MAINE REPORTS

142

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 5, 1946, to JUNE 16, 1947

CECIL J. SIDDALL

REPORTER

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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[1]

HON. HAROLD H. MURCHIE

HON. NATHANIEL TOMPKINS

HON. RAYMOND FELLOWS[2]

[1] Active Retired April 3, 1946

[2] Appointed May 1, 1946

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

HON. ARTHUR CHAPMAN

HON. HARRY MANSER

JUSTICES OF THE SUPERIOR COURT

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

HON. RAYMOND FELLOWS[1]

HON. ARTHUR E. SEWALL

HON. EARLE L. RUSSELL

HON. EDWARD F. MERRILL

HON. ROBERT B. WILLIAMSON

HON. FRANK A. TIRRELL, JR.[2]

[1] Appointed to Supreme Judicial Court May 1, 1946

[2] Appointed to Superior Court May 15, 1946

ACTIVE RETIRED JUSTICE OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

ATTORNEY GENERAL

HON. RALPH W. FARRIS from January 2, 1945

REPORTER OF DECISIONS

CECIL J. SIDDALL

TABLE OF CASES REPORTED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

PARKER B. SMITH,

PETITIONER FOR WRIT OF ERROR.

Knox. Opinion, January 5, 1946.

Criminal Law. Writ of Error. Common Law. Embezzlement.

Writs of error issue as of course in criminal cases not punishable by life imprisonment.

A writ of error is the appropriate process for attack against a sentence imposed without authority in law.

The issue raised by writ of error must be determined on the record.

The crime defined in R. S. 1930, Chap. 131, Sec. 10 (now R. S. 1944, Chap. 119, Sec. 9), is the embezzlement of goods held in trust and confidence rather than breach of trust.

Each separate act of embezzlement constitutes an offense.

ON EXCEPTIONS.

Petitioner was convicted of the embezzlement of two lots of bonds held in an estate. He was sentenced to two terms of imprisonment under separate counts of a single indictment alleging separate embezzlements from a single estate on different dates. The petitioner contended that the imposition of the first sentence

foreclosed the authority of the Court to mete out punishment for a breach of trust; and that breach of trust is the crime defined by R. S. 1930, Sec. 10, Chap. 131. Petition was dismissed. Petitioner filed exceptions. Exceptions overruled. The case fully appears in the opinion.

E. S. Roberts, for the petitioner.

Ralph W. Farris, Attorney General.

Abraham Breitbard, Deputy Attorney General, for the State.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, JJ. AND CHAPMAN, ACTIVE RETIRED JUSTICE.

MURCHIE, J. Petitioner's exceptions to the dismissal of his writ of error involve the construction of R. S. 1930, Chap. 131, Sec. 10 (now R. S. 1944, Chap. 119, Sec. 9), on the single point as to whether the words "or any part thereof" preclude the possibility of sentencing a defaulting executor under separate counts of a single indictment for two embezzlements from one estate.

The first sentence of the statute traces back directly to P. L. 1893, Chap. 241, although the closing words "and shall be punished accordingly" were added to the original language thereof in the statutory revision of 1903, infra, and have ever since appeared therein. In its essential parts it reads:

> "Whoever embezzles . . . money, goods or property delivered to him, or any part thereof, . . . shall be deemed guilty of larceny. . . ."

Petitioner was convicted of the embezzlement of separate lots of bonds held in the estate of one Ella M. Foss on March 10 and April 11, 1942, representing $25,000 and $10,000 respectively. He was sentenced to not less than two years nor more than three years on one count and not less than one year nor more than two years on the other, the second sentence by its express terms to commence at the expiration of the first. The form of sentence is

in accordance with established practice, *Breton, Petitioner*, 93 Me., 39, 44 A., 125, 74 Am. St. Rep., 335, if the convictions relate to distinct offenses but the petitioner asserts that the effect of the words "or any part thereof" is to define a single crime, i.e., a fraudulent breach of trust, which may be committed by one conversion or by many and is a completed crime when one embezzlement has taken place. It is his present contention that the imposition of the first sentence foreclosed all authority and jurisdiction of the court to mete out punishment for it. His conviction was brought to this Court on appeal and exceptions. *State* v. *Smith*, 140 Me., 255, 37 A., 2d, 246. Judgment was for the State. The question now raised was neither presented nor considered.

Writs of error issue as a matter of course in criminal cases which do not involve offenses punishable by imprisonment for life. R. S. 1944, Chap. 116, Sec. 12. *Nissenbaum* v. *State*, 135 Me., 393, 197 A., 915. The issue raised by a writ of error must be determined on the record of the proceedings brought in question. *Welch* v. *State*, 120 Me., 294, 113 A., 737. It is the appropriate process for attack against a sentence imposed without authority in law, *Galeo* v. *State*, 107 Me., 474, 78 A., 867. This is the point on which the petitioner now relies.

It is argued on behalf of the petitioner that the sentence of the statute in question traces back to and is an enlargement of R. S. 1841, Chap. 156, Sec. 7. This dealt with the embezzlement of "money, goods or other property" which might be the subject of larceny, intrusted to one to be carried for hire. The crime defined was committed whether misappropriation was "in the mass, . . . or otherwise" and it was held immaterial in *State* v. *Haskell*, 33 Me., 129, that the act of conversion may have taken place outside the State. The fraudulent act, wherever committed, was regarded as evidence that the property was accepted for carriage with intent to commit the crime.

The decision in *State* v. *Haskell*, supra, was handed down in 1851. At the next revision of the statutes the language of the particular section was rephrased and much surplus language de-

leted but the crime defined was still limited to property intrusted to one "to be carried." R. S. 1857, Chap. 120, Sec. 8. It first appeared in its present phraseology in P. L. 1893, Chap. 241, where all reference to carriage was eliminated. The present language has been held applicable to the property of deceased persons held by executors and administrators, *State* v. *Snow*, 132 Me., 321, 170 A., 62, but not to that of wards in the possession of guardians, *State* v. *Whitehouse*, 95 Me., 179, 49 A., 869. The exception of the latter, in the last cited case, was based on the fact that embezzlement from the estates of wards was covered by a special statute at the time of the enactment of the 1893 law.

Counsel for petitioner refers to the law punishing embezzlement by guardians in its present form, R. S. 1944, Chap. 145, Sec. 34, and argues that its language presents support for petitioner's claim. This statute reads in its essential parts:

> "If a guardian . . . having . . . custody of property embezzles the same or fraudulently converts it. . . ."

It traces back directly to R. S. 1841, Chap. 110, Sec. 18 but like the statute dealing with the embezzlement of goods being carried for hire has been substantially condensed in phraseology in the work of statutory revision from time to time. The 1841 recital of "money, bill, note, bond, evidence of debt, or any property, whatever" was all expressed in the single word "property" in R. S. 1857, Chap. 67, Sec. 25, and considerable verbiage was eliminated in R. S. 1930, Chap. 80, Sec. 34. Neither the original language nor that presently in use supports the claim that plural pilferings by a guardian from his trust subject him to nothing more than a single punishment.

Counsel for petitioner quotes excerpts from *State* v. *Haskell*, supra; *State* v. *Cates*, 99 Me., 68, 58 A., 238; *State* v. *Thomes*, 126 Me., 230, 137 A., 396; and *State* v. *Snow*, supra, which seem to lend color of support to his claim when separated from their texts, but reference to the facts involved discloses that neither the cases nor the quotations are pertinent to the issue raised by

the exceptions. This is true also of the cases cited from other jurisdictions and of *State* v. *Shannon*, 136 Me., 127, 3 A., 2d, 899 (also cited and relied on), where a considerable review of cases involving the issue of double jeopardy emphasizes the fact that such a plea is tested by the issue as to whether the former acquittal was for the same offense "in law and in fact." The present case is clearly distinguishable from *State* v. *Cates*, supra, where an indictment alleging that the respondent embezzled certain goods and secreted the same goods with intent to embezzle them was held good against a demurrer asserting that it was bad for duplicity, and from the cases cited in 15 Am. Jur. 58, Par. 382 and 22 C. J. S., 422, Par. 281, which relate generally to individual acts which constitute several crimes or to separate parts of single crimes. These relate to the larceny of several articles at one and the same time, *State* v. *Elder*, 65 Ind., 282, 32 Am. Rep., 69, or to individual acts which constitute more than one crime. *State* v. *Cooper*, 1 Green, N. J., 361, 25 Am. Dec., 490.

Petitioner asserts that the two defalcations, alleged and proved to have been committed on different dates, constitute a single crime because the goods embezzled came into the constructive possession of the petitioner simultaneously. As the record stands the acts of embezzlement were separate and distinct. The Massachusetts Court held in *Bushman* v. *Commonwealth*, 138 Mass., 507, that where the record did not disclose that several larcenies covered in separate counts were or were not distinct, it was not bound to consider them one and the same offense although alleged to have been committed on the same day. It had earlier declared that where a single stealing involved the property of several owners, the larcener might be indicted either for a single offense or for several. *Commonwealth* v. *Sullivan*, 104 Mass., 552. If the latter form of prosecution was resorted to, it was declared, the court:

> "in superintending the course of trial and in passing sentence, will see that justice is done and oppression prevented."

That the Massachusetts practice permitting a single larcenous act covering several articles to be prosecuted as several larcenies is not generally accepted is indicated in American Jurisprudence and Corpus Juris Secundum, *supra*. It was originally declared in *Commonwealth* v. *Butterick*, 100 Mass., 1, 97 Am. Dec. 65.

The criminal offense defined in the statute in question is the embezzlement of goods held in trust and confidence rather than the breach of trust which such embezzlement constitutes. Each separate act of embezzlement constitutes larceny according to its terms. It is not necessary either to accept or to reject the Massachusetts rule on the present facts since petitioner was convicted of and sentenced for two distinct acts of larceny committed on different dates.

Exceptions overruled.

CITY OF BANGOR *vs.* CITY OF BREWER.

Penobscot. Opinion, January 7, 1946.

Taxation. Municipal Corporations. Water Power.

Land owned by one municipality within the confines of another is not exempt from taxation under R. S. 1930, Chap. 13, Sec. 6, Par. 1.

Land so owned may be valued for tax purposes as if privately owned, i.e., with due regard to its value for use as a mill privilege.

The increment of value traceable to the usability of land for the development of water power is taxable although the power site is currently submerged by the impounding of water upon it.

ON EXCEPTIONS.

Action by City of Bangor against City of Brewer for abatement of tax assessed by the City of Brewer on a dam and mill

privilege owned by the City of Bangor extending across the Penobscot River from land in Bangor to land in Brewer and constructed and maintained by the City of Bangor to supply water and light to Bangor. Bangor filed its application for abatement with the assessors of Brewer, and, the application being denied, appealed to the Superior Court. Judgment in that Court was for the City of Bangor. Exceptions were filed on behalf of the City of Brewer. Exceptions sustained. The case fully appears in the opinion.

Benjamin W. Blanchard, for the plaintiff.

Chester A. Robinson,

Michael Pilot, for the defendant.

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

MANSER, J., DISSENTS.

MURCHIE, J. This case originated in an application for abatement of a tax assessed for the tax year commencing April 1, 1944, filed with the assessors of the City of Brewer by the City of Bangor pursuant to R. S. 1930, Chap. 13, Sec. 73, as amended. The language of the statute, giving effect to all amendments adopted prior to the filing of the application, appears in R. S. 1944, Chap. 81, Sec. 39. The application being denied, the City of Bangor took an appeal to the Superior Court in accordance with subsequent provisions of the statute. See. R. S. 1930, Chap. 13, Secs. 76, 77 and 78 (now R. S. 1944, Chap. 81, Secs. 42, 43 and 44). Decision there was favorable to the City of Bangor and the cause is brought here by exceptions filed on behalf of the City of Brewer as authorized by R. S. 1930, Chap. 13, Sec. 79 (now R. S. 1944, Chap. 81, Sec. 45), which allege that it is aggrieved by the judgment and that the decree entered below contains multiple erroneous findings.

Each such finding can be segregated from the language of the decree but analysis of them discloses that basically and collectively they charge error in a single finding that part of the taxed land is "a reservoir and a dam used only for reservoir purposes" and a ruling that that part, with its appurtenant mill privilege, is exempt from taxation under R. S. 1930, Chap. 13, Sec. 6, Par. I (now R. S. 1944, Chap. 81, Sec. 6, Par. I). The quoted words are substantially those used in the statute. There can be no doubt of the accuracy of the finding that from the down-river limit of a dam anchored on the shore to the up-river limit of the parcel that shore and the land under the dam and the impounded water are used by the City of Bangor to maintain a reservoir for the dual purposes of supplying water to its inhabitants and generating electricity for its municipal use. The issue presented by the exceptions relates solely to the ruling that all that part of the land and that between the highway and the river up-stream from a line drawn to the highway in continuation of the down-river limit of the dam constitutes a separate parcel which is exempt from taxation.

The dam extends across the Penobscot River from the Bangor shore to the taxed land, which comprises five acres according to the testimony but is assessed as seven. The tax valuation is $25,000. The decision finds it overrated by $24,000 but this results from the finding that a part of it is exempt from taxation. There is no finding as to its value as a mill privilege but we must pass upon the exceptions on the assumption that the valuation is proper if the property is taxable. The record contains no evidence to establish the value of the property as riparian land but one of the assessors of the City of Brewer, called as a witness by the appellant, testified that without reference to its shore location it had a tax value of $25 or $30 per acre. The difference is not material. A plan introduced in evidence shows that the dam is anchored to the taxed land at a point approximately midway between its up-river and down-river limits. The findings make it apparent that the part declared non-taxable includes approxi-

mately half the total unsubmerged area. For convenience we shall refer to the parts hereinafter as the up-river half and the down-river half. Neither the dam nor the reservoir is taxed as such and the tax valuation must be considered as relating to an approximate $200 for the land without reference to its shore location (the range would be from $125 to $210 depending on the true acreage and the use of the lower or higher valuation figures stated by the assessor) plus $24,800 or thereabouts for an increment of value traceable to its capacity for use as a site for the development of water power. The Justice who heard the appeal declared that the shore privileges of the down-river half did not add much to its value, which he fixed for tax purposes at $1,000. This must be considered as representing about $100 without reference to the shore and something like $900 for shore privileges other than the mill privilege which was declared appurtenant to the up-river half.

The issue presented is the taxability of the up-river half and its mill privilege, which involves the construction of the consolidated effect of R. S. 1930, Chap. 13, Secs. 2 and 3 and the first sub-paragraph of the following Sec. 6 (now found in the corresponding sections of R. S. 1944, Chap. 81) or, perhaps, nothing but the latter since the first two have the undoubted effect of subjecting all real estate within the state to taxation unless exempted therefrom by the third, wherein nothing but the first sub-paragraph relates to publicly owned property. Secs. 2 and 3 may be considered as having remained on our statute books unchanged for the purposes of this case in more than a century. They were enacted originally as P. L. 1845, Chap. 159, Secs. 2 and 3. The language of Sec. 3 has been amplified from time to time as in 1911 when P. L., Chap. 174, Sec. 2 made specific provision that "water power, shore privileges and rights" and other items should be taxable as real estate, but this was declaratory of existing law rather than an enlargement of the provisions of the statute. See the cases cited infra relative to the taxation of water power.

The legislation under which the City of Bangor maintains and operates the water system which supplies its inhabitants with water and electricity for its own use is found so far as here material in Private & Special Laws as follows: 1875, Chap. 168; 1876, Chap. 260; and 1927, Chap. 73. The dam and reservoir are essential parts of the water supply system established under the legislative authorization of the 1875 and 1876 laws, as are the power house, located entirely in Bangor, and a part of the machinery with which it is equipped. The additional machinery is equally essential for the municipal electric power and light plant. From the very beginning it was contemplated that any surplus of either water or power might be leased or sold but the question whether the authorization was ever used is not material. Since sometime prior to 1925 (see the dates of installation of water wheels infra) the entire property has been used by the City of Bangor. The 1927 law cited *supra* authorized the Water Board to take over an electrical department created by municipal ordinance and carries a necessary implication that it was then in full operation. The capacity of the water wheels or turbines and settings on April 1, 1944, was 850 kilowatts. A single 200 k.w. unit installed in 1898 supplied the power used in connection with the water supply system. Two other units with a combined capacity of 650 k.w. were used to generate electricity for municipal use. One was installed in 1925 or two years prior to the 1927 legislation, the other in 1931.

Prior to the enactment of P. L. 1911, Chap. 120, the City of Brewer could have imposed no taxes on the property of the City of Bangor within its limits which was appropriated to public use. Prior to the effective date of P. L. 1903, Chap. 46, the same thing was true regardless of the use to which it was devoted. Since 1845 the law defining real estate for tax purposes has been couched in language as general as that now in effect. See P. L. 1845, Chap. 159, Secs. 2 and 3 and the corresponding sections of our periodic statutory revisions of 1857, 1871 and 1883. Until 1903 no publicly owned property was declared exempt from taxation except

that belonging to the United States and the State of Maine. Yet it was decided in 1885 that a building owned by a public municipal corporation was free from tax burden because taxation was applicable to private property only. *Inhabitants of Camden* v. *Camden Village Corporation*, 77 Me., 530, 1 A., 689. The plaintiff contended in that case that the statute was so definite as to leave no room for judicial construction and that all property not falling within the defined exemption was taxable. This claim was rejected on the authority of many text writers and decided cases cited in the opinion. The decision is of great importance in the development of our law on the subject matter because the defendant was classified as a "public municipal corporation" and that term was adopted by our Legislature in amending the statute.

Disregarding an amendment in P. L. 1941, Chap. 183, which has no bearing on the present question, the purpose and effect of R. S. 1930, Chap. 13, Sec. 6, Par. I, can be determined best by a consideration of its piecemeal development. We quote it in that manner to show how the amendments adopted in 1903 and 1911 affected earlier existing law. The section provides that the property and polls defined in its sub-paragraphs "are exempt from taxation." Only the first of those sub-paragraphs applies to publicly owned property. The first clause has remained unchanged from the time of its original enactment as P. L. 1845, Chap. 159, Sec. 5, Par. First. From 1845 to 1903 it read:

> "The property of the United States and of this State."

P. L. 1903, Chap. 46, added:

> "and the property of any public municipal corporation of this state, appropriated to public uses;"

and P. L. 1911, Chap. 120:

> "if located within the corporate limits and confines of such public municipal corporation, and also the pipes, fixtures, hydrants, conduits, gate-houses, pumping stations, reser-

> voirs, and dams used only for reservoir purposes, of public municipal corporations, engaged in supplying water, power, or light, if located outside of the limits of such public municipal corporations,"

with a proviso safeguarding the right of any city or town to tax property without reference to its terms if authorized to do so by special legislation. As the bill which effected this last amendment was presented to the Legislature it would have added nothing except the phrase "if located within the corporate limits and confines of such public municipal corporation." This would have made all property owned by a municipality outside its limits taxable. The Legislature in its wisdom determined to exempt certain items of property so situated if devoted to particular uses and proceeded to list them in a careful manner and enumerate the uses.

Decision in *Inhabitants of Whiting* v. *Inhabitants of Lubec*, 121 Me., 121, 115 A., 896, was handed down some years after the statutory revision of 1916, where the provision now controlling appears as Chap. 10, Sec. 6, Par. I, although the references in the opinion are to the session laws rather than to the revision. Once again the entire subject matter of the taxation of publicly owned property was reviewed with the result that in view of the 1903 and 1911 amendments this Court adopted the construction which it had rejected in deciding, *Inhabitants of Camden* v. *Camden Village Corporation*, supra. It recognized as that case had declared that the:

> "public property of the state and that of its governmental divisions is presumptively immune from taxability"

but that the immunity did not result from a want of legislative power to impose taxation on some publicly owned property at its election and construed the law as then phrased as an exercise of that power subjecting the property of one municipality situate in another to taxation unless expressly exempted.

Inhabitants of Whiting v. *Inhabitants of Lubec*, supra, decided definitely that land did not come within the defined exemptions and that the real estate of one municipality situate within the confines of another should be taxed therein on the tax valuation applicable to private owners, i. e., with recognition of any increment traceable to its availability for development as a mill privilege. *Union Water Power Co.* v. *City of Auburn*, 90 Me., 60, 37 A., 331, 37 L. R. A., 651, 60 Am. St. Rep., 240; *Saco Water Power Co.* v. *Inhabitants of Buxton*, 98 Me., 295, 56 A., 914; *Penobscot Chemical Fibre Co.* v. *Inhabitants of Bradley*, 99 Me., 263, 59 A., 83; *Central Maine Power Co.* v. *Inhabitants of Turner*, 128 Me., 486, 148 A., 799.

The decision below must be assumed to have been made on the theory that a mill privilege flowed out by the erection of a dam at its site was so engulfed or absorbed into the reservoir created thereby as to lose both its identity and inherent character. This is contrary both to *Inhabitants of Whiting* v. *Inhabitants of Lubec*, supra, where the municipality owning the property was held liable for taxes on land and mill privilege used in connection with its water and electric supply system but also to *Central Maine Power Co.* v. *Inhabitants of Turner*, supra, where a private owner was held for a tax based on a valuation of land which recognized its appurtenant mill privilege although the privilege had been flowed out by a lower riparian development. The only ground on which it can be claimed that the present facts are distinguishable from those presented in the *Central Maine Power Co.* case, supra, is that the privilege here in question has been engulfed or absorbed into a reservoir which is not taxable. That fact does not distinguish the case from *Inhabitants of Whiting* v. *Inhabitants of Lubec*, supra. The consolidated effect of the two cases is that land is not exempt from taxation under R. S. 1930, Chap. 13, Sec. 6, Par. I, and may be valued for tax purposes with due regard to an appurtenant mill privilege although the latter is not currently usable because of water impounded upon it. That the dam which

impounds the water stands upon the land which carries the privilege rather than at a lower riparian location or that the reservoir created by the dam is exempt from taxation is not material. The ruling complained of constitutes error and the exceptions must be sustained.

The application for abatement entitles the appellant to relief if the tax valuation involved is in fact excessive. It should not be precluded from offering testimony on this point and the case is remanded for further action in recognition of that right.

Exceptions sustained.

DISSENTING OPINION

MANSER, J. I regret that I cannot concur. The Penobscot River, in its passage to the sea, flows between the cities of Bangor and Brewer. In this area there existed a natural waterfall suitable for development of water power. Bangor became the riparian owner of land on both sides of the river at this point, and erected a dam reaching from bank to bank. It was thus enabled to develop hydro-electric power for the municipal purpose of supplying the city with electric lights. As stated in the majority opinion, it has long been recognized in this jurisdiction that public property of the state and that of its governmental divisions, is presumably immune from taxation. The legislature has power, however, to restrict this immunity, and the present existing exemptions are to property of any municipal corporation appropriated to public uses, located within its corporate limits, and also the

> "pipes, fixtures, hydrants, conduits, gatehouses, pumping stations, reservoirs, and dams used only for reservoir purposes of public municipal corporations and engaged in supplying water, power and light, if located outside of the limits of such municipal corporation."

Brewer assessed a tax on *land* owned by Bangor, said to contain seven acres, and lying between the river and a named highway. The valuation for the tax levy was $25,000. It was developed in the record that the land itself was rough and uncultivated, and it was valued by the presiding justice who heard the case, at $1,000. The court below ruled that so much of the dam and reservoir as was within the territory of Brewer was exempt from taxation under the express provision of the statute, and reduced the valuation by $24,000.

The majority opinion, evidently constrained thereto by the decision in *Whiting* v. *Lubec*, 121 Me., 121, 115 A., 896, holds in effect, that although the dam and reservoir are exempt from taxation, yet the property constitutes a "mill privilege" so-called, and as the statute did not expressly contain this term, the entire property including the dam and reservoir was taxable as such a mill privilege for its highest actual and potential value as such, in accordance with the rule when property of that nature is owned by private interests.

As noted in *Bean* v. *Power Co.*, 133 Me., 9, at page 20; 173 A., 498, at page 503:

> "Mill seat, now mill site, and mill privilege have been household words of the people served by power dams on streams since the mud-sill of the first dam was seated in the territory now the State of Maine, for full three hundred years.
>
> "The terms are synonymous, used interchangeably to name a location on a stream where by means of a dam a head and fall may be created to operate water wheels."

and we may now add to create hydro-electric energy to produce electricity.

It would seem that the logic is unassailable that a dam and the reservoir thereby created, the bed of the river and the banks which surround it, are also synonymous with "mill privileges." As above noted, it is held by the majority opinion that the dam and

reservoir are not taxable, yet the mill privilege, which is formed by the combination, is taxable at its full commercial value. In the judgment of the writer, it was plainly the intention of the legislature to exempt the very things which make a mill privilege. To hold that the dam and reservoir are not taxable but the city must pay for the "privilege," is looking through a glass darkly, and does not reflect legislative intent.

I am in full accord with the doctrine of *stare decisis*, but I cannot believe that there should be slavish adherence thereto when thereby a misconception will result in perpetuation of error and a nullification of the purpose of the legislation. There are no vested rights which will be uprooted, no procedural practices which will be upset, no uncertainty will result, and instead of tending to defeat justice in the present case, it will uphold it for the benefit of the citizens of Bangor, who should not be compelled to contribute to taxes levied against the city without right under the law.

The exceptions should be overruled.

STATE OF MAINE *vs.* ROYDEN V. BROWN.

Kennebec. Opinion, January 8, 1946.

Criminal Law. Indecent Liberties.

An assault is not a necessary element of the offense of taking indecent liberties and such an allegation in the indictment is not required.

The law is well settled that, if a trial judge sees fit to summarize the evidence for a jury's benefit, he must do so with strict impartiality and must not magnify the importance of the proofs on one side and belittle those on the other side.

In a case of this nature, where feeling runs high, it is more than ever essential, if the evidence for the State is summarized, that the evidence for the respondent and its bearing on the issue be given equal consideration.

Prejudice to the respondent is not cured by telling the jury that they are the judges of the facts, by platitudes against prejudice, racial or otherwise, nor merely because the matter is put to the jury in the form of questions.

Our statutes, R. S. 1944, Chap. 100, Sec. 105, forbid a judge during a trial, including the charge, to express an opinion on issues of fact. What he is forbidden to do directly he may not do indirectly.

ON MOTION FOR NEW TRIAL AND ON EXCEPTIONS.

The respondent was convicted of the offense of taking indecent liberties with a male child under sixteen years of age. The respondent claimed that the summarization of evidence and instructions to the jury by the Court were unfair to him. New trial granted. Exceptions sustained. The case fully appears in the opinion.

Henry Heselton, County Attorney,

Abraham Breitbard, Deputy Attorney General, for the State.

Burleigh Martin,

F. Harold Dubord, for the respondent.

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

THAXTER, J. The respondent was indicted for a violation of the provisions of R. S. 1944, Chap. 121, Sec. 6, in that, being more than twenty-one years of age, he took indecent liberties with the sexual parts or organs of one John N. McAuley, Jr., a male child under the age of sixteen years. On a trial before a jury in the Superior Court he was convicted, and the case is before us on an appeal from a denial by the presiding justice of his motion for a new trial and on exceptions. It is unnecessary to consider the appeal, for the exceptions must be sustained.

The exceptions are to the overruling by the presiding justice of a motion in arrest of judgment, to the exclusion of certain evi-

dence, to a portion of the charge as given, to the failure of the presiding justice in his charge to digest the defense testimony in as great detail as he had digested the evidence for the state, and to the refusal to give certain requested instructions.

The motion in arrest of judgment is without merit and was properly overruled. The only objection to the indictment brought up by the motion and now insisted on is that the indictment does not contain an allegation that the respondent committed an assault on the said John N. McAuley, Jr. An assault is not, however, a necessary element of the offense, and accordingly such an allegation in the indictment was not required.

It is not necessary to consider the exceptions to the exclusion of evidence or to the portion of the charge complained of.

There is considerable force in the respondent's complaint that the summation of the evidence by the presiding justice was one-sided in that attention was called unduly to the testimony favorable to the state and but little comment was made on that of the respondent. The law is well settled that, if a trial judge sees fit to summarize the evidence for jury's benefit, he must do so with strict impartiality and must not "magnify the importance of the proofs on one side and belittle those on the other." . . . *Com.* v. *Colandro*, 231 Pa., 343, 356, 80 A., 571, 576; *Com.* v. *Westley*, 300 Pa., 16, 150 A., 94; *Com.* v. *Karmendi*, 325 Pa., 63, 188 A., 752; 23 C. J. S. P., 896, *et seq.* In a case of this kind where, because of the nature of the offense charged, resentment is apt to run high, where there is likely to be indignation in a community against the accused, a heavy responsibility rests upon a judge to see to it that the members of a jury are in a temperate frame of mind and that they consider the evidence offered impartially and without bias toward a respondent. To that end it is more than ever essential, if the evidence for the state is summarized, that the evidence for the respondent and its bearing on the issue should be given equal consideration.

In this case the only direct evidence was that of the young boy who was the victim of the advances claimed to have been made

by the respondent. He testified that as the respondent passed in the early evening with his wife along the lower corridor of the State House and by the open door of a room which had been used as a kitchen, which was dark except for such light as came from the corridor, the respondent lured him into this room on a pretense and there committed the offense. If such were the fact, the wife obviously continued on her way, and the state offered evidence of the operator of the elevator that on the evening in question she rode alone in the elevator to the floor on which the respondent's office was located. The respondent, according to the elevator operator, followed shortly afterwards. Whatever happened was over in a very few minutes. The respondent continued with his duties for three days as secretary of the senate which was then in session, when he was called to the office of the attorney general and there placed under arrest. Testimony of Captain Young of the state police and of the sheriff of the county was offered of the conversations which they had with him there. There is no evidence and no claim is made that what he there said was not voluntary. The interpretation to be put on certain of the admissions which he made to the officers depends very largely on the weight which the trier of the facts would give to the testimony of the boy. In one aspect what he said to the officers might indicate guilt, in another innocence. It was, therefore, of the utmost importance that this evidence should have been weighed in its relation to the whole and not treated as isolated testimony supporting the charge. The evidence for the respondent was the testimony of himself and his wife. In view of the alleged circumstances, it was obviously all he had. He denied that he went into the abandoned kitchen with the boy or committed the act in question. He did admit giving the boy a friendly push as he passed by him. His wife says that she and her husband walked through the corridor together and took the elevator together to the upper floor, that he unlocked the door of his office for her, and that they went in there together. Obviously the whole case hinged on the proper evaluation by the jury of the testimony of the boy

on the one hand and of the respondent and his wife on the other.

Such being the case, what does the charge say with reference to the testimony for the state and for the respondent?

In the first place, the court told the jury that the witnesses for the state "all of them" had no choice but to testify, that they had to come and tell their story, that they stood "to gain or lose nothing by that action, one way or the other." The judge comments on the great importance of the testimony of the boy. To the claim of the defense that it is untrue, the judge says: "If he is not telling the truth, why not? Well, defense counsel say it is not necessary to prove motive to show why a witness should lie. I think you probably, as reasonable men of good sound judgment would say, 'Why should anyone lie if there is no reason for it?' " There is more in a similar vein later on. As to the boy's attitude on the stand, the judge again calls attention to the fact that he had to testify whether he wanted to or not. As to why the boy did not cry out then and there we find this comment: "There has been testimony and it has been said that there was opportunity for the boy that evening to cry out to his father for help. Again it might be proper for you, Mr. Foreman and members of the panel, to determine how a young man of that age who had no such experience before, would react under the circumstances which you found to have existed that night; and when he was asked why he didn't cry out to his father, his reply was, 'I was afraid.' You take that and give it the consideration it deserves and see who is telling the truth." Then the judge read to the jury long excerpts from the testimony of Captain Young as to his conversation with the respondent, coupled with this comment obviously directed to the weight to be given to such testimony: "Officers are chosen by the proper authorities supposedly because of their qualifications and their honesty to enforce the laws of the State to protect the persons and the citizens of this State." And then as to both Captain Young and the sheriff, we find this: "Do you believe that Officer Young is not telling the truth as to what happened at noon on March 9th? Do you believe the chief enforcement officer of

this county, elected by the people of this county, is not telling the situation as it is when he corroborates Mr. Young? Do you believe, Mr. Foreman and members of the panel, that these officers are influenced by any other desire than to come in and tell you the truth as they see it and as they understand it, or are they the type of officers, as argued by the defense, who come in here to get a conviction, no matter what? It is for you to say."

The summary by the court of the testimony for the state and the suggestions, largely in question form to be sure, on the weight to be given to it cover six pages of the record. The summary of the defense testimony is comprised within six lines to the effect that the respondent denies the charges and is corroborated by his wife, who says that "she did not leave his presence from the time they left the car until they reached the room upstairs." Then follows this comment on the weight to be given to the testimony of the respondent and his wife: "I have said to you, but I do not know as I have in this charge, sometimes in determining the truth of a statement given by an individual, it is very helpful to determine the interest in the case. It doesn't necessarily mean that one who is interested will deliberately commit perjury, but it might occur to you that one who is interested in the outcome would try to tell that story he thought would be helpful. I say his interest is something for you to consider and the interest of any witness. Is he interested in the outcome of the case? The other witness who testified for him is his wife. Is she interested in the outcome of the case? She is his wife. She may not be interested, but is she? If she is, does it tend to color her testimony? These are all matters for you to consider."

We have here in this charge a summary of the testimony and the weight to be given to it heavily balanced in favor of the state. Particularly damaging was calling attention to the compulsion on the part of the prosecution's witnesses to testify, as compared with the voluntary character of the testimony for the defense. Then there is an obvious attempt to suggest the honesty of the law enforcement officers, as distinguished from the interest of the

respondent and his wife. We do not believe that such damage is cured by telling the jury that they are the judges of the facts, by platitudes against prejudice, racial or otherwise, nor merely because the matter is put to the jury in the form of questions. The constant reiteration of a question may become in effect an affirmation. Our statutes, R. S. 1944, Chap. 100, Sec. 105, forbid a judge during a trial, including the charge, to express an opinion on issues of fact. What he is forbidden to do directly, he may not do indirectly.

It is not necessary for us to decide whether this respondent should, under the rule set forth in *State* v. *Wright*, 128 Me., 404, 148 A., 141, be granted a new trial because of the partiality shown by the presiding justice in his summary of the evidence; for a new trial must be granted because of the failure to give a requested instruction. We call attention to the charge as given because of the cumulative effect of it on the failure to instruct properly on this other point.

The respondent requested the following instruction:

> "The jury is instructed that the law presumes the innocence of a person accused of crime, and this presumption is not a matter of form merely, that the jury may disregard at pleasure, but is a part of the law of the land and is a right guaranteed by that law to every person accused of crime. This presumption of innocence continues with the defendant throughout all the stages of the trial, and until the case has been finally submitted to the jury, and the jury has found that this presumption has been overcome by the evidence of the prosecution beyond a reasonable doubt as to each and every material fact.
>
> "If after carefully considering all the evidence, you have any reasonable doubt as to the guilt of the respondent, then it is your duty to resolve that doubt in favor of the respondent and render a verdict of acquittal."

This instruction should have been given unless the matter had been covered in the charge. It not only had not been covered, but the charge as given could well have given the jury an altogether wrong impression of the law on this fundamental point. The presiding justice said:

> "In cases such as this, criminal cases, it has been well said the respondent is presumed to be innocent. That means this, Mr. Foreman and members of the panel, that until there is evidence produced in Court there is no presumption of guilt. On the other hand, there is the presumption of innocence. The mere fact that proceedings were instituted, the mere fact there was a hearing in Municipal Court, the mere fact the case was investigated by officers of the law, the mere fact he was finally indicted by the Grand Jury, the mere fact he is placed in this court room for trial doesn't militate against him in the least. It is not to be considered at all in establishing his guilt."

The jury could have understood from this that, when the case opened and the state commenced to put in its case, the presumption of innocence was gone. Just what was meant by "presumption of guilt" is not clear, but it is a dangerous phrase. The judge calls attention to the fact that the hearing in the Municipal Court, the investigations by the state officers, the indictment, the bringing of the respondent to trial, do not affect the presumption of innocence. This admonition was of course proper, but these were all preliminary procedures to the opening of the case by the state when the judge implies the presumption of innocence no longer exists. Nowhere is the jury specifically told that the presumption of innocence remains until the jury is satisfied from all the evidence in the case that the respondent is guilty beyond a reasonable doubt. It is true that subsequently the judge did say that the presumption remains until there is evidence to overcome it but we do not think that this statement alone clarifies for the jury what was said before. Taken in connection with the one-

sided summary of the evidence in the case, we think the charge as given on this point was highly prejudicial. For this reason it was more than ever important that the requested instruction should have been given. The failure to give it under the circumstances constitutes reversible error.

We do not grant a new trial in this case because of mere technical errors. What happened here was fundamental. We express no opinion as to whether the evidence in this record would sustain the verdict. Regardless of what our decision might be on that point, this man was entitled to a fair and impartial trial. That, he did not have.

Exceptions sustained.
New trial granted.

MURRAY, APPELLANT

FROM DECREE OF JUDGE OF PROBATE.

Piscataquis. Opinion, January 26, 1946.

Wills. Trusts.

There can be no delegation of discretion by trustees to the beneficiary; and the trustees are bound by the instructions of a testator in his will rather than by an assumption that he would not expect them to be so bound.

In the instant case, the trustees did not use their own discretion but left the determination to the beneficiary and thereby surrendered their own discretion to her.

Upon the record as presented, the trustees failed to appreciate their duty under the will to the life tenant and to the remainderman.

The Court must interpose where the trustees fail to use their own judgment because of a mistaken view of their power or duties, whether the mistake is one of law or of fact.

ON REPORT.

Charles Locke, by his will, created a trust for the benefit of his wife for her lifetime with remainder over to a daughter by a former marriage. The will authorized the trustees, in addition to their other duties, to pay from the principal of the estate such sums as in their discretion might be needed for the comfortable support of the beneficiary. Upon the request of the beneficiary, the trustees paid to her a certain sum from the principal of the estate. They did not investigate the question of her need for such sum and the facts showed that it was not needed for her comfortable support. The Judge of Probate approved the payment. Appeal was taken to the Supreme Court of Probate and by that Court the entire record of the Probate Court proceedings was reported to the Law Court to "render such judgment as the law and facts required to determine all rights of the parties." There was also objection by the remainderman to charges against the principal of the estate for loss on bonds purchased by the trustees at a premium. The Law Court held that the changes of investments by the trustees were within their discretionary rights but that the payment from the principal to the beneficiary was improper. The case was returned to the Supreme Court of Probate to be remanded to the Probate Court for further proceedings in accordance with the opinion. The case fully appears in the opinion.

Verrill, Dana, Walker, Philbrick & Whitehouse, for the trustees.

Effler & Eastman and *Wayne Strichter,* Toledo, Ohio, *John Powers White,* for remainderman.

M. O. Locke, pro se.

SITTING: THAXTER, MANSER, MURCHIE, JJ., CHAPMAN, ACTIVE RETIRED JUSTICE.

MANSER, J. Charles Locke, by his will, created a trust for the benefit of his wife for her lifetime, with remainder over to Doro-

thea Locke Murray, his daughter by a former marriage. He designated his attorney and a bank as trustees, and they were appointed by the Probate Court. Their first account as trustees covered the period from August 1937 to February 1943. The account is challenged in two particulars by the remainderman. The Judge of Probate overruled the objections, and the account was allowed with certain other modifications which had been agreed to by the parties. A full hearing was held in the Probate Court, and on appeal to the Supreme Court of Probate, the entire record of the Probate Court proceedings was reported to the Law Court "to render such final judgment as the law and facts require to determine all rights of the parties."

The first objection relates to a payment of $3,000, made in July 1939, from the corpus of the estate for the ostensible purpose of providing for the comfortable support and maintenance of the life tenant.

The second objection is to charges against principal of the estate for loss on two bonds purchased at a premium by the trustees. One bond was paid at maturity with a loss from the purchase price of $49.87. The other bond was called at a loss of $32.00. The contention was that the rule should be established that such losses must be taken from income and not charged against principal.

With relation to the first objection, the will made provisions as to use of income as follows: It authorized the trustees to retain reasonable compensation for their services; to pay out of income for the preservation and management of the estate and property, including taxes, and improvement of the property of the estate.

It further authorized and directed the trustees to distribute the net income to the beneficiary at least four times in each year.

Then is found a specific provision that the

> "Trustees and successors of them in said trust are hereby authorized and empowered to pay from the principal of my estate such sums as in their absolute discretion may be

needed for the comfortable support and maintenance of my said wife, Edna Mae Oakes Locke."

It is by virtue of this provision that the trustees assert their justification for the payment of $3,000.

The situation was as follows: Mr. Locke, the testator, died in November 1935. He had not been engaged in business since his marriage to the wife who survived him. He received by will a large sum from his mother, and a second considerable sum in securities from a source indefinitely described as a Mr. Smith in Toledo.

In addition to the testamentary trust, Mr. Locke created an irrevocable trust in August 1935, a few months before his death, under which Mrs. Locke was named as beneficiary for her life-time, and the remainder was then payable to the living grand-children of the donor. The bank named as one of the testamentary trustees, was appointed as sole trustee of the living trust. The funds turned over to the trustee under this trust were $344,500 United States Treasury Bonds, and over $51,000 in cash. The trust document contained a similar provision to that in the testamentary trust, that the life tenant should be entitled to the net income during her natural life "together with such part of the principal as the trustee in its sole discretion, shall deem necessary from time to time for the comfortable support and maintenance of Edna Mae Locke in a manner suitable for one of her station in life."

The inventory filed by the testamentary trustees included the homestead at Cape Elizabeth, appraised at $25,000, other real estate appraised at $2,000, and securities and cash amounting to $250,718.62.

It, therefore, appears that the two trusts constituted the whole of the settlor's aggregate estate of $672,000. It further appears from the record that these assets constituted the chief source of income for both husband and wife while they lived together, and that the purpose and intention of the husband, so far as his wife was concerned, was to make certain she should have the benefit

of the combined income of both trusts during her life. As beneficiary, she was to have the entire income which both had shared before her husband's death. Consequently, the income from both must be taken into account in determining whether the trustees might properly withdraw from the principal of one. The record shows that the case was tried upon that hypothesis. The bank was trustee of the one, and the bank and the individual trustee were trustees of the other. They both, therefore, had the opportunity of access to the sources of information as to the entire amount of income, and other relevant facts.

The testamentary trustees paid from the income of their trust fund taxes on real estate and property insurance, which averaged about $900 a year, and this went to the benefit of the life tenant, the income actually received by her being in addition thereto. Mrs. Locke received as income from the testamentary trust during the years 1937, 1938 and 1939, $21,774.34, and from the living trust $37,077.19, or a total average for the three-year period of $19,600 annually. In the first six months of 1939 she received $10,000. Mrs. Locke's health was generally good, and she estimated her medical expenses averaged $75 a year, in addition to compensation of a nurse for one period of eight weeks.

In the spring of 1939 she made some substantial renovations upon the homestead, amounting to nearly $3,000. She testified that, after these were completed, she went to the individual trustee early in July of 1939 and "told him that I had to make the repairs and that they were going to cost this amount of money and possibly more, and because of that and other commitments, I would need more money for the year, and I asked him if I was entitled to money out of the principal under the terms of the will and he said he would have to have a written request, which was done in his office at my request." Such request, in the form of a letter, was prepared by the trustee on July 10, 1939, but made no mention of "other commitments." Mrs. Locke received from the trustees check for $3,000 two days thereafter. She testified that the other commitments she mentioned referred to the fact that

she had agreed to purchase her brother's share in their father's estate. She had already paid $550, and subsequent to the receipt of the money from the trustees, disbursed for her brother's account about $1,400 more, making a total of approximately $1,950. This was a capital investment which was thereby diverted from income for her "comfortable support and maintenance." Mrs. Locke testified that she did not communicate to the trustees the fact of this investment.

It also appears that, on January 1, 1938, Mrs. Locke received $3,000 on account of income from the testamentary trust. This particular sum she deposited on a savings account, which she already had in the trustee bank. This deposit remained untouched until December 1939, and was on deposit at the time the $3,000 payment from principal was turned over to her. It appears that she had forgotten or overlooked the fact. It does not appear, however, that either of the trustees requested information as to the nature of the other commitments mentioned by her, made no specific inquiries as to her expenditures for her own comfortable support and maintenance, and did not become aware of the savings deposit of over $3,000 in the trustee bank, or the fact that she also had on checking account a balance of $1,725.

That the gentlemen administering the trust were men of good judgment, of fine character, standing and reputation, is to be taken for granted.

Their counsel assert the following propositions:

1. The trustees are entitled, when a moderate request is made by the beneficiary for payment out of principal, to assume that she is acting in good faith when she says she needs the money.

2. That Mr. Locke was an indulgent husband and would probably have acceded to her request, so the trustees were warranted in doing the same.

3. That they acted in good faith and without dishonest motive.

4. That, *ipso facto*, the payment having been made and their discretion being absolute, it is not within the province of the remainderman or the Court to question it unless it is made to ap-

pear by evidence of the fullest and clearest character that there has been abuse of discretion.

Neither the first nor the second contention presented state the true rule by which trustees in such a situation must be guided. There can be no delegation of discretion to the beneficiary, and the trustees are bound by the instructions of the testator in his will, rather than by an assumption that he would not expect them to be so bound.

The term "discretion" has been defined as deliberate judgment — the discernment of what is right and proper. It implies soundness of judgment — judgment directed by circumspection. These definitions are culled from Words and Phrases, Permanent Edition, Vol. 12.

As said in *Alford* v. *Richardson*, 121 Me., 316, 321, 114 A., 193:

> "The will invests the Trustee with the right to use his discretion, to use his own judgment, in determining whether or not the conditions specified in the will exist or not in fact, and as to how much relief may properly be given. So long as he acts within his power, honestly and in good faith, his determination is conclusive."

Here, the trustees did not use their own discretion. They left the determination to the beneficiary, and thereby surrendered their own discretion to her. They did not use their own judgment. They did not determine whether the conditions specified in the will existed. The trustees did not ascertain the true facts, knowledge of which was chargeable to them. They did not learn that the beneficiary had committed herself to the payment of $1,450 in capital investment in addition to $550 already spent for the purpose. They did not learn that the beneficiary had at the time unexpended income of $4,725. The information was readily accessible.

It is also suggested by counsel that the sum paid was trivial, and represented but little more than one per cent of the principal of that particular trust. Of course, that argument is fallacious.

Moreover, it appears from the record that the following year the beneficiary invested $5,000 in southern property, to which she holds title. Could it be said that she would have been entitled to deplete the principal of the estate by that amount for such a second capital investment because it represented only two per cent of the principal?

The Court must interpose where the trustees fail to use their own judgment because of a mistaken view of their power or duties, whether the mistake is one of law or of fact. Restatement of the Law of Trusts, §187 - h. Scott on Trusts, §187.3; *Garvey* v. *Garvey*, 150 Mass., 185, 22 N. E., 889; *Boyden* v. *Stevens*, 285 Mass., 176, 188 N. E., 741; *Matter of Osborn*, 299 N. Y. Supp., 593; *Matter of Flood*, 217 N. Y. Supp., 702.

> "If a trust is created for beneficiaries in succession, the Trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests." Restatement of Law of Trusts, §232, and note b thereunder; also §183.

As said in *Matter of Osborn*, supra, a trustee who permits a beneficiary to invade the corpus of the estate without supervision or restriction, unlawfully abandons his duties as trustee by so doing. "The question of good faith and honesty of purpose is unimportant."

This is in no wise contrary to the rule laid down by our Court that the exercise of discretion by trustees is not reviewable when the trustees have acted in good faith according to their best judgment and uninfluenced by improper motives. *Wight* v. *Mason*, 134 Me., 52, 180 A., 917; *Kimball* v. *Blanchard*, 101 Me., 383, 64 A., 645; *True Real Estate Co.* v. *True*, 115 Me., 533, 99 A., 627.

Further comment is unnecessary as to the third and fourth contentions made for the trustees. What has already been said has application thereto.

Upon the record as presented, the trustees failed to appreciate their duty under the will to the life tenant and the remainderman, their action was not justified, and the amount charged in

their probate account of $3,000 paid from principal to the widow must be disallowed, together with the charge against principal of five per cent of the sum for their own services in that regard.

The second contention is that when bonds are purchased at a premium, they must be amortized by retaining from income and crediting to principal so much of the premium over the interim period as would constitute a loss to principal when the bonds mature or are called. It is true that when bonds mature, only the face value will be paid, or if called under the the terms of the bond contract, only the call price will be paid. If a higher price is paid for the bonds, then loss results to principal, if there has been no amortization. Technically, such transactions come within the category of wasting investments, thus creating a detriment to the remainderman. In this jurisdiction there is no statutory or judicial rule which arbitrarily governs the situation. The Uniform Principal and Income Act adopted in some states, but not in Maine, permits trustees to purchase at a premium without the requirement of amortization. This might well be called a rule of convenience for the guidance of trustees. In ordinary investment periods, it is possible to buy some good securities at a premium and other good securities at a discount, and the gain or loss practically offset each other without direct application of the rule of amortization.

The reasons for and against amortization of discount or premium on bonds purchased by trustees in instances where there are successive beneficiaries, are fully discussed in Bogert on Trusts and Trustees, §§830, 831, pp. 2423-2434, and in the absence of legislation, it appears there is no fixed rule, and the Court has no occasion in the determination of this case to put its stamp of approval on one method and veto the other. It cannot be said in the present instance that the trustees have acted without proper regard to the rights of all. In certain changes of investments evidently made to procure a larger income, but with due regard to the safety of principal, they were acting within their discretionary rights, without any resulting net loss to principal. The two items

of charges against principal here questioned may be allowed in the probate account of the trustees.

Under the terms of the report of this case, it was agreed by counsel that the Court might indicate what disposition should be made as to counsel fees and expenses. This we leave to the determination of the Judge of Probate.

Case returned to the Supreme Court of Probate to be remanded to the Probate Court of Piscataquis County for further proceedings in accordance with this opinion.

ALBERT'S CASE.

Kennebec. Opinion, February 7, 1946.

Workmen's Compensation Act.

There is no distinction in this jurisdiction as to right of review by the Law Court between decisions based wholly on findings of fact *whether such decisions are in favor of the employee or against it.*

The Industrial Accident Commission is made the trier of facts and its findings thereof, whether for or against the claimant, are final; but in arriving at its conclusions, it must be guided by legal principles.

When there is any evidence competent and probative before the Commission, its decision based upon the same will not be disturbed by the Supreme Judicial Court. Its sufficiency is for the Commission and is not subject to review by the Court.

But a disregard of competent and probative evidence or a finding by the Commission founded in whole or in part upon incompetent or illegal evidence would constitute an error of law which would necessitate the sustaining of an appeal from a decree based on such decision.

Where there is competent evidence of probative value in the record in support of the contentions of both parties, the Commission has the right to adopt as the

basis of its decision that which it regards true and proven by a fair preponderance of the testimony, and in such case we cannot substitute our judgment for that of the Commission.

In the instant case, the issue being factual only and no error of law appearing, the appeal must be dismissed.

ON APPEAL.

Proceeding under the Workmen's Compensation Act by Edith G. Albert. The claimant was in the employ of the Lockwood Company and, in January, 1940, while so employed, received injuries. On account of such injuries she received compensation until May 18, 1940. She petitioned for further compensation on account of alleged total incapacity subsequent to that date. The Industrial Accident Commission ruled that her petition failed to sustain the burden of proof that she had suffered any incapacity over and above that for which she had been fully compensated. The Superior Court affirmed the finding of the Commission. The claimant appealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

F. Harold Dubord, for the petitioner.

Robert B. Matthews,

James M. Gillin, by brief, for the defendants.

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

HUDSON, J. This is an appeal from a *pro forma* decree of a Justice of the Superior Court confirming a finding of the Industrial Accident Commission denying an employee's petition for award of further compensation.

In her petition the claimant set forth that on January 22, 1940, while working as a tailing girl in the employ of the Lockwood Company at Waterville, she received a personal injury by accident arising out of and in the course of her employment; that said

accident happened while she was bending over a box containing bobbins at the end of a spooler, she being caught between the traveler and steel bobbin box; that her chest was crushed and that she suffered injuries to her right arm, shoulder, and other parts of her body, which left her with a condition of osteo-arthritis of the right shoulder; and that on account of said injuries she received total compensation ending on May 18, 1940. In the pending petition she now claims "further compensation on account of total incapacity subsequent to said date." The defendant answered that to this she was not entitled. The Commission heard the case at Waterville on October 23, 1944, and dimissed the petition.

It found factually that the employee was injured on January 22, 1940, for which she was paid compensation for total incapacity to and including May 18, 1940; that she returned to work on May 20, 1940 and worked continuously to January 22, 1941, performing the same type of work and at the same rate of pay; that on or about the first day of June, 1942, she was again employed by the Lockwood Company and worked continuously at a wage in excess of that which she was receiving at the time of her accident until July, 1943, a period of over a year, when she quit because of her physical condition. The Commission also found that she was treated by Dr. McQuillan for the injury sustained on January 22, 1940, and that she was again examined by him on October 6, 1943, when the doctor found a changed condition in the right shoulder, her condition then being acute. It concluded that there had been "some intervening cause or condition which the employee has suffered which has resulted in her incapacity to work subsequent to May 18, 1940, the date of her last payment of compensation, and that the cause or condition is not the result of the accident of January 22, 1940. . . ." It added:

> "The petitioner fails to sustain the burden of proving that she has suffered any incapacity to work as a result of her accident and injuries of January 22, 1940, to October 23,

1944, date of last hearing, over and above that for which she has already been compensated."

It will be noted that the decision of the Commission was based wholly on findings of fact. No issue of law was presented.

Formerly, as held in *Orff's Case*, 122 Me., 114, 119 A., 67, and as stated later in *Ferris' Case*, 132 Me., 31, 165 A., 160; *Weymouth* v. *Burnham and Morrill Co.*, 136 Me., 42, 1 A., 2d, 343; *Drouin* v. *Snodgrass Co. et al.*, 138 Me., 145, 23 A., 2d, 631; and *McNiff* v. *Town of Old Orchard Beach et al.*, 138 Me., 335, 25 A., 2d, 493, a distinction was made between decisions of the Commission in favor of the employee and those against it. In those against the employee the Court would review the decision, even upon findings of fact, but not so in decisions against the employer. The question of such a distinction again came before this Court in *Robitaille's Case*, 140 Me., 121, 34 A., 2d, 473, and therein the distinction was abolished, the Court stating on page 125 of 140 Me., page 475 of 34 A., 2d:

> "The Commission, by the Act, is made the trier of facts and its findings thereof, *whether for or against the claimant*, are final; but in arriving at its conclusions it must be guided by legal principles. Failing in this it commits error of law and it is the function of the Court to correct such error. For this purpose the Court will examine the evidence set forth in the record." (Italics ours.)

And later on page 127 of 140 Me., page 475 of 34 A., 2d:

> "We therefore, after careful consideration, disaffirm the claimed interpretation of *Orff's Case*, supra, and the rule as to review that would follow such interpretation and, so far as *Orff's Case*, supra, *Ferris's Case*, 132 Me., 31, *supra*, *Weymouth* v. *Burnham & Morrill Co.*, supra, *Drouin* v. *Snodgrass*, supra and *McNiff* v. *Town of Old Orchard*, supra, are in conflict with the rule here stated, the same are overruled."

To the same effect see *Fisher's Case*, 140 Me., 156, 34 A., 2d, 621. In *Fisher's Case* it was stated:

> "The issue in this case being factual only and no error of law appearing, the appeal must be dismissed."

We adhere to the law as enunciated in both the *Robitaille* and *Fisher* cases, supra. Before this appeal should be sustained, it would be incumbent upon the claimant to show that the decision below was based upon an error of law. If such error of law were made to appear, it would be the function of this Court, as above stated in the quotation from *Robitaille's Case*, to correct such, and for this purpose the Court would examine the evidence set forth in the record. We do not review the evidence with a purpose to discover whether the Commission erred in its finding of facts. It is the trier of facts and its holdings on questions of fact, when there is any evidence in support of the same, cannot be disturbed by us. We will not pass upon the sufficiency of the evidence, but it must be competent and have probative force.

> Still, "Upon either finding by the Commission, in favor or against the moving party, if it is apparent that the Commission has disregarded evidence which has probative force in favor of the party against whom the decision has been rendered, the decision will be set aside." *Robitaille's Case*, supra, on page 126.

In the instant case it has not been made to appear that the Commission disregarded evidence which had probative force in favor of the appellant or that the finding of the Commission was founded in whole or in part upon incompetent or illegal evidence. Had there been such, it would have been an error of law which would necessitate the sustaining of the appeal. *Robitaille's Case*, supra, on page 126, 34 A., 2d, 475.

The stated contention of counsel for the appellant is "that the decision of the Commissioner is entirely erroneous and not founded on any evidence and definitely contrary to the evidence in the

case. In other words, the Commissioner found facts without evidence." But the record does not support this contention. It contains competent and probative evidence in favor of both parties and the question of whether the employee sustained the burden of proof before the Commission under those circumstances was for its sole determination. However, a finding not based on any evidence is an error of law which would compel this Court to sustain an appeal from such a decision. Where there is competent evidence of probative value in the record in support of the contentions of both parties, the Commission has the right to adopt as the basis of its decision that which it regards true and proven by a fair preponderance of the testimony, and we cannot substitute our judgment for that of the Commission on such fact finding by the Commission.

The Commission denied the appellant's petition for further compensation because there was "some intervening cause or condition which the employee has suffered which has resulted in her incapacity to work subsequent to May 18, 1940, the date of her last payment of compensation, and that the cause or condition is not the result of the accident of January 22, 1940, and we so find." This was a finding of fact. If there were no competent or probative evidence in the record to justify it, then the appeal should be sustained. A very careful study of the record convinces us, however, that there was some such evidence supporting such a finding. That being the case, it is not within our province or legal right to disturb the Commission's finding of fact.

Although we do not intend at length to discuss the evidence, we think perhaps we should indicate briefly some of the facts the Commission had before it in support of its findings.

The claimant testified that following the original accident on January 22, 1940, she suffered two accidents, one at the mill and the other in her home. It seems that at the mill she was carrying a basket of bobbins, which she dropped. She said, "When I dropped the basket, it hurt me," and she dropped it because "It was too heavy." As to the home accident she was asked this question,

"Now, do you remember, Mrs. Albert, of, while at home you slipped and was obliged to support all of your weight with the right arm, and hurting your right arm again?" to which she answered, "I tried to help myself on my right arm and I couldn't." While she denied that she hurt her right arm at that time, she stated, "I forced my arm, and it hurt a little bit more." She said that when she went to get something under the sink in her home she put her right hand on the board there and fell. When asked if she had difficulty in getting up from the floor her reply was, "No, with my left arm I didn't have a hard time," and when asked if her right arm gave her pain at that time she gave the evasive answer of, "It always did hurt." She quit work after this accident at home. She stated, "No, I couldn't work," and that she remained at home a year following the home accident. At another place in the record she was asked, "Why did you stop working at the mill in July, 1943?" to which she replied, "Because I couldn't work any more on account of my arm."

This cessation of work for a long time following the home accident and the fact that she gave no reason for such cessation except her inability to work following that accident no doubt had significance with the Commission in determining whether an "intervening cause or condition" had occurred following the original accident which "resulted in her incapacity to work subsequent to May 18, 1940, the date of her last payment of compensation."

It seems that on the day following the original injury, an X-ray was taken of the arm and shoulder, which showed no fracture of the bone, and later, following the accidents in 1943, an X-ray was taken which did reveal a bone fracture of the right arm. It may well be that this evidence in particular induced the Commission to find as it did that these later accidents caused the injuries to the right arm which constituted the intervening cause mentioned in its decision. Anyway, the Commission found this to be the fact from the evidence before it, which cannot be said to be incompetent or without probative value. The petitioner admitted the intervening accidents but denied the bone fracture on either occa-

sion. The Commission, however, had a perfect right to rely on the X-rays and the medical testimony rather than on her statement in determining this question of fact.

These factual findings based upon some testimony, whether sufficient or not, must stand before this tribunal. *Robitaille's Case*, supra. It has not been made to appear to us that the Commission in arriving at its conclusion was not guided by legal principles, and, as stated in *Fisher's Case*, supra, on page 157, 34 A., 2d, 621, "The issue in this case being factual only and no error of law appearing, the appeal must be dismissed."

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* YORK UTILITIES COMPANY.

Kennebec. Opinion, February 7, 1946.

Street Railroads. Statutes. Taxation.

Depending on the context, the word "railroad" may or may not include a street railroad, but nowhere is there any authority for holding that there is included in that designation any road on which the cars or carriages do not operate on rails.

Our statutes governing the operation of street railways and busses do not contemplate that the operation of a bus is in any way the operation of a street railroad.

When busses came into use, the Public Utilities Commission was given authority over their operation by the provisions of a separate statute entitled "Motor Vehicles Carrying Passengers for Hire" (R. S. 1930, Chap. 66).

The fact that the state tax department for many years assessed the excise tax against the defendant in accordance with the defendant's present interpretation of the statute is not controlling on the Court. The Court must interpret the statute in accordance with its clear meaning as expressed by the language which the legislature used.

ON EXCEPTIONS.

Two separate actions against the York Utilities Company to recover excise taxes assessed for the years 1943 and 1944. The only question involved was whether the proper method was used in determining the amount of the tax. Until 1925 the company had operated a trolley car service over rails. In that year it began to use busses, until, in 1943, its trolley mileage was only 2.44 miles and its bus mileage 225 miles. The tax assessors in assessing taxes took into consideration only the track mileage and assessed the tax according to the provisions of R. S. 1944, Chap. 14, Sec. 116. The presiding justice ruled in favor of the State. The defendant filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Abraham Breitbard, Deputy Attorney General, for the State.

Titcomb & Siddall, for the defendant.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, TOMPKINS, JJ.

THAXTER, J. There are two separate actions involved here brought against the defendant, a street railroad, to recover excise taxes assessed for the years 1943 and 1944. The issue involved in each case is exactly the same. Both cases were defaulted under an agreement that they should be heard by the court in damages with right of exceptions reserved. The only question is what is the proper method for ascertaining the rate for determining the tax and the amount thereof. The decision of this question involves an interpretation of R. S. 1930, Chap. 12, Sec. 35 as amended by P. L. 1941, Chap. 99, now incorporated in R. S. 1944, Chap. 14, Sec. 116, which reads as follows:

> "*Taxation of street railroad corporations.* Street railroad corporations and associations which own or operate a street railroad are subject to the 7 preceding sections and all street railroad corporations and associations are subject to section

4 of chapter 13, except that the annual excise tax shall be ascertained as follows: when the gross average receipts per mile do not exceed $1,000 the tax shall be equal to ¼ of 1% on the gross transportation receipts; and for each thousand dollars additional gross receipts per mile, or fractional part thereof, the rate shall be increased ¼ of 1%, provided that the rate shall in no case exceed 4%."

Until 1925 the defendant operated a trolley car service over rails for the transportation of passengers and freight. In that year it commenced to add busses until in 1943 its track mileage had been reduced from 36.81 miles to 2.44 miles and its bus mileage had risen to 225 miles.

In determining what under the statute were the "gross average receipts per mile" the state tax assessor divided the gross transportation receipts received from rail operation by the number of miles of track mileage and disregarded the receipts from bus operation and the mileage of the bus routes. The result of this method of computation was to render the defendant liable for a tax based on the full four per cent of the gross transportation receipts.

The company contends that there should be included in the gross transportation receipts the revenue received from both bus and rail revenue and that this amount should be divided by the sum of the rail and bus mileage to determine the "gross average receipts per mile." On this method of computation the tax rate would be one quarter of one per cent which would be applied to the "gross transportation receipts" which would be the sum of the rail and bus transportation receipts. This method of figuring would result in a materially smaller tax.

The question in short is, was the defendant in operating its bus lines engaged in operating a street railroad as these words are used in the statute. The presiding justice ruled, in accordance with the claim of the state, that it was not, and determined the amount of the tax accordingly. The defendant has brought the cases before us on exceptions to this ruling.

Depending on the context, the word "railroad" may or may not include a street railroad, but nowhere do we find any authority for holding that there is included within that designation any road on which the carriages or cars do not operate on rails. In fact our court has adopted the following definition found in 25 R. C. L., 1120, now found in 44 Am. Jur., 215, as to what constitutes a railroad: "Generically the word 'railroad' includes all roads upon which the carriages or cars have wheels adapted to run, and which in operation do run upon metallic rails. The term includes tramways used in mining; it includes railroads in which the propelling power is steam, electricity, the horse or mule, and even those upon which push cars are propelled by men." *State* v. *Boston and Maine Railroad Co.*, 123 Me., 48, 55, 121 A., 541, 545. See also *O'Malley* v. *Riley County*, 86 Kan., 752, 121 P., 1108; Ann. Cas. 1913, C. 576; *Woodward* v. *City of Seattle*, 140 Wash., 83, 248 P., 73. In this last case the question was whether a city given authority by statute to operate a street railway system had power to run a motor bus service as incidental to the operation of such street railway. In holding that such operation was *ultra vires* the court said, page 87: "The power granted by the statute is restricted to railways; and to say that the term 'railways' may be construed to include motor busses and motor-bus routes, is to say that the term also includes all manner of transportation, including that by water and by air."

It is clear that our statutes governing the operation of street railways and busses do not contemplate that the operation of a bus is in any way the operation of a street railroad. By various enactments, embodied in R. S. 1930, Chap. 62 as amended, the public utilities commission was given certain control over public utilities including street railroads which were defined in Section 15 as follows: "The term 'street railroad' when used in this chapter, includes every railway, and each and every branch or extension thereof, by whatsoever power operated, being mainly upon, along, above or below any street, avenue, road, highway, bridge, or public place within any city or town, together with all real es-

tate, fixtures, and personal property of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property." It should be noted that a street railroad is here regarded as a "railway." Nothing is said about busses. When busses came into use, the public utilities commission was given authority over their operation by the provisions of a separate statute embodied in R. S. 1930, Chap. 66, entitled "Motor Vehicles Carrying Passengers for Hire." Nowhere is it suggested that the commission had any control over busses because their operation constituted in any sense the operation of a street railroad and as such subject to the provisions of Chapter 62.

Counsel for the defendant contends, however, that the state tax department for many years assessed the excise tax against the defendant in accordance with the defendant's present interpretation of it and that such interpretation acted on for many years should be controlling on the court. The presiding justice, who wrote an exhaustive opinion on this subject, has a sufficient answer to this claim. He said: "While in a doubtful case, such a consideration should have weight, and perhaps great weight as a guide to judicial interpretation of a statute it cannot overcome the clear meaning as expressed in the statute itself. Such consideration is at best but a guide to the ascertainment of legislative intent. To make it a hard and fast rule for the construction of statutes would result in transferring the legislative and judicial functions to administrative agencies, a result fostered elsewhere but which as yet has obtained no foot-hold here in Maine."

Both the wording of the statute in question and its relationship to other provisions show clearly what the legislature intended. The effect is not absurd or unreasonable. Neither an administrative agency nor the court has any right to modify its provisions.

Exceptions overruled.

Mr. Chief Justice Sturgis took no part in the consideration or decision of this case.

VINCENT SCAVONE *vs.* LEON M. DAVIS.

Kennebec. Opinion, February 15, 1946.

Taxation. Statutes.

Under our law, there is no lien on real estate for the enforcement of payment of personal property taxes. Real estate cannot be forfeited by lien process to enforce collection of a tax on personal property.

A certificate which includes a non-lien item vitiates the instrument. No lien is thereby created and there is nothing to ripen into a foreclosure.

Tax liens are not to be extended by implication or enlarged by judicial construction. A tax is a lien on property only so far as expressly made a lien by the statute. It exists and attaches only according to such terms and conditions as are prescribed by the statute creating it.

ON REPORT.

Writ of entry by plaintiff to recover certain real estate to which the defendant claimed title under a quitclaim deed from the inhabitants of the Town of Rome. The tax collector of the town combined the tax on the real estate in question with the tax on certain personal property and assessed the whole as a tax "duly and legally assessed to real estate" and filed a lien certificate with the register of deeds. Held that defendant obtained no title to the real estate under the quitclaim deed issued to him. Judgment for the plaintiff. Case returned to the Superior Court for appropriate docket entries. The case fully appears in the opinion.

Harvey D. Eaton, for the plaintiff.

F. Harold Dubord, for the defendant.

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

MANSER, J. This case comes forward on report. The plaintiff, by writ of entry, seeks to recover a lot of land with building thereon, to which title is claimed by the defendant under a deed from the inhabitants of the Town of Rome. The deed was one of quitclaim and the basis of title rests upon proceedings taken by the town to enforce the Tax Lien Law, so-called, P. L. 1933, Chap. 244 as amended, now R. S., Chap. 81, §97 *et seq*. The tax which laid the foundation for the lien was assessed against the property in 1941. The aggregate amount of the tax on the real estate, the land and buildings having been properly valued separately, amounted to $55.20. There was also a tax on personal property — apparently a boat — of $1.20. A lien certificate was filed in the registry of deeds on May 29, 1942.

While the Tax Lien Law applicable to real estate has simplified enforcement procedures, yet the principle still obtains that there must be strict compliance with statutory requirements to divest property owners of their titles for non-payment of taxes. *Warren* v. *Norwood*, 138 Me., 180, 24 A., 2d, 229.

The plaintiff asserted several claims as to the invalidity of the assessment, and of insufficiencies in the tax lien certificate, which appear of little, if any, legal merit. It is, however, unnecessary to consider them with the meticulous care which otherwise might be required, because there is one outstanding element which destroys the validity of the tax lien certificate, and the basis of the defendant's title. R. S. 1930, Chap. 13, §3, now R. S. 1944, Chap. 81, §3, provides:

> "There shall be a lien to secure the taxes legally assessed on real estate as described in this section, which shall take precedence of all other claims on said real estate and interests...."

Under our law there is no lien on real estate for the enforcement of payment of personal property taxes. A man's real estate cannot be forfeited by lien process to enforce collection of a tax on personal property. Yet it indubitably appears that the tax collector combined the real estate tax of $55.20 and the personal prop-

erty tax of $1.20, a total of $56.40, as the tax "duly and legally assessed to real estate in said town of Rome." The provision in the printed form of certificate relating to interest was left unfilled, and there is no claim that interest was in fact chargeable. As appears by the record, the town at its annual meeting had not taken advantage of the permissive provisions of R. S. 1930, Chap. 14, §1, now R. S. 1944, Chap. 81, §68, to require the payment of interest after a fixed due date.

> "Tax liens are not to be extended by implication or enlarged by judicial construction. A tax is a lien on property only so far as expressly made a lien by the statute. It exists and attaches only according to such terms and conditions as are prescribed by the statute creating it." 51 Am. Jur. Taxation, §1010; *Linn County* v. *Steele*, 223 Iowa, 864, 273 N. W., 920; *Krug* v. *Hopkins*, 132 Neb., 768, 273 N. W., 221.

Under the terminology used in the statutes, P. L. 1933, Chap. 244, and amendments thereof, and as now appears in R. S. 1944, Chap. 81, §98, it is provided that the filing of a tax lien certificate shall be deemed to create a mortgage upon the real estate to the town in which the real estate is situated; and, if said mortgage shall not be paid within eighteen months after the date of filing, the mortgage shall be deemed to have been foreclosed and the right of redemption to have expired. A false certificate, which includes a non-lien item, vitiates the instrument, no mortgage is thereby created and there is nothing to ripen into a foreclosure. The defendant obtained no title under the quitclaim deed which he received from the Town of Rome. The plaintiff is entitled to judgment for possession of the premises described in his writ and for his costs.

Case returned to Superior Court for appropriate docket entries.

RENA LAGRANGE *vs.* COSTAS DATSIS.

Kennebec. Opinion, March 9, 1946.

Good Will. Promissory Estoppel. Injunction.

The conveyance of the intangible element known as good will does not of itself debar the vendor from engaging in a similar business.

Estoppels in pais have long been regarded as wise and salutary. A promissory estoppel exists where a representation or assurance as to the future relates to an intended abandonment of an existing right and is made to influence another, and the latter has been influenced thereby to act.

Such an estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon agreement not yet made.

Plaintiff not entitled to equitable relief by injunction merely because of the fact that one of the vendors engaged in a similar business in the same city a year after.

In the instant case the bare statement that "Prior to the sale the defendant stated as a reason for selling, that he was retiring from business" fails to fulfill the requirement of a promissory estoppel for the following reasons:

1. So far as appears, it was made at some time before the actual contract of sale was consummated.
2. It is spoken of as a statement, not a promise or inducement designed to influence the plaintiff to purchase the business.
3. No claim is made as far as the record shows that the plaintiff relied upon this statement as an abandonment by the defendant of an existing right with reference to a contract not then made.

The doctrine of equitable estoppel is to be applied with great care. The equity must be strong and the proof clear.

ON APPEAL.

Defendant and another owned a building located on property not owned by them. They gave a bill of sale of the building and equipment to the defendant, with usual covenants of title and warranty, and with no written agreement restraining the vendors

from re-engaging in a similar business. Prior to the sale of the property to the plaintiff, the defendant stated as a reason for selling that he was retiring from the business. More than a year after the sale the defendant opened a place of business in the same city and carried on a similar business. Plaintiff brought a bill in equity and sought to restrain the defendant from conducting such business. The case was heard by the presiding justice upon bill, answer, replication and an agreed statement of facts, and the bill was dismissed without costs. Appeal dismissed. Decree below affirmed. The case is fully stated in the opinion.

Jerome G. Daviau, for plaintiff.

Perkins, Weeks & Hutchins, for defendant.

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

MANSER, J. Through the aid of equity, the plaintiff seeks to restrain the defendant from conducting a business on Temple Street in Waterville, similar in character to that conducted by her on Front Street in Waterville. From a decree dismissing the bill, the case comes forward upon appeal.

Some issues, raised by the pleadings and agreed statement, have been eliminated by stipulation of the parties, and the issues presented to the presiding justice for determination and now before us on appeal, are based upon facts which may be summarized as follows:

Costas and Stefanos Datsis owned a building located on property of the City of Waterville. The lot was leased by the city to these men. The business conducted by them was colloquially known as a "hot dog" stand where various foods, ice cream and soft drinks, were sold. On June 2, 1943, Costas Datsis, the defendant, and his brother Stefanos, gave a bill of sale to the plaintiff of

"The hot dog stand and all equipment as now operated by us on Front Street in said Waterville, to wit:

"Frame building with all appurtenances and fixtures, all equipment, appliances, utensils and dishes and all other furnishing together with stock of goods as of the closing hour of June 5, 1943."

Excepted only was an ice cream cooler which belonged to the manufacturer. The sale price was $2,500. The instrument contained the usual covenants of title and warranty. It appears that the lease of the lot given by the city to the vendors was terminated by mutual consent. A new lease was executed between the city and the plaintiff on June 5, 1943. There were no other written documents or memoranda between the parties. There was no written agreement restraining the right of the vendors or either of them to re-engage in the same or a similar business, either in Waterville or elsewhere. There was no mention of the "good will" as being sold. More than a year after the sale of the business to the plaintiff, the defendant obtained a license from the City of Waterville to carry on the same kind of business on Temple Street. In his findings of fact, the presiding justice set forth that the two establishments, one on Front Street and the other on Temple Street, were some 400 feet away from each other on streets that ran at right angles; that the defendant's stand was not in sight of the plaintiff's, nor was there any way to go from one to the other except by the streets and sidewalks.

As to the legal principles involved, the presiding justice assumed that, in the voluntary sale of an ordinary going business to the plaintiff, the good will thereof was impliedly included. The effect of this is not actually urged in this Court by the plaintiff as a ground for relief. It would not have availed the plaintiff to do so, as the conveyance of the intangible element known as good will does not of itself debar the vendor from engaging in a similar business. *VonBremen* v. *MacMonnies*, 200 N. Y., 41, 93 N. E., 186; *Reardon Laundry* v. *Reardon*, 97 N. J., Eq. 356, 128 A., 482.

Again, under the provisions in the bill of sale, the only written document evidencing the contract of the parties, the plaintiff would not be entitled to equitable relief because of the fact that one of the vendors, a year or more thereafter, engaged in a similar business in the same city. 82 A. L. R. 1030 (Annotation); Williston on Contracts, Rev. Ed., Vol. 5, §1640.

It further appears that the defendant advertised the opening of his new place of business in a local newspaper on August 22, 1944, in which appeared the statement, "Old and new customers welcomed." It is not claimed that this form of solicitation was ever repeated. The plaintiff might have been entitled to relief restraining the defendant from continued solicitation of this character, as indicated in cases cited immediately *supra*, because violative of his transfer of the good will of the old establishment, but no relief is sought on this ground.

The whole case for the plaintiff necessarily rests upon an oral statement made by the defendant, which appears in the agreed statement of facts, that

> "Prior to the sale, the Defendant stated, as a reason for selling, that he was retiring from business."

It is not necessary to discuss the rules generally appertaining to the admissibility of testimony relating to oral statements made by either of the parties preliminary to the execution of a written contract, but not included therein, for the parties have deliberately made the foregoing statement of the defendant a part of the case for consideration upon its merits.

It is the contention of the plaintiff that this statement constituted a promissory estoppel, at least to the extent of preventing the defendant from engaging in the same kind of business within a reasonable area.

Our Court has affirmed the general principle that estoppels in pais have long been regarded as wise and salutary. *Caswell* v. *Fuller*, 77 Me., 105; *Milliken* v. *Dockray*, 80 Me., 82, 13 A., 127, and cases there cited.

As to whether such estoppel was created, the holding of the Court is necessarily limited to the facts actually before it for adjudication. The plaintiff has cited, and we adopt the excellent definition given in Pomeroy's Equity Jurisprudence, 5th ed., Vol. 3, p. 213:

> "The doctrine of promissory estoppel is most widely recognized and most frequently applied in cases of promises or representation as to an intended abandonment of existing rights. Where a representation or assurance as to the future relates to an intended abandonment of an existing right and is made to influence another and the latter has been influenced thereby to act, it operates as an estoppel."

There is both elaboration and limitation to the foregoing definition found in *Insurance Co.* v. *Mowry*, 96 U. S., 544, 24 L., ed., 674, as follows:

> "The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made."

> "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, has designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made,

> to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing."

In the record before us there was no testimony of witnesses and there is no amplification of the single statement here requoted:

> "Prior to the sale, the Defendant stated, as a reason for selling, that he was retiring from business."

Such a bare statement fails to fulfill the requirements of a promissory estoppel. So far as appears, it was made at some time before the actual contract of sale was consummated. It was not contemporaneous. It is spoken of as a statement, not a promise, representation or inducement designed to influence the plaintiff to purchase the business. Except for allegation in the bill, the record is barren of any claim by the plaintiff that she relied upon this statement as an abandonment by the defendant of an existing right with reference to a contract not then made. By its terms the words are consonant with a mere statement of present intention. There was no express guaranty on the part of the defendant that he would never resume business at any time.

The elements of a promissory estoppel, which would be in derogation of the rights of the defendant under the written contract, are not susceptible of proof by implication. The connotation of the word "retirement" is not necessarily tantamount to a final abandonment.

The doctrine of equitable estoppel is to be applied with great care. The equity must be strong and the proof clear. *Rogers* v. *St. Ry.*, 100 Me., 86, 60 A., 713; *Hooper* v. *Bail*, 133 Me., 412, 179 A., 404; *Box Machine Makers* v. *Wirebounds Patents Co.*, 131 Me., 70, 159 A., 496. The ruling below was correct.

Appeal dismissed.
Decree below affirmed.

INHABITANTS OF THE TOWN OF ORRINGTON

vs.

CITY OF BANGOR.

Penobscot. Opinion, March 12, 1946.

Paupers.

The effect of a collusive marriage upon a pauper settlement is governed solely by statute.

The provisions of P. L. 1933, Chap. 203, Sec. 1, now R. S. 1944, Chap. 82, Sec. 1, Par. 1, relating to marriages of paupers procured by the agency or collusion of the officers "of either town," applies only to actions in which the town which procures such marriage is a party.

ON EXCEPTIONS.

Action brought by plaintiff town against defendant city to recover for pauper supplies furnished to a mother and her two minor children, alleged paupers of the defendant city. The case was heard by the presiding justice of the Superior Court, who found for the plaintiff, to which findings exceptions were taken. Exceptions overruled. The case is fully stated in the opinion.

Chester A. Robinson, for plaintiff.

Benjamin W. Blanchard, for defendant.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, AND TOMPKINS, JJ.

HUDSON, J. This is an action brought by the Inhabitants of the Town of Orrington against the City of Bangor to recover for pauper supplies furnished by the plaintiffs to Christie W. Hutch-

inson and her two minor children, alleged paupers of the defendant city. It was heard below by a justice of the Superior Court, who found for the plaintiffs, to which finding exceptions were taken to this Court.

The only question raised is the pauper settlement of Mrs. Hutchinson and her children at the time the relief was afforded, and that depends upon the construction of P. L. 1933, Chap. 203, Sec. 1, which reads as follows:

> "A married woman has the settlement of her husband, if he has any in the state; if he has not, she shall be deemed to have no settlement in the state. A woman over 21 years of age, having no husband, shall acquire a settlement in a town by having her home therein for 5 consecutive years, without receiving supplies as a pauper. When, in a suit between towns involving the settlement of a pauper, it appears that a marriage was procured to change it by the agency or collusion of the officers of either town, or of any person having charge of such pauper under authority of either town, the settlement is not affected by such marriage. And no derivative settlement is acquired or changed by a marriage so procured, but the children of such marriage and their descendants have the settlement which they would have had if no such marriage had taken place. And the same rule applies in all controversies touching the settlement of paupers between the town by whose officers a marriage is thus procured and any other town whether the person whose marriage is thus procured is a pauper at the time of the marriage or becomes so afterwards."

The same statute in effect now appears in R. S. 1944, Chap. 82, Sec. 1, Par. I.

Christie Hutchinson had been previously married to Rexford W. White, whose pauper settlement was in the Town of Greenfield, and by that marriage she obtained a settlement in Greenfield. She was divorced from Mr. White September 25,

1940, having had by him the two children who later, with her, were relieved from distress by Orrington.

> "Minor children of parents divorced after July 12, 1929, if given into the custody of either parent by the decree of divorce, shall follow the settlement of the parent to whom custody is given. . . ." P. L. 1935, Chap. 186, now appearing in R. S. 1944, Chap. 82, Sec. 1, Par. II.

So the pauper settlements of these two children, their custody having been given to their mother in the divorce proceedings, "follow" her pauper settlement.

On November 7, 1940, she married Harvey K. Hutchinson, whose pauper settlement was in the City of Bangor. The defendant claimed that the marriage to Hutchinson was procured through the agency or collusion of the Town of Greenfield, and so, by reason of the statute, "no derivative settlement" in Bangor was "acquired or changed by a marriage so procured." On the other hand, the plaintiffs contended that the statute is inapplicable because the Town of Greenfield is not a party to this action. The Court below sustained the contention of the plaintiffs and ruled as a matter of law that proof of the marriage so procured would not constitute a defense in this action. In its decision it stated:

> "The defendant does not attempt to show that the marriage was brought about in any manner by either town involved in this suit, so this evidence cannot show that which is necessary to be shown under the statute, namely, 'a marriage so procured.' "

To this ruling the exceptions before us were taken. Thus the necessity for construction of this statute. The question then is whether or not under this statute it is only when the town procuring the collusive marriage is a party to the litigation that a marriage so procured will affect the pauper settlement. Neither the plaintiffs nor the defendant had anything to do with the pro-

curement of this marriage. Had the Town of Greenfield which procured it been a party, the statute would have been applicable. Although we have made a careful search of the Maine cases in which this statute has been involved, we have found none in which it has been given application in which the town acting collusively was not a party.

> "At common law, public authorities were not liable for the support of paupers. The obligation of towns and plantations in reference to their support originates solely in statutory enactment and has none of the elements of a contract, express or implied. There are no equitable considerations out of which presumptions in favor of either party will arise. The statutes upon the subject are not to be modified or enlarged by construction and nothing is to be deemed to be within their spirit and meaning which is not clearly expressed in words." *Auburn* v. *Farmington*, 133 Me., 213, on page 215.

In this state, the effect of a collusive marriage upon a pauper settlement is governed solely by statute. Hence, herein we confine ourselves simply to a construction of the statute.

The first sentence of the pertinent part of the statute reads:

> "When, in a suit between towns involving the settlement of a pauper, it appears that a marriage was procured to change it *by the agency or collusion of the officers of either town*, or of any person having charge of such pauper under authority *of either town*, the settlement is not affected by such marriage." (Italics ours.)

Of vital significance are the words "of either town." We think they refer only to the towns engaged in the controversy through the agency or collusion of one of which the marriage was procured to change the pauper settlement. Such is not the fact in this case. Hence, thus far, the statute is inapplicable.

The statute continues:

> "And no derivative settlement is acquired or changed by a marriage *so procured,* but the children of such marriage and their descendants have the settlement which they would have had if no such marriage had taken place." (Italics ours.)

The words "so procured" refer back to the language of the previous sentence and must be held to mean a marriage procured by the agency or collusion *of either party to the action.*

The last sentence in the paragraph reads:

> "And the same rule applies *in all controversies* touching the settlement of paupers *between the town by whose officers a marriage is thus procured and any other town* whether the person whose marriage is thus procured is a pauper at the time of the marriage or becomes so afterwards." (Italics ours.)

Here, again, the rule is made to apply only to controversies touching the settlement of paupers wherein one of the parties to the action is the town charged with the procurement of the marriage.

Our examination of this statute, as well as of it in previous revisions, convinces us that it applies only to actions in which the town which procures such a marriage is a party. Whether or not this should be so is not for us to determine. The legislature has spoken and the law as enacted is clear and unambiguous. Whether or not it should be changed is for that body to determine. It is not for us to amend the law judicially.

Exceptions overruled.

Chief Justice Sturgis did not sit in this case.

STATE OF MAINE *vs.* JAMES CALANTI ET AL.

Kennebec. Opinion, March 18, 1946.

Criminal Law. Intoxicating Liquor. Bonds. Liquidated Damages.

It is no defense to prosecution for illegal sale of liquor that the purchase was made by a spotter, detective or hired informer.

The defense of entrapment is applicable in those cases where by some scheme, device, subterfuge or lure, the accused is induced to adopt and pursue a course of conduct which he would not have otherwise entered upon, and in such cases a conviction is against public policy.

Where the only inducement used by an officer to procure the sale of liquor, is a willingness to buy, the doctrine of entrapment is not available.

The inquiry and solicitation for liquor, by an inspector of the liquor commission, and his willingness to purchase no more than offered an opportunity to commit the criminal act, being entirely lacking in the element of lure or inducement, did not constitute a defense to the seller in a suit against him to recover on his bond.

On breach of the condition of a bond given by the holder of a hotel, club or restaurant liquor license, the State is entitled to recover the penal sum of the bond.

ON EXCEPTIONS.

This is an action of debt for breach of the conditions of a bond required of holders of hotel, club or restaurant liquor licenses. Upon motion of the plaintiff, the presiding justice directed a verdict for the plaintiff in the penal sum of the bond. Defendant excepted. Exceptions overruled. The case is fully stated in the opinion.

Ralph W. Farris, Attorney General of Maine, and *William H. Niehoff*, Assistant Attorney General, for plaintiff.

Michael Pilot and Locke, Campbell & Reid, for defendants.

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

TOMPKINS, J. This is an action of debt to recover the penalty of a bond given by the defendant James Calanti and The Aetna Casualty and Surety Company as surety, which bond was given in accordance with the provisions of P. L. 1934, Chap. 301, and acts additional thereto and amendatory thereof, and rules and regulations pursuant thereto. The case is before the Court on exception.

The section of the statute involved reads

> "Hotels, clubs, and restaurants. No license shall be granted to a hotel, club or restaurant until the applicants file with the Liquor Commission a surety bond payable to the State of Maine in the penal sum of one thousand dollars as liquidated damages in case of default, as hereinafter mentioned. Such bond shall have as surety a duly authorized surety company, or two individuals to be approved by the Commission. All such bonds shall be conditioned for the faithful observance of all the laws of the State of Maine and the rules and regulations pursuant thereto relating to spirituous and vinous liquors. Such bond shall be filed with and retained by the Commission. Upon the revocation of any license in this section mentioned the Attorney General shall bring an action of debt in any county in the State upon the bond given by such licensee to recover the penal sum thereof as liquidated damages."

The breach of the bond was the sale to one E. S. Thurston, an inspector for the Maine State Liquor Commission, in violation of the rules and regulations of said Commission relating to the sale of spirituous and vinous liquors to be consumed elsewhere than upon the premises covered by the license. Certain admissions were made at the commencement of the trial by the at-

torney for the defendant, Calanti, in which the defendant, Calanti, admitted the sale of liquor to E. S. Thurston, inspector for the Maine State Liquor Commission, of a pint of Seagram's seven crown whiskey on July 31, 1944, and a pint of Seagram's seven crown whiskey August 14, 1944, at Winterport, Maine, where the defendant was a licensee of the Maine State Liquor Commission to conduct a place for the sale of intoxicating liquors for consumption on the premises. These two pints were sold for the purpose of not being consumed on the premises, but to be taken out. Thurston was not a guest at the hotel at the time. Defendant also admitted he signed the bond in suit.

In view of the admissions the State introduced no testimony. The defendant then took the stand in his own behalf and was asked by his attorney the following questions:

"Q. Tell the Court and Jury just what he said to you and what you did.

"A. He came to the place and had the cold and sat down and said 'Nice place. Can I have a drink?' 'Sure.' He tell me what he wanted and I pass him a drink. He talk about business and one thing and another and he said 'I was up in the liquor store and I stood up an hour and a half and can not get a pint of liquor.' I say 'I have not a permit to sell outside.' He said 'You have a couple of pints up there.' I said 'Yes, but I have not a license to sell out.' He said 'All right, I have another drink.' He had another drink and kept talking just the same. Anyway, after he had two drinks he got up and said 'I have to go to Portland and I don't know if I get sick. I have got to have a pint.' I said 'I am not supposed to, but all right, I will let you have a pint.'

"Q. Did he get in his car and drive off?

"A. I didn't see it.

"Q. And then he came back a couple of weeks later?

"A. Yes.

"Q. Tell us what happened that time.

"A. Most of the same thing but he didn't fight so much then as before, keeping talking about it."

THE COURT: "What do you mean, he didn't fight?"

MR. PILOT. "Resistance."

WITNESS: "Not so much."

"Q. It was the same man — Mr. Thurston?

"Yes.

"Q. When he asked for a pint did you tell him he could have it?

"A. I said I could not do it. He said 'You did it once before and it is all right now.' That is why."

CROSS EXAMINATION.

"Q. You knew when he was there on the 31st of July that it was not legal for you to sell him that pint of whiskey?

"A. Yes, I do.

"Q. You told him you would not sell it to him?

"A. He begged me to, that is why.

"Q. When he came back the second time — did he have a drink the second time?

"A. Yes.

"Q. Isn't it a fact that all he did the second time was lay $5.00 on the table . . .

"A. I didn't say that. He said 'I have got to have another pint.'

"Q. You didn't have to sell it to him, did you?

"A. True. I did, though.

"Q. He had to coax you a while before you sold him the liquor?

"A. That is right."

At the close of the testimony and on motion of the plaintiff the presiding justice directed the jury to return a verdict for the plaintiff in the sum of one thousand dollars, to which the defendant seasonably objected.

The defendant in his exception makes the issue in this case as to whether the violation of the rules and regulations of the Maine State Liquor Commission, instigated by an inspector of the Maine State Liquor Commission, is such a default on the bond that the State of Maine can recover the penal sum of one thousand dollars as liquidated damages.

1. The defendant urges under the exception that public policy will not permit a municipality to derive a profit from acts which were deliberately instigated and contrived by its officer, and cites the case of *People* v. *Braisted*, 13 Colo., App. 532, also reported in 58 P., 796.

2. To sustain such prosecution would be in effect to say that such officers have a license to inveigle citizens into the commission of violations so that money may be extracted from them.

In *People* v. *Braisted*, supra, the court held that the town could not recover a penalty of a druggist for selling intoxicating liquor in violation of the ordinance of the town, where the price of the liquor was furnished to the buyer by the attorney for the town with instructions to purchase from the defendant for the purpose of procuring a violation of the ordinance.

In 31 Colo., page 90, 71 P., 1108, the Supreme Court of Colorado, in reference to the case of *People* v. *Braisted*, supra, says

> "We are not prepared to announce as a doctrine that town attorneys are to be so handicapped in the performance of their duties that prosecutions may not be sustained by the testimony obtained in the manner that testimony in this case was obtained."

The defendant argues that the State should not recover on the bond because the defendant was entrapped into the violation of its terms by an officer of the State Liquor Commission. The weight of authority supports the view

> "That a person making an unlawful sale of liquor is not excused from criminality when the sale is induced for the sole

purpose of prosecuting the seller, and it is no defense that the act charged was done at the instance or procurement of a public officer whose purpose was to obtain evidence of violations of the law." 30 Am. Jur., Par. 403.

It appears to be the general rule in that class of cases where the doing of a particular act is a crime regardless of the consent of anyone, that if the criminal intent originates in the mind of the accused, and the criminal offense is completed, the fact that an opportunity is furnished, or the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor constitutes no defense. To the argument that the act is done at the instigation or solicitation of an agent of the government, the courts have responded that the purpose of the detective or governmental agent is not to solicit the commission of or to create an offense, but to ascertain if the defendant is engaged in an unlawful business. 18 A. L. R. 146 and cases therein cited.

It is no defense to prosecution for the illegal sale of liquor that the purchase was made by a spotter, detective, or hired informer. *Nelson* v. *Roanoke*, 24 Ala., App. 227; 135 Southern, 312; *State* v. *Hamrick*, 163 S. E., 868; *State* v. *Jarvis et al.*, 143, S. E., 235.

Where the only inducement used by the officer to procure the sale of liquor was a willingness to buy the doctrine of entrapment is not available. *Tripp* v. *Hennessey et al.*, 10 R. I., 128.

In *State* v. *Cowling*, 161 Wash., 519, 297, P., 172, on prosecution for the unlawful sale of whiskey, it was held that the defendant was not entrapped where it appeared that the federal agent had pretended to be a friend of a young university student and inveigled himself into the confidence and friendship of the defendant and his wife in order to secure evidence of violations of the law.

The defense of entrapment is

"Applicable in those cases whereby some scheme, device, subterfuge or lure the accused is induced to adopt and pur-

> sue a course of conduct which he would not have otherwise entered upon, and in such cases a conviction is against public policy."

State v. *Lambert,* 148 Wash., 657; 269 P., Rep., 848 and cases there cited.

As in the case of *State* v. *Lambert,* supra, this Court fails to see in the case under consideration anything indicating any lure, inducement or subterfuge on the part of the officer which could have caused the defendant to act. The officer's inquiry and solicitation for liquor, and his willingness to purchase no more than offered an opportunity to commit the criminal act which was entirely lacking in the elements of lure or inducement and, if there was any subterfuge whatever in it, it was only that of concealing by the officer of his identity, or his failure to disclose it, which was wholly insufficient to invoke the rule, there being an entire lack of evidence of inducement or of any act from which a reasonable inference of inducement might be drawn.

DAMAGES.

The attorney for the defense urges in his brief that the bond in question is a penal bond, that the legislature so stated, but set forth that the penalty should be regarded as liquidated damages. If thus recognized (as a penal bond) the damage to the State is negligible in the event of breach.

On breach of the conditions of the bond the penal sum of the bond became due and payable as liquidated damages. The court in this state has said, in speaking of a contract providing for liquidated damages,

> "It is evident that the forfeiture must be construed as liquidated damages and not as penalty. The defendant has so stated explicitly and without qualification. True, this is not conclusive, though this part of the contract, like all others, is to be construed so as to carry out the intention of the

parties, yet to ascertain that intention we are to examine the words used, its nature and the purpose to be accomplished, and all its parts. For this purpose the statements of the parties, though not conclusive, are strong evidence, and conclusive unless overcome by other tests to be applied. In this case the tests to be applied confirm and corroborate this statement rather than weaken it. One of the most usual and certain tests is whether otherwise the damage would be wholly uncertain and incapable or very difficult of being ascertained except by conjecture. In this case we find all the tests fairly definite and emphatic. The damage caused by breach must necessarily be uncertain and incapable of being ascertained." *J. Winslow Jones & Co., Ltd.* v. *Binford,* 74 Me., 439.

In *United States* v. *Engelberg,* 2F, 2d, 720, the Court says:

"In most if not every case where the bond is given to the State or the Government to compel obedience to its laws, no definite loss can be truly averred or definitely proven. To treat the sum named otherwise than as a penalty for forfeiture inflicted by the sovereign power for a breach of its laws as a sum fixed or as a certain punishment for the offense would be to render worthless the obligation so taken."

Also to the same effect *Albany* v. *Cassel,* 11 Geo., App., 745, 76 S. E., 105, which was an action brought by the city for the breach of the bond of a seller of near beer conditioned, among other things, on the keeping of an orderly place and the observance of the state prohibition law and the city ordinance regulating the sale of near beer, it was held that the full amount of the bond could be recovered. The court said:

"It would be impossible to prove any pecuniary loss from the violation of the terms of the bond, and if this were required the taking of the bond would be a mere sham and a useless formality."

To the same effect see *State* v. *Canon,* 73 N. H., 434. Also *Commonwealth* v. *J. & Amoeschlin,* 314 Pa., 34, 170 A., 119; *Commonwealth* v. *Eclipse Literary and Social Club,* 117 Pa., Super. Ct., 349, 178 A., 341; *Quintard* v. *Cochran,* 50 Conn., 34; *Sullivan* v. *Burkhard,* 93, App. Div. 31, 88 N. Y. S., 1003.

The object of the bond has been set out and defined in the case of *Clement* v. *Reaveley,* 126 App., Div. 215, 110 N. Y. S., 418.

The court there says:

> "The primary object of the bond is to secure the observance of the law and the penalty named is what the State exacts for failure to comply with the conditions under which the right to traffic in liquor has been given. . . . If the conditions of the bond have been broken the amount of the recovery is fixed and absolute; if not, there is nothing due."

To the same effect *Lyman* v. *Shenandoah Social Club,* 39 App. Div. 459, 57 N. Y. S., 372.

Exceptions overruled.

STATE OF MAINE *vs.* MANUEL BRICKEL ET AL.

Kennebec. Opinion, March 18, 1946.

New Trial. Bonds.

On breach of the conditions of a bond given under the provisions of P. L. 1934, Chap. 301, the State is entitled to recover the penal sum of the bond.

On motion for a new trial all matters not properly raised in the appellants' brief or argument are considered waived.

ON MOTION.

On motion by defendants for new trial. Action of debt on bond.

Verdict by jury for penal sum of bond. Motion overruled. The case is fully stated in the opinion.

Ralph W. Farris, Attorney General of Maine and *William H. Niehoff*, Assistant Attorney General, for plaintiff.

Michael Pilot and William B. Mahoney, for defendant.

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

TOMPKINS, J. This action of debt against the principal Manuel Brickel and the Maine Bonding and Casualty Company surety on a bond, is before us on general motion.

The bond in form is identical with that considered in the case *State of Maine* v. *James Calanti et al.*, decided this day. As in that case, it purports to have been given in accordance with the provisions of P. L. 1934, Chap. 301, and acts additional thereto and amendatory thereof, and rules and regulations pursuant thereto.

The case was tried before a jury which returned a verdict for the State for the sum of one thousand dollars, the penal sum of the bond. The same points of law were raised by the defendant in his brief as in the Calanti case. The defendant in this case did not raise in his brief or in his argument the question that the verdict was against the evidence and the weight of evidence. Matters not properly raised in the brief or in the argument are considered waived.

Motion overruled.

MONROE LOAN SOCIETY OF MAINE *vs.* JOHN W. OWEN.

Cumberland. Opinion, April 1, 1946.

Trial. Evidence.

Objections to evidence should be stated at the time it is offered, and with sufficient definiteness to appraise the court and the opposite party of the precise grounds of the objection, and all objections not thus specifically stated, are waived.

In an action brought to recover balance of loan represented by note, after discharge of defendant in bankruptcy, based on false representations of defendant, testimony of defendant, on cross examination, that after obtaining the loan from plaintiff and prior to his act of bankruptcy, defendant obtained a loan from another by use of similar representations, is inadmissible for the purpose of impeaching credibility of defendant.

ON EXCEPTIONS.

Action on the case for false representations to recover balance due on loan represented by note. The case was tried before a justice of the Superior Court without a jury, with right of exceptions reserved on matters of law. The Court found for the defendant. Plaintiff excepted. Exceptions overruled.

Elton H. Thompson, and Walter F. Murrell, for plaintiff.

William E. Perlin, for defendant.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, JJ., AND CHAPMAN, ACTIVE RETIRED JUSTICE.

THAXTER, J. This is an action on the case for false representation, in which the plaintiff seeks to recover against the defendant for the balance due on a loan of $300 represented by a note. The defendant received a discharge in bankruptcy and the loan was listed as one of his debts. The recovery is sought notwith-

standing the discharge in bankruptcy on the ground that the loan was procured by the false representation of the defendant. The action was tried by a justice of the Superior Court without a jury with right of exceptions reserved on questions of law. He found for the defendant and the case is before us on exceptions. The only exception before us which is entitled to consideration is as to the exclusion of certain evidence.

A question asked of the defendant on cross-examination sought to bring out that shortly after he obtained the loan from the plaintiff and prior to his act of bankruptcy he obtained a loan from another company by the use of a similar fraudulent statement. The question was objected to and a colloquy with the court ensued as to the purpose for which the evidence was offered. The basis of the plaintiff's objection to the ruling excluding the evidence is stated in the bill of exceptions as follows:

> "That the Presiding Justice erred as a matter of law in refusing to permit questioning of defendant on cross-examination as to another absolutely similar transaction by the same defendant in order to establish fraudulent intent, to prove that fraudulent representation, with the same fraudulent intent, were made by the said defendant about the same time to other persons."

The evidence is made a part of the bill of exceptions, and the discussion of this subject, which covers more than three pages of the record and is set forth in part in the bill of exceptions, must be read in full in connection with the above statement. When read in its entirety it is clear that the court was told in unmistakable terms that the purpose of the question was to bring out evidence to impeach the credibility of the witness. The court sustained the objection to the question on the ground that the evidence would be inadmissible for such purpose. The rule is well established that "objections to evidence should be stated at the time it is offered, and with sufficient definiteness to apprise the court and the opposite party of the precise grounds of the objection;

and all objections not thus specifically stated, should be held to be waived." *State* v. *Savage*, 69 Me., 112, 114.

The evidence would have been clearly inadmissible for the purpose of impeaching the credibility of the witness and the ruling of the court was correct.

Exceptions overruled.

CONCURRING IN RESULT

MURCHIE, J. I concur in the result but believe it should be reached by considering the two alleged exceptions on their merits. I cannot subscribe to dismissing one of them as not "entitled to consideration," without stating the reason therefor, or disposing of the other by deciding a question of law which was neither raised in the Bill of Exceptions nor argued.

The second alleged exception was intended to assert that there was no credible evidence to support the decision rendered in the Trial Court. The record shows that the defendant and three supporting witnesses testified that the plaintiff was responsible for the incompleteness of the financial statement alleged to constitute its falsity. If considered on its merits this exception would necessarily be overruled.

The first alleged exception, quoted in the majority opinion, is appropriately phrased to pose the issue whether the evidence excluded was admissible within the principle declared in *McKenney* v. *Dingley*, 4 Me., 172. The language of the exception carries assurance that the Justice who excluded it ruled upon that issue and not upon that of impeaching credibility.

Nothing in *State* v. *Savage*, 69 Me., 112, justifies weighing an extended colloquy "in its entirety" with complete disregard of its parts. The case deals with evidence admitted over a single objection but it recognizes that plural objections may be stated and urged in appellate proceedings. It is only those not stated that are waived.

The evidence was offered for a dual purpose, i.e. to impeach

credibility and to establish fraudulent intent. The latter purpose was stated twice in the colloquy. I quote the two statements in sharply skeletonized form:

"To show . . . an act . . . of a similar nature, in similar circumstances. . . ."

". . . we ask the question based on an act of a similar nature . . . whereby another company was induced. . . ."

That the Justice who excluded the evidence knew of this purpose and ruled in contemplation of it is attested by the phraseology in which the exception is alleged and allowed, all taken substantially from the full language of the two excerpts. That last quoted was ushered in by words specially designed to emphasize the issue intended to be raised by an exception:

"I would like to note with my exception."

That counsel for both parties knew of the purpose is apparent from their briefs. Both are devoted to it. Neither discusses impeaching credibility. The exception should be overruled on its merits because irrelevant to the issue which controlled the decision below.

ROBERT J. MONAHAN *vs.* JUNE H. MONAHAN.

Cumberland. Opinion, April 18, 1946.

Divorce. Evidence. Bastards.

In the absence of statutory provisions to the contrary, the admissions of the libellee are competent to prove adultery on her part when it appears that the admissions have not been obtained by connivance, fraud, coercion, collusion or other improper means.

Letters written to a third person, or to the libellant, by the libelee, admitting adultery, are admissible, as well as verbal admissions.

In divorce actions, the admissions of the parties are closely scrutinized. The court must be satisfied that an attempt is not being made to destroy the marriage relation falsely or through collusion.

Neither spouse may give evidence to prove nonintercourse by the husband if the result be to bastardize issue born after marriage.

ON EXCEPTIONS.

Libel for divorce, alleging adultery, heard by presiding justice. Libellant excepted to the ruling by the presiding justice that evidence of adultery of libellee, admitted without objection, could not be considered as proving adultery because the primary source of the evidence was admissions by the libellee. Exceptions sustained.

Francis W. Sullivan and Clifford E. McGlauflin, for libellant.

Walter M. Tapley, Jr. and Armand O. LeBlanc, for the libelee.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, TOMPKINS, JJ.

TOMPKINS, J. On exceptions. Libel for divorce heard by the presiding justice without the assistance of a jury. The libel alleged adultery of the libellee and cruel and abusive treatment of the libellant by the libellee, and was dated May 12, 1945.

At the hearing evidence was introduced by the libellant, but none was offered by the libellee, although she was present in court and represented by counsel. The libellant relied principally upon his allegations of the adultery of the libellee, which if proved is a ground for divorce in Maine. Without objection admissions as to the adultery of the libellee made by her to Christina Campbell were offered by the libellant and admitted by the presiding justice. Also offered by the libellant and admitted by the presiding justice, without objection, was an attested copy of the birth

certificate of a child born to the libelee on March 29, 1945, which certificate did not give the name of the father.

The evidence introduced by the libellant to sustain his allegations of adultery was the testimony of Dr. Thor Miller, who attended the libelee during her confinement at the hospital on the 29th day of March 1945, when she gave birth to a baby whose name was given in the recorded certificate as Peter David Monahan.

"Q. Did you ask her who the father of the baby was?
"A. No.
"Q. Did she tell you who it was not?
"A. Yes.
"Q. Who did she say it was not?
"A. Well she said Mr. Monahan was not the father."

Later on cross-examination in reply to

"Q. Well, Doctor, the information that you did get relative to the father of this child, was it from Mrs. Monahan or was it given you by the attendant at the hospital?
"A. Neither one.
"Q. Well where did you get your information?
"A. On the birth certificate.
"Q. Birth certificate had not been prepared by you?
"A. No.
"Q. It had been prepared by the hospital authorities?
"A. That is right."

The testimony of Dr. Thor Miller with relation to the certificate was merely hearsay evidence and is disregarded in the consideration of this case.

Christina Campbell testified in answer to the following questions:

"Q. Are you employed at the Maine Eye and Ear Infirmary?
"A. I am.
"Q. Were you there last March?

"A. I was.

"Q. In what capacity?

"A. I am the record clerk.

"Q. Did you interview Mrs. Monahan as a patient at the hospital?

"A. I did. I did. Her name was Sillinger when she entered the hospital.

"Q. You interviewed her as to the parentage of the child?

"A. I did.

"Q. What name did she give you for the father?

"A. Charles Sillinger.

* * * * * * *

"Q. Using that information you made out the first certificate?

"A. I did.

"Q. That is not the certificate that was ultimately recorded?

"A. That is not. I believe there were others made too."

She further testified on direct examination:

"Q. Mrs. Campbell, the lady you talked to is the lady — and who said she was Mrs. Sillinger, is the lady concerning whom you made out the birth certificate?

"A. I made one on the Sillinger child and I made another out on Hawkes.

"Q. That is the Hawkes one?

"A. Yes, June Hawkes."

The certificate of birth certified to by the city clerk of the City of Portland gave the name of the child Peter David Monahan. Date of birth March 29, 1945. Name of father not given. Maiden name of mother June Arlene Hawkes (Monahan) mrg. name.

From the testimony of Christina Campbell it therefore appears that there were at least two certificates of birth made out

by her, one giving the name of the father as Sillinger, and one without giving the name of the father, which last certificate was recorded in the city clerk's office at Portland, Maine.

At the end of the hearing a decree denying the divorce sought was entered by the presiding justice. The presiding justice ruled that the evidence of adultery of the libellee offered by the libellant and admitted by the presiding justice at the hearing, without objection, could not be considered by him as proving the adultery of the libelee, because the primary source of the evidence was admissions made by the libellee. The presiding justice ruled that the evidence of adultery of the libellee offered by the libellant at the hearing and without objection by the libellee admitted by the presiding justice was incompetent to prove the adultery of the libellee. To which ruling the libellant, Robert J. Monahan, excepted.

The State having a most important interest in the marriage relation is a party to the divorce proceeding just as much as the parties themselves and, not like other contracts, the contract of marriage cannot be dissolved by the mere consent and agreement of the parties, and in an action for divorce the admissions of the parties are closely scrutinized. The court must be satisfied that an attempt is not being made to destroy the marriage relation falsely, or through collusion. In the absence of statutory provisions to the contrary the admissons of the defendant would be competent to prove adultery on her part when it appears that the admissions have not been obtained by connivance, fraud, coercion, collusion or other improper means. *Burk* v. *Burk*, 44 Kan., 307, reported in 24 P., 466; *Miller* v. *Miller*, 2 N. J., Equity 139; *Warren* v. *Warren*, 41 Times Law Report (English), 599, Probate Div. 1925, page 107, cited 60 A. L. R., 383; *Wallace* v. *Wallace*, 114 N. W., at 531; *Billings* v. *Billings*, 11 Pick., 461; *Dillen* v. *Dillen*, 281 Mass., 423; *Vance* v. *Vance*, 8 Me., 132.

In the case under consideration the admissions were made, not to the libellant but to a third person. Letters written to a third person, or to the libellant, by the libellee, admitting the

adultery are admissible, as well as verbal admissions. *Alta* v. *Alta*, 121 A., 301; *Bancroft* v. *Bancroft*, 85 A., 561 at 566; *Lenning* v. *Lenning*, 52 N. E., 46; 176 Ill., 180; *Warren* v. *Warren*, supra; *Purinton* v. *Purinton*, 101 Me., 250.

Defendant's counsel contends that the testimony of Christina Campbell as to the admission by the libellee is not admissible and should not be considered, because it tends to bastardize the child. In *Goodright ex dem. Stevens* v. *Moss*, Cowp., 591, the rule has been laid down and generally adopted, that neither spouse may give any evidence to prove nonintercourse by the husband if the result be to bastardize issue born after marriage. *Hubert* v. *Cloutier*, 135 Me., 230.

What the libellant sought to prove in this present case was adultery. The alleged admissions made to a third party that the husband was not the father of the child but the man she named, cannot bastardize the child for, as previously stated, it is well settled that the declarations of husband or wife are inadmissible to show (in the absence of a statute) that children born after marriage are illegitimate. Adultery and illegitimacy are distinct. Adultery alone was the issue in this case. Proof of the wife's adultery while cohabiting with her husband cannot overcome the presumption of legitimacy of their offspring. *Koffman* v. *Koffman*, 193 Mass., 593; *Grant* v. *Mitchell*, 83 Me., 23; *Parker et al.* v. *Parker*, 137 Me., 80; *Hubert* v. *Cloutier*, 135 Me., 230; *People* v. *Case*, 137 N. W., 55; *Rabeke* v. *Baer*, 115 Mich., 328.

The legitimacy of the offspring was only an incidental matter in this case and does not affect the rule in cases where the legitimacy of the offspring is the primary question involved. *Adams* v. *Adams*, 148 Atl., 287; 102 Vt., 318; *Koffman* v. *Koffman*, supra; *Warren* v. *Warren*, supra.

It does not appear that there is anything in the evidence submitted from which it could be inferred that the admissions were obtained by connivance, fraud, coercion or collusion, or other improper means. The suit was adverse in character and the admissions had probative value and should be considered, with

other evidence in the case, and given the evidentiary weight to which they are entitled, bearing upon the infidelity of the libellee.

Exceptions sustained.

JAMES G. STANLEY *vs.* HOWARD D. PENLEY ET AL.

Cumberland. Opinion, April 20, 1946.

Habeas Corpus. New Trial. Parent and Child.

A writ of habeas corpus is a proper remedy for a parent who claims to have been unjustly deprived of the custody of a child.

A parent has a natural right to the care and custody of a child, and though that right is not absolute, it should be limited only for the most urgent reasons.

The interest of the child is paramount in an action for its custody.

An unintentional misstatement, the correctness of which could have been easily established, will not justify the granting of a new trial on the ground of newly discovered evidence.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Habeas corpus proceedings brought by father of child against several defendants. The court below awarded custody to the petitioner. Respondents excepted, and moved for a new trial on the ground of newly discovered evidence. Exceptions overruled. Motion overruled.

Chaplin, Burkett & Knudsen, for petitioner.

Jacob H. Berman, Edward J. Berman, Sidney W. Wernick and William B. Mahoney, for respondents.

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

THAXTER, J. A hearing was held by a justice of the Superior Court on a writ of habeas corpus petitioned for by a father who sought to obtain custody of his son of the age of three and a half years. The respondents are the maternal grandparents of the child, the child's stepfather, and the child's maternal aunt. After a lengthy hearing, during the course of which the justice presiding had the opportunity of seeing all of the parties, the child was ordered discharged from the custody of the respondents and custody was awarded to the father. The respondents bring the case here on exceptions and on a motion for a new trial on the ground of newly discovered evidence. There is no dispute as to the essential facts.

THE EXCEPTIONS

The petitioner, James G. Stanley, and Catherine Jane Thompson, the daughter of the respondents, Dr. and Mrs. Thompson, and the sister of the respondent, Mrs. Foss, were married April 26, 1941. A son, James G. Stanley, Jr., was born February 22, 1942. About two weeks after the birth of the child, while the mother after her return from the hospital was staying at the house of the Thompsons, the petitioner left his wife and, except on one occasion, did not thereafter see his child. Five months later a separation agreement was drawn up in contemplation of a libel for divorce to be brought by the wife. Under the terms of this agreement, the mother was to have the sole care and custody of the child, and the father was to purchase a home, the title to which was to be placed in the mother and child as joint tenants. There were other provisions relating to support and maintenance, counsel fees, and a division of property. Jane T. Stanley was granted a divorce from the petitioner at the October Term, 1942, of the Superior Court for the County of Cumberland for the cause of cruel and abusive treatment, and the care and custody of the child was granted to the mother, and provision was made for alimony for the wife and support for the child. In February 1943 the petitioner married Mildred Holland and a son was born in

July of the same year. A second son was born in February or March 1945. The first wife, Jane T. Stanley, was married May 15, 1943 to the respondent, Howard D. Penley. She lived with the second husband and the child in the house which had been bought for her in accordance with the terms of the separation agreement. A child was born of this second marriage in January 1944. In July 1945, Jane T. Penley (formerly Jane T. Stanley) died. At this time her husband, Howard D. Penley, was in the army in the Philippine Islands. He obtained a furlough, came home, and was in court and testified in the hearing on the writ of habeas corpus. James G. Stanley was in the European theatre when he learned of the death of his first wife; and he likewise came home and made immediate claim to the custody of his child. There were conferences on the subject between Stanley and Penley which were not unfriendly. There was a conference between Stanley and Mrs. Thompson which was unfriendly, Mrs. Thompson claiming that Stanley and his second wife were unfit persons to bring up the child.

The final result was that the father petitioned for a writ of habeas corpus. The issue thereby presented to the court was whether custody of the child should be awarded to the grandparents, Dr. and Mrs Thompson, who were supported in their claim to the child by their daughter, Mrs. Foss, and by their son-in-law, Howard D. Penley, or whether custody should be awarded to the child's father, James G. Stanley. A writ of habeas corpus is a proper remedy for a parent who claims to have been unjustly deprived of the custody of a child. *Merchant* v. *Bussell*, 139 Me., 118.

A parent has a natural right to the care and custody of a child, and, though that right is not absolute, it should be limited only for the most urgent reasons. *Merchant* v. *Bussell*, supra.

The claim of the grandparents is that in this instance the natural right of the petitioner to the custody of his child is not controlling, because, they say, neither he nor his second wife are proper persons to rear the child. No evidence is offered in support

of that charge except the circumstances of his separation from his first wife. The record does not disclose the details of what took place at that time. He did leave his wife shortly after the birth of the child and had almost nothing to do with either one of them thereafter, although he did make fairly generous provision for their support. Four months after the divorce he remarried, and four months after his remarriage his former wife was also married. During the time that she was living with her parents he says that any attempt of his to enter the home to see his child would create a scene and he felt it inadvisable to go there. The grandparents concede that they have great bitterness toward him. There may be justification for it, but even so it is a reasonable conclusion that his decision to have no contact with his former wife and her family was a wise one. After his wife's remarriage it must be conceded that his decision to keep away was justified. The child was in the custody of the mother and unquestionably tenderly nurtured and adequately provided for. A new life had been entered upon by all of them. It was better that the old should be forgotten. All this was changed by the death of the former wife. Promptly then and not until then did he assert his claim. It was not seriously opposed by Penley. It was bitterly opposed by the grandparents.

The justice, who heard the evidence below, who had the advantage of seeing and talking to the parties, concedes that the grandparents are cultured, home-loving people who would to the very best of their ability rear this child. But they are respectively seventy-four and sixty years of age. The chances are that should they attempt to bring up this child a readjustment would have to be made later when attachments would have been formed on the part of the child which would then be difficult to break. Penley and Mrs. Foss, though they express a willingness to assist, have their own problems, and their own lives are ahead of them. The evidence amply justifies the conclusion of the presiding justice that this is the time to make the change. It is the interest of the child which is paramount.

The only possible reason for not permitting this father to assume the obligation to care for his son would be that he and his second wife are unfit to do so. The justice below has found that that charge is not substantiated. On the contrary, he has found that the father is a fit person, and all the inferences to be drawn from the evidence point to the justness of that conclusion. He is financially responsible, he has a comfortable home and two other children, and the mere fact that he now, after the mother is gone, asserts his natural right is something in his favor. The claim is that the circumstances of the divorce are sufficient for this court to hold as a matter of law that the father's claim to this child is barred. Viewing the evidence most strongly against him, the inference is justified that prior to the granting of the divorce he had formed an attachment for another woman. Though the details of the difficulties between his former wife and himself are, perhaps fortunately, shrouded in darkness, we may assume that she suffered a grievous wrong. The fact that she was granted a divorce establishes that. But is a father because of such wrongdoing to be forever deprived of his right to his child? Such is the argument of the respondents. Is there nothing that he can do to make requital? Should he be denied the opportunity of making recompense for past wrongs by bringing up the child of the marriage which failed? Or must we establish as a rigid rule of law that he must carry the burden of his transgressions with him for the rest of his journey through life? There was ample evidence to justify the finding of the justice below.

Counsel for the respondents cite the case of *Merchant* v. *Bussell*, supra, in support of their contention. The facts in the two cases are utterly different.

THE MOTION

The petitioner in his testimony said that he was married the second time in February 1944, and his first child was born in July 1944. Both of these dates should have been 1943. There is nothing to indicate that this was an intentional misstatement. The

correct dates could have been easily established. Assuming that this motion is properly before us, what we have already said in this opinion with respect to the past errors of this petitioner indicates that this new evidence would not justify the granting of a new trial in this case. It does nothing more than corroborate what we have assumed to be the fact.

Exceptions overruled.
Motion overruled.

RALPH WILLIAMS *vs.* ARTHUR BISSON ET AL.

Sagadahoc. Opinion, April 22, 1946.

Deceit. Trial. Damages.

An action of deceit is an appropriate remedy for the recovery of damages suffered through the perpetration of a fraud.

A plaintiff cannot recover in an action of deceit unless deceived by representations he did not know to be false and could not have ascertained to be so by the exercise of reasonable care.

A nonsuit or a directed verdict for the defendant should be ordered on motion whenever all the evidence, reviewed most favorably to the plaintiff, would not support a verdict in his favor, or the recovery sought is not available to him in the process he has invoked.

Proof of damages sustained by the plaintiff is essential in action of deceit.

ON EXCEPTIONS.

Action of deceit. Presiding justice, at trial below, granted defendants' motion for a nonsuit. Exceptions overruled.

Paul L. Powers and Edward W. Bridgham, for plaintiff.

Aldrich & Aldrich, for defendant, *Arthur Bisson and Eudore A. Drapeau,* pro se.

SITTING: THAXTER, HUDSON, MANSER, MURCHIE, TOMPKINS, JJ.

MURCHIE, J. This case presents a single issue of law, arising on the allegation in plaintiff's Bill of Exceptions that he is aggrieved by a nonsuit ordered in the Trial Court.

In the process the plaintiff seeks to recover in an action of deceit, which is an appropriate remedy for the recovery of damages suffered through perpetration of a fraud, on allegation that a deed dated July 7, 1942, running to one of the defendants and his wife, and conveying property on which trees were standing which the plaintiff had purchased on January 23, 1941 under a deed giving him the right to remove them until January 23, 1944, a right later extended to March 1, 1944 by parol, contained language to protect that extended right at the time of its execution and delivery and was changed prior to recording by substitution of the earlier date. The attorney who prepared the deed, employed for that purpose at the solicitation of the grantees named in it, is the other defendant.

The declaration charges all the essential elements of an action of deceit except the last enumerated in *Crossman* v. *Bacon & Robinson Co. et al.*, 119 Me., 105, 109 A., 487. This is that a plaintiff cannot recover in such an action unless deceived by representations he did not know to be false and could not have ascertained to be so by the exercise of reasonable care. The plaintiff's knowledge of the true fact as to the recitals of the deed in question at the time of its execution and delivery made this particular element of an action of deceit impossible of either allegation or proof.

The evidence shows that the deed was executed at the office of the defendant who prepared it in the form which the plaintiff alleges; that both grantees were present, with that defendant, when it was signed and acknowledged and the grantor departed from the scene; and that it had been altered when filed for record on the day following. Proof of these facts represents all the evidence in the case that the alteration constitutes a false representation, that it was intended to deceive the plaintiff and was material to

his rights, or that it was made either with knowledge of its falsity or reckless disregard to its falsity or truth. This establishes no more than that the deed was altered after its execution and delivery without the authority of the grantor and in a manner that would have affected the plaintiff's rights adversely if the recording of it made it effective according to its altered terms. It was not so effective. The plaintiff continued to remove trees after January 23, 1942 and until March 1, 1942 in accordance with his extended right and the deed as originally written.

The only evidence connecting either defendant with the alteration was testimony that the handwriting in which it was made bore some resemblance to that of the defendant who prepared the deed. There was none to indicate that the alteration was made to deceive, or to damage, the plaintiff or that either defendant, or anyone else, made any representation to the plaintiff with reference to it. Nothing in the record shows that it was not made by negligent mistake rather than with fraudulent intent.

There can be no point in discussing the evidence relative to damages in a case where liability has not been established but it seems pertinent to note that the plaintiff proved no damages directly traceable to the act of which he complains except that it compelled him to employ counsel to protect his rights. He did not prove the expense this involved.

A nonsuit, or a directed verdict for the defendant, should be ordered on proper motion whenever all the evidence viewed most favorably to the plaintiff would not support a verdict in his favor, *Lander* v. *Sears Roebuck & Co.*, 141 Me., 422, 44 A., 2d, 886 and cases cited therein, or the recovery sought is not available to him in the process he has invoked, *Crossman* v. *Bacon & Robinson Co. et al.*, supra. On either ground the nonsuit ordered herein was proper.

Exceptions overruled.

L. W. O'CONNOR, COLLECTOR

vs.

WASSOOKEAG PREPARATORY SCHOOL, INC.

Penobscot. Opinion, May 1, 1946.

Trial. Taxation. Statutes.

Factual findings made by triers of fact to whom cases are submitted by the parties either as referees or under the provisions of R. S. 1944, Chap. 94, Sec. 17, are not to be reviewed in Supreme Judicial Court if supported by any credible evidence.

All tax exemption statutes should be strictly construed.

Decision rendered in the Trial Court exempting from taxation corporation operating a school of high school grade, is supported by credible evidence.

ON EXCEPTIONS.

Action of debt brought by plaintiff to collect a tax on real estate owned by defendant. After hearing before a justice of the Superior Court, judgment was rendered for the defendant. Plaintiff excepted. Exception overruled.

Francis W. Sullivan, for plaintiff.

Charles P. Conners and James E. Mitchell, for defendant.

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

MURCHIE, J. This case presents a single action of debt brought to collect a tax of $351 assessed against one of several parcels of land owned by the defendant on April 1, 1942. It is one of seven between the same parties heard together by a Justice of the Superior Court. Six of them are brought here by the plaintiff

on exceptions, in accordance with a right reserved to do so. By agreement of counsel the decision herein is to control all of them. The seventh, decided for the plaintiff, is not involved.

The issue is whether the defendant, a corporation organized under R. S. 1930, Chap. 70 (now R. S. 1944, Chap. 50), which operates a school of high school grade on the premises sought to be taxed, is entitled to the benefit of the tax exemption provided by R. S. 1930, Chap. 13, Sec. 6, Par. III (now R. S. 1944, Chap. 81, Sec. 6, Par. III), for:

> "the real estate of all literary and scientific institutions occupied by them for their own purposes or by any officer thereof as a residence."

The seventh case was decided against exemption because of the qualification.

The school has been in operation since 1926. Until 1929 it was conducted by its present headmaster as an individual enterprise. From sometime in 1929 until October 1941, when its present form of organization became effective, it was incorporated under the laws of the State of New York. It was not successful financially when operated by the headmaster as an individual or under the corporate charter granted by New York and was incorporated in its present form to secure tax exemption and encourage private financial aid in the form of gifts. The evidence shows that some assistance of the latter kind has been secured.

The defendant relies entirely on the statutory language quoted which has stood unchanged since the enactment of P. L. 1889, Chap. 274, wherein an earlier absolute exemption of all the property of literary and scientific institutions was curtailed by the qualification relative to use. Since the effective date of P. L. 1939, Chap. 123, the operative effect of the exemption applicable to literary, scientific, charitable and benevolent institutions has been restricted by a proviso that benevolent and charitable corporations whose officers, members or employees, or any of them, received any pecuniary profit therefrom except reasonable com-

pensation for services, or as proper beneficiaries of their strictly benevolent or charitable purposes, should not be exempted from taxation under its provisions.

The plaintiff admits that the defendant is a literary and scientific institution "in its legal conception" but claims that its property is subject to taxation on allegation that the evidence adduced at the hearing can support no other finding than that it was not conducted as such "in substance and truth" but was "a subterfuge and device for tax evasion."

The very statement of the issue as set forth in the bill of exceptions carries recognition that decision of the case must be controlled by a question of fact. Ample authority supports the principle that factual findings made by triers of fact to whom cases are submitted by the parties either as referees or under the statute invoked in the present case, R. S. 1944, Chap. 94, Sec. 17, are not to be reviewed in this Court if supported by any credible evidence. *Chabot & Richard Co.* v. *Chabot*, 109 Me., 403, 84 A., 892; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171; *Stern* v. *Fraser Paper, Limited*, 138 Me., 98, 22 A., 2d, 129.

Assuming, without deciding, that the 1939 law was intended to be applicable to corporations organized for literary and scientific purposes as well as to those intended to serve charitable or benevolent purposes, to which it specially relates, and with full recognition that all tax exemption statutes should be strictly construed, *City of Bangor* v. *Rising Virtue Lodge*, etc., 73 Me., 428, 40 Am. Rep., 369; *Inhabitants of Camden* v. *Camden Village Corporation*, 77 Me., 530, 1 A., 689; *City of Auburn* v. *Young Men's Christian Association*, etc., 86 Me., 244, 29 A., 992; *Inhabitants of Orono* v. *Sigma Alpha Epsilon Society*, 105 Me., 214, 74 A., 19; *Ferry Beach Park Association*, etc. v. *City of Saco*, 127 Me., 136, 142 A., 65; *Camp Emoh Associates* v. *Inhabitants of Lyman*, 132 Me., 67, 166 A., 59, we cannot say on the record before us that the finding adverse to the plaintiff's claim has no support in credible evidence.

Tax exemption for lands granted to literary and scientific insti-

tutions in this State was provided in the seventh condition of Section 1 of the Act of Separation passed by the General Court of Massachusetts and approved June 19, 1819. It was extended to cover all the property and estate belonging to such institutions incorporated in this State in our first State Tax Act, P. & S. L. 1821, Chap. LXXXV, Sec. 6, and corresponding provision was made annually thereafter in such acts until the system for the assessment of taxes which has ever since been in effect was enacted as a public law, P. L. 1845, Chap. 159. Sec. 5, Par. Second of that law continued the same complete exemption. Changes made in the law since that time are not material to the issue now presented except for the 1889 and 1939 amendments heretofore identified. The legislature has provided that questions of taxability shall be decided by determination of facts. Since the factual decision rendered in the Trial Court has support in credible evidence, the entry must be

Exceptions overruled in Cases 927 to 932 inclusive on the Law Court docket.

IDA E. HOGUE,

ADMINISTRATRIX OF THE ESTATE OF DOROTHY IDA CONNORS

vs.

LUCIEN ROBERGE.

York. Opinion, June 12, 1946.

Death. Pleadings.

Damages for conscious suffering are recoverable by decedent's estate, and damages for death following conscious suffering belong to the statutory beneficiaries. Only one action is necessary under the provisions of R. S. 1944, Chap.

152, Sec. 11, in order to recover for conscious suffering and for death following, but there must be at least two counts.

In order to maintain action under the provisions of R. S. 1944, Chap. 152, Secs. 9 and 10, it must be alleged in the declaration, or appear by inference, that there was no conscious suffering, and the writ must show for whose benefit the action is brought.

A count in a declaration in an action brought for the benefit of decedent's mother, and alleging that plaintiff's decedent, a week before her death received "serious and painful injuries," and that she "languished and died," without an averment, direct or by inference, that the death was immediate, or that there was no conscious suffering, describes an action at common law, and seeks compensation for a beneficiary who is only entitled to receive under another and statutory form of action, and is demurrable.

A count in plaintiff's declaration alleging the death of decedent, and that she "suffered excruciating pain," and that plaintiff seeks compensation under the provisions of R. S. 1944, Chap. 152, Sec. 11, was demurrable in the absence of a separate count for such death, since by statute damages for wrongful or negligent death, following conscious suffering, may only be recovered "in a separate count in the same action."

NOTE: The Court does not decide whether or not it is permissible to join an action for immediate death without conscious suffering, with an action for death and conscious suffering.

ON EXCEPTIONS.

Plaintiff as administratrix brings suit to recover for death of her intestate. Defendant filed demurrer to plaintiff's declaration. Demurrer overruled by presiding justice, and defendant excepted. Exceptions sustained. Demurrer sustained.

Varney & Fuller, for plaintiff.

Hilary F. Mahaney, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This case brought by Ida E. Hogue as administratrix of the estate of Dorothy Ida Connors against Lucien

Roberge involves the validity of a declaration in an action for negligence under the "Death Liability Statutes." It comes before the Court on defendant's exceptions to the overruling of his demurrer.

The declaration is in two counts. The first count states that on February 7, 1945 Dorothy Ida Connors, twenty-four years of age, was walking upon a public way in Sanford, immediately following a heavy snow storm, as the sidewalks were not then plowed; that she was negligently struck by an automobile driven by the defendant, and "that as a result of said careless, negligent and unlawful operation of said automobile, the plaintiff's intestate was struck and run over, inflicting serious and painful injuries upon her body, from which she languished and died on the 14th day of February 1945, and your plaintiff further says that she left as her only heir her mother, the plaintiff, Ida E. Hogue of Sanford, Maine; that at the time of her death she was living at the house of her mother; was working and contributing largely to her mother's support; that because of her death, her mother, the said Ida E. Hogue, has lost financially the support from her said daughter, which she otherwise would have had for the remainder of her life."

The second count is similar to the first, with the exception that it contains the additional allegation "that during the time from the date of the accident, February 7th, to the time of her death, February 14th, she suffered excruciating pain and mental anguish, all caused by the negligence of the defendant, as aforesaid, and for which your plaintiff seeks compensation under the provisions of Section 11 of Chapter 152 of the Revised Statutes of Maine." There was no separate count to recover for the death following the conscious suffering.

The defendant demurred generally to the declaration and specially as to the first count, assigning as a cause for demurrer that "defendant is not informed by the declaration whether it is an immediate death or a common law action." The demurrer was overruled, and the plaintiff allowed to amend the first count, by

striking out the word "languished," to all of which the defendant filed exceptions.

Sections 9 and 10 of Chapter 152 of the Revised Statutes of 1944, commonly referred to as the "Lord Campbell Act," allows a suit in the name of the personal representative of a deceased person for the exclusive benefit of certain specified dependents or heirs, to recover not exceeding $10,000 (and medical and funeral expenses), for wrongful and negligent act causing immediate death, or death without conscious suffering. These Secs. 9 and 10 of Chap. 152, R. S. 1944, were enacted to provide for a right of action for death, because no money recovery was permitted for a death at the common law, *Ames* v. *Adams*, 128 Me., 174. In order to bring an action under Secs. 9 and 10 it must therefore be alleged in the declaration, or appear by inference, that there was no conscious suffering. It is a statutory action to recover for the death only. *Sawyer* v. *Perry*, 88 Me., 42; *Anderson* v. *Wetter*, 103 Me., 257; *Conley* v. *Portland Gas Light Co.*, 96 Me., 281; *Carrigan* v. *Stillwell*, 97 Me., 247; *Frank C. Perkins, Adm'r* v. *Oxford Paper Co.*, 104 Me., 109; and the writ must show for whose benefit the action is brought. *Hammond* v. *Lewiston Street Railway*, 106 Me., 209.

The Lord Campbell Act, passed in England in 1846, became a law in Maine in 1891; so that the right to recover in a death negligence case was then limited to two types of actions, (1) at common law to recover for the conscious suffering, if there was any conscious suffering, and (2) to recover under the statute, for the death itself, if the death was immediate. *Perkins* v. *Paper Co.*, 104 Me., 109, 113. There was at that time no right at common law, or by statute, to recover compensation for death if any conscious suffering existed between the time of injury and the time of death. This situation continued in Maine until the year 1943.

In 1943 the legislature enacted a new section to permit a recovery for death through wrongful or negligent act, following conscious suffering, "in addition to the action at common law," and in "a separate count in the same action." The amount re-

covered for death is to be "separately found," and for the same beneficiaries as in Section 10. See P. L. 1943, Chap. 346; R. S. 1944, Chap. 152, Sec. 11.

The plaintiff states in her brief, and through counsel in argument, that she brought the first count under Secs. 9 and 10 of Chap. 152 of the R. S., to recover for immediate death, for the benefit of the mother of decedent; and that her second count, was brought for the same beneficiary under the new Sec. 11 of Chap. 152.

The defendant by his demurrer admits facts alleged, and claims that the counts, and each of them, are insufficient to maintain these statutory actions. The question for decision is whether the Court properly overruled the demurrer.

The first count alleges that the injuries to the plaintiff's intestate were received on February 7, 1945, and that she died because of these injuries a week later; that the injuries were "serious and painful" and that she "languished and died on the 14th day of February 1945." Nowhere does it appear by direct averment, or by inference, that the death was immediate or that there was no conscious suffering. In fact the inferences are strongly to the contrary. It appears to us that this describes an action at common law to recover damages for suffering, and as such, it should be for the benefit of decedent's estate. *Anderson* v. *Wetter*, 103 Me., 257.

The proposed amendment to the first count by striking out the word "languished" would not as we view it, change its effect or meaning. *Conley* v. *Gas Light Co.*, 96 Me., 281; *Anderson* v. *Wetter*, 103 Me., 257. It is alleged in this first count that Ida E. Hogue was the decedent's mother and was receiving support. The action is brought for her benefit as mother, and as the only heir of Dorothy Ida Connors. The first count, therefore, describes the cause of action at common law for conscious suffering, and seeks compensation in the same common law count for a beneficiary who is only entitled to receive under another and statutory form of action. The count is demurrable. *Conley* v. *Gas Light Co.*, 96 Me., 281.

In the second count the plaintiff directly avers the death and that decedent "suffered excruciating pain," and also alleges that "plaintiff seeks compensation under the provisions of Section 11 of Chapter 152 of the Revised Statutes." In other words, the plaintiff seeks to recover, under this second count, damages for the suffering and damages for the death. This single count does not permit a recovery for the suffering and for the death. There is no separate count for such death. Damages for a wrongful or negligent death, following a period of conscious suffering, may only be recovered, under the specific terms of the statute in "a separate count in the same action," R. S. 1944, Chap. 152, Sec. 11. The reason for this demand of the statute, that a separate count be inserted, is to enable the jury to find the amount due for the conscious suffering and to separately find the amount due for the death. Damages for conscious suffering are recoverable by decedent's estate; and damages for the death, following the conscious suffering, belong to the statutory beneficiaries classified in R. S. 1944, Chap. 152, Sec. 10. This count also is subject to demurrer.

Only one action is necessary, under Section 11, in order to recover for conscious suffering and for the death following, but there must be at least two counts. There must be "a separate count in the same action for such death" is the express command of the legislature as contained in the eleventh section.

Because of our conclusions, we are not called upon to decide whether there must be separate actions under Secs. 9 and 11 of Chap. 152, R. S. 1944, or whether it is permissible to join an action for immediate death without conscious suffering (Section 9), with the action for death *and* conscious suffering (Section 11), as the plaintiff insists she attempted in this case.

The declaration, in an action involving negligence, is often hastily drawn before the case is fully understood, and the plaintiff in her brief suggests that "a rule of law sustaining a demurrer for inconsistent pleading is both unjust and hard, since often the pleader cannot tell and does not know which plea he will be able to prove until later on in the trial." That it is difficult to foresee

what may develop in a trial, has been long recognized, and as a result great liberality has been shown through the allowance of amendments, at almost every stage of court proceedings; but there is an equal injustice and equal hardship to the opposing party, if he must engage in a struggle where there is not some regularity or some limit.

It is but ordinary justice to insist that a legal privilege or legal benefit shall be granted to a person when, and only when, he fairly shows himself to be entitled to it.

Exceptions sustained.
Demurrer sustained.

PHILIP GIGUERE *vs.* MATHIAS MORRISETTE.

Kennebec. Opinion, July 12, 1946.

Trover. Sales. Practice.

Trover is an appropriate form of action whenever a plaintiff seeks to recover damages from a defendant who deprives a plaintiff of his personal property, or who has converted plaintiff's goods to his own use. The action lies for any unauthorized assumption or exercise of the right of ownership, or possession, over goods belonging to another, or to another who has the right of possession. The gist of the action is the invasion of the plaintiff's possession.

The plaintiff, in an action of trover, must show that he had a general, or a special property in the goods, and the right to their possession at the time of the alleged conversion, and if there were conditions, or his right of possession depended on a condition, he must show compliance with the condition.

The delivery, by defendant to plaintiff, of a key to a car of watermelons, is a constructive delivery of the melons, if the defendant and plaintiff so intended.

Whether delivery of a key to a car of watermelons was conditional or not, and whether such condition was complied with, was for the jury.

The owner of a trucking business, who was instructed by the consignee of a car of watermelons to bring to consignee's store such of the melons as were saleable, and to clean out the remaining melons from the car by a certain time, could not sell the remaining melons to a third person, before the removal of

such remaining melons from the car, and before cleaning out the car. R. S. 1944, Chap. 171, Sec. 65 and 66.

The Trial Court should direct a verdict for either party entitled to it, if the evidence raises a pure question of law, or if the evidence is such that reasonable minds would draw but one conclusion therefrom.

If different inferences of fact may be drawn from the evidence, or if there is any substantial conflict relating to a material issue, a verdict should not be directed.

ON EXCEPTIONS.

Action of trover by plaintiff against defendant to recover the value of a portion of a car of watermelons. At the conclusion of the evidence, plaintiff's motion for a directed verdict was denied. Plaintiff excepted. Exceptions overruled.

Jerome G. Daviau, for plaintiff.

F. Harold Dubord, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is an action of trover brought by Philip Giguere vs. Mathias Morrisette to recover the value of a portion of a car of watermelons. At the conclusion of the evidence the plaintiff moved for a directed verdict, which motion was denied. The case comes to the Law Court on plaintiff's exceptions for refusal to so direct.

It appears that on Friday, June 29, 1945, the First National Stores received a shipment of a car of watermelons, which car arrived at the Waterville freight yard. This car was to be unloaded within three days from this date, in order for the First National Stores to avoid demurrage charges. Upon arrival, the First National Stores ascertained that many of the watermelons were over-ripe and were spoiling. The defendant Morrisette, in the trucking business, testified he was instructed by the First National Stores to bring to its Waterville store such of the melons as were saleable at the store, and to clean out the car by Monday.

There were about 1,200 melons in the car; and Morrisette, according to instructions, hauled to the store on Saturday 350 of the best melons. Morrisette believed that some of the remaining melons had a value, and offered to turn them over to the plaintiff on condition that the plaintiff would clean out the car not later than Monday night. The plaintiff denies that there was this condition in Morrisette's offer to transfer. The watermelons, which had any value, were to be sold by the plaintiff outside of Waterville, and he was to pay to the defendant 10¢ for each watermelon sold. The arrangement between the parties, whatever it may have been, was arrived at on Monday morning July 2, 1945.

The defendant placed his own padlock upon the freight car, and at the time of entering into the agreement with the plaintiff he gave to the plaintiff his key to this lock. The plaintiff testified that upon receiving the key he "went to the office of the Maine Central and fixed up about demurrage."

Late in the afternoon of Monday, July 2nd, the defendant learned that the plaintiff had not removed the melons and had not cleaned the car; and in order to comply with his agreement with the First National Stores, the defendant says he broke the padlock that he had placed on the railroad car, and took out 315 melons that appeared to have value. These 315 melons he put into his truck, and went to the home of the plaintiff, who then had the key to the padlock, and offered to deliver the melons to the plaintiff. The plaintiff refused to accept, and said that he would be at the home of defendant early the following morning. On July 3, 1945, the plaintiff failed to come to the home of the defendant, and the defendant again drove to the plaintiff's house and again offered to deliver the melons on his truck to the plaintiff. The plaintiff again refused to accept, and the defendant then sent his truck to Augusta, where these remaining melons were sold for $88.00. Employees of the defendant cleaned the car early in the morning of July 3rd. The plaintiff then brought this action of trover.

In support of his motion for a directed verdict the plaintiff claimed that there was no question of fact for the jury to pass upon; that he owned the melons, or at least had the right of possession to them, and that delivery of the key was delivery of the melons. The plaintiff also denied that he agreed to have them out of the car on Monday night, and for that reason told the railroad agent that he assumed any charges on the car. The plaintiff further claimed that "a conditional contract as testified to by the defendant did not privilege him to use force in the recaption of the goods," and that no demand was shown.

The defendant stated that his rights of disposal were given to the plaintiff on condition that the melons be removed from the car and the car cleaned on Monday; and that "at the time of the alleged conversion plaintiff neither had title to nor right of possession to the goods in issue."

The case was submitted to the jury and the jury returned a verdict for the defendant. The question for decision is whether the ruling of the Court in denying the motion, to direct a verdict for the plaintiff, was proper.

The common law action of trover was originally an action brought by a person who had lost personal property, and it was directed against the finder of the property. The ancient form of declaration, followed by the plaintiff in this case, alleges possession of the goods, their "loss," and the "finding" by the defendant. By a legal fiction it has become the appropriate form of action whenever a plaintiff seeks to recover damages from a defendant who deprives a plaintiff of his personal property, or who has converted a plaintiff's goods to his own use. The action lies for any unauthorized assumption or exercise of the right of ownership, or possession, over goods belonging to another, or to another who has the right of possession. Under our practice "the gist of the action is the invasion of the plaintiff's possession." *Webber* v. *McAvoy*, 117 Me., 326, 327, 104 A., 513.

The plaintiff must show that he had a general, or a special property in the goods, and the right to their possession at the time of

the alleged conversion. If there were conditions, or his right to possession depended on a condition, he must show a compliance with the condition. *Landry* v. *Mandelstam,* 109 Me., 376, 84 A., 642; *Patten* v. *Dennison,* 137 Me., 1, 14 A., 2d, 12. The case of *Davis* v. *Emery,* 61 Me., 140, 14 Am. Rep., 553, cited by the plaintiff, was where the plaintiff bought of the defendant a building standing on defendant's land, and paid for it. The building was to be moved by the plaintiff before a certain date. The Court held in the Davis case, that the neglect to remove would not constitute a forfeiture as there was no sale on condition. The price had been paid, and the defendant had only an action for damages.

Here the evidence shows that First National Stores had title to the melons. The only right that was given to defendant, after he delivered the best melons at the First National Store in Waterville, was the right, as he says, to unload the car, and to dispose of the spoiled and spoiling melons, before the First National Stores became liable to the railroad company for demurrage charges. The defendant says he offered to turn over to the plaintiff his right to possession on the same condition. The plaintiff took the key to the car, which was constructive delivery if so intended by the parties. *Vining* v. *Gilbreth,* 39 Me., 496. The plaintiff says that he did not then know, but he later learned from the defendant, that the defendant was expected to promptly clean the car. The plaintiff says that the condition was not stated to him in defendant's original offer when he locked the car and delivered the key. The plaintiff claims that as there was no agreement on his part to remove the melons that day, he assumed railroad charges.

There was a conflict of testimony as to whether there was or was not a condition; and whether, as between the parties to this action, the plaintiff was told of, or agreed to, any condition. The plaintiff could not relieve the primary obligation of First National Stores to the railroad company, for charges for delay in unloading the First National's melons, unless the railroad com-

pany in some manner, waived its rights against First National Stores. As between the parties to this action, and before removal of the melons from the car, there could be no such sale as is contemplated by the Sales Act, if the condition told by the defendant existed. R.S., Chap. 171, Sec. 65, 66. The plaintiff could not "buy" the melons of the defendant, at the time the key to the car was transferred, because the defendant then had no title. The defendant had the right of possession for the purpose of disposal if, or when, the melons were promptly removed from the car. There was no recaption when the defendant broke his own padlock, if the defendant's contentions were correct, and the plaintiff had not complied or intended to comply with his agreement, because he did not "retake" from the plaintiff. No demand was necessary, if the defendant's story is true, as the plaintiff never had either "possession or a special property" in the melons, and would not have, unless removed from the car that day. The right to possession, and the possession, on the part of the plaintiff, would depend on removal, and removal within the time specified, if, as claimed, the plaintiff agreed to the condition.

In the testimony presented at the trial in Superior Court, the parties agreed that the key to the padlock on the car was delivered by the defendant to the plaintiff after the car was locked on Monday morning; and it was not disputed that the defendant, later in the day, broke the lock and removed the melons. On other and important facts, relating to the necessity of prompt removal the evidence conflicts. The plaintiff, by his motion for a directed verdict, indicates that these two agreed facts alone authorize, as a matter of law, a verdict in his favor, without regard for any condition. To this view we cannot subscribe.

Was the understanding or agreement as claimed by the plaintiff or as claimed by defendant? As between the parties, did the plaintiff agree to, or know of, any condition that required immediate removal, when the defendant attempted to transfer his rights? If a condition existed, did the plaintiff comply? All such,

and similar questions bearing on the plaintiff's possession or right to possession, were questions for the jury.

It is firmly established in this State, that the Trial Court should direct a verdict for either party entitled to it, if the evidence raises a pure question of law, or if the evidence is such that reasonable minds would draw but one conclusion therefrom. If different inferences of fact may be drawn from the evidence, or if there is any substantial conflict relating to a material issue, a verdict should not be directed. It must be apparent that a contrary verdict could not be sustained. *Heath* v. *Jaquith*, 68 Me., 433; *Bank* v. *Sargent*, 85 Me., 349, 27 A., 192, 35 Am. St. Rep., 376; *Day* v. *B. & M. Railroad*, 97 Me., 528, 55 A., 420; *Wellington* v. *Corinna*, 104 Me., 252, 71 A., 889; *Drummond* v. *Pillsbury*, 130 Me., 406, 56 A., 806.

The motion for a directed verdict was properly denied.

Exceptions overruled.

ALLEN ROSS *vs.* CARLL RUSSELL.

JEAN ROSS PRO AMI *vs.* CARLL RUSSELL.

Cumberland. Opinion, July 13, 1946.

Negligence.

A child of tender years is not bound to exercise the same degree of care as an adult, but only that degree of care which ordinarily prudent children of the same age and intelligence are accustomed to use under like circumstances.

A pedestrian about to cross a road, or, as in the present case, to walk from a street car to the sidewalk, is not, as a matter of law, bound to look and listen.

A pedestrian in crossing a street is not negligent as a matter of law because he fails to anticipate negligence on the part of the driver of a car.

Plaintiff, a child of eight years, was walking with another child in a southerly direction, and started to cross intersecting street between automobiles on the north side of the intersection, which were headed in a westerly direction, and which had been stopped by traffic police. Plaintiff stepped out between two cars so stopped, took two or three steps southerly of the middle of the road, and apparently tried to get back into a position of safety. She was struck by the defendant's automobile travelling in an easterly direction along the intersecting street. Whether or not plaintiff was guilty of contributory negligence was a question for the jury.

On Exceptions.

Two actions, one brought by a minor child by her father for personal injuries, and the other by the father for medical expenses. The presiding justice directed a verdict for the defendant. Plaintiff excepted. Exceptions sustained.

Wilfred A. Hay, for plaintiffs.

Robinson, Richardson & Leddy, for defendant.

Sitting: Sturgis, C.J., Thaxter, Hudson, Murchie, Tompkins, Fellows, JJ.

Thaxter, J. We are concerned here with two actions, one by a minor child of the age of eight years brought by her father as next friend to recover for personal injuries, the other brought by the father to recover for medical expenses. In each case at the close of the evidence the presiding justice on the defendant's motion directed a verdict for the defendant. The cases are now before us on exceptions to these rulings.

The only question before us is whether, giving to each plaintiff the most favorable view of the facts and of every justifiable inference to be drawn therefrom, the jury might have been warranted in finding for the plaintiff. If so, the ruling below was error. *Collins* v. *Wellman,* 129 Me., 263, 151 A., 422; *Drummond* v. *Pillsbury,* 130 Me., 406, 156 A., 806. The jury could have found the following facts.

The minor plaintiff of the age of eight years was proceeding on foot with her brother of the age of nine and a half years on the sidewalk of Stanford Street in South Portland, which runs approximately north and south and intersects Broadway which runs from the shipyard in a westerly direction to Sawyer Street. Both streets at this point are nearly level, and Broadway is straight at least as far as Sawyer Street, which is slightly more than four hundred feet away. It was also possible to see a considerable distance beyond Stanford Street in an easterly direction. The children were proceeding southerly on Stanford Street preparing to cross Broadway to the southerly side. It was shortly after three o'clock in the afternoon of November 23, 1943, admittedly a misty, wet day, and the road was slippery. Broadway is a hard surfaced street capable of carrying four lanes of traffic, two moving west and two east. Workmen were leaving the shipyard and there was very heavy traffic on the northerly half of Broadway. At the time of the accident this traffic, composed of two lanes headed west, was halted by a traffic policeman at Sawyer Street. The cars were almost bumper to bumper and extended easterly beyond Stanford Street. The defendant, driving his automobile easterly on Broadway, was headed for the shipyard where he was employed, and was travelling on the southerly side of the road in the lane nearest the middle. In fact the testimony shows that he was only from two to three feet from the line of cars headed in the opposite direction. His view northerly on Stanford Street was obstructed so that he was unable to see pedestrians about to cross Broadway at that point. At the time of the accident he was travelling, according to his testimony and the testimony of two others who were in the car with him, at from ten to fifteen miles an hour and he said he stopped within a foot. According to the occupant of one of the waiting cars headed in the other direction who saw the accident, his speed was far in excess of that, between thirty and thirty-five miles per hour, and the bill of exceptions concedes that the plaintiff's evidence tends to show such a rate of speed. The little girl stepped between two cars which

were stopped in the northerly side of the street in the lane of traffic nearest the middle, took two or three steps southerly of the middle line of the road, and, apparently seeing the defendant's car coming, tried to get back into a position of safety near the waiting line of cars. She was too late and was struck apparently by the left fender of the defendant's car. He did not even see her. He testified that he was conscious of a bump or what he called a "flash." Robert D. LaLanne, who seems to be the only person who actually saw all that happened, testified that the little girl passed through the line of stalled traffic one car ahead of him, took two or three steps into the other side of the highway and then tried to get back, was rolled by the defendant's car over the road alongside of the car of the witness and stopped about two and a half car lengths in back of him, a distance of forty or forty-five feet from where she was hit.

It seems to be conceded that there was sufficient evidence of the defendant's negligence to go to the jury. The question is whether or not on these facts, which the jury would have been justified in finding, we are compelled to rule as a matter of law that the child was contributorily negligent.

It is well settled that a child of tender years is not bound to exercise the same degree of care as an adult but only that degree "of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances." *Colomb* v. *Portland & Brunswick Street Railway,* 100 Me., 418, 420, 61 A., 898, 899; *Blanchette* v. *Miles,* 139 Me., 70, 27 A., 2d, 396. No hard and fast rule can be laid down as to the care required of children. It is a question of the facts of each particular case. *Farrell pro ami* v. *Hidish,* 132 Me., 57, 165 A., 903. In *Brown* v. *European & North American Railway,* 58 Me., 384, a child of nine was held responsible for the degree "of care and prudence proportionate to his age." In commenting on this case, and on the case of a child three years and ten months old which is held incapable as a matter of law of exercising care, this Court said in *Grant* v. *Bangor Railway & Electric Co.,* 109 Me., 133, 138, 83

A., 121, 123, "Between these two extremes lies a zone with shadowy and indefinite boundaries." The inference is that within that zone the question is one of fact for the jury. Furthermore, we must consider the rule, and it is particularly applicable in the case of a child, that, "A pedestrian about to cross a road, or as in the present case, to walk from a street car to the sidewalk, is not as a matter of law bound to look and listen." *Day* v. *Cunningham,* 125 Me., 328, 331, 133 A., 855, 856, 47 A. L. R., 1229; *Shaw* v. *Bolton,* 122 Me., 232, 119 A., 801; *Hall* v. *West End Street Railway Co.,* 168 Mass., 461, 47 N. E., 124.

This is not a case of a child darting out into the street directly into the path of a car. We have had in the past a number of such cases not only of children, but of adults, who have stepped suddenly from behind a line of cars into the path of a moving automobile. The issue in those cases has been, not one so much of contributory negligence, but of whether the act of the pedestrian may not have been the sole proximate cause of the accident. *Levesque* v. *Dumont,* 116 Me., 25, 99 A., 719; *Milligan* v. *Weare,* 139 Me., 199, 28 A., 2d, 463.

There is one other consideration. Whether or not a pedestrian in crossing a street may be guilty of negligence depends in part at least on the extent to which he may rely on the fact that approaching vehicles will be lawfully and carefully driven. He is not negligent as a matter of law because he fails to anticipate negligence on the part of the driver of a car. *Day* v. *Cunningham,* supra, 333. For this reason the ordinary rule is that in such cases contributory negligence is a question for the jury.

Applying these principles of law to the facts of this case, we feel that the question of this child's contributory negligence should have been submitted to the jury. In view of her age and capacity, to what extent was she capable of exercising care? Should she have anticipated that an automobile would be driven so close to the line of waiting cars and at a rate of thirty-five miles per hour that it would be unsafe for her to pass through them and take two or three steps beyond to view the road to see if

she could safely cross? Was it necessary before stepping into the southerly part of the highway that she peek cautiously around the back end of the car ahead of her before she could step over the middle line? Could she not place some reliance on the fact that the speed of any car coming east in that lane would be reasonable in view of the conditions? Knowing that the southerly half of that road was, as a glance would indicate, so clear of traffic that the driver of an approaching car had plenty of room to turn away from her toward the edge of the road, was she not justified in expecting him to do so? Or must she anticipate that he would not even see her?

Our opinion is that these were clearly cases for the jury and that the ruling of the presiding justice in directing verdicts for the defendant was error.

Exceptions sustained.

STATE OF MAINE *vs.* ROYDEN V. BROWN.

Kennebec. Opinion, July 16, 1946.

New Trial. Evidence.

The issue on motion for new trial addressed to the presiding justice was whether, upon all the evidence, the jury was warranted in arriving at their verdict in finding the respondent guilty beyond a reasonable doubt, having in mind that it is for the jury to determine the credence to be given the witnesses and the weight of their testimony.

There was, in the instant case, conflict on the question of whether or not the respondent and his wife rode together on an elevator. It was important, almost essential, that the State should be able to establish that on the evening in question respondent and his wife rode in the elevator at separate times. The elevator operator testified that they did not ride in the elevator together on the night of the alleged offense, and he was permitted to establish this fact by testifying that it was their custom to come in together, and that on this occasion they did not do so, and in order to fix the time the witness testified that soon afterwards it was brought to his attention that "something had hap-

pened out of the ordinary." Trial Court's refusal to strike out the testimony of elevator operator as to prior custom and as to how he fixed in his mind the date of the happening was proper.

The rule is well settled in this State that evidence admissible on one ground, and offered in good faith for a legitimate purpose such as refreshing the recollection of a witness, or as showing why he was able to fix a certain date as the time when an occurrence took place, is not to be excluded from the consideration of a jury because it may be irrelevant or inadmissible on other grounds or otherwise prejudicial.

ON APPEAL AND EXCEPTIONS.

Respondent was convicted of taking indecent liberties with the sexual parts or organs of a male child under the age of sixteen years. Presiding justice denied motion for a new trial and respondent appeals and excepts to the admission of certain evidence. Appeal dismissed. Exceptions overruled. Judgment for the State.

Henry H. Heselton, County Attorney,

Abraham Breitbard, Deputy Attorney General, for the State.

F. Harold Dubord and

Burleigh Martin, for the respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

THAXTER, J. This case is before us for the second time. In our first opinion, *State* v. *Brown,* 142 Me., 16, 45 A., 2d, 442, we sustained certain exceptions but did not consider the appeal and expressed no opinion as to whether the evidence in the record then before us would have sustained the verdict of the jury. The respondent was tried before a jury in the Superior Court on an indictment in which he was charged with taking indecent liberties with the sexual parts or organs of one John McAuley, Jr., a male child under the age of sixteen years. As at the first trial he

was convicted and the case is before us on an appeal from a denial by the presiding justice of his motion for a new trial and on exceptions to the admission of certain evidence.

The Appeal

The issue on the motion for a new trial addressed to the presiding justice was, to use the language from *State* v. *Dodge,* 124 Me., 243, 246, 127 A., 899, 901,

> "Whether upon all the evidence the jury was warranted in arriving at their verdict in finding the respondent guilty beyond a reasonable doubt, having in mind that it is for the jury to determine the credence to be given the witnesses and the weight of their testimony."

The appeal, taken in accordance with the provisions of R. S. 1944, Chap. 135, Sec. 30, brings before this court the question whether the presiding justice correctly decided that issue.

We shall endeavor to summarize the salient points in the evidence which is sharply conflicting. For the state there was the testimony of John McAuley, Jr., the victim of the alleged advances by the respondent, of his father, John McAuley, Sr., of Joseph F. Young, Jr., deputy chief of the Maine State Police, of Charles A. Watts, the sheriff of Kennebec County at the time the alleged offense was committed, and of James L. Coakley, an elevator operator in the State House at the time. The evidence for the respondent was the testimony of himself, of his wife, Naomi B. Brown, and of Delmont T. Dunbar, a newspaper reporter. If the jury believed the testimony of John McAuley, Jr., as they apparently did, the respondent was properly found guilty. McAuley, a large, well-developed boy of fourteen, testified that on March 6, 1945, after school had been dismissed at one-thirty, he played basketball in the school gymnasium and then went to the State House to work for his father, who was the proprietor of a restaurant in the basement of the building. He did cleaning and washing in the kitchen of the restaurant until the arrival of

his father at about six o'clock with provisions which he helped him unload. While he was removing these from his father's car, which was parked near the rollway which led to the basement of the State House, the respondent, who was secretary of the State Senate, and his wife drove up and entered the building through that entrance. The boy entered just behind them, went with his load to the storeroom, which is near the kitchen, and saw the respondent talking to Mr. McAuley, Sr. in the kitchen. In a very short time Brown left the kitchen and passed by the storeroom. Young McAuley, when he had finished, left and went out for another load. The course by which he had entered and left took him through a so-called pressroom, where papers are pressed, and thence to the door leading out to the rollway. Off this pressroom was a room which had been the old kitchen for the restaurant. He says that as he passed by the door to this room on his way out, the respondent asked him if this wasn't the old kitchen which his father used to have. As he stepped through the door to look at it, Brown made an improper remark to him, pushed him over by the sink, undid the fly of his trousers, and put his hand on McAuley's private parts. Brown then asked him how old he was and the boy said: Fourteen." Just about then his father called to him and Brown left the room by a back entrance. The boy made no outcry, and when the respondent left, went back to the kitchen and continued to work with his father. On the way home he told his father of what had happened. There was a light in the pressroom but none in the kitchen where the incident took place. Such is the boy's story of what happened.

The boy's father corroborated his son's story as to what occurred prior to the commission of the alleged offense. He says that the boy told him of the episode on his way home. The next day, which was Wednesday, Mr. McAuley, Sr. notified the state police.

Deputy Chief Young of the state police told of the arrest of the respondent by Sheriff Watts in the office of the attorney general at noon on March 9th. Brown said he thought he should

have counsel, and asked that he might talk with Mr. Young alone. In the conversation which ensued between them, which was afterwards repeated to Sheriff Watts in the presence of the respondent, the respondent in response to questions said that he remembered the evening of March 6th, of talking to John McAuley, Sr. in the kitchen of the restaurant, of talking to young McAuley near the rollway about some packages, and then Mr. Young relates the following conversation: "I asked if he remembered being in the door of the old kitchen and fooling around with the fly of John McAuley, Jr.'s trousers and he said he did not remember, but did remember pushing him." Brown finally said that he would like to talk to the boy and see if he couldn't "straighten this thing out."

Sheriff Watts merely corroborated the testimony of Mr. Young as to the conversation which took place with the respondent while the sheriff was in the room.

Such is the salient testimony for the state.

The respondent testified that his wife drove him to the State House about quarter past seven in the evening of March 6th; that they left the car near the rollway, and saw John McAuley, Jr. near his father's car and spoke to him; that the boy followed the respondent and his wife into the building and went by them; that the respondent gave the boy a push on the shoulder as he went by; that the respondent, leaving his wife standing in the corridor, went on to see the father who was by the kitchen door about breakfast the next morning; that he spoke to him for just a moment, during which time the boy was putting the goods away in the storeroom; that he then went back and joined his wife and saw the boy pass out of the storeroom and go toward the press-room, and that thereafter he did not see the boy again that night; that he and his wife walked together toward the elevator which they took to the Senate floor; that he unlocked his office door and was there with his wife until about quarter of nine when he left the building and went to the Augusta House. He says that at all times, apparently until he got to his office, he was dressed in

heavy winter clothes, an overcoat, muffler and gloves. He denies specifically that he went back to the pressroom that night, or that he saw the boy, or spoke to him again or committed the act which the boy claims he did. The next morning he ate breakfast in the State House restaurant. At the time he was called to the office of the attorney general on Friday, he asked to see the warrant and suggested that the matter be left for the grand jury which would be summoned after the legislature would have adjourned. He said he had no recollection of Mr. Young asking him whether he had fooled around young McAuley's fly; and when asked whether he remembered the conversation between himself and Mr. Young being repeated to Sheriff Watts, he merely said he didn't remember everything.

Mrs. Brown, who was employed in her husband's office, corroborated him in every particular. She said that at no time during the evening in question were she and her husband separated except when he went to the kitchen to talk to John McAuley, Sr. and that while he was there for about a minute and a half she heard the conversation between them. Her husband, she said, went up with her in the elevator, opened the office door for her, and they were there together until a quarter of nine.

The testimony of Delmont T. Dunbar, who was called by the defense as a witness, does not seem to be important on any fundamental issue of the case.

In rebuttal the state called James L. Coakley, an operator of the elevator in the State House, who testified that on the night of March 6th he went on duty at five o'clock in the afternoon; that Mr. and Mrs. Brown on that night did not come up in the elevator together, but that Mrs. Brown went up alone and was followed by Mr. Brown about six or seven minutes later. He remembered this, he said, because it was their custom always to come in together and ride up together. He stated that he remembered that it was the night of March 6th, because about a half or three quarters of an hour after they went up it was brought to his attention that something unusual had happened. The wit-

ness did not remember anyone else he took up that night. He said that Mr. and Mrs. Brown went up in the elevator the night before.

Mrs. Brown on being recalled testified that she and her husband came back late from Skowhegan the night before and did not go to the State House at all. She said that on another night, the latter part of February, when her husband was at a fraternity dinner, she did go up in the elevator alone.

Respondent's counsel argues the improbabilities of the commission of such an offense under the particular circumstances existing at the time. What happened was certainly not planned and was, even according to the state's theory, over in a very few minutes. The victim of the respondent's alleged advances made no outcry, went about his work, and, it may be argued, treated the matter in a sense lightly. We have his testimony against that of the respondent and the respondent's wife; for if either Brown or Mrs. Brown gave a correct account of what happened that evening no such occurrence could possibly have taken place. But the boy has told at all times a consistent story, and no motive is apparent why he should make it up. If the elevator operator is correct in his dates and in giving six or seven minutes as the interval which elapsed between the time when Mrs. Brown and the respondent went up in the elevator, all that the state claims did happen could have happened. According to the story of Deputy Chief Young as to the conversation he had with the respondent, which according to both him and Sheriff Watts was repeated to the sheriff in the presence of the respondent, the respondent remembered all the happenings of that evening in great detail with the exception that he could not remember that he touched the fly of the McAuley boy's trousers. Would not the reaction of an innocent man to such an inquiry be: "I did no such thing"? There would be eagerness to deny, not forgetfulness.

The respondent's inquiry of the boy as to his age is important. He was a lawyer and a municipal court judge. The boy was not. The respondent undoubtedly knew that he was guilty of the

statutory offense only in case the boy was under the age of sixteen years. For us to assume that young McAuley knew the significance of his age and deliberately lied as to this inquiry is to impute to him a knowledge of the law and a devilish cunning which it is quite obvious he did not have.

In arriving at the truth in such a case as this, one of the most important factors is the opportunity that a jury has to see the principals involved, to hear their testimony, to observe their demeanor on the stand, to evaluate the testimony of witnesses from the spoken word instead of from the printed pages of a record. It was the jury's province to resolve conflicting testimony and to determine where the truth lay. We cannot say that they manifestly erred. Their verdict must stand.

The Exceptions

James L. Coakley, the operator of the elevator, testified that on the night of March 6th, 1945, Mr. and Mrs. Brown did not come up in the elevator together. This was very material testimony. It was important, almost essential, that the state should be able to establish that on the evening of March 6th they rode in the elevator at separate times. The witness was permitted to establish this fact, firstly, by testifying that it was their custom to come in together and that on this occasion they did not do so, and secondly, in order to fix the time as March 6th, the witness was asked the following question and gave the following answer:

"Q Now what else if anything happened that night that impresses you with March 6th as the date when Mr. and Mrs. Brown separately went up in the elevator?

"A Well, I hesitated when I took Mrs. Brown up in the elevator a minute thinking Mr. Brown would come. He didn't, so I brought her up alone. Then I came back down again and in a little while afterwards, perhaps six or seven minutes, Mr. Brown came along and I took him up. After that, possibly half or three-quarters of an hour

or so, it was brought to my attention something had happened out of the ordinary."

Counsel for the respondent requested that the answer of the witness as to prior custom be stricken out. The court refused to do so. To that refusal and to a reiteration and elaboration of the same subject-matter by the witness exceptions were allowed. Counsel also took an exception to the refusal of the court to strike out the answer of the witness to the effect that the incident of Mr. and Mrs. Brown riding separately was fixed in his mind as happening on March 6th by reason of the fact that it was brought to his attention that on that night "something had happened out of the ordinary."

Neither exception has merit.

We will concede without deciding that under certain conditions custom may not be admissible to prove the doing of a certain act. But the custom of Mr. and Mrs. Brown to come in together was not introduced in evidence for that purpose here. In this instance their prior custom was relevant because the failure to conform to it fixed the circumstance on the mind of the witness that on a certain night they did not ride in his elevator at the same time. There was no error in the ruling of the court admitting such evidence.

Neither was the court in error in refusing to strike out that part of the answer to the succeeding question by which the witness explained that he was able to fix the date of this occurrence as March 6th because something out of the ordinary happened that night. The rule is well settled in this state and elsewhere that evidence admissible on one ground, and offered in good faith for a legitimate purpose such as refreshing the recollection of a witness, or as showing why he was able to fix a certain date as the time when an occurrence took place, is not to be excluded from the consideration of a jury because it may be irrelevant or inadmissible on other grounds or otherwise prejudicial. *State* v. *Farmer*, 84 Me., 436, 24 A., 985; *Plourd* v. *Jarvis*, 99 Me., 161,

58 A., 774; *O'Brien* v. *J. G. White & Co.*, 105 Me., 308, 74 A., 721; *Johnson* v. *Bangor Railway & Electric Co.*, 125 Me., 88, 131 A., 1; *State* v. *Mosley*, 133 Me., 168, 175 A., 307; *Angell* v. *Rosenbury*, 12 Mich., 241; *State* v. *Fox*, 25 N. J. L., 566; *Bingham Mines Co.* v. *Bianco*, 246 Fed., 936; Wigmore on Evidence, 3 ed., Vol. I, Sec. 13; Vol. II, Sec. 655. The rule is well stated by Chief Justice Peters in *State* v. *Farmer*, supra, at page 440, 24 A., at page 986, as follows:

> "That evidence, properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it."

In the case now before us the presiding justice even without any request by respondent's counsel was scrupulously careful to explain to the jury the ground on which the evidence was admitted and to warn them that they must consider it for no other purpose. He said, in admitting the evidence: "This testimony is admitted not as testimony of, as evidence, that something did happen, but merely as evidence that tends to fix the date in his mind." Again in his charge he reiterated the same warning.

In the trial of this case the rights of the respondent were at all times scrupulously guarded. We find no error in the conduct of the trial.

Appeal dismissed.
Exceptions overruled.
Judgment for the State.

In re George R. Hadlock, Petitioner for Authority to Erect a Fish Weir in Tidal Waters.*

Hancock. Opinion, July 22, 1946.

Navigable Waters. Fish Weirs. Exceptions. Courts.

The rights of property incident to shore ownership stop at low water mark.

The requirement of a license for the erection of a weir is a valid regulation for the control of fisheries beyond low water mark.

The statutory limitation on the licensing authority authorizing the licensing of fish weirs is a real one, and a license issued in defiance of it is no protection against the liability it imposes. R.S. 1944, Chap. 86, Sec. 11.

The rights intended to be safeguarded by the statute authorizing licensing of fish weirs, are such tangible ones as unobstructed navigation and fishing, and not such intangible ones as unobstructed views or sightly prospects.

Only parties to litigation have a right to take and prosecute exceptions to rulings of law in its course.

The Law Court is a court of limited jurisdiction. When resort to the Law Court is intended to be made available, provision to that effect is set forth in the statutes.

On Exceptions.

Petitioner applied to municipal officers for a license to erect a fish weir. The application was denied and he appealed to a justice of the Superior Court who directed a license to issue. Exceptions were filed by an owner of shore property nearby. Exceptions dismissed.

George R. Hadlock,

Blaisdell & Blaisdell, for petitioner.

Woodman, Skelton, Thompson & Chapman, for Milton Lord.

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

MURCHIE, J. The proceedings to which the bill of exceptions herein presented relates originated in petitioner's application to the Municipal Officers of the Town of Cranberry Isles for a license to erect a fish weir or trap in front of his shore in the tidewaters of Broad Cove within said town. The application being denied, he appealed to a "justice of the superior court" pursuant to R. S. 1944, Chap. 86, Sec. 7. The appeal is dated December 17, 1945, was filed December 19, 1945, and was heard near the premises on January 29, 1946, pursuant to order thereon. A decree entered February 1, 1946, directed the municipal officers to issue the license sought. Attested copies of that decree and the findings on which it was based were forwarded to the parties, i.e., the petitioner and municipal officers, on that day.

The bill of exceptions was filed on behalf of an owner of shore property bordering on the Cove. Counsel for the exceptant appeared at the hearing and raised objections both to the form of the application and to the granting of the license but took no formal action to make his client a party to the process. The bill presents the petition, appeal, exhibits presented at the hearing on the appeal, findings, decree and docket entries. In the findings it is recorded that no objections were presented at the hearing before the municipal officers; that thereafter two of them wrote certain summer visitors and received objections from them; and that the application was denied. The lack of a transcript of the oral evidence taken out before the justice who heard the appeal makes it impossible to consider whether any of his factual findings lack the support of credible evidence, but this is not material if the proceedings cannot be brought forward on exceptions. That is the issue to be resolved.

The licensing of fish weirs by general law traces back to the enactment of P. L. 1876, Chap. 78. Earlier regulation had prohibited the extension of stationary weirs "into more than two

feet depth of water at ordinary low water," R. S. 1871, Chap. 40, Sec. 34. The license law constituted municipal officers as the sole licensing authority for the construction of fish weirs in their cities and towns and charged them with the duty of determining whether a proposed weir would interfere with navigation or the rights of others. If not it gave them discretionary authority to issue a license. The language conferring discretion was stricken out by P. L. 1883, Chap. 239, wherein earlier restrictions were repealed and the granting of a license to one person for placing a weir in front of the shore of another without the owner's consent was prohibited. It was restored without express legislative sanction in the statutory revision of 1883 (R. S. 1883, Chap. 3, Sec. 60), where changed phraseology leaves the meaning and effect unaltered except for the restored discretion which has since received legislative sanction in numerous amendments of the law, the first of which appears in P. L. 1911, Chap. 110.

Until 1921 there was no appeal from the decision of the municipal officers but P. L. 1921, Chap. 135, provided that any person aggrieved by their decision "in either granting or refusing to grant a license" might appeal to the commission of sea and shore fisheries, and in P. L. 1935, Chap. 88, the appellate authority was changed to "any justice of the superior court." The 1921 law provided that the decision on the appeal should be communicated to the municipal officers promptly; should bind them; and that they should issue a license if so directed. Except for the period from 1921 to 1925 the 1876 law, as amended from time to time, has governed wharves as well as weirs and fish traps but since 1921 its provisions have been especially appropriate for structures designed for catching fish. This is particularly apparent in P. L. 1923, Chap. 127, which gave the owners of islands not within the jurisdiction of any town the power and authority of municipal officers in connection with fish weirs and traps, with the equivalent of an appeal to the director of sea and shore fisheries. That provision was left unchanged when the 1935 law, *supra* (Chap. 88), substituted a justice of the Superior Court for the

commission of sea and shore fisheries as the appellate authority for weir licenses within the limits of towns.

The statute has been construed on other points heretofore. *Donnell et al.* v. *Joy et al.*, 85 Me., 118, 26 A., 1017; *Perry et al.* v. *Carleton et al.*, 91 Me., 349, 40 A., 134; *Sawyer* v. *Beal et al.*, 97 Me., 356, 54 A., 848; *Dunton* v. *Parker et al.*, 97 Me., 461, 54 A., 1115; *McLellan et al.* v. *McFadden et al.*, 114 Me., 242, 95 A., 1025. These cases indicate that the rights of property incident to shore ownership stop at low water mark; that the requirement of a license for the erection of a weir is a valid regulation for the control of fisheries beyond that mark; that the limitation on the licensing authority imposed by R. S. 1944, Chap. 86, Sec. 11, is a real one; and that a license issued in defiance of it is no protection against the liability it imposes. *Whitmore* v. *Brown et al.*, 102 Me., 47, 65 A., 516, 9 L. R. A. (N. S.), 868, 120 Am. St. Rep., 454, decides that the rights intended to be safeguarded by the license requirement are such tangible ones as unobstructed navigation and fishing and not such intangible ones as unobstructed views or sightly prospects.

The present question has never been adjudicated in this jurisdiction or in any other so far as the researches of counsel for the parties disclose. The issue presented to the justice to whom the appeal was taken was between the petitioner and the municipal officers. The exceptant was not a party to it except so far as his property ownership in the vicinity gave him an interest which entitled him to have the licensing authority determine whether the proposed erection would interfere with his rights. It is only parties to litigation who have a right to take and prosecute exceptions to rulings of law in its course. *Reed* v. *Cumberland & Oxford Canal Corporation*, 65 Me., 53; *Abbott* v. *Abbott*, 106 Me., 113, 75 A., 323. The exceptant is undoubtedly a "person" who would have been entitled to appeal from a decision by the municipal officers granting the license, on the ground that he was "aggrieved" thereby, and one of the "parties interested" for whose benefit public notice of both hearings was required. As-

suming, without deciding, that in such a process one appearing to be heard and claiming to be affected becomes a party in the sense of the decisions restricting the right of exceptions to those who are parties, it would not affect the issue.

It is not always that parties whose rights are dealt with in the Superior Court, or by one of its justices, have a right to resort to this Court sitting as a Court of Law. In some instances the law expressly provides for the finality of decisions made by justices of the Superior Court. Instances are found in the handling of motor vehicle licenses, R. S. 1944, Chap. 19, Sec. 7, and in appeals from refusals to issue marriage licenses, R. S. 1944, Chap. 22, Sec. 114. The Law Court is a court of limited jurisdiction. *Stenographer Cases,* 100 Me., 271, 61 A., 782; *Cole* v. *Cole,* 112 Me., 315, 92 A., 174. Where resort to the Law Court is intended to be made available provision to that effect is set forth in the statutes. The right is conferred in civil and criminal proceedings generally by R. S. 1944, Chap. 94, Sec. 14. It is not claimed that the present proceedings fall in either of those classes. For all other matters resort must be had to the law authorizing the process. Illustrations of legislation making express provision for exceptions are found in the State Boxing Commission law, R. S. 1944, Chap. 78, Sec. 9; in that regulating the location of highways over railroad tracks, R. S. 1944, Chap. 84, Sec. 47; and in that allowing tax appeals, R. S. 1944, Chap. 81, Sec. 45. Sometimes the result is reached by declaration that appeal proceedings shall be according to the provisions of a law carrying that right. See R. S. 1944, Chap. 79, Secs. 53 and 55, where there is express provision for a stay pending appeal, and R. S. 1944, Chap. 84, Sec. 7, where there is not. In the law under consideration the decision of the municipal officers was final from 1876 to 1921 and that of the commission of sea and shore fisheries was equally final from 1921 to 1935. The 1935 law carries no suggestion that the decision of the justice of the Superior Court hearing an appeal is not intended to be equally final. The law as then rewritten provides for the same expedition in handling the matter ("in

term time or in vacation") as was available with a commission having no fixed terms. It contains the identical requirement and recital that the decision of the appellate authority shall be promptly communicated to the parties and that it shall bind the licensing authority charged to issue a license if so directed "within 3 days."

The endorsement on the bill of exceptions is "Exceptions allowed, if allowable." The statute makes no provision for their consideration. The mandate must be

Exceptions dismissed.

LOOSE-WILES BISCUIT COMPANY

vs.

DEERING VILLAGE CORPORATION.

Cumberland. Opinion, July 22, 1946.

Landlord and Tenant. Appeal and Error. Contracts. Equity.

Where defendant took title to demised premises under a deed which carried recital at the close of the descriptive part and immediately preceding the habendum that the premises were subject to a lease to the plaintiff, and lease was excepted from the operation of full covenants of warranty, title of the defendant is subject to the plaintiff's right to occupy the premises until termination of lease.

In England, a convenant for quiet enjoyment in a lease is not construed as reaching property outside the demised premises and is interpreted with reference to such premises as they existed when the lease was executed.

Where plaintiff as lessee had right to have lessor maintain spur track on other land adjoining as long as adjoining owner permitted it, the merging of title in the defendant to the lot on which the spur track was located and the leased property, did not subject the former to a servitude in favor of the latter.

Factual findings will not be disturbed unless clearly erroneous.

The interpretation of written contracts is a question of law, and a contract should be construed in a manner which will effectuate the intention of the parties.

In the construction of contracts, words are to be given their plain, ordinary and generally accepted meaning, and if such meaning will sustain the position of either party, the intended meaning is to be determined by the context of the entire agreement, by giving consideration to the entire contract, without undue weight on a particular part. Court will go back to the day of the execution of a contract and consider the position of the parties with reference to the properties involved.

The paragraph in plaintiff's lease that a spur track should be maintained by the lessor for the benefit of the plaintiff imposed an obligation on the lessor to support the expense of maintaining the spur track so long as the owner of the land on which it was located should permit its use for the purpose contemplated, and lessee, on removal of track, had no remedy other than his right to terminate the lease, at his election, even though the same person owned the leased land and the adjoining land.

In equity, whether or not the plaintiff has an adequate remedy at law is a question of law, and where the evidence indicates that the money measure of damages is determinable, an allegation that no legal remedy is adequate is not sustained.

ON APPEAL.

Appeal by the defendant from a decree in equity enjoining the removal of a spur track located on property adjoining that occupied by plaintiff under a lease carrying the undertaking of defendant's predecessors in title, as lessors, to maintain the track for the use of the lessee, and a condition giving the plaintiff the right to terminate the lease if the track was removed. Appeal sustained. Case remanded for the entry of a decree dismissing the bill.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick, for the plaintiff.

Wilfred A. Hay,

Verrill, Dana, Walker, Philbrick & Whitehouse, for the defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

MURCHIE, J. This case is brought forward on appeal by the defendant from the decree of a single justice sitting in equity. In the process the plaintiff, as lessee of defendant's immediate predecessors in title to a parcel of land and the buildings thereon, seeks to enjoin the defendant from removing a spur track or siding which serves said parcel, and is the subject matter of an express provision in plaintiff's lease, although it is located on an adjoining lot, never owned by the lessors, which the defendant acquired after securing the title to the reversion in the leased property by a deed conveying that title subject to the lease. The issues raised can be brought into focus most effectively by a chronological recital of the pertinent title history of the separate lots.

On and prior to April 15, 1943, when the lease was executed, the leased parcel was owned by five individuals. It had been serviced since January 1, 1926, by the spur track aforesaid. The preferential use of that spur track was assured to the plaintiff under two agreements between the lessors and Portland Terminal Company, the owner of the parcel on which it was located and the operator of the railroad rendering service over it. These were a Sidetrack Maintenance and Operation Agreement dated January 1, 1942, setting forth the terms and conditions regulating the maintenance and use of the track, and a Consent Agreement dated June 5, 1942, making it available to the tenants of the lessors. The defendant took title to the demised premises, and other property, under a deed dated November 18, 1943, which carries recital at the close of the *premises*, or descriptive part, and immediately preceding the *habendum*, that:

> "Said premises are subject to two leases, one to the Loose-Wiles Biscuit Company . . . ."

Appropriate language in the *convenants* excepts the leases from

the operation of full covenants of warranty. There can be no doubt that the title of the defendant to the leased property is held subject to the plaintiff's right to occupy the premises until April 30, 1948, and thereafter until April 30, 1953, upon exercise of an option of renewal.

The parcel on which the spur track is located is referred to in the lease as "immediately adjacent" to the premises therein demised. It was owned by Portland Terminal Company prior to April 15, 1943, on that date, and thereafter until it was purchased by the defendant. Title to it, as part of a larger lot, passed in a deed runnning to the defendant which bears date of May 23, 1944, but was not recorded until November 2, 1944. In the interval prior to May 23, 1944, the defendant had acquired title to the demised premises and executed agreements with Portland Terminal Company similar to the Sidetrack Maintenance and Operation Agreement of January 1, 1942, and the Consent Agreement of June 5, 1942. On the day of the execution of these agreements the defendant was the owner of the leased property, subject to the lease, but had no manner of interest in or connection with the title to the spur track parcel.

Plaintiff asserts its claim on the basis of three paragraphs in the lease which set forth respectively a covenant of quiet enjoyment, an undertaking by the lessors in connection with the maintenance of the spur track which contains a condition giving the lessee the right of termination on the happening of a named event, and a recital that the provisions of the lease should bind, and inure to, the assigns of the parties. In their pertinent parts, these read:

> "The Lessors covenant and agree that the Lessee . . . shall and may peaceably and quietly . . . enjoy the demised premises . . . ."

> "It is agreed and shall be made a condition of this lease that a spur switch track . . . shall be maintained by the Lessors for the use of the Lessee, and should said . . . spur

be removed, or the use thereof interfered with . . . the said Lessee shall have the right and privilege of terminating this lease."

"It is covenanted and agreed . . . that the covenants . . . shall be binding upon and apply and inure to the . . . assigns of the respective parties."

A memorandum, filed prior to the entry of the decree, recites findings that:

". . . it was the intention . . . that the lessors should be obligated to furnish . . . the spur track so far as it was and should be under their control."

"It was not in accordance with the intention . . . that the lessors . . . should be relieved of the obligation by acquiring the interest of the Portland Terminal Company."

"the use of the spur track was an essential requirement to the plaintiff as lessee"

and

"if denied such use the lessee would be without adequate remedy by action at law."

If these recitals constituted factual findings they would be entitled to the benefit of the principle declared in *Young* v. *Witham,* 75 Me., 536, ever since maintained, that they should not be disturbed on appeal unless clearly erroneous. Actually they are findings, or rulings, of law, as the language used discloses. The first two find intention and while the law is clear that contracts should be construed in a manner which will effectuate the intention of the parties, *Erskine* v. *Moulton,* 66 Me., 276; *Ames* v. *Hilton,* 70 Me., 36; *Bell* v. *Jordan et al.,* 102 Me., 67, 65 A., 759, it is recognized that the interpretation of written contracts is a question of law. *Guptil* v. *Damon,* 42 Me., 271; *Hoyt* v. *Tapley,* 121 Me., 239, 116 A., 559. The essentiality of the spur track

has no bearing on the case unless the lessors contracted to furnish it as part of the leased property. Whether a litigant seeking equitable relief has an adequate remedy at law is a question of law.

The decree sustains the plaintiff's bill and permanently enjoins the defendant, its agents and servants (in accordance with the prayer of the process), from removing the spur track or interfering with the plaintiff's use of it during the term of the lease, or renewal. The injunction is potentially effective through April 30, 1953. It prohibits the defendant from utilizing its title on the basis of a negative intention, and from conveying that free title which it acquired from its predecessor in title. Counsel for the plaintiff conceded at oral argument that the owner of the property when the lease was executed, or any grantee other than the defendant (or one holding title to the leased premises), would have the right to remove the spur track. The effect of the injunction therefore is to hold that the merging of title to the lot on which the spur track is located and the leased property in a single owner subjected the former to a servitude in favor of the latter.

Defendant's appeal presents the issue as to whether the injunctive relief sought and obtained is available to the plaintiff, assuming the breach of contract alleged and that damages cannot be compensated by a money verdict, and additional ones, perhaps more fundamental, whether the lease contains a contract which bound defendant's immediate predecessors in title in the manner asserted, regardless of the will of the owner of the land on which the track is located, and whether the defendant is so bound by reason of its acquisition of title to the separate parcels.

We deal with the question of remedy first because the situation is unique and we feel, as was stated in *Myers* v. *Gemmel,* 10 Barb., 537 (New York Supreme Court), that:

> "A rule . . . blindly fettering estates without any written evidence of right . . . should not be adopted . . . unless it is clearly the law."

In the New York case, *supra* (10 Barb., 537), as in three English cases to which the defendant cites us, *Booth* v. *Alcock,* L. R., 8 Ch., 663 (1873 B., 72); *Leech* v. *Schweder,* L. R., 9 Ch., 463 (1873 L., 100); and *Davis* v. *Town Properties Investment Corporation, Limited,* L. R. 1903, 1 Ch., 797; injunctions originally granted were dissolved on the ground that a lessee acquired no rights in one parcel of land by leasing an adjacent one. In the English cases the rights were sought to be asserted under a covenant of quiet enjoyment and the plaintiff herein alleges such a covenant as one ground for relief. Declarations with reference to covenants of quiet enjoyment in the *Leech* case, supra (L. R., 9 Ch., 463), that it:

> "does not increase or enlarge the rights . . . granted by the previous part of the conveyance"

and in the *Davis* case, supra (L. R. 1903, 1 Ch., 797), that it does not enlarge the obligation of the lessor with reference to any rights other than:

> "those incident to the demised premises such as they were at the time of the demise"

indicate clearly that in England a covenant for quiet enjoyment is not construed as reaching property lying outside the demised premises and is interpreted with reference to such premises as they existed when the lease was executed. These decisions have particular force because of the common law principle of English law relative to prescriptive rights in light and air. That principle controlled the decision in *Story* v. *Odin,* 12 Mass. 157, 7 Am. Dec., 46, but that case was never followed and was overruled in effect by *Keats* v. *Hugo,* 115 Mass. 204, 15 Am. Rep., 80. An annotation in 7 Am. Dec. (49), reviews numerous cases dealing with the subject matter. The New York Court, in *Myers* v. *Gemmel,* supra (10 Barb., 537), expressly declared that the English common law on the point was not applicable under the changed conditions prevailing in this country. What the plain-

tiff seeks here would require us to go further than the English common law and no precedent has been presented which would justify us in going so far. The Massachusetts Court, in *Royce* v. *Guggenheim,* 106 Mass., 201, 8 Am. Rep., 322, drew a distinction between the acts of a landlord or lessor performed in good faith for the purpose of improving his estate and those designed to injure a tenant. It is expressly stipulated here that the action of the defendant enjoined was intended to serve a proper purpose and was contemplated in entire good faith.

The plaintiff relies on an alleged agreement to maintain the spur track as well as on the covenant of quiet enjoyment. In argument counsel for the plaintiff supports his contention in this regard by reference to certain dictionary definitions of the word "maintained" and by citations to particular paragraphs in the Restatement of Contracts and Williston & Thompson on Contracts. These will be referred to in considering the contract issue but we note in connection with the remedy sought that the premises demised are a

> "One-story building on property at 167-169 Forest Ave. Portland, Maine"

and that the spur track is located without the limits of it. It is property adjacent to the demised premises to which the injunction relates. The lease when executed could not have imposed a servitude upon it because the lessors held no shadow of claim to its title but merely a right of use during the pleasure of the owner. It could not have operated in that manner when defendant acquired the reversion because said defendant had no title to it at that time. The only possibility is that the servitude attached when the defendant, as owner of the reversion, took title. The facts are not such, however, as bring into operation the principle of law, well established in this State, that a grantee of one who has warranted a title he did not possess takes the title warranted if his grantor subsequently acquires it. *Pike* v. *Galvin,* 29 Me., 183; *Powers* v. *Patten,* 71 Me., 583; *Lapitre* v. *Breton,* 134

Me., 300, 186 A., 706. That principle is grounded in an estoppel which prohibits one bound by a covenant of title, or those claiming under him, from asserting an adverse one subsequently acquired by the warrantor. 19 Am. Jur., 610, Par. 12. In *Fairbanks et al.* v. *Williamson,* 7 Me., 96, such an estoppel was declared to result from a limited covenant but that case was expressly overruled in the *Pike* case, supra (29 Me., 183), where in discussing covenants running with the land the fundamentals applicable thereto were stated in the words:

> "But a covenant, which may run with the land, can do so only when the land is conveyed. It can only run, when attached to the land, as its vehicle of conveyance."

The language of the lease shows clearly that no covenant of title was intended. The spur track is said to be located on land not owned by the lessors. Mr. Justice Wells dissented from the opinion in the *Pike* case, supra (29 Me., 183), but his dissent does not challenge the general principles stated in the quoted excerpt. See the dissenting opinion in 30 Me., 539 and also *Bennett* v. *Davis,* 90 Me., 457, 38 A., 372. Without reference to the issue of defendant's contractual liability it must be held that the land on which the spur track is located was not impressed with a servitude by defendant's acquisition of the title to it after becoming the owner of the reversion following the leasehold estate. The appeal must be sustained and the injunction dissolved.

On the record the plaintiff's allegation that a remedy at law would not be adequate, assuming that the lease imposed a definite obligation on the lessors to maintain the spur track during the term of the lease, and defendant's liability thereon, is not supported. The direct testimony of its principal witness is that the leased premises could not be used for its business there conducted without a siding at the door for discharging incoming freight but the cross-examination discloses that the explanation lies in anticipated prohibitive cost. Later suggestion, against the intimation that a convenient siding rather than one at the

door might service the plant, was that the goods handled were subject to breakage on long highway hauls. In support of this suggestion the witness offered the experience of substantial damage done in transporting a few loads from Boston in a trailer truck. No effort was made to show that receipt of incoming freight at a convenient siding was unworkable except by reference to increased cost. Such impossibility as results from that is compensable in money damages. Factually the case shows that defendant offered plaintiff a new siding at the door of the plant and more building space at an increased rental. Under such an arrangement the money measure of a breach of contract, if one was involved, could be established with exactitude.

The question of remedy is unimportant unless the contract is construed as imposing a liability on the lessors and their assigns to furnish the spur track to the lessee during the leasehold term. On that issue the plaintiff bases its claim in part on the word "maintained" and the principle of law that in the construction of contracts words are to be given their plain, ordinary and generally accepted meaning. This principle is well established. *Hawes et al.* v. *Smith,* 12 Me., 429; *E. A. Strout Co.* v. *Gay,* 105 Me., 108, 72 A., 881, 24 L.R.A. N.S., 562. Relying on it the plaintiff refers us to certain definitions given in Webster's New International Dictionary. These are:

> "to hold or keep in . . . a state of efficiency; to keep up; not to suffer to fail or decline."

Additional meanings, found in Webster's Universities Dictionary, are:

> "To continue; not to suffer to cease;"

and:

> "to support the expense of."

In so far as intention is to be determined by the use of the word "maintained' 'it is clear that one of the plain, ordinary and gen-

erally accepted meanings of it will sustain the position of either party. In such cases its intended meaning is to be determined by the context of the entire agreement. *Amey et al.* v. *Augusta Lumber Co.*, 128 Me., 472, 148 A., 687.

To give the word "maintained" the meaning which reflects the intention of the parties to the contract we must go back to the day of its execution and consider the position of those parties with reference to the properties involved. It is in that manner that contracts should be construed. *Sewall et al.* v. *Wilkins*, 14 Me., 168; *Bucksport & Bangor Railroad Co.* v. *Inhabitants of Brewer*, 67 Me., 295. The intention is to be garnered by giving consideration to the contract as a whole, without undue weight for a particular part. *Erskine* v. *Moulton*, supra (66 Me., 276); *Ames* v. *Hilton*, supra (70 Me., 36); *Bell* v. *Jordan et al.*, 102 Me., 67, 65 A., 759; *Skowhegan Water Co.* v. *Skowhegan Village Corporation*, 102 Me., 323, 66 A., 714. Neither party had any shadow of title to the spur track parcel. The lessors owned the demised premises. The lessee occupied them. The lessors had an agreement or agreements making the track available for use in connection with the leased property by the railroad rendering the service. That the railroad was the owner is unimportant. Nothing in the side track agreements encumbered the title. Nothing in the lease suggests that they did. The particular paragraph imposed an obligation on the lessors to support the expense of maintaining the spur track so long, during the term of the lease, as the owner of the land on which it was located should permit its use for the purpose contemplated. The parties did not give the spur track that degree of essentiality conferred upon it in the findings. Their agreement was that if it should be removed, or its use interfered with, the lessee should have the right to terminate the lease.

The plaintiff cites us to the Restatement of Contracts and to Williston & Thompson on Contracts and quotes excerpts from these authorities which it is claimed assert the principle that whenever it is doubtful whether particular words of a contract

create a promise or a condition they should be interpreted as carrying a promise, Restatement, Vol. 1, Pages 375-376, Sec. 261; and that the recital of both promise and condition is designed to secure the fullest protection, Williston & Thompson, Vol. 3, Page 1909, Sec. 664. The quoted paragraph from the Restatement is followed by comment indicating that the section itself "involves merely a question of interpretation" and referring to other text material, both preceding and to follow, which supports the general principle already stated. Declaring a written document to be the integration of a contract, this authority declares that the meaning is that which would be attached to it by:

> "a reasonably intelligent person acquainted with all the circumstances prior to and contemporaneous with the making of the integration."

If consideration is given to the situation of the parties at the time the contract was integrated, and particularly to their situation with reference to the separate properties with which their contract dealt, it is apparent that there could have been no binding obligation intended to be assumed by the lessors, or which the lessee should have believed the lessors were undertaking, to commit the spur track parcel to the purposes of the lease. As to this defendant the issue is once removed. Under the contract between plaintiff's lessors and the defendant, by which the defendant secured the title to the reversion, the latter undertook no obligation for the benefit of the plaintiff. The defendant, it is true, accepted the title subject to the plaintiff's lease but it would be stretching the principle which gives third party beneficiaries the benefits of contracts to which they are not parties beyond anything heretofore known to hold that by the mere acceptance of a title encumbered by a lease a grantee bound himself to do something with property lying outside the leased premises which neither his grantor nor any other predecessor in title was obligated to do.

So far as the spur track is concerned the contract contained in

the lease gave the plaintiff as lessee that right it clearly expresses and no more, i.e., the right to terminate the lease at its election if the spur track was removed, or its use interfered with, and if the property proved unsatisfactory for its purposes without the use of that facility.

The case must be remanded for the entry of a decree dismissing the plaintiff's bill.

Appeal sustained. Case remanded for the entry of a decree dismissing the bill.

NATHANIEL HASKELL, ADMR. *vs.* STUART HERBERT.

Cumberland. Opinion, July 23, 1946.

Trial. Death. Automobiles.

A verdict should not be ordered by the trial court when, giving the party having the burden of proof the most favorable view of his facts and of every justifiable inference, different conclusions may fairly be drawn from the evidence by different minds.

To establish liability based on Lord Campbell's Act, it is incumbent on the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he would avoid liability, to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury.

It is the duty of a driver of an automobile to stop his car when for any reason he cannot see where he is going.

The deceased, who had started to cross a street, was not bound to anticipate that defendant's automobile traveling in a westerly direction would be turned from the northerly half of the street and be steered onto the rail of a car track and strike plaintiff, when defendant had 18 feet of the street on which to proceed without danger of striking deceased.

ON EXCEPTIONS.

Action of negligence brought by administrator of deceased against defendant for death. Motion for a directed verdict was granted by trial court. To this ruling, plaintiff filed exceptions. Exceptions sustained and new trial ordered.

Wilfred A. Hay,

Mayo S. Levenson, for plaintiff.

William B. Mahoney, for defendant.

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

HUDSON, J. This is an action of negligence brought by the administrator of the deceased, one Fred A. Morin, under the provisions of Chap. 152, Sections 9 and 10 of the Revised Statutes of 1944 (known as Lord Campbell's Act), to recover damages for death without conscious suffering of Mr. Morin. At the close of the testimony, counsel for the defendant moved for a directed verdict, which was granted. To this ruling the sole exception relates.

It is elemental that

> "A verdict should not be ordered by the trial court when, giving the party having the burden of proof the most favorable view of his facts and of every justifiable inference, different conclusions may fairly be drawn from the evidence by different minds. *Young* v. *Chandler,* 102 Me., 251."

Collins v. *Wellman,* 129 Me., 263, on page 264. Also see *Johnson* v. *Terminal Co.,* 131 Me., 311, 312, 313; *Gould* v. *Transportation Co.,* 136 Me., 83, on page 84; *Collins* v. *Maine Central Railroad Co.,* 136 Me., 149, on page 151; and *Gold* v. *Portland Lumber Corp.,* 137 Me., 143, 144.

Sec. 50 of Chap. 100, R. S. 1944, provides:

> "In actions to recover damages for negligently causing

> the death of a person, or for injury to a person who is deceased at the time of trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant."

In *Bechard, Adm'x* v. *Lake,* 136 Me., 385, also a death liability case based on Lord Campbell's Act, it is stated on page 387:

> "It is incumbent upon the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he would avoid liability to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury."

So in the case at bar the plaintiff to recover would have the burden to prove negligence of the defendant as the proximate cause of the death of the deceased, and if proved, the defendant would have the burden to overcome the presumption of due care upon the part of the deceased.

The accident happened at about 7:30 o'clock in the evening of January 2, 1945, approximately in the middle of Veranda Street where Whittier Street enters it from the north. Veranda Street "is a through way, being the main travel artery entering Portland from the east," and is a part of U. S. Highway Route No. 1. It is 42 feet in width between curbs with an electric car line running along its center. As one travels easterly on Veranda Street in that section he comes to Whittier Street entering from the north, then Olympia Street and further on Oregon Street, both entering from the north. Opposite the entrance of Whittier Street into Veranda Street there is a manhole between the rails of the electric car track. On the south side of Veranda Street approximately 87 feet easterly of the manhole there is a bus-stop. Here Veranda Street curves slightly to the south. But ample vision is

possible in each direction on Veranda Street from where this collision took place. There are some buildings delineated on the plan on the north side of Veranda Street in this locality but none on the south side until the Tydol station is reached on the south side of the street just westerly of the Marine Hospital.

From the evidence introduced the jury could have found these facts: that Mr. Morin boarded a bus near the City Hall in the city of Portland and rode in it until he alighted therefrom at the bus-stop above mentioned; that he then proceeded along the side of the bus to its rear, where he started to cross Veranda Street to the north, and when he reached the southerly rail and entered the area between the two rails of the electric car track, he was hit by the defendant's automobile, which was proceeding westerly along Veranda Street at an approximate speed of 25 miles per hour; that the defendant, with his lights on, did not see Mr. Morin at all before the collision and then not until, having swung his car to the north curb of the road (his windshield having been shattered by contact with some object), he had gotten out of it and had come back where he found Mr. Morin's body lying between the rails in the middle of the road close to a pool of blood just easterly of the manhole; that the defendant, before reaching the bus-stop, had been driving westerly on the northerly side of Veranda Street in the northerly half thereof, which half in width was at least 18 feet, but for some unknown reason had swerved his car to the south into the area between the two rails of the car track, and but for this turning, had he been attentive, he might have proceeded northerly of the rails and averted any collision at all.

Under the foregoing facts, was a case presented that should have been sent to the jury for factual determination on the issue of negligence? We think so.

If it were true that lights of approaching vehicles blinded the vision of the defendant, that only increased his duty of care. In *Day* v. *Cunningham,* 125 Me., 328, this Court said on pages 330 and 331:

"The jury may have reasoned that the defendant should have applied his brake when he became blinded by the street car's glaring headlight, without waiting until he saw the plaintiff (to quote his language) 'right out in front of my radiator' when it was too late to save her. Such reasoning was not erroneous.

"'It is the duty of a driver of an automobile to stop his car when for any reason he cannot see where he is going.' . . .

"'No man is entitled to operate an automobile through a public street, blindfolded. When his vision is temporarily destroyed (by a glaring light) it is his duty to stop his car.'" Also see *House* v. *Ryder,* 129 Me., 135, 139.

The jury would also have had the right to consider the fact that the defendant was approaching a bus-stop where a bus had stopped of which he knew or should have known. In *House* v. *Ryder,* supra, this Court said on pages 139 and 140:

"Not only must he expect passengers on the side of the car from which they alight, but he must anticipate that some passengers may pass behind the car to the other side. *Day* v. *Cunningham,* supra, 125 Me., 328. If the motorist seeks to avoid the charge of negligence on the ground that he is unable to know whether the street car has stopped to accommodate passengers, because of the glare of the light on the street car, or for other reasons, the reply is that he must not recklessly proceed upon his way under circumstances of doubt, he must know or, failing to know, should bring his car to a stop as in cases where his vision is blinded by a glare." Also see *Blanchette, Adm'x* v. *Miles,* 139 Me., 70, 72.

The jury under these facts might have found him to be driving inattentively, although not at excessive speed, and that he did not have his automobile under such control as he should have had in such a place of danger. We consider that there was ample evi-

dence of negligence to require the submission of this case to the jury on that issue.

The burden of proving contributory negligence upon the part of the deceased being placed by the statute on the defendant as above stated, was this presumption overcome by him? We think not. After leaving the rear end of the bus, the deceased started to cross the street. He was not bound to anticipate that the defendant's automobile would be turned from the northerly half of the street and be steered onto the rails when the defendant had 18 feet of the street on which to proceed without danger of collision with the deceased.

> "It is not a reasonable inference from any proven facts to assume that the deceased was negligent when he had arrived at a point where he was beyond the danger of being struck by a car which had ample opportunity to proceed on the right hand side of the street." *Ramsdell, Admin.* v. *Burke,* 140 Me., 244, 249.

The only eye witness to the collision was Miss Semple, offered by the defense, and her testimony is strongly corroborative of the position taken by the plaintiff both as to negligence and lack of contributory negligence. She testified that Mr. Morin in starting to cross the street had only reached a place between the two rails when he was hit. She saw the defendant swerve his car onto the rails where the deceased was. He then was in a place of safety and would have continued so to have been had not the defendant left the 18-foot wide lane northerly of the car tracks, crossed over to the position of the deceased, and run him down.

Consequently, viewing the evidence in the case in the light most favorable to the plaintiff, as well as every justifiable inference, and believing that at least different conclusions might fairly be drawn from the evidence by different minds (*Collins* v. *Wellman,* supra, 129 Me., 263), and that there was sufficient evi-

dence to justify the jury in finding a verdict for the plaintiff which could have been held by him (*Johnson* v. *Terminal Co.*, supra, 131 Me., 311), we hold error in the direction of the verdict for the defendant.

Exception sustained.
New trial ordered.

Fellows, J., did not participate.

BEULAH M. STODDER *vs.* COCA-COLA BOTTLING PLANTS, INC.

Sagadahoc. Opinion, July 26, 1946.

Res Ipsa Loquitur. Evidence.

The maxim of *res ipsa loquitur,* "the thing itself speaks," is applicable where there has been an unexplained accident and the instrument that caused the injury was under the management or control of the defendant and in the ordinary course of events the accident would not have happened if the defendant had used due care.

If instrument which caused injury was in the possession and control of the plaintiff, the *res ipsa loquitur* doctrine does not apply.

Evidence of the breaking of a bottle after the bottle had left the control of the defendant, a Coca-Cola Bottling establishment, is not sufficient to make a prima facie case of negligence without proof of any other circumstances indicating failure on the part of the defendant to use due care.

In suit for damages caused by bursting of bottle, evidence of previous bursting of similar bottles not admissible.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Action of negligence brought against defendant for injuries received from bursting Coca-Cola bottle. Evidence of previous bottle explosions was offered by plaintiff and admitted. Jury re-

turned verdict for plaintiff. Defendant filed exceptions and motion for a new trial. Motion for new trial sustained. Exceptions sustained.

Edward W. Bridgham,

Harold J. Rubin, for the plaintiff.

John P. Carey,

Locke, Campbell, Reid & Hebert, for the defendant.

SITTING: STURGIS, C. J., HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is an action of negligence brought by *Beulah M. Stodder* v. *Coca-Cola Bottling Plants, Inc.* There was a verdict for the plaintiff in the sum of $1,444.46. The case comes to the Law Court on defendant's exceptions, and motion for new trial.

The plaintiff, Beulah M. Stodder, on July 24, 1944, operated a small restaurant in Bath, Maine, where she sold sandwiches, ice cream, and soft drinks. On that day the plaintiff purchased from the defendant two cases of Coca-Cola and these were delivered to her by an employee of the defendant. The day was warm, and the bottles had been carried by truck from Lewiston to Bath.

The driver carried the cases of Coca-Cola from the truck into the plaintiff's restaurant and placed them on the floor. After the driver left, the plaintiff took out a bottle of Coca-Cola to place the same in the cooler for refrigeration. While she was transferring the bottle, the bottle burst, causing injuries to the plaintiff's hand.

The plaintiff claimed that she did not strike the bottle against any hard object, and insists that the cause of the explosion must have been over carbonation. The plaintiff and also an employee testified, over objections of the defendant, that three weeks before, two bottles of Coca-Cola had exploded in her store.

The allegations in the declaration were that the defendant

> "so carelessly, negligently and wantonly caused said 'Coca-Cola' to be bottled with such an excessive amount of carbonation that when the plaintiff attempted to take hold of one of the aforesaid bottles of 'Coca-Cola' which she had purchased from the said defendant, the said bottle exploded by reason of the excessive amount of carbonation inserted therein by the defendant's servants and agents."

The allegation of negligence in the declaration, is excessive carbonation. The declaration makes no claim of any crack or other defect in the bottle. There is no general count for negligence.

It is well known that Coca-Cola and other "soft drinks" consist of syrup placed in a bottle into which is poured water containing carbonic acid gas. The bottle is then capped. The gas makes a sparkling drink, when the contents of the bottle are taken out. While the product is confined in the bottle there is necessarily a greater or lesser degree of pressure.

There was no evidence of negligence submitted by the plaintiff beyond the breaking of the bottle, and the fact, strenuously objected to, and to which exception was taken, that on a date three weeks previously another bottle, or two other bottles, which she bought of the defendant, had broken in her restaurant without apparent cause. The bottle was a standard bottle and there was no evidence of negligence in the defendant's plant where the bottling was done. The plaintiff relies on the doctrine of *res ipsa loquitur* to make a prima facie case.

The defendant showed that a carbonated and palatable beverage has an internal bottle pressure of from 30 to 45 pounds per square inch. If the pressure is under 30, the drink is flat and insipid; if it is over 45, it is sharp and disagreeable. Hourly tests are therefore made to keep the pressure between 30 to 45 pounds. When filling a bottle, if the pressure becomes excessive, the contents are likely to foam out before the bottle can be capped, or, if capped, the cap will undoubtedly leak and permit the gas to

escape. From experiments made with standard Coca-Cola bottles, the tensile strength of the glass will ordinarily withstand a pressure of 500 pounds. The bottle was not made by the defendant, but was purchased as a standard Coca-Cola bottle from a reputable manufacturer.

In actions for negligence it is the general rule that a person asserting negligence, or other wrong, has the burden of proof. It is also the general rule that the mere fact of injury does not indicate negligence on the part of anyone. Sometimes, however, slight proof is sufficient to raise a presumption of negligence, and the burden is thus cast upon the other party to explain. Thus a prima facie case is made out where it appears that an accident occurred to the plaintiff, without fault on his part, while he was a passenger of a common carrier, by reason of the failure of the machinery or other means provided by the defendant for transportation, *Stevens* v. *E. & N. A. Railway,* 66 Me., 74; or, where an automobile and the operation thereof are within the control of the defendant, an accident may be prima facie evidence of negligence on the part of the defendant. *Chaisson* v. *Williams,* 130 Me., 341, 156 A., 154.

The maxim of *res ipsa loquitur* "the thing itself speaks" might, in practice, be translated, "the accident spells negligence." It does not dispense with the requirement that the one who alleges negligence must prove it. It is a rule of evidence that relates to the mode of proof. It is applicable, where there has been an unexplained accident, and the instrument that caused the injury was under the management or control of the defendant, and in the ordinary course of events the accident would not have happened if the defendant had used due care. The unexplained circumstances may, in a particular case, warrant an inference of negligence. The inference can be rebutted by the defendant upon showing how the accident actually happened, and that it was not defendant's fault, or by showing that the defendant had done his full duty in trying to guard against it. *A. & P. Co.* v. *Kennebec Water Dist.,* 140 Me., 166, 34 A., 2d, 729. There must be negli-

gence. The defendant is not an insurer. *Edwards* v. *Power and Light Co.*, 128 Me., 207, 146 A., 700.

It must not be a question of conjecture. The circumstances of the accident must indicate negligence. *Nichols* v. *Kobratz*, 139 Me., 258, 29 A., 2d, 161; *Winslow* v. *Tibbetts*, 131 Me., 318, 162 A., 785. If there are several reasons why the accident may have happened, for some of which the defendant would be liable, and others for which defendant would not be liable, the jury is not at liberty to guess which reason caused the accident. *Deojay* v. *Lyford*, 139 Me., 234, 29 A., 2d, 111. Where, in a negligence case there are two or more possible causes and the true cause is conjectural, "the Court cannot, and the jury should not, select." *McTaggart* v. *Railroad Co.*, 100 Me., 223, 60 A., 1027.

In this case the instrumentality, viz., the Coca-Cola bottle, was not, at the time of the accident, in the possession of the defendant or under the defendant's control. It was in the possession and control of the plaintiff. The plaintiff contends that it should be considered as in control of the defendant, because it had so recently been in the possession of the driver of defendant's truck and there had been no change in circumstances. If the rule, that the instrument should be in the control of defendant, can be changed "for a few minutes," why not for a longer period?

The facts in this case also indicate that the breaking might have been from any one of several causes, such as "over carbonation," as claimed; a bottle "partially broken"; a bottle injured by striking or being struck by a hard object; excessive shaking on a hot day; some latent and not discoverable defect for which no one would be responsible, or, an "accident for which there is no adequate explanation." *A. & P. Co.*, v. *Kennebec Water Dist.*, supra, 140 Me., 166, 34 A., 2d, 729.

We hold that evidence of the breaking of a bottle, after the bottle has left the control of defendant, and without proof of any other circumstance indicating failure on the part of the defendant to use due care, is not sufficient to make a prima facie case of negligence.

This leads us to a consideration of the defendant's exception relative to evidence admitted of previous explosions. The plaintiff and an employee testified, under objection, that plaintiff had purchased from the defendant, three weeks before the accident, several cases of Coca-Cola, and that for some unknown cause two of the bottles were found broken in the cases on the floor. What had happened to the bottles previously, if anything, or under what circumstances the breaking occurred, was not shown. Witnesses testified to hearing the noise of an explosion or breaking in the room where the cases were kept, and, on going to investigate, found pieces of glass and contents "all over the floor." This evidence was not admissible. The question for determination was whether the defendant was negligent at this time,—not at some earlier time and perhaps under different conditions. Previous happenings, or previous omissions of duty, if there were omissions, do not prove negligence. "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." *Parker* v. *Portland Publishing Co.*, 69 Me., 173, 174; *Damren* v. *Trask*, 102 Me., 39, 65 A., 513.

The precise question here involved has never been decided in Maine, and the plaintiff urges us to adopt the rule of some southern states which apparently holds that the doctrine of *res ipsa loquitur* may not be applicable to the bursting of a single bottle, but with other evidence of other explosions, a case is presented sufficient to go to the jury. We feel, in holding as we do, that *res ipsa loquitur* does not apply where the only circumstance shown is the bursting of a bottle while in the plaintiff's possession or control, and, in holding evidence of other explosions at other and earlier times is not admissible, that we are following the law of Maine as carefully considered in previous decisions of this Court relative to the *res ipsa* rule and relative to inadmissible testimony. We see no reason to change.

For discussion of this form of the *res ipsa* rule, in vogue only in a few jurisdictions, see *Dail* v. *Taylor*, 151 N.C., 287; 66 S. E., 135,

28 L. R. A. N. S., 949; *Cashwell* v. *Fayetteville Pepsi Cola Bottling Co.*, 174 N. C., 324; 93 S. E., 901; *Grant v. Graham Chero-Cola Bottling Co.*, 176 N. C., 256; 97 S. E., 27, 4 A. L. R., 1090; *Winfree* v. *Coca-Cola Bottling Co.*, Tenn., 83 S.W. (2nd), 903; and see decisions under Civil Code of Georgia, *Payne* v. *Rome Coca-Cola Bottling Co.*, 10 Ga., App. 762, 73 S. E., 1087; *Macon Coca-Cola Bottling Co.* v. *Crane*, Ga., 190 S. E., 879; and *Stolle Aplt.* v. *Anheuser-Busch*, Mo., 271 S. W., 497; 39 A. L. R., 1001. See also 22 Am. Jur. 214 "Explosions" Sec. 97. We have examined the record with care, and had the North Carolina rule been adopted in this State it would not have availed the plaintiff in this action, for the reason that the defendant produced evidence which, in our opinion, fully rebutted any possible inference of negligence. Undoubtedly the jury permitted sympathy for an injured plaintiff to outweigh legal proof.

It is not necessary to discuss the other exceptions of the defendant, including exceptions to refusal to direct a verdict and exceptions to certain portions of the charge, as they necessarily involve the propositions already discussed.

Motion for new trial sustained.
Exceptions sustained.

ST. PIERRE'S CASE.

Androscoggin. Opinion, August 3, 1946.

Workmen's Compensation.

The Industrial Accident Commission, as a trier of facts in compensation cases, is charged with the duty of determining what an employee is able to earn while partially incapacitated.

ON APPEAL.

Employee appeals from a decree of the Superior Court based on an award of Industrial Accident Commission made on an employer's Petition for Review of Incapacity, suspending payment of compensation. Appeal sustained. Decree of sitting justice reversed. Case recommitted to Industrial Accident Commission for further proceedings.

Berman & Berman, for employee.

William B. Mahoney, for employer.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

MURCHIE, J. The employee herein has taken an appeal from the decree of a justice of the Superior Court entered pursuant to an award of the Industrial Accident Commission made on a Petition for Review of Incapacity filed by her employer as authorized by R. S. 1944, Chap. 26, Sec. 38. The petition is dated September 17, 1945, and the award was made on October 23, following a hearing held on October 15, 1945. The petition will be referred to hereafter as the Second Petition because the compensation which was being paid for partial incapacity when it was filed was based on an award made by the Commission on a similar petition filed while the employee was drawing compensation for total incapacity. That petition will be referred to hereafter as the First Petition.

The copy of the agreement which appears in the record does not show that it was approved by the commissioner of labor and industry, as R. S. 1944, Chap. 26, Sec. 32 requires, but compensation was paid under it until July 21, 1944, and was terminated by the award on the First Petition. The award on the Second Petition recites that compensation shall be paid to and including

October 15, 1945, at a rate which is that fixed in the earlier award, and that further compensation shall be paid:

> "only after hearing upon a petition to be filed by the employee after sustained efforts to work in a remunerative occupation and demonstrated earning capacity or lack of one."

The record contains a copy of the First Petition and the award thereon. The latter and the cross-examination of the employee at the hearing on the Second Petition disclose that the doctors who had examined her prior to the first hearing and the physician who testified at the second believed her capable of doing "light" work and that it would be for her advantage to re-engage in employment of some sort, or make the attempt. The award is designed to compel her to do so to provide a yardstick for the accurate measurement of her partial incapacity.

The issue is the propriety of such an award. In testing it the circumstances of the accident, the injuries and the compensation paid are unimportant. The Workmen's Compensation Act fixes the time when compensation shall commence and establishes alternative bases for determining the amount of it, i.e., agreement between the parties or award of the Commission on petition. It provides a fixed basis for measuring the amount when the incapacity of the employee is total, R. S. 1944, Chap. 26, Sec. 11, and a yardstick for the measurement of it when the incapacity is partial, R. S. 1944, Chap. 26, Sec. 12. That yardstick requires factual finding of the difference between the earnings of the employee before an injury and his ability to earn thereafter. While compensation is being paid, under either an agreement or an award, a review of incapacity is available on the petition of either an employee or an employer, and such a review may be had on the petition of an employee after compensation has been discontinued by decree or approved settlement receipt. R. S. 1944, Chap. 26, Sec. 38.

The parties recognize that the issue is as stated. The appellee

meets it squarely by asserting that the authority to make such an award has been recognized in this jurisdiction and in Connecticut. The assertion is made in reliance on the decisions in: *Ray's Case,* 122 Me., 108, 119 A., 191, 33 A. L. R., 112; *Connelly's Case,* 122 Me., 289, 119 A., 664; *Milton's Case,* 122 Me., 437, 120 A., 533; *Foley* v. *Dana Warp Mills et al.,* 122 Me., 563, 119 A., 805; *Hustus' Case,* 123 Me., 428, 123 A., 514; *Reilley* v. *Carroll et al.,* 110 Conn., 282, 147 A., 818; *Tarascio* v. *S. C. Poriss Co. et al.,* 116 Conn., 707, 164 A., 206; and *Ferrara* v. *Clifton Wright Hat Co. et al.,* 125 Conn., 140, 3 A., 2d, 842. Several of these indicate that the willingness of an employee to return to work and his diligence in seeking employment, or the lack of it, are elements for consideration in determining the ability to earn which measures compensation for partial incapacity, but none of them support the principle for which they are cited.

The issue is where the burden of proof lies. The words "burden of proof" appear in only two of the cases cited. The reference to it in *Milton's Case,* supra (122 Me., 437), is not helpful, although it may be said to recognize that an employer seeking a review has the burden of establishing factually that his employee's incapacity has diminished (or ended). *Connelly's Case,* supra (122 Me., 289), declares this with entire definiteness. Thereafter it uses the language which the appellee quotes to sustain its position and which we requote in part:

> "When a petitioner for review has shown an ability to . . . work . . . he has sustained the burden upon him as the moving party . . . . It then . . . becomes the burden of the employee to meet this by showing he has used reasonable efforts to obtain . . . work and failed . . . ."

Its meaning and effect can be determined most accurately by bearing in mind that the proceeding was a petition for review filed by the employer while compensation for total disability was being paid and that the award was for the continued payment of

it on the ground that the employee was unable to do the kind of work he was doing when injured. The allegation of a petition for review is that:

> "the incapacity for which the employee is being compensated has diminished or ended."

The decision in *Connelly's Case*, supra (122 Me., 289), declares that the employer met the burden of proving the allegation that total incapacity had ended. The contrary finding was held erroneous but there was no decision that the employee had the burden of proving the extent of his partial incapacity. The mandate recommitted the case to the commission for determination, with or without further hearing, whether the employee had:

> "any capacity to earn and if so, the extent of his disability . . . due to his injury."

This carries recognition of what the Connecticut court, in the *Tarascio Case*, supra (116 Conn., 707, 164 A., 206), declares is the duty of the trier of facts in compensation cases, namely:

> "determine the actual earning ability of the employee."

That duty is imposed on the Industrial Accident Commission under our law. The requirement of the statute is that an employer pay compensation to an injured employee during partial incapacity in an amount representing a percentage of the difference between his earnings before injury and what he is able to earn thereafter. The appellee's brief declares that one of the issues to be resolved is "Did the Commissioner err in making findings of fact without evidence?" He did not. His error was in failing to find a fact essential to the proper disposal of the petition before him.

The case must be recommitted to the Industrial Accident Commission to determine the compensation to which the employee is entitled, as was done in *Milton's Case*, supra (122 Me.,

437). That determination must be made on the present record since it relates to the employee's ability to earn on September 17, 1945, and the petitioner closed its case on medical testimony that the employee was physically able to do "light" work and had made no effort to secure it.

Appeal sustained.
Decree of sitting justice reversed.
Case recommitted to the Industrial Accident Commission for further proceedings.

WILLIAM L. VASSAR *vs.* MARY M. VASSAR ET AL.

Cumberland. Opinion, August 3, 1946.

Husband and Wife. Equity.

Where gift between a husband and wife is in issue, the alleged donor's intention to pass title must be clearly shown.

Equity will as a general principle settle all rights involved in any proceedings on which it acts.

Equity will not grant relief under the provisions of R. S. 1944, Chap. 153, Sec. 40 if the plaintiff conveyed any part of the property sought to be recovered for the purpose of defrauding creditors.

ON APPEAL.

Bill in equity by husband against wife seeking an accounting as to funds in joint bank account which were withdrawn by the wife. Plaintiff appeals from decree of single justice ordering principal defendant to play plaintiff one-half of sum withdrawn

and its earnings. Appeal sustained. Decree below set aside. Case remanded for further proceedings.

Wilfred A. Hay, for plaintiff.

George H. Hinckley, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

MURCHIE, J. In this process, commenced by inserting a bill in equity in a trustee writ, the plaintiff seeks an accounting for, and the recovery of, $3,321.80, withdrawn by the principal defendant from a savings account opened by the plaintiff on February 18, 1935, by the deposit of $75 in his own name, and converted into a joint account with said defendant on July 16, 1936, when a deposit of $250.25 was made and the balance stood at $255.50. The bill alleges erroneously that the account was opened as a joint one and this is admitted in the answer. The evidence supports the plaintiff's allegation that the full amount of the account as it stood on September 25, 1942 was withdrawn by the principal defendant and re-deposited in her own name.

The plaintiff and the principal defendant are husband and wife. The process was instituted under R. S. 1930, Chap. 74, Sec. 6 (now R. S. 1944, Chap. 153, Sec. 40), in accordance with the jurisdiction conferred by R. S. 1930, Chap. 91, Sec. 36, Par. IX (now R. S. 1944, Chap. 95, Sec. 4, Par. IX). The evidence presents three conflicting stories concerning the opening and handling of the savings account, told by the husband, the wife, and the former counsel of the latter, which cannot be reconciled with themselves, the allegations of the bill and answer, or the decree. The facts nevertheless are apparent and cannot be said to be in dispute on any point controlling the decree.

The single justice who heard the case found that the husband and wife, at some unstated time, entered into an undertaking to which they should devote their separate efforts and from which

they should share equally, and that the money in the joint account represented the proceeds of that undertaking. His decree ordered the principal defendant to pay the plaintiff one-half the sum withdrawn and its earnings. Plaintiff's appeal presents the entire matter for the determination of this Court.

The plaintiff's factual recital is that he placed the name of his wife on the bank pass-book for his own convenience; that he kept the book within his own control at all times, although making it available to her for depositing and withdrawing funds from time to time at his direction; and that all the money deposited in the account represented the proceeds of his labor, paid to him by a corporation which he organized, owned and conducted.

The wife's testimony asserts that she was an employee of the plaintiff's corporation, working in reliance on his promise that the corporation would pay her $10 weekly; that she never received the money but was assured by the plaintiff repeatedly that her compensation was being deposited in a bank; and that her name was placed on the pass-book at her insistence, after which she retained the custody and control of it.

Except for the variance as to the time when the name of the wife was placed on the pass-book, which is not material to the issue, the testimony of the plaintiff is consistent with his allegations and is supported in many essential parts by that of an employee who kept the corporate books and the accountant who prepared the corporate returns, including the income tax and social security returns. The name of the wife never appeared as an employee on the books of the corporation or in its returns to government authorities.

The wife's evidence does not support either the allegations of her answer or the decree under review. Assuming that she had justification for the belief that her labor, in attending the telephone which served plaintiff's business and that of his corporation at the home where the parties resided, assisting in the corporate accounting, and generally, was to be compensated by a fixed wage (and that the plaintiff agreed thereto), there is no evidence

that the business of the corporation was conducted on that basis. The transcript of the bank account shows that it amounted to no more than $277.25 on May 27, 1940, more than five years after it was opened and almost four years after it was made into a joint account, and that more than two-thirds of the total it represented at the time it was withdrawn had been deposited during the fifteen-month period immediately preceding.

The evidence given by the former counsel of the wife is in general accord with an allegation of her answer, that the money was deposited for the benefit of the husband, the wife and their minor child, but does not support the claim that a part of it was hers, or the finding that it represented the proceeds of the labor of both husband and wife. It has long been recognized in this jurisdiction that where a gift between a husband and wife is in issue the alleged donor's intention to pass title must be clearly shown. *Lane v. Lane,* 76 Me., 521; *Staples* v. *Berry,* 110 Me., 32, 85 A., 303; *Garland, Appellant,* 126 Me., 84, 136 A., 459. The *Staples* and *Garland* cases, supra, deal with joint savings accounts of husbands and wives against which either might draw. The latter, like the present one, shows a contract with the depositary recognizing the right of survivorship. The decision under review is not based on a finding of intention by the husband to make a gift nor would the evidence have warranted such a finding. It is grounded instead in a finding that the money was owned by the parties equally without reference to its deposit. There is no evidence to support that finding.

The decree must be set aside, but in the absence of decision on one issue raised by the pleadings, a final disposal of the process cannot be ordered at this time notwithstanding the general principle that equity will settle all rights involved in any proceeding on which it acts. *Bailey* v. *Myrick et al.,* 36 Me., 50; *Clarke* v. *Marks et al.,* 111 Me., 218, 88 A., 718. The statute (R. S. 1930, Chap. 74, Sec. 6) declares expressly that a bill brought under it shall be dismissed if it appears that the plaintiff has conveyed any property for the purpose of cheating or defrauding creditors.

The principal defendant alleges in her answer that the plaintiff:

> "is in court with unclean hands and is not entitled to the relief which he seeks."

There is evidence which might indicate, if believed, that the plaintiff was facing the possibility of litigation during the time the major portion of the fund was being deposited and made the deposits for the protection of his family as distinguished from creditors. If it was his purpose to cheat or defraud, then he is not entitled to recover any part of the deposited money in this process. Decision of the case should await factual determination of that issue.

In the *Clarke* case, supra (111 Me., 218), a bill was dismissed without prejudice when a question of fact which might have been controlling, and was presented by the pleadings, had not been submitted to the jury which passed upon the facts. The issue as to its disposal in this Court was whether or not it should be retained for amendment. It seems more orderly to remand this case for further proceedings, that the particular statutory issue may be passed upon by the trier of facts on the present record or after further hearing.

Appeal sustained.
Decree below set aside.
Case remanded for further proceedings.

MARY A. PERRY *vs.* THOMAS M. BUTLER.

Cumberland. Opinion, August 8, 1946.

Evidence. New Trial. Trial.

Witness' testimony of failure to see or hear is negative if he is paying no particular attention. Testimony that the witness did not see or hear something which

he would have observed had it occurred is more commonly regarded as positive. Testimony that an event did not occur, given by one who was in a position to observe, is positive.

Moving party must prove that jury verdict is manifestly wrong in order to obtain a new trial.

Under Rule Eighteen of the Rules of Court, it is the duty of counsel to ask clearly what rulings he desires to be given, and clearly indicate to what rulings he objects before the jury retires. An exception to this rule has been established when any instruction given is plainly erroneous, as where it appears that the jury may have been misled by the charge as to the exact issue or issues to be determined.

ON MOTION FOR NEW TRIAL.

Action for negligence by plaintiff, a passenger in an automobile, for injuries sustained by her in a collision with automobile driven by defendant. Verdict for defendant. Plaintiff filed general motion for new trial. Motion overruled.

Robert A. Wilson,

Walter F. Murrell,

Richard K. Gould, for the plaintiff.

William B. Mahoney, for the defendant.

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

TOMPKINS, J. This case comes to the Law Court on the plaintiff's general motion for a new trial under the provisions of Chap. 100 of the Revised Statutes of Maine, 1944, after a general verdict for the defendant, and after denial by the court below of the plaintiff's motion for a new trial directed to the presiding justice under Chap. 100, Sec. 60.

The action was in tort for negligence.

The alleged cause of action arose out of a collision which occurred at approximately 6.50 A. M. on November 2, 1944, at the

intersection of Cross and Fore Streets in the City of Portland, between an automobile owned and operated by one Owen, in which the plaintiff was riding as a passenger, sitting on the right front seat, and which was being driven in an easterly direction on Fore Street, and an automobile owned and operated by the defendant, which was being driven in a southerly direction on Cross Street.

The allegations of negligence in the declaration are, in substance, that the defendant carelessly and negligently operated, managed and controlled his automobile so that the same ran against and collided with and struck the automobile in which the plaintiff was riding, causing her personal injuries. The plaintiff further alleges that she was in the exercise of due care.

The plea was the general issue.

Jury trial was had at the June term 1945 of the Superior Court of the County of Cumberland.

A general verdict for the defendant of not guilty was returned by the jury.

The plaintiff filed a general motion for a new trial with the presiding justice. After hearing the motion was denied.

The plaintiff in her general motion for a new trial makes two contentions: (1) that upon all the evidence the verdict of the jury was manifestly in error, and (2) that the charge of the presiding justice was manifestly in error in that it contained omissions which misled the jury.

The plaintiff contends under a general motion for a new trial that in view of the testimony it is reversible error of the jury in its findings to have accepted the negative testimony of the defendant over the positive testimony offered by the plaintiff with respect to the lights on the Owen car.

The determination of this contention must turn on the question of what is to be treated as positive and what is to be treated as negative testimony. In that regard we call attention to Par. 1037, page 1097, Vol. 32 Corpus Juris Secundum under evidence, which lays down the following rule:

"A witness's testimony of failure to see or hear is negative if he is paying no particular attention; testimony that the witness did not see or hear something which he would have observed had it occurred, is more commonly regarded as positive; and testimony that the event did not occur, given by one who is in position to observe, is positive. Testimony may be positive in character although amounting to a negative statement, or showing a negative situation."

The fact in issue to which the testimony related was whether or not the headlights of the Owen car, in which the plaintiff was riding at the time of the accident, were on. The plaintiff testified that the headlights of the car in which she was riding were on. Mr. Owen, the driver of the car in which the plaintiff was riding, testified as follows in respect to the headlights:

"Q What was the condition of light or darkness?
A It was dark.
Q What was the situation with respect to the headlights on your automobile?
A On bright, sir."

The defendant testified on direct examination that he stopped at the corner of Cross and Fore Streets and waited for four cars to pass, traveling west, and two cars to pass traveling east. He was then asked by his attorney—

"Q Then what happened?
A Then I didn't see anybody coming so I pulled ahead.
Q Were you going fast or slow?
A No, going slow.
Q What kind of a car were you driving?
A A Franklin car.
Q What was it, what year?
A A 1941.
Q A 1941 Franklin. Now go on in your own way and state what happened from there on.

A Well I just got started, seems though, and right in the middle of the street this car struck me—took my bumper right off.
Q Any lights on that car?
A I didn't see any lights at all. No lights.
Q What happened to the car after it struck you?
A It went down and hit the curb and climbed the curbing, struck the post and went out into the middle of the street.
Q Were there any lights on the car when it stopped?
A No sir.
Q Did you get out of the car and go over—
A Yes sir.
Q — to the place where the accident happened?
A Yes sir."

On cross-examination the defendant testified as follows:

"Q Did you tell the police that the other car had no lights before or after the accident?
A No, I don't think I did.
Q Did you know that it had no lights at that time?
A I didn't see any lights. I know they didn't have any lights.
Q When did you first remember that the car had no lights, before you struck it or it struck you?
A Well after thinking the accident over I know he didn't have any lights.
Q That was the recollection of a past event subsequent to its happening.
A Well after thinking it over—after it was all over—right after the accident.
Q Did you examine the other car after the accident?
A I went around and looked at it.
Q Did you look at the front?
A Yes sir.

Q Did you look at the back?
A Yes sir.
Q You saw no lights?
A No sir.
Q Now, when you claim you were stopped—was that north I believe it would be of the stop sign, or were you at the building line we will say right down on the ground there ready to enter the street?
A I think I was pretty near half way between the sign and the corner.
Q Going toward Fore Street?
A Yes, so I could see up the street."

The defendant's testimony is that he stopped at the corner of Cross and Fore Streets, pretty near half way between the sign and the corner, so that he could look up the street, and waited until four cars passed going westerly and two cars passed going easterly, and that

> "I didn't see anybody coming so I pulled ahead. I just got started, seems though, and right in the middle of the street this car struck me — took my bumper right off. I didn't see any lights at all. No lights."

That there were no lights on the Owen car, and that there were no lights when the two cars collided, and that there were no lights on the Owen car when it stopped when he examined the Owen car both front and back and saw no lights, is positive testimony under the circumstances as stated by the defendant.

> "The witness's testimony of failure to see or hear is negative if he is paying no particular attention. Testimony that the witness did not see or hear something which he would have observed had it occurred is more commonly regarded as positive."

Evidence Par. 1037, page 1079, Vol. 32 Corpus Juris Secundum; *Franklin* v. *New Orleans Public Service, Inc.*, L. A. Appeals, 187,

S. 126; *Sand Springs Railway Co.* v. *McWilliams,* 170 Okla., 85, 38 P., 2d, 539; *Suts* v. *Chicago & N. W. Ry. Co.,* 205 Wis., 532, 234, N. W., 715.

The witness had placed himself in a position to see approaching cars and their headlights; he was about to cross the street; his own safety was involved and his attention was centered upon the condition of the traffic at that point; he examined the Owen car after the accident.

> "Testimony that an event did not occur, given by one who was in a position to observe, is positive."

Evidence Par. 1037, page 1079, Vol. 32 Corpus Juris Secundum; Wigmore on Evidence, 2d Ed., Par. 664; *Richter* v. *Dahlman & Inbush Co. et al.,* 179 Wis., 7, 190, N. W., 841, 30 A. L. R., 747; *Staples* v. *Spence,* 179 Va., 359, 19 S. E., 2d, 69; *Hicks* v. *Chicago & N. W. Ry Co.,* 215 Wis., 442, 255, N. W., 73; *Cox* v. *Schuylkill Valley Traction Co.,* 214 Pa., 223, 63 A., 599; *Stinson* v. *Maine Central R. R. Co.,* 81 N. H., 475, 128 A., 562; *Suts* v. *Chicago & N. W. Ry. Co.,* supra; *St. Louis-San Francisco Ry. Co.,* v. *Russell,* 130 Okla., 237, 266 P., 763; *Hough* v. *Boston Elevated Company,* 262 Mass., 91, 159 N. E., 526; *Virginia Ry. Co.* v. *Haley,* 156 Va., 350, 157 S. E., 776; *Philadelphia B. & W. Ry. Co.* v. *Gatta,* 27 Del., 38, 85 A., 721, 47 L. R. A. N. S., 982, Ann. Cas. 1916 E., 1227; *Kindt* v. *Reading Co.,* 352 Pa., 418, 43 A., 2d, 145.

The defendant's testimony is just as positive in character as to the fact in controversy, though negative in form, as the testimony of the plaintiff and her witnesses. Evidence Par. 1037, page 1097,Vol. 32 Corpus Juris Secundum; *Stall* v. *Duff et al.,* 23 N.W., 2d, 75 — Neb. — ; 170 Okla., 85, supra; *Franklin* v. *New Orleans Public Service, Inc.,* supra, L. A. Appeals, 187 Southern, 126; *Stinson* v. *Maine Central R. R. Co.,* supra; *Suts* v. *Chicago & N. W. Ry. Co.,* supra; *St. Louis-San Francisco Ry. Co.* v. *Russell,* supra; *Kindt* v. *Reading Co.,* supra.

Whether the witness on the one side and the other had equal

honesty, ability and opportunity for knowing, and memory of what had transpired, was for the jury to decide. So we think and so we decide that under the circumstances disclosed by this testimony, the question of positive and negative testimony was not involved in the case.

The plaintiff further contends, in her oral argument at least, that the defendant did not state in the police report that there were no lights burning on the Owen car before or after the accident, and did not state that six cars passed along Fore Street, and that this omission discredited his oral testimony given at the trial, so that the jury erred in giving proper weight to his oral testimony at the trial.

> "The jury had the advantage of seeing the witnesses, of hearing their testimony orally delivered, of observing their demeanor and conduct upon the stand, and considering prejudice, if any is shown."

Cheney v. *Russell,* 132 Me., 130, 167 A., 857.

It was within the province of the jury to accept or reject the oral testimony of the defendant given at the time of the trial.

> "Where there is sufficient evidence upon which reasonable men may differ in their conclusions, the court has no right to substitute its own judgment for that of the jury. To obtain a new trial the movant has the burden of proving the jury verdict is manifestly wrong."

Eaton v. *Marcelle,* 139 Me., 256, 29 A., 2d, 162, and cases cited. This the plaintiff has failed to do.

The second contention of the plaintiff is that the charge of the presiding justice was manifestly in error in that it contained omissions which misled the jury. The omission complained of by the plaintiff was that the presiding justice failed to properly instruct the jury on the relative weight to be given to positive and negative testimony on the issue before them. No exceptions were

taken to the charge and no instruction was requested by the plaintiff's counsel.

> "Rule 18 of the Rules of Court defines the proper procedure by counsel claiming either that improper instruction has been given to a jury, or that there has been an omission to charge on a particular point. It is the duty of counsel to ask clearly what rulings he desires to be given, and clearly indicate to what rulings he objects, before the jury is sent out with the case. Practice at variance with the Rule of Court, which in the respect noted represents merely the affirmance of established practice, should not be encouraged. It is only the exceptional case which will justify a new trial when proper practice has been disregarded. An exception to the rule referred to, however, has been established when any instruction given is plainly erroneous, as where it appears that the jury may have been misled by the charge as to the exact issue or issues to be determined." *Roberts* v. *Neil,* 138 Me., 105, 22 A., 2d, 135.

In the case at bar there was not involved a failure of the presiding justice to instruct the jury on the weight of positive and negative testimony because, as we have decided, the testimony of the defendant was as positive in fact as the testimony of the plaintiff. The case does not fall within the rule laid down in *Trenton v. Brewer,* 134 Me., 295, 186 A., 612. There was no failure to instruct the jury on a pertinent fact in the case. We find no error in the charge of the presiding justice.

Motion overruled.

STATE OF MAINE *vs.* ANNIE MANCHESTER.

Cumberland. Opinion, August 24, 1946.

Criminal Law. Jury.

Appeal from conviction in cases of felony on general grounds that it was contrary to the law and the evidence raises the single question whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt the guilt of the respondent.

The jury is the final arbiter of questions of fact when the evidence in support of their conclusion, considered in connection with all the other evidence in the case, is of such character, quality and weight as to warrant them in believing it.

ON APPEAL.

The respondent was indicted of larceny from the person, and upon conviction, filed an appeal. Appeal dismissed. Judgment for the State.

Richard S. Chapman, County Attorney,

Daniel C. McDonald, Assistant County Attorney, for the State.

Harry E. Nixon, for respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

TOMPKINS, J. The indictment in this case charges the respondent with larceny from the person of one Frank B. Bisbee on the 14th day of April 1945. After verdict of guilty by the jury the respondent filed a motion asking the presiding justice to set aside the verdict on the general ground that it was contrary to

the law and the evidence. The motion was denied and the respondent filed an appeal to the Law Court.

The appeal authorized by R. S. 1944, Chap. 135, Sec. 30, in cases of felony raises the single question whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt the respondent was guilty. *State* v. *Pietrantonio,* 119 Me., 18, 109 A., 186, and cases there cited; *State* v. *Pond,* 125 Me., 453, 134 A., 572.

The respondent through her attorney raises two questions; first, should a conviction for felony be permitted to stand upon the unreasonable, conflicting story of the complaining witness, who the respondent alleges was undoubtedly under the influence of intoxicating liquor at the time of the alleged happening he afterwards attempts to relate. It was the province of the jury to determine whether his story was reasonable or unreasonable in view of all the testimony, and whether the degree of intoxication affected his mental procesess so that his memory of the event was obscured. The jury must be the final arbiter of questions of fact when the evidence in support of their conclusion considered in connection with all the other evidence is of such character, such quality, and such weight as to warrant them in believing it. *State* v. *Lambert,* 97 Me., 51. We have carefully read all of the testimony and find no merit in this contention.

The second question raised was that the verdict was unquestionably rendered upon prejudice and bias, and for no other reason in the world than the record of Mrs. Manchester, and that the jury, instead of considering her conviction for the purpose of deciding as to her veracity did, in violation of the charge of the presiding justice, permit said criminal record to prejudice their minds and to cause them to decide that she must be guilty anyway. The testimony discloses that two of Mrs. Manchester's witnesses had been convicted on other occasions for various violations of the law. Mrs. Manchester had been convicted of illegal sales of intoxicating liquor, harboring boys escaped from the State Reform School, and assault and battery upon a policeman.

One of the witnesses for the defense, Margaret Manchester Small, daughter of the respondent, had been convicted of illegal sale of intoxicating liquor, and another witness, Wilfred J. Small, husband of Margaret Manchester Small, had been convicted, on his own testimony, of assault and battery and intoxication numerous times.

The presiding justice in his instructions to the jury, among other things, charged them that one who comes into this court is presumed to be innocent and that the State must prove its case beyond a reasonable doubt, and then said

> "If after weighing all the evidence, you can truthfully say to yourselves that you have an abiding conviction, a conviction that will last with you tomorrow and the next day and for the days to come, then you would have no reasonable doubt as to guilt or innocence. As I have said, the State must prove beyond a reasonable doubt. If, after weighing all the evidence, you have an abiding conviction that the respondent is not guilty, you should say so. If, on the other hand, all the evidence convinces you so that you have an abiding conviction that the respondent is guilty, you should say so. When you jurymen were drawn you were asked whether you would have any feeling against one who had been convicted of crime, if it would influence your feelings in this particular case. Now whether one has or has not been convicted of crime isn't material in this particular case except insofar as it may test the credibility of that person. In other words, the fact one has been convicted of crime,—and in this instance it would seem the respondent had been convicted of selling liquor out of season, when unlawful—would that fact affect her credibility? So far as this particular case is concerned, her past record of breaking the law is immaterial except as it may affect her credibility."

It appears from the charge of the presiding justice that the jury before taking their places in the jury box were examined by the

respondent's attorney as to their feelings against one who had been convicted of crime, and if it would influence their feelings in this particular case. The judge in his charge instructed them that evidence of conviction extended only to credibility; that if after weighing all the evidence they had an abiding conviction that the respondent was not guilty they should say so, and if, on the other hand, all the evidence convinced them and they had an abiding conviction that the respondent was guilty, they should say so. The fact that the respondent and two of her witnesses had convictions for various offenses, some minor, some serious, was competent evidence to affect their credibility, and it cannot be said that it would be bias or prejudice because they took into consideration the credibility of the respondent and her witnesses.

We are of the opinion that the evidence as reported presents a typical case for the consideration of the jury. They saw as well as heard all the parties, and in coming to their conclusion they may have placed as much stress upon the manner and appearance of the respondent and her witnesses, as in what they said, or even more. If the jury had believed the respondent and her witnesses their verdict should have been in her favor. If they did not believe the respondent and her witnesses then there was ample testimony to sustain the verdict which they rendered. *State* v. *Clancy*, 121 Me., 362, 117 A., 304.

A careful study of the evidence aided by the briefs of counsel fails to convince this Court that the verdict of the jury was unwarranted.

Appeal dismissed.
Judgment for the State.

JOHN HACKETT *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion, August 28, 1946.

Railroads.

A traveler on a highway crossing railroad track, in spite of the absence of the flagman, is bound to exercise the care that ordinarily prudent persons might have exercised under like circumstances, and whether this care has been exercised is a question for the jury.

ON MOTION FOR NEW TRIAL.

Plaintiff brought action to recover for personal injuries and for damage to his car. Jury returned verdict for plaintiff and defendant filed motion for a new trial. New trial granted unless plaintiff remits all damages in excess of $2,000.

Clifford & Clifford, for plaintiff.

Perkins, Weeks & Hutchins, for defendant.

SITTING: THAXTER, HUDSON, MANSER, JJ., AND CHAPMAN, Active Retired Justice.

CHAPMAN, Active Retired Justice, dissents.

THAXTER, J. The plaintiff, while driving his automobile over the Court Street railroad crossing in Auburn, collided with a train of the defendant proceeding northerly through the crossing. He has brought an action to recover for personal injuries and for damage to his car. After a verdict for the plaintiff, the case is brought before us on the defendant's motion for a new trial.

The main line of the Maine Central Railroad Company crosses Court Street at grade. Court Street, running east and west, is a

wide and busy thoroughfare; and the crossing is protected by gates which were operated by a gate tender during the entire twenty-four hour period. On the southerly side of the street and close to the crossing is a building which obstructs the view of the tracks in a southerly direction. One proceeding easterly and approaching the crossing, particularly when driving on the right hand side of the street as the plaintiff was doing, can see the tracks southerly but a short distance until practically on the railroad right of way. The gates are located approximately on the line of the easterly wall of the building above mentioned. The distance from the line of the gates to the point on the main line tracks where the accident took place is approximately fifty-five feet, and before coming to the main track the traveler going toward Lewiston, as the plaintiff was doing, must cross a spur or side-track.

The plaintiff was born in Auburn, had lived there all his life, for many years had been employed by the Androscoggin Mills in Lewiston, and at the time of the accident was the office manager of that company. He was thoroughly acquainted with the crossing in question. As a matter of fact he testified that he went down Court Street every day on his way to work and had been doing so for a good many years. About half past six in the morning on January 20th, 1945, he was driving on Court Street toward Lewiston to his work. There was considerable snow. As he approached the crossing, proceeding at a rate of ten or fifteen miles per hour, he noticed that the gates were up, and without stopping, but looking according to his testimony each way on the tracks insofar as conditions permitted him to see, started over the tracks. When he had crossed the first track he heard the roar of a train coming from the south. He attempted to stop but before being able to do so was struck either by the tender of the locomotive or by the baggage car and suffered the personal injuries and the property damage for which he now seeks to recover. The train proceeded on its way without any of the crew knowing of the accident. The train was a special and the gate tender was ap-

parently unaware that it was to be expected. At the time he was sweeping snow from the flange of the main line track. He saw the train when it was six or seven hundred feet away, dropped his broom, and ran to lower the gates; but it was too late to stop the plaintiff, who had proceeded so far that he did not even see the gates being lowered. The evidence is in conflict whether the headlight on the locomotive was lighted and the whistle sounded. The plaintiff testified that he did not see the light or hear the whistle. He heard the roar of the train and then saw the driving wheels of the engine.

On these facts there was ample evidence to justify the finding of the jury that the defendant was negligent. In fact the defendant does not seriously contend otherwise. It bases its claim for a new trial on the ground that the plaintiff was contributorily negligent as a matter of law.

The plaintiff's negligence must be based either on the fact that he did not stop, look, and listen before proceeding to cross the tracks, or that he did not take proper precautions to stop his car, when, after starting to cross, he should have seen the train.

The facts of this case are very similar to those in the cases of *State* v. *Boston & Maine Railroad,* 80 Me., 430, 15 A., 36; *Hooper* v. *Boston & Maine Railroad,* 81 Me., 260, 17 A., 64, and *Borders* v. *Boston & Maine Railroad,* 115 Me., 207, 98 A., 662, Chief Justice Peters said in the first case, page 444,

> "If the presence of a flagman and closed gates indicate a passing train, certainly the absence of the flagman and open gates must be evidence that a train is not presently due or expected."

And in the second case the court, discussing in a civil action the same facts as in the first case, laid down the rule that reliance on an open gate is not a want of due care. In the *Borders* case, supra, Chief Justice Savage further amplified the rule and laid down what we must hold is still the law. He points out that it is the law in Maine that the attempt to cross a railroad track without look-

ing and listening for an oncoming train is negligence. He then discusses to what extent this rule should be modified if a flagman, who should be present to warn of an approaching train, is absent. And of course the same rule applies to a gate tender who is not performing his duties. The court points out that there are three separate views each supported by decisions in different jurisdictions. The first is that the traveler has the absolute right to rely on the absence of the flagman and can assume that no train is approaching. The second is that the traveler has no right to assume that the absence of the warning signal is an assurance of safety. The third or modified rule which is adopted as the law in Maine is that the traveler in spite of the absence of the flagman is bound to exercise "the care that ordinarily prudent persons might have exercised under like circumstances" and that whether this has been exercised is a question of fact for the jury. The court says, page 213:

> "The modification that the traveler may rely to some extent upon the absence of the flagman removes the case from the class of negligence *per se* cases. It makes it a question of fact whether the traveler in view of all the circumstances, including the absence of the flagman, was in the exercise of ordinary care."

In reliance on these cases we must hold that it was a question of fact for the jury to decide whether this plaintiff in entering the railroad crossing as he did was in the exercise of due care.

When he came to the line of the gates there was a distance of fifty-five feet to the main line of the railroad where the collision took place. At ten miles per hour he would cover this in a little over three seconds, at fifteen miles an hour in two seconds and a half. During that time he had two ways to look to see what was approaching, to formulate a decision in his mind as to what he should do, and then, if the train was too near, to act to bring his car to a stop. His failure under these circumstances to stop be-

fore reaching the main track cannot be regarded as negligence as a matter of law. It was a question of fact for the jury.

We feel that the damages awarded by the jury are clearly excessive. It is stipulated that the damages to the car were $1,000. The evidence of the personal injuries suffered by the plaintiff is meager. He had some minor bills, but he lost no substantial time from his work. He complained of some soreness being present even at the time of the trial. We think that $1,000 for his personal injuries in addition to payment for the damage to his car will amply compensate him.

New trial granted unless the plaintiff will remit all of the damages awarded in excess of $2,000 *within thirty days after filing of rescript.*

CHAPMAN, A. R. J., dissenting.

As to the conclusion of the three justices writing and concurring in the above opinion that the jury erred in the finding as to the damages, I am in agreement. The plaintiff, after the accident, went to his place of employment and lost no time therefrom on that day or thereafter. He made one visit to his personal physician and had three osteopathic treatments. His medical bills were $20.50. By stipulation, the damage to his automobile was $1,000. The jury's award of damages was $3,108.40. Therefore, $2,108.40 was for his personal injuries inclusive of medical bills. The three majority justices found that the jury's decision in this respect was so excessive that it was error as a matter of law. In other words, in stating the maximum damage to which the plaintiff was entitled, they feel that the jury awarded more than double the amount that a reasonable man would award.

I believe that the mental state present when the damages were assessed was also present when liability was passed upon. I believe that the conclusion reached was contrary to principles es-

tablished by this and other courts; and I therefore nonconcur in the opinion sustaining the finding upon liability.

I realize that it is not important to record my personal difference of opinion with the other justices, but I regard it of importance that the principles upon which the decision depends and which principles have been carefully and emphatically laid down in the cases subsequent to the three cases cited by the majority decision should be stated. I refer to the precautions prescribed by the court as necessary to the traveler in approaching a railroad crossing when the gates or other warning device thereon are not in operation. As authority for the care required in such situation I cite *Hesseltine* v. *Railroad Company*, 130 Me., 196, 154 A., 264; *Johnson* v. *Terminal Co.*, 131 Me., 311, 162 A., 518; and *Witherly* v. *Bangor & Aroostook Ry.*, 131 Me., 4, 158 A., 362.

In consideration of the present case, it should be kept in mind that the plaintiff was not "trapped" on a blind crossing and cut down by a fast moving train, as was the situation described by the court in *Borders* v. *Boston & Maine Railroad*, 115 Me., 207, 98 A., 662, cited in the majority opinion; and likewise in *Hooper* v. *B. & M. R. R.*, 81 Me., 260, 17 A., 64, and *State* v. *B. and M. R. R. Co.*, 80 Me., 430, 15 A., 36, also cited and relied upon by the majority opinion. Rather it was a motorist driving at a leisurely pace—10 to 15 miles per hour according to the testimony—and running into the side of one of the cars of a train traveling at a moderate rate—15 to 20 miles per hour—which had passed in front of him the length of a modern locomotive and its tender on a lighted crossing and in the full glare of his automobile headlights,—the approach to which crossing was unobstructed from a point 55 feet from the track.

Mr. Thompson, in his *Commentaries on the Law of Negligence* (2nd ed.), Volume II, Section 1672, makes the following comment:

> "But there is not much room for a difference of judicial opinion, where the traveller, with a courage that the Wan-

> dering Jew displayed when he parted his coat tails and received a shower of grape-shot at close range at the Battle of Wagram, or that Dagobert displayed when he rode upon a row of broken bottles,—quietly walks, runs or drives against a moving train, contributory negligence being conclusively imputed to him."

In a footnote he apologizes for giving citations:

> "It is an amazing commentary upon human nature that the books present such cases; but here they are."

As already suggested in the three cases cited in the majority opinion, the controlling facts were a blind crossing and a fast moving train. In the *Borders* case, supra, chiefly relied upon, the view of the driver was obstructed until within 10 to 12 feet, as compared with 55 feet in the present case. In these cases, no guide was furnished as to what would stand the test of "reasonable care." They suggest that the open gate is a circumstance upon which the traveler may rely but must, nevertheless, be in the exercise of ordinary care. No help is given in determining what is ordinary care under such conditions. That what is ordinary or reasonable care under such circumstances is primarily a question for the determination of the jury; but the jury must adhere to recognized principles rather than be guided by its own personal inclinations, and the court will in such cases, no less than in other negligence actions, assert its authority if a verdict is rendered by a jury upon what is less than the minimum of precautions that it has prescribed as due care. When a jury finds due care upon less than that minimum it is as equally in error as if it assesses damage at more than double the largest amount that a reasonable man would assess.

In the cases of *Hesseltine* v. *Railroad Company*, supra, *Johnson* v. *Terminal Co.*, supra, and *Witherly* v. *Bangor & Aroostook Ry.*, supra, the court prescribed principles to be observed in the determination of the due care of a traveler approaching a cross-

ing at which the gates or other warning devices provided for at that crossing are not in operation; and it is to be borne in mind that the discussion in each of the cases was not confined to the general situation of a traveler approaching a crossing. The discussion and principles laid down were applied to a situation involving the open gate and the essential facts were very similar to those in the present case.

In *Hesseltine* v. *Railroad Company*, supra, the situation of the plaintiff was not essentially different from that of the plaintiff in the present case except that he was a guest passenger. The collision occurred in the night and the gates were open. The automobile struck the engine just back of the pilot or cowcatcher. The court said that the plaintiff had an unobstructed view and should have seen the approaching train, and that his failure to do so was negligence as a matter of law. The court stated, in discussing the conduct of this plaintiff:

> "Certain principles that shall govern the conduct of a traveller on the highway as he approaches an area where a railroad crosses or is crossed by a highway are and have been for years settled in this state."
>
> "Some of them are as follows."
>
> "The obvious peril of collision at grade crossings of railroads with common roads requires 'that the traveller upon the common road, when approaching a railroad crossing, should exercise a degree of care commensurate with the peril.' "
>
> " 'He should never assume that the railroad track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near. He should, when near or at the crossing, look and listen, not simply with physical eyes and ears but with alert and intent mind, that he may actually see or hear if a train or locomotive be approaching.

" 'He should not venture upon the track or crossing until it is made reasonably plain that he can go over without risk of collision.' "

" 'If the plaintiff did not listen with ear and mind both he was negligent.' "

" 'Care commensurate with the peril requires the traveller upon the highway to look and listen for trains *at the very time* (italics supplied) he is approaching the crossing, and omission to take this ordinary precaution is, if unexplained, contributory negligence *per se*, as matter of law, and will bar an action for the collision even though the railroad was negligent in the premises.' "

"And ordinarily, when the traveller's view of the track is obstructed 'greater care is required in looking and listening, even to the extent, if driving, of alighting.' "

The opinion in *Hesseltine* v. *Railroad Company*, supra, was approved in *Johnson* v. *Terminal Co.*, supra. As in the present case, the plaintiff was thoroughly familiar with the crossing, likewise the crossing was at night and, as in the present case, there was a street light near the crossing with an unobstructed view of the three tracks that crossed the street. There was no gate, but trains passing over the crossing were customarily preceded by a trainman carrying a lighted lantern. Of this custom the plaintiff had knowledge from previously passing over the crossing. On the night in question, this precaution was not taken. No lights were on the engine and tender as they backed across the intersection. The court said:

"Had he looked toward his right, even when he reached the first railroad track, *he could not have failed to see* the approaching train"; (italics supplied)

In *Witherly* v. *Bangor & Aroostook Ry.*, supra, the plaintiff was familiar with the crossing. He drove his automobile at night

against an empty flat car standing motionless across a highway as a part of a train. The crossing, as the plaintiff knew, was protected by an automatic signal consisting of a red light on a wigwag arm. This signal, which operated when a train was approaching at or on the crossing, was hidden from the sight of the plaintiff by a boxcar, a part of the train. The plaintiff drove his automobile into the side of the flat car. The court held that in spite of the absence of the usual warning signal, the plaintiff's failure to see the train was negligence as a matter of law.

The failure of the plaintiff in the present case was more pronounced for a moving train drawn by a modern locomotive is incomparably more apparent to the eye and ear than a silent, motionless flat car. The court stated the following principles as applicable to the consideration of that and similar cases:

> "Literally, there was some evidence that, in approaching the crossing, the plaintiff had been careful. But this evidence is overwhelmed by opposing evidence, and the reasonable inferences deducible from established facts, that plaintiff did not exercise that due precaution which men of reasonable prudence, conscious of danger, usually exercise to avoid the incurrence of injury. The jury, therefore, had no evidence before it on which a verdict for the plaintiff could be based." (citation)
>
> "Care and vigilance must depend on surrounding conditions, and be proportioned to known danger. 'A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous.' " (citation)
>
> "A railroad crossing is a place of special danger." (citation) "All railroad crossings are hazardous." (citation) "It is always train time at any railroad crossing." (citation)
>
> "When a highway and a railroad cross at grade, the high-

way traveller should look, listen, and should stop, if there is room for doubt." (citation) "Besides, he should be attentive to make such acts reasonably effective."

"That the accident happened at night was no excuse." (citation) "A greater degree of precaution must be exercised when darkness throws a mantle over vision."

"Both authority and common sense bar him from recovery." (citation)

If it be said that the court, in prescribing the precautions to be observed by the traveler approaching a crossing with an open gate, has been exacting,—the answer is that it was observing the fundamental principles in the law of negligence that the precautions necessary in any situation depend upon the likelihood of mishap and the seriousness of results if mishap occurs. The likelihood of mishap apparent to the traveler, if the gate is open, is decreased; but the seriousness of the result, if such mishap occurs, is not diminished. It is this that has governed the court in its statement of the principles set forth.

It is my opinion that the conduct of the plaintiff, as disclosed by the evidence, falls far short of the care so unequivocably prescribed.

The majority opinion contains in its outline of the case a statement that I think might cause misunderstanding. It is said that a person approaching the crossing could not see the tracks southerly whence came the train "but a short distance until practically on the right of way." The location of the boundary of the railroad right of way does not affect the traveler's view of the track. The salient fact is that there is an unobstructed view of the track at a point 55 feet therefrom for a distance of more than 250 feet, and that such view continues until the track is reached. This is conclusively shown by the plan drawn to scale, introduced by the plaintiff.

As to the sufficiency of this distance in which to avert colli-

sion, the statement of the court in *Blanchard* v. *Railroad Company,* 116 Me., 179, 182, 100 A., 666, 667, is enlightening:

> "It is in evidence that a distance of from 9 to 10 feet from the more easterly rail of the track a person could see as far northeasterly as the Bosworth Street crossing—substantially one hundred feet—and that at a point 13 feet and 7 inches from the easterly track, his view would extend 65 feet in the same direction. When Miles reached this point the front of the car would have been at least seven or eight feet from the track. If plaintiff's intestate when he reached the latter point, had looked he must have seen the train, if he had listened he must have heard the bell, which the positive evidence conclusively shows was ringing, and the rumble and other noises of the train and in either case it is inconceivable that he would have failed to warn Bridges and request him to stop, but the car was not stopped nor did he speak to Bridges."

The plaintiff was entirely familiar with the situation. He had passed over the crossing daily for years, at the same and other times of day. He knew that his view was completely obstructed until he had passed Raymond's and that thereafter his view would be completely unobstructed, that it was during his passage of 55 feet that he must make his observation and be prepared for what was disclosed. The opinion makes important the time that it would take him to go from Raymond's to the track. Two and a half or three seconds when written seems a short time. That is not so in traffic. Most negligent acts in driving and the resultant damage occur in less time. Moreover, he was not confronted with a sudden emergency. There was no situation that he could not have foreseen and been prepared for.

I would add to the statement of the case, as a material fact, that a street light was located adjacent to the crossing.

As to visibility, witnesses for both parties present when the collision occurred saw the train from varying distances as it ap-

proached and passed the intersection. Douquette, following the plaintiff, saw the train and the automobile. Francis saw it coming at a distance of 600 or 700 feet. Berry, from a considerable distance beyond Raymond's, saw the rear unlighted car of the train as it passed over the crossing. Farrar saw the train approaching and stood and watched as it went by. Boulay, witness for the plaintiff, heard the roar of the train before it came in sight. All the witnesses testified readily as to what happened, without the suggestion of any difficulty in seeing the train or other objects in the vicinity. Farrar saw the broom in the hands of the flagman.

The plaintiff's version of his looking was: "I had glanced both ways to the right and left." He did not state at what point he glanced nor which track, if either, his glance encompassed. Webster defines "glance" as "to look with a sudden, rapid cast . . . to snatch a momentary or hasty view." Such observation hardly complies with the requirements prescribed in the cited cases. The fact that he was in a covered vehicle does not serve as an excuse for his not seeing or hearing. He was required to take such precautions as would overcome any disadvantage in this respect. *Smith* v. *Me. Cent. Railroad Co.*, 87 Me., 339, 351, 32 A., 967. He was unable to state whether his window was open or closed. Such lack of knowledge indicates inattention.

His rate of speed as he approached the track was, according to his testimony, 10 to 15 miles per hour, a speed that would enable him to stop in a mere fraction of 55 feet. He says that he put on his brakes 8 or 9 feet from the train and thought he had stopped when he collided. If he had put on his brakes at any point in the first 46 feet he would not have struck the train. If the train was approaching at the rate of 15 to 20 miles per hour as estimated by different witnesses, considering that the train arrived at and passed over the crossing the length of the engine, it follows that when he arrived at Raymond's 55 feet from the track, the engine was approximately that distance from the crossing. It would seem that a man with conscious attention in that direction would

be appraised of its presence. Also, it follows that if the train had passed in front of him the distance of the length of a modern locomotive it must have been before him at least half the time while he was covering the 55 feet upon the lighted crossing and in the full glare of his headlights. It is inconceivable that he would fail to see and hear the train under such conditions unless he had allowed himself to lapse into complete inattention to his surroundings. He not only failed to make conscious effort to observe with eyes and ears, but he failed to respond to sight and sound that should have been apparent to anyone in the full possession of his senses though making no conscious effort. It makes little difference whether he looked. If he did, he saw not what he ought to see and what all others did see. Not seeing what he ought to see was negligence. Citations to this effect are unnecessary.

The opinion dismisses the question of whistle and headlight upon the engine as a conflict of evidence. I do not regard these questions as important. The presence of the train should have been apparent to the plaintiff regardless of the presence of a headlight or sound of the whistle—it was apparent to the others present. However, I do not think that the question of the headlight can be dismissed as a conflict of testimony. As to the whistle, the witnesses for the plaintiff testified that they "did not hear" the blasts. None testified that the whistle was not blown. By decree of the Public Utilities Commission, no whistle was to be blown at this crossing; but the engineer testified that when he perceived that the gates had not been lowered, he gave two blasts. Three other witnesses testified that they heard the blasts. The fact that persons within hearing did not hear may be considered as some evidence.

This cannot be said, however, as to the testimony in regard to the headlight by witnesses who did not make such observation that would disclose the headlight to their view. They testified that they "did not see" a headlight. None testified that there was no headlight and none disclosed such observation of the train as would enable them to make such a statement. Boulay first

testified that he looked at the front of the oncoming train, then changed his testimony to the effect that he did not do so. Douquette observed only the side of the train and Berry saw only the rear end of the last car. Certainly the observation of the plaintiff of what was going on about him was not sufficient to give any positive force to his statement that he did not see a headlight. On the other hand, the engineer testified that he personally manipulated the switch controlling the light, and that it was on during the entire trip. The conductor testified that he saw the light. Francis, the gateman, saw it as the train appeared 600 to 700 feet down the track, and Farrar, a disinterested bystander, had his attention attracted by the light as the train approached and stood watching it as the train passed. The testimony of the plaintiff's witnesses is negative in character in that none of them made such observation as would enable them to say whether or not there was a headlight; and such testimony should not prevail over the positive testimony of the defendant's witnesses. *Am. Jur.*, Vol. 20, subject "Evidence," Section 1187; *Crosby* v. *Railroad Company,* 113 Me., 270, 93 A., 744, L. R. A. 1915, E. 225; *Robinson* v. *Railway,* 99 Me., 47, 58 A., 57; *The Buenos Aires,* 5 Fed. (2nd), 425; *The Finn MacCool,* 147 Fed., 123.

I am of the opinion that a reasonable man would not believe there was no headlight; but I am also of the opinion, irrespective of the presence thereof, that there was abundant evidence of the presence of the train which would have been apparent to the plaintiff, if he had given proper attention to his surroundings.

In view of the precedents that I have cited, I believe the appeal should be sustained. I therefore nonconcur in the majority opinion.

HENRY H. KIMBALL, PETITIONER FOR ANNULMENT OF DECREE OF SUPREME COURT OF PROBATE AND APPELLANT FROM DECREE OF PROBATE COURT.

Kennebec. Opinion, September 8, 1946.

Probate Courts.

Probate appeals are of statutory origin and are not referable.

The Supreme Court of Probate has no original jurisdiction, and cannot entertain a petition to it asking annulment of one of its earlier decrees.

Courts of probate have jurisdiction to review proceedings in the Supreme Court of Probate on allegations involving irregularities in procedure.

A hearing on a probate appeal in the Supreme Court of Probate is not essential if the parties do not desire it at the time action is taken to reverse or affirm a probate court decree in whole or in part.

ON EXCEPTIONS.

Henry H. Kimball filed a single bill of exceptions to separate decrees of the Superior Court (Supreme Court of Probate). One decree dismissed his petition to the Superior Court for the annulment of a surcharge decree, so-called. The other dismissed his appeal from a decree of the Probate Court disallowing a probate account. Exceptions overruled.

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

Ernest L. Goodspeed, for petitioner and appellant.

George D. Varney, for petitionee and appellee.

MURCHIE, J. In these two cases a single bill of exceptions relates to separate decrees of the Superior Court (the Supreme Court of Probate) entered on the same day in processes instituted in different forums with the common objective of avoiding the effect of an earlier decree therein (hereinafter referred to as the "surcharge decree") disallowing items in the Sixth Account of the Trustee under the fourth clause of the will of Horace Williams (hereafter referred to as the "Trustee"). One of them dismissed his petition to the Superior Court, dated August 21, 1945, for the annulment of the surcharge decree. It had been entered October 19, 1944, on an appeal from the decree of the Probate Court allowing the account, and operated to surcharge the Trustee for investment losses amounting to $12,555.98. An appeal therefrom to this Court was dismissed on jurisdictional grounds. *Edwards, Appellant (In re Williams' Estate)*, 141 Me., 219, 41 A., 2d, 825. The other dismissed his appeal from a decree of the Probate Court disallowing his Seventh and Final Account, dated July 22, 1943 (hereafter referred to as the "Seventh Account").

Both processes are grounded on the claim that the surcharge decree was "null and void and of no effect" because the Supreme Court of Probate exceeded its statutory authority "in referring the issues involved" in the appeal to referees "and in blindly adopting" their decision "without itself hearing and deciding the case." These are the allegations of the Reasons of Appeal in the appeal case and corresponding allegations are made in the Petition for Annulment, which declares also that while the case was pending before the referees the parties signed an agreement waiving exceptions to any question of jurisdiction or otherwise, stipulating that whatever decision the referees might render would:

> "be incorporated into a decree . . . by the Supreme Court of Probate"

and undertaking that all parties would:

> "co-operate in the settlement of the Sixth Account in accordance with said decree."

There is nothing to indicate that such allegations were made in the Seventh Account but the decree entered thereon in the Probate Court shows that the facts alleged were proved at the hearing on it. In disallowing the account the Judge of Probate declared that regardless of its merits the claim presupposed an authority and jurisdiction of the Probate Court "to review the proceedings and pass upon the Decrees of the Supreme Court of Probate," which it did not possess.

The detail of the Sixth Account does not appear in the record, but the issue raised by the appeal which carried it to the Supreme Court of Probate is plainly set forth. That issue was the propriety of the allowance of investment losses. The account was dated April 18, 1939, and covered the period from January 1, 1935 to August 14, 1938. It asked the allowance of $49,506.77 on 15 investments involving a cost of $58,220.85. The cost and sale prices of the investments, except for 3 items that were not sold but proved to be worthless, are shown. The losses on 12 purchases ranged from a minimum of just under fifty per cent of the cost to a maximum of more than ninety-nine per cent. In the other 3 instances the loss was total. The overall average loss was slightly more than eighty-five per cent.

The account was allowed in May 1941. The appeal was entered in the Supreme Court of Probate at the October Term in that year. No action was taken on it until the October Term 1943, when it was referred to 3 referees. The referees filed a report at the October Term 1944. No action was taken on it. Three court days later, at the same term, the challenged decree was entered, sustaining the appeal, surcharging the Trustee and remanding the case to the Probate Court for further proceedings. There can be no doubt on the record that it was rendered on the basis of the report of the referees and an accompanying opinion setting

forth the reasons and reasoning underlying it, after consideration thereof and consultation with counsel.

The Trustee asserts his claim in reliance on the principle that probate appeals are not referable. *Chaplin, Appellant,* 131 Me., 187, 160 A., 27. In that case, as in the present ones, a decree entered in the Probate Court was carried to the Supreme Court of Probate by appeal and the parties agreed to submit it to reference. Thereafter counsel entered a stipulation waiving the illegality of the reference, but the appellant seasonably filed objections to the acceptance of the referee's report when it was filed. This was in accordance with the Rules of Court and the report having been accepted, notwithstanding the objections, and exception taken and prosecuted, this Court was obligated perforce to sustain it. As was stated in that opinion:

> "Probate appeals are of statutory origin, and must be conducted strictly according to the statute."

The situation here is different. The report of the referees was given no force as such. The agreement of the parties was not a waiver of the illegality of the reference but of the right to take exceptions to a decree which would decide the cause in accordance with the judgment of the referees, in apparent compliance with the statute, and included an undertaking to have that judgment control the settlement of the Sixth Account (which would in turn control the closing of the trust).

The issues presented by the bill of exceptions are whether the Supreme Court of Probate transcended its authority in deciding the appeal without a hearing involving testimony and in accepting the judgment of unauthorized referees, in accordance with the formal agreement of the parties, and, if so, whether the surcharge can be avoided by either process invoked by the Trustee.

That a petition for annulment addressed to the Supreme Court of Probate is not a proper remedy, assuming an error, is apparent. That Court has no original jurisdiction. R. S. 1944, Chap. 140, Sec. 32, provides that the:

"superior court is the supreme court of probate, and has appellate jurisdiction in all matters determinable by the several judges of probate."

It has an appellate jurisdiction and nothing more. This has been noted in decisions over a long period of years. *Small et al.* v. *Small,* 4 Me., 220, 16 Am. Dec., 253; *Moore* v. *Smith,* 5 Me., 490; *Patten et ux.* v. *Tallman,* 27 Me., 17; *Cousins* v. *Advent Church of the City of Biddeford,* 93 Me., 292, 45 A., 43; *Tripp et al.* v. *Clapp et al.,* 126 Me., 534, 140 A., 199. Even in the appellate field its authority is confined to cases within the jurisdiction of courts of probate, *Veazie Bank* v. *Young,* 53 Me., 555, and to those brought forward by one entitled to prosecute an appeal, *Deering et al.* v. *Adams,* 34 Me., 41. An additional limitation is declared in *Merrill Trust Company* v. *Hartford,* 104 Me., 566, 72 A., 745, 129 Am. St. Rep., 415, where the decision was that it could not consider questions not raised by allegations in the Reasons of Appeal. The principle that courts of probate have an original jurisdiction in probate matters that is exclusive accords with the rule prevailing in Massachusetts. *Pope* v. *Pope,* 4 Pick., 129; *Waters* v. *Stickney,* 12 Allen, 1, 90 Am. Dec., 122; *Gale et al.* v. *Nickerson et al.,* 144 Mass., 415, 11 N. E., 714; *Crocker* v. *Crocker et al.,* 198 Mass., 401, 84 N. E., 476. The exception to the decree dismissing the Petition for Annulment must be overruled on that ground.

This does not indicate that the surcharge decree is beyond the reach of a petition for annulment instituted in the proper forum. The issue as to whether a decree of the Supreme Court of Probate is open to direct attack in a court of probate has never arisen in this jurisdiction, but it has been decided expressly in Massachusetts that it is, *Gale et al.* v. *Nickerson et al.,* supra (144 Mass., 415, 11 N. E., 714); *Crocker* v. *Crocker et al.,* supra (198 Mass., 401, 84 N. E., 476). The first of these decisions cites several authorities supporting the general principle that an inferior court cannot review or revise the decree of a higher court without leave

of the latter, but we adopt the rule prevailing in Massachusetts for all matters within the exclusive original jurisdiction of our probate courts. Such action received the approval of this Court in *Thompson, Appellant,* 116 Me., 473, 102 A., 303, although it was there noted that the appellate court had not passed on the merits of the appeal earlier presented to it.

The Seventh Account does not appear in the record but the decree of the Probate Court thereon, entered at the August Term 1945, discloses that it covers the period beginning August 16, 1938 and ending March 18, 1943, and that it starts with the closing balance of the Sixth Account, without amendment because of the surcharge decree. Its date, and the fact that it was presented as a Final Account showing the closing of the trust estate in March 1943, indicate that the Trustee purported to close his trust while an appeal involving the question of a surcharge against him was pending and while all further proceedings in connection with his accounting were suspended pending decision on the appeal. R. S. 1944, Chap. 140, Sec. 36.

The allowance of the account, notwithstanding the surcharge decree, was urged on the identical grounds alleged in the Petition for Annulment. That the facts were not alleged in the account, or in a petition accompanying it, is not material. It was stated in *Bergeron, Appellant,* 98 Me., 415, 57 A., 584, that although the process therein carried no direct application for the revocation or modification of an earlier decree, the relief sought must be regarded as containing it by necessary implication. The decree of the Judge of Probate in this case was not a denial of the remedy sought on the ground that the errors in procedure relied on had not been alleged but a forthright declaration that the court in which they were urged was without authority to consider them. That the ruling on that point was erroneous is not material if the decree entered was a proper one on other grounds. *Ellis* v. *Jameson,* 17 Me., 235; *Warren et al.* v. *Walker,* 23 Me., 453; *State* v. *Mosley,* 133 Me., 168, 175 A., 307. The decree brought forward for review is that of the Supreme Court of Probate and

not that of the Judge of Probate. By the terms of the former the latter is approved and reaffirmed "in all respects." This might be held to relate only to the disallowance of the account (all else being surplusage), but if it be interpreted as affirming the ruling that the Probate Court had no authority to annul the surcharge decree, assuming that it involved error, it was erroneous in that respect. The error was harmless however if the result was a proper one on any other ground.

The result was proper. The objection raised is that there was no hearing on the appeal in the Supreme Court of Probate. Counsel for the Trustee cites us to decisions which support the principles that probate decrees entered outside the field of statutory probate jurisdiction are wholly void and may be attacked collaterally, *Fowle* v. *Coe,* 63 Me., 245; *Coolidge* v. *Allen,* 82 Me., 23, 19 A., 89; *Snow* v. *Russell et al.,* 93 Me., 362, 45 A., 305, 74 Am. St. Rep., 350; and that decrees entered within that apparent field may be attacked directly and avoided on proof that statutory procedure was not followed. See the cases cited on the first point and also *Thompson* v. *Hall,* 77 Me., 160; *Taber et al.* v. *Douglass et al.,* 101 Me., 363, 64 A., 653; *Thompson, Appellant,* supra (116 Me., 473, 102 A., 303); *Waitt, Appellant,* 140 Me., 109, 34 A., 2d, 476; *Roukos, Appellant,* 140 Me., 183, 35 A., 2d, 861, and 141 Me., 83, 39 A., 2d, 663. Reference is made also to *Peters* v. *Peters,* 8 Cush., 529, and *Pierce* v. *Prescott,* 128 Mass., 140, but these add nothing to our own cases.

It is undoubted that a preliminary inquisition by municipal officers is essential for the appointment of the guardian of an insane person, *Coolidge* v. *Allen,* supra (82 Me., 23, 19 A., 89); that bonds are requisite in connection with licenses to sell real estate, *Snow* v. *Russell et al.,* supra (93 Me., 362, 45 A., 305, 74 Am. St. Rep., 350); that the appointment of a guardian for a minor involves the written consent of a parent, *Taber et al.* v. *Douglass et al.,* supra (101 Me., 363, 64 A., 653); and that particular facts must be alleged and proved to support the issue of a license to sell real estate, *Roukos, Appellant,* supra (141 Me.,

83, 39 A., 2d, 663). These are prerequisites. In the present case there can be no doubt of the jurisdiction of the Probate Court or of the Supreme Court of Probate over the Sixth Account of the Trustee or of the power and authority of the latter to issue such a decree as the one in question. The statute does not require that every probate appeal shall be heard by the Supreme Court of Probate. Appeals are "cognizable" therein, R. S. 1944, Chap. 140, Sec. 37, and the court shall take appropriate action thereon. Express provision of the statute is that if an appeal is not prosecuted the decree of the Court of Probate may be affirmed and additional action taken, R. S. 1944, Chap. 140, Sec. 35; *Sproul* v. *Randell et al.*, 107 Me., 274, 78 A., 450. Statutory authority would not be necessary to give the court power to dispose of an appeal in accordance with the agreement of the parties. It applies when an appellant fails to proceed with his appeal and does not assent to its dismissal. It can hardly be doubted that the parties to an appeal might agree that an appellant should have all or none of the relief sought, or a part of it, or that a trustee might be surcharged by agreement on designated items of an account under appeal and not on others. Such machinery was not adopted in this case. Instead the parties agreed, subject to the right of the Supreme Court of Probate to reject the proposed compromise, that a surcharge be made in accordance with the judgment of unauthorized referees. If the agreement had been that the Trustee be surcharged an agreed amount without specification of particular items, it must be assumed that the agreement would have been rejected because such a decree would not present the decision of the Supreme Court of Probate on the issues raised by the appeal. If the Trustee had repudiated his agreement when the appeal was considered in the Supreme Court of Probate, the opportunity for a hearing therein was available to him. *Chaplin, Appellant,* supra (131 Me., 187, 160 A., 27) indicates that the report of referees could not have been accepted against the objection of the trustee. It follows necessarily that their decision could not have been used as the foundation for a

decree over such objection. *Thompson, Appellant,* 114 Me., 338, 96 A., 238, L. R. A. 1918, A, 911 suggests that the trustee might have changed his position after the agreement was made provided he took the action before a decree was entered. His agreement must be interpreted as waiving a hearing in the Supreme Court of Probate. His counsel participated in the preparation of a decree giving effect to that agreement. The Supreme Court of Probate, reviewing the action of the Probate Court in disallowing the Seventh Account which involved the issues intended to be raised by the Petition for Annulment, was justified in refusing to annul the surcharge decree on the technical ground alleged. There is nothing in the statutes which requires a hearing on a probate appeal when the parties do not wish it at the time the appeal is reversed or affirmed in whole or in part.

Exceptions overruled.

EDWARD F. TIBBETTS *vs.* CENTRAL MAINE POWER CO.

Lincoln. Opinion, September 28, 1946.

New Trial. Exceptions. Negligence.

General motion by defendant for new trial and exceptions to denial for directed verdict raise the same questions. The evidence must be viewed in the light most favorable to the successful party, and the appellant has the burden of proving that the verdict of the jury is manifestly wrong.

In actions of negligence it is not sufficient for the plaintiff to show that the defendant's negligence was adequate and sufficient to cause the injury complained of, or that it might have caused the injury, but plaintiff must show that defendant's negligence did cause the injury.

In the instant case, the evidence does not support plaintiff's contention that the fire was caused by defendant's service wires.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

The plaintiff sued defendant for negligence in causing destruction of plaintiff's dwelling house by fire, by (1) alleged failure to repair or replace defective wires after notice, (2) failure to disconnect or shut off power in defective wires after notice. Defendant's motion for directed verdict denied. Defendant excepted. Verdict for plaintiff. General motion for new trial filed by defendant. Verdict set aside. New trial granted.

Ralph A. Gallagher,

Reginald H. Harris, for the plaintiff.

Perkins, Weeks & Hutchins,

William H. Dunham,

Charles M. Giles, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

TOMPKINS, J. Action on the case to recover damages for the destruction of the plaintiff's dwelling house by fire. The plaintiff in his writ set forth three counts for negligence, (1) alleging failure of the defendant to repair or replace defective wires after notice, (2) failure of the defendant to disconnect or shut off the power in the defective wires after notice, and (3) negligence of the defendant in attaching wires to the limb of an apple tree in a place exposed to storm. The defendant pleaded the general issue. Trial by jury.

The third count in the plaintiff's writ was eliminated from the consideration of the jury.

The plaintiff was under guardianship at the time of the bringing of the action and at the time of the trial. Maud Bernice Tibbetts, wife of the plaintiff, was the duly qualified guardian. The defendant is a public utility corporation engaged in the business of furnishing electricity for light and power.

After the close of all the testimony the defendant moved for a

directed verdict, which motion the presiding justice denied, to which denial the defendant seasonably excepted. After verdict for plaintiff, defendant filed a general motion for a new trial. The motion raises the same question for consideration as does the exception. *Symonds* v. *Free Street Corporation,* 135 Me., 501. *Fort Fairfield* v. *Millinocket,* 136 Me., 426. We shall consider only the motion for a new trial.

The defendant does not press the contention that the damages were unduly excessive as ground for a new trial. In considering a motion for a new trial the evidence must be viewed in the light most favorable to the successful party. The defendant has the burden of proving that the jury verdict is manifestly wrong, *Marr* v. *Hicks,* 136 Me., 33; *Dube* v. *Sherman,* 135 Me., 144; *Cameron* v. *Lewiston, Brunswick & Bath Street Railway,* 103 Me., 482. The plaintiff does not rely upon the doctrine of *res ipsa loquitur.* "To entitle the plaintiff to recover he must show, first, that the defendant was guilty of negligence; the injury itself does not import negligence." Consequently he must show that the defendant's negligence caused the injury. "There must be a visible connection of cause and effect. It is not enough to show that the defendant's negligence was adequate and sufficient to cause it—that it might have caused it—he must show that it did cause it; that it was the preponderating, efficient cause of the injury." *Lesan* v. *Maine Central Railroad Company,* 77 Me., 85.

The plaintiff was the owner in fee of the dwelling house alleged to have been destroyed by the defendant's negligence. The house was located at Christmas Cove in South Bristol, Lincoln County. The structure consisted of the main house, the ell, and the annex to the ell some 10 x 13 feet in length and breadth, and between eight and nine feet high, with a flat roof. The latter structure is referred to in the testimony as the washroom, the laundry, or the little ell. The entire set of buildings was constructed of wood and painted. With the exception of the laundry the structure had been built about seventy-five years. The fire that destroyed the buildings was first discovered by the witness Theodore H. Eaton be-

tween three and four o'clock in the morning of September 19, 1944. According to the testimony of Mrs. Tibbetts, the guardian, the building had been vacant from the very last of August 1944 up to the time of the fire. Up to the last of August it had been occupied by summer tenants. The house was heated by an open fireplace and one or two stoves.

The 110-volt, two-wire service that supplied the electricity to the destroyed building led from pole #19 maintained by the defendant in the highway. The wires led across the plaintiff's land and were attached to the large limb of an apple tree standing on this land. The tree stood in a sheltered place and was about twenty feet from the laundry. At the apple tree the wires were affixed to the limb by insulated fittings on an iron bracket bolted to the limb. From the apple tree the wires led to the finish board upon the north side of the laundry, to which they were attached by porcelain knobs. These knobs were higher than the weather head on the conduit. The wires looped down from the porcelain knobs and entered the weather head on an upright galvanized iron conduit or pipe. The lead-in wires were #6, and the ones entering the conduit leading to the switch and ground installation were #8. The current available had the switch been closed was 110 volts. The Hyson cottage which the witness Eaton occupied at the time of the fire, and the buildings destroyed by the fire, received electricity from the same pair of wires. An employee of the defendant had sealed the switch open sometime prior to the fire so that no current would flow into the house beyond the switch. The switch was in the service entrance box located on the inside wall of the laundry. The two service wires reached the box through a porcelain bushing in the upright galvanized iron conduit or pipe, which was on the outside of the north wall of the laundry near the junction of the laundry with the ell. The porcelain bushing was missing at the time of the trial. The pipe had a galvanized iron arm or tee running at right angles to it through the wall of the laundry to the switch box. The wires entered the switch box through this arm. The service installation was sixteen

years old and of standard type, and no radical changes would have been made if installed under present day methods.

On the Thursday preceding the fire which occurred on the following Tuesday morning there was a high wind, referred to as a hurricane. On the following Friday morning Maud Bernice Tibbetts discovered that the limb of the apple tree to which the wires were affixed had fallen. The butt of the limb was still clinging to the tree and was several feet above the ground. The other end was down and resting on the smaller branches of the broken limb. She testified that the wires were sagged, and up at the corner of the house where they were attached to the laundry were pulled away and the casing was all ragged, and the wires were swaying in the wind. She did not see the wires again before the fire. On the Saturday following this discovery her daughter, Geraldine Kelsey, accompanied by Lettie Kelsey, her mother-in-law, notified the defendant company that the house needed attention, that the limb was down. The mother-in-law at the same time said: "I saw the house Friday afternoon and I think they should be attended to at once in case of fire, or something like that." This notification was delivered verbally at about seven o'clock on Saturday evening. Lewis Kelsey, the plaintiff's witness, testified that on this Tuesday morning he saw the glow of the fire from a distance of two miles, that he was awakened by the siren of the fire engine. When Mr. Kelsey arrived the whole outside of the laundry was ablaze. He could not tell at what point the fire started nor whether the fire started on the inside of the building or on the outside.

Charles L. Gammage was called by the plaintiff and testified as an expert on house wiring and on electrical installation and maintenance. This witness on direct examination was asked an hypothetical question as to the cause of the fire. His answer was: "Well, as I say, assuming those cases to be true, the wire had chafed there on the top of the pipe, heating the pipe to a point where it ignited the building." On cross-examination with reference to this answer to the hypothetical question he said "I defi-

nitely said I did not know what caused the fire. I was asked what could cause the fire." He further said if there was an arcing at the end of the pipe it would be burned but not necessarily any pitting, and after going through the fire, and the lapse of thirteen months, the burning would not be discernible. This witness was asked the following question:

"Q A very quiet night, wasn't it?

A I don't recall. It never is quite down there. Always a breeze."

Winfield H. Bearce, an employee of the defendant company, qualified as an expert in the field of electricity. Some thirteen months after the fire he found the conduit in a vertical position located along side of the wall that had disappeared. He found the ground rod driven into the ground some two feet from the base of the conduit, found the wires in position in the conduit, leaving approximately two inches exposed from the end of the weather head. The wires had been previously cut off by an employee of the defendant company. He found the ground wire attached to the ground rod, and the conduit driven into the ground a little more than a foot at the base. The tee and the switch attached were in position on the iron conduit. Mrs. Tibbetts testified in rebuttal that shortly after the fire she saw this conduit and attached switch box down in the ruins. Mr. Bearce testified that if there had been a contact between the bare #8 wires which entered the weather head, the copper wire would have been electrically burned by the arc, and the weather head would have had part of it melted away. In case of a permanent contact there would have been a weld mark. His examination of the weather head and the wires in the conduit showed no sign of any weld mark or electrical burning, and after the lapse of thirteen months the arc mark and the weld mark would be found. The wires still had some insulation on them. The wires had been annealed by the heat of the fire and all showed signs of having been very hot.

C. J. Sittinger qualified and testified as an expert for the defendant. Mr. Sittinger is a consulting engineer, and has been engaged in electrical work about thirty-five years since his graduation from Massachusetts Institute of Technology. He testified if there was an arcing between the #8 covered service wires in the galvanized iron pipe or conduit and the weather cap that the copper metal would be subtracted and deposited on the conduit, and that the pipe, weather head and wires indicated the absence of arcing. He also testified, based on the data given in the testimony, that under the worst conditions, producing the most heat, the conduit would heat up to about two hundred degrees Fahrenheit, and that the igniting temperature of a dry pine board, depending on the dryness of the board and the age, would ignite at about twelve hundred degrees. This same witness testified that the effect of a short circuit, caused by contact between a live wire and the conduit, at a house in the location of the plaintiff's, would appreciably reduce the light in a building located as was the Hyson cottage.

A defense witness, Theodore H. Eaton, testified that he was occupying the Hyson cottage about two hundred feet distant from the burning building. He was awakened about three o'clock in the morning of the fire and saw the blaze from his window. His daughter went to a neighbor's house and notified the fire department which arrived, as nearly as the witness could estimate, in not less than half an hour. When he turned on the lights in his own cottage he noticed no disturbance or failure of light in the electric bulbs. After assisting his wife, who was lame, from her bed to the front porch of the cottage, he went over to the burning building. He stood within forty or fifty feet of the back of the building which was burning. When he arrived the laundry was burning and the fire was coming from the inside and breaking out a foot to two below the eaves on the southwest corner of the laundry. This corner was diagonally across from the conduit, housing the service wires entering the laundry. The night was still and the smoke went straight up.

These are the salient features of the case, contained in some two hundred pages of printed testimony. From the testimony the jury was asked to determine, not what might cause the fire, but what did cause it.

The contention of the plaintiff appears to be that the insulation of the service wires leading into the weather head was worn by swaying in the wind against the rough edge of the conduit, and that this damage to the insulation caused there an arcing or freezing of the wires to the pipe, which heated the pipe at some point to a temperature sufficient to ignite the side wall of the laundry to which the pipe and the weather head were attached. The plaintiff contends that the circumstantial evidence in the case is sufficient to satisfy the burden of proof, and that the jury verdict should stand.

It is the duty of the plaintiff to prove by a fair preponderance of the evidence that some instrumentality of the defendant caused the fire. This proof consisted primarily of the fact that on the Friday previous to the fire there had been a high wind. The limb of the apple tree supporting the lead-in wires had fallen. Mrs. Tibbetts and another witness testified they saw the wires leading into the weather head sagging and swaying, the extent of which was not elaborated on. On the following Tuesday the house burned. There was no further testimony in the plaintiff's evidence on the situation in regard to the weather conditions except one witness who, when asked if the night of the fire was quiet, replied "I don't recall. It is never quiet down there. Always a breeze."

From the testimony the inference is sought to be established that the insulation on the wires was removed by chafing against the rough edge of the entrance of the conduit, the insulation worn away and the bare wire or wires made contact with the pipe. The installation was of standard construction, and the wires would not ordinarily rest on the edge of the pipe because of the porcelain fitting in its entrance. Assume, however, that the insulation of the wires had been worn away and contact was made with the con-

duit so that there was an arcing or freezing as claimed by the plaintiff, and this pipe at some point was heated to such a degree that it ignited the outside of the laundry where it rested against the wall. To substantiate this contention there was no testimony produced by the plaintiff to show, or tending to show, the fire originated in the vicinity of the conduit, weather head or switch box. There was no attempt made to show the nature of the material of the building in the vicinity of the conduit and the tee, except that it was constructed of wood. There was no attempt to show the kind of weather intervening between the time of the discovery of the damage to the wires and the occurrence of the fire. The defendant's witness, Mr. Sittinger, testified that, depending upon the weather and the kind of wood, the ignition point varied. Taking, however, a dry pine clapboard as an example, he said this would ignite at twelve hundred degrees Fahrenheit. He also testified that the greatest heat that would be generated in the wires in this pipe would be two hundred degrees Fahrenheit.

The testimony of the defendant's witness Eaton was of great significance. He was the first to arrive on the scene. According to his testimony the fire was burning from the inside out. The flames were breaking out under the eaves of the laundry at its southwest corner, at a point farthest from the conduit located on the outer wall of the laundry and the switch box on the inner wall. The switch was sealed open so that no current could flow into the laundry. The testimony of Mr. Sittinger was that with an open circuit, a 110-volt current could not flow through open points separated three or four inches, as the points were in the switch box. The same witness testified further that he examined the conduit and the tee, and the wires disclosed no arcing or freezing. This statement was also corroborated by the defense witness, Winfield H. Bearce.

The entire fabric of the plaintiff's right to recover rests on the assumption that the fire started with the chafing of the wires against the edge of the conduit where the wires entered the

weather head, that as a result of this chafing the bare wire or wires came in contact with this conduit and caused an arcing or freezing of the wires to the pipe, that the pipe at some point was heated to a temperature that ignited the building at the point of contact between the building and the conduit. The plaintiff's witness does not establish it by direct or indirect proof. No such inference can be drawn because the physical facts which were established by the witness Eaton rebut the inference that the fire started at the place where the conduit was fastened to the laundry. A further piece of evidence by the same witness, that he did not observe any diminution in the lights in the Hyson cottage when he turned them on the morning of the fire, also rebuts the assumption or inference that an arc had been formed in the conduit. He was in a position to see and observe this if it had occurred.

> "In order to recover the plaintiff must show, more than merely prove, that he has suffered a loss, he must prove a wrong the cause thereof, and trace it to the defendant. The burden of this proof rests upon the plaintiff. It is incumbent upon him to show how and why the fire occurred—some fact or facts by which the cause can be determined by the jury, and not left to conjecture, guess, or random judgment. He is required to prove by a preponderance of the evidence that the fire was caused by some agency for which the defendant was responsible. It is not sufficient that the evidence shows a possibility, or even a mere probability that the fire was caused in the manner charged. It must be based upon facts proved or regarded as proved."

Barnett v. *Virginia Public Service Co.*, 193 S. E., 538; *Lesan* v. *Maine Central Railroad Company,* supra.

Considering all the testimony in the light most favorable to the plaintiff, and giving to the testimony of the experts the weight to which it is entitled, we are led to the conclusion that the evi-

dence does not support the plaintiff's contention that the fire was caused by the defendant's service wires. In view of our conclusion on this vital point the question of whether or not the defendant was negligent becomes unimportant.

Verdict set aside.
New trial granted.

DANIEL J. ELLSWORTH, PETITIONER FOR WRIT OF MANDAMUS,

vs.

MUNICIPAL OFFICERS OF THE CITY OF PORTLAND.

HARRY B. POWERS, PETITIONER, *vs.* SAME.

Cumberland. Opinion, October 2, 1946.

Municipal Corporations.

Municipal ordinance, enacted in pursuance of act of legislature, providing for the retirement on pension of members of police department after twenty-five years of service, empowered city to retire such members without their consent.

ON EXCEPTIONS.

Petitions for mandamus brought by petitioners against the Municipal Officers of the City of Portland, for reinstatement as members of the police department. Demurrer to the return to the alternative writ was sustained, and peremptory writ issued. Defendants filed exceptions. Exceptions sustained. Writ quashed. Petition dismissed.

Berman, Berman & Wernick, for petitioners.

W. Mayo Payson, for respondent.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

THAXTER, J. In each of these cases the petitioner, a police captain of the City of Portland, was honorably discharged from service as of May 1, 1946 and placed on the pension payroll at one half his annual salary. Each claims that such action of the city was without his consent and unlawful; and each has filed a petition for a writ of mandamus against the municipal officers of the City of Portland asking that they show cause why their order should not be expunged and the petitioner restored to his position as a permanent member of the police force with the rank of captain. There were amendments to the pleadings, and the issue was finally presented to the justice below by a demurrer to the return to the alternative writ. This demurrer was sustained and the peremptory writ issued. To this ruling and to the issuance of the peremptory writ the defendants have filed exceptions, which, in accordance with the provisions of R. S. 1944, Chap. 116, Sec. 18, were certified to the Chief Justice and are now before us.

The defendants in their returns claim that their action was authorized under the provisions of a municipal ordinance approved July 18, 1927 which was enacted under authority of Priv. & Sp. Laws 1927, Chap. 75. As the ordinance follows the wording of the legislative act, we need determine only the proper interpretation of that act. The essential part of this reads as follows:

> "Sec. 1. *Retirement pensions for police department provided for; conditions.* The city of Portland is authorized to provide, by ordinance, for the retirement, upon pension not exceeding half pay, of all the members of its police force, including the chief of police, captains, lieutenants, sergeants, and patrolmen, who have been honorably discharged from the police force by reason of,—
>
> "First: Having served on said police force not less than twenty-five consecutive years, or

> "Second: Having served on the police force not less than twenty consecutive years and having reached the age of sixty-five years, or
>
> "Third: Having been permanently disabled in the performance of duty."

This act was amended in 1929 and in 1933, Priv. & Sp. Laws 1929, Chap. 28, Priv. & Sp. Laws 1933, Chap. 28. Such amendments, however, in no way modified the provisions with which we are here concerned and the new ordinances passed pursuant to such amending acts made no change in the provisions of the 1927 ordinance with which we are dealing.

The question before us is whether the 1927 legislative act empowered the City of Portland to retire on half pay without their consent these two members of its police force, Captain Ellsworth having served as a permanent member of the force for thirty-four years, and Captain Powers having so served for thirty years. The city claims that under section 1 of the act it had the power so to do. Each petitioner claims that he could not be honorably discharged and placed on the pension roll against his will but only on his own application.

The petitioners claim that the action taken was in violation of Art. VI, Sec. 3, of the charter of the City of Portland, Priv. & Sp. Laws 1923, Chap. 109, which provides that except for cause

> "neither the city council nor the civil service commission shall have power or authority to reduce, terminate, or diminish in any away the pay, term of office, or pension or retirement privileges of the members of the police department or of the fire department of the City of Portland as now enjoyed by them . . . ."

Whatever may have been the rights of the petitioners under the statute as originally drafted, the legislature had the right to amend the powers of the city in this respect, and in our opinion the amendment passed in 1927 controls; for, except as otherwise

provided by the constitution, there is no vested right in a public office. *Farwell* v. *Rockland,* 62 Me., 296; *Gardner* v. *Lowell,* 221 Mass., 150, 108 N. E., 937, 4 A. L. R., 205.

Nor does the action of the city violate, as claimed by the petitioners, the provisions of the ordinance of 1924, amended June 19, 1940, which created a Civil Service Commission and provided a system of civil service rules for the members of the police and fire departments. This ordinance deals primarily with discipline and has to do with the demotion, lay-off, suspension and removal of members of these departments for cause and upon presentation of charges and after a hearing. There is also a provision giving authority to the commission to reinstate members. If there were evidence that the city had retired these officers to circumvent the provision of this ordinance with respect to the right to a hearing on charges, we might have a different problem. But the record discloses no such action by the city.

Holding as we do that the legislature could empower the city by amendment of the original charter to retire in its discretion members of the police force, we come to the construction of the legislative act of 1927 and must determine whether under its provisions the legislature intended to give to the city the right to honorably discharge members of the police force without their consent who had served for twenty-five years or more and to place them on the pension roll.

As a guide to the interpretation of the 1927 law, counsel for the petitioners call our attention to various early statutes relating to the appointment, tenure, and retirement of members of the police force of the City of Portland. They assert that Chap. 424 of the Priv. & Sp. Laws of 1897 is ambiguous when read in connection with Sec. 1, Chap. 486 of Priv. & Sp. Laws of 1885. The 1885 enactment, it is claimed, provides for the compulsory honorable discharge of members of the police force on reaching the age of sixty, whereas the 1897 law authorizes the city to provide for the retirement of police officers who have been honorably discharged by reason of having reached the age of sixty-five. Of course the

1897 law is meaningless unless its purpose was to supersede the earlier law by authorizing the city to provide for the compulsory retirement of an officer on reaching the age of sixty-five. But counsel are unwilling to accept this construction of the 1897 law; for its language is similar to the 1927 law which they claim does not authorize the city to retire members of the police force against their will.

In their effort to place an interpretation on the 1897 law which will conform to their claimed construction of the 1927 act they, not only do violence to the language of the 1897 law, but assume that the legislature in 1897 enacted a perfectly meaningless statute.

When the new city charter was granted to the City of Portland in 1923, Priv. & Sp. Laws, Chap. 109, it was clearly the intention to provide a new and comprehensive system for the government of the city. Certainly so far as the police department was concerned it was not the purpose to leave old laws in force. Art. VI, Sec. 3, provides that the city council may provide for the "appointment, promotion, demotion, lay off, reinstatement, suspension and removal of the members of the police force . . . ." In the second paragraph there is a specific denial of the right of the city council or of the civil service commission "to reduce, terminate, or diminish in any way the pay, term of office, or pension or retirement privileges" of the members of the department. In 1927 this latter provision was amended by the law which is now before us for construction. This law authorized the city to provide for the retirement on pension not exceeding half pay of all members of the police force who have been honorably discharged from the police force by reason of,—

> "First: Having served on said police force not less than twenty-five consecutive years, or
>
> "Second: Having served on the police force not less than twenty consecutive years and having reached the age of sixty-five years, or

"Third: Having been permanently disabled in the performance of duty."

This amendment in our opinion gave to the city the right at its option, either on its own initiative or at the request of the individual member of the force, to honorably discharge any such officer coming within these provisions and to place him on the pension roll at not exceeding half pay.

This interpretation does no violence to the language of the act; it is in accord with the construction which we place on the act of 1897 if that early act has any significance here; and it is in accord with the spirit of the law and what is reasonable if a modern police force is to be maintained in an efficient condition. Is it reasonable that a man who is incapacitated from work, even though such disability may have been incurred in the line of duty, shall remain a member of the force at full pay till the end of his life? Is it unjust that a man shall be pensioned at sixty-five or does he have the right during the rest of his life, if he so wishes, to attempt what he may not be able to perform? If we face the problem realistically, must we not admit that an officer may after twenty-five years of service be beyond the age when he can perform the arduous work required and face with daring the dangers inherent in his work? Is it not true that after middle life a man in this position may lose the enthusiasm, the mental alertness, and the energy which are required for the proper performance of police duties? Under any of these conditions, should not the city have the right to retire him on a reasonable pension, so long as there is no abuse of discretion in so doing? We think that the legislature intended to give the city that right, which it may exercise in its discretion in accordance with the circumstances of each individual case.

Counsel for the petitioners have cited two cases which, certainly in the view which we take of the statute here involved, are not in point.

In *State* v. *Toledo*, 143 Oh. St., 123, 50 N. E., 2d, 338, it was

held that a city ordinance requiring the retirement of a deputy fire chief at the age of sixty-five was invalid as inconsistent with a state statute providing that the tenure of such officer shoud be during good behavior.

In *Boyle* v. *City of Philadelphia,* 1940, 338 Pa., 129, 12 A., 2d, (43), the city was held empowered even without statutory authority to provide for the retirement of firemen and policemen on a non-discriminatory age limitation. Counsel call attention to the fact that their retirement can only be made effective on a non-discriminatory basis. In other words, they argue that it must be applicable to all individuals on the same basis.

It is only necessary to call attention to the fact that in neither of these cases was the court presented with a statute which gave to the municipality the authority which we hold our statute gives to the City of Portland.

According to the interpretation which we place on the statute here involved, the ruling below was error. The entry in each case is,

Exceptions sustained.
Writ quashed.
Petition dismissed.

RAYMOND A. REMICK, PETITIONER *vs.* JUNE B. ROLLINS.

Knox. Opinion, October 2, 1946.

Divorce. Evidence.

Court has statutory authority at any time to alter, amend, or suspend a decree for alimony or specific sum when it appears that justice requires.

Evidence of financial situation of husband at time of separation prior to divorce, immaterial on petition for modification of decree of alimony.

ON EXCEPTIONS.

Petition brought by libellee for modification of a decree of alimony. Libellant offered testimony of libellee's financial condition at time of separation which was excluded. Libellant filed exceptions. Exceptions overruled.

Alan L. Bird, for petitioner.

Charles T. Smalley, for respondent.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, JJ.

THAXTER, J. At the May term, 1943, of the Superior Court for the County of Knox, June B. Remick, now June B. Rollins, was granted a divorce from the petitioner, Raymond A. Remick. Custody of two minor children was granted to the libellant and the libellee was ordered to pay to the libellant fifty dollars a month for their support. He was also required to pay $50,000 as a specific sum in lieu of alimony. By agreement certain real estate was to be transferred to the libellant and execution was to issue against the libellee for $43,200. January 21, 1944 a petition was filed by the libellee to amend this decree, and on March 25th a decree was entered amending it by striking out the provision relating to the payment of $50,000. Exceptions of the libellant to the entry of this decree were sustained on procedural grounds. *Remick* v. *Rollins,* 141 Me., 65, 38 A., 2d, 883. At the February term, 1945, of the Superior Court, on a new petition by the libellee and on agreement of the parties, a decree was entered modifying the original decree. Under the terms of this the libellee was ordered to pay $100 per month for the support of the children and $70 per month as alimony for a period of fifteen years, and the sum of $4,350 in settlement of all sums in arrears under the original decree. March 29, 1946 a new petition was filed by the libellee asking for a modification with respect to alimony of this last decree. Apparently by agreement at the time of the hearing a petition was filed by the libellant asking that the amount allowed for the support of the children be increased. With this we

are not here concerned. On the petition seeking a modification with respect to alimony, the presiding justice after a hearing altered the decree by striking out the order for the payment of alimony of $70 per month for fifteen years, and on the petition seeking an increase in the amount for the support of the children this was raised from $100 to $150 per month; but, as we have said, the question of the children's support is not before us.

The case is here on the libellant's exceptions to the exclusion of certain evidence. Counsel for the petitioner claims that the exceptions are not in proper form to present the issue to this court. We do not agree with his contention. The exceptions present a narrow but very fundamental question.

Counsel for the wife sought to bring out the financial situation of the husband at the time the parties separated prior to the divorce. The evidence was excluded on the ground that it was immaterial. This ruling was certainly correct when we consider that such decree, having been subsequently amended in accordance with an agreement of the parties, was no longer in force. Also counsel attempted to show the circumstances back of the award of the $50,000 settlement. All questions on this subject were objected to and excluded. Apparently it is the purpose of counsel for the wife to claim that the original decree with respect to the payment of money and the modification of it represented a property arrangement agreed to by the parties, and that therefore the amended decree was not really an order for the payment of alimony, and that for this reason the presiding justice who made the ruling below was without power to change the decree entered at the February term, 1945. The bill of exceptions indicates very clearly that the evidence which was excluded was offered on this assumption. It says: " . . . counsel for said June B. Rollins offered to show that the original agreement was not in the nature of alimony but was and was intended by the parties to effect a settlement of their property affairs. The court ruled that such evidence was immaterial . . . ."

R. S. 1944, Chap. 153, Sec. 62, gives to the court the power at

any time to "alter, amend, or suspend a decree for alimony or specific sum when it appears that justice requires; . . ."

Even though the decree of the court with respect to the payment to the wife may have been entered in accordance with an agreement of the parties, it was still a decree for alimony and subject to modification as provided by this statute. The evidence offered by the libellant was therefore immaterial and the ruling of the court below excluding it was correct.

Exceptions overruled.

CLARENCE F. MCCULLY *vs.* EARL D. BESSEY.

Somerset. Opinion, October 14, 1946.

New Trial. Evidence.

If a jury hears and determines disputed facts, that determination is final, unless so clearly wrong that it is apparent that the verdict was the result of prejudice, bias, passion, or a mistake of law or fact. The values of conflicting testimony are for the jury, and the burden of showing to the satisfaction of the court that the verdict is manifestly wrong, is upon the one seeking to set it aside.

An exception does not lie to the admission of testimony unless it is prejudicial.

Testimony to explain the meaning of words "belonging to us" in a bill of sale of pulpwood not admissible as instrument spoke for itself.

Relevancy of evidence is dependent on probative value, and the determination of relevancy and materiality rests largely in the sound discretion of the presiding justice as of the time it is offered, subject to the established rules of exclusion.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Trover to recover the value of pulpwood alleged to have been taken by defendant. Jury returned verdict for plaintiff after refusal of presiding justice to direct a verdict for defendant. Defendant excepts and files motion for new trial. Motion for new trial overruled. Exceptions overruled.

Harvey D. Eaton, for plaintiff.

Burleigh Martin,

Clayton E. Eames, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is a trover action to recover the value of 250 cords of pulpwood alleged to have been taken by the defendant. The jury returned a verdict for the plaintiff in the sum of $1,208.12. The case is before the Law Court on general motion for new trial, and also on exceptions to the admission of certain evidence and for refusal to direct a verdict.

The record shows that in May 1943 one Archie M. Kent, by warranty deed, conveyed to Mrs. Leslie Dodge a three years right to cut the wood growing on a tract of land in Benton, Maine. Later, Leslie Dodge arranged to sell some of the wood to Clarence F. McCully, the plaintiff. The wood sold to McCully was soft wood to be cut into pulp for the use of Keyes Fibre Company at Fairfield, Maine, and payments were to be made as the work of cutting was done. Dodge began the work of cutting for McCully; and during the spring and summer of 1943, McCully, without going to see the wood, made payments to Dodge of $4,000. The payments by McCully to Dodge, for wood cut and to be cut, were made as a result of statements of amounts by Dodge. Nothing was done, in 1943, relative to delivery of wood to McCully, or to Keyes Fibre Company, his customer.

In June 1944, the plaintiff McCully and Leslie Dodge met at the Keyes Fibre Company office to arrange for delivery by scaling and marking; and as a result of the conference, McCully and Dodge, with Clifton Gerald and John H. White of the Fibre Company, went to the Kent lot to see the wood. While on the lot, Dodge pointed out the McCully wood. The wood was measured or estimated, by Gerald, the Assistant Superintendent of the Fibre Company, while McCully, Dodge and White marked some

of the wood with a marking hammer. Gerald testified that there were 428.4 cords measured and marked. There was then on the lot other wood that was not marked or measured, because Dodge stated that it belonged to Earl D. Bessey.

It appears that in May 1944 the defendant Bessey also purchased pulpwood from Dodge, which wood was to be delivered to the Hollingsworth and Whitney mill at Winslow, Maine. The defendant, Bessey, received from Mr. and Mrs. Dodge on July 22, 1944 a bill of sale of "all the pulpwood, and without limiting the generality, including 4′ lengths and tree lengths, belonging to us, and located on the Archie Kent place" and other lots.

After the scaling of the McCully wood, no wood was received at the mill by McCully or by his Fibre Company customer. The wood that had been marked and measured by McCully disappeared. McCully then sued Dodge to recover the $4,000 he had advanced. Judgment was obtained, but Dodge filed petition in bankruptcy in 1945 and collection was impossible.

At the Dodge bankruptcy hearing on November 23, 1945, this defendant, Bessey, was summoned as a witness and testified that he bought pulpwood for different companies including Hollingsworth and Whitney, that he took a bill of sale from Mr. and Mrs. Dodge of all the wood on the Kent lot and other lots, and later got the wood.

At the trial of this action, however, the defendant Bessey testified that he got no wood other than the wood cut expressly for his customer, and explained his previous testimony by saying that the wood he referred to at the bankruptcy hearing, and that he took from the Kent lot, was only the wood on which he had advanced money for cutting. The defendant also claimed that his wood was cut on another portion of the Kent lot from where the McCully wood was cut; that his wood was cut in 1944 and not in 1943; that he purchased no marked wood; that no wood was received by him or by his customer other than the wood that belonged to him and was cut for him.

The defendant pleaded the general issue with a brief state-

ment denying that plaintiff owned the wood, but the record shows that at the trial the main defense was that neither the defendant, nor the defendant's customers, ever took or received any McCully wood. No witness for the defense, and many of them worked on the lot, seemed to know what became of the wood marked by or for McCully, or any of it. The evidence of conversion came from the admission of the defendant himself, if he made the admission as plaintiff claims.

Motion

A general motion for a new trial, is based on the proposition that injustice will plainly be done if the verdict is allowed to stand. It is a motion that asks that the verdict be set aside because it is against the evidence, and the weight of evidence, and that it is against the law, and that the damages are excessive. Under our system, if a jury hears and determines disputed facts, that determination is final, unless so clearly wrong that it is apparent that the verdict was the result of prejudice, bias, passion, or a mistake of law or fact. The Court cannot, and does not, pass upon credibility or number of witnesses. If the evidence in support is substantial, reasonable, coherent, and consistent with circumstances and probabilities, the verdict should stand. The values of conflicting bits of testimony are for the jury, and the burden of showing, to the satisfaction of the Court that the verdict is manifestly wrong, is upon the one seeking to set it aside. *Jannell* v. *Myers,* 124 Me., 229, 127 A., 156; *Marr* v. *Hicks,* 136 Me., 33, 1 A., 2d, 271; *Eaton* v. *Marcelle,* 139 Me., 256, 29 A., 2d, 162.

Here, there was substantial and reasonable evidence for the jury to find, as it must have found, that wood belonging to the plaintiff was on the Kent lot, that the wood was taken by the defendant, and that the value of the wood taken was the verdict. The defendant has failed to satisfy us that the verdict is "manifestly wrong." The motion for new trial, therefore, should not be sustained.

Exceptions

The first and second exceptions were taken by the defendant during the testimony of Archie Kent, called as a witness for the plaintiff, who was questioned relative to his sale of stumpage to Mrs. Dodge, and how she came to be named grantee in his deed. The witness testified, subject to objection by defendant, "that was the way Mr. Dodge wanted it," "that is what he said." The title of the plaintiff was raised by the defendant's pleadings, and such evidence might become relevant and material to show agency of Mr. Dodge for Mrs. Dodge. *Lunge* v. *Abbott,* 114 Me., 177, 95 A., 942. In any event, it was harmless, and no exception lies unless prejudicial. *Simoneau* v. *Livermore,* 131 Me., 165, 159 A., 853.

The third exception taken during the examination of Manley H. Huff relates to acts of Mr. Dodge in making his first contact with plaintiff McCully. The witness was asked if he took a message from Dodge to McCully that he would like to have McCully call about wood that he had to sell. This testimony, too, bears on agency, but was harmless.

For the fourth exception, the defendant objected to the admission of the bill of sale from Leslie Dodge, and his wife Maud Dodge, to the defendant Earl D. Bessey of all the pulpwood "belonging to us" on the Kent lot. This was material evidence and bearing on the issue of title, as well as conversion.

In exception five the witness Dodge, who with his wife sold the wood to plaintiff McCully, and also apparently sold all or a portion of the same wood to the defendant Bessey, was asked by the defendant to explain what was meant by the phrase in his bill of sale "belonging to us," and whether he intended to sell to Bessey the McCully wood. This was properly excluded. The instrument spoke for itself. *Stevens* v. *Gordon,* 87 Me., 564, 567, 33 A., 27; *Smith* v. *Blake,* 88 Me., 241, 33 A., 992.

The sixth exception, taken while John H. White was testifying for plaintiff in rebuttal, was in reference to the question "Did

you find marks of the Hollingsworth and Whitney Company on the portions left there?" The defendant objected on the ground that it was not rebuttal. The presiding justice permitted the question to rebut defense testimony that the Hollingsworth and Whitney wood was marked, and taken from the lot as fast as marked. It might also tend to contradict the defense that none of the wood, bearing marks by McCully, was ever taken. It is possible to re-mark. This exception is not valid. *Hill* v. *Finnemore,* 132 Me., 459, 172 A., 826.

In regard to each, and all, of the foregoing exceptions, our attention has been called by counsel to no authority to sustain the contentions of the defendant. Most of the objections were that the evidence was immaterial and irrelevant. Relevancy of evidence is dependent on probative value. If it is necessary for the jury to know a certain fact, in order to reach a just conclusion, the evidence bearing on that fact is admissible, unless it is excluded by some rule, or principle of law. Rules of evidence are usually rules of exclusion, and evidence is often admitted, by the trial court, not because it is shown to be competent, but because it is *not* shown to be *incompetent.* The determination of relevancy and materiality must necessarily rest largely in the sound discretion of the presiding justice, as of the time it is offered. We see no force in any of the objections of the defendant to any evidence admitted or excluded.

The seventh exception was to the refusal of the presiding justice to direct a verdict. The same issue is presented by the exception as by the motion for new trial.

In this case, the charge of the justice who presided at the trial, is made a part of the record. It is clear and comprehensive. The claims of the plaintiff and of the defendant are unusually well and fairly stated. The law applicable was properly given. We see no error in the case that demands correction.

Motion for new trial overruled.
Exceptions overruled.

HYMAN GERSTIAN *vs.* JAMES E. TIBBETTS, JR.

Kennebec. Opinion, October 15, 1946.

Brokers.

An agent or broker for the sale of real estate, is entitled to compensation for his services when he has performed the service according to special or implied agreement, by the usage of trade, or by the presumed intention of the parties.

A real estate broker must prove a contract. If the contract is express, he must show a compliance with its terms; if implied, he must show facts and circumstances from which an inference may be drawn of knowledge and assent to the acts of the broker on the part of the seller, and that the broker produced to the seller a ready, willing and able buyer upon the authorized terms.

In order to maintain an action for commission for the sale of real estate, a broker must allege and prove that he was a duly licensed real estate broker at the time the cause of action accrued. R. S. 1944, Chap. 75, Secs. 2, 7.

ON EXCEPTIONS.

Action to recover a real estate broker's commission for the sale of real estate. At the conclusion of plaintiff's case, defendant moved for a nonsuit, which was granted. Plaintiff excepted. Exceptions overruled.

William H. Niehoff, for plaintiff.

McLean, Southard & Hunt, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. In this action, tried before a jury, the plaintiff, Hyman Gerstian, has alleged that "on or about the fifteenth

day of January, 1946, that he was individually carrying on the business of real estate broker and agent, that on or about said date the defendant employed the plaintiff to negotiate sale of land and buildings at No. 312 on Water Street so-called, in said Augusta; undertaking and agreeing to pay him as a commission, a sum agreed, to wit: Five per cent of the selling price of said land and buildings if he should obtain a purchaser for the same for the sum of $30,000; that he did procure a purchaser for the said land and buildings upon the terms mentioned and that the defendant owes the plaintiff the sum of Fifteen Hundred dollars."

At the conclusion of the evidence, offered by the plaintiff, the presiding justice ordered a nonsuit. The case is now before this Court on plaintiff's exceptions to this order. The question for decision is whether the evidence offered, viewed most favorably to plaintiff's claim, would warrant a recovery.

The plaintiff testified that his business was agent for the sale of real estate. That he was a licensed broker was admitted by counsel for defendant. In January 1946, he had in his hands, for sale, certain property, in Augusta, occupied by Joseph Kaplan and Julius Sussman and known as the Blouin Block, which he tried to sell to them, but was informed that they preferred the Tibbetts building next door, owned by the defendant James E. Tibbetts, Jr. As a result, Gerstian went to Tibbetts to learn if Tibbetts would sell, and learning that he would, he told Tibbetts that he "might put the deal through." Tibbetts told Gerstian to "bring him in." Sussman had seen the building but Kaplan had not, and the plaintiff took Kaplan in to see it. Kaplan and Sussman then made an offer of $27,500. Tibbett's price however was $30,000, with the condition of a lease back permitting Tibbetts to continue to occupy for a short period at a "certain price." There was no testimony to the effect that Gerstian ever discussed with Kaplan or Sussman the question of defendant's demand for a lease, as part of the purchase.

After the offer and refusal of $27,500, the defendant Tibbetts told the plaintiff, Gerstian, that another real estate agent, one Newbert, had the contract to sell the building, and he wanted Gerstian to see Newbert. Gerstian refused to see Newbert and during January and February continued his endeavors to secure a sale from the defendant to Kaplan and Sussman, by calling on them frequently without success. All were "backing and filling" the plaintiff says. Finally on March 4, 1946, Tibbetts told Gerstian to report to Kaplan and Sussman that "unless they buy that building tomorrow or next day they are going to lose it," because the defendant had another customer. Gerstian's activities then ceased.

Julius G. Sussman testified for the plaintiff that he and his brother-in-law, Kaplan, occupied the block next door to the Tibbetts property and that they wanted to buy from Tibbetts, if the Tibbetts block met with their requirements as to floor space. Otherwise they were not interested. He had several conversations with Gerstian "dickering back and forth on price and conditions." "After Mr. Newbert came into the case" the measurements were made, and Kaplan and Sussman paid Newbert a deposit of $1,000. A deed was made through Newbert on March 23, 1946, with a lease back to Tibbetts for two years.

Joseph Kaplan, for the plaintiff, testified that he "dickered" with Gerstian "half a dozen times," but that the first part of March, Mr. Newbert came to see him "and showed me he had the contract with Mr. Tibbetts that he had the property for sale and I could not do business with anybody else." Kaplan did no business with anyone except Newbert after March 1, 1946. With Newbert, Kaplan went to look at the building and took measurements. The contract to purchase was made through Newbert on March 9, 1946. The sale of the property to *Mrs.* Kaplan and *Mrs.* Sussman, with the furnishings and an agreement to lease back for two years, was made on March 23, 1946. The lease back was a part of the agreement of purchase and sale.

An agent or broker, for the sale of real estate, is ordinarily entitled to compensation for his services, when he has performed the service according to special or implied agreement, by the usage of trade, or by the presumed intention of the parties. The broker must first prove there was a contract. If an express agreement, he must show its terms, and that the terms have been complied with. If an implied understanding, it is necessary to prove facts and circumstances, from which the inference may be drawn, of knowledge and assent to the acts of the broker on the part of the seller, and that the broker produced to the seller a ready, willing, and able buyer upon the authorized terms. *Garcelon* v. *Tibbetts,* 84 Me., 148, 24 A., 797; *Smith* v. *Lawrence,* 98 Me., 92, 56 A., 455; *Hartford* v. *McGillicuddy,* 103 Me., 224, 68 A., 860, 16 L. R. A. N. S., 431, 12 Ann. Cas., 1083; *Damers* v. *Fisheries Company,* 119 Me., 343, 111 A., 418; *Grant* v. *Dalton,* 120 Me., 350, 114 A., 304; *Jutras* v. *Boisvert,* 121 Me., 32, 115 A., 517; *Mears* v. *Biddle,* 122 Me., 392, 120 A., 181; *Hoskins* v. *Wolverton,* 123 Me., 33, 121 A., 170; *Jones* v. *Briggs,* 125 Me., 265, 132 A., 817; *Morrill* v. *Farr,* 130 Me., 384, 156 A., 383; *Jordan* v. *Hilbert,* 131 Me., 56, 158 A., 853.

In this case the defendant did not in words employ the plaintiff to sell for him his property. The plaintiff had the Blouin Block to sell. The prospective customers told him they were not interested in the Blouin property, but in the block next door belonging to the defendant. The plaintiff went to the defendant to ascertain if he would sell. There was evidence from which a jury might have inferred that prior to the first week in March, the plaintiff was engaged in an endeavor to effect a sale of defendant's property, with knowledge on the part of the defendant. There was no evidence, however, that the prospective customers were ready or willing to agree to the defendant's terms of $30,000 and a lease, until after the property was placed in the hands of Newbert and after the plaintiff had ceased to do any work in the matter. The customers were not interested in paying

more than their offer of $27,500, until satisfied that the building met with their required measurements, and these measurements were not taken until the building was in Newbert's hands, and the plaintiff had ceased his activities. The plaintiff ceased because he knew of the exclusive employment of Newbert. The customers, also, knowing of this employment, felt that they could no longer consult with the plaintiff, and no longer did so. If a jury could have found that there was originally a contract of employment, the right to negotiate for the sale of the property was clearly withdrawn from the plaintiff, on or before March 4, 1946, and before his customers were either ready or willing to purchase on defendant's terms. The sale resulted through other efforts, and with no intimation of bad faith on the part of the defendant. The plaintiff did not produce to the defendant the necessary, ready, willing, and able customer to permit him to recover a commission. On this ground, the order of nonsuit was proper.

There is another reason why the order of nonsuit in this case was a proper one, although the question does not appear to have been raised by counsel. The Legislature of Maine has defined in R. S. (1944), Chap. 75, Sec. 2, a real estate broker as one who sells, buys, or negotiates the purchase or sale of real estate, and has provided, in Section 7 of the same chapter, that no person engaged in that business "shall bring or maintain any action in the courts of this state for the collection of compensation for any services performed as a real estate broker or real estate salesman without alleging and proving that such person, partnership, or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose." Here, the record shows, there was no allegation that the plaintiff was a duly licensed real estate broker or salesman. The plaintiff did state without objection that he was a licensed broker for 1946; and it also appears, in answer to a question from the Court relative to the statutory license, that the attorney for the defendant said, "My brother

says it is so, and I have no doubt about it." If the fact that the plaintiff had a license is considered proved, it is not alleged. The very jurisdiction of the Court depends on *both* allegation and proof.

Exceptions overruled.

MAINE BROADCASTING COMPANY, INC.

vs.

EASTERN TRUST & BANKING COMPANY and THOMPSON L. GUERNSEY.

Penobscot. Opinion, October 19, 1946.

Declaratory Judgments

In proceedings for declaratory judgment, it is essential that a controversy exists.

A proceeding for a declaratory judgment may be maintained even although another remedy is available.

The Uniform Declaratory Judgment Act is remedial and should receive a liberal interpretation.

A petition for declaratory judgment is not a proceeding in equity merely because in form the procedure is equitable. The relief may be availed of either in courts of equity or in courts of law; but the action must be brought in that court which has jurisdiction of its subject matter.

The question of whether the plaintiff was liable on a note in the instant case is a legal question exclusively cognizable in the superior court.

ON APPEAL.

Suit in equity by plaintiff against defendant for declaratory judgment. From decree of sitting justice in favor of plaintiff, the defendant appeals. Appeal sustained. Case remanded to the

court below with direction that the petition be dismissed for want of jurisdiction, but without prejudice, to the right to bring a new petition in the appropriate court.

Verrill, Dana, Walker, Philbrick & Whitehouse, for petitioner.

Edgar M. Simpson,

James E. Mitchell, for defendant, Eastern Trust & Banking Co.

Eaton & Peabody, for defendant, Thompson L. Guernsey.

SITTING: STURGIS, C. J., THAXTER, HUDSON, TOMPKINS, FELLOWS, JJ.

THAXTER, J. We are concerned here with a petition for a declaratory judgment brought under the provisions of P. L. 1941, Ch. 233, now embodied in Rev. Stat. 1944, Ch. 95, Secs. 38-50. The original petition sought to have declared invalid as *ultra vires* an alleged endorsement by the petitioner on a promissory note for $50,500 given by the defendant, Thompson L. Guernsey, to the defendant, Eastern Trust & Banking Co. Guernsey filed an answer to this petition; the defendant, Eastern Trust & Banking Co., demurred on the grounds (1) that the facts as stated did not make out a case, (2) that the plaintiff had an adequate remedy at law, and (3) that the court had no jurisdiction. This demurrer was overruled by the sitting justice and the defendant, bank, reserved exceptions. It then filed an answer, one allegation of which was that it did not hold any note of the defendant, Guernsey, endorsed by the petitioner. The plaintiff then moved to amend by substituting a new petition setting forth that the plaintiff was a joint maker with Guernsey on a demand note for $50,500 dated June 25, 1941 payable on demand to the said Eastern Trust & Banking Co.; that the signing of the note by the plaintiff was for the accommodation of Guernsey and was *ultra vires,* and because of such

invalidity it asked for a decree that it was not liable on the note. The defendant, bank, objected to the allowance of the amendment, on the ground that it introduced a new cause of action, and, to the overruling of its objection took an appeal. Both defendants then answered the amended petition; and, after the filing of replications by the petitioner, the case went to a hearing. The sitting justice filed carefully considered findings and entered a decree sustaining the prayer of the petition and holding that the plaintiff was free of any liability on the note. From this decree the defendant, bank, has appealed.

This appeal brings before us among other issues that raised by the demurrer to the original petition, that the court to which the petition was presented had no jurisdiction. It is to this vital question that we shall address ourselves.

This is the first case under the Uniform Declaratory Judgments Act to be brought before this court. Most of the states have statutes on this subject and the majority have acts similar to our own. There is also a federal statute giving to the United States courts the right to grant this form of relief. Act of June 14, 1934, 48 Stat. at L. 955, Chap. 512, Judicial Code, Sect. 274D, 28 U. S. C. A., Sect. 400. These acts have uniformly been held constitutional. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S., 249, 77 L. Ed., 730, 87 A. L. R., 1191; Borchard: Declaratory Judgments (2 ed.) 150. It is essential that a controversy exist; for otherwise the petition would seek only an advisory opinion of the court. As to what constitutes a controversy see the opinion of Chief Justice Hughes speaking for a unanimous court in *Aetna Life Insurance Company of Hartford, Conn.* v. *Haworth,* 300 U. S., 227, 81 L. Ed., 617, 108 A. L. R., 1000. A proceeding for a declaratory judgment may be maintained even though another remedy is available. To hold otherwise would do violence to the statute which provides in Sec. 1 that the remedy is available "whether or not further relief is or could be claimed." For a discussion of this subject see *Stephenson* v. *Equitable Life Assur. Soc.* 92 F., 2d, 406, 408; *Schaefer* v.

First National Bank of Findlay, 134 Ohio St., 511, 18 N. E., 2d, 263, 265. It should furthermore be borne in mind that the statute in question is remedial and should receive a liberal interpretation in order that the purpose which the legislature had in mind in enacting it may not be thwarted. The act declares in Sec. 15, now Rev. Stat. 1944, Ch. 95, Sec. 50, that its provisions "shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees; . . . ."

The purpose of this statute is not to enlarge the jurisdiction of the courts to which it is applicable but to provide a more adequate and flexible remedy in cases where jurisdiction already exists. The act by its very terms so indicates. It says in Sec. 1, P. L. 1941, Ch. 233, "Courts of record within their respective jurisdiction shall have power . . . ." Mr. Anderson says: " . . . it is the undoubted weight of authority, sustained upon unassailable reasons, that the declaratory judgment statutes do not have the effect of increasing or enlarging the jurisdiction of the courts." Anderson: Declaratory Judgments, 81. And Mr. Borchard in his work on this subject says: "It is an axiom that the Declaratory Judgments Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it manifestly has opened to prospective defendants—and to plaintiffs at an early stage of the controversy—a right to petition for relief not heretofore possessed. In that sense, it has decidedly extended the power of courts to grant relief in cases otherwise within their jurisdiction to pass upon." Borchard: Declaratory Judgments (2 ed.) 233. Such also has been the view of the majority of courts which have had this problem before them. As examples we call attention to the following cases: *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F., 2d, 321; *Davis* v. *American Foundry Equipment Co.,* 94 F., 2d, 441, 115 A. L. R., 1486; *Mississippi Power & Light Co.* v. *City of Jackson,* 116

F., 2d, 924; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* supra; *Aetna Life Ins. Co.* v. *Haworth,* supra. See also for a discussion of this subject *Sheldon* v. *Powell,* 99 Fla., 782, 792, 128 So., 258. All of these cases indicate that the purpose of Uniform Declaratory Judgments Act is to give a new remedy in cases where jurisdiction exists.

The petition in the case before us is addressed to the Supreme Judicial Court as if the proceeding were in equity. But a petition for a declaratory judgment is not a proceeding in equity, merely because in form the procedure may be equitable. That the petitioner assumed it to be an action in equity is, however, immaterial if the subject matter is of such a nature that the court to which the petition is addressed may give the desired relief. As a matter of fact the relief may be availed of either in courts of equity or in courts of law, *Stephenson* v. *Equitable Life Assur. Soc.,* supra; but the action must be brought in that court which has jurisdiction of the subject matter. *Wolverine Mut. Motor Ins. Co.* v. *Clark,* 277 Mich., 633, 270 N. W., 167; *Ewing Tp.* v. *City of Trenton,* 137 N. J., Eq. 109, 43 A., 2d, 813; *Aetna Casualty & Surety Co.* v. *Quarles,* supra.

In the Michigan case, *supra,* the plaintiff filed a petition in chancery seeking a declaratory judgment that it had no liability to the defendants under a certain insurance policy. In reversing a ruling of the trial court the opinion says, page 636:

> "Is plaintiff in the proper forum? It is plain from the whole statute that the remedy must be sought in the appropriate court and 'the nature of the case,' not the pleasure of the petitioner, is the test of the forum. It would require clear language to support a holding that the Legislature intended so unjust a proceeding as that a party, having a purely legal right of action or defense, may bring a proceeding for declaratory judgment in chancery, at his will, serve process anywhere in the State, and deprive a defendant of his right of trial in his own locality and by a jury of his vicinage."

In the New Jersey case, *supra,* in holding that there was no jurisdiction, the court said, 43 A., 2d, 815:

> "However, it must be conceded that under the express terms of the act, the controversial or doubtful question must be one within the jurisdiction of the court in which the declaratory judgment or decree is sought. A declaration of legal rights may be had only in the courts of law."

In *Aetna Casualty & Surety Co.* v. *Quarles,* supra, page 325, the court said:

> "The company seems to think that by asking a declaratory judgment it became entitled to a trial in equity without a jury and that this is a sufficient reason for granting declaratory relief notwithstanding the institution of the action on the policy; but this is clearly not the case as the defense to determine which the declaratory judgment was sought was legal and not equitable in character. Where the issues raised in a proceeding for a declaratory judgment are of this nature, they must be tried at law if either party insists upon it, for the statute so provides. 28 U. S. C. A., Sect. 400(3). And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure."

In the instant case, the question whether the plaintiff was liable on the note is a legal question, which, since January 1, 1930, has been exclusively cognizable in the Superior Court. P. L. 1929, Ch. 141, Sec. 7; Rev. Stat. 1930, Ch. 91, Sec. 15; Rev. Stat. 1944, Ch. 94, Sec. 5. The sitting justice was apparently satisfied that there was no basis for equitable relief; and he did not base his decision that the Supreme Judicial Court had jurisdiction on the ground that the issue submitted was equitable. He held in effect that it was the purpose of the Uniform Declara-

tory Judgments Act to give to the Supreme Judicial Court and to the Superior Court concurrent jurisdiction over all actions where declaratory judgments should be sought. He said: "Notwithstanding the words 'within their respective jurisdictions', in Section 1 of the Act, it seems apparent that the legislation contemplated original concurrent jurisdiction for declaratory judgments in the Supreme Judicial and the Superior Courts." In this we feel he was in error; for in our opinion it was not the intention of the legislature in enacting the Uniform Declaratory Judgments Act to enlarge the jurisdiction of either court, but merely to provide a new remedy where jurisdiction already existed.

Appeal sustained. Case remanded to the court below with direction that the petition be dismissed for want of jurisdiction, but without prejudice to the right to bring a new petition in the appropriate court.

CARL A. PROCTOR, ET AL. *vs.* PETER P. CAREY.

Kennebec. Opinion, October 19, 1946.

Appeal and Error. Boundaries.

Location of the boundary line of lots marked on the ground by surveyor, and antedating a plan of lots, controls over a plan subsequently made.

Findings of fact by presiding justice, if there is any evidence to support them, are conclusive. If there is no evidence to support such findings, the error becomes one of law.

ON EXCEPTIONS.

Action of trespass *quare clausum* brought by plaintiffs against

defendant and tried before a single justice who found for the plaintiffs. Defendant filed exceptions. Exceptions sustained.

Harvey D. Eaton, for plaintiffs.

F. Harold Dubord, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

THAXTER, J. This action of trespass *quare clausum* was tried before a single justice without the intervention of a jury but with right of exceptions reserved. He entered judgment for the plaintiffs and the case is before us on the defendant's exceptions. The sole issue is the determination of the dividing line between the property of the plaintiffs and the property of the defendant in a certain land development known as College Avenue Heights in the City of Waterville.

A portion of this development includes lots 28 to 35 inclusive running easterly and westerly on the southerly side of Donald Street according to a plan made in August 1921 by Green & Wilson. Both parties trace their titles to deeds from D. W. Lanigan and L. J. Rosenthal who first developed the tract. By warranty deed dated September 3, 1921 Lanigan and Rosenthal conveyed lots 28 and 29 on the plan to George L. Chamberlain and Margarette Chamberlain who conveyed to the defendant, Peter P. Carey, by deed dated April 20, 1945. Each of these conveyances was made by lot numbers and there was no mention of metes or bounds, of courses or distances, or of monuments. June 23, 1923 Lanigan and Rosenthal deeded in a similar manner lot 30 to Walter Lint and subsequently on August 18, 1928 the easterly half of lot 31. By various conveyances, none of which mentioned metes or bounds, courses or distances, or monuments, title to lot 30 and the east half of lot 31 vested in the plaintiffs. According to the plan the frontage of lot 28 is 52.9 feet on Donald Street, lot 29 is 60 feet, and lot

30 is 50 feet. Measuring on the ground the distances called for by the plan from the easterly bound of lot 28 to the westerly bound of lot 35 there is a shortage of approximately six feet. It is this six feet which is in dispute between the parties. The plaintiffs claim that their easterly bound is six feet farther east than is called for by the defendant's deed. If they are correct in their contention, the width of lot 29 would be 54 feet instead of 60 feet as shown on the plan.

The sitting justice has found that when the Chamberlains acquired lots 28 and 29 in September 1921 there were wooden stakes such as surveyors use marking the boundary between lots 29 and 30 and that Chamberlain replaced these stakes with iron pins; that the pin on Donald Street remains in the same location as Chamberlain placed it; and that this pin marked the boundary as claimed by the plaintiffs. There was also a finding that this boundary was acquiesced in at least passively for over twenty years.

He ruled that the record title to the strip was in the defendant; that the plaintiffs, under the doctrine of *Landry* v. *Giguere,* 127 Me., 264, 143 A., 1, did not gain title to this strip by adverse possession; and that neither the parties nor any of their predecessors established the line marked by the stake by agreement. *Bemis* v. *Bradley,* 126 Me., 462, 139 A., 593. He also ruled on the authority of *Brown* v. *Gay,* 3 Me., 126, and *Thomas* v. *Patten,* 13 Me., 329, that if the original locations had been marked on the ground by the surveyor and such marking antedated the plan, such locations would control over the plan subsequently made. *Brown* v. *Gay,* supra; *Thomas* v. *Patten,* supra. With these rulings of law we agree.

The justice then proceeded to make the following finding of fact:

> "Bearing in mind that the deed to Chamberlain from Lanigan and Rosenthal was dated September 3, 1921, that the wooden stakes were there at that time, and that the plan referred to in the deed was dated August 1921, and

is not in accord with the locus as it lies upon the face of the earth, it seems reasonable to infer that in this instance the survey was made and the monuments erected prior to the making of the plan; we so find.

"We further find, therefore, that the location of the boundary between lots 29 and 30 as claimed by the plaintiff is to be sustained."

Findings of fact by the justice hearing a case, if there is any evidence to support them, are conclusive, and exceptions do not lie. If on the contrary there is no evidence to support the findings, the error becomes one of law. *Chabot & Richard Co.* v. *Chabot,* 109 Me., 403, 84 A., 892. Mr. Green, in whose office the plan was made, does not tell when he made the survey; and he says nothing about placing any stakes or other markers in the ground. As a matter of fact there is no evidence that a survey was ever made on the land until very recently. We are completely in the dark as to how the wooden stakes got there. Chamberlain says that he replaced them with iron pins when he bought the land. To be sure, iron pins were found in the ground recently at points marking the line as claimed by the plaintiffs; but there is no assurance that they are in the same location as were the wooden stakes which Chamberlain removed. The only affirmative evidence on this point would indicate otherwise; for Chamberlain testified that the pin which he set marking the northwest corner was about six feet from the Lint house. If this were so, the line would be in the location claimed by the defendant.

In our opinion there is no evidence to support the inference drawn by the sitting justice that the wooden stakes were placed in the ground by the surveyor at the time of making a survey of the land, nor is there any evidence that a survey if made antedated the making of the plan. The inference seems to us based on conjecture rather than on proof.

Exceptions sustained.

UNITED FELDSPAR & MINERALS CORPORATION

vs.

HARRY E. BUMPUS ET AL.

Oxford. Opinion, October 21, 1946.

Mines and Minerals.

The owner of a reversion, subject to a mining lease, was not entitled to cancellation of the lease on the ground that a covenant to carry on mining operations with reasonable diligence is implicit in any lease providing for rental on a royalty basis where there is no provision for a minimum annual rental, and that there has been a breach of such implied covenant, where suit was brought within short time after acquisition of title, and price paid for reversion at the sale must be considered as having been determined to some extent by the omission from the terms of the lease of any express covenant to carry on operations, and abandonment of mining might be attributable to litigation initiated by plaintiff.

ON APPEAL BY PLAINTIFF.

Plaintiff brought complaint against defendant seeking the cancellation of a 50-year mining lease. Bill was dismissed, and plaintiff appealed. Appeal dismissed. Decree below affirmed.

Brann, Isaacson & Lessard,

Thomas E. Delahanty,

Raymond Burdick, for plaintiff.

George C. Wing, Jr., for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

MURCHIE, J. In this case the plaintiff's bill of complaint, seeking the cancellation of a 50-year mining lease dated June 1, 1927 on the ground that a covenant to carry on mining operations with reasonable diligence is implicit in any lease providing for rental on a royalty basis where there is no provision for a minimum annual rental, was dismissed by decree dated July 6, 1945 for the assigned reasons that the original parties to the lease did not contemplate such a requirement; that forfeitures and cancellations are not favored at law or in equity but rest within the discretion and conscience of the court, and that such discretion and conscience were not moved to action on the evidence presented. Notice was forwarded to counsel on July 9, 1945. Plaintiff attempted to appeal on August 15, 1945, too late to comply with the requirements of R. S. 1944, Chap. 95, Sec. 21, but leave therefor was granted on August 22, 1945, in accordance with the provisions of R. S. 1944, Chap. 95, Sec. 25.

The process was filed on October 18, 1943; separate answers on November 4, 1943, and a replication on November 16, 1943. The case lay dormant thereafter until April 21, 1945 when the plaintiff was authorized to inspect the leased premises on proper motion. In the interval between the filing of the bill of complaint and the hearing, and for a long time prior to that filing, the parties had litigated the liability of the defendants for royalties on minerals removed from the demised premises between October 1, 1934 and October 16, 1940, and the reversion following the lease had been sold on partition proceedings. The plaintiff had instituted all the litigation as the owner of twenty undivided thirtieth parts of the reversion; had collected $2,361.68 as its share of the overdue royalty, and had acquired title to the entire property, subject to the lease. It prosecutes this action on the title acquired on July 8, 1943 from the purchaser at the judicial sale. On March 1, 1943 the purchaser at the judicial sale made demand on the defendants that mining operations be resumed promptly and conducted

during the balance of the leasehold term with reasonable diligence and advised that if operations were not resumed proceedings would be taken for the cancellation of the lease. The deed to the plaintiff carried an assignment of all rights under the demand.

The lessors were Allen E. Cummings and Sybil E. Cummings, a brother and sister of the defendant Laura J. Bumpus. The property demised was described as the homestead farm of Joseph W. Cummings, on which the brother and sister made their home. It had never been developed as a mine. The brother had carried on some casual or exploratory mining work but he had no mining equipment and had never removed or sold any minerals when the lease was executed. The lessees were a husband and wife, the former a druggist. Neither had ever engaged in mining. There is nothing in the lease to indicate that the parties contemplated that mining operations should be commenced promptly or that once commenced they should be prosecuted with diligence. As a matter of fact they were not commenced until after the lapse of about seven years. During the next six years something over 8,300 long tons of feldspar were removed, along with 500 tons of quartz or thereabouts, a little less than 2,500 tons of beryl and mica scrap in negligible quantity. The machinery used was borrowed or rented largely from the plaintiff or its corporate predecessor and the entire output sold to it. The plaintiff became an owner of a part of the reversion on January 2, 1940 (see *United Feldspar & Minerals Corp.* v. *Bumpus et al.*, 141 Me., 7, 38 A., 2d, 164). It was familiar with the entire history of the operations under the lease. The title on which it prosecutes the present action is "subject to all rights" of the lessees under the lease, to quote the language of the deed given to consummate the judicial sale.

The plaintiff seeks cancellation of the lease, notwithstanding the recital of the deed, on the ground that a covenant to mine with reasonable diligence should be implied against the lessees

and that it should have been found that that covenant had been breached. Counsel for the plaintiff cite us to decisions which they claim assert the principle involved. Included among the eighteen cases cited is *Freeport Sulphur Co. et al.* v. *American Sulphur Royalty Co. of Texas,* 117 Tex. 439, 6 S. W., 2d, 1,039, reported in 60 A. L. R., 890, where it is followed by an annotation in which all but three of them are discussed to some extent. Collectively the cases carry recognition that under proper circumstances a covenant to mine with reasonable diligence may be considered implied in a lease calling for the payment of a royalty with no language regulating the conduct of operations, but no one of them furnishes a precedent for declaring the circumstances of the present case sufficient for the purpose. Included among them are three Alabama decisions, *Collins* v. *Smith,* 151 Ala., 133, 43 So., 838; *Collins* v. *Abel,* 151 Ala., 207, 44 So., 109, 125 Am. St. Rep., 24; and *Majestic Coal Co.* v. *Anderson,* 203 Ala., 233, 82 So., 483, which are not authority for the principle urged but grant recognition to it in holding that a mining contract which contains no express covenant for operation is unilateral and void in that jurisdiction without regard to agreements in it which would raise an implied covenant in others. In the last of these cases the court remarked that however doubtful the correctness of the rule might be, it had prevailed in the state for twelve years and would be followed. The Arkansas case of *Millar* v. *Mauney,* 150 Ark., 161, 234 S. W., 498, dealt with a lease containing a covenant not to cease work for more than three months continuously and has no bearing upon the present issue. Of three North Carolina decisions one dealt with a lease defining its purposes as "testing, developing and operating" for minerals and the facts showed a failure to work the mine for a period of five years, *Maxwell* v. *Todd,* 112 N. C., 677, 16 S. E., 926. Of three West Virginia cases one dealt with the lapse of forty years (a most unreasonable time), *Shenandoah Land & A. Coal Co.* v. *Hise,* 92 W. Va., 238, 23 S. E., 303, and another declared that operation within

a reasonable time was evidently contemplated by the parties, *Chandler* v. *French,* 73 W. Va., 658, 81 S. E., 825, L. R. A. 1915 B 561. A Kentucky case, *Kentucky Coke Co.* v. *Smith,* 207 Ky., 485, 269 S. W., 558, shows a lapse of twenty years without mining.

There is no occasion on the facts presented to determine whether the principle applicable in some jurisdictions where mining is a substantial industry should be adopted in this state. Our case is distinguishable from those cited to us wherein such a covenant was held to be implied on a variety of grounds. The lapse of time between the plaintiff's acquisition of title to the reversion and the commencement of its process was less than four months. The defendants' abandonment of mining might be attributable to the litigation involving the lease and its construction initiated by the plaintiff. The plaintiff's title was subject to the lease by express recital in the deed evidencing the judicial sale. The price paid at that sale must be considered as having been determined to some extent by the length of the unexpired leasehold term and the omission from the terms of the lease of any covenant such as that sought to be read into it by implication. There is no sound reason why a court should increase the value of a reversion sold by judicial sale.

Appeal dismissed.
Decree below affirmed.

PHILIP H. MACDONALD, EXECUTOR

vs.

PHILIP D. STUBBS, INHERITANCE TAX COMMISSIONER.

Cumberland. Opinion, November 18, 1946.

Taxation.

Taxation is the rule and exemption is the exception.

An inheritance tax is not a tax on property, as such, but is a tax on the privilege of receiving property by will or inheritance, therefore a statute that exempts real or personal property from taxation would not necessarily exempt from a tax on the privilege of receiving the property.

Where income from trust fund under will is to be used not only for annual dues of fraternal organization, but also for maintenance of a building, a portion of which is rented, the fraternal organization is not exempt from the payment of inheritance taxes on the trust fund.

ON REPORT ON AGREED STATEMENT.

Petition in equity by executor of will for abatement of inheritance tax on ground that legacy to lodge for certain purposes is exempted by law from payment of inheritance taxes. Abatement denied. Petition in equity dismissed.

Sherman I. Gould,

Charles H. Shackley, for the plaintiff.

Ralph W. Farris, Attorney General of the State of Maine,

Nunzi F. Napolitano, Assistant Attorney General of the State of Maine, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is a petition in equity under Rev. Stat. 1944, Chap. 142, Sec. 30, to the Probate Court in the County of Cumberland, brought by Philip H. MacDonald as executor of the Will of William G. Hunton, for abatement of inheritance tax. The case comes to the Law Court on Report by agreed statement of facts. The question for decision is whether the particular legacy provided by the terms of the will of the late William G. Hunton for Lafayette Lodge No. 48, Free and Accepted Masons, of Readfield, Maine, is exempted by law from payment of inheritance tax.

William G. Hunton, late of Portland, died July 31, 1944, and, under the seventh paragraph of his Will, created a trust for the benefit of Margaret H. Andrews (now living) and instructed the Trustee upon her death to distribute certain personal property among certain beneficiaries, "and all the rest, residue and remainder of said trust estate to Lafayette Lodge No. 48, Free and Accepted Masons, of Readfield, Maine, to be held in trust and the annual income from said funds to be used by said Lodge to pay their annual dues to the Grand Lodge of the State of Maine; and any of said income which may not be required for said purpose to be used for the maintenance of the building or buildings which they may occupy."

The agreed facts and exhibits show that Lafayette Lodge was incorporated February 24, 1865 by act of the Maine Legislature, Private and Special Laws 1865, Chapter 523; and it was given power to take and hold real estate and personal property "for masonic, charitable and benevolent purposes." Its Charter from the Grand Lodge of Maine was dated May 20, 1850 and constituted certain named individuals, "a Regular Lodge of Free and Accepted Masons, . . . hereby giving and granting unto them and their successors, full power and authority to convene as Masons, . . . to receive and enter Apprentices, pass Fellow Crafts, and raise Master Masons, upon the payment of such compensations for the same as may be determined by the Grand Lodge; also to make choice of a Master,

Wardens and other Office Bearers, annually or otherwise, as they shall see cause; to receive and collect funds for the relief of poor and distressed Brethren, their Widows or Children; and in the general to transact all matters relating to Masonry, which may to them appear to be for the good of the Craft."

The original Legislative Act, incorporating the Grand Lodge, approved June 16, 1820, authorized the management of affairs according to ancient Masonic usages, and to take and hold real estate and personal property for charitable and benevolent uses.

The constitution of the Grand Lodge provides for a "Masonic Charitable Foundation" and the interest from charitable funds may be appropriated in whole or in part, in the first instance, for poor and worthy members of lodges, their widows and orphans, and, secondly, to "other worthy cases of distress within and without the Masonic Fraternity" as the Grand Lodge or the Trustees of the Foundation "may consider worthy of assistance."

Lafayette Lodge owns the building which it occupies, and its income is derived from rent from portions of the building, and dues from members. This income is expended for maintenance of building, the general expenses of the fraternal order, the annual dues to the Grand Lodge, and for relief of poor and distressed members or their widows and children.

The Inheritance Tax Commissioner, by his Certificate of tax dated July 9, 1945, determined the value of the residue to which Lafayette Lodge is entitled upon the death of Margaret H. Andrews, at $6,066.73, and imposed a tax of $556.67. Philip H. MacDonald as executor of the Will, filed this petition for abatement, and claims that Lafayette Lodge "as a Masonic Lodge, pecuniary profit not being its object or purpose, is entitled to receive the rest, residue and remainder of said trust estate without payment of any inheritance tax thereon," under the authority of P. L. 1939, Chap. 122 (Rev. Stat. 1944, Chap. 142, Sec. 2, Par. 2). The Defendant Commissioner contends

that the inheritance tax is legal and proper, and that the Lodge is not exempt, by reason of this statute, as a "charitable corporation."

The Court does not feel in the present case that it is necessary to decide what is, or what is not, a charitable corporation, because it feels that regardless of the corporate status, the purpose of this particular trust is not charitable, and that it is subject to tax.

The principal portion of the Inheritance Statute in question, is as follows:

> "All property which shall pass to or for the use of societies, corporations, and institutions now or hereafter exempted by law from taxation, or to a public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, religious, benevolent, educational, public, or other like work, pecuniary profit not being its object or purpose, or to any person, society, corporation, institution, or association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy to any such property or the income thereof, shall be exempted; provided however, that such society, corporation, institution, or association be organized and existing under the laws of this state, or that the property transferred be limited for use within this state." Rev. Stat. 1944, Chap. 142, Sec. 2, Par. 2.

Rev. Stat. 1944, Chap. 81, Sec. 6, Par. 3 is the general law which now exempts from taxation the real and personal property of certain named organizations, like the Red Cross and American Legion, and also exempts the real and personal property of all benevolent and charitable institutions incorporated by the State, and corporations whose property in excess of ordinary expenses, is held for the relief of the

sick and the poor. Express provision, however, is also made that so much of the real estate owned by benevolent and charitable corporations, which is not occupied by them for their own purposes, shall be taxed.

Taxation is so vital and so universal a necessity under the many demands of government, that an exemption from the payment of a tax is the exception and never the rule. Public policy and public necessity require, however, that some organizations or institutions devoted to the general welfare, such as religious organizations, free hospitals, schools and colleges, should not be obliged to use their funds for the general purposes of government. The benefits derived by the public from the activities of certain moral, educational and charitable organizations are of greater value than would be their tax contributions. The very word "exemption" indicates a freedom from duties and charges to which others are subject. The burden of proving that a particular legacy is exempt is on the one who claims that it is free from the usual obligation. "Taxation is the rule and exemption the exception." *Auburn* v. *Y. M. C. A.*, 86 Me., 244, 247, 29 A., 992, 993; *Park Association* v. *Saco*, 127 Me., 136, 142 A., 65; *Camp Associates* v. *Inhabitants of Lyman*, 132 Me., 67, 70, 166 A., 59.

Although inheritance taxes have been introduced into the United States, and adopted by this State, in comparatively recent times, it is not a modern discovery as a system of raising revenue, because it was an established form of taxation in ancient Rome. All inheritance tax laws contain the graduated principle, and the amount of tax depends on the amount received, or to be received, and whether the recipient is related to the decedent, or a stranger to the blood. Almost all inheritance tax statutes contain an exemption in favor of bequests for charitable purposes.

The precise question presented here has never been passed upon by our Court. The inheritance tax laws of Maine have contained provisions for the exemption of gifts to charitable or

benevolent institutions since 1895 (see P. L. 1895, Chap. 96), but only two decisions have been made on what constitutes a charitable benevolent institution or a gift within the meaning of the inheritance tax statute. In *re Estate of Lena A. Clark,* 131 Me., 105, 159 A., 500, it was held that the town of Berwick was a charitable institution, within the meaning of the statute, and the gift of funds for a public building was a charitable use (the statute being later amended by P. L. 1933, Chap. 148, specifically exempting public corporations) while in *re Estate of James N. Hill,* 131 Me., 211, 160 A., 916, 83 A. L. R., 928, the Court held that a cemetery corporation was not charitable, the gift being for care and improvement of cemetery property.

It is well recognized that an inheritance tax is not a tax on property, as such, but is a tax on the privilege of receiving property by Will or inheritance. *State* v. *Hamlin,* 86 Me., 495, 30 A., 76, 25 L. R. A. 632, 41 Am. St. Rep. 569; *Re Cassidy,* 122 Me., 33, 118 A., 725, 30 A. L. R., 474. Therefore, a statute that exempts real or personal property from taxation would not necessarily exempt from a tax on the privilege of receiving the property. 28 Am. Jur., 106, Sec. 203. The inheritance tax laws of Maine, as above stated, provide however, that if an organization is exempted under the property tax law it is also exempted under the inheritance tax law.

The plaintiff claims that the Lafayette Lodge is not liable for inheritance tax because it is within the exemption under the property tax law. Rev. Stat. 1944, Chap. 81, Sec. 6, Par. 3; and if not within this exemption, it is exempt because it is a "charitable corporation," "engaged in or devoted to charitable and benevolent work" under the inheritance tax law, Rev. Stat. 1944, Chap. 142, Sec. 2.

As appears from the above extract from Chap. 142, Sec. 2 of the Rev. Stat. of 1944 known as the Inheritance Tax Law, the exemption applies to property passing (1) to or

for the use of a corporation now or hereafter exempted by Rev. Stat. 1944, Chap. 81, Sec. 6 from taxation, (2) to a public corporation, (3) to a corporation engaged in or devoted to charitable work, and (4) to *any* corporation in trust for or to be devoted to any charitable purpose.

Taking these divisions in order, the first question is whether this legacy in this case, and under these facts, is exempted from taxation under the general law, above mentioned as Rev. Stat. 1944, Chap. 81, Sec. 6, Par. 3, and this, it appears to us, is decided by the very fact that the income from the trust fund is to be used not only for annual dues, but also for maintenance of a building or buildings that are, or may be, taxable. Portions of the buildings are now rented. Under these facts the Lafayette Lodge is not exempt under (1), which is the general law exempting from all real and personal property tax.

There is no question as to subdivision (2), for this lodge is admittedly not a "public corporation." The bequest here is to be used for the payment of annual dues and for maintenance of lodge buildings which, on its face, shows that it is not a "charitable purpose" and that exemption (4) does not apply. As to (3), whether the corporation is engaged in or devoted to charitable work within the meaning of the inheritance tax statute, we do not view as material in this case. It would not appear to be within legislative intent to say that a corporation might take moneys free of inheritance taxation for the declared purpose of maintaining property subject to taxation, or to relieve individuals of payment of dues incidental to membership.

It is not for the Court to amend old statutes or to make new ones. If the Legislature desires to add the name of a fraternal order to the general exemption law, or wishes to make an inheritance tax law with more liberal exemptions, it has authority to do so. All we can say is, that in this case, with the facts as presented, the plaintiff is not exempt under existing laws

from payment of the inheritance tax imposed by the Defendant Commissioner.

Abatement denied.
Petition in equity dismissed.

LEON HENDERSON *vs.* WOODBURY L. BERCE.

Aroostook. Opinion, November 22, 1946.

Statutes. Sales. Evidence. Damages.

The provisions of R. S. 1944, Chap. 27, Secs. 124, 127, relating to the certification of seed was intended to be regulatory, and penal only if the statute was knowingly or wilfully violated.

The statute relating to the certification of seed was intended to provide protection to the purchaser and does not deprive him of common law action to recover damages if the potatoes were not as certified, and a warranty, express or implied, exists.

A new statute will not be considered as intending a reversal of long established principles of law and equity unless such intention unmistakably appears.

Certificate of Commissioner of Agriculture provided prima facie evidence that the goods sold were certified seed potatoes of the variety described on the tag within the varietal tolerance allowed, and grown according to the regulations of the Commissioner of Agriculture.

If seller expressly or impliedly warranted variety of potatoes sold, he is not protected against liability for breach of warranty of variety, although in good faith he grew and prepared potatoes for sale in accordance with the rules and regulations of the Commissioner of Agriculture.

Where seeds of a particular kind are asked for and sold as such, the express or implied affirmation of the seller that they are of such kind, constitutes a warranty as to kind when inspection would not have revealed the variety sold.

The seller is responsible for a breach of warranty when he sells a thing as being of a particular kind, if it does not answer the description, the vendee

not knowing whether the vendor's representations are true or false, but relying upon them as true, whether seller acted wilfully or innocently.

Where a breach of warranty is in respect to the kind of seed sold for raising a crop and the crop raised is for such reason inferior to the crop which would have been raised if the seed had been as warranted, the buyer is entitled to recover the difference between the value of the crop raised and the value of the crop which ordinarily would have been raised if the seed had been as warranted, which, in the instant case, was the difference between the market value of table stock and the value of the crop as certified seed at the time of harvest.

Where seller does not warrant that potatoes would produce certified seed, measure of damage for breach of warranty as to variety is not the difference between table stock market value of crop grown from seed purchased and amount buyer had to pay to secure seed of same quantity in the following spring for the purpose of starting his crop for that year.

ON REPORT AND AGREED STATEMENT OF FACTS.

Action to recover damages for breach of implied warranty in the sale of certified seed potatoes. Judgment for the plaintiff.

George B. Barnes, for plaintiff.

Scott Brown, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

TOMPKINS, J. Action on the case to recover damages for breach of implied warranty of variety in the sale by the defendant to the plaintiff of fifty barrels of certified Earlaine seed potatoes. The case is before the Court on report and agreed statement of facts, the Law Court to render such final decision as the rights of the parties may require.

The plaintiff testified that in February 1944 he bought, over the telephone, fifty barrels of certified Earlaine seed potatoes #2 from the defendant. The potatoes were delivered to Mr. Henderson, the plaintiff, in containers marked as provided under our statute relative to certified seed. The plaintiff further stated

that in his conversation with Mr. Berce, the defendant, he told him he was purchasing the potatoes to raise seed for the coming year.

The potatoes were planted during the farming season of 1944 and entered with the State Department of Agriculture for certification. Under the regulations authorized by the statute they were duly inspected by Wendell Sharp, an inspector for the Maine Department of Agriculture. Mr. Sharp testified that he made two field inspections and that so far as these two readings were concerned they were good relative to disease. Mr. Sharp had been an inspector for the Maine Department of Agriculture for twenty-one years or more, and he stated that the fact that certified seed was planted does not insure that the crop raised from that seed will certify, because of aphids carrying disease virus from diseased fields to certified fields, and that weather conditions and the condition of the land on which the potatoes are planted have nothing to do with failure to certify. The question of infection, he stated, was entirely due to bugs and that this infection of the potato would not show until the next year. He further stated that when the potatoes raised from the seed in question were harvested they were of a mixed variety.

Mr. Henderson stated that from a visual inspection of the potatoes when delivered, he himself could not tell the difference in the variety of the potatoes, but after the potatoes were growing and at the time of the second inspection he could tell the difference in variety. The inspector after the potatoes were dug decided that there was a mixture of varieties in the potatoes.

At the close of the testimony of the plaintiff and inspector Sharp the following stipulation was made: "*It is stipulated* and agreed that the potatoes sold by the defendant to the plaintiff were grown and prepared for sale by the defendant in accordance with the regulations laid down by the commissioner of agriculture for the growing and certification of certified seed potatoes, as set forth under Sec. 124 of Chap. 27 R. S. 1944,

and that to each bag of potatoes was attached a tag of certification as provided for under Sec. 127 of said Chap. 27; that the bags actually contained a varietal mixture of 70 per cent Houma and 30 per cent Earlaine potatoes; that the permitted tolerance of varietal mixture under the regulations of the commissioner of agriculture is .0025 per cent; that the defendant acted in good faith, without fraud or deceit, there being no knowledge on his part that the potatoes sold to the plaintiff contained a varietal mixture.

It is further stipulated and agreed that if the defendant is liable for damages, they should be assessed under one of the following methods:

a. The difference between the market value of table stock and certified seed at the time of sale—$150.00.

b. The difference between the table stock market price of the crop grown by the plaintiff from the seed purchased from the defendant and the value of the crop as certified seed at the time of harvest—$516.04.

c. The difference between the table stock market value of the crop grown from the seed purchased by the plaintiff from the defendant and the amount the plaintiff had to pay to procure certified seed of the same quantity in the spring of 1945 for the purpose of planting his 1945 crop—$973.20.

It is further stipulated and agreed that there are only two issues in this case:

First: Is the defendant protected against liability if in good faith he grew and prepared for sale the potatoes in accordance with the rules and regulations laid down by the commissioner of agriculture for the growing and selling of certified seed potatoes, and the commissioner through his inspector did in fact inspect and certify as certified Earlaine seed potatoes the potatoes sold by the defendant to the plaintiff.

Second: If the defendant is liable, which of the above rules of damage should apply."

It may be noted in the stipulation that Secs. 124 and

127 of Chap. 27, R. S. 1944, are to all intents and purposes the same as Secs. 4 and 7 in Chap. 41, R. S. 1930, which were in effect when the sale was made and this right of action accrued. To decide the first issue submitted to this Court it is important to consider the provisions of Secs. 4, 5, 6 and 7 of Chap. 41 of R. S. of Maine for 1930, and determine the bearing they have upon this issue. These provisions are set out as follows:

"Sec. 4. The term certified seed as used in this chapter shall be deemed to mean potatoes or such vegetable seeds as shall have been grown and prepared for sale in accordance with the regulations laid down by the commissioner of agriculture and for which a certificate or tag has been issued as provided in section seven. Authority to make all reasonable rules and regulations hereunder is hereby given to the commissioner of agriculture.

Sec. 5. Any grower of potatoes or vegetable seeds may make application to the commissioner of agriculture for inspection and certification of his crop growing or to be grown in this state, giving description of his land and such information as the said commissioner may require. He shall also enter into an agreement to pay such fee into the treasury of the state for said inspection and certification as the said commissioner shall deem necessary to cover the cost of inspection and certification. Thereupon his crops shall be listed for inspection and inspected and certified by the said commissioner or his agents under such rules and regulations as the said commissioner may provide. Authority to make all reasonable rules and regulations hereunder is hereby given to the commissioner of agriculture.

Sec. 6. In determining the amount of the fee to be paid by the growers of potatoes or other vegetable seeds for inspection and certification under this chapter, the com-

missioner of agriculture may establish an entry charge not to exceed fifty cents on each acre of potatoes or other vegetables for which inspection and certification is requested, but in the case of potatoes which shall be found to be unfit for certification, the amount of such entry fee shall not exceed the actual cost of labor performed by said commissioner or his agents upon such potatoes, nor shall the charge for labor so performed upon such potatoes as shall be found unfit for certification exceed the above-named amount of fifty cents per acre, and in the case of potatoes which shall be accepted and certified the said commissioner shall establish a fee for field inspection not to exceed two dollars and fifty cents per acre inclusive of entry charge and also a supplementary charge of five cents for each barrel of potatoes which shall be finally accepted, certified, and sold as certified seed as defined in this chapter.

Sec. 7. The commissioner of agriculture may issue a certificate or tag which shall be attached to each container or package in which certified seed shall be offered or exposed for sale. Such tag or certificate shall indicate the name of the grower, the shipping station or depot, the name of the inspector making the final inspection, the variety of the seed, and shall bear the imprint of the seal of the state. Any tag, having the words "inspected," or "certified seed" thereon, attached to the container or package in which certified seed shall be offered or exposed for sale, shall be so attached thereto that the whole of said certificate or tag shall be in full view. Any person who shall knowingly or wilfully misuse any such tag or certificate or who shall attach to any container or package of seed which has not been duly inspected and certified, any such tag or certificate which shall have printed thereon the words "certified seed" or which by reason of color, size, shape, or otherwise may convey the impression that such seed has been certified by the said commissioner or his agents, shall be punished

by a fine of fifty dollars for each offense and shall be thenceforth denied the privileges of sections four to eight inclusive."

The language of the act clearly shows that it was intended to be regulatory, and penal only if the act was knowingly or wilfully violated. It does not purport to establish any new rule of civil liability for the breach of an express or implied warranty in the sale of certified seed potatoes. Section four defines the term certified seed and names the agricultural seeds which are to be included within its provisions. When the grower has complied with sections five, six and seven the seeds then appear in commerce as certified seed potatoes. Without performing the conditions set forth in sections five, six and seven the seeds do not qualify for certification. Knowingly and wilfully disregarding these sections subjects the seller to a fine and denial of the privileges of this statute.

All these conditions, by the agreed statement, have been complied with by the defendant and admittedly in good faith, without fraud or deceit. The statute does not provide any remedy for the buyer if the seeds are not as represented by the certificate or tag. The defense argues that, having complied in good faith with all the conditions imposed by the statute, the certificate is a protection to him in this action because the state has undertaken by the services which it renders to determine whether or not the potato is a certified seed potato both as to quality and variety. If the department says the potato is a certified seed it is a certified seed.

The defendant was the grower and made the selection. The inspection was made by an officer of the Department of Agriculture, as provided by the statute. The plaintiff could not tell, as he said, from an inspection, that there was a varietal mixture in the seed that he received from this defendant. Under the defendant's theory of the case the statute supersedes the common law liability of the defendant. The statute had as one

of its objectives the protection of the purchaser of certified seed. The statute will not deprive the plaintiff of his long-established common law right of action to recover damages if the potatoes were not as certified, and a warranty, express or implied, exists. A new statute will not be considered as intending a reversal of the long-established principles of law and equity unless such intention unmistakably appears. *Carle* v. *Bangor & Piscataquis Canal Co.*, 43 Me., 269; *Hare* v. *McIntire*, 82 Me., 240, 19 A., 453, 8 L. R. A., 450, 17 Am. St. Rep., 476; *Haggett* v. *Hurley*, 91 Me., 542, 40 A., 561, 41 L. R. A., 362; *Thomas* v. *Thomas*, 96 Me., 223, 52 A., 642, 90 Am. St. Rep., 342; *Howard* v. *Howard*, 120 Me., 479, 115 A., 259.

We do not believe that the legislature by this act intended to deprive the plaintiff of his common law rights. Rather, the consideration of the various sections of the statute in their relation to each other leads to the conclusion that it was the intent to establish protection for the purchaser of certified seed potatoes, and for the seller, the certificate provides prima facie evidence that the goods sold were certified seed potatoes of the variety described on the tag or certificate within the varietal tolerance allowed, and grown according to the regulations of the commissioner of agriculture. The inspection, issuance and affixing of the certificate to the container are official acts. The law raises the presumption that the public officers have acted with fidelity and properly discharged their duties, but this presumption, like the presumption of innocence, is undoubtedly a legal presumption, and it does not supply proof of independent and substantive facts, and when met by competent evidence it is destroyed. *United States* v. *Ross*, 92 U. S., 281, 23 L. Ed., 707; *Blaco et al* v. *State et al*, 58 Neb., 557, 78 N. W., 1056; *Crawford* v. *Zieman et al*, 192 Ia., 559, 185 N. W., 61. Such presumption in the present case is rebutted by the admitted substantive facts which destroy the probative value of the certificate. The potatoes delivered to the plaintiff were not Earlaine potatoes within the varietal variation, but seventy

per cent Houmas and thirty per cent Earlaines. The defendant is not protected against liability for breach of warranty of variety although in good faith he grew and prepared for sale potatoes in accordance with the rules and regulations of the commissioner of agriculture for the growing and selling of certified seed potatoes, if there was a warranty either express or implied.

In order for the plaintiff to recover damages he must prove, first, that the certified seed had a varietal mixture beyond that allowed by the rules and regulations of the commissioner of agriculture under the authority of the statute, and that the goods did not "correspond with the description." Second, that there was a warranty, express or implied, of the variety, and that the defendant had been guilty of a breach to the plaintiff's damage. The first proposition was admitted in the agreed statement. Defendant denies the second proposition.

There was opportunity for inspection by the buyer when the goods were delivered. Inspection, however, would not have revealed the defect, as the buyer stated he could not tell the variety until after the seeds were planted and were growing, and inspector Sharp did not know the variety of potatoes produced from the seed, except that the crop was not of the Earlaine variety. "Seeds of different kinds cannot always be distinguished by inspection, and it seems to be generally recognized in such cases that the express or implied affirmation of the seller where seeds of a particular kind are asked for and sold as such, that it is of such kind, constitutes a warranty as to kind." 24 R. C. L., 175. The Uniform Sales Act, Sec. 14 of Chap. 165, R. S. 1930, of the state, provides that where there is a contract to sell or a "sale of goods by description there is an implied warranty that the goods will correspond with the description." Prof. Williston in his 2d Edition of Sales, paragraph 223, in discussing the provisions of this section says:

> "It is customary to call a warranty in a sale by description an implied warranty, and for that reason this nomen-

clature has been preserved in this section of the Sales Act. The warranty might more properly, however, be called express, since it is based on the language of the parties."

The defendant was the grower and producer of the seed and was informed by the plaintiff both of the particular kind of seed desired and the particular purpose for which the seed was required. Defendant made the selection and plaintiff did not see the seeds until they were delivered to him. The variety was a substantial part of the bargain.

"Where specified goods are sold in compliance with an order describing the goods, and the seller furnishes them he is held to warrant that the goods are of the kind asked for. In such case it is a substantive part of the contract that the goods shipped are of the kind ordered. That is one of the terms of the contract, without the fulfillment of which the contract cannot be performed. In accepting the goods tendered as fulfillment of the contract the plaintiff, not being able to determine from an inspection that the seed was not of the kind ordered, relied and had a right to rely upon the description of the goods ordered."

Kefauver v. *Price et al,* 136 Ark., 342, 206 S. W., 664; *Parrish* v. *Kotthoff,* 128 Or., 529, 274 P., 1108 and cases therein cited; *Rocky Mountain Seed Co.* v. *Knorr,* 92 Colo., 320, 20 P. (2nd), 304; *Morse et al* v. *Moore,* 83 Me., 473, 22 A., 362, 13 L. R. A., 224, 23 Am. St. Rep., 783. In the latter case, at page 479, the Court says:

"It is now well settled by the authorities generally, our own cases included, that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract, if relied upon at the time of purchase."

The seller is responsible for a breach of warranty when he

sells a thing as being of a particular kind, if it does not answer the description, the vendee not knowing whether the vendor's representations are true or false but relying upon them as true, whether the vendor acted wilfully or innocently. *Hoffman* v. *Dickson,* 105 Wis., 315, 81 N. W., 491, 76 Am. St. Rep., 916; *Parrish* v. *Kotthoff,* supra; *Firth et al* v. *Richter,* 49 Cal., Appeals, 545, 196 P., 277; *Hise* v. *Romeo Stores Co.,* 70 Colo., 249, 199 P., 483; *Stevenson* v. *B. B. Kirkland Seed Co.,* 176 S. C., 345, 180 S. E., 197; *Johnson* v. *Foley Milling & Elevator Co.,* 147 Minn., 34, 179 N. W., 488, 16 A. L. R., 856; *West Coast Lumber Co.* v. *Wernicke et al,* 137 Ala., 363, 188 S., 357.

We are of the opinion that the defendant in this case was guilty of a breach of warranty of the variety of the goods delivered, whether the warranty be called express or implied. There is no difference in the measure of damages. The plaintiff made known to the defendant the variety of seed potatoes that he desired to purchase. He made known the particular purpose for which they were to be used. Plaintiff did not see them until after delivery. The selection was made by the defendant. Inspection by the plaintiff when the merchandise was delivered would not disclose, on reasonable investigation, the varietal mixture. He relied and had a right to rely upon the defendant making the selection. The variety was a substantive part of the contract. The fact that the goods did not correspond to the variety ordered, though there was no fraud or deception on the part of the defendant, results in substantial damage to the plaintiff. By the stipulation of the parties they have agreed that if the defendant is liable for damages the damages should be assessed under one of the three methods set out in the agreed statement.

The ordinary rule of damages applying to a warranty of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted. Additional damages, however, are sometimes recoverable if specially declared for and such may reasonably be

supposed to have been contemplated by both parties when the contract was made, as a probable result of a breach of it. *Thomas et al* v. *Dingley et al,* 70 Me., 100, 35 Am. Rep., 310.

> "Special damages resulting from the breach of a warranty as to quality or kind of seeds sold naturally resulting from the breach are recoverable."
>
> 24 Ruling Case Law, par. 542.
>
> "Where a breach of warranty is in respect to the kind of seeds sold for raising a crop and the crop raised is for such reason inferior to the crop which would have been raised if the seeds had been as warranted, the buyer is held entitled to recover, according to what seems to be the better view, the difference between the value of the crop raised and the value of the crop which ordinarily would have been raised if the seeds had been as warranted."

24 R. C. L. page 263, par. 542; *Johnson* v. *Foley Milling and Elevator Co.,* 147 Minn., 34, 179 N. W., 488, 16 A. L. R., 856; *West Coast Lumber Co.* v. *Wernicke,* supra; *Wolcott Johnson & Co.* v. *Mount, 36 New Jersey Law 262,* 13 Am. Rep., 438; *White et al* v. *Miller,* 71 N. Y., 118, 27 Am. Rep., 13. Method "a" of computing the damages in the present case is not applicable under this rule. Method "b" comes within this rule.

The plaintiff contends that rule "c" should be the measure of damages because the seed was purchased for a special purpose known to the defendant, the purpose being to produce a crop of certified seed potatoes with which to plant another crop for the coming year. Defendant did not warrant that the potatoes would produce certified seed. From an inspection of defendant's Exhibit 1, the tag or certificate attached to the container, and from the rules promulgated by the commissioner of agriculture as authorized by the statute, it appears that in addition to the two field inspections, a third inspection is provided. The third inspection is at the time of the shipment or sale. If the third

and last inspection discloses defects prohibited by the statute and the commissioner's regulations, the potatoes do not qualify as certified seed. If these potatoes had been of the variety described by the plaintiff it is not certain that the seed would have passed the third inspection. The defendant's warranty was, that the seed sold would produce a crop of the variety known as Earlaine potatoes. He did not warrant that the potatoes would pass inspection and certification. This situation brings the question of damages under rule "c" into the realm of uncertainty and speculation. In this state any rule giving uncertain or speculative damages has been uniformly rejected. This seems too well established to require the citation of cases.

We therefor adopt rule "b" as the measure of damages in the present case. Because of the stipulation of the parties as to the measure of damages the entry must be:

Judgment for the plaintiff in the sum of $516.04 and costs.

STATE OF MAINE *vs.* FRANK MORTON.

Oxford. Opinion, November 25, 1946.

Information and Indictment. Criminal Law. Evidence.

Each count in a criminal complaint should present only a single issue; and two or more substantive offenses cannot be pleaded in the same count.

Duplicity is a formal defect, and ordinarily objection should be made by demurrer or motion to quash.

A complaint or indictment, otherwise sufficient, is not vitiated because it includes unnecessary words, or does not accurately identify the particular statute under which it was brought. The constitutional requirements are satisfied if the facts are stated with that reasonable degree of fullness,

certainty and precision necessary to enable the accused to meet the exact charge against him, and to plead any judgment rendered against him in bar of a subsequent prosecution for the same offense.

Complaint charging that respondent "did have in his possession parts of a deer, which said deer had not been registered" charged but one offense, that of having in his possession parts of an unregistered deer, and not that of having unregistered parts.

To justify a conviction on circumstantial evidence, the circumstances must point to the respondent's guilt, and be inconsistent with any other rational hypothesis. The principal facts must be consistent with each other. They must point to the guilt of the accused, and they must be inconsistent with his innocence. Guesswork is not the moral certainty of guilt that the law requires. Conjecture, surmise, and suspicion do not constitute proof beyond a reasonable doubt.

Possession of a part of a deer that has no tag on such part does not throw burden on respondent of showing his innocence.

ON REPORT.

Respondent was charged with illegal possession of parts of a deer which had not been registered. The case went on trial before a jury but by agreement it was withdrawn from the jury and submitted to the Law Court on an agreed statement of facts.

Case remanded to Superior Court for entry of judgment for respondent.

Theodore Gonya, County Attorney of Oxford County, for State of Maine.

George A. Hutchins,

Peter M. MacDonald, for respondent.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

FELLOWS, J. This is a complaint and warrant issued from Rumford Falls Municipal Court for illegal possession of parts of a deer, which deer, it is alleged, had not been registered as

required by the fish and game statutes. In the Municipal Court the respondent was found guilty and took an appeal to the Superior Court. At the March Term 1946 of the Superior Court for Oxford County the case went to trial before a drawn jury, but by agreement it was withdrawn from the jury and submitted to the Law Court on agreed statement of facts. R. S. 1944, Chap. 91, Sec. 14. The questions now before this Court are (1) whether the warrant is bad for duplicity and (2) whether the facts in the agreed statement are sufficient to authorize a jury to find the respondent guilty.

COMPLAINT

The well established rule of criminal pleading, that prohibits the joinder of two or more substantive offenses in the same count, is important to every respondent. It is necessary that a person who is accused of a crime, should know the specific charge against him in order that his rights be protected. Each count should, therefore, present only a single issue, which, if sustained, subjects the accused to a punishment that is specified. Duplicity, however, is a formal defect, and ordinarily objection should be made by demurrer or motion to quash. *State* v. *Smith,* 61 Me., 386; *State* v. *Palmer,* 35 Me., 9; *State* v. *Derry,* 118 Me., 431, 108 A., 568. This case is on report, and although the record does not show a motion or a demurrer, counsel for the State and counsel for the respondent apparently assume this issue of duplicity has been raised, or is raised by the agreed statement.

The allegations in the complaint are "that Frank Morton of Andover in said County of Oxford at said Andover on the 2nd day of November, A. D. 1945 did have in his possession parts of a deer, which said deer had not been registered in accordance with the provisions of Chapter 33 of the Laws of 1945 of the State of Maine." The respondent is accused of having in his possession parts of an unregistered deer. The deer, as a whole animal, was not registered. He is not accused of having non-

registered parts. Only one offense is charged. R. S. 1944, Chap. 33, as revised in P. L. 1945, Chap. 33, Sec. 88, and known as the "Eighth Biennial Revision of the Inland Fish and Game Laws." A complaint or indictment, otherwise sufficient, is not vitiated because it includes unnecessary words, or does not accurately identify the particular statute. *State* v. *Hatch,* 94 Me., 58, 46 A., 796; *State* v. *Noble,* 15 Me., 476; *State* v. *Dunning,* 83 Me., 178, 22 A., 109. The constitutional requirements are satisfied if the facts are stated with that reasonable degree of fullness, certainty and precision necessary to enable the accused to meet the exact charge against him, and to plead any judgment rendered against him in bar of a subsequent prosecution for the same offense. *State* v. *Doran,* 99 Me., 329, 59 A., 440, 105 Am. St. Rep., 278; *State* v. *Strout,* 132 Me., 134, 167 A., 859; *State* v. *Smith,* 140 Me., 255, 37 A., 2d, 246; *State* v. *Jalbert,* 139 Me., 333, 30 A., 2d, 799. The complaint is good.

PROOF

Section 88 of the 1945 revision of the Inland Fish and Game Laws states, in the fifth paragraph, that "no person shall have in possession at any time any deer or part thereof, except as herein provided." The remainder of Section 88 provides, among other things, for registration stations to register and tag each deer presented for registration; that all deer killed must be presented at one of these stations by the killer or his agent; and that no person shall keep a deer which he has killed, at his home, or any place of storage, more than 12 hours without registration. Section 82 of the Revision provides for one deer a season.

The State claims that the facts, agreed upon, present such convincing circumstantial evidence that a jury would be authorized to find this respondent guilty of the crime charged in the complaint.

By the plea of not guilty the accused has put in issue every essential averment in the complaint. His plea is not affirmative.

He is not required to prove his innocence. The State, by the facts presented, must establish his guilt beyond reasonable doubt. In a criminal case the State has the burden to show (1) that a crime has been committed and, if there has been a crime, (2) that the respondent committed it. To justify a conviction on circumstantial evidence, the circumstances must point to the respondent's guilt, and be inconsistent with any other rational hypothesis. *State* v. *Merry*, 136 Me., 243, 8 A., 2d, 143. The principal facts in a criminal case must be consistent with each other. They must point to the guilt of the accused, and they must be inconsistent with his innocence. Guesswork is not the moral certainty of guilt that the law requires. Conjecture, surmise, and suspicion do not constitute proof beyond a reasonable doubt.

Here, it is agreed that on November 2, 1945, in a two-family house, parts of a deer were found in both apartments by officers acting under search warrant. The respondent and his family had occupied the apartment upstairs. No one was in the house. The house was locked. How long it had been vacant, if it was vacant, does not appear. Under the sink upstairs were found the heart and liver of a deer. A sack was discovered off the kitchen with deer hair on it. Blood and deer hair were seen in the shed. Across the hall, in a closet, was a rear quarter. The meat was cold. No registration tag was attached to any part. It was further "agreed that none of the witnesses for the State knew when the deer was killed, by whom it was killed, where it was killed, or whether the deer was registered or tagged." The charge is possession of parts of an unregistered deer. The evidence points as strongly to other members of the respondent's family as to the respondent, and it might also point to some person in another family on the first floor. It could point to any hunter who was a friend of either family. There is no proof that the deer was not registered by the killer, beyond the agreed fact that there was no tag or other identification on any part found. There is no proof that any parts were in

respondent's possession, except that parts were in the house he occupied when at home. He was away, and how long he had been away does not appear. The deer might well have been killed outside the jurisdiction and be subject to foreign laws.

The fact that the respondent later registered a deer at Andover, Maine, on November 12, 1945—(and under the statute only one deer may be killed or registered in Maine by any person in any one year) does not tend to prove that the parts here found were parts of a deer that had been killed in Maine, or that the deer had not been registered. No witness knew anything about when, where or by whom the deer was killed, or whether it was registered or not.

The State urges that the rule in this case should be the same as in cases of stolen goods, and that possession of a part of a deer that has no tag on that part is prima facie proof of guilt, and that any one accused must show his innocence. Such is not the law. Moreover, in the case of stolen goods the goods must first be proved to have been stolen. *State* v. *Russo,* 127 Me., 313, 143 A., 99. The circumstances here were as consistent with the innocence of the respondent as with his guilt. See *State* v. *Baron,* 135 Me., 187, 192 A., 701; *State* v. *Wagner,* 141 Me., 403, 44 A., 2d, 821.

It is the opinion of the Court that there was not sufficient evidence produced by the State to warrant a jury in finding the respondent guilty of the offense charged. A jury verdict of guilty could not be sustained under the agreed facts. In accordance with the stipulation, the entry should be

Case remanded to Superior Court
for entry of Judgment for Respondent.

VERNA V. ALPERT *vs.* JACOB S. ALPERT.

Penobscot. Opinion, November 26, 1946.

Exceptions. Evidence.

An appellate court has the right to disregard evidence as inherently impossible, but such a right should not control any case unless the inherent impossibility or improbability is plainly apparent.

ON EXCEPTIONS.

Divorce granted to libellant on ground of cruel and abusive treatment. Libellee files exceptions on ground that decree is contrary to and unsupported by evidence. Exceptions overruled.

James B. Mountaine, for libellant.

Nathan Solman,

Randolph A. Weatherbee, for libellee.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

MURCHIE, J. The libellee's exceptions herein allege as the single ground for a claim of error that the decree of divorce for cruel and abusive treatment to which it relates is "contrary to and unsupported by the evidence presented in the cause." The basis for the claim is difficult of comprehension on reference to the record, which discloses very complete specifications of the acts of the libellee relied on to support the allegations of the libel and plenary evidence in support of most, if not all, of those specifications if the trier of facts found it credible and con-

vincing. The explanation lies in the argument presented that all of it is "inherently improbable."

The right of an appellate court to disregard evidence as inherently *impossible* is well established. Instances of its exercise by this Court are found in *Blumenthal* v. *Boston & Maine Railroad,* 97 Me., 255, 54 A., 747, where a nonsuit was found proper on that ground, and in *McCarthy* v. *Bangor & Aroostook Railroad Co.,* 112 Me., 1, 90 A., 490, L. R. A., 1915 B, 140 where a verdict was set aside. It is a principle peculiarly appropriate in cases where the trier of fact might be considered susceptible to bias or prejudice, although the declaration of the Court in *Bond* v. *Bond,* 127 Me., 117, 141 A., 833, carries recognition that it may serve as a check on the factual findings in a divorce case heard, as this one was, without a jury. As was said of the evidence in that case so it is apparent here that:

> "the evidence was conflicting, but it can not be said that the evidence of the libellant and her witnesses on any material point was inherently improbable."

Conflicts of evidence can be resolved most fairly by a trier of facts who sees the witnesses on the stand and has an opportunity to adjudge the elements that make for credibility or otherwise that is unavailable to those who merely read the printed word. It is only when inherent impossibility (or improbability) is plainly apparent that the principle relied on by the libellee can control. No justification for invoking it appears in the present case.

Exceptions overruled.

ELWOOD B. HUNTOON

vs.

SHERWOOD WILEY AND JOSEPH TEENEY.

Cumberland. Opinion, November 27, 1946.

Negligence.

Where one-half of highway was blocked by a disabled automobile after an accident, the plaintiff, standing near edge of highway assisting a victim of the accident, was struck and injured by a truck driven by defendant, who failed to see the disabled automobile in time to stop, defendant's negligence and plaintiff's care were questions for the jury.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Action for personal injuries to plaintiff sustained when struck by a truck driven by Elwood B. Huntoon. Verdict for plaintiff in sum of $1,875.00. Elwood B. Huntoon brought exceptions to denial of motion for directed verdict and moved for a new trial by general motion. Exceptions overruled. Motion overruled.

Frank I. Cowan,

Caspar F. Cowan, for plaintiff.

William B. Mahoney, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

FELLOWS, J. This case, tried before a jury, comes to the Law Court on defendant's exceptions to denial of motion for

a directed verdict, and on general motion for new trial. The exception taken to allowance of an amendment to plaintiff's declaration was expressly waived. The plaintiff discontinued as to defendant Teeney. The jury verdict was for the plaintiff in the sum of $1,875.

The main facts in the evidence appear to be, that two motor cars were in collision at Falmouth, on the main highway from Portland known as Route 1, on a dark night November 24, 1945. The highway was two lane concrete, and ran east and west. One of the cars, a Chevrolet that had been in the collision, was completely blocking the south half of the highway, the front of the car at the center of the road. The plaintiff, driving a tank truck toward Portland, then came to the scene. The plaintiff passed the Chevrolet car that was disabled, and stopped his truck 100 feet away. The plaintiff then went back with a flashlight to the disabled car to render any assistance needed. The plaintiff was in the highway, "about one foot on the road" near the left rear fender of the Chevrolet, and was assisting a lady who was on the running board of the Chevrolet. The defendant at that time was proceeding in a truck easterly from Portland, and on the same southerly side of the road. A witness, Pelletier, said he saw the defendant coming and stood in the road waving his hands to stop him. As the defendant passed the parked tank truck, the defendant says he dimmed his lights, saw too late the disabled Chevrolet blocking his path, swerved suddenly to the left to pass, and as a result the side of defendant's truck struck the plaintiff, and threw the plaintiff against the disabled car.

There was certainly sufficient evidence for the jury to find that the defendant was negligent; and the Court cannot say, under the circumstances here, that a person, trying to be "a good Samaritan," is negligent as a matter of law to be at the edge of a highway near a disabled car that blocks one half the way. These are jury questions. Only one half of the highway was blocked. The defendant had opportunity to pass. Was the

plaintiff in an apparent position of danger, and if so, how serious was the danger? Did the plaintiff, as an ordinarily careful and prudent person, have a right to assume, and did he assume, under the circumstances, that an approaching driver would see and appreciate the unusual, and would exercise proper care to observe extraordinary conditions of persons and objects, due to an accident; and, having opportunity to pass, that he would not run into a car standing at an angle across his path, or near enough to injure a person there assisting the unfortunate? The defendant did not directly run into the plaintiff. He did not run into the disabled car. It was a situation where a jury should determine what the exact circumstances were, and whether either the plaintiff or defendant, or both, were negligent. *Hill* v. *Finnemore,* 132 Me., 459, 464, 172 A., 826; *Rogers* v. *Forgione,* 126 Me., 356, 138 A., 553; *Esponette* v. *Wiseman,* 130 Me., 297, 155 A., 650; *Gerrish* v. *Ferris,* 138 Me., 213, 23 A., 2d, 891. The Court cannot say that the jury's verdict is manifestly wrong. *Eaton* v. *Marcelle,* 139 Me., 256, 29 A., 2d, 162.

In reference to damages, there is no yardstick to measure pain or to ascertain the worth of mental suffering. Only such things as actual loss of earnings, and expenses incurred in an effort to effect a cure, may be mathematical. The plaintiff was struck and violently thrown against the disabled car. The jury could find for hospital expense and medical care $219.86, and for loss of wages about $400. He "coughed blood" at the time of regaining consciousness, and testified to "burning sensations" in his chest at the time of trial. There were lacerations. He had difficulty in breathing. He was badly swollen for some period of time, possibly in part due to reactions from penicillin treatment. He also testified to much pain, much discomfort, and much mental distress. The verdict is large, but the examination of the record does not convince that it is "grossly excessive" as claimed by the defendant. *Hachey* v.

Maillet, 128 Me., 77, 145 A., 740; *Gregory* v. *Perry,* 126 Me., 99, 136 A., 354; *Vallely* v. *Scott,* 126 Me., 597, 598, 138 A., 311.

Exceptions overruled.
Motion overruled.

WALTER H. MCFARLAND *vs.* LEOLA L. STEWART.

Cumberland. Opinion, December 2, 1946.

Landlord and Tenant.

A tenant at will holding over after his tenancy is terminated becomes a tenant at sufferance whether the termination results by reason of notice from his landlord or by alienation of his landlord's title.

The action of a landlord in permitting a former tenant to remain on premises undisturbed for fifteen days in reliance on an undertaking to vacate as soon as possible does not change an estate at sufferance to a tenacy at will.

A tenant at sufferance holding possession of property by permission of the owner is liable for use and occupation on an implied contract.

ON EXCEPTIONS.

Action of assumpsit to recover fair value for use and occupation of plaintiff's property as tenant at sufferance after termination of tenancy at will. Judgment was given plaintiff by Justice of the Superior Court, from which judgment the defendant filed exceptions. Exceptions overruled.

Arthur Chapman, Jr., for plaintiff.

Jacobson and Jacobson, for defendant.

SITTING: THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

MURCHIE, J. The issue which the defendant in this case brings forward on exceptions involves the negligible sum of $15 but a principle of law which would be of considerable importance under any circumstances and is made increasingly so because tenancies of real estate are subject to a governmental control that may continue tenants in possession against the will of the owner of the property they occupy for substantial if not indeterminate periods. Baldly stated that issue is whether a tenant at sufferance may occupy property free of charge.

The case presents the unusual if not the unique situation of having been tried, i. e. submitted to the Court below, on an *oral* agreed statement of facts. Under those circumstances surely neither party can assert the claim that the facts are not exactly as the Justice who decided the case without the intervention of a jury declared them. The right of exceptions on questions of law was reserved to the parties so that the issue as to whether the proper law has been applied to those facts is squarely presented.

The facts are that the defendant occupied a tenement prior to November 30, 1945 as the tenant at will of the plaintiff and that her estate was terminated on that day by a notice meeting the requirements of R. S. 1944, Chap. 109, Sec. 2. The defendant tendered the plaintiff an amount equal to a month's rent (according to the terms of the former tenancy) on the day following. Acceptance of it would have created a new tenancy at will, which the plaintiff declined to do. He took no action to eject the defendant either physically (without force) or by legal proceedings but relied on her declared willingness to get out as soon as she could. She vacated the property on December 15, 1945. The agreed facts include a stipulation that if the defendant is liable to pay the plaintiff for the use and occupation of the premises for fifteen days the measure of value of that use and occupation is that for which the judgment was rendered. The decision is grounded in a ruling that the defendant became a tenant at sufferance of the plaintiff at the

expiration of her tenancy at will and a finding that her holding over was by permission of the plaintiff.

The questions of law to be resolved are three: whether a tenant at will holding over after his tenancy is terminated by notice becomes a tenant at sufferance; whether a tenant at sufferance becomes a tenant at will against the wishes of the owner of the property he occupies by the lapse of fifteen days; and whether a tenant at sufferance is holden to pay the owner of the property he occupies whatever may fairly measure the value of his use and occupation on the basis of an implied contract.

There can be no doubt on the first question. A tenant at will holding over after his tenancy is terminated becomes a tenant at sufferance whether the termination results by reason of notice from his landlord (as in the present case), *Robinson* v. *Deering et al.*, 56 Me., 357, or by the alienation of his landlord's title, *Esty* v. *Baker*, 50 Me., 325, 79 Am. Dec., 616; *Sweeney* v. *Dahl*, 140 Me., 133, 34 A., 2d, 673, 151 A. L. R., 356. An estate at sufferance has been recognized in law from the earliest times. Quoting the substance rather than the language of Blackstone's definition of it, such an estate represents the interest of a tenant who having acquired possession rightfully by permission of the owner continues in possession after the expiration of the period to which he was entitled. 2 Blackstone's Commentaries, 150.

The second question is equally free from doubt on the particular facts, which show plaintiff's refusal to create a new tenancy at will by accepting rent from the defendant. This is not to say that such a tenancy may not be created by the lapse of time. *Perley* v. *Chase et al.*, 79 Me., 519, 11 A., 418, indicates that a mortgagor continuing in possession after the right of redemption has been foreclosed becomes a tenant at sufferance of the mortgagee in the first instance but that his mere retention of possession, which in that case was for more than a full year, would authorize the inference that he had become a tenant at

will. This is in line with the declaration of Chief Justice Shaw in *Howard* v. *Merriam,* 5 Cush., 563 at 571, that a tenancy at will results when a landlord permits a tenant at sufferance to remain in possession and that this is the case *"especially if he receives rent of him"* (the emphasis is supplied here). That case is quoted in *Dunning* v. *Finson,* 46 Me., 546, where an English case is cited as supporting the principle that a permissive occupancy constitutes a tenancy at will. *Doe* v. *Wood,* 14 M. & W., 682.

It cannot be said under our law however that an owner of property who terminates a tenancy at will by notice creates a new one by inaction for fifteen days after the expiration of his notice. The statute authorizing the use of the process of forcible entry and detainer, R. S. 1944, Chap. 109, Sec. 1, recites that the process is available in some cases only "if commenced within 7 days from the expiration on forfeiture of the term." That this limitation is not applicable to tenancies at will terminated by notice has already been declared in *Dunning* v. *Finson* (46 Me., 546) and *Gilbert* v. *Gerrity,* 108 Me., 258, 80 A., 704. In the earlier of these cases Mr. Justice Kent reviewed legislation dealing with forcible entry and detainer prior to the statutory revision of 1857 and declared the process available in three cases: against (1) disseisors, (2) tenants or sub-tenants holding under written leases or contracts at the expiration or forfeiture of their terms, and (3) tenants at will whose tenancies had been terminated under the statute. As to the second group he particularly stated that it was available without notice "if instituted in seven days after the expiration or forfeiture." The case was submitted to the Court on report. The facts as set forth by the reporter indicate that the plaintiff served a notice on the defendant in April (the exact date is not given) and commenced the action on the 16th day of July following. Of similar effect is the declaration made by Chief Justice Emery in *Gilbert* v. *Gerrity* (108 Me., 258, 80 A., 704). He described the number of cases served by

the statute as four, separating Judge Kent's second classification into instances of expiration on the one hand and forfeiture on the other. As to both he reiterated that the "process must be commenced within seven days." No such statement has been made in this Court with reference to tenancies at will. To hold that a landlord who has terminated a tenancy at will by notice must institute legal proceedings to eject his former tenant, or use force for the purpose, within a week under penalty of having a new one created by inaction would compel unnecessary litigation. No argument based on sound reason can support the theory that a property owner must throw out a tenant at sufferance by physical force today who is willing to leave peaceably tomorrow or that he must place the burden of litigation expense upon himself and that tenant under those circumstances. The decision in *Perley* v. *Chase* (79 Me., 519, 11 A., 418) indicates that his consent to the creation of a new tenancy at will may be implied by long inaction. The reference to *Howard* v. *Merriam* (5 Cush., 563) in *Dunning* v. *Finson* (46 Me., 546) makes it apparent that the acceptance of rent after the close of a tenancy at will may create another but neither case discloses a situation where the former tenant attempted to secure that result by the payment of rent and had his tender refused. The action of a landlord in permitting a former tenant to remain on premises undisturbed for fifteen days in reliance on an undertaking to vacate as soon as possible does not change an estate at sufferance to an estate of greater dignity.

The remaining question relates only to the issue whether a tenant at sufferance may occupy property without paying a fair price for his use and occupation. The mere statement of it would seem to provide an answer but counsel for the defendant argues seriously that it became established law long since that a tenant at sufferance is not liable to pay the owner of the property he occupies either a fixed rental or the money value of his use and occupation. Obviously he is not required

to pay rent as such for rent is fixed by the mutual agreement of a landlord and his tenant holding under some estate greater than one at sufferance. *Cunningham* v. *Holton,* 55 Me., 33. The defendant cites us to this case, as to *Porter* v. *Hooper et al.,* 11 Me., 170, and *Wheeler* v. *Wood,* 25 Me., 287 (the latter of which has no bearing on the present problem but decides merely that in 1845 forcible entry process was not available against a tenant at sufferance). In *Rogers* v. *Libbey,* 35 Me., 200, as in *Howe* v. *Russell,* 41 Me., 446, it was decided that assumpsit for use and occupation did not lie except by some contract between the parties, express or implied. In these cases, as in *Porter* v. *Hooper et al.* (11 Me., 170), the facts disclose that the parties defendant had never recognized the title of the parties plaintiff. The exact opposite is true in this case. The defendant occupied the property on November 30, 1945, and prior thereto, as a tenant at will of the plaintiff. She continued in possession thereafter by virtue of her continued recognition of the plaintiff's title and her declared willingness to vacate promptly. It would be difficult to conceive circumstances which would imply a promise to pay whatever equity and good conscience might require more clearly than those here presented. *Cunningham* v. *Holton* (55 Me., 33), recognizes that where an occupation is tortious the tort may be waived and assumpsit for use and occupation maintained. Several decisions of the Massachusetts Court declare expressly that while a tenant at sufferance is not liable to pay rent as such, he is liable for his use and occupation on an implied contract. *Merrill* v. *Bullock,* 105 Mass., 486; *Emmons* v. *Scudder et al.,* 115 Mass., 367; *Benton et al.* v. *Williams,* 202 Mass., 189, 88 N. E., 843. The defendant makes point of the fact that a Massachusetts statute provides expressly that a tenant at sufferance shall be liable to pay "rent." Ann. Laws, Chap. 186, Sec. 3. A footnote to this statutory provision states that at common law such a tenant was not liable to pay rent but was liable on an implied contract for use and occupation. Such was

declared the law of England by Chief Justice Wilde in 1810. His statement in *Bayley* v. *Bradley,* 5 Com. Bench 396, was:

> "the plaintiff had a right to treat the defendant as a tenant at sufferance . . . for the period he held on after the expiration of the lease, and to sue him for use and occupation in respect thereof."

Trifling support for the contention of the defendant can be found in Taylor's Landlord and Tenant, Sec. 4, Par. 64, and in the opening language of the opinion of Mr. Justice Gray in *Merrill* v. *Bullock* (105 Mass., 486), where it is said that a tenant at sufferance is not liable to pay rent:

> "because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate."

Granting recognition to that principle the case declared that such a tenant was liable for use and occupation on an implied contract. Such is the case here. The decision below was correct.

Exceptions overruled.

MILDRED ANDREAU *vs.* EDWARD F. WELLMAN.

ALBERT W. DOSTIE *vs.* EDWARD F. WELLMAN.

Androscoggin. Opinion, December 6, 1946.

Exceptions. Appeal and Error.

Exceptions can properly be brought to Supreme Judicial Court only after final adjudication.

The existence of a final, or an appealable interlocutory judgment, order, or decree, is jurisdictional, and, in the absence thereof, an appeal cannot be maintained, even by consent or waiver of the parties.

ON EXCEPTIONS.

Action brought by plaintiffs against defendant to recover damages for personal injuries. The cases were tried before the sitting justice with right of exceptions reserved on questions of law under a stipulation. The sitting justice found for the plaintiffs, and in accordance with stipulation, without assessing damages. Defendant filed exceptions. Dismissed from the law docket.

Benjamin L. Berman,

David V. Berman, for plaintiffs.

William B. Mahoney, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

THAXTER, J. These actions brought to recover damages for personal injuries are not properly before this court. The cases were tried before the sitting justice with right of exceptions on questions of law reserved under a stipulation which in so far as it is pertinent reads as follows:

> "It is stipulated and agreed that the Presiding Justice is to rule on the question of the defendant's liability in either or both cases. If the ruling of the Presiding Justice is in favor of the defendant in either or both cases, plaintiff has exceptions, and if the ruling of the Court is for the plaintiff in either or both cases the defendant has exceptions. And in the event the defendant's exceptions are overruled the case or cases are to come back for the assessment of damages by the Court."

The justice made a finding that the defendant was liable and that judgment should be entered for the plaintiff in each case. Following the terms of the stipulation, he made no assessment of damages. Exceptions were taken to such ruling and counsel on both sides assume that they are properly here and should be considered by this court.

Without the assessment of damages and the completion of the case below, there could be no final judgment or adjudication in the nature of a final judgment, and exceptions can properly be brought to this court only after such final adjudication.

As is pointed out in *McKown* v. *Powers,* 86 Me., 291, 29 A., 1079, exceptions have their origin in the Statute of Westminster, 2 (13 Edw. 1, c. 31), and formerly were a supplement to the record which went forward with the writ of error. Under our practice it is not now necessary to sue out the writ of error in order to bring the exceptions forward. As is said in the *McKown* case, supra, page 295:

> "The bill of exceptions alone is sent direct to the court of review, and judgment is stayed in the trial court until the exceptions are determined."

As, however, no writ of error could be brought except after final judgment, *Butterfield* v. *Briggs,* 92 Me., 49, 42 A., 229; 3 C. J., 597; 4 C. J. S., 180, 331, a bill of exceptions, which is now the substitute for the writ of error, cannot properly be considered by the court of review until final judgment below; and there was no final judgment in the instant cases. *Butterfield* v. *Briggs,* supra. There is nothing in our statutes which implies or contemplates that any case can go forward to the Law Court on appeal or on exceptions until after final judgment below. And the authorities are practically unanimous in holding that this cannot be done in the absence of a statute authorizing it and that the entry of final judgment is a jurisdictional fact which the parties cannot waive. The rule is thus stated in 3 C. J., 437:

> "The existence on the record of a final, or an appealable interlocutory judgment, order, or decree is jurisdictional, and, in the absence thereof, an appeal cannot be maintained, even by consent or waiver of the parties. Although no objection may be made at the hearing and no motion may be made to dismiss, the court will, on its own motion, dismiss the appeal."

To hold that we can consider these exceptions would not only do violence to all known authority, but would be subversive of those rules of procedure and practice, the aim of which is to secure a prompt disposition of causes and an efficient administration of justice in our courts. Cases should not be brought forward piecemeal for review. We should consider them only when in one alternative the decision here will end the litigation. See *State* v. *Inness,* 53 Me., 536, 541. In the instant cases no matter which way our decision might be they would have to go back for further proceedings below. As was said in *State* v. *Inness,* supra, 541:

> "Cases should not therefore be entered in the law court on exceptions until they are in a condition to be finally disposed of if the exceptions are overruled."

The time consumed in the trial of these cases has been lost; for they must go back for a hearing *de novo.* The mandate in each case must be the same as in *Day* v. *Chandler,* 65 Me., 366:

Dismissed from the law docket.

ALICE PRESTON, LEGAL GUARDIAN OF ABRIGAIL REED

vs.

HOLLIS REED.

Kennebec. Opinion, December 7, 1946.

Divorce.

In order for desertion to constitute a ground for divorce, it must continue and be in existence, not for any three years prior to the filing of the libel, but for the three years next prior to the filing of the libel.

To constitute "utter desertion" under divorce statute, there must be, not only cessation from cohabitation continued for the required period and absence of consent to the separation on the part of the libellant, but also intention in the mind of the libellee not to resume cohabitation.

During time libellee was insane, she did not have the mental capacity necessary to form the intent to desert.

ON EXCEPTIONS.

Petition by legal guardian of an insane person to annul a divorce decree granted to respondent from ward. From decree annulling divorce respondent excepts. Exceptions overruled. Decree below affirmed.

Udell Bramson, for petitioner.

Berman, Berman & Wernick, for respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

HUDSON, J. In this case the respondent excepts to the decision of the judge below in the Superior Court and to certain statements made by him in relation thereto. In the decision

he sustained the petition of the plaintiff asking for the annulment of a divorce granted to Hollis Reed against his wife, Abrigail, daughter of the petitioner herein, Alice Preston, and decreed that the divorce granted Hollis be rendered void and of no effect on the ground that the wife, Abrigail, was insane at the time of the institution of the divorce proceedings, had remained so continuously since then, had no guardian, general or *ad litem*, or any attorney in fact, and did not appear at and was not represented at the divorce hearing.

In his opinion the justice said:

> " . . . Petitioner's ward had, and now has, a good and meritorious defense to Hollis Reed's libel for divorce.
>
> " . . . Under the facts of the instant case, in the light of the rules of law properly applicable, we find that 'so far as the record shows, a judgment was rendered against the (libelee) while she was presumptively insane,' without opportunity to her to be heard either by general guardian, guardian ad litem, or attorney. 'We think it was the imperative duty of the court, as soon as the matter was in any way called to its attention, to see that the defendant was given what the record shows she did not have, a trial in which she was properly represented.' *Cubbison* v. *Cubbison* . . . ." (45 Ariz., 14, 40 Pac. (2nd), 86.) "This was particularly true in view of the fact that she had a meritorious defense to the libel brought against her."

Then he decreed that the divorce be annulled and rendered void and of no effect.

Counsel for the respondent frankly states that all of the exceptions of the respondent are directed to one point on which the decision of the Court below was founded and that in the interest of brevity the exceptions may be regarded as coalescing and that the problem may be presented to this Court as a unit.

It clearly appears, we think, that the question of law thus presented is this: Assuming that a wife actually deserts her

husband for a period of three years prior to the filing of a libel for divorce and lives apart from him for that length of time and later becomes insane, what is the effect of the insanity upon the desertion as a ground for divorce under our statute?

The exceptant claims that the desertion once established continues automatically to the time of the filing of the libel. This the plaintiff denies.

The justice below ruled that, in order to have a legal divorce for utter desertion, the desertion must continue for the three consecutive years next prior to the filing of the libel. He cited certain Maine cases with which we agree to the effect that:

> "To constitute 'utter desertion' under the statute, there must be not only cessation from cohabitation continued for the required period and absence of consent to the separation on the part of the libelant, but also intention in the mind of the libelee not to resume cohabitation. *Moody* v. *Moody*, 118 Me., 454; *Landry* v. *Landry*, 121 Me., 104, 106; *Deering* v. *Deering*, 123 Me., 448."

It would seem that he reasoned rightly that while she was insane (and she was insane during a large portion of the three-year period next before the filing of the libel) she could not be said to be consenting to the separation and have no intention to resume cohabitation. Consequently, the desertion did not continue for the three-year period next prior to the filing of the libel as required by the statute. He plainly stated in his decision:

> "Because of Abigail Reed's mental disorder, she did not have from the time of her entry into the Augusta State Hospital in December, 1938, to the time of the filing of the libel, the mental capacity necessary to form the intent necessary to constitute the act of desertion."

The statute was enacted in 1863 (see P. L. 1863, Chap. 211, Sec. 2). Then this three-year period did not have to be next

prior to the filing of the libel, nor did it in the Revision of 1871 (see Chap. 60, Sec. 3), but in P. L. 1883, Chap. 212, Sec. 2, the law was changed to include these pertinent words, "next prior to the filing of the libel," and such has been the law ever since.

Thus it is perfectly clear that the legislature intended that, before authority would be granted by it to a court to grant a divorce for utter desertion, the desertion should not be for *any* three years prior to, but for the *particular* three years *next* prior to the filing of the libel. It could well be that a long time prior to the filing of a libel there might be a period of three consecutive years during which there was a desertion, and yet under our present statute it would not be a ground for divorce for utter desertion because it was not for the three-year period clearly specified in the statute, by which the Court is absolutely bound. If there be a desertion, it, to be a ground for divorce under the statute, must continue and be in existence for the three years next prior to the filing of the libel.

In *Hartwell* v. *Hartwell*, 234 Mass., 250, 251, 125 N. E., 208, the late Chief Justice Rugg stated:

> "One of the objects of the establishment of a substantial time of desertion as a prerequisite for maintenance of a libel for divorce on that ground is to enable the offending party to repent and return to the matrimonial home, and thus to afford opportunity to the parties to become reconciled and live together again. *That object would be frustrated in cases where the mind to will has become unsound.*" (Italics ours.)

Had Mrs. Reed had her day in court at the time of the divorce hearing, it might have appeared that she did actually repent and offer to return to her matrimonial home, and if the Judge found that to be true, that would have destroyed desertion as a ground for divorce under this statute. Under the facts in this case she never had any opportunity to present any defense in the divorce hearing.

The statute above-quoted is not only emphatic but clear and the Court below in his ruling followed it and based his decision upon it as he interpreted it. We think he interpreted it rightly. The mandate must therefore be,

Exceptions overruled.
Decree below affirmed.

NEWELL G. HARDISON *vs.* EARL K. JORDAN.

NEWELL G. HARDISON *vs.* EARL K. JORDAN.

EARL K. JORDAN *vs.* NEWELL G. HARDISON.

Hancock. Opinion, December 12, 1946.

Judgment. Writ of Entry. Boundaries. New Trial.

Title to land in controversy in real action was not finally determined in a trover suit between the same parties where previous decision did not finally determine issues raised in instant cases.

In real actions disclaimers must be filed at the first term and within two days after entry of action, unless the time therefor be enlarged or permission to file is granted by court.

Where 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 a description in a deed, the point of beginning is given as on a road, the point of beginning is to be taken as the center of the way, if there is nothing to indicate a different intention. This presumption, however, is not conclusive and may be rebutted.

When it is uncertain from description in deed and from facts produced, whether it was intended that line should run from center of road or from side of road, the acts of the parties and their predecessors must be considered in considering the true construction of the instrument

Where general verdict granted demandant recovery of land described in writ, but did not determine where boundary of such land began, or the ownership of the strip of land between disputed locations, and what land demandant was actually entitled to recover, new trial should be granted in order that all issues involved may be finally determined.

Where real action and actions of trespass and trover for wrongful entry are tried together, and except as to entry and conversion, upon the same evidence, and verdicts for defendant in trespass and trover suits do not bar further maintenance of real action decided in favor of demandant by general verdict, and are not clearly inconsistent therewith, and are not clearly wrong, motions for new trials in trover and trespass cases would not be granted.

ON MOTIONS FOR NEW TRIALS.

Real action by Earl K. Jordan against Newell G. Hardison and actions of trespass and trover by Hardison against Jordan. Verdict for demandant in real action, and for defendant in actions of trespass and trover. Motion for new trial by plaintiff in trespass and trover cases, and by defendant in real action. Motion sustained and new trial granted in real action. Motions for new trials denied in actions of trespass and trover.

Blaisdell & Blaisdell, for Newell G. Hardison.

Clarke & Silsby, for Earl K. Jordan.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

STURGIS, C. J. These cases, growing out of a dispute between the parties as to the dividing line between their properties in Waltham, Maine, and the ownership of a strip of land along that boundary, come forward on motions for new trials and are argued together as they were tried below. They are reviewed in the reverse order of their numerical positions on the docket.

Controversy as to this disputed strip of land has recently been before this Court in an action of trover brought by *Newell G. Hardison* v. *Earl K. Jordan* for picking blueberries on the land, in which on review a new trial was granted. *Hardison* v.

Jordan, 141 Me., 429, 44 Atl., 2d, 892. That case, however, did not finally determine the issues raised here and is not a bar to these actions. *Susi* v. *Davis,* 134 Me., 308; *Kimball* v. *Hilton,* 92 Me., 214; *Young* v. *Pritchard,* 75 Me., 513.

EARL K. JORDAN *v.* NEWELL G. HARDISON

This is a real action and was entered at the September Term of the Superior Court for Hancock County and continued to the following April Term when a plea of nul disseizin and a disclaimer having been filed by the defendant the case was submitted to the jury and a general verdict for the demandant returned. It appearing that the disclaimer filed at the trial term was without enlargement of time for filing, it was ineffective and must be disregarded. R. S., Chap. 158, Sec. 6; Rule 5, Supreme Judicial and Superior Courts; *Susi* v. *Davis,* supra and cases cited. Upon the pleadings, the demandant can only recover the premises described in his writ and to which he proves legal title at the date of the commencement of his action. He must recover, if at all, upon the strength of his own title. If he shows no title, he cannot prevail, even though the defendant has none. *Elwell* v. *Borland and Sexton,* 131 Me., 189; *Spencer* v. *Bouchard,* 123 Me., 15; *Wyman* v. *Porter,* 108 Me., 110; *Brown* v. *Webber,* 103 Me., 60. The case comes forward on defendant's motion for a new trial.

The demandant and the defendant trace their titles to their adjoining lands back to Andrew M. Fox who owned a part of Lot 15 in Township No. 20 and in the Town of Waltham and on February 16, 1871 conveyed the westerly part of his tract to Daniel Wooster and the remainder and easterly part to Henry Fox.

Title to the Daniel Wooster lot, after several mesne conveyances, was acquired on November 7, 1904 by Hollis D. Jordan and held by him, except for sales on execution which were redeemed, until he died in 1940 and was then, on September 23, 1941, sold by Earle H. Kelley his administrator to

Sadie M. and Theron Haslam who on November 12, 1941 conveyed it to Earl K. Jordan the demandant by deed 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 beginning and containing forty acres more or less."

This description was used in every deed by which this property was conveyed. And it is the description used in the demandant's writ.

The Henry Fox lot is now owned by the defendant Newell G. Hardison under deed of Everett Mace of July 3, 1926, describing the property conveyed as,

> "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."

And by deed of Oscar T. Jordan administrator of February 11, 1932 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."

At the trial, the defendant relying upon a plan made by his surveyor which was based on the calls for distances in one of his deeds, contended that his West boundary was about thirty-three rods from the side of the county road leading to Mariaville and admitted that he had taken possession of the land lying East of that line. The demandant claimed, however, that the East boundary described in his deed was the dividing line between the adjoiners and defined the land he was entitled to recover. The defendant's contention cannot be sustained for under his deeds and those of his predecessors in title the property conveyed is and always has been bounded on the West by the demandant's land which is a monument to which distances must yield. *McCausland* v. *York,* 133 Me., 115, 123; *Perkins* v. *Jacobs,* 124 Me., 347. The demandant's claim that his land extends to the East line described in his deed is well founded but where that line is located determines the extent of his right of recovery under his writ and as he proves no other source of title depends upon the construction to be placed upon his conveyance.

An examination of the demandant's deed which, as already stated, comports with all prior grants, discloses that there is a presumption that the East line of the land conveyed begins at the end of the southerly bound and thirty-eight rods East of the center of the county road leading to Mariaville and thence runs North with a jog one hundred and sixty rods more or less.

For it is settled in this jurisdiction that the point of beginning of the southerly bound, which fixes the location of the beginning of the East line being described as on the county road leading to Mariaville, unless a different intention is indicated, is to be taken as in the center of the way. *Cyr* v. *Dufour,* 68 Me., 492; *Hardison* v. *Jordan,* supra. This presumption, however, as stated in the rule, is not conclusive, and although it is not clearly rebutted by the terms of the grant, in the light of the evidence in this record it is uncertain whether it is intended that the East line of the demandant's land should run North from a point thirty-eight rods from the center or that distance from the side of the county road leading to Mariaville and the acts of the parties and their predecessors in title must be considered in determining the true construction of the instrument. *Borneman* v. *Milliken,* 123 Me., 488; *Bradford* v. *Cressey,* 45 Me., 9.

At the trial the demandant showed that for many years there had been a fence, stone wall and trees spotted on a line running North from a point practically thirty-eight, or by measurement 37.91 rods, from the East side of the county road leading to Mariaville and produced many witnesses who testified that from as early as 1904, when Hollis D. Jordan became the owner of the demandant's land, he and his successors in title had recognized and occupied to the line of these monuments as their East boundary and the adjoiners had done the same on the other side, until in 1943 the defendant refused to recognize this line and advanced the claim that his boundary was only thirty-three rods East of the side of the county road. This evidence was for the jury to weigh with other material facts and find where under his deed the demandant's East line was located, but it cannot be ascertained from the verdict that this was done.

The general verdict returned grants the demandant a recovery of the land described in his writ and to this he was undoubtedly entitled. But it does not determine whether his East line begins thirty-eight rods from the side or from the center of the county road leading to Mariaville, who owns the strip

between these locations, and what land he actually is entitled to recover. This was the real issue tried out in this case and with their general verdict the jury should have been directed to report their finding thereon in a special verdict. *Nicholson* v. *Railroad Co.*, 100 Me., 342, 348. As is there said:

> "when it is perfectly apparent that the verdict, upon the issue presented, does not determine the rights of the parties, it seems clear that the case, if possible, should be put in such a position, that the parties, by means of the action already pending which has been brought for that express purpose, may be able to have all their rights decided, instead of being left in uncertainty, their litigation and expense of no avail, with the necessity still resting upon them of bringing another suit to accomplish the very end the one in being was instituted to secure."

We think the verdict should be set aside and a new trial granted where all the issues involved can be finally determined.

Motion sustained.
New trial granted.

NEWELL G. HARDISON *v.* EARL K. JORDAN.

NEWELL G. HARDISON *v.* SAME.

These are actions of trespass and trover for wrongful entry upon and removal of hardwood from land along the dividing line between the adjoining properties of the parties and the verdicts were for the defendant. They were tried with the real action already considered and by the same jury, and except as to entry and conversion, upon the same evidence, but all remain separate so far as concerns verdicts, judgments, and all aspects save only the one of joint trial. *Barton, Exec.* v. *McKay,*

135 Me., 197, 199. These cases come forward on plaintiff's motions for new trials.

We do not think the verdicts in the trespass and trover suits are clearly inconsistent with that returned in the real action. They do not bar its further maintenance. They are not clearly wrong and the motions for new trials cannot be granted. In each of these cases the entry is

Motion for new trial denied.

NEW ENGLAND TRUST COMPANY, ET AL

vs.

PENOBSCOT CHEMICAL FIBRE COMPANY, ET AL.

Penobscot. Opinion, December 19, 1946.

Corporations.

The declaration of dividends rests in the sound discretion of the board of directors of a corporation, but such discretion may be limited by a contract between the company and its stockholders.

The discretion of directors in the declaration of dividends is limited when the preferred stock contract provides without qualification that stockholders are entitled to dividends at a fixed rate, and in such case the question is not whether the directors, in carrying out the financial policy of the company, have acted wisely in withholding dividends, but rather, what are the legal rights of the stockholders?

Second preferred stockholders, under a by-law providing without qualification that such stockholders are entitled to dividends at a fixed rate, are entitled as a matter of right to dividends if they are earned, and the directors do not have the right to postpone payment of them because in their judgment it is wiser to use the money required for extensions, rehabilitation and improvements, in the absence of circumstances which would justify the refusal to pay.

Where there is any inconsistency between two by-laws of a corporation, the last by-law must be held to have modified the first.

ON APPEAL.

Bill in equity to compel the payment of accumulated dividends on preferred stock. Defendant appeals from a decree sustaining bill.

Appeal dismissed. Decree below affirmed.

Verrill, Dana, Walker, Philbrick & Whitehouse,

Palmer, Dodge, Chase & Davis, for plaintiffs.

Ballard F. Keith,

Charles B. Rugg,

Warren F. Farr,

John J. Phelan, Jr.,

Ropes, Gray, Best, Coolidge & Rugg, for defendants.

SITTING: STURGIS, C. J., THAXTER, TOMPKINS, FELLOWS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

THAXTER, J. The plaintiffs, who are the holders of 1618 shares out of a total of 2500 of the second preferred stock of the Penobscot Chemical Fibre Company, on behalf of themselves and all other second preferred stockholders similarly situated, filed a bill in equity on May 15, 1945 against the Company and its directors to compel the payment of accumulated dividends on the stock which on March 31, 1945, the end of the fiscal year, amounted to $42 per share. Answers were filed by the defendants to which there were replications by the plaintiffs and a hearing was had on bill, answers and evidence. The sitting justice entered a decree sustaining the bill and ordering the payment of the accumulated dividends which on April 14, 1946, the date of the entry of the decree, had been reduced to

$35 per share. The case is now before us on an appeal from this decree.

The corporate defendant was organized under the laws of Maine in 1882. At all times with which we are here concerned its capital stock issued and outstanding has consisted of 1450 shares of Series A $6 Cumulative Prior Preference Stock of no par value; 1181 shares of Series B $5 Cumulative Prior Preference Stock of no par value; 3000 shares of 7% Cumulative Preferred Stock authorized by stockholders' vote in 1914 of $100 par value, of which 7 shares had been reacquired by the company; 2500 shares of 7% Cumulative Second Preferred Stock authorized by stockholders' vote in 1920 of $100 par value; and 20,000 shares of common stock of no par value. The Prior Preference stock was issued in March 1937 to pay dividend arrearages on the preferred and second preferred stock.

The net profits of the company after taxes for the six years prior to the bringing of the bill in equity were as follows:

1940	$ 94,089.20
1941	501,665.60
1942	260,168.42
1943	93,996.70
1944	73,832.49
1945	77,928.31
	$1,101,680.72

The amount necessary to pay dividends in full on all classes of preferred stock in each of these years was as stated in the answers $53,056 or $318,336 for the period. It is apparent, therefore, that in each one of these years the preferred dividends were earned and that for the whole period the net earnings were approximately 3½ times the dividend requirements. At the date of the bringing the bill in equity, all the dividends due on preferred stock senior to the second preferred had been paid. At the end of the fiscal year, on March 31, 1945, just prior to

the time when this bill was brought, the company had on hand cash and United States Treasury Savings Notes amounting to $432,361.84 and total current assets of $1,593,177.87 with which to meet total current liabilities of $427,519.26. According to the balance sheet the common stockholders had an equity in this company valued at $4,208,502.98, or a book value for their stock of better than $200 per share.

On January 8, 1945 the plaintiffs, on behalf of themselves and all other second preferred stockholders, made written demand on the company and on the directors that all accumulated dividends on their stock should be declared and paid. No answer having been received to this demand, this action was brought.

The plaintiffs rely on the by-law relating to the second preferred stock, Par. (a) which reads as follows:

> "Second preferred stock shall bear date of May 1, 1920, and shall be entitled to dividends at the rate of seven per centum per annum and no more, payable quarterly on the first days of August, November, February and May in each year hereafter.
>
> "Such dividends shall be cumulative so that if on any such quarterly dividend date a dividend of 1¾ per centum of the par value shall not have been paid, the deficiency shall be paid before any dividends shall be declared, paid out, or set apart for any other class of stock, excepting Preferred Stock."

This by-law was enacted in 1920 and has remained in force to the present time exactly as originally worded with the exception that, apparently in 1937 at the time of the issuance of the prior preference stock, the second paragraph was amended to read as follows:

> "Such dividends shall be cumulative so that if on any such quarterly dividend date a dividend of one and three-quarters per cent (1¾%) of the par value shall not have

been paid, the deficiency shall be paid before any dividends shall be declared, paid out or set apart for any class of junior stock."

The defendants contend that, in the absence of fraud, bad faith or abuse of discretion, their judgment not to pay dividends is conclusive unless their discretion is limited by statute, charter or by-law. With this general principle we concur. It is a fact that the corporation has made large commitments for additional plant equipment and for improvements, the justification for which seems to be established. And the sitting justice has found that, if the directors had a discretion to withhold dividends on the second preferred stock, they exercised that discretion soundly.

A glance at the balance sheets of this company indicates that the payment of these dividends is not impossible as was the case in *Spear* v. *Rockland-Rockport Lime Co.*, 113 Me., 285, 93 A., 754, 6 A. L. R., 793. Without doubt the money to do so could have been procured without imperiling the credit of the company, and it had the right to borrow money for that purpose. *Hazeltine* v. *Belfast & Moosehead Lake Railroad Co.*, 79 Me., 411, 419, 10 A., 328, 1 Am. St. Rep., 330.

The question before us is a narrow one. On the facts of this particular case, were these plaintiffs entitled as a matter of right to these dividends, or did the directors have a discretion to withhold them?

As we have intimated above, we have no quarrel with the general rule that the declaration of dividends rests in the sound discretion of the board of directors of a corporation; but such discretion may be limited by a contract between the company and its stockholders, *Spear* v. *Rockland-Rockport Lime Co.*, supra, or by a by-law which in effect constitutes such a contract. *Lydia E. Pinkham Medicine Co.* v. *Gove*, 303 Mass., 1, 13, 20 N. E., 2d, 482. Our court has gone farther than have some others in holding that the discretion of directors is limited when

the preferred stock contract, as was the case here, provides without qualification that stockholders are entitled to dividends at a fixed rate. *Spear* v. *Rockland-Rockport Lime Co.*, supra. In such a case the question is not, whether the directors in carrying out the financial policy of the company have acted wisely in withholding dividends, but rather what are the legal rights of the stockholders.

The question here involved was discussed in *Spear* v. *Rockland-Rockport Lime Co.*, supra. The preferred stock contract there before the court provided "that the preferred stock is entitled, out of the net earnings of the company, to a semi-annual, preferential, cumulative dividend at the rate of seven per centum per annum, and no more, payable on the first days of March and September in each year, to be paid or provided for before any dividend shall be set apart or paid on the common stock." Chief Justice Savage said at page 289:

> "The plaintiff's contract is that he shall be entitled, out of the net earnings of the company, to a semi-annual, preferential, cumulative dividend, to be paid or provided for before any dividend is set apart or paid on the common stock. And that is why it is called preferential. By being cumulative, if net earnings at any dividend period are insufficient to pay the contract dividend it is to be made up out of subsequent net earnings. And in any event, upon liquidation or dissolution of the corporation, the contract goes on to say, the preferred stockholders are to be paid in full for their stock at par, with all accrued and unpaid dividends, before common stockholders receive anything. One feature of the contract remains to be noticed. The contract was that the preferred stockholder was entitled, out of the net earnings, to 'semi-annual . . . dividends.' The defendant contends that under this contract, the plaintiff was not entitled, even if there were net earnings, to have dividends paid for any half year, year,

or series of years, that the directors might use the net earnings for the development of the business, and that there was but a single limitation, namely, that the plaintiff must be paid all accrued and unpaid dividends before anything is paid to common stockholders. In other words, it is claimed that the defendant made no promise or guaranty to the plaintiff of any dividends to be paid out of net earnings, at any particular time, and that it will have fully kept and performed the obligation of its contract, if at any time, past or future, it has paid or will pay, the preferred dividends before common ones are paid. That is, it may indefinitely postpone payment. We are unable to concur in this view. This contract like all others must be interpreted in accordance with the expressed intention of the parties, reading the contract in the light of its purposes and existing conditions and surrounding circumstances. And reading the contract in that way, we think it obvious that when the parties agreed that the plaintiff was to be entitled, out of the net earnings, to a semi-annual dividend, they intended that he should be entitled to have a dividend *paid* semi-annually if there were net earnings."

Counsel for the defendants claim that the language quoted is dictum because the bill was in fact dismissed on the ground that the corporate property had been sold and there were no funds available from which payment of dividends could have been made. Conceding that technically the doctrine here laid down is dictum, it is none the less a statement as to how such a contract as we now have before us should be construed; and we cannot ignore it. It certainly means that preferred stockholders under such an agreement are as a matter of right entitled to dividends if they are earned, and that the directors do not have the right to postpone payment of them because in their judgment it is wiser to use the money required for their payment for extensions, rehabilitation and improvements. In

reaffirming this principle we do not mean to imply that such right is an absolute one. Circumstances may exist which would justify the refusal to pay but they are not present in the instant case.

There is a cogent if not a compelling reason why this court should not now modify the doctrine so clearly laid down in the *Spear* case, supra. Dictum though it may have been, it was a carefully worded and deliberate statement as to the rights of preferred stockholders. The by-law which we have before us was drafted within a few years after the opinion in the *Spear* case, supra, was handed down and the money may well have been paid to the corporation by the purchasers of the second preferred stock with the knowledge that under that by-law they were entitled, in accordance with the opinion of this court previously rendered, to semi-annual dividends at the rate of seven per cent, if there were net earnings of at least that amount applicable to such stock. In construing the language used in the contract involved in that case, the court said page 289:

> "And if there is any ambiguity in meaning, the contract should be construed more strictly against the company. The phraseology was its own, and it should be held to the significance which the words would ordinarily imply to an investor."

We call attention to the fact that in the case now before us the language of the by-law with which we are dealing did have significance to the investors in this stock. It told them of their right to dividends if they were earned and on that understanding they paid their money to the corporation. For this court to change the rule after the money has been paid would in effect be to sanction a breach of faith.

We must therefore hold that under the contract between the company and the second preferred stockholders as expressed in the by-law the stockholders were entitled as of right to dividends if they were earned.

We should perhaps consider certain contentions of the defendants. They claim that, assuming the doctrine of the *Spear* case, supra, does govern in this instance, yet the by-law has been modified both expressly and by implication.

Our attention is directed to Art. III, Section 7 (d) of the by-laws. This reads as follows:

> "The Board of Directors may declare dividends out of the surplus profits whenever they shall deem it expedient."

Here counsel say is an authorization to the directors to exercise discretion. This by-law but expresses the general rule of law on which we have already commented. It was in effect at the time the by-law with respect to the second preferred stock was adopted, and if there is any inconsistency between the two the later one must be held to have modified the first.

The suggestion is made that the second preferred stockholders at the time of the issuance of the prior preferred stock impliedly granted a discretion to the directors to withhold their dividends. The theory is this. The by-law under which the prior preference stock was issued does give to the directors a discretion to withhold the payment of dividends on that stock and it also provides that while there are unpaid dividends on that stock no dividends shall be paid on any junior stock. Therefore by withholding dividends on the prior preference stock no dividends can be paid on the second preferred stock. The second preferred stockholders assented to that by-law, and thereby it is claimed gave to the directors the right, by withholding dividends on the prior preference stock, to withhold dividends on the second preferred stock. The sitting justice ruled, and we think correctly, that the by-law governing the rights of the second preferred stockholders could not thus be modified by indirection. Furthermore at the time the by-law was adopted authorizing the issue of the prior preference stock the by-law now before us was in effect reenacted. It was modified in an unessential respect but in so far as the question now be-

fore us is concerned it was left exactly as it had been. Had there been an intention to change it, that could readily have been done. The same argument now presented to us was made to the Supreme Court of Massachusetts in the case of *Crocker* v. *Waltham Watch Co.*, 315 Mass., 397, 53 N. E., 2d, 230, and was rejected by that court.

Neither did the second preferred stockholders expressly amend the provisions of the by-law here in question by providing in the by-law authorizing the issuance of the prior preference stock that:

> "dividends upon junior stock may be declared by the board of directors of the Company out of any funds available therefor as determined by said board of directors . . . ."

This provision may be reconciled with the by-law here involved.

It is strenuously argued that the corporation has insufficient cash with which to make this payment; that it has tried to borrow sufficient money and has failed. It did have sufficient funds at the time the suit was brought but we prefer not to rest our rejection of the defendants' contention on that ground. With such a favorable financial position as this balance sheet indicates, we frankly do not believe that there is no way that the relatively small amount necessary for this purpose can be procured. And we are fortified in that belief by the fact that in making the commitments for extensive improvements the directors must have determined that the money for such improvements could be raised. It is obvious that they feel it is wiser to use their funds and credit for improvements rather than to make the payment to these stockholders. In that they may be right as a matter of business policy but that is not the question before this court.

Appeal dismissed.
Decree below affirmed.

RUTH I. MCKAY, ADM'X. OF THE ESTATE OF BERTRAM E. MCKAY

vs.

NEW YORK LIFE INSURANCE COMPANY.

York. Opinion, January 22, 1947.

Death. Pleadings. Insurance.

In the case of the unexplained absence of a person for seven years, the law raises no presumption as to the precise time of death. The presumption is only that the person is dead at the end of the seven years.

It is an elementary principle of the law of pleading that there must be an allegation in the declaration of the time any material or traversable act took place, otherwise declaration is demurrable.

In action on life insurance policy, it is necessary to allege that the insured died on a date previous to the expiration of the policy.

Under clause in life insurance policy, requiring notice and proof of death of insured, and providing the company will pay within a specified time thereafter, such notice and proof are conditions precedent to recovery, unless waived or excused by company.

If notice and proof of death of insured are waived by company, plaintiff's declaration must contain an allegation of such waiver, otherwise the declaration is demurrable.

ON EXCEPTIONS.

Action to recover proceeds of life insurance policy brought by administratrix of insured's estate against insurer. Defendant's demurrer to plaintiff's declaration was sustained and judgment was ordered for the defendant.

Exceptions overruled. Demurrer sustained. Case remanded for entry of judgment for defendant.

Daniel F. Armstrong, for plaintiff.

Verrill, Dana, Walker,

Philbrick & Whitehouse, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ. AND MANSER, ACTIVE RETIRED JUSTICE.

TOMPKINS, J. This is an action to recover the proceeds of a policy of insurance on the life of Bertram E. McKay issued by the defendant. The defendant demurred specially to the declaration for the following reasons: first, because in the declaration, the plaintiff states that the insurance on the life of the plaintiff's intestate, Bertram E. McKay, for which the plaintiff's action is brought, expired on August 28, 1939, yet the plaintiff in her declaration does not allege that the said Bertram E. McKay died prior to August 28, 1939. Second: because the plaintiff in her declaration states that said insurance was payable to the defendant upon due proof or notice of the death of the insured yet in her declaration she does not allege that due proof or notice of his death has been given.

This case comes up on exceptions by the plaintiff to the order of the presiding justice sustaining the demurrer and ordering judgment for the defendant.

The plaintiff alleges in her writ that the policy of insurance was dated the 31st day of December 1931, and issued to Bertram E. McKay, now deceased. One of the conditions of the policy was that the company would pay at the defendant's office in New York or through its agents in the State of Maine, to the executors or administrators or assigns of the late Bertram E. McKay immediately upon due proof or notice of his death. The insured paid the premiums up to September 22, 1936, when the policy lapsed for nonpayment of premiums. At the date of the lapse the policy had sufficient value to purchase term extended temporary insurance in the amount of $1,969.00, which insurance expired on August 28, 1939.

While the temporary insurance was in full force the said

Bertram E. McKay disappeared. He vanished from his home on the 27th day of November 1938, and from that time until the bringing of the action had not been heard from or seen by any member of his family or his friends, and due and reasonable search had been made by the plaintiff to ascertain his whereabouts. The plaintiff alleges that thereupon said policy became due and payable to her. The plaintiff in her writ did not allege any date of the death of the insured previous to August 28, 1939, nor that due proof or notice of death had been furnished to the defendant. The writ is dated January 28, 1946.

The defendant claims that either the omission to notify the company of death, or due proof thereof, or the failure of the plaintiff to allege that the death of the insured occurred prior to the date of the expiration of the policy, is a fatal defect in the declaration. The plaintiff relies upon the seven years unexplained absence to establish the death of the insured. The law as to the presumption of death from seven years unexplained absence we have adopted from the common law.

> "There is a conflict of authorities as to whether the presumption of death from absence raises any presumption as to the precise time of the death of the absent person. . . . However, the view generally obtaining in England and followed by the great weight of authority in the United States is to the effect that in the case of the unexplained absence of a person for seven years the law raises no presumption as to the precise time of his death. The presumption is only that the person is dead at the end of the seven years, but such presumption does not extend to the death having occurred at the end of any particular time within that period, and leaves it to be judged of as a matter of fact according to the circumstances which may tend to satisfy the mind that it was at an earlier or later date."

Wilson Admr. v. *The Prudential Life Ins. Co. of America,* 132 Me., 63, 166 A., 57; *Johnson* v. *Merrithew,* 80 Me., at page 115,

13 A., 132, 6 Am. St. Rep., 162; *Davis* v. *Briggs,* 97 U. S., 628, 24 L. Ed., 1086; Vol. 14 Am. Jur., Death, par. 34 and cases there cited.

> "A presumption of death from seven years absence and undiscoverable whereabouts does not relate back to the date of the absentee's disappearance in the absence of evidence on the subject."

Ferris v. *American Insurance Union,* 245 Mich., 548, 222 N. W., 744, 65 A. L. R., 1033; 75 A. L. R., 633, 16 Am. Jur., Death, par. 35.

Under the established rules of common law pleading in civil actions the plaintiff's declaration must state a good cause of action and contain a clear and distinct averment of the facts which constitute the cause of action. It must set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits in order that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations and by the court that is to give judgment. *Sessions* v. *Foster,* 123 Me., 466, 123 A., 898; *Ferguson* v. *National Shoemakers,* 108 Me., 189, 79 A., 469; *Foster* v. *Beaty,* 1 Me., 304.

One of the essential facts to be established by the plaintiff and to be found by the jury is that the insured died prior to August 28, 1939. The aid the plaintiff derives from the seven years absence and lack of information is not by way of presumption at the end of the seven years period that her husband is dead, which would be the all important fact if her case depended entirely on his death having occurred before the suit was filed, but as the facts stand it does not help her at all inasmuch as recovery depends on his being dead prior to August 28, 1939.

> "It is an elementary principle of the law of pleading that there must be an allegation in the declaration of the time

any material or traversable act took place. If no time should be stated the declaration would be ill on demurrer."

Andrews v. *Thayer,* 40 Conn., 157; Vol. 1, 7th Ed. Chitty on Pleading, par. 272. The vital fact that the insured died on a date previous to the 28th day of August 1939, within the life of the policy, is not alleged in the declaration. Time of death of the insured was a material allegation of one of the facts which constituted the cause of action. The defendant claims this omission is fatal to the sufficiency of the plaintiff's declaration. In *Bradley* v. *Modern Woodmen of America,* 146 Mo., Appeals 428, 124 S. W., 69, the court said in substance, in a case similar to the one under discussion where this vital allegation was missing, that inasmuch as the policy involved lapsed shortly after the disappearance of the insured, the declaration was insufficient because it failed to aver the death of the insured prior to the lapse of the policy. We think this ruling correct because the presumption of death arising from the seven years absence raises no presumption of the time of death, according to the great weight of authority.

The second ground of demurrer urged by the defendant is that the declaration stated that the policy was payable to the defendant upon due proof or notice of death. The declaration nowhere alleges that due proof or notice of death had been given. The purpose of the proof of death is to enable the insurer to form an intelligent estimate of its rights and liabilities under the contract. A cause of action does not arise until proof or notice of death is furnished. *Griffin* v. *Northwestern Mutual Life Insurance Company,* 250 Mich., 185, 229 N. W., 509. Under the usual clause in a policy of life insurance requiring notice and proof of death of insured, and providing the company will pay within a specified time thereafter, such notice and proof are conditions precedent to recovery, unless the company has waived the provisions or the circumstances are such as to excuse noncompliance therewith. 37 Corpus Juris, Life Insurance, par. 309, and cases there cited.

No facts are pleaded showing a waiver or excuse for non-compliance with the conditions precedent. The money is only recoverable on the performance of certain acts by the plaintiff and the existence of certain facts. These acts and the existence of these facts must be alleged.

Exceptions overruled.
Demurrer sustained.
Case remanded for entry of
Judgment for Defendant.

EDNA P. TOWNE AND CHARLES E. TOWNE *vs.* PEARL J. LARSON.

York. Opinion, January 24, 1947.

Contracts. Evidence. Appeal and Error.

A contract must be sufficiently definite to enable the court to determine its meaning and fix the legal liability of the parties, but every single detail need not be set forth, as the court looks to the substance rather than to form, and is reluctant to construe a contract so as to render it unenforceable if that result can be avoided.

Where essential terms of contract are incorporated in writing, parol evidence is not admissible to vary the terms of contract or to cast doubt on what the writing actually purports to be.

The court is not disposed to find an agreement vague or indefinite which was precise and clear to the parties who signed it.

In action brought by vendor for breach of contract to purchase real estate and personal property, testimony of vendor as to market value of property on date set for performance was admissible.

There was no abuse of discretion of court in denying motion for mistrial, when remarks of counsel, relied upon in motion, were not prejudicial.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Action for breach of contract to purchase real and personal property. Jury found for plaintiffs and defendant files exceptions and moves for new trial. Exceptions overruled. Motion overruled.

Locke, Campbell, Reid & Hebert,

Hillard H. Buzzell, for plaintiffs.

Titcomb & Siddall,

Nathan B. Bidwell, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

THAXTER, J. This is an action for breach of contract brought by the vendors of certain real estate and personal property against the vendee. The case was tried before a jury which found for the plaintiffs and assessed damages at $4,000. It is now before this court on exceptions, four in number, and on a motion for a new trial. We shall consider first the fourth exception as this raises the issue which the exceptant treats as the important one.

The plaintiffs, husband and wife, had operated for about fifteen years a summer resort at Kennebunkport. The property included about an acre of land, a store with kitchen equipment, a restaurant, garages, and a cottage with about sixteen rooms. Title to the real estate and at least to some of the equipment was in the name of the wife. The balance of the contents belonged to the husband or to the husband and wife jointly. The defendant, a widow, a resident of Massachusetts, who was the librarian of the Middlesex County Law Library, had spent a number of summers at Kennebunkport and was well acquainted with the property and with its owners. Hearing that they wished to sell, she opened negotiations with them for its purchase. The result of the discussions was a written document drawn up

by the defendant of the following tenor, omitting certain irrelevant interlineations:

"August 23, 1944

We, Charles E. Towne and Edna P. Towne, of Kennebunkport, Maine do hereby acknowledge the receipt of $1.00 (one dollar) from Pearl J. Larson, of Kennebunkport, Maine and Medford, Massachusetts.

The said Charles Towne and Edna Towne do hereby agree to give a clear title to the property consisting of approximately one acre of land at Goose Rocks Beach three buildings and contents hereafter named, contents listed in separate document, to the said Pearl J. Larson, title to pass April 1, 1945 and said Pearl J. Larson agrees to pay the consideration of $22,000 (twenty-two thousand dollars); $250.00 (two-hundred-fifty dollars) to be paid September 15, 1944; the balance of $21,750 (twenty-one-thousand, seven hundred fifty dollars) to be paid when title is passed April 1, 1945.

The property herein named consists of a dwelling house and contents with annex and contents three garages and Ford truck.

Store, fixtures and equipment. Store is to be painted and cleaned within and all equipment cleaned and put in 1st class running condition. All equipment formerly used in the store is to be sold with the store.

Casino with equipment including two bowling alleys and equipment.

Signed and sealed this
23rd day of August, 1944

Signed Edna P. Towne
Signed Charles E. Towne
Signed Pearl J. Larson

WITNESS: Emily R. Jones"

No list of contents as referred to in the agreement was ever made. Shortly after the signing of the agreement there was,

however, some discussion as to certain personal belongings that Mrs. Towne wanted to retain. On September 7, 1944, Mrs. Larson in a letter to Mr. Towne asked that the agreement be extended from September 15, 1944 to October 14. On September 19, 1944 she wrote him another letter suggesting that money which she thought was to be available for payment was part of a trust fund and she found that she could not reach it. She suggested the possibility of a different method of payment, or perhaps an entirely different arrangement by which she would share the profits with the then owners. On October 11, 1944, she notified Mr. Towne that she must cancel "our original agreement." In none of these letters, nor in any conversation with the Townes does she claim that she will not go through with the matter because of any indefiniteness in the agreement; nor because of any failure to make up the list of personal property, although in the last letter she does refer to the negotiations being long drawn out. It is obvious from her correspondence that her trouble, and her only trouble, was the financing of her purchase. Sometime after April 1, 1945, the time set for performance, the Townes sold the property to a third party for $18,000. Such in brief are the facts about which there is no essential dispute.

The judge in his charge instructed the jury that the paper signed by the parties was a binding contract to sell real estate and personal property. The defendant excepted to this instruction.

The contention of the defendant is that this document is not a contract but only "a very loosely drawn option to purchase within a specific time upon terms not then agreed upon"; that the minds of the parties really never met on the essential details of the transaction; and that accordingly the judge's definite direction that it did constitute a contract was error.

The writing indicates that the parties did not have an option in mind at all, but were endeavoring to draft an enforceable contract in so far as the data then in their possession permitted.

The presiding justice, having properly as we think, determined that the parties had incorporated in this writing the essential terms of their understanding, was correct in refusing to permit parol evidence to be introduced to vary its terms or to cast doubt on what the writing actually purported to be. *Johnson* v. *Burnham,* 120 Me., 491, 115 A., 291.

We do not agree with the defendant that because of the indefinite nature of an essential part of the contract the minds of the parties never met. It is true that a contract must be sufficiently definite to enable the court to determine its meaning and fix the legal liability of the parties. *Corthell* v. *Summit Thread Co.,* 132 Me., 94, 167 A., 79, 92 A. L. R., 1391; 12 Am. Jur., 555. But this does not mean that every single detail must be set forth. The court looks to substance rather than to form, and is reluctant to construe a contract so as to render it unenforceable if that result can be avoided. *Spicer* v. *Hincks,* 113 Conn., 366, 155 A., 508; *Middendorf, Williams & Co., Inc.* v. *Alexander Milburn Co.,* 134 Md., 385, 107 A., 7; Williston on Contracts, 1st ed., Vol. 1, Sec. 37; 12 Am. Jur., 556.

The agreement now before us is not rendered so indefinite that the rights of the parties cannot be readily ascertained merely because it contemplates that the contents of the buildings are to be listed. There was no doubt in the defendant's mind as to its meaning; and she never made any such claim as she now asserts prior to the time that suit was brought against her. Her letters written to Mr. Towne show clearly that her failure to carry out her agreement was because of difficulty in financing the purchase and not because of any misunderstanding of its terms. The court is not disposed to find an agreement vague or indefinite which was precise and clear to the parties who signed it.

We think that the instruction of the presiding justice was correct that there was here a binding contract.

The first exception is without merit. Mrs. Towne was asked what was the fair market value of the property on April 1, 1945.

The question was objected to on the ground that there was no allegation in the writ to justify the question. We are somewhat puzzled, as apparently the presiding justice was, as to the reason for the objection. It seems to us to have been a perfectly proper inquiry.

The second exception is to the refusal of the presiding justice to grant defendant's motion for a mistrial. A colloquy took place between counsel for the plaintiffs and counsel for the defendant over the testimony of Marshall K. Berry, a real estate expert called by the plaintiffs. During the course of the discussion plaintiffs' counsel said: "You can do as you wish relative to his Mr. Berry's testimony; I never saw the man before in my life." Assuming the remark was irrelevant, any possible prejudice from it was negligible and there was no abuse of discretion in denying the motion.

The third exception is to the exclusion of certain evidence relating to the condition of the property in October, 1944. The judge had a discretion to determine whether conditions on that date were such that the opinion of the witness would be at all helpful to the jury. He apparently determined that such opinion would not be. There was no abuse of discretion.

The defendant does not seriously argue that the motion for a new trial should be sustained. We have nevertheless carefully read the evidence and are satisfied that there is sufficient to justify the verdict of the jury.

Exceptions overruled.
Motion overruled.

CLARENCE D. SHANNON *vs.* RALPH SHANNON ET AL.

Penobscot. Opinion, January 31, 1947.

Probate Courts. Wills.

Probate courts are wholly creatures of the legislature. They are of special and limited jurisdiction, and their proceedings are not according to the course of the common law.

A probate appeal vacates the decree of the probate court, and brings the whole subject matter of the appeal *de novo* before the Supreme Court of Probate.

The right of a widow to renounce the provisions of her husband's will may be exercised by her within six months after final decree of the Supreme Court of Probate.

ON REPORT.

Bill in equity against defendants to remove cloud from the title to certain real estate. The case involved the question of the time limit in which a widow must file a waiver of the provisions of her deceased husband's will. Case remanded to the Court below for decree in accordance with opinion.

Edward I. Gross, for plaintiff.

Fellows & Fellows,

C. J. O'Leary, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, JJ.

TOMPKINS, J. Bill in equity to remove cloud from the title to certain real estate situated in Bangor, Penobscot County, Maine. The case comes to this court under the provisions of

Sec. 24 of Chap. 95 of R. S. 1944 of the State of Maine, to be heard on bill, answer and replication.

The case as stated in the bill is substantially as follows. The plaintiff claims title to the real estate under the will of Michael Shannon, late of Bangor. Michael Shannon died on August 30, 1942, testate, leaving a widow, Christina Shannon, three daughters and three sons. In the will he bequeathed certain money and the income from certain buildings to his wife "in lieu of such share and interest as she would have in my estate if I died intestate," and to his son Clarence D. Shannon the real estate in question.

The will of said Michael Shannon was duly proved and allowed on October 7, 1942, by the Judge of Probate in and for the county of Penobscot. On the 22nd day of October 1942, being within the twenty days allowed for an appeal from the decree of the Judge of Probate, an appeal was taken by the widow to the Supreme Court of Probate. The decree of the Judge of Probate was affirmed by the Supreme Court of Probate on the 6th day of April 1943. On April 10th, 1943, the widow filed an election to waive the provisions of the will and claim her right and interest by descent. The election and waiver were duly recorded on the 14th day of April 1943. The widow, Christina Shannon, died on the 28th day of April 1945, testate. Her will was probated and allowed. By the terms of her will all her real estate was devised to Ralph Shannon. The plaintiff claims to own the real estate in controversy in fee simple under the will of said Michael Shannon. The defendant, Ralph Shannon, claims to own one third interest in common and undivided of the same through the will of his mother Christina Shannon. The legal controversy upon which the decision in the case depends is the effect of the waiver filed by the widow. The plaintiff claims that the waiver had no effect because it was not filed within six months after the probate of the will of Michael Shannon, as provided by Ch. 156, Sec. 13 of R. S. 1944. This is the sole issue for determination by this court.

Sec. 13 of Ch. 156 provides, so far as this case is concerned, as follows:

> "When a specific provision is made in a will for the widow or widower of the testator or testatrix . . . such legatee or devisee may within six months after the probate of said will and not afterwards, . . . make election, and file notice thereof in the registry of probate, whether to accept said provision or claim the right and interest herein provided."

Sec. 14 on the same Chapter provides:

> "When a provision is made in a will for the widow of a testator who died after the 26th day of April 1897, or for the widower of a testatrix who died after the first day of June 1903, and such provision is waived as aforesaid, such widow or widower shall have and receive the same share of the real estate and the same distributive share of the real and personal estate of such testator or testatrix as is provided by law in an intestate estate."

Par. 1 of Sec. 1 of Ch. 156, so far as relates to the case under consideration provides as follows:

> "If he leaves a widow and issue one third to the widow."

Sec. 32 of Ch. 140 provides that:

> "The superior court is the supreme court of probate; and has appellate jurisdiction in all matters determinable by the several judges of probate; and any person aggrieved by any order, sentence, decree or denial of such judge, (with certain exception), may appeal therefrom to the supreme court of probate to be held within the county, if he claims his appeal within twenty days of the date of the proceedings appealed from."

Sec. 37 of the same Chapter provides that:

> "Such appeal shall be cognizable at the next term of the supreme court of probate held after the expiration of thirty-four days from the date of the proceedings appealed from, and said appellate court may reverse or affirm in whole or in part, the sentence or act appealed from, pass such decree thereon as the judge of probate ought to have passed, remit the case to the probate court for further proceedings, or make any order therein that law and justice require; and if, upon such hearing, any question of fact occurs proper for a trial by jury, an issue may be framed for that purpose under the direction of the court, and so tried."

The waiver of the provisions of the will by the widow was not filed until after six months from the time the will was allowed by the Probate Court, but was filed within six months from the date of the decree of the Supreme Court of Probate affirming the decree of the Probate Court. The defendant's contention is that the appeal to the Supreme Court of Probate vacated the decree of the Probate Court, and that the waiver was seasonably filed because the will had not been judicially allowed until the appellate court had spoken. Probate courts are wholly creatures of the legislature. They are of special and limited jurisdiction, their proceedings are not according to the court of the common law. *Bradstreet* v. *Bradstreet,* 64 Me., 204; *Taber* v. *Douglas,* 101 Me., 363, 64 A., 653. The Supreme Court of Probate is created by the statute as an appellate court. Its jurisdiction and proceedings are clearly defined by the statute. It has the same jurisdiction as the Probate Court but the jurisdiction is appellate and not original.

In ordinary judgments between plaintiff and defendant a valid appeal vacates a valid decree or judgment and until affirmed by the appellate court there is no judgment. *Knox* v. *Lermond,* 3 Me., 377 at page 379; *Inhab. of Winslow* v. *County Commissioners,* 31 Me., 444; *Atkins* v. *Wyman,* 45 Me., 399;

Hunter v. *Cole,* 49 Me., 556; *Milliken* v. *Moray,* 85 Me., 342, 27 A., 188; *Thompson* v. *Thompson,* 1 N. J. L. R., 159.

The extent to which a judgment is vacated by appeal depends entirely upon the subject matter of the appeal and the jurisdiction of the appellate court over such subject matter. There is no such thing as an appeal known to the common law. It is regulated exclusively by statute. An appeal at common law is only a writ of error. If the appeal carries up the whole matter in controversy so that it is retried as upon original process in the appellate court, and if the appellate court has jurisdiction to settle that controversy by a judgment of its own, and to enforce that judgment by a process of its own, then the appeal vacates the judgment of the inferior tribunal. *Bank of North America* v. *Wheeler,* 28 Conn., Reports 433, 73 Am. Dec., 683; Corpus Juris Secundum, Vol. 4, Par. 611, Appeal and Error.

The status of a probate decree after appeal is not defined by our statutes. It is left to judicial interpretation. *Rawley, Appellant,* 118 Me., 109, 106 A., 120. The effect of an appeal is generally to vacate the judgment or decree of the Probate Court which is thenceforth of no force or effect. The cause is to be heard *de novo* upon new proofs and arguments. 3rd Edition American Law of Administration, Vol. 3, Page 1867. *Tarbox* v. *Fisher,* 50 Me., 236; *Gilman* v. *Gilman,* 53 Me., 184; *Thompson, Appellant,* 116 Me., 477, 102 A., 303; *Rawley, Appellant,* supra, 118 Me., 109, 106 A., 120; *Heard, Appellant,* 126 Me., 495, 139 A., 670; *Perkins, Appellant,* 141 Me., 137, 39 A., 2d, 855.

In *Gilman* v. *Gilman,* supra, 53 Me., 184, where this question of the effect of an appeal upon the decree of the Judge of Probate was considered at great length, the court said:

> "An appeal in all cases vacates the judgment appealed from."

The statute then in force relative to an appeal to the Supreme Court of Probate is retained in the present revision with hardly

a verbal alteration and without any change in its meaning. The case further approved this quotation from Chancellor Sanford:

> "By the practice of the civil law and all the courts that follow that practice a case removed to a superior tribunal is reheard upon the facts as well as the law. It is treated as if it had been commenced in the superior court. The parties may produce new proof and new proceedings may take place which law and justice may require for the investigation of the truth."

Our court then declared that:

> "These principles apply to courts of probate equally as to other courts. Indeed they apply universally except where by statute some change has been made."

In *Heard, Appellant,* supra, 126 Me., 495, the court said:

> "The appeal vacated the decree and brought the whole subject matter of the appeal de novo before the Supreme Court of Probate but with the appellant confined to such matters and questions as were specifically stated in the reasons of appeal,"

citing *Gilman* v. *Gilman,* supra; *Rawley, Appellant,* supra, 118 Me., 109. The court further said:

> "A new decree was to be made by the appellate court upon the evidence presented to it, which might have been the same or entirely different from that presented to the Probate Court. The decree of the appellate court must be based on the proofs before it and cannot be based on proofs or upon the legal effect of such proofs in the court below and not before it."
>
> "Wills do not become operative until proved and established in some court having jurisdiction for that purpose—in this state by a court of probate or an appeal to the

> Supreme Court of Probate—until established in that forum it has no life."

Cousens v. *Advent Church,* 93 Me., at 295, 45 A., 43; *Martin, Appellant,* 133 Me., 422, 179 A., 655. The rights of the widow were contingent until there was a final judicial determination of the validity of the will in the Supreme Court of Probate. The appeal carries the proceedings one step forward toward that final adjudication for which the law has provided. The appeal vacated the decree and brought the whole subject matter of the appeal *de novo* before the Supreme Court of Probate. A new decree was to be made by the appellate court upon evidence presented to it which might have been the same or entirely different from that presented to the Probate Court.

The right of the widow to renounce the provisions of the will is a statutory right which may be exercised at any time within the six months after the probate of the will. Where the widow is left a legacy in lieu of dower her right to take an appeal for any legal reason still exists. The widow's right to renounce the provisions of the will remains to be exercised by her within six months after determination of its validity. The decree of the Supreme Court of Probate is a new decree and a final judgment. The widow may then file her waiver, if done within six months after final decree of the Supreme Court of Probate. This she did.

The interest of the widow, Christina Shannon, in the real estate described in this bill then became a one third interest in common and undivided. By her will this interest was devised to Ralph Shannon, the defendant, who then became the owner of one third interest in common and undivided in this real estate.

Case remanded to the court below for decree in accordance with this opinion.

THE CANAL NATIONAL BANK OF PORTLAND AND ARTHUR J. CONLEY, EXECUTORS,

vs.

BOYD L. BAILEY, INHERITANCE TAX COMMISSIONER.

Cumberland. Opinion, February 17, 1947.

Statutes. Inheritance taxes.

By statute, the rule for the construction of statutes is that words and phrases shall be construed according to the common meaning of the language.

A widower under inheritance tax laws is a man who has lost his wife by death, and has not remarried.

ON REPORT OF AGREED STATEMENT.

Petition in equity for abatement of inheritance tax on ground that one Arthur J. Conley, a legatee under will of George S. Hobbs, was the widower of daughter of deceased, and as such was subject to a lower rate of taxation than assessed by the commissioner. Case remanded to Probate Court for denial of abatement and dismissal of petition.

Frank D. Marshall, for plaintiffs.

Ralph W. Farris, Attorney General,

Nunzi Napolitano, Assistant Attorney General, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is a petition in equity, under R. S. 1944,

Ch. 142, Sec. 30, to the Probate Court in Cumberland county for abatement of inheritance tax. The case comes to the Law Court on report by agreed statement.

The petitioners, Canal National Bank and Arthur J. Conley, are coexecutors under the Will of George S. Hobbs late of Portland, who died testate June 2, 1945. Arthur J. Conley is also a legatee and devisee under the Hobbs Will.

George S. Hobbs had two daughters, Eleanor M. Conley and Margarett H. James. Arthur J. Conley had been the husband of Eleanor M. Conley, who died before the testator in January, 1944. Margarett H. James is living. Arthur J. Conley married again December 9, 1944. George S. Hobbs executed his last will on December 20, 1944, and died June 2, 1945. The will was probated June 19, 1945.

By this will George S. Hobbs bequeathed and devised to Arthur J. Conley "my son in law" certain properties computed by the Inheritance Tax Commissioner as having a value of $45,083.25 in excess of $500 exemption. This included his half interest as devisee and residuary legatee. The other residuary legatee was the daughter, Margarett H. James.

Under date of April 3, 1945 the Commissioner assessed on Arthur J. Conley an inheritance tax at the rate of ten per cent, to wit, a tax of $4,508.12.

Rev. Stat. 1944, Chap. 142, Sec. 3, provides:

> "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 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 two per cent (2%) of such value in excess of said exemption as does not exceed $50,000 . . ."

R. S. 1944, Ch. 142, Sec. 5, provides:

> "Property which shall so pass to or for the use of any person not falling within either of the classes hereinbe-

> fore set forth (Class A, above and Class B, collaterals) shall be subject to a tax . . . in excess of an exemption of $500.00, of ten per cent (10%) of such value in excess of said exemption as does not exceed $50,000 . . ."

Under the facts set forth in this case the question for decision is, whether Arthur J. Conley, mentioned and identified by the testator as "my son in law," is a person to be designated Class A in above Sec. 3 of Chap. 142 of the R. S. of 1944, as the "widower" of Eleanor Conley, and subject to a tax of 2%, or $901.66; or should he be classified as a person falling within the provisions of Class C, as provided in above Sec. 5 of Chap. 142, and subject to the tax at the rate of 10%, as determined and assessed by the commissioner. This is not a case where an exemption is claimed. A tax is admittedly due, and the amount only is in controversy.

The petitioners claim that Arthur J. Conley is the "widower of a daughter of the decedent," and hence is in Class A and subject to a tax at the rate of 2% only; that "widower" as used in the statute, is a descriptive word to identify the person, and not a word to describe the state or condition of that person.

The defendant commissioner contends that Arthur J. Conley, being married and having a wife living at testator's death, is not a "widower" and, therefore, is not the "widower" of his former wife, the testator's daughter.

The statutory rule for the construction of statutes is that "words and phrases shall be construed according to the common meaning of the language." Rev. Stat. 1944, Chap. 9, Sec. 21, I. The common meaning of the word "widower" is "a man who has lost his wife by death and has not married again," "a man whose wife is dead." Webster's *New International* (1935); *Bouvier's Law Dictionary* (Rawles Third Revision); *Words and Phrases; Solon* v. *Holway*, 130 Me., 415, 157 A., 236. In common, colloquial, and accepted use, the word "Widower" refers to a man whose wife is dead. This common meaning is

firmly opposed to the contention of the petitioners that the word is descriptive, and may describe a man who is now or was previously a widower. It would have to be used in a figurative sense only to give it the meaning here requested. A man ceases to be a widower when he marries again. Had he not again married until after the death of the testator he would, at the time of the testator's death, have been the widower of the deceased daughter within the meaning and contemplation of the statute. *Solon* v. *Holway,* supra, 130 Me., 415, 157 A., 236; *Commonwealth* v. *Powell,* 51 Penn., 438.

At the time when the property of the decedent passed by his will to Arthur J. Conley, Arthur J. Conley was not the husband of the testator's daughter. The daughter was dead. He was not the widower, because he was again married.

The right to be considered the widower of testator's deceased daughter did not attach to Arthur J. Conley at the time of the testator's death, for the reason that at that time he had a wife living.

Many cases throughout the country, in construing the words "widow" and "widower," have held that in the event of remarriage certain statutory rights remain. A study of such cases reveals, in most instances, that the right had attached, and would not be lost by subsequent marriage. Other cases involve rights that became fixed at the moment when a person became a widow or widower, and the right could not be divested. The case of *Ray's Estate* (1895) 35 N. Y. S., 281 seems to be one case that supports the petitioners' claim, but this case disregards well-established and accepted definitions, and is in contradiction of the rule in *Solon* v. *Holway,* supra. See also *Commonwealth* v. *Powell,* supra, 51 Penn., 438; *Words and Phrases* (1940 Perm. Ed.), where authorities are collected, and 68 *Corpus Juris,* 263, "Widow," "Widower."

The petitioners say that "to place" Arthur J. Conley in Class C instead of Class A is, in effect, imposing a penalty on marriage and restraints on future marriages. With this statement we

disagree. Neither the Court nor the legislature "place" Arthur J. Conley or "impose" on him any restraint or penalty. He was at one time the widower of the testator's deceased daughter. He saw fit to change his condition, and he changed it before the testator died. In fact, his status was changed, and by himself, before the Will was ever made. The tax was determined correctly by the commissioner and according to law.

Case remanded to Probate Court for Denial of Abatement and Dismissal of Petition.

MAURICE A. BRANZ

vs.

CARLTON H. STANLEY AND ALICE F. STANLEY.

Cumberland. Opinion, February 19, 1947.

Bills and Notes. Estoppel.

If a person, not intending to sign a promissory note, is by fraud and deceit, and without negligence, tricked into signing that which afterwards proves to be a note, the instrument is a forgery and void as to all parties.

Whether a person is estopped by her own negligence from denying her signature on a note is a question for the jury.

ON EXCEPTIONS.

Action upon a promissory note against defendants, Carlton H. Stanley and Alice F. Stanley. The jury were instructed to return a verdict against both defendants. Alice F. Stanley

reserved exceptions, claiming she was tricked into signing the note. Exceptions sustained.

Julius Greenstein,

Milan J. Smith, for the plaintiff.

E. A. Turner, for Alice F. Stanley.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ., AND MANSER, ACTIVE RETIRED JUSTICE.

STURGIS, C. J. In this action upon a promissory note against Carlton H. Stanley and Alice F. Stanley at the close of the evidence the jury was instructed to return a verdict against both defendants. Carlton H. Stanley abides the verdict. Alice F. Stanley reserved exceptions.

The case reported shows that Carlton H. Stanley, having wrecked his Studebaker, on October 30, 1945 purchased and received delivery of a used Terraplane from Samuel Silverman doing business as Sam's Used Car Lot, traded in his old car and gave his negotiable installment note of even date for $275 in part payment of the balance of the purchase price. On the same or following day the payee having indorsed the note for transfer, offered it for discount to Maurice A. Branz doing business as the Guardian Acceptance Co., but he refused to finance the paper without another signer and a representative apparently of the payee carried the note to the home of Carlton H. Stanley and his wife Alice F. Stanley signed it as a comaker. Five days later the note still bearing its original date and indorsement for transfer was delivered to Maurice A. Branz who sent his check for $250 to Samuel Silverman for it and when the first installment was not paid sued the signers jointly for the full amount of the note.

The exceptant Alice F. Stanley, however, stated at the trial that on November 5, 1945 a man whom she did not know brought papers to her home which her husband Carlton H.

Stanley asked her to hurry and sign and on her inquiry as to what they were told her that they were just about the car, which she thought referred to the wrecked Studebaker and not to the Terraplane just bought, and without knowing their contents she wrote her name on two papers where the man who had kept them folded up lifted the corners for her to sign. She insisted that she did not know she had signed a note and conditional sales agreement which the papers proved to be, or even that her husband had made the instruments until later he told her what she had done and made known his intention to desert her and let her pay for the car. And she says that when a few weeks later he did abandon her she notified the holder of the note she would not be responsible for it.

The exceptant's account of what took place when she signed the note in suit is partially confirmed by her housekeeper and not clearly contradicted in the record. And improbability does not compel its rejection as unworthy of belief. If found to be true, which we think it could be, the note which she signed was a forgery and if that defense is not barred by her own negligence she is not liable on it in this action. For it is well settled in this jurisdiction that if not intending to sign a promissory note she was by fraud and deceit and without negligence on her own part tricked into signing that which afterwards proved to be a note the instrument is a forgery and void as to all parties. And whether she is estopped by her own negligence from denying her signature was a question for the jury. *National Bank* v. *Hill*, 102 Me., 346, 66 A., 721, 120 Am. St. Rep., 499; see Negotiable Instruments Act, R. S. 1944, Chap. 174, Sec. 23; 8 Am. Jur., 318.

We are of opinion that the charge of fraud made here raises issues of facts which should have been submitted to the jury and the ruling below directing a verdict against the exceptant was error. On this ground, without consideration of other questions argued on the briefs, the exceptions are sustained.

Exceptions sustained.

SHOEMAKER'S CASE.

Cumberland. Opinion, February 26, 1947.

Workmen's Compensation.

On appeal by claimant in compensation case, no review may be made of a previous erroneous decree of the Commission from which no appeal had been taken.

A decree of Industrial Accident Commission, insofar as it exceeded statutory powers, is of no effect, and failure to take appeal does not validate it.

It is the duty of the Industrial Accident Commission to determine the actual earning ability of the employee, and decree suspending payments without finding that incapacity had ended, and requiring an attempted demonstration of employee's earning capacity, was erroneous for improperly placing the burden on the employee to make an attempted demonstration of her earning capacity.

ON APPEAL.

Employee petitioner filed claim for further compensation under Workmen's Compensation Act. The petition was dismissed because the petitioner did not furnish the "yardstick" to measure the amount of her ability to work, as required in a previous decree. Petitioner appealed from decree of Superior Court affirming dismissal of petition for further compensation. Appeal sustained. Decree of sitting justice reversed. Case recommitted to Industrial Accident Commission for further proceedings.

Raymond S. Oakes, for petitioner.

William B. Mahoney,

James R. Desmond, for respondents.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This case comes to the Law Court on appeal by Lucy V. Ridgwell Shoemaker. The decree of the Industrial Accident Commission having dismissed the petitioner's claim for further compensation, she here appeals from pro forma decree of the Superior Court affirming the order of dismissal.

The facts are these: On April 3, 1943, Lucy V. Ridgwell Shoemaker, in the employ of the New England Shipbuilding Corporation as a ship fitter's helper, was injured between two steel plates. On October 13, 1943 she filed with the Industrial Accident Commission a petition for award of compensation. The Commission by decree dated December 11, 1943 awarded compensation at the rate of $18.00 per week to commence June 28, 1943 and "to continue, subject to the provisions of the Workmen's Compensation Act, until modified or ended by subsequent approved agreement or commission decree." R. S. 1944, Chap. 26, Sec. 38. Compensation continued until January 9, 1945. On January 22, 1945 the respondents filed petition for review. Hearing was held March 7, 1945. The Commission, by its decree dated March 22, 1945, found that the employee's incapacity had materially diminished, and ordered compensation at $9.00 per week from January 9, 1945 to March 7, 1945.

The material portion of the decree of March 22, 1945 stated that:

> "Compensation for total incapacity was ordered at the rate of $18.00 per week. In view of diminished incapacity, and with no evidence upon which to figure a rate of compensation for partial incapacity, we estimate that employee's condition from January 9, 1945 to March 7, 1945 entitles her to partial compensation at the rate of $9.00 per week. Any claim for compensation subsequent to March 7, 1945 should be based upon an attempted demonstration of earning capacity."

The Commission thus found "diminished incapacity." It did not find that incapacity had ended, but it did "suspend" the payments, and demanded "an attempted demonstration of earning capacity." No appeal was taken from this decree.

On June 11, 1945 the employee filed the pending petition for further compensation "on account of further incapacity," and by decree, dated March 14, 1946, this petition was dismissed. From this decree of March 14, 1946 the employee petitioner filed and perfected this appeal. The record before us, therefore, contains three decrees of the Commission,—the original decree of December 1943, the decree of March 1945, and this decree of March 1946.

The facts upon which the Commission based this pending decree of March 14, 1946 are stated in the decree as follows:

> "The petitioner now claims that because of pain in her left leg, severe headaches, inability to walk, loss of sleep, and inability to do her house-work, the same complaints of which she testified to at the hearing of March 7, 1945, she is entitled to an Award of Further Compensation.
>
> There appears to be no doubt but what the injury which the petitioner sustained on April 3, 1943, resulted in osteomyelitis of the left femur. She was operated upon for the correction of this condition by Dr. Henry W. Lamb in January, 1944.
>
> On September 9, 1943, following her injury of April 3, 1943, this employee married, and has borne two children, one child having been born on November 18, 1944, the other some months subsequent to the hearing of March 7, 1945, when compensation was suspended.
>
> On April 7, 1945, following the hearing of March 7, 1945, the petitioner, upon advice of Dr. Weeks, consulted Dr. Sullivan of the Pratt Diagnostic Hospital in Boston and as a result was given penicillium treatments by Dr. Lamb.
>
> Dr. Lamb, the petitioner's own physician, who treated

her over a period of months, testifies that in his opinion she was not totally incapacitated for work as far back as January, 1945, as a result of her injury. He feels that she was able to do light work at that time and has not changed his opinion as to her ability to work since, as relates to her injury. He further testifies that the X-rays do not disclose any active osteomyelitis.

The only attempt to work for remuneration which the petitioner has made was on May 25, 1945, when she worked for a period of three or four hours for the National Biscuit Company and quit. We feel that this was not a fair trial of her ability to work, as related to her injury of April 3, 1943. It seems to us, from the evidence, that her physical condition at that time, not referable to her injury, might well have caused her to quit, if indeed she were incapacitated at that time.

Since the petitioner's complaints are the same as those of the hearing of March 7, 1945, at which time it was found by Commission decree that her incapacity to work had materially diminished as of January 9, 1945, and suspending compensation as of March 7, 1945; the failure on her part, as we view the case, to fairly demonstrate a real working incapacity referable to the injury of April 3, 1943, since said hearing; and the testimony of Dr. Lamb that in his opinion she has had a working capacity since January 1945; we find that the petitioner fails to sustain the burden of proving that she has been incapacitated for work as a result of her injury of April 3, 1943, over and above that for which she has already been compensated."

The original decree of December 11, 1943 had ordered compensation at $18.00 per week, and to continue until "modified or ended." It was diminished by the decree of March 22, 1945 to $9.00 per week to be paid from January 9, 1945 to March 7, 1945, and subsequently to be based on "Attempted demonstration of earning capacity."

The Commission decree of March 22, 1945 (which as stated above was not appealed from) finds a partial disability, but "suspends" the payments and improperly places the burden on the employee to make an "attempted demonstration" of her earning capacity. What an "attempted demonstration" might consist of is difficult, if not impossible, to understand. "The award is designed to compel her to do so to provide a yardstick for the accurate measurement of her partial incapacity." *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, 636. In other words, the original decree of 1943 awarding $18 per week, the decree of 1945 awarding $9 from January to March, and this decree of 1946, all apparently recognize that more or less incapacity due to the accident exists; but this pending decree of 1946 does not attempt to "determine the actual earning ability," nor does the decree "end" payments. *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, supra.

The aforementioned decree of March 22, 1945 was not appealed from, and no review of it may now be made. *Comer's Case,* 131 Me., 386, 163 A., 269; *Conners' Case,* 121 Me., 37; 115 A., 520; *Devoe's Case,* 131 Me., 452, 163 A., 789; *Lynch* v. *Jutras,* 136 Me., 18, 1 A., 2d, 221. The decree of March 22, 1945, however, recognizes a partial incapacity due to the accident. The door to further compensation was left open but left for the petitioner to make an "attempted demonstration" of her earning capacity. This additional and unnecessary portion of the decree of March 22, 1945, requiring "demonstration" of capacity, was void, because it was not authorized by statute, and beyond the power of the Commission to require. *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, supra. In so far as it exceeded its statutory powers the decree was of no effect, and the failure to take an appeal would not validate. *Snow* v. *Russell,* 93 Me., 362, 376, 45 A., 305, 745 Am. St. Rep., 350. As stated in *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, 637, supra:

"The requirement of the statute is that an employer

pay compensation to an injured employee during partial incapacity in the amount representing a percentage of the difference between his earnings before injury and what he is able to earn thereafter."

It is true that the decree of March 22, 1945, which reduced the payments and required "demonstration," was not appealed from, but it recognized incapacity still existing; and the decree in the pending appeal of March 14, 1946 recognizes *an* incapacity but dismisses the petition because the employee did not submit evidence of "a fair trial of her ability to work" to "fairly demonstrate a real working incapacity" as improperly required by the previous decree.

This decree of March 14, 1946 dismisses the pending petition because in the opinion of the Commission the petitioner does not furnish the "yardstick" to correctly measure the amount of her ability to work. See *St. Pierre's Case,* 142 Me., 145; 43 Atl. (2nd), 635, supra. The error of the Commissioner in the *St. Pierre's Case,* supra, was "in failing to find a fact essential to the proper disposal of the petition before him." *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, 637, supra. So, in this case, the error of the Commissioner was that he did not determine the amount of incapacity, or "further" incapacity, if he intended to find incapacity. If, as a fact, there was no incapacity due to the accident, or no proof of "causal connection between the injury and the incapacity now claimed," he failed to make that finding. R. S. 1944, Chap. 26, Sections 12, 38; *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, supra.

We do not discuss the evidence before the Commission. There was evidence on which the Commission could make findings of fact, and on which it did make certain findings. Willingness to work, the amount of work done, if any, and the diligence or lack of diligence in seeking and holding employment, may be elements for consideration by the Commission, but the duty of the Commission is to find whether or not there is incapacity due

to the accident. Has the employee "any capacity to earn, and if so, the extent of his disability due to his injury?" "The duty of the trier of facts in compensation cases is to determine the actual earning ability of the employee." *St. Pierre's Case,* 142 Me., 145; 48 Atl. (2nd), 635, supra; *Connelly's Case,* 122 Me., 289, 119 A., 664; R. S. 1944, Chap. 26, Sec. 38.

Appeal sustained.
Decree of sitting Justice reversed.
Case recommitted to the Industrial Accident Commission for further proceedings.

KENNEBEC TOWAGE COMPANY *vs.* STATE OF MAINE

Kennebec. Opinion, March 31, 1947.

Trial. Damages. Evidence. Negligence. New Trial.

Navigable Waters. Towage. Exceptions.

The presiding justice has the right, as well as the duty, during the trial and before the case is committed to the jury, to correct or explain any statement he may have made.

Jury was not obliged to accept testimony of officers of plaintiff company placing damages to plaintiff's tug at a certain figure, but was at liberty to consider the evidence of all facts and circumstances in the light of their knowledge and experience.

Where towage company had permission from the legislature to bring an action against state according to the "practice", "proceedings" and "liabilities" as in cases between individuals, for damages to its tugboat claimed to have been caused by hidden underwater obstruction, plaintiff company had the duty of proving to jury by a fair preponderance of evidence that the state was negligent, and that as a result of this negligence the plaintiff suffered damages to its property, and that no negligence on plaintiff's part contributed to the injury.

The "due", "ordinary" or "reasonable" care and caution that the law requires is the care that reasonable and prudent men use in respect to their own affairs under like circumstances.

Negligence is the failure, in the opinion of a jury, to act as would the usual and prudent man of ordinary intelligence.

On motion for new trial defendant must show that jury verdict was so manifestly or clearly wrong that it is apparent that the conclusion of the jury was the result of prejudice, bias, passion, or a mistake of law or fact.

Navigable waters are common highways which persons have a right to use as they use other highways. The law recognizes that to leave a concealed and underwater obstruction in a navigable channel may be negligence.

Due care must be at all times exercised by the master, or directing agent, of a tugboat. The highest degree of skill and care is not required of the master of a tugboat, but he is required to exercise reasonable care, caution and maritime skill. The negligence of a master which brings about a collision, or contributes to an injury, will prevent the recovery of damages by the owners.

If no exceptions are taken to portions of charge relating to duties and rules of care, it must be assumed that the jury were properly instructed.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Action by Kennebec Towage Company to recover from the State of Maine damages to its tugboat, claimed to have been caused by collision with a hidden underwater obstruction in the draw channel of the Richmond-Dresden Bridge. Verdict for plaintiff for $5,200. Defendant filed exceptions to a portion of judge's charge, and a general motion for new trial. Exceptions overruled and motion overruled.

McLean, Southard & Hunt, for plaintiff.

Ralph W. Farris, Attorney General,

Abraham Breitbard, Deputy Attorney General, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is an action to recover damages to the

plaintiff's tugboat "Seguin," through collision with an alleged hidden underwater obstruction, in the draw channel of the Richmond-Dresden Bridge. The jury in the Superior Court for Kennebec County returned a verdict for the plaintiff for $5,200.00. The case now comes before the Law Court on the State's exceptions to a portion of the charge, and on general motion by the State for a new trial. The action was brought by virtue of a legislative resolve, whereby the State waived its immunity to suit, and authorized an action at law with the "liabilities of the parties the same as the liabilities between individuals." Resolves of 1945, Chapter 12.

It fairly appears that on the morning of June 18, 1940 the tug "Seguin" left Bath for Augusta, having in tow the barge "Bast." The tug was on the starboard quarter of the barge, and fastened to the barge by tow line, backing line, and breast lines. The breadth of the "Seguin" was about 20 feet and its length 80 feet. The registered breadth of the "Bast" was 35.6 feet and its length 170 feet. The barge was loaded with about 650 tons of soft coal.

The vessels thus tied together, proceeded northerly up the Kennebec river to the channel on the easterly side of Swan Island. The Richmond-Dresden Bridge, built by the State and crossing the Kennebec, is situated near to and northerly of Swan Island. At this point in the River, where the waters of the channel on the westerly side of Swan Island join the waters on the easterly side, the current is often unsteady, with a possible tendency towards the easterly side of the river, and described as a "tricky" or "witch current." At the time, it was flood tide, the wind was "fresh southwest," and the current was running up the river at a rate of about one and one half miles per hour. The vessels were going slowly, and were being steered in a manner to "line up the draw." The captain of the tug was at the wheel, and because the bow of the barge obstructed his view of the channel, the mate was stationed at the bow to signal the course.

There was a passageway, through the draw channel of the bridge, that was apparently 70 feet wide. The total width of barge and tug was about 56 feet. The draw pier on the west was protected by a plank wall or "apron" filled with stone. The bridge pier on the east side of the draw channel had several "dolphins," or near-by clusters of piling driven into the river bottom, to indicate the course, and to protect the passing ship, as well as to protect the bridge. The total length of barge and tug as lashed together was approximately 180 feet, and the length of the westerly draw pier, that held the movable part of the bridge, was about 50 feet. The captain could seemingly allow, while in the draw bridge channel, for a possible side movement due to winds or current of fourteen or fifteen feet, in going forward the necessary 230 feet to clear the draw. The apparent safe width of the draw channel, however, of 70 feet, through which the vessels passed, was in fact about four feet less.

It appears that in the repair or reconstruction of the pier east of the draw channel, in 1938, the abutment or underwater portion of the pier was increased in size about three feet by putting concrete around it, and around this concrete some steel sheeting projected an additional five inches. The top of this repair work was at low water level. Also, six or eight inches below the top of the steel sheeting was an eight by eight oak timber, or "waling," fastened horizontally on the sides of the abutment. The sheeting and waling were used during reconstruction but were not entirely removed. This underwater projection, with the sheeting and waling, which extended about four feet into the draw channel, could not be seen when the water was above the low tide level. At the time of this accident the water was at about half tide.

The tug and barge proceeded slowly, and, as claimed by the plaintiff, only fast enough to maintain their course. They were passing so near to the westerly or draw pier, that the barge struck the corner of the plank apron of the westerly pier, placed

to protect the pier. The impact threw the tug and barge across the narrow channel and against the downstream dolphin near to and southerly of the easterly pier. The tug then speeded up in order to straighten out, and immediately struck the unseen underwater projection in the easterly part of the draw channel, which crushed in her planking and caused the tug to sink soon after passing through the bridge. Witnesses for the plaintiff testified that this downstream dolphin, at the time of the accident, was improperly placed and did not indicate or protect the underwater obstruction, but was in line with the top portion of the pier. The State denied this, and claimed that the dolphin was properly placed, and that the cause of injury was the negligence of the tugboat captain.

EXCEPTIONS

The presiding Justice, in his charge, said to the jury:

> "If the State was responsible for this, how much did it damage this plaintiff? It is not for me to say. It is for you. I say this to make myself clear to you. The evidence as I remember it, is that damage was $7,200. If it is different from that—if there is other evidence to show it was more or less—it is whatever the evidence shows. But my memory is—and don't depend upon my memory—my memory is one gentleman said—the owner of the tug or someone else—that the amount of the damage was $7,200. Frankly—and if I am wrong, I know one of the gentlemen will correct me—frankly, I believe if you come to damage, you should make the damage $7,200; but it is your province, I myself, remember no contradictory evidence."

At the conclusion of the charge, and before the jury went out, the Attorney General stated:

> "The defendant takes exception to the statement of the Presiding Justice to the jury when he says if they find damages for the plaintiff it would be $7,200."

The Court then immediately said:

"Did I say that? I want to qualify it. Disregard what I said. It is not for me to say what damages are. I thought I was shortening some of your work, but I have no right when objected to. It is for you to find damages from evidence presented here—if you get to damages. You are to find it from all the evidence and from inferences and exhibits; and I tell you distinctly as far as the Court is concerned, the damages are not $7,200 nor 72 cents—it is not the Court's business. Perhaps I should not have invaded your province. I repeat and will exaggerate so there will be no misunderstanding. It is for you to say what the damages are from all this evidence."

No exception was taken to the corrected instruction.

Evidence of value of the tug before and after the accident came in part from a vice-president and treasurer of the plaintiff company, who placed the total damage at $7,200. The members of the jury were of course not obliged to accept this amount, and the Court plainly so stated. They were at liberty to consider the evidence of all facts and circumstances in the light of their knowledge and experience. Damages cannot always be reduced to mathematical computation. There are no rules that furnish an absolute guide for the discretion of a jury. *Savoy* v. *McLeod,* 111 Me., 234, 238, 88 A., 721, 48 L. R. A. (N. S.), 971. If they did not believe a witness they could disregard his testimony. It was for the jury to determine what damage, if any, was the natural, reasonable and direct result of any unlawful act. As stated in the corrected instruction, if any liability, the jury should "say what the damages are from all this evidence." *Collins* v. *Kelley,* 133 Me., 410, 170 A., 65; *Moore* v. *Daggett,* 129 Me., 488, 150 A., 538; *Topsham* v. *Lisbon,* 65 Me., 449.

The presiding Justice had a right, during the trial, and before the case was committed to the jury, as well as a duty, to correct

or explain any statement he may have made. *McKown* v. *Powers,* 86 Me., 291, 296, 29 A., 1079; *Skene* v. *Graham,* 116 Me., 202, 100 A., 938; *Jameson* v. *Weld,* 93 Me., 345, 45 A., 299; *Coombs* v. *Mason,* 97 Me., 270, 54 A., 728. It is "incumbent on a judge to see that no misconception arises in their minds because of any statement of his." *State* v. *Shannon,* 135 Me., 325, 328, 196 A., 636, 637. There was perhaps no chance of misunderstanding by the jury here. It was told to fix the amount, "It is not for me to say. It is for you." If the inadvertent statement of the presiding Justice, to the effect that the evidence indicated $7,200 damage, could be understood as an instruction to find $7,200, the correction was fully and clearly made. The verdict itself indicates this. The verdict was not as estimated by a witness, and as referred to by the presiding Justice. It was much less. The jury understood and gave heed to the correction, if it had any "misconception," and if any correction was necessary. The exception is not valid.

MOTION

By the terms of a Resolve, the Legislature gave permission to the plaintiff Towage Company to bring an action at law against the State, in the Superior Court for Kennebec County, according to the "practice," "proceedings" and "liabilities" as in cases "between individuals." Resolves of Maine for 1945, Chapter 12.

In this action for alleged negligence, therefore, it was the duty of the plaintiff company to prove to a jury by a fair preponderance of evidence that the defendant State was negligent, that as a result of this negligence the company suffered damage to its property, and that no negligence on its part contributed to the injury. *Blumenthal* v. *B. & M. R. R.,* 97 Me., 255, 54 A., 747; *Edwards* v. *Express Company,* 128 Me., 470, 148 A., 679; *Baker* v. *Transportation Company,* 140 Me., 190, 36 A., 2d, 6; *Adams* v. *Richardson,* 134 Me., 109, 182 A., 11; *Lesan* v. *M. C. R. R. Co.,* 77 Me., 85. The standard of measure-

ment is, that care and caution exercised by a person who is ordinarily prudent and thoughtful. One who falls below this level, when in dangerous circumstances, is negligent. The law does not expect the impossible, but it does expect average, usual, and ordinary care.

This "due," "ordinary" or "reasonable" care and caution, that the law requires, is the care that reasonable and prudent men use in respect to their own affairs under like circumstances. *Raymond* v. *Railroad Co.*, 100 Me., 529, 62 A., 602, 3 L. R. A. (N. S.), 94. As a practical proposition this "ideal" man of ordinary foresight and prudence is usually a composite picture drawn from the combined ideas, knowledge, feelings, and experiences of the members of a jury, which picture may exonerate from blame, or fix a liability. Negligence, therefore, is the failure, in the opinion of a jury, to act as would the usual and prudent man of ordinary intelligence.

Under its motion for a new trial the State must show that the jury verdict was so manifestly or clearly wrong that it is apparent that the conclusion of the jury was the result of prejudice, bias, passion, or a mistake of law or fact. *Eaton* v. *Marcelle*, 139 Me., 256, 29 A., 2d, 162; *McCully* v. *Bessey*, 142 Me., —; 49 Atl. (2d), 230; *Marr* v. *Hicks*, 136 Me., 33, 1 A., 2d, 271.

The law recognizes that to leave a concealed and unprotected underwater obstruction in a navigable channel may be negligence. Navigable rivers are common highways which persons have a right to use as they use other highways. While a bridge itself may obstruct free use, the legislature, with consent of the Federal Government, may authorize construction of a bridge over navigable tidal waters upon conditions, such as proper draw channels, and the like. *State* v. *Freeport*, 43 Me., 198; *Commonwealth* v. *Charlestown*, 1 Pick. (Mass.), 180; 11 Am. Dec., 161; The Nonpareil, 149 Fed., 521; *The Philadelphia R. R. Co.* v. *Towboat Co.*, 64 U. S. (23 How.) 209; 16 L. Ed., 433; *Tuell* v. *Inhabitants of Marion*, 110 Me., 460, 86 A., 980,

46 L. R. A. (N. S.), 35; *Patterson* v. *East Bridge in Belfast*, 40 Me., 404; 4 Ruling Case Law "Bridges," 195, 197; 8 Am. Jur., "Bridges," 913, 915.

In this case the record shows that the legislature of Maine authorized, by Chapter 188 of the Private and Special Laws of 1929, the construction of this bridge across the Kennebec river, with a draw to be satisfactory to the War Department. It also shows that the War Department approved plans for construction and for repairs of the bridge with not less than 69 foot draw channel, on condition that "free navigation of the waterway shall not be unreasonably interfered with; that the present navigable depths shall not be impaired; and that the channel or channels through the structure shall be promptly cleared of all falsework, piling, or other obstruction placed therein or caused by the reconstruction of the bridge."

The defendant State of Maine, through its Attorney General, contends that the damage to the *Seguin* was not caused by the unseen obstruction, but was caused by the negligence of the master of the tug, who, carelessly, or through bad judgment or lack of skill, steered too far westerly, and struck the apron or fender of the draw pier, with great force, which "threw" or "bounced" the vessels to the right against the dolphin, and thus, breaking the piling, permitted the tug to hit the underwater projection on the abutment. In other words, the State says that whether there was an underwater obstruction extending four feet into the channel, or no obstruction, is immaterial. It claims that the evidence shows that the damage resulted through a series of events beginning with the plaintiff's negligence in hitting the crib or apron of the draw pier in a severe and careless manner.

The Plaintiff company, alleges and claims that leaving a concealed, unauthorized, and unprotected obstruction in the draw channel was negligence, and the sole reason for the damage. The plaintiff further says there was no negligence on its part that either caused or contributed to the injury; that

it was necessary to pass very close to the draw pier because of wind and current; that to strike the apron of the pier in a slight manner as here, was not negligence, and that the apron and dolphin were intended and placed to care for just such an incident.

The towing of vessels in a navigable river is a well known and distinctive business, and due care must of course be at all times exercised by the master, or directing agents, of a tugboat. The negligence of a master that brings about a collision, or contributes to an injury, will prevent the recovery of damages by the owners. The highest degree of skill and care are not required. The master of a tugboat is required to exercise "reasonable care, caution and maritime skill." *Berry* v. *Ross,* 94 Me., 270, 47 A., 512; *Cumberland County* v. *Tow Boat Co.,* 90 Me., 37 A., 867, 60 Am. St. Rep., 246; The Nonpareil, 149 Fed. (D. C.) 521; *Steiner* v. *Mississippi River Co.,* 194 Ia., 647, 190 N. W., 9, 25 A. L. R., 1551, and note.

No exceptions were taken to the portions of the Charge relating to duties and rules of care and it must be assumed that the jury were properly instructed. *Frye* v. *Kenney,* 136 Me., 112, 3 A., 2d, 433; *Eaton* v. *Marcelle,* 139 Me., 256, 29 A., 2d, 162.

The plaintiff's tugboat was to pass with barge in tow through the draw bridge channel. There was an unseen obstruction in the channel. The barge struck the protective apron of the westerly pier and swerved across to hit the dolphin and the submerged obstruction. Was there negligence on the part of the State? Were the servants of the plaintiff company at fault? If known to the company agents could the obstruction have been avoided by the exercise of due care? What was the real or proximate cause of the damages received? Did the negligence of the tugboat captain, if there were negligent acts on his part, contribute to the injury to the boat? If the damage was done through the fault of the State, what was the amount of damage? These and similar questions were answered, by the jury verdict.

This case with its sharply contested facts, involving means and methods of river navigation and the construction and use of a highway drawbridge, is one that a jury,—and especially a jury composed of Maine citizens,—should be able to fairly and properly decide. The jury had the opportunity, that this Court has not, to see and hear each witness and to note his appearance and his manner on the stand, to consider any of his hesitations or embarrassments, and to observe other unprinted things that might or might not indicate intelligence, knowledge, memory, power of observation, fairness, truthfulness and reliability. The Court has carefully examined the record, and from the record cannot say that the verdict was "manifestly" wrong.

Exceptions overruled.
Motion overruled.

STATE OF MAINE *vs.* ERNEST HUDON.

Cumberland. Opinion, April 8, 1947.

Criminal Law.

A trial judge in his summation of evidence for the benefit of the jury must be strictly impartial.

If any material omission or misstatement is made by trial court in his charge, all grounds of complaint are waived unless counsel at the time calls attention of court to such omission or misstatement.

On appeal, if no exceptions are reserved, the only question before the court is whether, in view of all the testimony in the case, the jury was warranted in believing beyond a reasonable doubt that respondent committed the crime alleged in the indictment.

The court has on certain occasions reviewed questions of law, both on motion for new trial and on appeal, even though exceptions were not taken, but such review is not compatible with good practice, and although there be error in an instruction, where no exception is taken a new trial should not be granted unless error in law was highly prejudicial.

It is not necessary for the court to define to the jury the legal meaning of the expression "reasonable doubt." It is sufficient if jury is told, in whatever form of words, that in order to convict, the proof must remove every reasonable doubt of guilt from their minds.

Presumption of innocence is founded on the first principles of justice, and is intended, not to protect the guilty, but to prevent, so far as human agencies can, the conviction of an innocent person.

Where no exceptions are taken, the court will not exercise its discretionary power to disregard the absence of objections unless on the whole case there is a reasonable basis for the fear that injustice has been done.

Exceptions to any opinion, direction, or omission of the presiding justice in his charge must be noted before the jury or all objections thereto will be regarded as waived. R. S. 1944, Chap. 100, Sec. 105, Rules of Court, 18.

A trial judge does not express an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact; nor because an inference, favorable or unfavorable, to the position taken by one of the parties may be drawn from such obvious truth or fact.

ON APPEAL.

Ernest Hudon was convicted of assault with intent to commit rape. After conviction, he moved that verdict be set aside, which motion was denied. An appeal was taken from the denial of motion. Appeal dismissed. Judgment for the State.

Richard S. Chapman, County Attorney for Cumberland County.

Daniel C. McDonald, Assistant County Attorney for Cumberland County, for the State.

Henry H. Franklin

Harry E. Nixon, for respondent.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

TOMPKINS, J. The appellant, Ernest Hudon of Freeport, in

the county of Cumberland and State of Maine, was indicted by the grand jury for assault with intent to commit rape on one Thelma Collins of Brunswick, in said county of Cumberland. The indictment charges that the assault took place at said Brunswick on the 14th day of September 1945. On trial the respondent pleaded not guilty. Trial was had and a verdict of guilty was returned by the jury. The respondent was sentenced by the presiding justice to a term of ten years in the State Prison. He seasonably moved that the verdict be set aside and a new trial granted for the following reasons: (1) because it is against the law and the charge of the presiding justice; (2) because it is against the evidence; (3) because it is manifestly against the weight of evidence in the case. The presiding justice denied the motion. The respondent took an appeal from the denial of said motion by the presiding justice to the Law Term of the Supreme Judicial Court.

There were no exceptions taken to the charge of the presiding justice, and no requested instructions were refused. The errors complained of are now raised for the first time under this appeal. Respondent claims he has not had a fair and impartial trial because the court below erred in delivering a prejudicial charge which amounted to a denial of the respondent's fundamental rights. The respondent is certainly entitled to a fair and impartial trial. Section 6 of Article 1 of the Constitution of this State guarantees him this fundamental right. He complains that the presiding justice in his summation of the testimony placed undue emphasis on the evidence presented by the State, and did not give a proper summation of the evidence presented by the respondent, and gave undue weight to the circumstantial evidence; that the presiding justice gave no definition of reasonable doubt; that in his charge he gave an erroneous instruction to the jury on the law pertaining to the presumption of innocence; that the presiding justice in his charge expressed his opinion upon issues of fact, which is contrary to Sec. 105 of Chap. 100 of the Revised Statutes of Maine.

The testimony discloses that the alleged offense occurred on the 14th day of September 1945. It appeared from the testimony that Thelma Collins was employed at the Bath Iron Works at Bath, Maine. She lived on Main Street in Brunswick, Maine, a little over a mile from the center of the town. She travelled back and forth to her work by bus from the center of the town of Brunswick to Bath along with others who worked in the shipyard. The respondent rode on the same bus and had been in the habit of giving Miss Collins a ride to and from her residence to the bus terminal. The respondent lived in Freeport, Maine. According to the testimony of Miss Collins the respondent made improper advances to her about a week before the offense alleged in the indictment occurred, and she refused to ride any longer with him. On the afternoon of September 14th she ceased her employment with the Bath Iron Works about 3:30 in the afternoon. The bus left at four o'clock. She stated that between 3:30 and four o'clock she went to a diner in the city of Bath and had a meal; that she drank no intoxicating liquors. There was evidence introduced by the defense that she was intoxicated before the bus left Bath, and that she drank after boarding the bus. On the bus she claimed that the respondent apologized to her and asked to be forgiven for what he had done the week before, to which she said "All right." He offered to take her home on this particular day, but before going home he asked her to go into a cafe in Brunswick, and there they each had a glass of beer. After leaving the cafe they got into Mr. Hudon's pickup truck, and from there drove to the gas station on the Portland road and got some gas. Then he drove to a secluded spot on a back road and on the way Miss Collins claimed he brought up their previous disagreement. She quoted him as saying, "Either you listen to me or I'll blow you wide open." She said he then swung his fist and that is all she remembered until she waked up in the hospital. She was semi-conscious for the most of two days, according to the doctor, and remained in the hospital ten or twelve days in all.

The doctor who attended Miss Collins at the hospital testified that when he first saw her at the hospital her face was swollen . . . the swelling was so rapid you could almost see it swell, and the next day her face was almost fifty per cent more than normal size, and that "All over her body you could see sand particles and very small pebbles and little bits of leaves, as if she had been on the ground without any clothing; you could notice that all over her body;" that the state of her consciousness was so poor you could not tell upon examination if she had imbibed any great amount of liquor or not. He further testified that at the time of the trial on January 11, 1946, she still showed a little swelling on the left side of her face.

Another of the State's witnesses, who lived upstairs in the same house in which Miss Collins lived, testified that around eight o'clock in the evening of September 14th, 1945, through a side window he saw a truck leaving the yard, and that he heard groanings and a door slamming, and he looked out of the window and saw Miss Collins on her knees, and she was trying to get the screen door open. He rushed down to her and she had fallen back unconscious. She was stripped to the waist and her face was badly swollen. He took her into the house with the help of a neighbor. Not being able to get a doctor the police ambulance was sent and she was taken to the hospital; that after she returned from the hospital her face was badly swollen and her eyes bloodshot. He also testified that he saw a truck pulling out of the yard; that it was a V8 pickup, '34 or '35; and that he found on the doorstep Miss Collins underpants and they were all wrinkled up and soaking wet. It was raining hard, and Miss Collins was very wet and cold. Another witness testified that when he went to the house where Miss Collins lived, on the night this occurred and before she was taken to the hospital, he found one article of her clothing at the bottom of the steps—a bandanna handkerchief. These articles were identified at the trial as the property of Miss Collins. According to the State's witnesses there was no sign or odor of

alcohol about Miss Collins, and the officer testified that he got close to her and bent over her for that purpose.

Later the respondent's truck was located, and there was found to be bloodstains on the floor, and in the back of the truck a small branch lying on the open part of the truck body. The place where the truck was parked was located and a tree was found from which it was claimed this branch had been broken. They found on the ground a brassiere, and a jacket from the top of work clothes, and one stocking. These articles were identified as the property of Miss Collins in court. The ground in the vicinity where these articles were found had been disturbed. A warrant was issued and the respondent was arrested that night. According to the testimony of the police officers the respondent's speech was coherent and he was perfectly normal. On questioning by the officers respondent made certain admissions. These were made without threat or inducement. One of the officers testified that the respondent told him Miss Collins had been drinking, and that on her way down Main Street going towards her home she went crazy in the truck and started taking off her clothing and throwing it out of the window, and that the respondent admitted he had struck her because when he got to her house she would not get out of the truck. On further conversation with the respondent he admitted that he went parking with her because she went crazy in the truck, and that he took her up into the woods to try to quiet her down, that she went running through the woods banging up against trees, kind of went crazy, and he couldn't do anything with her, and that he finally got hold of her by the neck and pulled her down to the ground and got on top of her and held her, but hadn't penetrated her in any way. The witness further testified the respondent was arraigned the next morning in the Brunswick Municipal Court, and when asked said he did not want an attorney. After the warrant was read to him and explained to him by the judge of the court, and he was told it was a very serious charge, he pleaded guilty. The witness fur-

ther testified that the respondent's hands were cut, and there were marks on his hands that resembled teeth marks.

The testimony further disclosed that the respondent stated to the officers that he had stopped at her house and continued from there to the woods to see if he couldn't quiet her down. He didn't think he should leave her at the house in the state she was in; that when he brought her back from the woods where the truck was parked he pushed her out of the truck. The respondent denied that he ever made any improper proposals or indecent gestures towards Miss Collins. He claimed that when they took the bus at four o'clock, from Bath, Miss Collins was drinking and that she drank from a bottle of liquor that was being passed around, and when they arrived at Brunswick she wanted one more glass of ale, and that when they left the beer tavern in Brunswick Miss Collins was staggering; that he tried to drive her directly to her home; that when he stopped there she was acting so bad that in order to save a disturbance around there he went down the road further; and that he tried to sober her off. He went down the road from her house about a quarter of a mile and, as there were cars going by, he took her to a side road where they would be out of sight, as he did not want to have her arrested, and parked the truck, and that when he parked the truck, she unlatched the door and fell out on her face and rolled over. He tried to help her up and she started taking off her clothes and throwing them on the ground, and went through the woods and fell down three or four times, and then he sat in the truck while she was running about. It was raining very hard. Finally he helped her back to the truck, and when he told her she was going home from there she "Took a sling at me, and" he said "I knew with her size and all if it would connect with me it would be too bad, so I up and let a drive at her with my fist on the jaw" and then she sobered up and said "Take me home," and he did so. According to the respondent it was about 6:50 in the afternoon. When he returned to her house the second time he said that Miss Collins

got out of the truck herself and walked toward her door, and that he went directly home, arrived there about 7:15, and told his wife what had occurred. He further stated that he did not remember when his wife got him up that night, when the officers came to arrest him, and that he did not remember going to the police station, that he did not remember making any statements to the officers as to what had happened, and he did not remember about going to court the next day. There was further testimony by the respondent's wife that she and the respondent drove around by Miss Collins' home sometime about eight o'clock that evening on their way back from the grocery store. Three other witnesses testified that Miss Collins had been drinking before she took the bus from Bath on the afternoon of September 14th. Such is some of the sordid story contained in the record.

The respondent claims that the presiding justice in his charge was unfair in the summation of the testimony, that he placed undue emphasis upon the evidence presented by the State, and gave undue weight to the circumstantial evidence. "The law is well settled that if a trial judge sees fit to summarize the evidence for the jury's benefit he must do so with strict impartiality, and must not magnify the importance of the proofs on the one side and belittle them on the other." *State* v. *Brown,* 142 Me., 16; 45 A. (2d), 442. The latter case, however, was not decided on that point. It was decided on the exception by the respondent to the refusal of the judge to give a requested instruction on the presumption of innocence. An examination of the testimony discloses that it is heavily weighted in favor of the State. If, as claimed by the respondent, the charge bore somewhat strongly against him, the testimony as reported shows that it is no less decided in its bearing the same way. That this is so is the fault or the misfortune of the respondent. It can hardly be expected that the judge in his charge shall allude to all the testimony developed through a long trial, and if any material omission or misstatement occurs it is the privilege and

the duty of counsel to call the attention of the court to it at the time, otherwise all grounds of complaint are waived. "If the tower leans it would hardly be excusable to give the impression that it stood upright." *State* v. *Reed,* 62 Me., 129. We are unable to discover wherein the respondent has suffered any injustice in the summation of the testimony by the presiding justice.

On appeal, where no exceptions are reserved, the only question before the court is whether, in view of all the testimony in the case, the jury is warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent committed the crime alleged in the indictment. *State* v. *Lambert,* 97 Me., 51, 53 A., 879; *State* v. *Albanes,* 109 Me., 199, 83 A., 548; *State* v. *Meulkerrin,* 112 Me., 544, 92 A., 785; *State* v. *Priest,* 117 Me., 223, 103 A., 359; *State* v. *Peiteantonio,* 119 Me., 18, 109 A., 186; *State* v. *Papazian,* 124 Me., 378, 130 A., 129; *State* v. *Pond,* 125 Me., 453, 134 A., 572; *State* v. *Smith,* 140 Me., 255, 37 A., 2d, 246.

The court has on certain occasions reviewed questions of law both on motion for new trial and on appeal even though exceptions were not taken. *State* v. *Wright,* 128 Me., 404, 148 A., 141; *State* v. *Mosley,* 133 Me., 168, 175 A., 307; *Trenton* v. *Brewer,* 134 Me., 295, 186 A., 612; *Springer* v. *Barnes,* 137 Me., 17, 14 A., 2d, 503; *Megquier* v. *D. Weaver,* 139 Me., 95, 27 A., 2d, 399; *Cox* v. *Metropolitan Life Ins. Co.,* 139 Me., 167, 28 A., 2d, 143. However, such review is not compatible with good practice and has been condemned from time to time in various decisions of the court in this State. *State v. Smith,* 140 Me., 255, 37 A., 2d, 246.

It is objected that the court in his charge to the jury omitted to define to the jury trying the case the legal meaning of the expression, a reasonable doubt. The justice stated, quoting from the charge, "As I have told you before the burden is on the State to satisfy you beyond a reasonable doubt that the crime alleged in the indictment has been committed. I am not going to

define reasonable doubt because I have done that on at least two occasions within a day or two and the definition of the term must be still fresh in your minds." The term reasonable doubt has been variously defined, but "It would seem that the phrase reasonable doubt explains itself. Certainly the meaning is obvious and will readily be appreciated by every juror without further explanation." *Battle* v. *State,* 103 Ga., 53, 29 S. E., 491. Mr. Bishop in his 2nd Edition on Criminal Evidence, Pleading and Practise, at Par. 1094 says: "There are no words plainer than reasonable doubt and none so exact of the idea meant. Hence some judges, it would seem wisely, decline to attempt to interpret them to the jury. Others deem that some explanation should be given, especially if requested, or deem the neglect to make the request justifies the omission." Cited in *State* v. *Rounds,* 76 Me., 123; *State* v. *Blay,* 77 Vt., 56, 58 A., 794.

Our own court in *State* v. *Reed,* 62 Me., 129 at 142 says:

> "The explanations of the meaning of this phrase have been almost innumerable and the best jurists have often found it difficult to convey to their own satisfaction the idea in their own minds expressed by its use. Not that there is any considerable difficulty in understanding its meaning, but rather in conveying it. It may indeed admit of grave doubt whether the proposition is in itself so simple and the words so well calculated to express the state of mind so easily felt though difficult to describe, that in some cases it is sufficient to use the expression without any attempt at explanation. All such attempts must result in simply stating the same proposition in a different form of words, and words that are, perhaps, no more easily understood. There is no exact mathematical test by which we can certainly know whether the doubt, entertained in any given case, is reasonable or otherwise. What would be reasonable to one person might be far otherwise to another. Therefore, no certain line, as upon a plan, can be drawn, that shall be

recognized by everyone as the dividing line between the mere skeptical doubt and that which has the sanction of reason. Hence, whatever explanations may be given of the phrase, its meaning practically must depend very largely upon the character of the mind of the person acting. We must assume that jurors are reasonable men, and as such they must be addressed. When told that, in order to convict, the proof must remove every reasonable doubt of guilt from their minds, whatever the form of words used, if any heed is given to the instruction the result must be that each individual juror will understand it and act according to the dictates of his own reason; and if, tried by that test, the doubt is reasonable, conviction must fail; otherwise it would follow."

The court charged the jury on the presumption of innocence as follows: "There is here, as I have said before, a presumption of innocence which is about this individual until he comes into court, and, as I have said to you, the mere fact that he has been apprehended, indicted and tried, was no evidence of his guilt whatsoever. He starts even when he comes into court, and if the State convicts it must convict on the evidence produced in court and not on any of the preliminaries which must necessarily take place before the respondent is put on trial." This was an erroneous statement of the law in that the jury could have understood from this, that when the case opened the presumption of innocence was gone. The presumption of innocence continues with the respondent throughout all stages of the trial and until the case has been finally submitted to the jury and the jury has found that this presumption has been overcome by the evidence of the State beyond a reasonable doubt as to each and every material fact.

"Presumption of innocence is founded on the first principles of justice, and it is intended, not to protect the guilty but to prevent, so far as human agencies can, the conviction of an

innocent person." C. J. Vol. 22, Par. 587; *Burnham* v. *Hazelton,* 82 Me., 495, 20 A., 80, 9 L. R. A., 90. Where no exceptions are taken the court will not exercise its discretionary power to disregard the absence of objections unless on the whole case there is a reasonable basis for the fear that injustice has been done. *People* v. *Semione,* 235 N. Y., 44, 138 N. E., 500; *People* v. *Eimleta,* 238 N. Y., 158, 144 N. E., 487; *People* v. *Odell,* 230 N. Y., 481, 130 N. E., 619; *State* v. *Cary,* 124 Kan., 219, 257 P., 719; *State* v. *Smith,* supra. While we do not approve of the instruction complained of we find no reasonable basis for fear that injustice has been done to the respondent as a result of the erroneous instruction.

The respondent complains that the presiding justice in his charge expressed his opinion on issues of fact, which is contrary to Sec. 105 of Chap. 100 of the Revised Statutes of Maine. The section referred to commands that "During a jury trial the presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case, but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such expression of opinion is sufficient cause for a new trial, if either party aggrieved thereby and interested desires it; and the same shall be ordered accordingly by the law court upon exceptions." Rule of Court 18, among other things, makes the following provision: "Exceptions to any opinion, direction or omission of the presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived." When counsel regards the charge as an expression of opinion by the presiding justice he should request the court to rectify the mistake or take his exception as the Statute and Rule of Court provides, before the jury retires. His failure to do so is regarded as a waiver of any objection arising from that source. *State* v. *Benner,* 64 Me., 267; *Grows* v. *Maine Central R. R. Co.,* 69 Me., 412; *Murchie* v. *Gates,* 78 Me., 300, 4 A., 698; *Elwell* v. *Sullivan,* 80 Me., 207, 13 A., 901; *State* v. *Richards,* 85 Me., 252, 27 A.,

122; *State* v. *Jones et al,* 137 Me., 137, 16 A., 2d, 103. "It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact: nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact." *McLellan* v. *Wheeler,* 70 Me., 285; *State* v. *Jones et al,* 137 Me., 137, 16 A., 2d, 103, supra.

"A judge presiding in a court of justice occupies a far higher position and has vastly more important duties than those of an umpire. He is not merely to see that the trial is conducted according to certain rules and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He is sworn to 'administer right and justice.' He should make the jury understand the pleadings, position and condition of the litigants. He may state, adjudge, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solution of some difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence and form a correct judgment. He is to see that no injustice is done." *State* v. *Jones,* supra. We find no expression of opinion in the charge that would cause such injustice as to warrant a reversal.

In the present case no exceptions were taken to any claimed omission in the charge, or to erroneous instructions, or to the claimed unfair summation of the testimony by the presiding justice, or to his claimed expression of opinion or questions of fact arising in the case. In *State* v. *Smith,* supra, our court said:

> "This court has in certain cases reviewed questions of law both on motion for new trial and on appeal though exceptions were not taken. Such review, however, is not compatible to the best practice, and although there be

> error in an instruction, when no exception is taken, a new trial either on appeal or motion should not be granted unless the error in law was highly prejudicial and well calculated to result in injustice, or injustice would inevitably result, or the instruction was plainly wrong and the point involved so vital that the verdict must have been based on misconception of the law, or when it is apparent from a review of all the record that the party has not had the impartial trial to which under the law he is entitled. We consider the foregoing applicable as well to omissions as to erroneous instructions when no exceptions are taken."

The respondent's attorneys were of his own selection. They were asked by the court if there were any exceptions or requested instruction. If the respondent desired further amplification or correction in the court's charge they should have requested it. Attorneys for the respondent are in court for the purpose of protecting their client in every legitimate way. They are officers of the court. They should not lie in wait to catch the court in error for the purpose of obtaining a reversal. They should claim every right of their client at the proper time as the case progresses. *State* v. *Cary,* supra; *State* v. *Smith,* supra. A study of the entire record, viewed in the light most favorable to the respondent, convinces us that the jury was warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty as charged. Other objections have been considered but we find no error which would warrant a reversal. We hold that the case under consideration does not come within the exception to the general rule laid down in *State* v. *Smith,* supra. No injustice has been done the respondent.

Appeal dismissed.
Judgment for the State.

HARRY L. CURTIS

vs.

GEORGE J. JACOBSON, DOING BUSINESS AS PRIME TAXI COMPANY.

Cumberland. Opinion, May 2, 1947.

Automobiles. Negligence. New Trial.

Automobiles are not inherently dangerous and are not classed as explosives and other dangerous instrumentalities, nor are they such dangerous instrumentalities as to render the owner or operator liable as an insurer for injuries caused thereby.

Negligence is the proximate cause of an injury only when the injury is the natural and probable result of it, and in the light of attending circumstances it ought to have been foreseen by a person of ordinary care.

Defendant's agent, who had parked taxicab on private property with engine running while he went into diner to eat, and which car was stolen, and, being driven by the thief, collided with parked car owned by plaintiff, was not as a matter of law negligent where he had no warning of the presence of thieves in the vicinity, and where car was not parked in violation of any statute or ordinance, and was at all times in view of defendant's agent.

Defendant is not liable for damages to plaintiff's automobile where proximate cause of injury was the wilful and illegal act of thief over whom defendant had no control.

In the instant case, the intervening, independent, illegal and unlawful act of thief broke the causal connection between the defendant's alleged negligence and the injury suffered by plaintiff.

The verdict of a jury on matters of fact and within their exclusive province cannot be the basis of a judgment when there is no evidence to support it, or where they have made inferences contrary to all reason.

ON MOTION FOR NEW TRIAL.

Action to recover damages sustained as a result of collision

between taxicab owned by defendant, which had been stolen and driven by thief, and automobile of the plaintiff. Verdict for plaintiff. Defendant filed general motion for new trial. Motion sustained. Verdict set aside. New trial granted.

Berman, Berman and Wernick, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ., AND MANSER, ACTIVE RETIRED JUSTICE.

TOMPKINS, J. This is an action on the case to recover for damages sustained as the result of a collision between a taxicab owned by the defendant and the automobile of the plaintiff. The defendant pleaded the general issue. The case was submitted to the jury which returned a verdict for the plaintiff, and it is now before this court on defendant's general motion for a new trial.

The defendant's agent, the driver of the taxicab, gave a signed statement to the defendant's counsel to the effect that on the night of October 20th, 1945, at approximately 9:30 P. M., he parked the taxicab on private property in the driveway of the Forest diner located on St. John Street in the city of Portland. The driver states that he left the motor idling because there had been a new motor job on the taxi and if he had shut the motor off it would be difficult to start again because the pistons had not been used very much. He went into the diner and ordered a meal, and from where he sat, he stated, he could see the taxicab at all times. Between three and five minutes elapsed between the time when he observed the taxi and on looking discovered it had disappeared. When the driver of the taxicab discovered it was missing he immediately set out in another taxi looking for his own taxicab. He learned that the taxicab was involved in an accident in front of the Eye and Ear Infirmary. On going to the scene of the accident he found the taxicab

that he had been driving in collision with the parked car owned by the plaintiff.

The plaintiff had parked his car close to the curb on the right hand side of Bramhall Street in the city of Portland, in front of the Eye and Ear Infimary. This was a distance of a little more than a mile from where the defendant's taxicab was parked. The plaintiff stated that he left his car in gear, ignition locked, steering gear locked, and the car doors locked, and had the key with him.

Apparently fifteen or twenty minutes had elapsed between the disappearance of the defendant's taxicab and its location in collision with the plaintiff's car. It must be inferred that the defendant's taxicab was being operated at the time of the collision by a driver who had stolen it. Whoever drove the defendant's taxicab from where it was parked on the diner driveway was never apprehended or identified. The driver of the defendant's taxicab could not be found at the time of the trial. His signed statement was offered by the plaintiff and admitted by agreement.

The plaintiff's contention is that by parking the taxicab unattended, with its motor running, at night time, the defendant's agent created an unreasonable risk of harm to the plaintiff by virtue of the fact that the theft of the taxicab was invited, with the reasonably foreseeable likelihood that the thief would drive improperly, especially in making his getaway, and that the jury having so found the fact, it is final.

The defendant's position is that his liability in this respect is purely a question of law for two reasons. First, there is no evidence on this record that anyone's negligence caused the plaintiff's damage. Second, the act of the defendant's servant in leaving the taxi with the motor running, off a public way, within the servant's view, was not the proximate cause of the plaintiff's damage.

Automobiles are not inherently dangerous, *Mitchell* v. *Reitchick*, 123 Me., 30, and are not classed as explosives and other

dangerous instrumentalities. Huddy on Automobiles, 8th Ed., Sec. 36. Nor are they such dangerous instrumentalities as to render the owner or operator liable as an insurer for injuries caused thereby. 5 Am. Jur., page 523, Automobiles Par. 11. The automobile of the defendant was harmless where parked and when unused threatened no injury to the plaintiff. The negligent use might injure the plaintiff but the automobile unused was harmless. The plaintiff contends, however, that by parking the automobile unattended, at night time, with the motor running, the defendant's agent created an unreasonable risk of harm to the plaintiff, because by his act the theft of the taxi was invited, and there was a reasonably foreseeable likelihood that the thief would drive improperly in making his escape. For the purpose of the discussion of this point we concede, without so deciding, that the act of the driver in parking the car with the engine running was negligence. It must be remembered that the defendant's taxicab was not parked in the street but upon private property. No city ordinance or statute of the State was being violated.

It is true that the owner of an automobile has been held liable in various cases where the machine was parked in violation of some ordinance or statute for the damage ensuing from its careless operation by a thief or intermeddler. In most of the cases the interpretation of the statute fixed the liability of the defendant. The defense claims that leaving the taxi with the motor running, off a public way, within the driver's view, was not negligent under the circumstances, and if it was it was not the proximate cause of the plaintiff's damage, because of the unforeseeable, willful and illegal act of a third person. The rule in this state is stated in *Hawkins* v. *Theatre Co.*, 132 Me., 1, as follows: "A recovery may be had even though the willful or negligent act of a third person intervenes and contributes to the injury, provided such act should have been foreseen," and cases there cited. In that case the defendant had solicited the patronage of children to his theatre and distributed balloons to

them, thus creating a condition in his theatre which called for more oversight than was given, according to the plaintiff's contention. The court said:

> "The management of the theatre might well have been charged with notice that the filling of the balcony with children and giving out of the balloons would result in boisterous and unruly conduct. It was accordingly its duty to take reasonable precautions to restrain the ordinary conduct of children under such circumstances. It was under no obligation to provide an attendant for every child or to anticipate the isolated, willful and sudden act of one boy, the natural tendency of which was to inflict serious harm upon another."

In the absence of evidence that the defendant had any warning, or the incident ever had happened before, it was not a danger which the defendant was bound to have foreseen or to have guarded against.

In *Frashella* v. *Taylor*, 157 N. Y. S., 881, defendant's car was started by some boys while the driver was in the act of delivering some goods in front of the plaintiff's premises. The court said:

> "It appears that these boys were playing in the street and had jumped on the truck and started it by pulling the controller and the brake. I cannot find that the plaintiff has either pleaded or proved any cause of action. The automobile was started by the willful act of the boys and concededly the defendant is not responsible for their act. The only negligence which the plaintiff has attempted to plead or prove is negligence in leaving the automobile in a situation where the boys could reach the lever without being seen or stopped. Such an act does not constitute negligence. The defendant was not bound to provide against the act of willful wrongdoers even though the wrongdoers were small boys."

In *Rhad* v. *Duquesne Light Company,* 255 Penn., 409, the defendant's chauffeur set the brakes and left the car standing at the curb on a down grade, and a twelve-year-old boy released the brakes so that the car started down grade and struck the plaintiff. The court held the boy's interference was the proximate cause of the injury. The defendant, even though negligent, was not liable.

In the case of *Hatch* v. *Globe Laundry,* 132 Me., 379, on which the plaintiff places great stress, and electric automobile driven by the defendant's servant was left parked upon the street and headed down hill on a grade. The circuit breaker was not removed. With this removed power could not pass to the motor. Small children were playing about the street, which was known to the driver of the truck. While the driver was delivering laundry to a house, he was away from the truck some four or five minutes. Two small children, four and five years of age, playing near, started the truck by turning the wheel controlling the rheostat. The court cited the rule in *Hawkins* v. *Maine and New Hampshire Theatre Co.,* supra. The defendant was held liable to a bystander who was injured in attempting to stop the car. The court found that it was a reasonably foreseeable fact that small children would tamper with the truck. The court in commenting on the opinion in *Rhad* v. *Duquesne Light Co.,* supra, which was cited by counsel for the defense in the *Hatch* case said that the *Rhad* case was within the rule laid down in the *Hawkins* case, and it was clearly distinguishable from the *Hatch* case because the conduct of a boy of twelve is no measure of what should be expected from one of five.

Most of the cases where the defendant has been held liable for damage involved the negligence of the owner or operator of the motor vehicle in leaving it unattended, without taking any precautions to prevent small children, playing about the place where the vehicle was left, from setting it in motion, because it is a matter of common knowledge that boys are likely to experi-

ment with the operation of any mechanism which can be set in motion, whereas it is unreasonable to suppose that a person who has reached years of discretion will do so.

Then there is the other class of cases involving a statute or local ordinance regulating the parking of cars upon public highways. In that class of cases the owner who has violated that statute has had to respond in damages when the willful act of a third party has intervened, and at other times has not been held liable, depending upon whether the injuries were the consequences that the statute or ordinance was intended to prevent. In Massachusetts the owner or operator of an unlicensed or unregistered automobile is liable without regard to negligence for injuries caused by the operation of the car on the highway. In the application of this rule it was held in *Malloy* v. *Newman*, 310 Mass., 269, where the owner of an unregistered automobile left it on the highway, from which it was stolen, that it was not necessary in order to find the owner liable for the death of a third person who was killed when struck by the car while being driven by a thief, to show that the owner should have anticipated the wrongful conduct of the thief in stealing the car and later killing the person while driving at an excessive rate of speed, but that it was enough for the plaintiff to show that the death was due to the combined effect of the wrongdoing of the owner of the car and that of the thief; two justices dissenting being of the opinion that the trial judge's direction of a verdict for the defendant should stand, claiming that the case was governed by the authority of *Slater* v. *T. C. Baker Company*, 261 Mass., 424. In the latter case the owner of the automobile parked it on a public street opposite his place of business, in constant view of his employees, unlocked, with the key in the lock and the brake not fully set, in violation of a statute. In an action for personal injuries caused by one feloniously appropriating the automobile and driving it at a high rate of speed through the public streets, the court sustained a directed verdict for the defendant upon the ground that the larceny of the

automobile and its use by the thief were intervening, independent acts which the owner was not bound to anticipate and guard against.

The *Slater* case, supra, was held to govern the decision in *Sullivan* v. *Griffin* (1945) 318 Mass., 359, sustaining a directed verdict for the defendant where it appeared that the defendant left his automobile in his driveway so that it extended nearly across the sidewalk to the gutter, with the ignition key in the switch and the window open, and went into his house, from which he could not see his car; that two boys removed the key, and that other boys started the car and while driving at an excessive rate of speed struck and killed a pedestrian. The defendant violated an ordinance against parking upon the sidewalk and a statutory provision against leaving a car unattended and not locked, and the statute provided that the violation of the statute or ordinance was evidence of negligence as to all consequences that are intended to be prevented. The court said that injury sustained through the operation of the car by thieves, in the circumstances, was not a consequence that was intended to be prevented by the statute; that the negligence consisted in violating the law and was without legal consequence unless it was a contributory cause of the injury; and that the injuries in the case were not the proximate result of the defendant's negligence, and that to hold the defendant liable would go far towards making him an insurer as to the consequence of every accident in which his car could be involved while operated by thieves or their successors in possession.

It was held in *Castay* v. *Katz & Berthoff*, 140 So., 76, that where a thief or intermeddler drove a motor truck, negligently parked unattended in the street, with the engine running, and collided with another truck to the injury of the occupants thereof, the act of the intermeddler was an intervening efficient cause, and the proximate cause of the accident, and the owner of the first truck was not liable because of the theft of the truck, and

the subsequent collision was a too remote consequence of the negligent parking of the truck to have been reasonably within the contemplation of the defendant's driver, and the intervening act of the thief was sufficient to break the sequence of the defendant's negligence so as to establish the intervening cause as the efficient one proximately causing the accident.

In *Kennedy* v. *Hedberg*, 159 Minn., 76, the court said:

> "The act of the owner and driver in leaving the motor running is not the proximate cause in an injury to a pedestrian, inflicted, when the person in attendance wrongfully attempted to move the automobile from the place where the owner left it, and that it was unnecessary to enter upon a discussion of the doctrine that legal responsibility for an accidental injury cannot be fastened upon a man unless his act or failure to act was the proximate cause of the injury. If his act or omission only became injurious through the distinct wrongful act of another, the last act is the proximate cause of the injury and will be imputed to it."

In *Brecker* v. *Lakewood Water Co.*, 174 A., 478, the supreme court of New Jersey said:

> "Defendant's negligence is too remote to constitute the proximate cause where the independent, illegal act of a third person which could not reasonably have been foreseen and without which such injury would not have been sustained intervenes."

In *Illinois Central R. R. Co.* v. *Oswald*, 338 Ill., 270, the court said:

> "The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with the negli-

gence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish the condition by which an injury is made possible, and that condition causes the injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury and the intervening and efficient cause is the new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate cause of the injury. One act may furnish the occasion for another act, and such second act may be the cause of the injury without the first act in any manner being a contributing cause of such injury. The second act may be the result of some intervening cause in no manner flowing from the original act, but which cause is given the opportunity to operate through the occasion furnished by such original act. The cause of the injury is that which actually produces it, while the occasion is that which provides the opportunity for the causal agency to act."

In *Ward* v. *Southern Ry. Company*, 206 N. C., 530, thieves crawled on railroad cars and threw coal therefrom, striking a brakeman, the court said:

"The general rule of law is that if between the negligence and injury there is an intervening crime or willful and malicious act, and the third person produces the injury, but that such act was not intended by the defendant and could not have been reasonably foreseen by it, the causal chain between the original negligence and the accident is broken,"

and cases there cited.

Negligence is the proximate cause of an injury only when the injury is the natural and probable result of it and in the light of attending circumstances it ought to have been foreseen by a person of ordinary care. To the same effect *Aune* v. *Oregon*

Trunk Ry. et al, 51, P. (2d), 663. The question involved is whether the defendant's act, if negligent, can be considered the direct and proximate cause of the injury. The defendant contends that it cannot. "There can be no fixed and immutable rule upon the subject that can be applied upon all occasions. Much therefore depends upon the circumstances of each particular case." *Page* v. *Bucksport,* 64 Me., 51.

In considering motion for a new trial the evidence must be viewed in the light most favorable to the plaintiff. On the defendant is the burden of proving that the jury verdict is manifestly wrong. *Marr* v. *Hicks,* 136 Me., 33. It cannot be said as a matter of law that the defendant's agent was negligent under the circumstances of this case. There was no evidence of surrounding circumstances that defendant's driver had any warning, nor was there such a situation as would put him on notice of the presence of a thief or thieves in the vicinity "so such act could have been foreseen." He was under no legal duty to anticipate the sudden, willful and unlawful act of the thief or thieves. It was not a danger which the driver was bound to have foreseen or to have guarded against. The automobile was at all times within the view of the defendant's agent. It was not parked in violation of any statute or ordinance, and had been brought to rest upon private property. *Ward* v. *Southern Ry. Co.,* supra; *Honan* v. *Watertown,* 217 Mass., 185; *Andrews* v. *Kinsell,* 114 Ga., 390; *Hawkins* v. *Theatre Co.,* supra. "The defendant's negligence (if it was negligence) might be a temptation in the way of another person to commit the wrongful act by which the plaintiff was injured, and yet the defendant's negligence may be in no sense the cause of the injury." 1 Shear. & Red., Neg. 6th Ed., par. 25.

The plaintiff further contends that the jury having found that the defendant was negligent, that finding is final. "The verdict of a jury on matters of fact and within their exclusive province cannot be the basis of a judgment where there is no evidence to support it, or where they have made inferences

contrary to all reason." *Day* v. *R. R. Co.,* 96 Me., at 216. Whether there is any evidence to support an action is a question of law. Whether the evidence is sufficient is a question of fact. *Brooks* v. *Libby,* 89 Me., 151. "The verdict of a jury on matters of fact and even within their exclusive province cannot be the basis of a judgment where there is no evidence of probative value to support it." *Ogunquit* v. *Perkins,* 138 Me., at 63.

The plaintiff's contention goes far towards making the defendant an insurer as to the consequences of every accident in which his automobile might become involved while operated by the original thief or his successors in possession. This court does not subscribe to such a theory. The intervening, independent, illegal and unlawful act of the thief or thieves broke the causal connection between the defendant's alleged negligence and the injury suffered by the plaintiff. We see no escape from the conclusion that the proximate cause of the injury was the willful and illegal act of the thief or thieves, over whom the defendant had no control, and for whose act he was not responsible.

In view of these conclusions the entry must be

Motion sustained.
Verdict set aside.
New trial granted.

MERRILL TRUST COMPANY, SUCCESSOR TRUSTEE UNDER WILL OF CHARLES D. BRYANT,

vs.

LUCY M. PERKINS, ET AL.

Penobscot. Opinion, May 16, 1947.

Wills. Remainders.

In the construction of a will the testator's intent takes precedence over all else.

A vested remainder is an estate in praesenti, a present fixed property right though to be possessed and enjoyed in the future.

A vested remainder, even at common law, was an estate which was descendible, devisable, and alienable.

The test of a contingent remainder is that it is so limited as to depend on some event which is uncertain to happen, or on a condition which may not be performed, or on an event or a condition which may not happen or be performed until after the termination of the particular estate on which the remainder depends.

Contingent remainders were at common law inalienable and could not be devised.

In the instant case, there was an intent on the part of the testator to create a contingent remainder in those persons to whom on the death of his granddaughter, his estate would be distributed under the statutes of the State of Maine regulating the descent and distribution of intestate estates, and it was clearly the purpose of the testator that the persons who are to share under the will are to be determined as of the date of the death of the testator's granddaughter rather than on the date of his own death.

ON REPORT.

Bill in equity for construction of will of Charles D. Bryant. The interpretation of will involved determination of whether

remainder was vested or contingent, and who was entitled to remainder. Case remanded to Superior Court for decree in accordance with opinion.

Eaton & Peabody, for petitioner.

Gerard Collins, for Marie B. Fitzgerald, Sarah Bryant, Viola Bryant Collier, John Henry Bryant, Frances Earl Taylor, Patricia Helen Taylor, James Robert Taylor, Barbara Jane Taylor, Bradley M. Bryant, John Henry Bryant, Frank L. Bryant, defendants.

Ralph W. Farris, for Avis Bryant and Eva Bryant, defendants.

David Fuller, for Bradley M. Bryant, Frank L. Bryant, James F. Bishop, Ray T. Luce, executor under will of Ella D. Colson, George Damon, James Burton Bishop, Wayne Frederick Bishop, Jon Eldin Bishop, Gary Erwin Bishop, Cary Edwin Bishop and Merrill Trust Company as Trustee under will of Annie Bishop, defendants.

Robert J. Milliken, for Roscoe Fitzpatrick and Jennie F. Overlock, defendants.

D. I. Gould, for Harold W. Casey, Donald C. Casey, Roscoe Libby, defendants.

Edward Stern, for Victor E. Pomelow, Zelma Garland, Stanley White, Christie Scott, Henry Harvey, Caroline B. Davis, defendants.

C. J. O'Leary, for Alfred L. Grant, Muriel Grant Smith, defendants.

B. W. Blanchard, for Ireson P. Bryant, Jr., Madeline Bryant Rowley, Edith Bryant, Alice Bryant Hanson, defendants.

Atherton & Atherton, for Irving Ferguson, defendant.

Michael Pilot, for William C. Peters, defendant.

Prentiss Godfrey, for Persons Unknown, claiming by, thru or under will of Charles D. Bryant, deceased, minors and persons unborn and unknown as of date of C. D. Bryant's death.

Louis C. Stearns 3rd., for Persons Unknown, claiming by, thru and under the will of Charles D. Bryant, deceased, and minors and persons unborn and unknown as of the termination of the trust.

Morris Rubin, for Zelma Garland, Stanley White, Christie Scott and Henry Harvey, claiming under will of Charles D. Bryant.

J. P. Quine, for Lois Jean Withee Lufkin and Flora B. Jordan, defendants.

John H. Needham, for Lucy M. Perkins, Eva M. Springer, Lottie M. Snow, defendants.

Fellows & Fellows, for Leeott V. Bryant, Ralph H. Bryant, Franklin P. Doble, defendants.

Edgar M. Simpson and James E. Mitchell, for Myrtle W. Hughes, Jennie S. Woodbury, Mabel W. Daniels and Amy Leach, defendants.

Nathaniel M. Haskell, for Walter A. Woodbury, defendant.

Richard Small, for Walter A. Woodbury and Maude W. Pierce, defendants.

F. B. Snow, for Ephraim S. Drew, defendant.

Percy T. Clarke, for Mary Lynburner and Millard Spencer, defendants.

James M. Gillin, for Ella M. Doughty.

Shirley Berger, for Ella M. Doughty, Robert O. Bryant, Adrian E. Bryant, Virginia M. Johnson, Lewis F. Bryant,

Mellissa Bryant, Flora B. Jordan, Caroline B. Davis and Leroy Bryant, defendants.

A. M. Rudman, for Mellissa Bryant, defendant.

Nunzi Napolitano, for Philip D. Stubbs, Inheritance Tax Commissioner.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, JJ.

THAXTER, J. This bill in equity, before us on report, was brought for the construction of the will of Charles D. Bryant late of Bangor who died January 3, 1900 at the age of eighty-seven. He left as his only heir at law a granddaughter, Ada Stewart, whose name was legally changed to Ada Bryant. The mother had died in 1873 when the daughter was born; and the child was brought up by the grandfather, the testator, with whose will we are here concerned.

The will of Mr. Bryant was executed three years before his death. He gave under it his homestead together with the furnishings therein to his granddaughter and $5,000 in cash. There were certain other bequests, one to an employee, and small bequests to certain nieces and nephews. Under the fourth clause the residue was left in trust to pay the net annual income to the granddaughter, Ada Bryant, as long as she should live. Then the will provided as follows:

"If the said Ada Bryant should die, leaving issue of her body, then upon her death the entire trust property remaining in the hands of the Trustee under this Will to be paid, transferred, conveyed and delivered to such issue, discharged of the trust.

If the said Ada Bryant should die, leaving no issue of her body, then the entire property constituting said trust estate, real and personaly, to be conveyed, transferred and assigned to those persons to whom it would be distributed and to whom it would pass by descent under the statutes

of the State of Maine regulating the descent and distribution of intestate estates.

Provided, however, that if my said granddaughter, Ada Bryant, should have no children of her own, and should choose to legally adopt a child or children, she shall have the right by will to dispose of an amount not exceeding Ten Thousand Dollars ($10,000) to each child so adopted, and the residuum of my estate for final distribution under the statutes of the State of Maine as aforesaid, would be reduced to that extent."

Ada Bryant married William C. Peters, one of the claimants herein, in 1906. She died December 19, 1945 testate, leaving no issue and no adopted children. This bill was brought by the successor trustee to determine the proper disposition of the balance of the trust which on February 26, 1946, when the twenty-third account was filed, amounted to $236,518.87.

William C. Peters, who was the husband of Ada Bryant Peters, claims that she, as the testator's sole heir, took a vested remainder in this trust, which was a part of her estate and was disposed of by her will. This claim is denied by all the others who have filed briefs, who contend that the will shows an intention on the part of the testator to exclude her from sharing in the remainder as an heir. They are not in agreement, however, among themselves as to whether this remainder was vested or contingent, in other words as to whether the heirs who would take it are to be determined as of the date of death of the testator or as of the date of death of the beneficiary, Ada Bryant Peters.

The problem in construing a will is to determine a testator's intent. That takes precedence over all else. This, as was said in *Bradbury* v. *Jackson,* 97 Me., 449, 455, 54 A., 1068, 1070, is the " 'pole star' . . . of testamentary construction." There is no dispute among the authorities as to this rule. In England Lord Justice Lindley in *In Re Morgan* (1893), 3 Ch., 222, 228,

said: "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." For a discussion of the same question, see *Abbott* v. *Danforth,* 135 Me., 172, 192 A., 544; *Rogers* v. *Walton,* 141 Me., 91, 39 A., 2d, 409.

What was the testator's intent with respect to the provision that he made for his granddaughter under the fourth clause of his will?

In the very first clause of his will he called attention to the fact that his granddaughter "would now be my sole heir if this Will were not made." And it may well be argued from this statement that he was expressing a purpose not to give her the rights of an heir at law. This purpose is even more apparent from other provisions of the will. He set up a trust for her in which her only interest was to receive the net annual income, the entire trust property on her death was to go to her children, his own direct descendants, and if there were no such children, to his heirs. If she should adopt children she was given the right to give to each such child by will "an amount not exceeding Ten Thousand Dollars ($10,000)." Was not that limited power of disposal utterly inconsistent with the claim now made by her husband that she had an unlimited power to dispose of this trust property as she might wish? Does not the will of Mr. Bryant show a clear purpose to dispose of his estate among his own blood, first the income to his granddaughter, the corpus to her children, if there should be any, or if not to his own blood relatives? To this end did he not deny to her control over his property so that she could not dispose of it as she might wish in case she should die without issue? To concede that she had such right would in our opinion be contrary to his intent as disclosed by his will. The facts in this case are similar to those in *Abbott* v. *Danforth,* supra, in which it was held that the life tenant was excluded as an heir.

Was the remainder contingent or vested?

If a remainder is vested there is an estate in praesenti, a present fixed property right though to be possessed and enjoyed in the future. A vested remainder was, even at common law, an estate which was descendible, devisable, and alienable. *Belding* v. *Coward,* 125 Me., 305, 133A., 689; 33 Am. Jur., 614.

A test of a contingent remainder is that it is so limited as to depend on some event which is uncertain to happen or on a condition which may not be performed, or on an event or a condition which may not happen or be performed until after the termination of the particular estate on which the remainder depends. *Giddings* v. *Gillingham,* 108 Me., 512, 81 A., 951; 33 Am. Jur., 529. Contingent remainders were at common law inalienable and could not be devised. *Schapiro* v. *Howard,* 113 Md., 360, 78 A., 58, 140 Am. St. Rep., 414. For a discussion of this subject and the changes which have been made by statute, see 23 Am. Jur., 614, et seq. See also Rev. Stat. 1944, Ch. 154, Sec. 3. The provisions of our own statute have no application here.

A review of other cases with facts very similar to those before us shows clearly that the remainder with which we are here dealing is contingent.

In the old English case of *Loddington* v. *Kime,* 1 Salk., 224, a testator devised land to A for life, and if he have issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B and his heirs forever. It was held that the remainders to both the issue of A and of B were contingent.

In *Goodright* v. *Dunham* (1779), 1 Doug., 264, there was a devise to J. L. for life "and, after his death, unto all and every his children equally, and to their heirs, and, in case he die without issue, I give the said premises unto my said two daughters and their heirs, equally to be divided between them." The court, speaking through Lord Mansfield, held both remainders contingent.

It is unnecessary to review the cases generally in this country. Those in our own jurisdiction which are typical of many others

elsewhere seem to be decisive and in accord with the early English authorities.

In *Webber* v. *Jones*, 94 Me., 429, 47 A., 903, 904, a bill in equity was brought for the construction of the following provision of a will: "I also give and bequeath my youngest son, W. T. Jones, the farm upon which he now lives during his lifetime, then to his children, if any, if none, to his nearest relatives." The court held that the remainder to the children of the life tenant, or to his "nearest relatives" as the case might be was contingent upon a future uncertain event, namely whether there would be any children surviving at the time of the death of their father. The court points out, page 432, that the devise was to the children as a class "and was made to them 'if any' that is, if any living; and if they were not living, then to others." And then follows this language which has a significant bearing on the case now before us: "And we think the language used fairly implies an intention that this contingency should be determined at the time of the death of the life tenant, rather than at the death of the testator." In other words, until the members of the class could be determined the remainder in the children would not vest, and likewise, until it could be determined whether there would be children living at the death of the life tenant, it could not be determined whether the "nearest relatives" of the life tenant would take. Both remainders were therefore contingent.

Let us apply this reasoning to the case now before us. Whether there would be children of Ada Bryant Peters surviving her could not be determined until the time of her death. Until then, whether the heirs of the testator would take under the fourth clause of his will was uncertain, and until then the remainder to the heirs was clearly a contingent remainder.

To the same effect is the case of *Giddings* v. *Gillingham*, supra. A testator left property in trust for the benefit of his wife and others. Then follows this provision: "On the decease of my wife Lucy L. Humphrey, I direct the following disposition

of the residue of my estate by my executors or administrators and the trustees under this will." Then follow various bequests. The court held that these remaindermen took contingent and not vested remainders. Such was held to be the testator's intent. This intent was discovered from a number of circumstances but primarily from two which have great significance in the case which we are considering. Firstly the court points out that the disposition of his property was not to be made until the death of the wife and that some of those who would take would remain uncertain until that time. On this point we find the following language at page 517: "The 'disposition' is not made by the testator at the time of his death, but is to be made by his legal representatives after the decease of his wife. Nowhere in the will is there a gift or bequest to these legatees independent of the direction to his executors or trustees to pay them at a future time. The gift, therefore, implied from the direction to pay, speaks as of the time of payment and not as of the date of the testator's death. The courts have always held that the fact that there are no words of present gift has great weight in indicating that the testator intended that the title should not vest until the period of distribution should arrive, and that the bequest should be contingent until that time." Secondly, it is pointed out that one of the provisions for the disposition of a part of the remainder on the death of the wife was to pay $1,000 to each of the children of a brother. As to this the court said, page 520: " . . . where there are no words in a will importing a gift to a class, as children or grandchildren, except in the direction to make a division among them at a period subsequent to the testator's death, the interest is contingent and the members of that class are to be ascertained as of the time fixed for the division."

Though the law favors vested rather than contingent remainders, we must hold in the light of these authorities that there was here an intent on the part of the testator to create a contingent remainder in those persons to whom on the death

of Ada Bryant Peters his estate "would be distributed and to whom it would pass by descent under the statutes of the State of Maine regulating the descent and distribution of intestate estates." His purpose is clear that the persons who are to share under this provision of his will are to be determined as of the date of the death of the granddaughter and not as of the date of the death of the testator.

The case is remanded to the Superior Court for a decree in accordance with this opinion.

LANDRY FORTIN AND ALICE FORTIN *vs.* LEAH WILENSKY.

York. Opinion, May 19, 1947.

Appeal and Error. Landlord and Tenant. Specific Performance. Contracts.

On equity appeal, decision of single justice, on matters of fact, will not be reversed unless clearly erroneous, and the burden of showing such error falls upon the appellant.

A landlord cannot compel a tenant at will to pay increased rent without termination of the tenancy, but the amount of rent may, however, be changed by mutual consent.

An oral agreement to execute a written lease may be specifically enforced, in a proper case, where it has been partly performed, but mere negotiations looking toward a written lease that is to be agreed upon have no binding force on either party.

When no time is specified for performance of a contract, a reasonable time is implied, and what a reasonable time is may be a mixed question of law and fact, depending on the circumstances of the case.

At law, time is of the essence of a contract, but in equity it depends on the circumstances.

A decree of specific performance can never be claimed as a matter of right.

A bill in equity for this purpose is always addressed to the sound discretion of the court under the rules and principles of equity jurisdiction.

In the instant case, the record does not show the decree of the court below to be incorrect, or that the findings of fact were clearly erroneous.

ON APPEAL.

Bill in equity brought to enforce claim for specific performance of an alleged contract to make lease of real estate. Plaintiff appealed from final decree dismissing the bill. Appeal dismissed. Decree of court below affirmed.

Lausier & Donahue, for complainants.

Waterhouse, Spencer & Carroll, for respondent.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. This is a bill in equity, brought in Superior Court for York County, to enforce claim for specific performance of an alleged contract to make lease of certain real estate in Biddeford. The case comes to the Law Court on appeal from a final decree which dismissed the bill. This final decree is affirmed.

The evidence, which was uncertain and very conflicting, apparently discloses that Landry Fortin and his wife, Alice Fortin, are tenants at will of defendant, Leah Wilensky, and in possession of premises located at 22 Alfred Street in the City of Biddeford. Since 1932 they have been in the grocery business there, and at first had a lease from the then owner Kendall. After the expiration of the Kendall lease in 1941 the building was sold to this defendant, and the plaintiffs became her tenants at will at a monthly rental of fifty dollars. From February 1, 1943 the Fortins paid to the defendant seventy-five dollars per month, as rent for the store, and this rental continued until December 1945.

Sometime in the fall of 1945 Mr. and Mrs. Fortin said they

desired to obtain a lease of the premises, and they were informed by the defendant that they could have a five year lease, and that in the future the rent would be ninety dollars. The plaintiffs had a lease prepared by Mr. Harvey, their attorney, in December 1945 and brought it to the defendant for her approval. She refused to sign because it contained a provision for annual renewals instead of a five year provision. Beginning January 1, 1946 the plaintiffs voluntarily commenced to pay the defendant the said monthly sum of ninety dollars as rent, but they did not prepare any other form of lease to submit to the defendant.

In February 1946 the defendant, Leah Wilensky, had a lease prepared by Attorney Donahue, which lease provided for a term of five years beginning on March 1, 1946, with a five year renewal privilege, at the monthly rental of ninety dollars. This proposed lease was submitted by the defendant to the plaintiffs for their approval. The defendant says that the two copies were submitted by her to the plaintiffs in February. The plaintiffs say that she turned the two copies over, but they are not sure of the time when. Plaintiff, Alice Fortin, testified that Mrs. Wilensky delivered to the plaintiffs the drafts of the lease, and later came into the store and asked if the leases were signed, and "I said we will sign them and we will talk them over" and that about "three weeks after" or "maybe four weeks," Mrs. Fortin took the signed leases in to Mrs. Wilensky. On the other hand, the defendant, Mrs. Wilensky, says that she delivered the drafts of lease in February and that she called several times to ask if the lease was signed and "they say no, they found a flaw in the lease. I say put it on a piece of paper and I go back to the lawyer and fix it up the way you want it." Mrs. Wilensky says she waited nearly four months before they brought it in. Meanwhile, the Singer Sewing Machine Company offered a larger amount as rent, and the defendant Wilensky says she discussed the matter with plaintiffs and then went to Attorney Donahue, who advised her that the Fortins had waited too long, and for her to go ahead and lease to the Sewing Machine

Company. It is argued by the defendant that the plaintiffs did not intend to sign the five year lease prepared by Mrs. Wilensky, and held it until they learned of her negotiations with the Singer Company. The plaintiffs deny this, and say that the rent was paid to July 1st by the plaintiffs to the defendant, and the plaintiffs' checks for ninety dollars were accepted and cashed by the defendant. The plaintiffs also say that "the payment by the plaintiffs of a monthly rental of ninety dollars, an increase of fifteen dollars" over the 1945 rental, was consideration for the giving of a lease.

The defendant served a notice on the plaintiffs to quit, dated July 17, 1946, stating that the tenancy would expire on September 1, 1946. Interlocutory decree on plaintiffs' motion for temporary injunction was filed August 13, 1946, which decree provided "if an action of Forcible Entry and Detainer is brought, that the said action shall be allowed to stand continued pending final hearing on this bill."

The sitting justice in dismissing the bill stated in his decree:

> "The plaintiffs in this action were lessees of certain property owned by the defendant, for which they paid ninety dollars ($90.00) a month rent.
>
> The defendant at the request of the plaintiffs and without consideration agreed to give to said plaintiffs a written lease of said premises for a certain period of years. First the plaintiffs had a lease prepared, which was not satisfactory to the defendant; whereupon the defendant had another lease prepared by her own counsel. This lease was presented to the lessees, the plaintiffs in this action, for their signatures, with the understanding that it would be signed and returned to the lessor, the defendant in this action, for her signature.
>
> From all the evidence, it would appear that reasonable time was of the essence of this agreement. However, the plaintiffs in this action did not sign the lease for some weeks.

In the meantime the defendant in this action had an opportunity to lease said premises at a much larger rent to other parties, and negotiated with said parties for said lease.

Eventually the plaintiffs in this action did sign the lease and took the lease to the defendant, but the defendant then refused to sign the lease, and this action was brought for the purpose of enforcing this agreement to give a lease.

THE COURT FINDS that there was no consideration for the agreement to give a lease; that time was of the essence of the agreement, and that the plaintiffs in this action did not act seasonably, nor until the defendant had already begun arrangements to lease the premises to other parties."

When a cause in equity comes up on appeal it is, of course, the duty of the Law Court to determine whether, upon the record, the decree of the Court below was correct; but the decision of the single justice, on matters of fact, will not be reversed unless clearly erroneous, and the burden of showing such error falls upon the appellant. *Whitehouse Equity* (1st Ed.) 653, 655, Pars. 628, 631; *Young* v. *Witham*, 75 Me., 536; *King* v. *Metropolitan*, 127 Me., 543, 142 A., 780; *Brickley* v. *Leonard*, 129 Me., 94, 149 A., 833; *Cloutier* v. *Giguere*, 130 Me., 508, 152 A., 853; *Savings Institution* v. *Johnston*, 133 Me., 445, 180 A., 322.

Here, the plaintiffs contend that the justice below was clearly in error when he made the foregoing findings of fact.

First, let us consider the finding of "no consideration for the agreement to give a lease." It was in the fall of 1945 that the plaintiffs asked for a lease and were told by defendant that they could have a five year lease and that future rental would be ninety dollars. The plaintiffs prepared an annual lease with renewals, which defendant declined to sign. The plaintiffs, on January 1, 1946, commenced to pay the defendant ninety dollars. There was no existing lease. The plaintiffs voluntarily paid fifteen dollars more because the defendant desired it, and

the plaintiffs wished to stay. It is true that the landlord cannot compel a tenant at will to pay increased rent without termination of the tenancy. The amount of rent may, however, be changed by mutual consent. *Ryan* v. *Cogan Company*, 130 Me., 88, 90, 153 A., 815. The rent of this building here had been changed several times previously, and by mutual consent. The inference could easily be drawn by the justice hearing the case that the rental was ninety dollars, and mutually agreed upon. One important detail of the leasehold was not agreed upon. The plaintiffs desired an annual lease; the defendant a five year term. The plaintiffs were plainly opposed to being held to a long term. The form of lease made by the plaintiffs was not approved by the defendant, and the form of lease made by the defendant was not seasonably signed by the plaintiffs. It was signed by the plaintiffs after weeks of delay, and only after negotiations had commenced between defendant and other parties. The justice below could properly find, as he did find, that the rent was ninety dollars and that there was no consideration. The payment of the increased rent followed a refusal by the defendant to execute a lease on the terms desired by the plaintiffs, and before any other draft of lease was submitted by either of the parties to the other. The payment of the increase of fifteen dollars would not necessarily be regarded as made in contemplation of the refused lease made by Attorney Harvey, or of the lease to be afterwards drafted by Attorney Donahue. There is no evidence that clearly indicates that either of the parties considered this increase of rent to be legal consideration for the making of a new and written contract. It certainly was not so understood by both parties.

The bill alleges that, in addition to the payment by the plaintiffs of an increase in rent, there was an expansion of business "in reliance upon the promises of the defendant," but there is no evidence to support such a contention. The plaintiffs were already in possession of the premises and there was no change of business shown.

The result would probably have been the same however if the evidence had authorized the justice to find a consideration, because details were not agreed upon, and an agreement to make an agreement is not always enforcible. As our court has said, "The proof must show the terms of the contract clearly, definitely and conclusively . . . the agreement must be concluded, unambiguous, and proved to the satisfaction of the court." *Bennett* v. *Dyer,* 89 Me., 17, 22, 35 A., 1004, 1005; *Woodbury* v. *Gardner,* 77 Me., 68, 71. The authorities recognize that an oral agreement to execute a written lease may be specifically enforced, in a proper case, where it has been partly performed; but mere negotiations looking toward a written lease, that is to be agreed upon, have no binding force on either party. Pomeroy's *Specific Performance of Contracts* (3d ed.) 350, Par. 136; 58 Corpus Juris, 990, Pars. 178-227; 49 Am. Jur. "Specific Performance" 142, Pars. 121, 122, 124.

This case is easily distinguished from the cases where the terms of the tenancy have been fully agreed upon by the parties, and the tenant has entered into possession at the request, or implied request, of the landlord, and where there has been a substantial change in circumstances on the part of the tenant.

The court below also stated in the decree "that the plaintiffs in this action did not act seasonably." It is a well established doctrine that when no time is specified, a reasonable time is implied. What a reasonable time is may be a mixed question of law and fact, depending on the circumstances of the particular case, and whether the facts and circumstances are in dispute. At law, time is of the essence of a contract, but in equity it depends upon the circumstances. *Snowman* v. *Harford,* 55 Me., 197, 199; *Fisk* v. *Williams,* 75 Me., 217; *Telegraphone Corp.* v. *Telegraphone Co.,* 103 Me., 444, 69 A., 767; *Dalton* v. *Callahan,* 122 Me., 178, 187, 119 A., 380; *Colbath* v. *Stebbins Lumber Co.,* 127 Me., 406, 144 A., 1.

If the plaintiffs had acted promptly and had signed the lease

prepared for the defendant by Attorney Donahue, and had as promptly returned it, they probably would now have a lease of the store. They did not desire a five year lease, because they had indicated that they desired an annual one. Delay, under the circumstances here, could cause injury or prejudice to the rights of the defendant. The tenants had no right to wait for a favorable turn of events before making their election to sign, on the possible theory that if values increased they would sign and if values declined, or another rent became available, they would refuse. Under such a situation equity would be lending its assistance to the carrying out of an unjust and inequitable arrangement. A decree of specific performance can never be claimed as a matter of right. A bill in equity for this purpose is always addressed to the sound discretion of the court under the rules and principles of equity jurisdiction. *Whitehouse Equity* (1st Ed.), 94, Par. 83; 49 Am. Jur., 89, 92, 93, Pars. 73, 75, 76; *Brown* v. *Boston & Maine R. R.,* 106 Me., 248, 255, 76 A., 692.

In this case the record shows that credibility of witnesses was most important. The sitting justice had the advantage of exercising his trained powers of observation. He could see the witnesses and hear their testimony. This court, on appeal, can only read the printed page that gives no information of those visible details that may have indicated at the hearing where the truth was. All that the Law Court can say is, that the record does not show the decree of the court below to be incorrect, or that the findings of fact were clearly erroneous. *Snow* v. *Gould,* 119 Me., 318, 321, 111 A., 337.

Appeal dismissed.
Decree of Court below affirmed.

EDWARD A. MANSFIELD *vs.* RALPH F. GOODHUE.

Cumberland. Opinion, May 19, 1947.

Pleadings. Brokers.

A writ and declaration are to be treated as one, and fact that amendment was inserted in the writ and not in the declaration is immaterial.

The omission to state in the original declaration that the plaintiff was a duly licensed broker, as required by statute, is not such a jurisdictional defect that it cannot be cured by amendment, for if a court has jurisdiction of the subject matter, it may allow an amendment to perfect the jurisdiction on the record.

Advantage can be taken of a misjoinder of counts only by special demurrer.

ON EXCEPTIONS.

Action by real estate broker to recover real estate broker's commission on contract in writing under which plaintiff was given exclusive authority to sell real estate. Defendant's demurrer was overruled by trial court and defendant brings exceptions. Exceptions overruled.

Raymond S. Oakes, for plaintiff.

Clifford E. McGlauflin, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

THAXTER, J. This action by a real estate broker is before us on exceptions to the overruling of the defendant's demurrer. There are four counts based on a contract in writing dated March 20, 1946 under which the plaintiff was given the exclusive authority to sell certain real estate. Under its terms

the defendant agreed to pay a "10% commission on any sale made within —— months from the date hereof and until written termination of this agreement." The plaintiff alleges that he spent money and made a great effort to make a sale. The first count alleges a breach of the agreement in that the defendant sold the property on May 26, 1946 and notified the plaintiff that his agency was terminated. The second count is substantially the same. The third count is the same with an additional allegation that the defendant placed the property in the hands of another broker. In each of these three counts the damages sought are for breach of the contract and are claimed to be $400 or 10% of the selling price of $4,000. The last two counts are substantially the same except that the plaintiff claims to recover a commission of 10% instead of damages for a breach of the agreement.

The defendant demurred and the demurrer was sustained. The plaintiff had omitted to allege, as required by Rev. Stat. 1944, Ch. 75, Sec. 7, that the plaintiff was a duly licensed real estate broker at the time the cause of action arose. The plaintiff, apparently recognizing that such omission made his declarations defective, sought and was given permission to amend. There was no objection to the amendment, but the defendant demurred again and this demurrer was overruled. Exceptions which are now before us were taken to this ruling.

The defendant argues that exactly the same issue was before the presiding justice after the amendment was allowed as before because the amendment was made to the writ and not to the declaration. In other words, he contends that the court cannot read the writ and the declaration together. This seems to be a discarding of substance for form; and, moreover, to sustain such a claim would be contrary to long established practice which treats the writ and declaration as one. *Friend* v. *Pitman,* 92 Me., 121, 42 A., 317.

The defendant also claims, if we understand his argument correctly, that the allegation that the plaintiff was a duly

licensed broker at the time the cause of action arose was a necessary averment to give the court jurisdiction to hear the case, and that being such a necessary averment the failure to allege it could not be cured by amendment. The case of *Gerstian* v. *Tibbetts* (142 Me. —), 49 A., (2d), 227, is cited as authority for such principle. But the defendant gives a broader construction to the language there used than is warranted. Assuming that such allegation does involve the right of the court to consider the case, yet there is no reason why the failure to allege such fact may not be cured by amendment. It may be true that a court without jurisdiction has no authority to allow an amendment. Yet if a court has jurisdiction of the subject matter, it may in such a case as this allow an amendment to perfect the jurisdiction on the record. *Merrill* v. *Curtis*, 57 Me., 152. See *Perry* v. *Plunkett*, 74 Me., 328, 331; 1 Enc. Pl. & Pr., 511; 49 C. J., 505; 41 Am. Jur., 498.

The defendant's contention that there was here no binding contract cannot be sustained. We think that a binding contract was set forth which the defendant did not have the right to terminate except as therein provided. We are not here concerned with its termination by operation of law. Rev. Stat. 1944, Ch. 106, Sec. 12.

The defendant also argues that the demurrer should be sustained because there is a misjoinder of counts. Assuming without deciding that this is so, advantage can be taken of such defect only by a special demurrer and the demurrer here is general. If any one count is good, a general demurrer will be overruled. *Blanchard* v. *Hoxie*, 34 Me., 376; *National Exchange Bank* v. *Abell*, 63 Me., 346. See discussion in *Fernald* v. *Garvin*, 55 Me., 414, 417, as to the right to amend for misjoinder by striking out counts.

The demurrer here was properly overruled.

Exceptions overruled.

MARJORIE M. BUTLER AND JEAN M. WEBB

vs.

HARRY E. DOBBINS, LEGATEE AND EXECUTOR UNDER THE WILL OF ROSE D. MANSUR.

Aroostook. Opinion, May 27, 1947.

Wills.

A will speaks only from the death of the testator.

The primary duty of the court is to discover the testator's intent, which must be found from the language he has used in the will, and which in cases of doubt may be interpreted in the light of conditions existing at the time the will was made.

In the instant case, legacies of 21 shares of stock to each of two legatees were specific, and the legatees were each entitled, not only to seven shares representing a stock dividend declared after execution of will, but also to cash dividends on the 28 shares declared after death of testatrix.

ON APPEAL.

Bill in equity brought by legatees for the construction of the third and fourth paragraphs of the will of Rose D. Mansur. From a decree sustaining the contentions of the plaintiffs, defendant appeals. Appeal dismissed. Decree below affirmed.

Doherty & Roach, for plaintiffs.

Scott Brown,

James C. Madigan, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, FELLOWS, JJ.

THAXTER, J. The plaintiffs brought a bill in equity for the

construction of the third and fourth paragraphs of the will of Rose D. Mansur late of Houlton. From a decree which sustained the bill and the contentions of the plaintiffs with respect to the will, the defendant has appealed. There is no dispute as to the facts.

The plaintiffs were the daughters of Walter P. Mansur, the husband of the testatrix by a former marriage; the defendant, who is the executor and residuary legatee under her will, was her brother. The third and fourth clauses of the will and the tenth clause which disposes of the residue read as follows:

> "*Third*—To Jean Webb, daughter of my late husband, I give and bequeath my diamond engagement ring, and also twenty-one (21) shares of the capital stock held by me in The First National Bank of Houlton."
>
> "*Fourth*—I give and bequeath to Marjorie Butler, daughter of my late husband, twenty-one (21) shares of the capital stock held by me in the First National Bank of Houlton."
>
> "*Tenth*—All the rest, residue and remainder of my estate, real, personal and mixed, wherever found or however situated, now owned or hereafter acquired, I give, bequeath and devise to my brother, Harry E. Dobbins, to have, to hold to him and his heirs and assigns forever."

The will was executed November 29, 1940; and the testatrix died May 3, 1945. When the will was executed, Mrs. Mansur owned sixty-five shares of stock in The First National Bank of Houlton of a par value of $100 and worth approximately $200 per share. On August 11, 1944, nearly four years after the execution of the will and about nine months before the death of the testatrix, the bank declared a stock dividend and the stockholders received one share of stock for each three shares held. The testatrix, without paying any new money, received twenty-one and two-thirds new shares which she held at the time of her death with the sixty-five which she originally had.

The plaintiffs claim that the bequest of the twenty-one shares of stock to each of them was a specific bequest. If so, there would pass to each of them the seven additional shares which would represent the stock dividend on the original twenty-one shares. *Chase Nat. Bank* v. *Deichmiller,* 107 N. J. Eq., 379, 152 A., 697. They each also claim the sum of $280 which amount represents dividends declared after the death of the testatrix on July 11, 1945 and January 2, 1946 on the twenty-eight shares. See *Perry* v. *Leslie,* 124 Me., 93, 95-96, 126 A., 340. Both the stock and such cash dividends belong to them if the bequests made under the third and fourth clauses of the will are specific.

A will speaks only from the death of the testator. The primary duty of the court is to discover a testator's intent. That must be found from the language which he has used in the will, which in cases of doubt may be interpreted in the light of conditions existing at the time the will was made. *Palmer* v. *Estate of Palmer,* 106 Me., 75 A., 130, 19 Ann. Cas., 1184, 25; *Gorham, Adm.* v. *Chadwick et al,* 135 Me., 479, 200 A., 500, 117 A. L. R. 805.

We are satisfied that the intention of the testatrix under the third and fourth clauses of her will was to make a specific bequest of twenty-one shares of stock in the bank to each of her two stepdaughters. She refers to twenty-one shares of stock "held by me." That language refers to the stock which she held at that time. It is apparent that by the third and fourth clauses and the residuary clause she intended to dispose of her entire interest in The First National Bank of Houlton and made provisions which would divide it as nearly equally as was feasible between her two stepdaughters and her brother. In this respect this case is akin to *Gorham* v. *Chadwick,* supra, and is distinguishable from *Palmer* v. *Estate of Palmer,* supra; *Spinney* v. *Eaton,* 111 Me., 1, 87 A., 378, 46 L. R. A. (N. S.), 535; *Perry* v. *Leslie,* supra; and *Maxim* v. *Maxim,* 129 Me., 349, 152 A., 268, 73 L. R. A., 1244.

She was concerned with twenty-one shares only in so far as

they represented one third, or approximately that, of her interest in the bank; and to sustain the defendant's contention would result in the two stepdaughters receiving less than she intended them to have. Action taken by the bank in reorganizing its capital structure should not result in defeating the purpose of the testatrix.

This doctrine is in accord with that laid down in *Gorham* v. *Chadwick,* supra. It is true that in that case the testatrix intended to give to her legatee all of her stock in the bank. But what difference does it make that she intended to give it all to one person or all to three persons in approximately equal shares? The *Gorham* case, supra, therefore, in holding that the legacy was specific and that new stock substituted for the old would pass to the legatee supports the contention of these plaintiffs. If the intention of the testatrix is clear, it would seem to make no difference whether the substitution of new stock for the old took place before or after death; and the ruling of the New Jersey court in the case of *Chase Nat. Bank* v. *Deichmiller,* supra, cited with approval in the *Gorham* case, supra, so indicates.

That was a case involving a stock dividend declared before the testator's death but after his will was made. There was a bequest of eight hundred shares of stock in the F. W. Woolworth Co. At the time of the testator's death these eight hundred shares by reason of a fifty per cent stock dividend and a two and a half for one split up had increased to three thousand shares. It was held that the legacy, even though not of all the stock of the testator in the Woolworth Company, was specific and that the entire three thousand shares passed under the clause of the will which bequeathed eight hundred shares. The court said, page 382:

> "Obviously the thing which testator intended to give was not the mere paper certificates for eight hundred shares of stock, but the interest in the company which those shares represented."

The legacies with which we are here concerned were specific and the ruling of the sitting justice was correct in holding that the plaintiffs were each entitled, not only to the seven shares representing the stock dividend, but to the cash dividends paid after the death of the testatrix on the twenty-eight shares.

Appeal dismissed.
Decree below affirmed.

G. LESLIE MILLIKEN

vs.

SACO AND BIDDEFORD SAVINGS INSTITUTE

York. June 6, 1947.

Cloud on Title.

Proceedings to remove a cloud on title may be brought by action at law under provisions of R. S. 1944, Chap. 158, Sec. 48, or in equity under the provisions of R. S. 1944, Chap. 158, Sec. 52.

Proceedings to remove cloud on title brought by bill in equity but seeking remedy at law are not properly brought.

Proceedings to remove cloud on title involving the validity of a mortgage are not properly brought at law.

ON APPEAL.

Bill in equity brought to remove a cloud on title brought by plaintiff who claims to be a remainderman of property mortgaged by his deceased mother during her lifetime. The sitting justice ruled that plaintiff's mother took a fee and not a life estate, and that the mortgage given by her was valid. The bill was

dismissed and plaintiff appealed. Appeal sustained. Case remanded for the entry of a decree dismissing bill without prejudice for want of jurisdiction.

Lausier & Donahue, for plaintiff.

Hutchinson, Pierce, Atwood and Scribner, for defendant.

SITTING: STURGIS, C.J., THAXTER, MURCHIE, FELLOWS, JJ., MANSER, ACTIVE RETIRED JUSTICE.

THAXTER, J. This is a bill in equity which purports to have been brought under the provisions of R. S. 1944, Chap. 158, Sec. 52, to remove a cloud on the title to certain real estate. The property was mortgaged November 18, 1931, to the defendant by Annie L. Milliken who claimed as devisee under the will of Clara E. McKenney. Annie L. Milliken died in 1940. The plaintiff is her son. He claims that his mother took but a life estate in the property and that the mortgage deed given by her to the defendant constitutes a cloud on his title as remainderman. The sitting justice ruled that under the will of Clara E. McKenney, Mrs. Milliken took a fee and not a life estate and that the mortgage given by Mrs. Milliken was valid. He accordingly dismissed the bill. The plaintiff has appealed.

Proceedings to remove a cloud on title are customarily brought under one of two statutory provisions. Under R. S. 1944, Chap. 158, Sec. 48, an action may be brought at law in the Superior Court. If the plaintiff brings himself within the statutory requirements, the defendant may be ordered to show cause why he should not bring an action to try his title. Under the provisions of Chap. 158, Sec. 52, a suit may be brought in equity. This is an action in rem against the land, and under the provisions of Sec. 54 a decree sustaining the bill operates directly on the land and has the effect of a release made by or on behalf of the defendant of all claims inconsistent with the title established or declared by the decree.

The action in the instant case is neither one nor the other of these authorized by statute. It is brought as a bill in equity but the remedy sought is that provided by the statute authorizing a proceeding at law. The case of *Hoadley* v. *Wheelwright,* 130 Me., 395, is a direct authority that equity has no jurisdiction to hear such a case as this. Nor could the action be brought at law under the provisions of Sec. 48; for the case of *Poor* v. *Lord,* 84 Me., 98, holds that the provisions of the original statute on which the present law is based, then embodied in R. S. 1883, Chap. 104, Sec. 47, were not intended to apply to the claims of mortgagees or their assignees. As is said in that case, if the mortgage is invalid and hangs as a cloud on title, equity has power to remove the cloud.

As there was here under the doctrine of *Hoadley* v. *Wheelwright,* supra, no jurisdiction on the face of the bill, this case should not have been heard on the merits. We must sustain the appeal in order that the case may be remanded to the Superior Court for the entry of a decree dismissing the bill for want of jurisdiction. Such decree should be without prejudice to the plaintiff's right to bring an appropriate bill in equity.

Appeal sustained.
Case remanded for the entry of a decree dismissing the bill without prejudice for want of jurisdiction.

LILLIAN LEVESQUE

vs.

FRED G. NANNY, D.B.A.
BEVERLY BEAUTY SALON

Cumberland. June 16, 1947.

Bailment.

In action against bailee plaintiff must prove actual or constructive delivery of personalty to the bailee, and acceptance by bailee, for a particular purpose, upon an express or implied contract.

A bailee is not an insurer of property, and before liability exists against him, a demand must be made for the property, and negligence of the bailee must be shown.

ON EXCEPTIONS.

Action against defendant for negligence in loss or personal property. Case was heard on agreed statement of facts and judgment was entered for defendant. Plaintiff filed exceptions. Exceptions overruled.

Elton H. Thompson,

Walter F. Murrell, for plaintiff.

Walter M. Tapley, for defendant.

SITTING: STURGIS, C.J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

FELLOWS, J. In this action the bill of exceptions says "this was an action in a plea of the case for damages against said defendant for negligence in the loss of a coat and a gold pin, which

was lost or stolen from a row of clothes hooks on the wall and where she had hung her coat while having her hair treated by said defendant. The case was tried in the Municipal Court upon an agreed statement of facts and briefs of law, and after judgment for defendant was appealed to the Superior Court, and there heard on the same statement of facts and briefs of law. Judgment for the defendant was rendered by said Superior Court." The case now comes to the Law Court from Cumberland County, on exceptions to the ruling of the Superior Court, with the same agreed statement of facts as a part of the bill.

This is the statement which was agreed to:

> "That, to wit, on June 9, 1945, said plaintiff, in accordance with an appointment or contract previously made with defendant, entered said defendant's place of business for the purpose of having her hair treated. There being a row of clothes hooks on the wall with other clothing hanging thereon, she removed her coat, on which was attached a costume pin, and hung it on said rack. She proceeded to a chair selected for her by an operator and had her hair attended to, said process taking the usual period. When treatment was through, she went to the rack for her coat, which was not there, and after diligent search could not be located.
>
> That said coat was a navy blue wool coat purchased of J. W. Palmer Co., on May 10, 1945, at a cost of Sixty-nine dollars and ninety-five cents, $69.95.
>
> That said coat had been worn twice prior to said date alleged in this action.
>
> That the costume pin attached to said coat was purchased at approximately the same time as said coat at a cost of Fifteen ($15.00) Dollars."

Under the plaintiff's declaration and the above agreed facts, the decision of this case depends upon the law relating to bailment of personal property. It is necessary that there should be

proof of actual or constructive delivery of the personalty to the bailee, and acceptance by him for a particular purpose, and upon an express or implied contract. *Frost* v. *Motor Co.*, 138 Me., 274, 277; 6 Am. Jur. "Bailments," Pars. 61-69; 6 C. J. "Bailments," 1084, 1103.

"The court cannot assume nor infer a fact not agreed upon by the parties." *Trafton* v. *Hill*, 80 Me., 503, 509. It does not appear in this case where the clothes hooks were, or that the coat was so located as to be considered in defendant's care or control rather than under the plaintiff's care. It does not appear that defendant or any agent or employee of defendant, at the time, saw or should know that plaintiff had a coat, or removed a coat, or saw or should know what she did with it. In fact circumstances are not stated to clearly show actual or constructive transfer of custody and control of the coat from the plaintiff to the defendant. "There being a row of clothes hooks on the wall with other clothing hanging thereon, she removed her coat, on which was attached a costume pin, and hung it on said rack," are the agreed facts.

However, if we should assume, without deciding, that there was delivery and acceptance, and that the coat was in the temporary control and under the exclusive care of defendant, there was no demand made by the plaintiff and no evidence of the defendant's negligence. "When her treatment was through, she went to the rack for her coat, which was not there, and after diligent search could not be located." A bailee is not an insurer. A demand must be made, and, negligence of the bailee must appear. *Sanford* v. *Kimball*, 106 Me., 355, 357; *Mills* v. *Gilbreth*, 47 Me., 320; *Bank* v. *Jackson*, 67 Me., 570; *Walters* v. *Garage Inc.*, 131 Me., 222.

Liability of a bailee does not necessarily follow because there is a loss and no explanation for the loss. There must be evidence of negligence. *Sanford* v. *Kimball*, 106 Me., 355; 6 Am. Jur. "Bailments," 326, 333, Pars. 242, 248.

The agreed facts do not show that the plaintiff is entitled to recover.

Exceptions overruled.

RUBY R. MCMULLEN

vs.

JESSEN A. CORKUM, AND TRUSTEES

Kennebec. June 16, 1947.

Referees.

Where no exceptions are reserved and where there is no fraud, prejudice or mistake on the part of a referee, the referee's findings are conclusive.

A "mistake" such as will authorize relief against a referee's report, does not mean an error of judgment either upon facts or law, but rather some unintentional error such as a mathematical computation.

A plea of general issue denies every material allegation in the declaration. Such a plea is distinct and separate from special matters of defense contained in a brief statement.

In the instant case the defendant in his brief statement of defense admitted that he said in substance certain words, and whether the admitted words constituted slander depended on proof of circumstances before the statement, and if slanderous, whether or not they concerned the plaintiff. What meaning the words did convey was a question of fact for the referees.

Where there is nothing in the case to show that the result stated by the referees is not the result intended, and nothing to show that the result does not express the judgment of the referees as to all matters in issue, there is no apparent mistake or unintentional error to authorize or require a correction.

ON EXCEPTIONS.

Action of slander heard by three referees without reservation of questions of law. Defendant pleaded this general issue with

brief statement. The referees found for the defendant, and plaintiff objected to the acceptance of the report, claiming error on the part of the referees. Upon acceptance of the report, the plaintiff filed exceptions. Exceptions overruled.

McLean, Southard & Hunt, for plaintiff.

Goodspeed & Goodspeed,

Arthur F. Tiffen, for defendant.

SITTING: STURGIS, C.J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ., MANSER, ACTIVE RETIRED JUSTICE.

FELLOWS, J. This is an action of slander brought by Ruby R. McMullen against Jessen A. Corkum and refereed to three referees. The referees filed a report that "judgment should be for the defendant." The report was accepted by the Superior Court for Kennebec County over the written objections of the plaintiff. The case is now before the Law Court on exceptions by the plaintiff to the acceptance of the report. The plaintiff claims a mistake on the part of the referees.

The record shows that the alleged slanders are set forth in a writ containing twelve counts, with requested specifications filed by the plaintiff. The plea is the general issue with brief statement containing claims of privilege, and offers to prove truth as justification.

The case was first tried before a jury, and at the conclusion of the evidence the presiding justice stated that in view of intricate legal questions involved, it would be wise if the case were referred to referees who were learned in the law, and suggested that the parties agree to a reference to three justices of the Supreme Judicial and Superior Courts. The defendant agreed. The plaintiff consented to a reference, provided the presiding trial justice who had heard the evidence would act as one of the referees, and it was finally "stipulated and agreed by and between counsel that

transcript of the testimony will be written up and the case then will be referred to Justices Chapman, Fisher and Sewall . . . the findings of said justices will be final as to all matters of fact and law."

The declaration and pleadings are long and complicated, but the questions here arise under the fifth count. This fifth count is in the usual form alleging the good character of the plaintiff, Ruby McMullen, and alleging that on the defendant's complaint a search warrant was issued to search the plaintiff's dwelling for goods which the defendant Corkum claimed had been feloniously carried away from his store. The count further stated that while search was being made the alleged slanderous words were spoken.

There are two exceptions, and both involve the same alleged "oversight or accidental error," and both refer to the fifth count in the declaration. The plaintiff's objections to the allowance of the report, under Superior Court Rule Twenty-one, 129 Me., 511, and made a part of the bill of exceptions, are as follows:

> "The plaintiff's fifth count (eliminating the formal parts) sets forth the following slanderous statement with innuendoes:
> 'The Internal Revenue Department is checking up and someone is going to jail and it won't be me,' (meaning that the Internal Revenue Department was checking or would check the income tax returns of the Accessory Shop (a partnership consisting of the said Jessen A. Corkum and Beatrice Wehrwein) in which the plaintiff was employed as a clerk, and that this check would show a want of profits that could be accounted for only by misconduct on his part or theft or embezzlement on the part of the plaintiff, and that there had been no misconduct on his part, and that therefore the plaintiff had stolen or embezzled money or other property of the said Accessory Shop, and hence would have to go to jail because of her thefts) was spoken in substance on several different occasions and under different circumstances

on or within a few days of the seventh day of August, 1945, at said Gardiner, to the plaintiff and to plaintiff's husband, William McMullen, in the presence, at some one of their several utterances, of one or more of the following: the plaintiff, Mr. William McMullen, Arthur G. Robinson, Mrs. Helen Robertson, Philip Maxcy, Mildred I. Corkum, and a detective employed by the defendant, whose name is unknown to the plaintiff, to any one of whom the above or a substantially similar statement may have been directed.

To this count the defendant pleaded: With reference to the fifth count, the defendant admits that he said in substance that someone was going to jail and it would not be he, but he denies that he said 'The Internal Revenue Department is checking up.'

On direct examination by his own counsel, the defendant testified as to this fifth count:

Q. Did you make any statement such as this: 'The Internal Revenue is checking up and some one is going to jail and it won't be me.' Did you make that statement?
A. No, sir.
Q. What did you say?
A. I said the Internal Revenue might check up sometime and I didn't feel I ought to go to jail if I was not at fault.
Q. Did you say 'Someone is going to jail and it won't be me'?
A. Not at one sentence. I think I put the whole thing together.
Q. What is the whole thing?
A. I said 'If the Internal Revenue ever checked up on me somebody may have to go to jail.'

The foregoing (without the quoted evidence) constituted an admission of slander on the face of the record, which admission was confirmed by the plaintiff's evidence and further admission above quoted.

The pleadings (supplemented by the above quoted evidence) admitted the slander charged in the fifth count and some consequential damages for the plaintiff followed as a matter of law.

The Referees found 'that judgment should be for the defendant.'

The foregoing reveals a clear error on the part of the Referees."

According to the above quotation from plaintiff's bill of exceptions the plaintiff contends that the referees were compelled to find for the plaintiff, and that the finding for the defendant was necessarily the result of a mistake. The only difference between the first and second exception is that the pleadings only are considered in the first exception, while the above testimony of the defendant concerning the Internal Revenue is in the second exception. As the plaintiff says in the bill of exceptions,

"This pleading was an admission of the slander on the face of the records, did not require of the Referees any exercise of judgment, and obligated the Referees to make a finding on this count for the plaintiff, but the Referees, as a result of error due to oversight or accident and notwithstanding defendant's admissions, made a finding for the defendant."

Rule of Court 42, 129 Me., 519, provides that "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 especially reserved and so entered on the docket." No exceptions were here reserved and no right to except docketed. It has been long recognized in this State, that where no exceptions are reserved, and where there is no fraud, prejudice, or mistake on the part of the referee, the findings are conclusive. A "mistake," such as will authorize relief, "does not mean an error in judgment either upon facts or law, but some unintentional error as for instance in a mathematical computation." The word "mistake" is used "in

much the same connection" in statutes authorizing reviews. *Perry* v. *Ames,* 112 Me., 202, 203; *Pickering* v. *Cassidy,* 93 Me., 139; *Hagar* v. *Insurance Co.,* 63 Me., 502, 504; *Staples* v. *Littlefield,* 132 Me., 91; *Courtenay* v. *Gagne,* 141 Me., 302; *Lewiston* v. *Historical Society,* 133 Me., 77. Was there a "mistake" here? The mistake claimed, as stated in plaintiff's brief, is in "overlooking an express admission in the pleadings fixing liability and resulting damages . . . the admission, of course, included the innuendoes."

The plaintiff in argument says that when the defendant admitted in his brief statement that he had said in substance someone is going to jail and it won't be me, and "the Internal Revenue Department is checking up," it necessarily follows that the defendant, by this admission, also admitted the innuendoes claimed by the plaintiff in her declaration. The plaintiff in effect says, and so argues, that when the defendant admitted he had said certain words, alleged by the plaintiff as slanderous, this admission carried with it any and all the allegations and meanings that the plaintiff assigned to them, such as: the Revenue Department was checking the Accessory Shop; that the Accessory Shop was a partnership consisting of the defendant and one Wehrwein; that the plaintiff was a clerk there; that the checkup would show want of profits; and that any losses were due to misconduct; that therefore the plaintiff had stolen or embezzled money or other property; and that the words "someone is going to jail" were slanderous, charged a theft, and referred to plaintiff, and not to some other clerk or other person. The plaintiff further argues that the defendant's admission, that he said in substance that someone was going to jail and it would not be he, has the effect of a demurrer and is an admission of all other well-pleaded facts, and is an admission of all claimed meanings, and cites 33 Am. Jur., Sec. 251, page 233, which authority states that "a demurrer to a complaint admits all facts well pleaded." There is no demurrer, however, in this record and the docket record shows that none was ever filed.

The questions in issue here relate to the legal effect of an alleged admission that the defendant made in a brief statement, and whether the referees, in view of that admission, were bound to find for the plaintiff under this fifth count.

A declaration for slander ordinarily contains, as here, (1) the *inducement,* or statement of the alleged matter out of which the charge arose (2) the *colloquium,* or averment that the words were used concerning the plaintiff (3) and the *innuendo,* or meaning placed by the plaintiff upon the language of the defendant. 2 Greenleaf Ev. (4th Ed.) "Libel and Slander," 405; Starkie on Slander "Averments," 262; 37 C. J. "Libel and Slander," 22, Par. 328; *Patterson* v. *Wilkinson,* 55 Me., 42; *Bradburg* v. *Segal,* 121 Me., 146; *Brown* v. *Rouillard,* 117 Me., 55. The pleadings, under our practice, may in all cases be the general issue with a brief statement of special matter of defense. "The plaintiff must join a general issue." R. S. 1944, Chap. 100, Sec. 36.

A general denial is called the *general issue* because "the issue that it tenders involves the whole declaration." Stephen on Pleading (5th Ed.), 155; 2 Bouvier Law Dictionary (3d Revision), 1347. "The general issue is the plea which challenges the merits of the plaintiff's declaration." *Craven* v. *Turner,* 82 Me., 383, 388.

By his plea of the general issue the defendant here denied every material allegation in the declaration. *Improvement Co.* v. *Brown,* 77 Me., 40; Newell on Slander and Libel (3d Ed.), 788, Sec. 781 citing 2 Greenleaf Evid. (15th Ed.), 410. Taken in connection with the defendant's brief statement, every allegation was denied by the general issue except as the brief statement might be evidence of an admission of some particular fact or facts. The pleas are distinct and separate. Special matters of defense are confined to what is contained in the brief statement. *Trask* v. *Patterson,* 29 Me., 499, 501; *Washburn* v. *Moseley,* 22 Me., 160; *Taylor* v. *Robinson,* 29 Me., 323; *Nye* v. *Spencer,* 41 Me., 272; *Moore* v. *Knowles,* 65 Me., 493; *Corthell* v. *Holmes,* 87

Me., 24; *Gilman* v. *Carriage Co.*, 125 Me., 108, 113; *Advertising Co.* v. *Flagg*, 128 Me., 433, 435.

The testimony taken in this case is not before us. The writ, declaration, and specifications of the plaintiff, pleadings of the defendant, the agreement of reference, findings of referees, and plaintiff's objections are the only matters made parts of the exceptions. The Court is therefore not permitted to conjecture on what evidence may have been offered upon the one side or upon the other. It is limited to what is contained in the bill of exceptions. *Bates* v. *Cigar Co.*, 137 Me., 51; Bronson Aplt., 136 Me., 401; *Byrne* v. *Byrne*, 135 Me., 330. The findings state no facts, and are simply "that judgment should be for the defendant."

The plaintiff alleged that the defendant said "'The Internal Revenue Department is checking up and someone is going to jail and it won't be me." The defendant pleaded the general issue, and in his brief statement "admits that he said in substance that someone was going to jail, and it would not be he." The defendant did not admit anything except that he said in substance certain words. He did not name any individual. It was a general statement that might refer to one or several persons. These words may or may not be slanderous, depending on proof of circumstances before the statement; and if slanderous, they may or may not be of or concerning the plaintiff, depending on the proof of other facts. Our Court has said:

> "Whether or not the language set out will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. What meaning the words did convey to one hearing him is in such a case a question of fact for the jury." *Bradburg* v. *Segal*, 121 Me., 146, 148.

The record before us does not sustain the contentions of the plaintiff. The referees were authorized by the parties to act as court and jury, and they had the right and duty to determine,

under the terms of reference, both law and fact. This they have done by their finding for the defendant. The docket shows no exceptions reserved. There is nothing to show that the result stated is not the result intended; and nothing to show that the result does not express the careful and considered judgment of the referees as to all matters in issue. There is no "apparent mistake or unintentional error," to authorize or require a correction. *Hagar* v. *Insurance Co.*, 63 Me., 502; *Kennebec Housing* v. *Barton*, 122 Me., 374; *Kliman* v. *Dubuc*, 134 Me., 112.

Exceptions overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

LORRAINE LABRIE, PRO AMI *vs.* MAURICE LORD.

HENRY LABRIE *vs.* MAURICE LORD.

Kennebec. Opinion, January 11, 1946.

Automobiles. Negligence. Jury Verdict.

Motions for new trials must be considered in recognition of the fact that controlling questions of fact were decided by those who heard the evidence and had opportunity to observe witnesses on the stand.

ON MOTIONS FOR NEW TRIALS.

Action to recover for injuries sustained by plaintiff Lorraine LaBrie, a minor, when struck by defendant's motor vehicle; and action by her father to recover for his financial loss due to his daughter's injury and for loss of her services. The evidence was conflicting. The jury found for the defendant in each case. Plaintiffs moved for new trials. Motions overruled. The case fully appears in the opinion.

Jerome G. Daviau, for the plaintiffs.

Locke, Campbell & Reid, for the defendant.

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

PER CURIAM.

The plaintiff Lorraine LaBrie, a minor eleven years of age at the time, suffered injuries when run down while crossing a public highway by a motor vehicle owned and operated by the defendant. She sues by her father and next friend to recover for her personal injuries. The plaintiff Henry LaBrie, the father, seeks to recover for his financial loss traceable to the damage suffered by his daughter and the loss of her services.

The cases were tried together and a jury verdict returned for the defendant in each. They are brought forward on general motions for new trial containing the usual allegations.

The evidence viewed as a whole discloses considerable conflict of testimony as to the speed at which the defendant's truck was traveling when the injured child emerged from behind a parked ice truck which the defendant was about to pass, and the length of the marks made upon the surface of the highway by his tires when his brakes were sharply applied upon seeing her. To a lesser extent there is conflict as to the exact spot where the child was located at impact, the point at which she was later picked up, the distance she had traversed after coming within the range of defendant's vision, the rapidity of her progress across that short space, and whether she was still in motion, or stationary, when struck. All present typical questions of fact for jury determination and the motions must be considered in recognition that the controlling ones were decided favorably to the defendant by those who heard the evidence and had opportunity to observe the witnesses on the stand.

It is asserted on behalf of the plaintiffs that defendant's testimony is inherently incredible. This claim is grounded solely in the fact that at the lowest estimate of his speed when he first saw the child (25 miles per hour) the time interval before impact was

insufficient for her to do all the things he testified he saw her do, i.e., dance, run, walk and stop. In support of the contention we are cited to *Brisson* v. *Glen Falls Insurance Co.*, 119 Me., 355, 111 A., 417. Other descisions of this Court on the point are found in *Blumenthal* v. *Boston & Maine Railroad*, 97 Me., 255, 54 A., 747, and *Rovinsky* v. *Northern Assurance Co.*, 100 Me., 112, 60 A., 1025.

The *Blumenthal* case, arose on exceptions to a nonsuit which were overruled because the only testimony which could have supported a verdict for the plaintiff was characterized as "inherently impossible." The *Rovinsky* case, like the *Brisson*, presented a motion for new trial following a jury verdict for the plaintiff and a new trial was granted on the ground that the only testimony which could support it on an essential point was "unreasonable and incredible." The characterization used in the *Brisson* case, was that controlling testimony was "incredible." These cases all disclose bases for disregarding testimony which is much more tangible than that relied upon in the present instance.

In one of its most pertinent aspects the evidence of the defendant was corroborated by the police officer who reached the scene within minutes after the accident. This related to the issue of defendant's alleged negligence but whether the verdict was grounded in factual finding that such negligence was not established by a preponderance of the evidence or that the plaintiff Lorraine LaBrie did not use that degree of care to be reasonably expected of a child of her age, there is no justification in the record for this Court to disturb it. On whichever ground the jury action was based the case of Henry LaBrie must fail with that of his daughter. Identical mandates in the two cases must be

Motion overruled.

CHARLES HASHEY

vs.

BANGOR ROOFING & SHEET METAL CO.

JOHN G. HASHEY
BY CHARLES HASHEY HIS FATHER AND NEXT FRIEND

vs.

SAME.

Penobscot. Opinion, January 27, 1947.

PER CURIAM.

These two cases, involving a single alleged act of negligence of the defendant, present identical docket records and bills of exceptions and are intended to raise the same issue. They are brought to this court by the defendant on exceptions alleging error in the allowance of amendments to declarations adjudged bad on demurrer. Written objections to allowance of the amendments, and to the motions presenting them, allege among other things that the amendments are "demurrable" and that if allowed the amended declarations "will still be demurrable." These allegations are not determinable (in the Law Court) at the present stage of the proceedings (see cases cited infra), although controlling of the propriety of the allowance of the amendments. *Garmong* v. *Henderson,* 112 Me., 383, 92 A., 322; *Gray* v. *Chase,* 115 Me., 350, 98 A., 940. The issue might have been raised for immediate consideration by the filing of demurrers to the amended declarations. *Bean* v. *Ayers et al.,* 67 Me., 482.

The docket entries and the bills of exceptions record that defendant's demurrers were sustained; that plaintiffs were given leave to amend; that amended declarations and written objections thereto, and to the motions presenting them, were filed and overruled; that the amendments were allowed and exceptions taken and certified. The justice who presided at the term of the Superior Court during the proceedings resigned prior to the filing of the extended bills of exceptions, which were allowed by another justice pursuant to R. S. 1944, Chap. 95, Sec. 51.

The exceptions must be dismissed as prematurely brought forward. The mandate of the statute is clear that allegations of error as to the disposal of pleadings of a dilatory nature are not determinable in this court until after the close of the trials to which they relate. R. S. 1944, Chap. 94, Sec. 19; *Day* v. *Chandler et al.*, 65 Me., 366; *Cameron* v. *Tyler*, 71 Me., 27; *Smith* v. *Hunt*, 91 Me., 572, 40 A., 698; *Copeland* v. *Hewett et al.*, 93 Me., 554, 45 A., 824; *Gilbert* v. *Dodge*, 130 Me., 417, 156 A., 891; *Augusta Trust Co.* v. *Glidden et al.*, 133 Me., 241, 175 A., 912. It has been indicated heretofore that the test determining whether a ruling on a pleading may be brought to this court immediately or should await the close of the trial, i. e. whether the pleading is dilatory in nature, hinges on the issue whether it is "adverse to the proceeding." *Hurley* v. *Inhabitants of South Thomaston*, 101 Me., 538, 64 A., 1050; *Augusta Trust Co.* v. *Glidden et al*, (133 Me., 241, 175 A., 912).

Exceptions dismissed from the law docket.

John H. Needham, for plaintiff.
James M. Gillin, for defendant.

STATE OF MAINE

vs.

BERTRAND F. JALBERT

Androscoggin. Opinion June 3, 1947.

PER CURIAM.

Complaint for operating a motor vehicle while under the influence of intoxicating liquor. R. S. 1944, Chap. 19, Sec. 121. Motion for a directed verdict for respondent denied and exception reserved. Verdict guilty.

The record shows that officers, called to investigate a disturbance in a driveway in the rear of the Mechanics Savings Bank Building in Auburn, found an automobile with the lights on and engine running, the respondent in the driver's seat and two companions standing alongside. As the officers approached, the automobile moved forward toward them a short distance but stopped and the respondent, being badly intoxicated, was ordered out of his seat and then driven to police headquarters.

Although the officers did not see just how the automobile was set in motion, the inference is that this resulted from the respondent's manipulation of the gear lever or brakes. It cannot be reasonably accounted for by motor vibration or a slight depression in front of the automobile. The facts and circumstances in evidence could not leave any reasonable doubt in the minds of the jury of the respondent's guilt. The refusal to direct a verdict was not error.

Exception overruled.
Judgment for the State.

A. F. Martin, County Attorney for Androscoggin County, State of Maine.

Thomas E. Delahanty, Assistant County Attorney for Androscoggin County, State of Maine.

Edward J. Beauchamps, for respondent.

SITTING: STURGIS, C.J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 21, 1947, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

IN SENATE, March 21, 1947.

Whereas, there is now pending before the Senate of the 93rd Legislature of the State of Maine:

Bill "An Act to Provide for Issuance of State Highway Bonds" (S.P. 467) (L.D. 1309), a Legislative Document copy of which is hereby enclosed and made a part hereof; and

Whereas, such Bill, if enacted, would authorize the Treasurer of State under the direction of the Governor and Council to issue bonds from time to time during the biennium ending June 30, 1949 in an amount not exceeding $3,358,000 for the purpose of raising funds to match federal aid funds for the construction of state highways and bridges, and

Whereas, the authority for the issuance of these bonds, it is stated in the bill, is Article LVIII of the Constitution. This article was adopted October 8, 1935.

Grave doubt has arisen as to the meaning of Article LVIII in view of the previous amendments to Section 17 of Article IX and the outstanding bonded indebtedness issued under the previous articles, the facts concerning which will hereafter appear.

This Article, namely LVIII, refers only to "Section 17 of Article IX, as amended by Article LII," and begins as follows:

> "Section 17 of Article IX of the constitution, as amended by Article LII of the constitution is hereby further amended by striking out all of said section and inserting in place thereof the following, so that said section, as amended, shall read as follows: "

No further reference is made to the articles previous to LII amending Section 17 of Article IX.

Article LII was adopted October 25, 1929. This article authorized issuance of bonds "not exceeding in the aggregate $31,000,000 in amount at any one time." The proceeds of bonds issued during and after the year 1929, to the extent of $15,000,000, were to be devoted solely to the purposes therein enumerated. The sentence before the last was as follows:

> "Said bonds when paid at maturity or otherwise retired shall not be reissued."

The highest point of outstanding bonded indebtedness for highways and bridges under the various amendments of Section 17 of Article IX was reached in 1933 and amounted to $29,951,500. In 1935, when Article LVIII was adopted, it was $28,308,500.

During the years beginning September 25, 1936, and ending July 1, 1941, there were issued bonds in the amount of $5,000,000. This, it is to be noted, was issued subsequent to the adoption of Article LVIII, which increased the maximum bonded indebtedness from $31,000,000 (Article LII) to $36,000,000. (Article LVIII)

In 1929, when Article LII was adopted, increasing the maximum bonded indebtedness to $31,000,000, the maximum under the previous article (Article XLIX) was $16,000,000. The bonded outstanding indebtedness in 1928 was $15,918,500.

In 1925, when Article XLIX was adopted, authorizing the maximum issuance of bonds not exceeding $16,000,000 and

amending Section 17, as further amended by Article XLIII (maximum $10,000,000) the bonded indebtedness outstanding was $9,662,500.

This Article (XLIX) provided that:

> "... bonds issued during or after the year nineteen hundred twenty-five ... when paid at maturity, or otherwise retired, shall not be reissued; ..."

This brief recital would tend to indicate a successive progression of advancing or increasing the bonded indebtedness from the immediately preceding maximum, when the outstanding bonded indebtedness had reached near the peak of the prescribed limit.

Article LVIII provides in the second sentence of the second paragraph:

> "Said bonds, when paid at maturity or otherwise retired, shall not be reissued."

The Senate is uncertain as to whether this refers to the $5,000,000 in bonds to be issued under the preceding sentence, or to the maximum of $36,000,000, and whether in this maximum amount all bonds previously issued under the former articles are included, which, under the former articles (beginning with Article XLIX) were not to be reissued after the same were paid or retired.

The question also arises whether Article LVIII is an amendment to Section 17, of Article IX as amended by Articles XXXV, XLIII, XLIX, and LII, or whether it repeals Section 17 of Article IX and all said later amendments.

The outstanding bonded indebtedness issued under the constitutional provisions above recited, on June 30, 1946, was $15,438,500, and

Whereas, the Senate is in doubt as to its authority to authorize the issuance of bonds in accordance with the bill now pending before it, and

Whereas, if the bill is enacted, the legality of the debt thereby attempted to be created may be brought into question, thus affecting the marketability of the bonds, and

Whereas funds that may be available to it from the Federal Government may be withheld because of the State's inability to market these bonds to produce the matching funds, and

Whereas, the questions of law hereafter stated are important and the occasion a solemn one, now therefore be it

ORDERED, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the Senate, according to the provisions of the Constitution in this behalf, their opinion on the following questions, to wit:

QUESTION I

Can the legislature under Article LVIII authorize the issuance of bonds for building state highways, intrastate, interstate and international bridges in an amount not exceeding in the aggregate $36,000,000 at any one time, first deducting from said amount the outstanding bonded indebtedness heretofore issued under said article and the former articles, amounting, as of June 30, 1946, to $15,438,500, for any or all of the aforesaid purposes?

QUESTION II

If the prohibition against reissuance of bonds retired or paid at maturity applies to the $5,000,000 to be used solely for the construction of state highways theretofore or thereafter designated, may the legislature authorize the issuance of bonds for any or all of the purposes set forth in Question I in an amount not exceeding $31,000,000, first deducting from said amount the outstanding bonded indebtedness heretofore issued under said Article and former Articles, amounting as of June 30, 1946, to $15,438,500?

QUESTION III

Would the bill now pending before the Senate, S. P. 467, L. D. 1309, hereto attached, if enacted by the legislature, be a proper exercise of the power under Article LVIII?

QUESTION IV

Would the bonds issued in accordance with said legislation, if enacted, be a legal and valid obligation of the State under said Article LVIII?

QUESTION V

May the legislature, under Article LVIII, authorize the issuance of bonds within the prescribed limitations as to amount, to match federal aid funds for the construction of state highways and bridges?

In Senate Chamber
March 21, 1947
Read and Passed.

CHESTER T. WINSLOW
Secretary

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FORTY-SEVEN

S. P. 467 — L. D. 1309 as amended.

AN ACT to Provide for Issuance of State Highway Bonds.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MAINE, AS FOLLOWS:

Sec. 1. Treasurer of state to issue bonds. Under the authority of Article LVIII of the Constitution the treasurer of state is hereby authorized under the direction of the governor and council to issue bonds from time to time during the biennium ending June 30, 1949, the said bonds not to exceed the amount of $3,358,000, for the purpose of raising funds to match federal aid funds for the construction of state highways and bridges.

Sec. 2. Bonds, conditions of. The bonds issued under the pro-

visions of section 1 hereof shall be payable at the state treasury within 15 years from the date of issue at a rate of interest not exceeding 2½% per year, interest payable semiannually, and shall bear the facsimile of the signature of the governor and shall be signed by the treasurer of state, and attested by the state auditor, with the seal of the state affixed. Such bonds shall contain such callable features as the governor and council shall determine. None of these bonds shall mature before 1952. The coupons attached to said bonds shall bear the facsimile of the signature of the treasurer of state; and such bonds and coupons shall be of such denominations and form and upon such terms and conditions not inconsistent herewith as the governor and council shall direct. Said bonds, together with the proceeds thereof, shall be designated as highway and bridge bonds, and shall be deemed a pledge of the faith and credit of the state.

Sec. 3. Records of bonds. The state auditor shall keep an account of such bonds, showing the number and amount of each, the date of countersigning, the date when payable and the date of delivery thereof to the treasurer of state, who shall keep an account of each bond, showing the number thereof, the name of the person to whom sold, the amount received for the same, the date of sale and the date when payable.

Sec. 4. Proceeds of bonds, how used. The treasurer of state may negotiate the sale of such bonds by direction of the governor and council, but no such bond shall be loaned, pledged or hypothecated in behalf of the state. The proceeds of such sales shall be held by the treasurer of state and paid by him upon warrants drawn by the governor and council, and shall be expended for the purposes set forth in section 1 hereof, and the amounts of such proceeds are hereby appropriated for that purpose. No portion of the said proceeds not expended within the period for which they were appropriated shall lapse, but shall be carried forward to the same account to be used for the same purpose in any ensuing fiscal year.

Sec. 5. Proceeds of bonds not available for other purposes; must be kept separate from other funds. The proceeds of all

bonds issued under the authority of this act shall at all times be kept distinct from other moneys of the state, and shall not be drawn upon or be available for any other purpose.

Sec. 6. Maturity and interest, how met. Interest, maturity and retirement obligations accruing on all bonds issued under the provisions of this act shall be paid by the treasurer of state from the general highway fund upon warrants drawn by the governor and council therefor.

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court having considered the Questions contained in Senate Order of March 21, 1947, relating to S. P. 467, L. D. 1309, "An Act to Provide for Issuance of State Highway Bonds" as amended, concur in and respectfully submit the following Advisory Opinion:

The fundamental rule of construction of statutory and of constitutional provisions is that language shall be interpreted in accordance with the intention with which it was used, if that result may be accomplished by giving words their ordinary and usual significance. The language to be construed, at this time, is that appearing in Section 17 of Article IX of the Constitution as contained in Article LVIII of the amendments thereto, adopted in 1935. That Article struck out the entire section, as earlier amended, and substituted the language to be construed. It is proper in construing constitutional language to give decisive weight to the history of its development. This involves a review of changing language, in this instance, over the period of 23 years commencing with the addition of Section 17 to Article IX in 1912, Article XXXV of the Amendments, and Article LVIII aforesaid, closing with the acceptance of the present form in 1935.

Prior to 1912 the credit of the State could not be pledged or loaned for any purpose which would create an aggregate of debts or liabilities in excess of $300,000 except to suppress insurrection, repel invasion or serve war purposes. The limitation was not ap-

plicable to money deposited by the State with the government of the United States or held in trust for any Indian tribe. This was declared in Section 14 of Article IX of the Constitution. In 1912 an additional exception was written into it declaring that the prohibition should not exclude indebtedness incurred for the purpose of building and maintaining state highways (Article XXXV of the Amendments). Concurrently Section 17 authorized a borrowing capacity of $2,000,000 for that purpose. The legislative debates make it clear that the authority might be exercised from time to time, and that indebtedness once incurred and subsequently paid off might be reincurred at the will of the legislature, provided only that the maximum indebtedness outstanding for the purpose at any one time should not exceed the stated amount (Legislative Record 1912, p. 47, Special Session).

Since 1912 Section 14 has been amended four times and rewritten once. The amendments appear in Articles XLI, XLII, XLIII and XLV, the rewriting in Article LV. The changes made for some other purpose than to revise the highway bond program may be disregarded. These are to be found in Articles XLI and XLII, both adopted in 1919, Articles XLV adopted in 1920, and Article LV adopted in 1934. The changes pertinent to the present issue are found in Article XXXV, adopted in 1912, and in Article XLIII, adopted in 1919.

Section 17 of Article IX has been amended four times since its adoption in 1912 and rewritten twice. The amendments appear in Articles XLIII, XLVIII, XLIX and LI. The rewriting appears in Articles LII and LVIII. Articles XLVIII and LI may be disregarded. They deal exclusively with the construction of two bridges. The others, with Article XXXV, present the full history of the development of Section 17 of Article IX so far as it has to do with pledging the credit of the State to provide funds for highway and bridge construction.

Article XLIII, adopted in 1919, raised the borrowing capacity of the State for highway construction to $10,000,000. Its language is identical with that of Article XXXV, except for the changed

maximum amount and interest rate, the elimination of highway maintenance as an authorized purpose, and the inclusion of bridge construction. There can be no doubt that under its terms, as under the terms of Article XXXV, the legislature had authority to borrow at will for the stated purpose from time to time, provided the terms and interest rates of the bonds issued were not exceeded, that bonds currently issued, with those previously issued and then outstanding, should not exceed the maximum authorized, and that the application of the proceeds was for the proper purpose.

Article XLIX, adopted in 1925, marked the beginning of a change. There for the first time a provision against reissue was adopted, applicable to the full amount of the newly authorized borrowing and to such part of that earlier authorized as might be paid off and reissued during or after 1925. The statement of facts accompanying the questions indicates that bonds in the amount of $9,662,500 were then outstanding. The Article increased the maximum borrowing capacity from $10,000,000 to $16,000,000 and made it possible for the legislature to authorize the reissue of bonds aggregating $337,500 to bring the $9,662,500 to $10,000,000 and the original issue of $6,000,000 additional, but it eliminated the freedom of action which Articles XXXV and XLIII had vested in legislative authority to reissue bonds issued and retired. No part of the new $6,000,000 could be utilized except for original borrowing. Such part of the formerly unrestricted $10,000,000, as might thereafter be reutilized by a new borrowing during or after 1925 was taken out of the breadth of the earlier authorization by reissue.

Article LII, adopted in 1929, marked a further change. There for the first time the proviso written in Section 17 in 1912 (Legislative Record 1912), for the express purpose of authorizing the reissue of bonds issued and retired, was deleted and the prohibition against the reissue of bonds made absolute by the words: "Said bonds when paid at maturity or otherwise retired shall not be reissued." The words "in the aggregate" which had appeared for-

merly in the proviso were written into the sentence of authorization, but their use at that point cannot be construed as negativing the prohibtion against reissue expressly stated thereafter.

The language prohibiting the reissue of bonds in Article LII is restated in Article LVIII. Against the express prohibition of that language we feel constrained to say that the legislature has no present authority to reissue any part of the $2,000,000 authorized to be issued by Article XXXV, or of the additional amounts of $8,000,000, $6,000,000, $15,000,000 and $5,000,000 respectively authorized by Articles XLIII, XLIX, LII and LVIII. Since the adoption of Article LII in 1929 legislative authority to reissue highway bonds has not existed. Article LVIII made no change in this regard.

As will be seen by the foregoing statement our opinion is that the legislature had authority to reissue highway bonds up to a $2,000,000 limit, from 1912 to 1919. It had authority to reissue highways bonds, to a $10,000,000 limit, from 1919 to 1925. From 1925 to 1929 its authority to reissue highway bonds was somewhat limited. It has had no authority to reissue highway bonds since 1929.

This Advisory Opinion is based on the statement of facts contained in the Order of the Senate which does not clearly disclose whether all the bonds authorized by the several Articles of Amendment have been originally issued. The Legislature has undoubted authority to issue any bonds authorized which have never been issued, subject to the limitations of Article LVIII of the Amendments.

We therefore answer QUESTIONS I, II, III, IV and V in the negative.

GUY H. STURGIS
SIDNEY ST. F. THAXTER
HAROLD H. MURCHIE
NATHANIEL TOMPKINS
RAYMOND FELLOWS

March 26, 1947.

MEMORANDUM.

Mr. Justice Hudson is unable to act because of illness.

GUY H. STURGIS
Chief Justice.

A true copy.
Attest:
S/ GUY H. STURGIS
Chief Justice.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 13, 1947, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

IN HOUSE March 12, 1947.

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 93rd 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 questions on H. P. 1184, L. D. 754, "An Act to Protect the Right to Work and to Prohibit Secondary Boycotts, Sympathetic Strikes and Jurisdictional Strikes":

1. Would the third paragraph which reads as follows:

"Sec. 122. Agreements or combinations in restraint of right to work declared illegal. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby membership in such union or organization is made a condition of employment or continuation of employment by such employer, or

whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy."

if enacted by the Legislature in its present form, be constitutional?

2. Would the fourth paragraph which reads as follows:

"Sec. 123. Conditioning employment or non-union membership prohibited. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

if enacted by the Legislature in its present form, be constitutional?

3. Would the fifth paragraph which reads as follows:

"Sec. 124. Conditioning employment on union membership prohibited. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer."

if enacted by the Legislature in its present form, be constitutional?

4. Would the sixth paragraph which reads as follows:

"Sec. 125. Conditioning employment on payment of union charges prohibited. No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization."

if enacted by the Legislature in its present form, be constitutional?

5. Would the seventh paragraph which reads as follows:

"Sec. 126. Secondary boycotts prohibited. No person, labor union or labor organization or member therefor or person acting

on behalf of such union or organization shall by any means or methods whatsoever engage in a secondary boycott. The term "secondary boycott" shall include causing or threatening to cause and combining or conspiring to cause or threaten to cause, injury to a person not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other unlawful means, in order to bring such person against his or its will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom such labor dispute exists to comply with any particular demands."

if enacted by the Legislature in its present form, be constitutional?

6. Would the eighth paragraph which reads as follows:

"Sec. 127. Sympathetic strikes prohibited. No employee, labor union or labor organization or member thereof or person acting on behalf of such union or organization shall cause or, acting in concert or confederation with others, participate in a sympathetic strike. The term 'sympathetic strike' shall include a strike, slowdown or stoppage of work for the purpose of aiding others than the participants in said sympathetic strike in the course of a dispute which has no direct relation to the participant's own rates of pay, wages, hours of employment or other conditions of employment."

if enacted by the Legislature in its present form, be constitutional?

7. Would the ninth paragraph which reads as follows:

"Sec. 128. Jurisdictional strikes prohibited. No labor union or labor organization or member thereof or person acting on behalf of such union or organization shall cause or, acting in concert or confederation with others, participate in a jurisdictional strike. The term 'jurisdictional strike' shall include any strike, slowdown

or stoppage of work because of any dispute, grievance or disagreement between or within labor unions or labor organizations."

if enacted by the Legislature in its present form, be constitutional?

8. Would the tenth paragraph which reads as follows:

"Sec. 129. Boycotting; picketing upon agricultural premises. No person shall picket upon or about any farm, processing plant or other premises where either produce is raised, or dairy products are produced, bought or sold, or boycott the movement to market, or sale of any agricultural commodity or dairy product, because such commodities may have been produced or transported by non-union labor or in violation of the orders or rules of any labor union."

if enacted by the Legislature in its present form, be constitutional?

HOUSE OF REPRESENTATIVES
Laid before the House
by the Speaker and PASSED
March 13, 1947
HARVEY R. PEASE
Clerk

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court in obedience to the requirements of the Constitution of the State of Maine respectfully submit the following Answers to the Questions submitted to us under date of March 13, 1947 relating to a pending Bill designated as H. P. 1184, L. D. 754 and entitled "An Act to Protect the Right to Work and to Prohibit Secondary Boycotts, Sympathetic Strikes and Jurisdictional Strikes."

Under the Federal and State Constitutions and existing Federal Statutes as heretofore interpreted by the courts of last re-

sort, it is our opinion that the Legislature has power to enact Section 123 of the proposed Bill and equal power to enact Sections 122, 124 and 125 unless prohibited by the National Labor Relations Act, 49 Stat. 449, U.S.C.A. §§ 151-166, which it is intimated in *Am. Fed. of Labor* v. *Watson*, 66 S. Ct. 761, 90 L. Ed. 715, decided March 25, 1946, may be construed by the Supreme Court of the United States as authorizing closed shop contracts negotiated through collective bargainings in industries engaged in interstate commerce. Such a construction would invalidate Sections 122, 124 and 125 if enacted in their present form.

It is also our opinion that in the present state of the law the Legislature does not have the power to enact Sections 126, 127, 128 and 129 of the proposed Bill in their present form because their terms are so inclusive that they would violate constitutional rights.

GUY H. STURGIS
SIDNEY ST. F. THAXTER
HAROLD H. MURCHIE
NATHANIEL TOMPKINS
RAYMOND FELLOWS

March 25, 1947.

MEMORANDUM.

Mr. Justice Hudson is unable to act because of illness.

GUY H. STURGIS
Chief Justice

A true copy.
Attest:
S/ GUY H. STURGIS
Chief Justice.

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE SUPREME JUDICIAL COURT SITTING AS A LAW COURT ON SEPTEMBER 5, 1946, AT AUGUSTA

In Memory of

HONORABLE JOHN A. MORRILL

LATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born June 3, 1855 Died August 25, 1945

SITTING: STURGIS, C.J., THAXTER, HUDSON, MURCHIE, TOMPKINS, FELLOWS, JJ.

HON. WILLIAM B. SKELTON, President of the Androscoggin Bar Association, addressed the Court as follows:

MAY IT PLEASE THE COURT:

The Androscoggin County Bar Association is grateful for the opportunity to join with this Court in paying tribute to the memory of the late Justice JOHN A. MORRILL who died at his home in Auburn on August 25th, 1945.

JUDGE MORRILL was born in 1855 and spent all of his active life in the law. He had a long and distinguished service at the Bar of

this State. He then served with equal distinction as a member of this Court. He commanded the esteem and affection of all who knew him.

He was an active member of the Androscoggin County Bar Association and it is fitting that these exercises be conducted under its auspices. It has designated a committee of its members who will offer resolutions in his memory and support them with appropriate remarks.

I now yield to Brother George C. Wing, Jr., Chairman of that committee.

HON. GEORGE C. WING, JR. then addressed the Court as follows:

MAY IT PLEASE THE COURT:

Fulsome eulogy and modest statement will not describe with accuracy JOHN A. MORRILL. He was somewhere between these two extremes. He was essentially a sound, modest, intelligent man —not a leader—but more interested in how to run than to obtain. He was born in Auburn, June 3, 1855, and in that city, in the house in which he was born, he died August 25, 1945. Thus, it may be observed that he had attained the great age of ninety years.

He was the son of Nahum Morrill and Anna Isabella Littlefield. He prepared for college in the Edward Little High School in Auburn, entered Bowdoin College and was graduated from that institution in 1876, a Bachelor of Arts. Bowdoin College made him a Master of Arts in 1879, and in 1912 a Doctor of Laws. He was admitted to the Bar February 12, 1880 and from that date constantly applied himself to the practice of law in the community of his birth and residence. In 1900 he was named a member of the State Board of Examiners for Applicants for Admission to the Bar and served for eight years, and declined a second appointment.

By resolve of March 21, 1901, he was named Commissioner to revise and consolidate the public laws, the Statutes of the State.

As such commissioner he prepared the Fifth Revision, known as the Revised Statutes of 1903. Again in 1913 he was chosen to discharge the same duty and prepared the edition of the Statutes known as the Revised Statutes of 1916. At the State election in 1912 he was elected Judge of Probate for Androscoggin County. This office his father before him also held. His term began January 1, 1913 and was for four years. He was reelected in 1916. February 25, 1918 he was appointed a Justice of the Supreme Judicial Court. He resigned May 31, 1926 and was appointed Active Retired Justice June 4, 1926 and his term expired June 4, 1933, since which time he led a retired life.

He was President, in 1917, of Maine State Bar Association, and as such presided on the occasion of the well remembered visit of William H. Taft to the Association in January of that year. He served as Trustee and President of Auburn Savings Bank. He gave of his time as Trustee, Treasurer and President of Auburn Public Library. He served as an Overseer of Bowdoin College from 1888 to 1925, and was President of the Board of Overseers from 1921 to 1925. He was a Trustee of Bowdoin College from 1925 to 1928.

Here, briefly sketched, is a record of a fine, strong man, well-born, a good citizen, honest, always dependable, reliable, bearing the respect and confidence of his neighbors and friends. As a lawyer he was a safe, trusted and wise counselor. As a Judge he brought to the Supreme Judicial Court undoubted character, learning, experience, a well-trained mind, and a great capacity for work. If one were to speak in criticism of him it would be to say that he was ultra-conservative—perhaps over-well set in his views. Evidence of this and of his forthrightness appears in the printed report of the Indictment and Charge of Presiding Justice at Trial of Michael X. Mockus, For Blasphemy before the Supreme Judicial Court, Oxford County, Maine, October Term 1919, where the charge given to the jury is reported and JUDGE MORRILL explained blasphemy in a most orthodox manner and the respondent was convicted. The case is reported in 120 Me.,

84 and the rulings of JUDGE MORRILL sustained. In his dissenting opinion in *Lawrence* v. *Lincoln County Trust Company*, 123 Me., 273, he pointed out the necessity of accuracy and great care in dealing with the property, money and rights of others. No one could gainsay after reading this opinion, or knowing or observing JUDGE MORRILL, his honesty of purpose, his clear sight of the goal to be reached and his determination to obtain it.

So he lived, worked and died in the city of his birth, respected and admired, with a record of which his family and his fellow townsmen may well be proud. The Court, I am sure, will forgive a personal touch if I add that his father and my father were partners nine years, who separated with respect and esteem, which continued throughout the years; and that I had a pleasant relation with JUDGE MORRILL which was tempered with things far away and long ago, and of which I am most proud.

And so, may it please the Court, for the Androscoggin Bar Association we respectfully offer the following resolutions:

MEMORIAL AND RESOLUTIONS

JOHN A. MORRILL

1855-1945

JOHN A. MORRILL was a sound man, of great integrity and honor, faithful and just, of most excellent learning—an example of that which a lawyer should be and try to be.

THEREFORE, BE IT RESOLVED, that his death marks the passing of a most useful citizen, by whose life and conduct many have benefited and by whose learning, diligence, determination, wisdom and intelligence his contemporaries were well served and by the same token unknowns may receive the guidance of his written words; that in honoring the dead the Court honors themselves, the living, and gives satisfaction to his friends, his neighbors and family and makes it evident that knowledge and understanding of laws

is requisite to good order, peace, liberty, happiness and the safety of the State.

GEORGE L. WING, JR.
BENJAMIN L. BERMAN
W. H. CLIFFORD
FERNAND DESPINS
L. A. JACK
Committee.

HON. BENJAMIN L. BERMAN was the next speaker.

MAY IT PLEASE THE COURT:

It is indeed an honor and a privilege for me to take part in these Memorial Exercises which honor the memory of a great, a strong and noble man and Judge.

My acquaintance with JUDGE MORRILL began soon after my admission to the Bar, in September, 1914. The reputation of JOHN A. MORRILL for being helpful to young lawyers was not long in reaching me after my admission, and the high regard in which he was held in lay circles as a good lawyer was known to me long before. It was, therefore, quite natural that I should go to him for counsel and advice when occasion required. My first visit to him was in quest of knowledge concerning one of the Extraordinary Legal Remedies. I found him stern, yet kindly, reserved, yet pleasant, agreeable and anxious to assist me in my problem. It did not take him long to demonstrate to me that I was in error and to point out to me the appropriate remedy applicable to the situation and the procedure that should be followed.

His office was neither pretentious nor filled with waiting clients but the atmosphere surrounding him was permeated with warmth, graciousness, sympathy and learning. Since that early meeting I watched, with great and admiring interest, this sturdy man serve as Judge of the Probate Court, as an Associate Justice of the Supreme Judicial Court, and as an Active Retired Justice

thereof. I had occasion to practice before him in all of the Courts wherein he served and lastly, during his full retirement, as a Referee in many legal disputes submitted to him for decision. During all this period of time I was moved by the courtesy, the dignity, the graciousness and the profoundness which he brought to every task and to every case presented. He was quick to grasp fundamentals. He had little patience with the artificial or the unreal. Pettiness irked him. His aim and purpose was the search for truth, the administration of justice and service to humanity within the bounds of legal principle.

There was nothing dramatic or ostentatious about JUDGE MORRILL. Modesty was one of his greatest virtues and by that modesty, silently proclaimed by demeanor and attitude, his great and strong legal mind was able to command the respect and confidence of all who came in contact with him.

JUDGE MORRILL came to the Bar and Bench quite naturally, for his father was a successful lawyer before him. In his father's footsteps he followed as Judge of the Probate Court. He has left upon the memories of men a deep and lasting impression.

He believed in the law and, as he believed, so he did rule. He was a man of great courage and applied his studied conception of the law regardless of whatever contrary popular feeling may have existed. He was a true democrat in the non-political sense. He understood human problems. He was an avid reader, a wide traveler and a keen observer of the vicissitudes of human life. Before him all men were truly equal. Litigants, rich or poor, high or low, regardless of political affiliation, received justice in the truest and best sense of the word.

His life's work, as reflected in the written pages of the Maine Law Reports, furnishes an everlasting tribute to the memory of the late JUDGE JOHN ADAM MORRILL as a great man, a learned Judge and an understanding humanitarian.

WILLIAM H. CLIFFORD, ESQ., then addressed the Court as follows:

MAY IT PLEASE THE COURT:

I am conscious of the high honor having been conferred upon me in being permitted to pay tribute to the memory of former Supreme Court Justice JOHN A. MORRILL today. I have always had the most sincere admiration, respect and regard for him.

When I started the practice of law in 1914, JUDGE MORRILL, who was then 59 years of age, was considered by all the members of our Androscoggin Bar, as the acme of perfection. He possessed the essential qualities of greatness, intellectual honesty, courage, integrity and brilliance of intellect unexcelled by any lawyer or judge of my acquaintance. He had a marvelous mind, an innate sense of justice, a wonderful power of analysis, all of which marked him as one set apart from his associates, with whom, nevertheless, he lived and moved with unaffected modesty.

It is not my intention to attempt a biographical sketch of JUSTICE MORRILL. He was some 30 odd years older and my acquaintanceship of course, was not of the closest; nevertheless, when I started the practice of law, I felt free to go to him with the many problems that usually confront a young lawyer who is actively engaged in the rough and tumble of general practice; but he expected you to have exhausted whatever facilities you had in attempting to solve your problem before he would go into the matter with you. He was such a thorough student of the law himself, that one would hesitate to seek his counsel until all of the available resources were gone into fairly well. He had rather a stern countenance, which at first seemed forbidding, but as the then younger members of the Bar got to know him better, and saw more of him, we realized that he was a very human sort of a person, with an excellent sense of humor, and that he enjoyed having company come to his office to talk with him; I know that during the last twenty years of his life I spent many enlighten-

ing hours in his office at the Court House, and had several wonderful visits with him at his home at the top of Goff Hill.

The name of JUDGE MORRILL, as he was commonly known in our community, connoted the ultimate in legal learning; he was a lawyer's lawyer; his clientele, before his elevation to the bench, consisted of a great number of the most substantial citizens of our community; they had implicit confidence in his wisdom and integrity; he had a tenacious and determined characteristic that compelled him, once he felt sure he was right, to keep a death grip on the problem that was then occupying his attention.

It was as a Presiding Justice that my generation knew him best, because he was engaged in the practice of law with us only four years when he received his appointment to the Supreme Judicial Court—where he served with distinction and honor for about eight years.

It was my good fortune to have tried several cases before JUDGE MORRILL with a jury, and also to have participated in cases which were heard before him while he was serving as an Active Retired Justice; I had the good fortune to be on the winning side on some and the misfortune to be on the losing side on others. In every case tried, both with and without juries, it was the unanimous opinion of my clients, whether they won or lost, that they felt they had been afforded a fair trial and a square deal. Such a feeling on the part of litigants, it seems to me, is the highest compliment that can be paid to any man or woman who acts as a judge of the actions of their fellow men; he had the well deserved reputation of giving every problem that came before him the most conscientious, careful and detailed study.

The clear and logical opinions of JUDGE MORRILL as set out in our Maine Reports are an everlasting testimonial to his keen mind, his analytical reasoning and sound judgment.

When the records of stewardship of JOHN A. MORRILL are compiled by historians, his name will appear on the scrolls as one of our great lawyers and jurists; he always practiced law, not as a business, but as a wonderful profession; his conduct was digni-

fied and courteous and will always serve as an admirable example and inspiration for the bench and bar as long as we shall have lawyers and judges in our present form of government.

FERNAND DESPINS, ESQ. was the next speaker and he said:

MAY IT PLEASE THE COURT:

I feel highly honored in being asked to take part in these Memorial Exercises. Speaking for the younger members of the Androscoggin County Bar, who have been admitted to the practice of law during the past twenty-five years, I might say that to us JUDGE MORRILL, even as he lived, stood as a symbol and a tradition. I believe this is a real tribute to his character and person, for it is not usually given to man, during his lifetime while still active and at the peak of his career, to be so honored by his contemporaries. We gave him that respect and reverence that were his due.

As he was appointed an Associate Justice on February 25, 1918, none of us knew him as the great lawyer he was. As he became an Active Retired Justice on June 4, 1926, very few of us tried any cases before him. But his fame as a lawyer and a jurist to us was well known. We who knew him as neighbor and fellow townsman will always carry with us a distinct picture of him as he moved among us. His figure was imposing. Of scholarly and cultured countenance, of reserved and dignified bearing, singularly modest and conservative to a high degree, he truly personified the ideal of what a judge should be and look like.

The name Morrill is a distinguished and honored one in the annals of the history of Androscoggin County. Father and son, Nahum Morrill and JOHN A. MORRILL, both were judges of our Probate Court; Nahum Morrill being the first judge of our Probate Court when the County of Androscoggin was organized in 1854. JOHN A. MORRILL was twice appointed commissioner to revise the public laws of the State: in 1903 and in 1916.

JOHN A. MORRILL lived and expounded the traditions bequeathed him by his distinguished father. He will long be remembered for the deep seriousness with which he looked upon his work, his fidelity to every trust, his high sense of honor, his loyalty to his profession, his willingness to serve, his gentlemanly qualities, his kindness and never failing courtesy.

The year of his accession to the bench was a notable one in the history of this Court, for it was in the year 1918 that Justices Dunn, Morrill, Wilson and Deasy were appointed, making the greatest change in the personnel of the court that ever occurred in one year. It is worthy of mention that, of these four appointees, three later became Chief Justices of this Court.

His written opinions begin with *State* v. *Holland* reported in 117 Me., 288 and end with *Megunticook National Bank* v. *Knowlton Bros.*, in 125 Me., 480, a total of 107 opinions. They are expressed in language that is clear and accurate, their reasoning convincing and compelling, the product of a well-trained mind. They constitute a most valuable and lasting contribution to the jurisprudence of our State and a monument to his legal ability and industry.

No greater compliment could be said of him than the words of Judge Philbrook in the famous case of *State* v. *Mockus*, 120 Me., at page 92, when he said of JUDGE MORRILL who had presided at the trial in which religious freedom and freedom of speech were involved:

> "In a charge which for clearness of thought, beauty of diction, accuracy in law, and impartiality of statement, is seldom equalled, the learned Justice who presided at the trial well said: 'The great degree of liberty which we enjoy in this country, the degree of personal liberty which every man and woman enjoys, is limited by a like degree of liberty in every other person, and it is the duty of men, and the duty of women, in their conduct, in the exercise of the liberty which they enjoy, to consider that every other man and woman has the right to exercise the same degree of liberty;

that when one person enters into society—and society is the State in which personal liberty exists—each gives up something of that liberty in order that the other may enjoy the same degree of liberty. It is a conception that perhaps some people find difficult to understand, but it is the conception of liberty which we enjoy.' "

In these troubled days, when our institutions, our democratic form of government and our most precious heritage—the American way of life—are being challenged and assaulted by foreign ideologies incompatible with our way of thinking, it would be well if we paused a moment and gave serious thought to the words of the learned and beloved Justice who wrote the opinion in that case when he said:

"These two constitutional rights (religious freedom and freedom of speech) within constitutional limits, are not to be violated, destroyed or denied. The rights are always vigorously claimed, but the limitations are not always carefully scrutinized or respected."

It can be said of JUDGE MORRILL, as it has been said of another of our great and beloved jurists that "he cherished with reverence the historic grandeur of the good principles of 'liberty under law' consecrated by the fathers as the foundation of a new republic; but he believed with the first Federal Chief Justice that 'civil liberty consists not in the right of every man to do just what he pleases, but it consists of an equal right to all citizens to have and enjoy and do in peace and security whatever the equal and constitutional laws of the country admit to be consistent with the public good.' "

JUDGE MORRILL died in his ninetieth year, his physical powers and splendid mental forces remaining unimpaired up to the hour of his death.

The people of the community in which he lived, and the State which he served so well, will always cherish the memory of JOHN A. MORRILL as one of its best and foremost citizens—who as law-

yer and an Associate Justice contributed much to sustain the dignity and worth of both Bench and Bar in this State, and who in his individual, family and civic life has left an impress that will long endure.

And for the Court HON. HARRY MANSER, Active Retired Justice, paid the following tribute to the memory of JUDGE MORRILL:

In a prosaic listing of biographical data concerning JUSTICE JOHN A. MORRILL appears at the end the laconic statement, "Home, Auburn, Maine."

To the older residents of that community these three words bring a flood of recollections of the service of a man whose entire life, from 1855 to 1945, a period of ninety years, was spent in that community. There is hardly a single individual, who so modestly and quietly for nearly three generations, was such an integral part of its financial, civic, educational, charitable and religious institutions. In their formative and development stages, he actively participated in their affairs and gave them the benefit of wise and beneficent counsel.

At the outset of his career, when but just graduated from Bowdoin College at the age of 21, he became a member of the faculty of Edward Little High School, and was confronted with a difficulty which he solved by the exercise of such firmness and tact as would have reflected credit on an executive of long experience. Later, when the school had been dedicated to public purposes, he became and remained throughout his life one of the Trustees of the surrounding park system, which added much to the adornment of the school buildings and to their environment.

He took an active part in the organization of the Auburn Public Library. He served on the building commission which had charge of procuring a site and erecting the present building. From the inception of the Library in 1890 and until the time of his death, a period of 55 years, he was a member of its Board of Trustees, and served as Treasurer from 1902 to 1916, and as President from 1918 to 1929.

Another local institution to which he gave many years of service was the Auburn Savings Bank, of which he was a Trustee from 1888 to 1920 and President for the last twelve years of that period.

He took great interest in the affairs of the High Street Congregational Church, of which he was a valued member. At the time of many material improvements and changes, he served as Chairman of the Committee on Renovations. In 1926, on the occasion of the centennial of the Church, he delivered the historical address, which disclosed not only his own intimate knowledge of its progress, but also careful research and inspirational interpretation of its history and its benign influence on the life of the community.

Thus is delineated but a few of his outstanding contributions to the welfare of his home town, Auburn. The emphasis thereon, however, is not intended to indicate a provincial or limited outlook. His horizons were wide. He concerned himself with many interests of far reaching character.

He was a loyal alumnus of Bowdoin and served the College for 40 years as a member of the governing Board. He was a member of the Board of Overseers from 1888 to 1925, being Vice President for the last four years. Then for the next three years he served as a member of the Board of Trustees. He received the degree of A.M. three years after his graduation, and the College honored itself by conferring upon him in 1912 the degree of Doctor of Laws, as, too, did the University of Maine in 1920.

During World War I, he served as Chairman of the Local Board under the Selective Service Act for a large part of the war period.

Thus far reference has been had to the public service of JOHN A. MORRILL as a citizen.

For 38 years he was a member of the legal profession, and engaged in the active practice of the law, until his elevation to membership in the highest Court of our State.

As a lawyer he regarded the profession as exemplifying high ideals, and the duty of its votaries as the ascertainment of right

and justice so far as it can be accomplished by human agency. His guiding motive was not to seek rich emoluments, but to render faithful service to his clients. He was a constant student. His knowledge of the principles of the common law and of equity became profound, while no man was more conversant with our Maine statutory law than he. His excelling qualities in this last respect led to his selection by the Legislature as Revisor of the Statutes in 1903 and again in 1916. This formidable work was accomplished practically unaided, and in his own office. His recommendations to the Legislature for the clarification of ambiguities and for more orderly arrangement were favorably acted upon. The local Bar well understood his familiarity with the statutes and were prone to seek assistance to avoid otherwise necessary research. Gracious in response, he never, however, undertook to answer until his ready hand turned to the particular chapter or section for a precise reading of the statute itself. The Bar of Maine recognized his outstanding qualities as a lawyer by his election as President of the State Association in 1917.

He was serving his second term as Judge of Probate when he was appointed to the bench of the Supreme Judicial Court of Maine, early in 1918. That was a tragic period in the history of the membership of the Court. Justices Madigan, Haley and King died and Justice Bird reached the retirement age. Thus was removed from further service four of the eight members of the Court. The appointments of Justices Dunn, Morrill, Wilson and Deasy need but be mentioned to bring to our minds the fact that the Court continued to uphold the great traditions of the past and to maintain the prestige to which it was so justly entitled.

The service of JUSTICE MORRILL at *nisi prius* is remembered with respect and admiration. His opinions as found in our Reports stand as monuments to his memory. His contributions in that respect are the equal of the great jurists of the nation. They will continue to light the way of truth and justice for generations to come.

When retirement from active duties brought a measure of

leisure he had the better opportunity to read the sort of books he loved so well, and which covered a wide range of subjects, from the great masters to works on current problems of the day. He was a student of history and was particularly well versed in the history of Maine. He retained his keen interest in events of local interest as well as matters of material and political significance. He loved nature. The beauties of his native State were a source of never-ending pleasure to him, and he also found satisfaction in visiting many of the great national parks of the west, and in travelling extensively through the United States and Canada. Thus though his age increased, he continued young in spirit, and the closing years of his life were a benediction. He was always a kind and considerate husband and father, and his home was a haven to him.

He died in the fulness of years, without protracted suffering and with his mental powers unimpaired. He had finished his course. He had kept the faith, and surely the good Lord has laid up for him a crown of righteousness.

CHIEF JUSTICE GUY H. STURGIS then announced:

The Resolutions offered by the Committee of the Androscoggin Bar Association and endorsed by all who have spoken are accepted by the Court for entry upon its records. And as a tribute of respect to the memory of MR. JUSTICE MORRILL this Court is now adjourned.

STATE OF MAINE

SUPREME JUDICIAL COURT

LAW TERM
Portland, June, 1947.

ORDER FIXING TIMES FOR BAR EXAMINATIONS

Pursuant to the provisions of Section 1 of Chapter 93 of the Revised Statutes of Maine of 1944 it is

ORDERED that the Board of Examiners for the examination of applicants for admission to the Bar be and hereby are directed to hold a session at Portland in the County of Cumberland on the first Wednesday of September, 1947, and thereafter until otherwise directed by this Court to hold sessions at Bangor in the County of Penobscot on the first Wednesday of February in each year and at Portland on the first Wednesday of August in each year, for the purpose of examining applicants for admission to the bar as to their legal learning and general qualifications to practice in the several courts of the state as attorneys and counselors at law and solicitors and counselors in chancery, and that this order supersedes any and all prior orders of this Court with respect to the holding of any sessions of said board after the date hereof.

BY THE COURT,

June 10, 1947

GUY H. STURGIS
Chief Justice.

A true copy
Attest:
S/ GUY H. STURGIS
Chief Justice.

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CONTRACTS.

A contract must be sufficiently definite to enable the court to determine its meaning and fix the legal liability of the parties.

The court is not disposed to find an agreement vague or indefinite which was precise and clear to the parties who signed it.

In action brought by vendor for breach of contract to purchase real estate and personal property, testimony of vendor as to market value of property on date set for performance was admissable.

Towne et al. v. *Larson,* 301.

See BROKERS, *Gerstian* v. *Tibbetts,* 215.

See EQUITY, *Fortin et al.* v. *Wilensky,* 372.

CORPORATIONS.

The declaration of dividends rests in the sound discretion of the board of directors of a corporation, but such discretion may be limited by contract.

The discretion of directors in the declaration of dividends may be limited by the stock contract.

Stockholders under a by-law providing without qualification that such stockholders are entitled to dividends at a fixed rate, are entitled as a matter of right to dividends if they are earned.

Where there is any inconsistency between two by-laws of a corporation the last by-law must be held to have modified the first.

Trust Co. et al. v. *Fibre Co. et al.,* 286.

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The Law Court is a court of limited jurisdiction.

See EXCEPTIONS, FISH AND GAME, *Hadlock, Petitioner,* 116.

See PROBATE COURTS, *Kimball, Petitioner,* 182; *Shannon* v. *Shannon et al.,* 307.

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See EMBEZZLEMENT, *Parker B. Smith, Petitioner,* 1.

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In equity, whether or not the plaintiff has an adequate remedy at law is a question of law, and where the evidence indicates that the money measure of damages is determinable, an allegation that no legal remedy is adequate is not sustained.

Where gift between a husband and wife is in issue, the alleged donor's intention to pass title must be clearly shown.

Equity will as a general principle settle all rights involved in any proceedings on which it acts.

Vassar v. *Vassar et al.*, 150.

On equity appeal, decision of single justice, on matters of fact, will not be reversed unless clearly erroneous, and the burden of showing such error falls upon the appellant.

A landlord cannot compel a tenant at will to pay increased rent without termination of the tenancy, but the amount of rent may, however, be changed by mutual consent.

An oral agreement to execute a written lease may be specifically enforced, in a proper case, where it has been partly performed.

When no time is specified for performance of a contract, a reasonable time is implied.

At law, time is of the essence of a contract, but in equity it depends on the circumstances.

A decree of specific performance can never be claimed as a matter of right.

Fortin et al. v. *Wilensky*, 372.

Proceedings to remove a cloud on title may be brought by action at law under provisions of R. S. 1944, Chap. 158, Sec. 48, or in equity under the provisions of R. S. 1944, Chap. 158, Sec. 52.

Proceedings to remove cloud on title brought by bill in equity but seeking remedy at law are not properly brought.

Proceedings to remove cloud on title involving the validity of a mortgage are not properly brought at law.

Milliken v. *Savings Institute*, 387.

ESTOPPEL.

The conveyance of the intangible element known as good will does not of itself debar the vendor from engaging in a similar business.

Estoppels in pais have long been regarded as wise and salutary. A promissory estoppel exists where a representation or assurance as to the future relates to an intended abandonment of an existing right and is made to influence another, and the latter has been influenced thereby to act.

Such an estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon agreement not yet made.

The doctrine of equitable estoppel is to be applied with great care. The equity must be strong and the proof clear.

LaGrange v. *Datsis*, 48.

See *Branz* v. *Stanley et al.*, 318.

EVIDENCE.

Objections to evidence should be stated at the time it is offered, and with sufficient definiteness to appraise the court and the opposite party of the precise grounds of the objection, and all objections not thus specifically stated, are waived.

In an action brought to recover balance of loan represented by note, after discharge of defendant in bankruptcy, based on false representations of defendant, testimony of defendant, on cross examination, that after obtaining the loan from plaintiff and prior to his act of bankruptcy, defendant obtained a loan from another by use of similar representations, is inadmissible for the purposes of impeaching credibility of defendant.

Monroe Loan Society v. *Owen*, 69.

The admissions of the libellee are competent to prove adultery on her part.

Neither spouse may give evidence to prove nonintercourse by the husband if the result be to bastardize issue born after marriage.

Monahan v. *Monahan*, 72.

Evidence admissible on one ground and offered in good faith for a legitimate purpose is not to be excluded from the consideration of a jury because it may be irrelevant or inadmissible on other grounds or otherwise prejudicial.

See NEW TRIAL, *State* v. *Brown*, 106.

The maxim of *res ipsa loquitur*, "the thing itself speaks," is applicable where there has been an unexplained accident and the instrument that caused the injury was under the management or control of the defendant and in the ordinary course of events the accident would not have happened if the defendant had used due care.

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See *Ellsworth, Petitioner* v. *Portland,* 200.

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See PAUPERS, *Orrington* v. *Bangor,* 54.

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See TAXATION, *Bangor* v. *Brewer,* 6.

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Ellsworth, Petitioner v. *Portland,* 200.

NAVIGABLE WATERS.

See NEGLIGENCE, *Towage Co.* v. *State,* 327.

See FISH AND GAME, *Hadlock, Petitioner,* 116.

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A child of tender years is not bound to exercise the same degree of care as an adult, but only that degree of care which ordinarily prudent children of the same age and intelligence are accustomed to use under like circumstances.

A pedestrian about to cross a road is not as a matter of law bound to look and listen and is not negligent as a matter of law because he fails to anticipate negligence on the part of the driver of a car.

Ross v. *Russell,* 101.

A traveler on a highway crossing railroad track, in spite of the absence of the flagman, is bound to exercise due care.

Hackett v. *Maine Central Railroad Co.,* 167.

In actions of negligence it is not sufficient for the plaintiff to show that the defendant's negligence was adequate and sufficient to cause the injury com-

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PROBATE COURTS.

Probate courts are wholly creatures of the legislature. They are of special and limited jurisdiction, and their proceedings are not according to the course of the common law.

A probate appeal vacates the decree of the probate court, and brings the whole subject matter of the appeal *de novo* before the Supreme Court of Probate.

Shannon v. *Shannon et al.*, 307.

See TRUSTS, *Murray, Appellant*, 24.

PUBLIC UTILITIES.

Depending on the context, the word "railroad" may or may not include a street railroad, but nowhere is there any authority for holding that there is included in that designation any road on which the cars or carriages do not operate on rails.

Our statutes governing the operation of street railways and busses do not contemplate that the operation of a bus is in any way the operation of a street railroad.

Assessment of excise tax by Taxation Department on wrongful interpretation of statute not controlling on court.

State v. *York Utilities Co.*, 40.

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See NEGLIGENCE, *Hackett* v. *Maine Central Railroad Co.*, 167.

See PUBLIC UTILITIES, *State* v. *York Utilities Co.*, 40.

REFEREES.

Where no exceptions are reserved and where there is no fraud, prejudice or mistake on the part of a referee, the referee's findings are conclusive.

A "mistake" such as will authorize relief against a referee's report, means unintentional error.

A plea of general issue denies every material allegation in the declaration. Such a plea is distinct and separate from special matters of defense contained in a brief statement.

McMullen v. *Corkum*, 393.

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A count in plaintiff's declaration alleging the death of decedent, and that she "suffered excruciating pain," and that plaintiff seeks compensation under the provisions of R. S. 1944, Chap. 152, Sec. 11, was demurrable in the absence of a separate count for such death, since by statute damages for wrongful or negligent death, following conscious suffering, may only be recovered "in a separate count in the same action."

NOTE: The Court does not decide whether or not it is permissible to join an action for immediate death without conscious suffering, with an action for death and conscious suffering.

Hogue v. *Roberge,* 89.

To establish liability based on Lord Campbell's Act, it is incumbent on the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he would avoid liability, to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury.

It is the duty of a driver of an automobile to stop his car when for any reason he cannot see where he is going.

See DIRECTED VERDICT, *Haskell, Adm'r.* v. *Herbert,* 133.