAXTER J. The plaintiff, as executrix of the will of David Walton, and in her own right as sole beneficiary under his will, brings this bill in equity for the construction of the will of his mother, Annie Walton, under the terms of which the plaintiff claims that his estate is entitled to share. The defendants are the surviving two sons of Annie Walton and are made parties individually and as trustees of her estate. The case is before us on *report* on bill, answer, and agreed statement.

The will of Annie Walton was executed October 29, 1935. At that time she had three sons, David, Arthur and Edward. Two other sons, Fred and Lawrence, had died each leaving a widow and children. She died April 12, 1936, and her will was duly allowed in the Probate Court for the County of Androscoggin on June 6, 1936. All three sons survived their mother and in accordance with the terms of her will were appointed executors and trustees. Subsequent to the death of the mother, David Walton was divorced. He died without leaving a widow or issue. His will, dated November 13, 1941, was duly allowed and the plaintiff was, in accordance

with its terms, appointed executrix. She is the sole beneficiary. The two other brothers, who are the surviving trustees under the will of their mother, claim that neither the income of the trust created by her will, nor the corpus thereof at its termination, nor any other part of the property or estate of Annie Walton became vested in the estate of David Walton and that no part thereof could be bequeathed or devised by him. They have accordingly refused to pay over any part of the income of the trust to the executrix of his estate and claim that she will not be entitled, either as executrix or individually, to any of the corpus of the trust on its termination.

After making a few minor bequests, Annie Walton left the entire residue of her estate in trust to her three surviving sons. The controversy arises over the terms of this trust. The essential parts of the will creating it read as follows:

> "*Fourth*: All the rest, residue and remainder of my property, both real and personal, and of whatsoever kind and nature and wherever the same may be located or found, which I may own or have a right to dispose of at my decease, I give, devise and bequeath to my children who are alive on the date of the execution of this will in trust, to manage and control the same and particularly to operate my bakery and to pay all the expenses out of the income and deduct a reasonable charge from the income for the services of those children who are actively engaged in the management of the trust and I direct the trustees to divide the net income equally among my children who are alive at the execution of this will.
>
> "*Fifth*: 1—In the event any of my sons who are alive at the date of the execution of this will but who predecease me, leaving child or children, by blood or by adoption, and a widow who has not remarried at

the time of my decease then the share of such deceased son shall go as follows: From the net income of my estate during the period of trust the right to the share of the deceased son shall be shared in the following manner, two-thirds thereof to such unmarried widow and one-third to such child or children in equal shares and upon the termination of the trust herein, the same apportionment of the res is to be made, that is, the widow of a deceased son, which deceased son was alive on the date of the execution of this will, is to take two-thirds of the share of said deceased son and the child or children of said deceased son is to take one-third, to be divided equally among them provided there is more than one.

"2—In the event of any of my sons who are alive at the date of this will should predecease me, leaving a widow surviving, who has not remarried at the time of my decease, but no child or children, then I give, bequeath and devise the share of such deceased son to his unmarried widow.

"3—In the event any of my said sons should die before me leaving no widow but leaving children of their own blood or by legal adoption then I give, devise, and bequeath to the child or children the right to share in the proceeds of the trust herein set forth and upon the termination of the trust, the child or children of the deceased son who has died since the execution of this will is to take the share of their deceased father.

"*Sixth*: Upon the decease of anyone of my children during the period of this trust there shall be no new trustee designated to fill the vacancy but the other children who are alive will continue to manage and pay over the benefits of this trust until there is only one trustee living at which time this trustee shall liquidate the residue of my estate in the most expedi-

> tious manner with regard to preserving the value of the same for the best interest of the devisees under this will and the trustee may buy the business himself and to pay therefore a reasonable sum and which sum is to be approved by the Judge of the Probate Court in and for the County of Androscoggin and the said trustee shall thereupon distribute the proceeds of this trust to the devisees under this will, in paragraph four, to their estates, and to himself equally."

The claim of the defendants is, with respect to the income, that David Walton was entitled to it so long as he lived, that if he had died leaving a widow or children such widow or children would have been entitled to it, but that having died without a widow or children, the income should be distributed to the surviving children of the testatrix who are these defendants. As to the principal, the same general claim is made that "the corpus of the estate should be distributed" on the termination of the trust "to the last surviving son and to the widows and children, if any, of any deceased child." Though it is not contended that the corpus passes under the fifth clause of the will, yet, for some reason not fully comprehended by us, it is suggested that resort should be had to the fifth clause to interpret what the testatrix meant by the word "estates" used in the sixth clause and to determine the proportions in which the survivor and the widows and children of deceased sons should share.

The statute giving to the equity court jurisdiction to construe wills should be liberally interpreted to the end that litigation may be prevented, multiplicity of suits avoided, and title to property, both real and personal, promptly settled. *Baldwin* v. *Bean,* 59 Me., 481; *Haseltine* v. *Shepherd,* 99 Me., 495, 59 A., 1025. The plaintiff, as executrix of the will of David Walton who was a beneficiary under the will of his mother, certainly had the right to bring such a bill. To be

sure the question of the disposition of the corpus of the trust is not a matter of immediate concern to the trustees. But the reason for the rule laid down in *Moore* v. *Emery,* 137 Me., 259, 18 A., 2d 781, that the court will not construe a will in order to determine future rights has no application here. The right of the plaintiff at a future time to share in the corpus of the estate is inextricably interwoven with her claimed present right to the income, and she has besides an immediate problem in deciding whether this right to a share in the principal of the trust should be included as an asset in the inventory of the estate of David Walton. We are met with one other requirement which gives us some concern. This is laid down in *Haseltine* v. *Shepherd,* supra, page 504, in the following language: "It must appear that the language of the will is such that the parties may reasonably have doubts concerning its true construction." We do not quite understand how such doubt can exist here. The language seems reasonably plain to this court even though it does not to the parties, or at least to the defendants, who have refused to make payments of the income to the executrix of their brother's estate. But we concede that their claim is honest that the will is ambiguous; and in the interest of ending a controversy and determining the rights of the parties, we shall not be too rigid in limiting our authority to act on the prayer of this bill.

We shall take up first the question as to the right of the plaintiff on the termination of the trust to share in the corpus of the estate. For our views on this issue will settle her right to the income.

Annie Walton created a trust of substantially her entire estate. Her three sons, if they survived her, were to be trustees and beneficiaries and her intention to treat them in exactly the same manner is obvious. The trust was to continue until there should be but one son surviving, who was charged with the duty of distributing the principal "to the devisees

under this will, in paragraph four, to their estates, and to himself equally." This language when read in the light of conditions which would at that time exist seems clear. The two deceased sons, through their personal representatives charged with the duty of administering their estates, were to share equally with the survivor. What else could it mean? We doubt if any other construction would have been suggested, if the industry of counsel had not discovered certain cases which seem to lay down the doctrine that a legacy to the estate of a deceased person is void because an estate as such is incapable of receiving property. *Estate of Glass,* 164 Cal., 765, 130 P. 868; *In Re Davis' Estate,* 59 P. (2d), 547; *Gardner* v. *Anderson,* 116 Kan., 431, 227 P., 743; *Simmons* v. *Spratt,* 20 Fla., 495; *Martin* v. *Hale,* 167 Tenn., 438, 71 S. W., 2d, 211. Counsel seem to argue that the language of the testatrix is ambiguous because of her use of a phrase which, viewed technically, some courts have held is meaningless. In the first place we are not satisfied that a single one of the cases cited by counsel lays down the doctrine that a bequest or a devise to an estate is necessarily void, when the intent of a testator in using these words is apparent and when his obvious purpose can be made effective. Certainly it is not the rule in Maine where we have consistently sought to determine the intent of the maker of a will from the language used, however inartificial it may be. And that language should not be construed in its technical sense where it is apparent that the testator did not so use it. *Abbott* v. *Danforth,* 135 Me., 172, 192 A., 544; *Gorham* v. *Chadwick,* 135 Me., 479, 200 A., 500, 117 A. L. R., 805; *Moore* v. *Emery,* supra. The language of Lindley, L. J. in *In Re Morgan* (1893), 3 Ch. 222, cited with approval in *Abbott* v. *Danforth,* supra, 178, is peculiarly applicable here:

> "I should have thought that, upon the will, the matter was reasonably plain; but we are pressed with

> authorities. Now, I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases. I always protest against anything of the sort. Many years ago the Courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it."

On the other hand there are cases which hold very definitely that a devise or bequest to an estate may be made effective where the testator's intent is plain. *Leary* v. *Liberty Trust Co.* 272 Mass., 1, 171 N. E., 828, 69 A. L. R., 1239; *Bottomley* v. *Bottomley,* 134, N. J. Eq., 279, 35 A. (2d), 475 (N. J. 1944).

In the Massachusetts case the bequest was "to my said brother James if he be then living and in event of his death to his, said James' estate" . . . . James died before his brother. The court pointed out that there is authority that a devise or bequest to an "estate" is too indefinite to be given a meaning, but, rejecting such a rigid rule, held that it was its duty to carry out the testator's intention, which in this instance was that the "remainder should be taken by those whom James should designate, not in the sense of incorporating the will of James into his (Michael's) will by reference, but by making the remainder a part of James' estate, James having the right to dispose of the remainder as a part of his estate as he wished."

We think that the Massachusetts and New Jersey courts have stated the rule correctly in holding that a bequest or devise to an estate is not necessarily void where the intent of the testator can be determined. Strangely enough, coun-

sel, having raised up this specter of a legal formalism, almost immediately shy away from it for their own construction of what this testatrix meant by the word "estate." Having spent no inconsiderable effort in citing cases to the effect that the language of the testatrix is without meaning, they now give it a meaning of their own. And so they say that her property "should go in accordance with the intent of the testatrix as in this case is found in other portions of her Will, said Will being read as a whole." Then they go on to argue that the word "estates" means "the widows and children of any deceased son and no one else." And they claim to find warrant for this interpretation by reading clause five. Clause five, however, has no possible bearing on the subject. It makes provision for the disposition of the share of a child who might die before the testatrix. She provided for that contingency and for no other. She apparently was content to trust to the judgment of her sons who might survive to make disposition of their shares in the light of circumstances which she could not foresee. To do what counsel now ask of us would be to make a will not to interpret one.

We think that the intent of the testatrix is clear to give to each son a one-third interest in the trust fund, which could pass as his property under his will or as intestate property if he should leave no will. During the continuance of the trust he, or in case of his death, his personal representative, would be entitled to one-third of the net income of the trust. At the termination of the trust it was her intent that the corpus should be divided into three equal parts, one part going to the surviving son and each of the other two parts to the personal representative of each of the sons who had died to be distributed as a part of the estates of such sons.

The case will be remanded to the sitting justice for a decree in accordance with this opinion.

So ordered.

HAYNES *vs.* LINCOLN TRUST COMPANY.
THOMPSON *vs.* LINCOLN TRUST COMPANY.
HOBBS *vs.* LINCOLN TRUST COMPANY.
PHILIP SHEDD *vs.* LINCOLN TRUST COMPANY.
VERA SHEDD *vs.* LINCOLN TRUST COMPANY.
BROWN *vs.* LINCOLN TRUST COMPANY.
LINTON *vs.* LINCOLN TRUST COMPANY.

Penobscot. Opinion, October 26, 1944.

Banks and Banking. Account Stated. Agency.

The treasurer of a bank is only its agent, and his conduct is governed by the general law of agency. The bank is bound so long as he keeps within the scope of his authority, but is not answerable if he acts beyond his authority or in his individual capacity.

In the instant case, the Treasurer of the Bank had no implied authority to pay his individual debts by using the funds of the Bank.

The fact that the Treasurer was personally interested as principal in the transactions described, was sufficient to put his creditors upon inquiry as to the actual scope of the Treasurer's authority as agent of the Bank.

When the Treasurer delivered his personal checks, drawn on his bank, to creditors for the purpose of paying his debts, such creditors took the checks at their peril and without recourse against the Bank unless the Treasurer had funds on deposit with which to meet the checks.

An "account stated" is an account where the balance due has been ascertained to be correct and is agreed upon, and there is express or implied promise to pay.

Although after an audit of the Bank's affairs, some of the plaintiffs received monthly statements which included the amounts credited to their accounts by the Treasurer, such monthly statements did not become "accounts stated" because the sums shown as balances had not been agreed upon as owing to the plaintiffs, and it was understood that liability was disputed.

The nondelivery by the Bank of deed originally left with plaintiff Vera Shedd as collateral security, did not create liability on the part of

the Bank, because there is no evidence of demand by said plaintiff for its delivery and none of assertion of right of retention by the Bank.

ON REPORT.

Separate actions by the plaintiffs to recover moneys credited on their deposit books as being due to them as depositors of funds in the defendant Bank. The Treasurer of the bank, William M. Noddin, who also acted as its manager was indebted to each of the plaintiffs in connection with his personal affairs. In alleged payment on his debts to plaintiffs, he drew personal checks in favor of some of the plaintiffs, which, when deposited by them, he credited on their bank deposit books. In the case of Vera Shedd, one of the plaintiffs, he executed a deed to her of certain real estate as security for a loan to him, which deed was turned back to him when the amount of the loan, with interest, was credited to Vera Shedd on her deposit book. As a matter of fact, none of his personal checks, given to plaintiffs and received as deposits by him as Treasurer of the Bank, the amounts of which were credited in the deposit books of plaintiffs, were ever cleared on the records of the Bank, as Noddin at no time had a balance in the Bank sufficient to meet any of them. None of the fraudulent acts were known to the plaintiffs or to the other employees of the Bank. When they were discovered, the plaintiffs were notified that they would not be allowed to draw out any sum which would affect the amounts fraudulently credited to them by Noddin. This suit was brought to recover such sums. Judgment for the defendant was ordered. The case fully appears in the opinion.

Randolph A. Weatherbee,

Fellows & Fellows, by Frank G. Fellows, for the plaintiffs.

James E. Mitchell,

Edgar M. Simpson, for the defendant.

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

MANSER, J. On report. The defendant, Lincoln Trust Company, organized under State laws, is a country commercial bank with savings department. Its Treasurer, William M. Noddin, acted as manager. There were five employees. None of the directors lived nearer than fifty miles to the town of Lincoln.

Noddin, in addition to his employment in the bank, carried on the business of purchasing and selling lumber on his own account, in which business the bank was in no wise concerned.

The plaintiffs in the seven cases presented were all creditors of Noddin in connection with his personal affairs. Because of the similarity in the facts, and which involved substantially the same principles of law, the cases were presented in one record for determination.

The situation in each case arose from the conduct of Noddin in manipulating entries in the books and records of the Bank, and by the issuance of bank statements or memoranda designed to show that the debts owed by him to the plaintiffs were paid, and the amounts thereof ostensibly credited to the deposits of the plaintiffs in the Bank.

Noddin had a personal checking account with the Bank, and in the cases of the plaintiffs Haynes, Thompson, Hobbs and Brown, he drew his own checks, which were deposited by the recipients, either personally or by mail, to be credited to their checking accounts in the same Bank. The plaintiff, Vera Shedd, a sister-in-law of Noddin, was induced by him to allow a withdrawal from her savings deposit in the Bank as a temporary loan to Noddin. As security, Noddin delivered a deed of real estate executed to her by the wife of Noddin's business partner. Later Noddin returned the deposit book with the entry of a credit by him of the amount borrowed

plus interest. The deed was turned back to him and remained with his personal papers in the Bank.

The plaintiffs, Philip Shedd and William Linton, each made temporary loans to Noddin, who later credited the amounts to their checking accounts in the Bank.

Actually, Noddin never used his own funds in any of these transactions. While he had a personal checking account with the defendant Bank, his balance was never sufficient to pay any of the checks he drew connected with the matters now under consideration, and they were worthless. Receiving the checks as deposits in his capacity as Treasurer, he then immediately concealed the deposit slips and checks with his own papers, and the checks were never cleared on the records of the Bank. The transactions covered a period of several months, during which time Noddin first falsified the monthly statements sent out to the plaintiffs who had checking accounts, to make it appear that their actual balance included the amounts of his ostensible payments. Later, he secretly charged certain large inactive accounts of other depositors with withdrawals equalling the false entries he had made, and entered the sums upon the accounts of his creditors. From that time on, the books of the Bank and the monthly statements apparently reflected that the plaintiffs were entitled to the sums involved in the present suits and for which they now claim the Bank is indebted to them. The aggregate of the amounts in controversy is $9,179.37. In addition, one plaintiff, Thompson, had received from Noddin checks totalling over $6,000, and had made withdrawals, reducing his balance to $3,941.24, the sum for which he brought suit.

None of the fraudulent acts were known to the plaintiffs, or the directors, or other employees of the Bank. When they came to light, an audit was made, and the plaintiffs were all notified that they would not be allowed to withdraw any sum which would affect the amounts credited to them by Noddin, as recited above. While they continued to receive

from the Bank monthly statements which, on their face, gave them credit for the withdrawals made by Noddin on inactive accounts, they knew that such funds were not available for their use, and that the rights of the parties awaited judicial determination. There is no dispute as to the facts.

The contentions of counsel for the plaintiffs may be summarized as follows:

The plaintiffs were all innocent parties. They were unaware of any fraud on the part of the Treasurer of the Bank, and they were in no way put upon notice thereof.

The Treasurer was permitted to have a checking account with the Bank, and when another depositor received his check and deposited it in the same Bank and received credit therefor, the Bank was charged with knowledge as to the status of the account of the maker of the check, and acceptance thereof by its Treasurer was the equivalent of a deposit of cash.

When a depositor deals with the sole representative officer of a bank, the knowledge of that officer is the knowledge of the bank.

When a bank holds out its Treasurer to the public as worthy of trust and confidence, and enables him to convince the depositors that its transactions are within his power, the bank is liable.

A credit entered on the account of a depositor's pass-book, and likewise monthly statements which include the credit, are admissions on the part of the Bank that such sum is due the depositor.

The sending out of monthly statements of certain of the plaintiffs, after discovery of the fraud, constituted as to each of them an account stated.

As generalizations, most of these contentions are supported by judicial authority, but the claim of applicability fails to recognize essential elements here present.

These we proceed to consider. No case involving the exist-

ent situation appears to have been passed upon by our Court, but the tenor of our decisions is in accord with the many jurisdictions where such issues have been decided. The factors, not existing in most of the decisions urged as precedents, are that the plaintiffs dealt with Noddin as a principal in transactions between them. Here when an assumed adjustment took place, Noddin acted in a dual capacity as principal and also as agent and representative of the Bank. In the latter capacity, he committed fraudulent acts without the knowledge of his employer, to make it appear by false bank entries that he had paid his debts.

Under such circumstances, did the Bank become liable?

Plaintiffs seek to apply the fundamental rule that where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. This is a correct general statement of a universal approved principle. It is without application here, as the plaintiffs were dealing with Noddin on his own personal business, and the Bank gave him no power or authority to pay his own debts with its funds. Under such circumstances, the duty rests on the plaintiffs to ascertain that he is using his own funds, and not misappropriating those of his employer. The burden may appear onerous, and not in accordance with popular concept, but it gives effect to the only safe rule. The general principle would have application if the Treasurer were acting, not as principle in his own business, but solely as agent for the Bank. Then, if he accepted as good a worthless check drawn on the Bank by another depositor, the Bank might be liable, because the Bank, by its recognized agent, has the knowledge, or means of immediate ascertainment, of the status of the account of such depositor.

Again, what are the "consequences" of his act which are to be borne either by the creditor of Noddin or by the Bank? The debt has not been paid. The creditor is in the same situa-

tion as before the fraudulent act of Noddin was committed. He has the same right of action against him as he had then. The debtor may be bankrupt and the claim against him of no value, but there has been no change in legal status as between the principals in the transaction, and it would be an ominous and dangerous rule to hold that a bank can give its treasurer license to steal its own funds or those entrusted to it by other depositors to pay his own debts.

The great weight of authority supports the views here expressed.

Upon the general proposition that the treasurer of a corporation cannot draw notes and checks of the Company, payable to himself, and signed by him as treasurer, and use them to pay his personal obligations, our own Court in *Gilman* v. *Carriage Co.*, 125 Me., 108, 131 A., 138, 139, held:

> "While the treasurer's authority to *sign* the notes and cheques in suit cannot be questioned, he presumptively had the right to *negotiate* them for corporate purposes only.
>
> Even his authority given by vote to issue and indorse paper gave him no right to use it to pay his individual debts."

In *Langlois* v. *Cragnon*, 123 La., 453, 49 So., 18, 22 L. R. A. N. S., 414, the plaintiff loaned money to the cashier of a bank. When the loan became due, the parties agreed that the cashier should make a deposit in the bank to the credit of the plaintiff. Later, a check was drawn for part of the deposit, which check was paid. The position taken by the plaintiff was that the duty of making entries on the books of the bank was exclusively that of the cashier, and when informed by him that the deposit had been made to the credit of the plaintiff, the bank became liable therefor, and further honoring of checks drawn on the deposit constituted notice

of the transaction, from which ratification is deducible. The Court disposed of these contentions thus:

> "We answer that the bank is not responsible. The effect of holding it to be responsible would be to permit the agent to pay his debt by saddling it on his principal. It stands to reason that such a thing cannot be legal. The principle of law which comes into play in such a case is the following: 'In matters touching the agency, an agent cannot act so as to bind his principal, where he has an adverse interest in himself' Story, Agency, No. 210.
>
> As a corollary to that principle, where, from the circumstances of the particular business, the agent's interest and that of his principal are necessarily in opposition, as in the present case, third persons are charged with notice of such want of authority.
>
> The notice which is thus imputed to Rev. Langlois cuts him off from invoking the rule that, whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it.
>
> In fact, Rev. Langlois not only cannot claim to have been an innocent third person, but, by the statement of facts, does not show affirmatively that he suffered a loss. He does not show that, but for the deception in question, he could have made his claim out of Pellerin. For all that appears, Pellerin may not have had a dollar to his name."

This case is cited with approval as to principles concerning agency in *Realty Co.* v. *Amey*, 121 Me., 545, 118 A., 475.

Hier v. *Miller*, 68 Kan., 258, 75 P. 77; 63 L. R. A., 952, has been widely cited and may well be regarded as a leading

authority. The position taken by the present plaintiff was vigorously and cogently advanced, but the holding of the Court is well summarized in the headnotes as follows:

> "The cashier of a bank organized under the laws of this state has no implied authority to pay his individual debt by entering the amount of it as a credit upon the pass-book of his creditor, who keeps an account with the bank, and permitting the creditor to exhaust such account by checks which are paid, the bank having received nothing of value in the transaction.
>
> If the cashier of a bank, without actual authority so to do, undertakes to pay his individual debts in the manner stated, the bank may recover of his creditor the amount of money paid on checks drawn upon the faith of the unauthorized pass-book entries.
>
> The fact that the cashier is personally interested in a transaction of the character described is sufficient to put his creditor upon inquiry as to the actual extent of the former's power."

Again, in *Cobe* v. *Hardware Co.*, 83 Kan., 522, 112, P. 115, 31 L. R. A. N. S., 1126, the Court said:

> "Neither the cashier nor a stockholder of a bank can by any device or fraud give away its funds, nor can they use them to pay their individual debts to appellee or anyone else. Appellee had overdrawn its account with the bank and was indebted to it . . . . 'The funds of the bank could not be diverted or appropriated to the individual debts of Devlin or the cashier by the mere agreement between Devlin and the appellee to enter a credit in its favor. The appellee

> had paid nothing to the bank, and the bank had received nothing to warrant such a credit.' "

It might be argued that the principles enunciated in the decisions establishing the rule that a bank officer cannot pay his personal obligations with funds of the Bank, without authority from the Bank so to do, generally deal with facts which show that credit was given by the officer by means of a deposit slip, an entry in depositor's pass-book, or by a cashier's check drawn on the Bank, and that there should be an exception to the rule, where, as here, in some instances, he drew his own personal check, and therefore his creditor had a right to assume that he was paying his debt from his own funds on deposit in the Bank.

It is the opinion of the Court, that this does not affect the applicability of the general rule. *In Columbia Bank* v. *Morgan,* 198 Wis., 476, 224 N. W., 707, the same situation was discussed. There the cashier handed to his creditor his personal check for the balance of his indebtedness to her, and she endorsed it and returned it for deposit, but there, as here, the cashier abstracted the check and the records of the bank did not disclose it. He used devices to make it appear that the assets of the bank were fully intact.

In the above case the Court quoted copiously from *Hier* v. *Miller,* supra, and commented on this difference in facts, but adhered to the same rule, saying:

> "The result of the transaction was that the defendant received the moneys of the bank, which in equity and good conscience belonged to it, and for which it received no consideration."

So in *Schwenker* v. *Parry,* 204 Wis., 590, 236, N. W., 652, the Court reaffirmed the principle enunciated in the *Columbia Bank* case, supra, in particular because its soundness was questioned, and concluded:

> "We hold, on grounds of sound public policy, that when a bank cashier delivers his personal check on his bank to a person for the purpose of paying his debt, such person takes the check at his peril and without recourse against the bank unless the cashier has funds on deposit with which to meet the check. Payment of the check, by the cashier, as an officer of the bank, should not be held to close the transaction."

For further authorities see *Campbell* v. *Bank*, 67 N. J. L. 301, 51 A., 497, 91 A. S. R. 438; 9 C. J. S., Banks and Banking, Sec. 202 and cases there collated; *Greer* v. *Farmers* Bank, 174 Okl., 46, 51 P. 2d. 792; *State* v. *Thedford Bank*, 114 Neb., 534, 208 N. W., 627; 7 Am Jur., Banks, Secs. 226, 227. With particular regard to the rule admitting evidence contra to entries in bank books, reference is made to the decisions of our own Court in *Northrop* v. *Hale*, 72 Me., 275, and *Savings Bank* v. *Fogg*, 83 Me., 374, 22 A., 251.

Counsel for the plaintiff appears to rely on *Pemiscot Bank* v. *Tower Grove Bank*, 204 Mo. App., 441, 223 S. W., 115, as authority for the contention that checks drawn by cashier on his own bank in payment of personal debts, do not carry notice to his creditor concerning his authority, but the Court there pointed out facts which took that particular case out of the rule relating to the issue of checks by a cashier in payment of his personal indebtedness, and cited its own decision, *Bank* v. *Edwards*, 243 Mo., 553, 147 S. W., 978, as supporting such general rule, which it there speaks of as "rigorous but wholesome."

Specifically we hold in accordance with the well established rule, that the treasurer or cashier of a bank is only its agent, and his conduct is governed by the general law of agency. Hence, the Bank is bound, so long as he keeps within the scope of his authority, but is not answerable if he acts beyond his authority or in his individual capacity. *Home Bank*

v. *Otterbach,* 135 Iowa, 157, 112 N. W., 769, 124 A. S. R., 267, with cases cited in annotations. *State* v. *Bank of Manchester,* 6 Smedes & M., 218 (Miss.), 45 Am. Dec., 280; *Realty Co.* v. *Amey,* 121 Me., 545 at 556, 118 A., 475.

Recurring to the contention of the plaintiffs that after they received notice that an audit of the Bank's affairs had shown discrepancies and that the Bank could not allow any withdrawals of the sums now in question, yet some of the plaintiffs later received monthly statements which included them, and as to those plaintiffs, such statements thereby became accounts stated. The facts warrant no finding that liability for a definite sum had been agreed upon, the balance ascertained to be correct, and an express or implied promise given to make payments. These elements are necessary to support an account stated. Notwithstanding the receipt of monthly statements, it was always understood that the plaintiffs could not make withdrawals, that liability was disputed, and that the issue was to await judicial determination; *Pride* v. *King,* 133 Me., 378, 178 A., 716; *Holmes* v. *Morse,* 50 Me., 102; 1 Am Jur., Accounts and Accounting, Secs. 31, 32; 7 Am. Jur., Banks, Secs., 461, 462.

Neither is there merit in the claim on behalf of Vera Shedd that the Bank became liable to her because it did not deliver to her the deed which was deposited with her by Noddin as security and which she later returned to him, when he credited her savings account with the amount he had borrowed. There is no evidence of an assertion of right of retention of this deed by the Bank, and none of demand or request by the plaintiff for its delivery to her. The Bank was not a party to the transaction and apparently the plaintiff relied solely on her claim of right to recover from the Bank, and awaited its determination.

The entry in each of the cases must be

Judgment for the defendant.

ISABEL WALTON, LILLIAN G. WALTON,
WALTER NEWELL ROBERTS

vs.

GRACE H. ROBERTS.

Cumberland. Opinion, October 26, 1944.

Wills. Failure to provide for children in will.

Rev. Stat. 1930, Ch. 88, Sec. 9, raises a presumption that the omission to provide for a child in a will is not intentional.

This presumption is rebuttable and the burden of rebutting it is on those who oppose the claim of the child.

The circumstances of the life of the testatrix at the time the will was drawn speak even more conclusively than would direct evidence of her intent. They are relevant and can properly be considered by the court.

That a mother living with her infant children and caring for them, about to give birth to another, omitted them unintentionally from a share in her estate is to assume that she forgot she had them.

ON APPEAL BY PLAINTIFFS.

Bill in equity seeking a construction of the will of Lillian G. Roberts and a partition of certain real estate owned by her at the time of her death. Her husband, Walter H. Roberts, was the sole devisee under her will. No mention was made in the will of decedent's children who were the plaintiffs in this action. A little over a year after his wife's death the husband married the defendant and subsequently conveyed to her by warranty deed the property in question. The defendant claimed to be the sole owner of the property. The question in the case was whether the children of Lillian G. Roberts were omitted intentionally from her will. The sitting

justice found that such omission was intentional. The plaintiffs appealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Berman & Berman, Portland,

Sidney W. Wernick, for the plaintiffs.

Frank H. Haskell,

Hinckley & Hinckley, by George H. Hinckley, for the defendant.

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

THAXTER, J. The amended bill in this case seeks a partition of certain real estate and a construction of the will of Lillian G. Roberts. The claim of the plaintiffs is that the parties are tenants in common. The defendant claims to be the sole owner under a deed from her husband, Walter H. Roberts, who was the sole devisee under the will of his deceased wife, Lillian G. Roberts. The question is whether the plaintiffs, being the children of Walter H. and Lillian G., and not being mentioned in their mother's will, took a two-thirds interest in the real estate under the provisions of the statute governing the rights of children not having a devise under a parent's will. The essential provisions of the statute in question, Rev. Stat. 1930, Ch. 88, Sec. 9, read as follows:

> "A child, or the issue of a deceased child not having any devise in the will, takes the share of the testator's estate, which he would have taken if no will had been made, unless it appears that such omission was intentional, or was not occasioned by mistake, or that such child or issue had a due proportion of the estate during the life of the testator."

The sitting justice found as a fact that the testatrix, Lillian G Roberts, intentionally omitted from her will her children born and to be born, and in accordance with such finding entered a decree dismissing the bill. The case is before us on an appeal from this ruling. The question is whether the appellants have sustained the burden of showing that such finding is clearly erroneous. *Young* v. *Witham,* 75 Me., 536.

The facts are not in dispute. The sole question is whether the omission by Lillian G. Roberts to mention her children in her will was intentional. Title to the property in question was acquired by Lillian G. Roberts on July 2, 1886. She was then living with her husband, Walter H. Roberts. The son, Walter N. Roberts, was then eighteen months old, the daughter, Lillian G. Walton, was born June 14, 1887, and the daughter, Isabel Walton, on October 26, 1891. The will which was in Mrs. Roberts' handwriting was executed April 14, 1891, six and a half months prior to the birth of her youngest child. Under its terms her entire estate both real and personal was left to her husband who was appointed sole executor. No mention was made of any of the children. Mrs. Roberts died June 20, 1927, and her will was duly allowed by the Probate Court for the County of Cumberland on November 20, 1929. A little over a year after his wife's death Walter H. Roberts married the defendant and on April 21, 1938 conveyed to her the property in question by warranty deed. He died May 27, 1941. The real estate consisted of a lot of land on Fessenden Street in Portland containing approximately 4,600 square feet on which was a house in which the father, mother and their children lived. In the petition for probate of Mrs. Roberts' will, her husband estimated its value as not over $5,000. It was a modest home paid for in installments in which the mother and father lived happily and brought up their children. The mother had no property of her own, and was not at any time gainfully employed.

Her daughter, Isabel, testified that her mother's will was kept in a strong box in the house and that she often talked with her mother about it.

The statute raises a presumption that the omission to provide for a child in a will is not intentional. This presumption is rebuttable, *Ingraham, Appellant,* 118 Me., 67, 105 A. 812, and the burden of rebutting it is on those who oppose the claim of the child. *Ramsdill* v. *Wenthworth,* 106 Mass., 320. Declarations of a testator are admissible on this point, *Whittemore* v. *Russell,* 80 Me., 297, 14 A., 197, 6 Am. St. Rep., 200. In the case before us there is no evidence of what the testatrix may have said as to her reasons for omitting her children as devisees. If there were any such statements they were undoubtedly made to her husband and he is dead. But the circumstances of her life at the time the will was drawn speak even more conclusively than would direct evidence of her intent. They are relevant and can properly be considered by the Court. *Ingraham, Appellant,* supra; *Buckley* v. *Gerard,* 123 Mass., 8; *Peters* v. *Siders,* 126 Mass., 135, 30 Am. Rep., 671; *Peet* v. *Peet,* 229 Ill., 341, 82 N. E., 376, 13 L. R. A. N. S., 780; *Froelich* v. *Minwegen,* 304 Ill., 462, 136 N. E., 669; *Mitchell* v. *Mitchell,* 48 R. I., 1, 135 A., 35.

The case of *Buckley* v. *Gerard,* supra, is typical of several others. The evidence showed that the testatrix, a woman of intelligence, fond of her children, who lived with her and her husband, made no mention of them in her will. The court said, page 12:

> "Considering the affection and respect she felt for her husband, and the tender age of her children, it was not unnatural or unreasonable that she should leave her estate to him, trusting to his known affection to support and educate their children and to make suitable provision for them by his will.
>
> "To assume that she unintentionally omitted to

> provide for the child living when the will was made, is to assume that she forgot that she had a child, which is incredible."

That statement describes substantially the situation which we have before us. There was every reason why Mrs. Roberts should in case of her death wish her husband to have this home in which they had lived happily. Her children were of tender years. They could be much better provided for if the home were owned by the father instead of each child having a fractional interest to be handled by a guardian or to become a problem on a child becoming of age. We have the ordinary case so well known to many of us of one spouse trusting in case of death to the other to provide for their children. It is argued that the testatrix may not have known at the time she executed the will that she was to have another child. It is a reasonable inference that she did know. But under the facts of this case, whether she did or not makes no difference. The same reasons which she had for omitting the children already living would apply to the one who was unborn. The case of *Froelich* v. *Minwegen,* supra, shows that the same circumstances which indicated an intention to omit children living at the time of making the will applied to those born subsequently thereto.

That this mother living with her infant children and caring for them, about to give birth to another, omitted them unintentionally from a share in her estate is, as the Massachusetts court said, to assume that she forgot that she had them. Counsel in effect ask us to ignore circumstances which we know existed in this home as they do in so many others, to refuse to draw from them the only inference which a reasonable man could draw, to reject as a fact what we know was the fact. In short they ask us to lay down a doctrine, unsupported by a single cited authority, which would in effect make the presumption given by the statute irrebuttable.

The overwhelming weight of authority supports the findings of the sitting justice. Not only is his decision not manifestly wrong, we do not see how he could have come to any other conclusion.

Appeal dismissed.
Decree below affirmed.

RALPH WILLIAMS

vs.

ARTHUR BISSON AND ODILE BISSON.

Sagadahoc. Opinion, October 28, 1944.

Trover.

The title to wood cut by a licensee within the time granted by the land owner as extended is in the licensee whether it is regarded that the licensee's right was acquired by the original deed or under a parol extension.

The title to wood cut within the time granted by the owner of the land, but not removed prior to the expiration of such time, is in the licensee, despite the fact that his failure to remove the wood prior to such expiration of time constitutes a wrong for which the land owner may have his remedy; and the land owner who forbids the licensee to remove his property is guilty of conversion.

ON REPORT.

Action of trover by the plaintiff to recover damages for conversion. The plaintiff purchased the soft wood timber on a lot of land owned by one Tolman, the wood to be cut and removed within a fixed time. Afterward the land was con-

veyed to the defendants by a deed which excepted from its covenant of warranty the grant to the plaintiff to cut and remove wood within the time granted by the original owner. At the time of the expiration of the granted term a considerable quantity of trees which had been cut had not been removed from the land. The defendants then refused to permit the plaintiff to remove the trees. Plaintiff thereupon brought this action. It was held that the defendants were guilty of conversion and the case was remanded to the Superior Court for its assessment of damages. The case fully appears in the opinion.

Paul L. Powers, for the plaintiff,

Ellis S. Aldrich, for the defendants.

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

THAXTER, J. This action of trover is before us on report on an agreed statement. January 23, 1941, the plaintiff purchased the soft wood timber on a lot of land owned by Eleanora H. Totman. He acquired his right to cut such timber by a quitclaim deed from her which contained a covenant of limited warranty. Under the terms of the conveyance he was given the right "to cut and remove the aforementioned trees at any and all times within three years from date, together with the right to set up and operate a portable saw mill on said property and to pile the board and lumber cut from said trees on said property provided the same be removed therefrom within three years from date." On July 7, 1942, the grantor conveyed the land to the defendants by deed, which contained covenants of warranty, from the operation of which there was excepted the grant to the plaintiff to cut and remove timber which was described as expiring January 23, 1944. A controversy took place between the plaintiff and the defendants, the new owners of the lot, as to whether the

plaintiff's rights expired January 23, 1944 or March 1, 1944. Apparently the difficulty arose from the fact that the time had been extended by an oral agreement between Eleanora H. Totman and the plaintiff prior to the delivery of the deed to the defendants. In any event the defendants consented that the time should be extended to March 1; and the case has been argued on the assumption that the plaintiff's right did not expire until then. The plaintiff operated until March 1, at which time there had been cut a considerable quantity of trees which, however, had not at that time been removed from the land. On March 2nd the defendants refused to permit the plaintiff to remove such trees. Thereupon this action of trover was brought.

The title to the wood cut prior to March 1, 1944 was in the plaintiff. This is the case whether we regard the plaintiff's rights as having been acquired under the original deed or under a parol agreement which continued those rights to March 1. *Erskine* v. *Savage,* 96 Me., 57, 51 A., 242.

The authorities are in conflict as to the status of the title to wood which has been lawfully cut during the time limited by the contract but not removed from the land prior to the expiration of such time. See notes in 15 A. L. R., 95, and 31 A. L. R., 948. The rule, however, is settled in this state that title remains in the licensee despite the fact that his failure to remove the wood from the land constitutes a wrong for which the landowner may have his remedy. Accordingly it is held that the owner of the soil who forbids the licensee to remove his property exercises such a dominion over it that he is guilty of a conversion. This is the rule laid down in *Erskine* v. *Savage,* supra, which is controlling on this court.

We find, therefore, that the defendants are guilty of a conversion.

Case remanded to the Superior Court for the assessment of damages.

EDWARD KNOWLES

vs.

LOUIS WOLMAN.

Kennebec. Opinion, October 28, 1944.

Demurrer.

To meet the burden imposed upon him to inform the defendant of the facts upon which he relies to establish liability, a plaintiff must set out a situation sufficient in law to establish a duty of the defendant toward the plaintiff and that the act complained of was a violation of that duty.

ON EXCEPTIONS.

Action for injuries sustained by the plaintiff while working at a metal-cutting machine on defendant's premises. While the plaintiff was in the act of inserting a heavy piece of metal into the machine the defendant called to him, allegedly loudly, and so frightened the plaintiff that he dropped the metal on his foot. No evidence as to the reason for the call was introduced. Defendant filed a general demurrer in the trial court, which was overruled by the sitting Justice. Defendant filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Jerome G. Daviau, for the plaintiff.

F. Harold Dubord, for the defendant.

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

CHAPMAN, J. This case comes before the court on exceptions by the defendant to the overruling of a general demurrer to the declaration, filed by the defendant. The demurrer raised the issue as to the sufficiency of the plaintiff's claim as stated in his declaration. To meet the burden imposed upon him to inform the defendant of the facts upon which he relies to establish liability for the injuries alleged, a plaintiff must set out a situation sufficient in law to establish a duty of the defendant toward the plaintiff and that the act complained of was a violation of that duty. 45 *Corpus Juris,* 1056, 1058; *Chickering* v. *Power Co.,* 118 Me., 414, 417, 108 A., 460.

The plaintiff's claim as to the liability of the defendant toward him is contained in the following allegations:

> " . . . the Plaintiff was working at a metal cutting machine on the premises of the Defendant in Waterville, County of Kennebec and State of Maine and was about to insert a large and heavy piece of metal into the jaws of the machine aforesaid, and this the Defendant knew of and it then and there became the duty of said Defendant to exercise great caution and care and not to startle and frighten the Plaintiff while he, the Plaintiff was working at the aforesaid dangerous machine, but notwithstanding his said duty, the Defendant negligently did call the Plaintiff by yelling and shouting loudly which so startled and frightened the Plaintiff and through no negligence of his own, he, the Plaintiff, dropped a large and heavy piece of metal, aforesaid, onto his foot and severely crushed and broke and bruised his foot and became sick, sore and lame . . . ."

The duty resting upon the defendant toward the plaintiff depended upon the relationship existing between them. It is alleged that the plaintiff was upon the premises of the defendant and, in the operation of a dangerous machine, was about to insert a heavy piece of metal into the machine. Nothing is stated as to whether he was rightfully or wrongfully upon the premises. The allegation is silent as to whether he was operating the machine in accordance with, or against the will of the owner. He might be invitee, licensee, employee or trespasser. The duty owed him would vary according to his status in these respects. The allegation, so uncertain, doubtful and ambiguous, is insufficient as a statement of plaintiff's claim. *Sessions* v. *Foster*, 123 Me., 466, 468, 123 A., 898; *Estabrook* v. *Webber Motor Co.*, 137 Me., 20, 26, 15 A., 2d 25, 129 A. L. R., 1268. For all that appears in the declaration, the call to the plaintiff may have been for the purpose of warning him of a danger or it may have been the call to a trespasser who was meddling with dangerous machinery, with the purpose of either avoiding injury to the meddler or to the machinery.

The evidence offered in *Gifford* v. *Morey*, 123 Me., 437, 123 A., 520, was somewhat similar to the facts declared upon in the present case. The plaintiff who was the employee of the defendant, while engaged in his work, was spoken to by the defendant. The plaintiff turned toward the defendant and was struck from behind by a heavy log. Plaintiff claimed that the defendant was negligent in so speaking to him and that this act was the proximate cause of his injury. There was no evidence as to what was said by the defendant. In commenting upon the question of sufficiency of the evidence offered, Chief Justice Cornish said:

> "Reduced to its simplest form the negligence on the part of the defendant of which the plaintiff complains,

is that while he, the plaintiff, was standing and facing the load of logs, the defendant spoke to him. Surely it requires something more than this to charge an employer with actionable negligence. A situation might possibly be conceived where certain instructions given by an employer to an employee under certain circumstances might be regarded as an act of negligence. But here nothing is proven as to the words spoken. They may have been words of caution uttered with the distinct purpose of enabling the employee to avoid peril. The case fails to disclose the fact and we are left to doubt and surmise, a substructure too frail to sustain a cause of action."

The declaration in the instant case was insufficient in its statement of the plaintiff's claim. The entry must be

Exceptions sustained.

BESSIE S. DOUGHTY

vs.

MAINE CENTRAL TRANSPORTATION COMPANY.

Cumberland. Opinion, November 4, 1944.

Common Carriers. Statutes. Limitation of Actions. Assumpsit. Legislative Intent.

A common carrier of passengers is required to exercise the highest degree of care that human judgment and foresight are capable of, to make its passenger's journey safe, and it promises impliedly that the passenger shall have this degree of care. If he does not have it and receives injuries as a result thereof, his remedy may be either in assumpsit or tort, at his election.

The words "actions of tort" appearing in the special statute of limitations: to wit, in Sec. 11 of Chap. 66, R. S. 1930, do not include actions of assumpsit, although the claimed breach of the implied promise was founded originally on the commission of a tort.

Under said Sec. 11, only actions of tort must be commenced within one year next after the cause of action occurs.

A party having a right to either of two actions, the one he chooses is not barred because the other, if he had brought it, might have been.

The omission in said Sec. 11 of the remedy of assumpsit and the mention only of actions of tort justify the employment of the maxim: *Expressio unius est exclusio alterius.*

The legislature must be supposed to employ language relating to legal proceedings in its well known legal acceptation.

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

This action being one of assumpsit and not of tort, the time within which it could be brought is governed by the assumpsit statute of limitations, to wit, Chap. 95, Sec. 90, Par. IV, R. S. 1930, rather than by said Sec. 11.

ON EXCEPTIONS.

Action of assumpsit to recover damages for personal injuries suffered by the plaintiff while a fare-paying passenger in a motor bus owned and operated by the defendant. The action was brought more than a year after the accident occurred. The defendant claimed that Section 11 of Chapter 66, R. S., 1930, was applicable and that under that section action must have been commenced within one year after the cause of action occurred. The plaintiff contended that the applicable section was Section 90, Par. IV of Chapter 95, R. S., 1930, which fixes six years as the time within which actions in assumpsit must be commenced. In the lower court the defendant pleaded the applicability of Section 11 of Chapter 66, to which plea plaintiff filed demurrer. The Court sustained the demurrer. Defendant filed exceptions. It was held that the plaintiff could have sued either in assumpsit or tort; that she elected to sue in assumpsit and that, therefore, the statute fixing the limitation as to actions in assumpsit was applicable. Exceptions overruled. The case fully appears in the opinion.

Nathan W. Thompson,

Richard S. Chapman, for the plaintiff.

William B. Mahoney,

John B. Thomes, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, JJ.
MURCHIE AND CHAPMAN, JJ., did not sit.

HUDSON, J. The defendant excepts to a ruling below sustaining the plaintiff's demurrer to its plea, wherein, by way of brief statement, a special statute of limitations was set up in defense.

This action is assumpsit, brought to recover damages for personal injuries suffered by the plaintiff on June 15, 1942, while a fare-paying passenger on a motor bus owned and operated by the defendant, when the bus left the travelled portion of the highway and collided with a tree near Bethel, Maine.

In the brief statement, the defendant alleged "That under Section 11 of Chapter 66 of the Revised Statutes of Maine, 1930, it is provided that this action shall be commenced only within one year after the cause of action occurs." It was not brought within the year.

Sec. 11 reads as follows:

> "Actions of tort for injuries to the person or for death and for injuries to or destruction of property caused by the ownership, operation, maintenance or use on the ways of the state of motor vehicles or trailers subject to the supervision and control of the public utilities commission, shall be commenced only within one year next after the cause of action occurs."

The question is the applicability of this statute. The plaintiff contends that in place of Sec. 11, the statute governing the time in which this action could have been brought lawfully is Chap. 95, Sec. 90, Par. IV, R. S., 1930, which reads in part:

> "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."

If this statute is applicable, this action was seasonably commenced.

The gist of the defendant's argument is that this "action, in substance, is one 'of tort' " and that "if the words 'of tort' are directed to the form of the action rather than to its substance, then the action is one for personal injury for negligence" and "is controlled by the limitation in Sec. 11."

Thus we are called upon to construe the statutory words "actions of tort for injuries," etc. It is elemental that in doing this we must attempt to discover the legislative intent. That intent is to be sought from the language used by the legislature and we should not substitute language of our own in place of that used by it or do violence to its language. Furthermore, regarding this statute in derogation of common law, it must be strictly construed.

Then what did the legislature intend when it said "actions of tort"? Had it in mind the form of the action or the cause of action upon which it would be based? Counsel agree upon the law enunciated in *Goddard* v. *Grand Trunk Railway*. 57 Me., 202, 2 Am. Rep., 39, where the Court on pages 217 and 218 said:

> "The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care . . . . The passenger's remedy may be either in assumpsit or tort, at his election."
>
> "The law requires him" (meaning a common carrier) "to carry with impartiality and safety for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, express or by operation of law, that he will carry with impartiality and safety;

and if he fails in this there is a breach of contract. Thus for the breach of the general duty, imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought." Cooley on Torts, Third Edition, Vol. 1, page 159.

This from 37 C. J., Sec. 73, page 749:

"Viewed with reference to the statute of limitations, an action against a carrier, whether of goods, or of passengers, for injury resulting from a breach of contract for safe carriage is one on contract, and not in tort, and is therefore governed by the statute fixing the period within which actions for breach of contract must be brought."

To the same effect, 25 Cyc., Sec. 3, page 1033. In both C. J. and Cyc., *supra*, are cited many cases sustaining the context.

In *Lamb, Executor,* v. *Clark,* 22 Mass., 193, it is stated on page 198:

"If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been."

In *United States* v. *Whited & Wheless, Ltd.,* 246 U. S., 552, 38, S. Ct., 367, 62 Law Ed., 879, 882, 883, Mr. Justice Clarke held likewise, citing *Lamb* v. *Clark,* supra.

Later, in *Currier* v. *Studley,* 159, Mass., 17, 27, 33, N. E., 709, 713, that Court said:

"It is well settled, also, that one remedy may be barred and another not. The question in each case is

whether the remedy that is chosen is barred." (Italics ours)

In *Hughes* v. *Reed et al.*, 46 F. (2d), 435, the Court stated on page 440:

> "Stated more accurately, the question presented to us is whether the facts alleged state a breach of an implied contract, for, if the facts disclose both a breach of an implied contract and a tort, the appellant may recover in debt or assumpsit, although the remedy in tort is barred by limitations . . . . Where doubt exists as to the nature of the action, courts lean toward the application of the longer period of limitations."

Also see *Frankfort Land Co.* v. *Hughett,* 137 Tenn., 32, 191 S. W., 530, in which the tort was waived and action in indebitatus assumpsit was brought and the Court applied the assumpsit rather than the tort statute of limitations.

It must be assumed that the legislature enacted Sec. 11 with knowledge of the law as to the right of choice of remedies. With this knowledge it said "actions of tort," not "actions of tort and/or contract," not simply "actions to recover damages, etc.," not "actions to recover damages for a personal injury resulting from negligence," as in *Webber* v. *Herkimer & M. St. R. Co.,* 109 N. Y., 311, 16 N. E., 358, relied on by the defense, but it confined the limitation to "actions of tort." This language is plain. One of two possible remedies, assumpsit or tort, was chosen for the one-year limitation. It omitted actions *ex contractu,* to which another statute already applied. In the language of Chief Justice Peters, in *Shaw et al.* v. *County Commissioners,* 92 Me., 498, on page 500, 43 A., 105, 106. "The omission, if it be such, is a silence that speaks loudly. And the maxim applies: *Expressio unius est exclusio alterius.*" This maxim was employed

also in *State* v. *Giles,* 101 Me., 349, on page 353, 64 A., 619, 620, where the Court said: ". . . it is remarkable that it" (meaning the legislature) "should have made explicit provision for the action of debt alone and made no allusion whatever to the complaint or indictment in that connection."

Sec. 11 relates to legal proceedings, that is, actions of tort, and it was early decided in this state that "The legislature must be supposed to employ language relating to legal proceedings, in its well known legal acceptation . . . ." *McLellan* v. *Lunt,* 14 Me., 254, on page 258.

Not long ago this Court stated in *Portland Terminal Co. et al.* v. *Boston and Maine Railroad,* 127 Me., 428, on page 436, 144 A., 390, 393:

> "It is a fundamental rule in the construction of statutes, that unless inconsistent with the plain meaning of the enactment, words and phrases shall be construed according to the common meaning of the language, and technical words and phrases and such as have a peculiar meaning convey such technical and peculiar meaning. R. S., Chap. 1, Sec. 6. In and of this major rule is the rule that legal terms are presumed to be used according to their legal significance. *McLellan* v. *Lunt,* 14 Me., 258."

Without question, assumpsit and tort as used in these statutes are names of certain remedies at law and constitute legal terms, well known by members of the legal profession, and as such they are presumed to be used according to their legal significance. We cannot believe that the legislature, when it said in this statute "actions of tort," intended to include actions of assumpsit, although the claimed breach of the implied promise were founded originally on the commission of a tort. As stated by Chief Justice Marshall in *Kirkman* v. *Hamilton,* 6 Peters, 20, 23, 8 L. Ed., 305, "This

statute bars the particular actions it recites, and no others."

In the recent case of *Alropa Corp.* v. *Britton,* 135 Me., 41, 188 A., 722, in dealing with the applicability of a statute of limitations, we said on page 43:

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

To the same effect, *Currier* v. *Studley,* supra, on page 27.

This plaintiff could have sued either in assumpsit or in tort; she had her choice. She elected to sue in assumpsit, and hence the assumpsit statute of limitations rather than the tort is applicable.

Exceptions overruled.

CLARENCE V. CARSON
PETITIONER FOR WRIT OF ERROR.

Knox. Opinion, November 6, 1944.

Criminal Law. Indictment. Common Law.

An indictment charging the crime defined in R. S., Chap. 135, Sec. 6, includes allegation of an attempt to commit that crime.

Such an attempt constitutes a residue substantially charged against the respondent within the meaning of R. S., Chap. 143, Sec. 6.

Conviction for an attempt under an indictment charging the completed offense is proper when proof is sufficient that the respondent has committed an overt act toward consummation of the crime charged.

The English common law has never been adopted in this jurisdiction in its entirety, but only so much thereof as is applicable to the changed conditions prevailing.

ON EXCEPTIONS.

Petition for writ of error alleging that the confinement of the petitioner in the State Prison, on a sentence imposed after a verdict finding him guilty of an attempt to take indecent liberties with a female child nine years of age is improper because he was tried under an indictment alleging the offence and not an attempt to commit it. The writ was dismissed. The petitioner filed exceptions. Exceptions overruled. The case fully appears in the opinion.

C. S. Roberts, for the petitioner.

Frank I. Cowan, Attorney-General.

Abraham Breitbard, Ass't Att'y-General, for the State.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. The petitioner herein, after serving a little more than half of a 4-year term of imprisonment in the State Prison, seeks freedom by writ of error, filed pursuant to R. S. 1930, Chap. 116, Sec. 12, on assertion that the verdict underlying the sentence imposed against him was not a proper one under the indictment on which he was tried. Certified copies of the indictment, sentence and docket entries involved disclose that he was charged with taking indecent liberties with the sexual organs of a female child 9 years of age and convicted of an attempt to do so. The writ having been dismissed below comes forward on exceptions to that action.

The claim is asserted that petitioner should be discharged from imprisonment, not because the indictment on which he was tried lacked an allegation essential to the crime for which he was convicted, as in *Smith* v. *State,* 33 Me., 48, 54 Am. Dec., 607, and *Galeo* v. *State,* 107 Me., 474, 78 A., 867, but on the technical grounds that an attempt to commit a crime must be prosecuted as such and that conviction for it will justify sentence only under an indictment alleging that in the attempted perpetration of a designated crime the accused committed some described overt act toward its consummation. Such is a recognized method of pleading in the prosecution of attempts. See *State* v. *Doran,* 99 Me., 329, 59 A., 440, 105 Am. St. Rep., 278, and the authorities therein cited.

The State relies on R. S., 1930, Chap. 143, Sec. 6, which authorizes a jury to acquit a respondent as to part of an alleged crime and convict him of any residue thereof which is substantially charged against him. Counsel for the petitioner denies that this statute is applicable by assertion that a crime and an attempt to commit it are separate and distinct offenses. The issue presented is the very narrow one as

to whether an attempt may be considered, under the statute, a lesser crime included within the greater one, or a residue thereof. The decision below was affirmative on this point with reference to the particular statutory crime charged and declares that one accused of the completed offense may lawfully be found guilty of an attempt to commit it, although no separate count charges such an attempt, there being adequate proof of an overt act toward its complete accomplishment.

The ruling was a proper one. The administration of criminal law should be conducted in accordance with the dictates of common sense. A charge of the commission of any crime involves and includes of necessity allegations that the person charged intended to commit it and made an attempt to do so. Mere intention to do a criminal act, in and of itself, is neither criminal nor punishable, *State* v. *Inness*, 53 Me., 536, but an attempt is defined and made both by our statute, R. S., 1930, Chap. 143, Sec. 10. The actual commission of a crime represents the execution of an attempt to commit it. *People* v. *Horn*, 25 Cal., App. Rep., 583, 144 Pac., 641. In sound reason there can be no doubt that an attempt to commit a particular crime is not only necessarily included in but is also substantially charged by an indictment alleging that the crime itself has been committed. *Rookey* v. *State*, 70 Conn., 104, 38 A., 911; *People* v. *Abbott*, 97 Mich., 484, 56 N. W., 862, 37 Am. St. Rep., 360. It was declared in *State* v. *Waters*, 39 Me., 54, that whenever an accusation includes not only the offense charged but one of inferior grade a jury may discharge the defendant of the higher crime and convict him of that which is less atrocious. The controlling provision in our statute is that which limits the finding of guilt as to the residue of a charged crime to one that is "substantially charged" in the indictment under which the prosecution is conducted. For additional instances where convictions for something less than the full offense have been

sustained, see *State* v. *Ham et al.*, 54 Me., 194, and *State* v. *Leavitt*, 87 Me., 72, 32 A., 787.

There is ample authority for the ruling to which the exceptions relate. Encyclopedia of Pleading & Practice, Vol. 3, Page 102, states that under an indictment alleging a crime "the defendant may generally be convicted of an attempt to commit" it, and the same principle is declared in 31 C. J. 860, Par. 503, where it is recorded, on the authority of *Rookey* v. *State*, supra, that an accusation of rape will support a conviction for either an attempt, or an assault with intent, to commit it. Neither Maine nor its mother commonwealth ever adopted the English common law in its entirety but "just so much of it as suited their purpose." *Conant et al.* v. *Jordan et al.*, 107 Me., 227, 77 A., 938, 31 L. R. A. N. S., 434. From the standpoint of procedure in the prosecution of crimes we recognize no substantial difference between felonies and misdemeanors. *State* v. *Leavitt*, supra. The Connecticut Court in the *Rookey* case expressly indicated that the common law in that jurisdiction, disregarding the technical differences of the English common law between felonies and misdemeanors, "has always permitted a conviction of the attempt upon an indictment for rape." *Commonwealth* v. *Cooper*, 15 Mass., 187, sustained a conviction for assault with intent to commit rape under an indictment alleging rape, and although this decision was criticized in *Commonwealth* v. *Roby*, 12 Pick., 496 at 506, the bases for criticism were found in statute law and in technical distinctions between prosecutions for felonies and misdemeanors. The Massachusetts statute of 1805 (Chap. 88) limited juries in finding a respondent guilty as to the residue of a crime to cases where both the offense charged and the lesser crime to which the verdict of guilty related were of felony grade. Our own law has always been more liberal (see Stat. 1821, Chap. 59, Sec. 43) and since the enactment of P. L. 1829, Chap. 433, has been applicable in the prosecution of any crime or mis-

demeanor. In this jurisdiction conviction is proper if the evidence proves enough of the allegations set forth in an indictment to show that the respondent has committed a substantive crime charged therein. *State* v. *Burgess et al.*, 40 Me., 592; *State* v. *Ham et al.*, supra.

The *Rookey* case notes that the facts necessary to constitute an attempt to commit a crime are alleged in an indictment charging the completed offense. This is obvious and satisfies fully the fundamental requirement of criminal procedure which safeguards the rights and interests of persons facing criminal accusations, i.e. that conviction for any crime may be held lawful only when the indictment or complaint "contains a direct allegation of every material fact which it is necessary to prove in order to establish" guilt. *State* v. *McDonough*, 84 Me., 488, 24 A., 944. The indictment under which the petitioner, as a respondent, was tried and sentenced directly alleges everything essential to establish his guilt of the offense for which he was convicted and sentenced. That verdict was responsive to the indictment charging the completed offense, and carries the legal effect of acquittal on that charge and conviction for an attempt to commit it. *State* v. *Payson*, 37 Me., 361; *State* v. *Waters*, supra; *State* v. *Leavitt*, supra.

Exceptions overruled.

ALURA PERKINS ET AL.,
APPELLANTS
FROM DECREE OF JUDGE OF PROBATE.

Kennebec. Opinion, November 18, 1944.

Probate Courts. Widow's Allowance. Appeal.

The statute vests a double discretion as to a widow's allowance in the court of probate to determine (1) whether any allowance should be granted, and (2) the amount thereof according to the degree and estate of the husband.

Such discretion is subject to review on appeal.

Appeal presents the issue *de novo* in the Supreme Court of Probate where any allowance made in the Probate Court may be increased, diminished or disallowed.

All the circumstances of a particular case should be considered to determine the discretionary issues.

The evidence may properly cover a range wide enough to embrace testimony showing when and how the estate was accumulated or depleted.

A widow's allowance is not confined to needs that are temporary or immediate.

The authority to grant an allowance to the widow of a deceased husband out of his personal estate vests a discretionary authority which should be liberally construed.

ON EXCEPTIONS.

A decree of the Probate Court, affirmed in the Supreme Court of Probate, granted a widow's allowance out of personal estate amounting to $6,196.51. Decedent left real estate amounting to $1,800. There were no children. Both of the decedent's parents survived him. The evidence showed that the wife, appellee herein, had been gainfully employed during the entire term of the marriage and had contributed

substantially to household expenses, home improvements and insurance premiums. The appellants claimed that the allowance was excessive as a matter of law. Exceptions overruled. The case fully appears in the opinion.

McLean, Southard & Hunt, for the appellants.

Knight & Lamb, for the appellee.

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

MURCHIE, J. The appellants herein, after a decree of a Judge of Probate granting the appellee a widow's allowance of $2,000 was affirmed on appeal, bring the case to this Court on six exceptions. Three of these assert that the cause was prejudiced at the hearing on the appeal by the erroneous admission of testimony concerning (1) financial aid rendered by the decedent to his brother (2) the fact that decedent's mother lived with him and the appellee during several years immediately preceding his death, and (3) contributions made by the appellee to the payment of insurance policies on the life of decedent under a policy payable to his mother. The others allege that there was no sufficient evidence in the case to warrant judicial finding (4) that an allowance to the widow was necessary, or (5) that her necessities justified the exercise of any judicial discretion in her behalf under R. S., 1930, Chap. 78, Sec. 14, and (6) that the award was excessive as a matter of law.

The proceedings relate to the Estate of Nathan Elden Perkins who died December 2, 1942 leaving a widow and parents, but no issue, and property appraised in probate proceedings as representing $1,800 in real estate and $6,196.51 in personalty. The widow, when the parties were married on September 3, 1933, was, and continued to be, gainfully employed. At the time of the death of her hus-

band she had slightly less than $900 on deposit in savings accounts in her own name and was the owner of defense bonds, as they are called in the testimony, representing a maturity value of either $100 or $125, the cost of which would have been 75% of the proper figure. The death of the husband made her the surviving owner of $500 maturity value additional in a bond of the same variety, which the husband had paid for and caused to be issued in their joint names. The record discloses that the husband and wife lived together in apparent contentment during the entire term of their married life; that they had handled their earnings during the period separately; that the wife had paid generally for the groceries used and the electric energy consumed in the family home; that she had bought and paid for the furniture contained in it; and had contributed to the expense of improvements. It shows also that both the husband and the wife had accumulated separate savings and that the husband had the larger amount in his own name although his earnings in the over-all period had been substantially less than those of the wife. Evidence is ample that following the death of the husband the appellee enjoyed earnings considerably greater than currently received during the period of her married life and that these ran to an average of almost $35 per week during the year 1943 and to more than that figure in the first 3 months of 1944.

The "Appeal and Reasons for Appeal" by which the case was carried to the Supreme Court of Probate alleged that appellee's earnings after she became a widow, having regard to her separate property and the distributive share to which she was entitled in her husband's estate, assured her an income more than ample to provide for all her needs and that the award of any allowance under the statute was without support in evidence and operated to substitute judicial discretion for the laws of descent contrary to the spirit and meaning thereof. The exceptions are based on a construc-

tion of the statute consistent with the allegations of the appeal and the argument presented on the questions of evidence is that the testimony involved was not material to the issue but designed to assert a claim for allowance based on counterbalancing benefits granted to relatives of the decedent. The principal reliance on the assertion that judicial discretion was abused or exceeded is language contained in the decision of *Hilt* v. *Ward,* 128 Me., 191, 146 A., 439, where the Court said:

> "The necessities of the petitioner are expressly made by the statute the underlying basis on which judicial discretion when exercised must rest for its authority."

To give consideration to the exceptions in the order in which they are stated it seems to this Court that there is no foundation for the claim that the evidence admitted over objection was prejudical to the appellants. The outstanding features of the statute are found in the provisions which vest a double judicial discretion in the judge of probate, first, to grant or not to grant an allowance in any amount, and second, if in his discretion he determines to grant one, to measure the amount thereof according to his own judgment of what is necessary "according to the degree and estate" of the husband. *Kersey* v. *Bailey,* 52 Me., 198; *Gilman* v. *Gilman,* 53 Me., 184; *Dunn* v. *Kelley et al.,* 69 Me., 145; *Walker, Appellant,* 83 Me., 17, 21 A., 176; *Hussey* v. *Titcomb,* 127 Me., 423, 144 A., 218; *Hilt* v. *Ward,* supra. The discretion is subject to review on appeal, *Cooper, Petitioner,* 19 Me., 260; *Kersey* v. *Bailey,* supra; *Hussey* v. *Titcomb,* supra, and any appeal presents the cause for hearing *de novo* in the Supreme Court of Probate, where the allowance made may be either increased or diminished, as in this Court, *Gilman* v. *Gilman,* supra; *Walker, Appellant,* supra. Decision here may deny

an allowance entirely notwithstanding one was granted by the judge of probate, and on appeal. *Hilt* v. *Ward,* supra.

A court exercising such discretion must be justified in permitting the evidence adduced before it to cover a wide range. It has heretofore been declared not only that all the circumstances of each particular case should be considered, *Kersey* v. *Bailey,* supra; *Gilman* v. *Gilman,* supra, but, expressly, that it is important whether the wife has contributed to the acquisition of the estate, *Brown et al.* v. *Hodgdon,* 31 Me., 65. The estate here under consideration is larger than would otherwise have been the case as a result of the wife's contributions to household expenses, home improvements and insurance premiums, and smaller by reason of financial help given to the husband's relatives and providing a home for the husband's mother.

The claim is asserted on behalf of the appellants that the statute is intended only to make provision for needs that are temporary and immediate or such as are presently foreseeable and this was the theory of construction which controlled early decisions under it, *Brown* v. *Hodgdon,* supra; *Tarbox* v. *Fisher,* 50 Me., 236, where it was asserted in substance that the statutory purpose was to provide support until the wife could realize upon her dower. Later cases however have made it clear that an allowance is available to provide means for a widow additional to what she would receive as her distributive share, *Gilman* v. *Gilman,* supra; *Walker, Appellant,* supra; and should be liberally construed. *Smith et al.* v. *Howard,* 86 Me., 203, 29 A., 1008.

It has been declared with some frequency in this Court that each case involving an allowance under our statute should be determined upon its own particular facts, *Brown* v. *Hodgdon,* supra; *Kersey* v. *Bailey,* supra; *Gilman* v. *Gilman,* supra; *Walker, Appellant,* supra. In all these cases emphasis was laid on the discretionary nature of the authority conferred and the Court went so far in *Dunn* v. *Kelley,* supra,

where an allowance made in the Supreme Court of Probate which considerably increased that granted to a widow in the Probate Court on her appeal alleging its inadequacy, as to say that the amount of an allowance was the subject matter of a discretion which was not subject to review on exceptions. In *Hilt* v. *Ward,* supra, on which the appellants so strongly rely, it was noted that this Court would have hesitated to interfere with the allowance granted in the court of probate had it been affirmed merely in the Supreme Court of Probate when the appeal was dismissed. We have no doubt under the circumstances disclosed by the record that the judge of probate was authorized within the discretion conferred upon him by statute to order an allowance for the present appellee in such sum as he deemed necessary according to the degree and estate of her husband. The amount of that allowance was affirmed on appeal in the Supreme Court of Probate and nothing has been presented in the exceptions or argument which would justify decision that the judicial discretion doubly exercised was either abused or exceeded.

Exceptions overruled.

PHILIP D. STUBBS,
INHERITANCE TAX COMMISSIONER,
APPELLANT
FROM DECREE OF JUDGE OF PROBATE.

Somerset. Opinion, November 22, 1944.

Inheritance Tax. Construction of Statute.

The words "by representation" in Section 1 of Chapter 304 P. L. 1941, relate only to the amount and application of the exemption.

ON REPORT.

Appeal by the Inheritance Commissioner from a decree of the Judge of Probate granting a petition for the abatement of the tax assessed against the grandchild of a decedent, said grandchild being the child of a deceased daughter of said decedent. The Inheritance Tax Commissioner had ruled that the grandchild was entitled to an exemption of only $500. It was held that the Probate Court ruled rightly in granting the petition for abatement of the tax. Case remanded to the court below for entry of a decree in accordance with the opinion. The case fully appears in the opinion.

Frank I. Cowan, Attorney General,

Nunzi F. Napolitano, Ass't. Attorney General, for the appellant.

Paul S. Woodworth, for the appellee.

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

HUDSON, J. This cause is reported by the Superior Court sitting as Supreme Court of Probate on an agreed statement of facts for determination of a question of law. Required is the construction of certain language in Sec. 3 of Chap. 148 of the Public Laws of 1933, as amended by Sec. 1 of Chap. 304 of the Public Laws of 1941.

According to the report, Addie C. Vickery, widow, late of Fairfield, County of Somerset, State of Maine, died June 20, 1943. She was the mother of two daughters, Helen and Hazel Vickery. Helen predeceased her mother and was survived by a son, Carleton V. Cook. By her will, Addie C. Vickery devised the bulk of her estate to her daughter Hazel, and her grandson Carleton, who was also named as executor of the will. The Inheritance Tax Commissioner ruled that Hazel, as a daughter, was entitled to an exemption of $10,000, while Carleton, child of the deceased daughter Helen, was entitled to an exemption of only $500, and accordingly assessed against him a tax of $87.23. A petition for abatement of this tax was filed and granted. From the abatement the Inheritance Tax Commissioner appealed to the Supreme Court of Probate in Somerset County, by whom, as stated, the case was reported to this Court.

As stated in the report, "The sole question in issue is whether Carleton V. Cook, grandson of the testatrix, is entitled to an exemption of $10,000.00 under Sec. 3, Chap. 148, P. L. 1933 as amended by Chap. 304, P. L. 1941, or an exemption of $500.00 as ruled by the Inheritance Tax Commissioner."

Sec. 3, Chap. 148, P. L. 1933, as amended by Sec. 1 of Chap. 304, P. L. 1941, reads as follows:

> "Property which shall so pass to or for the use of the following persons who shall be designated as Class A, to wit: husband, wife, lineal ancestor, lineal descend-

ant, adopted child, adoptive parent, wife or widow of a son or husband or widower of a daughter of a decedent, shall be subject to a tax upon the value thereof, in excess of the exemption hereinafter provided, of 2% of such value in excess of said exemption as does not exceed $50,000, of 3% of such value as exceeds said $50,000 and does not exceed $100,000, of 4% of such value as exceeds $100,000 and does not exceed $250,000, and of 6% of such value as exceeds $250,000; the value exempt from taxation to or for the use of a husband, wife, father, mother, child, adopted child, or adoptive parent *or child or children of a deceased child, by representation,* shall in each case be $10,000, and the value exempt from taxation to or for the use of any other person falling within said Class A, shall in each case be $500."

By the amendment, the percentages in the amended statute were doubled and the above-underscored words were added to the former statute.

Before the amendment of 1941, the amount of the exemption for a child or children of a deceased child, whether they took by will or otherwise, was $500. The appellant contends that since the amendment, while such children who do not take by will are entitled to the exemption of $10,000, yet those who take by will are entitled to an exemption of only $500. He bases his argument on the use of the statutory words "by representation." Where there is a will, he says there is no taking by representation.

The Probate Court, however, sustained the contention of the appellee that the words "by representation," instead of referring to the manner of taking the property, related only to the amount and application of the exemption, to the end that children of a deceased child should enjoy collectively the exemption of $10,000.

The appellant construes the statute as though it read, "The value exempt from taxation to or for the use of a child or children of a deceased child, *if they take by representation, i.e., by intestacy,* shall in each case be $10,000." But we think that injects into the statute something not therein, namely, that the amount of the exemption, whether $500 or $10,000, shall depend on how the property is taken, by will or otherwise. In effect, all the statute says is that the value of the exemption to the child or children of a deceased child shall by representation be $10,000. The word "representation" herein insures that the limit of the exemption per stirpes is $10,000, however many children there may be of the deceased parent; instead of each receiving $10,000, that amount is shared alike by them. "To represent," as the word "representation" is here used, we think means to stand in the place of the deceased parent only insofar as the value of the exemption is concerned. If "representation" were not so interpreted, we see no reason why each child would not receive the full amount of the $10,000 exemption.

By Sec. 2 of said Chap. 148, all property received by beneficiaries in excess of the exemption, whether received "By will, by laws regulating intestate succession or by allowance of a judge of probate," etc., with certain named exceptions, is subject to the tax. Then in Sec. 1 of Chap. 304, P. L. 1941, the amending statute, (Sec. 2 of said Chap. 148, P. L. 1933, not having been amended), it is provided that "Property which shall *so pass* to or for the use of the following persons," which means all property passing, whether by will or otherwise, "shall be subject to a tax upon the value thereof, in excess of the exemption hereinafter provided . . . ."

Thus, in the first clause of the paragraph constituting said Sec. 1, the manner of the taking of the property is provided for, and it includes all property however taken, except that taken by certain institutions, the State, or subdivisions thereof. Then in the second clause of that paragraph in which the

words "by representation" appear, only the value of the exemption is dealt with, and that has efficacy as to all the property coming to the child or children, whether by will, laws of descent, or otherwise.

To construe the statute in a way that would make a distinction between property descending testate and intestate would create disparities which, if not absurb, would in our opinion certainly transcend the intention of the legislature. We can conceive of no reason why it would have intended that the making or not making of a will should govern the value of the exemption. No reason whatever for such a distinction is even suggested in the appellant's brief. We cannot attribute to the legislature an intention (unfairly and unjustly, it would seem) to give a child of a deceased child who takes *by laws of descent* a twentyfold financial preference over another child of a deceased child *who takes by will*. That result, if ever, should be reached only by employment of clear and explicit language. There is none such in this statute that would justify such a construction.

Furthermore, if the construction of the Tax Commissioner were correct, then there would be a grave question as to whether that part of the statute would be constitutional, because of the imposition of inequality and non-uniformity as to taxation among members of the same class. While herein it is not necessary to pass upon the constitutionality of this statute as interpreted by the Tax Commissioner, yet in construing the statute, if it is susceptible of either of two interpretations, we should adopt the interpretation which would tend to sustain rather than to defeat it. *Hamilton et als., In Equity,* v. *Portland Pier Site District et als.*, 120 Me., 15, 24, 112 A., 836.

We are convinced that the Probate Court ruled rightly that the beneficiary, Mr. Cook, was entitled under this statute to an exemption of $10,000, and so the inheritance tax of $87.23 was properly abated.

Thus determining the issue presented to us, this cause, as provided in the report, is remanded for entry of a decree in accordance with this opinion.

So ordered.

UNITY CO.

vs.

GULF OIL CORPORATION.

Cumberland. Opinion, December 5, 1944.

Landlord and Tenant. Cancellation of Lease.

Provisions for the cancellation or termination of a lease are usually inserted for the benefit of the lessor, and on account of some default on the part of the lessee.

A tenant cannot nullify a lease by taking advantage of his own default and thus escape liability on a burdensome contract. The liability for rent continues unless the contingency which prevents use and occupancy is unavoidable.

ON REPORT.

Plaintiff brought suit for four months rent of a gasoline filling station in South Portland. The lease by plaintiff to defendant provided that if the lessee were prevented by any properly constituted authority from using the premises for the sale and storage of gasoline, it might, at its option, cancel the lease. Under the city zoning ordinance the location of the filling station was made a residential zone, but provided that any lawful building or use of a building existing at the

time of the adoption of the ordinance might be continued, but that if such nonconforming use were abandoned for more than a year any future use of the building must conform to the provisions of the ordinance. The defendant abandoned the use of the property as a filling station for more than a year and December, 1942, the City of South Portland refused to renew the yearly permit to sell gasoline on the ground that the defendant had abandoned the use of the property as a filling station for more than one year. The defendant claimed that it was prevented from using the property as a service station by governmental authority. Held that there would have been no such exercise of authority if there had not been abandonment by the lessee. Judgment for the plaintiff. The case fully appears in the opinion.

Frank P. Preti, for the plaintiff.

Woodman, Skelton, Thompson & Chapman, for the defendant.

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

MANSER, J. As this case comes up on report, the Court has jury powers to determine the facts established by the record, and the reasonable inferences to be drawn therefrom, as well as the law applicable thereto. The suit is for four months' rent from December 1, 1943 to April 1, 1944, a total of $300, accruing under the terms of a written lease between the parties. The contention of the defense is solely that the lease provided that, upon the happening of a contingency or condition subsequent, the defendant had the option to surrender and cancel the lease and be relieved from the payment of rent or any further obligation. It is claimed that the event occurred which justified the defendant in exercising such option, and that due notice of cancellation was given, taking effect on November 30, 1943.

The essential facts are found to be as follows: The Unity Co., plaintiff corporation, is engaged in real estate operations. It purchased a city lot in South Portland and entered into negotiations with the defendant to lease the premises after the plaintiff had, at its own expense, built a gasoline filling station according to specifications and blue prints furnished by the defendant. The lease was executed in the summer of 1939, but occupancy and rental were to begin upon completion of the building so that the lease was actually for a ten-year term from October 24, 1939. The rental was $900 annually, but the lessor was required to pay taxes and make repairs.

The defendant sublet the premises and had three tenants between November 1939 and July 8, 1941. Since that time, the station has never been operated for sale of products to the public. Sometime in 1942, some of the gasoline pumps were removed.

In the autumn of 1942, the premises were occupied by a sub-lessee or tenant for business purposes which had nothing to do with the operation of a gasoline filling station.

In November 1941, the City of South Portland adopted a zoning ordinance, which made the particular section of the city where the premises were located, a residential zone for single families. The ordinance contained, however, the following exemption:

> "Any lawful building or use of a building or any part thereof existing at the time of adoption of this ordinance may be continued, although such building or use does not conform to the foregoing provisions hereof. If such nonconforming use be abandoned for more than one year, any future use of said building shall be in conformity with the provisions of this ordinance."

In December 1942, both the plaintiff and defendant were notified that there would be no renewal of the yearly permit required by the municipality to sell gasoline, upon the ground that the defendant had abandoned the use of the building as a filling station for more than one year. Appeal was made by the defendant to the Zoning Board and later to the Appeal Board in the attempt to secure a renewal of the permit, but without success.

The claim by the defendant to the right to a renewal of the permit was based upon the contention that there had not been a continuous abandonment of the use of the premises for more than one year, because on June 25, 1942 the defendant made a sale of six gallons of gasoline. The sale was made for the avowed purpose of preventing an abandonment of use. A representative of the defendant went with one of its employes in his car to the premises. As the electric motors were not in operation, a hand pump was used, and the gasoline emptied into cans which were then put in the car. A sales slip was made, showing payment of $1.22. This is the sole claim upon which the defendant relied at the time it endeavored to secure renewal of permit.

It was not claimed that the station was open for business in the usual sense of the term, or that the public could procure delivery of gasoline by the usual and ordinary method. Such a farcical performance was properly held by the governmental authorities to be of no avail.

The provision in the lease upon which the defendant relies is as follows:

> "It is understood and agreed that if by reason of any law, ordinance, or regulation of properly constituted authority, or by injunction Lessee is prevented from using all or any part of the property herein leased as a service station for the sale and storage of gaso-

line and petroleum products, or if the use of the premises for the purposes herein permitted shall be in any manner restricted, or should any Governmental authority refuse at any time during the term of this lease to grant such permits as may be necessary for the installation of reasonable equipment and operation of said premises for the permissible purposes hereunder, the Lessee may, at its option, surrender and cancel this lease, remove its improvements and equipment from said property and be relieved from the payment of rent or any other obligation as of the date of such surrender."

Provisions for the forfeiture, cancellation or termination of a lease are usually inserted for the benefit of the lessor, and on account of some default on the part of the lessee. Here the provision was clearly for the benefit of the lessee alone. The strict rules applicable to forfeitures when claimed by lessors apply with like force to lessees who attempt to take advantage of cancellation provisions for their own benefit, and it must be shown that the contingency arose, or the condition subsequent occurred without fault on the part of the lessee. In other words, the tenant cannot nullify the lease by taking advantage of his own default and thus escape liability on a burdensome contract. 32 Am. Jur., Landlord and Tenant, §§825-849. Examination and analysis of the record is, therefore, made to determine whether the defendant has shown that it was prevented from using the premises without fault on its part.

The issue is important to both the lessee and the lessor. If the lessee has permanently lost the right to use the premises and yet is bound to continue rental payments, it will be required to pay a total of approximately $5,300 in $75 monthly installments. As to the lessor, assuming the continuance in effect of the zoning ordinance, if the lessee is entitled

to cancellation of the lease, the property in its present condition is valueless and is still subject to taxation. The owner can realize no income from it. The only alternative is to remove the present filling station structure, sell the land, or retain it and erect a single family dwelling thereon.

The only witness for the defendant was a man who was in charge of its operations in the Portland area. He testified to the causes and events which brought about the closing of the station. He admitted that it was unprofitable from the beginning of the lease in 1939, that he had trouble in getting operators, that the last operator took the station in the spring of 1941 and left it on July 8 of that year, since which time no one has ever been employed at the station. After the station was closed, he testified that efforts were made to secure a new operator but

> "Rationing came into effect at that time, which was a great handicap, and the labor situation was very bad in South Portland. We were unable to get someone to operate it."

Later, he was asked what efforts were made to get an operator and answered:

> "Made personal contacts and ran an ad in the paper."

So far as appears of record, this is all that was done to avoid the effect of the zoning ordinance, the provisions of which were well known to the defendant.

The lease provided:

> "Said premises are leased for the purpose of the sale and storage thereon of gasoline, petroleum and petroleum products, and at Lessee's option for the conduct of any other lawful business thereon."

The three reasons given for failure to reopen the station and of the efforts made to do so, require consideration from the viewpoint of the duty resting upon the defendant to prevent the loss of use of the premises under the provisions of the zoning ordinance, and which could be accomplished by not abandoning such use for a year. With reference to the statement that, when the station was closed on July 8, 1941, "rationing came into effect at that time which was a great handicap," it is to be noted that governmental rationing did not begin until May 15, 1942, more than ten months afterwards.

Again, the witness said, "The labor situation was very bad in South Portland." There is nothing of record as to how acute the labor situation was in that particular locality except this bare assertion, but, of course, the defendant was not confined to securing an operator from that vicinity. It was not until after the declaration of war made by our Government on December 7, 1941, that induction of men into the armed services began in any great volume.

These facts and dates are not definitely in the record, yet the Court will take judicial notice of historical facts, matters of public notoriety and interest transpiring in our midst. *Weeks* v. *Smith*, 81 Me., 538 at 544, 18 A., 325; *Opinion of Justices*, 70 Me., 608; *Prince* v. *Skillen*, 71 Me., 361 at 368, 36 Am. Rep., 325.

As to efforts made to secure operators, again is found the bare statement that the defendant "Made personal contacts and ran an ad in the paper." Nothing appears of record as to the number of personal contacts nor as to the extent or amount of publicity given to the need for operators, nor as to the inducements offered. It appears that the only method which occurred to the defendant for operation of the station was to secure a person who would pay rent and take his own chances of making a living from the sale of products provided by the defendant. There was apparently no undertaking

whatsoever by the defendant to place one of its own employees in charge of the station, although it would have been entirely within the purview of the lease to do so. It would then have received the gross profit from the sale of products, less the wages paid the employee. The provision for subletting was permissive, not compulsory.

The inferences are very strong that, after making some desultory motions having the appearance of attempts to fulfill the obligations of the zoning ordinance, the defendant is now undertaking to seize upon the action of governmental authorities as an excuse for termination of a contract which had proved to be unprofitable and burdensome. The evidence carries with it the conviction that, if the defendant had really felt it imperative to operate the leased station to protect its own interest, it would have, without too great difficulty, found a way to do so.

It was incumbent upon the representatives of the municipality to enforce its laws. They were entirely justified under the circumstances. There had been an abandonment of the use of the property as a filling station for more than one year, and such abandonment was the fault of the defendant, and it cannot, therefore, avoid its obligations under the lease.

While few cases presenting similar factual circumstances appear to have required judicial consideration, the principle is well established that whether it be a lessor or lessee who seeks to be relieved from an obligation or to enforce a right to cancellation of a lease, he must present sufficient evidence to prove that he was in no way responsible for creating the situation of which he seeks to take advantage.

In *Noland* v. *Cooperage Co.* (Ky.), 82 S. W., 627, the plaintiff leased land for a nominal consideration for the erection of a stave mill but with the further provision that lessee should furnish refuse wood for use for the house and grist mill of the lessor. The lessee did not build any stave mill but continued to occupy the premises. It was held that the lessee

could not be allowed to avoid liability for rent by its own failure to erect the stave mill.

In *Pizitz-Smolian* v. *Randolph* 221 Ala., 458, 129 So., 26, where the lease of a building restricted the use to certain business, it was held that the lessee was not relieved from performance because the right to continue business was rendered less profitable or easy.

As it is sometimes expressed, the liability for rent continues unless the contingency which prevents use and occupancy is unavoidable. *Calechman* v. *A. & P. Tea Co.,* 120 Conn., 265, 180 A., 450, 100 A. L. R., 302. See also *Hayes* v. *Goodwin,* 253 Pa., 607, 98 A., 727; *Reid* v. *Fain,* 134 Ga., 508, 68 S. E., 97; *Brewing Co.* v. *Roser,* 169 Ky., 198, 183 S. W., 479; *Wills* v. *Gas Co.,* 130 Pa., 1222 5 L. R. A., 603, 18 A., 721.

The entry will be

Judgment for the plaintiff for $300 *with interest from date of the writ.*

STATE OF MAINE

vs.

GEORGE BRAGG.

Oxford. Opinion, December 5, 1944.

Criminal Law. Rape. Evidence. Appeal. Exceptions.

Alleged errors of law by the trial judge which are presented in exceptions perfected cannot be reviewed on appeal.

Upon the evidence in the instant case, the jury were warranted in believing beyond a reasonable doubt and, therefore, returning a verdict that the respondent was guilty of the charge laid against him in the indictment.

It was within the sound discretion of the trial judge to allow leading questions to be propounded to the prosecutrix in the progress of her examination in chief and exceptions do not lie to the admission of her answers.

In allowing witnesses to testify that the prosecutrix told them that she had been carnally abused without further details of the complaints, no more was admitted than was sufficient to identify the subject matter and there was no error.

The reframing and repeating, because of objections of opposing counsel, of questions admissible in form and substance as finally submitted, was unobjectionable.

As the case was presented the main question was whether the testimony of the prosecutrix was true or false and it was the duty of the trial judge to so instruct the jury.

The suggestion, but not direction, that the jury give this question first consideration, which could only encourage intelligent and orderly deliberation and an early determination of the dominant issue of whether the respondent was guilty or innocent, was in no way prejudicial.

There was no harmful error in the manner in which the question was submitted to the jury for consideration. Exceptions will not be sustained and a just verdict set aside for harmless error.

If an inference that the prosecutrix in this case was entitled to greater credence than other witnesses, could have arisen from a recital by the

trial judge of elementary and axiomatic rules and principles concerning her status as a witness, and that of all other witnesses summoned by the prosecution, it was removed by the instruction which immediately followed that the question of whether she was telling the truth or was lying was for the jury to determine. The correctness of a charge is not to be determined from isolated statements extracted from it without reference to their connection with what precedes or follows.

The burden resting upon the State to prove the guilt of the respondent beyond a reasonable doubt in this a criminal case, as clearly and fully defined in the charge, was in no way modified or controlled by an instruction that the process of the court was available to the respondent as well as the prosecution to compel the attendance of needed witnesses. The instruction did not relate to the burden of proof, inferentially or otherwise.

There was no error by the trial judge in his discussion in the charge of the law relating to a recital of the details of a complaint made by the prosecutrix. By way of explanation, the law was stated correctly but the admissibility of such evidence was not submitted to the jury for determination and with it they had no concern. The court alone had the right to decide that question. The jury were not judges of the law.

In this jurisdiction the refusal to instruct the jury on the law of assault with intent to rape, assault and battery, and assault, as requested, was not prejudicial error.

ON APPEAL, EXCEPTIONS, AND MOTION FOR NEW TRIAL.

The respondent was convicted in the Court below of unlawfully and criminally abusing a child of eight years of age. R. S. 1930, Chap. 129, Sec. 16. The child, on returning from a visit to her grandparents, complained to her mother and father that she had been so abused and medical examination confirmed her story. While no one saw the attack, important parts of the child's testimony were corroborated by facts and circumstances testified to by persons who were in the vicinity. The jury returned a verdict of guilty. Respondent appealed and also filed exceptions and a motion for a new trial. Appeal dismissed. Exceptions overruled and motion for new trial denied. Judgment for the State. The case fully appears in the opinion.

Theodore Gonya, for the State.

Robert T. Smith,

Benjamin L. Berman, for the respondent.

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

STURGIS, C. J. The respondent was convicted in the Court below of unlawfully and carnally knowing and abusing a female child under fourteen years of age contrary to R. S., (1930), Chap. 129, Sec. 16 and his appeal and exceptions reserved are before this Court.

APPEAL.

When the prosecutrix, a little girl of eight years, returned on the morning of June 17, 1943 from a visit to her grandparents she complained to her mother and father and others that she had been carnally abused on her way home, and medical examinations confirmed her story. At the trial, identifying the respondent with whom she was well acquainted, as her assailant, she described what had taken place, and while no one saw the attack, important parts of her testimony were corroborated by facts and circumstances related by persons who were in the vicinity. Although the respondent protested his innocence we are convinced that the jury were warranted in believing beyond a reasonable doubt and finding that he was guilty of the charge laid against him in the indictment.

The respondent, through counsel, however, argues that regardless of whether on the evidence the verdict was right the appeal should be sustained for errors in rulings of law and improper comments by the trial judge. This contention does not require extended discussion. An appeal may be sustained in a criminal case for errors of law by the court to

which exceptions are not reserved and injustice would otherwise inevitably result. *State* v. *Wright,* 128 Me., 404, 148 A., 141. And a new trial may be granted for prejudical remarks by the court outside rulings in matters of law. *State* v. *Carter,* 121 Me., 116, 115 A., 820. Here, however, the alleged errors of law apparently relied upon are presented in exceptions perfected and their review lies there. And no objectionable comments by the trial judge are found in the record.

EXCEPTIONS 1 AND 2.

These exceptions, it is conceded, are directed to what are characterized as leading questions propounded to the prosecutrix by the county attorney. If leading, which need not here be decided, it was within the sound discretion of the trial judge to allow such questions to this witness in the progress of her examination in chief and exceptions do not lie to the admission of her answers. *State* v. *Lull,* 37 Me., 246; *Blanchard* v. *Hodgkins,* 62 Me., 119; *Harriman* v. *Sanger,* 67 Me., 442.

EXCEPTIONS 3 AND 4.

In the examination of the parents of the ravished child concerning her complaints the mother was interrogated as follows:

> "Q. Kindly answer this next question, yes or no, if you will. When they brought her home did she make any complaint to you that she had been carnally abused that morning? A. Yes."

The father's testimony in its material parts reads:

> "Q. When you saw her at Herman Ridlon's, did she make a complaint to you that she had been carnally abused that forenoon? A. Yes."

In oral argument the fault found by counsel for the respondent is that in allowing the witnesses to testify that the child made complaints that she had been *carnally abused,* not only the complaints but their details, were allowed to go to the jury. It is, of course, well settled that in the trial of one indicted for rape, if the prosecutrix takes the stand her testimony may be corroborated by proof that she made a complaint through the testimony of the person to whom it was made but the details of the complaint are not admissible unless her testimony has been impeached, or the complaint is within the rule of *res gestae. State* v. *King,* 123 Me., 256, 122 A., 578. But it is uniformly held that this rule is not violated if not more is admitted than is sufficient to show the nature of the complaint. *State* v. *Powers,* 181 Ia., 452, 164 N. W., 856; *Com.* v. *Cleary,* 172 Mass., 175, 51 N. E., 746; *Blake* v. *State,* 157 Md., 75, 145 A., 185; *State* v. *Dawson,* 88 So. Car., 225, 70 S. E., 721; 52 Corpus Juris, 1067, n. 92 and cases cited. If context and reference disclose the subject matter of a complaint made in a rape case further description is unnecessary. *State* v. *Mulkern* 85 Me., 107, 26 A., 1017. Here the mere recital that complaints were made would have been unintelligible and a disclosure of their nature was necessary. We think the words *carnal abuse* only served that purpose and their use was unobjectionable.

No more convincing is the contention that the oft repeated framing of the questions relating to the prosecutrix's complaints, in the manner and form submitted, was calculated to prejudice the jury against the respondent. The questions were reframed and repeated because of objections by counsel for the defense, as finally submitted were admissible in form and substance, and the evidence was material to the issues. There is no ground for complaint here.

EXCEPTIONS 5, 6 AND 7.

As this case was presented the main and controlling question was whether the testimony of the prosecutrix was true or false and it was the duty of the trial judge to so instruct the jury. *State* v. *Clair*, 84 Me., 248, 251, 24 A., 843. And the suggestion, but not direction, that the jury give this question first consideration could not have done more than encourage intelligent and orderly deliberation and point the way to an early determination of the dominant issue of whether the respondent was guilty or innocent. Neither this nor the statement that the question was whether or not the prosecutrix was lying and a perjurer confused or misled the jury. They returned a just and true verdict according to the law and the evidence. There was no harmful error here for which exceptions can be sustained. *Reed, et al.* v. *Power Co.*, 132 Me., 476, 172 A., 823; *State* v. *Priest*, 117 Me., 223, 103 A., 359.

Nor was there error in making known to the jury that the prosecutrix was not a party litigant but a witness who with others summoned by the prosecution, could be compelled to attend and testify and, if honest and upright citizens, must tell the truth. It is elementary that the prosecutrix is not a party in a criminal case and personally has nothing to gain or lose by the outcome. By statute summons may issue to her and all other witnesses for the State and the punishment for failing to appear is severe. R. S., (1930), Chap. 146, Sec. 15, 16. So, too, a witness who fails to answer questions allowed by the Court may be fined or committed to jail. R. S., (1930), Chap. 96, Sec. 123. And the admonition that witnesses summoned to Court if they are honest and upright citizens must tell the truth was undoubtedly intended and could only be understood to be general in its application and a statement of what every honest and upright witness is morally required to do and a truism which brooks no denial.

If in this recital of elementary and axiomatic rules and principles lies an inference that the prosecutrix is entitled to greater credence than other witnesses and must be believed, which we do not find, it was entirely removed by the instruction which immediately followed that the question of whether she was telling the truth or was lying was for the jury to determine. The correctness of a charge is not to be determined from isolated statements extracted from it without reference to their connection with what precedes or follows. *State* v. *Day*, 79 Me., 120, 125, 8 A., 544.

Nor can an inference that the State does not have the burden of proving the guilt of the respondent beyond a reasonable doubt in a criminal case be drawn from an instruction that the process of the court is available to the respondent as well as the prosecution to compel the attendance of needed witnesses. Apparently this statement of the law related only to the inferences which might be drawn from the absence of persons from the stand who might have been called to testify and undoubtedly was so understood. The burden of proof resting upon the State as clearly and fully defined in other parts of the charge was in no way here modified.

The final objection that in the charge as given the jury were led to believe, and to their prejudice, that the details of a complaint made by the prosecutrix were admissible in evidence is groundless. No more was said relative to the complaint than was necessary to identify its nature and in immediate connection the jury were told that the law did not allow a recital of details. This was a correct statement of the law but with it the jury had no concern. The admissibility of details of the complaint was not submitted to the jury for determination. Their province was to pass upon the evidence before them, not to determine its admissibility. The Court alone had the right to decide that question. *Winslow*

v. *Bailey*, 16 Me., 319, 321. The jury were not judges of the law. *State* v. *Stevens*, 53 Me., 548; *Horan* v. *Boston Elevated Railway Co.*, 237 Mass., 245, 248, 129 N. E., 355.

EXCEPTION 8.

Under the settled law in this jurisdiction the refusal to instruct the jury on the law of assault with intent to rape, assault and battery and assault, as requested, cannot be deemed prejudicial error. *State* v. *Black*, 63 Me., 210.

Convinced, as we are, that on the evidence the respondent was undoubtedly guilty of the crime of which he was convicted and there were no exceptionable errors in the trial of the case, the entry is

Appeal dismissed.
Motion for a new trial denied.
Exceptions overruled.
Judgment for the State.

DIANA S. ANTHONY

vs.

ALPHONSE ARPIN.

CHARLES B. ANTHONY

vs.

ALPHONSE ARPIN.

York. Opinion, January 31, 1945.

Master and Servant.

A master is liable to third persons for damages resulting from his servant's negligence while acting in the course of his employment, but the relation of master and servant at the time of and in respect to the acts complained of must be shown.

ON MOTIONS FOR NEW TRIALS.

Actions for damages for personal injuries and for medical expense on account of severe injuries suffered by plaintiff Diana Anthony as a result of a collision between automobile of plaintiff, Charles B. Anthony, and an automobile belonging to the defendant and driven by his brother-in-law. The only issue was whether or not the brother-in-law was acting as the servant or agent of the defendant. The jury returned a verdict that he was. Held that there was sufficient evidence to sustain the jury verdict. Motions overruled. The case fully appears in the opinion.

Clifford & Clifford,

John D. Clifford,

Daniel E. Crowley,

Albert W. Cookson,

Merle C. Rideout, for the plaintiffs.

Robinson & Richardson, John D. Leddy, for the defendants.

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

PER CURIAM.

On motions by the defendants for new trials. The actions arose out of an automobile accident in which the plaintiff, Diana L. Anthony, received severe injuries and her husband, Charles B. Anthony, incurred large expense for her medical, hospital and other services. The defendant owned the automobile which was in collision with that driven by Charles B. Anthony on Sunday, February 15, 1942. At the time of the accident, the Arpin car was being operated by Leo Durand, a brother of the defendant's wife. He was alone in the car.

The only issue presented is whether or not Durand was, at the time of the accident, acting as the servant or agent of the defendant, and liability is contested upon the contention that the doctrine of respondeat superior, under the circumstances of the case, does not apply. It appears from the record that, after the general charge by the presiding Justice, to which no exceptions were taken, the specific question was submitted to the jury by request or agreement of counsel:

> "Was Leo Durand at the time of the accident acting as the servant or agent of the defendant, Alphonse Arpin, and on the business of said defendant?"

Upon return of the verdicts, the jury on interrogation, answered the specific question in the affirmative. There can be

no doubt that the attention of the jury was particularly called to the issue, and no complaint is made of the instructions of the Court with respect thereto.

The defense relied upon a statement made by Leo Durand four days after the accident, which statement was procured and written by counsel for the defendant. He said:

> "Alphonse Arpin is my brother-in-law. On February 15, 1942 he let me use his car for the afternoon. At about 1:45 P. M. that day I was going east on the Sanford-Biddeford road when I was in an accident with Charles Anthony. I was alone. I was taking a ride to pass the time."

The only other persons apparently chargeable with knowledge of the fact in issue were Alphonse Arpin, the defendant, his wife and their son, Richard L. Arpin. Neither the defendant nor his wife testified. Durand was in the armed services at the time of the trial, and the unsworn statement which he had given was admitted by agreement as testimony. The son, Richard L. Arpin, a boy thirteen years old, testified in substance that his uncle, Durand, was at the Arpin home in the forenoon of the Sunday in question, stayed to dinner and left soon after. During the forenoon he heard a conversation between the defendant and Durand, which recognized the fact that Mrs. Arpin was pregnant and expected soon to be delivered, and Arpin wanted Durand to find a woman to do the housework, because Mrs. Arpin was then sick and unable to work. Durand was working for a woman in Biddeford or Old Orchard, and agreed to make the trip there to see if she could obtain the needed help. Durand was to go in the afternoon and came back for supper. On cross-examination, the lad was asked:

"Q. You didn't hear him (Arpin) say to take the car for the afternoon?

A. No, sir. He said to take the car and go get a woman."

The accident happened about seven miles from Sanford on the road towards Biddeford and Old Orchard, and Durand went no farther. Considering the fact that Arpin and his wife remained silent, that Durand was not asked for any further explanation, and the element of agency was never specifically called to his attention, and the further fact that, as appears in the record, Mrs. Arpin gave birth to a child seventeen days later, the jury was amply justified in coming to the conclusion that Durand was acting at the particular time and place of the accident, upon the request and direction of the owner of the car, in performance of a mission for the defendant, and as his servant and agent.

There was sufficient evidence, if accepted as credible by the jury, to comply with the rule as enunciated in varied phrase, but with like effect that

> "A master is liable to third persons for damages resulting from his servant's negligence while acting in the course of his employment, or as it is sometimes expressed, within the scope of his authority, but the relation of master and servant at the time of and in respect to the acts complained of must be shown." *Copp* v. *Paradis*, 130 Me., 464 A.; *Maddox* v. *Brown*, 71 Me., 432; *Karahleos* v. *Dillingham*, 119 Me., 165 A.

Motions overruled.

EMMA HARVEY,
ADMINISTRATRIX OF THE ESTATE OF ETTA E. COVEL
vs.
MARGARET A. RACKLIFFE,
ADMINISTRATRIX OF THE ESTATE OF WILLIAM A. GRIFFIN.

Knox. Opinion, February 21, 1945.

United States Constitution. War Bonds. Federal Law. United States Treasury Regulations.

Treasury Regulations in respect to the transfer of United States war savings bonds are a proper exercise of the power given to the Secretary of the Treasury by the Congress; and they accordingly have the force and effect of Federal law.

Under the provisions of the Federal constitution Congress has the power "to borrow Money on the credit of the United States," and "to make all Laws which shall be necessary and proper for carrying into Execution" this power. Art. VI, Clause 2, provides that these laws "shall be the supreme Law of the Land; and the judges in every state shall be bound thereby . . . ."

The capacity of the Federal government to borrow money depends on the inviolability of its obligation, on its ability to carry it out strictly in accordance with its terms. If the state may treat the bonds here involved, or the proceeds of their sale, as the property of some person other than the one whom the contract has designated, the government has thereby been prevented from carrying out the agreement into which it has entered.

In this case there was a contract with the United States for the benefit of a third party whose rights arise solely from the contract and in no sense by reason of a grant or gift; this contract gives the beneficiary a present, vested, though defeasible interest; it is governed by Federal law and must be enforced in accordance with its letter and its spirit uniformly throughout the United States; and no state statute or rule of law may stand in the way of such enforcement.

Because of the supremacy of Federal law a state rule has no application to this contract.

ON REPORT.

The plaintiff appealed to the Supreme Court of Probate from a decree of the Judge of Probate, who had determined that the proceeds from the sale of certain United States War Bonds belonged to the estate of William A. Griffin. Said Griffin was the purchaser of the bonds, which were registered in the so-called beneficiary form and were made payable upon his death to Etta E. Covel. Subsequent to the death of Mr. Griffin, Mrs. Covel, the beneficiary named in the bonds, died. Emma Harvey, Administratrix of Mrs. Covel's estate, cashed the bonds. The sole question in the case was which of the estates was entitled to the proceeds. The Judge of Probate ruled that the money belonged to the Griffin estate. Emma Harvey, Administratrix of the estate of Mrs. Covel appealed to the Supreme Court of Probate, and the case came before the Law Court on report from the Supreme Court of Probate. A representative of the United States Treasury appeared in the case in support of the contention that there was a contract by which the United States Government agreed to pay the proceeds of the bonds to the survivor named in the bonds, that the Federal law was supreme and that no state law could stand in the way of the fulfillment of the obligation of the Federal Government. The case was remanded to the Supreme Court of Probate for the entry of a decree sustaining the appeal and for such relief as was required by the opinion. The case fully appears in the opinion.

Jerome C. Burrows, for the appellant.

Frank F. Harding, for the appellee.

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

THAXTER, J. This case is before us on report from the Supreme Court of Probate for the County of Knox. It is an

appeal by the administratrix of the estate of Etta E. Covel from a decree of the Judge of Probate of that county, which determined that the sum of $888.75, representing the proceeds in her hands as such administratrix from the cashing of certain United States War Bonds, belonged not to her but to the administratrix of the estate of William A. Griffin. The United States of America, because of the importance to it of the issue involved, has filed a brief as *amicus curiae*. The facts are not in dispute.

William A. Griffin purchased with his own money United States War Bonds having a maturity value of $1,125. In accordance with United States Treasury Department Regulations Circular No. 530, the applicable provisions of which are Sections 315.1, 315.2, 315.4(c), 315.8, 315.34, 315.35, 315.36, and 315.37, these bonds were registered in the so-called beneficiary form in the name of William A. Griffin payable on death to Etta E. Covel. The essential part of the statute authorizing their issuance reads as follows:

> "The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service or otherwise, United States savings bonds and United States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b), (c), and (d) hereof, and including any restrictions on their transfer, as the Secretary of the Treasury may

> from time to time prescribe." (Section 22 of the second Liberty Bond Act, added by the Act of February 4, 1935, 49 Stat. 21, Title 31, U. S. C., 1940 ed., Sec. 757c, as amended by the Public Debt Act of 1941, Act of February 19, 1941, 55 Stat. 7, Title 31, U. S. C., 1940 ed., Sup. 1, Sec. 757c).

The regulations provide in part that the form of registration "will be considered as conclusive of such ownership and interest"; that the bonds "are not transferable and are payable only to the owners named"; that they may not be sold or hypothecated; that they may be paid to the registered owner during his lifetime; that after his death the beneficiary if surviving will be recognized as "the sole and absolute owner"; and that after the death of the surviving beneficiary the bond may be paid or reissued in accordance with the regulations "as though it were registered in the name of the surviving beneficiary alone."

No contention is made, nor could any validly be made, that these regulations are not a proper exercise of the power given to the Secretary of the Treasury by the Congress; and they accordingly have the force and effect of Federal law. Cases involving this and analogous situations have consistently so held. *Maryland Casualty Co.* v. *United States,* 251, U. S., 342, 64 L. Ed., 297, 40 S. Ct., 155; *United States* v. *Sacks,* 257 U. S., 37, 66 L. Ed., 118, 42 S. Ct., 38; *United States* v. *Janowitz* 257 U. S., 42, 66 L. Ed., 120, 42 S. Ct., 40; *United States* v. *Grimaud,* 220 U. S., 506, 55 L. Ed., 563, 31 S. Ct., 480; *Hampton* v. *United States,* 276 U. S., 394, 72 L. Ed., 624, 48 S. Ct., 348; *Bowles* v. *Willingham,* 321 U. S., 503, 88 L. Ed., 892, 64 S. Ct., 641.

After the death of Mr. Griffin, Mrs. Covel, the beneficiary owner, died; and the bonds came into the possession of the appellant as her administratrix who, in accordance with the

treasury regulations, cashed them. The controversy is between the two estates as to the title to the proceeds. The Judge of Probate has ruled that the money belongs to the administratrix of the estate of Mr. Griffin.

Her contention is that the case of *Garland, Appellant,* 126 Me., 84, 136 A., 459, is controlling. This holds that a bank deposit payable to either of two persons or the survivor does not by reason of its form belong to the survivor, the question being to whom did the money, represented by the deposit book, actually belong. If it was the money of the deceased and he reserved a right of control over it in his lifetime, it was the property of his estate after his death. For to hold otherwise would be to sustain a gift intended to take effect after death in violation of the Statute of Wills.

The appellant and the United States claim that the *Garland* case is not controlling; that there is here a contract by which the United States agreed to pay this money to the survivor; that the performance of that contract according to its terms is one of the essential functions on which the ability of the Federal Government to borrow money on a reasonable basis depends; and that no state law can stand in the way of the fulfillment of that obligation both in accordance with its letter and its spirit.

At the outset our attention is called to the provisions of the Federal constitution giving to Congress the power "to borrow Money on the credit of the United States", Art 1, Sec. 8, Clause 2, and "to make all Laws which shall be necessary and proper for carrying into Execution" this power, Art. 1, Sec. 8 Clause 18; and particularly we are directed to Art. VI, Clause 2, which provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges

> in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This supremacy of Federal law has been established by numerous decisions.

In *M'Culloch* v. *Maryland,* 4 Wheat., 316, 4 L. Ed., 579, Chief Justice Marshall laid down the principle that a State has no power to tax a branch of the Bank of the United States. He said, page 427, L. Ed., page 606:

> ". . . the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence."

In *Weston* v. *City Council of Charleston,* 2 Pet., 449, 7 L. Ed., 481, the same Chief Justice amplified this principle in language which is peculiarly applicable at the present time and to the case now before us. He said, pages 465, 467, L. Ed., pages 487, 488:

> "Congress has power 'to borrow money on the credit of the United States.' The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract, subsisting between the government and the individual.

It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract."

* * *

"A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created."

In *Irvine* v. *Marshall,* 20 How., 558, 15 L. Ed., 994, there was involved a Minnesota statute which provided that no trust should result where, with the consent of the true owner, title to land should be taken in the name of another. In refusing to recognize the statute in so far as the title to land bought of the Federal Government was involved, the Court said:

"Another error . . . is seen in the supposition that the contracts of the government with respect to subjects within its constitutional competency are also local, confined in their effect and operation strictly to the *situs* of the subjects to which they relate. The true principle applicable to the objection just noted, and by which that objection is at once obviated, we hold to be this: That within the provisions prescribed by the Constitution, and by the laws enacted in accordance with the Constitution, the Acts and powers of the Government are to be interpreted and applied so as to create and maintain a system, general, equal, and beneficial as a whole. By this rule, the Acts and the contracts of the Government must be under-

> stood as referring to and sustaining the rights and interests of all the members of this Confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such policy."

In the application of these general principles to the specific problem now before us, the cases have not been uniform, but the strong weight of authority, particularly of the more recent cases, is to sustain the principle claimed by the government and by the appellant in the instant case. Washington and Iowa have refused to follow it, and there is one decision in New York to the same effect. *Decker* v. *Fowler*, 199 Wash., 549, 92 Pac. (2d), 254, 131 A. L. R., 961; *Sinift* v. *Sinift*, 229 Iowa, 56, 293, N. W., 841; *Deyo* v. *Adams*, 36 N. Y. S. (2d), 734.

In the Washington case, decided in 1939, there was a strong dissenting opinion; and it is important to note that the majority opinion proceeds on the assumption that there was no claim by the Federal government that the Federal law was supreme. The Court held that the provisions of the regulations were for the convenience of the Federal government which was not concerned with the question of "to whom the money might belong after it was paid."

In the Iowa case, decided in 1940, we find substantially the same interpretation of the Treasury Regulations as was adopted by the Washington Court. It is held that they were promulgated solely for the convenience of the government and to protect it in making payment to one who might not in fact be the owner.

In the New York case the Court placed the same interpretation on the Treasury Regulations, but the government did not appear to claim that such interpretation was not warranted. The decision did not involve a hearing on the merits but went only to the sufficiency of the complaint. The deci-

sion was followed in *In re Karlinski's Estate,* 38 N. Y. S. (2d), 297, 40 N. Y. S. (2d), 22, 43 N. Y. S. (2d), 40. However, before a decree was signed the United States asked to intervene. In granting the petition, the Surrogate said: "If it convinces me of the tenability of its position, namely, that the United States Government in the exercise of its power to borrow money through the sale of War Bonds is not subject to the law of the State of New York governing the disposition and distribution of the property of deceased persons, I will not hesitate to change my decision." *In re Deyo's Estate,* 42 N. Y. S. (2d), 379, was a hearing on the merits of the complaint which had been sustained in the earlier decision. The Surrogate, however, refused to adopt the principle there laid down. He referred to the fact that the preceding decision had been severely criticized, and then in an exhaustive opinion, holding that the Federal law was supreme, sustained the right of the surviving beneficiary. This decision was followed *In re Hager's Estate,* 45 N. Y. S. (2d), 468. In *Deyo* v. *Adams,* 48 N. Y. S. (2d), 419, the Court held that the decision in the first *Deyo* case, which sustained the complaint, was the "law of the case" and must stand until it should be reviewed by the Appellate Division which, it was conceded, might adopt a different rule. While this case was thus finding its way through the different courts, the New York Legislature settled the question in so far as future cases were concerned by the passage of a statute, L. 1943, Ch. 632, which provided that the right of the owner, co-owner or beneficiary of such United States savings bonds, to receive payment of the same "shall not be defeated or impaired by any statute or rule of law governing transfer of property by will or gift or an intestacy . . . ." This bill was passed according to a legislative note annexed to it, to remove doubt resulting from the original *Deyo* decision and to "assure purchasers of such bonds that the persons designated by them as payees will receive the money." Leg. Doc. (1943),

No. 65 (M), p. 3. In New York therefore the controversy is ended except in so far as the rights of the parties in the *Deyo* case may be concerned. We have not been informed whether or not that case has gone forward to the Appellate Division.

No case, other than these three rather unsatisfactory decisions, has been cited sustaining the position of the appellee in the case before us. On the other hand there are a number of carefully considered opinions which adopt a contrary view. *Warren, Executrix* v. *United States,* 68 C. Cls., 634 (1929); *United States* v. *Dauphin Deposit Trust Co.,* 50 Fed. Supp., 73 (Dist. Court Mid. Dis. Penn., 1943); *Franklin Washington Trust Co.* v. *Beltram,* 133 N. J., Eq., 11, 29 A. (2d), 854 (N. J. Ch. 1943); *Reynolds* v. *Danko,* 134 N. J., Eq., 560, 36 A. (2d), 420 (N. J. Ch. 1944); *Meyer* v. *Mercier,* 102 Colo., 422, 80 P. (2d), 332; *In re Di Santo's Estate* 142 Ohio St., 223, 51 N. E. (2d), 639 (Ch. 1943); *Conrad* v. *Conrad,* 152 P. (2d), 221 (Cal. App., 1944); *Mitchell* v. *Edds,* 181 S. W. (2d), 323 (Tex. Civ. App., 1944).

Generally speaking these cases are decided on the theory that there is here a contract with the United States for the benefit of a third person whose rights arise solely from the contract and in no sense by reason of a grant or gift; that this contract which gives the beneficiary a present, vested, though defeasible interest, is governed by Federal law and must be enforced in accordance with its letter and its spirit uniformly throughout the United States; and that no State statute or rule of law may stand in the way of such enforcement.

The exact question here at issue has not been decided by the Supreme Court of the United States but decisions in cases upholding the exercise of Federal powers leave but little doubt as to what the result will be if this issue is presented.

In *Ruddy* v. *Rossi,* 248, U. S., 104, 63 L. Ed., 148, 39 S. Ct.,

46, 8 A. L. R., 843, it was held that Congress had the power to exempt, to the extent prescribed by the Federal statute, homestead lands within a state from liability to satisfy debts of the homesteader.

United States v. *Janowitz*, 257 U. S., 42 66 L. Ed., 120, 42 S. Ct., 40, assumes without question the right of the Federal Government to impose restrictions on the transferability of its obligations.

In Johnson v. *Maryland*, 254 U. S., 51, 65 L. Ed., 126, 41 S. Ct., 16, the power of the State was denied to require an automobile driver's license of a government employee, while operating a truck over a state highway on government business.

In *Clearfield Trust Co.* v. *United States*, 318 U. S., 363, 87 L. Ed., 838, 63 S. Ct., 573, the question was as to the liability of a bank in cashing a government check, the endorsement of which was forged. "Under the law of Pennsylvania, where the transaction took place, prompt notice to endorsers by the drawee of the check after learning of the forgery was necessary to recover the amount paid to them." Under Federal law this was not required. In deciding that the contract was governed by Federal Law, the Court said, 318 U. S., page 367, 87 L. Ed., 842, 63 S. Ct., 575:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making indentical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain."

Then there are the cases which, in order to maintain to the fullest extent the borrowing power of the Federal government, hold that a state may not impose a tax on bonds or other obligations of the United States. *Weston* v. *City Council of Charleston,* supra; *Farmers Bank* v. *State of Minnesota,* 232 U. S., 516, 58 L. Ed., 706, 34 S. Ct., 354; *Missouri* v. *Gehner,* 281 U. S., 313, 74 L. Ed., 870, 50 S. Ct., 326.

In *United States* v. *Waddill, Holland & Flinn, Inc.,* 65 S. Ct., 304, 306 (U. S. Supreme Court, Jan. 2, 1945), the question was whether in a state proceeding under a general assignment for the benefit of creditors, Sec. 3466 of the Revised Statutes, 31 U. S. C. A., Sec. 191, gave priority to a claim of the United States over a landlord's lien and a municipal tax lien. Whether such liens should take precedence depended on whether these liens had been perfected on the date of the assignment, and the determination of this question depended on the construction by the state court of the state statute. In refusing to follow the interpretation put on the state statute by the state court, the court said:

> "These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by a state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority."

A significant case, which upholds the supremacy of Federal law in the enforcement of Federal contracts, is *Gulf Oil Corporation* v. *Lastrap,* 48 Fed. Supp., 947 (Dist. Ct. S. D. Tex. 1943), which holds that an insurance contract, authorized by federal law, was enforceable in Texas in spite of the rule of law in Texas that such contract was unenforceable there because the insured had no insurable interest.

If there was a reason for upholding the supremacy of Federal Law and for its uniform enforcement throughout the country in the instances above mentioned, there is even more in the case now before us. We are engaged in a great war in which the life of the nation is at stake. For the successful prosecution of that war the United States must borrow money. The price which it must pay for it depends on a number of factors—on whether its securities shall or shall not be free from taxation, on their maturity date, on their marketability, on the ease with which the title to them may be transferred. It is essential that the determination of these matters shall be in the exclusive control of the Federal Government. Otherwise we should have varying prices for these securities depending on the treatment to which they might be subjected by the laws of the different states where their situs might be. Above all else the capacity of the government to borrow at all depends on the inviolability of its obligation, on its ability to carry it out strictly in accordance with its terms. If the state may treat the bonds here involved, or the proceeds of their sale, as the property of some person other than the one whom the contract has designated, the government has thereby been prevented from carrying out the agreement into which it has entered. That the Treasury Department is fully conscious of this fact, and of the serious consequences which will flow from a failure to sustain Federal supremacy in this vital sphere, is evidenced by its appearance before this court to assert its rights and to call our attention to the fact that the sale of these bonds in the future

will be seriously hampered if its position in this and similar cases is not sustained.

We are not asked to overrule a rule of law already established in this state, but only to decide that, because of the supremacy of Federal law, the state rule has no application to this contract. This we have no hesitation in doing. The duty of the state in this instance is plain. As was said by a great Chief Justice: "Nor can it be inconsistent with the dignity of a sovereign State, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes." *Ableman* v. *Booth*, 21 How., 506, 16 L. Ed., 169, 176.

The case is remanded to the Supreme Court of Probate for the entry of a decree sustaining the appeal and for such relief as is required by this opinion.

So Ordered.

BRADFORD H. HUTCHINS

vs.

EDITH HYDE HUTCHINS, EXECUTRIX

OF ESTATE OF GUY H. HUTCHINS,

BRADFORD H. HUTCHINS,

EXECUTOR OF ESTATE OF NELLIE M. HUTCHINS

vs.

EDITH HYDE HUTCHINS,

EXECUTRIX OF ESTATE OF GUY H. HUTCHINS.

Androscoggin. Opinion, March 5, 1945.

Probate Courts. Executors and Administrators.
Trusts. Equity Jurisdiction.

The Probate Court is entrusted with the administration of estates of deceased persons by legislative enactment. Its jurisdiction in this respect is exclusive and is limited to the authority so given.

The Probate Court can distribute personal property only in accordance with the provisions of the legislative grant of authority and this is so even though the beneficiaries agree otherwise.

The administrator of the estate of a deceased person and the widow of such deceased person could enter into an agreement to divide the money which should come to them through distribution by the Court in such manner as they saw fit but they could not make an agreement that would affect the distribution of the estate by the Court. They could make an agreement personally binding upon them but it would be binding upon them only personally.

If the administrator of the estate of a deceased person made a valid agreement with the widow of such deceased person which he breached, the widow had a right of action, but, upon the death of the parties, the action survived to the executor of the widow's estate and he alone could maintain the action against the estate of the administrator.

Irrespective of the fact that the amount claimed may eventually come to him, the residuary legatee of a deceased person is not entitled to the same until the estate of which he is the beneficiary has been administered and the estate distributed.

It is the right and duty of the personal representative of a deceased person to collect all collectible claims in favor of the estate of such deceased person which come to his attention.

Equity will protect against a wrong done through abuse of a relationship of trust and confidence, but, in the instant case, there was nothing to indicate that there was any relationship of trust and confidence such as to impose a trust upon the money claimed by the plaintiff.

In the instant case there was no particular fund charged with a trust and no evidence presented that the money claimed could be distinguished from other money of the estate of defendant's testator.

Failure of an agreement to pay money received from a particular source is not a reason for equity to impose a lien or trust upon money so received by the promisor.

If the defendant, in the instant case, wrongfully retains possession of property belonging to the estate of which the plaintiff is the beneficiary legatee she is liable personally and not as executrix.

Equity jurisdiction was not conferred by the failure of the defendant to raise the question of such jurisdiction.

ON EXCEPTIONS AND APPEAL.

Two actions, one at law by the plaintiff in his personal capacity and the other in equity as executor of the estate of his grandmother. The plaintiff was the residuary legatee of the estate of his grandmother, Nellie M. Hutchins. Guy H. Hutchins was the administrator of the estate of the husband of Nellie M. Hutchins. The plaintiff claimed that there had been an agreement between Nellie M. Hutchins and Guy H. Hutchins in relation to the proceeds of the estate of which Guy H. Hutchins was administrator; that by virtue of such agreement the sum of $4,564.38 was payable to Nellie M. Hutchins; that Guy H. Hutchins failed to pay said money to Nellie M. Hutchins and that at his death it was returned as a part of his estate; that the plaintiff as residuary legatee un-

der the will of Nellie M. Hutchins was entitled to recover said sum from the executrix of the estate of Guy H. Hutchins. In the lower court judgment for the plaintiff was ordered in each case. The defendant filed exceptions in the case at law and appealed against the judgment in the equity case. Exceptions sustained. Appeal sustained and case remanded to lower court for dismissal of the bill. The case fully appears in the opinion.

Berman & Berman, Lewiston, for the plaintiff.

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

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

CHAPMAN, J. The court is presented with the rather novel situation of two actions, one at law and the other in equity, seeking the same end and brought by the same persons in different capacities, with judgment ordered for the plaintiff in each case. The two actions were heard together, a Justice of the Superior Court acting as referee in the suit at law and as sitting Justice in the equity suit. By agreement, the evidence presented applied to both cases. In the suit at law, the decision was that the plaintiff, in his personal capacity, was entitled to $4,564.38. In the equity suit, it was decreed that the defendant, in her said capacity, holds in trust for the benefit and use of the plaintiff a fund of $4,564.38 which she was ordered to pay over to the plaintiff and also to make accounting and pay to the plaintiff any increase of the fund that had accumulated while in her hands. The finding of the Referee was sustained in the Superior Court and exceptions were filed by the defendant. From the decree in equity, appeal was taken.

The litigation arises from the following facts. Albert A. Hutchins died intestate. He left a widow, Nellie M. Hutchins,

and a son Guy H. Hutchins as his only heir. The son was appointed administrator of his father's estate. He filed an inventory showing both real estate and personal property. Nellie M. Hutchins filed a petition in the Probate Court for widow's allowance. No objection was made thereto and decree was entered granting an allowance of all the personal estate after the payment of debts, expenses of last sickness and expenses of administration. Subsequently a petition was filed by the widow asking that the decree be amended to the effect that the allowance should be one-half of the personal property after the payment of debts, expenses of last sickness and expenses of administration. This petition remained upon the files of the Probate Court without action thereon. The administrator, Guy H. Hutchins, filed his "First and Final Account" in which he accounted for the personal property scheduled in the inventory and increment while in his hands, and credited himself with sundry expenses and with the payment to himself and Nellie M. Hutchins of the balance in the proportion of two-thirds and one-third respectively. The account was allowed by the Judge of Probate. Voucher acknowledging receipt by Nellie M. Hutchins of one-third of the personal property of the estate was filed in support of the account. No order of distribution was made nor petition for the same filed.

Subsequently to the allowance of the account Nellie M. Hutchins died testate and, in accordance with her will, Bradford H. Hutchins, son of Guy H. Hutchins, qualified as executor. It is in this capacity that he appears as plaintiff in the bill in equity. He was also named in the will as residuary legatee and, as such, he brings the suit at law.

Subsequently to the death of Nellie M. Hutchins, Guy H. Hutchins died and Edith Hyde Hutchins qualified as executrix under his will and, in that capacity, is named as defendant in the two actions.

It is the contention of the plaintiff in both cases that an

agreement was made between Nellie M. Hutchins and Guy H. Hutchins, subsequently to the entry of decree of widow's allowance and previous to the filing of the account of Guy H. Hutchins as administrator, that they would divide equally the personal property of the estate after the payment of debts, expenses of last sickness and expenses of administration, and that the agreement was not kept by Guy H. Hutchins in that he paid her one-third only of the balance of the personal property. This agreement and the breach thereof is the foundation for the claim in both actions.

In the action at law the declaration is for money had and received with specifications setting forth the Probate proceedings hereinbefore referred to, and the claimed agreement between Guy H. Hutchins and Nellie M. Hutchins and breach thereof by Guy H. Hutchins, by reason of which it is claimed that the plaintiff is entitled as residuary legatee of the estate of Nellie M. Hutchins to recover from the executrix of the estate of Guy H. Hutchins that part of the money of the estate that Guy H. Hutchins failed to pay to Nellie M. Hutchins, namely,—the difference between one-third and one-half thereof and alleged to be the sum of $4,564.38. There is further specification of claim to recover the value of certain articles of personal property which it is claimed had belonged to Nellie M. Hutchins and retained by Guy H. Hutchins in his lifetime and, after his death, by the defendant. It will be noted that this claimed right to recover by the residuary legatee is not against the estate of which he is a beneficiary but upon an obligation in favor of that estate by the defendant's deceased.

It appears from the evidence that within the period provided by statute for a proof of claim against the estate of a deceased person "Proof of claim of Bradford H. Hutchins" was filed in the Probate Court. The claim as presented was not, in its terms, set forth in the record and it does not appear whether the claim was filed in behalf of Bradford H.

Hutchins personally or by him in his capacity as executor of the estate of Nellie M. Hutchins.

The Probate Court is a tribunal entrusted with the administration of estates of deceased persons within channels provided by legislative enactment. Its jurisdiction in this respect is exclusive and is limited to the authority so given. *Graffam* v. *Ray*, 91 Me., 234, 39A. 569; *Thompson, Appellant*, 116 Me., 473, 102 A. 303. It can distribute personal property only in accordance with the provisions of the legislative grant of authority, and this is so even though the beneficiaries agree otherwise. *Knowlton* v. *Johnson*, 46 Me., 489; *Grant* v. *Bodwell*, 78 Me., 460, 7A. 12.

It follows that while the parties, Guy H. Hutchins and Nellie M. Hutchins, could enter upon an agreement to divide monies which should come to them through distribution by the court, in such manner as they saw fit, they could not make an agreement that would affect the distribution of the estate by the court. They could make an agreement personally binding upon the parties but of no effect upon them in any other than their personal capacities.

If a valid agreement existed between Guy H. Hutchins and Nellie M. Hutchins, and Guy H. Hutchins breached the same, an action accrued to Nellie M. Hutchins; but, upon the death of the parties, the action survived to the executor of the estate of Nellie M. Hutchins and he alone could maintain the action against the estate of Guy H. Hutchins. *Palmer* v. *Palmer*, 112 Me., 156, 91 A. 284; *Lee* v. *Chase*, 58 Me., 432. In that case, Chief Justice Appleton said:

> "The legal representative of the estate is the proper party to any litigation, when the assets of the estate are to be recovered for its benefit. . . . The administrator represents all those rights and unites in himself all those interests. Upon him alone the law devolves the duty of their protection and enforcement.

> He only can give a valid discharge. His bond to the judge of probate is the security afforded by law to all interested in the estate, and if he fails in his duty, those aggrieved must seek their remedy upon it."

To the same effect is *Wright* v. *Holmes,* 100 Me., 508, 510, 62 A. 507, 3 L. R. A. N. S. 769, 4 Ann. Cas. 583. This is recognized as the settled law of this jurisdiction. *Wilson's Probate Law,* page 146.

Irrespective of the fact that the amount claimed may eventually come to him, the residuary legatee is not entitled to the same until it has been administered upon as the property of the estate of which he is a beneficiary, and a decree of distribution has been issued. *Bean* v. *Bumpus,* 22 Me., 549; *Caleb* v. *Hearn,* 72 Me., 231; *Palmer* v. *Palmer,* supra; *Wright* v. *Holmes,* supra; *Leighton's Probate Law and Practice,* section 459.

This procedure insures proper distribution of the assets of the estate and it is not to the disadvantage of the legatee. The personal representative may be compelled by the Probate Court to bring suit. *Peacock* v. *Ambrose,* 121 Me., 297, 302, 116 A. 832, 21 *Am. Jur. Executors and Administrators,* section 222, and notwithstanding a settlement of all matters pertaining to the estate, if there comes to the attention of the personal representative a disclosure of collectible claims in favor of the estate it is his right and duty to make collection thereof. *Robinson* v. *Ring,* 72 Me., 140, 39 Am. Rep. 308; *Stetson* v. *Caverly,* 133 Me., 217, 175 A. 473. If there be a vacancy in the office of personal representative, the Probate Court will appoint an administrator de bonis non for the collection of uncollected assets.

To the claim for the value of goods alleged to belong to Nellie M. Hutchins in her lifetime, in the hands of Guy H. Hutchins, the same objection exists. These articles were not specifically bequeathed and, as the property of the deceased,

became a part of the estate of Nellie M. Hutchins and vested in the executor thereof. 33 *Corpus Juris Secundum, Executors and Administrators,* section 299; *Carter* v. *National Bank of Lewiston,* 71 Me., 448, 36 Am. Rep. 338. It was within his province to enforce his right to possession by appropriate action. *Hathorne* v. *Eaton,* 70 Me., 219. The residuary legatee had no right of action for their value. *Caleb* v. *Hearn,* supra.

The Referee found that the plaintiff, in his personal capacity, was entitled to maintain the suit. Exception to this finding was well taken.

The bill in equity declares against the defendant in her capacity as executrix of the estate of Guy H. Hutchins and in behalf of the plaintiff in his capacity as executor of the estate of Nellie M. Hutchins. In determining their respective rights and obligations, they must be considered in their said capacities. The bill sets forth probate proceedings as hereinbefore described and alleges an agreement between Guy H. Hutchins and Nellie M. Hutchins in the following language:

> "That the said Nellie M. Hutchins and the said Guy H. Hutchins then and there, notwithstanding said Widow's Allowance, agreed that they would divide the personal estate of the said Albert A. Hutchins equally between them so that each would receive one-half thereof instead of the said Nellie M. Hutchins receiving the whole."

There follows the allegation that Guy H. Hutchins breached the agreement in that he failed to pay the sum of $4,564.38 of the amount that he had agreed to pay, that this sum of money was of the property of the estate of Albert A. Hutchins for the benefit of Nellie M. Hutchins, and that the sum which he failed to pay, upon his death, became a part of his estate and came into the possession of the defendant

as his executrix. In addition, there are allegations that there existed a relationship of trust and confidence between Guy H. Hutchins and his mother, Nellie M. Hutchins, and that it was a violation of this relationship for Guy H. Hutchins not to pay the money to her as he had agreed. Further, that the amount of $4,564.38 was a fund in the hands of Guy H. Hutchins in his lifetime and, upon his death, in the hands of his executrix was impressed for the fulfillment of the alleged agreement. Also it is alleged that certain articles of personal property that belonged to Nellie M. Hutchins were in the hands of the defendant and wrongfully withheld from the plaintiff.

As to the allegation of breach of the relationship of trust and confidence, equity will protect against a wrong accomplished through abuse of such relationship. *Gerrish* v. *Chambers,* 135 Me., 70, 189 A. 187. But, in the instant case, there is nothing to indicate that the failure to pay on the part of Guy H. Hutchins as he had agreed originated in or had any connection with any relationship of trust and confidence. There was no money in the hands of Guy H. Hutchins that had come into his possession by reason of such relationship, there was nothing to indicate that Nellie M. Hutchins was led into believing that payment had been made, there was no indication that Nellie M. Hutchins granted permission for such withholding and as far as anything appears in the case it was no different from any ordinary case of breach of an agreement to pay money for which a plain, adequate and complete remedy at law exists. No reason for equity to take jurisdiction is disclosed in this respect.

As to the allegation that the sum of $4,564.38 was impressed with a trust for fulfillment of the alleged agreement, what has been heretofore said as to this alleged agreement is here applicable. Inasmuch as Guy H. Hutchins, in his capacity as administrator, had no authority to make a valid agreement as to the distribution of the estate, the funds of

the estate could not be impressed with any trust in this respect and, as funds of the estate, they certainly could not be impressed with a trust to carry out his personal agreement. *Boynton* v. *Payrow*, 67 Me., 587.

The parties as individuals could make an agreement for the division of money after it had been received through a legal distribution by the Probate Court; but failure of an agreement to pay money received from a particular source is not reason for equity to impose a lien or trust upon money so received by the promisor. *Russ* v. *Wilson*, 22 Me., 207; *Crooker* v. *Rogers*, 58 Me., 339; *McKey* v. *Paradise*, 299 U. S., 119, 81 L. Ed., 75, 57 S. Ct. 124.

Such allegation must fail for the additional reason that there is no identity of a fund to be impressed. No particular fund is charged with the trust and there is no allegation or testimony to the effect that this money can be traced or distinguished from other money of the defendant's testator. The monies that came into her hands were all subject to the general charges upon the estate. *Hodge* v. *Hodge*, 90 Me., 505, 512, 38 A. 535, 40 L. R. A. 33, 60 Am. St. Rep. 285; *Goodell* v. *Buck*, 67 Me., 514; *Steamboat Company* v. *Locke*, 73 Me., 370; *National City Bank* v. *Hotchkiss*, 231 U. S., 50, 34 S. Ct. 21, 58 L. Ed. 115. In the latter case, Judge Holmes said:

> "A trust cannot be established, in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies had gone into it."

The allegation relating to the possession of articles of the personal property belonging to Nellie M. Hutchins in the hands of the defendant cannot be maintained for two reasons: 1, because if the defendant wrongfully retains possession of property belonging to Nellie M. Hutchins in her life-

time, she is liable personally and not as executrix; 2, because, in any event, the plaintiff under such allegation has a plain, adequate and complete remedy at law and has no remedy in equity. *Caleb* v. *Hearn*, supra.

The fact that the question of equity jurisdiction was not raised by the defendant does not confer such jurisdiction when the absence of the same is apparent. *York* v. *McCausland*, 130 Me., 245, 154 A. 780.

The entry as to the action at law must be

Exceptions sustained.

The entry as to the bill in equity must be

Appeal sustained.
Case remanded to the lower court for dismissal of bill.

STATE OF MAINE

vs.

WILLIAM B. McKRACKERN.

Sagadahoc. Opinion, March 27, 1945.

Criminal Law. Assault and Battery. Jury Verdict. Segregation of Witnesses. Instructions to Jury. Directed Verdict. Judicial Notice. Exceptions.

Denial of a respondent's motion for a directed verdict and appeal from the denial of the trial judge to set the verdict aside present like questions and accomplish precisely the same result.

The only question raised before this Court on the appeal was whether in view of all the testimony the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty.

Conclusions reached by the jury, if warranted by the evidence, must stand.

If the story of a witness is seemingly credible and probable, and not inconsistent with other admitted or proven facts, the listener has much better opportunity to judge correctly of its truthfulness than a reader has.

Absolute denials by a respondent of vital facts proven beyond question by the State where there is no evidence in the record to support the denials taint all essential testimony of the respondent and may well destroy the jury's confidence in his veracity.

Inferences as to probabilities, while they should receive careful consideration by the jury, should not overcome convincing, direct proof of facts evidencing guilt.

The fact that a pregnant woman when assaulted suffers no ill effect to her pregnancy is insufficient to raise a probability that no assault took place, when there is present other testimony strongly evidencing the assault.

From the facts in this case the jury could find as it did that the assault occurred as related by the assaulted party.

This record contains no fact foundation for the assertion that the assaulted party had any "serious mental delusion at the time of the alleged assault and at the time of respondent's arrest and subsequent trial."

The statute on which the indictment herein was drawn does not create an offense of *aggravated* assault. It is still only assault, although of an aggravated nature.

The matter of aggravation has to do only with the sentence and is a matter for the Court, whose duty it is to sentence.

Whether or not 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.

Judicial notice will be taken that a particular town in this State is in a certain county.

An exception to a denial to give a requested instruction which permits the jury to believe that there must be separate and independent proof by the State by way of evidence of non-innocent intent upon the part of the respondent and which does not apprize the jury that the proof of such intent may be inferred by it from the act itself is not sustainable.

The general rule in a case of assault and battery is that, if it be proved that the accused committed the unlawful act laid against him, it will be presumed from his violent conduct, and the attending circumstances, and the outward demonstration, that the act was done with a criminal intention; and it will be left for the accused to rebut this presumption.

The fact that the presiding Justice reads the requested instruction to the jury and then denies it creates no prejudicial error.

Refusal of the trial court to repeat in language of respondent's counsel an instruction already substantially given by the Court will not ground a sustainable exception.

ON EXCEPTIONS AND APPEAL.

The respondent was convicted by jury verdict for assault upon one Dorothy Cloutier. Mrs. Cloutier testified that the respondent forced her over a fence lining the sidewalk into the snow on the other side. No other person saw the attack but a witness for the State testified that he heard a scream and saw the respondent and the complaining witness coming up the embankment; that the complaining witness was nervous and crying and that her clothes were "busted"; that she told him of the assault by the respondent. Respondent made a complete denial of the assault, which denial was en-

tirely uncorroborated. The jury returned a verdict of conviction. Respondent filed exceptions and also appealed. Exceptions over-ruled. Appeal dismissed. Judgment for the State. The case fully appears in the opinion.

Ralph O. Dale, County Attorney,

John P. Carey, for the State.

Clarence Scott,

Hayden Covington, Brooklyn, N. Y., for the respondent.

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

HUDSON, J. On exceptions and appeal from a conviction for assault on an indictment based on Sec. 27 of Chap. 129, R.S. 1930, as amended by Sec. 6 of Chap. 92, P. L. 1933. The statute as amended reads as follows:

> "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another however small, in a wanton, wilful, angry, or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault; and if such attempt is carried into effect, he is guilty of an assault and battery, and *any person convicted of either offense when it is not of a high and aggravated nature, shall be punished by a fine of not more than* $100 *or by imprisonment for not more than* 6 *months or by both such fine and imprisonment; and when the offense is of a high and aggravated nature, the person convicted of either offense* shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 5 years, when no other punishment is prescribed."

The words above in italics constitute the amendment of 1933.

The Justice below denied the respondent's motion for a directed verdict and the denial constitutes one alleged error in the bill of exceptions. That, however, will be considered in discussion of the appeal, for "denial of respondent's motion for a directed verdict and the appeal from the denial of the trial Judge to set the verdict aside . . . present like questions and 'accomplish precisely the same result.' " *State* v. *Smith,* 140 Me., 255, 283; 37 A. (2d), 246, 258. Also see *State* v. *Bobb,* 138 Me., 242, 245, 246; 25 A. (2d), 229, 231.

THE APPEAL.

The only question raised before this Court on the appeal "is whether in view of all the testimony the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty." *State* v. *Smith,* supra, on page 286 of 140 Me., and 259 of 37 A. (2d), and cases therein cited.

In *State* v. *Lambert* (a homicide case), 97 Me., 51 (53 A. 879), our Court in speaking of the functions of the jury stated on page 52:

> "We may say at the outset that in considering the weight of this testimony, depending as it does for its effect upon the credibility of the witnesses, we cannot put ourselves in the place of the jury, nor usurp that province of deciding questions of fact which the law imposed upon them. Their conclusions, if warranted by the evidence, are to stand. We have before us only the pages of a printed record, aided somewhat by an inspection of the exhibits which were introduced in evidence at the trial. The jury had before them the living, speaking witnesses. The degree of credence properly to be given to the story of a witness may de-

pend much upon his appearance upon the stand, upon his air of candor and truthfulness, upon his seeming intelligence and honesty, upon his apparent want of bias or interest or prejudice. The want of such characteristics may render testimony of little value. And the appearance of such characteristics, or the want of them, is not always transcribed upon the record of a case. If the story of a witness is seemingly credible and probable, and not inconsistent with other admitted or proven facts, the listener has much better opportunity to judge correctly of its truthfulness than a reader has. From the bare record we might be in grave doubt as to which of two conflicting statements is true. The jury, seeing the witnesses, might have no reasonable doubt. And it follows that in cases like the one under consideration, as in all others, the jury must be the final arbiters of questions of fact, when the evidence in support of their conclusions, considered in connection with all the other evidence, is of such a character, such a quality and such weight, as to warrant them in believing it."

It is contended this offense was committed in the village of Topsham in the town of Topsham. Topsham is northerly of and across the Androscoggin River from the town of Brunswick. A state highway leads over the bridge to Topsham and to points further north in the state. On its westerly side in the village of Topsham there is a sidewalk with a fence on the west consisting of posts driven into the ground, to which are attached two lengthwise wire cables. From a plan introduced it would appear that the upper cable is approximately three feet above the ground. Employment of violence it is asserted was started on the sidewalk in the vicinity of a highway culvert several hundred feet northerly of Pop's Place, a small store near the north end of the bridge.

The land westerly of the fence at the place of claimed attack, unoccupied by any building or buildings, descended steeply some distance down into a ditch, where the violence ceased. Northerly of this place were certain buildings westerly of the highway, in one of which lived Deputy Sheriff Carver. The first of these buildings in the bend of the highway almost wholly obscured vision from uptown. On the easterly side of the highway there were no buildings immediately across, but a short distance northerly on the east side were Bushy's filling station (sometimes called the Topsham filling station), a street entering from the east, a bank, Whittier's filling station, and still further north on both sides of the highway were other buildings comprising a portion of the village of Topsham. There was no sidewalk on the easterly side of this highway in the vicinity of the place of alleged assault.

The respondent, 28 years old, married and living in Bowdoinham, was an ordained minister of the Gospel, a member of Jehovah's Witnesses. In the forenoon he left home to go to Brunswick to attend to some business at the O. P. A. office and he was on his way home at the time of the occurrence.

Mrs. Cloutier, the complaining witness, who lived in Topsham, was a married woman then five months along with child. Her husband worked at the Bath Iron Works, and in the latter part of the afternoon she started afoot to meet him on his return home. The offense is claimed to have been committed at approximately 4:30 o'clock in the afternoon of January 22, 1944. The evidence shows that then there was a considerable accumulation of snow and that along this fence there was quite an embankment of it, probably occasioned by plowing of the sidewalk.

The State's version of what took place follows: Mrs. Cloutier was walking southerly on this sidewalk on her way to Brunswick, and when in the vicinity of the culvert saw this man coming northerly on the sidewalk about to meet her. They were strangers. She testified:

"And as I was walking along on the sidewalk I met this man, and as I met him supposedly to pass him he put one hand in between my legs and on my private parts. . . . And he put one arm around me. . . . And he pushed his head like that (illustrating) and threw me back into the snow. . . . When I got over in the bank he had one hand over my mouth, and one hand still on my private parts."

On cross-examination the following questions and answers appear:

"Q. What did he do? Where did he put you then, when he had his arm around you and his left hand on your private parts?

A. He lifted me up and threw me over the fence.

Q. . . . Do you mean to tell me that he lifted your feet clear up over the fence?

A. Of course, he did.

Q. And you didn't say anything until you got down in the ditch. Is that right?

A. I hollered.

Q. You hollered when he put his arm around you. Is that right?

A. Yes.

Q. And did you scream?

A. I did, yes.

Q. Loud? Did you say anything to him?

A. I told him to leave me alone.

Q. What were you doing with your hands?

A. I tried to push him away.

Q. Did you push him back?

A. I tried to push him back.

Q. Did you push his arms away from your private parts?

A. I tried to. . . . I tried to get away from him.

Q. . . . Your first opportunity to talk to this defendant was when—first opportunity to say anything to him was when?

A. At first I said 'Leave me alone'.

Q. And when was that, before you were thrown over the fence?

A. Yes.

Q. And after the defendant threw you over the fence did he continue to have his arms around you when you fell down in the ditch?

A. He did.

Q. And then you both went over the fence at the same time. Is that right?

A. That's right.

Q. When was it that he had his arm over your mouth?

A. After we landed in the snow.

Q. How did he get his hand off of your face?

A. I managed to push it off after a while.

Q. And what did you say to him then?

A. I said 'I wish you would leave me alone; I am going to have a baby'.

Q. And what did he say then?

A. He says 'Oh, all right', and he helped me up."

She also testified that after the assault he helped her back to the sidewalk. Her leg was injured as it went down through the crusted snow and her neck was bruised. It did not appear that anyone saw the claimed attack, but immediately after Mrs. Cloutier had gotten back to the sidewalk, she saw Mr. Keough, a State witness, approaching on it from the bridge. She told him what had happened, pointed to the respondent then proceeding up the sidewalk a short distance away, and inquired if he knew who the man was. He said,

"No, but I will find out." He then followed the respondent to a point in front of the post office where a Navy bus stopped, from which Mr. White, a guard at the Bath Iron Works, got off. Keough requested his aid. For a while both followed the respondent and then White went to Deputy Sheriff Carver's house. Soon Carver, who had commandeered a private automobile with driver, came and the four men finally found the respondent and started back with him to Bushy's filling station where Mrs. Cloutier was waiting.

As soon as she had told Keough about the assault, she had gone across to this station. There she saw a Mr. Siegers who she said had just come out of the door. She asked him if he knew who the man was then still walking up the street. He did not. Apparently Siegers was not outdoors or in any position to see any part of the assault. He told her he would get in touch with the State Police and would follow the respondent. He asked her to go into the office and wait, which she did. Mr. Siegers testified that she was nervous and excited and was crying part of the time.

Mr. Keough testified that as he was coming along the sidewalk and when he was about 75 yards beyond the north end of the bridge, he heard a scream. He saw nothing then but as he proceeded along he noticed Mrs. Cloutier and the respondent coming up the embankment to the fence. He said, ". . . she was in a very nervous condition, and her clothes were busted and she had snow on her coat, and she was crying." When asked if the respondent was the man who came up over the bank with Mrs. Cloutier, he answered, "Absolutely."

She then told him what had happened. He testified what he did to overtake the respondent and find out who he was, how he had requested White to aid him, and how later he and Mr. White got into Carver's automobile and with the respondent therein drove back to the filling station where Mrs. Cloutier was waiting. When the car got to the filling

station with its occupants (Mendes the driver, Carver the deputy sheriff, White the government guard, Mr. Keough, and the respondent), Mr. Carver got out of the car, went into the station, got Mrs. Cloutier, and brought her out to the car where he asked her, "Is the man in this car that assaulted you?" Her answer was, "Yes, he is," and then asked Mr. Carver, "Which one is it?" and she pointed to Mr. McKrackern. Carver continues: "I said to Mr. Keough, 'You say you have been following this man, and is he the man that was at the scene when you arrived, as you have told me?,' and he says 'Absolutely'. I said 'Mr. White, you have come into the picture, as Mr. Keough has told me, and is this man that she has just pointed out to me the man that you saw coming up the street that Mr. Keough showed you?, and he said 'Absolutely, it is.' " The identification was testified to by all the occupants of the car except Mr. Mendes, who was not a witness. Then Mr. Carver took the respondent to the Brunswick police station.

The version of the respondent, on the other hand, uncorroborated on all vital points, was a complete denial of the assault. While he admitted that he was in that vicinity at the time, he denied that he was on that sidewalk or that he saw Mrs. Cloutier there or had even seen her. While he also admitted that he was picked up by Officer Carver and went in the automobile down to the filling station, and that Mr. Carver got out of the car and went into the filling station, he denied positively that any woman came out of the station and identified him as her assailant. He said that he came across the bridge, went into Pop's Place, came out and crossed over to the other side of the street where there was no sidewalk, and walked up on the east side of the highway, but he did say that later when he reached a point in the village where the sidewalk was shovelled clear of snow, he turned off the street and travelled on it.

Thus the jury was presented with two conflicting stories

that were absolutely irreconcilable. It was put to the necessity of deciding which was the true version, that of the State based on Mrs. Cloutier's testimony and in part by that of corroborating State witnesses, or that of the respondent uncorroborated. It found as true the contentions of the State. It would seem that the jury were virtually compelled to find that the respondent testified falsely when he denied the testimony of Mr. Keough as to coming up from the ditch to the sidewalk with Mrs. Cloutier, and also when he denied that Deputy Sheriff Carver brought Mrs. Cloutier out of the filling station to the automobile where she identified him as the man who had attacked her. These denials no doubt tainted all essential testimony of the respondent. They must have destroyed the jury's confidence in his veracity. There was nothing whatsoever in the record on which to found any claim upon the part of the defense that either Mrs. Cloutier or any other witness for the State had any motive or desire to frame him. None of the witnesses for the State had previously known the respondent. Neither had its principal witness, Mr. Keough, known her.

Two questions in particular presented themselves to the jury: (1) Was there any assault? and (2) If so, who was the assailant? Our study of the record convinces us that there was ample proof as to the assault and the assailant. We think that the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty of the assault.

Counsel for the respondent argues with insistence that Mrs. Cloutier's testimony is so improbable and unbelievable that it constitutes a miscarriage of justice to permit a judgment to stand upon the verdict. He asserts this claim of improbability principally because of the place where and the time when it is said the offense was committed. But inferences as to probabilities, while they should receive careful consideration by the jury, should not overcome convincing, direct proof of facts evidencing guilt. What one would expect

to have taken place under certain circumstances should not outweigh proof of what actually took place. There is no rule or ascertainable means by which it may be determined that even an atrocious crime will not be committed at some particular place or at some particular time. Apparently something in the criminal's mind governs his action. Just what, we do not know, but it is common knowledge that atrocious and brutal crimes and particularly those of sex have been and will continue to be committed in places where and at times when it might be considered improbable. In this case it must be that something, probably an intense sex passion, prompted this man to do what he did.

It is also argued in defense that if this assault had taken place Mrs. Cloutier, on account of her pregnancy, would have immediately gone to her attending physician for physical examination. It was not claimed that her pregnancy was affected and probably she did not consult her doctor because she was not conscious of any ill effect upon it. As a matter of fact, however, a short time afterwards she did consult him as she had been doing occasionally. It is not claimed that the assault could not have been committed without affecting her then condition. The jury might well have considered that the depth of snow protected her from harm that otherwise might have resulted. She did give birth to a child some four months later. We do not consider that the fact that she suffered no ill effect to her pregnancy was sufficient to raise a probability that no assault took place, in view of other testimony in the case strongly evidencing the assault.

Also, it is argued in defense that the assault could not have been committed because they both had on winter clothing. While she testified that he had his left hand on her private parts, the evidence is not clear whether outside or inside her clothing, but either would have been possible in spite of winter clothing.

The contention of the defense that Mrs. Cloutier "may

have been under a serious mental delusion at the time of the alleged assault and at the time of respondent's arrest and subsequent trial" does not impress us. It is simply an assertion of words without any foundation in fact in the record on which even an inference could be based.

It is strongly argued that it was absolutely impossible for this respondent weighing 192 pounds to have put this woman, weighing approximately 150 pounds, over this fence. That, of course, was a fact for the jury's determination. A reading of the testimony does not convince us that the jury could not have found as proven beyond a reasonable doubt that he did in some way get her over the fence. Otherwise, Keough's testimony was false that he saw them coming back up the embankment. We think the jury could well have found that he grabbed her as she said, pressed her back against the snowbank and the upper strand of the cable, and forced her over the fence, he all the time retaining his hold, and that then they rolled or slid together down the steep embankment to the ditch. Such a finding would obviate the necessity as contended by the defense of the jury's "believing that the respondent, holding the woman as she claims he did, jumped three feet and scaled the fence." But however they got over, the jury was warranted in believing that they did, because Keough saw them returning to it.

To have justified the jury to have reached a verdict of not guilty, it would have had to disregard in large measure the testimony of the State's disinterested witnesses as well as that of Mrs. Cloutier, and have accepted as true the uncorroborated testimony of the respondent, most interested in the outcome of the case.

In his argument on the appeal, counsel claimed that "The undisputed evidence shows as a matter of law that no aggravated assault and battery was committed by the respondent upon Dorothy Cloutier because no serious bodily injury was shown and only a common or simple assault and bat-

tery was established; and, moreover, no intention to commit an assault and battery was established by evidence." The matter as to intent will be dealt with later in connection with one of the exceptions relating to refusal to give a requested instruction. We deal now with the contention that there was no proof of an *aggravated* assault as found by the jury. To secure conviction under this statute this was not necessary.

In the defendant's brief are many citations from other jurisdictions as to what may constitute an *aggravated* assault. But the statute on which this indictment was drawn does not create an offense of *aggravated* assault. It is still assault, although of an aggravated nature. Our Court since the amendment of 1933 said in *Rell* v. *State of Maine*, 136 Me., 322, on page 327, 9 A. (2d), 129 at page 131:

> "As we construe the new law, we are not of opinion that the legislature intended to divide assault and battery into separate and distinct crimes. It is still assault and battery which is punishable, *and facts which establish that the offense is or is not of a high and aggravated nature go only to the measure of punishment and need not be alleged.* The rules laid down for charging the offense under the general statute are neither abrogated nor changed by its amendment. The authorities already cited are controlling precedents for holding that assault and battery, regardless of its enormity, may be charged in general terms without specifying the means by which it was accomplished, and appropriate punishment imposed." (Italics ours.)

Thus, as before the amendment the statute provided for the offenses of assault and assault and battery, so it did after the amendment. No new offense of what might be called an *aggravated* assault or assault and battery was added. The matter of the aggravation has to do only with the sentence

and is a matter for the Court, whose duty it is to sentence. The matter of aggravation need not be alleged in the indictment and if it is, it may be considered as surplusage. The jury has no duty to declare aggravation in its verdict, and if it does, it adds nothing. The conviction would still be of assault or assault and battery. Therefore, it is not for us in this proceeding to determine whether that which was done constituted aggravation or not. That was a matter for the trial Judge and if in his opinion aggravation did attend the commission of the assault, then under the statute he had a right to give the more severe sentence as he did.

THE EXCEPTIONS.

In the first exception charged as error was the refusal of the trial Judge to order a segregation of witnesses so that "all of the witnesses for both the State and the respondent be sworn and excluded from the courtroom out of the presence and hearing of the court and jury except the one witness testifying."

In *State of Maine* v. *Cox,* 138 Me., 151, 23 A., 2d, 634, we stated on page 178:

> "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."

As said in the *Cox* case, supra, so we say here, this exception cannot be sustained, for the record shows no abuse of discretion in refusing to order the witnesses segregated.

The second exception relates to the refusal to direct a verdict for the respondent, which has already been dealt with in connection with the appeal, and secondly, that "there is no proof that the offense alleged was committed in the County of Sagadahoc." But there was ample testimony to show that this offense was committed in the town of Topsham, and judicial notice must be taken that the town of Topsham is in the County of Sagadahoc. *Harvey et al., Petitioners,* v. *The Towns of Wayne, Readfield, and Winthrop, Appellants,* 72 Me., 430, 432; *Coffin* v. *Freeman,* 84 Me., 535, 540, 21 A. 986.

The third exception was taken to the refusal to give the following requested instruction:

> "An assault and battery is committed by carrying into effect an unlawful attempt to strike, hit, touch or do any violence to another, however small, in a wanton, wilful, angry or insulting manner, having an intention and ability to do violence to such other person. That offense cannot be committed by the respondent if, at the time of doing the alleged act as charged in the complaint, his mind was innocent of any evil, wanton, wilful, angry or insulting intent to the complaining witness. It is necessary for the State to prove that the respondent at the time did have such guilty and evil intent coexistent with his overt act, and if you find that he did not have such evil intent, or if you have a reasonable doubt thereof, you will acquit the respondent and by your verdict say not guilty."

As to refusal to give this instruction, counsel for the defense insists that "It was prejudicial error for the trial court to infer to the jury that intent to do bodily injury was not an element of the offense in reading the requested instruction

to the jury and then stating that it was refused and to refuse said request that properly presented said issue to the jury." Counsel also said:

> "Here the court permitted the jury to *infer* intent. Nowhere in the court's charge did he instruct the jury that it was necessary for the State to *prove* that the respondent actually intended to commit an aggravated assault and battery upon the person of the complainant."

It will be noted that the exception was taken, however, not to the failure properly to instruct the jury on the issue of intent, but simply to the refusal to give the particular requested instruction. As a matter of fact, the Court in its charge did inform the jury of the provisions of the statute on which this indictment was based, including as an essential element of the crime "*an intention* and an existing ability to do some violence to such person." (Italics ours.) If that said in the charge as to intention were deemed insufficient by respondent's counsel by reason of omission of something more that should have been said, then it was his duty before the jury retired to call the attention of the Court to that fact. *State* v. *Smith,* 140 Me., supra; on page 284, 37 A., 2d, 246. Instead, however, of requesting instruction as to some omission or for further amplification as to that said by the Judge, respondent's counsel presented the particular request above-stated and the question is whether *that* instruction should have been given.

While at first blush the law as stated in the request seems to be accurate and no harm might have resulted from the giving of it, yet upon reflection and careful consideration we think the Court was warranted in denying it. Had it been given, it might have afforded an opportunity for a verdict of not guilty on a mistaken understanding of the law by the

jury obtained from the instruction itself. The jury might have understood that it was necessary that there be separate and independent proof by way of evidence of non-innocent intent upon the part of the respondent. The law, however, is well settled in this State that proof of the intent under this statute may *be inferred* by the jury from the act itself. In the request no statement was made that the intention might be inferred from facts proven. In *State* v. *Sanborn,* 120 Me., 170 (113 A., 54) our Court said on page 173, then speaking of the crime of assault and battery:

> "It is obvious that the crime would not be committed if, at the time of doing the act, the mind of the doer were innocent. Therefore, it was incumbent on the State to prove respondent's guilty intent coexistent with his overt act. *State* v. *Carver,* 89 Me., 74. *A guilty intention may be inferred as a fact by the triers of fact from the act itself.* And as it may be thus inferred, so the circumstances which attended the doing of the act may show its absence. *The general rule in a case of assault and battery is that, if it be proved that the accused committed the unlawful act laid against him, it will be presumed from his violent conduct, and the attending circumstances, and the outward demonstration, that the act was done with a criminal intention; and it will be left for the accused to rebut this presumption.*" (Italics ours.)

To have given the instruction as requested would have only partially stated the law as to the necessity of proof of intention and would have been extremely prejudicial to the State. The respondent takes nothing under this exception.

Counsel for the defense not only complains because of the refusal of the instruction here considered, but to the reading of it to the jury. In this we see no prejudicial error. Be-

sides, it accords with custom and practice which have obtained in this jurisdiction for many years.

One other requested instruction was refused, to which refusal exception was taken. It reads as follows:

> "The respondent has alleged and testified that he did not assault the complaining witness on the day in question, or at any other time, and that he did not commit the offense as alleged in the complaint. You are instructed that the burden is not upon the respondent to prove that he did not by a preponderance of the evidence, or to a moral satisfaction, but if upon all the evidence introduced before you, you have a reasonable doubt that he did not assault the complaining witness on the day in question, and did not commit the assault, as alleged, or that he was not the man alleged to have committed the assault, you will acquit the respondent and by your verdict say not guilty."

This request was properly refused for the reason that the Court in its charge had already given the substance of the requested instruction. It was not necessary to restate it in the language of respondent's counsel. *State* v. *Cox,* supra, on page 169. The Court gave a full explanation as to the meaning of the term "reasonable doubt" and made it perfectly clear to the jury that before conviction of *this* respondent could be had it must find *him* guilty beyond a reasonable doubt. Then in the latter part of the charge were these words:

> "Now if you are convinced beyond a reasonable doubt, as I have defined it to you, that *this respondent* is guilty as charged, you may bring in a verdict of 'Guilty.' If there is a reasonable doubt in your minds as to *his guilt,* you will bring in a verdict of 'Not

guilty.' This is to be determined on the evidence which has been presented before you, and upon which you must decide that question." (Italics ours.)

Exceptions overruled.
Appeal dismissed.
Judgment for the State.

A. J. SANBORN

AND

F. S. SANBORN

vs.

WALTER D. MATTHEWS.

Androscoggin. Opinion, March 27, 1945.

Chattel Mortgages. Trover and Conversion. Joint Action.

The purchase of mortgaged chattel property from the mortgagor (if all the property covered by a particular mortgage is acquired) does not of itself constitute a conversion on the part of the vendee but any subsequent action on his part does if it is in denial of or inconsistent with the rights of the true owner.

The test of liability of an alleged converter to a particular plaintiff is whether that plaintiff had the right to possession at the time of the alleged conversion.

The measure of the liability of a converter of chattel property is the value thereof at the time of his conversion.

The right to possession at the time of the commencement of an action of trover is requisite to its successful maintenance.

The owner of property may maintain trover against a converter whether or not the latter continues in possession of the converted property or against anyone having possession of it after a conversion if it is not surrendered on demand.

A joint action in trover does not lie in favor of two persons when only one of them had the legal right of possession at the time of the alleged conversion.

A misjoinder of plaintiffs is not waived by a defendant's failure to raise the issue.

On exceptions.

The plaintiffs were the named mortagees and the owners of a chattel mortgage at the time when the mortgage was foreclosed, but in the interval between execution and foreclosure one of them had aliened his interest, prior to the time of the alleged conversion, had not reacquired it at that time and did not do so until after the defendant had parted with possession of the chattel. Defendant purchased the chattel of the mortgagor, who had the right of possession under the mortgage until default, and resold it to someone not identified in the record in the interval during which one of the plaintiffs, F. S. Sanborn, had no basis for a claim of title to it, though he afterwards reacquired title to it. No demand had been made upon the defendant while the chattel was in his possession. The plaintiffs brought an action of trover against the defendant for conversion of the chattel. In the lower court a verdict was directed for the defendant. Plaintiffs filed exceptions. Exceptions overruled. The case fully appears in the opinion.

John G. Marshall, for the plaintiffs.

Frank W. Linnell, for the defendant.

Sitting: Sturgis, C. J., Thaxter, Hudson, Manser, Murchie, Chapman, JJ.

MURCHIE, J. This case is brought forward on plaintiffs' exceptions to the directing of a verdict for the defendant. It poses the single question whether the holders of a chattel mortgage, after foreclosure, may maintain trover for the conversion of a part of the mortgaged property against one who, having exercised dominion over it at a time when one of them had no interest in the title, had parted with possession prior to the time when the plaintiffs became possessed jointly of that title and right of possession on which they rely. The mortgage, which was properly recorded, ran to the plaintiffs as co-mortgagees and was given to secure notes which they owned severally but the plaintiff Frank S. Sanborn had aliened his interest in it prior to the time when the property in question came into the possession of the defendant and did not reacquire it until after that possession had been terminated.

The mortgage was executed in 1933 and provided that the mortgagor might continue in possession of the mortgaged property until breach of the conditions. The plaintiffs took a second mortgage in 1935, carrying similar recital. The plaintiff Frank S. Sanborn assigned his interest in 1937 and reacquired it in 1943, after which the plaintiffs joined in foreclosure. Between the dates of assignment and reassignment the defendant purchased one of the mortgaged chattels of the mortgagor and resold it to someone who is not identified in the record.

The purchase of mortgaged chattel property from the mortgagor (if all the property covered by a particular mortgage is acquired) does not of itself constitute a conversion on the part of the vendee, *Dean* v. *Cushman*, 95 Me., 454, 50 A., 85, 55 L. R. A., 959, 85 A. S. R., 425, but it is established law that any subsequent action on his part does if it is in denial or exclusion of, or inconsistent with, the rights of the true owner, 26 R. C. L., 1098, Par. 3; 65 C. J., 29, Par. 37; *Fuller* v. *Tabor*, 39 Me., 519; *Moulton* v. *Witherell*, 52 Me., 237;

McPheters et al. v. *Page,* 83 Me., 234, 22 A., 101, and the sale itself, if not made subject to the mortgage, is a conversion by the mortgagor. The purchaser becomes a converter if he exercises dominion over the purchased chattel in a manner inimical to the rights of the mortgagee, *Dean* v. *Cushman,* supra; 14 C. J. S., Sec. 264, 11 C. J., 631, Par. (342) 5 a (on which point note 64 cites *Dean* v. *Cushman,* supra). In the instant case the defendant not only purchased a part of the property originally mortgaged to the parties who are now prosecuting this action in trover but he resold it to a person unnamed without reference to the rights of the holders of the mortgage. The defendant must be held to have converted the property at the time he sold it if not at the time he purchased it, a question not requiring decision here, and the only issue presented in the present case is that of his liability for that conversion to these plaintiffs jointly.

The law is clear that the liability of a converter is measured by the value of the property at the time and place of conversion, 26 R. C. L., 1148, Par. 63; 65 C. J., 131, Par. 247; *Moody* v. *Whitney et al.,* 38 Me., 174, 61 Am. Dec., 239; *Wing* v. *Milliken,* 91 Me., 387, 40 A., 138; *Glaspy* v. *Cabot,* 135 Mass., 435; although interest may run from that date, R. C. L., and C. J., both supra; *Hayden* v. *Bartlett,* 35 Me., 203; *Brown* v. *Haynes,* 52 Me., 578; *Wing* v. *Milliken,* supra. This relates to the value at the time when the property came into the possession of the defendant against whom recovery is sought, *Moody* v. *Whitney et al.,* supra; *Powers* v. *Tilley,* 87 Me., 34, 32 A., 714; *Wing* v. *Milliken,* supra.

The issue has not arisen heretofore in this Court for formal adjudication as to whether the time element controls the question of liability as well as its measure. The owner of a chattel having the right to possession may maintain trover against a converter, whether or not such converter still retains the possession of it, or against anyone who has the prop-

erty in possession and refuses to surrender it on demand, *Moody* v. *Whitney et al.*, *Moulton* v. *Witherell*, both supra; or proceed without demand against one having possession where the taking was tortious, *Seaver* v. *Dingley*, 4 Me., 306; *Galvin* v. *Bacon*, 11 Me., 28, 25 Am. Dec., 258; *Whipple* v. *Gilpatrick*, 19 Me., 427, *Robinson et al.* v. *Bird*, 158 Mass., 357, 33 N. E., 391, 35 A. S. R., 495. There can be no doubt that the right to possession at the time of the commencement of an action of trover is requisite to its successful maintenance, *Jones* v. *Cobb*, 84 Me., 153, 24 A., 798; *Gilpatrick* v. *Chamberlain*, 121 Me., 561, 118 A., 481; *Weed* v. *Boston & Maine Railroad*, 124 Me., 336, 128 A., 696, 42 A. L. R., 487.

In each of the last three cited cases this Court has declared that a plaintiff in order to maintain an action in trover must establish that he had the right to possession of the chattel for which he seeks recovery at the time it was converted by the defendant in the process. This is recognized as a principle of general application in 26 R. C. L., 1131-2, Par. 41, and is supported in note 3 thereto by a considerable line of authorities. In Massachusetts the principle was stated and applied in *Bacon* v. *George*, 206 Mass., 566, 92 N. E., 721, in the language following:

> "It is elementary that at common law the plaintiff" (in an action of trover) "in order to support this action, must at the time of the conversion have had a complete property either general or special in the chattel and also the actual possession, or the right to the immediate possession of it,"

and later:

> "the plaintiff must show that at the date of the writ he had the right to immediate possession."

The plaintiffs in this action can satisfy the latter test but not the former. At the date of the writ the 1933 mortgage had been foreclosed by them but there was no time when the chattel which is the subject matter of the process was in the possession of this defendant that the plaintiff Frank S. Sanborn had either an interest in the title or any right to the possession of it. This fact alone supports the action of the Court below because the plaintiffs, regardless of the interest of Albert S. Sanborn in the title throughout the term of the mortgage, could not recover in a joint action and a misjoinder of plaintiffs is not waived by a defendant's failure to raise the issue. *United Feldspar & Minerals Corp. et al.* v. *Bumpus et al.*, 140 Me., 7, 38 A., (2d), 164.

Exception overruled.

NEWTON EDWARDS, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE

IN RE

ESTATE OF HORACE WILLIAMS.

Kennebec. Opinion, March 28, 1945.

Jurisdiction of Supreme Judicial Court.

The Supreme Judicial Court sitting as a Law Court can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure.

Jurisdiction over a cause not legally before the Law Court does not exist and cannot be conferred by consent of the parties.

The Law Court in this State does not have supervisory jurisdiction over inferior courts under Section 7, Chapter 91, R. S., 1944.

The Law Court is a court of review and not of original jurisdiction. It cannot extend its statutory powers.

An appeal from the Supreme Court of Probate not being authorized by statute does not bring forward for review any phase of the case in which it is entered.

When it is patent that jurisdiction is lacking decision is a nullity and proceedings must stop.

ON APPEAL.

Appeal by one of the beneficiaries under the will of Horace Williams from a decree of the Judge of Probate allowing the sixth account of the trustee under said will. Appeal was taken to the Superior Court of Kennebec County sitting as Supreme Court of Probate. A rule of reference was issued. The question being raised as to the power of the Supreme Court

of Probate to refer such an issue, the trustee and all the beneficiaries entered into an agreement to refer the matter to referees and abide by their decision. The referees filed an opinion and the Superior Court Justice, sitting as Supreme Court of Probate, after hearing, filed a final decree which disallowed certain items in the sixth account of the trustee and remanded the case to the Probate Court for further proceedings. No objection was made or exception taken by the trustee or his counsel. Later counsel for the trustee withdrew and new counsel filed an appeal to the next Law Court. Motion to dismiss filed. Case dismissed.

Sewall, Varney & Hartnett, for the appellant, Newton Edwards.

Ernest L. Goodspeed, for the trustee.

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

STURGIS, C. J. Appeal from decree of Judge of Supreme Court of Probate disallowing items in the account of a trustee and remanding the case to the Probate Court of origin for further proceedings. Motion to dismiss filed.

The Supreme Judicial Court sitting as a Law Court can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. *Simpson* v. *Simpson,* 119 Me., 14, 15, 109 A., 254. And jurisdiction over a cause not legally before it does not exist and cannot be conferred by consent of the parties. *Hatch* v. *Allen,* 27 Me., 85; *Davis, ex parte,* 41 Me., 38; *Milliken* v. *Morey,* 85 Me., 340, 341, 27 A., 188. An appeal from the Supreme Court of Probate is within these rules. It is not authorized by statute and does not bring forward for review any phase of the case in which it is entered. *Cotting* v. *Tilton,* 118 Me., 91, 106 A., 113; *Tuck* v. *Bean,* 130 Me., 277,

155 A., 277; *Bronson, Appellant,* 136 Me., 401, 11 A., 2d, 613.

Nor has the law Court in this State supervisory jurisdiction over inferior courts under Section 7, Chapter 91, R. S. 1944. That is vested in the Supreme Judicial Court sitting at Nisi Prius. The Law Court is a court of review and not of original jurisdiction. It cannot extend its statutory powers. *Mather* v. *Cunningham,* 106 Me., 115, 75 A., 323. If this were not so the incongruity of invoking original jurisdiction by appeal is apparent.

When it is patent that jurisdiction is lacking decision is a nullity and proceedings must stop. *Kelley, Appellant,* 136 Me., 7, 1 A., 2d, 183. It is here so ordered.

Case dismissed.

CASCO CASTLE COMPANY,
PETITIONER FOR APPROVAL OF DISCONTINUANCE OF SERVICE.

Cumberland. March 30, 1945.

Public Utilities. Powers of Public Utilities Commission. Constitutional Law.

The statutory method provided in R. S., 1930, Chap. 62, Sec. 63, as amended (now R. S., 1944, Chap. 40, Sec. 66) is the exclusive remedy for raising questions of law relative to decrees of the Public Utilities Commission.

P. L., 1933, Chap. 155 (now R. S., 1944, Chap. 40, Sec. 47) establishes no basis for justifying the discontinuance of service by a public utility as a matter of right but vests authority in the Commission to approve, or decline to approve, such action.

One who invokes a statute may not contend that it offends against the Constitution of the United States when dissatisfied with the result of its appeal for relief thereunder.

Abandonment of public service by a public utility is not dependent on its own will.

A law purporting to vest power in a regulatory body to enforce operation of a public service at a loss would infringe the Constitution of the United States.

Factual findings of the Public Utilities Commission are final if supported by substantial evidence.

A litigant before the Commission who desires to raise issues of fact should request the Commission to set forth in its decree the facts upon which it is based.

In the absence of findings of fact by the Commission, or request therefor by a party seeking to raise a factual issue, no issue of law is raised within the contemplation of the statute resorted to in this process.

EXCEPTIONS.

Petition filed with the Public Utilities Commission to secure approval for discontinuance of service by the Casco Castle Company to the public on the ground that the cost of improvements previously ordered by the Commission would be such that after their installment the net revenue to be derived by the company would be inadequate to yield a fair return on the reasonable value of the property used, or required to be used, in connection with such public service, if the value of said property were appraised with due regard to the amount of capital invested in the plant and such improvements. No evidence was offered as to the value of the plant or the cost of the required improvements or the cost of rendering service. The claim was made that the company had the right to abandon service at will upon notice to consumers. The Commission denied the petition. The petitioner filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Charles E. Gurney, for the petitioner.

Paul L. Powers, for unnamed consumers.

Hutchinson, Pierce, Connell, Atwood & Scribner, for unnamed opponents.

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

MURCHIE, J. The bill of exceptions which brings the proceedings here under consideration to this Court was allowed by the chairman of the Public Utilities Commission on August 26, 1944, pursuant to the provisions of R. S. 1930, Chap. 62, Sec. 63, as amended, now found in R. S. 1944, Chap. 40, Sec. 66.

The petition which instituted the process is dated May 24, 1944, and was filed with the Commission in accordance with Chapter 155 of the Public Laws of 1933 (R. S. 1944, Chap. 40, Sec. 47) to secure approval for discontinuance of the service then being rendered to the public by the petitioner. It was denied by decree dated June 28, 1944, declaring that the petitioner had failed to sustain the burden of proving facts that would warrant the approval sought.

The statute establishes no ground which will justify discontinuance of public service by a public utility as a matter of right but vests authority in the Commission to approve such action and in connection therewith to "impose such terms, conditions, or requirements as in its judgment are necessary to protect the public interest." The procedure is compulsory for all public utilities, as defined in Chapter 40 aforesaid, except those subject in that regard to the jurisdiction of the Interstate Commerce Commission or acting by order of court in bankruptcy, foreclosure or receivership proceedings.

The ground alleged by the petitioner relates to a decree entered by the Commission on May 17, 1944, which, according to the petition, ordered it to repair and replace its "source of supply, pumps, tanks, pipes and other facilities". Specifically the alleged justification for discontinuing service is that the cost of the improvements ordered would exceed any reasonable return thereon, whereby it was clearly intended to assert that the net revenues to be derived from public service, after the improvements required by the order were installed, would be inadequate to yield a fair return on the reasonable value of the property used or required to be used in connection therewith, if valued with due regard to the capital invested in the plant and improvements.

The petitioner made no attempt to raise a question of law under the statute to which it has resorted in this process

concerning the decree of May 17, 1944, but voted on May 23, 1944, first, to cease rendering service on July 1, 1944, and second, to seek authority to do so by filing the present petition. Its first two exceptions to the decree entered thereon allege error of law in rulings that a public utility "upon due notice to its customers, . . . may not lawfully withdraw its property from public use and discontinue its public service" and "may not discontinue its public service without the consent of the Commission" because such action is required by the terms of P. L. 1933, Chap. 155 (now R. S. 1944, Chap. 40, Sec. 47). These exceptions contain no allegation, nor does counsel for the petitioner argue, that the Commission in refusing to approve the voted discontinuance of service abused the discretionary authority intended to be vested in it by the legislation. The cause was presented and argued on these exceptions on the theory that the statute purports to impose a regulation on public utilities that is unwarranted unless the statute is administered with recognition of the right of a utility to withdraw its property from any service that, in the opinion of its owners, will not yield a reasonable return on its value. The obvious purpose of the petitioner's decision to discontinue its service, as of the proceedings to which the exceptions relate, is to nullify the decree of May 17, 1944 without establishing that error of law is involved therein. Such a result may be accomplished by any appropriate procedure for a decree issued by the Commission which is outside the scope of the authority vested in it by statute, because such a decree has no validity, *S. D. Warren Co.* v. *Maine Central Railroad Co.*, 126 Me., 23 (25), 135 A., 526 (528), but it has been adjudicated in several cases that decrees issued within that scope are not subject to attack except for error of law and by the statutory procedure which has been invoked against the present decree. *Hamilton et al.* v. *Caribou Water, Light & Power Co.*, 121 Me., 422 (423),

117 A., 582 (583); *S. D. Warren Co.* v. *Maine Central Railroad Co.*, supra; *Stoddard* v. *Public Utilities Commission*, 137 Me., 320, 19 A., 2d, 427.

The principle declared in these cases requires that all of the exceptions here presented be overruled on the ground that they present an attempt to avoid the effect of a decree of the Public Utilities Commission without compliance with the provisions of R. S. 1930, Chap. 62, Sec. 63, as amended by P. L. 1931, Chap. 116 and P. L. 1933, Chap. 6 (now found in R. S. 1944, Chap. 40, Sec. 66), unless P. L. 1933, Chap. 155 (now R. S. 1944, Chap. 40, Sec. 47), provides a statutory method for indirect attack on Commission action, available as an alternative to raising a question of law against a decree affecting a utility entitled to discontinue its public service with the approval of the Commission. Petitioner argued the two exceptions which have been quoted in their pertinent parts on the dual ground that a public utility has an absolute right to discontinue its public service at will and that the statute purporting to vest regulatory authority over such action in the Public Utilities Commission is unconstitutional if it contravenes that right. Reliance for the latter ground is on the Fourteenth Amendment to the Constitution of the United States and the contention must be summarily dismissed on the authority of the Supreme Court of the United States, on which point is seems unnecessary to cite anything more than *United Fuel Gas Co. et al.* v. *Railroad Commission of Kentucky et al.*, 278 U. S., 300, 49 Sup. Ct., 150, 73 L. Ed., 390, where the present Chief Justice declared it to be a rule of the Court, consistently applied:

> "that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was

> taken offend against the Constitution of the United States."

Since the petitioner sought approval for its voted discontinuance of service under the statute, it does not lie within its power, that approval being denied, to attack the constitutionality of the law in subsequent proceedings on its petition.

In support of its contention that the right of discontinuance of public service by a public utility is a matter of absolute right the petitioner cites decisions of the United States Supreme Court which recognize that there are circumstances which will justify the withdrawal of property devoted to public service from such a use. From two cases language is quoted which carries implication that the issue is for determination by the property owner. In *Munn et al.* v. *People of Illinois,* 94 U. S., 113, 24 L. Ed., 77, Mr. Justice Waite speaking for a majority of the Court declared that although one who devoted his property to public service granted the public a right therein and must submit to control for the common good:

> "He may withdraw his grant by discontinuing the use."

This statement was quoted by Chief Justice Taft in a case involving the validity of a statute intended to regulate wages and terms of employment in industry covering a wider field than public service. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of Kansas,* 262 U. S., 522, 43 Sup. Ct., 630, 67 L. Ed., 1103, 27 A. L. R., 1280. Neither case dealt with legislation designed to safeguard the public interest in proceedings having to do with the abandonment of public service.

The additional cases cited by the petitioner treat the right of abandonment of service as one dependent on facts rather than on the will of the owner of the property. In *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S., 396, 40 Sup. Ct., 183, 64 L. Ed., 323, it was held that a railroad might discontinue a service that could "be kept up only at a loss." The opinion cites the *Munn* case, and substantially quotes its language relative to the withdrawal of property from the grant of a public use. Adjudication is plain that a law purporting to vest power in a regulatory body to enforce operation of a public service at a loss would infringe the Constitution of the United States. The opinions in the *Brooks-Scanlon* case, and in the later decision of *Erie Railroad Co.* v. *Board of Public Utility Commissioners et al.,* 254 U. S., 394, 41 Sup. Ct., 169, 65 L. Ed., 322, were written by Mr. Justice Holmes, the former with unanimous concurrence and the latter with the Chief Justice and two of the Associates dissenting without opinion. In the latter, it is true, the principle is declared in language referring to the absence of profit rather than the presence of loss but the citation of the *Brooks-Scanlon* case on the point carries clear indication that no change or enlargement of the principle earlier declared was intended.

Later decisions make this crystal clear. In *Bullock et al.* v. *State of Florida,* 254 U. S., 513, 41 Sup. Ct., 193, 63 L. Ed., 680 (decided two weeks after the decision in the *Erie Railroad* case, supra, the *Brooks-Scanlon* case is interpreted as representing the principle that the owners of a property devoted to a public use "are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future." In *Railroad Commission of Texas et al.* v. *Eastern Texas Railroad Co. et al.,* 264 U. S., 79, 44 Sup. Ct., 247, 68 L. Ed., 569, the same thought is expressed in the words that "if at any time it develops with reasonable certainty

that future operation must be at a loss, the company may discontinue operation." In this opinion the *Brooks-Scanlon* case was again cited and stated in terms which show that the controlling consideration was the impropriety of compelling service "at a loss."

Neither petitioner's allegations nor its proof meets the requirements of these cases. The fact relied on is that operation of an improved plant will not yield a reasonable return but no evidence was presented to establish the amount of capital the improvements would involve. Proof was that in ten years of operation ending on December 31, 1942, net revenues, after depreciation, had ranged between 1.6 per cent and 10.8 per cent, with an average in excess of 4 per cent according to petitioner's own accounting and on its own conception of plant value. That accounting, it is true, showed an apparent operating loss of slightly more than $200 in 1943 but the operating expenses in that year were more than $500 in excess of the average for the preceding nine years and included a single item of repairs, greater than the loss, which had no counterpart in earlier years.

The first two alleged exceptions present no bases for establishing error in the Commission decree. The additional ones cannot be interpreted as raising a question of law although it is apparent that they were intended to assert that facts found by the Commission have no support in the testimony taken out at the hearing. It has already been decided in this Court that in proceedings before the Public Utilities Commission facts are for the consideration and determination of the Commission, that its findings of fact are final if supported by any substantial evidence and that it is a question of law, reviewable under R. S. 1944, Chap. 40, Sec. 66, whether the record of testimony on which a particular finding is based contains such evidence. *Hamilton et al.* v. *Caribou Water, Light & Power Co.*, supra; *Gilman et al.* v. *Somerset*

Farmers Co-Operative Telephone Co. et al., 129 Me., 243, 151 A., 440. The first of these cases outlines procedure for the guidance of parties involved in hearings before the Commission who may desire to raise issues of fact. It was there stated and we now repeat that:

> "it is . . . the duty of the Commission . . . if requested . . . to set forth in its orders . . . the facts on which its order is based."

It was said on that occasion that if this was not done the statutory remedy for errors of law in that regard might be rendered futile. The rule of practice thus declared was affirmed in *Public Utilities Commission* v. *Lewiston Water Commissioners*, 123 Me., 389, 123 A., 177. See also *Mitchell* v. *Mitchell*, 136 Me., 406, 11 A., 2d, 898, where it was recognized as applicable in its proper field although not in the process then before the court. As it was in the *Hamilton* case, so is it in this one. We cannot determine on the record that a finding that "revenues have in the past been adequate," the factual finding complained of in the third alleged exception, was erroneous because the Commission did not find and was not requested to find as facts either operating revenues or operating expenses. The question of adequacy or reasonableness would depend on the money spread between the one and the other and the rate of return it represented on the value of the property. The question of value is an additional fact concerning which no finding was made or requested.

The fourth and final exception challenges language of the Commission declaring that:

> " 'The evidence presented relating to past income and expenses is material to the issue only so far as it tends to show future prospects.' "

This is consistent with the claim asserted under the first and second exceptions and seems to disclose that the petitioner was not seeking approval of its abandonment of service on the basis of facts it had the burden of establishing by proof but rather that it relied solely on the language hereinbefore quoted from *Munn et al.* v. *People of Illinois,* although the filing of its petition recognized the validity of legislation imposing regulation on the right of withdrawal. If the evidence to which the fourth exception relates was not material to show future prospects, then the record contains no testimony, either direct or indirect, to support the allegation of the petition. There is no merit in the exception.

Exceptions overruled.

ARMAND DUQUETTE, PETITIONER,

vs.

GLADYS HOBBS MERRILL.

York. Opinion, April 11, 1945.

Elections. Vacancies in Office. Statutes.

Notice to the electors that a vacancy exists and that an election is to be held to fill it for the unexpired term is essential to give validity to the meeting of an electoral body to discharge that duty, and it is also an essential characteristic and element of a popular election. Public policy requires that it should be given in such form as to reach the body of the electorate.

It appears to be almost universally held that if the great body of the electors are misled by the want of such notice and are, instead, led to believe that no such election is in fact to be held, an attempted choice by a small percentage of the voters is void.

The method of surprise used by a small number of voters in attempting to elect a County Treasurer for an unexpired term when the great body of the electors were in ignorance of the fact that a vacancy existed is ineffectual and against public policy.

ON APPEAL.

Proceeding brought by Armand Duquette claiming to have been elected County Treasurer of York County at the state election held September 11, 1944, against the respondent, who was holding and who claimed to be entitled to hold the office of County Treasurer. Maynard A. Hobbs was duly elected County Treasurer to serve for the term of four years from January 1, 1943. He died on July 24, 1944. The vacancy in the office was filled in accordance with the statute (R. S., 1944, Chapter 79, Section 142) by appointment of the respondent, Gladys Hobbs Merrill, to the office by the Gover-

nor with the advice and consent of the Council. The statute provides that the person so appointed and qualifying, shall hold office "until the 1st day of January following the next biennial election, at which said election a treasurer shall be chosen for the remainder of the term, if any; but in any event he shall hold office until another is chosen and qualified." The next biennial election was held September 11, 1944. Previous to such election no nomination for County Treasurer had been made by any of the methods prescribed by law. (R. S., 1944, Chapter 4, Sections 45, 46, 47, 51). No provision was made on the official ballot for the election of a County Treasurer and the name of the office did not appear on the ballot. In the City of Biddeford, however, 1309 voters either wrote in the title of the office and the petitioner's name thereunder or used a sticker to the same import. Approximately 22,000 ballots were cast in the county at the election but none except the 1309 in Biddeford purported to vote for the petitioner. In the Superior Court the Presiding Justice denied the petition. The petitioner appealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Louis B. Lausier,

William P. Donahue, for the petitioner.

Titcomb & Siddall, for the respondent.

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

MANSER, J. The petitioner claims to have been elected as County Treasurer of York County at the biennial state election held September 11, 1944. The present proceedings were brought under the provisions of R. S., 1944, c. 5, §§85-89 inclusive, against the defendant who is holding, and claims to be entitled to hold, the office of County Treasurer. The

petition was denied by the Presiding Justice of the Superior Court and comes forward on appeal. The facts are not in controversy.

Maynard A. Hobbs was duly elected County Treasurer to serve for the term of four years from January 1, 1945. He died on July 24, 1944. The vacancy in the office was filled in accordance with the statute by an appointment made by the Governor with the advice and consent of the Council. The specific provision of law with reference to a vacancy in the office of County Treasurer is found in R. S., 1944, c. 79, §142, and provides:

> "If a person so chosen declines to accept or a vacancy occurs, the governor, with the advice and consent of the council, may appoint a suitable resident of the county, who, having accepted the trust, given bond, and been sworn, shall be treasurer until the 1st day of January following the next biennial election, at which said election a treasurer shall be chosen for the remainder of the term, if any; but in any event he shall hold office until another is chosen and qualified."

The next or following biennial election was held on September 11, 1944. The state-wide primary election had been held in June, 1944. There was no nomination at that time for the office of County Treasurer because the term of the incumbent did not expire until January 1, 1947. The official ballot for the general election in September was in print at the time of the death of Mr. Hobbs. The only regular method provided for placing the names of candidates for office upon the official ballot to be used at the general election is by means of the primary election held in June, at which time each of the political parties select by ballot their choice of candidates. The law, however, further provides that, in case of vacancy in any office which is to be filled at the next bien-

nial state election, for which no nomination has been made at the primary election, a special primary election shall be ordered by proclamation of the Governor. R. S., 1944, c. 4, §47. If the time is insufficient therefor, said nomination may be supplied in the manner provided in R. S., 1944, c. 4, §§45, 46, 51. No special primary election was ordered by the Governor and it may be assumed that it was not deemed practicable or there was insufficient time therefor.

The alternative provisions just above cited for providing a candidate to fill the vacancy, are by political parties, by convention of delegates, or appropriate caucus, or if the time is insufficient therefor, by regularly elected political committees. No political party, convention or committee nominated any candidate for the office. Consequently, there was no change made in the official ballot and no provision made therein for the selection of a County Treasurer to fill the vacancy for the unexpired term. The name of the office did not appear on the ballot.

The petitioner, however, claims to have been regularly elected County Treasurer by reason of the fact that in the City of Biddeford 1309 voters either wrote in the title of the office and his name thereunder, or used a "sticker" of the same import and voted for him.

Biddeford is the largest city in York County. The County, however, comprises two cities and twenty-six towns. At the election there were approximately 22,000 ballots cast, but none included the name of the petitioner except in Biddeford.

The contention of the petitioner is that the law distinctly provides for an election to fill the vacancy in the office of County Treasurer at the succeeding general election; that the failure of the Governor or of the various political organizations to set in motion proper machinery to provide political candidates, did not nullify the right, duty and responsibility of the voters to cast their ballots for their choice of a

candidate to fill the office. It was further contended that the omission by the Governor and the election authorities to act in accordance with the provisions of the statute, was without effect because of the claim that such provisions were directory and not mandatory.

In this connection, there is to be noted that the legislature apparently provided for contingencies which would bring about a failure to elect a successor to the office of County Treasurer. The provision for filling the vacancy concludes with this clause:

> "but in any event he shall hold office until another is chosen and qualified."

Although it was a general election that was held September 11, 1944, yet, assuming a vacancy in the office of County Treasurer, and the right and duty of the electorate to fill that vacancy at the time of the general election, yet as to such office it was a special election, as there would be no one to be elected except for the vacancy and by the provisions of the statute the election would not be for the regular term of four years but for the unexpired term of two years. That such election is held at the same time and place with the general election, does not change its character.

Although there is not unanimity of judicial opinion as to the requirement of official notice, if the vacancy is to be filled at the time of a general election, yet it appears to be almost universally held that if the great body of the electors are misled by the want of such notice and are instead led to believe that no such election is in fact to be held, an attempted choice by a small percentage of the voters is void. *Wilson* v. *Brown*, 109 Ky., 229, 139 Ky., 397, 58 S. W., 595; *Wooton* v. *Wheeler*, 149 Ky., 62, 147 S. W., 914; *Secord* v. *Foutch*, 44 Mich., 89, 6 N. W., 110; *Bolton* v. *Good*, 41 N. J. L., 296; *Fos-*

ter v. *Scarff*, 15 Ohio St., 532; *State* v. *Hay*, 71 Wash., 699, 128 P., 1058; *State* v. *Holm* (202 Minn. 500), 279 N. W., 218. See also 33 Ann. Cas. 1914 C., 597, 18 Am. Jur., Elections, §107; 29 C. J. S. Elections, §72.

Notice to the electors that a vacancy exists and that an election is to be held to fill it for the unexpired term, is essential to give validity to the meeting of an electoral body to discharge that particular duty, and is also an essential characteristic and element of a popular election. Public policy requires that it should be given in such form as to reach the body of the electorate. Here there had been no nominations to fill the vacancy, either by the holding of a special primary election, or by nomination by county political conventions or party committees. The designation of the office to be filled was not upon the official ballot. As before noted, except for the vacancy, it would have no place there, as the term of office of the incumbent, if living, would not expire until January 1, 1947. The only notice which might be assumed by the voters to have any official import was the report in certain newspapers of limited circulation in York County, that the Attorney General gave as his opinion that "the words 'to fill a vacancy' must of necessity apply to an actual vacancy in an office. In York County there is no vacancy since the governor has filled the office." The petitioner claims that these newspaper notices called the attention of the voters to the fact that a vacancy existed and they must be presumed to know the law and of their duty in the premises, notwithstanding the alleged erroneous opinion of the Attorney General. To say that the voters received notice that they were to fill a vacancy by reason of the fact that the Attorney General said such vacancy did not exist, would appear to be far-fetched.

In *State* v. *McKinney*, 25 Wis., 416, it was shown that a vacancy was not generally known, as votes for the office

were cast in only 5 out of 41 election districts in the county, and it was held that the lack of any notice, either actual or official, invalidated the election. The Court said that when

> "the great body of electors cast their votes in utter ignorance of the fact that a district attorney was to be chosen at that election, to hold that the very inconsiderable number of votes cast constituted a valid election for the office of district attorney, would be going further than any adjudicated case to which we have been referred has yet gone; and further, we think, than the law or public policy will allow."

And again, as said in *Foster* v. *Scarff*, supra:

> "No man has the right to filch an office through the method of a surprise upon the great body of the electors."

The entry will be

Appeal dismissed.
Decree below affirmed.

FRED L. EDWARDS

vs.

CLARENCE A. HALL.

Oxford. Opinion, May 2, 1945.

Account. Referees. Exceptions.

The judgment of referees on facts is final if supported by any credible evidence.

An objection to the ruling of referees is without merit when such objection assumes as a fact that which the referees found was not true.

ON EXCEPTIONS TO ACCEPTANCE OF REPORT OF REFEREES.

Action by plaintiff on an account annexed setting forth certain sums to the amount of $1,678.25 claimed to be due the plaintiff from the defendant. The defendant filed an account in set-off. The case was submitted to referees who found that a balance of $61.30 was due to the defendant. Their report was accepted by the presiding justice. Plaintiff filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Peter M. MacDonald,

Gerry Brooks, for the plaintiff.

George A. Hutchins, for the defendant.

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

PER CURIAM. This was an action on an account annexed which sets forth certain payments made by the plaintiff to the

defendant amounting to $775, and charges for certain lumber amounting to $903.25 making a total of $1,678.25. The defendant filed an account in set-off showing money paid out by the defendant for cutting, hauling and yarding pulp wood in the sum of $907.51, cost of building a truck road $37.50, payments for social security $5.87, cash price for trucking, plowing, roofing paper and sundries $27.54, making a total of $978.42. There is a credit of $12.58, leaving a balance claimed to be due on the account in set-off of $965.84.

The case was submitted to referees who allowed the items amounting to $775 on the plaintiff's account, and charged the defendant with $64.50, being the value of certain wood taken by the defendant with the consent of the plaintiff, making a total allowed on the plaintiff's account of $839.50. They disallowed all other items. On the account in set-off they disallowed the charge of $37.50 and $27.54 and allowed all other items, leaving a balance of $900.80. They therefore found a balance due the defendant of $61.30, being the difference between $900.80 allowed on the account in set-off and $839.50 allowed to the plaintiff.

The plaintiff filed written objections, twenty-two in number, to the acceptance of the report. The presiding justice overruled the objections and accepted the report. The case is before us on exceptions to these rulings.

The referees found that the defendant acted as agent for the plaintiff in certain lumbering operations and the main issue concerns the claim of the plaintiff that the defendant appropriated without right certain lumber belonging to the plaintiff valued at approximately $900. The lumbering operations took place during the winter of 1937-1938. There are many items in the accounts and there is a record of over five hundred pages. It was peculiarly a case to be heard by referees whose judgment on facts is final if supported by

any credible evidence. *Benson* v. *The Inhabitants of the Town of Newfield,* 136 Me., 23, 1 A., 2d., 227. Many of the objections filed by the plaintiff involve rulings by the referees on issues of fact. This applies to the following objections: 2, 3, 6, 7, 8, 9, 16, 18, 20, 21 and 22. There was credible evidence supporting the findings of the referees on these issues. The first objection relates to the referees' refusal to rule that it was the duty of the defendant to keep true and correct accounts. In view of their finding that the defendant did keep such accounts, a ruling as to the duty to keep them was superfluous. The fourth objection was to the refusal of the referees to rule that it was the duty of the defendant not to commingle his wood with that of the plaintiff. A ruling to this effect was superfluous in view of the finding that there was no such commingling. The fifth objection was to the refusal to rule as to the defendant's duty as agent. In view of the general finding that the defendant performed his fiduciary obligation to the plaintiff, a ruling on this point was likewise superfluous. The tenth objection to a refusal of the referees to rule assumes unfaithfulness by the defendant which the referees found did not exist. The eleventh objection is without merit because it assumes as a fact what the referees have found was not true. Objections 12, 13, 14 and 15 involve mere generalities or are based on false assumptions of fact. Objection 17 assumes that the referees have made an inconsistent finding. We see no inconsistency. Objection 19 charges that the referees erred in not charging the defendant for wood trucked from plaintiff's lot to the home of Alton Hutchinson. There was evidence to support the refusal of the referees so to rule.

The objections filed by the plaintiff are without merit and the ruling of the presiding justice in accepting the report was correct.

Exceptions overruled.

IRENE SABIN SNELSON

vs.

C. MAUDE CULTON ET AL.

BOARD OF REGISTRATION OF NURSES.

Cumberland. Opinion May 14, 1945.

Statutes. Registration of nurses. Demurrer.

The purpose of Sections 18-24, Chap. 21, R. S. 1930 as amended relating to the registration and certification of registered nurses is not to regulate or control the practice of nursing as a calling but to designate by public registry and certification those nurses for whose qualifications the State is willing to vouch and to prevent others who are not entitled to it from falsely claiming such sponsorship.

Under Section 20, Chapter 21, R. S. 1930 as amended no applicant for registration and certification as a registered nurse can be admitted to examination unless he or she has complied with all the conditions there enumerated.

The requirement that the applicant for examination for registration shall have been trained as there provided in an approved school of nursing presided over by a nurse registered here applies to schools in and out of the State of Maine.

The language of that provision is plain and unambiguous and its operation cannot be limited or extended by reading into it a meaning at variance with its express terms.

Regardless of the standing of the school where the petitioner for mandamus in the case at Bar, as an applicant for admission to examination for registration as a registered nurse, had trained for nursing or the reasons why the school had not been approved the fact that it was neither approved nor presided over as required by the statute compelled the Board of Registration of Nurses to refuse to admit her to examination.

The Board of Registration of Nurses cannot be required by mandamus to violate their duty and disobey the law.

Upon this record the challenge that the provision of the statute requiring an applicant for admission to examination for registration as a registered nurse be trained in an approved school of nursing presided over by a nurse registered here is unconstitutional, does not require decision.

This provision is an integral part of Section 20, Chap. 21, R. S. 1930 as amended, if void this section of the statute in its entirety is a nullity, and registration and certification of registered nurses by examination has no sanction in law and right to it does not exist in this State.

Upon a premise of the unconstitutionality of the statute authorizing the registration and certification of registered nurses by examination a writ of mandamus could not be issued commanding the performance of an act by the respondents which they had no power to perform.

And an application of the rule that the validity of a statute cannot be assailed, the benefits of which are invoked in the same proceedings, is appropriate in this case.

The respondents' return that the petitioner for mandamus had not taken a course in and graduated and received a diploma from an approved school of nursing presided over by a nurse registered here, admitted to be true by demurrer, was sufficient in law to defeat the claim of the petitioner of right of examination for registration as a registered nurse.

One sufficient and valid defense having been stated in the return the demurrer being general should have been overruled.

The ruling sustaining the demurrer to the return and the order that peremptory writ issue were error and exceptions reserved must be sustained.

In view of the conclusions reached upon the controlling issues in the case other questions raised in the pleadings and in the briefs need no discussion and are not decided.

ON EXCEPTIONS.

The petitioner, who is a registered nurse in Pennsylvania, applied to the Board of Registration of Nurses for examination for registration and certification as a registered nurse in Maine. Her application was denied. The petitioner then instituted proceedings by petition for mandamus addressed to a Justice of the Supreme Judicial Court, who, after hearing, ordered an alternative writ of mandamus to issue. The writ was addressed to the Board of Registration of Nurses,

which had refused to permit the petitioner to be examined for registered nursing in Maine. The respondents set up as a defense that the petitioner was not entitled to examination for the reason that the school of nursing from which she had graduated, viz., a nursing school maintained in an osteopathic hospital, did not meet the prerequisites for admission to examination required by the laws of Maine, and prayed that the writ be quashed. The petitioner demurred. Her demurrer was sustained by the Justice, who ordered the peremptory writ to issue. Respondents excepted. Exceptions sustained. Writ quashed. Petition dismissed.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick, for the petitioner.

Frank I. Cowan, Attorney General,

Neal A. Donahue, Assistant Attorney General, for the respondents.

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

STURGIS, C. J. The petitioner for mandamus in this proceeding applied to the Maine Board of Registration of Nurses for examination for registration and certification as a registered nurse and her application was denied. She alleges in her petition and the alternative writ which issued that she was eligible for registration and the refusal to admit her to examination was illegal and a violation of her constitutional rights. The respondents, without traverse, returned that for lack of required qualifications the petitioner was not entitled to examination and prayed that the writ be quashed.

Demurrer to the return was sustained and peremptory writ awarded. Respondents' exceptions are certified.

In this jurisdiction any person may nurse the sick gratuitously or for hire without a license or permit and nursing as a calling is open to all alike regardless of age, sex or qualifications and free from governmental regulation. There is no distinction in this regard between the professional and the private or the trained and the merely experienced nurse or even the friend or relative who assists in time of need. Their right to nurse the sick is the same and unrestricted.

The State of Maine, however, in current legislation provides for the registration and certification of professional trained nurses and a register of their names at all times open to public scrutiny, and commits the administration of the law to a Board of Registration of Nurses constituted as directed and with powers and duties there defined. Registration is purely voluntary and in no way compulsory. It is open by examination to all professional trained nurses of requisite qualifications and without examination to those who are duly registered in other states. And while the practice of professional nursing as a registered nurse without a certificate of registration is prohibited, it is expressly provided that the law does not apply to the nursing of the sick by any person who does not represent himself or herself to be a registered nurse. R. S. 1930, c. 21, Sections 18 to 24; P. L. 1935, c. 127; P. L. 1939, c. 87. The purpose of this law clearly is not to regulate or control the practice of nursing as a calling but to designate by public registry and certification those nurses for whose qualifications the State is willing to vouch and to prevent others who are not entitled to it from falsely claiming such sponsorship. See *State ex rel. Marshall* v. *District Court*, 50 *Mont.*, 289, 296, et seq. Compare *Lehmann* v. *State Board*, 208 *Ala.*, 185; *State* v. *DeVerges*, 153 *La.*, 349,

350; *People* v. *Marlowe*, 283 N. Y. S., 474; *Henry* v. *The State*, 97 Tex., Crim. Rep., 67.

In this proceeding only the provisions of the statute relating to admission to examination of applicants for registration are of direct concern. *Section* 20, *Chap.* 21 *R. S.* 1930 *as amended* in its material parts reads:

> "Application for registration shall be made upon blanks furnished by the board and shall be signed and sworn to by applicant.
>
> The board shall admit to examination for registration any applicant who shall pay a fee of $10 and submit satisfactory evidence that he or she:
>
> (a) Is more than 21 years of age and of good moral character;
>
> (b) Has had at least 2 years high school education or its equivalent; provided, however, that any applicant beginning training in an approved school as hereinafter provided after September 1, 1935, shall submit satisfactory evidence that he or she has graduated from a class A secondary school or has education equivalent thereto;
>
> (c) Has taken a full course of not less than 2 years in the same school of nursing from which he or she has graduated and received a diploma, said school of nursing to be one approved by the board of registration, and presided over by a nurse registered in accordance with the requirements of sections 18 to 24 inclusive, provided, however, in case of transfer of a student nurse from an accredited school of nursing because of closing of the school of nursing the minimum time that the candidate shall spend in the school of nursing from which she receives her diploma shall be 1 year."

Under this section of the statute no applicant for registration and certification as a registered nurse can be admitted to examination unless he or she has complied with all the conditions enumerated, and no warrant can be found in it for waiving any of its provisions, least of all that requiring training in an approved school of nursing presided over by a nurse registered here. That provision in its reference to schools is all inclusive and an intent to distinguish between schools in and out of the State is not apparent in the plain and unambiguous language in which it is written nor elsewhere in the statute. Its operation cannot be limited or extended by reading into it a meaning at variance with its express terms. *In re* Frank R. McLay, 133 Me., 175, 177; *Pease* v. *Foulkes*, 128 Me., 293, 298. It was and is the duty of the Board of Registration of Nurses to make no exceptions in their obedience to the mandates of this law.

The petitioner for mandamus as the pleadings show when she applied for registration by examination, if otherwise qualified, had not taken the required course in or graduated and received a diploma from a school of nursing approved by the Board of Registration and presided over by a nurse registered in accordance with the laws of this State, and of necessity submitted no satisfactory evidence thereof. Regardless of the standing of the school where she had trained or the reasons why it had not been approved the fact that it was neither approved nor presided over as directed compelled the Board of Registration to refuse to admit her to examination. They cannot be required by mandamus to violate their duty and disobey the law. *Burkett* v. *Secretary of State*, 137 Me., 42; *Chapman, Attorney General* v. *Snow et al.*, 135 Me., 134.

But the petitioner contends that the provision of the law requiring training in an approved school of nursing presided

over by a nurse registered here is unconstitutional and should be declared void. This provision, however, is an integral and all-affecting part of *Section* 20, *Chap.* 21, *R. S.* 1930 as amended, without which we are convinced that law would never have been passed. If the provision is void this section of the statute in its entirety is a nullity. *State* v. *Cohen,* 133 Me., 293, 303. And the far-reaching consequence would be that the registration and certification of nurses by examination has no sanction in law and right to it does not exist in this State. Upon a premise of unconstitutionality a writ of mandamus could not be issued commanding the performance of an act which the respondents would have no power to perform. *Burkett* v. *Secretary of State,* supra. But appropriate for consideration here is the recognized rule that the validity of a statute cannot be assailed, the benefits of which are invoked in the same proceeding. *Fogler* v. *Clark,* 80 Me., 237, 241; *Casco Castle Company,* Petitioner, 141 Me., ——; *Wall et al.,* v. *Parrot Silver & Copper Co.,* 244 U. S., 407 *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S., 300. We are of opinion the record does not require decision upon the challenge of unconstitutionality.

The respondents in their return, without denying the allegations of the alternative writ, stated among other facts, that the petitioner has not taken a course in and graduated and received a diploma from an approved school of nursing presided over by a nurse registered here which was sufficient in law to defeat the claim of right to examination. This was proper practice. *Libby* v. *Water Company,* 125 Me., 144, 146; *Dane* v. *Derby,* 54 Me., 95. By demurring to the return the petitioner admitted all facts there well pleaded. *Rogers* v. *Selectmen of Brunswick,* 135 Me., 117. But one sufficient and valid defense having been stated in the return the demurrer being general should have been overruled. *School*

Directors v. *The People*, 106 Ill., App., 620, 622. The ordinary rules of pleading apply to a demurrer in madamus proceedings. 13 Encyc. Pl. and Pr., 698. The ruling sustaining the demurrer to the return and the order that peremptory writ issue were error and exceptions reserved must be sustained.

In view of the conclusions reached upon the controlling issues in this case other questions raised in the pleadings and in the briefs need no discussion and are not decided. The entry is,

Exceptions sustained.
Writ quashed.
Petition dismissed.

Manser J. concurs in the result.

ROBERT C. THOMPSON, PETITIONER

FOR WRIT OF HABEAS CORPUS.

Knox. Opinion, June 11, 1945.

Statutes. Sufficiency of Indictment. Manslaughter. Constitutional Law.

Section 7 of Chapter 146, R. S. 1930 which provides that "It is sufficient in every indictment . . . for manslaughter, to charge that the defendant did feloniously kill and slay the deceased, without, in either case," (referring to murder and manslaughter) "setting forth the manner or means of death" is constitutional.

Under the Constitutions, both Federal and State, it is necessary "simply, that all the elements of, or facts necessary to, the crime charged, shall be fully and clearly set out."

As the statute requires all that the Constitution requires and as a strict compliance with its provisions tends to the advancement of justice, there can be no reason for pronouncing it invalid.

Manslaughter at common law is the unlawful killing of another without malice aforethought either express or implied.

All of the necessary elements comprising manslaughter as defined at common law are contained in said statute.

Regardless of their individual importance, all essential elements of the crime charged must be set forth in the indictment to meet constitutional requirements.

There are cases where an act may be criminal or otherwise, according to the circumstances under which it is done. If made criminal by the circumstances, then they become constituent elements of the crime and must be set out. Otherwise they are not a part of the crime and need not be set out.

Nothing in this record reveals the omission of any such circumstances.

The allegations in the indictment under consideration show the jurisdiction of the trial court and are set forth with such certainty as to enable the accused to plead a conviction or acquittal thereunder, in bar of another prosecution for the same offense.

ON EXCEPTIONS.

Petition for Writ of Habeas Corpus on the ground that the statute (R. S. 1930, Chapter 146, Section 7), upon which the indictment under which he was convicted of manslaughter offends Article VI of Amendments of the Constitution of the United States providing that an accused shall have the right "to be informed of the nature and cause of the accusation"; and also offends Section 6, Article 1 of the Constitution of Maine providing that accused shall have the right "to demand the nature and cause of the accusation, and have a copy thereof"; and Section 7 of Article I of the Constitution of Maine providing that "no person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury," with certain exceptions. The petitioner was convicted of manslaughter and sentenced to hard labor for not less than five years nor more than eight years in the State Prison, and was serving sentence. The sole question was the legality and sufficiency of the indictment; The petition for Writ of Habeas Corpus was dismissed. Petitioner filed exceptions. Exceptions overruled. The case fully appears in the opinion.

C. S. Roberts,

F. Harold Dubord, for the petitioner.

Ralph W. Farris, Attorney General,

Abraham Breitbard, Deputy Attorney General, for the State.

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

HUDSON, J. The petitioner, Robert C. Thompson, was indicted for the crime of manslaughter at the April term,

1944, of the Superior Court holden at Belfast in Waldo County in this state. Upon arraignment he pleaded not guilty, which plea he retracted and pleaded guilty. He was sentenced to hard labor for not less than five nor more than eight years in the State Prison at Thomaston, and was there serving sentence when he filed this petition for habeas corpus, claiming unlawful imprisonment therein. Upon hearing, his petition was dismissed, to which ruling the exceptions now before us were taken. His counsel state: "The sole issue is the legality and sufficiency of the indictment."

In the indictment the grand jurors did "present that Robert C. Thompson of Belfast, in said County of Waldo, at Stockton Springs in said County of Waldo, on the ninth day of April in the year of our Lord one thousand nine hundred and forty-four, with force and arms, at Stockton Springs, aforesaid, one Gerald Murphy of said Stockton Springs, in said County of Waldo, then and there feloniously did kill and slay, against the peace of said State and contrary to the form of the Statute in such case made and provided."

The statute on which this indictment was based reads as follows:

> " . . . It is sufficient in every indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; *and for manslaughter, to charge that the defendant did feloniously kill and slay the deceased, without, in either case, setting forth the manner or means of death.*"
> R. S. 1930, Chap. 146, Sec. 7. (Italics ours.)

It is not claimed that the indictment does not conform to the statute, but rather that the statute offends Article VI of the Amendments of the Constitution of the United States according the accused the right "to be informed of the nature

and cause of the accusation"; Section 6 of Article I of the Constitution of Maine providing that the accused shall have the right "To demand the nature and cause of the accusation, and have a copy thereof"; and Section 7 of Article I of the Maine Constitution providing that "No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury," with certain exceptions therein mentioned but not here pertinent.

Assuming without deciding that the constitutionality of this statute may be determined in this habeas corpus proceeding rather than by writ of error, the petitioner's exceptions must be overruled unless this court now declares the aforesaid statute to be unconstitutional which many years ago it held constitutional as to indictments both for murder and for manslaughter.

In *State* v. *Verrill,* 54 Me., 408, decided in 1867, wherein the indictment based on this statute was for murder, this court, in an able and exhaustive opinion, the reasoning of which has lost nothing with the passing of years, held the statute constitutional and the indictment legal. Objection was made that the indictment in the statutory form did not set out the manner in and the means by which the alleged murder was effected or accomplished. The court said on pages 411 and 412:

> "Formerly, in capital cases, this was held to be necessary, though in crimes of a lower grade it was not. . . . This mode of framing indictments in the higher crimes may be considered, therefore, as having been established rather by precedent and authority than by any legal principle involved. It was, however, soon found that this method served rather to secure the escape of the guilty than the accomplishment of justice. It was often difficult, and sometimes impossible for prosecutors to ascertain the means by which a

murder had been effected, when the testimony left no doubt as to the guilty party. In such case the indictment must necessarily be drawn in a great measure from conjecture, and the chances for the escape of the guilty party were greatly increased from the liability of the failure, or variance of the proof as to some of the allegations."

Then added at the bottom of page 413:

"But, to relieve this matter of all doubt, our Legislature wisely enacted the law of 1865, c. 329," later R. S. 1930, Chap. 146, Sec. 7, and now R. S. 1944, Chap. 132, Sec. 11.

It was held in the *Verrill* case, supra, that the Constitution requires "simply, that all the elements of, or facts necessary to, the crime charged, shall be fully and clearly set out," and then the court said:

"It requires no argument to show that 'the manner in which and the means by which' a crime has been committed, are no part of the crime itself. . . . As the law of 1865 requires all that the constitution requires, and, as a strict compliance with its provisions tends to the advancement of justice, there can be no reason for pronouncing it invalid."

"By the common law, felonious homicide is the killing of any human being without justification or excuse. 4 Black. Com. 188. It is divided into manslaughter and murder. Manslaughter is the unlawful killing of another without malice aforethought either express or implied . . . . 4 Black. Com. 191.

"Murder is where a person of sound memory and discretion unlawfully kills any human being in the

> peace of the State, with malice aforethought either express or implied. 4 Bl. Com. 195."
> *State* v. *Conley*, 39 Me., 78, 87.

All of the necessary elements comprising murder and manslaughter as defined at common law are contained in said Sec. 7 of Chap. 146, R. S. 1930.

In *State* v. *Smith*, 65 Me., 257, the respondent was indicted for manslaughter. There were three counts. In the first the manner and means were set forth. On page 266 the court stated: "But such allegations are now unnecessary under the provisions of R. S., c. 134, Sec. 7," the statute now under consideration. In the third count the charge was in the short statutory form, and as to it the court said on page 266:

> "The defendant's objections to the third count are futile. Similar objections were made and overruled in *State* v. *Verrill*, 54 Maine, 408."

But counsel for the petitioner claim that the decision of the court as to the legality of the short form in Count 3 was only obiter dictum. Not so, because the court found both Counts 1 and 3 constitutional. It can no more be said that the holding on Count 3 is obiter dictum than that on Count 1.

In *State* v. *Morrissey*, 70 Me., 401, the indictment being for murder, objection was made to its legal sufficiency in the abbreviated form. But the court upheld it and stated on page 404:

> "We accept the occasion to express our opinion of the correctness of the decision in *State* v. *Verrill*, and to affirm the same."

The petitioner concedes that the statute in providing the short form of an indictment for murder is constitutional. His

argument is that, malice aforethought being an essential element in murder and not in manslaughter, it is not necessary to allege the manner and means in murder indictments but only in manslaughter, because in murder "the means by which the killing was accomplished became of minor importance and form no part of the crime."

But regardless of their individual importance, all essential elements of the crime, whether of murder or manslaughter, must be set forth in the indictment to meet constitutional requirements. The greater importance of one particular element than that of another will not warrant the omission of the less important, for all necessary elements, even though of varying importance, must be alleged. The distinction claimed by the petitioner was not noted in the *Verrill* case, supra, the *Smith* case, supra, nor the *Morrissey* case, supra, we believe because there is no such valid distinction.

It is also argued that we have many statutes providing for the crime of manslaughter under special circumstances and that the abbreviated form in our statute would not inform the accused of the nature and the cause of the accusation. In the opinion in the *Verrill* case, supra, it is stated on page 414:

> "There are cases where an act may be criminal or otherwise, according to the circumstances under which it is done. If made criminal by the circumstances, then they become constituent elements of the crime and must be set out. Otherwise they are not a part of the crime and need not be set out."

We hold, with reference to statutory manslaughter, that it is only when the statute embraces within it special circumstances making that criminal which would not otherwise be criminal that such circumstances become constituent elements of the crime and must be set out in the indictment.

Nothing in this record reveals the omission of any such circumstances. Hence it was not necessary in this indictment to allege the manner in and the means by which the crime was committed.

From our examination of the cases outside of this jurisdiction, we find that the greater weight of authority is in accord with the law so long ago established in this state.

> "At common law and under the statutes in certain jurisdictions the manner and means of the killing, if known, must be alleged, and if not known that fact must be stated; *but under the statutes in force in many jurisdictions such averments have been dispensed with, and such statutes do not deprive the accused of any of his constitutional rights.*" 40 C. J. S., 1041, Sec. 150, a. (Italics ours.)

The law is stated to the same effect in 26 Am. Jur., 326, Sec. 246:

> "It is well established that the legislature has the power not only to enact laws defining offenses and their punishment, but also to prescribe the forms of indictment whereby they shall be prosecuted. This power is unlimited except in so far as it is restrained by the state or Federal Constitutions giving to an accused the right to demand 'the nature and cause of the accusation against him.' A statute cannot, however, prescribe a form of an indictment or information which dispenses with allegations that are essential to reasonable particularity and certainty in the description of the offense. This principle, of course, applies in prosecutions for homicide. In such prosecutions, it has been held that a short form of indictment provided by

> statute does not deny the accused the constitutional right of being advised of the nature and cause of the accusation. It has also been held that an indictment drawn according to a form prescribed by statute is sufficient, notwithstanding it fails to allege the means, manner, or circumstances of the killing."

And in Sec. 248, on page 328 of said 26 Am. Jur., it is stated:

> "Both courts and legislatures have a tendency toward liberality, and according to modern authority, it is not necessary to aver more in the indictment than is sufficient to show the jurisdiction of the trial court, and to advise the defendant of the nature and cause of the accusation against him with such certainty as to enable him to plead a conviction or acquittal thereunder, in bar of another prosecution for the same offense."

Also see 26 Am. Jur., 337, Sec. 263.

The allegations in the indictment under consideration showed the jurisdiction of the trial court and were set forth with such certainty as to enable the accused to plead a conviction or acquittal thereunder, in bar of another prosecution for the same offense.

We call particular attention to *Rowan* v. *State*, 30 Wis., 129, 11 Am. Rep., 559, for the reason that the opinion therein deals with the constitutionality of a statute almost identical with our statute, and also because of the uniqueness of expression and soundness of reasoning. In the *Rowan* case, in an information charging both murder and manslaughter in the language of the Wisconsin statute, conviction was of manslaughter. The Wisconsin statute provided that "in in-

dictments or informations for murder or manslaughter, it shall not be necessary to set forth the manner in which or means by which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder, to charge that the accused did willfully, feloniously and of his malice aforethought, kill and murder the deceased; *and in any indictment or information for manslaughter, it shall be sufficient to charge that the accused did feloniously kill and slay the deceased.*" (Italics ours.) It was claimed that this statute violated the Constitution in that it deprived the accused of the right "to demand the nature and cause of the accusation against him." The court stated:

> "We do not perceive any thing in chapter 137 which deprives him of that right. The information plainly, substantially and formally describes the crime of murder and manslaughter. It does not contain all the verbiage and tautology found in the old forms. Nor do we think this necessary. The statements that the accused 'not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil,' with force and arms, at, etc., in and upon one — in the peace of God, etc., then and there being, etc., and many other allegations in the old forms of indictment no longer serve any valuable purpose, either for aggravation or embellishment. The safety and rights of the accused will not be compromised or endangered by the omission of all such useless averments or recitals. The information clearly states 'the nature and cause of the accusation' against the accused . . . . The means or method by which death was produced could not always be proven as laid in the indictment, and sometimes the variance was held to be fatal. It was doubtless to avoid the consequences

> of a variance and for the purpose of dispensing with many useless averments in the old forms of indictment, that the legislature prescribed the forms found in this enactment. We can really see no substantial objection to this legislation."

For a period of eighty years since the enactment of our statute in 1865, general use of it has been made in the drawing of indictments for murder and manslaughter. We do not feel that we should now disrupt this practice so long maintained. This court still regards the statute constitutional and abides by the reasoning in the opinions in the *Verrill, Smith,* and *Morrissey* cases, supra, declaring its constitutionality.

Exceptions overruled.

ELIZABETH M. MACVEAGH,

APPELLANT FROM DECREE OF JUDGE OF PROBATE

in re ALLOWANCE OF LAST WILL AND TESTAMENT OF

HELEN JOSEPHINE MCKEEN.

Cumberland. Opinion, June 14, 1945.

Wills. Undue Influence. Mental Incapacity.

In the instant case no evidence was presented upon which a finding that the will was the result of undue influence could be justified.

There was competent evidence to support the finding of the presiding justice upon the question of mental incapacity.

The decision of the presiding justice, if supported by competent evidence, is final.

ON EXCEPTIONS.

The appellant contested the allowance of the will of Helen Josephine McKeen claiming mental incapacity of the testatrix and undue influence. The will was allowed by the Judge of Probate. The contestant appealed to the Supreme Court of Probate, in which the decree of allowance was sustained. The contestant filed exceptions. Exceptions overruled.

Elizabeth M. MacVeagh, pro se.

Ellis L. Aldrich, for appellees.

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

CHAPMAN, J. The will of Helen Josephine McKeen was allowed by the Judge of the Probate Court and, upon appeal to the Superior Court sitting as the Supreme Court of Probate, the decree of allowance was sustained. In her stated reasons for appeal from the decree of the Judge of Probate to the Supreme Court of Probate, the appellant claimed mental incapacity on the part of the testatrix and undue influence. The case comes to this court upon exceptions to the decree of the Superior Court.

There was no evidence upon which to justify a finding that the will was the result of undue influence.

Upon the question of mental incapacity each of the parties presented evidence material to the issue.

The burden was upon the proponent to prove that the testatrix, at the time of the execution of the will, had such mind as would enable a person to transact common and

simple kinds of business with that intelligence which belongs to the weakest class of sound minds, together with a memory sufficient to recall the general nature, condition and extent of her property and her relations to those to whom she gave and also to those from whom she excluded her bounty. *Hall* v. *Perry,* 87 Me., 569, 33 A., 160; 47 Am. St. Rep., 352; *Rogers, Appellant,* 126 Me., 267, 138 A., 59.

The credibility of the witnesses and the probative force of their testimony were for the determination of the presiding justice and his decision if supported by competent evidence was final. For this there is abundant authority. *Hooper Estate,* 136 Me., 451, 12 A., 2d., 417.

A careful examination of the record convinces us that the decision of the justice should be sustained.

The entry must be

Exceptions overruled. Ordered that the costs and stenographers' and counsel fees of the proponent in the Supreme Court of Probate and in the Probate Court be fixed and allowed by the respective judges of those courts, and paid by the administrator to be appointed by the Probate Court, and charged by such administrator in his account with the estate.

RINALDO A. L. COLBY

vs.

JESSE TARR & DEPOSITORS TRUST CO., TRUSTEE.

Sagadahoc. Opinion, June 27, 1945.

Trespass. Witnesses. Jury.

The defendant, in the instant case, had the burden of proof to show that there was a contract with the plaintiff giving him the right to cut trees.

It was the province of the jury to determine whether or not there was a contract of sale; and there was sufficient evidence to sustain their ver-verdict.

ON MOTION FOR NEW TRIAL.

The plaintiff alleged that the defendant committed trespass in entering upon the plaintiff's land and cutting trees thereon. The defendant admitted the entry and cutting but claimed that it was in pursuance of a contract with the plaintiff for the sale of the trees. The jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial. Motion overruled. The case fully appears in the opinion.

McLean, Southard, & *Hunt,* for the plaintiff.

Edward W. Bridgham,

Harold J. Rubin, for the defendant.

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

CHAPMAN, J. The plaintiff alleged in an action of trespass that the defendant entered upon his land and cut oak trees thereon. The jury returned a verdict for the defendant. The defendant admitted the entry upon the premises and the cutting; but claimed that it was through permission of the plaintiff by reason of a contract by which he bought the growing trees with a right to cut and remove the same. The plaintiff denied that there was a contract and the burden was upon the defendant to satisfy the jury of the same. Such a contract was a defense to the action; but all of its terms were not essential in consideration of the matter. It was sufficient if it appeared that the minds of the parties met to the extent that the defendant was to go upon the land for the purpose of cutting the trees.

The defendant testified to a conversation between himself and the plaintiff, according to which the trees were sold to him. The plaintiff claims that the testimony of the defendant did not constitute competent evidence in that he gave two versions of the alleged contract and that therefore his testimony should have been disregarded.

It is true that the testimony of a witness may be so unreasonable and contradictory in its parts that it is entitled to no credit. *Garmong* v. *Henderson,* 114 Me., 75; 95 A., 409; *Rovinsky* v. *Assurance Co.,* 100 Me., 112, 60 A., 1025. But we find no such situation in the present case.

A witness does not always use language with such literal exactness that his meaning must be determined without consideration of the circumstances which are found to exist. Whether the testimony of the defendant affected his credibility and the probative force of such testimony were for the determination of the jury. *Jackiewicz* v. *Mallick,* 126 Me., 602, 138 A., 627; *Frye* v. *Kenney,* 136 Me., 112, 3 A., 2d., 433.

The verdict depended upon whether there was a contract of sale, and it was the jury's province to answer that ques-

tion. *Wigmore on Evidence,* Sec. 2556; *Luce* v. *Potato Farms,* 125 Me., 386, 134 A., 198; *Gassett* v. *Glazier,* 165 Mass., 473, 43 N. E., 193.

The entry must be

Motion overruled.

ADELARD J. LUSSIER

vs.

SOUTH PORTLAND SHIPBUILDING CORP.
(HARTFORD ACCIDENT & INDEMNITY COMPANY)

Cumberland. Opinion, June 29, 1945.

Workmens Compensation Act.

The evidence in the case sustained the finding of the Industrial Accident Commission and hence there was no abuse of discretion.

ON APPEAL.

The claimant Lussier was injured in the course of his employment and was paid compensation to July 10, 1944; and medical and hospital bills were also paid. Lussier filed a petition asking for a further amount for medical and hospital bills. The Commission allowed some of the amounts asked for and disallowed others. The Justice of the Superior Court affirmed the decision. The claimant appealed. Appeal dismissed. Decree affirmed. The case fully appears in the opinion.

Franklin Fisher, for the claimant.

William B. Mahoney, for the defendants.

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

PER CURIAM. This is an appeal from a pro forma decree of a justice of the Superior Court affirming a decision of the Industrial Accident Commission.

The employee, on July 15, 1942, suffered a personal injury by accident arising out of and in the course of his employment and compensation was paid through July 10, 1944. In addition thereto the employer or its insurance carrier paid hospital or medical bills in the sum of $310.30.

The employee thereafter filed a petition asking that the commission allow a further amount for medical, surgical and hospital services, nursing, medicines, and mechanical aids. The amount asked for was made up of six separate items. Of these the commission allowed three and disallowed the others on the ground that "the petitioning employee failed to sustain the burden of proving that the services rendered as set forth in items (4), (5), and (6) were made necessary by reason of the nature of the injury or process of recovery, that the services there rendered were adequate, and that the charges therefor were reasonable." From such disallowance the petitioner appealed. The relevant part of the statute, Rev. Stat. 1930, Ch. 55, Sec. 9, reads as follows:

> "During the first thirty days after an injury aforesaid the employee shall be entitled to reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical surgical aids when they are needed. The amount of such services and aids shall not exceed one hundred dollars unless a longer period or a greater sum is allowed by the

commission, which in its discretion it may allow when the nature of the injury or the process of recovery requires it."

The evidence sustains the finding of the commission; and there was, therefore, on its part no abuse of discretion in disallowing the items in question.

Appeal dismissed.
Decree affirmed.

CARMELO S. SACHELIE

vs.

JAMES A. CONNELLAN, ADM'R., ET AL.

Cumberland. Opinion, June 29, 1945.

Presumptions. Possession of Deed. Witnesses. Appeal.

The presumption that a deed found in the possession of the grantee named therein was delivered by the grantor is one against which nothing can prevail except most satisfactory evidence of non-delivery.

In a suit in which an executor, administrator or other legal representative of a deceased person is a party the opposite party is not a competent witness as to his transactions with the decedent except such as are specifically authorized by statute.

On equity appeals the test is whether or not on the record a factual decision appears clearly to be erroneous.

ON APPEAL.

Suit by plaintiff seeking to have a cloud removed from his title to certain real estate. Plaintiff had signed two deeds each purporting to convey certain real estate to the decedent of the defendant administrator, one of which was marked "Copy." The deed marked "Copy" was filed in the office of the Register of Deeds, the other remained in the possession of the plaintiff. The plaintiff was not competent to testify. The scrivener who prepared the deeds was dead and there was no direct testimony available to sustain plaintiff's allegations that the recorded instrument was a copy of the deed in his possession rather than a deed executed for purpose of conveying the property. Plaintiff relied on the assumption that a deed retained in the possession of the grantor named in the deed passed no title. The defendants relied on the opposing presumption that a deed found in the possession of the grantee was delivered by the grantor. The lower court issued a decree dismissing the bill. Plaintiff appealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Adelbert L. Miles, for the plaintiff.

John M. Curley, for the defendants.

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

MURCHIE, J. In the bill in equity to which the appeal here presented relates, the plaintiff seeks relief against what he alleges is a cloud on his title to property acquired under a deed dated April 2, 1936, recorded August 5, 1936. The cloud is said to originate in a record at the registry of deeds indicating that he reconveyed the property to his grantor by a deed dated April 22, 1936, recorded October 27, 1942. It is undoubted that the plaintiff signed and acknowledged

a deed on April 22, 1936 which is almost, but not quite, identical in language with the record of which he complains. His allegation in that regard, and it is supported by the evidence of a professed eye-witness although the plaintiff's own testimony implies that said witness was not present at the time, is that on the day named he signed and acknowledged both an original deed and a copy of it. The witness deposes that after signing and acknowledging one paper the plaintiff called attention to the fact that it was a copy and thereupon signed and acknowledged the other. It is the copy, so-called, which the bill alleges came into the possession of the defendant Dorothy Avenzato, after the death of her husband who was the grantee therein "by some means unknown" to the plaintiff, that bears the endorsement of the register of deeds.

The grantor in the deed of April 2, 1936, and the grantee in the deed of April 22, 1936, was one Dominick Avenzato, who died intestate on September 21, 1942. The defendants are his widow and children and the administrator of his estate. The deeds of April 2 and April 22, 1936 appear in evidence as Plaintiff's Exhibits No. 5 and No. 1. The instrument in dispute, which appears on its face to be a quitclaim deed of the same property described in Plaintiff's Exhibit No. 1, is Plaintiff's Exhibit No. 3, although the record shows that it was produced from the custody of the parties defendant. Each of the three papers carries an endorsement on the back indicating that it was prepared in the office of one Clarence E. Sawyer, who died prior to the commencement of the process. His signatures, identified by his son, indicate that he witnessed all signatures and took the acknowledgments.

As the issues were framed by the bill and answer it seems unnecessary to review the allegations in their entirety since the relief sought must be granted or denied according to

decision whether Plaintiff's Exhibit No. 3 was delivered to the grantee therein named in his lifetime as a deed or is a copy of Plaintiff's Exhibit No. 1, executed by mistake and never delivered. If the former, the history of Plaintiff's Exhibit No. 1 would be meaningless for the property would have been conveyed without its use. If the latter, proof that Plaintiff's Exhibit No. 1 was never delivered but remained in plaintiff's custody until after the death of the grantee would support an essential allegation of the bill. Plaintiff's Exhibit No. 1 must be considered as coming into the record from plaintiff's custody. His signing and acknowledgement of Plaintiff's Exhibit No. 3 are admitted in the bill and the only testimony to support his allegation that it was signed by mistake and not as a deed is that of the witness above referred to who asserted that he went to the office of the scrivener on April 22, 1936 with the plaintiff and that the latter, after signing one paper, called attention to the fact that it was a copy and had the word "copy" typed upon it, whereupon he signed and acknowledged another. This testimony declares that he took the latter into his own custody and left the former with the scrivner.

The death of the scrivener occured on February 24, 1941. The evidence of his son, the witness above referred to, indicates that thereafter he sorted a mass of papers found in his father's files and attempted to mail them to the clients to whom they belonged. He states definitely that he mailed some papers to the plaintiff. There may be inference that he mailed something to Mr. Avenzato, in testimony that he recalls finding the name in the files because of its unusual nature and believes that he found documents bearing it which would have been so mailed in normal course in the distribution of papers he was making. There is no evidence however that Plaintiff's Exhibit No. 3 was in the files of the scrivener at the time of his death or that his son found it and mailed it to Avenzato.

The case provides an apt illustration of the operation of the law of evidence when an executor, administrator or other legal representative of a deceased person is a party. His adversary is not a competent witness as to his transactions with the decedent except as authorized by one of the several sub-paragraphs of R. S. 1930, Chap. 96, Sec. 119 (now R. S. 1944, Chap. 100, Sec. 120). The force and effect of this statute have been frequently declared. *Sherman* v. *Hall, Adm'x.*, 89 Me., 411, 36 A., 626; *Weed* v. *Clark, Adm'r.*, 118 Me., 466, 109 A., 8; *Travelers Insurance Co.* v. *Foss, Adm'r.*, 124 Me., 399, 130 A., 210; *Tuck, Appellant,* 130 Me., 277, 155 A., 277. A reading of the record with the many questions asked of the plaintiff by his counsel and excluded on objection makes it all too plain that the process was instituted in the belief that the plaintiff might prove many factual allegations essential to entitle him to the relief he seeks by his own testimony. Numerous exceptions were taken and allowed to the rulings excluding this testimony but they are not urged in argument and could not be under our statute.

As the record stands, the sole support for the plaintiff's cause, other than the inferential force of the testimony of the son of the scrivener, is found in the presumption that an executed deed retained in the possession of the grantor was never delivered by him. *Hatch* v. *Haskins,* 17 Me., 391; *Patterson* v. *Snell,* 67 Me., 559; 26 C. J. S., 593, Par. 184 a. The cases cited recognize that there is a presumption of at least correlative force that a deed found in the possession of the grantee was delivered by the grantor. This presumption in direct opposition to the plaintiff's contention is likewise stated in the text of C. J. S., - Vol. 26, Page 594, Par. 184 b. It is urged also on behalf of the plaintiff that a deed found in the possession of the grantee is invalid to convey the property it describes if it reached that possession by mistake. On this point we are cited to

Reed v. *Reed,* 117 Me., 281, 104 A., 227, wherein it is declared that a deed obtained by a grantee either by mistake or for a special purpose other than delivery will not pass a title. The opinion cites several cases (Page 286 of our own reports and Page 229 of Atlantic) as illustrations of the principle. Each of them discloses on examination that there was factual proof to controvert the force of the presumption. When a grantor delivers a deed to some third person, as in *Tripp* v. *McCurdy,* 121 Me., 194, 116 A., 217, and *Eddy et al.* v. *Pinder,* 131 Me., 139, 159 A., 727, and it is later found in the possession of the grantee the force of the presumption which that possession carries will be overridden by proof that the delivery to the third person was for some other purpose.

The unique feature of the present case lies in the fact that the plaintiff signed and acknowledged two instruments on one day either of which, if delivered, would convey the property in dispute to the individual named as grantee in both. That the documents are not an original deed and a carbon copy of it produced simultaneously is established conclusively by unimportant differences in their wording. They are both originals but one of them has the single word "copy" typed or written upon it, not on the face or front of the sheet where the words of conveyance appear but on the reverse side where the instrument is described by designation of the type thereof, the names of the parties thereto, the date and the name of the scrivener, and provision to show its record, now filled in over the attest of the Register of Deeds.

It is clearly established by proof that on the day following the death of the grantee named in plaintiff's deed of April 22, 1936, and in the recorded paper which is alleged to be a copy of it, the latter was found in the apartment on the premises it purports to convey which was occupied by

that grantee and his family at the time of his death. It was contained in a metal box with birth certificates of the grantee and his children. The presumption that a deed so found was delivered by the grantor who executed and acknowledge it is one of substantial strength. It is said in *Shaw et al.* v. *McKenzie,* 131 Me., 248, 160 A., 911, that "nothing but the most satisfactory evidence of non-delivery should prevail" against it. There is no direct evidence whatsoever in the present case. The plaintiff relies on inference drawn from the testimony of the son of the scrivener and the presumptive force flowing from possession of Plaintiff's Exhibit No. 1. The Justice who heard the cause did not specify in his decree whether he found this evidence insufficient to overcome the force of the presumption traceable to the possession of Plaintiff's Exhibit No. 3 and based his decision on the failure of the moving party to prove the facts alleged in his process or dismissed the bill on the principle that one not in possession of land may not resort to equity to remove a cloud from the title to it which he claims is vested in him. This principle is declared in *Snow* v. *Russell, et al.,* 93 Me., 362, 45 A., 305; *Frost et al.* v. *Walls et al.,* 93 Me., 405, 45 A., 287, and *Annis* v. *Butterfield et al.,* 99 Me., 181, 58 A., 898. It might be considered applicable on the present facts where some of the parties defendant are occupying the premises claiming title from the plaintiff. The argument presented on behalf of the plaintiff is addressed to the factual question and indicates belief that the basis for the decision appealed from rests upon the factual ground rather than the legal. On the record before us we cannot say a factual decision that the plaintiff had not established the allegations essential to the remedy he seeks appears clearly to be erroneous and it has been stated with great force and clarity heretofore in this Court that such is the test on equity appeals. *Young* v. *Witham,* 75 Me., 536, is the first of a long

line of decisions wherein that principle is declared and affirmed. It is established so thoroughly that it seems unnecessary to cite further authority in its support.

Appeal dismissed.
Decree below affirmed.

STATE *vs.* POOLER, ALIAS POULIN
STATE *vs.* PAUL CARON
STATE *vs.* RALPH LABBE.

Kennebec. Opinion July 21, 1945.

Criminal Law. Statutes. Conspiracy. Lotteries. Public Morals.

Indictments. Constitutional Guarantees.

Lotteries are public nuisances, subversive to morals, and contrary to the interests of society and of the State and nation.

The gravamen of conspiracy is combination, concerted action and unlawful purpose.

The combination of two or more persons by concerted action to commit a crime, whether a felony or a misdemeanor, is an indictable offense punishable under the conspiracy statute.

The conspiracy statute is designed to provide punishment for a combination of persons acting in concert to accomplish an illegal purpose.

A conspiracy to commit an offense is itself a separate offense and the punishment therefor may be fixed by statute.

Legislatures and courts have long recognized that a confederacy or conspiracy to effect criminal objects creates additional power to cause injury, and is more sinister and subversive to public morals than the commission of the crime by a single individual.

A conspiracy is the gist of the indictment in the instant case, and though nothing be done in prosecution of it, it is a complete offense in and of itself.

The allegations in the indictment showed the jurisdiction of the trial court and were set forth with such certainty as to enable the accused to plead conviction thereunder in bar of another prosecution for the same offense; and were not in violation of their rights under the Constitution of the United States or the Constitution of Maine.

ON EXCEPTIONS.

The three respondents were indicted jointly for conspiracy to engage in maintaining and operating lotteries. Each respondent filed a general demurrer to the indictment. The presiding justice overruled the demurrers. Respondents filed exceptions. The issue was as to the sufficiency of the indictments. As to one respondent the exceptions were sustained. As to all the other respondents the exceptions were overruled. The case fully appears in the opinion.

William Niehoff, County Attorney,

Henry Heselton, County Attorney, for the State.

F. Harold Dubord, for respondents Pooler and Caron.

Benjamin Berman,

David V. Berman, for respondent Ralph Labbe.

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

MANSER, J. There are three respondents who were indicted jointly with other persons for conspiracy to engage in maintaining and operating lotteries. Thirteen cases were

argued together as they present essentially the same issues of law.

The respondent, Pooler alias Poulin, was indicted in seven cases with another person in each case, but not with either of the two other respondents whose cases are before the Court. The indictments in these cases related to lotteries designated as "Old Reliable."

The respondent, Caron, was indicted in six cases with one other person in each case. In four of these the other persons are not before the Court.

The respondent, Labbe, was indicted in two cases and was a joint respondent with Caron. Indictments in the six cases relating to Caron and Labbe concern a lottery designated as "Pay Check."

The seven cases which involved Pooler alias Poulin appear in one record. In three of the cases, sentences were imposed aggregating $500 in fines and three months' imprisonment. The other four cases were placed on file.

The cases involving Caron and other persons, and Caron and Labbe, appear in one record. In three of them, sentences were imposed against Caron, aggregating $350 in fines and two months' imprisonment. In the two cases which involve Labbe, a fine of $250 was imposed in one and a sentence of two months' imprisonment in the other.

Each respondent, after entering a plea of "Not guilty" in the cases against him, filed general demurrers to the indictments, and comes forward upon exceptions to the action of the presiding Justice in overruling the same. The issue is the sufficiency of the indictments.

The statute relating to conspiracies as it existed at the time of the indictments is now found in R. S., 1944, c. 117, §25, and reads as follows:

> "If two or more persons conspire and agree together, with the fradulent or malicious intent wrong-

> fully and wickedly to injure the person, character, business, or property of another; or for one or more of them to sell intoxicating liquor in this state in violation of law to one or more of the others; or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice; or to commit a crime punishable by imprisonment in the state prison, they are guilty of a conspiracy, and every such offender, and every person convicted of conspiracy at common law, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 10 years."

The indictments were drawn under this statute. In most of them the charging portion, after giving the date, reads:

> "at Waterville in said County of Kennebec, feloniously did combine, conspire and agree together, with fraudulent intent, wrongfully and wickedly to do a certain illegal act injurious to the public morals to wit, did then and there conspire and agree together with such intent wrongfully and wickedly to engage in maintaining and operating a lottery and to receive, sell and offer for sale lottery tickets, the same being a scheme and device of chance known as "Old Relible" (or "Pay Check"), a more particular description of which is to your Grand Jurors unknown, in violation of the laws of the State of Maine."

The statute prohibiting lotteries and providing punishment for participation therein, as it existed at the time of the indictments, is now found in R. S. 1944, c. 126, §18, and so much thereof as is pertinent reads as follows:

"Every lottery, policy, policy lottery, policy shop, scheme, or device of chance, of whatever name or description, . . . is prohibited; and whoever is concerned therein, directly or indirectly, by making, writing, printing, advertising, purchasing, receiving, selling, offering for sale, giving away, disposing of, or having in possession with intent to sell or dispose of, any ticket, certificate, share or interest therein, slip, bill, token, or other device purporting or designed to guarantee or assure to any person or to entitle any person to a chance of drawing or obtaining any prize or thing of value to be drawn in any lottery, policy, policy lottery, policy shop, scheme, or device of chance of whatever name or description; . . . or who in any manner aids therein, or is connected therewith, shall be punished by a fine of not less than $10, nor more than $1,000, to be recovered by complaint or indictment to the use of the county, and he may further be punished by imprisonment for 30 days on the 1st conviction; 60 days on the 2nd conviction, and 90 days on the 3rd conviction.'

The contentions of the respondents may be summarized as follows: The indictments are insufficient because

(1) Under the statute a lottery cannot be regarded as an act injurious to public morals;

(2) The indictments cannot be upheld as common law conspiracies because of insufficiency as to acts alleged;

(3) The indictments are defective because the legislature did not intend to make a felony out of a conspiracy to commit a misdemeanor; and further, the conspiracy statute relates to crimes punishable by imprisonment in the State prison and, therefore, has no application to misdemeanors;

(4) Conspiracies to operate lotteries are in and of them-

selves violations of the lottery statute under the language thereof and accordingly cannot be punishable under the conspiracy statute;

(5) All the indictments except one are defective for failure to set forth that the acts which were to be the purposes of the conspiracies were to take place in the State of Maine.

With reference to the contention that a lottery cannot be regarded as injurious to public morals, comment is hardly necessary.

Though lotteries in years past were at times and for special purposes permitted or regulated by law, there is now practical unanimity of legislative and judicial thought as expressed in statutes and decisions, that lotteries are public nuisances, subversive of morals, and contrary to the interests of society and of the state and nation. This is but the expresssion of the public conscience as formulated into law.

As summed up in 34 Am. Jur., Lotteries, §19:

> "experience demonstrated the evil tendency and effect of such schemes and the need for public control and regulation."
>
> "It is generally recognized that laws for the suppression of lotteries are in the interest of the morals and welfare of the people of the state, and are therefore a legitimate exercise of its police powers."

Scathing is the denunciation of the United States Supreme Court, written in 1849, in *Phalen* v. *Virginia*, 8 Howard 163, 49 U. S., 163, 168, 12 L. Ed., 1030, as follows:

> "The suppression of nuisances injurious to public health or morality is among the most important du-

> ties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infects the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

This comment was quoted with approval in 1897 in *Douglas* v. *Kentucky*, 168 U. S., 488, 18 S. Ct., 199, 42 L. Ed., 553. It is as apt to present conditions as it was on the former occasions.

As to the second contention, it appears to be predicated upon a hoped-for finding sustaining the first claim that a conspiracy to engage in maintaining and operating lotteries is not against public morals, and that the indictments must therefore be sustained, if at all, as alleging a conspiracy at common law. Having found against the respondents on the first issue, it is unnecessary to consider or discuss the second, except to say that it is without merit in any event.

Regarding the third contention, it is claimed that by means of the conspiracy statute the state seeks to convert a misdemeanor under the lottery statute, into a felony. It is also urged that the conspiracy statute contains a provision to the effect that a combination "to commit a crime punishable by imprisonment in the state prison" is a conspiracy, and hence the statute was intended to have application only to such substantive offenses as were felonies. Examination of the conspiracy statute clearly negatives any such intention. The clause cited is but one of several offenses specifically denominated. True it is that a wide discretion is given to the court as to punishment, and undoubtedly because of the wide range of criminal turpitude which may be experienced in the various sorts of conspiracies. So, in the present

case, we find the aggregate sentences against Pooler to be $500 in fines and three months' imprisonment; against Caron $350 in fines and two months' imprisonment; and against Labbe $250 in fines and two months' imprisonment. The statute says "shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 10 years." In the cases here considered, the trial court imposed sentences applicable to the grade of misdemeanors. The court is properly given the power to make the punishment fit the crime.

Legislatures and courts have long recognized that a confederacy or conspiracy to effect criminal objects, creates additional power to cause injury, and is more sinister and subversive of public morals than the commission of the crime itself by a single individual. 11 Am. Jur., Conspiracy, §§6, 9.

In *Clune* v. *United States*, 159 U. S., 590 at 595, 16 S. Ct., 125, 40 L. Ed., 269, the Court said:

> "A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan* v. *Wilson*, 127 U. S., 540, 555. The power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each."

The combination of two or more persons by concerted action to commit a crime, whether it be of the grade of a felony or only of a misdemeanor, is an indictable offense

made punishable by the conspiracy statute. *State* v. *Vermette,* 130 Me., 387, 156 A., 807.

The next contention is that the language of the lottery statute is all-inclusive as to participants in lotteries as it provides that "whoever is concerned therein, directly or indirectly," "or who in any manner aids therein, or is connected therewith, shall be punished . . ." Argument is that this is tantamount to the offense described in the conspiracy statute. The lottery statute, however, is directed against persons acting individually. The conspiracy statute is designed to provide punishment for a combination of persons acting in concert to accomplish an illegal object. The reason for the legislation has heretofore been pointed out. *Clune* v. *United States,* supra. The elements of proof may be essentially different and the crime of conspiracy more reprehensible.

Upon the final proposition that all but one of the indictments are defective for failure to set forth that the acts which concerned the lotteries were to take place in this jurisdiction, contention rests upon the representation that after the allegation of conspiracy at Waterville, the purpose thereof is alleged as follows: "and to receive, sell and offer for sale lottery tickets," without averment of the place where these acts were to be performed.

It is to be borne in mind, however, that, as stated in *State* v. *Parento,* 135 Me., 353, 197 A., 156, 157, in quoting from leading cases in our own jurisdiction:

> "The conspiracy is the gist of the indictment, and though nothing be done in prosecution of it, it is a complete and consummate offense, of itself." *State* v. *Ripley et al,* 31 Me., 386, 388.
>
> ". . . the gravamen of conspiracy is 'combination,' 'concerted action' and 'unlawful purpose'." *State* v. *Trocchio et al.,* 121 Me., 368, 375.

"If the conspirators carry out, or attempt to carry out the object of the conspiracy, that fact may be alleged in aggravation of the offence, and given in evidence to prove the conspiracy." *State* v. *Mayberry*, supra, page 238.

". . . overt acts are laid merely as evidence of the principal charges." *State* v. *Murray et al*, 15 Me., 100, 103."

The distinction which the respondents attempt to set up in the present case is that a lottery is not an offense at common law, and therefore a conspiracy to maintain and operate a lottery must be alleged to be designed to become effective in this state or in some state which, by statute, makes lotteries unlawful.

Although it has been noted that in most, if not all, jurisdictions lotteries are now prohibited by statute, yet the ingenuity of counsel suggests that, as our Court does not take judicial notice of the statutory law of other states, it cannot be assumed that the respondents did not intend to maintain a lottery in some state where it might be lawful. If there be such a state, then, say counsel for the respondents, the indictments have not negatived an intent to carry on a legal project in that particular jurisdiction.

As the conspiracy is alleged to have been committed in this state, and is made by statute a criminal offense therein, it would appear that no refinement of pleading should make it necessary to negative a purpose to commit overt acts in some other jurisdiction where the offense was not prohibited.

A case directly in point is *Commonwealth* v. *Dana*, 2 Met. 329 (43 Mass.), decided over a century ago, and which appears never to have been questioned, concerned an indictment for unlawful possession of lottery tickets, with intent to sell them. Objection was that there was no allegation of

intent to sell in that Commonwealth. As a matter of fact, the tickets were a part of a lottery for the benefit of schools in Rhode Island and authorized by its legislature, and a copy of the act was introduced in evidence.

In the indictments under consideration, there is allegation that the acts charged were "in violation of the laws of the State of Maine." In the Massachusetts case, the statute prohibited the sale of tickets "not authorized by law."

The Court in the above cited case said:

> "The laws of Rhode Island, or any other State, have no force in this Commonwealth . . . . The de-defendant is charged with an offense committed in this Commonwealth, in violation of the Rev. Sts., c. 132, §§1, 2. And according to the construction we give to that statute, it would be no defence to prove that the tickets found in the defendant's possession, with the intent charged in the indictment, were duly issued by the authority of the State of Rhode Island."

See also the supplemental opinion by Shaw, C. J. in the same case, but arising from a subsequent motion in arrest of judgment. In this opinion, the Court further elaborated as follows:

> "The objection to the first and several other counts in the indictment is, that although it alleges, that the defendant at Boston, &c. unlawfully had lottery tickets in his possession, with an intent to sell the same, it does not allege an intent to sell the same within this Commonwealth; and the question is, whether such an averment is necessary . . . .
>
> "Here the indictment charges an unlawful possession of the lottery tickets, with the averment of an

intent to sell generally, including of course, as well this Commonwealth, as all other places. It is, in this respect, general and unlimited."

The Court then proceeds to point out if the act intended to be done is not criminal in itself, but only made so by statute, then if it should appear that the overt acts were to be carried out in a state where lawful, it would then become a question of whether the proof supported the indictment.

"It appears to the court, therefore, that the question is rather, whether the evidence is sufficient to maintain the indictment, than whether the indictment is sufficiently certain."

". . . the intent to sell generally, being averred in the indictment, in the words of the statute, it is sufficient, although it should be held, on trial, that proof of an intent to sell in another State only would not bring the case within the statute so as to warrant a conviction."

It is further to be noted that the foregoing case concerned an indictment for the substantive offense of having in possession lottery tickets, with intent to sell them. In the instant cases the indictments are for conspiracy to maintain a lottery, and that conspiracy is alleged to have been formed in Waterville in this State.

Of similar import is the opinion in *Thompson et al* v. *State,* 106 Ala., 67, 17 So., 512 at 516, which treating on conspiracies and their essential elements, says:

"The combination and agreement are of the essence, the gist of the offense; and as a distinct, sub-

stantive offense, it is then committed. The place at which it is intended to commit the felony is not material. It is the law of the place where the conspiracy is formed which is broken."

In 31 Ann. Cas. (1914 A), p. 632, is an annotation following the case of *Hyde* v. *United States*, 225 U. S., 347, 32 S. Ct., 793, 56 L. Ed., 1114, Ann. Cas. 1914 A., 614, in which many cases are collected which give emphasis to the rule that as the gravamen of criminal conspiracy is the unlawful confederation, a prosecution may be had where the conspiracy is formed, though the unlawful design of the conspirators is consummated by overt acts in another jurisdiction. Included are cases from England, Canada, the United States Supreme and Federal Courts, and the courts of various states. This rule obtains whether or not an overt act must be alleged in the indictment.

The general claim was also made that the indictments offended Article VI of the Bill of Rights of the U. S. Constitution and Article I, §6 of the Constitution of Maine, both to the effect that the accused have the right to be informed of the nature and cause of the accusation. To this, if not specifically dealt with already, it may now be categorically stated that the allegations in the indictments showed the jurisdiction of the trial court and were set forth with such certainty as to enable the accused to plead convictions thereunder in bar of another prosecution for the same offense.

There is also presented for consideration a question apart from all other contentions and relating only to one indictment involving the respondent, Pooler, and one Fitch, and numbered 137 on the docket of the Court below. The word "intent" does not appear after the word fraudulent in the indictment. The phrasing is as follows:

"Feloniously did combine, conspire and agree together, with fraudulent, wrongfully and wickedly to do a certain illegal act injurious to the public morals to wit, did then and there conspire and agree together with such intent . . . ."

It is necessary under the statute to allege fraudulent or malicious intent. It was not done in this instance. In this connection, the later phrase "such intent" refers to an antecedent use of the word "intent" and means the same intent as previously mentioned. Words & Phrases, Permanent Ed., under definitions of the word "such." When, however, there is no antecedent, it cannot under the rules of criminal pleading be supplied by intendment, construction, implication or argument. The charge must be laid positively, and not informally or by way of recital merely. *State* v. *Paul,* 65 Me., 215; *State* v. *Peterson,* 136 Me., 165, 4 A., 2d. 835.

The docket entries in the particular case show that the case was closed as to the other respondent, who filed no demurrer, and as to Pooler, was placed on file without sentence. In the case Law Docket No. 610, Superior Court Docket No. 137, exceptions are sustained and the indictment adjudged insufficient.

In all other cases the enteries will be

Exceptions overruled.
Indictments adjudged sufficient.

MARGARET L. HAWKINS,
ALLEGED DEPENDENT DAUGHTER OF
NELSON HAWKINS
vs.
PORTLAND GAS LIGHT CO., ET AL.

Cumberland. Opinion, August 16, 1945.

Workmens Compensation Act. Scope of Employment. Burden of Proof.

In order to be entitled to compensation under the Workmens Compensation Act an employee must have received "a personal injury by accident arising out of and in the course of his employment." To arise out of the employment an injury must have been due to a risk of the employment.

The burden of proof rests upon the claimant to show facts necessary to establish the right to compensation.

ON APPEAL.

The plaintiff sought an award of compensation upon the ground that the injury causing the death of her father arose out of and in the course of his employment as a foreman working for the defendant company. Her father was killed by a crazed United States soldier. Just prior to the shooting, Hawkins was in the office of the Company, which was located near the waterfront in Portland. At hearing a noise which he thought might be a rifle shot, he and two other men who were in the office went out a gate in the wall which surrounded the Company plant and stepped through into the darkness; and Hawkins was killed by a shot fired by a soldier. There was no evidence that there was any menace to the Company plant or to any employee or that it was incumbent upon him to unlock the gate or go out of the Com-

pany premises. Hearing was had before a Commissioner of the Industrial Accident Commission, who ruled that the petition be dismissed; and the Justice of the Superior Court affirmed the decision. The plaintiff appealed. Appeal dismissed. Decree affirmed. The case fully appears in the opinion.

Edward B. Perry, for the plaintiff.

Forrest E. Richardson,

Robinson, Richardson & *Leddy,* of Counsel, for the defendants.

SITTING: STURGIS, THAXTER, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. Nelson Hawkins was killed while in the employ of the Portland Gas Light Co., by a shot from a revolver in the hands of a crazed United States soldier. His daughter, Margaret L. Hawkins, alleged dependent, sought an award of compensation upon the ground that the injury causing the death of her father arose out of and in the course of his employment as a foreman working for the defendant Company.

Hearing was had before a Commissioner of the Industrial Accident Commission. So far as material to the present issue, his findings of fact were as follows:

> "Hawkins was on the shift whose hours of employment were from three to eleven o'clock in the evening. At some time between seven and seven-thirty, Hawkins, with two other employees, was in the front office of the plant. This plant was enclosed by a board fence some six feet high, with barbed wire strung on its top. The office was close to the fence on the Commercial Street side, and not far from the

gate. The gate, as high as the fence, also had barbed wire on its top. The only means of entrance to the plant or its property was either through the gate or over the fence. The gate was closed and locked.

As the three men were together there in the office they heard a noise which might, they thought, have been either the back-fire from an automobile or a rifle shot. All three proceeded leisurely toward the gate, apparently with no one having any anxiety that the Company's property was in any way endangered. Hawkins unlocked the gate, opened it, and the three men stepped through into the darkness.

At the time, the waterfront was being guarded by colored troops of the United States Army. Such troops were guarding the railroad right of way which adjoined the gas company's property on the Commercial Street side. As the eyes of the three men became accustomed to the darkness, they saw a colored soldier standing with his rifle pointed toward them. The soldier muttered something that was unintelligible to the men, then said distinctly, "I mean you," and fired a shot from his rifle. The shot killed Hawkins and wounded one of the other men. The soldier, as it afterward developed, had already shot one soldier, and, after killing Hawkins, was to shoot another soldier."

The Commissioner then stated the resulting issue thus:

"Did Nelson Hawkins' death occur under such circumstances as to make it compensable under the Workmen's Compensation Act? Was it injury "arising out of and in the course of his employment" with-

in the meaning of that phrase as used in Section 8, Chapter 55, 1930 Revised Statutes?"

The Commissioner ruled as follows:

> "This assault by the crazed soldier did not occur because of Mr. Hawkins' employment. Mr. Hawkins was not exposed to the danger of such an assault any more than a member of the public generally who might have been in the neighborhood at the time the soldier was shooting so promiscuously. The evidence does not warrant a finding either that Mr. Hawkins was in the act of protecting his employer's property or that such property was in fact endangered, or even that Mr. Hawkins thought it was. He was not fired upon because he was an employee of the gas light company."

The petition for award of compensation was dismissed, and the case is before the Court upon an appeal from the subsequent decree of a Justice of the Superior Court denying compensation.

The familiar rule of the statute that the decision of the Commissioner in the absence of fraud, upon all questions of fact, shall be final, is not challenged by the appellant, but it is claimed that the statute has been misconstrued and that the Commissioner was in error in making application of the legal principles to the facts as found, and further that he did not apply the proper rule as to the burden of proof.

In his discussion of the law the Commissioner cited *McNicol's Case*, 215 Mass., 497, 102 N. E., 697, L. R. A., 1916 A., which since 1913 has been an expository guide to many courts, including our own, in the interpretation of

the particular requirement of the statute here involved. Other authorities referred to in our own jurisdiction were *Fournier's Case,* 120 Me., 236., 113 A., 270, 23 A. L. R., 1156; *Gray's Case,* 123 Me., 86, 121 A., 556; and *Weymouth's Case,* 136 Me., 42, 1 A., 2d., 343. *Harbroe's Case,* 223 Mass., 139, 111 N. E., 709, was cited for the reasoning of the court upon a similar factual situation. The decision also showed study and consideration of the cases annotated in 15 A. L. R., 595, 21 A. L. R., 760, 29 A. L. R., 442, 40 A. L. R., 1127, 72 A. L. R., 114 and 112 A. L. R., 1262.

Reams have been written undertaking to define and apply the simple, expressive requirement of the statute that, in order to be entitled to compensation, an employee must have received "a personal injury by accident arising out of and in the course of his employment." The Commissioner decided that this accident did not arise out of the employment. The inescapable connotation of the phrase is that the injury must have been due to a risk to which the employe was exposed because employed by the defendant. *Mailman's Case,* 118 Me., 172, 106, A., 606. There must be some causal relation between the conditions under which the employee worked, and the injury which he received. *Westman's Case,* 118 Me., 133, 106 A., 532. The causative danger must be incidental to the character of the employment. *Fogg's Case,* 125 Me., 168, 132 A., 129. To arise out of the employment, an injury must have been due to a risk of the employment. *Wheeler's Case,* 131 Me., 91, 159 A., 331.

The rational mind must be able to trace the resultant injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery. *Madden's Case,* 222 Mass., 487, 495, 111 N. E., 379, 383, L. R. A., 1916 D. 1000.

So far as appears in the evidence, Hawkins had no duty to perform when he went with the other men outside the

place of his employment. It was not incumbent upon him at the time to unlock the gate separating the premises of his employer from the street and the railroad tracks. There is no intimation that there was any menace to his employer's establishment or to any employee thereof. Even if he realized that it was the sound of shooting which he heard, it does not appear that he, entirely unarmed, could perform any useful service by leaving the premises and walking into the peril. He went out, utterly defenseless, and unwittingly made himself a target to the rifle in the hands of a soldier, who had suddenly lost his reason. There is nothing which would warrant the ruling that he expected to find any other employee, subordinate to himself, for whom he could attempt to provide protection. The causative danger must be peculiar to the work and not common to the neighborhood. *Washburn's Case,* 123 Me., 402, 123 A., 180.

Upon the issue here involved, practically all of the foregoing cases and a number of others were considered and cited more copiously in *Weymouth* v. *Burnham & Morrill Co.,* 136 Me., 42, 1 A., 2d., 343, and except for the purpose of application to the circumstances of the present case, are but a repetition of the course of the decisions of our Court relative to such issue. The risk and resulting injury did not arise out of the employment. The Commissioner was justified in so ruling upon the facts as found by him.

But the appellant urges that the Commissioner should have considered other possibilities upon the hypothesis that the burden rests entirely upon the defense to show that Hawkins was not acting within his employment at the time. Upon such assumption, it is claimed that, while the evidence shows that Hawkins went outside the premises of the defendant to investigate, it does not show the purpose of the investigation or even that that was the reason for leaving the premises. It is urged that he might have decided to ex-

ercise his responsibility under the Sabotage Prevention Act, P. L. of Maine 1941, c. 237, §8; he might have been on his way to the Libbytown holder; he might have been going to the freight shed again. These suppositions are noted, not because it was the duty of the Commissioner to consider them, but to show that they are without merit. The Sabotage Act referred to provides only that a man acting in a supervisory capacity may stop any person found on any premises to which entry without permission is forbidden, and may detain him for the purpose of demanding his name, address and business in such place. By no stretch of the imagination could Hawkins be found to have been undertaking to detain an intruder on the premises of his employer to ascertain his business. As to the Libbytown holder, which is decribed in the evidence as a gas receiver or tank some distance away from the premises, the only witness who testified concerning Hawkins' duty in that respect, answered explicitly in the negative when asked whether Hawkins was on his way there when the shooting incident occurred; and again, as to the freight shed, that he had just returned therefrom with a bill of lading. The same witness further testified that the action of the soldier when the three men appeared was absolutely deliberate and unprovoked, and so far as he knew, there had never been any trouble between any of the negro soldiers and any of the employees. Thus the surmises and conjectures of counsel find no support in the evidence.

The ruling, however, is firmly established in this State since the earliest construction of the statute relating to workmen's compensation, and which Act became operative in this State January 1, 1916, that the burden rests upon the claimant to prove the facts necessary to establish the right to compensation. *Westman's Case,* supra; *Mailman's Case,* supra; *McNiff* v. *Old Orchard Beach,* 138 Me., 335,

25 A., 2d. 493. Attention is also called to the clarification of the rule relating to findings of fact by the Commissioner against the claimant as set forth in *Robitaille's Case,* 140 Me,. 121, 34 A., 2d. 473.

Appeal dismissed.
Decree affirmed.

RE EARLE TOBEY, INTERVENOR IN HOMER E. ROBINSON, BANK COMMISSIONER, SUCCESSOR TO THOMAS A. COOPER, AS BANK COMMISSIONER

vs.

AUGUSTA TRUST COMPANY ET AL.

Kennebec. Opinion, August 22, 1945.

Banks and Banking. Discretion of Court.

When the intervenor had failed to meet the requirement of his agreement with the receivers of the bank for the purchase of certain real estate and the realty was resold, his petition for the revocation of the order authorizing the receivers to resell the property and for cancellation of the deed was properly dismissed.

There was no abuse of discretion by the sitting justice in dismissing the petition of the intervenor.

ON APPEAL.

Petition by intervenor praying revocation of an order of court authorizing the receivers of the Augusta Trust Company to sell certain real estate to one, Poulin, and for cancellation of the deed to him. The intervenor had contracted with said receivers to purchase the land in question and had entered into possession. He defaulted in his payments and failed to carry out the agreements of his contract. The receivers under order of court then resold the property to Poulin. Petition dismissed. Appeal by intervenor. Appeal dismissed. The case fully appears in the opinion.

Harvey D. Eaton, for intervenor.

John E. Nelson, for receivers of Augusta Trust Company.

Jerome G. Daviau, for appellee Poulin.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. Earle Tobey, the intervenor in this case, filed a petition praying for the revocation of an order dated June 14, 1943, authorizing the receivers of the Augusta Trust Company to sell to Joseph Poulin, or his nominee, a certain parcel of real estate for $1,150 plus two years taxes, and also that the deed issued in pursuance of said order should be cancelled and delivered up. From a decree dismissing the motion, the intervenor has appealed.

The sitting justice in his findings has set forth the facts in detail. Except for its length, we might well adopt his opinion as that of this court. The intervenor entered into an oral contract with the receivers of the Augusta Trust Company for the purchase of a parcel of real estate and entered into possession of it. He defaulted in his payments and after repeated attempts by the receivers to persuade him to carry out his contract they, under an order of court, sold the property to one Joseph Poulin. Tobey brought a bill in equity against Poulin alleging fraud on the part of Poulin in negotiating with the receivers for such sale and in accepting the deed of the property. A justice of the Superior Court sustained the bill; but on appeal this ruling was reversed on the ground that the proceeding constituted a collateral attack on the decree of the court ordering the sale. *Tobey* v. *Poulin,* 141 Me., 58, 36 A., (2d), 826. In its opinion, this court stated the facts as to which there is no real dispute and then made the following comment on them:

> "As it is clear, in the case here made, that at that time the purchaser was far in arrears in his payments and indicated neither ability nor intention to cure his de-

> faults, no reason for permitting or directing him to complete his purchase is made to appear and to order a resale would seem to have been an exercise of sound discretion and good judgment."

The present proceeding is an attempt to attack directly the decree authorizing the sale. The sitting justice had this to say with respect to the default of Tobey:

> "It is to be noted that the record shows the receivers were engaged in final liquidation of the Augusta Trust Co., that they had many foreclosed properties to sell, that Tobey had substantially failed to meet the requirements of the arrangement made with the receivers, that he had the benefit of possession of the premises for two and one-half years, was greatly in arrears on monthly payments, had not made the principal installment, had failed to pay taxes and had committed strip and waste on the timber lot. He still owed all but about $200 of the original purchase price."

The record shows not only no abuse of discretion by the sitting justice in dismissing the intervenor's motion but on the contrary that his decision was clearly correct.

Appeal dismissed.

CLARISSA D. deMENDOZA
APPELLANT FROM DECREE OF JUDGE OF PROBATE
IN RE ESTATE OF ALFRED WANDKE.

Androscoggin. Opinion, August 22, 1945.

Wills. Revocation by Operation of Law.

The manner in which a will may be revoked is prescribed by statute. R. S. 1944, Chapter 155, Section 3.

By statutory provision a will may be revoked "by operation of law from subsequent changes in the condition and circumstances of the maker."

A will is not revoked by the subsequent marriage of a testator and the birth of a child.

ON EXCEPTIONS.

The appellant, Clarissa deMendoza, formerly Clarissa D. Wandke, was married to Alfred Wandke and by him had two children. Wandke also had a child by a former marriage. Wandke's will, which was made previous to his marriage to the appellant, was allowed by the Probate Court. The appellant filed a petition in the Probate Court praying that the decree allowing the will be vacated and annulled on the ground that the will was revoked by his subsequent marriage and the birth of the first child of that marriage. The Judge of Probate refused to vacate the decree allowing the will. Appeal was taken to the Supreme Court of Probate by which court the appeal was dismissed. The appellant filed exceptions. Exceptions overruled. Decree affirmed. The case fully appears in the opinion.

Crockett & Crockett, for the appellant.

Carl F. Getchell, for the appellee.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. The appellant, Clarissa D. deMendoza, formerly Clarissa D. Wandke, was married to Alfred Wandke of Lewiston on September 19, 1935. By him she had two children. He died February 14, 1941, leaving the appellant and the two children surviving, also a child by a former marriage. His will, drawn June 16, 1932, three years before his second marriage, was allowed by the Probate Court for the County of Androscoggin on December 3, 1941, and Harold L. Redding was appointed administrator d.b.n.c.t.a. on February 14, 1943 on the resignation of the executor qualifying under the will. On February 29, 1944 the appellant filed a petition in the Probate Court praying that the decree allowing the will should be vacated and annulled. The basis for such prayer was that the will drawn before marriage was revoked by the marriage coupled with the birth of the first child. The judge of probate declined to vacate the decree allowing the will, and from this ruling an appeal was taken to the Supreme Court of Probate which dismissed the appeal. From this ruling the case is before us on exceptions.

The question before us is one of law. Does marriage coupled with the birth of a child revoke a will made prior to marriage?

Our statutes, Rev. Stat. 1930, Ch. 88, Sec. 3, now Rev. Stat. 1944, Ch. 155, Sec. 3, prescribe the manner in which a will may be revoked. Among other methods therein enumerated, it is provided that a will may be revoked "by operation of law from subsequent changes in the condition and circumstances of the maker." And counsel call to our attention the rule of the common law that marriage and the birth of a child revoked a will.

Conceding that such is the rule at common law, it does not now apply in this state, and marriage and the birth of a child

do not constitute such a change in the condition and circumstances of the maker of a will as to result in a revocation of it. The reason for the common law rule was that the presumption would be that the testator did not intend that the will, which made no provision for those nearest and dearest to him, should remain in force. But in view of the provisions of Rev. Stat. 1930, Ch. 88, Sec. 9, and Ch. 89, Sec. 14, now found in Rev. Stat. 1944, Ch. 155, Sec. 9, and Ch. 156, Sec. 14, making provision for a wife or children not provided for under a will, the reason for the rule no longer exists. As was said in *Emery, Appellant,* 81 Me., 275, 17 A., 68, 69, "when the reason of any particular law ceases, so does the law itself." The reasoning of the court in the *Emery* case is peculiarly applicable here. At common law the will of a feme sole was revoked by her marriage because at common law marriage destroyed her testamentary capacity. The case holds that the common law rule was abrogated when the legislature by statute provided that a married woman could make, or alter, or revoke a will.

In permitting his will to stand, the testator in the instant case may well have had in mind the fact that his wife and children would by reason of the statute be taken care of. Why should there be a revocation of the entire will under such circumstances? As the reason for the old rule no longer exists, the rule itself is abrogated.

Exceptions overruled.
Decree affirmed.

MARGARET J. COURTENAY

vs.

WILFRID GAGNE ET AL.

York. Opinion, August 25, 1945.

Referees. Pleading and Practice.

In reference of cases by rule of court, findings of fact honestly made by the referee are final provided there is supporting evidence.

There is a clear distinction between the verdict of a jury and the award of a referee. Upon a motion to set aside a jury verdict the court is called upon to pass on the question of whether such verdict is against the evidence. In respect to the finding of a referee the question for the court is whether there is any evidence of probative value to support the finding.

In cases heard by referees no remittitur can be ordered. If exceptions to acceptance of the report of referees are sustained, the authority of the Supreme Judicial Court goes only to remanding the case to the Superior Court, where, in the discretion of the presiding justice, the reference may be stricken off and the case heard before a jury, recommitted to the same referees, or, with the consent of the parties, referred to new referees.

ON EXCEPTIONS TO ACCEPTANCE OF REPORT OF REFEREES.

Action for damages for personal injuries suffered when the bus in which the plaintiff was a passenger was struck by an oil truck. The case was referred by agreement of the parties with the approval of the court. The referees awarded damages to the plaintiff. The only objection made by the defendants was that the award was grossly excessive and they took the case to the Law Court on exceptions. Exceptions overruled. The case fully appears in the opinion.

Waterhouse, Spencer & Carroll, for the plaintiff.

Robinson, Richardson & Leddy,

Willard & Willard, for the defendants.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. Exceptions to acceptance of report of referees. The plaintiff, a young woman, was awarded $5,312.45 as damages for personal injury as result of an automobile accident. The plaintiff was a passenger in a public bus. When a stop was made to take on another passenger, the bus was struck from the rear with great force by an oil truck operated by a servant of the defendants. Action brought in the Superior Court was referred by agreement of the parties and with the approval of court. The right of exceptions as to questions of law was reserved in accordance with the rule of Court XLII. While the question of whether the driver of the oil truck was at the time the servant of the defendants and engaged in the business of his employers was originally raised, it was waived. Liability is not now in issue, and the only objection is that the award was grossly excessive. The rule of Court mentioned above reads:

> "In references of cases by rule of court, the decision of the referee upon all questions of law and fact shall be final unless the right to except as to questions of law is specifically reserved and so entered on the docket, but the referee may find the facts and report questions of law for decision by the court."

The exception presented must necessarily rest upon the claim that the amount of the award constituted an error of law.

The limitations upon the power of this Court to review the record in any case decided by referees, have been clearly defined. There was a period in the judicial history of this State

when referees were made the sole judges of both law and fact, in the absence of fraud, prejudice or mistake. When the right of exceptions is reserved, the rule is still the same with regard to facts.

The rule and the reasons therefor are well stated in *Staples* v. *Littlefield,* 132 Me., 91, 167 A., 171, as follows:

> "Questions of fact once settled by Referees, if their findings are supported by any evidence, are finally decided. They and they alone are the sole judges of the credibility of witnesses and the value of their testimony. The parties to this controversy submitted their cause to a tribunal of their own choosing. To it they entrusted, without limitation, the power to decide questions of fact. Having chosen to go to that tribunal, they cannot now be heard upon the merits by this Court so long as there was produced before the Referees any evidence upon which could be based a decision."

In this respect there is a clear distinction between the verdict of a jury and the award of a referee. Upon a motion to set aside a verdict, the Court is called upon to pass on the question of whether such verdict was against the evidence and manifestly against the weight of the evidence. Upon this award, as the question is one of law, it is whether there is any evidence, or as stated in some decisions, any evidence of probative value to support the finding.

> "In reference of cases by rule of court, decision of fact, honestly made by the referee, in the proceedings, is final, provided there is supporting evidence. *Francoeur* v. *Smith,* 132 Me., 185, 168 A., 781.

The only inference to be drawn from arguments of counsel in support of their exceptions is that the same rule should ob-

tain as in jury cases. In the instances cited upon the amount of damages awarded, all but one of them were jury verdicts and the other a case submitted to the Law Court on report with jury powers. In the jury cases, a remittitur was ordered in each instance. So in the cited case of *Penley* v. *Teague & Harlow Co.*, 126 Me., 583, 140 A., 374, it is apparent that the Court properly passed upon the weight of evidence when it used the expression:

> "We do feel that the damages awarded were excessive and plainly so. In such a case the sympathy of the jury might be easily aroused and even to such an extent as to warp their judgment."

Again, in the case of *Chaisson* v. *Williams*, 130 Me., 341, 156 A., 154, the Court said:

> "Excessiveness of damages, not attributable to appeals to passion and prejudice, is not regarded as an unconditional ground for setting aside the verdict, because it may be cured by remittitur."

In cases heard by referees, no remittitur can be ordered.

If the exceptions were sustained, the authority of this Court only goes to remanding the case to the Superior Court, where, in the discretion of the presiding Justice, the reference may be stricken off and the case heard by a jury, or there might be a recommittal to the same referees, or with the consent of the parties, a reference to new referees. *Chaput* v. *Lussier*, 131 Me., 145, 159 A., 851.

Evidence of the injury and its effect, past, present and prospective, was introduced before the referees from the plaintiff and a number of witnesses, including the attending physician. The defense relied entirely upon cross-examination, introducing no witness either lay or professional.

Nowhere, in exceptions or arguments, is it asserted by the defendants that fraud or prejudice on the part of the referees influenced decision.

At best, the amount awarded can be regarded only as an error of judgment. The parties agreed to submit the case to referees, and implicit in such submission is an agreement to be bound by their judgment. Even if the Court was of opinion that such error had been made, it cannot substitute its own judgment.

It is not asserted that the error in law was caused by mistake on the part of the referees. The principal element of damage, as shown by the record, is the pain and suffering of the plaintiff, both that already endured and that which is likely or probable in the future. Minor elements are the expenses already incurred and those to be anticipated. Aside from the money spent, the remaining factors are to be weighed, considered and determined by the selected tribunal. The word "mistake" used in this connection does not mean an error in judgment upon the facts, but some *unintentional* error, as for instance in a mathematical computation. *Perry* v. *Ames*, 112 Me., 202, 91 A., 931; *Pickering* v. *Cassidy*, 93 Me., 139, 44 A., 683. If there be such error, the record does not disclose what it is.

Exceptions overruled.

STATE OF MAINE

vs.

THOMAS A. CORMIER.

Aroostook. Opinion, August 27, 1945.

Automobiles. Drunken Driving. Statutes.

The statute under which the complaint in the instant case was drawn (R. S. 1930, Chapter 29, Section 88) recognizes the fact that every intoxicated driver is a menace and creates a potential danger, and is to be regarded as one who should be denied wholly the right to operate a motor vehicle while in such condition.

It is common knowledge that in this State there are many private ways on lands privately owned. These do not constitute places to which the public has a right of access but they are frequently used by pedestrians and drivers of motor vehicles, and it is apparent that the legislature intended to safeguard the right of all persons who might be endangered, without limitation to those on public ways.

ON EXCEPTIONS.

Complaint for operation of a motor vehicle while under the influence of intoxicating liquor. The sole question at issue was whether the complaint set forth any violation of law, inasmuch as it did not charge that the vehicle was operated on a public way or in a public place and that, in fact, the place described was a private driveway. The respondent demurred to the complaint. The demurrer was overruled. Respondent brought exceptions. Exceptions overruled. The case fully appears in the opinion.

George V. Blanchard,

James P. Archibald, County Attorney, for the State.

Ralph K. Wood,

Jasper H. Hone,

Scott Brown, for the respondent.

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

MANSER, J. Complaint for operation of a motor vehicle while under the influence of intoxicating liquor. The case comes up on exceptions to the overruling of a demurrer. Counsel for the State and the respondent agree that the sole question is whether the complaint sets forth any violation of law, inasmuch as it is not charged that the vehicle was operated upon a public way or in a public place, and that in fact the place described was a private driveway.

The statute, R. S. 1930, c.29, §88 (now R. S. 1944, c.19, §121), under which the complaint was drawn, and which has not been amended with regard to the particular point involved, reads as follows:

> "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs, . . . upon conviction, shall be punished . . ."

The history of this law is of value in interpretation of the provision as it now stands. When first enacted, it appeared in P. L. of 1911, c.162, §20, and then read:

> "Any persons operating a motor vehicle upon any way recklessly or while under the influence of intoxicating liquor so that the lives or safety of the public are in danger, . . . shall be punished by a fine not exceeding fifty dollars, or by imprisonment for a term of three months, or by both such fine and imprisonment."

In this act, in §1, appears for the first time a definition as to the scope of the term "motor vehicle" and as to the application of the various provisions of the statute with respect to the place of operation. It reads:

> "The term 'motor vehicle,' as used in this act shall include all vehicles self-propelled on the highway, townway, public streets, avenues, driveway, park or parkway, by motive power of whatsoever kind, namely, automobiles, . . ."

These two sections are found in the Revised Statutes of 1916, c.26, §§ 15 and 38, to precisely the same effect. No substantial change was made thereto until the codification by P. L. 1921, c.211. In this act appears a revised definition of terms. In §1, we find:

> "As used in this chapter, unless the context otherwise indicates, the word 'way' includes all kinds of public ways; . . . and words in the context of this act indicating operation or use of a vehicle refer to its operation or use upon any way or bridge in this state, including public parks and parkways."

In this codification the offense of reckless driving and that of operating a motor vehicle while under the influence of intoxicating liquor were separated into two sections. §72 provided:

> "Whoever operates a motor vehicle upon any way recklessly, so that lives or safety of the public are in danger, . . . shall be punished by a fine of not more than fifty dollars, or by imprisonment for a term not exceeding three months or by both fine and imprisonment."

§74 provided:

> "No person shall operate or attempt to operate a motor vehicle when intoxicated or at all under the influence of intoxicating liquor or drugs. Whoever violates the foregoing provision shall be punished upon conviction by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment for not less than thirty days nor more than one year, or by both fine and imprisonment."

Thus is demonstrated the developing consciousness of the greater menace of drunken driving as compared with reckless driving, and the intended deterrent effect of legislation.

Four years later the Court in *State* v. *Conant*, 124 Me., 198, 126 A., 838, 839, considered an indictment based on said §74 of operation of a motor vehicle by the respondent while intoxicated. The indictment included no mention of any way or place except that it was in the city of Portland. The respondent demurred. The Court sustained the demurrer on the ground that the statute must be read in the light of the provision of §1 of the act, and held that the operation of a motor vehicle while the operator was intoxicated was declared to be a crime only when the act was committed upon a way or bridge, including public parks and parkways, and the Court said:

> "So tested the indictment fails. Clearly by its terms it may include an act which is not punishable; as, for example, the operation or attempt to operate a motor vehicle by an intoxicated man within his own dooryard or on a private driveway on his own premises. In neither case would the act be penal."

At the next session of the legislature, said §74 was repealed

(See c.211, P. L. 1925) and in place thereof a new paragraph was substituted, reading in pertinent part as follows:

> "No person shall operate or attempt to operate a motor vehicle upon or along any way, bridge, public park or parkway in this state, when intoxicated or at all under the influence of intoxicating liquor or drugs; and no person shall operate or attempt to operate a motor vehicle in any other place where the life or safety of any other person is endangered, when intoxicated. . . ."

In the new law it will be noted that words defined in §1, to wit, way, bridge, public park, or parkway, were incorporated and then was added language that had not appeared in any previous statute, whereby drunken driving was prohibited "in any other place where the life or safety of any other person is endangered." In the new section the legislature did not say, "in any other public place." It had stated the public places it had in mind and then added, "or in any other place."

It would appear that the decision in the *Conant* case, then so recently promulgated, was in the minds of the legislators, and that the change was made for the very purpose of affording protection to the lives and safety of the men, women, and children of this State wherever they might be, whether on public or private ways or at any other place where drunken driving would constitute a menace. It was conscious of the fact so well stated in *State* v. *Taylor,* 131 Me., 438 on page 441, 163 A., 777 on page 778, that

> "The condition that makes a driver, under the influence of intoxicating liquor or drugs, a menace to the travelling public, is not only a lessening of his mental alertness, or an exhilaration thereof, but as well any weakening or slowing up of the action of his motor nerves, interference with the coordination of sensory

and motor nerves, which may cause sluggishness where quickness of action is demanded."

The legislature realized that every motor vehicle at best is inherently a machine of dangerous propensities whose operation should not be permitted to one even at all under the influence of intoxicating liquors at any place "where the life or safety of any other person is endangered."

Before the change of the law in 1925, the statute as construed in the *Conant* case permitted an operator, however drunk, to drive his motor vehicle with impunity except on public ways and bridges and in public parks or parkways. It is apparent, however, that the legislature appreciated that the menace was the same to people using private ways, driveways and any other places where motor vehicles might be operated. These people should be protected against the intoxicated driver of a motor vehicle. They should not lose the benefit of that protection the instant they step from the line of a public way into a private way or driveway. The legislature evidently intended to safeguard the rights of all persons who might be endangered without limitation to those on public ways or even confining the protection to places where the public had the right of access. The very purpose of operating a motor vehicle is to go somewhere. Even assuming that a man, realizing his condition, decided to drive his car into his own garage, yet the law, as we construe it, intended to protect his child or any other person who might be upon the driveway, even to the stranger within his gates. We are not dealing with the rights of litigants on the civil side of the court, but with a criminal statute.

It is common knowledge that, in this State, there are many private ways on lands privately owned. These do not constitute places to which the public has a right of access, but they are frequently used by pedestrians and drivers of motor vehicles.

Following the change of 1925, amendment was made by P. L. 1929, c.327, §17, both as to reckless driving and as to drunken driving, and as further revised, appear in R. S. 1930, c.29, §§ 86 and 88. As to reckless driving it provided:

> "Whoever upon any way, or in any place to which the public has a right of access, operates any vehicle recklessly or in a manner so as to endanger any person or property shall be guilty of reckless driving";

The distinction in the revision as to drunken driving is apparent and we repeat here that section reads:

> "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquors or drugs, upon conviction, shall be punished . . ."

Eliminated entirely from requirement of proof in the statute under consideration, is the element of danger to lives or safety of others.

Evidently the intoxicated driver is to be regarded as one who should be denied wholly the right to operate a motor vehicle while in such condition. It recognizes the fact that every intoxicated driver is a menace and creates a potential danger, and it relieves the State from proving that actual danger existed at the time of arrest.

The statute relating to the operation of a car while intoxicated is not now affected by the definitions contained in §1 of the act. The language is complete and sufficient of itself and is in no way dependent or governed by the definitions given in §1 of the act.

Exceptions overruled.

CONCURRING IN RESULT

MURCHIE, J. I concur in overruling the exceptions and in those declarations in the opinion which indicate that motor vehicles operated by intoxicated persons are hazardous on driveways and private ways as in public places and that the drunken driving law is not curtailed in its field of operation by definitions appearing elsewhere in the statutes. The complaint charges the respondent with "driving" his automobile "on a certain driveway" leading out of a public highway. Webster defines "driving" as "handling an automobile or other vehicle on the road" or "on a journey" and "driveway" has been held by this Court, approving the definition given in the Standard Dictionary, to be "a road for driving," designating an ownership which is private but not exclusive. *Young* v. *Braman*, 105 Me., 494 at 498, 75 A., 120 at 121. The allegations are sufficient to charge the respondent with going "somewhere," to quote a single word from the opinion of Mr. Justice Manser which seems to me to mark the bounds beyond which the drunken driving law was not intended to be effective.

This is distinguishable from driving a car from a dooryard into a garage within its limits and it is the construction of R. S. 1930, Chap. 29, Sec. 88, as amended, which declares such "driving" criminal, if done by one "realizing his condition" (whatever that may mean), from which I feel constrained to dissent. It is based on contrasting the words "any other place" and "any other public place," without any indication that such a contrast was in the legislative mind. There is nothing in any legislative record or debate to suggest that it was and much of contrary effect in the changing phraseology of the statute from time to time.

The words "any other place" were not written into the law in 1929. They appeared first in P. L. 1925, Chap. 211, enacted after the decision in *State* v. *Conant*, 124 Me., 198, 126 A., 838, was handed down. The closing paragraph of the opinion with

its reference to a "dooryard" and a "private driveway" is quoted by Mr. Justice Manser. Earlier statement in it is that:

> "The operation of . . . a motor vehicle when the operator is intoxicated . . . is . . . a crime only when . . . committed upon a way or bridge, including public parks and parkways."

The offense charged was that the vehicle was operated "at * Portland" without specification that it was on any way either public or private. Assuming that the particular words were used to offset this decision, the qualification carried in the words "where the life or safety of any other person is endangered" discloses that it was the language quoted above rather than that dealing with dooryards against which they were aimed. The amended law covered travel routes and "other places" of the same type or species, i.e., where the presence of travelers might be anticipated. The principle of *ejusdem generis* was applied by express legislative language and not left for judicial construction. A legislative intention to extend the law to all places, public or otherwise, used frequently by pedestrians and vehicles is apparent but it is obvious that there was no intent to reach a man "within his own dooryard or on a private driveway on his own premises," to refer to the quotation from the *Conant* case made by Judge Manser. There "the life or safety of any other person" would not be endangered.

P. L. 1925, Chap. 124 makes a procedural change in the reckless driving law identical with that effected in the drunken driving law by Chap. 211 aforesaid. The Legislative Record shows that the two acts were companion pieces when introduced in the Senate on January 27, 1925 and proposed no changes other than that induced in both instances by the decisions rendered in *State* v. *Vashon*, 123 Me., 412, 123 A., 511,

and *State* v. *Mathon,* 123 Me., 566, 123 A., 824. Senate Document No. 28. The enumeration of places where drunken driving was prohibited appeared in a new draft reported by the committee on March 27, 1925. Senate Document No. 281. As finally enacted the law made the state of intoxication the sole test of the crime when a vehicle was operated in named places but imposed the requirement of danger to the life or safety of some other person if in "any other place."

The 1929 law put an end to that distinction. Since the effective date of P. L. 1929, Chap. 327, drunken driving has been punishable without either allegation or proof of danger to any other person if committed anywhere falling within the descriptive words "upon any way, or in any other place." The 1929 Legislature had 3 acts presented to it proposing some change in the drunken driving law. See House Documents Nos. 511 and 831 and Senate Documents 284, 399 and 429. The second House Document was a new draft of the first and became P. L. 1929, Chap. 327, Sec. 17, with a paragraph repealing P. L. 1921, Chap. 211, Sec. 64. Senate Document No. 284 was not enacted. Senate Documents 399 and 429 are respectively a new draft of "An Act to Provide an Uniform Motor Vehicle Code," originally introduced at the legislative session of 1927 and then referred to the 1929 Legislature, and a Senate Amendment thereto striking out everything after the enacting clause and substituting a complete new bill. The title of this new bill, P. L. 1929, Chap. 327, was changed in Senate Document No. 399 to read "An Act Relating to the Use and Operation of Motor Vehicles on the Highways."

Senate Documents Nos. 511 and 831 were entitled "An Act Relating to Licensing Operators of Motor Vehicles After Their Conviction of Operating the Same While Under the Influence of Intoxicating Liquors." The former proposed a change in P. L. 1921, Chap. 211 comparable to that which the latter accomplished by rewriting Sections 72 and 74 thereof and repeal-

ing Section 73. There was neither fanfare nor discussion about condensing the language defining the offense from 75 words in the first paragraph and 74 in the second to a mere and uniform 31 in each. No new word was called into play. I quote the language of the essential part of the first paragraph of the 1925 act emphasizing the 8 words retained, to designate the coverage of the legislation, that the mechanics of the change may be apparent:

> "*upon* or along *any way,* bridge, public park *or* parkway in this state, when intoxicated or at all under the influence of intoxicating liquor or drugs; and no person shall operate or attempt to operate a motor vehicle *in any other place* where the life or safety of any other person is endangered."

The historical review of pertinent legisation made by Judge Manser is incomplete and seems inaccurate in some respects. Motor vehicle regulatory legislation dates back to P. L. 1903, Chap. 237 although the first reference to either reckless driving or drunken driving appears in the 1911 law which he cites. The 1903 act, *supra,* P. L. 1905, Chap. 147, the 1911 codification and enlargement of regulation and P. L. 1915, Chap. 207 enumerated several classes of travel thoroughfares including "driveways" in numerous sections. See R. S. 1916 where all this legislation was incorporated into Chapter 26 containing our "Law of the Road," indicating legislative intention that it was for the protection of travelers upon our highways, Sections 15, 16, 18, 19 and 28. In other instances the reference was to "ways" or "highways" only, Sections 20, 36 and 38, to "streets or ways" or to "roads and highways," Sections 21, 32 and 37, yet it would be difficult to support a claim that the Legislature intended its severally described places of application to be different from each other.

The separation of the offenses of reckless driving and drunken driving did not occur in 1921 as Judge Manser states. The separation appears in P. L. 1919, Chap. 211, Secs. 12 and 14. It made reckless driving an offense "upon any way" and applied drunken driving to "any highway, townway, public street, avenue, driveway, park or parkway," using the identical enumeration of travel thoroughfares contained in so many sections of the statute containing the "Law of the Road," *supra*. The "developing consciousness of the greater menace of drunken driving," apparent in imposing a more severe penalty therefor than that applicable to reckless driving dates back to 1919. The 1921 law did not increase the penalty. A second offense of either was given felony status in P. L. 1911, Chap. 162. The 1919 law gave that status to the first drunken driving offense. The 1923 Legislature was more impressed with the gravity of reckless driving and increased the money penalty for both first and subsequent offenses. See P. L. 1923, Chap. 14.

The entire history of our legislative regulation of motor vehicles and motor vehicle operation discloses an intent to safeguard travelers on our highways. This is apparent even in that part of P. L. 1929, Chap. 327, Sec. 17 which amended Section 74 of the 1921 act. A part of the penalty for drunken driving is revocation of the license to operate a motor vehicle and express declaration of the closing paragraph of the section as then amended and as it now appears is that the secretary of state may issue a new license after a measured waiting period upon "his determination that public safety will not be endangered." It seems apparent that the 1929 legislation was intended to eliminate the requirement as to pleading and proof that the 1925 law imposed when the operation involved was not upon a "way" and that there was no intention to enlarge the coverage of the law. Apparently all my colleagues except Mr. Justice Chapman construed the law as I do now when *State* v. *Peterson,* 136 Me., 165, 4 A., (2d), 835 was decided

in 1939. The pertinent part of the law was worded then as now, yet it was declared of a complaint alleging operation "on Route 3 in Gray" that if

> "purpose was to say that . . . the operator ran his machine in some place other than on a public way, declaratory words vary greatly in color and content from saying so."

If the words "in any other place" are so inclusive as to apply to the dooryard of an operator it would seem unnecessary that declaratory words be meticulous.

A construction of the statute which gives the words "any other place" the broadest possible signification seems to violate both the principle that penal statutes should be strictly construed and that of *ejusdem generis* which was so plainly applicable to the legislation wherein the phrase was first used. The ways, bridges, public parks and parkways covered by the first and second paragraphs of P. L. 1925, Chap. 211 might have been described within the framework of the decision in *State* v. *Conant,* supra, by using the single word "way" since all are public ways. Their common characteristic is that they are used for travel on foot and in vehicles. That common characteristic is applicable as well to roads and driveways on land privately owned but available for public use and these were undoubtedly covered by the 1925 act. The "way" of the 1929 act included bridges, parks and parkways and it seems to strain construction to say that the words "other places" changed their meaning because the preceding matter was covered by a generic term. I would overrule the exceptions without construing the statute as applicable to a dooryard, a potato field or any private place or area not available for use in going somewhere. In 1929 as in 1925 the Legislature used pending legislation proposing identical procedural and penalty changes in the reckless driving and drunken driving laws to rewrite

the definition of drunken driving without any public hearing. I cannot believe our legislators intended such a departure from the consistent policy of more than 20 years as to extend regulation from travel routes to dooryards without giving the interested public an opportunity to be heard. The 1925 law rewrote that of 1921 to specify with exactness what was intended by the words of absolute prohibition used at that time. The 1929 amendment rewrote that of 1925 but carries no clear indication that it was intended to do more than change the features of pleading and punishment.

ANNA GREENBERG

vs.

MORRIS GREENBERG.

Cumberland. Opinion, September 13, 1945.

Husband and Wife. Trusts. Equity Jurisdiction.

Special jurisdiction in equity to hear and determine property matters between husband and wife is conferred by R. S. 1930, Chapter 74, Section 6.

When land is purchased by a husband and the conveyance is to his wife, while a resulting trust may arise, the presumption from the relationship of the parties is that the transfer was a gift to the wife, and the burden is upon the husband to establish the contrary by full, clear and convincing proof.

In the instant case, the presumption that when the defendant purchased the properties concerned and caused them to be conveyed to his wife in joint tenancy with him he gave her half interests in the properties was not rebutted but was fully confirmed.

When the husband and wife joined in the sale of their properties which they held as joint tenants there were severances and the proceeds from each sale became the individual properties of the spouses.

When the defendant gave his wife joint half interests in the properties and these were sold without her consent and he appropriated the entire proceeds, he holds his wife's share thereof which he has received or afterwards collects under an implied trust to account for it as her individual property.

The wife's shares are the wife's separate properties which in equity and good conscience belong to her and when held in the husband's possession and under his control are wrongfully held and may be recovered by the wife.

In the instant case, however, the recovery allowed the wife was excessive, and that this error might be corrected the appeal was sustained and the cause remanded for entry of a decree in accordance with the opinion.

ON APPEAL.

A bill in equity by a wife to recover from her husband one-half of the rentals and proceeds from the sale of properties which they owned jointly. Certain property on Middle Street in Portland purchased by the husband was by his express direction conveyed to him and his wife as joint tenants. By mutual consent they sold the property and later used the proceeds of the sale and additional money of the husband to purchase certain property on Congress Street in Portland which property was conveyed to the husband and wife as joint tenants. This property was subsequently sold and the husband retained possession and control of all money, notes and mortgages received as payment in this transaction. The bill was brought by the wife to recover one-half of the proceeds. In the lower court a decree was entered directing the husband, defendant, to pay to his wife, complainant, one-half of the money he had received from the sales of their joint properties and one-half of all money afterwards collected on outstanding notes and mortgages with interest. The defendant appealed. The Law Court held that the recovery allowed the plaintiff was excessive in that it required the husband to pay his wife one-half of the down payment for the Middle Street property in addition to one-half of the proceeds from the sale of the Congress Street property, and sustained the appeal and remanded the case

for the entry of a decree in accordance with the opinion. The case fully appears in the opinion.

Raymond S. Oakes,

Israel Bernstein, for the plaintiff.

Robert W. DeWolfe,

Francis W. Sullivan, for the defendant.

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

STURGIS, C. J. This is a bill in equity by a wife to recover from her husband one-half of the rentals and proceeds of the sales of properties which they owned jointly during coverture. The case comes forward on appeal from a decree sustaining the bill and allowing recovery in accordance with the prayers.

It is conceded, or at least not controverted, that on February 11, 1942, the defendant Morris Greenberg having purchased with his own money a property located at 98-102 Middle Street in Portland, Maine, and by express directions caused the conveyance to be made to himself and his wife, the plaintiff Anna Greenberg, as joint tenants, collected the rents accruing until September 30, 1942 following when by mutual consent they sold the property, the vendees paying the husband $2,000 in money, and giving him a note and mortgage for $4,000 payable to the vendors jointly with interest at four per cent but in installments over a period of five years. Then on April 28, 1943, using with his own moneys that which had been received from the sale of the Middle Street property, Morris Greenberg bought another property located at 241-249 Congress Street in Portland, caused this also to be conveyed to him and his wife as joint tenants, and received all the rents until August 31, 1943 when by agreement they sold the property. At this sale the purchaser paid the husband $4,000 in

money, clear of expenses, and gave a note and mortgage for $13,000 payable in semi-annual installments with interest at five per cent, the mortgage running to the vendors jointly but the note, through error, being payable to the husband alone. All notes and mortgages received in these transactions are in the possession and under the control of the husband or his attorney.

In the court below the sitting Justice found that the defendant Morris Greenberg when he purchased the properties on Middle Street and Congress Street in Portland and caused the same to be conveyed to himself and his wife, as recited, made an absolute gift to his wife of a one-half interest therein in joint tenancy, and when sales were made she was entitled to share equally in the proceeds but rentals accruing during their ownership were given to the husband. It was also found that this man had appropriated not only all of the moneys received for these properties but substantial amounts which he has collected on the notes and mortgages given as part of the purchase prices and he now refuses to pay his wife any part of the proceeds of these sales. Upon these findings a decree was entered directing the defendant Morris Greenberg to pay the plaintiff Anna Greenberg one-half of the moneys he has received from the sales of their joint properties and one-half of all that he hereafter collects on the outstanding notes and mortgages, with interest from the filing of the bill on moneys then received and from the time of payment on the rest. In principle the decision below was clearly right.

For it is well settled that when land is purchased by a husband and the conveyance is to his wife, while a resulting trust may arise, the presumption from the relationship of the parties is that the transfer was a gift to the wife and the burden is upon the husband to establish the contrary by full, clear and convincing proof, *Danforth* v. *Briggs,* 89 Me., 316, 36 A., 452; *Long* v. *McKay,* 84 Me., 199, 24 A., 815; *Lane* v. *Lane,* 80 Me.,

570, 16 A., 323; *Stevens* v. *Stevens*, 70 Me., 92. Here the presumption that when the defendant purchased the properties of concern and caused them to be conveyed to the plaintiff, his wife, in joint tenancy with him he gave her half interests in the properties is not rebutted but fully confirmed. Upon this premise when the properties were sold the joint ownerships were severed and the proceeds became the individual properties of the spouses. *Woodward* v. *Woodward*, 216 Mass., 1, 3, 102 N. E., 921 and cases cited.

Furthermore in this State special jurisdiction in equity to hear and determine property matters between husband and wife is conferred by R. S. 1930, Chap. 74, Sec. 6, which is current in this case, and in its material part reads:

> "A wife may bring a bill in equity against her husband for the recovery, conveyance, transfer, payment, or delivery to her of any property, real or personal or both, exceeding one hundred dollars in value, standing in his name, or to which he has the legal title, or which is in his possession, or under his control, which in equity and good conscience belongs to her and which he neglects or refuses to convey, transfer, pay over, or deliver to her, and upon proper proof, may maintain such bill."

And upon a finding, affirmed as it is here, that the defendant Morris Greenberg gave his wife the plaintiff Anna Greenberg joint half interests in his properties, these were sold, and without her consent he has appropriated the entire proceeds, the husband, we think, holds his wife's share thereof which he has received or hereafter collects under an implied trust to account for it as her individual property. *Woodward* v. *Woodward*, supra. The wife's shares were not gifts to the husband nor in them has he any joint, common or other interest of his own. They are the wife's separate properties which in equity

and good conscience belong to her and are wrongfully in the husband's possession and under his control, and may be recovered in this proceeding. *Whiting* v. *Whiting,* 114 Me., 382, 385, et seq., 96 A., 500; *Walbridge* v. *Walbridge,* 118 Me., 337, 108 A., 105.

However, the recovery allowed the complainant wife in the court below was excessive. The record clearly indicates that the money paid down when she and her husband sold their Middle Street property was used with other moneys belonging to the husband to purchase the Congress Street property which they soon acquired and it was intended, by both, regardless of the use of the wife's money, that she should have only a one-half interest in joint tenancy in the new property and no greater individual interest in the proceeds of its sale. To require the husband to pay his wife one-half of the down payment for the Middle Street property in addition to one-half of the proceeds of the Congress Street property as was ordered in the decree below would be to allow her a double recovery to that extent which is not equity. Although the decree below is in all other respects clearly right that this error may be corrected, the appeal is sustained and the cause remanded for entry of a decree in accordance with this opinion.

Appeal sustained.
Case remanded for an entry of decree in accordance with this opinion.

ELLEN E. LARSON

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH CO.

Cumberland. Opinion, September 18, 1945.

Telephone and Telegraph Companies. State Highway Commission. Statutes. State Agencies. Evidence. Negligence.

A telephone company excavating a road is subject to the provisions of Section 15 of Chapter 68, R. S. 1930.

The authority of the State Highway Commission over state and state aid highways is essentially the same as that of towns before the passage of the provisions contained in Chapter 28, R. S. 1930.

The State Highway Commission, being purely a creature of statute is subject to the rule universally applicable to all bodies that owe their existence to legislative act. It must look to the statute for its authority.

The authority of political organizations created by the legislature is delegated and their powers, therefore, must be strictly pursued.

The legislature could not authorize the State Highway Commission to make regulations that would invalidate a legislative mandate that remained unrepealed. Any regulation that conflicts with any existing statute must yield thereto.

When an official organization is charged with the enforcement of a statute it is intended that the statute shall be enforced as it reads.

The provisions of Section 15, Chapter 68, which were in effect at the time of the occurrences set forth in plaintiff's writ, were a condition attached to the granting of rights in the streets to the public service corporations named and their non-fulfillment was made a public nuisance.

A public nuisance is abatable by the proper officials.

It is common knowledge that when the wheels of a car encounter a hole or rough place in the road the control of the driver is made more difficult.

It is also common knowledge that when the road is slippery anything which interrupts or interferes with the control of the driver is a sufficient cause of skidding.

ON REPORT.

Action by the plaintiff to recover for damage sustained by her automobile, while operated by her daughter, on the ground that the damage was caused by a depression in the highway for which the negligence of the defendant was responsible. Judgment was for the plaintiff. The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick, for the plaintiff.

Hutchinson, Pierce, Connell, Atwood & Scribner,

by Leonard A. Pierce and Fred C. Scribner, for the defendant.

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

MURCHIE AND THAXTER, JJ. DISSENTING.

CHAPMAN, J. Plaintiff sues to recover damages sustained by her automobile while in the possession of and operated by a bailee upon the highway. She claims that the damage was caused by a depression in the highway for which the defendant was responsible.

The case is submitted to this court upon a certificate of the Judge of the Superior Court that questions of law of sufficient importance are involved to justify such submission,—the question of liability to be decided upon so much of the evidence reported as is legally admissible. If there is no liability, judgment is to be rendered for the defendant. If there is liability, judgment is to be rendered for the plaintiff, damages to be assessed by the court below.

The defendant is a telephone company and one of the public

service corporations, the rights and duties of which are set forth in Chap. 46 of R. S. 1944, which was Chap. 68 of R. S. 1930, the revision of the statutes in effect at the time of the occurrences declared upon in the plaintiff's writ.

In September of 1942, the defendant undertook the laying of an underground cable on a course that passed through the Town of Cumberland and across the Middle Road, so called, a road that had been designated as a state aid highway under the provisions of Sec. 17, Chap. 28, R. S. 1930. This road was surfaced with what is commonly known as tarvia, composed of tar and gravel mixed and applied in such manner as to form a smooth, hard surface. It was in good repair at the place of crossing.

Permission to make an excavation across the road was sought and obtained from the Town of Cumberland in accordance with Sec. 14, Chap. 68, R. S. 1930, and because of the regulations established by the State Highway Commission, a permit was sought from that organization and the same granted, with the proviso that the work of relaying the pavement over the excavation should be performed by the Commission at the expense of the defendant. This was in accordance with a procedure adopted by the Commission by which it took to itself a like authority to that granted to the cities by the provisions of Sections 118-127, inclusive, of Chap. 27, R. S. 1930, when a paved street within their borders is excavated. Sec. 125 provided that in the cases outlined in the two preceding sections, the pavement should be relaid by the commissioner of public works of the city or by such official as the city should designate.

The authority of the State Highway Commission to require such procedure and the protection afforded the public service corporations named in Chap. 68 if they follow this procedure and if the Commission fails to fulfill the requirement set forth in Sec. 15 of that chapter of restoring the road to as good re-

pair as it was before the excavation, is one of the questions that must be passed upon in this case.

After laying the cable, the defendant completed the rough fill some time before November 24th and notified the State Highway Commission that it had completed its work and that the "state could make the necessary repairs." The surface fill varied in width from eighteen inches to four feet. On November 24th the Commission resurfaced the portion of the road that had been excavated, with cold patch, a substance composed of gravel and liquid tar, no heat being used to harden the mixture. On December 3rd or 4th, according to representatives of the Commission, the material had "kicked up" leaving a depression of "four or five or six inches." On that date the roadmen of the Commission again filled the depression, this time with gravel with no binder except, as stated by the Commission's patrolman, a little clay. Such is the undisputed evidence of the proceedings previous to the accident.

On December 11th, the plaintiff loaned her car to her daughter, Mrs. Bither, who was driving on the road in a westerly direction accompanied by a friend, Mrs. Sumpter. The road was very slippery from ice and frost. According to the testimony of Mrs. Bither and Mrs. Sumpter, when the wheels of the car struck the depression caused by the displaced gravel, the car skidded and overturned.

The plaintiff alleges in the usual form that the defendant was guilty of negligence by reason of faulty repair of the road, and also alleges that it was the duty of the defendant to put the road into as good repair as it was before the excavation and, failing so to do, was guilty of maintaining a public nuisance and answerable to her for her special damage.

We shall consider the matter upon the latter allegation. A finding in favor of the plaintiff requires:

1—That Sec. 15, Chap. 68, R. S. 1930, was in effect

and applicable to the defendant corporation in the excavation of the road and the restoration thereof. Such is a question of law.

2—That the road was not restored, within a reasonable time, to as good repair as it was before the excavation. Such is a question of fact.

3—That the depression was a cause of the overturning of the car. Such is a question of fact.

We shall discuss these questions in the order named.

For convenience of expression, chapters of the statutes referred to, unless otherwise designated, will be of the 1930 revision; and the provisions of the chapters and sections in that revision will be referred to by their numbers therein, although they have an earlier origin.

The first issue requires an examination of the provisions of Chapters 27, 28 and 68.

Sec. 15 of Chap. 68 reads as follows:

"Any such corporation digging up and opening such roads and streets, shall do so in such manner as to cause the least possible interference with public travel, and shall put all such highways, roads, and streets which it shall dig into and open, into as good repair as they were before they were dug into and opened; and on failure to do so within a reasonable time, such corporation shall be deemed guilty of causing a public nuisance, and shall be liable to the city or town for all expenses incurred in making such repairs."

The corporations referred to in the section are certain of the public service corporations, inclusive of telephone companies,

with which the chapter deals. It provides for the organization and control of such corporations. It grants rights and imposes obligations. Sec. 10 of the act reads:

> "Every corporation organized hereunder for the purpose of operating telegraphs or telephones, may, except as herein limited, construct, maintain, and operate its lines upon and along the route or routes and between the points stated in its certificate of incorporation; and may, subject to the conditions and under the restrictions provided in this chapter, construct its lines along, over, under and across any of the roads and streets and across or under any of the waters upon and along such route or routes, with all necessary erections and fixtures therefor."

It is by reason of the provisions of these sections that the plaintiff claims that the defendant was guilty of causing a public nuisance.

The defendant claims that the provisions of Chap. 28 establishing the State Highway Commission, taken together with provisions of Chap. 27, places the matter of excavations in those roads that have been designated as state or state aid highways, exclusively in the hands of the Commission.

Legislative history discloses that Chap. 27 is an assembly of enactments that have been passed from time to time for the purpose of proper control of roads of every description. The essential provisions were in effect many years before the enactment of Chap. 68 relative to public service corporations, and Chap. 28 creating the State Highway Commission.

It is within the exclusive jurisdiction of the Legislature to lodge control of the roads of the state in the municipalities and to prescribe rules as to the exercise of such control. *McMillin Municipal Corporations,* 2nd Ed., Sec. 1414. This was done

by the provisions of Chap. 27. The responsibility of maintaining and keeping the roads in proper repair was imposed upon the municipalities and, under prescribed procedure, they were subject to penalty for failure to keep in proper repair. Such a responsibility carried the right and duty to exercise control over the excavating of roads and the restoration to the condition that the same were in before the excavation was made. Such was the situation before the enactment of Chap. 68. All parties, individuals and corporations were subject to the same control, when engaged in such undertaking.

The provisions contained in Chap. 68 were enacted in 1895 and telephone and telegraph companies were granted, in Sec. 10 above quoted, the right to construct its lines over or under any road or street but subject to the conditions and restrictions contained in the chapter. A part of the conditions imposed are included in Sec. 15. These provisions were specially imposed upon the corporations named and took precedence over the general provisions of Chap. 27. *Crawford's Statutory Construction,* Sec. 230; *Lovegrove* v. *Hunt,* 58 Me., 9.

There can be no question raised that upon the passage of Chap. 68, a telephone company excavating a road was subject to the special provisions of Sec. 15, nor do we think that the question would be raised that such would be the case at the present time if the way were a town road as distinguished from a state or state aid highway.

The provisions of Chap. 28 were enacted in 1913. The object of the chapter was to establish a system of state highways and to create a highway commission to have general charge of the same. The Commission being purely a creature of statute is subject to the rule universally applicable to all bodies that owe their existence to legislative act. It must look to the statute for its authority. *Alley* v. *Inhabitants of Edgecomb,* 53 Me., 446; *Anheuser-Busch, Inc., et al* v. *Walton et al,* 135 Me., 57, 190 A., 297.

The limits of the authority of political organizations created by the Legislature are well stated in *Willard* v. *Killingworth Borough,* 8 Conn., 247, 253:

> "They act not by any inherent right of legislation, like the legislature of the state; but their authority is delegated; and their powers, therefore, must be strictly pursued. *Within* the limits of their charter, their acts are valid; *without* it, they are void."

The statute creating the State Highway Commission gave it the power to

> "lay out, construct and maintain a system of state and state aid highways. . . ."
> As to state aid highways, it was provided that such
> "shall be continually maintained under the direction and control of the commission at the joint expense of the state and town in which the same are located;".

The control granted in the chapter to the Commission is no more complete in its effect than that which was previously lodged in the municipalities by the provisions of Chap. 27. It was the apparent purpose of the Legislature to transfer from the town to the Commission the control of those roads that should become state aid highways, that previously had been invested in the municipalities. It is true that Sec. 7 of the act provided that

> "The commission may from time to time make and shall enforce rules and regulations relating to construction and maintenance of all state and state aid highways . . ."

But this adds nothing to what the municipalities could do

previous to the enactment of the statute. The municipalities had the right and duty to oversee and superintend by all reasonable methods the construction and maintenance of roads, including excavations and restorations. Even if it had intended to do so, the Legislature could not authorize the Commission to make regulations that would invalidate a legislative mandate that remained unrepealed. Such would be a delegation of the power to legislate. Any regulation that conflicts with any existing statute must yield thereto. *Mayor etc. of Savannah* v. *Ellington Co.*, 177 Ga., 149, 152, 170 S. E., 38.

It adds nothing to the powers of the Commission to call its activities the exercise of a governmental function or to say that the State of Maine was acting through its agency. The state acts only through its duly constituted agencies but the functions of those agencies are limited by the powers delegated.

This court said in *Cooper* v. *Fidelity Trust Company*, 134 Me., 40, 50, 180 A., 794, 799 in discussing the validity of acts of the Bank Commissioner, an agency of the state created by the Legislature:

> "His duty is to administer the law, not to make it or set it aside. His directions to that effect, reported here, were clearly outside his authority and void."

As long as Sec. 15 of Chap. 68 remains a statute, failure to fulfill its requirements constitutes a public nuisance which cannot be legalized.

Woods Law of Nuisances says in Sec. 747:

> "While municipal corporations may provide by ordinance for the prevention and removal of, yet it cannot license a nuisance."

This language is applicable to the Commission.

The history of the creation of a state highway system in Massachusetts is similar to that of Maine. Upon the establishment of the State Department of Public Works, the control and maintenance of the state roads were given to that department as fully as control is given over state roads to the State Highway Commission by the Maine statute. Also provision was made that all excavations should be under the supervision and in accordance with the regulations of the department and at the expense of the party excavating. Another statute specially applicable to gas and electric companies provided that such companies should restore excavated highways to as good repair as before. The language used was substantially the same as that of our Sec. 15 of Chap. 68. Thus the procedure covering excavations was similar to our own. There was a general provision that the work should be done under the supervision of the Department of Public Works at the expense of the party excavating and also provisions applicable specially to certain public service companies by reason of which they were bound to restore the road to the same repair as before the excavation, under penalty of being adjudged guilty of causing a nuisance upon nonfulfillment of the provision.

In *Bern* v. *Boston Consolidated Gas Co.*, 310 Mass., 651, 39 N. E., (2d), 576, action was brought against the defendant public service company for damage caused by the alleged failure of the defendant to restore an excavated road to as good repair as before the excavation. While no issue was raised that the section was not in effect because of the general control of state roads granted to the Department of Public Works, the opinion and decision show that the court considered the provision that the public service company should itself restore the road to its former repair to be unaffected by the grant of general control to the Department of Public Works. It held that if the defendant public service company fails to restore as provided, it is guilty of maintaining a nuisance and liable to one who has suffered special injury from the same. See also

Sullivan v. *Boston Consolidated Gas Co.*, 316 Mass., 404, 55 N. E., (2d), 608.

Examination of the New Hampshire statutes discloses a similar history and similar provisions. The general control of state roads previously in the municipalities was given to the Commissioner of the State Highway Department. There also existed a statute applicable only to excavations made for the purpose of laying water or gas pipes and providing that the parties making excavations

> "for such purpose shall restore the highway or ground to as good condition as it was in before . . . ."

In *Emerson* v. *Twin State Gas & Electric Co.*, 87 N. H., 108, 174 A., 779, suit was brought against the defendant corporation for injuries caused by failure to restore; and the court held that it was liable under the provisions of the act referred to. Moreover, in this case the provisions of an ordinance were invoked, requiring that in excavations the repairs should be performed by the street commissioner of the municipality and paid for by the party excavating. It was held that such ordinance did not supersede or invalidate the statute.

It is our opinion that there was nothing in the grant of the general control of state highways to the Maine State Highway Commission that in any way affected Sec. 15 of Chap. 68, and regardless of the resurfacing by the Commission, the statutory responsibility therefor remained upon the defendant. *Emerson* v. *Twin State Gas & Electric Co.*, supra.

But the defendant asserts that, in addition to the general authority extended in other sections of the chapter creating the Commission, Sec. 16 was sufficient to give the authority claimed for it. The section provides as follows:

> "The provisions of section fifteen of chapter sixty-eight and of sections one hundred eighteen to one hun-

> dred twenty-seven, both inclusive, of chapter twenty-seven, relating to the repair of streets dug into, may be enforced by the commission wherever state or state aid highways are affected."

Sec. 15 of Chap. 68 we have already quoted. The ten sections of Chap. 27 referred to are set off in the 1930 revision as a distinct part of the chapter under the designation "Excavations in City Streets" and are devoted entirely to that subject. The sections included provide as to when and under what conditions the streets of a city may be opened, and they specify in detail the duties of city officials relative to the subject. Sec. 125 which must be read in connection with the other sections is as follows:

> "When any excavation shall be made in any paved public highway and the trench shall have been filled as required by the two preceding sections, the commissioner of public works or such officer as the city government may appoint, shall relay the pavement; the cost thereof, including materials, labor, and inspection, shall be paid out of any moneys in the city treasury standing to the credit of the regular fund for this purpose."

The intent of the Legislature in the provisions of Sec. 16 of Chap. 28 providing for the enforcement of parts of Chapters 27 and 68 is not difficult of interpretation if we observe the primary rule that the Legislature is presumed to intend that its language shall be given its ordinary meaning. The ordinary meaning of "enforce" is "to compel obedience to," "to cause to be executed." Such was the meaning given in *Tennant* v. *Kuhlemeier*, 142 Iowa, 241, 120 N. W., 689, 693, 19 Ann. Cas., 1026, a case in which was involved the interpretation of a statute making it the duty of an official to enforce certain statutes; and it would seem that when an official organization

is charged with the enforcement of a statute it is intended that the statute shall be enforced as it reads.

According to the defendant's interpretation, the word "enforce" was intended, not to give authority to see that the provisions of the statute relative to roads in cities were executed according to the terms thereof, but that it enabled the Commission to establish a procedure identical with that which the Legislature had provided for city streets and city officials and substitute such procedure in place of the statute as written. It assumed authority to do the work of resurfacing excavated roads at the expense of the party excavating; but what is more pertinent to the present case, it claimed authority to follow such procedure to the exclusion of the provisions of Sec. 15 of Chap. 68. This it could not do.

It cannot be maintained that this section has been repealed. On the contrary it has been reenacted in each succeeding revision of the statutes. Sec. 16 of Chap. 28 providing for enforcement of Sec. 15 of Chap. 68 is a reaffirmation of the latter section and clearly indicates that it was the intention of the Legislature that it should remain in force and that the Highway Commission should enforce it as written. Such intention was not inconsistent with the grant of general control of the roads. Rather it provided an effective means of exercising such control.

The importance which the Legislature attached to the provisions in said Sec. 15 is apparent from the drastic provisions relative to nonfulfillment by a public service corporation, and the appointment of an enforcing agency. Not only were its provisions a condition attached to the granting of rights in the streets to the public service corporations named; but its nonfulfillment was made a public nuisance, an indictable offense. Further, a public nuisance is abatable by the proper officials. 25 *Am. Jur., Highways,* Sec. 618; *Smith et al* v. *McDowell,* 148 Ill., 51, 69, 35 N. E., 141, 22 L. R. A., 393. And the Commission

was designated as the proper official agency to proceed for abatement of such a nuisance and also to make complaint for criminal prosecution.

The defendant argues that it was the policy of our Legislature to enable the Commission to maintain the highways in a uniform condition and that it was conducive to this purpose that the Commission do all resurfacing; but we can conceive of no more effective means to this end than the provisions of Sec. 15 of Chap. 68, the enforcement of which is delegated by Sec. 16 of Chap. 28 to the Commission.

The defendant cites several cases in other jurisdictions, in which it was held that the defendants were not liable for the condition of the streets complained of; but in each of these cases the condition resulted from an undertaking of the municipality within its powers and with which the defendant corporation had no authority to interfere. It was upon such premise that each of the decisions was rendered. *Swift* v. *Brooklyn Heights R. Co.*, 118 N. Y. S., 827, is typical of cases cited. The defendant corporation had the duty of keeping in repair the street between and within two feet adjacent to its tracks but the city had the right to open the street and did so to repair a water gate under the surface, and the injury to the plaintiff resulted from the condition created. The court held that the defendant could not be held responsible for a condition due to an undertaking over which it had no control. If the State Highway Commission had authority to make the repairs to the exclusion of the corporation as contended by the defendant, the cases cited would be authority to sustain its position; but, as we have pointed out, the duty of restoration was by statute placed exclusively upon the defendant, and the legal effect of the acts of the parties is not altered by the fact that the situation of the defendant appears

"to have grown out of an excusable but erroneous in-

terpretation of the law seemingly justified by precedent,"

Cooper v. *Fidelity Trust Company,* supra.

The defendant says that the assumption of authority by the Commission, though it were illegal, made it impossible to meet the requirements of the statute. We cannot accept this contention. *Emerson* v. *Twin State Gas & Electric Co.,* supra. If the defendant had correctly interpreted its position and asserted its statutory rights and attempted the fulfillment of its statutory duty, the Commission would have been unable to prevent the same. The court would have restrained the Commission from interference by unauthorized regulations or otherwise. *Anheuser-Busch, Inc. et al* v. *Walton et al,* supra.

It must be held that Sec. 15 of Chap. 68 was in effect, and that if the defendant failed within a reasonable time to obey its mandate to put the road into as good repair as before the excavation, it was guilty of causing a public nuisance.

That the excavated section of the road was not put into as good repair as before admits of no argument. We do not understand that it is claimed that such repair was effected, either by the defendant or by the State Highway Commission in its behalf. The Commission resurfaced the road with a material that perhaps temporarily rendered the road reasonably safe for travel but which was without the resistance to wear and weather that the original surface possessed and, in ten days time, this material had worn and washed away. The depression was then filled with loose gravel containing a little clay. Such restoration did not put the road into as good repair as before.

The defendant claims that the repairs were such as the Commission was accustomed to make under the existing conditions; but such was not a compliance with the statute nor would it have been sufficient if it could be said that the repairs made

the road reasonably safe. The statute set the requirement and that is the requirement that must be fulfilled.

Ruling that the measure of duty of the corporation excavating is the putting of the road into a reasonably safe condition, would establish the right to open a road of expensive construction and by repairing it with inexpensive materials to leave it for the time being in a condition reasonably safe for travel but far short of the condition in which it was found. Such interpretation would also on occasion place the corporation in an unfair situation in that it would be compelled to put into a safe condition a road that was impassable before it was excavated. This was pointed out in *Seltzer* v. *Amesbury & Salisbury Gas Co.*, 188 Mass., 242, 74 N. E., 339. In *Bern* v. *Boston Consolidated Gas Co.*, supra, it was held that the gist of the action for the injuries received by reason of nonfulfillment of the statute is the nuisance itself, not that it was negligently maintained.

We find that the road was not within a reasonable time put into as good repair as before the excavation and, therefore, that a nuisance existed.

As to the cause of the skidding and consequent overturning of the car, it is not in dispute that the road was very slippery and for that reason the driving was difficult. It is common knowledge that under such conditions anything which interrupts or interferes with the control of the driver is a sufficient cause of skidding. It is also common knowledge that when the wheels of a car encounter a hole or rough places in the road, the control of the driver is made more difficult. It is to be observed from the photographic exhibits introduced, that a depression crossed the road diagonally at an angle of approximately forty-five degrees which would cause the left front wheel of the car to drop into the depression before the right front wheel, and this fact would make more uncertain the steering of the car upon the icy pavement.

Unless we entirely disregard the testimony of both Mrs. Bither and Mrs. Sumpter, we must find that the skidding of the car took place at the exact time when the wheels struck the depression. Both testified that there was a distinct jar followed by loss of control. The car was operated safely upon a smooth, hard surface but skidded when it came in contact with the defective condition of the road at the place of excavation.

The defendant lays stress upon the curve in the road as a cause of the skidding. Photographic exhibits show pronounced curves east and west but Plaintiff's Exhibits Nos. 5, 6, 12 and 13 taken in close proximity to the excavated section and clearly showing the course of the road at that point show little, if any curve. The car had safely passed a pronounced curve but skidded upon the excavated area.

Moreover, if the curve were a factor in increasing the difficulty of control, still this does not prevent liability from attaching if the defect in the road was the culminating cause of the skidding. *Lake* v. *Milliken*, 62 Me., 240, 16 Am. Rep., 456; *Hutchins* v. *Emery*, 134 Me., 205, 207, 183 A., 754; *Neal* v. *Rendall*, 100 Me., 574, 62 A., 706.

No question of contributory negligence by the driver is before us. *Robinson* v. *Warren*, 129 Me., 172, 151 A., 10; 39 *Am. Jur., Nuisances*, Sec. 200; *Warren* v. *City of Bridgeport*, 129 Conn., 355, 28 A., (2d), 1.

We find that the condition of the road caused by the failure of the defendant to restore to as good condition as before the excavation was the cause of the plaintiff's damage.

The defendant was guilty of causing a public nuisance as specified in the statute, and the plaintiff having suffered special injury therefrom is entitled to recovery. Chap. 26, Sec. 19, R. S. 1930; *Brown* v. *Watson*, 47 Me., 161, 74 Am. Dec., 482; *Smart* v. *Lumber Co.*, 103 Me., 37, 68 A., 527, 14 L. R. A. N. S. 1083; *Smith* v. *Preston*, 104 Me., 156, 71 A., 653; *Bern* v. *Boston Consolidated Gas Co.*, supra.

The entry must be

Judgment for the Plaintiff.
Remanded to the court below
for assessment of damages.

DISSENTING OPINION.

MURCHIE, J. I am unable to concur in the decision that the defendant caused a public nuisance in a state aid highway on December 11th, 1942 within the purview of the statute on which the majority of the Court relies. I am satisfied that more than 30 years' legislation designed to vest full control over an interlocking system of state highways and the continuous maintenance of state aid highways in a State Highway Commission has not been so pointless and ineffective that its employees may be enjoined from conducting maintenance work on a highway opened for the laying of a cable until the permittee has restored it to good repair.

If the opinion of the majority is taken literally one who digs up any highway except a paved city street becomes an insurer against damage subsequently suffered thereon (presumably within a reasonable time) traceable to road work by the State Highway Commission unless the one so opening the highway has maintained its legal right to put the highway in good repair by the use of injunctive process, if necessary, to restrain interference on the part of unauthorized authority. Despite the definite dictum of the Court majority declaring the right to this extraordinary remedy, I cannot believe that if the issue is raised squarely the clear mandate of R. S. 1930, Chap. 28, Secs. 9 and 18 as amended will be ignored.

The depression in the highway which is found factually to have caused the plaintiff's automobile to overturn did not result from defendant's refilling of the trench. That refilling was completed on November 24th, 1942 and employees of the State Highway Commission immediately took over to lay a road

surface. The defendant left no depression. It filled the trench with tamped-in gravel, crowned at the road surface. The evidence discloses and the opinion of the majority recognizes that the depression apparent on December 3rd or 4th was caused by the kicking up of materials placed in the highway by employees of the State Highway Commission. The State laid a second new surface after December 3rd and there can be no doubt on the record that the road condition which caused the damage (on the finding of the Court majority) was the direct result of its failure to withstand wear and weather. When the facts are analysed it is clear that the liability imposed on the defendant is not based on its failure to make the highway safe and convenient for travel (for which it would have been holden to indemnify public authority against any claim originating in a highway defect) but on its omission to resist intermedling by the State Highway Commission.

The statute on which the liability is grounded antedates the highway policy induced by the advent of automobiles. Motor vehicle traffic required the policy declared in P. L. 1913, Chap. 130 (R. S. 1930, Chap. 28, Sec. 1) with its interlocking system of state highways and continuous maintenance thereof (and of state aid highways) which superseded earlier less-inclusive legislation along similar lines. R. S. 1903, Chap. 23, Secs. 99 et seq.; P. L. 1907, Chap. 112; P. L. 1909, Chap. 69; P. L. 1911, Chaps. 21 and 183. The conception of state roads as distinguished from those constructed and maintained by counties and municipalities traces back to 1901, P. L. 1901, Chap. 285. The objective since has been increasing state participation and control over both construction and maintenance. R. S. 1903, Chap. 23; R. S. 1916, Chap. 25; R. S. 1930, Chap. 28; R. S. 1944, Chap. 20. (See also the laws enacted from 1901 to 1943 inclusive consolidated in the several revisions.)

P. L. 1913, Chap. 130 constituted the State Highway Commission as an administrative agency to control the construc-

tion and maintenance of a state highway system, superseding the State Commissioner of Highways. P. L. 1907, Chap. 112. Since the effective date of the 1913 law the State Highway Commission has been vested with exclusive authority to "lay out, construct and maintain a system of state and state aid highways" (P. L. 1913, Chap. 130, Sec. 8; R. S. 1930, Chap. 28, Sec. 8), and charged with the duty of continuous maintenance of state and state aid highways (to the improvement of which the State has contributed), P. L. 1913, Chap. 130, Secs. 9 and 18; R. S. 1930, Chap. 28, Secs. 9 and 18. As of the same effective date the State undertook to reimburse municipalities on judgments recovered for defects in the highways it was obligated to maintain. P. L. 1913, Chap. 130, Sec. 27; R. S. 1930, Chap. 28, Sec. 39.

The foundation for the opinion of the Court majority lies in the fact that R. S. 1930, Chap. 68, Sec. 15 has not been repealed or modified by express enactment. The same is true of R. S. 1930, Chap. 27, Secs. 1, 16, 25, 29, 55, 60, 66, 70 and 86, yet the authority there conferred upon county commissioners and municipal officers by explicit language unchanged since 1883 has been vested in the State Highway Commission to the exclusion of the named local officers for more than 30 years except for highways which have not become a part of our statewide system.

Without reference to anything outside R. S. 1930, Chap. 68, Sec. 15, I cannot believe the Legislature intended that one opening a highway for laying pipe or cable should be holden for causing a public nuisance if the municipal officers repaired the opening. The State Highway Commission has been substituted for municipal officers as to all the provisions of the section "relating to the repair of streets . . . ." P. L. 1913, Chap. 130, Sec. 16; R. S. 1930, Chap. 28, Sec. 16. Since it assumed to make or complete "such repairs" as it deemed necessary to put the highway in "as good repair" the permittee should not be held to have caused a nuisance thereby.

Reference to the history of R. S. 1930, Chap. 68, Sec. 15 discloses that it traces back to P. L. 1895, Chaps. 102 and 103, dealing respectively with Gas and Electric Companies and Telegraph and Telephone Companies. It appears as Section 7 of the former, where it closes with the words "shall be decreed guilty of nuisance." Section 10 of that law carried provisions substantially identical with R. S. 1930, Chap. 68, Sec. 17. The words "and shall be liable to the city or town for all expenses incurred in making such repairs" were written into R. S. 1903, Chap. 55, Sec. 7 in consolidating the two 1895 laws therein. They seem to indicate, as did P. L. 1895, Chap. 102, Sec. 10 which became R. S. 1930, Chap. 68, Sec. 17, that municipalities should repair roads opened under permit if the permittees did not and to impose liability for damages resulting from highway defects in default of repair by either permittee or municipality.

The recovery allowed is under R. S. 1930, Chap. 26, Sec. 19. Section 5 of the same chapter describes numerous nuisances including the obstruction or encumbering of highways by fences, buildings or otherwise. The express recitals of R. S. 1930, Chap. 68, Sec. 15 that persons digging up highways shall do so in such manner as to produce the minimum of interference with public travel and of the following Section 17 requiring permittees to reimburse municipalities holden for highway defects traceable to the digging indicate that the legislation involved is being given a scope which far exceeds the legislative intention underlying its enactment.

I am authorized to say that Mr. Justice Thaxter is in agreement with this dissent.

STATE OF MAINE

vs.

HOWARD ARTUS.

STATE OF MAINE

vs.

FRED BUNKER AND HOWARD ARTUS.

Penobscot. Opinion, September 22, 1945.

Criminal Law. Statutes. Fish and Game Laws.

Criminal and penal statutes should be strictly construed in a manner favorable to the innocence of the citizen to the end that his liberty of action may not be restricted in doubtful cases.

The word "part" in the transportation section of our Fish & Game Laws does not include skins or hides in passage from one having a right to sell them to another having a right to buy.

Unless the driver of a truck has knowledge that his load, or a part thereof, is being transported unlawfully, he does not commit an unlawful act.

The driver of a vehicle is not chargeable with intent of transporting something in his load of which he has no knowledge.

Facts as consistent with bailment or agency as with sale do not prove an unlawful sale as distinguished from bailment or agency which would be legal.

ON EXCEPTIONS.

The respondents herein were found guilty in the Bangor Municipal Court, on agreed facts, of buying and selling deer skins without a license, and transporting deer, or parts thereof, contrary to the provisions of the statute requiring that any deer, or parts thereof, transported be carried exposed to view, tagged

with the name of, and accompanied by, the person who lawfully killed it.

Bunker was an employee of Artus. Artus accepted two deer skins from persons having a right to dispose of them and had them delivered to a licensed dealer in Bangor together with the hides of other animals, collected the proceeds and remitted the proceeds from the deer skins to the persons from whom he received them. Bunker drove the truck in which the deer skins were transported. There was no evidence that he knew that the skins were a part of the truck load. The State contended that the delivery of the skins to Artus without specification that he was to act as the agent or bailee of the owners of the skins passed the title as if sales were thereby consummated, notwithstanding the record of the licensed dealer to whom they were later delivered showed that they were purchased from the persons who had a right to sell them. The respondents took the case on exceptions to the Supreme Judicial Court. Exceptions sustained. Case remanded to the Bangor Municipal Court for entry of judgment for the respondents. The case fully appears in the opinion.

John H. Needham, County Attorney, for the State.

Louis Villani, for the respondents.

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

MURCHIE, J. These cases were certified to the Chief Justice pursuant to appropriate provision in the amended charter of the Bangor Municipal Court. Private & Special Laws 1895, Chap. 211 (Sec. 6). One charges the respondent Artus with buying and selling "two deer skins, without being licensed so to do by the Commissioner of Inland Fisheries and Game." The other charges both respondents with transporting "two deer, or parts thereof" from Milo to Bangor "not open to view,

and not tagged and plainly labelled with the name and residence" of two named persons and "not being accompanied" by said persons. Each of them had a legal right, admitted on behalf of the State, to dispose of the skins which are the subject matter of the first complaint and are described as parts in the second. The cases were submitted for decision in the Municipal Court on a single Agreed Statement of Facts. Whether the admitted acts of the respondents constitute the crimes charged is certified to this Court, prior to the imposition of sentences, following rulings that they are guilty. Similar questions have been submitted heretofore on agreed facts. *State* v. *Montgomery*, 92 Me., 433, 43 A., 13; *State* v. *Cohen*, 133 Me., 293, 177 A., 403.

The facts are that the respondent Artus operates a store, butcher shop and garage in Milo; that he transports butchered animals and the parts thereof, "including hides," to Bangor; that two residents of Milo, acting separately, each left a deer skin with him in Milo; that he transported the skins to Bangor in a load which included the hides of other types of animals; that the skins were tagged with the names of the persons who left them with Artus; that those persons did not accompany the load; that Artus left skins and hides at a place of business in Bangor; that the skins were purchased there and registered by the purchaser as having been sold by the persons whose names appeared on the tags; that Artus collected for the skins and hides in a single check payable to him which included $1.50 for one skin and $1.25 for the other; that he paid $1.25 and $1.00 to the persons aforesaid and retained 25 cents out of the proceeds of each skin for himself; and that he was not licensed to buy and sell deer skins. The respondent Bunker drove the vehicle which transported the skins and hides, as an employee of Artus, but is not otherwise involved.

The offense charged against Artus alone is that he bought and sold the deer skins. It is argued by the State that he vio-

lated R. S. 1930, Chap. 38, Secs. 93 and 95, as amended. Our Inland Fish and Game Laws, as in effect at the time of the alleged offenses, are found in the Seventh Biennial Revision thereof in the volume which contains the Public Laws of 1943. Citations of them hereafter will be by section number only. The sections above cited relate exclusively to deer, their skins (or hides), heads and parts. Section 93 provides for licensing residents to buy and sell deer skins and heads. It contains no reference to hides or parts. Section 95 prohibits the sale of deer or parts except that heads and hides may be sold to taxidermists and dealers. The claim of the State is that delivering the skins to Artus constituted sales of them under rules laid down in the Uniform Sales Act, R. S. 1930, Chap. 165, for ascertaining the intention of parties as to when the property in goods sold passes to a buyer. See Section 19 of the Act, now contained in R. S. 1944, Chap. 171. The provisions thereof are controlled by the opening words which indicate that the rules established are to be applied when no "different intention appears." The agreed facts are not that the persons who had a legal right to dispose of the deer skins delivered them to Artus or intended to sell them to him or that he intended either to buy or sell them. Recitals are that those persons "brought" the skins to Artus; that he "left" them in Bangor. The records of the purchaser there indicate that the sales were made by the persons who had a legal right to dispose of the skins. There is no statement in the agreed facts which negatives an intention on the part of each and every person involved that Artus should act and was acting as agent or bailee. The registration of the sales, presumably made in accordance with license requirements, shows that to have been the intention or understanding of the purchaser. The facts are as consistent with agency or bailment as with sale. See 8 C. J. S., 234, Par. 3 e; *Frye* v. *Burdick et al.*, 67 Me., 408. Artus is not chargeable with having either bought or sold the deer skins.

The case against the respondent Bunker must fail. There is no suggestion of any knowledge on his part that the truck he drove as an employee of Artus was carrying the deer skins. He did not help load them and if the allegations of the complaint are true they were not exposed to view while being transported. There is nothing to show either that he knew or that he should have known of their presence in his load. The case is clearly distinguishable from *State* v. *Goodenow et al.*, 65 Me., 30 and *State* v. *Huff*, 89 Me., 521, 36 A., 1000, where the persons whose convictions were under review knew what they were doing but did not know that their acts were criminal. Driving a truck is not unlawful unless its load, or a part thereof, is being transported unlawfully. There can be no intent to transport on the part of a driver who has no knowledge of the contents of his load. The action of Bunker is comparable with that which both of the cited cases imply would not have been criminal.

Artus transported the deer skins. If it was unlawful to do so his guilt under the complaint alleging that fact is established. This involves the question whether the skin of a deer is a part thereof within the purview of the pertinent statute and the particular requirements which must be complied with to make the transportation of deer and their parts lawful. The State relies on Sections 67 and 82. Section 67 prohibits the transportation of deer and parts, with an exception not here material, unless they are exposed to view, clearly tagged with the name and address of the person who killed the deer and accompanied by that person. This section is controlling. Section 82 relates to the transportation of game animals and game birds without reference to their parts. It imposes the same requirements except on the part of common carriers. The requirements are cumulative. The transportation of deer or parts is lawful only when all are met. Failure to comply with any one or more or all of them constitutes the offense made

punishable by the statute. *State* v. *Burgess et al.*, 40 Me., 592; *State* v. *Lang et al.*, 63 Me., 215; *State v. Haskell*, 76 Me., 399; *State* v. *Willis*, 78 Me., 70, 2 A., 848; *State* v. *Stanley*, 84 Me., 555, 24 A., 983; *State* v. *Trowbridge*, 112 Me., 16, 90 A., 494. The persons who killed the deer did not accompany the skins. This is enough although it may be noted that recital that the skins were tagged with tags bearing names implies that they did not bear addresses and that the omission to state that the skins were exposed to view implies that allegation to the contrary in the complaint is true. The acts of Artus constitute the crime charged if Section 67 is applicable to deer skins.

This issue is not free from doubt notwithstanding the recital in the Agreed Statement that Artus was engaged in the business of transporting animals and the parts thereof, "including hides," and the implication that a skin or hide is a part in Section 95 where hides are excluded from the operation of the word "parts." The Fish and Game Laws contain many references to parts of both animals and birds. Section 42 deals with a fur-bearing animal or part; Section 55 with migratory birds or parts. Sections 60 and 61 regulate hunting and refer to the parts of animals of several species. Sections 66 and 67 deal with the transportation of deer and parts. The skin or hide of an animal and the plumage of a bird are undoubtedly parts thereof within the generally accepted meaning of the term. Yet Section 58 relates to part of the plumage, skin or body of birds and Sections 61 B and 61 B 2, P. L., 1941, Chap. 200, declare that one killing a protected animal under designated conditions shall dress the carcass and care for the meat and may become the owner of the carcass. They do not use the words "part" or "parts." The provisions of Sections 68 and 69 relative to the parts of deer clearly contemplate such parts as constitute meat for consumption as food.

Section 92 authorizes the licensing of taxidermists and provides that fish, game or parts may be transported to them.

The only reference to transportation in Section 93 is that deer skins bought and sold by licensed dealers shall be transported under rules made by the Commissioner of Inland Fisheries and Game. Section 94 provides for licensing persons to buy the skins of fur-bearing animals, with no provision for the transportation of them. To hold it illegal for one having a right to sell a skin to transport it to a licensee for sale would render his right of small value and make licenses to buy skins worthless unless their holders became itinerant buyers traveling to the homes of persons lawfully possessed of skins. A contrary holding will accord with rules of construction that have received general recognition, i. e. that the several sections of a statute may be considered together in seeking to determine legislative intention, *State* v. *Frederickson,* 101 Me., 37, 63 A., 535, 6 L. R. A. (N. S.), 186, 115 Am. St. Rep., 295, and that criminal and penal statutes should be strictly construed, *Case of Waldo T. Pierce,* 16 Me., 255; *State* v. *Kaufman,* 98 Me., 546, 57 A., 886. These support the view, to quote the latter, that laws should receive an interpretation

> "most favorable to the innocence of the citizen, and most agreeable to reason and justice,"

which is perhaps but a rephrasing of declaration in the former that when

> "the liberty of the citizen is involved, the statute should be construed strictly, and should not be made to embrace any doubtful case."

To construe the word "part" in Section 67 as not intended to include skins or hides finds support in the history of legislation on the subject matter. R. S. 1883, Chap. 30 was completely rewritten by P. L. 1899, Chap. 42. It declared closed

seasons on moose, deer and caribou in Sections 9, 10 and 12 and made the possession or transportation of a carcass, hide or part illegal except in an open season in Sections 11 and 13. As somewhat corresponding sections appear in the 1899 law killing and possession are commonly treated but the word "hide" is omitted: Sections 17, 18 and 23. Since 1899 laws regulating the killing, possession and transportation of deer use the word "part," sometimes in the plural, but neither of the words "skin" nor "hide." See P. L. 1901, Chap. 222, Sec. 18; R. S. 1903, Chap. 32, Secs. 17 and 25; P. L. 1913, Chap. 206, Secs. 27, 28, 29, 32, 33 and 37; R. S. 1916, Chap. 33, Secs. 36, 37, 38, 41, 42 and 44; P. L. 1919, Chaps. 37, 131 and 196, Secs. 7, 10, 11 and 12; P. L. 1929, Chap. 331, Secs. 24, 25, 30 and 31; the Biennial Revisions of our Fish and Game Laws, and the session laws consolidated therein which have amended any of the enactments cited. Had earlier legislation referred to deer, or carcasses, and hides the use of the word "parts" in substitution for the latter might have indicated intention to apply a more inclusive term but when a law specifically naming both hides and parts is amended by striking out one of the two words there is clear implication of a restrictive purpose. This is borne out by the fact that the 1899 legislation made the first provision known to our law for licensed dealing in deer skins, Chap. 42, Sec. 28, with no reference to their transportation and no language excepting them from the operation of Section 23. Then, as ever since, dealers were required to register dates of purchase and identities of sellers but there was no requirement involving addresses. This refinement first appeared in P. L., 1933, Chap. 69. If it should be argued that dealers became obligated thereby to travel to sellers rather than have skins transported to them the answer is that it is not manifest in the simple change made in the law. It would be forcing construction to so hold. We determine that the word "part" as used in R. S. 1930, Chap. 38, Sec. 67, as amended, does not include a

skin being carried from one having the right to dispose of it to another licensed to buy it and that the acts of Artus do not constitute the crime with which he is charged.

Exceptions sustained.
Cases remanded to the Bangor Municipal Court for entry of judgment for the Respondents.

VIRGINIA C. STEELE

vs.

CHARLES T. SMALLEY.

Cumberland. Opinion, October 2, 1945.

Statutes. Motor Vehicles. Legislative Intent.

In construing a statute it is the duty of the court to interpret the language so as to carry out the obvious purpose which the legislature had in mind.

A particular phrase or a particular section of a statute should not be considered apart from the context. The entire statute should be considered as a whole and all statutes on the same subject should be considered together in order to reach a harmonious result. Due consideration should also be given to the conditions which prompted the legislature to act.

The limitation period for bringing action provided in Chapter 66 of the revised statutes applies only to actions involving vehicles subject to that chapter.

ON EXCEPTIONS.

Action by the plaintiff for alleged negligence by her attorney, the defendant, said negligence being the failure of the defend-

ant to commence an action within the time fixed by statute for such an action to recover for personal injuries suffered by the plaintiff by reason of a collision between an automobile in which she was riding and a truck. The plaintiff claimed that the right of action was limited to one year by R. S. 1930, Chapter 66, Section 11, and because of defendant's failure to bring action within one year she was obliged to accept in settlement a much smaller sum than she would have recovered had action been brought within the year. Defendant filed a plea claiming that the one year limitation applied only to an action involving a vehicle carrying passengers for hire and subject to the control of the Public Utilities Commission. The plaintiff demurred to defendant's plea. Her demurrer was overruled. The plaintiff filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Richard S. Chapman, for the plaintiff.

Charles T. Smalley, the defendant, pro se.

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

THAXTER, J. This is an action on the case brought by a client against an attorney. The declaration alleges negligence because of the attorney's failure to commence an action at law to recover for personal injuries suffered by the plaintiff until, it is claimed, the action was barred by the running of the statute of limitations. The plaintiff was injured in a collision between an automobile in which she was a passenger and a truck. It is conceded that the defendant represented her as attorney and that he did not bring an action for her within one year after the cause of action occurred. The plaintiff claims that the action was barred by the provisions of Rev. Stat. 1930, Ch. 66, Sec. 11, and that she was obliged to accept in settlement of her claim a very much smaller sum than she

would have received had suit been brought within the year. The statute in question reads as follows:

> "Actions of tort for injuries to the person or for death and for injuries to or destruction of property caused by the ownership, operation, maintenance or use on the ways of the state of motor vehicles or trailers subject to the supervision and control of the public utilities commission, shall be commenced only within one year next after the cause of action occurs."

The defendant filed a plea of the general issue with a brief statement setting forth that the statutory provision in question applied only to an action involving a vehicle, subject to the control of the public utilities commission, which at the time of the accident was carrying passengers for hire. The plaintiff demurred to this plea and the defendant joined in the demurrer. The presiding justice overruled the demurrer and the case is before us on the plaintiff's exceptions.

It is conceded that the operation of the truck was subject to the control of the public utilities commission. The sole question presented to us, therefore, is whether the limitation period of one year prescribed by the statute was a bar to the plaintiff's right to bring an action to recover for personal injuries arising out of the accident.

If we consider only the letter of the statute, the plaintiff's contention would appear to be sound. But, as has been repeatedly pointed out, the strict letter does not always tell the story.

A great chief justice of this state said many years ago: "It has been repeatedly asserted, in both ancient and modern cases, that judges may in some cases decide upon a statute even in direct contravention of its terms; that they may depart from the letter in order to reach the spirit and intent of the act. Frequently has it been judicially said, that 'a thing

within the intention, is as much within the statute, as if it were within the letter, and a thing within the letter is not within the statute, if contrary of the intention of it.'" *Holmes* v. *Paris,* 75 Me., 559, 561.

The rule thus set forth has been consistently followed in this state ever since. *Landers* v. *Smith,* 78, Me., 212, 3 A., 463; *Carrigan* v. *Stillwell,* 99 Me., 434, 59 A., 683, 68 L. R. A., 386; *Sullivan, Adm.* v. *Prudential Insurance Co.,* 131 Me., 228, 160 A., 777; *State* v. *Day,* 132 Me., 38, 165 A., 163; *Chase, Adm.* v. *Inhabitants of Town of Litchfield,* 134 Me., 122, 182 A., 921; *Perkins* v. *Kavanaugh,* 135 Me., 344, 196 A., 645; *George A. Middleton's Case,* 136 Me., 108, 3 A. (2d), 434; *Belfast* v. *Bath,* 137 Me., 91, 15 A. (2d), 249; *S. D. Warren Co.* v. *Inhabitants of the Town of Gorham,* 138 Me., 294, 25 A. (2d), 1471; *Inhabitants of the Town of Ashland* v. *Wright,* 139 Me., 283, 29 A. (2d), 747; *Beck* v. *Corinna Trust Co.,* 139 Me., 350, 31 A. (2d), 165.

In construing the language which has been used, the history of an enactment may throw light on the intent of the legislature. *Inhabitants of Guilford* v. *Inhabitants of Monson,* 134 Me., 261, 265, 185 A., 517 (quoting from *Smith* v. *Chase,* 71 Me., 164, 165). It is fundamental, likewise, that a particular phrase or a particular section should not be considered apart from its context. The entire statute should be considered as a whole and all statutes on the same subject should be considered together in order to reach an harmonious result. *Inhabitants of Turner v. Lewiston,* 135 Me., 430, 198 A., 734; *Belfast* v. *Bath,* supra. Due consideration should also be given to the conditions which prompted the legislature to act. *State* v. *Day,* supra; *The Church of the Holy Trinity* v. *United States,* 143 U. S., 457, 36 L. Ed., 226, 12 S. Ct., 511.

Two recent opinions of our own court are very helpful in determining the question now before us.

In *Chase, Adm.* v. *Town of Litchfield,* supra, the question

was whether the provisions of Rev. Stat. 1930, Ch. 27, Sec. 94, known as Lord Campbell's Act, applied to an action against a town. By its terms the statute applied to all corporations without any limitation. Yet we had no difficulty in excluding municipal corporations from its operation. And the reasons for so doing were set forth in the following language: "If it be said and it is admitted that in a sense a town is a corporation and so comes within the strict letter of the law, yet ' "a thing may be within the letter of the statute and not within its meaning, ... The intention of the law maker is the law. *Smythe* v. *Fiske,* 23 Wall., 374, 23 L. Ed., 47" ... 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, Admr.* v. *Stillwell,* 99 Me., 434, 437, 59 A., 683, 684, 68 L. R. A., 386. It is not reasonable to believe that the legislature intended the word 'corporations' to embrace both towns and private corporations so dissimilar and with practically nothing in common."

In *Connor* v. *Inhabitants of Southport,* 136 Me., 447, 12 A. (2d), 414, the provisions of Pub. Laws 1929, Ch. 161, Sec. 3, were in question, which provided for an appeal by any person or persons aggrieved by the action of municipal officers. Though the language by its terms applied to all appeals without limitation, it was held that the procedure prescribed applied only to appeals by persons aggrieved by the action of the municipal officers in discharging or failing to discharge the duties required of them by that particular chapter of the statutes.

Applying the principles of law above set forth to the instant case, we are satisfied that it was not the intention of the legislature to make the provisions of the statute here in question applicable to actions arising out of accidents caused by the operation of a truck, subject to the control of the public utilities commission.

In 1921 the legislature enacted a law giving to the public utilities commission control over the operation of jitney busses carrying passengers for hire. Pub. Laws 1921, Ch. 184. This statute was amended in 1923, Pub. Laws 1923, Ch. 211, and again in 1925, Pub. Laws 1925, Ch. 167. A number of new sections were added in 1925, one of which was Sec. 11 prescribing the limitation of one year within which actions might be brought. As thus enacted, this section read as follows:

> "Actions of tort for injuries to the person or for death and for injuries to or destruction of property caused by the ownership, operation, maintenance or use on the ways of the state of motor vehicles or trailers shall be commenced only within one year next after the cause of action occurs."

The original act as amended was incorporated into the revision of 1930 as Chap. 66, the title of which was "Motor Vehicles Carrying Passengers for Hire." In Section 11 there was the modification which has caused the present controversy. By this change the act was made applicable to vehicles or trailers "subject to the supervision and control of the public utilities commission." Just why this qualification was made is not clear. It must, however, be borne in mind that at that time only jitney busses, and not trucks carrying freight, were subject to the control of the commission. The change was made to meet conditions as they existed at that time. Possibly it may have been recognized by the revisors of the statutes that the section as originally worded was in technical conflict with the general statute of limitations providing a limitation of six years, Rev. Stat. 1930, Ch. 95, Sec. 90; and the intention was to indicate that the one year limitation was to be confined to the provisions of the chapter of which it was a part governing the operation of jitney busses, which were the only motor vehicles at

that time subject to the control of the commission. But the most significant circumstance is that in 1933 there was passed, not as an amendment to Rev. Stat. 1930, Ch. 66, or any part thereof, a separate and comprehensive act providing for regulation by the public utilities commission of motor vehicles carrying property for hire. Pub. Laws 1933, Ch. 259. In this act there is no reference whatsoever to the other law, and there is in it no special limitation of time within which actions based on negligence in the operation of trucks must be brought.

It therefore seems to us perfectly clear that the limitation period provided in Chap. 66 of the revised statutes applies only to actions involving the vehicles subject to that chapter. There is no more justification for tearing that provision out of its context and applying it to the operation of vehicles covered by another chapter than there would have been in applying the provision relating to appeals commented on in the *Connor* case, supra, to appeals generally simply because justification for such construction could be found in the strict language used by the legislature.

We are concerned here not with form but with substance; and it is the duty of this court to interpret the language of this act so as to carry out the obvious purpose which the legislature had in mind. To apply it in accordance with the plaintiff's contention would be to do exactly the reverse.

The general statute of limitations, Rev. Stat. 1930, Ch. 95, Sec. 90, applied to the right of action arising from this accident. The decision below in overruling the plaintiff's demurrer to the plea was correct.

Exceptions overruled.

RALPH W. FARRIS, ATTORNEY GENERAL,
EX. REL. DANA BOWKER, NATHANIEL M. HASKELL,
RALPH A. LEAVITT, FRED B. KELSEY AND CLIFFORD C. BRUNS
vs.
HARRY C. LIBBY.

Cumberland. Opinion, October 3, 1945.

Elections. Statutes. Legislative Intent. Municipal Corporations.

Whenever possible from a standpoint of legal justice to validate an election, it is the duty of the court to do so.

All parts of a statute should be read as a whole; ambiguities should be resolved; the effects of obvious omissions should be neutralized; and it must be assumed that the legislature did not intend an absurd result or one which is clearly harmful.

In the construing of a statute it is the intent of the legislature which controls, not the particular language which has been used to express that intent.

In the instant case, though not specifically expressed, it is clear that the legislature intended that the old city council of Portland should remain in office until the new council provided for by the amending statute should be qualified to act.

ON EXCEPTIONS.

Writ of mandamus sought by petitioners to compel the respondent, a member of the City Council of the City of Portland, to countersign a certain warrant drawn on the city treasurer for the payment of certain wages and other debts owed by the city, the respondent being the officer designated by the Council to countersign such warrants. The respondent had refused to countersign the said warrant on the ground that by reason of the adoption by the voters of an amendment to

the charter of the City of Portland he had ceased to be a councilman in and for the City of Portland. The justice before whom the hearing on the petition was held ordered the writ to issue. Respondent filed exceptions. Exceptions overruled. The case fully appears in the opinion.

W. Mayo Payson,

Nathaniel M. Haskell, for the petitioners.

Harry C. Libby, respondent, Pro se.

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

THAXTER, J. The attorney general of the state on the relation of certain citizens and taxpayers of the City of Portland petitioned a justice of the Supreme Judical Court for a writ of mandamus to compel Harry C. Libby, who it is alleged, holds the office of councilman of the City of Portland, to countersign a certain warrant drawn on the city treasurer in the sum of $19,353.12 for the payment of certain wages and salaries and other debts owed by the city, the said Libby being the officer duly designated by the council to countersign such warrants. The alternative writ issued, to which the respondent filed a return stating that by reason of the acceptance by the voters of the city at an election held September 10th, 1945, of an act to amend the charter of the City of Portland, he had ceased to be a councilman in and for the City of Portland. A traverse was duly filed to this return. The justice to whom the petition was addressed after a hearing ordered the peremptory writ to issue. To this ruling the respondent filed exceptions, which, in accordance with the provisions of Rev. Stat. 1944. Ch. 116, Sec. 18, have been certified to the chief justice and are now before this court.

The controversy has arisen out of the legislative attempt, Priv. & Sp. Laws 1945, Ch. 113, to amend the charter of the

City of Portland granted in 1923, Priv. & Sp. Laws 1923, Ch. 109. The purpose of the legislature was not to repeal the original charter, or to abolish the form of government thereby established, but to make changes in the composition of the city council therein provided for. By these changes the number of councilmen is increased from five to nine, their terms are shortened from five years to three, and instead of being elected at large, three of the nine are to be elected at large and six from districts established by the amending statute. Except for these changes, the act was left as it had been. As a piece of draftsmanship, the amendment leaves much to be desired. There are apparent omissions and ambiguities.

Firstly, in spite of the clear intent to change the number of councilmen from five to nine, Art. V, Sec. 1, of the original act was left unchanged which provided for the election of only five with an election each year on the first Monday of December to fill the vacancy of the one councilman whose term should expire. The draftsman of the amending act in failing to amend this section apparently lost sight of the fact that, with the increase in the number of councilmen and the shortening of their terms, there would be more than one vacancy to be filled each year.

Secondly, section 4 of the amending act makes provision for the submission of the act for approval to the legal voters of the City of Portland "at the next general election therein to be held on the 2nd Monday of September, 1945." As a matter of fact there would be no "general election" on that date.

Thirdly, section 4 provides that the act "shall take effect for all the purposes" of the act immediately on its acceptance by the voters at the above election. It is to be noted that section 3 of the amending act repeals Art. II, Sec. 2 of the original act which among other things provided that each member of the council "shall hold office until his successor is elected and qualified." In the clause which is substituted for this, no provi-

sion is made for holding over by members of the old council after the act should take effect and until the new members elected in December should assume office.

The respondent, who is chairman of the council as it was established by the original act, has refused to carry out the duties of his office, because he claims that under the letter of the statute he was legislated out of office when the voters accepted the amendment to the charter at the election held on Monday, September 10, 1945. The pleadings indicate that the decision of the respondent not to countersign the warrant was not made in the exercise of any discretion on his part. It is conceded that the warrant was valid and called for the payment of money duly owed by the city. The only reason given for his refusal to sign was that he was not, when called on to do so, a member of the city council. Whether he was is the only question before the court.

The result of the respondent's refusal has been that many necessary municipal functions are at a standstill. City pay rolls have been met only by the adoption of cumbersome expedients. The seriousness of the problem gives to this court, as it should to the administrative officers of the city, good reason to question whether the legislature ever intended the dire consequences which would result from a literal reading of the amending statute. And it is the intent of the legislature which controls, not the particular language which has been used to express that intent. It is the obligation of all concerned, and the particular duty of this court, to approach the solution of a problem such as this, not in a spirit of captious insistence on the letter of the law, but with tolerance and understanding to carry out its spirit. To that end, all parts of the statute should be read as a whole; ambiguities should be resolved; we should seek to neutralize the effects of obvious omissions; and we must assume that the legislature did not intend an absurd result or one which is clearly harmful. The principles of law

governing this subject have been many times set forth. See the case of *Steele* v. *Smalley*, recently decided by this court, in which many of the cases from this jurisdiction are collected.

In this spirit let us take up the particular problem before us.

It is not necessary at this time to consider the inconsistency between the provisions of Art. V, Sec. 1, of the original act and the provisions of Sec. 3 of the new law. What we may here say, however, may serve as a guide to a solution of that problem when it arises.

The provisions of Section 4 of the amending statute providing for a referendum "at the next general election" to be held at Portland "on the 2nd Monday of September, 1945" are not invalid. It is clear that the purpose was to provide for an election to be held on the day in question. That it was misdescribed as a "general" election is immaterial. The specific mention of the date and the place controls.

The respondent's contention that the old council ceased to exist on the acceptance by the voters of the act at the September election cannot be sustained. From a reading of the act as a whole, it is perfectly clear that the legislature never intended any such absurd and harmful result. We need only call attention to the fact that Art. V, Sec. 1, which was left intact provides the method for holding the election for councilmen. That section provides among other things for an election on the first Monday of December of each year and that "the city council shall, as soon as it conveniently can, examine the copies of the records of the several wards, certified as aforesaid, and shall cause the persons who shall have been elected councilmen or members of the superintending school committee to be notified in writing of their election, . . ." How, it may be asked, was this provision of the statute to be complied with if the old council did not remain in office until that duty had been performed? Can we hold that the legislature in enacting this law intended a result which would in effect invalidate

the statute as a whole, and that the lawmakers purported to set up the machinery for an election which would be an utterly futile proceeding? Though it is not specifically expressed, we think it is absolutely clear that the legislature intended that the old council should remain in office until the new council provided by the amending statute should be qualified to act. There is a striking analogy between the problem here before us and that which we considered in *Inhabitants of the Town* of *Ashland* v. *Wright,* 139 Me., 283, 29 A. (2d), 747. It was there claimed that the assessors of the town were not legally qualified to hold office because they were not sworn as the statute provided. The statute required that all town officers should be sworn by the town clerk. The town clerk was sworn in by the moderator of the town meeting, and therefore it was claimed that he himself never properly qualified and could not give the oath to the assessors. The opinion points out the mischievous and absurd result which would follow from a literal interpretation of the statute. If a vacancy should occur in the office of town clerk, the one who might be elected to fill the vacancy could never be sworn in, or if the town clerk were reelected he would have to administer the oath to himself. In holding that it was clear that the legislature never intended any such absurd result, the court said, page 286: "It seems obvious that, though the act says that all officers must be sworn by the town clerk, there was excluded from such category the town clerk himself who was expected to qualify in the usual manner as provided by Rev. Stat. 1930, Ch. 5, Sec. 19."

A reading of the opinion in *Norway Water District* v. *Norway Water Company,* 139 Me., 311, 30 A. (2d), 601, should give notice that, where legislative intent can be ascertained, this court does not look with favor on an effort to invalidate a charter to a municipal or quasi municipal corporation by insistence on ambiguities and incongruities in the act which defines the grant of powers given. There, as here, the validity of

a referendum election was attacked, and this court, quoting from *East Bay Util. Dist.* v. *Hadsell, et al,* 196 Cal., 725, 239, Pac. 38, reiterated the well established rule, "that, wherever possible from a standpoint of legal justice to validate an election, it is the duty of the court to do so."

The sitting justice, in ruling that the referendum election held on the second Monday of September, 1945, was valid and that the respondent is a member of the city council, gave effect to the clear purpose of the legislature in enacting the statute in question. The entry will be

Exceptions overruled.

VIOLET ROBIE, APPELLANT
FROM DECREE OF HARRY E. WILBUR, JUDGE OF PROBATE.

Knox. Opinion, October 5, 1945.

Equity. Fraud. Fiduciary Relations. Findings of Fact. Burden of Proof.

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

Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his or her position will not be permitted to retain the advantage.

The term "fiduciary or confidential relation" embraces both technical fiduciary relations and those informal relations which exist whenever one person trusts in and relies on another.

The rule is that whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them by which the superior party obtains a possible benefit equity presumes the existence of undue influence and the invalidity of the transaction, and casts upon that party the burden of proof of showing affirmatively by clear evidence that he or she acted with entire fairness and the other party acted independently, with full knowledge and of his own volition free from undue influence.

Findings of fact below in such a case are not to be reversed upon appeal unless they are clearly wrong.

The burden to show the error is upon the appellant.

ON APPEAL.

The appellant brought a bill in equity in the Probate Court in which she prayed to have the decree of that court assigning

all her interest in the estate of William F. Rankin, deceased, to said Rankin's widow declared null and void. Decision in that court was in favor of the widow. Appellant above appealed to the Supreme Court of Probate, which court sustained her appeal and declared the assignment invalid for fraud. The widow then appealed to the Supreme Judicial Court. Her appeal was dismissed and the decree of the Supreme Court of Probate was affirmed. The case fully appears in the opinion.

Charles T. Smalley,

Clifford & Clifford, for the appellant, Violet Robie.

Z. M. Dwinal, for the appellee, Martha J. Rankin.

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

HUDSON, J. William F. Rankin, aged 73, died intestate in Camden in Knox County, State of Maine, on February 2, 1943. He left a widow, Martha J. Rankin, whom he had married on August 20, 1940, it being her third marriage and his first, and as his only heir at law his niece, Violet Robie of Hempstead, Long Island, New York, daughter of a deceased sister. Under our statute of descent the interest of the niece in the estate was one-half.

On February 17, 1943, the widow filed a petition for appointment as administratrix and was appointed on March 20, 1943. An inventory of the estate was taken which revealed property of the appraised value of $14,139.23. This was filed and accepted on September 7, 1943. On September 2, 1943, the administratrix made oath that it was a true inventory of all of the estate that had come to her possession or knowledge. On June 5, 1944, she petitioned for a widow's allowance, which was granted at the October term of the Probate Court in the sum of $3,750. Her first and final account, filed on November 2, 1944, showed a balance in her hands for distribution of

$8,679.35, all of which she claimed, one-half as widow and the other half under an assignment by the heir at law dated March 16, 1943.

The validity of this assignment is the issue in this case. Attacking it, the niece as sole heir at law brought this bill in equity in the Probate Court in Knox County (Sec. 2, Chap. 140, R. S. 1944), alleging that it was obtained by fraud and praying that it be decreed null and void for that reason. Decision in the Probate Court was for the widow. Appeal by the niece was taken to the Superior Court as Supreme Court of Probate, which court reversed the decision below, pronouncing the assignment invalid for fraud. To this ruling appeal was taken to this Court.

The fraud complained of consists of certain alleged misrepresentations of fact, chiefly in regard to the size of the estate, contained in a letter written by the widow to the niece on March 12, 1943, in which was enclosed a prepared form of assignment of the niece's interest in the estate to the widow, with a request that she "sign where the x is send it right back, please." This she did. In this letter the widow stated:

> "You do that, then I'll come across not less than $500. perhaps more. I really don't know just what his estate is yet, but don't you worry I know Bill would want me to give you something the only blood relative.
>
> Violet believe me I want to do the right thing by you, as I have done by Bill. . . . I didn't know any more about Bill's business than you. . . . I really don't know as there is it be very much left after everything is paid, but I won't forget you as I shall try and go back to work by the 1st June I get $20 a week. Poor Bill lost so much money in stock the 'Central Maine Power is all he has left, that is any good $400 a year coming in from that. that won't pay my rent and feed me so I am going to work."

The inventory showed that the estate consisted of rights and credits only, viz.: two savings bank deposits, one for $1,790.10 in the Waterville Savings Bank and the other for $3,000 in the Camden National Bank, besides 89 shares of preferred stock of the Central Maine Power Company valued at $8,352.75, and other stocks of differing values and some of no value, making a grand total of $14,193.23.

The niece's contention is that the letter of March 12th was intended to and did mislead and deceive her in picturing an estate very much smaller in fact than the widow knew it to be. Such misrepresentations it is claimed induced her to "sign off" for at least the sum of $500, which she would not have done had the facts as known by the widow been revealed. The letter contains no disclosure of the existence of the bank books. The widow testified that she knew of their existence when she wrote the letter, but that then she did not know how much there was in the banks. These books Mr. Rankin had kept locked in a trunk. He had been accustomed to withdraw money from the deposits and let her have it to pay hospital and doctors' bills. Upon his death she had the trunk and the keys thereto and had full opportunity and means to ascertain the amount in the two banks standing to his credit. She testified that she found these bank books "right after he passed on." He died February 2, 1943 and the letter was written March 12th thereafter. It is incredible that when she found the bank books she did not look at them and learn the amount of the deposits unless she already knew.

In the letter she stated, "I didn't know any more about Bill's business than you," but she had been doing his business to a certain extent anyway. She was his wife; no trouble existed between them; she was in a position, living with him as his wife, to know all about his business transactions (they must have been few as he had retired), while on the other hand his niece lived in New York, and she testified that her uncle never talked with her about business matters.

When the letter was written the widow was the only one upon whom the niece could rely for information as to the estate. She had a right to believe what her aunt wrote her. She had implicit faith in her honesty.

The disclosure in the letter of information in regard to the stocks and the omission to mention the bank books were well calculated to lead the niece to believe that the estate really consisted principally of the stocks. This was a material misrepresentation as to the size of the estate, intentionally made, we believe, for the very purpose of inducing the niece to sign off her interest to the widow for a nominal amount.

When she wrote in that letter, "Poor Bill lost so much money in stock the 'Central Maine Power is all he has left, that is any good $400 a year coming in from that. that won't pay my rent and feed me so I am going to work," she portrayed herself as greatly in need of what her husband left, that it was so little that she would have to go to work, and thus made a direct appeal for sympathy, when in fact she must have known of what the estate consisted and particularly in regard to the money in the banks of which she made no mention, as already stated.

In the letter she also wrote, "I really don't know as there is it be very much left after everything is paid," but her first and final account shows that the only bills against the estate, outside of the expense of administration and counsel fees, were undertaker service, nursing and board, ambulance service, hospital, and doctors' bills, totalling less than $600. It would appear that when she wrote the letter she had no knowledge in regard to bills against the estate that warranted the statement in the letter that there wouldn't be much left after everything was paid.

It must be borne in mind that the widow had possession of all the effects of the estate and so she either did know or could have known within reasonable limits of what the estate actually consisted. She also knew that she was dealing with the

heir at law in New York State who had no such means of acquiring such information and who put her entire trust in her. When the niece was asked as to her trust or confidence in the widow she said, "Why, yes. I had no reason not to. She had seemed kind. I trusted her," and when asked, "Would you have signed this paper marked Bill of Sale if you didn't trust her?" her answer was, "Oh, no, of course not."

We quite agree with what the Justice below said in his decision, that "The defendant may not have known the exact value of the estate of her husband when she wrote the letter asking the plaintiff to 'sign where the X is'; but she did know that it was more than she then intended to inform the plaintiff, and of greater value than she wanted the plaintiff to know or to understand. The defendant deceived and intended to mislead and deceive the plaintiff."

The applicable law pertaining to the issue of fraud in this case is familiar and well established in this state. In *Gerrish, Executor* v. *Chambers et al.*, 135 Me., 70 (189 A., 187) this Court recently stated on page 74:

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

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

To the same effect as to fiduciary or confidential relationship, see the more recent case of *Small, Adm'r* v. *Nelson,* 137 Me., 178, on page 182, 16 A. (2d), 473.

Furthermore, the findings of fact in such a case as this "are not to be reversed upon appeal unless they are clearly wrong. The burden to show the error is upon the appellant." *Gerrish, Executor* v. *Chambers et al.,* supra, on page 74, and cases therein cited. The appellant has failed to sustain her burden to show error.

Appeal dismissed.
Decree below affirmed.

GEORGIANA MERCIER

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

Kennebec. Opinion, October 19, 1945.

Insurance. Jurisdiction of States. Principal and Agent. Fraud. Collusion. Evidence. Province of Jury.

It is for the jury to determine as to the credibility of witnesses and the weight of the evidence.

In the instant case, the record did not warrant a ruling by the Court that the jury verdict was manifestly wrong.

The state in which an application for insurance is made, the premium paid and the policy delivered is the place where the contract is entered into. Agents of insurance companies not incorporated in Maine must submit to the jurisdiction of the courts of Maine in all litigation with residents of Maine. No conditions, stipulations or agreements shall deprive the courts of this state of jurisdiction of such actions.

The law of the state in which an agent is authorized to act for the principal determines whether an act done on account of the principal imposes a contractual duty upon such principal.

The statute of this State, R. S. 1930, Chapter 56, Section 55, provides that the agents of both foreign and domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith.

No fraud can be practised upon a company which is predicated upon the acts or omissions of its agents, such acts and omissions being, in law, the acts of the company.

There was nothing in the evidence in the instant case on which to base a claim of collusion. The term "collusion" is practically synonymous with "conspiracy."

ON MOTION FOR NEW TRIAL AND ON EXCEPTIONS.

The plaintiff was named as beneficiary in an insurance policy issued to her son by the defendant company. The defendant contested her claim to payment on the ground that the insured had made false representations as to his physical condition to the company agent. Witnesses for the plaintiff contradicted the company's claim that false representation had been made by the insured. The jury returned a verdict for the plaintiff. The defendant moved for a new trial and also filed exceptions. Motion dismissed. Exceptions overruled. The case fully appears in the opinion.

William H. Niehoff, for the plaintiff.

Locke, Campbell & Reid, for the defendant.

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

MANSER, J. The defendant company issued a life insurance policy of $1,000 to Dennis Pignoni, son of the plaintiff, who was named as beneficiary. The application was written by an authorized resident agent at Waterville on April 15, 1943. No medical examination was required. The young man was 24 years of age, 5 ft. 10 in. in height and weighed 155 lbs. The evidence, unquestioned, shows that he was apparently in good health. He died July 11, 1943 from pneumonia due to tuberculosis of uncertain duration. He received medical attention for eleven days.

The defendant company contested payment upon the ground that Pignoni made false representations to the effect that no albumin or sugar had ever been found in his urine, and that he had never been told that he had symptoms of diabetes, when in truth he had been diabetic for ten years and had used the insulin treatment therefor. Also that he stated his brother was in good health, when he was at the time a patient in a

tuberculosis sanitarium, and died soon thereafter. From the evidence adduced during the trial, it was stipulated by the parties that Pignoni did not know at the time of the application that he himself was afflicted with tuberculosis.

The position of the plaintiff was that the agent was explicitly informed of the diabetes. The stepfather of the young man, speaking of the visit of the agent to solicit insurance, said:

> "Well, he wanted to sell him a policy, and I told him, "No," I said, "because he has got diabetes; you can't sell no insurance to a man who has got diabetes." But he said, "That won't make no difference; he may never die on account of it, and he may live to be 90 years old."

This epitomizes the testimony of both Mr. and Mrs. Mercier on the point, who said they were present at the time the young man was interviewed.

With relation to all the questions concerning the physical history of the applicant, the testimony for the plaintiff is that no questions were asked of the applicant by the agent except as to whether he had had a surgical operation, and that no question was asked him concerning the condition of health of his brother.

The testimony of the agent was taken by deposition in Alaska. He testified that he read each question to the applicant, whom he did not know prior to taking the application; that the interview was with him alone; that he had no previous knowledge of any physical ailment nor did he learn of any except as to an appendectomy; that the answers as written by him were as given by the applicant. In rebuttal to this, the mother and stepfather testified they were both present during the entire interview and that the agent had known both Pignoni boys since childhood, had seen them frequently up to 1940, and had called them by nicknames.

The issues presented to the jury were whether there were,

in fact, any material misrepresentations or concealments by or on behalf of the applicant; whether the agent knew or was informed of the diabetes and took the responsibility of assuring the applicant that it made no difference and need not be mentioned in the application; and again whether the agent failed to ask the question as to the health of the brother of the applicant, and instead assumed the responsibility of inserting a favorable answer.

The testimony was flatly contradictory. The instructions by the presiding Justice were clear and lucid upon the factual issues. It was for the jury to determine as to the credibility of witnesses and the weight of the evidence. The record would not warrant a ruling by this Court that the verdict was manifestly wrong.

This brings us to a consideration of the exceptions. These were taken as a result of the refusal by the presiding Justice to give certain instructions, in the form requested, and which were as follows:

> "1. The statute C. 56, Sec. 55, 1944 Revised Statutes does not apply to the insurance contract before you, if you find that it is a Massachusetts contract, unless it is proved that Massachusetts has a similar statute.
>
> 2. The statute, C. 56, Sec. 55, 1944 Revised Statutes applies to contracts of insurance "effected" by agents. It does not apply if the contract is not closed by the agent. Taking the application is not enough, for the contract is not completed until acceptance by the insurance company.
>
> 3. The statute does not apply if the effect of application of it in this case would be to permit a fraud to be practiced upon the insurer.
>
> 4. The statute does not apply if there is collusion on

the part of the applicant or the beneficiary or both, and on the part of the agent.

5. This contract is a Massachusetts contract."

As background for the consideration of the legal questions thus arising, we must consider the effect of our statutory provisions relating to out of State companies.

The provisions of R. S., C. 56, §§38-57 inclusive, have application to foreign insurance companies, which by definition mean companies not incorporated in this State. Under the conditions, limitations and restrictions there imposed, such insurance companies are permitted to carry on their business and procure insurance from residents of Maine. To protect the rights of Maine residents, definite requirements are made. Such companies must first secure from the Commissioner of Insurance license to do business in this State. They must qualify in accordance with the specific provisions of our law. They must employ resident agents. These agents must be licensed by the State. They must submit to the jurisdiction of our Courts in all litigation with the residents of Maine. No conditions, stipulations or agreements shall deprive Courts of this State of jurisdiction of actions. Notice of process may be served upon any agent or upon the Commissioner.

Then, of paramount importance, comes the positive provision of §55 of the Chapter,

"Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The Company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company, and waived by it as if noted in the policy."

This law does not discriminate against foreign companies.

> "The simple purpose of the statute is that those seeking insurance and those afterwards holding policies, may as safely deal with the agents, with whom alone they ordinarily transact their business, as if they were dealing directly with the companies themselves." *Maxwell* v. *Insurance Co.*, 114 Me., 170 at 176; *LeBlanc* v. *Standard Insurance Co.*, 114 Me., 6.

The first of these cases was against a Maine Company and the second against a foreign company. The phrase that the agent shall be regarded as in the place of the Company has been interpreted as meaning that the agent "is the company in all respects regarding any insurance effected by him." Cases above cited.

The fundamental question is whether a foreign company can avoid the effect of the statutory provision which, in exact terms, is designed to apply to its contracts, by asserting that such contracts are not executed in this State. It is suggested there is no requirement that the statutory clause must be inserted in the contract, and there is no penalty provided for noncompliance with its terms. It is, however, a basic provision of our law, and our citizens are thereby apprized of the fact that they may rely upon the knowledge and acts of the agents of foreign companies in insurance matters, just as they can with agents of domestic companies. If any foreign company is held to be exempt from the operation of the law by reason of a technical construction as to the place of the contract, the penalty might well be the loss of its right to do business in Maine.

Without undertaking to discuss the fine distinctions, oft-times confusing, drawn by many Courts and legal authorities as to the place of the contract, and which arise from the conflict of laws in various States, we might well adopt the broad

general rule as applicable here that the State in which the application is made, the premium paid, and the policy delivered is the place where the contract is entered into. 11 Am. Jur., Conflict of Laws, ¶ 107. That is what took place in the present case.

Further, while the contract required that due proof of death of the insured must be sent to the home office and the policy surrendered, yet it did not provide, as contended by the defendant, that payment should be made at the home office. It flatly agreed to make payment to Georgianna Mercier, mother, who lived in Waterville, and is the plaintiff here.

The question of whether the policy was, technically, a Maine or a Massachusetts contract was not passed upon by the presiding Justice or the jury. It did not need to be.

The situation presented here is simply whether the defendant Company is responsible for the acts of a duly authorized agent, licensed in the State of Maine, in connection with an application for insurance which he procured in Maine from a citizen thereof, when our statute says that such agent stands in the place of the Company with regard to all insurance effected by him.

In the Restatement of the Law upon the title Conflict of Laws, §345, the rule is succinctly stated as follows:

> "The law of the state in which an agent or a partner is authorized or apparently authorized to act for the principal or other partners determines whether an act done on account of the principal or other partners imposes a contractual duty upon the principal or other partners."

Then under the Comment, after discussing the effect of an agent's acts, we find the definite statement:

> "But whether or not a particular act of the agent or

> partner is authorized, the law of the state where the act is done determines whether the principal is bound by a contract with a third person."

Professor Beale in his work on Conflict of Laws, which is an elaboration of the Restatement, says further, p. 1193:

> "Each state has jurisdiction to impose obligations on a person as a result of the acts which he has done *or caused another to do* within that state."

Thus is put into concrete form a sound rule applicable to the instant case, as collated from the trend of judicial opinion. We agree with the logic and reasoning of Justice White in *Hooper* v. *California*, 155 U. S., 648 at 658, 39 L. Ed., 297, 15 S. C., 207:

> "If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable. . . .

> The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction."

Exceptions numbered 1 and 5 are found to be without merit.

The second exception seeks to uphold the contention that the insurance was not "effected" by the agent because the application had to be sent to the Company for acceptance. The presiding Justice, with reference to this request, instructed the jury as follows:

> "The statute which I read to you applies to insurance effected by agents. I interpret the word "effected" in that case as meaning procured by the agent. In other words, it is undisputed in this case that the agent solicited the insurance, obtained the application and premium, forwarded them to the company at its home office in Boston, that the company sent the policy back to the agent here in Maine, and that he delivered the policy to the insured. I instruct you that that policy was effected—that is, effected by the agent within the meaning of the statute which I read to you."

This properly interpreted the intent of the statute and this exception is without merit.

As to exception 3,

> "The statute does not apply if the effect of it in this case would be to permit a fraud to be practiced upon the insurer."

Again, the defendant is seeking to avoid the effect of the applicable statute. As the verdict of the jury negatived the proposition that any fraud had been committed by the applicant, then what the agent knew or did was the knowledge and act of the Company itself. No fraud can be practiced upon a Company which is charged with the knowledge of the acts and omissions of its agents. The presiding Justice fully covered the questions at issue between the parties upon this point.

As to exception 4,

> "The statute does not apply if there is collusion on the part of the applicant or the beneficiary or both, and on the part of the agent."

As an abstract question of law, the statement is correct. The statute does not apply in cases of fraud on the part of the applicant or collusion between the applicant and agent. In this case, however, it was the position of the plaintiff that no fraud was committed by the applicant. It was the contention of the defendant that its agent faithfully performed his duty, asked all the questions found upon the form provided by the Company and exactly recorded the answers as given. There was nothing in the evidence upon which to predicate a claim of collusion. This term has been well defined as practically synonymous with conspiracy. Under the circumstances here involved, it would amount to a secret agreement between the applicant and the agent to deceive and defraud the insurance company. The Court can not assume that a situation existed which both parties denied, and as to which there could be no reasonable inference.

Motion denied.
Exceptions overruled.

ALICE PRESTON, GUARDIAN,

vs.

HOLLIS REED.

Kennebec. Opinion, November 8, 1945.

Divorce. Fraud. Writ of Error.

A divorce action is not a civil case in the sense used in the statute regarding writs of error and is not according to the course of the common law as modified by any practice or usage in this State.

No specific provision is found in the divorce statute, R. S. 1944, Chapter 153, Sections 55-69, as to the method of procedure to be used to annul or vacate a divorce decree.

The course of the common law as to writs of error does not appear to have been changed by any practice or usage in this State or by any of the general rules of court. The uniform usage and practice in this State under circumstances such as exist in the instant case has been to petition the court which granted the divorce for an annulment thereof.

A plaintiff who takes judgment against an insane person without the suggestion of insanity to the court, or notice to guardian, does so at his peril.

The plaintiff, in writ of error may assign errors of fact not disclosed by the record and offer proof of the same provided they do not contradict the record.

ON EXCEPTIONS.

Writ of error brought by the plaintiff to reverse or correct a decree of divorce granted to the defendant, Hollis Reed, from Abigail Reed, on the ground that the decree was obtained by fraud upon the Court. At the time of the divorce suit, Abigail Reed was, and for a long time had been, confined in the Augusta State Hospital for the insane. The Court was not informed of her insanity. Mrs. Reed had no guardian, no guardian ad litem was appointed for her and she was not represented

at the hearing. The defendant moved to dismiss the suit on the ground that writ of error was not the proper proceeding to obtain the relief sought. The only question before the Court was whether writ of error would lie. Motion to dismiss was granted in the Superior Court. The plaintiff brought the case to the Supreme Judicial Court on exceptions. Exceptions overruled. The case fully appears in the opinion.

Udell Bramson, for the plaintiff.

Sidney W. Wenick, for the defendant.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, JJ., AND CHAPMAN, ACTIVE RETIRED JUSTICE.

MANSER, J. The plaintiff brought writ of error in the Kennebec Superior Court to reverse or correct a decree of divorce granted in that Court to Hollis Reed from Abigail Reed in April 1942. The errors assigned were that the wife, Abigail, has been continuously insane since long before the divorce proceedings were instituted; that she had no guardian at the time and no guardian ad litem was appointed for her; that she was not represented at the hearing and that the decree was obtained by a fraud upon the Court.

A motion to dismiss was filed upon the ground that a writ of error is not the proper proceeding to obtain the result sought. The motion was granted, and the case comes forward upon exceptions. The only question, therefore, is whether the particular form of action will lie.

Redress of wrong to an individual, and condemnation of fraud upon the Court itself, are attributes of justice, and it would be a travesty to hold that there was no remedy. We agree with the vigorous expression of the Court in *Leach* v. *Marsh,* 47 Me., 548, 74 Am. Dec., 503, that, if the plaintiff takes judgment against an insane person without the suggestion of insanity to the Court, or notice to guardian, he must do

so at his peril. As said in forceful language in *Holmes* v. *Holmes,* 63 Me., 420:

> "Shall fraud be skilful enough to impose a sham upon a court of justice, to the injury of innocent persons, without any adequate remedy or reparation therefor?
>
> We are not willing to concede it."

With regard to the position of the plaintiff, it is observed that no specific provision is found in the divorce statute, R. S. 1944, C. 153, §§55-69, as to the method of procedure to be used to annul or vacate a divorce decree, although there is as to annulment of marriages, R. S., C. 153, §52; and that while the propriety of a writ of error for such purpose was questioned in *Prescott* v. *Prescott,* 59 Me., 146, yet the Court proceeded to decide the case upon its merits.

R. S., C. 116, §1, provides that:

> "Writs of error in civil cases may issue out of the supreme judicial court or the superior court in vacation or term time, returnable to the same court."

The form of the writ is prescribed in §7 of this Act, and provides for the allegation that in the former process, proceedings and judgment

> "there occurred the errors hereinafter specified, by which the present plaintiff was injured, and for which he therefor seeks that said judgment may be reversed, recalled or corrected, as law and justice require; that is to say, the following errors: "

It has been uniformly held in Massachusetts, which has a statute relating to writs of error quite similar to our own, that

such statute covers the whole subject in the way intended by the legislature. Other provisions of the common law, including such as are remedial in nature, are thereby superseded. *Commonwealth* v. *Phelan,* 271 Mass., 21, 171 N. E., 53; *Commonwealth* v. *Rollins,* 242 Mass., 427, 136 N. E., 360; *School Comm. of Lowell* v. *Mayor of Lowell,* 265 Mass., 353, 164 N. E., 91. Also, in *Atkinson* v. *Bank,* 85 Me., 368, 27 A., 255, 256, the Court, after referring to the common law procedure, says:

> "Under our system of procedure in Maine, the original writ of error and all the special writs of certiorari and also the special assignments of errors are dispensed with."

Under both the common law and statutory writ of error, if errors in law are assigned, only the record in the former proceedings is admissible to determine such error. *Nissenbaum* v. *State,* 135 Me., 393, 197 A., 915. If the plaintiff's claim was based upon an error of law therefore, the writ would obviously be unavailing, as the record of the divorce proceeding would not disclose the incapacity of the libelee therein, the want of notice and would not indicate the need for appointment of a guardian ad litem. The plaintiff, in error, may, however, assign errors of fact, though not disclosed by the record, and offer proof of the same, provided they do not contradict the record. *Daggett* v. *Chase,* 29 Me., 360; *Jewell* v. *Brown,* 33 Me., 250; *Paul* v. *Hussey,* 35 Me., 97; *McArthur* v. *Starrett,* 43 Me., 345; *Weston* v. *Palmer,* 51 Me., 73; *Denison* v. *Portland Co.,* 60 Me., 519.

The contention of the defendant is that a divorce proceeding is not a civil action, and is not in accordance with the common law, but is ecclesiastical in its origin. In the case of *Prescott* v. *Prescott,* supra, the Court pointed out that

> "The proceedings for a divorce, in some of the States,

> are by a bill in equity. In others they are by libel or petition. In England they are in the ecclesiastical courts. Error only lies where the proceedings are according to the course of the common law."

Our statute, R. S., 116, §9, provides:

> "The proceedings upon writs of error, not herein provided for, shall be according to the common law as modified by the practice and usage in the state, and the general rules of court."

The course of the common law as to writs of error does not appear to have been changed by any practice or usage in the State, or by any of the general rules of Court. Instead, since the pronouncement of the Court in *Prescott* v. *Prescott,* supra, the uniform usage and practice in this State under circumstances such as exist here, has been to petition the Court which granted the divorce for an annulment thereof.

In *Holmes* v. *Holmes,* supra, decided three years after *Prescott* v. *Prescott,* a petition, and not a writ of error, was brought to annul a decree of divorce for fraud. The Court pointed out the distinction between this and other suggested remedies as follows:

> "A new trial is not asked for. If this motion prevails, none can be had. It cuts deeper than that. It seeks to nullify a previous proceeding. To use the forcible phrase of the respondent's counsel, 'it wipes out a record,' it proceeds upon the ground that no trial has been had; and that the record of the trial is no better than it would be, if there had been no notice or order of notice to the libellee. It is not a motion to review or reverse, but to vacate a judgment, on account of a fraud practiced upon the court, injurious to a party who has not been

> heard. It is not pretended that, under this motion, an error of the court could be corrected, or that there could be any remedy for false testimony given at the trial on the merits of the cause. But the court can determine that an apparent and not a real jurisdiction was obtained by fraud, and that a decree made without legal notice in pursuance of it shall be null and void."

Again, in *Lord* v. *Lord,* 66 Me., 265, in which the petitioner asked for a review and for annulment of the divorce, the Court said:

> "The petitioner does not ask for a re-trial of the original libel upon the merits, and also that the proceedings of divorce be annulled. He evidently does not use the word review in the technical sense of a new trial under the statutes pertaining to review, but in the sense of a re-hearing or re-examination, as incidental to his motion to set the decree wholly aside as having been obtained by fraud."

See also *Hills* v. *Hills,* 76 Me., 486; *Spinney* v. *Spinney,* 87 Me., 484, 32 A., 1019, in which the petition is set out at length; *Leathers* v. *Stewart,* 108 Me., 96; 79 A., 16; and the recent case of *Magri* v. *Magri,* 141 Me., ——, 42 A. (2d.) 213.

The statute as to writs of error makes them applicable in civil cases, and although there is found in *Sullivan* v. *Sullivan,* 92 Me., 84, 42 A., 230, a statement that:

> "A suit for a divorce is a civil suit.",

yet this had reference only to the distinction in evidential rules applicable to civil and criminal cases. Clarification is found in *Simpson* v. *Simpson,* 119 Me., 14, 109 A., 254, in the declaration that,

> "While proceedings in divorce are civil in their nature as distinguished from criminal, yet they are ecclesiastical in their origin, are regulated entirely by statute, and cannot be classed as civil actions or cases."

And again, the Court, speaking as to divorce actions, said in *Henderson* v. *Henderson,* 64 Me., 419:

> "All the power vested in the court for this purpose is found in the statutes. . . .
>
> The court, deriving its authority upon this subject solely from the statutes, must be governed by them."

Where, as here, the issue is solely whether writ of error is maintainable to seek the annulment of a decree of divorce, the ruling must perforce be that a divorce action is not a civil case in the sense used in the statute regarding writs of error, that it is not according to the course of the common law as modified by any practice or usage in this State, and is not recognized by any rules of court. That a remedy exists and is open to the plaintiff, cannot be gainsaid.

The legal contention raised by the defendant in the instant proceedings must be upheld.

Exceptions overruled.

LILLIAN LEVESQUE *vs.* COLUMBIA HOTEL.

Cumberland. Opinion, November 21, 1945.

Hotelkeepers. Guests. Bailment. Burden of Proof.

The liability of a hotelkeeper to a guest for the loss of or injury to any property of the guest is determined by R. S. 1944, Chapter 88, Sections 35 and 36. These two sections are complementary and must be read together to determine the liability of the hotelkeeper.

By said sections the liability of an innkeeper for such loss or injury is limited to the sum of $300 even though the loss or injury is due to his negligence.

A guest is a person who lodges, boards or receives refreshment, for pay, at a hotel, boardinghouse, restaurant, or the like, whether permanently or transiently.

The rule is settled in this State that, whatever the form of action, the burden is on the bailor to prove negligence, not on the bailee to prove due care.

ON EXCEPTIONS.

Action of assumpsit to recover the sum of $4,850 which the plaintiff alleged she had deposited with the defendant for safe-keeping, having delivered the same to the assistant manager of the hotel. The plaintiff's money, together with money belonging to the hotel, was stolen from the hotel safe. Plaintiff claimed that the loss was due to negligence on the part of the defendant. The jury returned a verdict for the plaintiff. Defendant filed exceptions and also moved for a new trial. Only the exceptions were considered by the Law Court. Exceptions sustained. The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick, for the plaintiff.

Bradley, Linnell, Nulty & Brown by William B. Nulty and Franklin G. Hinkley, for the defendant.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, JJ. AND CHAPMAN, Active Retired Justice.

THAXTER, J. This is an action of assumpsit brought to recover the sum of $4,850 which the plaintiff claims she deposited with the defendant for safe-keeping. After a verdict for the plaintiff, the case is before us on the defendant's exceptions and motion for a new trial. We shall consider only the exceptions.

The defendant owns and operates a hotel in the City of Portland. In July, 1943, the plaintiff interviewed the manager to find out on what terms she might obtain a room. She told him that she wanted it permanently, but nothing was said as to the length of time she would be there. She was told that the hotel had just the daily rate, but she could have the room on a weekly basis and pay six times the daily rate. She arrived at the hotel July 9th, registered, and was assigned room 132. She found that this room was too hot and later was transferred to room 107. Here she remained during the balance of 1943 and all of 1944. Statements were presented to her weekly and were paid. She took with her to the hotel her radio, a few pictures, and personal belongings. Except for these articles, the room was furnished by the hotel, which supplied the linen, and was taken care of by maids employed by the hotel. On occasions she went away for short stays but continued to pay for her room. She claims, and the jury appears to have found, that on December 29, 1944, she drew from a bank the sum of $4,850 and brought it back to the hotel. This money in bills she inserted in an envelope, wrote her name on it, sealed it, and then placed it in a larger envelope which she also sealed, wrote directions on this envelope to send it to her sister in New Hampshire should anything happen to her. She then inserted this in a third envelope

which she signed. She left her room with this envelope in her hand, and near the hotel office on the second floor met one Anne Goodrich who, she claims and the jury apparently found, was the assistant to the manager of the hotel. She and Miss Goodrich were friends. She gave Miss Goodrich the envelope telling her that there was money in it and that she wanted the hotel to keep it for her safely. Miss Goodrich placed the package in the safe in the upstairs office of the hotel. The plaintiff then left town for a few days returning shortly after New Year's. On the morning of January 9, 1945, it was discovered that the safe had been opened during the night and the plaintiff's money together with over $2,000 of the hotel money had been stolen. The jury evidently found, and we shall assume for the purpose of this opinion were warranted in finding, that Miss Goodrich as the duly authorized agent of the hotel received the money for safe-keeping and that it was lost by the negligence of the defendant.

The action is assumpsit and is based on the claim as set forth in the declaration that the plaintiff was not a guest of the hotel but was a permanent resident, and that the defendant received the money as a bailee and did not return it. The plea is the general issue with a brief statement setting forth that the plaintiff was a guest of the hotel, that the hotel had complied with the statute relating to innkeepers, and that it was entitled to the benefit of the statute which placed a limit on its liability to its guests. The brief statement further alleges that the defendant had kept the money in accordance with the instructions of the plaintiff and that in doing so it had exercised due care.

The issue involves the liability of the defendant as a hotelkeeper as that liability may be limited by the provisions of R. S. 1944, Chap. 88, Secs. 35 and 36. These sections read as follows:

35. "No innkeeper, hotel keeper, or boarding-house

keeper who constantly has in his inn, hotel, or boarding-house a metal safe or suitable vault, in good order and fit for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers, and bullion, and who keeps on the doors of the sleeping rooms used by guests suitable locks or bolts, and on the transoms and windows of said rooms suitable fastenings, and who keeps a copy of this section printed in distinct type constantly and conspicuously posted in not less than 10 conspicuous places in all in said hotel or inn, shall be liable for the loss of or injury to any articles or property of the kind above specified suffered by any guest, unless such guest has offered to deliver the same to the innkeeper, hotel keeper, or boarding-house keeper for custody in such metal safe or vault, and the innkeeper, hotel keeper, or boarding-house keeper has omitted or refused to take said property and deposit it in such safe or vault for custody and to give such guest a receipt therefor; provided, however, that the keeper of any inn, hotel, or boarding-house shall not be obliged to receive from any 1 guest for deposit in such safe or vault any property hereinbefore described exceeding a total value of $300, and shall not be liable for any excess of such property, whether received or not.

36. "Any such innkeeper, hotel keeper, or boarding-house keeper may, by special arrangement with a guest, receive for deposit in such safe or vault any property upon such terms as they may in writing agree to; and every innkeeper, hotel keeper, or boarding-house keeper shall be liable for any loss of the above enumerated articles of a guest in his inn, hotel, or boarding-house after said articles have been accepted for deposit,

> if caused by the theft or negligence of the innkeeper, hotel keeper, or boarding-house keeper, or any of his servants."

At common law a hotelkeeper was an insurer of the property of a guest and was liable for loss or injury to it not caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants. *Wagner* v. *Congress Square Hotel Company*, 115 Me., 190, 98 A., 660. From time to time this liability has been limited by statute. Our present law dates from 1913, P. L. 1913, Chap. 101. Sections 35 and 36 quoted above govern the problem before us. They are complementary and must be read together and harmonized.

The *Wagner* case supra, clearly shows that the innkeeper is not liable for the loss or injury of the articles enumerated in Section 35 if he complies with the conditions specified in that section, unless the guest has offered to deposit and he has omitted or refused to receive the articles for custody. If he does not comply with the the statute he is left under the old common law obligation as an insurer with this exception — that his liability is limited to $300 whether he receives the property or not.

Section 36 provides that the guest and the hotelkeeper may make in writing a special arrangement to receive such articles for deposit upon such terms as they may see fit. Then comes the provision, the meaning of which is in controversy in the present case. It provides that the hotelkeeper is liable for the loss of the enumerated articles after they have been accepted for deposit provided such loss is caused by the theft or negligence of the hotelkeeper or any of his servants. Counsel for the plaintiff maintain that for theft or negligence there is liability for the full value of the articles received for deposit irrespective of the $300 limitation set by Article 35. This might be true if we read Section 36 by itself and not in connection with Section 35. To construe it as suggested renders it inconsistent

with Section 35, the last provision of which would thereby become meaningless. It is clear that the court in the *Wagner* case did not so construe it. That opinion, referring to the deposit of the articles with the hotelkeeper says, page 194, 98 A., page 661: "If they were accepted, Section 2 (now Section 36) made him liable for theft or negligence afterwards by him or his servants. If he did not comply with the statute, it afforded him no protection as to liability for such articles. He was left under the common law liability. But the statute provided that an innkeeper should not be liable for the value of such property in excess of three hundred dollars, whether received or not." It is clear from this that the provision of Section 36 imposing the liability for theft or negligence, applies to the articles enumerated in Section 35 only after they have been received for deposit and that the limitation of three hundred dollars governs, not only the liability imposed by Section 35 for the omission or failure to accept the articles, but also the liability imposed by Section 36 for their loss by theft or negligence after they have been received.

This construction, first made in the *Wagner* case, not only renders the two sections of the statute harmonious, but is in accord with sound public policy. The hotelkeeper is not a banker; and he is not in the business of operating a safe deposit vault except as an incident to operating a hotel. It is not, therefore, unreasonable to restrict his liability for such incidental services rendered to his guests within such limits as will meet their ordinary needs. Those who carry with them large amounts of money or jewelry must take other measures for their protection. The added cost to the hotelkeeper of providing for such protection even as against the willful act or negligence of an employee, is in the last analysis one of his costs of operation reflected in the rates charged to all. Why should those guests who do not need such protection pay for the cost of those who do?

Counsel for the plaintiff have cited a number of cases as

authorities for their contention that this provision of Section 36 renders a hotel liable to a guest without restriction as to amount, if it accepts money for deposit and thereafter it is lost by the theft or negligence of the "hotel keeper . . . or any of his servants." Certain of the cases lend some support to this doctrine. *Leon* v. *Kitchen Bros. Hotel Company*, 134 Neb., 137, 277 N. W., 823, 115 A. L. R., 1078; *Shiman Bros. & Co.* v. *Nebraska Nat. Hotel Co.*, 143 Neb., 404, 9 N. W. (2d), 807; *Gillett* v. *Waldorf Hotel Co.*, 136 Wash., 615, 241 Pac. 14. But it is not without significance that the Nebraska court gives a much narrower interpretation of the provision limiting liability in a similar statute than does our court in the *Wagner* case, and holds that the statute has no application if negligence on the part of the defendant can be shown. This is in no sense the construction which has been put on our statute. The force of the Washington case is greatly weakened by a later case, *Goodwin* v. *Georgian Hotel Co.*, 197 Wash., 173, 84 P. (2d), 681, 119 A. L. R., 788, in which it is held, in construing a slightly different statute, which in substance we are unable to distinguish from our own, that the limitation of liability applied "to losses occasioned by the theft of an employee or by the gross negligence of the hotelkeeper or his, or its, employees." The other authorities cited either involve statutes which are different from ours or the provisions of which do not appear. As against these we have the rather definite implication in the *Wagner* case, that the limitation of liability in the case of a guest applies generally. Counsel for the plaintiff say that, if we put such a construction on the provision in question, the exemption would apply to a theft by the hotelkeeper himself. Of course it would not. The legislature may well have intended that the limitation should apply to theft by an employee; but it does not follow that it applies in case of theft by the hotelkeeper himself if an individual, or in case of wrongful appropriation if the defendant is a corporation. Theft by an employee would be theft from the bailee, theft by the hotel-

keeper himself would be theft from the bailor. See the discussion of this problem in *Millhiser* v. *Beau Site Company*, 251 N. Y., 290, 167 N. E., 447, and in *Goodwin* v. *Georgian Hotel Co.*, supra.

It is apparent, therefore, that, if the plaintiff was a guest of the hotel, its liability to her under the circumstances of this case, even though it may have been negligent in its care of the money, was limited to the sum of $300. The all important question accordingly is, as recognized by both sides, what does the statute mean by the word "guest."

The judge charged the jury as follows:

> "A guest at a hotel is one who is transient, who comes temporarily, is perhaps a traveler or perhaps a person who is passing through a town only. It is temporary—for the time."

To this charge the defendant excepted, as well as to certain amplifications of it which appear to have impressed on the mind of the jury that the decisive consideration was the intent of the plaintiff with respect to her permanent tenure of the hotel room. One of these supplements to the above quoted passage follows closely the language of the court in *Norcross* v. *Norcross*, 53 Me., 163. Also the court below refused to give the two following instructions requested by the defendant:

> "The word 'guest' as used in the statute relating to the liability of hotel keepers to their guests is not limited merely to a person who is a transient or traveler."
>
> "A 'guest' of a hotel within the meaning of said statute is any person who registers at a hotel, receives, or may receive the usual services of the hotel, and who pays or is obligated to pay for his room and service whether it be by the day, week, or otherwise."

We believe that the two requested instructions as applicable to the facts of this case should have been given and that the

charge, which laid emphasis on the transient nature of a guest's status, was altogether too narrow. It is not a question of what the situation was eighty years ago when the Norcross opinion was written, when inns almost exclusively catered to wayfarers and travelers arriving over the highways by horse and buggy, when hotels in the cities seldom had as guests permanent boarders as they now do. The question is what, as applied to present day conditions, does the statute mean by the word "guest."

The word "guest" as used in the statute obviously has reference, not only to the patron of an inn, but to the patron of a hotel which may be of that type which primarily caters, not to transients, but to those who stay for a more or less indefinite time. A guest, according to the statute, also may be a boarder in a boarding-house, clearly not a person who is regarded as a transient, a wayfarer or a traveler. It accordingly seems to us clear that the legislature did not use the word "guest" in the narrow sense which had been given to it at common law. The lawmakers had in mind the ordinary, common, every-day meaning of the word. They were concerned, not with the technical distinctions of the common law, but used the word in the sense that the dictionary gives to it as a "person who lodges, boards or receives refreshment, for pay, at a hotel, boarding-house, restaurant, or the like, whether permanently or transiently."—Webster's New International Dictionary. This is the meaning given to it by other courts. For the distinction between a guest and one who is not, see the following cases: *Brin* v. *Sidenstucker*, 232 Iowa, 1258, 8 N. W. (2d), 423, 145 A. L. R., 359; *Knutson* v. *Fidelity Mut. L. Ins. Co.*, 202 Minn., 642, 279 N. W., 714; *Hart* v. *Mills Hotel Trust*, 258 N. Y. S., 417; *Driskill Hotel Co.* v. *Anderson* (Tex. Civ. App. 1929) 19 S. W. (2d), 216. See also 28 Am. Jur. 547. There are cases which fall very definitely on one side or the other of the line. If a room is rented for a definite period under such circumstances that the occupant assumes full control over it and does not receive the

ordinary services that the hotel offers to guests, the relationship of hotelkeeper and guest does not exist. There are of course border line cases. But where as here a person occupies a room in a hotel, registers as others do, receives maid service, and has the benefit of the other incidental services that the hotel gives, she is a guest, and this is true in spite of the fact that her stay there may be a long one and that she pays on a weekly or a monthly basis. The charge as given on this point was error and the instructions requested by the defendant should have been given.

Possibly the views here expressed may finally dispose of this case. On the chance that it may be retried, we should perhaps discuss the exception to that portion of the charge relating to the burden of proof. The declaration alleges that the plaintiff was not a guest; and the trial proceeded on the theory that the defendant thereby became liable as a bailee, if through its negligence the money of the plaintiff was lost. The judge charged the jury that under such circumstances the burden was on the defendant "to show that no lack of due care on its part was responsible for the non-delivery of the money." This was error. The rule is settled in this state that, whatever the form of action, the burden is on the bailor to prove negligence, not on the bailee to prove due care. *Dinsmore* v. *Abbott*, 89 Me., 373, 36 A., 621; *Sanford* v. *Kimball*, 106 Me., 355, 76 A., 890, 138 Am. St. Rep., 345; *Chouinard* v. *Berube*, 124 Me., 75, 126 A., 180. It is unnecessary to cite further cases. This error apparently arose from confusing the burden of proof with what constituted a *prima facie* case.

Exceptions sustained.

STATE OF MAINE *vs.* CARL WAGNER.

Aroostook. Opinion, November 21, 1945.

Criminal Law. Intent.

In the case of a respondent indicted under Section 22 of Chapter 129, R. S. 1930 as amended by P. L. 1937, Chapter 94 for wantonly and maliciously vexing, irritating, harassing or tormenting any person, specific intent to vex, irritate, harass or torment is an element of the offense and must be proved with the same certainty as any other element.

When a criminal intent of a defendant is at issue, if a conclusion consistent with innocence is reasonable, the defendant is entitled to the benefit of such conclusion.

ON EXCEPTIONS.

The respondent was convicted of wilfully, wantonly and maliciously vexing, irritating, harassing and tormenting the keeper of a rooming house by entering said house without the permission of its owner and occupier after he had been duly forbidden so to do by a deputy sheriff. The respondent moved for a directed verdict of "not guilty," which motion the presiding justice denied. The respondent filed exceptions to the denial and also to various other rulings of the Court. Exceptions sustained. The case fully appears in the opinion.

George V. Blanchard, County Attorney for the State.

Clarence Scott,

Hayden Covington, Brooklyn, N. Y., for the respondent.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, JJ., AND CHAPMAN, Active Retired Justice.

CHAPMAN, A. R. J. Section 22 of Chapter 129, R. S. 1930,

as amended by Chap. 94, P. L., 1937, and in force at the time of the occurrences which were the subject of this case provides in part,

> "whoever being more than 16 years of age wilfully and wantonly or maliciously vexes, irritates, harasses, or torments any person in any way, after having been forbidden so to do, by any sheriff, deputy sheriff, constable, police officer, or justice of the peace, . . . shall be punished."

The indictment against the defendant alleged that the defendant

> "on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and forty-four, being then and there a person more than sixteen years of age, did wilfully, wantonly and maliciously vex, irritate, harass and torment one Mabel E. White by then and there without the permission or consent of the said Mabel E. White entering the dwelling house and convalescent home owned and occupied by the said Mabel E. White, and others, and frightening, disturbing and bothering the said Mabel E. White after he, the said Carl Wagner, had been duly forbidden so to do by one Leo T. Spain, a duly appointed and qualified deputy sheriff, ..."

At the trial, after presentation of the evidence by the State and by the defendant, the defendant moved the Court to direct the jury to return a verdict of "not guilty." The presiding justice denied the motion, and the defendant noted his exception. To sixteen other rulings of the Court made during the progress of the trial, the defendant also noted exceptions. The jury returned a verdict of "guilty" and the defendant is before this Court upon a bill of exceptions embodying the exceptions so noted at the trial.

The defendant, a minister of a religious organization, was engaged in making house to house calls at Houlton in furtherance of the doctrines of his organization. It was in accordance with his procedure to attempt to interest those upon whom he called and, if successful in gaining their interest, to make visits to such persons and engage with them in Bible study. On May 11, 1944, he called at the house of Mrs. White, the complaining witness, for the purpose of seeing a Mr. Wheaton who had a room in the house and who had attended meetings of the organization. The defendant had also on occasions visited Mr. Wheaton at his previous home and engaged with him in Bible study. Mrs. White conducted the defendant to Mr. Wheaton's room but told him that he could not see anyone else in the house. Mrs. White in her testimony stated that she had no objection to the defendant seeing anyone who wanted to see him. She also stated that the other roomers had any callers whom they desired. On the occasion of this visit, the defendant left without seeing or attempting to see any other occupant of the house. On May 18, 1944, he again went to the house and asked for a Mrs. Ketchum but was refused permission to see her by Mrs. White who stated that Mrs. Ketchum was unwilling to see him and she refused to show him what room was occupied by that lady. She, however, again allowed him to see Mr. Wheaton. After a visit with Mr. Wheaton, during which he engaged in Bible study with him, he again approached Mrs. White with a request that she show him Mrs. Ketchum's room, whereupon an argument took place as to their respective rights. The defendant claimed the right to call upon Mrs. Ketchum as an occupant of a room in a rooming house, while Mrs. White claimed that the house was a private dwelling and that she had the right to admit or exclude visitors. Mrs. White called in a deputy sheriff, who at Mrs. White's request compelled the defendant to leave, and forbade him to come to the house again. On May 25, 1944, the defendant again went to the house, went to Mr. Wheaton's room, and in accordance

with his previous visits engaged in Bible study with Mr. Wheaton and left without coming in contact with any other person or attempting to do so.

The charge in the indictment is based upon the defendant's doings on that occasion. If he wilfully, wantonly and maliciously vexed, irritated, harassed or tormented Mrs. White, it was by entering the house and going to Mr. Wheaton's room and holding a Bible study according to the practice of the religious sect to which he belonged.

In the statute the words "wilfully and wantonly or maliciously" modify the words "vex, irritate, harass, or torment." The specific intent to "vex," etc., is, therefore, an element of the offense created and must be proved with the same certainty as any other element. 22 C. J. S., Crim. Law §32; *State* v. *Neal*, 37 Me., 468; *State* v. *Quigley*, 135 Me., 435, 437, 199 A., 269; *State* v. *Sprague*, 135 Me., 470, 475, 199 A., 705; *Savitt* v. *United States*, 59 Fed. (2d), 541; *People* v. *Plath*, 100 N. Y., 590, 3 N. E., 790, 53 Am. Rep. 236; *Roberts* v. *People*, 19 Mich., 401; *Thacker* v. *Comm.*, 134 Va., 767, 114 S. E., 504. It cannot be presumed from the commission of the overt act although such overt act be committed with general wrongful intent. 22 C. J. S., Crim. Law, §32; Lawson on Presumptive Evidence, p. 271; *Smith* v. *State*, 87 Fla., 502, 100 So., 738; *Thacker* v. *Comm.*, supra; *People* v. *Plath*, supra.

The defendant's state of mind which constituted his intent upon the visit complained of must be ascertained from his conduct viewed in the light of attendant circumstances.

He had made visits on previous occasions to see Mr. Wheaton who was interested in the work carried on by the defendant and such visits had been unobjectionable to Mrs. White. It was his persistence in claiming the right to see Mrs. Ketchum that had incurred her displeasure and caused her to order him not to return. On May 25 he visited Mr. Wheaton and engaged with him in Bible study as on previous occasions, and made no attempt to see any other person. His conduct on

that occasion was devoid of anything that on the former visit had been displeasing to Mrs. White. It would not be an irrational conclusion that the purpose and intent of the defendant in his visit to Mr. Wheaton on May 25 was the same as that which had actuated him on his previous visits to that gentleman. It is a principle too elementary to require citation of authority that when a criminal intent of a defendant is at issue, if a conclusion consistent with innocence is reasonable, the defendant is entitled to the benefit of such conclusion. The defendant's motion should have been allowed. It is unnecessary to consider the remaining exceptions. The mandate must be,

Exceptions sustained.

EARL HAMMOND BUBAR, PETITIONER

vs.

DORIS DARLING PLANT.

Penobscot. Opinion, November 21, 1945.

Alimony.

A decree ordering payment of alimony is in the sound discretion of the Court subject to alteration, amendment or suspension, if, by reason of changed conditions, justice so requires.

The payments decreed to the wife in the instant case at the time of the divorce were in fact alimony in spite of the words in the decree "in lieu of alimony."

The discretion of the Court in awarding alimony is not subject to exceptions; and the same rule applies to any subsequent action in altering the decree, though an abuse of such discretion raises an issue of law.

The remarriage of a divorced wife does not of itself terminate her right to alimony, but it does make out a *prima facie* case which requires the Court to end it in the absence of some extraordinary circumstances justifying its continuance.

ON EXCEPTIONS.

Petition for the termination of payment of alimony or such change as to the Court might seem just and reasonable. The plaintiff and defendant were formerly husband and wife. They were divorced and the divorce decree provided for payment of a weekly sum to the divorced wife "in lieu of alimony." The wife remarried and the husband filed a petition seeking that payment should end or be changed. The presiding justice decreed that the payments should be reduced but not entirely terminated. The petitioner filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Arthur L. Thayer,

Frank G. Fellows, for the petitioner.

Abraham M. Rudman, for the defendant.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, JJ. AND CHAPMAN, ACTIVE RETIRED JUSTICE.

THAXTER, J. The parties to this proceeding were formerly husband and wife. At the November, 1940, term of the Superior Court sitting at Bangor within and for the County of Penobscot, the respondent obtained a divorce from the petitioner. By the terms of the decree the petitioner was ordered "to pay to the libelant (Doris Darling Bubar), in lieu of alimony, the sum of twenty-five dollars per week, until further order of Court, the first payment to be due and payable November 30th, 1940, and payments to be made weekly thereafter." Payments were made regularly until about December 13, 1944. On November 26, 1944, Mrs. Bubar was married to one Arnold O. Plant. On December 12, 1944, this petition was

brought, seeking, because of the changed conditions, a termination of the payments as of November 27, 1944, or such change in the order as to the court might seem just and reasonable.

On this petition a hearing was had April 18, 1945. The presiding justice entered an order reducing the payments to ten dollars a week effective on and after April 18, 1945. The case is before us on the petitioner's exceptions to this ruling.

The statute here involved, R. S. 1944, Chap. 153, Sec. 62, has been in effect in its present form since 1939. It prescribes the authority of the Court to award and control alimony payments to a wife obtaining a divorce. The essential part reads as follows:

> "The court may also decree to her reasonable alimony out of his estate, having regard to his ability . . . ; or, instead of alimony, may decree a specific sum to be paid by him to her or payable in such manner and at such times as the court may direct; and may at any time alter, amend, or suspend a decree for alimony or specific sum when it appears that justice requires; and use all necessary legal processes to carry its decrees into effect."

The payments of twenty-five dollars weekly decreed to the wife in this case at the time of the divorce were in fact alimony in spite of the words in the decree "in lieu of alimony." The order was not for the payment of a specific sum. Being alimony, the provision was for the maintenance and support of the wife from week to week, *White* v. *Shalit*, 136 Me., 65, 68, 1 A., 2d, 765; and the decree ordering the same was, in the sound discretion of the Court, subject to alteration, amendment, or suspension if by reason of changed conditions, justice so required. The discretion of the Court in awarding alimony is not subject to exceptions, *Call* v. *Call*, 65 Me., 407; and the same rule would of course apply to any subsequent action of

the Court in altering the decree. But, as in analogous situations, an abuse of such discretion raises an issue of law.

The petitioner in the instant case claims that the remarriage of a divorced wife raises a presumption that the reason for the continuance of alimony no longer exists; and, in the absence of some compelling circumstance, requires the court as a matter of law to order its discontinuance.

The authorities are in conflict on this question. Some hold that the continuance of alimony under such circumstances rests in the sound discretion of the Court; others hold that remarriage *ipso facto* ends the right of a wife to it. For a summary of these divergent points of view, see the annotations in 30 A. L. R., 81; 42 A. L. R., 602; 64 A. L. R., 1273; 112 A. L. R., 253.

We think that the correct rule is that the remarriage of a divorced wife does not of itself terminate her right to alimony, but that it does make out a *prima facie* case which requires the court to end it, in the absence of proof of some extraordinary circumstance justifying its continuance. It is a question in which public policy plays an important part; and it is against public policy in the ordinary case for one man to be supporting the wife of another who has himself assumed the legal obligation for her support. The award of alimony is a continuance under the order of the Court of the husband's obligation to support the wife, and there is no reason why that obligation should remain when another husband has assumed it. The Supreme Court of Connecticut in *Cary* v. *Cary*, 112 Conn., 256, 261, 152 A., 302, 303, has thus summed up the effects of a contrary rule; "It would offend public policy and good morals. It is so illogical and unreasonable that a court of equity should not tolerate it. Well has it been characterized as legally and socially unseemly. Two husbands should not be liable for the obligation of support for a woman who is the divorced spouse of one and the wife of the other." The following authorities support the doctrine of the Connecticut court which we here

adopt. *Maginnis* v. *Maginnis*, 323 Ill., 113, 153 N. E., 654; *Atlass* v. *Atlass*, 112 Cal., App. 514, 297 P., 53; *Montgomery* v. *Offutt*, 136 Ky., 157, 123 S. W., 676; *Lyon* v. *Lyon*, 243 Ky., 236, 47 S. W., 1072; *Emerson* v. *Emerson*, 120 Md., 584, 87 A., 1033; *Sides* v. *Pittman*, 167 Miss., 751, 150 So., 211; *Mindlin* v. *Mindlin*, 41 N. M., 155, 66 P., 2d, 260; *Kirkbride* v. *Van Note*, 275 N. Y., 244, 9 N. E., 2d, 852; *Phy* v. *Phy*, 116 Ore., 31, 236 P., 751, 240 P., 237, 42 A. L. R., 588; 17 Am. Jur. 474, *et seq.*

In California and New York, statutes were involved, but the reasoning of those courts indicates that the same result would have been reached irrespective of statute.

The Massachusetts court has held that remarriage makes out a *prima facie* case for the reduction of alimony to a nominal sum. *Southworth* v. *Treadwell*, 168 Mass., 511, 47 N. E., 93.

In the case now before us the only reason given by the wife why alimony should be continued is that she would not be able without it to live with her second husband in the way in which she lived prior to her marriage to him. That is hardly a valid reason for its continuance. The first husband is under no obligation to support her as another man's wife in the same status as she lived as a single woman.

The decree reducing the alimony to ten dollars a week was erroneous. The payments should end as of the date of the last payment made by the petitioner to her.

Exceptions sustained.

GEORGIANNA BOUCHER GOSSELIN

PETITIONER FOR WRIT OF HABEAS CORPUS.

Somerset. Opinion, December 11, 1945.

Constitutional Law. Criminal Law. Habeas Corpus. Indictment and Complaint. Confinement of Women in Reformatory.

The issue in habeas corpus proceedings is whether one is being held on process issued by competent authority in accordance with law and in proper form.

Habeas corpus is an appropriate process for one who is held in confinement under an unconstitutional statute to seek discharge.

The legislation establishing the Reformatory for Women, and other corrective institutions, is designed to accomplish the reform of persons committed thereto rather than their punishment.

The test to be applied in determining whether indictment, as distinguished from complaint, is requisite to the prosecution of a particular criminal offense is whether that offense may be punished by imprisonment for a year and is not met because the persons accused, if convicted, might be sentenced to a reform institution for an indefinite term which might exceed that period.

The legislative branch of our government has a considerable latitude in the classification of persons for the purpose of the punishment or reformation of persons convicted of crime.

The courts may not interfere with such legislative classification on constitutional grounds unless legislative power has been exercised arbitrarily or irrationally.

The Court held that R. S. 1944, Chap. 23, Sec. 53, is not unconstitutional because of the provision authorizing the confinement of women for 3 years as contrasted with the 2-year maximum applicable to men under R. S. 1944, Chap. 23, Sec. 66, for offenses of the same grade.

ON EXCEPTIONS.

Petition for writ of habeas corpus. It was urged in the Court below that the statute under which sentence was imposed upon the petitioner is unconstitutional because it permits the confinement of women in the Reformatory for Women under indeterminate sentence upon conviction of misdemeanor for three years, whereas men committed to the Reformatory for

Men for offenses of the same grade may be confined there for not more than two years, and thereby discriminates against women. Ruling in the lower Court was adverse to the petitioner. The petitioner filed exceptions. Exceptions overruled. The case fully appears in the opinion.

F. Harold Dubord, for the petitioner.

Ralph W. Farris, Attorney General,

Abraham Breitbard, Deputy Attorney General, for State.

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

MURCHIE, J. The petitioner herein was committed to the Reformatory for Women under a mittimus issued from the Superior Court on December 22, 1944. She pleaded guilty in that Court in June 1944 to a Municipal Court complaint carried there by her appeal. The offense charged was intoxication. She was sentenced to an indefinite term in the Reformatory but the sentence was suspended and she was placed on probation for one year. Her commitment followed finding that she had violated her probation. The habeas corpus proceedings were instituted January 18, 1945.

Her petition is in the usual form alleging her imprisonment unlawful without specifying any grounds therefor but it was urged upon the Justice who heard the cause below that the statute under which the sentence was imposed is unconstitutional because it permits the confinement of women in the Reformatory for Women under indeterminate sentence upon conviction of misdemeanor for three years and thereby discriminates against them as a class, since men committed to the Reformatory for Men for offenses of the same grade may be confined there under similar sentence for no more than two years. As an alternative ground it was asserted that process which involves a penalty of imprisonment for more than one

year may not be commenced by complaint but requires indictment. The latter contention, although included in the bill of exceptions, is expressly waived in the argument presented in this Court.

The issue is nothing more than whether the petitioner is being held on process issued by competent authority in accordance with law and in proper form. *O'Malia* v. *Wentworth*, 65 Me., 129; *Hibbard* v. *Bridges*, 76 Me., 324; 25 Am. Jur. 144, Par. 2; 39 C. J. S., 425, Par. 1. Habeas corpus has been declared an appropriate remedy for one in prison under sentence imposed according to a law which contravenes constitutional safeguards, *Herrick* v. *Smith*, 1 Gray (Mass.), 1 at 49, 61 A. D., 381, at 407; *Sennott's Case*, 146 Mass., 489, 4 Am. St. Rep., 344, 16 N. E., 448; 39 C. J. S., Habeas Corpus 458, Par. 18; 25 Am. Jur. 164, Par. 29. That principle we adopt although there is authority contra. See 25 Am. Jur. 166 and 39 C. J. S., 459 with the footnotes thereto. The exceptions do not record whether the petitioner was found intoxicated in a public place, the punishment for which was then found in R. S. 1930, Chap. 137, Sec. 18, or upon the premises of a common carrier (see R. S. 1930, Chap. 64, Sec. 70), but the arguments offered on her behalf and for the official who produced her in court and answered to the process make it clear that the former is the case and the statutory punishment for a first offense, applicable to all persons not eligible for commitment to the Reformatories and other corrective institutions, is a fine of not more than $10 or imprisonment for not more than 30 days. The statute fixing the punishment draws no distinction between men and women or between minors and persons of age.

We refer to the alleged ground for exception waived by the petitioner because it is so obviously a companion piece to that on which she continues to rely and consideration of it throws so definite a light thereon. If an indeterminate sentence to the Reformatory for Women constitutes punishment measured by imprisonment for a term of three years and a sentence to the

Reformatory for Men corresponding punishment for terms of two years or five, depending upon the grade of the offense involved, it would be requisite under our law that prosecution in either case be commenced by indictment. Our constitutional provision, contained in Article 1, Sec. 7, provides only that:

> "No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury . . ."

with language excepting impeachment, cases arising in the armed services and those "usually cognizable by a justice of the peace." Capital crimes or offenses have been unknown in this jurisdiction since capital punishment was abandoned in 1887, P. L. 1887, Chap. 133, Sec. 1, and we have no crimes generally classified as infamous, but a classification of felonies as major crimes and misdemeanors as crimes of lesser grade was declared by statute as far back as the revision of 1841. In R. S. 1841, Chap. 167, Sec. 2, as now, the basis for distinction was whether the offense was punishable by imprisonment in the State Prison. At that early date the applicable section of the statute enumerated certain crimes as felonies, and followed the enumeration with a general provision declaring all crimes punishable with death or imprisonment in the State Prison to be such. In the succeeding revision the enumeration was dropped and the general recital applicable to punishment by death or imprisonment in the State Prison retained, as was the case in the revision of 1871. See R. S. 1871, Chap. 131, Sec. 9 and R. S. 1857, Chap. 131, Sec. 9. The language used in R. S. 1944, Chap. 132, Sec. 1 is identical with that appearing in the revision of 1883 and each subsequent one. See R. S. 1883, Chap. 131, Sec. 9; R. S. 1903, Chap. 132, Sec. 10; R. S. 1916, Chap. 133, Sec. 11; R. S. 1930, Chap. 143, Sec. 11. The effect of this definitive provision has been controlled at all times since the revision of 1857 by a general law directing that all

sentences of imprisonment for the term of one year or more "shall be in the state prison." See R. S. 1857, Chap. 135, Sec. 2; R. S. 1871, Chap. 135, Sec. 2; R. S. 1883, Chap. 135, Sec. 3; R. S. 1903, Chap. 136, Sec. 3; R. S. 1916, Chap. 137, Sec. 3; R. S. 1930, Chap. 147, Sec. 3; R. S. 1944, Chap. 136, Sec. 4. Decided cases make it clear that the test to be applied in determining whether indictment, as distinguished from complaint, is requisite to the commencement of prosecution is whether the offense charged is punishable by imprisonment for a year, in which case no one may be held to answer a charge except under the indictment of a Grand Jury. *Butler et al., Petitioners for Habeas Corpus*, 84 Me., 25, 24 A., 456, 17 L. R. A., 764; *State* v. *Arris*, 121 Me., 94, 115 A., 648, 24 A. L. R., 990; *State* v. *Vashon*, 123 Me., 412, 123 A., 511.

Criminal law in ancient times, in this State as elsewhere, had the punishment of criminals as its principal objective and sought to make the measurement of it proportionate to the grade of the offense without regard to the age or sex of the criminal, although Houses of Correction were required to be constructed in each and every County of the State in the early days of our statehood, P. L. 1821, Chap. CXI. That the primary purposes of the law were the punishment of offenders and the suppression of crime is undoubted but that a supplemental purpose involved the element of reform is apparent in the provision of the closing section of the law providing for Houses of Correction, which authorized the discharge of inmates therefrom on their application when "the ends" of the commitment had been answered.

Beginning with the establishment of a State Reform School in 1853 (P. L. 1853, Chap. 19) reform, as distinguished from punishment, has been an avowed objective of our penal system. Under that law any boy under the age of 18 years convicted of an offense punishable by imprisonment (other than assault and battery) might be sentenced to the State Reform School or to the punishment provided by law for the particular of-

fense. All sentences to the State Reform School were required to be in the alternative and if the trustees thereof found a boy sentenced to confinement therein incorrigible (or that it was inexpedient to receive him) their certificate to that effect on the mittimus would make the alternative sentence effective. This was the forerunner of a series of enactments in the field of reform which have provided not only a set of reform institutions available to attempt the reclamation of persons of both sexes from criminal tendencies but a system of indeterminate sentence and parole which has an identical objective.

The institutions named in the order of their establishment are the State School for Boys, as our State Reform School was designated in 1903, P. L. 1903, Chap. 144, R. S. 1944, Chap. 23, Secs. 75 to 85 inclusive; the State School for Girls, which the earlier Maine Industrial School for Girls, established as a private institution by P. & S. L. 1872, Chap. 183 and given public status by P. L. 1873, Chap. 141, became in 1915, P. L. 1915, Chap. 152, R. S. 1944, Chap. 23, Secs. 86 to 94 inclusive; the Reformatory for Women, established by P. L. 1915, Chap. 206, R. S. 1944, Chap. 23, Secs. 51 to 64 inclusive; and the Reformatory for Men, established by P. L. 1919, Chap. 182, R. S. 1944, Chap. 23, Secs. 65 to 73 inclusive. The government of the two schools was vested in a single board designated as the "Trustees of Juvenile Institutions" by P. L. 1911, Chap. 150. Provision was made that boys between the ages of eight and sixteen should not be given a record of conviction for any crime other than "juvenile delinquency" except for offenses punishable with imprisonment for life by P. L. 1919, Chap. 58. This provision was made applicable to any child under 17 years of age by P. L. 1921, Chap. 129. Our present statute law dealing with this subject matter is found in R. S. 1944, Chap. 133, Secs. 2 and 4 to 7 inclusive.

As now constituted our Reformatory for Women is available for all females between the ages of 16 and 40, our Reformatory for Men for all males from 16 to 36 years of age and our State

Schools take care of boys over 11 and girls over 9 up to 17 years in each case. There is an overlapping of one year for both males and females with identical provision that an incorrigible inmate of either school over 16 years of age may be transferred to the appropriate Reformatory.

Many years after the concept of reform as distinguished from punishment began to control legislative policy in our criminal law a system of indeterminate sentence and parole was developed to further it, P. L. 1913, Chap. 60. The enactment of this law preceded the construction of our Reformatories for Women and Men by only a few years. For those institutions originally there was no upper age limit for either sex but those now effective were provided for males in 1923 and for females in 1931, P. L. 1923, Chap. 58 and P. L. 1931, Chap. 17. The original legislation carried identical provisions fixing the maximum periods of confinement under indeterminate sentences for felonies and misdemeanors at five years and three years respectively, except that men were not subject to it for misdemeanors unless after prior conviction of crime, the maximum for male first offenders, except where felonies were involved, being fixed at six months. P. L. 1915, Chap. 206, Sec. 7 and P. L. 1919, Chap. 182, Sec. 7. From the time of the establishment of the Reformatory for Women to date the maximum indeterminate sentence for misdemeanors has been three years. That applicable to male first offenders was fixed originally at six months and changed by P. L. 1941, Chap. 140 to one year, the original three-year maximum for other males being reduced to two. There has been no time during the entire history of our legislation on the subject matter when male and female offenders have been accorded exactly identical treatment.

The issue presented in the case is the constitutionality of legislation which permits the confinement of women under indeterminate sentences, for the purpose of intended reform, during a maximum period longer than that applicable to men

subject to similar sentences for offenses of corresponding grade. Unconstitutionality is urged on the basis of declarations in two decisions of the Kansas Court and one in our Mother Commonwealth, which call attention to the fact that the statutes under consideration contained no element of discrimination. *Re Petition of Josie Dunkerton*, 104 Kan., 481, 179 P., 347, 3 A. L. R., 1611; *State* v. *Heitman*, 105 Kan., 139, 181 P., 630, 8 A. L. R., 848; *Platt* v. *Commonwealth*, 256 Mass., 539, 152 N. E., 914. Both Kansas cases involve Chapter 298 of the Laws of 1917 and were decided in 1919. The Massachusetts case relates to G. L., Chap. 279, Secs. 16, 17, 18, 31, 32 and 33 (as effective in 1925).

The Kansas statute provided for the confinement of women convicted of crime in a state industrial farm under indeterminate sentences but fixed a maximum term for each offense measured by that applicable to the punishment provided by law. The Massachusetts statute provided identical maximum periods of confinement under indeterminate sentences for men and women. Referring to the particular legislation the Kansas Court, in the earlier of the two cases cited from that jurisdiction, laid some emphasis on the limitation imposed with reference to the maximum period of confinement and made comment that the legislature might:

> "very properly determine that women convicted of crime . . . be less severely punished than men convicted of the same crime"

and Chief Justice Rugg noted in the Massachusetts case that the provisions:

> "applicable to sending men convicted of misdemeanors to the . . . reformatory are similar, in the particulars of which complaint . . . is made, to those relating to sending women to the reformatory for women."

A great deal of the discussion in the Massachusetts case and the later Kansas decision recognizes the trend of penology and of legislation toward abolishment of the theory of mere punishment (which the Kansas Court says was designed to accomplish vengeance or retribution) and establishment of the policy of reform. The Massachusetts case involved the issue of indeterminate sentences to reform institutions carrying the possibility of confinement for misdemeanors during periods greatly in excess of the punishments provided otherwise by law. It calls attention to the history of legislation on the subject matter and stresses the burden placed upon the courts:

> "to determine on the evidence in each case whether the purely punitive sentence for a specified period, or the indefinite sentence with a reformative purpose even though invoking longer restraint, is better for the common welfare."

Immediately prior to the sentence first quoted from the Massachusetts case (*Platt* v. *Commonwealth*), which may be said to lend some color of support to the argument made on behalf of the petitioner by its reference to the corresponding restraints in reform institutions applicable to both men and women, are declarations which seem very much in point to the present issue. These are:

> "It is too plain for discussion that the Legislature may classify according to sex for purposes of punishment and reformation those convicted of crime. There is no inequality between men and women as to their liability to sentence under the statutes even *if it be assumed that such inequality could rightly be urged.*"

We have emphasized the closing words of the quoted excerpt to call attention to the fact that the decided case makes

no declaration that equality of treatment for men and women is essential. There is clear implication that such equality is not requisite in the quotation already made from the Kansas case, *Re Petition of Josie Dunkerton*, supra. The latter, it is true, suggests that any inequality should favor women as a class, rather than men, but both cases recognize that classification is a matter for the legislative department of government rather than the judicial. The power of reasonable classification has been declared on numerous occasions by many courts. A considerable review of cases on the point is contained in *State* v. *King*, 135 Me., 5, 188 A., 775. There is no necessity for repetition at this time. It is only when legislative classification is arbitrary or irrational that courts may intervene on constitutional grounds.

Whether the members of this Court individually would have considered that less time would be required to accomplish the reform of male first offenders than would be requisite for other males or for females or that two years would be sufficient for more hardened males although the reform of women would require three years is not important. Our power and authority collectively is to decide no more than that legislative decision is reasonable or unreasonable. The petitioner was incarcerated in the Reformatory for Women instead of being sentenced to a small fine or a brief sojourn in jail on the theory (to quote Chief Justice Rugg) that her reform was "better for the common welfare" than "a purely punitive sentence." Legislative progress in the field of reform would be impossible if the law applicable to each and every reform institution had to be checked every time a change seemed desirable in one of them. If the sentence imposed on the petitioner could be considered as representing punishment for her offense according to the standards of ancient times, her prosecution would have failed at the outset because commenced by complaint rather than indictment. Since it cannot, it must be regarded as intended to accomplish her reform according to a legislative judgment or

classification that can not be considered as either unreasonable or improper. The statute under which she is held carries appropriate provisions for her parole as well as for her discharge from the institution when it appears to the authority in charge that she "has reformed" or "is no longer in need of supervision," R. S. 1944, Chap. 23, Secs. 58 and 59. Under the circumstances the mandate must be

Exceptions overruled.

NORA J. LANDER *vs.* SEARS, ROEBUCK AND COMPANY.

Penobscot. Opinion, December 20, 1945.

Negligence. Evidence. Duty of store proprietors.

A store proprietor owes a duty to his customers to use due care to keep his premises reasonably safe for the use of his customers, but is not an insurer of the safety of his premises for customers' use.

A store proprietor is not liable for injuries resulting from a fall suffered on his premises by a customer because of moisture or water accumulated on the floor in the ordinary course of business unless some other foreign substance or some defect in construction or lighting contributes thereto or unless a hazard has become apparent and there has been negligence in the failure to remove it.

In passing upon the propriety of a verdict ordered for defendant all conflicts in evidence must be resolved most favorably to the plaintiff.

Where all the evidence in a case viewed most favorably for the plaintiff will not support a plaintiff's verdict, it is proper for the Justice at *nisi prius* to direct one for the defendant.

ON EXCEPTIONS.

Action by plaintiff for injuries sustained by her in a fall on the floor of defendant's store. The floor was slippery from

water which had been tracked in. The plaintiff alleged negligence on the part of the defendant in not keeping the floor dry by the use of mats or by mopping. Verdict for the defendant was directed in the Superior Court. The plaintiff filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Abraham Stern,

Charles P. Conners, for the plaintiff.

James E. Mitchell, for the defendant.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, JJ. AND CHAPMAN, ACTIVE RETIRED JUSTICE.

MURCHIE, J. This case, brought forward by plaintiff's exceptions to the direction of a verdict for the defendant, presents the single issue whether a storekeeper is negligent in permitting customers to enter a store, having a floor which becomes slippery when weather conditions are such that water or moisture will be tracked in upon their footwear, without protecting them from the hazard of slipping by the use of mats or other materials under such circumstances or by keeping the floor dry through mopping. A wet floor inevitably results when customers in large numbers enter a store from the street when rain or snow is falling, or the ground outside is covered with melting snow. The facts with which we deal show that the plaintiff slipped and fell in defendant's store in the early afternoon of December 18, 1943, the weather being mild, with snow, ice and slush covering the highways and sidewalks which provided access to the premises. Every customer who entered, including the plaintiff, must have tracked moisture into the store and onto its floor.

The allegations of negligence concerning which evidence was introduced are that the surface of the floor at the time the plaintiff was injured was wet, very slippery and unsafe; that it

was hazardous whenever water or moisture was permitted to remain thereon; and that temporary mats or covers should have been provided under prevailing weather conditions, or arrangements made to keep the surface dry by mopping. Additional allegations, entirely unsupported by testimony, are that the floor was surfaced with "linoleum or other like smooth material"; that a "particular location" of the aisle where the plaintiff fell contributed to her fall; that the defendant or its servants knew, or ought to have known, of the hazard, in the exercise of due care; and that the duty of the defendant was "to see that the floors of its . . . store were in a safe condition to be walked upon."

The applicable law is established. It is stated with great clarity in an annotation covering more than 50 pages commencing at 100 A. L. R., 710, at page 711:

> "The proprietor of a store or shop owes a duty to his invitees to exercise reasonable, ordinary, or due care to keep his premises reasonably safe for their use."

This is consistent with the statement of the rule set forth in 38 Am. Jur. 754, Par. 96, and with many decided cases cited in the annotation aforesaid and in a footnote to that text. It has been declared the law in this jurisdiction. *Thornton* v. *Maine State Agricultural Society*, 97 Me., 108, 53 A., 979, 94 Am. St. Rep., 488; *Graffam* v. *Saco Grange Patrons of Husbandry*, 112 Me., 508, 92 A., 649, L. R. A., 1915 C632. A storekeeper is not held to insure his patrons against injury while on his premises. *S. S. Kresge Co.* v. *Fader*, 116 Oh. St. 718, 158 N. E., 174, 58 A. L. R., 132; *Bader* v. *Great Atlantic & Pacific Tea Co.*, 112 N. J. L., 241, 169 A., 687. The distinction between his duty and that of an insurer was well drawn by Mr. Justice Farrington in *Charpentier* v. *Great Atlantic & Pacific Tea Co.*, 130 Me., 423, 157 A., 238, when he said, in speaking of the duty of a railroad to its employees:

"It does not undertake to provide a reasonably safe place . . . , but it does undertake to use due care to do so, and that is the measure of its duty."

The issue presented by the exceptions is the application of this law to the facts of the present case. Those facts can not be said to be in dispute although the evidence discloses conflicts of testimony as to whether the surface of the floor at the point where plaintiff fell was wet or dry, the exact location of that point, and whether plaintiff was passing it for the first time that day or had passed it once and was retracing her steps. In considering the propriety of a directed verdict all such conflicts must be resolved in the manner most favorable to the plaintiff. *Howe* v. *Houde*, 137 Me., 119, 15 A., 2d., 740; *Barrett* v. *Greenall*, 139 Me., 75, 27 A., 2d., 599; *Jordan* v. *Maine Central Railroad Co.*, 139 Me., 99, 27 A., 2d., 811. We must pass upon the exceptions on the assumption that the jury would have found that the plaintiff fell where and as she deposed, while walking in the direction she asserted, and that the floor at that point was wet and slippery, but if the evidence viewed thus favorably would not warrant a jury finding that the defendant had not exercised "reasonable, ordinary, or due care to keep his premises reasonably safe" for the use of its customers, to repeat the essential language of the quotation from the A. L. R., annotation *supra*, it was proper for the Justice before whom the case was tried to direct a verdict for the defendant, as he did. *Heath* v. *Jaquith*, 68 Me., 433; *Bennett* v. *Talbot*, 90 Me., 229, 38 A., 112; *Johnson* v. *Portland Terminal Co.*, 131 Me., 311, 162 A., 518; *Scannell* v. *Mohican Market*, 131 Me., 495, 160 A., 777. This principal is of general application. *Hathaway* v. *Chandler and Co. Inc.*, 229 Mass., 92, 118 N. E., 273; *Johnson* v. *Pulidy*, 116 Conn., 443, 165 A., 355; *S. S. Kresge Co.* v. *Fader*, supra; 38 Am. Jur. 763, Par. 102. The propriety of a nonsuit ordered by the Court is tested in the same manner. *Spickernagle* v. *C. S. Woolworth & Co.*, 236 Pa. St. 496, 84 A., 909, Ann. Cas.

1914 A., 132; *Schnatterer* v. *Bamberger et al.*, 81 N. J. L., 558, 79 A., 324, 34 L. R. A., N. S., 1077, Ann. Cas. 1912 D., 139, 1 N. C. C. A., 669.

A jury might have found that the fact of plaintiff's fall in the aisle of defendant's store proved it was not a safe place, or even a reasonably safe place, for her unless it believed that the fall resulted from her own negligence in whole or in part. Whether the floor was in fact safe, or reasonably so, is not the issue, but rather whether the defendant is chargeable with negligence for a failure to use reasonable and ordinary or due care to that end. There is no complication resulting from the presence of some foreign substance other than moisture on the floors when it would be necessary to determine whether the proprietor knew of its presence or was chargeable with notice of it because of its presence for a sufficient period of time.

Plaintiff fell on a floor made slippery by water and melting snow and ice tracked thereon by customers entering the premises, as she did, to buy goods. That the floor was wet and slippery must be regarded as established since there is evidence to that effect which a jury might have accepted as true, notwithstanding testimony of opposite effect. There is no evidence however that the floor covering was linoleum or other like smooth material; that it was more slippery than store floors generally under the prevailing weather conditions, or that the defendant or its servants had knowledge of its condition prior to the time of the plaintiff's fall. "For all that appears" in the evidence, to quote the California court in *Neil* v. *Bank of America National Trust & Savings Association* (Cal.), 104 P., 2d., 107, the plaintiff may have tracked into the store the very moisture "which caused her to slip and fall."

The plaintiff cites us to numerous cases wherein the question whether one in the position of the defendant had used due care to have its premises reasonably safe was declared to be a question of fact for jury determination. Some of these, such as our own, *Franklin* v. *Maine Amusement Co.*, 133 Me., 203, 175

A., 305, and *Shaw* v. *Piel*, 139 Me., 57, 27 A., 2d., 137, are so clearly distinguishable from a floor made wet or slippery by moisture tracked in on a rainy day as to need no comment. Seven involve moisture tracked in as in the present case, but all of these disclose some basis for asserting liability on the part of the storekeeper other than mere slipperiness. In three of the seven, *Flora* v. *Great Atlantic & Pacific Tea Co.*, 330 Pa., 166, 198 A., 663; *Bankhead* v. *First National Bank in St. Louis* (Mo., App.), 137 S. W., 2d., 594; and *Smith* v. *Sears, Roebuck and Co.* (Mo., App.), 84 S. W., 2d., 414, the fact that the owner or occupant of the premises realized there was a hazard of slipping confronting his customers on rainy days was apparent from an established practice of keeping the floor dry by mopping and the issue was whether due care had been taken to guard customers against a known hazard, yet in the Pennsylvania case the issue was said to be "admittedly a very close one." Another, *Lyle* v. *Megerle*, 270 Ky., 227, 109 S. W., 2d., 598, is typical of a large number of cases where the hazard of mere wetness was increased by an additional complication. In the particular case it was mud and soot making the accumulation on the floor "very slick." Yet in setting aside a verdict directed for the defendant it was emphasized that the slippery condition had existed so long on the day of the injury complained of that the proprietor of the shop had had opportunity to remove the hazard or guard against it. The decisions in *Taylor* v. *Northern State Power Co.*, 196 Minn., 22, 264 N. W., 139; *Picariello et al* v. *Linares & Rescigno Bank*, 127 N. J. L., 63, 21 A., 2d., 343; and *Blake* v. *Great Atlantic & Pacific Tea Co.*, 266 Mass., 12, 164 N. E., 486, do not depend either on the presence of a foreign substance, other than moisture, on the floor or on a hazard continued so long as to render the proprietor chargeable with notice or knowledge, although in both the Minnesota and Massachusetts cases the practice of waxing in one instance and oiling in the other had made the floor surfaces more slippery than would have been the case with moisture

alone, and the opinion in the New Jersey case records that the plaintiff was the second customer of the bank to slip in the snow and water on the floor on the day of her injury. That this was known to the bank officers is not stated.

Extensive annotations dealing with the question of liability for injuries due to slippery floors are found in 118 A. L. R., Pages 425 to 458, and 13 N. C. C. A. (N. S.), Pages 619 to 710. Six of the seven cases above referred to are discussed in one or the other and the seventh, *Smith* v. *Sears, Roebuck and Co.*, supra, is considered in an earlier annotation, 1 N. C. C. A. (N. S.), 499, at 513. No one of the cases (or any other to which we have been cited) goes so far as it would be necessary to go on the instant facts to hold this defendant liable for the injuries suffered by the plaintiff as the direct result of the fall of which she complains. There is no evidence that the defendant knew or should have known that the condition of its floor was hazardous or that any foreign substance, other than that which every customer entering including the plaintiff was tracking in, increased the hazard caused by moisture alone. There is no evidence that the floor was more slippery that it would have been if surfaced with any material standard for use as the flooring in a mercantile establishment in the locality. There is none as to inadequate lighting (see *Judson* v. *American Railway Express Co.*, 242 Mass., 269, 136 N. E., 103), faulty construction or improper counter arrangement. The defendant was doing business on a day when the conditions of nature outside and the entry of customers into its store necessarily carried moisture onto the floor. It cannot be said on the evidence contained in the record that its agents or servants were not exercising reasonable care to guard its customers against any risk which was known to them or should have been foreseen by them. It was proper to direct a verdict for the defendant.

Exceptions overruled.

NEWELL G. HARDISON *vs.* EARL K. JORDAN.

Hancock. Opinion, December 21, 1945.

Trover. Boundaries. Titles. Adverse Possession. Mortgages.

The holder of the title to land has constructive possession in the absence of proof to the contrary and may maintain trover for blueberries picked therefrom without his authority.

When one accepts a deed bounding the land conveyed by that of another the land made a boundary becomes a controlling monument to which, if it can be located, distances must yield.

When in the description in a deed conveying land the point of beginning of a boundary is given as on a road, if as in the case at bar there is nothing to indicate a different intention, the point of beginning must be taken as in the center of the road.

On this record the distances given in plaintiff's deeds must yield to the line of the land of his adjoiner, made the monument by which the calls of his deed are governed.

Failing to prove title to that part of the strip of land in controversy, the plaintiff cannot recover for blueberries there picked and taken away.

In the defendant's deed the distances given determine the extent of his land to the East and the express language of the deed in that regard cannot be controlled by use and occupation or a conventional line agreed upon by adjoiners, not amounting to disseisin.

Relying on title the plaintiff is entitled to recover only to the extent he proves title.

As the verdict in the trial court allowed a recovery for blueberries picked throughout the land in dispute, a part of which was owned by the defendant, and it is impossible to here determine the quantity and value of the blueberries picked from the plaintiff's land for which he is here entitled only to recover, the verdict below must be set aside.

If a mortgage is foreclosed through a notice signed with the name of the mortgagee "by" L. F. G. "his attorney" and the mortgagee afterwards recognizes and adopts the acts of the attorney, claims rights thereunder and assigns the mortgage to his successors in title, this establishes *prima facie* the authority of the attorney to act and it not being impeached or qualified, as in the case at bar, it must be taken as proved and the foreclosure deemed sufficient.

EXCEPTIONS. MOTION FOR NEW TRIAL.

Action in trover by which the plaintiff sought to recover for conversion of blueberries growing upon land which he claimed to own. The defendant pleaded title to the land and possession in himself. Verdict in the lower Court was for the plaintiff. The defendant filed exceptions and also moved for a new trial. Exceptions overruled. Motion for new trial granted. The case fully appears in the opinion.

Blaisdell & Blaisdell, for the plaintiff.

Clarke & Silsby, for the defendant.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, JJ. AND CHAPMAN, ACTIVE RETIRED JUSTICE.

STURGIS, C. J. In this action of trover the plaintiff seeks to recover damages for the conversion of blueberries growing upon land which he claims to own in Waltham, in Hancock County, Maine. The defendant having pleaded title to the land and possession in himself, after an adverse verdict, filed exceptions and a general motion for a new trial.

The parties to this action, owning adjoining lots, are in dispute as to the location of the dividing line between their properties and the ownership of a strip of land about five rods wide and one hundred and sixty rods long in which the line is located. In the season of 1943 the defendant picked fifty bushels of blueberries on this land and appropriated them to his own use but except that it was in the southerly end of the strip it is not made to appear just where this was done. The verdict was general and for the full value of the blueberries as alleged in the writ.

Motion.

The record shows that the plaintiff Newell G. Hardison on July 3, 1926 received conveyance by warranty deed from Everett Mace of the following described parcel of land:

"Beginning at the County road leading from Waltham to Aurora, thence northerly seventy four (74) rods to lot No. 34; thence easterly seventy six (76) rods to lot No. 14, deeded to Twynham and Mercer; thence southerly one hundred and sixty (160) rods to land of Gilman Jordan estate, or lot No. 10; thence westerly seventy six (76) rods to land formerly of Daniel Wooster, now of Hollis D. Jordan; thence northerly seventy six (76) rods; thence westerly four (4) rods; thence northerly ten (10) rods; thence easterly four (4) rods to the place of beginning, and containing seventy six (76) acres, more or less. Excepting and reserving however, a strip of land on the south side of said lot of about ten acres, deeded to Arville S. Jordan by Isaac Jenkins."

Thereafter on February 11, 1932 he acquired title by deed from Oscar T. Jordan, administrator of estate of Arville S. Jordan of the ten-acre lot excepted from his deed from Everett Mace, as above recited, and containing the following description:

"Beginning at the south west corner of the William Mercer lot, formerly, and thence north on said Mercer lot west line, twenty three (23) rods; thence westerly so as to hit a stone wall, and thence by said wall to the east line of lot formerly owned by Daniel Wooster; thence southerly in said Wooster lot east line, twenty three (23) rods to land formerly of Isaiah Kingman; thence easterly on the north line of said Kingman lot to the place of beginning, and containing ten acres, more or less."

Such title as the plaintiff has in the strip of land in controversy is derived from these deeds. And he relies upon this title to prove possession or right of immediate possession to the blue-

berry crop which the defendant picked and carried away. If he had title he was constructively in possession in the absence of proof to the contrary and may maintain trover for the severance. *Stevens* v. *Gordon*, 87 Me., 564, 33 A., 27.

In Newell G. Hardison's deed from Everett Mace of the lot of land first above described the southerly bound is given as "thence westerly seventy six (76) rods to land formerly of Daniel Wooster, now of Hollis D. Jordan" and in his deed from Oscar T. Jordan, Administrator, conveying the ten-acre lot the corresponding bound is given as "thence by said wall to Daniel Woosters East line." It being conceded that the land formerly of Daniel Wooster and later of Hollis D. Jordan is now owned by the defendant Earl K. Jordan and it and its East line answers these calls the acceptance of deeds containing these bounds establishes that land or its East line as a controlling monument. *McCausland* v. *York*, 133 Me., 115, 174 A., 383; *Perkins* v. *Jacobs*, 124 Me., 347, 129 A., 4. The true line of the land is the boundary. *Ayer* v. *Harris*, 125 Me., 249, 132 A., 742; *Murray* v. *Munsey*, 120 Me., 148, 113 A., 36. And to this monument if it can be located distances must yield. *Bryant* v. *Maine Central Railroad Company*, 79 Me., 312, 9 A., 736; *Ames* v. *Hilton*, 70 Me., 36.

As the title has come down through mesne conveyances for three-quarters of a century without substantial variation in the description or material changes in the locus or its surroundings it is not difficult to locate the East line of the defendant Earl K. Jordan's land. It was conveyed to him by Sadie and Theron Haslam by their deed of November 12, 1941, containing the following description:

> "Beginning on the county road leading to Mariaville and thence East on line of land formerly of Isaiah Kingman thirty-eight rods; thence North seventy-six rods to house lot bargained to David Fox; thence West four rods; thence North ten rods to the Aurora road; thence

East four rods; thence North seventy-four rods; thence West forty-five rods; more or less to the county road aforesaid; thence South one hundred and sixty rods to place of beginnig and containing forty acres more or less."

There are no facts in evidence which limit the controlling effect of this description. The county road leading to Mariaville, at the point where the south bound of the defendant's land begins, although widened at some time, appears to be practically where it was when he and his predecessors received their deeds, and the location of the south bound itself, which is the land formerly of Isaiah Kingman, is known and admitted. Under the calls of the defendants' deed the southerly end of the East line of his land is at a point in the line of land formerly of Isaiah Kingman thirty-eight rods east of the center of the county road leading to Mariaville, and thence the line extends North at a right angle, with a jog here not of concern, one hundred and sixty rods more or less. That the first or southerly bound of the defendant's land which fixes the location of his East line begins at the center of the Mariaville road permits of no doubt, for when there is nothing as here to indicate a different intention, the point of beginning of a boundary being on a road must be taken as in the center of the way. *Cyr* v. *Dufour*, 68 Me., 492.

The parties in this case have both fallen into error as to the location of the dividing line between their adjoining properties in the main through a disregard of the controlling effect of the descriptions in their deeds. Although an engineer, taking the stand as his witness, knows and fixes on the face of the earth the location of the line thirty-eight rods from the center of the Mariaville road which, as stated, on this record is the East line of the defendant's land, formerly of Daniel Wooster, to which by the express provisions of his deeds Newell G. Hardison's land runs on the West, he relies on and claims under a survey

made by the engineer which extends his land thirty-six feet westerly and beyond his adjoiner's boundary line. This results from not allowing distance to yield to the stated monument in the fifth call of the plaintiff's deed from Everett Mace of July 3, 1926 which is "thence westerly seventy six (76) rods to land formerly of Daniel Wooster, now of Hollis D. Jordan" and it has no justification in the record. If the plaintiff or his predecessors in title in years gone by have used or occupied any part of the surveyed overrun upon the land of the defendant their acts appear to have been only occasional and fugitive in nature and do not prove title by adverse possession. *Webber* v. *McAvoy*, 117 Me., 326, 164 A., 513. Not amounting to disseisin occupation cannot control the express language of the deeds and change the location of the true line. *Wiswell* v. *Marston*, 54 Me., 270. Nor can a conventional line agreed upon by the adjoiners. *White* v. *Jones*, 67 Me., 20. As this case is presented the plaintiff Newell G. Hardison does not own the overrun of thirty-six feet which he has made in his West boundary and has no right to recover for any blueberries the defendant picked in that part of the strip of land in controversy.

The defendant Earl K. Jordan has even greater disregard for the true East line of his property. Enlisting the services of a forestry engineer he starts, not at the center of the county road leading to Mariaville where the first call in his deed begins, but at a ditch lying somewhere on the easterly side of the way and thence, ignoring the distance of thirty-eight rods there expressly given, runs his line to the middle of a pile of rocks or old wall and the remains of a fence which lie thirty-eight rods and forty-six feet from the center of the road and there turning a right angle projects his East line to the North, and with discrepancies which in this case are not important, closes his description to the point where he began. Who built this wall or fence at which the defendant attempts to establish his East line or when or for what purposes it was erected is not made to appear nor is more than occasional occupation to it on

the one side or the other not amounting to disseisin disclosed. The adjoining tracts of the parties to this action were formerly the property of a common owner and it is possible that he built the wall and fence for his own convenience and purposes and without regard to the location of the dividing line. Be that as it may in his later conveyances, which are in the chain of title, this common owner did not mention either the wall or the fence but made the East line of the defendant's land the West bound of that conveyed to the plaintiff's predecessor in title and that description has been continued in all subsequent deeds. No controlling significance can be attached to the existence of the wall and the fence or their location. For purposes of this case the defendant shows title only to the East line of his property as described in his deed which lies thirty-eight rods from the center of the county road leading to Mariaville, and includes the overrun of thirty-six feet which the plaintiff has made in his survey but not his own overrun of forty-six feet into the plaintiff's land.

The strip of land in controversy from which the blueberries in suit were taken is made up of the overruns of the dividing line between the lands of the parties which have been pointed out but whether the picking took place on the one or the other or if on both in what proportions the evidence does not show and no means of calculation is at hand. Relying on title, the plaintiff was entitled to recover only to the extent he proved title. *Amey* v. *Lumber Company*, 128 Me., 472, 148 A., 687. It appearing that the verdict below allowed a recovery for blueberries picked throughout the land in dispute and in part on that owned by the defendant a new trial must be granted.

Exceptions.

In the chain of title of the plaintiff to the land which he has proved he owned in more than one instance mortgage foreclosures were effected through notices signed by the mortgagee "By Lynwood F. Giles his attorney" or the equivalent, but the

record is clear that the mortgagees afterwards recognized and adopted the acts of the attorney, claimed rights thereunder and assigned the mortgages, with all the rights and benefits of foreclosure, to their successors in title. This established *prima facie* the authority of the attorney to act and it not being impeached or qualified it must be taken as proved. *Smith* v. *Larrabee,* 58 Me., 361. The defendant's exceptions to the rulings that these mortgage foreclosures were sufficient cannot be sustained.

Motion sustained.
New trial granted.
Exceptions overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

EMMA HARVEY, APPELLANT

FROM DECREE OF JUDGE OF PROBATE.

Knox. Decided September 6, 1944.

PER CURIAM

Probate Appeal on report. This probate repeal, reported on an agreed statement of facts, is discharged because the facts stated are insufficient for a just determination of the issues raised.

Report discharged.

Jerome C. Burrows, for the appellant.

Frank F. Harding, for the appellee.

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

UNITY CO. *vs.* GULF OIL CORPORATION

PETITION TO RECTIFY ERRORS.

Cumberland. Decided March 3, 1945.

PER CURIAM

This is a petition to rectify alleged errors in the Opinion in the above entitled case argued before the Law Court at the October Term, 1944, and appearing in 141 Me., 148, and 40 Atl. (2d), 4. It is filed by Gulf Oil Corporation, defendant therein.

A careful examination of the original case discloses no error of law or fact in the Opinion rendered which requires correction.

Petition dismissed.

Nathan Thompson,

Richard Chapman, ex parte.

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

KATHERINE HELEN MAGRI *vs.* FRANCIS ANTHONY MAGRI.

Kennebec. Decided October 2, 1945.

PER CURIAM

This petition for Annulment of decree of divorce obtained by the respondent at the June Term 1943, of the Superior Court for Kennebec County on hearing was denied and exceptions reserved.

After a full consideration of the case, a majority of the Court having failed to agree upon the issues raised, the exceptions are overruled.

Exceptions overruled.

William H. Niehoff, for the plaintiff.

Ralph A. Gallagher,

Frank A. Tirrell, for the defendant.

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

RULES OF COURT

STATE OF MAINE

Supreme Judicial Court
and
Superior Court

January 2, 1941.

All of the Justices concurring, the following Rule of Court pertaining to practice and procedure in matters arising under Article II, Section 200, Paragraph (1) *et seq*, of the Soldiers' and Sailors' Civil Relief Act of 1940 approved by the President October 17, 1940, is established:

1. The phrase "any action or proceeding" embraces all proceedings of a civil nature including causes in equity, libels for divorce and all petitions to enforce civil rights.
2. The affidavit required by Section 200 must state the fact that the defendant is not in military service as defined in Section 101 of the "Soldiers' and Sailors' Civil Relief Act," approved October 17, 1940; an affidavit upon information and belief is not sufficient.
3. The affidavit may be made by the plaintiff personally or by his attorney of record; if plaintiff is a corporation, the affidavit may be made by the President, Treasurer, Clerk or a Director, or by the attorney of record.
4. In civil actions the affidavit must be filed at the first term and before judgment is entered; if not so filed, the action will be continued for judgment without costs.

5. In causes of equity, the affidavit should be filed, when motion is made that the bill be taken *pro confesso*. In libels for divorce and in all other proceedings, in which a decree is signed, the affidavit must be filed before the cause is heard.

6. In actions heretofore defaulted and continued for judgment, the affidavit must be filed before judgment, or the action will stand further continued.

7. In actions which have been continued for judgment for want of such affidavit, judgment may be entered at any term upon the affidavit being filed.

GUY H. STURGIS,
Chief Justice

A true copy.

Attest:

GUY H. STURGIS
Chief Justice, Supreme Judicial and Superior Courts

OPINIONS OF THE JUSTICES

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 29, 1945, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

In House — March 28, 1945.

Whereas, a bill has been introduced into the House and it is important that the Legislature be informed as to the constitutionality of the proposed bill; and

Whereas, it appears to the House of Representatives of the 92nd Legislature that it presents important questions of law and that the occasion is a solemn one; now, therefore be it

Ordered: That in accordance with the provisions of the constitution of the state, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this House their opinion of the following question:

"Would H. P. 1009, L. D. 530, 'An Act to Abolish Taxation of Intangibles,' if enacted by the Legislature in its present form, be constitutional?"

House of Representatives
March 29, 1945
Passed
HARVEY R. PEASE,
Clerk.

STATE OF MAINE

In The Year Of Our Lord Nineteen Hundred Forty-Five

H. P. 1009 — L. D. 530

An Act to Abolish Taxation of Intangibles.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 81, § 5, amended. Section 5 of chapter 81 of the revised statutes is hereby amended to read as follows:

'Sec. 5. Personal estate taxable. Personal estate for the purposes of taxation shall include only tangible, physical goods, or chattels, and effects, wheresoever they are, and all vessels, at home or abroad.'

Sec. 2. R. S., c. 81, § 6, sub-§ II, repealed . . . Subsection II of section 6 of chapter 81 of the revised statutes is hereby repealed.

Sec. 3. R. S., c. 81, § 6, sub-§ XI, amended. Subsection XI of section 6 of chapter 81 of the revised statutes is hereby amended to read as follows:

'XI. The aqueducts, pipes, and conduits of any corporation supplying a town with water are exempt from taxation, when such town takes water therefrom for the extinguishment of fires without charge; but this exemption does not include therein any reservoir or grounds occupied for the same, or any property, real or personal, owned by such company or corporation, other than as hereinbefore enumerated.'

Sec. 4. R. S., c. 81, § 6, sub-§ XIV, repealed. Subsection XIV of section 6 of chapter 81 of the revised statutes is hereby repealed.

Sec. 5. R. S., c. 81, § 13, sub-§ III, amended. Subsection III of section 13 of chapter 81 of the revised statutes is hereby amended to read as follows:

'III. Machinery employed in any branch of manufacture, goods manufactured or unmanufactured, and real estate belonging to any corporation, except when otherwise expressly provided, shall be assessed to such corporation in the town or place where they are situated or employed.'

Sec. 6. R. S., c. 81, §13, sub-§ XI, repealed. Subsection XI of section 13 of chapter 81 of the revised statutes is hereby repealed.

Sec. 7. R. S., c. 81, § 14, repealed. Section 14 of chapter 81 of the revised statutes is hereby repealed.

Sec. 8. R. S., c. 81, §17, amended. Section 17 of chapter 81 of the revised statutes is hereby amended to read as follows:

'Sec. 17. Stock of companies invested in other stock, how to be taxed. When an insurance or other incorporated company is required by law to invest its capital stock or any part thereof in the stock of a bank or other corporation in the state, for the security of the public, such investments shall not be liable to taxation.'

Sec. 9. R. S., c. 81, § 19, amended. Section 19 of chapter 81 of the revised statutes is hereby amended to read as follows:

'Sec. 19. Mortgaged personal property; loan secured by deed taxable to grantee. When personal property is mortgaged or pledged, it shall, for purposes of taxation, be deemed the property of the party who has it in possession, and it may be distrained for the tax thereon. Personal property, loaned or passed into the hands or possession of another, by any person residing in the state, secured by an absolute deed of real estate, shall be taxed to the grantee, as in case of a mortgage,

although the land is taxed to the grantor or other person in possession.'

To The Honorable House of Representatives of Maine:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us bearing date of March 28, 1945, relating to the taxation of intangibles.

Question.

Would H. P. 1009, L. D. 530, "An Act to Abolish Taxation of Intangibles" if enacted by the Legislature in its present form be constitutional?

Answer.

A reading of Legislative Document H. P. 1009, L. D. 530 leaves no doubt that the real intention and purpose of the framers of this legislation is to exempt all intangible property from taxation. That the enactment of this bill would accomplish that result is apparent. Under existing statutes all real property within the state and all personal property tangible and intangible of inhabitants of the state, and within specified limitations of other persons, subject only to exemptions expressly defined and enumerated, is taxable. R. S., Chapter 81, Sections 2-5 *et seq*. By providing that "personal estate for the purpose of taxation shall include only tangible, physical goods, or chattels, and effects, wheresoever they are, and all vessels at home or abroad," with direct or amendatory repeal of related provisions inconsistent therewith, intangible property is withdrawn from taxation and all other real and personal property left with the entire burden thereof except as relieved by ex-

emption of express statutory mention. As the question propounded is presented our only concern is whether the proposed exemption of intangible property from taxation is constitutional and the pending bill in its details needs no consideration.

It is settled in this State that full power over taxation is vested in the Legislature including that of determining upon what kinds and classes of property taxes shall be imposed and what shall be exempt from taxation and is limited only by the positive requirements and prohibitions of the Constitution. It is a fundamental principle that no act of the Legislature shall be adjudged unconstitutional unless it is plainly forbidden by some plain provision of the Constitution. And the wisdom and policy of prescribing that upon certain kinds and classes of property taxes shall be imposed while others shall be exempted is for the determination, not of the Judiciary, but of the Legislature. *Whiting* v. *Lubec*, 121 Me., 121; *Opinion of Justices*, 102 Me., 527; *Opinion of Justices*, 123 Me., 573; *Opinion of Justices*, 133 Me., 525.

The only limitation upon the exercise of the legislative power of taxation in this State appears in Amendment XXXVI to Section 8 of Article IX of the Constitution and reads:

> "All taxes upon real and personal estate assessed by authority of this state shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property."

As to taxes upon real and personal estate in general it has long been accepted that this provision of the Constitution does not require the Legislature to impose taxes upon all property within the State but only that any tax which shall be lawfully im-

posed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally. Exception by amendment only is that taxes levied on tangible and intangible personal property may vary as to rate. We are of opinion that the Legislature still has the power to determine what kinds and classes of property shall be taxed and what kinds and classes shall be exempt from taxation. *Brewer Brick Company* v. *Brewer*, 62 Me., 62, 73, 74; *Opinion of Justices*, 102 Me., 527; *Opinion of Justices*, 133 Me., 525.

Finding no constitutional limitation upon the power of the Legislature to exempt intangible property from taxation we answer this question in the affirmative.

Very respectfully,

GUY H. STURGIS
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER
HAROLD H. MURCHIE
ARTHUR CHAPMAN

April 5, 1945.

A true copy.
Attest:
GUY H. STURGIS
Chief Justice.

INDEX

ACCOUNT STATED.

ACTIONS.

AGENCY.

APPEAL.

ASSAULT.

ASSIGNMENT.

BANKS AND BANKING.

BURDEN OF PROOF.

COLLATERAL ATTACK.

COLLUSION.

COMMON CARRIERS.

COMMON LAW.

CONSPIRACY.

CONSTITUTIONAL LAW.

CONVERSION.

licensee, despite the fact that his failure to remove the wood prior to such expiration of time constitutes a wrong for which the land owner may have his remedy; and the land owner who forbids the licensee to remove his property is guilty of conversion.

Williams v. *Bisson*, 117.

The purchase of mortgaged chattel property from the mortgagor (if all the property covered by a particular mortgage is acquired) does not of itself constitute a conversion on the part of the vendee but any subsequent action on his part does if it is in denial of or inconsistent with the rights of the true owner.

The test of liability of an alleged converter to a particular plaintiff is whether that plaintiff had the right to possession at the time of the alleged conversion.

The measure of the liability of a converter of chattel property is the value thereof at the time of his conversion.

Sanborn v. *Matthews*, 213.

CRIMINAL LAW.

An indictment charging the crime defined in R. S., Chapter 135, Section 6, includes allegation of an attempt to commit that crime.

Such an attempt constitutes a residue substantially charged against the respondent within the meaning of R. S., Chapter 143, Section 6.

Conviction for an attempt under an indictment charging the completed offense is proper when proof is sufficient that the respondent has committed an overt act toward consummation of the crime charged.

Carson, Petitioner, 132.

Criminal and penal statutes should be strictly construed in a manner favorable to the innocence of the citizen to the end that his liberty of action may not be restricted in doubtful cases.

Unless the driver of a truck has knowledge that his load, or a part thereof, is being transported unlawfully, he does not commit an unlawful act.

DEMURRER.

DIRECTED VERDICT.

DISCRETION OF THE COURT.

DIVORCE.

ELECTIONS.

EMPLOYMENT, SCOPE OF.

An employer is liable for damage caused by the negligence of an employee so far and only so far as it arises in the course of his employment and within the scope of his authority.

Whether an employee is acting within the scope of his employment at any particular time and place is, under proper circumstances, a question of fact for jury determination.

The question whether undoubted facts justify a finding that an employee at a particular time and place was acting within the scope of his employment is for determination by the Court.

Leek v. *Cohen*, 18.

In order to be entitled to compensation under the Workmen's Compensation Act an employee must have received "a personal injury by accident arising out of and in the course of his employment." To arise out of the employment an injury must have been due to a risk of the employment.

Hawkins v. *Portland Gas Light Co. et al.*, 288.

EQUITY.

Equity will protect against a wrong done through abuse of a relationship of trust and confidence.

Equity jurisdiction is not conferred by the failure of a defendant to raise the question of such jurisdiction.

Hutchins v. *Hutchins*, 183.

EVIDENCE.

Carbon copies of letters written by plaintiffs' attorney to the defendant constituted secondary evidence and under Rule of Court XXVII were not admissible unless previous notice had been given to produce the originals, which was not done. Furthermore said letters contained self-serving statements. Their admission in evidence was erroneous and prejudicial.

Wentworth et al. v. *Chapman et al.*, 35.

EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

FACTUAL QUESTIONS.

FEDERAL LAW.

Under the provisions of the Federal constitution Congress has the power "to borrow Money on the credit of the United States," and "to make all Laws which shall be necessary and proper for carrying into Execution" this power. Art. VI, Clause 2, provides that these laws "shall be the supreme Law of the Land; and the judges in every state shall be bound thereby . . . ."

Treasury Regulations in respect to the transfer of United States war savings bonds are a proper exercise of the power given to the Secretary of the Treasury by the Congress; and they accordingly have the force and effect of Federal law.

The capacity of the Federal government to borrow money depends on the inviolability of its obligation, on its ability to carry it out strictly in accordance with its terms. If the state may treat the bonds here involved, or the proceeds of their sale, as the property of some person other than the one whom the contract has designated, the government has thereby been prevented from carrying out the agreement into which it has entered.

In this case there was a contract with the United States for the benefit of a third party whose rights arise solely from the contract and in no sense by reason of a grant or gift; this contract gives the beneficiary a present, vested, though defeasible interest; it is governed by Federal law and must be enforced in accordance with its letter and its spirit uniformly throughout the United States; and no state statute or rule of law may stand in the way of such enforcement.

Because of the supremacy of Federal law a state rule has no application to this contract.

Harvey v. *Rackliffe*, 169.

FEES OF A POLICE OFFICER.

A police officer of a city, in delivering prisoners to state institutions, represents the State of Maine and is entitled to receive from the county treasury the amount of the fees earned by him as provided in R. S. 1930, Chapter 5, Sections 12, 14, for services rendered.

Cushing v. *Babcock and City of Bangor*, 14.

FIDUCIARY RELATIONS.

Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his or her position will not be permitted to retain the advantage.

The term "fiduciary or confidential relation" embraces both technical fiduciary relations and those informal relations which exist whenever one person trusts in and relies on another.

The rule is that whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them by which the superior party obtains a personal benefit equity presumes the existence of undue influence and the invalidity of the transaction, and casts upon that party the burden of proof of showing affirmatively by clear evidence that he or she acted with entire fairness and the other party acted independently, with full knowledge and of his own volition free from undue influence.

Robie, Appellant, 369.

FRAUD.

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

Robie, Appellant, 369.

HIGHWAYS.

See State Highway Commission.

HUSBAND AND WIFE.

Special jurisdiction in equity to hear and determine property matters between husband and wife is conferred by R. S. 1930, Chapter 74, Section 6.

INDICTMENT.

INSTRUCTIONS.

If an inference that the prosecutrix in this case was entitled to greater credence than other witnesses, could have arisen from a recital by the trial judge of elementary and axiomatic rules and principles concerning her status as a witness, and that of all other witnesses summoned by the prosecution, it was removed by the instruction which immediately followed that the question of whether she was telling the truth or was lying was for the jury to determine. The correctness of a charge is not to be determined from isolated statements extracted from it without reference to their connection with what precedes or follows.

The burden resting upon the State to prove the guilt of the respondent beyond a reasonable doubt in this a criminal case, as clearly and fully defined in the charge, was in no way modified or controlled by an instruction that the process of the court was available to the respondent as well as the prosecution to compel the attendance of needed witnesses. The instruction did not relate to the burden of proof, inferentially or otherwise.

State of Maine v. *Bragg*, 157.

The fact that the presiding Justice reads the requested instruction to the jury and then denies it creates no prejudicial error.

Refusal of the trial court to repeat in language of respondent's counsel an instruction already substantially given by the Court will not ground a sustainable exception.

State of Maine v. *McKrackern*, 194.

INSURANCE.

The statute of this State, R. S. 1930, Chapter 56, Section 55, provides that the agents of both foreign and domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith.

JOINDER.

JUDICIAL NOTICE.

JURISDICTION.

JURY VERDICT.

LANDLORD AND TENANT.

LEGISLATIVE INTENT.

LIMITATION OF ACTION.

LOTTERIES.

MASTER AND SERVANT.

to pay him for such work. Therefore, assuming that plaintiff did work at home Sundays and evenings as alleged in his pleadings and on the stand, he was not entitled to receive pay for such work in addition to his regular wages.

Perlman v. *Skolnick Building Corporation*, 79.

A master is liable to third persons for damages resulting from his servant's negligence while acting in the course of his employment, but the relation of master and servant at the time of and in respect to the acts complained of must be shown.

Anthony v. *Arpin*, 165.

MORTGAGES.

The purchase of mortgaged chattel property from the mortgagor (if all the property covered by a particular mortgage is acquired) does not of itself constitute a conversion on the part of the vendee but any subsequent action on his part does if it is in denial of or inconsistent with the rights of the true owner.

Sanborn v. *Matthews*, 213.

MOTOR VEHICLES.

The statute under which the complaint in the instant case was drawn (R. S. 1930, Chapter 29, Section 88) recognizes the fact that every intoxicated driver is a menace and creates a potential danger, and is to be regarded as one who should be denied wholly the right to operate a motor vehicle while in such condition.

It is common knowledge that in this State there are many private ways on lands privately owned. These do not constitute places to which the public has a right of access but they are frequently used by pedestrians and drivers of motor vehicles, and it is apparent that the legislature intended to safeguard the right of all persons who might be endangered, without limitation to those on public ways.

State of Maine v. *Cormier*, 307.

MUNICIPAL CORPORATIONS.

NEGLIGENCE.

NUISANCES.

NURSES, REGISTRATION.

Under Section 20, Chapter 21, R. S. 1930 as amended no applicant for registration and certification as a registered nurse can be admitted to examination unless he or she has complied with all the conditions there enumerated.

The requirement that the applicant for examination for registration shall have been trained as there provided in an approved school of nursing presided over by a nurse registered here applies to schools in and out of the State of Maine.

The language of that provision is plain and unambiguous and its operation cannot be limited or extended by reading into it a meaning at variance with its express terms.

Regardless of the standing of the school where the petitioner for mandamus in the case at Bar, as an applicant for admission to examination for registration as a registered nurse, had trained for nursing or the reasons why the school had not been approved the fact that it was neither approved nor presided over as required by the statute compelled the Board of Registration of Nurses to refuse to admit her to examination.

The Board of Registration of Nurses cannot be required by mandamus to violate their duty and disobey the law.

Snelson v. *Culton et al.*, 242.

PARTIES.

While a single individual may not be both plaintiff and defendant in an action at law, process which violates that principle may be amended by striking out a person so named as a plaintiff.

United Feldspar & Minerals Corporation et al. v. *Bumpus*, 7.

PAUPERS.

Following the amendment of R. S. 1930, Chapter 33, Section 1, Paragraph III, by P. L. 1933, Chapter 203, Section 3, the pauper settlement of an illegitimate child derived at birth from its mother fol-

PLEADING AND PRACTICE.

PRESUMPTIONS.

PROBATE COURTS.

PUBLIC UTILITIES.

PUBLIC UTILITIES COMMISSION.

REAL ESTATE BROKERS.

RECEIVERS.

REFERENCE AND REFEREES.

REVERSIONS.

Upon the severance of a reversion following a leasehold estate the rental accruing thereafter is apportionable among the owners in accordance with their interests.

United Feldspar & Minerals Corporation et al. v. *Bumpus*, 7.

SALES.

The words "sale" and "sell" in contracts between real estate salesmen and the owners of property who employ them have well defined meanings that do not restrict them to cover executed sales alone. The words "to sell" or "to make a sale" in such contracts mean to furnish the owner of the property with a purchaser "able, ready and willing" to buy on that owner's terms.

Paradis v. *Thornton*, 23.

The rule is well settled that to entitle a real estate broker to his commission he must produce a customer ready, able and willing to buy on the terms furnished by the owner.

Rosenbloom v. *London*, 26.

A receiver's sale is a judicial sale and the receiver acts only as an officer of the court, sells as and for the court, and sales conducted by him must be confirmed in order to be valid.

It is a general rule that a sale by a receiver is not complete and binding until the same is subsequently reported and confirmed by the court.

If an offer for property in the hands of a receiver is reported to the court and a sale to that purchaser in exact compliance with the offer is authorized the order is deemed an acceptance of the offer and a confirmation of the sale and no other and further confirmation is necessary.

If a purchaser at a receiver's sale refuses to pay the purchase price as ordered and agreed, it is the duty of the receiver to report the default to the court, which, if the sale has been confirmed, may order the purchaser to complete payment and hold him in contempt for noncompliance with the order, or order a resale, charging him with

STATE HIGHWAY COMMISSION.

STATUTES.

TAXATION.

TELEPHONE AND TELEGRAPH COMPANIES.

TROVER.

TRUSTS.

WAR BONDS.

WIDOW'S ALLOWANCE.

WILLS.

WITNESSES.

WORKMEN'S COMPENSATION ACT.

WRIT OF ERROR.

APPENDIX

CONSTITUTIONS, AND STATUTES CITED, CONSTRUED, ETC.

CONSTITUTION OF THE UNITED STATES.

UNITED STATES CODE, ANNOTATED.

STATUTES OF THE UNITED STATES.

CONSTITUTION OF MAINE.

REVISED STATUTES.

STATUTES OF MAINE.

PRIVATE AND SPECIAL LAWS OF MAINE.