MAINE REPORTS

143

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JULY 25, 1947 to DECEMBER 31, 1948

CECIL J. SIDDALL
REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
Printers and Publishers

1951

DAILY KENNEBEC JOURNAL
AUGUSTA, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. GUY H. STURGIS, *Chief Justice*

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON [1]

HON. HAROLD H. MURCHIE

HON. NATHANIEL TOMPKINS

HON. RAYMOND FELLOWS

HON. EDWARD P. MURRAY [2]

HON. EDWARD F. MERRILL [3]

1 Died August 21, 1947.
2 Appointed September 18, 1947.
Active Retired May 5, 1948.
3 Appointed June 2, 1948.

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

HON. ARTHUR CHAPMAN

HON. HARRY MANSER

HON. EDWARD P. MURRAY

JUSTICES OF THE SUPERIOR COURT

HON. EDWARD P. MURRAY [1]
HON. ALBERT BELIVEAU
HON. ARTHUR E. SEWALL
HON. EARL L. RUSSELL [2]
HON. EDWARD F. MERRILL [3]
HON. ROBERT B. WILLIAMSON
HON. FRANK A. TIRRELL, JR.
HON. WILLIAM B. NULTY [4]
HON. PERCY T. CLARKE [5]
HON. DONALD W. WEBBER [6]

1 Appointed to Supreme Judicial Court September 18, 1947.
2 Died August 5, 1947.
3 Appointed to Supreme Judicial Court June 2, 1948.
4 Appointed to Superior Court September 18, 1947.
5 Appointed to Superior Court October 1, 1947.
6 Appointed to Superior Court September 1, 1948.

ACTIVE RETIRED JUSTICES
OF THE
SUPERIOR COURT

HON. WILLIAM H. FISHER

Attorney General
HON. RALPH W. FARRIS

Reporter of Decisions
CECIL J. SIDDALL

TABLE OF CASES REPORTED

A

B

C

D

F

G

H

I

J

K

L

M

O

P

R

S

T

U

W

Y

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ALDA M. HALLETT, EXECUTRIX UNDER
WILL OF GEORGE W. HALLETT

vs.

BOYD L. BAILEY, INHERITANCE TAX
COMMISSIONER OF THE STATE OF MAINE

Aroostook. Opinion, July 26, 1947.

Inheritance Taxes. Savings Bonds. Survivorship.

Inheritance tax on all property passing by survivorship in any form of joint ownership is applicable to United States bonds issued to joint tenants with right of survivorship, as well as to joint deposits in Maine banks.

ON REPORT.

Petition in Equity filed in Probate Court by executrix asking the abatement of inheritance tax on War Savings Bonds and Treasury Bonds, and money on deposit in a Maine Bank in name of decedent and another and payable to either or the survivor. Abatement denied. Petition dismissed.

Frank E. Pendleton, for plaintiff.

Ralph M. Farris, Attorney General,
Nunzi F. Napolitano, Assistant Attorney General, for defendant.

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

MURCHIE, J. This Petition in Equity filed in the Probate Court within and for the County of Aroostook, by an executrix who claims to be aggrieved by the determination of an inheritance tax against the estate in her hands, was reported to this court, pursuant to R. S. 1944, Chap. 142, Sec. 30, under an Agreed Statement of Facts, to resolve the question as to the incidence of the inheritance tax law of the State of Maine on War Savings Bonds and Treasury Bonds issued by the United States of America, and money on deposit in a bank transacting business in the State of Maine, standing, at the death of the decedent, in his name and that of another and payable to either or the survivor.

The Agreed Statement of Facts is silent as to the title to the money represented by the bonds and deposits prior to the purchase and deposit of the same, but the process is based frankly on the claim that it passed to the plaintiff individually upon the death of the decedent. As to the bonds the allegation is that the imposition of an inheritance tax "would impair the contract made by the decedent with the United States of America."

No title question is involved. The plaintiff is undoubtedly the owner of the bonds and money in question. She is the widow and residuary legatee of the decedent and would take under his will if the property formed a part of his estate, but it is undoubted that a part of the money on deposit passed to her pursuant to R. S. 1944, Chap. 55, Sec. 36, and that the bonds did so in accordance with the terms of the contracts under which they were issued. *Harvey* v. *Rackliffe,* 141 Me. 169; 41 A. (2nd) 455; 161 A. L. R. 296.

Neither the statute nor the contract negatives the right of the state to impose a tax on the succession. In *Succession of Tanner,* 24 So. (2nd) 642, a divided Louisiana Court held bonds of the United States issued in the names of two persons payable on the death of one to the survivor not subject to a tax on inheritances, but a later case in the same court, *Succession of Raborn,* 29 So. (2nd) 53, calls attention to the fact that the earlier decision gave no consideration to a stipulation contained in the circulars or regulations issued by the United States Treasury Department relative to such bonds as are in question, that they "shall be subject to * inheritance * * * taxes, whether Federal or State * * *."

The language of the inheritance tax law, R. S. 1944, Chap. 142, Sec. 2, Par. I (C), delimiting its operation on property passing by survivorship, is more than a complete answer to plaintiff's contention that the repeal of a portion of P. L. 1923, Chap. 25 eliminated joint deposits to the extent therein stated from the operation thereof. That language reaches all property passing:

> "By survivorship in any form of joint ownership including joint bank deposits in which the decedent joint owner contributed during his lifetime * * *."

Abatement denied.
Petition dismissed.

REED BROTHERS, INC.
vs.
DONALD E. GIBERSON

Aroostook. Opinion, July 29, 1947.

Infants. Ratification. Contracts.

By statute, a minor, in order to be bound by a contract, must make a written ratification after he arrives of age, except for necessaries, or with reference to real estate of which he has received the title and retains the benefits. R. S. 1944, Chap. 106, Sec. 2.

The ratification of a contract by a minor after becoming of age, requires more than a recognition of the existence of a debt and the amount due thereon. There must be a deliberate written ratification.

Ratification of a voidable promise is a recognition of it, and an election not to avoid it, but to be bound by it.

Ratification is a question of intention. In the instant case, the giving of a mortgage by the defendant, after attaining his majority, and mentioning in that mortgage that it was subject to a mortgage held by plaintiff and given by the defendant while he was a minor, did not ratify the previous mortgage.

The acceptance of a deed by a minor, and the giving of a mortgage and note by a minor to another person, are separate transactions, and the giving of such note and mortgage must be ratified in writing by the minor after becoming of age, in order to be valid.

ON EXCEPTIONS.

Action on promissory note given by minor and heard before referee. Ratification of the note by the signer after becoming of age was claimed. Referee found for defendant, and exceptions to the acceptance of referee's report were filed by plaintiff. Exceptions overruled.

Charles M. Fowler,
A. F. Cook, for the plaintiff.

Granville C. Gray,
Philip D. Phair, for the defendant.

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

FELLOWS, J. This is an action on a witnessed promissory note given December 3, 1928 and signed by B. Frank Giberson, Georgia A. Giberson, and Donald E. Giberson, the defendant. The defendant was then twenty years old. The case was referred, and the referee found for the defendant. Exceptions had been reserved, and objections to the referee's report were filed by the plaintiff, and the objections were overruled. The case is now before the Law Court on the plaintiff's exceptions to the acceptance of the referee's report. These exceptions are overruled.

There seems to be no dispute as to these facts: On November 13, 1928, B. Frank Giberson conveyed to his wife, Georgia A. Giberson and to his son, Donald E. Giberson, in common and undivided, three lots of farm land in Presque Isle, Maine. On December 3, 1928 these three Gibersons mortgaged the lots to Walter M. and George W. Reed in the sum of $6,290, subject to two prior mortgages in favor of Charles M. Brundage and the Presque Isle National Bank. This mortgage of 1928 was given to secure the note for $3,790 now in suit, and a second note for $2,500, which second note was paid in 1929. The defendant signed the note and mortgage to the Reeds in 1928, and became twenty-one on October 23, 1929.

This mortgage and debt of December 3, 1928 was assigned by the Reeds on March 12, 1931 to Reed Brothers, Inc. Reed Brothers, Inc. assigned on October 18, 1932 to Armour Fertilizer Works; and later, on September 14, 1937, Armour Fertilizer Works assigned the mortgage and the debt to Armour & Company of Delaware. On August 2, 1943, Armour & Company reassigned the mortgage and the note now in suit to Reed Brothers, Inc.

On September 30, 1932 the defendant and his mother, Georgia A. Giberson, mortgaged the farm to the Fort Fair-

field National Bank, reciting in the mortgage that the same was given subject to prior mortgages held by C. M. Brundage, Presque Isle National Bank and Reed Brothers, Inc.

Georgia A. Giberson and the defendant in the years 1934, 1935 and 1936 also gave to Armour Fertilizer Works mortgages on the crops grown or to be grown on the farm. In 1937 the defendant alone gave a crop mortgage to Armour Fertilizer Works. Each of these crop mortgages was for $500, "said sum to be applied on reduction of my indebtedness to said grantee." No mention of the Reed mortgage is made in these crop mortgages. B. Frank Giberson and Georgia A. Giberson are now deceased. The defendant is the only heir.

The defendant and his mother were in possession of the farm until her death in December 1936. The father died previously. The Brundage mortgage was foreclosed and the equity of redemption expired March 6, 1940; after which, on March 27, 1940, the farm was deeded back to the defendant by the Brundage assignee.

In this suit brought by Reed Brothers, Inc. on the above mentioned note for $3,790, the defendant pleaded the general issue with brief statement that he was a minor when the note was made. The plaintiff filed replication claiming ratification, and further claimed that the mortgage and note were a real estate transaction, and that the defendant had received title to real estate conveyed by the mortgage and retained the benefits therefrom.

The questions raised by the pleadings are (1) whether there was a ratification by defendant upon attaining majority and (2) whether this was a real estate transaction such as is excepted by the statute. The referee found that there was no ratification and that the statute did not apply.

The statute in question reads as follows:

> No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he ar-

> rived at the age of 21 years, except for necessaries, or real estate of which he has received the title and retains the benefit. R. S. 1944, Chap. 106, Sec. 2.

From the earliest times in legal history it has been the policy of the law to protect the infant. The Legislatures of today universally recognize by statutes that minors must be saved from unscrupulous persons, who might take advantage of inexperience and immaturity. At common law, and by our statute, the infant is not authorized to bind himself or his property except for necessaries, (and except for real estate, as above stated). *Lawson* v. *Lovejoy,* 8 Me. 405; *Robinson* v. *Weeks,* 56 Me. 102; *Whitman* v. *Allen,* 123 Me. 1. By the terms of the Maine statute, ratification of a promise made by a minor, upon his reaching majority, must now be in writing. R. S. 1944, Chap. 106, Sec. 2 cited above. These disabilities of the minor are really privileges which the law gives him, and which he may exercise for his own benefit. The object is to secure him in his youthful years from injuring himself by his own improvident acts. Any person dealing with one who has not reached his majority, must do so at his peril. Coke's statement as to what are the necessaries, for which the minor is fully responsible, has been recognized for generations as the rule: "necessary meat, drink, apparel, necesary physic, and such other necessaries, and likewise his good teaching, or instruction, whereby he may profit himself afterwards." *Kilgore* v. *Rich,* 83 Me. 305; *Utterstrom* v. *Kidder,* 124 Me. 10.

Under the above statute therefore, one exception is the aforementioned necessaries, and one other exception is for "real estate of which he has received the title and retains the benefit." In this too, the law recognizes what may be beneficial to the minor, and a deed received by the minor or a deed given by the minor may be avoided by the minor at majority as against the other party. *Hubbard* v. *Cummings,* 1 Me. 11; *Boody* v. *McKenney,* 23 Me. 517; *Davis* v. *Dudley,* 70 Me. 236. This portion of the statute however has no application to the case at bar, for here the convey-

ance of one-half of the farm to the minor defendant was not made by the plaintiff, but by B. Frank Giberson, at the time when B. Frank Giberson made conveyance of the other undivided half to Georgia A. Giberson. The mortgage and note by the three Gibersons to the two Reeds was made later while defendant was a minor, and the purpose does not appear. The referee was correct in his ruling that "the transaction was *res inter alios acta.*" 3 Bouvier Law Dictionary (3rd Rev.) 2908. The Giberson deed to defendant and the Reed mortgage were separate. It was not the "same contract." *Hubbard* v. *Cummings,* 1 Me. 11; *Dana* v. *Coombs,* 6 Me. 89.

Was there a statutory ratification of this 1928 note for $3,790 made by the defendant after attaining his majority? No writing was necessary at common law, for the word or act of the person after he became twenty-one was sufficient to ratify a promise made while under age. The statute now requires a writing, except for the necessaries, or the real estate title received and a retention of benefits. To ratify is to "approve and sanction," or "to confirm," as the definition is given in standard dictionaries. "The ratification required by the statute must be something more than a recognition of the existence of the debt and the amount due thereon. It must be a deliberate written ratification." *Sawyer Boot & Shoe Company* v. *Braveman,* 126 Me. 70, 71. The defendant's conduct after coming of age may show a sufficient ratification at common law, but if there is no ratification in writing the statute bars the action. *Lamkin & Foster* v. *LeDoux,* 101 Me. 581; *Thurlow* v. *Gilmore,* 40 Me. 378; *Bird* v. *Swain,* 79 Me. 529.

The fact that the defendant and his mother in 1932 joined in a mortgage to Fort Fairfield National Bank, and that in the mortgage it was stated, as is usual, that the land was subject to mortgages held by Brundage, Reed Brothers, Inc. et als. is not such a ratification by the defendant of this promissory note sued upon as the statute demands. It may have "recognized" the existence of a claim or debt but it

did not ratify. "Ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it. Ratification always resolves itself into a question of intention." *Sawyer Boot & Shoe Company* v. *Braveman,* 126 Me. 70, 71.

All of the mortgages and notes mentioned in the record, except one crop mortgage of 1937, were signed by the mother, Georgia A. Giberson, and the defendant. Whether the defendant and his mother were compelled to give mortgages through force of economic conditions and government regulations in order to raise an annual crop, does not clearly appear. The defendant however testified that they were obliged to make crop mortgages "in order to get the waiver."

The conditions in the various crop mortgages to fertilizer companies cannot be construed as a promise or ratification on the part of the defendant with regard to this Reed debt now sued upon. Partial payments are not ratification of a larger debt. "A deliberate written ratification" or a promise as to the whole debt is necessary. *Sawyer Boot & Shoe Company* v. *Braveman,* 126 Me. 70; *Lamkin & Foster* v. *LeDoux,* 101 Me. 581; *Neal* v. *Berry,* 86 Me. 193; *Hilton* v. *Shepherd,* 92 Me. 160; *Robbins* v. *Eaton,* 10 N. H. 561; *Catlin* v. *Haddox,* 49 Conn. 492. "It should be voluntary, not obtained by circumvention, nor under ignorance of the fact that he was entitled to claim the privilege." *Thing* v. *Libbey,* 16 Me. 55, 57.

In many cases there may be hardships for an adult party who attempts to transact commercial business with an infant. It requires but little investigation, however, to ascertain in doubtful instances that one has not reached his years of majority. There would seem to be no hardship here, for this witnessed note of 1928, wholly unpaid for nearly nineteen years and bearing an indorsement of only one year's interest in 1930, has probably rendered full service in its assignment wanderings as good "scenic" collateral. The too questionable character of this note was doubtless the cause

of the great delay in taking action. There was no statutory ratification in writing. The decision of the referee was correct.

Exceptions overruled.

STATE OF MAINE

vs.

WALTER W. OSBORNE

Cumberland. Opinion, August 5, 1947.

Criminal Law. Plea.

A voluntary plea of guilty, before a court having jurisdiction of the offense, followed by payment of penalty imposed, terminates the action and precludes an appeal.

ON EXCEPTIONS.

Respondent was arrested upon charge of operating motor vehicle while under the influence of intoxicating liquor. Plea of guilty and payment of fine imposed. Later respondent entered appeal to Superior Court, and there filed a motion to be allowed to withdraw guilty plea and to enter a plea of not guilty. Motion denied, and respondent filed exceptions. Exceptions overruled.

Richard S. Chapman, County Attorney, for State of Maine.

Elton H. Thompson,
Harry E. Nixon, for respondent.

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

MANSER, A. R. J. The respondent was arrested upon the charge of operating a motor vehicle while under the influence of intoxicating liquor, and on the following day was brought before the Municipal Court of Brunswick to answer to the charge.

From the record, it clearly appears that the respondent was a man holding a responsible position, intelligent, and at the time of his arraignment, in full possession of his faculties. He pleaded guilty, whereupon the judge of the court imposed the minimum sentence of a fine of $100 and costs which he paid. The court had full jurisdiction of the case and authority to impose the sentence.

Later in the day respondent consulted an attorney who entered an appeal to the Superior Court for Cumberland County. The respondent there filed a motion, addressed to the presiding justice, to be allowed to withdraw the plea of Guilty which he had made in the Municipal Court, and to enter a plea of Not Guilty. Upon hearing, the motion was denied and the case comes up upon exceptions.

Counsel for the respondent had evidently sought no reopening of the case or withdrawal of plea of Guilty in the Municipal Court, or if he had, his effort was without success.

The issues raised are:

1. Can a respondent who has pleaded Guilty and paid the minimum fine imposed by a court of competent jurisdiction, thereafter enter an appeal to the Superior Court?

2. If so, was the denial by the justice of the Superior Court of a motion to withdraw his plea, an abuse of discretion?

The first issue has not been passed upon by our court and as there is some conflict of authority, it merits consideration as to the reasoning, logic and basis of the diverging opinions. As stated in 24 C. J. S., Criminal Law, Sec. 1668:

> "The decisions are not uniform as to the right of the accused to review a sentence or judgment imposing a fine which has been paid. According to the weight of authority, however, where accused in a criminal case voluntarily pays the fine imposed on him, he waives his right to an appeal, or to a review by *certiorari.* Under this rule some authorities hold that there is no waiver if the payment of the fine is involuntary, as where the fine is paid under protest to prevent imprisonment under a void sentence, or where it is made under circumstances amounting to duress, or where it is paid by another person without accused's authority; but other authorities take the position that the payment of a fine, even under protest, amounts to an execution of the sentence and, as nothing is left for further controversy, accused is deprived of an appeal."

Cases cited to this text are: *State* v. *Schreiber* (Del.) 166 A. 669; *Wilhite* v. *Judy* (Kan.) 21 P. (2nd) 317; *People* v. *Melovicz* (Mich.) 192 N. W. 562; *People* v. *Ortwski* (Mich.) 190 N. W. 239; *Berume* v. *Hughes,* (Tex.) 275 S. W. 268; *King* v. *State* (Tex.) 261 S. W. 1118. The same text will be found in 17 C. J., Criminal Law, Sec. 3327, with many earlier authorities there cited.

In the *Schreiber* case, *supra,* which is on all fours as to the facts with the instant case, the defendant voluntarily paid the fines and costs imposed on him by reason of his plea of guilty, and it was, therefore, held that he had waived his right of appeal. The court also alluded to the contention that the revocation of a driver's license ordinarily follows a conviction of driving while intoxicated, and that the defendant has a right to clear himself of that stigma. It was pointed out that this action is no part of the sentence imposed by the lower court.

The subject is also well treated in an annotation to *State* v. *Cohen,* (Nev.) 201 P. 1027, in 18 A. L. R. 867, in which cases from state and federal courts in many states are cited. This is supplemented by an annotation in 74 A. L. R. 638.

In *State* v. *Westfall,* 37 Iowa 575, the court said:

> "It is inconsistent to yield a voluntary obedience to a judgment of a court, and afterwards appeal therefrom."

Again, in *Commonwealth* v. *Konas,* 57 Pa. Super. Ct. 629, the reasoning of the court is as follows:

> "When a defendant is convicted in a summary proceeding before a magistrate, of an offense of which the magistrate had jurisdiction, and is fined an amount within the limit authorized by the statute or ordinance creating the offense, and voluntarily pays the fine, that is an end of the case."

In *Batesburg* v. *Mitchell* (S. C.) 37 S. E. 36, the court holds that a defendant who has paid the fine imposed, though under protest, cannot appeal, as the payment of the fine must be regarded as putting an end to the case. The court said:

> "There can be no doubt that an appellate tribunal cannot and will not do such a nugatory act as to hear an appeal from a sentence which has already been complied with, for that would be to decide a mere speculative question, and this, it has been frequently held, the court will not do."

In *Lafayette* v. *Trahan* (La.) 102 So. 409, in which motion for a new trial was made after the judgment of the court had been fully executed, the court emphasizes its conclusion as follows:

> "A new trial cannot restore life to him who has been hanged; it cannot set free one who, having served his term of imprisonment, is already restored to liberty; it cannot direct the return of a fine already paid into the fisc; hence such a motion, or an appeal taken from a refusal to allow the same, presents only a *moot question* and must be dealt with accordingly."

The great weight of authority is that a voluntary guilty plea, followed by payment of fine imposed terminates the action and precludes a review of the conviction.

What may be termed the minority view, is in most instances an emphasis favorable to the defendant upon questions of fact when it is shown that a fine was paid with the intent not to waive; in cases where fines were paid under protest or where there was an element of coercion.

The court is in accord with the weight of authority that the present case reached finality upon confession of guilt and voluntary payment of the penalty imposed. There was nothing to appeal from.

There is no foundation in the record to support any claim of fraud, duress or coercion on the part of arresting officers, police officials or on the part of the court, which might justify a determination that the proceeding in the Municipal Court should be declared void.

This is decisive of the case, but it may be added that if the justice of the Superior Court had considered that he had discretion to reopen the case, allow the respondent to withdraw his plea of guilt and proceed to a trial on a not guilty plea, the record of the testimony given by the respondent in support of his motion refutes any claim of abuse of discretion.

Exceptions overruled.

AARON LEVINE
vs.
SANFORD REYNOLDS

Kennebec. Opinion, August 5, 1947.

Exceptions. Contract. Quantum meruit.

Where erroneous instructions are given, or a correct instruction is refused, if the erroneous instructions or refusal to give correct instructions may have misled the jury, exceptions thereto must be sustained.

Where the breach of a contract is wilful, purposeful or in bad faith, no recovery on *quantum meruit* is permitted.

The construction of a written contract is for the court; the construction of an oral contract for the jury.

Whether an oral contract is entire or severable is for the jury.

Where there is an open subsisting entire contract for the performance of labor or delivery of goods, an action, if brought, must be brought on the contract, but if the contract has been fully performed by one party, such party may bring an action of *indebitatus assumpsit*.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

Action on case for money had and received. Jury returned a verdict for plaintiff. Defendant filed motion for new trial and exceptions to charge of presiding justice. Exceptions sustained. Verdict set aside. New trial granted.

F. Harold Dubord, for plaintiff.

Harvey D. Eaton, for defendant.

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

TOMPKINS, J. Action on the case for money had and received by the defendant to the use of the plaintiff, in which

the plaintiff seeks to recover the sum of $351. The jury returned a verdict for the plaintiff in the amount of $244.33. The case comes before the Law Court on defendant's motion for a new trial and on exceptions by the defendant to certain portions of the charge of the presiding justice, and the refusal of the presiding justice to charge the jury in accordance with certain requests by the defendant.

In April 1945 the plaintiff entered into an agreement with the defendant whereby the defendant agreed to sell to the plaintiff ten large heifers, one small heifer, two veal calves, two skimmed milkers, one bull, seven cows, nineteen sheep and a small quantity of hay, for an agreed price of $1,700. Both parties allege an oral contract for the purchase and sale of the animals. The defendant pleaded the general issue and a brief statement setting up as special matter of defense the oral contract which defendant claimed was entered into on the 10th day of April 1945; that it was an entire contract for the sale of a specified number of animals by the defendant to the plaintiff for one entire lump sum; and that the defendant was able, ready and willing to deliver said animals as agreed and repeatedly offered to do so, and repeatedly requested the plaintiff to accept said animals and pay for them; but the plaintiff neglected and refused to accept the animals or complete payment therefor as agreed.

The plaintiff was a cattle dealer and farmer living in the town of Fairfield and the defendant was a farmer living in the town of Winslow, in the county of Kennebec. Some time in April of 1945 the plaintiff called on the defendant and they entered into a conversation relative to selling the cattle and sheep described in the plaintiff's writ. Defendant at the outset wanted $2,000 for the aggregate number of animals, and after some bargaining they arrived at the price of $1,700 by placing a separate price upon the various animals, including a small quantity of hay that the defendant had in the barn. The defendant claimed that the cattle were to be all taken away by the plaintiff within a week

from the 10th of April, being the date on which he claimed the contract was made, and the purchase price paid in full when the defendant came for the animals within the time specified. The plaintiff claimed the bargain was made some time the latter part of April or the first of May. The plaintiff claimed that no time was set for taking the animals; that one of the conditions involved in the contract was that the milch cows were to be taken away after plaintiff was notified by the defendant, who wished to inform his butter customers so that they could buy elsewhere, that he was ready to deliver them. Plaintiff said "Our agreement was I should take the cows after he let his butter customers know." The plaintiff was to take delivery at the farm of the defendant.

The plaintiff paid the defendant $500 on account of the purchase price on the day the agreement was made, and in a day or two after the trade was made the plaintiff called at the farm of the defendant and removed one of the cows, two veal calves, one small heifer and five of the large heifers, leaving a check for $411 with the defendant's wife. Defendant's wife testified that the plaintiff remarked that he would take the rest of the cattle the next Sunday, which would give a week. Three or four days later he took the bull.

Defendant testified that he called the plaintiff on the 26th of April and asked him when he was coming after the rest of the animals, and claimed the plaintiff promised to come after them the following Thursday. This the plaintiff denied. The defendant further testified that he called the plaintiff again after that, and this the plaintiff disputed. Some time in June the plaintiff called by telephone and told the defendant "I am sending a man out to get the cattle," and the defendant then informed the plaintiff that the time had lapsed under the agreement and that he would not deliver the cattle to him.

From the testimony it can be fairly inferred that the trade took place about the 10th of April and that it was

some time the middle of June before the plaintiff notified the defendant that he was coming after the cattle. The sum of $351 as an overpayment for the value of the cattle received by the plaintiff was arrived at by subtracting the bargaining price of each animal as used in arriving at the total purchase price of $1,700, from the $911 that had been paid on account.

The presiding justice gave the jury the following instructions, to which the defendant excepted:

> "If you should say, for instance, that the plaintiff should have completed his contract the week after the 10th of April and paid the balance of the $1,700 and failed, but was willing some time in June to carry out his contract and so notified the defendant, and the defendant refused to allow him to have the cattle by saying that the time had gone by when he could have them, then I instruct you that the plaintiff had a right at that time to complete the contract if he had the money to buy. But the defendant may deduct from this $351 such sum as it may have cost him in feed and labor to take care of these cattle during the interim, during the time when you say the plaintiff should have taken the cattle until such time as he did take them.
>
> In other words, I am instructing you that under the evidence it would be unfair for the defendant to unduly enrich himself. If he has received from this plaintiff over and above what the contract calls for, there should be deducted whatever it cost the defendant to carry these cattle, if he did carry them, for an appreciable length of time beyond what you might find the agreement to be."

The defendant says this instruction is an incorrect statement of the law and was highly prejudicial to him, and claims that the question of liability was taken from the jury and they were expressly instructed to find a verdict for the plaintiff. The plaintiff claims that the instruction was correct and, if erroneous, was harmless, and defendant was not prejudiced thereby, because the result of the entire case

was correct and the jury had a proper understanding of the law from the entire charge. There are numerous cases in which it has been held a new trial will not be granted even if instructions are erroneous unless it appears also that they might have been prejudicial to the excepting party. *Russell* v. *Turner,* 59 Me. at 258, and cases there cited. Neither will a new trial be granted where there are erroneous rulings by the presiding justice on abstract principles of law not affecting the truth of the result. *Gordon* v. *Conley,* 107 Me. 291, 292. But where an erroneous instruction is given, or a correct instruction is refused, if the erroneous instruction or refusal may have misled the jury, and the court is not clearly satisfied that under a correct instruction a different verdict could not have been given, or if given could not have been permitted to stand, exceptions thereto must be sustained. *Starkey* v. *Lewin,* 118 Me. 87, and cases there cited; *Colbath* v. *Stebbins Lumber Co.,* 127 Me. 406; *Blumenthal* v. *Serota,* 130 Me. 263.

The plaintiff contends that independently of the instructions under consideration, upon a correct view of the law and the facts, the plaintiff is entitled to retain the verdict. It is not the province of the court when a case is presented by exception, to decide upon its general merits, but to determine whether the law applicable to it was correctly given to the jury. *Miller* v. *Goddard,* 34 Me. 102. This court has always, while considering the matter of retention of benefits in cases similar to the one under consideration, considered the nature of the breach. It has recognized well-defined classes of cases where there has been an endeavor in good faith to perform, substantial performance, and some variance when the work and material was of value and benefited the other party; but where the breach is wilful, purposeful, or in bad faith, no recovery on *quantum meruit* is permitted. *Thurston* v. *Nutter,* 125 Me. at 418, and cases there cited. The plaintiff claims the right of recovery on *quantum meruit* where an express contract exists. The action *per se* is an admission on the part of the plaintiff

that he is guilty of a breach of his contract. *Viles* v. *Kennebec Lumber Co.,* 118 Me. 148. The instruction complained of was on a material issue of law in the case and raised by the pleadings, and not on any abstract principles of law.

The contract was oral, and the defendant claims that it was an entire contract to purchase all the animals described in the plaintiff's writ for a lump sum. The construction of a written contract is a question of law to be decided by the court. But in an unwritten contract it is for the jury alone to determine from all the evidence what was said and done by the parties to a verbal contract, and therefrom to find their intention. *Guptil* v. *Damon,* 42 Me. 271; *Herbert* v. *Ford,* 33 Me. 90.

"As a general rule it may be said that a contract is entire when by its terms, nature and purpose it contemplates and intends that each and all of its parts and consideration shall be common each to the other and interdependent. On the other hand, it is a general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment." 17 C. J. S., Contracts, P. 331 Page 785; *Hartford, Conn. Mutual Co.* v. *Campbell,* 95 Conn. 399. "A test of severability which has frequently been applied is to the effect that if the consideration is single the contract is entire, but if the consideration is either expressly or by necessary implication apportioned, the contract will be regarded as severable, although this test will not necessarily prevail over other provisions of the contract showing a contrary intent of the parties. So where the portion of the contract to be performed by one party consists of several and distinct items, and the price to be paid is apportioned to each item according to the value thereof and not as one unit in a whole or a part of a round sum, the contract will ordinarily be regarded as severable; and this rule applies, although a contract may in a sense be entire, if what is to be paid is clearly and distinctly apportioned to the different items as such and not to them as a part of

one whole. However, the fixing of a price per unit for the ascertainment of the compensation for performance of the contract as a whole will not render the contract severable." 17 C. J. S., P. 334, Contracts, on page 790; *Bianchi Bros. Inc.* v. *Gendron,* 292 Mass. 443, 444; *Kahn* v. *Orenstien,* 114 A. 165; *Producers Coke Co.* v. *Hillman et al.,* 90 A. 144.

The question whether this was a severable or an entire contract should have been submitted to the jury. This was not done. This was error because, had the instruction been given, a different result could have been arrived at by the jury. The court stated to the jury that if the "Plaintiff was in default in not completing the contract the week after April 10th, but was willing some time in June to carry out his contract and so notified the defendant, and the defendant refused . . . . . because the time had gone by—then I instruct you that the plaintiff had a right at that time to complete the contract if he had the money to buy." This was an erroneous instruction and prejudicial to the defendant.

After the breach of a contract has given rise to a cause of action, the rights of an innocent party are not affected by an offer to perform by the party who has broken the contract. 6 R. C. L. P. 381 (Contracts). Neither are the rights of the defaulting party (in the absence of a statute) enlarged thereby. To permit a defaulting party to recover on such a theory if the contract was entire (and the question was not submitted to the jury) for part performance, or to permit him to recover on his agreement where he failed to perform, would tend to demoralize all business transactions. This portion of the instruction was prejudicial.

On the question of damages the court arbitrarily assumed that the defendant had been unjustly enriched and that the damage was the difference between the separate prices used in bargaining to arrive at the lump sum of the purchase price, less the cost of the feed and care of the animals left on the defendant's hands while the plaintiff was in default. The question of unjust enrichment was for the jury to deter-

mine from the evidence. The measure of damages, with the question of the nature of the contract whether severable or entire, whether the breach was wilful, purposeful, negligent or in bad faith, was not submitted to the jury. The jury found by their verdict that the plaintiff had broken his contract. Under proper instructions there could have been an entirely different outcome.

The question presented by the defendant in this case is, where a vendor who has contracted to sell personal property under an entire contract, for a lump sum, and the vendee receives part of the property and pays to the vendor a greater sum than the value of that received, can the vendee in fault recover against the vendor, not in default, in an action of *quantum meruit,* that portion of the purchase price over and above the value of the property received, deducting only the damage to the vendor due to the default of the vendee? Or, in other words, whether in case of such a contract, the party who refuses or neglects to perform the contract on his part, according to its terms can, notwithstanding such neglect or refusal, recover from the other party the money advanced under the contract, deducting therefrom any damage the vendor may have suffered.

This court has always held that where there was an open, subsisting entire contract for the performance of labor or the delivery of goods, if an action is brought it must be brought upon the contract. If the contract has been performed, then an action may be brought upon the contract or an action of *indebitatus assumpsit* for the work, labor, materials, money paid, for goods sold and delivered, as the case may be. *Holden Steam Mill* v. *Westervelt,* 67 Me. 450. So in a contract like the one under consideration, if there was any matter that would evince that the vendor had waived full performance, or it had been abandoned by mutual consent, or that the vendee had been prevented by inevitable accident, or prevented by the vendor, from performing the contract, or he had endeavored in good faith to perform the contract according to its terms, he might recover.

Veazie v. *Bangor,* 51 Me. 512; *Holden Steam Mill* v. *Westervelt, supra.* But this court has never gone so far as to say that where there is a special contract for the performance of labor, for the delivery of goods, or upon any other subject, the party violating or refusing in bad faith or neglecting fully to complete his contract, or failing without legal excuse, can have an action at law in any form to recover *pro rata* compensation as far as he has performed. *Holden Steam Mill* v. *Westervelt, supra; Dwinal* v. *Howard, supra; Harmon* v. *Company,* 35 Me. 453; *Jewett* v. *Weston,* 11 Me. 346; *Miller* v. *Goddard,* 34 Me. 102; *Veazie* v. *Bangor,* 51 Me. 509; *Otis* v. *Ford,* 54 Me. 104.

It has seemed and still seems to this court that the establishment of such a principle would have a tendency to encourage the violation of contracts and to diminish in the minds of contracting parties a sense of the obligation which rests upon them to perform their agreements, and an increasing tendency to break existing contracts. *Thurston* v. *Nutter, supra.* It is the duty of the court to enforce the performance of contracts, not to encourage their violation. The party in default, where a valid contract exists, derives no benefit from partial performance of the contract unless rescinded by mutual consent, or the plaintiff has a right to rescind it at his election. *Rounds* v. *Baxter,* 4 Me. 454; *Frost* v. *Frost,* 11 Me. 235; *Weymouth* v. *McLellan,* 14 Me. 214; *Appleton* v. *Chase,* 19 Me. 74; *Grimes* v. *Goud,* 10 At. 116. These cases were contracts involving the sale of real estate. But in *Brown* v. *Haynes,* 52 Me. 578 at 581, the court said the same rule applies in a contract for the sale of personalty as applies in a contract for the sale of real estate. The purchaser failing to perform his agreement derives no benefit from a partial performance of his contract. In *Dwinal* v. *Howard,* 30 Me. 258, the court said where, under a contract, the purchaser receives a part of the commodity and pays to the seller a greater sum than that part, at the agreed rates, would amount to, yet if he fails to pay the residue at the stipulated time the seller may,

for such failure, rescind the contract as to the residue and without liability to pay back any part of the amount which he has received.

A careful consideration of the entire charge in connection with that portion excepted to leads us to believe that the jury may have been misled, rendering their verdict under a rule of law inapplicable to this case, it not appearing as a matter of law that, upon proper instructions, a contrary verdict could not have been properly found. The defendant is aggrieved and his exceptions to this portion of the charge must be sustained.

Having arrived at this conclusion we do not find it necessary to consider the motion and other exceptions.

Exceptions sustained.
Verdict set aside.
New trial granted.

GEORGE H. GLIDDEN

vs.

BATH IRON WORKS CORPORATION

Kennebec. Opinion, August 14, 1947.

Negligence. Pleadings. Employer and Employee.

A declaration should contain a clear and distinct averment of every fact essential to a cause of action.

An employer owes no duty to an employee not to require him to perform the type of labor for which he was engaged.

An employer owes no duty to an employee to inform him of a serious heart disease in the absence of knowledge that the employee is ignorant of his condition.

Failure to allege an employer's knowledge of his employee's ignorance of his own heart ailment makes a declaration seeking recovery for damages through overwork defective.

Plaintiff sues for damages suffered by overexertion while employed by defendant. Defendant filed a special demurrer to plaintiff's declaration. Demurrer overruled. Defendant filed exceptions. Exceptions sustained.

McLean, Southard & Hunt, for plaintiff.

William B. Mahoney, for defendant.

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

MURCHIE, J. This case presents defendant's exceptions to the overruling of a special demurrer which, after the amendment of the several counts to eliminate allegations of damage which are not proper elements thereof, challenges the sufficiency of the declaration for its failure to allege either a legal duty owed by the defendant to the plaintiff or the violation thereof, or facts from which such duty, or violation, might be inferred. The alternative form of alleging the omissions satisfies the principle recognized in *Chickering* v. *Lincoln County Power Co.,* 118 Me. 414; 108 A. 460; recently affirmed in *Knowles* v. *Wolman,* 141 Me. 120; 39 A. (2nd) 666, that duty and breach may be pleaded either by forthright assertion (within the principle declared in *Boardman* v. *Creighton et al., infra*) or the averment of facts from which the law will imply them.

The plaintiff is an employee of the defendant. His allegations assert the liability of his employer for damage suffered through disability resulting from the aggravation of a serious heart disease induced, according to the most specific recital in any of his three counts, by hard manual labor and strenuous physical exertion required of him as a helper in defendant's maintenance department. His employment

covered a period of slightly over three months. Consolidating the counts the allegations are that the plaintiff applied to the defendant for employment; that defendant required plaintiff to submit to a physical examination which disclosed that he was suffering from a serious heart disease; that the defendant had knowledge thereof and knew, or should have known, that hard manual labor or physical exertion would endanger and shorten the life of the plaintiff; that the plaintiff, in the exercise of due care, did not know of his heart condition, or that he had any heart ailment whatsoever; and that the defendant owed the plaintiff the duties of informing him of his condition and not requiring him to perform hard manual labor or undergo physical exertion, which duties were breached.

In support of his demurrer the defendant urges the principle which controlled the decision in *Boardman* v. *Creighton et al.,* 95 Me. 154; 49 A. 663; and *Clyne* v. *Holmes,* 61 N. J. L. 358; 39 A. 767, that the mere allegation of a duty is insufficient, i.e., that a pleading must be tested by determining whether the facts alleged impose the duty asserted. Two attempts were made to present a sufficient declaration in the *Boardman* case. In holding the first ineffective (93 Me. 17; 44 A. 121) it was stated, in language substantially identical with that used by the Vermont Court in *Kennedy* v. *Morgan,* 57 Vt. 46, that the allegation of a duty as such amounts to nothing more than "a conclusion of law" on the part of the pleader. The foundation for the special demurrer lies in defendant's claim that the duties alleged to have been breached were not imposed upon it under the facts; that it owed the plaintiff no duty either to warn him that labor or exertion would endanger his health or life, or to limit the work required of him to that which would not cause him injury.

Plaintiff argues that the special demurrer does not point out the specific defect on which the defendant relies, within the rule declared by Chief Justice Mellen in *Ryan* v. *Watson,* 2 Me. 382. See 41 Am. Jur. 451, Par. 226. He recog-

nizes, however, that a special demurrer includes a general one, *State* v. *Peck et al.*, 60 Me. 498; *Mahan* v. *Sutherland et al.*, 73 Me. 158. The contention is not sound. An averment of failure to allege a legal duty, applied to a declaration asserting two stated ones, must be considered as the equivalent of declaring that they are not imposed on the defendant by law under the alleged facts. The point is not material here because the special demurrer, treated as a general one, raises the issue on which the defendant relies in identical manner with the *Chickering* and *Knowles* cases, *supra,* and with *Ouelette* v. *Miller et al.*, 134 Me. 162; 183 A. 341. The declaration in the *Chickering* case carried no specific allegation of either a duty or a breach, but was held sufficient because its factual recitals supplied the deficiencies. That in the *Knowles* case contained allegations of both a duty and a breach, but was held bad because it gave no factual recital laying a proper foundation for the duty specified. In the *Ouelette* case there were allegations of a duty, a breach and the facts relied on to establish the duty. The declaration was held bad because the alleged duty, undoubtedly breached if owned, was not imposed on the defendants by law under the particular facts.

Such is the exact issue here. As counsel for the plaintiff declares in his brief:

> "The basic question * * * is whether * * * the Iron Works owed Glidden a duty to inform him of his heart disease, or a duty not to hire him as a manual laborer, or a duty not to require hard work of him."

The declaration carries no allegation of a duty not to hire, but we see no essential difference between that and the alleged duty not to require hard manual labor or physical exertion. If a greater coverage is intended, and plaintiff is urging the adoption of a rule of law that an employer of manual laborers owes a duty to one seeking employment not to hire him if he is afflicted with a serious heart disease, the statement of the Alabama Court in *Tennessee Coal,*

Iron & R. Co. v. *Moody,* 192 Ala. 364; 68 So. 274, seems pertinent:

> "Nor would the imposition of liability * * * be either politic or humane * * * since it would * result in depriving of a livelihood many afflicted persons who have no choice but to labor * * *."

On the present declaration the claim to recovery on this ground might be dismissed as not alleged but we enter the field of *dictum* frankly to approve the quoted comment of the Alabama Court as applicable to the present facts. We deem it unwise to establish the principle, never adopted anywhere so far as we are aware, that an employer of labor owes a person seeking work the duty not to hire him if he is unfit for the labor he wishes to undertake.

We treat next of the alleged duty not to require hard manual labor or physical exertion. On that basis the case is one of novel impression in this jurisdiction. The plaintiff cites us to decisions in Mississippi and Missouri where an employer has been held liable for requiring physical labor in excess of the capacity of an employee. *Blue Bell Globe Mfg. Co., Inc.* v. *Lewis,* 27 So. (2nd) 900; *Hamilton* v. *Standard Oil Co. of Indiana et al.,* 323 Mo. 531; 19 S. W. (2nd) 679. To the contrary are the *Tennessee Coal* case, *supra,* and *Crowley* v. *Appleton,* 148 Mass. 98; 18 N. E. 675. The plaintiff seeks to minimize the force of these decisions by noting that the former was decided on the authority of the latter; that the writer of the opinion in that latter gave no explanation or authority for the principle he declared, but pronounced a mere *ipse dixit;* and that the Missouri Court in the *Hamilton* case, *supra,* dismissed both with the comment "The rule is otherwise in Missouri." Examination of the Mississippi and Missouri cases shows a ground for liability which goes beyond the mere requiring of excessive labor. In each of them the employee had the assurance of his employer that the work required of him would do him no injury. In the Mississippi case there was the added feature that the employee was threatened with discharge if

the work assigned was not performed. In the Missouri case he had been assured that nothing but light work would be required of him. If these cases stand for the principle that employers are liable to unfit employees for requiring the kind of labor they have undertaken to perform, without reference to any assurance given them that they are fit, we are not disposed to follow them.

The declaration in the instant case provides a clear basis for distinction between the present facts and those presented in the *Tennessee Coal* case, *supra*. The opinion therein makes it apparent that the employee involved knew his own condition, whereas it is alleged here that he did not know it in the exercise of due care. It was there stated that:

> "The reported cases present only a few instances in which a servant has sought to recover from a master for injuries which have resulted primarily from the physical unfitness of the servant for the work which he had undertaken to do."

This is such an instance. We think the Massachusetts Court in the *Crowley* case, *supra*, pointed to the *sine qua non* for recovery under those circumstances, namely, that there should be none without allegation and proof that the master knew of the servant's ignorance of his own unfitness. See *Murinelli* v. *T. Stuart & Son Co., infra.*

In declaring upon a duty of the defendant to inform him that he was suffering from a serious heart disease the plaintiff seeks to bring his case within a recognized principle of law, applicable to the contracting of occupational diseases and the spread of contagious or infectious ones. As applied to contagious or infectious diseases the principle gives no color of support to the present action. It is of much broader application than to the single relationship of employer and employee, but it operates in a narrower field that is well-defined in the statement of the Massachusetts Court in *Minor* v. *Sharon,* 112 Mass. 477; 17 Am. Rep. 122. There

the parties were a landlord and his tenant and the disease involved smallpox. The court said:

> "the defendant knew that the tenement was so infected as to endanger the health and life of any person who might occupy it. It was a plain duty of humanity on his part to inform the plaintiff of this fact, or to refrain from leasing it until he had used proper means to disinfect it."

Additional instances where the principle has been applied, including such a relationship as innkeeper and guest and such a disease as typhoid, are *Gilbert* v. *Hoffman,* 66 Iowa 205; 55 Am. Rep. 263, and *Kliegel* v. *Aitken,* 94 Wis. 432, 69 N. W. 67; 35 L. R. A. 249; 59 Am. St. Rep. 901. See also *Missouri, Kansas & Texas Ry. Co.* v. *Wood,* 95 Tex. 223; 66 S. W. 449; 56 L. R. A. 592; 93 Am. St. Rep. 834. An annotation following the last designated report of that case cites numerous decisions holding parties liable for the spread of contagious and infectious diseases. The principle is not applicable to a heart ailment.

The occupational disease cases are controlled by the same principle of a duty to warn, or inform. It applies, in the limited field of the employer-employee relationship, to employment hazards known to the former and not to the later. This court declared in *Spence* v. *Bath Iron Works Corp.,* 140 Me. 287; 37 A. (2nd) 174, that it:

> "would not hesitate to permit recovery for an occupational disease on proper proof that an employer had negligently failed to warn of a risk of disease known to him which was neither apparent nor known to his employee."

The disease to which that process related was typically occupational. It was a dermal affection contracted, as the jury found, as the direct result of working on degaussing cables, a risk common to every worker so engaged. Definitions of occupational disease are numerous and varied, but regardless of the terms used each and all of them define ailments to which workers are subject without reference to

their individual health. Francis H. Bohlen, writing in the Columbia Law Review in 1914 (14 Col. Law Rev. 563), said that in its usual sense occupational disease meant a disease:

> "contracted by slow infection or resulting gradually from a constant subjection to unhealthful work conditions."

Decided cases defining the term to the same general effect are numerous. Among them we note *Goldberg* v. *954 Marcy Avenue Corp.*, 276 N. Y. 313, 12 N. E. (2nd) 311, and *Gay* v. *Hocking Coal Co.*, 184 Iowa 949, 169 N. W. 360. Annotations in 6 A. L. R. 355; 99 A. L. R. 613 and 105 A. L. R. 80 cite many occupational disease cases both under statutes and at common law, including the *Gay* case, *supra.* There is no point in reviewing them here, but reference to a decision of the Washington Court, not included therein seems pertinent. In *Seattle Can Co.* v. *Department of Labor & Industries of Washington et al.*, 147 Wash. 303; 265 Pac. 739, the definition given is:

> "An occupational disease is one which is due wholly to causes and conditions which are normal and constantly present and characteristic of the particular occupation; that is, those things which science and industry have not yet learned how to eliminate. Every worker in every plant of the same industry is alike constantly exposed to the danger of contracting a particular occupational disease."

The disease for which recovery was sought in *Spence* v. *Bath Iron Works Corp., supra,* brought the case squarely within the scope of that definition. The result was controlled by evidence rulings, but recognition was accorded to the basic principle of a duty to warn. Earlier decisions of this court controlled by that principle were cited, covering a wider range than occupational diseases and including dangers confronting inexperienced and excusably ignorant employees concerning matters having no connection with disease. In *Colfer* v. *Best,* 110 Me. 465; 86 A. 1053, and *Muri-*

nelli v. *T. Stuart & Son Co.*, 117 Me. 87; 102 A. 824, this court has declared it essential, for an employee to maintain an action for his employer's failure to warn (or instruct) him, that the master knew, or ought to have known, of his employee's ignorance. Instruction, rather than warning, is the duty applicable to cases of the type where disease is not involved. The more complete statement of this fundamental is contained in the *Murinelli* case where Labatt's Master and Servant, 2nd Edition, Section 1141, is cited as authority. There it is said that one essential is:

> "that the master knew, or ought to have known, that the plaintiff was * * ignorant of the risk, and was * * * exposed to an abnormal hazard, over and above those which he was presumed to contemplate as incidents of his employment."

That is the true foundation for the decision in the *Crowley* case, *supra*.

The broad general principle on which the plaintiff relies is undoubted. It is stated in 45 C. J. 842, Par. 260, in the words:

> "where a person is placed in such a position with regard to another that it is obvious that, if he does not use due care * * * he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation * * *."

To the same general effect is the definition of negligence given in Cooley on Torts, Vol. 2, Third Edition, 1324, quoted with approval in *Hutchins* v. *Inhabitants of Penobscot*, 120 Me. 281, 113 A. 618:

> "the failure to observe, for the protection of * * * another * that degree of care * * * which the circumstances justly demand, whereby such other * suffers injury."

The plaintiff cites us to that case which has no remote connection with the employer-employee relationship, and to other decisions of this court where negligence and due care, the opposites of each other as stated in *Raymond* v. *Port-*

land Railroad Co., 100 Me. 529; 62 A. 602; 3 L. R. A. (N. S.) 94, are defined in very broad and general terms. The difficulty comes in the application of the present facts to those decisions and the definitions given in Corpus Juris and by Judge Cooley. Assuming the knowledge of the defendant not only of the condition of the plaintiff but of his own ignorance of that condition, the circumstances might require a degree of care altogether greater than would otherwise be the fact. The duty to warn of dangers which are neither known nor apparent is undoubted (see the cases already cited), but personal condition is presumptively apparent.

> "The unfit servant is almost always aware of his unfitness."

Labatt, Master and Servant, Section 180. Plaintiff's declaration lays the groundwork for rebutting the presumption by alleging that he did not know his own condition. It does not allege that defendant knew, or should have known, that fact. It is a fact essential to his right of recovery. The rules of pleading require that a declaration contain a clear and distinct averment of every fact essential to constitute the cause of action. *Foster* v. *Beaty,* 1 Me. 304; *Ferguson* v. *National Shoemakers,* 108 Me. 189; 79 A. 469. Absence of allegation that the defendant knew, or should have known, that the plaintiff did not know of his own condition makes the declaration defective.

Exceptions sustained.

EDITHA GLOVER GROVER, PETR.

vs.

CLARA GROVER

Kennebec. Opinion, August 19, 1947.

Parent and Child. Custody. Exceptions.

The paramount consideration for the court at the time of a divorce, or at the time of a requested alteration of a divorce decree regarding custody, is the present and future welfare and well-being of the child.

If the only conclusion which can be drawn from the evidence in the case does not support the decision, the finding is an error in law and exceptions lie. In the instant case the record shows that there is no evidence of circumstances which required a change of custody.

ON EXCEPTIONS.

From decree of Superior Court ordering a change in a former decree relating to custody, respondent excepts. Exceptions sustained.

Theodore Gonya, for petitioner.

Berman & Berman,
Matthew McCarthy, for respondent.

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

FELLOWS, J. This case involves the question of custody of Myra Editha Grover, the daughter of the petitioner and the granddaughter of the respondent. It comes to the Law Court on exceptions by the respondent to a decree of the Superior Court, which decree ordered a change in a former decree that gave custody to the grandmother. The exceptions are sustained.

The record is this: Editha Glover Grover married Rodney Paul Grover in 1934, and to them five children were born. The oldest child is this daughter, Myra Editha Grover, aged twelve years. Myra was born at Dixfield, Maine in the home of the respondent, Clara Grover, her paternal grandmother. Myra has lived in her grandmother's home, and with her grandmother, from the time of her birth. It is the only home she has ever known. Her parents moved from Clara Grover's home when Myra was four years old, and took with them their other children. Myra was left with the respondent grandmother. At the June term 1945 of Oxford Superior Court, Rodney Paul Grover obtained a decree of divorce from his wife, for cruel and abusive treatment on the part of the wife, Editha Glover Grover. No order was then made in regard to custody of any child. After the divorce was granted, Mr. Grover and his former wife continued to live together at Dixfield with their four children until August 1945, when Mrs. Grover moved to Norway, Maine and left the four children with the father.

Later, upon the petition of the mother, Editha Glover Grover, the Superior Court in September 1945, after a full hearing, amended the divorce decree by giving the care and custody of four children to the mother and the care and custody of this oldest child, Myra, to the grandmother, Clara Grover. After obtaining the order of custody, the mother went with a man named Harding, whom she had known before her marriage, to the home of her former husband to get her four youngest children. While there, Harding was shot and killed by the former husband, Rodney Paul Grover, who is now serving a life sentence for the crime.

Editha Glover Grover, having then four children to care for and with no means, made application for and received "Mothers Aid" from the state. She now obtains about twenty-nine dollars per week for herself and four children, and she expects an additional sum if she has an extra child.

Out of this "aid," she also has arranged to purchase a home in Norway.

The respondent's household consists of a son Roland, who runs the farm, his wife who is a school teacher, and their son John. John is twenty-five and is principal of Weld Grammar school.

In August 1946 the mother brought this pending petition against the grandmother to further modify the amended divorce decree, and to obtain the custody of this twelve year old daughter, Myra. At the hearing on this petition, the petitioner testified that with the twenty-nine dollars per week now given her by the state, and with the additional aid she will probably receive for an extra child, she will be able to give Myra and the four other children a home. This also was the opinion of Sheriff Francis. Eleven witnesses testified for the respondent in relation to the grandmother's home; her excellent care of the child; Myra's school, church, and Girl Scout activities; the piano lessons furnished by the grandmother; the expectation of a college education, and other facts that might indicate proper and affectionate care. In fact the petitioner herself, in testifying that her daughter Myra had lived for the twelve years with the respondent grandmother, agreed that "Myra has been getting along very well at her grandmother's home as far as food and clothing goes," and that she, the mother, had "consented" at the previous hearing that the grandmother might have the custody. The girl, Myra, testified in no uncertain terms that she desired to live, as she had always lived, with her grandmother because she is "happy" there, and "I just as soon spend the day with my mother, but to spend the night, I couldn't, because I am very homesick when I go away."

After this hearing on the pending petition the court by decree dated October 28, 1946 changed custody from the grandmother to the mother. The exceptions are to this 1946 decree.

One of the most important, if not the most difficult, problems to be decided by any court is the question of proper

custody of minor children at the time of, or after, a divorce. The family "war" is fought by the father and mother, but too often the lifetime scars are carried by their children. Too frequently also, the principals in the divorce are more concerned in defeating the wishes of a former wife, husband, or "relative-in-law," than they are interested in the welfare of the child. The law looks, however, only to the child's welfare; and the father, mother, and other blood relatives, as such, have no rights in or to the child. A child is not "owned" by anyone. The state has, and for its own future well-being should have, the right and duty to award custody and control of children as it shall judge best for their welfare. *Merchant* v. *Bussell,* 139 Me. 118, 121.

Usually the custody and control of minor children is vested jointly in the father and mother as natural guardians. If one of the parents is dead or has abandoned a child such parental custody devolves upon the other. R. S. 1944, Chap. 153, Secs. 16, 18. In the event of a divorce of the parents the justice, making the decree, may provide for the support, care and custody of their minor children, and may determine with which parent they shall live, or may grant custody to a third person; and such an order of custody may be altered at any time if or "as circumstances require." R. S. 1944, Chap. 153, Sec. 69. The paramount consideration for the court at the time of a divorce, or at the time of a requested alteration of a decree regarding custody, is the present and future welfare and well-being of the child. *Merchant* v. *Bussell,* 139 Me. 118; *Stanley* v. *Penley,* 142 Me. 78; 46 Atl. (2nd) 710.

This case is before the Law Court on exceptions, and the question presented is whether there is evidence in the record to support the decree, for if the only conclusion to be drawn does not support the decision, the finding is an error in law and exceptions lie. *Bond* v. *Bond,* 127 Me. 117. Does the evidence, which is made a part of the bill of exceptions, warrant the decree? *Sweet* v. *Sweet,* 119 Me. 81; *Mitchell* v. *Mitchell,* 136 Me. 406, 417, 418.

We feel that the exceptions here must be sustained. The mother is without doubt an estimable person. The sheriff states that in his opinion she is a "good mother," and can feed, clothe and care for the child if the state furnishes the necessary "Mothers Aid," but she cannot do it otherwise. A careful reading of the record shows that there is no evidence of circumstances which authorized the court below to determine that the girl's welfare required a change of custody from the grandmother, who had always cared for her in a good home, to the mother who must depend on public charity and a future increase of state aid. The attorney for the mother argues in his brief that "while the girl's material wants are well cared for, apparently to an exaggerated degree, she is being developed into a completely selfish child." We fail to find any evidence of selfishness on the part of Myra.

Extra state funds for an extra child would undoubtedly assist the mother to better care for her other children, but the welfare of others is not the question presented here. It is the welfare of Myra Editha Grover. The record is bare of any evidence to show that the child should be transferred against her wishes from this home to one where funds might not be sufficient for the bare necessities. Her personal wishes should have great weight. *Merchant* v. *Bussell,* 139 Me. 118, 123.

It is true that the loving care of a mother is a vital necessity to the very young child, but a mother who has not had the responsibility or management of a daughter from her fourth to her twelfth year, and has permitted, or has been obliged to permit, a grandmother to give to her all maternal care, must expect that the child should prefer to remain in the home where she was born and has always lived. This is especially true where the grandmother has furnished all material things as well as motherly care. *Merchant* v. *Bussell,* 139 Me. 118.

If we consider only the testimony of the petitioner we are forced to the conclusion that she is actuated more by a

desire to benefit her other children, and to prevail over a mother-in-law for real or fancied wrongs, than by interest in the welfare of this daughter — a daughter she has attempted to see but little for eight years. There is also a strong suspicion that she has feeling against the grandmother's son, Roland, and his wife, who live in the home with Myra, and have expressed a desire to adopt. She testifies to no fact or circumstances to show that this child's welfare will be advanced or improved by change of custody. The contrary is clear.

This minor child should not, under the existing conditions, be used as a method to force the state to contribute extra funds for a family. The circumstances shown by the record do not permit or require the change of custody made by the sitting justice. The only inference, or conclusion, that can be drawn from the evidence does not support the decree. *Mitchell* v. *Mitchell,* 136 Me. 406, 417.

Exceptions sustained.

HENRY C. LAWLER

vs.

HARTFORD FIRE INSURANCE CO.

HENRY C. LAWLER

vs.

IMPERIAL INSURANCE CO.

HENRY C. LAWLER

vs.

THE FRANKLIN NATIONAL INSURANCE CO. OF NEW YORK, N. Y.

HENRY C. LAWLER

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., LIMITED

HENRY C. LAWLER

vs.

THE PENNSYLVANIA FIRE INS. CO.

HENRY C. LAWLER

vs.

NEW HAMPSHIRE FIRE INSURANCE CO. OF MANCHESTER, N. H.

HENRY C. LAWLER

vs.

UNION ASSURANCE SOCIETY LIMITED

HENRY C. LAWLER

vs.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY

HENRY C. LAWLER

vs.

MARYLAND INSURANCE COMPANY

HENRY C. LAWLER

vs.

CITY OF NEW YORK INSURANCE COMPANY

HENRY C. LAWLER

vs.

FIREMAN'S FUND INSURANCE CO.

Waldo. Opinion, August 28, 1947.

Insurance. Referees.

Referees chosen under Maine Standard Fire Insurance Policy must be disinterested, not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad sense of being competent, impartial, fair and open-minded, substantially indifferent in thought and feeling between the parties, and without bias or partisanship.

The burden of proving bias and partiality on the part of referees under Maine Standard Fire Insurance Policy is on the plaintiff.

ON MOTION FOR NEW TRIALS.

Actions brought to recover amounts claimed to be due on policies of fire insurance. The parties, not being able to agree as to the amount of loss, submitted the matter to three referees in accordance with the provisions of the Maine Standard Fire Insurance Policy. A majority of the referees found for the plaintiff in an amount which he refused to accept. Plaintiff then brought suit alleging that the award was not binding on him because a majority of the referees were not disinterested and impartial, but were biased in favor of the defendant, and that the award was grossly inadequate and unfair and against the evidence and

weight of the evidence. After jury verdict, defendants filed general motion for new trial. Motion overruled.

Clyde R. Chapman,
McLean, Southard & Hunt, for plaintiff.

Perkins, Weeks & Hutchins,
Hillard H. Buzzell, for defendants.

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

THAXTER, J. These eleven actions tried together before a jury are, after verdicts for the plaintiff totalling $55,597.37, before this court on general motions by the defendants for new trials. They were brought to recover amounts claimed to be due on certain policies of fire insurance.

The plaintiff, Henry C. Lawler, was the owner of a potato storage house situated at Jackson, Maine. It burned February 12, 1944 with its contents of potatoes which were a total loss. The Hartford Fire Insurance Co. carried the insurance on the contents in the amount of $48,000. Insurance on the building in the sum of $10,000 was carried in varying amounts by the defendants in the other suits. The plaintiff filed a proof of loss against each company for the face of the policy or policies issued by each and claimed that his actual loss was in excess of the total amount represented by the policies. The parties, not agreeing as to the amount of the losses on the building and on the contents, the question was, in accordance with the provisions of the Maine Standard Fire Insurance Policy, submitted to referees, Joseph Bryant, Stillman E. Woodman, and Oscar H. Dunbar. A majority of the referees, Messrs. Woodman and Dunbar, found for the plaintiff in the following amounts, not considering some adjustments not in dispute: against the Hartford Fire Insurance Co. for the loss on the contents $26,625; against the other companies for the loss on the building $6,500. Mr. Bryant refused to sign the award,

claiming that the majority members of the board had not given due consideration to the evidence submitted, and that the amounts allowed were inadequate. The plaintiff refused to accept the award and brought suit, alleging in each case that the award was not binding on the plaintiff because the majority members "were not disinterested and impartial arbitrators such as the law requires, but were in fact biased in favor of the defendant; . . . that the said award was grossly inadequate and unfair and against the evidence and the weight of the evidence. . . ." It was necessary for the plaintiff to prove such partiality and bias in order that the issue as to the amount of the loss could properly be submitted to a jury. *Young* v. *Aetna Insurance Co.*, 101 Me. 294. That issue of bias in accordance with the agreement of the parties was submitted to the jury in the form of a special verdict and they found for the plaintiff; and they then determined the loss as $42,910 on the contents of the building which with interest came to a total of $48,094.96. They found the loss on the storehouse as $8,542, from which amount by agreement certain payments made on a mortgage were deducted, and the balance with interest amounted to $7,502.41 which was apportioned against the other companies.

Conceding for the moment that the jury's finding on the special verdict can be sustained, there is evidence to sustain their verdicts as to the amount of the loss on both the storehouse and on the contents. The sole question before this court accordingly is, was there evidence to sustain their finding that the referees were not impartial and disinterested. If their decision on this point was warranted, these motions must be overruled.

The contract of insurance in the form required by statute, R. S. 1944, Chap. 56, Sec. 97, provides that if the parties to the contract are unable to agree on the amount of a loss, it shall be determined by "three disinterested men" selected in accordance with the provisions of the statute. As is pointed out in *Young* v. *Aetna Insurance Co., supra,* the statutory

method of selection of referees takes from the parties the freedom of choice which they would have in an ordinary reference in choosing those who are to sit in determining a very vital question. The plaintiff was forced to agree to such provision of the contract or go without insurance. It is evident from the *Young* case that the court should, because of such compulsion against the assured, be meticulous in its examination of the facts to determine that the statutory requirement that the referees should be disinterested has been fulfilled. Both the language of the court and the decision in that case so indicate. "From the foregoing considerations and others," says the opinion at page 298, "we are satisfied that the insurance statute and the insurance contract require that the referee shall be 'disinterested' not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad, full sense of being competent, impartial, fair and open minded, substantially indifferent in thought and feeling between the parties, and without bias or partisanship either way." And the court found bias, prejudice, and want of open-mindedness on the part of one of the referees because of his refusal to consider a local man for the third member of the board. Such refusal was held to be unreasonable and to be evidence of partiality.

The two referees, against whom the plaintiff in the instant case complains, are men of the highest character. Not even the plaintiff questions that. Men of high character, however, may still have their prejudices which unconsciously influence their actions. We think that there was evidence to support the jury's finding that these referees were not open-minded. There is something to be said for the contention of plaintiff's counsel that Mr. Woodman was over insistent on the selection of a third referee of someone very friendly to himself like Mr. Dunbar, and that he refused even to consider other names suggested by Mr. Bryant.

We feel that there is evidence to support the jury's finding in the fact that Mr. Woodman supported by Mr. Dun-

bar refused to give due consideration to the testimony of many witnesses as to the quantity of potatoes in the building before the fire. It is apparent that much of that testimony was practically ignored because of Mr. Woodman's opinion that the quantity of potatoes there after the fire did not indicate that the amount claimed by the plaintiff could have been there before the fire. And there was almost no evidence to support that assumption. Evidence as to facts was ignored for a conjecture. There was evidence from a number of witnesses that the potato house was full or nearly full before the fire. One of these witnesses was called by the defendant. A glance at some of Mr. Woodman's testimony will, we think, indicate that he refused to consider important testimony as to the quantity of potatoes there before the fire because he could not find them in the ruins after the fire.

"Q. Now, Mr. Benjamin Morrison also testified that all available space was taken. Did you give any weight to that testimony?

A. Oh, yes.

Q. That is the same house.

A. But the same answer, Mr. McLean. I still wanted to find the potatoes. That is where my award was based.

Q. Harry M. Bates testified that all the available space was used?

A. Yes.

Q. Did you give any weight to that testimony?

A. Yes. He also testified here the other day —

Q. Well, never mind the other day. I want to know what weight you gave to that testimony.

A. Some. I still wanted to find the potatoes.

Q. Fernald E. Parlin testified that all available space was taken. What weight did you give to his testimony?

A. Some, but I wanted to find the potatoes.

Q. Percy C. Humphrey testified that all available space was taken. What weight did you give to his testimony?

A. I wanted to find the potatoes. I gave it some consideration."

Dana Small testified that all available space in the building was occupied before the fire. Mr. Woodman was asked what weight he gave this testimony and replied: "Not so much as I did to the fact that we could not find the potatoes, Mr. McLean." Then we find this comment on the testimony of Charles Roberts, a witness called by the defense:

"Q. Now, you know that Charles Roberts testified as a witness for the insurance companies, didn't you?

A. Yes.

Q. He testified that all bins were full except one to the east which started to crowd. Do you remember his saying that?

A. I have a faint recollection. You have got it down there.

Q. Now he was the insurance companies' witness, wasn't he?

A. I think he was.

Q. Now, the insurance companies' witness and Mr. Lawler's witnesses are agreed, then, that all those bins were full except the east one which had started to crowd?

A. Yes.

Q. Now, did you still discredit the testimony as to the number of potatoes when the witnesses on both sides agreed?

A. Yes, Mr. McLean; we couldn't find the potatoes and we had no evidence that they would shrink up that much."

Bias is a state of mind; and we think that the jury were warranted in finding that Mr. Woodman from his own deductions based on the quantity of potatoes which he saw after the fire was so convinced that the plaintiff's claim

was unfounded that he refused to consider important evidence bearing on the question of the quantity on hand before the fire.

Without in any way questioning the honesty of purpose of these referees, we think that there was evidence to support the jury in their finding that a majority of the board did not approach the solution of this problem with that open-mindedness to which the parties here involved were entitled.

The entry must accordingly be in each case:

Motion overruled.

RUBY R. MCMULLEN

vs.

MILDRED I. CORKUM

Kennebec. Opinion, September 20, 1947.

Slander. Damages. Malice.

Language imputing a criminal charge is actionable *per se*, from which malice in law may be implied, and such damages as naturally, proximately and necessarily result from the utterance of slander, to persons other than the plaintiff, are recoverable.

Such damages include the elements of mental suffering, humiliation, embarrassment, effect upon reputation and loss of social standing, as far as they have been proved or may reasonably be presumed.

A jury would be warranted in increasing an award because of the failure of a defendant to establish by evidence a plea of truth.

Actual malice or malice in fact, may be shown for the purpose of enhancing damages, and may be defined in the popular sense of rancor, personal animosity, or ill will.

Actual malice does not exist if the defendant had an honest belief in the truth of her accusations, which belief was based upon the

standard of care and caution that a reasonably prudent person would have exercised before making such accusations. The belief must be based upon reasonable and probable grounds.

Fact that accusations were not sustained by the jury is not justification for a finding of actual malice where jury made no specific findings and elements necessary to establish the good faith of defendant are present.

Special damages with respect to dismissal from employment and efforts to secure employment elsewhere must be alleged and proved.

ON MOTION FOR NEW TRIAL.

Action of slander in which plaintiff recovered a verdict of $4,300. If the plaintiff remits all of the verdict in excess of $2,000 within thirty days after the rescript in this case is received, motion overruled; otherwise, motion sustained, new trial granted.

McLean, Southard & Hunt, for plaintiff.

Goodspeed & Goodspeed,
Arthur F. Tiffin, for defendant.

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

MANSER, A. R. J. This is an action for slander in which the plaintiff recovered a jury verdict of $4,300. It comes forward on a motion for a new trial.

As factual background, the record discloses that Mrs. Corkum, the defendant, was the manager of the Accessory Shop, a retail store in Gardiner, Maine, where articles for women's wear and use were sold. The business was established in 1932, and was owned by the husband and daughter of the defendant, Jessen A. Corkum, and Beatrice Wehrwein. Mr. Corkum was not actively engaged in the business but exercised somewhat of a supervisory relation, particularly with regard to financial matters. Mrs. Wehrwein, nee Corkum, was actively employed until some time after

her marriage in 1940, and since then on occasion when needed.

The plaintiff, Mrs. McMullen, had been a friend of the family for practically a score of years prior to the establishment of the business. At that time, by reason of her experience in similar stores, she was of assistance by way of advice, and in practical matters in the arrangement and display of goods. She was employed as head clerk and continued as such until August, 1945, a period of thirteen years. She was accorded the privilege of purchasing goods at a discount, both for herself and members of her family. The same privilege was extended to other clerks. The apparently friendly relationship of the parties continued until the dismissal of the plaintiff from her position early in August, 1945.

For quite a number of years there occurred more or less frequent shortages of cash and merchandise, some of which were shown to be occasioned by mistakes or oversight of one or another of the employed personnel, but some were not solved.

It was the practice of the plaintiff to take home merchandise and if she decided to keep it, she would, according to her version, report it to the defendant, when it would be paid for or charged to her account. It is the representation of the plaintiff, and some other witnesses called by her, that no memorandum was ever made as to articles taken by clerks, and this with the knowledge and approval of the defendant. Such failure to have any record of goods taken from the store was categorically denied by the defendant, her daughter, and another employee, who maintained that in all instances of which they had knowledge, a memorandum in duplicate was required. It is urged that any other method would be patently contrary to safe business usages and so testimony to such effect was not credible.

In any event, as appears in the record, the defendant became suspicious of the actions of the plaintiff, and testified

from her own observation or upon information from the clerks that the plaintiff at times would secrete articles in various places and receptacles and later take them from the store without information of the fact to the defendant; that she sometimes made sales and would ring up on the cash register a lesser amount than the sale price, or else make a register record of "No sale," and then furtively go to her handbag or pouch and apparently place folded bills therein.

Measures were taken by the defendant and her husband by mechanical computation of amounts shown by cash register tapes with the actual cash receipts, and the defendant introduced exhibits tending to show cash deficits.

Finally, after a conference between the defendant and her husband, the advice of counsel was sought, and as a result, a woman detective was employed, ostensibly as a clerk in the store. She remained a few days. Her testimony was given as to her own observations concerning alleged irregularities on the part of the plaintiff with regard to cash and merchandise. She took occasion to make marks of identification of certain items on the register tape and on one piece of merchandise.

On August 5, 1945, Mr. Corkum secured a warrant to search the premises of the plaintiff for certain specified merchandise. The defendant went with the officer and there identified the piece of merchandise which had been marked by the detective in the store. A few other items claimed by the defendant to belong to the Shop were found, but not removed, as they were not designated in the warrant.

Following the search, Mr. Corkum made a complaint in the Municipal Court against the plaintiff for larceny. The hearing lasted two days, and the plaintiff was found Not Guilty. While Mrs. Corkum did not sign the complaint, it appears, inferentially at least, that the defendant attended the hearing. These proceedings were all taken upon advice of counsel, who appeared in connection with the prosecution.

In connection with the events thus arising, it is alleged by the plaintiff in the present action that the defendant made slanderous statements concerning the plaintiff. They were:

1. "She has stolen a lot of money from us."
2. "Another one of her lies to cover up what she has been taking here, but we have caught her."
3. Again, in a statement to the defendant by the brother-in-law of the plaintiff: "I was surprised to hear about Ruby," it is alleged the defendant said, "It is true."
4. Another allegation was that, in answer to a question by an unidentified customer as to whether she could see the defendant at the store on the following Monday, she replied, "No, we won't be here Monday. One of our clerks took some merchandise and the hearing is on Monday."
5. There was also a general allegation that the defendant had publicly charged the plaintiff with larceny or embezzlement.

The defendant, in her pleadings, admitted that she used the language alleged in the third and fourth counts, as indicated above, and asserted the truth thereof in justification.

She denied making the statements alleged in the other counts. On these issues, stress of argument for a new trial is that the plaintiff's witnesses, who testified as to the alleged slanders, were biased by relationship or friendship to her, and in one instance came from a man who had a resentful attitude toward Mr. Corkum on account of incidents occurring between them.

While these contentions deserve consideration, yet it cannot be said that the plaintiff did not present explicit and substantive testimony of the alleged slanders. Controversial questions of fact were thus submitted to the jury and it is not shown that its verdict was so clearly wrong as to liability that it must compel the conclusion it was the re-

sult of prejudice, bias, passion or a misconception of the law. Neither side excepted to the instructions given to the jury.

Concerning the statements admittedly made by the defendant, the burden of proof of the truth thereof was upon the defendant, and the jury was so instructed.

It also appears that there was no request for specific findings upon the various counts. The general verdict as to liability returned by the jury, must be upheld.

The matter of the amount of the verdict presents a different problem.

It is established law that language imputing a criminal charge is actionable *per se,* from which malice in law may be implied, and such damages as naturally, proximately and necessarily result from the utterance of the slander, to persons other than the plaintiff, are recoverable.

Such damages would include the elements of mental suffering, humiliation, embarrassment, effect upon reputation and loss of social standing, so far as they have been proved or may reasonably be presumed.

A jury would be warranted in increasing an award because of the failure of a defendant to establish by evidence a plea of truth.

Actual malice, or malice in fact, may be shown for the purpose of enhancing damages. These principles are well set forth in *Davis* v. *Starrett,* 97 Me. 568; 55 A. 516; *Elms* v. *Crane,* 118 Me. 261; 107 A. 852; *Hall* v. *Edwards,* 138 Me. 231; 23 A. (2nd) 889, and cases therein cited.

Consideration is now given to their application to the facts of the instant case. The principle that the alleged slanders were actionable *per se* cannot be gainsaid and has entire applicability.

As to the principle of enhancement of damages in event the defendant fails to establish by evidence a plea of truth

as to admitted statements, this concerns the third and fourth counts. There is some uncertainty as to its present application. No instruction of this character was given and none was requested. The jury was without guidance or information in this respect. As heretofore noted, there was a general verdict without special findings as to each count. The court in its charge said:

> "Now, if the plaintiff satisfies you, if she has sustained the burden of proof even on one count in the writ, she is entitled to a verdict at your hands."
> "You are not going to be asked to find on each one of the separate counts."

While it cannot be said, definitely, that the verdict was against the defendant on the counts in question, yet, despite the uncertainty of the record in this respect, as the defendant asked for no special findings, such uncertainty is resolved against her and the court makes no diminution of the verdict on that account.

A different situation is presented with regard to the question of actual malice. Such malice is defined in the popular sense of rancor, personal animosity or ill will. It implies a desire and an intention to injure. *Jellison* v. *Goodwin,* 43 Me. 287; *Elms* v. *Crane, supra.*

It does not exist if the defendant had an honest belief in the truth of her accusations, which belief was based upon the standard of care and caution that a reasonably prudent person would have exercised before making such accusations. The belief must be based upon reasonable and probable grounds. *Sullivan* v. *McCafferty,* 117 Me. 1; 102 A. 324, in which is an illuminating discussion of the matter.

The record negatives proof of actual malice. As outlined in the facts stated herein, it appears that the parties had been friends for years. The plaintiff had been the trusted chief clerk in the store managed by the defendant. Covering a period of several years, there had been shortages in money and merchandise. This was known to both parties.

Various methods of checking were used. From the defendant's own scrutiny, and information supplied by disinterested clerks, the defendant became convinced that the loss of goods and money was caused by intended peculations and that the plaintiff was the person responsible. Then the defendant and her husband sought the advice of competent attorneys. As a result, a woman detective was employed. Within a period of a few days the detective reported information of several incidents relating to the plaintiff, which led to the issuance of a search warrant on complaint of Mr. Corkum, and the finding of one article of merchandise at the home of the plaintiff and which had been marked to make identification certain.

That the accusations were not sustained by the jury, after hearing the version of the plaintiff and her witnesses, is not justification for a finding of actual malice on the part of the defendant. Under the facts of record, no logical reason is found to support the charge of personal animosity or a desire and intention to injure the plaintiff. Instead, the elements necessary to establish the good faith of the defendant are present.

The jury was left unguided and to its own conception of the law upon this question, as no instructions were asked for or given by the presiding justice thereon, although it was instructed in general terms that,

> "The theory of damages is fair and reasonable compensation and no more."

Again, it was in evidence that the plaintiff was dismissed from her employment. It is not disclosed whether she made any effort to secure employment elsewhere, but the fact of dismissal was thus brought to the attention of the jury. There was no allegation in the writ setting forth a claim for special damages in this or any other respect. Such damages must be alleged and proved. *Davis* v. *Starrett, supra; Elms* v. *Crane, supra.* The jury received no instruction relating thereto.

There was evidence of damages which may be considered to naturally, proximately and necessarily result from the utterances of the slanders so far as mental suffering, bodily health, humiliation and embarrassment are concerned. There is no substantive evidence as to their effect upon her reputation or social standing. While, ordinarily, there arises an adverse presumption with reference thereto, it appears in the present case that she certainly has not lost the esteem and regard of her friends and acquaintances. So far as the general public is concerned, the favorable result to her upon the charge in Municipal Court may well have tended to dissipate any doubts as to her integrity.

For the reasons given herein, the court holds that the verdict of the jury was clearly excessive as to damages, and that it was arrived at through a misconception of the law and the facts, and from sympathy for a woman of good repute, who it decided had been subjected to false accusations.

If the plaintiff remits all of the verdict in excess of $2,000 within thirty days after the rescript in this case is received, motion overruled; otherwise motion sustained, new trial granted.

CLIFFORD HOLDSWORTH, PETITIONER

vs.

GOODALL-SANFORD, INC.

AND

F. EVERETT NUTTER, CLERK AND DIRECTOR

York. Opinion, October 3, 1947.

Corporations. Records.

By statute a stockholder of a corporation has the absolute right to inspect the list of stockholders of the corporation, provided his purpose in seeking the examination is not vexatious or unlawful, and such right will be enforced by mandamus.

At common law, a stockholder has a right to examine the books, records and papers of a corporation, when the inspection is sought at proper times and for a proper purpose, which must relate to his interest as a stockholder.

In enforcing the common law right of the stockholder to inspect books and records generally, the court should not only be satisfied that the request for examination is made in good faith, but also for the purpose of protecting his rights as a stockholder, and that to grant the relief will not adversely affect the interests of the corporation.

ON EXCEPTIONS.

Petition for mandamus, and alternative writ issued wherein respondents were commanded to allow petitioner to inspect records. A return to the alternate writ was filed by respondents claiming justification for refusal to grant petitioner's demand for inspection, on the ground of alleged fraudulent acts which were the basis of an equity suit brought by the corporation against petitioner. Peremptory writ was ordered to issue by the justice hearing this case. Respondents filed exceptions. Exceptions sustained.

Franklin R. Chesley, for petitioner.

William B. Mahoney,
Wadleigh B. Drummond,
Burns, Blake & Rich, for respondents.

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

THAXTER, J. At the time of the institution of these proceedings the petitioner was the holder of record of 1920 shares of stock of Goodall-Sanford, Inc., which had been bought by him from time to time over a number of years. He had been employed by the corporation and one of its predecessor companies for a long time and had reached a position of responsibility, that of overseer of the yarn department, when his employment was terminated. It is obvious that trouble had arisen between him and his employer; for in July, 1946, the corporation made demand on him for an accounting of certain alleged unlawful and secret profits, and on March 4, 1947 brought action against him for an accounting of the same, in which suit his stock was attached. It was claimed that such stock was bought with the proceeds of such secret profits and was held by him on a constructive trust for the corporation. He was also indicted on a criminal charge in connection with the same transactions. On February 4, 1947 there was a request made to the president of the corporation by Franklin R. Chesley, Esq., the attorney for the petitioner, for an opportunity to examine the corporate books and records. This was submitted to the Board of Directors and was denied March 25, 1947, the board apparently claiming to act under authority of a by-law which provided that "no stockholder shall have any right to inspect any account or book or document of the Corporation, except as conferred by statute or authorized by the Directors or by a resolution of the stockholders entitled to vote." On April 8, 1947, a formal demand was made by the petitioner to inspect the books and records of the corporation. This was denied except as to the records of the stockholders' meetings and the list of stockholders.

On April 11, 1947 this petition for mandamus was filed and on the same day an alternative writ was issued under the terms of which the defendants were commanded to "allow said Clifford Holdsworth, his agents, accountants and attorneys, to have access to and inspect any and all of the corporate books, records, documents or Directors' and stockholders' minutes of said Goodall-Sanford, Inc., and to take copies and minutes therefrom of such parts thereof as concern his interests." There was a discontinuance by the petitioner as to all the respondents except the clerk and the corporation. By them a return to the alternative writ was filed which set up as a justification for the refusal to grant the demand of the petitioner his alleged fraudulent acts which were the basis for the equity suit which the corporation had brought against him. Also it was claimed in the return that the company had the right to refuse the petitioner's demand because of the bylaw above referred to and because the demand to inspect the books and records, other than the record of the stockholders' meetings and the list of stockholders, was not for a proper and legitimate purpose which related to the petitioner's interest as a stockholder, but was designed to discourage and obstruct the prosecution of the action brought by the company against the petitioner. There were other minor allegations made against the petitioner but the above are the fundamental issues on which the case was tried. The petitioner disclaimed any purpose to injure the company in seeking the examination of the books and alleged that he only desired the inspection in connection with his interest as a stockholder.

The learned justice before whom the case was heard found for the petitioner on the issues raised by the pleadings and ordered the peremptory writ to issue as prayed for. The case is now before us on the respondents' bill of exceptions.

The exceptions are twelve in number. In the view which we take of the issues before us, it is unnecessary to con-

sider Exceptions 3, 4, 5, 6, 7, 8, 9, 10 and 11. Exceptions 1 and 2 relate in part at least to the materiality of the respondents' defense and the evidence offered in support of it, that the inspection asked for was for an improper purpose. Exception 12 is to the justice's ruling granting the writ, the question here being as we see it, whether the writ should have been granted in view of the refusal to consider the issues involved in the rulings which gave rise to Exceptions 1 and 2.

R. S. 1944, Chap. 49, Sec. 33, provides that all corporations existing by virtue of the laws of this state shall have a clerk, who is a resident of this state, and a clerk's office where shall be kept the record of all stockholders' meetings and a record showing a true and complete list of all stockholders, their residences, and the amount of stock held by each. "Such records and list of stockholders shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests, and have them produced in court on trial of an action in which they are interested."

In addition to this statutory right, which applies only to the records of corporate meetings and to the list of stockholders, a stockholder has a right at common law to examine the books, records and papers of a corporation, when the inspection is sought at proper times and for a proper purpose, which it is held must relate to his interest as a stockholder. *White* v. *Manter,* 109 Me. 408; *Withington* v. *Bradley,* 111 Me. 384.

The stockholder's right under the statute is absolute and, provided his purpose in seeking the examination is not vexatious or unlawful, will be enforced by a writ of mandamus even though his motive in applying for the writ may in no way relate to his interest as a stockholder. *White* v. *Manter, supra,* 412; *Withington* v. *Bradley, supra,* 389; *Shea* v. *Sweetser,* 119 Me. 400; *Day* v. *Booth,* 123 Me. 443. For example, in *White* v. *Manter, supra,* the petitioner de-

sired to find out the amount of stock owned by her husband from whom she had been divorced and against whom she had a proceeding pending to determine the amount of alimony.

However, in enforcing the common law right, which gives to the stockholder the power to inspect books, records and papers generally, the court should not only be satisfied that the stockholder's request is made in good faith, but also for the purpose of protecting his rights as an owner of stock, and that to grant the relief will not adversely affect the interests of the corporation. *Varney* v. *Baker,* 194 Mass. 239; *Guthrie* v. *Harkness,* 199 U. S. 148; 38 C. J. 796. He should not be granted a roving commission to pore at will through the books and records of the corporation without regard to the purpose for which he seeks the extraordinary remedy which the law gives to him. 18 C. J. S. 1188. The court may impose reasonable limits on the time, and the place of the examination, and above all should be satisfied that the investigation relates to his interest as a stockholder. Such being the case, the writ should not be granted as an aid to the prosecution or defense of other litigation as was properly permitted under the statute involved in *White* v. *Manter, supra.* On these general propositions there seems to be no real dispute in the cases.

In the case of *In re Vengoechea,* 86 N. J. L. 35, the court at page 37 gave the following admonition as a guide to courts in the granting of a writ of mandamus in such a case as is before us. "It is the duty of the courts in a proper case to protect minority stockholders, but the power to order an inspection of books is so great, its exercise may affect unfavorably so many innocent stockholders, and may cause such inconvenience or perhaps such ruinous results to a corporation whose operations are so extensive in two continents that the court ought to exercise the power with the greatest care and only when a case is presented which indicates not only a *bona fide* desire to safeguard the interests of all stockholders but a probability that the interests of

all will be served by the proposed investigation." The application for the writ was denied because the court was satisfied that the petition was not brought for a proper purpose. The court said, page 36: "I have reached the conclusion that the application is not made in good faith for the purpose of ascertaining the true *status* of the company or of taking measures to protect the interests of the applicant as a stockholder, but rather for the purpose of annoying the company and perhaps assisting the applicant in his pending litigation against it, which is aside from his interest as a stockholder."

In *McMahon* v. *Dispatch Printing Company,* 101 N. J. L. 470, the principles of the above case were affirmed with this additional comment, page 471: "Of course, the well-settled doctrine that the motives which prompt a suitor to enforce a legal right cannot properly preclude its enforcement, is not affected by a declaration which refers to applications of the kind under consideration, the granting of which rests in the discretion of the court."

In *State ex rel* v. *German Mutual Life Insurance Company of St. Louis,* 169 Mo. App. 354, the court pointed out, in an application under the common law by a stockholder to enforce his right to inspect the books and records of his corporation, that there was a discretion to refuse the writ which should be refused, "where it appeared that relator, who was a debtor, was endeavoring, by means of his position as a stockholder, to extract material for a defense and was, therefore, not asserting his right as a stockholder for a good purpose."

It is unnecessary to discuss other cases. The doctrine above set forth represents the almost universal rule and is in accord with the language of our own court which has said that in a proceeding brought at common law the writ should be denied if the court is satisfied that it is not asked for to protect the rights of the petitioner as a stockholder.

One justification, which the respondents set up in their return to the alternative writ, for their refusal to open the

corporate books and records generally for inspection by the petitioner is that the request "was not for a proper and legitimate purpose which related to his interest as a stockholder, but was designed and intended by said Holdsworth, contrary to the best interest of said corporation, and of all the stockholders of said corporation to discourage and obstruct the prosecution of the aforesaid action brought by said corporation against said Holdsworth." Various alleged transactions are set forth in some detail which it is claimed show that the petitioner did abuse his position of trust and did defraud the company. Objection was made to such evidence and the court excluded it on the ground that it had no relevancy to this proceeding. Counsel argued very strenuously that it was relevant on the question whether the court should exercise its discretion and deny the writ.

The learned justice appears to have had a very narrow view of his discretionary power and to have felt that it was his duty to issue the writ as an aid to the petitioner in an attempt to discover evidence which would aid him in his defense to the suit which the corporation had brought against him. He said in support of his ruling: "If a man is charged with defrauding his company, and that proceeding is pending in another case, I think I should exercise my discretion, if discretion were allowed, to furnish him with an opportunity to determine whether the records of the company bore on the matter to such an extent that he could thereby be enabled to make his defense as a litigant." We think that the learned justice here failed to recognize the true basis for the stockholder's right at common law to examine the books and records of his corporation. It is a right which arises from his status as a stockholder, not as a litigant. It is a right which he asserts, in a sense not only for himself, but for the benefit of the corporation and all stockholders whose interests, because they are stockholders, are identical with his. Such inspection may put the company to great inconvenience and expense and be adverse to

the interests of other stockholders, who may be subjected to loss to benefit one stockholder in a matter which concerns him as an individual. Such reasoning is implicit in the authorities heretofore cited.

The motives of the petitioner were in this instance material. The purpose which leads one to act in a particular way is often known only to the actor himself. It may be discovered by others only from circumstances. As we say so often in construing wills, from the "surrounding circumstances." So in this case, whether the inspection of the corporate records and books was for a purpose which the law recognizes as proper could best be discovered by a consideration of the background and relationship of the parties, whether there was warfare going on between them, whether one had wronged the other, whether one had an interest in harassing the other. Of course the court has some discretion in limiting the range which such evidence may take, but it should not be held to be immaterial. And it is not inadmissible merely because it may also bear on the issues in other litigation. In this case the court excluded evidence on the relationship of the parties which it seems to us was not irrelevant as the court ruled.

The learned justice should not have denied himself the benefit which the evidence as to prior transactions between the parties would have given him in determining the very important question as to the purpose of the petitioner in seeking the examination of the corporate books and records.

Exceptions sustained.

WOODROW ARCHER
vs.
AETNA CASUALTY COMPANY
AND
IDA KORHONEN

Penobscot. Opinion, October 6, 1947.

Replevin Bond.

If defendant is entitled to return of goods in replevin action, he is entitled to damages for the taking, and costs, and the amount of damages may be assessed in the original replevin suit, or, if not then assessed or considered, by suit on the bond.

After a decision for defendant in replevin suit, by nonsuit, verdict or otherwise, defendant must file motion for a judgment for return. and he may then proceed with an action on the bond.

When defendant in replevin suit proves title or recovers judgment, he is entitled to damages for the interruption of his possession, and for the loss of the use of the property.

ON EXCEPTIONS.

Action of debt on replevin bond. In the original replevin suit the jury found for the defendant (now plaintiff) and an order was made for the return of the property, but no damages were assessed or passed upon. The present action on the bond was brought to recover special damages for costs and for the taking. Defendants filed a plea of general issue, with brief statement that the conditions of the bond declared upon had been complied with. Defendant excepted to refusal of trial justice to direct a verdict for defendants. Exceptions overruled.

Daniel I. Gould,
Milton Beverage, for plaintiff.

Frank F. Harding, for defendants.

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

FELLOWS, J. This is an action of debt on a replevin bond brought by Woodrow Archer against the Aetna Casualty and Surety Company and Ida Korhonen. The case was tried before a jury. It comes to the Law Court upon exceptions to the refusal of the presiding justice to direct a verdict for the defendants. The exceptions are overruled.

The evidence shows that on August 7, 1945 Ida Korhonen commenced an action of replevin against this plaintiff, Woodrow Archer, and took from him "one 1941 Mercury Club Coupe." The replevin bond, required by R. S. 1944, Chap. 112, Sec. 10, signed by these defendants, Ida Korhonen and Aetna Casualty Company, was conditioned as in the prescribed form of the writ, and to "pay such costs and damages as the said Woodrow Archer shall recover against her."

The original replevin action was tried before a jury at the September Term, 1946, of the Superior Court for Penobscot County, at which trial the question before the jury was the title to the automobile. The jury found for the defendant, and an order for return of the property to the defendant Archer was made. No damages for the taking were assessed, or passed upon. The execution or "writ of return," made by the Clerk of Courts in regular form, stated "no dollars damages" assessed, and ordered the sheriff to "return and restore" the automobile, and to collect costs taxed at $67.99 "arising in the defense of said suit." The automobile, taken from Woodrow Archer by Ida Korhonen on August 7, 1945 by virtue of the replevin writ and bond, was returned by Korhonen to Archer on September 11, 1946 immediately after the trial.

This action on the replevin bond was brought by Archer to recover special damages for the taking of his automobile, and for unpaid costs. The defendants Korhonen and Aetna Casualty and Surety Company plead the general issue, with a brief statement that the "conditions of the bond declared upon in the plaintiff's writ have been fully complied with."

The conditions of the bond, executed by these defendants at the time of bringing the original replevin action and on which this suit is brought, are (1) "to prosecute the said replevin to final judgment." (2) "to pay such costs and damages as the said Woodrow Archer shall recover against her" and (3) to "return and restore the said goods and chattels in like good order and condition as when taken, in case such shall be the final judgment." The first and third conditions have undoubtedly been complied with, because in the original replevin action the jury found title in the defendant Archer, and the automobile was returned. As to the second condition, relative to costs and damages, the plaintiff Archer claims non-compliance and has obtained this jury verdict for $572.10.

It is claimed by the plaintiff Archer that the costs, taxed by the clerk in the former action of replevin at $67.99, have not been paid; and that the replevied automobile was used for transporting men and for other business purposes in his lumber and sawmill work and was unlawfully kept from him for thirteen months. He was many times obliged to hire other cars for his numerous and necessary errands, and to use a truck that was more expensive to operate. He was forced to take a truck at times "off the job" at his sawmill, to do the work usually done by the car, at a loss and extra expense. He testified that his damages for loss of use of the replevied car for the thirteen months was five hundred dollars. Another witness stated that "$500 would be a small estimate" because "that is less than $2 a day" and he "has got a use for his car most every day in the year."

There is evidence that the costs in the original replevin action for $67.99 have not been paid. In fact the writ of return, offered in evidence by the defendants themselves, shows no satisfaction or payment. Also, in cross-examination of the plaintiff, the fact was brought out by the defense that the defendant's attorney and this plaintiff had talked about and endeavored to effect an adjustment of the "costs and damages." The defendant's brief states "no damages

were proved at the time of the trial upon the replevin writ and none were assessed or awarded by the jury."

A replevin bond is more than a formality. It is a substitute for property replevied and a security to the defendant for possible damage and costs. "If it appears that the defendant is entitled to a return of the goods," he is entitled to "damages for the taking and costs." R. S. 1944, Chap. 112, Secs. 10, 11. The amount of damages for taking and detention may be assessed in the original replevin suit. R. S. 1944, Chap. 112, Sec. 11. If, as in this case, it is not then assessed or considered, such damages may be determined and recovered in a suit on the bond. *Kimball* v. *Thompson,* 123 Me. 116, 118; *Thomas* v. *Spofford,* 46 Me. 408, 411; *Washington Ice Company* v. *Webster,* 62 Me. 341, 351.

Under Maine practice the question of damages for the taking cannot always be conveniently reached or passed upon during the trial of the original replevin action. The defendant in a replevin suit is never entitled to damages for the taking unless he is entitled to a return of the goods. R. S. 1944, Chap. 112, Sec. 11; *Washington Ice Company* v. *Webster,* 62 Me. 341, 351. Whether the replevin action can be maintained must be settled by a decision of the questions of law and fact. The title or right of possession is usually the main issue and, at the trial, usually the only issue. After a decision for the defendant is made upon nonsuit, verdict, or otherwise, it is the duty of a defendant to file a motion, as here, for a judgment for return. He can then proceed, as he has done in this case, with his action on the bond. *Washington Ice Company* v. *Webster,* 62 Me. 341, 351, 352; *Kimball* v. *Thompson,* 123 Me. 116.

In the early case of *Pettygrove* v. *Hoyt,* 11 Me. 66 cited by the defendants, the plaintiff in replevin failed to enter his writ, whereupon the defendant filed a *motion for costs only* and *failed to ask for a return of the goods.* The execution issued for costs only and *was satisfied.* It was held that action on the bond could not be maintained because no order for return.

The revision of the Statutes of 1841, Chap. 130, Sec. 11, which condensed the Act of 1821, Chap. 80, Sec. 4, provided "If it shall appear upon the nonsuit of the plaintiff, or upon a trial or otherwise, that the defendant is entitled to a return of the goods he shall have judgment therefor accordingly with damages for the taking thereof by the replevin with his costs." The present words of R. S. 1944, Chap. 112, Sec. 11 "If it appears that the defendant is entitled to a return of the goods," were prepared by Chief Justice Shepley, and first appears in the revision of 1857 at Chap. 96, Sec. 11.

When the defendant in the replevin action makes out a good title or recovers possession, he is entitled to damages for the interruption of his possession and the loss of the use of the property. *Smith* v. *Jeojay,* 124 Me. 381; *Kimball* v. *Thompson,* 123 Me. 116. "It is simply a question of actual damage." *Tuck v. Moses,* 58 Me. 461, 476.

At the close of the testimony in this action on the bond, the attorney for the defendants made a motion for a directed verdict in their favor "on the ground that as a matter of law, conceding the truth of all said evidence, no verdict or judgment except for the defendants could legally be had." The presiding justice properly denied the motion, and was correct in submitting the question of damage to the jury.

It is well established in this state that "a verdict should not be ordered for the defendant by the trial court when, taking the most favorable view of the plaintiff's evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds." *Howe* v. *Houde,* 137 Me. 119; *Wellington* v. *Corinna,* 104 Me. 252.

The brief statement filed by the defendants raised the question of whether the three conditions of their bond had been complied with. There was evidence on which the jury

might find, as it evidently did find, that although two conditions had been complied with, the costs in the replevin action had not been paid, and this plaintiff had suffered substantial damage by being unlawfully deprived of the use of his automobile for more than a year.

Exceptions overruled.

HENRY BARTLEY, PRO AMI
vs.
GEORGE COUTURE

LEO MORIN, PRO AMI
vs.
GEORGE COUTURE

EDWARD BARTLEY
vs.
GEORGE COUTURE

GEDEON MORIN
vs.
GEORGE COUTURE

Androscoggin. Opinion, October 27, 1947.

Evidence. Workmen's Compensation Act. Pleadings.

All questions relating to credibility and weight of testimony are to be determined by the trier of facts.

An employer who has not become an assenting employer under Workmen's Compensation Act, when sued at common law by an employee, is not entitled to set up defense of contributory negligence, assumption of risk, nor negligence of a fellow servant.

An injury suffered in the course of transportation furnished an employee as an incident of his employment is sustained in the course of that employment.

The provisions of the Workmen's Compensation Act are applicable to minor employees for whom a work permit is necessary, notwithstanding the failure to secure such a permit.

The principle of *res ipsa loquitur* is applicable where employees are being transported by an employer as an incident of their employment, and injuries are suffered as a result of employer's agent driving a motor vehicle off the highway.

In actions for the recovery of damages for personal injury, the duty claimed to have been breached and the breach of it may be pleaded either by forthright assertion or by the averment of facts from which the law will imply them.

ON EXCEPTIONS.

Actions at common law, brought to recover for personal injuries, medical and hospital expenses against employer of two minor plaintiffs under the provisions of the Workmen's Compensation Act. The cases were tried before a single justice without a jury with right of exceptions reserved on questions of law. The findings of the justice were for the plaintiffs. Defendant filed exceptions. Exceptions overruled.

Frank W. Linnell, for plaintiffs.

Edward J. Beauchamp, for defendant.

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

MURCHIE, J. These four cases, two of which are prosecuted on behalf of minors by their next friends, to recover for personal injuries, and two by parents, to recover the medical and hospital expenses incident to the injury of said minors, were tried together before a single justice of the Superior Court sitting without a jury, with the right of exceptions reserved on questions of law.

A decision, carrying awards of $900 and $300 to the minors and $205.58 and $122 to the parents, is brought to this court on defendant's exceptions. Notwithstanding the

allegation of twenty-five grounds of error in the Bill of Exceptions, including assertion that the evidence would not justify findings that he was negligent, that the minors were his employees, or that he employed more than five workmen or operatives in the business in which the minors were employed, stated and reiterated in various ways, the single point argued by his counsel is that the minors, each fifteen years of age when employed and injured, could not be considered employees within the purview of the Workmen's Compensation Act, hereinafter referred to as "The Act," because they were working without the permit required by R. S. 1944, Chap. 25, Sec. 18, as amended by P. L. 1945, Chap. 277, to legalize the employment of minors between the ages of fifteen and sixteen years during school hours. The preceding section, as amended by P. L. 1945, Chap. 277, prohibits the employment of any child under fifteen years of age "in, about, or in connection with any manufacturing or mechanical establishment, laundry, bakery, bowling-alley, or pool-room," and the employment of any child under fifteen years of age "at any business or service for hire," except by compliance with Sec. 18. As amended, the latter requires that any person employing a minor between the ages of fifteen and sixteen years in any of the occupations mentioned in the preceding section shall procure a permit therefor from the superintendent of schools, or other authorized person. Secs. 31 and 32 of the chapter impose penalties on any person employing a child contrary to Secs. 17 and 18 (and others) and on the parent, guardian, or custodian having such a child under his control for permitting the employment.

The pertinent provisions of The Act (R. S. 1944, Chap. 26) are found in the definition of the word "employee," in Sec. 2, II, i.e. that it "shall include every person in the service of another under any contract of hire, express or implied, oral or written," with exceptions not pertinent to these cases, and in the machinery provided by Sec. 7 to permit the employees, or the parents or guardians of minor

employees, of employers assenting to The Act, to reserve common law rights for the recovery of damages for injuries by appropriate action. A special provision therein is that a "minor working at an age legally permitted under the laws of this state shall be deemed *sui juris*" for the purpose of The Act.

The testimony offered on behalf of the defendant was designed to establish that the minors were volunteer workers, not employees; that they were injured while being given a ride home, not while being transported as an incident of their employment; that they were tipped gratuitously for volunteer work, not paid for labor; and that he did not employ more than five workmen in the business to which the minors devoted their labor. Some of these claims were grounded in the undisputed fact that the minors were not hired for a definite time at an agreed wage. Their own testimony was that the defendant told them to be at a certain place at a stated time if they wanted to go to work; that they appeared at that time and place, were put to work and were paid. The court found that they were employees of the defendant; that they were working in the usual course of his business, and were injured while being transported home from work as an incident of their employment; that their injuries were caused by the negligence of a fellow employee; and that the defendant employed more than five workmen in the business in which the minors were employed. Since the defendant had not assented to The Act, this would constitute him a non-assenting employer under it, assuming its application, as the Trial Court did, and eliminate the fellow-servant doctrine, so-called, as a ground of defense to the actions.

Examination of the record explains the failure of the defendant to argue the factual issues raised by his Bill of Exceptions. A clean-cut conflict of testimony on each and all of them was resolved in favor of the plaintiffs by the single justice who heard it, and had an opportunity to observe the witnesses on the stand. It was his province and

not that of this court to pass upon them. The handicap of a court of law in this field is well illustrated by one of the exhibits which the evidence discloses showed erasures that cannot be apparent in the transcribed record. It is sufficient on these issues to say that there was ample evidence, if believed, as the findings show it was believed, to support each and every finding of fact essential to the decision under review. Questions as to the credibility and weight of testimony are to be determined by the trier of fact. *Bubar* v. *Bernardo,* 139 Me. 82; 27 A. (2nd) 593, and cases cited therein.

It has been recognized heretofore in this jurisdiction that any employee of an employer subject to The Act, who has not become an assenting employer under it, may recover for injuries sustained in the course of his employment in an action at common law, and that under Sec. 3 of The Act neither contributory negligence nor the negligence of a fellow-servant or assumption of risk, shall be available to the employer as a defense to his action. *Nadeau* v. *Caribou Water, Light & Power Co.,* 118 Me. 325; 108 A. 190; *Bubar* v. *Bernardo, supra.* It is established also that injury suffered in the course of transportation furnished by an employer as an incident of employment is sustained in the course thereof, *Chapman et al.* v. *Hector J. Cyr Co., Inc.,* 135 Me. 416; 198 A. 736, and cases cited therein.

This court has not been called upon heretofore to adjudicate the status of a minor employee under The Act, or the application of Sec. 3 thereof to a common law action by such an employee against his employer. In one form or another both questions have been presented in many other jurisdictions, with results that are far from harmonious. Extended annotations on various phases of the issue fundamental to both are to be found in 6 N. C. C. A. at 763; 7 N. C. C. A. at 254; 11 N. C. C. A. at 599; 15 N. C. C. A. at 720; 14 A. L. R. at 818; L. R. A. 1918F at 209; and Ann. Cas. 1918B at 679. Supplemental annotations are found in 16 N. C. C. A at 1063; 17 N. C. C. A. at 607; 33 A. L. R. at

337; and 49 A. L. R. at 1435. The subject matter is treated briefly in annotations dealing with compensation acts generally in L. R. A. 1916A at 23 and L. R. A. 1917B at 80, as in one treating especially of the constitutionality of child labor laws in 12 A. L. R. at 1216.

The annotations analyze one or more decisions in each of twenty or more states. The weight of authority seems to be, as noted by the writer of that found in 14 A. L. R. 818 at 819, that "the employment contemplated by the provisions of the Workmen's Compensation Acts is a lawful employment, and that these acts are inapplicable in case of an injury to a minor whose employment is unlawful." The Vermont Court in *Wlock* v. *Fort Dummer Mills, infra,* declared to the same effect. There is no uniformity in the language of the legislation in the several states, or in the nature of the process wherein the adjudications have been recorded. As against our own almost unlimited definition of the word "employee," and the reference to a minor legally permitted to work, in declaring his full capacity to contract, the compensation acts in Illinois, Indiana, Michigan, Minnesota and Wisconsin (to mention no other states) limit their definitions of "employees" in a manner which excludes all minors except those legally permitted to work.

In many decided cases the issue has arisen in litigation wherein a minor, or the parent of one, was seeking a common law remedy and the employer claimed in defense that a compensation act was the exclusive remedy. *Widdoes* v. *Laub,* (Del); 129 A. 344; *Roszek* v. *Bauerle & Stark Co.,* 282 Ill. 557; 118 N. E. 991; L. R. A. 1918F 207; 16 N. C. C. A. 1063; *Hetzel* v. *Wasson Piston Ring Co.,* 89 N. J. L. 201; 98 A. 306; L. R. A. 1917D 75; *Western Union Telegraph Co.* v. *Ausbrooks,* 148 Tenn. 615; 257 S. W. 858; 33 A. L. R. 330; *Wlock* v. *Fort Dummer Mills,* 98 Vt. 449; 129 A. 311; and *Stetz* v. *F. Mayer Boot & Shoe Co.,* 163 Wis. 151; 156 N. W. 971; Ann. Cas. 1918B 675. It should be noted perhaps that in the *Wlock* case the employee had sought and obtained an award under the Compensation Act

prior to instituting his action at common law, and that in the *Stetz* case the insurer of the employer had entered into an agreement providing for payment under the Compensation Act, and the guardian of the minor had signed a release.

The general trend of the principles declared in the litigation covered by the annotations is difficult of appraisal by reason of the varied phraseology used in child labor legislation and compensation acts and the mingling of cases falling within such a provision as our own R. S. 1944, Chap. 25, Sec. 18, with those governed by provisions similar to those of the preceding section. It is obscured also by the fact that in some jurisdictions the employment of a minor for prohibited work, or during prohibited hours, is arbitrarily assumed to constitute negligence, *per se,* or *prima facie,* or to deny the employer either the defense of contributory negligence or that of assumption of risk, or both. In some instances the same effect is given to employing a minor without a permit, for work that would have been lawful if a permit had been obtained. Annotations dealing with these special features are to be found in 7 L. R. A. N. S. at 335; 12 L. R. A. N. S. at 461; 20 L. R. A. N. S. at 876; and 48 L. R. A. N. S. at 656.

There is a clean-cut conflict in jurisdictions where the issue as to the application of compensation acts to minors has been raised. Illinois, Indiana, Michigan, Oklahoma and Texas have denied compensation relief to minors employed, as the cases declare, illegally, or permitted a common law recovery on the ground that the compensation act was not applicable to them. *Messmer* v. *Industrial Board of Illinois et al.,* 282 Ill. 562; 118 N. E. 993; *In Re Stoner,* 74 Ind. App. 324; 128 N. E. 938; *Grand Rapids Trust Co.* v. *Petersen Beverage Co.,* 219 Mich. 208; 189 N. W. 186; *Rock Island Coal Mining Co.* v. *Gilliam,* 89 Okla. 49; 213 Pac. 833; *Galloway et al.* v. *Lumbermen's Indemnity Exchange et al.* (Tex. Civ. App.); 227 S. W. 536. On the other hand, minor employees, employed for work they might have undertaken

lawfully, if their employers had complied with the formalities of child labor legislation, have been permitted to collect benefits under compensation acts, or declared to be entitled to do so, in Connecticut, Massachusetts, New York, Virginia and Washington, although those formalities were ignored. *Kenez* v. *Novelty Compact Leather Co. et al.* (Conn.); 149 A. 679; *Pierce's Case,* 267 Mass. 208; 166 N. E. 636; *Noreen* v. *William Vogel & Bros. Inc.,* 231 N. Y. 317; 132 N. E. 102; *Humphries* v. *Boxley Bros. Co.,* 146 Va. 91; 135 S. E. 890; 49 A. L. R. 1427; *Rasi* v. *Howard Mfg. Co.,* 109 Wash. 524; 187 Pac. 327. The Connecticut case, which dates back to March in 1930, the latest of this group of decisions, was based to some extent on the authority of the others. In it, Mr. Justice Maltbie, Chief Justice of the Connecticut Court since the December after it was decided, stated with exact accuracy the problem then before his court and now presented to ours. That problem is to ascertain:

> "the legislative intent which is embodied in our own applicable statutes."

In 1925 the Delaware Court, in *Widdoes* v. *Laub, supra,* rejected the defendant's special plea that the parties were bound by the Workmen's Compensation Law on the theory that its binding effect was based on contract and could not be applicable to minors because they could not lawfully assent to its terms. The Delaware law defined employees in terms substantially as broad as our own, and carried similar provision for assuring employees the reservation of common law rights by notice to their employers, stated in terms of a presumption that both employers and employees were bound in default of notice. As to minors the recital was that:

> "A like presumption shall exist in the case of all minors * unless the notice * * * be given by * * the parent or guardian* * *."

In Delaware, as in Maine, the Compensation Act and the Child Labor Law were enacted by the same Legislature, and the latter made the employment of minors under sixteen

years of age unlawful except under an employment certificate or permit. There, as here, the ban against the employment of minors under a stated age could not be lifted by a permit. For the Maine laws as originally enacted, see P. L. 1915, Chaps. 295 and 327.

The Delaware Court considered the Indiana, Michigan, and Oklahoma cases which were rejected by the Connecticut Court, and the New York and Washington cases which the latter followed. The Washington case was distinguished on the ground that the Child Labor Law of that state, like our own, did not penalize the child for working in violation of it. The New York case was one of several in that state cited in the opinion, which stressed the point that New York distinguished between:

> "the employment of a child under fourteen years of age whose employment is absolutely prohibited and * * * a child over fourteen years of age and under sixteen without an employment certificate."

Such a distinction seems to this court to be a sound one. The minor plaintiffs in the present cases were employed by the defendant for work that would have been entirely lawful had a permit been obtained from the superintendent of schools, or other competent authority. As was stated by the Massachusetts Court in *Pierce's* case, *supra,* quoted with approval in *Kenez* v. *Novelty Compact Leather Co., supra:*

> "As respects the rights of minors under the act, we do not perceive any reason to differentiate between those who are lawfully employed and those employed as a consequence of the employer's illegal conduct. In both instances the minors are free from any statutory inhibitions; their contracts as to themselves are free from the taint of illegality; in each case they are entitled to similar benefits and to an equivalent amount of protection. The parties were possessed of capacity to establish the relation of master and servant, notwithstanding the contrary obligation which the statute imposed upon the employer. The contract is not of that

> type which is wholly void and from which no enforceable rights can arise."

That the legislative intention underlying our Act, and similar acts in other jurisdictions, was to benefit industrial employees and throw the burden of their injuries arising out of their employment on the industries of which they were a part does not admit of doubt. It has been declared in decisions of great number. Its general recognition was stated by the Texas Court in *Gilley et al.* v. *Aetna Life Insurance Co.*, 35 S. W. (2nd) 136:

> "It is an historical fact, of which courts will take judicial knowledge, that the primary purpose of * * * workmen's compensation laws, is to benefit * * * employees * * *."

A balance, according to the Connecticut Court, in *Kenez* v. *Novelty Compact Leather Co., et al., supra,* has to be struck in considering a compensation act and child welfare legislation between:

> "the possibility of benefit from the employment of fewer minors in contravention of the statute and the advantages which would come from extending to those so employed the obvious and recognized benefits of the Compensation Law. In determining the legislative intent, we cannot think that the former consideration had weight, but we believe that the extension to the child of the benefits of the act better accords with the broad humanitarian purpose of the law, to give certain and speedy relief to those suffering injury in industry * * *."

The particular form of certain and speedy relief The Act was designed to provide for employees in industry is not available to the minor plaintiffs because the defendant did not elect to become an assenting employer under it, although eligible to do so. An alternative benefit is found in the provision of Sec. 3, freeing employees prosecuting actions at common law for injuries sustained in the course of their employment from defenses which prior to The Act had re-

lieved employers from liability in cases almost without number. That benefit accrues to them under it.

The defendant challenges the decision in his Bill of Exceptions on the additional grounds, which he has not argued, that the declarations omit to allege negligence on the part of the defendant or his servants and that the Trial Court erred in applying the principle of *res ipsa loquitur* to justify finding that negligence on the part of one of the servants of the defendant caused the injuries. The principle is well established, *Chaisson* v. *Williams,* 130 Me. 341; 156 A. 154; *Shea* v. *Hearn,* 132 Me. 361; 171 A. 248. Its application is justified by the allegations that the driver who operated the truck in which the minors were being transported in the course of their employment drove it off the road and into a ditch, as a result of which it turned over twice and caused the injuries suffered, and that they were due to the negligent acts of that employee. The finding that "the injuries were caused by the negligence of the truck driver Cagliano" was made properly under those allegations. The exception that the decision was based "on an allegation not legally set forth in the declaration" has no merit. In actions for the recovery of damages for personal injury the duty claimed to have been breached and the breach of it may be pleaded either by forthright assertion or the averment of facts from which the law will imply them. *Glidden* v. *Bath Iron Works Corporation,* 143 Me. 24; 54 A. (2nd) 528, and cases cited therein.

Exceptions overruled.

EMILE SACRE

vs.

VICTOR L. SACRE

PEOPLE'S SAVINGS BANK

Androscoggin. Opinion, November 6, 1947.

Trusts. Equity.

The person claiming a trust by implication has the burden of proving the trust by full, clear and convincing evidence.

The statutes of Maine recognize two general classes of trusts, express and implied. Express trusts must be in writing; implied trusts need not be in writing.

Constructive trusts are based on fraud, abuse of confidential relations, oppression or mistake, and fraud or abuse of a confidential relation gives rise to a constructive trust notwithstanding that it may be accomplished by a parole promise which in and of itself would not be enforcible.

A constructive trust may arise in respect to property, which has been acquired by fraud, or though acquired without fraud, where it is not equitable that it should be retained by him who holds it.

There are two different kinds of implied trusts, resulting and constructive. The former carries into effect the presumed intent of the parties; the latter defeats the intent of one of the parties.

A constructive trust cannot be predicated upon a broken promise to hold land in trust, though such trust be fully proved and based upon adequate consideration, as such a promise creates an express trust which to be valid must be in writing.

It is not necessary that the alleged trustee in a resulting or constructive trust be the holder of the *legal* title.

A judge in equity is not required to answer separately each request for findings, and it is sufficient if the facts found and the law cited adequately cover the material points involved in the case.

ON EXCEPTIONS.

Bill in Equity brought to compel assignment and release from Victor L. Sacre, one of defendants, of his rights under a bond for a deed from the other defendant to Victor L. Sacre, and for a conveyance of certain real estate from the other defendant to the plaintiff. A demurrer to the amended bill was overruled by the presiding justice. The defendant, Victor L. Sacre, filed exceptions to the overruling of the demurrer. Exceptions overruled. Bill sustained. Decree in accordance with the opinion.

Frank W. Linnell,
Edward R. Parent, for plaintiff.

Crockett & Crockett, for defendants.

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

TOMPKINS, J. Bill in Equity seeking an assignment and release from Victor L. Sacre, one of the defendants, to his father, Emile Sacre, the plaintiff, of the defendant's rights under a bond for a deed from the People's Savings Bank, the other defendant, for a conveyance of certain real estate in Lewiston, in the county of Androscoggin, State of Maine. The bill is before this court on exceptions to matters of law.

The plaintiff in his bill alleges that on the 15th day of July, 1922, he purchased two certain parcels of real estate in the city of Lewiston, and that he executed at different times three several mortgages to the People's Savings Bank of Lewiston, Maine, amounting in all to the sum of $50,000; that on the 9th day of August, 1940, while the three mortgages were still outstanding, he entered into a written agreement with the defendant, the People's Savings Bank, relative to the settlement of said mortgages for less than the amount due thereon; that on the 5th day of November, 1940, the defendant, People's Savings Bank, further modified the written agreement; that from time to time between the 9th

day of August, 1940, and the 5th day of March, 1941, said defendant, People's Savings Bank, advised the plaintiff through his attorney, Edward R. Parent, that it did not desire to continue the extension of credit to the plaintiff in accordance with the terms of the mortgages, and from time to time advised him through his attorney that it would continue the extension of credit on said mortgages, to the plaintiff, if the title to the property were taken in the name of another, and instructed the plaintiff, through his attorney, that the Bank did not wish to do business any further with the plaintiff, but if the title to the property were put in the name of another it would continue to finance the property.

Acting upon the advice and instruction of the Bank the plaintiff arranged between August 9, 1940, and March 5, 1941, through his attorney, that his son, the defendant Victor L. Sacre, would hold the title for the plaintiff, so that the Savings Bank would continue to finance said mortgages. The Bank advised the plaintiff, through his attorney, on or about the third of March 1941, that in order to carry such arrangement into effect it would be necessary to foreclose one of the three mortgages and to execute a bond for a deed of the premises to the defendant, Victor L. Sacre; that acting in accordance with said procedure on the third day of March 1941 the defendant, People's Savings Bank, entered peaceably and openly for the purpose of foreclosing the first mortgage given by the plaintiff. On the 5th day of March, 1941 the Bank executed and delivered to the defendant, Victor L. Sacre, a bond for a deed of this property, and under the provisions of the bond Victor L. Sacre obligated himself to pay the Bank the sum of $2,000 upon the execution of the bond; that the sum of $2,000 was paid to the Bank by the plaintiff and not by Victor. Under the provisions of the bond for a deed Victor agreed to pay the defendant, People's Savings Bank, the sum of $100 on the 5th day of each month, with interest at the rate of 5% per annum on the unpaid balance of $38,000, payable monthly until said sum of $38,000 should be paid; that since the date

of said bond for a deed the defendant, Victor L. Sacre, had not contributed any of his funds to the payment of the monthly installments of principal and interest, but it had been paid out of funds belonging to the plaintiff by delivering the money over to the defendant Victor, or directly to said Bank. Under the bond for a deed the said Victor agreed to pay all taxes assessed for the year 1941 and subsequent years, pay all water rates charged against said premises and then remaining unpaid, and all water rates thereafter charged against said premises, and to keep the premises insured in a sum not less than $25,000; that since the date of March 5, 1941, the defendant, Victor, has not paid any of the aforementioned charges, but the plaintiff has paid said charges from his own funds, either by money delivered to the defendant Victor, or payment made directly to the Bank; that since the date of the bond for a deed Victor has made no payments out of money belonging to him on account of repairs on said premises, and all the repairs have been paid for out of money belonging to the plaintiff. From March 5, 1941, until May 28, 1944, the plaintiff advanced to said defendant, Victor L. Sacre, the sum of $9,267.83 with which to meet the payments provided for in said bond, and from March 5, 1941, to the date of this bill the plaintiff has paid to said defendant, People's Savings Bank, the sum of $8,337.99 on account of said bond for a deed, which sum includes the $2,000 paid by the plaintiff at the date of the execution of said bond for a deed, and that from March 5, 1941, to the date of this bill the plaintiff has paid out of his own funds taxes to the city of Lewiston in the amount of $6,294.54, and paid to the said city since March 5, 1941, for water rates the sum of $787.99, and from March 5, 1941, to the date of this bill the plaintiff has paid out of his own funds for insurance on the buildings the sum of $1,431.41, and has also paid all the expense of repairs, improvements, upkeep and maintenance of the buildings on the premises; that at no time since the plaintiff acquired title to the premises to the date of the bill has the defendant, Victor L. Sacre, ever made any payments out of any funds belonging to him-

self for any charges whatever against said premises, but that all payments for maintenance, upkeep, taxes, insurance, payments on account of purchase price, mortgage indebtedness and interest, and every other payment on account of said premises has been made by the plaintiff out of funds belonging to him; that from March 3, 1941, the plaintiff has been constantly in undisputed possession and control of said premises, and has collected all rents and profits therefrom, and at no time has either defendant been in possession or exercised any dominion or control over the premises; that the defendant, People's Savings Bank, since March 3, 1941, to the date of the bill has treated the plaintiff as the owner of said premises subject to the obligation to the defendant, People's Savings Bank. After March 3, 1941 until October 1945, the said defendant Victor L. Sacre has treated the plaintiff as the owner of said premises, subject to the obligation to said Bank.

On October 26, 1945, the plaintiff, through his attorney, requested the defendant Victor to execute a quitclaim deed of said premises, but the said Victor refused to execute a quitclaim deed of said premises, and since October 26, 1945, Victor claims to be the owner of said premises free of any right, title or claim on the part of the plaintiff, and the plaintiff alleges that he has no plain, adequate and complete remedy at law. The plaintiff further alleges that at the commencement of the foreclosure proceedings by the Bank, and the giving of the bond for a deed by the Bank to said Victor L. Sacre, it was understood and agreed between the plaintiff and the defendants that Victor was to act as the agent and intermediary for the plaintiff, who is the father of Victor, relative to the premises described in the plaintiff's bill, and that prior to the date of the execution of the bond for a deed it has been understood and agreed among the parties hereto that the arrangement was one of convenience only, and was for the use and benefit of the plaintiff, and it has been understood and agreed among all the parties that the rights vested in said defendant, Victor, by the bond for

a deed were subject to the control and direction of the plaintiff, and that said defendant Victor should convey and assign his rights under said bond for a deed to the plaintiff upon demand. The plaintiff now stands ready to reduce the indebtedness due to the defendant Bank to $20,000, and has requested that a deed be executed to him upon giving a mortgage to the defendant People's Savings Bank for $20,000, and the said defendant, Victor L. Sacre, refuses to assign to the plaintiff his rights under said bond for a deed described in the plaintiff's bill, and to permit the Bank to execute a deed to the plaintiff.

The plaintiff's prayer for relief asked:

1. That the foreclosure of the mortgage described in the bill be declared null and void.

2. That it be ordered, adjudged and decreed that said defendant, Victor L. Sacre, holds said obligee interest under the bond for a deed given him by the defendant, People's Savings Bank, dated March 5, 1941, in trust for the use and benefit of the plaintiff.

Three, four and five ask for injunctive relief.

6. That it be ordered, adjudged and decreed that the bond for a deed given by the People's Savings Bank to the defendant, Victor L. Sacre, described in the plaintiff's bill, be declared null and void.

7. That the plaintiff have such other and further relief as the equities of the case may require.

The defendant filed a demurrer in his answer to the bill alleging that the plaintiff had not in and by his bill made or stated such a case as entitles him in a Court of Equity to any discovery or relief against these defendants, or either of them, as to matters contained in said bill, or any of such matters.

The justice presiding sustained the demurrer solely upon the ground that the specific prayer number two was not

warranted by the allegations of the bill. Thereupon the plaintiff filed a motion to amend his bill, which motion was allowed, and the defendant moved to amend his answer with demurrer inserted therein, which motion was allowed. The plaintiff's amendment alleged that the fair market value of the property was approximately $75,000; that the sum of $30,000 was due the People's Savings Bank, the other defendant; that the equity in the property was approximately $45,000; that the plaintiff never intended to make a gift to the defendant, Victor L. Sacre, of his equity described in the bill; that until about October 26, 1945 the plaintiff reposed confidence and trust in the defendant, Victor L. Sacre, his son, that said defendant would release his rights under said bond for a deed and assign it to the plaintiff upon his request; that relying upon the agreement made with the defendant, Victor L. Sacre, set forth in the bill, and the trust reposed by the plaintiff in his son, the said Victor L. Sacre, the plaintiff took no steps to protect his equity in the premises during the statutory year allowed for redemption after March 3, 1941; that the defendant, Victor L. Sacre, by his repudiation of his agrement with the plaintiff and by the violation of the trust which his father, the plaintiff, reposed in him, now seeks to defraud his said father, who is now eighty-one years of age, of the bulk of his life savings and to gain for himself property having a fair market value of $45,000, to the accumulation of which he has made no contribution whatsoever.

The first, second and sixth paragraphs of the original prayer for relief were struck out and the following substituted in place thereof:

1. That the defendant, Victor L. Sacre, be ordered to assign to the plaintiff all his rights under the bond for a deed given him by the People's Savings Bank described in Par. 12 of the plaintiff's bill.

The presiding justice overruled the demurrer to the amended bill. The defendant, Victor L. Sacre, excepted to the overruling of the demurrer.

The plaintiff seeks the assignment of the bond for a deed on the ground that it was mutually agreed between the father and son that the son was to assume no actual responsibility and receive no benefits under the bond, that in the transaction he was acting solely as the agent and intermediary for his father; that a confidential and fiduciary relation was created and existed between them, and the refusal of the son to comply with the request to convey his interest constituted a constructive fraud. The learned justice presiding found the following facts in the situation: "That Victor had no interest in the property either apparent or real until the bond for a deed was executed and delivered to him on March 5, 1941; that the arrangement was made between Emile and Victor as alleged in the bill; that Victor L. Sacre did not conceive the purpose to assert otherwise or to claim that the documents made on March 5, 1941, reflected the actual relations of the parties, until he realized that the payments made by his father had substantially reduced the indebtedness and, with increased value of the real estate and greater income, he might become the owner of a valuable property without taking any chance of being disinherited by his father or, if not, to have to share with his stepmother; that Victor did not know how the mechanics of the transaction would be carried out by the attorney for the Bank. He did not know that he was to receive a bond for a deed. As to his conduct afterwards concerning the retention of control and management of the property and of its net income by Emile, his present claim is that he intended to allow his father and stepmother to live on the premises without any charge for rent, but it appears that the whole arrangement was actually made with him by Mr. Parent as attorney for Emile. In view of the entire situation and the evidence thereof as disclosed by the record, this claim is without probative force."

The learned justice then proceeds to consider the legal and equitable principles which have application to the foregoing finding of fact. The court states "The contentions

of counsel for Victor are that the bill in equity sets out a trust which, as it concerns real estate, must be either a resulting or constructive trust; that to establish either of such trusts it must be shown that the legal title to the property was in Victor; that instead he had only a bond for a deed which created no legal title; that no such trust was declared in writing as required by R. S. 1944, Chap. 154, Sec. 17; that the plaintiff, Emile, actually relies upon the breach of an oral promise or agreement for which a remedy in equity does not lie; that the contention of the plaintiff, Emile as to a constructive trust by reason of a fiduciary or confidential relationship between the parties fails of proof; that instead of the control and management of the property by Emile and the collection of rents the plaintiff was acting as agent for his son, Victor; and finally that whichever view of the evidence is accepted by the court as the true version Emile, the plaintiff, is not entitled to the relief prayed for.

"The case of *Cross* v. *Bean,* 83 Me. 61, is cited by the plaintiff to the point that a bond for a deed does not convey any legal interest in the land, but is wholly executory. The legal title remains in the vendor who may convey it to any person other than the vendee. This is the language of the court, but it is stating that proposition as 'viewed from a legal standpoint,' then points out very carefully that 'equity regarding what ought to be done as done, construes the agreement, so far as the interest in the land is concerned as executed; and treats the vendee as the equitable owner of the land, and the vendor as owning the consideration. The consideration draws to it the equitable right of property in the land, and he who pays it becomes the true beneficial owner and a trust is thereby created in his favor.' The estate in the property created by a bond for a deed is thus shown to be much more than the holder of an ordinary contract for breach of which money damages would lie.

"Plaintiff's counsel cites the statutory requirement, R. S. 1944, Chap. 154, Sec. 17, which reads: 'There can be no trust concerning lands, except arising or resulting by im-

plication of law, unless created or declared by some writing signed by the party or his attorney.' His citation from Pomeroy on Equity Jurisprudence (4th Ed.), however, makes clear that 'All trusts which arise by operation of law are, as the name indicates, excepted from the requirement of the statute of frauds. This entire grand division consists of two general classes; resulting trusts and constructive trusts.' Consequently the defendant's contention that the plaintiff must rely upon a constructive or resulting trust of itself negatives the necessity for a writing. Again in Pomeroy's Work, Sec. 1044 (4th Ed), cited by the plaintiff, the author in defining the application of constructive trusts says that 'It applies to all cases of actual or constructive fraud and breaches of good faith and enables courts of equity to wield a remedial power of tremendous efficiency in protecting the rights of property.' Further, the author says, 'The principle is one of universal application; it extends alike to real and personal property, to things in action and funds of money.' Again in Sec. 1052 (4th Ed.), the author makes the sweeping statement that 'The doctrine (on constructive trusts) may be stated in its most general form, that whenever a trustee or person clothed with any fiduciary character takes advantage of the relation, and by means of it acquires the title or use of the trust property, or makes a profit or advantage to himself out of the trust and confidence, then a constructive trust is impressed upon such property, profits, or proceeds in his hands, in favor of the original beneficiary. . . . . This form of constructive trust embraces many particular instances, and the principle is extended to all abuses of confidence, whereby the one in whom the confidence is reposed obtain an advantage.' Again, in Sec. 1053 (4th Ed.), appears the statement, 'The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer,' citing many cases.

"The case of *Wood* v. *White,* 123 Me. 139, is cited and claimed to be conclusive against the contention of the plain-

tiff as to a constructive trust on the ground of fraud. It is there held that 'A constructive trust cannot be predicated upon a broken promise to hold land in trust, though such promise is fully proved and based upon an adequate consideration. Such a promise creates an express trust which to be valid must be in writing.' The opinion of the court goes on to say, however, 'But fraud or abuse of a confidential relation gives rise to a constructive trust, none the less because accomplished by or accompanied by a parol promise which is as such unenforceable.' . . . . . In its ordinary acceptation a confidential relation is that relation that exists between attorney and client, guardian and ward, and the like. But the true definition is much broader. 'A person is said to stand in a fiduciary relation to another when he has rights and duties that he is bound to exercise for the benefit of the other person. Whenever one person is placed in such relation to another that he becomes interested for him or interested with him in any subject of property or business he is prohibited from acquiring rights in that subject antagonistic to the person with whose rights he has become associated.'

"Again, our court has clearly enunciated its own position in accord with Pomeroy and the great trend of judicial authority in *Gerrish Ex'r* v. *Chambers,* 135 Me. 70 at 74:

> 'Fraud in equity includes all wilful or intentional acts, omissions or concealments by which an undue or unconscientious advantage is taken over another. Undue influence is a species of constructive fraud. Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his or her position will not be permitted to retain the advantage.
>
> The term "fiduciary or confidential relation" embraces both technical fiduciary relations and those

> informal relations which exist whenever one person relies on and trusts in another. And the rule is that whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them by which the superior party obtains a possible benefit equity presumes the existence of undue influence and the invalidity of the transaction, and casts upon that party the burden of proof of showing affirmatively by clear evidence that he or she acted with entire fairness and the other party acted independently, with full knowledge and of his own volition free from undue influence.'

This statement adapts and confirms the principle as enunciated in *Eldridge* v. *May,* 129 Me. 112. There the business relations between a brother and sister were involved. Here it is those of father and son. The son was requested to act in behalf of his father. He understood the situation. He knew the efforts and energy the father had exerted to obtain the property, to greatly improve it, the exigencies he had faced, the attitude of the Bank toward the father, the opportunity to save the property by the offer of the Bank to greatly reduce the indebtedness, and that the father earnestly desired to save it for himself. To whom would the father turn under such circumstances than to his own son, for even though their relationships had not recently been cordial, still he reposed trust and confidence in him, and the son knew it, and agreed to act for the father. For more than four years his conduct substantiated the confidential and fiduciary relation. It might be argued that the wrongful intent and purpose of the son to secure the benefit of the property for himself must be shown to be coincident with the inception of the arrangement. It is, however, the occurrence of the breach itself which is fraudulent. *Goodwin* v. *McKinn,* 74 Am. St. Rep. 703. This case is cited in Pomeroy's Equity Jurisprudence in the author's note to Sec. 1056 (4th Ed.), in which he says:

> 'The question that may well be asked is, does it make any difference whether B intended at the

> time he obtained the conveyance, to violate the confidence reposed in him, or is it sufficient if he actually procures the conveyance and then at some later time, concludes to violate it? It seems that his conduct in either case would be equally inequitable, and the fraud after he had actually procured the conveyance, would consist in his holding the property contrary to the terms of the agreement'

"Here the defendant is now attempting to reap the benefit of a contract he never made, by abusing the confidence reposed in him. The efficient principles of equity may be invoked to prevent it. As said in the recent case of *Hutchins* v. *Hutchins,* 141 Me. 185, 'As to the allegation of breach of the relationship of trust and confidence, equity will protect against the wrong accomplished through the abuse of such relationship.' The defendant, Victor L. Sacre, by his refusal to release and transfer his apparent rights under the bond for a deed, has violated the trust and confidence reposed in him while acting in a confidential and fiduciary capacity and such refusal constitutes a constructive fraud. Inasmuch as the transaction was brought about, in part at least by the unwillingness of the People's Savings Bank to continue to deal with the plaintiff, individually, and further the bond for a deed provided that when the indebtedness was reduced to $20,000 the Bank would execute a deed to the obligee in the bond and take a mortgage for the sum of $20,000, still under the circumstances the court would not undertake to compel an arrangement which would require the Bank to accept such a mortgage from the plaintiff. However, there would appear to be no practical difficulty which would prevent the plaintiff from procuring a mortgage loan, if necessary, elsewhere, and under these circumstances, the Bank will not be directed to make a conveyance to Emile Sacre, the plaintiff, until the full amount due it under the bond for a deed has been paid."

The court made the following decree:

> (1) That the said defendant, Victor L. Sacre, assign to the complainant, Emile Sacre, all his

right, title and interest in and to the bond for a deed given to him by the People's Savings Bank on the fifth day of March 1941, and to the real estate described therein, a copy of which bond is fully set forth in Exhibit C of the complainant's bill.

(2) That the said defendant, Victor L. Sacre, be, and hereby is, permanently enjoined from conveying or encumbering the premises described in the complainant's bill except as set forth in Paragraph one hereof.

(3) That the defendant, Victor L. Sacre, be, and hereby is, permanently enjoined from exercising any dominion or control over the premises described in the complainant's bill.

(4) That when the assignment referred to in Paragraph 1 hereof has been completed, the said defendant People's Savings Bank execute and deliver to the complainant, Emile Sacre, a good and sufficient deed of the real estate described in the complainant's bill, clear of incumbrances, upon the tender to it by the said Emile Sacre of the balance of the principal, together with accrued interest at five per cent as provided in said bond for a deed.

(5) That the complainant, Emile Sacre, shall be entitled to costs against the said Victor L. Sacre.

The defendant Victor insists that the overruling of the demurrer was error and that the plaintiff was without remedy because the trust not being declared in writing is subject to the statute of frauds. The statute, however, does not apply where the "trust or confidence shall or may arise by implication or construction of law." No trust was created or sought to be created in this case by any agreement of the parties; it arose by implication or construction of law out of the confidential relation of the parties. Victor, the defendant, was not authorized to buy and hold in trust. His duty was to aid Emile, the plaintiff, in protecting his equity in the property and to secure for Emile a very substantial discount on the mortgage. Having undertaken to do this

he cannot by any fraudulent act during the period of his engagement thwart his father by refusing to perform his part of the undertaking, thereby making it impossible for the father to accomplish the purpose for which the arrangement was entered into between them. A party may voluntarily assume a confidential relation toward another, and if he does so he cannot thereafter do any act for his own gain at the expense of such relationship. *Quinn* v. *Phipps*, 113 So. 419, and cases there cited.

The plaintiff claims a constructive trust arose by implication of law. There rested upon him the burden of proving the trust and proving it by full, clear and convincing evidence. The learned justice found this burden sustained. He found the facts to be as claimed by the plaintiff. His conclusion of law was manifestly correct. The statute recognizes the two general classes of trusts, express and implied. No express trust is claimed. The exceptions in the statute which require no writing are implied trusts. There are two fundamentally different kinds, resulting and constructive. The former carries into effect the presumed intent of the parties. The latter defeats the intent of one of the parties. *Wood* v. *White*, 123 Me. 139.

The plaintiff does not claim a resulting trust. He bases his right solely on the ground of a constructive trust arising out of the confidential relationship. Constructive trusts are based on fraud, abuse of confidential relations, oppression or mistake. A constructive trust cannot be predicated upon a broken promise to hold land in trust though such trust be fully proved and based upon adequate consideration. Such a promise creates an express trust which to be valid must be in writing. *Wood* v. *White, supra,* and cases there cited.

But fraud or abuse of a confidential relation gives rise to a constructive trust, none the less because accomplished by a parol promise which is as such unenforceable. *Wood* v.

White, supra, and cases there cited. The circumstances which may create a fiduciary relationship are so varied and so difficult to foresee that courts have thought it unwise to attempt to make comprehensive definitions. *Gilpatrick* v. *Glidden,* 81 Me. at 150; *Cann* v. *Barry,* 293 Mass. 313. In the latter case the court cites with approval the statement of Lord Chelmsford in *Tate* v. *William,* L. R. 2, Chaps. 55, 56, that "Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or influence exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, though the transaction could not have been impeached if no such confidential relation had existed." See also *Gerrish Ex'r* v. *Chambers,* 135 Me. 70. The Massachusetts statute relative to trusts created in real estate is the same as our own, and in the case of *Barry* v. *Cann, supra,* the court said that where the defendant who acquired a lease of land with the intent to keep it for himself, but who had fraudulently allowed the plaintiff, toward whom he held a confidential duty, to believe that he would acquire the lease for the latter and had thus induced him not to take steps to acquire it for himself, held the lease under a constructive trust for the plaintiff.

A constructive trust is one raised by equity in respect to property which has been acquired by fraud, or though acquired originally without fraud it is against equity that it should be retained by him who holds it. A constructive trust arises purely by construction of equity, independent of any real or presumed intention of the parties to create the trust, and is generally thrust on the trustee for the purpose of working out a remedy. The trust is not what is known as a technical trust, and the ground of relief in such cases is, strictly speaking, fraud, and not trust. Equity declares the trust in order that it may lay its hand on the

thing and wrest it from the possession of the wrongdoer. The trust is said to arise from actual fraud, constructive fraud, and from some equitable principle independent of any fraud. 26 R. C. L. (Trusts) 1232. *Quinn* v. *Phipps,* 113 So. 419.

In *Wild* v. *Rabe,* 96 N. Y. at 425, the court there said: "There are two principles upon which a court in equity acts in exercising its remedial jurisdiction . . . . . One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property or obtains an advantage which he could not conscientiously retain the court, to prevent the abuse of confidence, will grant relief . . . . . The principle that when one used the confidential relation to acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds."

The defendant argues that because he held the bond for a deed the money paid from income arising from the property belonged to him, and that his father was acting as his agent, and that he was not acting as his father's agent. Equity looks at the substance and not at the form of a doubtful transaction. The learned justice hearing the case found that "The defendant is now attempting to reap the benefit of a contract which he never made by abusing the confidence reposed in him. The efficient principles of equity may be invoked to prevent it . . . . . The defendant, Victor L. Sacre, by his refusal to transfer and release his apparent rights under the bond for a deed has violated the trust and confidence reposed in him while acting in a confidential and fiduciary capacity, and such refusal constitutes a constructive fraud."

The defendant claims that the alleged trustee in a resulting or constructive trust must be the holder of the legal title,

and there is a wide difference between an equitable and a legal title, and states "There seems to be no authority for declaring a resulting or constructive trust where the alleged trustee is merely the holder of a bond for a deed." The justice presiding pointed out that Pomeroy's Work on Equity, Sec. 1044 (4th Ed.), defines the application of constructive trusts, and that "It applies to all cases of actual or constructive fraud and breaches of good faith and enables courts of equity to wield a remedial power of tremendous influence in protecting the rights of property." Further, the author says "The principle is one of universal application; it extends alike to real and personal property, to things in action and funds of money." In *Cann* v. *Barry, supra,* the court declared a constructive trust in a lease of real estate, not out of a broken promise but by implication of law, and ordered the assignment of the lease. See also *Horn Pond Ice Co.* v. *Pearson et al.,* 267 Mass. 256; *Essex Trust Co.* v. *Enright et al.,* 214 Mass. 507; *Girard Co.* v. *Lamoureux,* 227 Mass. 277.

In *Cushing* v. *Danforth,* 76 Me. 114, which was an action of forcible entry and detainer, the following facts appear. One R. J. Cushing and the defendant, Gardiner F. Danforth, bought a stock of goods and the good will of a store and divided the stock and store, each taking separate portions. The court found the facts and circumstances were such as to lead it to believe that the defendant expected a joint lease of the premises from the owner and he understood, and had a right to understand, not only from the relationship between R. J. Cushing and himself, but from the acts and representations of R. J. Cushing, that the said Cushing would and did obtain such a lease, while in fact R. J. Cushing obtained the lease in the name of his father, James E. Cushing, who brought forcible entry and detainer against the defendant, Gardiner F. Danforth, for the part occupied by him. The court there stated that R. J. Cushing was acting in a fiduciary character when he obtained the lease, and that he must be deemed to hold it in trust for the defendant

as well as himself; that James E. Cushing, the father of R. J. Cushing, was a passive trustee for the son and the same trust attached to his lease; and that the defendant had an equitable title to the premises sufficient to maintain his defense against the father, James E. Cushing. If a constructive trust can be declared where the alleged trustee is holder of a lease of real estate there seems to be no good reason why the same equitable principle should not apply to a bond for a deed. The exception cannot be sustained.

When the evidence was concluded, and before the court had filed findings and decision, the defendant's counsel presented to the court in writing a request for separate findings of law and fact. Counsel for defendant requested the court to make the following rulings of law, eighteen in number. The requested rulings 9, 13, 14, 15, 17 and 18, as they had reference to the evidence in the case which was not made a part of the bill of exceptions were not discussed. For that reason only rulings on 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12 and 16 requested were argued. The following rulings of law were pressed in argument:

> 1. The plaintiff in his bill, by a fair and reasonable construction of its language, attempts to impress a trust in his favor, the subject matter of that trust being the Bond for a Deed mentioned in the bill and made a part thereof as Exhibit C, and the real estate described therein, and the said Victor L. Sacre being the trustee.
>
> 2. Said Bond for a Deed concerns lands within the meaning of the R. S., Chap. 154, Sec. 17, which provides that "there can be no trust concerning lands except arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney."
>
> 3. The plaintiff's bill as amended, by a fair and reasonable interpretation of his language, alleges in substance that the said Victor L. Sacre holds his interest in and rights under said Bond for a Deed as Trustee for the benefit of the plaintiff.

4. There being no allegation, proof or claim of trust created or declared by a writing signed by said Victor L. Sacre or his attorney, there can be no trust concerning the real estate described in Paragraph 1 of the plaintiff's bill and described also in said Bond for a Deed except a trust arising or resulting by implication of law.

5. Trusts concerning land which arise or result by implication of law consist of two general classes, viz., resulting trusts and constructive trusts, and the evidence in the present case fails to show either a resulting trust or a constructive trust concerning said real estate.

6. As there has been no conveyance to the said Victor L. Sacre of the legal title to said real estate, and no such conveyance alleged in the bill or claimed by the plaintiff, no resulting trust concerning said real estate has arisen in favor of the plaintiff.

7. As there has been no conveyance to the said Victor L. Sacre of the legal title to said real estate, and no such conveyance alleged in the bill or claimed by the plaintiff, no constructive trust concerning said real estate has arisen in favor of the plaintiff.

8. The provision in said Bond for a Deed that "the said Victor L. Sacre is to have possession of said premises until he shall have failed to perform the conditions of this bond," gave him the right to receive and appropriate to himself the rents and income of said real estate until he should fail to perform the conditions of the bond, it neither having been alleged or shown by the evidence or claimed by the plaintiff that said Victor L. Sacre did fail to perform said conditions, said rents and income became his property under the terms of the Bond.

10. As the money of said Victor L. Sacre, and not the money of the plaintiff, went for said payments, taxes, insurance, water charges and repairs, no constructive trust concerning said real estate has arisen in favor of the plaintiff.

12. It not having been alleged in the bill, shown by the evidence or claimed by the plaintiff that there was any written promise on the part of said Victor L. Sacre to give a Quit-Claim deed of said real estate to the plaintiff or to assign to the said plaintiff his interest in and rights under said Bond for a Deed, the breaking of an oral promise to so deed or so assign, if there was the breaking of an oral promise was not sufficient to predicate a resulting or constructive trust in said real estate in favor of the plaintiff.

16. The allegations in the plaintiff's bill, even taken as true, do not entitle him to the relief prayed for in said bill, viz., "that the said defendant, Victor L. Sacre, be ordered to assign to the complainant all his rights under the bond for a deed given to him by the People's Savings Bank described in Paragraph 12 of the complainant's bill."

To the requested rulings of law the court made the following ruling: "Except as treated and considered in the findings and decision of the court the requested rulings for the defendant, Victor L. Sacre, are denied. Exceptions will be allowed." Defendant excepted to the denial in the case of each of the requested rulings, also to the following ruling contained in the court's findings and decision: "The defendant, Victor L. Sacre, by his refusal to transfer and release his apparent rights under the Bond for a Deed, has violated the trust and confidence reposed in him while acting in a confidential and fiduciary capacity and such refusal constitutes a constructive fraud." Also to the final decree and each paragraph thereof.

Sec. 26 of Chap. 95 of the R. S. provides that in equity proceedings "Either party aggrieved may take exceptions to any ruling of law made by a single justice . . . . . Upon request of either party the justice hearing the cause shall give separate findings of law and fact." The extent to which a judge in equity proceedings is required to go in making "Separate findings of law and fact" on request, de-

pends upon the interpretation of said Sec. 26. At common law in trial by the court without a jury the finding of issues of fact by the court on the evidence was unknown, and it may be said to be the general rule that a trial judge in a common law action need not make special findings of fact unless he is required to do so by statute. Am. Jur. (Trial) Par. 1133. Accordingly if any right without the aid of a statute or rule of court to present requests for rulings exists in any equity case heard by a judge the right is closely restricted. *Belzarian's Case,* 307 Mass. 559; *Pierce* v. *Woodbury,* 100 Me. 22; *McKenney* v. *Wood,* 108 Me. at 336.

A judge in equity, as when sitting at law without a jury, has two functions to perform, one to make rulings of law and the other to make findings of fact. These two functions are quite separate and distinct. Parties may rightly request rulings of law and fact of the judge sitting in equity for the statute so provides. His obligation on request for a ruling of law is to determine the legal issues necessarily involved in the decision of the case. The object of the finding of fact and conclusion of law in a case where the judge is the trier of fact is to ascertain the theory on which he decides the case, in order that the right of review may be preserved. *Tarjan* v. *National Security Co.,* 268 Ill. App. 232; *Johnson* v. *Murray et al.,* 289 S. W., 977; *Bianchi* v. *Denham & McKay Co.,* 302 Mass. 269. It is obvious that should a judge be required to answer each request separately he would be compelled to labor unnecessarily at times answering immaterial and irrelative matters having no material bearing on the merits of the controversy. It is not necessary to wander over the whole domain of facts and law developed by the case and involved in the requested findings. It is sufficient if the facts found and the law cited adequately cover the material points involved in the case. *Kershbaum* v. *London Guaranty & Accident Co.,* 286 Pa. 213; *Athens National Bank* v. *Ridgeway Tp.,* 393 Pa. 479; *Crew Levick Co.* v. *Philadelphia Investment Building & Loan Assn.,* 177 A. 498.

The cases cited so far were actions at law, but the analogy appears to be carried through in causes in equity. *Kilgore et al.* v. *Stevens et al.*, 14 P. (2nd) 690; *Stone* v. *Howard*, 33 Fed. Rep. (2nd) 701; *State ex rel. Utley* v. *Knights of Pythias*, 157 Ark. 266; 247 S. W. 1068; *Brener* v. *City of Philadelphia et al.*, 305 Pa. 182; 157 At. 466.

The statute does not require the court to make just such findings of law as may be requested any more than it would be required of him to give just such instructions as might be requested by a party in a jury trial. Nor does the statute provide that such findings as the court may or does make shall be in a particularly specified form, style or verbiage. It merely requires that "Upon request of either party the justice hearing the cause shall give separate findings of law and fact." It requires no more than that the material and controlling facts and rulings of law be found by the court, shall be so separated and distinguished from each other as to afford the party an opportunity to except to any particular findings of law or fact, thereby enabling him to assign and point out such finding as error. Where a court dictates into the record in such intelligible manner or form as to render them distinguishable, what the material facts are as he views them, and what are his conclusions of law in reference thereto, he has substantially complied with the statute and given the party his substantial rights under the same. *Etchen v. Texas Co. et al.*, 199 P. 212; *Kershbaum* v. *London Guaranty & Accident Co., supra; Kilgore et al.* v. *Stevens et al., supra; Brener* v. *City of Philadelphia et al., supra.*

In our opinion the finding which the court made constitutes a substantial compliance with the statutes. He embodied the facts involved in the case necessary to the determination of the issue so far as the record discloses. The findings of fact and law are clearly distinguishable one from the other. There is no difficulty in ascertaining from the record the real question of law to be passed upon, and no difficulty in determining the law under which the learned

justice decided the case. We think there was a substantial compliance with the statute.

From an examination of the record we conclude that the other assignments of error are without merit. The decree should be so amended that the defendant, Victor L. Sacre, be protected from any liability on the note held by the defendant People's Savings Bank and described in the bond for a deed given by the Bank to Victor L. Sacre. The finding for the plaintiff was justified.

Exceptions overruled.
Bill sustained
Decree in accordance with this opinion.

BAKER'S CASE

Kennebec. Opinion, November 10, 1947.

Workmen's Compensation Act.

Factual decisions of Industrial Accident Commission may be reviewed to determine whether or not they are based in any degree on the misapprehension of undoubted facts.

Disability traceable to a nervous condition caused by an industrial accident, or to a mental state accelerated or aggravated by one, is compensable. The burden of establishing causal connection between an industrial accident and petitioner's incapacity, is on petitioner.

ON APPEAL.

Petition for further compensation filed just prior to the expiration of the specific compensation period for loss of eye. Petitioner's claim is based on claim of incapacity due to a nervous condition resulting from the accident. Com-

pensation denied and appeal was claimed from *pro forma* decree. Appeal dismissed. Decree below affirmed.

McLean, Southard & Hunt, for petitioner.

William B. Mahoney,
James R. Desmond, for respondents.

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

MURCHIE, J. The petitioner herein, an employee of an assenting employer under the Workmen's Compensation Act (R. S. 1944, Chap. 26), suffered an industrial accident on January 29, 1945, resulting in the loss of his left eye and damage to his right. He was paid the specific compensation fixed by statute for the loss of an eye, under a compensation agreement approved October 5, 1945, which carries the usual provision that additional compensation for subsequent incapacity should be paid. His present petition, dated and filed December 3, 1946, alleges that the period of specific compensation was to end on December 28, 1946, and seeks "further compensation on account of total incapacity" subsequent to that date. It was heard March 12, 1947. The decision of the Chairman of the Industrial Accident Commission, dated July 2, 1947, carries findings that the petitioner is totally incapacitated and that a nervous condition is the cause of his disability. It dismisses his petition on the ground that the evidence does not establish factually that the condition is due to the industrial accident.

A *pro forma* decree was entered in the Superior Court on July 16, 1947, on a petition filed by the employee alleging, among other things, that the accident resulted in a severe nervous condition and neurosis; that there is no evidence showing an intervening or independent cause of the condition; and that the commission decision was based on incompetent evidence and evidence without probative force, and disregarded evidence of probative force favorable to the

petitioner. An appeal was taken in the usual form upon the filing of the decree.

The verbal testimony was given almost entirely by the petitioner. The oral statements of two physicians and written letters or reports of four others were admitted in evidence without objection. Included in the record are transcripts of the petitioner's post-injury employment data with four employers, furnished after the hearing was closed in accordance with a right reserved to the employer with the consent of counsel for the petitioner. The necessity for securing them developed in petitioner's inability to recall the dates and wages involved.

The employment records show that petitioner worked part or all of more than thirty-six weeks during the last approximate sixty weeks of the one hundred weeks he was drawing specific compensation. He was engaged for a little more than eighteen consecutive weeks at one job, at an average pay in excess of $44 per week, and something over one week at one time and ten later, just prior to the close of the specific compensation period (not always for full time) at another, which yielded him average weekly pay of less than $25. He did not work after the close of the period of specific compensation for a little more than seven weeks but had been employed about three weeks at the time of the hearing, working forty hours in each of two and thirty-two in the third, the hearing week. His own testimony shows that he worked a short period for one additional employer but the time and wage record for it are not in evidence. The petitioner worked some part or all of each and every week in the four months immediately preceding the close of the period of specific compensation except the interval from August 29th to September 19th and went hunting during that interval. The medical reports show that his blood pressure was taken by a physician to whom he was sent by his employer on October 8, 1946, and by his own physician on December 30, 1946. The increase in pressure from 130/90 on the earlier date to 180/120 on the later one stands unex-

plained in the record, and is one of the stated grounds for the denial of compensation:

> "We do not find any evidence to account for such a rapid change * * *. We * * cannot * * * find that such a change * * * was a result of his injury * * *."

The testimony of the petitioner is that in each and every case his post-injury employments terminated with headaches, nausea or other sickness, the first symptoms of which were manifested by pain in the right eye or in the socket from which the left had been removed. His testimony asserts many hours of acute pain which he attributed to the same sources.

There is no question of the severity of the injuries suffered by the petitioner; of his present incapacity; or that it is traceable directly to a nervous condition. A factual finding by the commission that the condition was caused by the accident of January 29, 1945, or to a pre-existing mental state accelerated or aggravated thereby, would have entitled the petitioner to further compensation. *Reynold's* case, 128 Me. 73; 145 A. 455. Such a finding was not made.

The physicians held conflicting views concerning the vision of his right eye and the cause of the mental condition. His own physician, on December 30, 1946, stated that he had "very little sight left" in the eye. Two others recorded respectively that the vision was 20/30 without refraction and 20/15 with on May 15, 1945, and that it was "normal plus" on April 11, 1946. The physicians who made oral statements connected the mental condition with the industrial accident. One believed it "connected with and attributable" thereto and explained that in his opinion it would go on until the question of compensation was cleared up. He described the neurosis as functional, but had no view as to whether it was traceable to an organic cause. The other believed it was "directly attributable" to the accident, and said it would commonly be known as a "traumatic neurosis."

There was no attempt to explain the term medically or to distinguish between a neurosis traceable to an organic cause and one that was not. A neurologist was of opinion that there was no "organic neurological basis" for petitioner's condition and that it would be "unusual to have any residuals" from the type of injury he had suffered.

The fundamental principles of law relied on by the petitioner are thoroughly established. These are that notwithstanding the plain recitals of the Workmen's Compensation Act that factual decisions of the Industrial Accident Commission shall be final "in the absence of fraud" and that no appeal will lie "upon questions of fact" (Secs. 37 and 41), such decisions must be guided by legal principles, *Robitaille's Case,* 140 Me. 121, 34 A. (2nd) 473, and will be set aside if based in any degree on the misapprehension of undoubted facts, *Hinckley's* case, 136 Me. 403; 11 A. (2nd) 485. The application of these principles to the present case is the issue which must control.

The situation presented may be demonstrated by comparing the decision under review with those in *Reynold's* case, *supra,* and in *Hunnewell's* case, 220 Mass. 351; 107 N. E. 934. In both of those cases awards of compensation were sustained. In both the trier of facts found causal connection between a compensable injury and a mental condition. As this court said, speaking of the commissioner:

> "He found the fact."

As stated by the Massachusetts court, the Accident Board found that the employee:

> "was 'partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, said condition having a causal relation with the personal injury.' "

The issue of causal connection is one of fact. *Kilpinen's* case, 133 Me. 183; 175 A. 314; *McCarthy's* case, 231 Mass. 259; 120 N. E. 852. The statement of the Massachusetts court in the latter case presents the situation here disclosed with entire accuracy:

> "The crucial question * * * was, whether any causal connection was shown * * *. The record shows that while there was some testimony tending to show that there was such connection, there was other testimony tending to show that there was no such connection. Its weight and credibility were for the Industrial Accident Board. The decision * * * has ample support in the evidence * * *."

Counsel for the petitioner argues that the case presents two issues; first, whether neurosis resulting from injury is compensable, and second, whether the evidence was erroneously evaluated. Since the decision in *Reynold's* case, *supra,* it can hardly be said that there is an issue on the first. The second must be resolved within the long established principle that in compensation cases (as in other matters) the moving party has the burden of proof. This was reaffirmed a little more than two years ago in *Hawkins* v. *Portland Gas Light Co. et al.,* 141 Me. 288; 43 A. (2nd) 718:

> "The ruling * is firmly established * * * since the earliest construction of the statute * * * that the burden rests upon the claimant to prove the facts necessary to establish the right to compensation."

In a reply brief counsel for the petitioner stresses the point that his opponent cites no evidence on which the decision could have been based. This is an attempt to reverse the norm since under the true rule it is his burden to cite controlling evidence that required a decision of opposite effect. This he attempts to do by referring to a particular part of the medical evidence. In its essential parts all of this has been summarized heretofore. It was the duty of the commissioner to consider and weigh it as a whole, as he recites he did in determining that causal connection had not been proved. There was evidence that would have justified a contrary finding, but we have no reason to suppose that he was under any misapprehension about it. His decision makes it plain that the post-injury work record and the

opinion of the neurologist, and perhaps other items of evidence, left him convinced that the petitioner had failed to prove the causal connection that alone would have entitled him to compensation. The language used in *Weliska's* case, 125 Me. 147; 131 A. 860, is pertinent:

> "As the compensation law is, the right to decide facts is invested exclusively in the Industrial Accident Commission, and the province of that tribunal may not be invaded by an arbitrary unauthorized court order that certain testimony must be accepted as involving both persuasion and decision."

Appeal dismissed.
Decree below affirmed.

CLIFFORD L. SWAN COMPANY, INC.

vs.

JOSEPH COOK

Cumberland. Opinion, November 20, 1947.

Brokers.

Real estate broker is entitled to commission if he brings prospective purchaser and seller together, and sale is consummated although at a modified price.

ON EXCEPTIONS, AND MOTION FOR A NEW TRIAL.

Action brought by real estate broker for commission. The broker brought the owner and purchaser together, but the buyer would not pay the price which the owner had given to the broker as the selling price. The parties separated and while property was still in the hands of the broker, a sale was consummated between the parties, without the knowledge of the broker, at a reduced price. The

court refused to direct a verdict for defendant, and defendant excepted, and also filed a general motion to set the verdict aside. Exceptions overruled, motion overruled.

Woodman, Skelton, Thompson & Chapman, for plaintiff.

Frank P. Preti, for defendant.

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

MURRAY, J. This case came to this court on an exception to the refusal of the justice presiding in the trial court to direct a verdict for the defendant, and also a motion to this court to set aside the verdict which the jury found for the plaintiff.

In oral argument and in his brief defendant abandoned the exception. As to the motion, in his brief he relied on but two of its items.

1. The verdict is against the law.
2. Because it is manifestly against the evidence in this case.

In oral argument he consolidated the two, so that they really became one, the first.

The facts are, that the defendant placed for sale in the hands of the plaintiff, a licensed real estate broker, the Lake Parlin Camps with a selling price of $35,000. The plaintiff introduced to the defendant a prospective customer, one Mr. Golden. Mr. Golden and defendant, in the presence of the broker, negotiated but were unable to agree on a price. The customer offering $20,000 which the defendant refused. The parties gave up negotiating and separated. It, at that time at least, appearing that they would be unable to agree. Later the defendant without withdrawing the property from the hands of the plaintiff and without the knowledge

of the plaintiff, got in touch with Mr. Golden and sold him the property for $25,000.

The defendant says "it is also true that the facts in the whole case are not too much in dispute or at variance. As a matter of fact, the facts are quite a great deal in agreement * * * * *."

If there was any disagreement or variance as to the facts —and the court does not see any—there is evidence to sustain the jury in finding the facts as set forth.

The verdict of the trier of facts is final, if there is evidence to sustain it. *Mercier* v. *Hancock Mutual Life Ins. Co.*, 141 Me. 376; 44 Atl. (2nd) 372. So, if there was any disagreement as to facts, it is now settled.

The defendant argues that even if these are the facts, as a matter of law they are not sufficient to support the verdict. Because the law in Maine is, quoting *Smith* v. *Lawrence*, 98 Me. 92 on page 94.

> "A real estate broker undertaking to sell real estate of another earns nothing until he produces to the owner a customer willing and prepared to purchase and pay for the property at the price and on the terms given by the owner to the broker."

And the record fails to disclose that the plaintiff produced a customer to defendant who was ready, willing and able to buy on the terms given by the owner to the broker.

The *Smith* v. *Lawrence* case, 98 Me. 92, is one in which the plaintiff had until May 1, 1902 to find a purchaser, and did not do so before that date. After May 1st the property was sold by the owner to one who had been a prospective customer of Smith, the plaintiff, and the plaintiff claimed commission saying that defendant had interfered in such a manner as to prevent the plaintiff from selling to the purchaser within the time specified. There was a verdict for plaintiff and this court in setting it aside said there was no evidence to sustain the finding of interference, and that

plaintiff could not recover, giving as a reason the above quotation.

A careful reading of the cited case—*Smith* v. *Lawrence*—shows that the quoted words applied to the facts of that particular case. This is made plain because the case, *Garcelon* v. *Tibbetts*, 84 Me. 148, cited in the *Lawrence* case as authority, says: "In the absence of any conduct of the seller preventing a completion of the bargain by the broker, an action for commission will not lie. And further, when his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own."

In the case at bar there was conduct by the seller, namely, the sale by the owner which prevented a completion of the broker's bargain with the owner. Broker's act, namely, bringing buyer and seller together, effected a contract between the owner and the purchaser. Both of these things were done while the property was in the hands of the broker for sale.

It is true there was a modification of the terms of the contract by the seller, but the modification being made by the owner would not effect the right of the broker to his commission. The seller accepted the customer as his purchaser. *Jutras* v. *Boisvert*, 121 Me. 32; *Hanscom* v. *Blanchard*, 117 Me. 501.

The record discloses not only that the plaintiff produced a customer to defendant who was ready and able to buy at the seller's terms, which is all that is necessary, but it also goes further and shows that the purchaser bought the premises.

Exceptions overruled.
Motion overruled.

EDITH F. WILSON

vs.

LOUIS N. WILSON

York. Opinion, December 8, 1947.

Divorce. Debt. Alimony and Support.

The court issuing a decree for support of a minor child has the right to amend it as to payments which are to be made in the future as well as to those which have already accrued but remain unpaid.

An execution for unpaid installments of alimony or support may be issued only on a petition by the libellant accompanied by an affidavit, and notice to the libellee must be given as in other cases.

The provisions of R. S. 1944, Chap. 153, Sec. 63, authorizing the issuance of a *capias* execution on default in payments of installments of alimony or for support of minor children, contemplates the issuance of an execution only after proper notice had been given.

Money remaining unpaid when a minor child becomes of age on a decree for the payment of money to the mother for the support of such child, is not the property of the mother, and an action of debt on judgment brought by the mother is not the proper remedy to recover the amount due.

ON EXCEPTIONS.

Action of debt on judgment brought by plaintiff. Plaintiff, the libellant in a prior divorce proceeding, obtained an order for support against libellee with an order for support of minor child. On default of payment of order, plaintiff filed an affidavit in clerk's office showing the amount due, and execution issued therefor. No notice was ever given the defendant of the filing of the affidavit. The defendant filed a plea "that no such record or judgment exists" as the plaintiff set forth in his writ. Upon a finding for the plaintiff by the presiding justice, the defendant excepted. Exceptions sustained.

Lausier & Donahue, for plaintiff.

Wilfred A. Hay, for defendant.

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

THAXTER, J. This in form is an action of debt on a judgment commenced by a writ of attachment against real estate. The plaintiff obtained a divorce from the defendant at the May Term 1927 of the Supreme Judicial Court for the County of York. Custody of a minor child was awarded to the libellant. The libellee, the present defendant, was ordered to "pay to the said Edith F. Wilson the sum of five dollars per week, for the support of said minor child. The first payment to become due and payable June 11, 1927, and, in default of payment, upon affidavit filed in the clerk's office, execution shall issue." On April 23, 1937 the libellant, the present plaintiff, filed the affidavit referred to in the divorce decree showing an amount due her to April 17, 1937 of $533.50 and execution was issued to her for such amount. No notice was ever given to the libellee of the filing of the affidavit, nor was any hearing ever had by the court to determine the amount due.

The declaration in the present action sets forth the above facts with respect to the decree of divorce, the issuing of the affidavit, the failure of the defendant to pay the amount of the execution, and in addition alleges that he has failed to pay any of the $5 weekly payments which have accrued from April 17, 1937 to July 16, 1946, which is apparently assumed to be the date when the child became of age. The defendant filed a plea "that no such record or judgment exists" as the plaintiff has set forth. The only evidence was as to the divorce, the issuing of the affidavit, and the plaintiff's testimony as to her not having been paid anything since April 17, 1937. This evidence was objected to. The presiding justice found for the plaintiff in the sum of $2,688.50 which was the amount of the original execu-

tion plus $5 per week thereafter for 431 weeks, which would seem to carry the time slightly beyond the child's twenty-first birthday, if the mother's testimony as to his age is correct. For the purposes of this case this discrepancy is immaterial. It may be that the year should have been 1946 as set forth in the declaration instead of 1945 as testified to by the mother. The record in the case is somewhat confused but the question is whether an action of debt on a judgment will lie under these circumstances. It is evident from the comments made by the learned judge who heard this action that he not only had grave doubts on this point but also whether any execution could properly have been issued on April 23, 1937 without notice to the libellee.

We believe that an action on a judgment was not in this case a proper remedy. The authorities are in great confusion as to whether installments of alimony, for maintenance, or for support of children are as they mature a component part of the judgment of the court which granted the divorce. This conflict arises because of the peculiar nature of the judgment in a suit for divorce. The case of *Sistare* v. *Sistare*, 218 U. S. 1; 54 L. Ed. 905, establishes the rule that the right to installments of alimony or for support becomes absolute and vested as they become due and that accordingly the decree requiring their payment is protected by the full faith and credit clause of the federal constitution provided no modification of the decree has been made prior to the maturity of the installments. But the opinion concedes that this rule does not obtain where "by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due." It is apparently assumed that if such is the rule

within the state granting the divorce there is no final or valid judgment within such state as to the installments until the court before which the proceedings were had forecloses such right to modification. This could of course be done by the entry of an order, after a hearing on proper notice, for execution to issue.

The case of *Barber* v. *Barber,* 323 U. S. 77; 89 L. Ed. 82, reinforces and amplifies the doctrine of the *Sistare* case and reiterates that the question is whether the right to the installments becomes vested as they mature.

The weight of authority seems to be that if there is reserved a right to revoke or modify accrued installments, an action on a judgment will not lie. *Allen* v. *Allen,* 100 Mass. 373; *Levine* v. *Levine,* 95 Ore. 94; *Bartholomae* v. *Stellwagen,* 277 Mich. 618; *Meister* v. *Day* (Ohio Court App. 1925) 151 N. E. 786; 27 C. J. S. 1035-1036.

In *Allen* v. *Allen, supra,* the Massachusetts court at page 376 makes it very clear that the proper method to enforce a decree for divorce is by some process from the court which entered the decree: "The jurisdiction over divorce and all its incidents is vested exclusively in this court; and we regard it as the necessary result to be collected from all the legislative provisions on the subject, that, within this Commonwealth, a decree for alimony made by this court can be enforced by it only, and not by an action on the decree in the Superior Court. In *Morton* v. *Morton,* 4 Cush. 518, *scire facias* was recommended as a proper process to enforce payment of arrears of alimony. But the elaborate discussion of the subject by Chief Justice Shaw, in that case, would have been superfluous, if not inappropriate, had it been regarded possible to bring an action of debt or assumpsit on the decree in this or any other Massachusetts court." It should be noted that at the time this case was decided decrees for alimony in Massachusetts were subject to revision and alteration, and that the court distinguishes this case from *Howard* v. *Howard,* 15 Mass. 196, for this reason.

In *Knapp* v. *Knapp,* 134 Mass. 353, the court points out that *scire facias,* which is not an original suit but a continuation of the original suit, is a proper remedy to enforce the judgment or decree for alimony. But the court suggests that it is not the exclusive remedy and that a more flexible and appropriate procedure is that suggested in *Slade* v. *Slade,* 106 Mass. 499, 501, "by petition, properly supported, an order of notice, returnable at such time as the court shall direct, and thereupon the court may order the issue of an execution, or such other process as may be appropriate to enforce payment. * * * A petition is usually preferable to a *scire facias,* because the proceeding is more speedy and flexible; but no order should be made without hearing or notice."

We are aware that *Stratton* v. *Stratton,* 77 Me. 373, was an action of debt to enforce the payment of a decree for alimony. There was involved there a contract between the parties incorporated in the decree of divorce for the payment of alimony which extended beyond the lifetime of the husband and was not subject to modification by the court. The right to such being vested, suit on a judgment was unquestionably a proper remedy in that case. Whether or not the amendment to our statute, R. S. 1944, Chap. 153, Sec. 62, providing that the court "may at any time alter, amend, or suspend a decree for alimony or specific sum when it appears that justice requires;" * * * applies under such circumstances we specifically do not decide.

We are concerned in the case now before us with a decree for support of a minor child and to that we devote our attention. We feel that the court issuing such a decree has the right to amend it both as to payments which are to be made in the future as well as to those which have already accrued but remain unpaid.

The court making a decree of divorce has wide powers to provide for custody and support of minor children. They are more often the chief sufferers from marital difficulties, and the court seeks to protect them as best it can. Their

interests are paramount. They are in a sense wards of the court which has dissolved the marriage relationship, and a payment ordered to be made to the mother for their support is not to be regarded by her as her property. She is rather the instrument selected by the court in its effort to provide for them; and it is her duty to use the money which she receives for their benefit during their minority. If there are unpaid installments which have not been applied by her for such support, the court unquestionably has the power to direct what disposition shall be made of these. It may divert them directly to the child's support. It may be that the father has made adequate provision for support in other ways, and it may be just that such action on his part should discharge his obligation under the decree. The court has a wide power in such cases. It may increase or decrease the amount and it may make its orders retroactive. The mother has no absolute property right in unpaid installments. Such is undoubtedly the intent of the statute which says, R. S. 1944, Chap. 153, Sec. 69, that the court "may also alter its decree from time to time as circumstances require," * * *. See the following cases: *Miller* v. *Miller,* 64 Me. 484; *Call* v. *Call,* 65 Me. 407; *Harvey v. Lane,* 66 Me. 526; *Stetson* v. *Stetson,* 80 Me. 483; *Luques* v. *Luques,* 127 Me. 356; *White* v. *Shalit,* 136 Me. 65.

Such being the statute which is here involved, it is apparent that an action of debt is not proper in the instant case. The decree for the payment of money to the mother of the minor for his support was subject to alteration in the discretion of the court at any time prior to his majority; and, when he became of age, the money remaining unpaid was not her property to be used by her for her own purposes. Whether she has any other remedy against the father it is not necessary here to determine. During the child's minority she did have the right to enforce the decree by the processes provided in the statute in so far as they were consistent with the due process requirements of the federal constitution, but she did not avail herself of them.

But right here is a further difficulty in the path of this plaintiff. Except for the execution issued April 23, 1937, and the affidavit on which it was based, which covered payments accruing to April 17th, there is no proof of any unpaid installments prior to that time. The execution was offered in this action brought on the judgment to prove that these early installments were unpaid. If any other force is claimed for it, the recent case of *Griffin* v. *Griffin*, 327 U. S. 220, 90 L. Ed. 635, establishes that it never had any validity, because it was issued without notice to the libellee. We discuss this problem because of its importance in the enforcement of future decrees for alimony and for support of children. It has been the practice in this state, at the time of the entry of a divorce decree with an order for alimony or support for children, for the judge to order that execution shall issue in case of default. On such order, execution has issued from the clerk's office as a matter of course. In view of the *Griffin* case, such practice should no longer be followed. That case holds that no valid judgment either *in personam* or *in rem* for unpaid installments of alimony which can form the basis for the issuance of a summary execution, and of course the same rule applies with respect to unpaid installments for maintenance of children, may be entered without some form of notice by personal or substituted service, sufficient to give to the debtor the opportunity to raise the defense of payment or such other defenses as may be open to him under the law of the forum. To permit a contrary procedure would, the case holds, violate the due process requirement of the federal constitution.

Such being the law, the course to be followed in this jurisdiction is clear. Unless the time is so short after the entry of the original decree of divorce that the issuance of an execution by the clerk can be regarded as a purely ministerial act, no execution for unpaid installments of alimony or support should be issued without notice to the libellee. Such execution should be issued as a continuation of the original divorce proceeding on a petition by the libellant

accompanied by an affidavit, and notice should be given as in other cases. This entails no undue hardship on the libellant; for, in case of a failure of the libellee to appear and contest, a default may be entered as in other cases. This is the exact procedure suggested by the Massachusetts court in the case of *Slade* v. *Slade, supra,* which lays down the admonition that "no order should be made without hearing or notice." We of course do not mean to say that this suggested procedure is exclusive of the other remedies authorized by the statute.

We are aware that the Legislature passed an act, P. L. 1947, Chap. 321, approved May 5, 1947, in an attempt to regulate the procedure on this subject. This statute, which is an amendment to R. S. 1944, Chap. 153, Sec. 63, provides for the issuance of a capias execution on default of any payment of alimony or any payment for support of minor children. The essential part of it reads as follows:

> "At the time of making a final decree in any divorce action, the court may order that execution and such reasonable attorney's fee as the court shall order shall issue against the body of any party to the action, charged with the payment of support of minor children or payments of alimony or a specific sum in lieu thereof, upon default of any payment, and the court shall order that the clerk of said court shall issue such execution upon the filing with the clerk an affidavit signed by the party to whom such payments are to be made, setting forth the amount in arrears under said decree."

This enactment if read literally is unconstitutional. It authorizes the issuance of execution without giving to the debtor any notice and without affording him an opportunity to come before the court and set up the defense of payment or any of the other defenses which he may be entitled to make. At the time it was passed the decision in the *Griffin* case, which holds that notice is necessary, had been on file for over a year. We cannot impute to the Legislature the

intent to ignore the requirement so clearly there set out. This enactment must therefore be interpreted to provide for the issuance of execution only after proper notice shall have been given.

It is not only better practice to give such notice but it is now a constitutional requirement.

Exceptions sustained.

EDITH F. WILSON

vs.

LOUIS N. WILSON AND HARRY WILSON

York. Opinion, December 8, 1947.

Divorce. Executors and Administrators. Alimony.

The provisions of R. S. 1944, Chap. 153, Sec. 69, authorizing the court to employ any compulsory process which it deems proper to enforce decrees relating to the support of minor children, do not authorize the issuance of a mandatory injunction against a party not served within the jurisdiction, or give the court authority to order an executor, who was not a party to the original divorce proceedings, what to do in the administration of an estate over which the Probate Court is given exclusive jurisdiction.

ON EXCEPTIONS.

Petition purportedly brought to enforce a decree of divorce, seeking to recover unpaid installments for support of child. The presiding justice found for the petitioner and ordered execution to issue, and also ordered the libellee to assign certain property sufficient to satisfy the execution, and further ordered that the defendant Harry Wilson, as executor, should account to the Probate Court for certain rentals. Exception filed by the defendant. Exceptions sustained.

Lausier & Donahue, for plaintiff.

Wilfred A. Hay, for defendants.

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

THAXTER, J. This case is before us on exceptions challenging the jurisdiction of the lower court.

It purports to be a petition brought under authority of the provisions of R. S. 1944, Chap. 153, Sec. 69, to enforce a decree of divorce. What it is in fact is difficult to determine. There is involved the same divorce decree discussed in *Wilson* v. *Wilson,* decided herewith, and the petitioner seeks to recover the same unpaid installments. It is evident that she was doubtful of the efficacy of the remedy which she sought to apply in that case. That was an action on a judgment.

In this case she seeks judgment in the amount of $2,688.50. She charges that the appraisal in the Probate Court for the County of York of the libellee's interest in the real estate of his father was false and fraudulent and that in fact the estate is worth much more than such appraisal. She asks that the court determine that the real estate has not been appraised at its fair value; that such appraisal is false and fraudulent, that the court decide its fair value; that the real estate may be sold by a receiver and her former husband's share of the proceeds paid to her; that the brother, as executor of the estate of the father, be restrained from selling the real estate; that an order be entered authorizing the attachment of the interest of the libellee in such real estate; that the brother, as executor, render an acount to this court of the rents and profits of the real estate during the few months he occupied it, and be ordered to pay to the petitioner the share of the libellee of said rents and profits; that the executor be ordered to pay to the petitioner any distributive share of the libellee in the estate to satisfy the amount found due under the decree;

and that the libellee be ordered to assign to the petitioner all of such part of his interest in the estate as is necessary to secure the amount found due.

The presiding justice found judgment for the petitioner for $2,688.50 and ordered an execution to issue. Among other things he ordered the libellee, Louis N. Wilson, to assign to Edith F. Wilson all of such part of his interest in the estate of his father as might be sufficient to satisfy the execution, and that Harry Wilson, as executor of the estate of Samuel Wilson, should not without the consent of the petitioner fail to account to the Probate Court for a fair rental of the real estate owned by his father, which it was claimed the executor had occupied since August, 1946.

The proceeding is certainly anomalous. A mandatory injunction was issued against a party who was not served within the jurisdiction and who appeared only to protest against the jurisdiction of the court; and the executor of an estate, who was not even a party to the divorce action, is told what to do in the administration of an estate over which the Probate Court is given exclusive jurisdiction. The court in a divorce action seems to have assumed some of the powers of the Probate Court and of the Equity Court. There is certainly nothing in R. S. 1944, Chap. 153, Sec. 69, or anywhere else for that matter, which authorizes the entry of such a decree as we have before us here.

We have in the companion case to this tried to explain at least one phase of the procedure which should be followed to enforce the provisions of a divorce decree, and have set forth why an action of debt on a judgment will not lie. We have there suggested a limitation on the right of a libellant to collect unpaid installments for support of a minor after the minor becomes of age.

Exceptions sustained.

DORIS BRADFORD

vs.

JAMES M. DAVIS ALSO KNOWN AS
J. MARTIN DAVIS: AND BESSIE E. DAVIS

DORIS BRADFORD

vs.

MERRILL F. DRISKO

Washington. Opinion, December 9, 1947.

Exceptions. Referees.

Bills of exception must be presented during the term in which the case was tried, provided that in *all* cases, such exceptions shall be presented within thirty days.

The complete report of evidence taken in any case is not necessarily a part of a bill of exceptions unless the bill states it is a part.

The bill of exceptions must state the grounds of exception in a summary manner, and the court cannot go outside the bill itself to determine that rulings are erroneous or prejudicial, even if the evidence accompanies the bill.

If the evidence taken out in the case is made a part of the bill of exceptions, it must be filed within the term, or within thirty days, if the term lasts over that time, unless there is an extension of time shown by docket entry, and the burden of securing such extension is on the party who desires it.

The justice who presides over the term at which exceptions are taken is the only justice who has authority over the bill, except in cases of death, disability, resignation or removal, and a justice presiding at one term of Superior Court has no authority to make an order to fix time for filing evidence to go with a bill of exceptions allowed by another justice at a previous term.

The ruling on the acceptance of a Referee's report is one of law and not of discretion.

ON EXCEPTIONS.

Two real actions were referred and referee's reports, finding for the defendants, were accepted. Exceptions were taken by the plaintiff. No extension of time for filing evidence was made by the justice presiding at the term during which the exceptions were taken. The cases were marked "Law" on the Superior Court docket and were transferred to the docket of the Law Court. The Law Court ordered that a law docket entry be made in each case of "Misentry, dismissed without prejudice," and the cases were remanded to the Superior Court. At the next term of the Superior Court the plaintiff filed motions in both cases that a time be fixed for filing evidence, which was denied, and plaintiff filed exceptions. Defendant filed motion that execution issue, which was granted, and defendant filed exceptions. Exceptions overruled in both cases.

Blaisdell & Blaisdell, for plaintiffs.

Dunbar & Vose, for defendants.

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

FELLOWS, J. These cases come before the Law Court on plaintiff's exceptions to the denial of the plaintiff's motion to fix a time for filing report of evidence to go with a bill of exceptions allowed at a former term; and also on plaintiff's exceptions to the granting of defendant's motion for executions to issue. The exceptions are overruled.

These two real actions were brought in the Superior Court for Washington County, and a referee returned to the clerk's office in November 1946 the Rule of Reference in each case, with findings for the defendants. On the first day of the February term 1947 of the Superior Court, objections to the allowance of the report of the referee were filed by the plaintiff in each case, but the reports were accepted by the presiding justice and allowed. What the objections

were does not appear in the record before us. Exceptions were then taken by the plaintiff, to the acceptance and allowance, and bills of exceptions to the acceptance of the reports were filed, allowed and signed. These two bills of exceptions, allowed and signed during the February term 1947, are not a part of this record, but from statements in this record and from the briefs and arguments, we are asked to assume that the report of the evidence heard by the referee was either, referred to in the bills of exceptions, or was made a part of each bill. No extension of time for filing evidence was made by the justice presiding at the February term 1947; and no request for extension was made by the plaintiff at this February term.

The clerk of the Superior Court for the County of Washington at the February term, 1947 marked both of the cases "Law" on the docket, and the cases were transferred to the docket of the Law Court.

At the May term of the Law Court it was ordered that a law docket entry be made in each case, of "Misentry. Dismissed without prejudice" and the cases were thus remanded to the docket of the Washington County Superior Court.

At the June term 1947 of the Superior Court for Washington County, the plaintiff filed motions in both cases that a time be fixed for filing the evidence, which motions were denied by the then presiding justice, and the plaintiff excepts.

At the same June term 1947 of the Superior Court the defendants, on the other hand, filed in each case a motion that execution issue to the defendants for costs, on the grounds that during the previous February term no report of evidence was filed by the plaintiff, and no extension of time to file was asked for by the plaintiff, and no extension was granted by the presiding justice. These motions for executions were granted and the plaintiff excepts.

The bills of exceptions now before the court in these two cases, are alike in substance. They state that the cases were referred; that objections to referee's reports were made; that reports were accepted, and that exceptions were filed at the February term 1947, with no time fixed for filing evidence, and they make claim of error in that the presiding justice at the June term 1947 had no authority to order executions to issue for costs. These bills of exceptions also claim that the justice presiding at the June term 1947 should have fixed a time for filing the evidence, to go with the original bills allowed during the preceding February term. It does not appear, in these two bills of exceptions before us, that the report of the evidence was made *a part* of the previous two bills of exceptions that were filed and allowed at the preceding February term. It does not appear that these are cases wherein "a report of the evidence is required for the Law Court" under Rule 19A, 138 Me. 367.

The purpose of a bill of exceptions is to put the decision objected to upon record for the information of the Law Court. *Dodge* v. *Bardsley,* 132 Me. 230. Bills must be presented "during the term," to the justice presiding, stating each issue of law in a clear, distinct, and "summary" manner as required by statute, "and when found true" they are allowed and signed by the presiding justice, "provided however that in *all* cases, such exceptions shall be presented within 30 days." R. S. 1944, Chap. 94, Sec. 14. The statute requires that bills be presented "during the term," and if the term shall be a long one, "within 30 days" of the ruling complained of. "The substance must be reduced to writing while the thing is transacting, because it is to become a record." *McKown* v. *Powers,* 86 Me. 291, 294. It is customary in practice, however, because of time necessary to prepare a formal bill, to note upon the term docket that exceptions have been "filed and allowed." Then if the exceptant believes that he will not have sufficient time or opportunity to write out and to prepare a complete bill of exceptions before

adjournment, or if there will be an unavoidable delay due to transcription of evidence by the court reporter, it is also the practice for the exceptant to ask the presiding justice for an extension, by making further docket entry that the completed bill may be filed on or before a certain date. In this manner the statute has been complied with, the exceptions are filed and allowed "during the term," leaving only mechanical details for some future time. The certificate of the justice who presided, that the exceptions are allowed, is conclusive as to regularity, unless he makes some qualification. *Colby* v. *Tarr,* 140 Me. 128; *Fish* v. *Baker,* 74 Me. 107; *Royal Insurance Co.* v. *Nelke,* 117 Me. 366; *Dunn* v. *Motor Co.,* 92 Me. 165; *Borneman* v. *Milliken,* 118 Me. 168; *Mann* v. *Homestead Co.,* 134 Me. 37; *McKown* v. *Powers,* 86 Me. 291.

"The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable the court to decide whether the rulings of which he complains were or were not erroneous. Failing to do so, his exceptions must fail." *Bronson Aplt.,* 136 Me. 401, 402; *Small* v. *Sacramento Co.,* 40 Me. 274. If a true bill of exceptions is presented to the presiding justice and he does not allow the same, the disallowance does not deprive the excepting party of his rights. He can proceed under R. S. 1944, Chap. 94, Sec. 14 and Rule of Court 40, 129 Me. 518, to establish the truth of the exceptions before the Law Court.

The complete report of evidence taken in any case is not necessarily a part of a bill of exceptions unless the bill of exceptions states that it is a part. *Doylestown Co.* v. *Brackett Co.,* 109 Me. 301; *Jones* v. *Jones,* 101 Me. 447. The court cannot go outside the bill itself to determine that rulings are erroneous and prejudicial, even if the evidence accompanies the bill. The bill itself must state the grounds of exception in a summary manner. The bill must be "able to stand alone." *Dennis* v. *Packing Co.,* 113 Me. 159; *State* v. *Belanger,* 127 Me. 327; *Jones* v. *Jones,* 101 Me. 447; *Dodge* v. *Bardsley,* 132 Me. 230; *Gerrish* v. *Chambers,* 135 Me. 79.

There are some departures from this general rule, such as in cases of exceptions to a directed verdict, *Brown* v. *Sanborn,* 131 Me. 53, or to a nonsuit, *People's Bank* v. *Nickerson,* 108 Me. 341; *Bouchles* v. *Tibbetts,* 117 Me. 193.

If all the evidence is "made a part" of the bill of exceptions, or if for any reason the complete evidence is to be a necessary part of the printed case, it must be filed within the term or within thirty days, unless there is an extension of time shown by docket entry. The burden of securing the order of court for an extension is on the party who desires it. There is no duty on the part of the presiding justice to seek out parties to ascertain if extra time is necessary. R. S. 1944, Chap. 94, Sec. 14. If an entry on the docket is made granting an extension, it is "conditioned upon a performance of that requirement within the time prescribed," *Goodwin* v. *Small,* 92 Me. 588, 589. In motions for new trials also, the evidence must be filed within thirty days, unless the time is extended, or the clerk may be directed to enter judgment, *Rule 17,* 129 Me. 509.

The justice who presides over the term at which the exceptions are taken is the only justice who has authority over the bill of exceptions. He is the one who certifies to the truth of the facts stated in the bill. R. S. 1944, Chap. 94, Sec. 14. The statute permits another justice to act in those instances only where there is death, disability, resignation or removal of the one who presided. R. S. 1944, Chap. 95, Sec. 51. "The right to establish exceptions is statutory." *Nissen* v. *Flaherty,* 117 Me. 534; *Borneman* v. *Milliken,* 118 Me. 168.

There are three parties to a bill of exceptions—the parties to the suit and the justice who is presiding. Neither the parties, nor their counsel, can agree, without the consent of the presiding justice, to make material alterations in a bill after allowance and signing. The judge himself cannot change it during the term without the consent of the excepting party, or on notice. *Shepard* v. *Hull,* 42 Me. 577.

Then too, after the term adjourns, the power of the presiding justice over the business of that term ceases, unless a "privilege was reserved during term time." "The presiding justice is not only not required to allow exceptions after the term is adjourned, but, without waiver and consent, he has no power to do it." *Poland* v. *McDowell,* 114 Me. 511, 513.

Where the parties agree to a reference of an action pending in the Superior Court, they agree to be bound by the judgment of the tribunal that they have themselves selected. *Courtenay* v. *Gagne,* 141 Me. 302. The referee determines all the questions of law and fact unless exceptions are reserved in matters of law. The referee may report questions of law, if he so desires. *Rule 42,* 129 Me. 519. When the referee's report is presented for acceptance the presiding justice may accept or recommit. Under the old practice, before the adoption of *Rule 42* in 1930, judicial discretion was not subject to exceptions unless there was plain abuse, or unless there was fraud, prejudice, mistake, or failure to pass upon submitted questions. *Kennebec Housing Co.* v. *Barton,* 122 Me. 374; *Chasse* v. *Soucier,* 118 Me. 63. Since the passage of *Rule 42,* 129 Me. 519, whenever objections under *Rule 21,* 129 Me. 511 are filed, the ruling on the acceptance of the referee's report is one of law and not of discretion. The objections must be filed to the acceptance of referee's report before acceptance and before exceptions are taken. Otherwise the exceptions will be invalid. *Insurance Company* v. *Pettapiece,* 132 Me. 44; *Camp Maqua* v. *Poland,* 130 Me. 485; *Lincoln* v. *Hall,* 131 Me. 310. Questions of fact are decided by the referee and will not be disturbed if supported by evidence of probative value. *Wood* v. *Balzano,* 137 Me. 87.

Ordinarily, after the allowance of exceptions, there is nothing to be done with a case in the Superior Court except to continue until receipt of a certificate from the Law Court of its action thereon. R. S. 1944, Chap. 91, Sec. 14; *Lunt* v. *Stimpson,* 70 Me. 250, 252. In the cases here, the Law

Court had acted and had entered dismissal orders, and the cases were pending on the Superior Court docket.

Modern practice of the law requires more direct and speedy results than was required formerly. The courts as well as the public demand a prompt conclusion to pending litigation. Delays, for the apparent purpose of delay only, are not favored, and where a party makes little or no effort to prepare, or conclude his case, it is the duty of the court to use all legal means to hasten its completion.

These two real actions under consideration were referred at the October term 1946. At the February term, 1947, plaintiff filed objections to the referee's reports, but what the objections were does not appear in this record. The reports were allowed and the plaintiff excepted, and her bills of exception were filed, allowed, and signed at the February term, 1947. These bills of exceptions are not in the record. We have no knowledge whether the testimony before the referee was made a part of either of the February bills of exception or was for any purpose required. In any event, no extension of time was asked for by the plaintiff or fixed by the presiding justice for filing evidence. It is presumed that the bills of exceptions being allowed and signed, were complete in themselves, and did not require the entire evidence as "a part." If it was made a part, the attorney for the plaintiff should have had a time fixed for filing, otherwise it should have been filed during the term or within thirty days. If the evidence was not a part of the exceptions there was no necessity for filing. In other words, there is nothing in the record to indicate that a report of evidence was "required" under *Rule 19A*, 138 Me. 367. The cases were marked "Law" at the February term, and went on the Law Court docket. At the May term of the Law Court these two cases were dismissed from the law docket without prejudice, and remanded to the Superior Court. The cases were thus in the Superior Court for some form of disposition.

So far as appears from the record before us, no attempt was made by the plaintiff to order or to procure a transcript

of the evidence to be filed "within thirty days," or at any time. The plaintiff, in her June motions to have a time fixed, does not claim that the printing of the evidence as part of the cases is indispensable or necessary. She does not claim in the June motions that the evidence was a part of the exceptions. She simply asks for a time to be set for filing evidence. If delays of this nature are to be favored or approved, practice before the court will become an endless game with no penalties for failure to follow the rules.

The justice presiding at the June term of the Superior Court had no authority to make an order to fix time for filing evidence to go with a bill of exceptions allowed at the February term. He had no authority over a bill of exceptions, or any part of a bill, allowed by another justice at a previous term. His denial of plaintiff's motion to fix a time for filing evidence, was correct.

The action of the presiding justice at the June term 1947, in granting the defendants' motions for executions to issue, was not improper. The cases were ready for executions. The reports of the referee had been accepted. The cases had been dismissed from the law docket. The plaintiff had not complied with the law in filing the evidence within the statutory time limit, if the evidence was a necessary part of the exceptions. If the evidence was not a part of the exceptions and, therefore, not "required," there was no occasion for extension of time. It does not appear that the plaintiff had made any effort to prepare her cases for the Law Court, and it does not appear that she had any intention to do so. The plaintiff either desired delay, or desired to complete her February bills of exception which the justice at the succeeding June term had no authority to allow her to do. The justice at the June term, in his judicial discretion, had authority to order judgments and executions. We see no abuse of discretion under the circumstances presented here.

Exceptions overruled
in both cases.

STATE OF MAINE
vs.
DONALD G. HARNUM

Cumberland. Opinion, December 26, 1947.

Jurisdiction. Trial Justices. Intoxicating Liquor.

In criminal cases, the question of jurisdiction may be raised at any time.

Statutes are to be construed in accordance with legislative intent, if determinable from the language used, giving the words their ordinary meaning, and applying that construction. P. L., 1939, Chapter 245, shows a legislative intention to limit the geographical jurisdiction of trial justices in the trial of cases so that a particular one shall have authority to try each violation of law. R. S. 1944, Chap. 133, Sec. 10.

A trial justice whose usual place of holding court is nearest to the place where the offense is alleged to have been committed has jurisdition of the offense and not a trial justice who did not usually hold court therein.

ON REPORT.

Respondent was convicted of an offense cognizable by trial justices before one who was not holding court in the municipality where the offense was alleged to have been committed, at the time of the offense, and who did not hold court there usually, and not the trial justice whose usual place of holding court was nearest thereto. Case remanded for quashing the complaint.

John H. Needham, County Attorney, for State of Maine.

Gerard Collins, for respondent.

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

MURCHIE, J. The respondent herein was convicted of the offense of operating a motor vehicle while under the influence of intoxicating liquor at Brewer on February 2, 1947, before a trial justice residing in Orono, who held his court in Brewer for the purpose of trying the case. The respondent did not raise the issue of jurisdiction but carried the case to the Superior Court by appeal. There the issue was raised and the parties joined in submitting it for determination under an Agreed Statement of Facts stipulating that if it was decided that the trial justice had jurisdiction judgment should be for the State and the case be remanded for sentence; otherwise, the remand should be for quashing the complaint. The respondent is not prejudiced by his failure to challenge the jurisdiction of the magistrate when his case was heard originally. If jurisdiction was lacking the action of the magistrate was void, *Lovejoy* v. *Albee,* 33 Me. 414; 54 A. D. 630. Lack of jurisdiction is a defect which may be interposed at any time, *Powers* v. *Mitchell,* 75 Me. 364; *Darling Automobile Co.* v. *Hall et al.,* 135 Me. 382; 197 A. 558; *Charles Cushman Co. et al.* v. *Mackesy et al.,* 135 Me. 490; 200 A. 505; 118 A. L. R. 148. Jurisdictional questions cannot be waived, *State* v. *Slorah,* 118 Me. 203; 106 A. 768; 4 A. L. R. 1256; 14 Am. Jur. 917, Par. 214.

A respondent who pleads not guilty and appeals from a conviction must be considered as substantially admitting his guilt when he agrees that if the court which found him guilty had jurisdiction judgment shall be entered for the State. One making such an admission is entitled to no sympathy, but when the issue is jurisdiction and is to be resolved by statutory construction the case in which it is presented is of far greater importance than the rights of an individual. That principle is implicit in the rule that questions of jurisdiction cannot be waived. *State* v. *Slorah, supra.* The result should not be controlled by either a lack of sympathy for a respondent or an excess of zeal for the enforcement of law.

The issue must be resolved by construing R. S. 1944, Chap. 133, Sec. 10, originally enacted as P. L. 1939, Chap. 245. This reads:

> "Any person accused of an offense cognizable by trial justices, if brought or ordered to appear by an officer before a trial justice, shall be brought or ordered to appear before a trial justice holding court within the town where the alleged offense occurred; but if there is no trial justice within said town, then to a trial justice whose usual place of holding court is nearest to where the offense is alleged to have been committed."

The case is reported under an Agreed Statement of Facts which incorporates the complaint and warrant. It recites that there is no trial justice in Brewer; that there is one in Bangor, whose usual place of holding court is there; that Bangor is adjacent to Brewer and Orono is not; and that Orono is not the nearest town having a trial justice. By necessary implication it indicates that the magistrate was not holding court in Brewer when the offense occurred. His authority to issue the warrant is undoubted. Any trial justice of the county had that authority.

Prior to 1939 trial justices had a geographical criminal jurisdiction to issue warrants and try cases co-extensive with the boundaries of their counties, except for violations of inland fish and game laws, where it covered each and every adjoining county. The enlarged jurisdiction was granted by P. L. 1913, Chap. 206, Sec. 70. The language employed therein, as in the statute to be construed, was designed primarily to regulate the official conduct of officers, but recognized that the appropriate method was through control of court jurisdiction.

The Legislature which enacted the statute to be construed repealed the provision of the 1913 law enlarging the jurisdiction of municipal courts and trial justices and curtailed that of trial justices sharply, not only with reference to their authority subsequent to 1913, but also by comparison

with earlier times. See P. L. 1939, Chap. 229. The effect on trial justices was to deprive all of them except one, determined in a specified manner, of jurisdiction to try any violation of the fish and game laws. The result was accomplished by provision that if an alleged offender was to be taken before such a court, the officer should take him before that one "whose usual place of holding court is nearest to where the offense is alleged to have been committed." These are the closing words of the statute controlling the present case.

Many principles of law established to guide courts in the construction of statutes have been affirmed and reaffirmed in decided cases. That most fundamental is that legislative intention shall be given effect if determinable from the language used, accepting the words in their ordinary signification. Our first Chief Justice said, as early as 1821, in *Porter* v. *Whitney*, 1 Me. 306, at 307, that the court ought:

> "to give such a construction to the law as to attain, as far as may be, the object in view."

Language to the same effect has been used in so many instances that it seems unnecessary to cite further authority.

The legislative intention of P. L. 1939, Chap. 245, is undoubted. It may be said in passing, although that is not material to the present case, that it is identical with that disclosed in P. L. 1939, Chap. 229. It is to require an officer serving a process alleging an offense cognizable by trial justices and electing to use such a court to take his prisoner before a particular one.

The language used is appropriate for the purpose. The statute directs that the accused be taken before a trial justice *holding court within* the town where the offense occurred, as a first directive, and if there is no justice *within* the town, before another plainly designated. For the purposes of this case it is immaterial whether the control words of the first directive identify a trial justice who was holding

court in the town when the offense occurred, regardless of his usual place of holding court. The second is absolute. The magistrate cannot qualify by either test. Jurisdiction must be determined on the basis of the facts as they exist when an offense is committed. It is not subject to control by subsequent action on the part of either officers or trial justices.

That the legislation prohibits an officer from transporting a person charged with an offense cognizable by trial justices before one of his selection, regardless of where the court of such justice was held usually or at a particular time, as he was authorized to do prior to the enactment, does not admit of doubt. That purpose would be defeated if it was construed to permit him to take such person before a trial justice of his selection in the municipality where the offense occurred although that justice was not holding court therein at the time of the offense and did not usually do so. The statute limits the geographical jurisdiction of trial justices for the trial of cases so that a particular one, designated by its terms, and no other, has jurisdiction of each individual violation of law cognizable by trial justices, except violations of the fish and game laws. P. L. 1939, Chap. 229 accomplishes the same result in that field.

The trial justice who issued the warrant in this case had no jurisdiction to try the case, and the mandate must be:

Case remanded for quashing the complaint.

DISSENTING OPINION.

MANSER, A. R. J. The statute construed in this case was originally enacted as P. L. of Maine, 1939, Chap. 245, and is now found in R. S. 1944, Chap. 133, Sec. 10. It reads:

> "Any person accused of an offense cognizable by trial justices, if brought or ordered to appear by an officer before a trial justice, shall be brought or ordered to appear before a trial justice holding court within the town where the alleged offense occurred; but if there is no trial justice within said town, then to a trial justice whose usual place of holding court is nearest to where the offense is alleged to have been committed."

As indicated in the majority opinion,

> "A respondent who pleads not guilty and appeals from a conviction must be considered as substantially admitting his guilt when he agrees that if the court which found him guilty has jurisdiction judgment shall be entered for the State."

He hopes to avoid, temporarily at least, punishment for his offense, by asserting want of jurisdiction by the trial justice who held court. The agreed statement of facts recited that the trial justice did hold court in Brewer. This was the city where the defendant lived, and where the offense was alleged to have been committed. The fact was stated in the terms of the statute. It would seem there is no reason to consider alternative provisions of the statute, which are effective only in case there was no trial justice holding court in Brewer. Such alternative provisions start off,

> "but if there is no trial justice within said town" etc.

The court is not called upon to consider "buts" and "ifs." The statute meant what it said.

The trial justice had been duly appointed and qualified. The offense committed was a violation of the motor vehicle law, and the general provisions relating to prosecutions thereunder are found in R. S. 1944, Chap. 19, Sec. 134:

> "Trial justices in their respective counties shall have original and concurrent jurisdiction with municipal courts and the superior court over all prosecutions for violations of the provisions of this chapter."

Under these circumstances, it appears that specious reasoning must be used to negative the purpose and intent of the particular statute now under consideration, and in denial of its plain provisions.

There is no legislative mandate designating where a trial justice shall hold court, and no limitation upon his right to do so in any town in the county.

There is no apparent design on the part of the Legislature to impugn the integrity of trial justices or to curtail their activities, but instead is shown careful consideration of the rights of an accused person, by giving him a hearing before a tribunal holding court in the town where he lives, where the alleged offense was committed, and where witnesses could be readily procured.

Here is no disagreement with the principle cited in the majority opinion, and enunciated by Chief Justice Mellen in *Porter* v. *Whitney*, 1 Me. 306, that

> "We ought, therefore, to give such a construction to the law as to attain, as far as may be, the object in view.'"

The majority opinion cites an amending statute relating to the jurisdiction of municipal courts and trial justices in cases of offenses against the fish and game laws. This is P. L. 1939, Chap. 229, and provides that the officer making arrest shall take the accused before any municipal court, "or a trial justice whose usual place of holding court is nearest to where the offense is alleged to have been committed."

This statute originally provided that game wardens could take the accused "before any trial justice or any municipal court in the county where the offense was committed, *or in any adjoining county.*"

The amendment was patently to prevent an injustice to accused persons, because it furnished opportunity to wardens, who have the right by law to arrest without process, to transport alleged offenders long distances to some mu-

nicipal court or trial justice in any adjoining county, and by-pass other qualified tribunals along the way, even to the extent of going much more than a hundred miles. Such pernicious practice would afford the game warden much greater fees and impose undue hardship on alleged offenders. It is conceded in the majority opinion that the remedial statute was designed primarily to regulate the official conduct of officers.

However, it does not follow that an entirely separate legislative act, limited to a special class of cases and enforced by a particular class of officers, is to be the controlling guide in the interpretation of another act passed by the same Legislature which contained different verbiage.

In the statute under consideration, the offender shall be "brought or ordered to appear before a trial justice holding court within the town where the alleged offense occurred."

In the fish and game law, the requirement is to take the accused before "a trial justice whose usual place of holding court is nearest to where the offense is alleged to have been committed, for a warrant and trial."

Upon this point, the majority opinion comes to the conclusion that the original and main directive in the statute to be construed must be ignored, and the second or "but if" clause be regarded as controlling, and the reason seems to be that, as the word "usual" appears in the fish and game law, it must also be read into the law of general application, although it is not there.

Furthermore, according to the majority opinion, it appears that, if the main directive of the provision in question is to have any application, then the magistrate must be "holding court in the town when the offense occurred." This statement is no inadvertence, because it is later emphasized as follows:

> "That purpose would be defeated if it was construed to permit him (the officer) to take such per-

> son before a trial justice of his selection in the municipality where the offense occurred although that justice was not holding court therein *at the time of the offense* and did not usually do so."

Parenthetically, it may be remarked that there is no justification in the record for the finding that the trial justice was selected by the prosecuting officer. There is no such representation in the agreed statement of facts.

It is safe to assume that the majority of offenses with which a trial justice has to deal are those of men who are found intoxicated on the public streets. Did the Legislature intend to require that a trial justice who holds court in a town on a particular day must be there the night before when the bars and the beer shops close, and the unfortunate drunks fall into the toils of the law, in order to qualify him to pass judgment on the inebriates when they have had time to get sobered up?

According to the majority opinion upon this point, such is the "necessary implication."

Before this judicial legislation becomes the law of this State, it might be suggested that as the prosecuting officer proceeded under the exact terms of the law as enacted, and brought the accused before a trial justice holding court in Brewer, it would be well to ascertain by remand or otherwise whether the trial justice in fact usually held court in Brewer.

Before this court calls the proceeding a nullity, is it justified in assuming the trial justice did not usually hold court in Brewer simply because the framers of the agreed statement of facts did not include the limiting word, which was not in the statute, but followed its exact wording?

In my opinion, the trial justice did have jurisdiction, and in accordance with the terms of the submission upon report, the entry should be:

Judgment for the State.

Sturgis, C. J. Joins in dissent.

CHESTER A. DUNHAM

vs.

WILLIAM H. HOGAN, CLARA MAGEE,

AND

MAINE TURNPIKE AUTHORITY

York. Opinion, January 7, 1948.

Equity. Mistake. Contracts.

Although equity has jurisdiction of a case, it is for the sound discretion of the court as to whether or not it will exercise jurisdiction. When the exercise of jurisdiction will cause a result contrary to equity, and the complainant has an adequate remedy at law, a decree will be refused.

In equity a mistake by one party can be a reason for not taking jurisdiction.

ON APPEAL.

Bill in Equity. From a decree dismissing the bill complainant appealed. Decree affirmed.

Waterhouse, Spencer & Carroll, for complainant.

Simon Spill, Margaret Currie, for respondent.

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

MURRAY, J. This bill in equity for specific performance of a contract for the sale of land and an assignment of a contract for the sale of gravel, came to this court on an appeal from a decree dismissing the bill.

The evidence produced by the complainant is that he and two others were riding in an automobile in the vicinity of Wells, looking for gravel pits adjacent to the new turnpike

road, with the idea of purchasing them and selling them to the Maine Turnpike Authority. The respondent was pointed out to them as the owner of such a pit. They got in touch with him, and after some hours of negotiating, entered into a written contract with him, under the terms of which he gave to the complainant an option, good for thirty days, on his farm, and in the option also agreed to assign a contract which he had made with the Maine Turnpike Authority, under the terms of which he was to receive 5c per yard for gravel sold to the Turnpike Authority from a gravel pit on the farm.

For the option he was paid $5 and was to receive $3,500 for the farm which included the gravel pit. When respondent was asked to deliver the deed and assignment he contended it was not intended by the parties that the gravel pit should be conveyed, nor was it intended that the contract with the Turnpike Authority should be assigned. The option is in evidence, and on its face at least, seems to sustain the complainant.

The evidence of the respondent is that he did sign the option and did receive the $5, but all of the talk between the parties was as to the sale of the farm. That one of the complainant's party, an older man, was to buy it for the younger man. It was distinctly understood that part of the farm, about eight acres, containing the gravel pit was not to be sold, and nothing was said about assigning the contract. The first he knew about the claim for the assignment and the gravel pit was when the complainant asked for a deed.

He testified that he paid $1,675 for the farm, and had improved it some. He said that in school he did not get into the fourth reader and went to work when he was twelve years old; he had difficulty in reading the option and could only read the headlines and pictures of a newspaper. He saw nothing in the option about the gravel so he signed it.

Two disinterested witnesses, agents of the Turnpike Authority testified that about May 17th, two weeks before re-

spondent signed the option, they made a survey of the gravel pit, and for the Turnpike Authority entered into an agreement with the respondent. Under this agreement he was to receive from the Turnpike Authority 5c a yard for gravel taken from the pit in question. They further testified that at that time they told him that under his contract he would receive at least $6,000 and probably $12,000 for gravel taken. One of them testified that the loam scraped from the top of the gravel pit amounted to 2,000 yards and loam is worth from 50c to $4 a yard, depending on its age.

Equity of course has jurisdiction in this case, but it is for the sound discretion of the court as to the exercising of it. If the exercising of it will cause a result contrary to equity, or good conscience, and the complainant has an adequate remedy at law, a decree should be refused and the parties left to the remedy at law.

On the law side of the court, the only things considered are whether there is a contract, a breach of it, and if so, damages. A mistake by one party is no defense. In equity a mistake by one party can be a reason for not taking jurisdiction. *Mansfield* v. *Sherman,* 81 Me. 365; 17 A. 300.

The court finds that the complainant has an adequate remedy at law, and the respondent did not intend to sign this option as to the gravel pit nor did he intend to sign the assignment of the Turnpike contract.

The evidence is conclusive that at least two weeks before signing the option he knew that there was at least $6,000 and probably $12,000 worth of gravel in the pit. He knew that there was loam of some value there.

The court sees nothing in the evidence which would cause respondent to think that the value had decreased between that time and the time of signing of the option. Respondent is a farmer and laborer, not familiar with such papers as the option which he signed. The other three are very well educated and knew what they were doing. He did not.

It seems incredible that he knowingly would have agreed to convey for $3,500 the farm a part of which was the gravel pit in which was gravel worth a minimum of $6,000 and probably $12,000, and the loam which he knew had some value, when he could have sold the gravel and loam and still retained his farm.

There is no explanation other than that he made a mistake; he did not realize what he was signing. A decree granting the prayer of the complainant would be inequitable and contrary to good conscience.

The decree below dismissing the bill is affirmed.

PRODUCTION CREDIT ASSOCIATION
vs.
L. RALPH KENT, *Deputy Sheriff*

Aroostook. Opinion, January 13, 1948.

Replevin. Chattel Mortgages. Appeal and Error.

In replevin suit, under plea of *non cepit* and brief statement alleging that at the time the goods were recovered by the plaintiff, the property of the same was not in the plaintiff, plaintiff must establish title or other right to the possession superior to that of defendant.

A chattel mortgagee who takes and retains possession of the mortgaged property, or records the mortgage, within twenty days after the date written in the mortgage, has a valid mortgage against all persons, under statute, but registration does not date back to the date of the mortgage so as to give it priority over intervening titles or liens.

If a chattel mortgage is recorded or possession taken subsequent to twenty days, as provided by statute, it shall be valid against attachments made subsequent thereto, based upon causes of action arising subsequent thereto.

Statute relating to recording of chattel mortgages are strictly construed.

Where question of damages in replevin was not raised in statement of facts in the report, such damages may be determined in suit on replevin bond.

ON REPORT.

Action by chattel mortgagee, against attaching officer to recover personal property under attachment. Judgment for defendant in replevin suit. Return of goods replevied ordered.

C. M. Fowler, for plaintiff.

M. P. Roberts, for defendant.

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

OPINION.

TOMPKINS, J. Replevin of a quantity of potatoes. On report. The Law Court to render such final decision therein as law and justice require, from such facts reported as are legally relevant to the issue involved. The case was argued in writing by the defendant before the Law Court. The plaintiff waived argument.

The facts in the case as gathered from the record and agreed stipulation are as follows: Wendell Christensen of Fort Fairfield, Maine, under the name of S. Wendell Christensen, executed a chattel mortgage in favor of Fort Fairfield Production Credit Association, the plaintiff in the replevin suit. The mortgage covered, in addition to certain farm machinery, all potatoes "Now growing or to be planted, grown or produced by the mortgagor during 1945," on the premises described in the chattel mortgage. The mortgage was dated May 14, 1945, and recorded in the Town Clerk's office in said Fort Fairfield on June 13, 1945. On

November 9th the defendant, a deputy sheriff, attached the potatoes in question on a writ in favor of Grant A. Hunt against said Christensen, and preserved the attachment by recording it the same day in the office of the Town Clerk of said town of Fort Fairfield. The action was based on account annexed for goods, wares and merchandise sold and delivered to said Christensen in the year 1944 and previous to the execution, delivery and record of the chattel mortgage. The writ was duly entered in the Superior Court of Aroostook County and there pending as of the date of the report.

The Fort Fairfield Production Credit Association on Nov. 17, 1945, gave notice of its claim and the amount thereof under the mortgage, and demanded payment of the same. Payment was not made and on Nov. 27, 1945, the Production Credit Association replevied the potatoes in question. The defendant pleaded *non cepit,* and for brief statement alleged that at the time the goods were recovered by the plaintiff the property of the same was not in the plaintiff.

Under the state of the pleadings the plaintiff must establish title or other right to the possession superior to that of the defendant. *Cate* v. *Merrill et al.,* 109 Me. 424; 84 A. 897; *McLeod* v. *Johnson,* 96 Me. 271; 52 A. 760; *Hoeffner* v. *Stratton,* 57 Me. 380. The owner or person entitled to possession of chattels may under our statute replevy them from anyone who has wrongfully taken them, or who, coming rightfully into possession of them, wrongfully detains them from him. The plaintiff's right arises and derives its force from the chattel mortgage on which the plaintiff depends. The cause of action on which the chattels were attached arose prior to the date of the mortgage and prior to its record. The chattel mortgage of the plaintiff was not recorded or possession delivered to the mortgagee within twenty days of the date written in the mortgage. The defendant contends that as the mortgage was not recorded or possession delivered the mortgagee within twenty days of its date the mortgage was invalid against the attaching creditor, and

therefore is a defense in the replevin suit to the defendant, the officer making the attachment.

The recording statute, Section 1 of Chapter 164 of the Revised Statutes of Maine, 1944, provides, omitting the parts not applicable to the case, as follows:

> "No mortgage of personal property shall be valid . . . . . against any person other than the mortgagor . . . . . unless and until possession of such property is delivered to the mortgagee within twenty days from the date written in the mortgage and unless possession is retained by the mortgagee, or unless and until the mortgage is recorded within said period of twenty days . . . . . If possession is taken or said mortgage is recorded subsequent to said period of twenty days it shall be valid . . . . . against attachments made subsequent thereto, based upon causes of action arising subsequent thereto."

The purpose of taking possession and retaining it, or of recording, is to give notice to creditors and subsequent purchasers. "The clause of the statute relating to possession is simply declaratory of the common law, while that relating to record provides an equivalent therefor not previously authorized. The mortgagee is given the option either to take and keep possession or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties." *Peaks* v. *Smith,* 104 Me. 315; 71 A. 884. Until the mortgagee takes and retains possession or records the mortgage, it is not valid against any person other than the mortgagor, such is the provision of the statute. The statute further provides that if he performs one of these two conditions within twenty days after the date written in the mortgage it is a valid mortgage, but the registration does not date back to the date of the mortgage so as to give it priority over intervening titles or liens. *Drew* v. *Streeter,* 137 Mass. 460. If however the "Mortgage is recorded or possession taken subsequent to said period of twenty days it shall be valid against attachments made sub-

sequent thereto, based upon causes of action arising subsequent thereto." Such attaching creditors are the exception under the statute. The mortgage is valid as to such attaching creditors, and the mortgagee is protected.

The attaching creditor in the case under consideration brought his action on a claim arising prior to the delinquent recording. The mortgage was not valid as to him because the statute definitely provides that the mortgage shall not be valid "Against any person other than the mortgagor unless and until possession of the property is delivered to the mortgagee within twenty days from the date written in the mortgage and unless possession is retained by the mortgagee, or unless and until the mortgage is recorded within the said period of twenty days." If one of these options is not exercised as directed by the statute, and the mortgage is recorded subsequent to the twenty day period it is "Valid against attachments made subsequent thereto based upon causes of action arising subsequent thereto." Such third parties are excluded from taking advantage of the delinquent recording. Not so as to creditors with claims arising prior to the recording or taking possession. The recording statute is strictly construed. *Hayden* v. *Russell et al.*, 119 Me. 38; 109 A. 485. The attachment took precedence over the mortgage because the mortgagee failed to conform to the provisions of the statute. *Drew* v. *Streeter*, 137 Mass. 460; *Burdick* v. *Coates*, 22 R. I. 410; 48 A. 389; *Roudebush* v. *Nash*, 93 Ind. App. 283; 177 N. E. 335; *Robinson et al.* v. *Whittier et al.*, 112 Wash. 6, 191 P. 763.

The burden is on the plaintiff to prove his title or right of possession of the goods attached. Plaintiff could do this either by proving that "possession" had been "delivered to" and retained by it as mortgagee, or that the mortgage had been duly recorded as provided by the statute. The plaintiff could not take possession of the potatoes because they were not in existence at the date written into the mortgage, nor were they in existence within the twenty day period after that date. The plaintiff could, however, have recorded

the mortgage as the statute provided. The plaintiff failed to do this. The mortgage was not valid against the attaching creditor.

The question of damages not being raised in the statement of facts in the report is not considered in this opinion. The question of damages may be determined in suit on the bond. *Archer* v. *Aetna Casualty Co.*, 55 A. (2) 135; 143 Me. 64.

Judgment for defendant in replevin suit.
Return of goods replevied ordered.

UNITED STATES TRUST COMPANY OF NEW YORK
Executor of the Will of
HENRY BEAMAN DOUGLASS
vs.
MINNIE M. DOUGLASS
ROBERT F. DOUGLASS
HELEN BOSHKOFF
JEAN YEOMANS
SARAH M. CRONE
ALICE DOUGLASS GRAVES
ROBERT F. DOUGLASS, JR.
MARSHALL W. DOUGLASS
YALE UNIVERSITY
NEW YORK ACADEMY OF MEDICINE
COLLEGE OF PHYSICIANS AND SURGEONS, COLUMBIA UNIVERSITY
COLUMBIA UNIVERSITY
CHILDREN, NOT DETERMINED OF ROBERT F. DOUGLASS

Lincoln. Opinion, January 16, 1948.

Wills. Election.

The election of a widow, to take against the provisions of the will, vacates the provisions made in her favor, but her waiver does not necessarily invalidate bequests or devises to others, and testator's intention as to others will be carried out so far as possible.

Waiver by widow of provisions of will operates to accelerate remainders only when acceleration is the actual or presumed intention of the testator.

The guiding principle in construing will is to determine intent of testator from the language of will taken as a whole, and in cases of doubt in the light of surrounding circumstances. Where legacy is given to a class of individuals in general terms, and no time is fixed for distribution, it is considered as due at death of testator. But where there is a postponement of the division of the legacy until a period subsequent to the death of testator, those who answer the description, so as to come within that class at time fixed for division, are entitled to share, though not *in esse* at death of testator, unless will shows contrary intent. And those living at death of testator, but afterwards deceased before the time of distribution, not entitled to share.

ON REPORT.

Bill in equity for construction of will of Henry Beaman Douglass, deceased. Reported from Superior Court. Decree in accordance with Opinion.

Hutchinson, Pierce, Atwood & Scribner, for plaintiff.

Francis P. Freeman, for Minnie M. Douglass.

Verrill, Dana, Walker, Philbrick & Whitehouse,
Edward T. Gignoux, for Alice Douglass Graves, Robert F. Douglass, Robert F. Douglass, Jr., and Marshall W. Douglass.

Woodman, Skelton, Thompson & Chapman, for Helen D. Boshkoff.

Drummond & Drummond,
William B. Mahoney,
Carl Beyer, for New York Academy of Medicine, College of Physicians and Surgeons of the Medical Department of Columbia University, Columbia University.

Porter Thompson, guardian *ad litem* of children not determined.

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

FELLOWS, J. This case is before the Law Court on report. The action is a Bill in Equity brought by the United States Trust Company of New York, as executor, for the construction of the last will and testament of Henry Beaman Douglass, late of Boothbay, Maine. The will is dated May 24, 1933. The codicil is dated November 24, 1933. The testator died December 5, 1946. The will was proved and allowed in the Probate Court for Lincoln County on February 4, 1947.

The testator had no children, but at the time of his death he had a wife, Minnie M. Douglass, and the seven relatives, who are named respondents in this Bill in Equity viz: a brother, five nieces and nephews, and one cousin.

The widow, Minnie M. Douglass, on February 4, 1947, elected to waive the provisions of the will in accordance with R. S. 1944, Chap. 156, Secs. 13, 14, and took the share to which she is entitled by law.

In his will, the testator, after mentioning his desired disposition of books, surgical instruments, household furnishings and other personalty, and $10,000 to Yale University to establish a scholarship fund, provides in the fifth paragraph of his will that the *residuum* shall be held

> "in trust, nevertheless, during the life of my said wife, to invest and reinvest the same and to pay to my said wife out of the entire net income arising therefrom, semiannually or oftener in the discretion of my trustees, at the rate of six thousand (6,000) dollars a year, and certain additional amounts in the contingencies hereinafter specified, and to pay the remainder of said entire net income yearly to my brothers me surviving, to the children in the first degree me surviving of my brothers, whether my brothers or any of them be living or dead at the time of my decease, and to my cousin, Sarah M. Crone, wife of Arthur Crone, share and share alike, per. capita and not per stirpes."

The "contingencies hereinafter specified," as above referred to in this paragraph five, are provisions for an extra payment of $2,000 to his wife in event of war, and to the wife, in the event that the income from the wife's own personal estate at any time shall be reduced, the amount of such reduction not exceeding $2,000. The fifth paragraph of the will then provides that

> "Upon the death of my said wife after me, I order and direct that all of the principal of the fund of said trust then remaining be divided unto four equal parts, and I give, devise and bequeath the same as hereinafter provided. Upon the death of my said wife before me, I likewise order and direct that all of my said residuary estate be divided into four equal parts, and I give, devise and bequeath the same as hereinafter provided, to wit:
>
> I give, devise and bequeath one of said parts to my brothers living at the time of the decease of my said wife, if she survives me, or of my decease, if she predecease me, to their children in the first degree living at that time, whether my brothers or any of them be living or dead at such time, and to said Sarah M. Crone, if living at that time, share and share alike, per capita and not per stirpes."

The first of the four parts is to brothers or their children, and a cousin, as stated above. The second of the four parts is to go to the New York Academy of Medicine for a library fund. The third part to the College of Physicians and Surgeons of the Medical Department of Columbia University for research. The fourth part is given to Columbia University for a fund to pay an instructor in the Department of Botany.

The will was written in 1933 when the testator was 68 years old and his wife was 57. The ages of the beneficiaries of the trust in 1933 were as follows: Edwin T. Douglass (brother), 65 years; Helen D. Boshkoff (daughter of Edwin T. Douglass), 40 years; Jean Yeomans (daughter of Edwin T. Douglass), 26 years; Robert F. Douglass, (brother), 55 years; Marshall W. Douglass (son of Robert

F. Douglass), 31 years; Robert F. Douglass, Jr., (son of Robert F. Douglass), 23 years; Alice Douglass Graves (daughter of Robert F. Douglass), 29 years; Sarah M. Crone (cousin), 58 years. At the time of testator's death on December 5, 1946, the brother, Edwin T. Douglass was the only one of the above-named beneficiaries who had deceased.

The estate of the testator, Henry Beaman Douglass, is valued at more than a million dollars, and when the will was made in 1933 his wife, Minnie M. Douglass, had an independent annual income of her own in the sum of approximately $5,800.

The issues presented are these: (1)) Does the trust created by the fifth paragraph of the will fail, because of the waiver by the widow, and is the time for distribution accelerated? (2) Should the trust be set up, to continue during the life of the widow for the benefit of the brother surviving, the children of brothers, and the cousin?

All authorities have recognized for generations that a last will and testament executed according to existing statutes is the final declaration of a person in regard to the disposition of his property. The name itself certifies that it is his "testimony" upon that subject, and is the expression of his "mind" and "will" in relation to it. The right to make a will is not a natural right, but is a privilege granted by statute, that permits the owner of property to direct use and ownership after his death. It has always been recognized that a testator may make any disposition of his property that he desires, if it is not inconsistent with the laws, or contrary to the policy of the state. It is the true intention of the testator that governs primarily, in the construction of words used to express that intention. "The intent of a testator is not to be thwarted unless some positive rule or canon of construction makes it necessary." *Ellms* v. *Ellms*, 140 Me. 171; 35 A. (2nd) 651. "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." *Merrill Trust Co.* v. *Perkins,* 142 Me. 363; 53 A. (2nd) 260, 262.

It is well established in this state that the election of the widow, to take against the provisions of the will, vacates the provisions made in her favor; but her waiver does not necessarily invalidate bequests or devises to others. Her action may diminish the estate, but the testator's intention as to others will be carried out so far as may be possible. The waiver will operate to accelerate remainders only when acceleration is the actual or presumed intention of the testator. *Adams* v. *Legroo,* 111 Me. 302; 89 A. 63; *Fox* v. *Rumery,* 68 Me. 121. This court has permitted acceleration of contingent remainders, after statutory waiver by the widow or widower, in those instances where the will has not expressed or shown a contrary intention, where the testator's objectives have been attained, where the remaindermen were definitely ascertainable, and where the expressed or presumed intention of the testator was that the enjoyment of the remainders should not for any reason be postponed. *Ladd* v. *Baptist Church,* 124 Me. 386; 130 A. 117; *Eastern Trust & Banking Co.* v. *Edmunds,* 133 Me. 450; 179 A. 716. See also regarding acceleration, *Nelson* v. *Meade,* 129 Me. 61; 149 A. 626, where the named life tenant died prior to testator.

In the case of *Eastern Trust & Banking Co.* v. *Edmunds,* 133 Me. 450; 179 A. 716, 717, the widow, Roberta Edmunds, waived the provisions of the will. There was a trust for the benefit of the wife, the brother, the grandson, and Ruby Fay Edmunds. The lineal descendants of the testator, or of his brother, took under the will contingent remainders, and the court said: "a contingent remainder will not be accelerated if there still remains undetermined contingencies so that it is impossible to identify the remaindermen or if there is evidence of an intention to postpone the taking effect of the remainder." In the Edmunds case, where there was acceleration, the grandson had died, the brother had died, and Ruby Fay Edmunds had married. All contingencies, men-

tioned in the will, were determined, and the members of the class who were to be donees, were ascertained.

"The guiding principle of a court in construing a will is to determine the intent of the testator, which must be found from the particular language which he has used, read in connection with the will taken as a whole, and in cases of doubt in the light of the surrounding circumstances. There is no particular magic in isolated phrases," as was stated by Justice Thaxter in *Moore* v. *Emery,* 137 Me. 259, 277; 18 A. (2nd) 781, 790.

The amount of the estate in the case at bar is a substantial one. The testator's wife was not his only concern. She had her own property, which gave her a fair income. He was interested to see that her income did not fall below a certain figure, and that she had a sufficient income in time of war or economic difficulties. His concern was for his blood relatives as well as for the wife.

When Henry Beaman Douglass made the will his wife was a comparatively young woman and he knew that she might expect many years of life. He knew also how much income she had and he knew the amount of his own property. The testator was interested both in his wife's future income and in the future of his blood relatives. He apparently did not foresee that his widow would waive the provisions of his will, as that appears to be the only contingency not expressly provided for.

The amount of this estate is large, and the testator provided that his widow should receive from the trust only $6,000 a year, with the right to receive $2,000 more under certain economic conditions. The balance of income from practically the entire estate was payable to brothers, their children, and a cousin. He evidently intended that his widow, with separate income of her own, should not receive the larger portion of income from his estate. He shows a desire to provide a continuing income for blood relatives during the lifetime of the widow. He says "upon the death

of my wife *after me*" the principal is to be divided into four equal parts. It is true that he provides for no trust in the event of her death *before me,* but we are not concerned with such contingency because she survived, as the testator expected. The fact that he intended no trust if his wife predeceased him, it does not necessarily follow that he intended the same result if she waived. If he contemplated her waiver of the provisions of her favor, he did not contemplate immediate acceleration, because by her waiver and with no children, she takes one-half, and the income from the substantial balance for the widow's lifetime may mean more to his relatives than the present value of a fourth part of the remaining half. The testator here shows the plain intention, in the light of all the surrounding circumstances, to provide income for his relatives during a period of the life of his younger wife. Mrs. Douglass, by her election, if he considered that situation, could destroy her interest in the trust, but he did not intend that the charities or educational institutions should take immediately the three-quarters of his remaining estate.

If the trust fails by the widow's waiver, the testator's relatives receive only one quarter of the fifty per cent balance of the estate. It will more nearly meet with all the testator's plans if they receive the income from one-half of the estate for the widow's life.

While the court believes that the intention of the testator, as expressed in his will, was to establish a trust for the benefit of relatives, as well as for the benefit of the widow, which trust was to continue during the widow's lifetime, there is another proposition involved here that does not appear in almost all cases where acceleration is permitted. The principal of the trust fund, at the termination of this trust, is divided into four parts, of which three parts are to be distributed to charities. The fourth part is to "my brothers *living at the time of the decease of my said wife* * * * to their children in the first degree *living at that time* whether my brothers or any of them be living or dead at

such time, and to said Sarah M. Crone, *if living at that* time, share and share alike, per capita and not per stirpes."

Our court has said that "the rule is that where a legacy is given to a class of individuals, not by a *designatio personarum,* but in general terms, as 'to the grandchildren of A' and no period is fixed for the distribution of the legacy, it is to be considered as due at the death of the testator; and none but children who were born or begotten previous to that time can share in the legacy. But where there is by the will, a postponement of the division of the legacy until a period subsequent to the testator's death, every one who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, though not *in esse* at the death of the testator, unless there is something in the will to show a contrary intention on the part of the testator. And persons living at the death of the testator, but afterwards deceased before the time of distribution, are not entitled to share. The class takes in all who answer the description at the time fixed for distribution, and no others." *Mary J. Webber, Executrix* v. *William T. Jones,* 94 Me. 429, 434; 47 A. 903, 905; *Storrs* v. *Burgess,* 101 Me. 26; 62 A. 730; *Giddings* v. *Gillingham,* 108 Me. 512, 520; 81 A. 951.

In the case at bar all contingencies have not yet been determined, and it is not now possible to know who will be entitled to this quarter portion of the remainder of the estate. The testator Douglass clearly intended that determination of the donees be at the time of the widow's death. Robert Douglass may or may not then be living. Which of the children of Robert or Edwin will survive? Sarah M. Crone, the cousin, may not outlive Mrs. Douglass, and she is plainly not entitled to share unless she does. The testator was interested in Sarah Crone as an apparently favored cousin. He did not intend to favor her heirs. Beyond all this, there may be other children born to testator's surviving brother who will be entitled to share if born, and if they survive the widow.

Under paragraph five of the will, above quoted, if any one of the named life beneficiaries dies during the lifetime of the widow his estate will be entitled to no part. If the widow's waiver has the effect of acceleration, the life beneficiaries will take a share of the estate now, even though one or all may predecease the widow, and possible future born children will be excluded. This would be a result never contemplated or intended by the testator.

The opinions of our court contained in the Maine Reports, as well as the opinions of courts in other jurisdictions, clearly demonstrate that there is no plain legal highway through this ever growing forest of individual wills. Each will filed is a new "tree," and where it shall be placed depends on the testator's desires as expressed in his last will and testament. This court, like all courts, must recognize former decisions as a partially blazed trail that can only indicate the general direction to reach the "destination" of testator's will and wishes. If the will to be construed does not violate some positive rule of law, the intentions of the testator must prevail; and when one considers the differences as well as the similarities in sane human minds, with their capacities for reasonable or unreasonable wishes, likes, dislikes, hopes and fears, it should be understood that no fixed and definite path can be found for all. Some wills must necessarily be, and often are, outside the common and ordinary pathway.

"No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another." *Bradbury* v. *Jackson,* 97 Me. 449, 456; 54 A. 1068, 1070.

Our study of the record convinces us that we must hold under the terms of the will, that the waiver by the widow filed in this estate of Henry Beaman Douglass did not accelerate distribution. The trust should be set up to continue during the life of the widow for the benefit of the brother surviving, the children of brothers, and the cousin.

Who may be entitled to share in final distribution must await the termination of the trust.

The questions submitted, in the various and able briefs of counsel for the parties, show that doubts might well arise as to construction of this will. It is therefore proper that costs, including reasonable counsel fees should be allowed the parties by the single justice, with the exception of the widow who has waived her interest in the will.

Decree to be made by sitting justice in accordance with this opinion.

OCEANIC HOTEL COMPANY

vs.

GEORGE F. ANGELL

Cumberland. Opinion, January 30, 1948.

Tax Deeds. Description. Parol Evidence.

Minute descriptions of lands assessed and sold for taxes are not required but lands must be so described that they can be identified with reasonable certainty and the descriptions must be certain or refer to something which can be made certain.

Description otherwise sufficient in a tax deed is not made uncertain by the inclusion of the approximate area of the property taxed, which appears to be merely an estimate and not intended as a controlling recital.

Description otherwise sufficient in a tax deed is not made uncertain or impaired by reference to a plan without designation of the plan by name or place of deposit since such an uncertain reference does not make any plan a part of the deed and parol evidence cannot be received to show an existing plan was the one intended.

Where tax deed described property merely as land at Peak's Island with the street and side thereof on which it is located, as also its

approximate area and a reference to certain unidentified plans, the description is insufficient and the tax deeds invalid.

ON EXCEPTIONS.

Real action to recover possession of certain land. The plaintiff objected and excepted to the acceptance by the Superior Court of a referees' report finding for the defendant. Exceptions sustained. Case fully appears in the opinion.

Frederic J. Laughlin,
Jacobson and Jacobson, for plaintiff.

Pinansky and Pinansky, for defendant.

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

STURGIS, C. J. This real action, brought to recover possession of land on Peaks Island in the City of Portland, was referred by agreement of the parties and approval of the court. The finding was for the defendant. The report of the Referees was accepted against objections and exceptions reserved.

The lands described in the writ and owned by the demandant, the Oceanic Hotel Company, were sold to the City of Portland for taxes assessed in the years 1939 and 1940 and as three separate lots. After the period of redemption expired the properties were conveyed to the defendant. The descriptions in the tax deeds each year were the same and as follows:

> "The following described real estate, situated in the City of Portland, to wit: Land hotel 'Oceanic House' $3,225 and garage $100 S side Pleasant Ave. Peaks Island Plan 92 Block G Lot 3 Approx Area 14119 sq ft."

> "The following described real estate situated in the City of Portland, to wit: Land S side Pleasant Ave. Peaks Island Plan 92 Block G Lot 2 Approx. Area 17029 sq ft."
>
> "The following described real estate situated in the City of Portland, to wit: Land E side Island Ave. and N W side Pleasant Ave., Peaks Island Plan 92 Block B, Lot 4 Approx. Area 11078 sq ft."

As the record clearly indicates that in other respects there was full compliance with all requirements of law in these tax sales, the sufficiency of the descriptions is the controlling issue submitted for decision.

It is well settled that while minute descriptions of lands assessed and sold for taxes are not required, the lands must be so described that they can be identified with reasonable certainty and the descriptions must be certain or refer to something which can be made certain. *Oldtown* v. *Blake,* 74 Me. 280; *French* v. *Patterson,* 61 Me. 203; *Orono* v. *Veazie,* 61 Me. 431; *Adams* v. *Larrabee,* 46 Me. 517.

The first lot of land sold to the City of Portland for 1939 taxes and called the "Oceanic House" and garage is described with the required certainty. The name by which apparently it alone is generally known and indicative of the uses to which it has been appropriated, as also the section of the city where it is situated, are stated and clearly indicate the property taxed. Such a description in a tax deed and an assessment has long been held sufficient. *Hunt* v. *Latham,* 121 Me. 303. It is not made uncertain by inclusion here of the approximate area of the property taxed, which appears to be merely an estimate and not intended as a controlling recital.

Nor is the sufficiency of the description in the 1939 tax deed of the "Oceanic House" and garage impaired by reference to Plan 92 Block G Lot 2 without designation of the plan by name or place of deposit. Such an uncertain reference does not make any plan a part of the deed or measure the extent of the lands conveyed. And parol evidence to

show that an existing plan was the one intended cannot be received. *Chesley* v. *Holmes,* 40 Me. 536, 546; *Thrasher* v. *Royster,* 189 Ala. 350. See also *Satterstrom* v. *Glick Bros. Sash, Door & Mill Co.,* 5 P. 2nd (Cal.) 21; *Connors* v. *Lowell,* 209 Mass. 111, 120, 122; *Kenyon* v. *Nichols,* 1 R. I. 411. No more do we think that such a reference to an unidentified Plan makes any plan a part of the assessment. There the lands taxed must be definitely and distinctly described, the assessment must be as complete in and of itself as a deed and parol evidence cannot be resorted to for the purpose of supplying deficiencies in the description. *Greene* v. *Lunt,* 58 Me. 518, 533. The reference here to Plan 92 Block G Lot 2, without further identification, does not meet these requirements and as in the tax deed must be disregarded. Without these references the deed and the assessment conform and their descriptions are sufficient.

As the title obtained by the City of Portland through the sale of the Oceanic House lot for the 1939 tax assessed upon it and since conveyed to the defendant must be upheld, the validity of the tax title growing out of the sale of this property for the 1940 tax needs no decision. That title, such as it was, has vested in the defendant and is not a cloud upon his title under the sale for the 1939 tax which on this record is as against the defendant and all others complete. The finding of the Referees that the defendant owns the second and third lots demanded and described in the Writ of Entry as the first and second of the lots known as the Oceanic House and is entitled to judgment therefor was not error.

As to the other lands demanded, which may be denominated the first and fourth Lots, the defendant shows no title and the acceptance of the report of the Referees that for them he should have judgment was clearly wrong. He has only the title which the City of Portland received as highest bidder for two lots of land on Peaks Island sold for 1939 and 1940 taxes. Both years the same descriptions were used in the tax deeds and each lot was described as land at

Peaks Island with the street and side thereof on which it is located given as also its approximate area and as to one there is a reference to Plan 92, Block G, Lot 2 and as to the other to Plan 92, Block B, Lot 4. As already pointed out, such uncertain references to plans do not make any plans or their details of description parts of the tax deeds. Without any plans the descriptions all being alike are entirely indefinite and clearly insufficient. *Orono* v. *Veazie, supra.* The reception of parol evidence to identify certain Assessor's Plans as the plans intended was error. *Chesley* v. *Holmes, supra; Thrasher* v. *Royster, supra.* These tax deeds are invalid and through them the defendant has acquired no title to the first and fourth lots demanded. He was not entitled to judgment for these lands.

As the acceptance of the Referees' report must be set aside for the errors stated, determination of other issues raised by the written objections is not required. Established rules of procedure govern the disposition of the case in the trial court.

Exceptions sustained.

RACHEL CANDAGE
vs.
JOSEPH BELANGER, JR.
and
EVERETT L. MOORE

Androscoggin. Opinion, February 10, 1948.

Joint Tort-Feasors. Damages.

In action for concurring negligence each tort-feasor is independently liable for the whole damage, and the jury may separate the defendants and return verdicts against the one and for the other.

Damages assessed by jury in sum of $2,840.35 for cuts and bruises, broken nose and transverse fractures of bone of right leg below the knee, slight disfiguration and somewhat mishapen nose, with incidental expenses of $340.35, without loss of earnings or permanent impairment, are excessive.

ON MOTION FOR NEW TRIAL.

Action of negligence against two defendants. Verdict for plaintiff against one defendant and judgment against plaintiff as to other defendant. Defendant against whom verdict was rendered filed for new trial.

Motion sustained unless within thirty days from filing of mandate plaintiff remits all of verdict in excess of $1,840.35.

Berman and Berman, Lewiston, for plaintiff.

John G. Marshall, for Joseph Belanger, Jr.

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

STURGIS, C. J. In this action a verdict of $2,840.35 was returned against Joseph Belanger, Jr. and the case comes

forward on his motion for a new trial. The jury found for Everett L. Moore and he has judgment.

The plaintiff was injured when the Chevrolet coach driven by Moore, in which she was riding as a guest passenger, collided with a Dodge truck approaching from the opposite direction and operated by Belanger. It was late in the afternoon and the state highway where the cars, with lights on, came together was hard-surfaced, dry, level and straight. On the evidence, with credibility of witnesses a controlling factor, the finding of the jury that the negligence of the defendant, Joseph Belanger, Jr., was the sole proximate cause of this collision was not manifestly wrong.

Nor is there merit in the complaint of the defendant Belanger that his codefendant Moore obtained a favorable verdict. In actions for concurring negligence each tort-feasor is independently liable for the whole damage, and the jury may separate the defendants and return verdicts against the one and for the other. This is settled practice. *Plante* v. *Canadian National Rys. et al.*, 138 Me. 215; *Arnst* v. *Estes et al.*, 136 Me. 272.

The damages assessed by the jury, however, are clearly excessive. The plaintiff was cut and bruised, her nose was broken and there were transverse fractures of the bones of her right leg below the knee. She was in the hospital a week and then incapacitated at home for about two months and ministered to by her mother. She necessarily suffered pain and discomfort and well may have been, as she says, lame, sore and nervous for a time. And she is slightly disfigured by small scars on her forehead and a somewhat misshapen nose. However, her recovery was rapid, proof of permanent impairment is lacking and she shows no loss of earnings. She is entitled to recover her incidental expenses of $340.35 and reasonable compensation for her pain and suffering but for that, on a most favorable view of the evidence, there is no warrant for the award of $2,500. We are of opinion that $1,840.35 would fully reimburse the

plaintiff for all her losses and the verdict as rendered cannot be allowed to stand.

Motion sustained unless within thirty days from filing of mandate plaintiff remits all of the verdict in excess of $1,840.35.

GEDEON MARSHALL
vs.
YVONNE MATHIEU, DAVID MATHIEU,
AND
CORA MAHEU

Kennebec. Opinion, February 14, 1948.

Liens. Time.

Only such labor and materials as are used in erecting, altering, removing or repairing a building are protected by a lien under R. S. 1944, Chap. 164, Sec. 34.

Neither the filing of a lien statement after 60 days from the date of the furnishing of the last lienable labor or materials nor the filing of a bill in equity after 90 days is seasonable.

The lien period begins to run from the furnishing of the last item of labor and materials proved to have been used in erecting, altering, removing or repairing a building.

ON APPEAL.

Bill in Equity to enforce lien claim on property belonging to one of defendants, for labor and materials furnished for alterations and repairs to a building and construction of table for a restaurant operated by another defendant. From a decree awarding a lien on property, Yvonne Mathieu and David Mathieu appeal.

Appeal sustained.

William H. Niehoff, for plaintiff.

F. Harold Dubord,
Arthur B. Levine, for defendants.

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

MURCHIE, J. The defendants Yvonne Mathieu and David Mathieu, her husband, prosecute the present appeal against a decision rendered against them, and another, on a Bill in Equity brought to enforce a lien claimed by the plaintiff on land and buildings belonging to the wife. The process names the tenant of one of the buildings, who operated a restaurant therein, as the third defendant, and alleges that the plaintiff furnished labor and materials in erecting, constructing, altering and repairing that building under a contract with all three defendants. The decision negatives such a contract. Its recitals that the third defendant, Cora Maheu Poilliot (named as Cora Maheu), is indebted to the plaintiff in a named sum and that the plaintiff has a lien on the land and buildings for a lesser one indicates factual findings that the plaintiff was employed to do all the work by Mrs. Poilliot alone and that lienable labor and materials for a part of it were furnished with the consent of the owner of the property. That is all the lien statute, cited *infra,* requires. An exception to an evidence ruling in the Trial Court, perfected in the Bill of Exceptions, was waived at oral argument.

A statement of the amount claimed as a lien was filed pursuant to the requirements of the statute, showing charges for labor and materials amounting to $1,172.34 and a balance due of $872.34. The award of $722.34 and costs of $25.00, a total of $747.34, eliminates items aggregating $132 applicable to labor and materials used in the construction of tables for the restaurant, and $18 which is said to have been duplicated in the statement. The larger amount is made up of $42 for materials and $90 for labor,

charged respectively on April 15 and April 20, 1946. An additional $3 is charged for trucking on the latter date. These are the last items in the account except a labor charge of $3 on May 15, 1946 and $222.21 paid for materials on the same date. The materials must have been used on or prior to April 15th because all subsequent labor charges, except that on May 15th, were for work done in constructing the tables. There is some confusion in the evidence as to the labor to which the May 15th item is applicable. The plaintiff testified, apparently after reference to some record or account book, that it was two hours' work devoted to setting up a fan and counter. The evidence of the employee to whom it was paid is that it was putting a fan in over the electric grill and cutting a hole through the wall of the building for the purpose, at a place which had been "framed in" earlier, obviously on or before April 15th. The fan was not furnished by the plaintiff. It was the property of the defendant who operated the restaurant and had been in the hands of an electrician for repairs when the building was prepared for its installation.

The lien statement was filed on July 11, 1946. The Bill in Equity is dated August 10, 1946, and was filed 6 days later. The statute requirements are that to preserve a lien the statement must be filed within 60 days after the claimant "ceases to labor or furnish materials" and, to enforce it in equity, the bill must be filed within 90 days "after the last of the labor is performed, or labor or materials" furnished.

Ample authority has established several pertinent principles. Only such labor and materials as are used in "erecting, altering, moving, or repairing" a building are protected by a lien. *Lambard* v. *Pike,* 33 Me. 141; *Baker* v. *Fessenden,* 71 Me. 292; *Dole* v. *Bangor Auditorium Association et al.,* 94 Me. 532; 48 A. 115; *Hanson* v. *News Publishing Co. et al.,* 97 Me. 99; 53 A. 990. The coverage stated is that of the present statute. R. S. 1944, Chap. 164, Sec. 34. Originally it was limited to "erecting or repairing." Laws of 1820, Chap. CLXIX. "Altering" was added in 1837, P. L. 1837,

Chap. 273, and "moving" in 1891, P. L. 1891, Chap. 21. Time is of the essence in filing a lien statement. R. S. 1944, Chap. 164, Sec. 36. Seasonable enforcement is requisite. R. S. 1944, Chap. 164, Sec. 38. Neither the filing of a lien statement after 60 days, nor of a Bill in Equity, after 90, is seasonable. *Baker* v. *Fessenden, supra; Cole* v. *Clark,* 85 Me. 336; 27 A. 186; 21 L. R. A. 714; *Darrington* v. *Moore,* 88 Me. 569; 34 A. 419; *Woodruff* v. *Hovey et al.,* 91 Me. 116; 39 A. 469; *Hartley* v. *Richardson et al.,* 91 Me. 424; 40 A. 336. The statutory periods do not begin to run until all the lienable labor and materials have been furnished. *Farnham* v. *Richardson et al.,* 91 Me. 559; 40 A. 553; *Van Wart* v. *Rees,* 112 Me. 404; 92 A. 328; *Delano Mill Co.* v. *Warren et al.,* 123 Me. 408; 123 A. 417. When all such labor and materials have been furnished and a lien has been lost by lapse of time, it cannot be revived by furnishing additional labor or materials. *Darrington* v. *Moore, supra; Dole* v. *Bangor Auditorium Association et al., supra; Hahnel et al.* v. *Warren et al.,* 123 Me. 422; 123 A. 420.

Prior to 1857 no lien was available to one furnishing either labor or materials for the construction or repair of buildings except under a contract with the proprietor of the land, as he was designated originally (Laws of 1820, Chap. CLXIX), or the owner, as subsequently identified in legislation. The law was liberalized in that year to provide a lien for one furnishing labor or materials for a building owned by one person and standing on the land of another, which would reach any interest the owner of the building might have in the land. P. L. 1857, Chap. 15. It was not until 1868 that land became subject to lien on the basis of its owner's consent to the furnishing of materials for the erection, alteration or repair of a building located on it. P. L. 1868, Chap. 207. The reason for permitting such a result was well expressed by Mr. Justice Strout, more than 30 years later, in *Hanson* v. *News Publishing Co. et al., supra:*

> "A lien is given upon the ground that the work has been a benefit to the realty, and has enhanced its value."

Taking the testimony of the plaintiff at its face value the defendant Mrs. Poilliot employed him to make the inside of the restaurant "nice and clean." She subsequently decided to lengthen the building and change the front. The changes required the rebuilding of a chimney. Some insulating materal was used in the work on the building. There is evidence which would support findings that all the labor and materials furnished by the plaintiff for work on the building were furnished by the consent of the owner and that each and every item thereof enhanced the value of the property. Not so the construction of the tables, the setting up of any counter, or the installation of the fan over the electric grill. These items, to use the language of *Lambard* v. *Pike, supra,* were not intended "to constitute a part of the building," but were designed "for its more convenient use."

Eliminating the labor and materials applied to the construction of the tables, and allowing for the $18 duplication in the lien statement, as the Justice below did, the decision relates to a total repair bill of $1,022.34, all except $6 of which was either paid out on or before April 15, 1946 or was applicable to materials used on or before that date. The $6 is divided between an item for trucking on April 20, 1946 and the labor charge of May 15, 1946 heretofore discussed. Whether the trucking involved the lumber furnished for the tables, the delivery of them after their construction, or the delivery of other materials, is not important. If it involved other materials it must have related to something delivered on or prior to April 15th. No materials were furnished thereafter.

Correcting the lien statement to eliminate the $18 duplication, it shows a total charge of $1,154.34 and a claimed balance of $854.34 for two jobs, one of which involved lienable labor and materials while the other did not. The division between the two is entirely clear except for the two $3 items. The Trial Court decided that the trucking item of April 20th, listed as labor, and the labor item of May 15th belonged to the lienable rather than to the non-lienable

job. It would seem apparent, as to the trucking item, that it was erroneous because all the labor and materials furnished in connection with the construction of the tables and nothing else, except the trucking, were charged at the same time, but the appeal must be sustained without reference to that point. It is the item of May 15th, and that alone, which would entitle the plaintiff to enforce the lien he undoubtedly had for his work on the building. His lien statement was filed within 60 days of that date, and his process within 90, but neither was timely if the last of the lienable labor and materials were furnished on either April 15th or April 20th. Whatever the fact in connection with the May 15th item, i.e. whether it represented labor in setting up a fan and counter, as the plaintiff testified, or the fan alone, and required cutting through the building wall at a prepared place, as the employee who did the work declared, there is no evidence to prove that it was a part of any of the work the plaintiff was employed to do on the building; that it was a benefit to the realty; or enhanced its value. Such evidence was essential to prove that the lien enforcement action was taken seasonably. It was the burden of the plaintiff to prove the fact. Since he failed to do so, the installation of the fan must be considered a part of the restaurant equipment job and the cutting of the wall, at a place "framed in" for the purpose when the work on the building was done, incidental to it.

Appeal sustained.

ALBERT PAUL BLUE, ET AL.

vs.

NESTER MARY BOISVERT

York. Opinion, February 16, 1948.

Adoption. Habeas Corpus.

The adoption of a minor child is legal only if the statutory procedure is followed.

Where petition for adoption alleges and Probate Court finds that both parents have abandoned child, consent to such petition must be given by legal guardian, if any, and if no such guardian, by the next of kin in the state, and if no next of kin, by some person appointed by the judge to act in the proceedings as next friend of such child. If no such consent is given, decree of adoption is void.

A divorce decree awarding custody of a minor child, cannot be disregarded in a subsequent proceeding by *habeas corpus* to obtain possession of the child, and where court on *habeas corpus* proceedings decides the case purely upon the fact that an appeal from adoption proceedings had not properly been taken, and granted the writ, without taking into consideration other elements relative to the child's welfare, the writ should be quashed.

ON EXCEPTIONS.

Petitioner claiming to be adoptive parents of Robert Boisvert brought *habeas corpus* proceedings to obtain possession of child. The writ was granted. Respondent brought exceptions. Exceptions sustained. Writ quashed.

Titcomb & Siddall,
Gendron & Gendron, for petitioners.

Simon Spill,
Lausier & Donahue, for respondent.

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

OPINION.

TOMPKINS, J. This cause came to the Supreme Judicial Court on exceptions by the respondent to the decree of the Justice of the Superior Court, in vacation. It is a *habeas corpus* proceeding. The proceeding was founded upon Chapter 113 of the Revised Statutes of 1944, which makes the remedy available to minors restrained of their liberty, on their own application or on the petition of a parent or guardian under Sections 1, 3 and 4 of said Chapter. The case is not without its difficulties.

The essential facts on which it is grounded are as follows: The petitioners claim to be the adoptive parents of the child, Robert Roland Boisvert, and that he is acting through the adoptive parents. The respondent is the mother and natural guardian, over whose objection the decree of adoption was made. Unfortunately the testimony was not reduced to writing, and the exceptions before the court relate solely to alleged errors of law in the decree of adoption and the *habeas corpus* proceedings. The exceptions to petition, the writ of *habeas corpus,* the return, the decree, attested copies of docket entries and adoption of Robert Roland Boisvert filed in the York County Probate Court by Albert Paul Blue and Viola Rita Blue dated May 14, 1946, the order of personal service thereon, attested copy of the decree, motion for dismissal of the petition of Nester Mary Boisvert, attested copy of the decree of the Probate Court in the county of York dated October 29, 1946, on the aforesaid petition for adoption, attested copy of motion and appointment of Nester Mary Boisvert guardian *ad litem* and next friend and the acceptance thereof under date of October 31, 1946, attested copy of the petition for adoption of Robert Roland Boisvert by Rose Alma Shaw dated Feb. 28, 1946, order of notice thereon and decree dismissing the same, dated October 29, 1946, and the stipulation that no appeal

bond was filed by Nester Mary Boisvert (the stipulation is not set forth in the case as it is not necessary to pass upon its contents, as will be disclosed later in the opinion) constitutes the entire record in the case.

From the record and finding of the Judge it appears that Nester Mary Boisvert obtained a decree of divorce from Raymond Boisvert on October 25, 1945, on the ground of gross and confirmed habits of intoxication, and the exclusive custody of their minor children Robert Roland and David James Boisvert was given to her; that Robert Roland Boisvert is alleged in the petition for adoption to have been born at Sanford on October 10, 1938; that on February 26, 1946, Rose Alma Shaw, maternal grandmother of the child, petitioned the Probate Court in York County for leave to adopt him; that Nester Mary Boisvert, mother, consented to this adoption and signed the consent clause. The court ordered this petition dismissed on October 29, 1946; that on May 14, 1946 Viola Rita Blue, paternal aunt, and Albert Paul Blue, her husband, both of Mesa in the county of Maricopa and State of Arizona, petitioned the same court for leave to adopt this child, with right of inheritance, and that the name of the child be changed to Roland Joseph Blue. Their petition stated that the father of said child "has indorsed this petition and given his consent to the adoption therein proposed;" and "that the mother, having custody of said child under and by virtue of the decree of the Superior Court within and for said county of York, is unfit to have the custody of said child; that both parents have abandoned said child and ceased to provide for its support." Personal service was ordered to be made on the mother. Whether this notice was ever served or not does not appear in the record, but the record discloses that the mother appeared by her attorney and filed a motion that the petition for adoption be dismissed, alleging, among other things "That under and by virtue of the decree of divorce of the Superior Court within and for the county of York held at Alfred, at the October, 1945, term thereof, the said Nester Mary Boisvert was

granted the care and custody of said Robert Roland and David James Boisvert, both minors under the age of fourteen years; and that the said Nester Mary Boisvert has not given written consent to the petition for adoption of Robert Roland Boisvert dated May 14, 1946, filed by Albert Paul Blue and Viola Rita Blue." This motion for dismissal was filed July 18, 1946, and upon hearing on the 29th day of October 1946 the petition was overruled and dismissed by the Judge of Probate for said county.

The petition filed by Viola Rita and Albert Paul Blue for leave to adopt with change of name and rights of inheritance was granted by the Probate Court on October 29, 1946, and the Judge of Probate found the mother "Unfit to have the custody of the (child) Robert Roland Boisvert" and both parents to "have abandoned said child and ceased to provide for its support." On the 31st day of October 1946 the mother filed a motion asking to be appointed guardian *ad litem* and next friend of Robert Roland Boisvert, and the motion was granted and she was appointed. On the 15th day of November following she filed an appeal from the decree of adoption setting forth that "She is interested as mother and next friend of Robert Roland Boisvert," that "She is aggrieved" by the decree of adoption and that "She hereby appeals therefrom," claiming her appeal to the Supreme Court of Probate, and filed her "Appeal and reasons for appeal" but filed no appeal bond. Thereupon the adoptive parents claiming that the appeal was not properly perfected and consequently was void and completely inoperative, and that the time limit had expired, thus making the decree of adoption final and absolute, brought this *habeas corpus* proceeding asking that the child be ordered delivered to them; that the court so found and ordered that the child be "Forthwith delivered to Albert P. Blue and Viola Rita Blue in accordance with the decree of adoption issued by the Probate Court on October 29, 1946." The respondent thereupon filed the exceptions which are before the court. The exceptions are six in number.

The first exception contends that the court erred in ruling and finding that the appeal "Was not properly taken."

Second, the court erred in that it failed to determine and declare whether the judgment of the Probate Court was valid or void, which finding the court had to make in order to determine the legal status of the petitioners in their relationship toward the said minor child.

Third, the decree of adoption of the Probate Court was void because the mother of the minor child did not give written consent to such adoption, she having sole care and custody by virtue of the unannulled and unreversed decree of divorce, and that the Probate Court neglected to make a ruling on the motion to dismiss the petition, and that the justice hearing the *habeas corpus* writ erred in disregarding the aforesaid decree of divorce, and in disregarding the lack of the written consent of the mother, required by law.

Fourth, that the decree of adoption of the Probate Court is void in that its decree found that both parents had abandoned the child and ceased to provide for his support, and which, if so, would require consent to be given by the legal guardian as required by law, and in disregarding the lack of written consent the court failed and erred.

Fifth, that the court erred as to a matter of law for that it failed to determine what would be the paramount welfare and interest of said child, Robert Roland Boisvert, inasmuch as this was an *habeas corpus* proceeding wherein the welfare of the child was involved, and wherein the petitioners did not have an absolute vested right in his custody.

The sixth exception is omitted because it was not pressed by the respondent in her argument to the court.

The question here involved is whether the court erred on any one or more of the points raised by exception. The petitioners in the *habeas corpus* proceedings claim that there was no error made by the court in any of the points raised by the exceptions.

The answer to the second, third and fourth exceptions, which we will first consider, depends upon the interpretation of the adoption statute, Sec. 36 of Chap. 145 of the Revised Statutes of 1944 as amended by Chap. 60 of the Laws of 1945. The section as amended reads as follows, quoting only those parts deemed applicable to this case: "Before such petition is granted, written consent to such adoption must be given by the child if of the age of fourteen years, and by each of his living parents, if not hopelessly insane or intemperate; or, when a divorce has been decreed to either parent, written consent by the parent entitled to the custody of the child, personal notice of such petition to be given to the other parent if within the jurisdiction of the court, or if beyond the jurisdiction of the court, or the residence is unknown, such notice as the judge deems proper; or such consent by one parent, when, after such notice to the other parent as the judge deems proper and practicable, such other parent is considered by the judge unfit for the custody of the child. If there are no such parents, or if the parents have abandoned the child and ceased to provide for its support, consent may be given by the legal guardian; if no such guardian, then by the next of kin in the state; if no such kin, then by some person appointed by the judge to act in the proceedings as the next friend of such child . . . . . Provided, however, if only one of such parents has abandoned the child and ceased to provide for its support, consent may be given by the parent who has not abandoned the child."

The adoption of a minor child and the giving of it in adoption to persons other than its natural parents, is a procedure and creates a status unknown to the common law. Being of purely statutory origin, a legal adoption results if the statutory procedure is followed but fails if any essential requirement of the statute is not complied with. *Taber* v. *Douglas,* 101 Me. 363; *Keal* v. *Rhydderck,* 317 Ill. 231; *Appeal of Goshharen,* 148 A. 379; *Smith* v. *Smith,* 180 Pac. (2nd) 853.

"Courts of Probate are wholly creatures of the statutes of the legislature and are tribunals of special and limited jurisdiction. It is true that when all of its proceedings have been regular with respect to any matter within the authority conferred upon it by law, the decrees of the Probate Court, when not appealed from are conclusive upon all persons and cannot be collaterally impeached. It is equally well settled in this State that jurisdiction of the subject matter alone is not sufficient to establish the validity of its decrees. If the preliminary requisites and the course of proceedings prescribed by law are not complied with, jurisdiction does not attach and the decree will be, not voidable, but void. The petition in this court is the foundation upon which to base its jurisdiction and it must allege sufficient facts to show the authority and power of the court to make the decree prayed for. The record of its proceedings must show its jurisdiction." *Taber* v. *Douglas, supra; Cummings Applt.*, 127 Me. 418. "The fact that a court of probate in giving judgment passed upon the question of jurisdiction, does not preclude courts of common law from inquiring into the jurisdictional facts collaterally and declaring the judgment of the Probate Court valid or void as they shall find the facts true or false." *Taber* v. *Douglas, supra.*

As adoption is in derogation of the common law right of the parent, consent of the natural parents is generally required and is a most important item of adoption proceedings. Our statute requires it, to make the adoption legally effective, unless the case falls within one of the exceptions, and an act of adoption without the required consent is null and void. *Taber* v. *Douglas, supra; Jackson* v. *Spellman,* 28 Pac. (2nd) 125; 2 C. J. S., Adoption, Par. 21, page 383.

Did the adoption proceedings follow the adoption statute? The adoption proceedings fall outside of the first class described in said Section 36 because the minor was under fourteen years of age and his consent was not required, and "Each of his living parents were not hopelessly insane or

intemperate." It does not fall within the second class because there has been a divorce and the mother was awarded the custody of the minor, but she gave no consent, as required by the statute, and actively opposed the adoption. The third class requires consent of one parent, with notice to the other parent, and such other parent is considered unfit to have the custody of the child. The petition alleges that both parents had abandoned the child and the Judge of Probate so found. He also found that the mother was unfit to have the custody of the child.

Now the fifth provision of said section provides "If only one of such parents has abandoned the child and ceased to provide for its support, consent may be given by the parent who has not abandoned the child," which would clearly indicate that the parent abandoning the child could not give the consent required under class three. The third class is not applicable. Neither is the fifth class applicable because the Judge of Probate found that both parents had abandoned the child. This conclusion is further strengthened by the fourth provision, which provides "If the parents have abandoned the child consent may be given by the legal guardian; if no such guardian, then by the next of kin in the state; if no such kin, then by some person appointed by the judge to act in the proceedings as next friend of such child." The fourth class does not apply because there was no consent by legal guardian, next of kin in the state, or by some person appointed by the judge to act in the proceedings as next friend of such child. In this case the mother, who had the custody under the decree of divorce, and was the one designated by the statute to give consent, did not do so. The Judge found both parents had abandoned the child. Then neither could give consent. In that case the fourth provision of Section 36 applied. If there was a legal guardian his consent was necessary. "If no such guardian the consent of the next of kin in the state; if no such kin then by some person appointed by the judge to act in the proceedings as the next friend of such child."

Because of "The conclusiveness and far-reaching effect of an adoption decree, and that it is not a mere custody decree like a guardianship or other similar proceedings, every consideration of fairness to the natural parent dictates that the provisions of our statutes prescribing the conditions under which their consent may be dispensed with should receive strict construction." In re *Privette,* 185 N. E. 435; *Smith* v. *Bradford,* 154 A. 272; In re *Lease,* 99 Washington 413, 169 Pac. 816; *Watts* v. *Dull,* 184 Ill. 86; *Elmer* v. *Wilbrook et al.,* 158 A. 760; *Jackson et. ux.* v. *Spellman,* 28 Pac. (2nd) 125. The consent required by the statute was not obtained, the procedure pointed out by the statute was not followed, jurisdiction did not attach, decree of adoption was null and void and conferred no rights upon the plaintiffs.

Having determined that the decree of adoption is void it is unnecessary to consider the first exception. The action of the Probate Court being null and void there was nothing from which to appeal. This brings us to the exceptions growing out of the *habeas corpus* proceedings brought by the plaintiffs for the custody of the child. While the writ of *habeas corpus* was originally limited to cases of restraint under color or claim of law, and was not originally intended to try the right of custody of infants, it has generally been extended to and generally made use of in controversies touching such custody. C. J. S. Vol. 39, *Habeas Corpus,* Par. 41, page 568; *Merchant* v. *Bussell,* 139 Me. at 121.

In cases of this nature there are three interests to be considered, the parent, the state, the child, and of these three interests that of the child is paramount. *Merchant* v. *Bussell, supra.* The fifth exception by the defendant alleges "That the court erred as a matter of law for that it failed to determine what would be the paramount welfare and interest of the child . . . . . inasmuch as this was a *habeas corpus* proceeding wherein the petitioners did not have an absolute vested right in his custody."

The plaintiffs represent themselves in their petition in the *habeas corpus* proceedings as the adoptive parents of the

child and as acting for the minor. The right of a parent to the custody of a minor child is not an absolute right. *Merchant* v. *Bussell,* 139 Me. 119; *Grover* v. *Grover,* 143 Me. 34; 54 A. (2nd) 637. Blood relatives, as such, have no absolute right to the custody of the child. *Grover* v. *Grover, supra.* Inasmuch as the rights of a parent or blood relative to the custody of a minor child are not absolute, these plaintiffs, if they were the adoptive parents, which we have just decided they were not, would have no absolute right of custody. They were not, however, without a blood tie with the minor for the record discloses that Mrs. Blue was his paternal aunt. This does not aid them so far as "absolute right" is concerned. *Grover* v. *Grover, supra.*

Section 16 of Chapter 153 of the Revised Statutes provides "That the father and mother are the joint natural guardians of their minor children and are jointly entitled to the care, custody and control . . . . . of such children." Section 20 of the Chapter provides that the provisions of this section shall not "Abrogate any power or jurisdiction now vested in any court over the care and custody of minor children." Section 69 of the same Chapter provides that "The court making the decree . . . . . of divorce, or any justice thereof in vacation, may also decree concerning the care, custody and support of the minor children . . . . . and may alter its decree from time to time as the circumstances require." The mother has been awarded the unqualified custody of the minor by the decree of divorce. True "The court making a decree of divorce, or any justice thereof in vacation may also decree concerning the care, custody and support of minor children . . . . . and also alter its decree from time to time as cimcumstances require." The decree was in full force at the time of the hearing. In view of Section 69 of the statute above cited it was ambulatory custody subject to be altered by the court or any justice in vacation, the court in divorce proceedings always retaining the power on proper petition to change the custody and control of the minor children of divorced parents. *White* v. *Shalit,* 136

Me. 65. The decree "Unless modified or set aside . . . . . awarding the custody of the child is conclusive as to all questions affecting the matter existing at the time it was rendered . . . . . The decree does not, however, preclude further action by the court on a change of circumstances arising after the decree." C. J. Vol. 19 through Par. 808.

"The decree in a divorce suit awarding the custody of a child to one of the parties fixes the status of the child as between the parties until modified or set aside for cause shown in some subsequent or supplemental proceedings in the same cause, and cannot be disregarded in a subsequent proceeding by *habeas corpus* to obtain possession of the children." *State ex rel Wookey* v. *Elifritz,* 160 N. W. 113 and cases there cited. The parents are the natural guardians of their minor children, and while, as we have previously stated, it is the best interest of the child that must be considered, the following observation made by the court in *Norvall* v. *Zinsmaster,* 77 N. W. 373 seems pertinent: "The court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent is affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with the power to take them from their parents—so long as the latter discharge their duties to the best of their ability—and give them to strangers because such strangers may be better able to provide what is already well provided." *Ex parte Hoines* 112 A. 613 to the same effect.

The finding of the court in the *habeas corpus* proceeding was as follows: "The Court therefore finds that appeal was not properly taken and the statutory period in which the appeal may be taken having expired, the original decree of adoption granted by the Judge of Probate must stand, and there is nothing now before the Court. Unquestionably the mother, Nester Mary Boisvert, attempted to take an appeal in good faith from the decree of the Judge of Probate. This,

however, she failed to do. Inasmuch as the proceeding is purely statutory, the provisions of the statute must be strictly complied with. It is therefore ordered, adjudged and decreed that the body of Robert Joseph Blue be forthwith delivered to Albert Paul Blue and Viola Rita Blue, in accordance with the decree of adoption issued by the Probate Court October 29th, 1946."

In this case the legal custody of the child belonged *prima facie* to the mother, its parent under the decree of divorce. It is generally held in such cases, all things being equal, the right of the mother to her child is superior to that of all other persons. "Each case presents a different problem which cannot be solved by a fixed and inflexible rule. In determining the delicate and often perplexing question of the custody of a child as between mother and third persons, it is incumbent upon all who are bound to decide such question to proceed with caution and to act only upon clear proof, lest, in a given case, violence be done to the tie of nature that binds mother and child." *Ex parte DesMarais,* 42 A. (2nd) 893. To the same effect *Merchant* v. *Bussell, supra.*

As we have previously decided, the decree of adoption was null and void. The court, however, hearing the case decided it purely upon the fact that the appeal from the adoption was not properly taken, and "The statutory period in which the appeal may be taken having expired the original decree of adoption granted by the Probate Court must stand, and there is nothing now before the — court," and he thereupon ordered that "The body of Robert Joseph Blue be forthwith delivered to Albert Paul Blue and Viola Rita Blue in accordance with the decree of adoption issued by the Probate Court October 29, 1946." The paramount interest of the child was not considered. The court considered only the fact that the petitioners were the adoptive parents and that their right to custody was absolute because of the decree of adoption issued by the Probate Court. This was the ground on which the petitioners based their right to the custody of the minor in their petition praying for the issuance

of the writ of *habeas corpus*. As we have previously demonstrated, that decree was void. The divorce decree stands. The decree of divorce has decided the custody of the minor. The learned justice was in error. The petitioners are not entitled, on the case made out by them, to take this child from the custody of the mother. Exceptions must be sustained.

Exceptions sustained.
Writ quashed.

MARTHA L. JORDAN

vs.

CHARLES H. DAVIS

Hancock. Opinion, February 17, 1948.

Bastardy. Evidence. Blood Tests.

Even though the blood grouping test, interpreted in accordance with biological laws, indicate that a respondent could not have been the father of a child, the result is not conclusive. The statute does not make it so but says only that it shall, if it excludes the respondent as a father, "be admissible in evidence." R. S. 1944, Chap. 153, Sec. 34.

In the face of unrefuted evidence that the complainant and the respondent had sexual intercourse on a certain date, that a child was born within the normal period of gestation, and in the absence of any evidence that anyone other than the respondent could have been the father of the child, the results of the blood tests as given in evidence are not conclusive.

The Jury have the right to decide that there may have been some error in the handling of blood or serums or some mistake in the conclusions of the laboratory technicians as to what they found.

ON MOTION FOR NEW TRIAL.

Upon a bastardy action and trial before a jury there was a verdict for the complainant. Respondent made a motion for a new trial. Motion overruled. Case fully appears in the opinion.

Clarke and Silsby, for complainant.

Blaisdell and Blaisdell,
Hale and Hamlin, for respondent.

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

THAXTER, J. This is a bastardy action brought under the provisions of R. S. 1944, Chap. 153, Secs. 23-34. There was a trial before a jury which found for the complainant. The case is before us on a motion for a new trial.

There was ample evidence to satisfy the jury that the respondent had sexual intercourse with the complainant on August 12, 1945, and that she gave birth to a child on May 23, 1946. Except for the blood grouping test referred to later, there is no evidence whatsoever that anyone other than the respondent could have been responsible for her pregnancy. He did not take the stand to deny her story and in conversations with her mother and father inferentially admitted that he was responsible for her condition.

Under an order of court and in accordance with the provisions of R. S. 1944, Chap. 153, Sec. 34, a blood grouping test was made to determine whether the paternity of the respondent could be excluded. The section of the statute which is here involved reads as follows:

> "**Sec. 34. Blood grouping tests. 1939, c. 259.** After return day, the court, in term time or vacation on motion of the respondent, shall order the complainant, her child, and the respondent to submit to one or more blood grouping tests to determine whether or not paternity of the respondent

> can be excluded, the specimens for the purpose to be collected and the tests to be made by duly qualified physicians and under such restrictions as the court shall direct, the expenses therefor to be audited by the court and borne by the respondent. The results of such tests shall be admissible in evidence, but only in cases where exclusion is established. The order for such tests may also direct that the testimony of the examining physicians may be taken by deposition."

Scientific research over many years by the use of blood grouping tests has made important discoveries which have had a profound effect, not only in the practice of medicine, but in the proof of issues in courts of law. Medical men have accepted these as accurate in many cases in which has depended the question of life and death. The law has moved more slowly in giving full weight to what these tests appear to prove. What medicine today may treat as a fact, as well established as the circulation of the blood, some courts still regard as a matter of opinion, which as evidence is tainted with all the skepticism which attaches to many forms of expert testimony on an abstruse subject. See the discussion of this problem by the courts of California in *Arais* v. *Kalensnikoff,* (Calif. Sup. Ct. 1937) 10 Cal. (2nd) 428; 74 P. (2nd) 1043; 115 A. L. R. 163; *Berry* v. *Chaplin,* (74 C. A. Calif. 2nd Div. 652) 169 P. (2nd) 442. Other courts in later decisions, hesitating perhaps to lay down as a rule of law, what may come into collision with scientific fact, have given to these blood tests the weight which is their due. As was said in *Shanks* v. *State* (Md. C. A. 1945, 185 Md. 437) ; 45 A. (2nd) 85, 86; 163 A. L. R. 931: "Blood tests are now accepted everywhere, scientifically, as accurate, and the courts and legislatures have generally followed the same view." See also *Beach* v. *Beach* (C. C. A. D. C. 1940, 72 App. D. C. 318) ; 114 F. (2nd) 479; 131 A. L. R. 804.

The value of these tests in determining the issue of nonpaternity was recognized by the Legislature of this state nine years ago when the statute above quoted was enacted,

which in 1944 was incorporated into the revised statutes of this state. This provision makes it mandatory on the court on motion of the respondent in a bastardy case to order such a test and makes the result admissible in evidence where it shows non-paternity.

It is not here necessary to discuss the intricate details by which science has reached certain definite conclusions founded on biological laws. We are told that by the examination of the blood of the mother, the child, and the putative father, non-paternity may be conclusively proved in a certain proportion of cases. The statute in question accepts this verdict of science,—that even though such tests cannot prove paternity, they may in certain instances disprove it.

The tests in the instant case were made by, or at least under the direction of Dr. Hooker, one of the leaders in this research work. According to his testimony they show that the mother's blood group formula is "O" "M" "N", that the child's is "O" "M", and that the respondent's is "A" "N". "A" and "O" in these cases refer to what are called groups, "M" and "N" to types. And the doctor states categorically that it is a biological law that a male with type "N" blood cannot be the father of a child with type "M" blood by a mother with type "M" blood. By the application of this law to the case before us, he definitely excludes the respondent as the father of this child.

We are not disposed to close our minds to conclusions which science tells us are established. Nor do we propose to lay down as a rule of law that the triers of fact may reject what science says is true; for to do so would be to invite at some future time a conflict between scientific truth and *stare decisis* and in that contest the result could never be in doubt. Courts are concerned with practical affairs of life and gladly accept and acknowledge the beneficent advances of science. But the application of scientific principles to the facts of a particular case where so many important issues, life and death, legitimacy or illegitimacy, and the right of

inheritance, may be involved, still remains the province of the court. The determination of such an issue as is here before us is not transferred from the courtroom to the laboratory, where lurk certain hazards in the application of scientific techniques.

We have here a clear cut question: In the face of unrefuted evidence that the complainant and the respondent had sexual intercourse on a certain date, that a child was born within the normal period of gestation, and in the absence of any evidence that anyone else could have been the father of that child, must we accept the testimony of the doctor as to the blood tests as conclusive on the issue of non-paternity? In weighing the overwhelming evidence for the complainant, outside of the blood tests, did not the jury have the right to decide that there may have been some error in the handling of blood or serums or some mistake in the conclusions of laboratory technicians as to what they found? We do not believe that the statute intended to make the result of a blood grouping test as reported in court conclusive on the issue of non-paternity. It says only that the result of such test "shall be admissible in evidence." In a case where testimony is conflicting, where access by others to the complainant may be shown, such test may be decisive, but that is not the case before us. To sustain this motion would be to hold as a matter of law that such a blood test is conclusive. That we cannot do. The statute does not require it and no case which we have found so holds.

The views which we express are, we believe, supported by the authorities which have considered this interesting and important question, with the possible exception of the courts of California which seem to have treated rather lightly methods which science offers for the determination of such an important issue as is presented here. *Arais* v. *Kalensnikoff, supra; Berry* v. *Chaplin, supra.* For a discussion of the importance of blood tests as evidence, see the following cases: *Beach* v. *Beach, supra; State* v. *Clark,* 144 Ohio 305 (Sup. Ct. Ohio 1944) ; 58 N. E. (2nd) 773; *Shanks*

v. *State, supra; Flippen* v. *Meinhold,* 156 Misc. 451; 282 N. Y. S. 444; *Dellaria* v. *Dellaria,* 183 Misc. 832; 52 N. Y. S. (2nd) 607; *Saks* v. *Saks,* 189 Misc. 667; 71 N. Y. S. (2nd) 797; *Euclide* v. *State* (Wis. 1939, 231 Wis. 616); 286 N. W. 3. See also Wigmore on Evidence, 3 ed., Secs. 165 (a) and (b); 20 Am. Jur. 326; Note 163 A. L. R. 939, et seq., 949.

Believing as we do that the jury could in considering all the testimony have rejected the accuracy of the blood grouping tests in this instance, we cannot say that their finding is manifestly wrong.

Motion overruled.

MEDOMAK CANNING COMPANY

vs.

HARRY Q. YORK

Knox. Opinion, March 17, 1948.

Waiver. Equity. Lease.

The party claiming a waiver of notice of renewal in a lease must prove the facts on which it relies for such waiver, and the intention to waive.

The decision as to matters of fact of a single justice sitting in a case in equity should not be reversed unless it clearly appears that such decision is erroneous and the burden to show error rests upon the appellant.

A waiver may be express or implied but it will not be implied contrary to the intention of the party whose rights would be injuriously affected unless by his conduct he has prejudicially misled the opposite party into the belief that such waiver was intended or consented to.

To constitute a waiver there must be a clear unequivocal and decisive act of the party showing such purpose or facts amounting to estoppel on his part.

Equity cannot aid a lessee to avoid the natural and reasonable consequences of his own negligence to which the lessor in no way contributed.

ON APPEAL.

Appeal by the defendant from the final decree of a single justice in equity sustaining bill brought by plaintiff, and decreeing that the lease between the plaintiff and defendant had been renewed and was in full force and effect. Appeal sustained. Decree below reversed. Case remanded for decree in accordance with this finding.

Alan L. Bird,
Samuel W. Collins, Jr., for plaintiff.

Berman and Berman, Lewiston, Maine, for defendant.

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

OPINION.

TOMPKINS, J. Appeal by the defendant from the final decree of a single justice in equity sustaining a bill brought by the plaintiff, and decreeing that the lease between the plaintiff and the defendant had been renewed and was in full force and effect. On plaintiff's motion and petition for temporary injunction the court on an *ex parte* hearing granted a restraining order against the defendant interfering with the plaintiff in the harvesting of the 1946 crop of blueberries on certain land located in New Sharon, Franklin county, upon the filing of a $5,000 bond. Bond was filed and the restraining order duly issued. The plaintiff thereafter harvested the crop of blueberries, but not until after the defendant had harvested a part of the crop before the restraining order was served on him, and after he, the defendant, had made a contract to sell the crop to another purchaser. Upon the service of the restraining order the defendant did not harvest or attempt to harvest any more of the crop, but abided by the restraining order.

The lease under which the proceeding arose was prepared by the plaintiff and mailed to the defendant for signature. It ran for a period of five years from the 11th day of October 1940, ending October 11th, 1945, and granted to the plaintiff the option to make two successive renewals of five years each under the following condition as set out in the lease: "In order to exercise each successive option the lessee shall give to the lessor written notice in not less than thirty days prior to the end of the then existing term of renewal, and on giving of such notice the renewal shall be deemed effective without the necessity of any further act or instrument." The lease was made for the following limited use: "For the purpose of growing blueberries thereon with the right to clear and burn the land, to dust the crops grown thereon, and to harvest the same at such time or times as is convenient for the lessee." The rent to be paid was set out in the following terms: "Yielding and paying therefor the net market price of all blueberries grown thereon f.o.b. at the factory at Winslow Mills, Maine, after deducting all the expenses necessary to produce said blueberries such as clearing and burning the land, dusting and harvesting the crop, and incidental expenses connected therewith."

It is admitted that the plaintiff did not exercise its option to renew by giving the thirty days' notice in writing, and from a careful perusal of the testimony no express notice in any form, either written or oral, was ever given by the plaintiff to the defendant before the expiration of the first five-year period. Whatever business was done in connection with the lease was transacted through Emma York, the wife of the defendant, as his agent.

The plaintiff bases its grounds for equitable relief (1) on the allegation that in September 1944, just prior to the 20th of that month, a certain conversation took place between Mr. Theodore Bird, treasurer, and Mr. Henry Bird, president, of the plaintiff corporation, on the one hand, and Emma York, acting in her capacity as agent of her husband. Mr. Theodore Bird testified as follows to the conver-

sation: "It happened at the factory there in New Sharon, after we had gotten through on blueberries and were canning corn. She came up to me one day there and asked me to talk with her—came up to me to talk about the blueberries, and she wanted us to send her a check for the blueberries that we had taken off there that year, and I said, I expressed some doubt about it being fair, because we had had our money tied up in this for four years and had never gotten out of it, nevertheless, she thought we should send her a check for the blueberries and that she stated we would get our money for the money that we were going to expend in the coming fall, out of the 1946 crop." Mr. Henry Bird testified as follows to the conversation: "Mrs. York came to me and she says "Mr. Bird, we need the money very much for those blueberries, and won't you please pay us for that crop that you took off this year 1944." I said "The only trouble with that, Mrs. York, is that we have got to spend a large sum of money in clearing the bushes, cleaning the land and preparing it this fall and haying and burning and so forth in the spring." "Well," she said, "If you pay me the money, why you can get that expense out of the 19—the expense you have put out you can get out of the 1946 crop." This conversation is denied by Mrs. York. There was no direct conversation in the testimony about any renewal or extension of the existing lease for a further period. On October 5th, 1944, the plaintiff, after deducting all expenses incurred for 1944 and balance of expenses incurred for previous years, forwarded by mail a letter and a check to the defendant for $432.98, the net balance due the defendant at that time. The check was dated September 20, 1944. In the letter transmitting the check no reference was made to the conversations above set forth.

(2) Between September 20, 1944 and January 1, 1945, the plaintiff spent $762.54 in preparing the ground for the 1946 crop. (3) In January, April and May 1945 the plaintiff expended $96.10 in preparation of the land for the 1946 crop. It is claimed by the plaintiff, as a crop is har-

vested every other year, it was necessary to prepare the land in this manner, in advance of the 1946 crop. Apparently this was the last work done on the land and the last time entry was made by the plaintiff until the spring of 1946, when the plaintiff's servants and agents started to dust the blueberry bushes and were ordered off the land by the defendant. The lease, by its express terms, did not provide for a new lease on the giving of the thirty days' notice. The language of the condition is "On giving of such notice the renewal shall be effective without the necessity of any further act or instrument." This provision was an option for an extension of the lease. *Holly v. Young,* 66 Me. 520; *Perry* v. *Line Co.,* 94 Me. 325; 47 A. 534; *Carrano* v. *Shoor et als.,* 118 Conn. 86; 171 A. 17.

The plaintiff claims that written notice for the renewal or extension of the lease was waived by the defendant and the lease was extended by acts of the parties, under the testimony as above set forth. The party claiming a waiver must, of course, prove the facts on which he relies for such waiver, and the intention to waive. *Knickerbocker Life Ins. Co.* v. *Norton,* 96 U. S. 234; 24 L. Ed. 689; *Dougherty et al.* v. *Thomas,* 313 Pa. 287; 169 A. 219; *Hurley* v. *Farnsworth,* 107 Me. 306; 78 A. 291. The decision as to matters of fact of a single justice sitting in a case in equity should not be reversed unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the appellant. *Brickley* v. *Leonard,* 129 Me. 94-97; 149 A. 833; *Lutick* v. *Sileika,* 137 Me. 30; 14 A. (2nd) 706.

Notice of the exercise of the option is for the benefit of the lessor, but lessor may waive an express provision for notice. *Donovan Motor Car Co.* v. *Niles,* 246 Mass. 106; 140 N. E. 304; *Wood et al.* v. *Edison Electric Illuminating Co.,* 184 Mass. 523; 69 N. E. 364; *Khourie Bros.* v. *Jonakin,* 300 S. W. 612; *Ketchum* v. *Oil Field Supply Co.,* 99 Okl. 201; 226 P. 93; *McCann* v. *Bass,* 117 Me. 548; 105 A. 13. Where the lessee has the right of renewal "Provided he gives notice at or before a specified time to the lessor of his inten-

tion to exercise the privilege of renewal, it is ordinarily held that the giving of the notice is a condition precedent which must be complied with within the stipulated time, and that, in the absence of special circumstances warranting a court of equity in granting relief, the right to renewal is lost if the notice is not given in accordance with the provisions of the lease." 27 A. L. R. 981, Sec. 2 and cases there cited.

Since thirty days' written notice was a condition precedent to effect an extension of the lease, and was never given as provided for, the right to an extension of the lease was lost. *Pope* v. *Goethe,* 175 S. C. 394; 179 S. E. 319; 99 A. L. R. 1005; *Fountain Co.* v. *Stern,* 97 Conn. 618; 118 A. 47; 27 A. L. R. 927. The plaintiff has no right of relief unless it can establish a waiver of the condition, or such acts as will bring it within the power of equity to relieve, and this it claims to have done. The plaintiff bases its claim of waiver upon the disputed conversations of September 1944, and the fact that it expended money between September 1944 and January 1945, and between January 1945 and May 1945 in preparing the land for the 1946 crop. The lease was in full force at the time the acts relied upon by the plaintiff occurred. After the last labor was performed upon the leased property in May 1945 it does not appear from the testimony that any negotiations or talk took place between the parties, nor was an entry made upon the property by the plaintiff, until some time in the spring of 1946, several months after the lease, as defendant claimed, had terminated. At the time the plaintiff entered for the purpose of dusting the blueberry bushes it was forbidden by the defendant to proceed with the work because the defendant claimed the lease was terminated by the failure of the plaintiff to give the written notice.

Waiver is a voluntary, intentional relinquishment of a known right. It may be shown by words or acts, and may arise from inference from all the attendant acts as well as from express manifestations of purpose. Whether there

has been a waiver established when it is to be implied from numerous acts is usually a question of fact. Whatever the evidence it must have probative force to prove the intention to waive. *Suburban Land Co.* v. *Brown,* 227 Mass. 166; 129 N. E. 291; *Colbath* v. *Lumber Co.,* 127 Me. 406; 144 A. 1; *Hurley* v. *Farnsworth, supra; Libby* v. *Haley,* 91 Me. 331; 39 A. 1004; *Dougherty* v. *Thomas, supra.* "A waiver may be express or implied. In the absence of an express agreement it will not be implied contrary to the intention of the party whose rights would be injuriously affected thereby unless by his conduct the opposite party has been misled to his prejudice into the honest belief that such waiver was intended or consented to. To make a case of waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part." *Dougherty* v. *Thomas, supra; Rogers* v. *Whitney,* 91 Vt. 79; 99 A. 419. There must appear, not mere negligence to claim the right, but a voluntary choice not to claim it. *Hurley* v. *Farnsworth, supra.*

The conversations relied upon by the plaintiff to show a waiver did not relate to the option for renewal of the lease or its extension, but simply pointed out to the plaintiff the manner in which it could obtain reimbursement under the lease. The defendant did not waive the required notice. There was no casual relationship between these conversations and the failure of the plaintiff to exercise the option, without which the plaintiff could not successfully invoke the principle of waiver or estoppel. The plaintiff was not unaware of the risk of not giving the required notice. There is nothing in the testimony indicative of any mutual intention to waive the exercise of the option. There is nothing in the evidence that appears to have been done by the defendant, of a malicious, wrongful or deceptive nature to induce the plaintiff not to exercise the option. The defendant had changed his position after the plaintiff failed to give the required notice. There was no "Clear, unequivocal and decisive act" of the defendant showing an intention to

waive the notice, or acts amounting to estoppel on the part of the defendant.

The giving of the written notice was a condition precedent to an extension of the lease for an additional term of five years. Time was of the essence of the option. The parties made it so in the lease. *Pope* v. *Goethe, supra; Donovan Motor Car Co.* v. *Niles, supra.* The condition not having been performed within the time prescribed, and not having been waived, equity cannot aid the lessee to avoid the natural and reasonable consequences of its own negligence, to which the lessor in no way contributed. *Goldberg Corporation* v. *Goldberg Realty & Invest. Co.,* 134 N. J. Eq. 415; 36 A. (2nd) 122; *Rogers* v. *Saunders,* 16 Me. 92 at 97; 33 Am. Dec. 635; *Jones* v. *Robbins,* 29 Me. 351 at 353; 50 Am. Dec. 593.

The evidence, considered in the light most favorable to the plaintiff, does not as a matter of law entitle the plaintiff to the relief granted by the decree. The decree appealed from is not supported by the evidence.

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

WHORFF, PETITIONER

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, April 8, 1948.

Inheritance Tax. Statutes.

Illegitimate and natural child of a testatrix is to be treated as a lineal descendant and designated as Class A under Inheritance Tax Law. R. S. 1944, Chap. 142, Sec. 3.

The legislative department is supposed to have a consistent design and policy and to intend nothing inconsistent or incongruous, so that when it passed the Inheritance Tax Law it had knowledge of prior existing statutes which provided in all cases an illegitimate child shall be considered as the heir of the mother, and should inherit in the same manner as if he had been born in lawful wedlock.

The consistent design and policy through the years has been to more fairly treat the innocent illegitimate and to improve and make easier his unfortunate circumstances of birth.

The maxim *expressio unius est exclusio alterius* is well recognized and might be of force as indicating an intention of the lawmaking body, except for the fact that the Legislature in other vital existing laws, had decreed otherwise.

ON REPORT.

Petitioner asks for partial abatement of inheritance tax. Case reported from Probate Court to the Law Court. Case remanded to Probate Court for further proceedings in accordance with the opinion.

Harvey D. Eaton, for Petitioner.

Ralph W. Farris, Attorney General,
Boyd L. Bailey, Assistant Attorney General, for State of Maine.

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

FELLOWS, J. This case comes to the Law Court from the Probate Court of Kennebec County, on report by agreed statement of facts. It arose by petition in equity commenced under R. S. 1944, Chap. 142, Sec. 30 as amended by Chap. 354 of the P. L. of 1947. The petition asks for partial abatement of inheritance tax determined by the State Tax Assessor.

The facts agreed to were, that the petitioner was born November 12, 1892, and was the illegitimate daughter of the testatrix. The testatrix (mother) named the petitioner (daughter) in her will as the executrix and the sole beneficiary. The mother died July 11, 1947, testate, and the above-mentioned will was proved and allowed in the Probate Court for Kennebec County on October 13, 1947.

It was also agreed that the petitioner on September 25, 1893 had been legally adopted by a man and wife of Gardiner, Maine, apparently not related.

On November 7, 1947 the State Tax Assessor made findings that the amount of the property for distribution in this case was $12,470.39, that the "natural" daughter of decedent was not in statutory Class A but in Class C, that the exemption was $500, that the taxable share of petitioner was $11,970.39, the rate 10%, and the tax $1,197.04. R. S. 1944, Chap. 142, Sec. 5.

The petitioner says that she is a "child" and "lineal descendant" of the testatrix and that the exemption should be $10,000, the taxable share $2,470.39, the rate 2%, and the tax $49.41, as provided by R. S. 1944, Chap. 142, Sec. 3.

In other words, the defendant assessor claims that the petitioner should not be designated as Class A, because she is the *illegitimate* daughter of the testatrix, and that she comes within Class C, requiring the larger tax. See R. S. 1944, Chap. 142, Secs. 2, 3, 4, 5.

Counsel for both parties apparently recognize and assume that although the petitioner was legally adopted in 1893, and her natural mother had been divested of certain rights regarding her, does not affect the child's right to inherit from her natural mother. R. S. 1944, Chap. 145, Sec. 38. The right to inherit is always "subject to legislative regulation." "The law supplies the rules of descent, with reference to the situation as it existed at the death of the decedent." *Gatchell* v. *Curtis,* 134 Me. 302, 307; 186 A. 669, 671; *Latham, Appellant,* 124 Me. 120; 126 A. 626.

The question for decision is, therefore, whether the petitioner, as the natural daughter of the testatrix, is to be treated as a "lineal descendant" and "child," and designated as Class A, under R. S. 1944, Chap. 142, Sec. 3; or whether she is to be considered as not falling in Class A, but in Class C, and taxable in accordance with Chap. 142, Sec. 5.

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, lineal ancestor, lineal descendant, adopted child, stepchild, adoptive parent, wife or widow of a son or husband or widower of a daughter of a decedent, shall be subject to a tax upon the value thereof, in excess of the exemption hereinafter provided, of 2% of such value in excess of said exemption as does not exceed $50,000 . . .; the value exempt from taxation to or for the use of a husband, wife, father, mother, child, adopted child, stepchild, or adoptive parent or grandchild of a deceased child, shall in each case be $10,000, provided however, that if there be more than 1 such grandchild, their total exemption shall, per stirpes, be $10,000; and the value exempt to or for the use of any other person falling within said Class A, to wit: grandparent and other lineal ancestors of remoter degrees, wife or widow of a son, or husband or widower of a daughter of a decedent, grandchild who is the child of a living child, and other lineal descendants of remoter degrees, shall in each case be $500."

> Chapter 142, Section 4, provides for Class B designation of collateral relatives, such as brothers, sisters, uncles, aunts, nephews, cousins, and the like.
>
> Chapter 142, Section 5, provides for taxation relative to property which shall pass to or for the use of Class C persons, or persons not being in the two preceding classes.

An examination of the different portions of the foregoing statutes, known as the Inheritance Tax Law, shows that heirs are not necessarily designated as Class A; for the members of Class A are "husband, wife, lineal ancestor, *lineal descendant,* adopted child, stepchild, adoptive parent, wife or widow of a son or husband or widower of a daughter of a decedent;" and the value exempt from taxation "to or for the use of a husband, wife, father, mother, *child,* adopted child, stepchild, or adoptive parent, or grandchild of a deceased child, shall in each case be $10,000." This is a law providing for a tax based on the value of property which shall "pass." It is not a tax on property as such, but is a tax on the privilege of receiving property by will or inheritance. The law contains the graduated principle, and the amount of tax depends on the amount received, or to be received, and whether the recipient is, in some manner, related to the decedent, or is a stranger to the family, or the blood. *McDonald* v. *Stubbs,* 142 Me. 235; 49 Atl. (2nd) 765.

Under the common law, an illegitimate child was not permitted to inherit, or to share in distribution, and such a "natural child" could not transmit by descent except to his, or her, immediate offspring. Such was the law of Maine until 1838. The law, however, has the tendency to break away from such harsh treatment towards the innocent son or daughter, whose fault was the "sins of the father," and the statutes of today, in large measure, tend to mitigate the unreasonable severities of yesterday. *Northrup* v. *Hale,* 76 Me. 306, 313; 49 Am. Rep. 615; *Messer* v. *Jones,* 88 Me. 349; 34 A. 177. *Re Crowell's Estate,* 124 Me. 71; 126 A. 178. It was the purpose of the common law to restrain and control

unlawful cohabitation by making lifetime embarrassments for the children. "It was thought wise to prohibit the offspring from tracing their birth to a source which is deemed criminal by law." *Northrup* v. *Hale,* 76 Me. 306, 313; 49 Am. Rep. 615.

By Chap. 338 of the P. L. of Maine for 1838, approved by the then Governor Kent who was later a justice of this court, it was provided that under certain conditions of acknowledgment an illegitimate child should be considered the heir of the father, and, "in all cases shall be considered as the heir of his mother, and shall inherit * * * * in the same manner as if he had been born in lawful wedlock." This act of 1838 has been, with few minor changes, reenacted in every revision of the statutes. It now reads as follows:

> An illegitimate child born after the 24th day of March, 1864 is the heir of his parents who intermarry. Any such child, born at any time, is the heir of his mother. If the father of an illegitimate child adopts him or her into his family or in writing acknowledges before some justice of the peace or notary public, that he is the father, such child is also the heir of his or her father. In each case such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred, and these from such child and its issue the same as if legitimate.
>
> R. S. 1944, Chap. 156, Sec. 3.

It is true that since the passage of the above statute of 1838, the word "child" in deeds, wills, and contracts has been, in some instances, construed under the facts of the particular case, to have its ancient common law meaning of "legitimate child." "Children" in a deed was construed as meaning that the grantor intended to refer to legitimate children. *Hall* v. *Cressey,* 92 Me. 514; 43 A. 118. "Widow" in a contract meant the legal widow. *Bolton* v. *Bolton,* 73 Me. 299. "Nephew," in a will, was prima facie intended by testatrix to mean legitimate nephew, because "whoever

claims under a will, claims not as heir or by descent, but by purchase." *Lyon* v. *Lyon,* 88 Me. 395, 405; 34 A. 180. It is held, however, that because of the statute an illegitimate child can inherit from the mother's collateral kindred. *Messer* v. *Jones,* 88 Me. 349; 34 A. 177. An illegitimate child can inherit through father's kindred, when father has adopted. *Re Crowell's Estate,* 124 Me. 71; 126 A. 178. An illegitimate child can inherit from his maternal grandfather. *Lawton* v. *Lane,* 92 Me. 170; 42 A. 352.

The will of the testatrix, under consideration here, says: "To my beloved daughter (naming the petitioner) I give, bequeath and devise all my estate of whatever kind and wherever found of which I may be seized or possessed at the time of my decease." It is agreed by the parties that the petitioner to whom the property "passes" is the daughter and child of the testatrix, although, as stated in defendant's answer, she is the "natural" daughter and child.

The defendant tax assessor claims that "child" as used in R. S. 1944, Chap. 142, Sec. 3, has its ancient common law meaning for inheritance tax purposes, and only refers to legitimate child.

Did the lawmaking body when it provided for inheritance taxation at 2% in regard to property which shall pass to a "lineal descendant," and also when it provided, in the same section, for an exemption of $10,000 in the case of a "child," have in mind any child or all children as "lineal descendants"? Did it consider and intend to exclude the natural child, who had been already defined by statute as at all times the heir of the mother and entitled to inherit "the same as if legitimate"? *Messer* v. *Jones,* 88 Me. 349; 34 A. 177, 178.

Before the passage of the law of 1838, now R. S. 1944, Chap. 156, Sec. 3, the illegitimate child was the child of nobody. It was "*nullius filius,*" "the son of no one." Bouvier Law Dictionary. It had no mother recognized by law. It had no father. It could not inherit, and no property could pass to it from an ancestor. It had no ancestor, under the

law. At common law "an illegitimate child is not a child." *Bolton* v. *Bolton,* 73 Me. 299, 311.

The purpose of the Legislature in passing the act of 1838 was to give to the illegitimate child in all instances, a mother. It created something that did not previously exist. It was recognition of the mother of the illegitimate child. It was recognition of the child. It made the child the *heir* of the mother, and by making the child the *heir,* it made *a child* who had not been previously recognized as a child. The child was made *the child* and *the heir,* to whom the mother's property might descend under the general law, because "children" inherit as heirs under the rules of descent. R. S., Chap. 156, Sec. 1. The statute did not pretend to make the illegitimate child legitimate for all purposes. It says "such child and its issue shall inherit * * * * the same as if legitimate." R. S. 1944, Chap. 156, Sec. 3.

When the Legislature passed the Inheritance Tax Statute, R. S. 1944, Chap. 142, Secs. 2, 3, 4, 5, it had the knowledge of its prior statutes and the decisions affecting the status of all children, whether illegitimate or born in lawful wedlock. "The legislative department is supposed to have a consistent design and policy and to intend nothing inconsistent or incongruous." *Cummings* v. *Everett,* 82 Me. 260; 19 A. 456, 457; *Haswell* v. *Walker,* 117 Me. 427, 429; 104 A. 810.

The "consistent design and policy" through the years, since 1838, has been to more fairly treat the innocent illegitimate, and to improve and make easier his unfortunate circumstances of birth. When the Legislature stated in the Inheritance Tax Law, Sec. 3 of Chap. 142, that a "lineal descendant" was in Class A, it necessarily had the intention, in view of the existing legislation, to include the issue of an unmarried mother. "Issue" and "lineal descendant" are synonymous. Webster's New International Dictionary; *Morse* v. *Hayden,* 82 Me. 227, 230; 19 A. 443. The property of this mother, passing to her illegitimate daughter passes "the same as if legitimate," (R. S. 1944, Chap. 156,

Sec. 3) and so passes to her child as "lineal descendant." Any child is a lineal descendant of its mother by the very necessity of the laws of nature, and is by legislative act legally recognized as the lineal descendant, child and heir of the mother.

It is our opinion that when it passed into law the inheritance tax statute (R. S. 1944, Chap. 142, Sec. 3) making the "lineal descendant" subject to a tax of 2% on property received up to $50,000 and making the exemption $10,000 for a "child," the Legislature intended the child and lineal descendant of the unmarried mother as well as the child of the wedded mother.

The cases decided in other jurisdictions are of little or no assistance. While the inheritance tax statutes in other states are similar to ours, the statutes fixing the status of the illegitimate vary greatly. For example, counsel have cited *Bank of Montclair* v. *McCutcheon,* 107 N. J. Eq. 564; 152 A. 379 and also *Commonwealth* v. *Mackey,* 222 Penna. 613; 72 A. 250; 128 A. S. R. 825. The McCutcheon case in New Jersey holds that the word "child," in the transfer tax law, excludes the illegitimate; while the *Mackey* case in Pennsylvania, on the contrary, gives exemption in an estate passing from the mother to her illegitimate. An examination of both these cases, and in fact all the cases that we have seen, show that the decision has depended upon construction of statutes fixing the rights of the child, which statutes are not uniform. See 28 Am. Jur. 102, Par. 195; 61 C. J. 1681, Par. 2532.

The attorney for the defendant State Tax Assessor contends that because the Legislature has named in the Inheritance Tax Law, R. S. 1944, Chap. 142, Sec. 3, "adopted child" and "stepchild" and has omitted to state "illegitimate child," that the illegitimate was not intended as either a "child" or as a "lineal descendant," the *expressio unius est exclusio alterius,* the expression of one is the exclusion of

another. This maxim is well recognized in Maine, as in other states, and might be of force here, as indicating the intention of the lawmaking body, except for the fact that the Legislature had decreed, in other vital existing laws, that property of a mother should pass to the mother's child when it was legitimate, and when it was illegitimate it should pass "the same as if legitimate." That the Legislature named the child who had been "adopted," and the "stepchild," would not of necessity exclude the illegitimate, because there was no occasion to use the word "illegitimate." "Child" in its ordinary and usual meaning, plus the statutory recognition, was sufficient. That "the beneficiary inherited as a child" and should be "taxed as a stranger," as stated by the defendant assessor in his brief, would be most unreasonable, inconsistent, and unjust, if not absurd. Injustice is certainly not to be "overlooked." *Brackett* v. *Chamberlain,* 115 Me. 335, 339, 340; 98 A. 933. We live in a world that boasts of an advanced civilization, and to assume and hold that the Legislature of Maine through an omitted word or phrase—that was not necessary—intended to treat with complete unfairness any innocent unfortunate, is inconceivable. To receive a few extra dollars in a few instances by injustice, and to return to the barbaric ideas of yesterday is to sell right and justice for "a mess of pottage." Whatever may be the attitude of other Legislatures toward the innocent illegitimate, Maine has shown through the years an unremitting effort to ameliorate the existing conditions. The court should not, and does not, insult the knowledge, purpose, and intelligence of a Maine Legislature by holding that by this tax legislation, it intended that only the legitimate child and heir was to be favored in the smaller tax rate. We cannot agree with the State's Attorney that this child, entitled to receive from her mother as "child," "heir" and "lineal descendant," is not entitled to so receive "for purposes of taxation."

In this case, and under this will, the property here passes within the meaning of R. S. 1944, Chap. 142, Sec. 3, to a

child and lineal descendant. The petitioner is therefore to be designated as in Class A, and subject to the lowest rate of tax with the highest exemption.

Case remanded to Probate Court for further proceeding in accordance with this opinion.

FRED C. GREAVES
vs.
HOULTON WATER COMPANY

Aroostook. Opinion, May 22, 1948.

Municipal Corporations. Taxation. Statutes.

The lighting of public streets, and public or private buildings, is a public purpose and the Legislature can authorize this to be done by any appropriate means which it may deem expedient.

Property which has been appropriated and devoted to public use may be exempted from taxation.

What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively within the Legislature to say, without limitation, except such as are imposed by express constitutional provision.

In the construction of statutes, court must look to the purpose for which a law is enacted, and avoid a construction which leads to a result clearly not within the contemplation of the Legislature.

The Legislature in creating an exemption statute cannot bind itself so as to prevent a future change or repeal. R. S. 1944, Chap. 81, Sec. 6.

In the instant case, the court decided that amendment to act creating the Houlton Water Company deeming that company a municipal corporation for purposes of taxation, was constitutional, and that the property taxed was appropriated to public use and exempt from taxation.

ON REPORT.

Action of debt by tax collector of Hodgdon to collect a tax levied on defendant as owner of poles and transmission lines located in Hodgdon and used for supplying electricity to that town and to the inhabitants thereof. Judgment for defendant.

Francis W. Sullivan,
W. S. Lewin, for plaintiff.

Hutchinson, Pierce, Connell, Atwood and Scribner,
James C. Madigan, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, FELLOWS, JJ. MURRAY, A. R. J.

MURRAY, A. R. J. This case comes to the Law Court on report on an agreed statement of facts. It is an action of debt by the plaintiff as Collector of Taxes of the town of Hodgdon to collect a tax assessed for the year 1944 against the defendant as owner of certain poles and wires constituting the transmission line along the highways in the town of Hodgdon, used for the purpose of supplying electric light and power to the town of Hodgdon and the inhabitants thereof.

The agreed statement makes all of the special acts of the Legislature, which are applicable, part of the case, and admits the assessment and commitment to be regular. It shows the defendant to be a corporation engaged in the distribution of light and power in several towns, including Hodgdon and Houlton. No other person or corporation is engaged in generating or distributing electricity, nor does any other person or corporation own any transmission line or facility within Hodgdon. The town of Hodgdon has so few inhabitants that it is economically impracticable to generate and distribute electricity solely to it and its inhabitants. The lines were extended into Hodgdon upon re-

quest of its inhabitants. All of the stock of the company is owned by the town of Houlton. Its directors are elected at the town meeting of Houlton. They must be citizens of Houlton. It is the only electric light company the capital stock of which is owned by a municipality in Maine.

The history of the defendant follows:

> The Houlton Water Company was given a charter in the year 1880 to supply water to the town of Houlton and its inhabitants, and to issue capital stock.
>
> Later it was given authority to merge with the Houlton Sewerage Company and conduct sewers. It was given the power of eminent domain. The town of Houlton was given the privilege of buying the capital stock. Its directors had to be elected from the citizens of Houlton at its town meeting.
>
> Its charter was amended by P. & S. L. 1943, C. 26, by adding: "and said corporation shall hereafter be deemed for all purposes of taxation a public municipal corporation."

The statute which applies to the exemption from taxation of public municipal corporations follows:

R. S. 1944, Chap. 81, Sec. 6, Par. I.

> "The following property and polls are exempt from taxation:
>
> I. The property of the United States and of this state and the property of any public municipal corporation of this state appropriated to public uses if located within the corporate limits and confines of such public municipal corporation, and also the . . . . . fixtures . . . . . of public municipal corporations engaged in supplying . . . . . power or light if located outside the limits of such public municipal corporations."

The defendant contends that the Legislature, by the amendment of 1943, made the defendant, as to taxation, a public municipal corporation and, therefore, the taxed property, is exempt. Both sides assume in argument that the

Legislature in the 1943 amendment, as to this case at least, also means exemption from taxation. With this we agree.

To this defense the plaintiff answers that P. & S. L. of 1943, C. 26 is unconstitutional, because it is repugnant to equal and impartial taxation,—Maine Constitution Amendment, Article XXXVI, and because the Legislature by such act suspended its sovereign power of taxation. Maine Constitution, Article IX, Sec. 9.

He says further, if the act is constitutional, it does not exempt the taxed property; at most, it exempts property within Houlton.

We shall consider the second defense first, because some of the arguments used in this connection may be useful in deciding as to the constitutionality of the act.

These parties were before this court for a tax assessed on this same property before the 1943 amendment. *Greaves* v. *Houlton Water Co.*, 140 Me. 158; 34 Atl. (2nd) 693.

The court decided at that time that the corporate entity of the Houlton Water Company had been continued; that by legislative enactment and intendment,

> "the corporation has been endowed to act in a dual capacity, one as a public municipal corporation so far as the town of Houlton and its inhabitants are concerned, and the other as a private enterprise in furnishing electric current to a dozen other towns and their inhabitants for their convenience and its private gain . . . . . There is no reason, under the circumstances of this case, why the Houlton Water Company should be exempt from taxation upon its property used solely in the transmission and distribution of electricity outside the limits of the town of Houlton."

The Houlton Water Company still maintains its corporate entity, but the Legislature, by the act of 1943, for all tax purposes, deems it to be a public municipal corporation. This is true, not only as to Houlton but also as to the other towns, including Hodgdon.

Is the taxed property appropriated to public uses? The lighting of public streets, public and private buildings, is a public purpose. The Legislature can authorize this to be done by any appropriate means which it may deem expedient. *Laughlin* v. *City of Portland,* 111 Me. 486-493; 90 Atl. 318.

The usual method, in early municipal history, of obtaining a supply of water, was through the agency of stock companies performing a joint, public and private service for private gain. *Dillon Mun. Corp.,* 5 Ed., Vol. III, Sec. 1298. *Laughlin* v. *City of Portland,* 111 Me. 486. The purpose of these companies is admittedly public. *Laughlin* v. *City of Portland,* 111 Me. 486; 90 Atl. 318; *Portland* v. *Portland Water Company,* 67 Me. 136; *Riche* v. *Bar Harbor Water Co.,* 75 Me. 91; *Hamor* v. *Bar Harbor Water Co.,* 78 Me. 127.

The case, *City of Portland* v. *Portland Water Company,* before cited, is one in which the Legislature had exempted the property of the defendant, a stock company, from taxation. The court decided that this could be done, and that the property of the defendant had been appropriated and devoted to a public use, and may be exempted from taxation for the same reason that town houses, schoolhouses and railroad tracks are.

Taxation is legislative. What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the Legislature to say, without any limitations, except such as are imposed by express constitutional provision. Re: *Maine Central R. R.,* 134 Me. 217; 183 Atl. 844.

Whether such taxation, or exemption, is wise or unwise, is not for the judiciary, but for the Legislature. *Inhabitants of Whiting* v. *Inhabitants of Lubec,* 121 Me. 121; 115 Atl. 896.

We say this property attempted to be taxed is property of a public municipal corporation of this state appropriated

to public uses, and we feel that the Legislature in enacting the act of 1943 meant to exempt the property of this corporation appropriated to public uses within the towns served by it. It meant to do this, or its passage was an idle ceremony, and meant nothing.

It is fundamental that we look to the purpose for which a law is enacted, and that we avoid a construction which leads to a result clearly not within the contemplation of the lawmaking body. Above all, we should seek to avoid an interpretation which leads to a result which is absurd, even though to do so we may have to disregard the strict letter of the enactment. This rule rescues legislation from absurdity. It is not judicial legislation; it is seeking to enforce the true sense of the law, notwithstanding its imperfection, or generality of expression. *Inhabitants of Ashland* v. *Wright,* 139 Me. 283; 29 Atl. (2nd) 747.

We think this reasoning has shown the taxed property to be within the exemption statute, and also the enactment exempting the property, to be constitutional,—but it would not be amiss to point out that one of the cases cited, *Portland* v. *Portland Water Company,* 67 Me. 135, is decisive as to one of the constitutional questions. The Portland Water Company was a stock company. The plaintiff argued that the law exempting the defendant from taxation, and not exempting all other water companies, operated unequally and was, therefore, unconstitutional.

The court replied to this, that all such companies are not alike situated in respect to the benefits created by them. One set may be of vastly more consequence to the state than another. The state, through the general benefits to the public, may receive a sufficient compensation for the remission of taxes to one corporation and not to another. We are not satisfied that the Legislature cannot, by charter, or contract, in any case, under any circumstances, for sufficient considerations, release one corporation from taxation merely because it does not include in its exclusion from taxation all similar corporations in the state.

There remains now the question whether, by the act of 1943, the Legislature suspended its sovereign power of taxation *contra* to Maine Constitution, Article IX, Sec. 9. This question, strictly speaking, cannot arise in this action as we view it, but as the parties have argued it, we shall answer it.

No matter what words the Legislature uses, or what attempts it makes to pass an exemption statute without the right to change or repeal it, it cannot bind itself so as to prevent a future change or repeal. The Constitution would make the part which attempts the prevention of a change or repeal, a nullity. Cooley on Taxation, Vol. II, 4th Ed., Sec. 702. In addition, there is a statute which has been in existence since long before the defendant corporation was organized. R. S. 1944, Chap. 49, Sec. 1-2.

> Sec. 1. "This Chapter applies to all corporations organized by Special Acts of the legislature, or under the general laws of the state . . . . ."
>
> Sec. 2. "Acts of Incorporation passed since March 17, 1831 may be amended, altered or repealed by the legislature as if expressed provision therefor were made in them . . . . ."

Thus, it is apparent that the power to repeal the exemption is retained by the Legislature both under the Constitution and under the statute, so, of course, this power cannot be said to be suspended.

We Hold:

That P. & S. L. 1943, Chap. 26, by which the Houlton Water Company is deemed, for all purposes of taxation, to be a public municipal corporation, is constitutional;

That the Houlton Water Company, for the purposes of this case, is a public municipal corporation; that it is the owner of the taxed property;

That the taxed property is appropriated to public uses and is exempt from taxation.

Judgment for Defendant.

ARTHUR BARLOW, PRO AMI
vs.
ROBERT LOWERY

RICHARD BARLOW
vs.
ROBERT LOWERY

Lincoln. Opinion, June 14, 1948.

Negligence. Last Clear Chance Doctrine. New Trial.

Where father is plaintiff, seeking to recover for expenses and loss of minor's services, contributory negligence on part of son bars recovery by father.

A person has the right to use a highway as a foot passenger, and to be on a highway is not, alone and of itself, negligence as a matter of law. The question of due care is to be determined from all circumstances, and the pedestrian under such circumstances must be most vigilant for his own safety.

The last clear chance doctrine is recognized in negligence cases where the defendant has become aware, or should have become aware, that the plaintiff is in a position of peril from which he cannot reasonably escape in the exercise of due care, while the defendant has the opportunity to avoid injury to the plaintiff by the exercise of due care.

On motions for new trial, the burden is on the moving party to show that adverse verdict is clearly wrong.

ON MOTIONS FOR NEW TRIAL.

Action for negligence brought by minor and by his father against defendant. Verdict for defendant in each case. General motions for new trial filed. Motion for new trial overruled in each case.

Edward W. Bridgham,
Harold J. Rubin, for plaintiffs.

William B. Mahoney,
James R. Desmond, for defendant.

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

FELLOWS, J. These are general motions for new trials made by the two plaintiffs after verdicts for defendant. The actions were brought by a minor and his father for alleged negligence. The motions are overruled.

The accident happened on November 3, 1945, in the town of Boothbay Harbor, Maine at approximately 10:15 P. M. when an automobile, operated by the defendant, struck and injured the minor plaintiff, Arthur Barlow, who was a pedestrian on the public highway that leads from the town of Boothbay to Boothbay Harbor.

The declaration of Arthur Barlow, the fifteen-year-old minor, and the declaration of Richard Barlow, the father, allege due care and caution on the part of the minor plaintiff, and that the defendant, Robert Lowery, was negligent in that (1) the speed of his automobile was excessive, (2) that he was under the influence of intoxicating liquor, (3) that he failed to have his car under proper control, and (4) that his automobile had defective lights. The plea was the general issue. Jury trial was had at the November term, 1947, of the Superior Court for the County of Lincoln. The two cases were tried together. A verdict for the defendant was returned by the jury in both cases.

The question for decision is, whether the verdicts are manifestly wrong. *Eaton* v. *Marcelle,* 139 Me. 256; *Huntoon* v. *Wiley,* 142 Me. 262; 49 Atl. (2nd) 910.

From the evidence presented a jury might find, and in these cases, undoubtedly did find, that:

On one of the main highways in Lincoln County—a highway that is macadamized and twenty-two feet wide, with gravelled shoulders three feet wide on both sides—the minor

plaintiff, Arthur Barlow, and two friends, were walking home. Arthur Barlow and his companions, Paul Little and Edward Andrews, were teen age boys returning from an evening at a skating rink. The night was clear and cold. There was no snow on the ground. The road was dry. The boys were walking on the right-hand part of the road, so that the traffic from Boothbay to Boothbay Harbor would approach them from behind. There was no sidewalk, but there was the gravelled shoulder, and at the place of accident a guard rail or fence. The highway at this point was straight, and there was an unobstructed view for a long distance in both directions. The place was partially lighted by a street light.

The three boys were close together, abreast, and they were "walking along talking to each other." The minor plaintiff stated that he "heard no car at all until just before I was struck," but he had noticed "a small flicker of light between my feet," and had continued on and "never paid any attention to it." This plaintiff further said "we was just walking along and Ed was talking, and he never talked very loud anyway. I never heard anything till the car got us, right on top of us, because I was listening paying more attention to Ed." The plaintiff testified that he was the middle boy, and had his right hand on Paul Little's left shoulder, and his left hand on Edward Andrews right shoulder.

The evidence for defendant was to the effect that he was driving at a rate of thirty-five or forty miles per hour, when he saw the boys who were nearly in "the middle of the highway" twenty-five to thirty feet ahead. The defendant placed the point of impact eleven feet from the guard rail fence. The defendant "turned out from them," applied his brakes, and did not know he had struck anything, although he heard a "tick," and one of his passengers "hollered." He stopped some distance from the place of accident and went back. The Andrews boy (who died) and the injured plaintiff Barlow, were then "on" or "near" or "against" posts of the guard rail.

The plaintiff's version of how the accident happened differed sharply from that of the defendant. The plaintiff claimed that he and his two companions were on the extreme right, that Paul Little was on the gravel with right hand touching the fence. The plaintiff was very close to Little, and the plaintiff had "one foot on the tar surface" and "one foot on the gravel." The Andrews boy, at the left of the group, was necessarily on the tar surface. The plaintiff testified that Andrews was "a foot and a half on the tarred surface." The boys were wearing dark-colored clothes.

In these actions, the burden to prove the negligence of the defendant, and to prove that no lack of due care contributed to the injuries, was upon the plaintiffs. *Baker* v. *Transportation Co.,* 140 Me. 190; *Rouse* v. *Scott,* 132 Me. 22. Also, where a father is plaintiff, seeking to recover for expenses and loss of minor's services, if there is contributory negligence on the part of the son it bars the father from recovery. *Bonefant* v. *Chapdelaine,* 131 Me. 45, 51. It should appear from the circumstances that the defendant was negligent and that the plaintiff was using due care. "If the result was produced by a commingling of the negligences of the two parties, the plaintiff cannot recover." *Lesan* v. *Railroad Co.,* 77 Me. 85, 87; *White* v. *Michaud,* 131 Me. 124, 128; *Eaton* v. *Ambrose,* 133 Me. 458. The standard of measurement for both parties is, therefore, the 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 ordinary or reasonable care.

If the jury believed the testimony of the witnesses for the plaintiffs, there was evidence of defendant's negligence. The negligence of the defendant might even be inferred from the defendant's own testimony. The defendant's contentions, however, that the minor plaintiff and his companions were walking at night in the center of a right-hand

highway lane with their backs toward traffic, talking together, and paying no attention to approaching cars even when they saw a "flicker of light," would warrant a jury, if believed, to return a verdict for the defendant.

It was decided early in the history of this state that a person has the right to use the highway as a foot passenger, and that to be on the highway is not, *alone* and of *itself*, negligence as a matter of law. The question of due care is to be determined from all circumstances. *Coombs* v. *Purrington*, 42 Me. 332; *Cole* v. *Wilson*, 127 Me. 316. The pedestrian, however, must be "most vigilant" for his own safety, if he sees fit to accept "the obvious hazard of the highway." *Cole* v. *Wilson*, 127 Me. 316, 320; *Tibbetts* v. *Dunton*, 133 Me. 128.

It is well known that if the highway pedestrian is not dressed in bright clothing and walks without a light, it is often impossible for him to be distinguished after dark, when beyond the distinct range of headlights. The hazard of the highway becomes at certain times, and under some circumstances, a suicidal peril. Due care on the part of the night highway pedestrian may demand that he frequently look for and listen for approaching danger and, if necessary, to promptly leave the way entirely free for motor traffic. Ordinary care may sometimes require that he walk on the left-hand side, in order to better see and avoid approaching cars. He must indeed be vigilant for his own safety when he is walking on, or even too near, the right-hand travelled portion of a way with his back to oncoming vehicles.

The plaintiffs, in the brief of counsel, deny that there was contributory negligence on the part of the minor plaintiff, but they say that if the evidence warrants a finding of "some negligence" on the part of the plaintiff, then the jury verdict is manifestly wrong, in that it "does not follow the law of last clear chance."

The "doctrine of the last clear chance," or "the doctrine of discovered peril," is recognized in Maine, and may or may

not be applicable in negligence cases, depending on the circumstances. It applies after defendant has become, or should become, aware that the plaintiff is in a position of peril, and that the plaintiff cannot reasonably escape in the exercise of due care, while the defendant has the opportunity, by exercise of reasonable care, to avoid injury. The doctrine of last clear chance is applicable where the negligent acts of the two parties are not concurrent. The negligence of the plaintiff has ceased, or is too remote. The negligence of the defendant is the last negligence, and is the proximate cause. It is the *last* chance, and it must be the last *clear* chance. It cannot be invoked if the plaintiff's own act is the last negligent act, or if the plaintiff's own negligence is actively concurring. *Coombs* v. *Mason,* 97 Me. 270, 274; *Moran* v. *Smith,* 114 Me. 55; *Goudreau* v. *Ouelette,* 133 Me. 365; *Atwood* v. *B. & O. Ry.,* 91 Me. 399; *Stone* v. *Forest City,* 105 Me. 237, 240; *Smith* v. *Joe's Market,* 132 Me. 234; 5 Am. Jur. 778, pars. 490, 491; 38 Am. Jur. 900, pars. 215-224. If the plaintiff can withdraw from the zone of danger, his failure to do so may be continuing negligence. The plaintiff sometimes has "the last clear chance" to avoid the accident. *Sawyer* v. *Electric Co.,* 131 Me. 60. "The question of causal connection is ordinarily for the jury." *Neal* v. *Rendall,* 98 Me. 69, 74. *Kirouac* v. *Railway,* 130 Me. 147. No exceptions were taken to the charge of the presiding justice, and it is presumed that the charge correctly presented to the jury the applicable propositions of law.

The plaintiff's brief, in discussing last clear chance, calls the court's attention to one case only,—*Arnold* v. *Owens,* 78 Fed. (2nd) 495, where the doctrine is considered, but many statements therein do not agree with Maine decisions. In the Arnold case the plaintiff was on the right shoulder of the road. She was not on the travelled portion of the highway. The Circuit Court of Appeals for the Fourth Circuit held that the jury should be instructed that the defendant was liable if the driver of the truck saw or should have seen that the plaintiff was in a position of danger in

time to have avoided hitting her, by using ordinary care. The plaintiff in the Arnold case "believed she was in a position of safety." The Court of Appeals say: "He (defendant) himself, according to his testimony, believed that with his wheels on the pavement there was no danger, and he took a chance. Obviously, his was the last decision, and he must take the responsibility for the mistake." *Arnold* v. *Owens,* 75 Fed. (2nd) 495, 499. The case at bar differs from the *Arnold* case, because it is seriously disputed as to where this minor plaintiff Barlow was, what care he exercised, if any, before and after he saw the "flicker" of light, and if the plaintiff was negligent, was it continuing, to say nothing of the facts in dispute relative to other circumstances and to the acts of the defendant.

The evidence here was conflicting, as in nearly all automobile actions, and where there is a conflict in testimony the verdict of a jury will not be disturbed, if it is supported by evidence that is credible, reasonable and consistent with the circumstances and probabilities of the case, so as to afford a fair presumption of its truth. *Jannell* v. *Myers,* 124 Me. 229. The weight and value of evidence depend on its quality, and not on the number of witnesses. *Bennett* v. *Hathorn,* 125 Me. 513; *Ladd* v. *Bean,* 117 Me. 445. Also, when there are two arguable theories, and both are properly sustained by evidence, the Law Court is without authority to act. "It is only when a verdict is plainly without support that a new trial on general motion may be ordered." *Young* v. *Potter,* 133 Me. 104, 108; *Mizula* v. *Sawyer,* 130 Me. 428, 430.

The burden is on the moving party to show that the adverse verdict is clearly and manifestly wrong. *Dube* v. *Sherman,* 135 Me. 144; *Perry* v. *Butler,* 142 Me. 154; 48 Atl. (2nd) 631; *Jannell* v. *Myers,* 124 Me. 229. This is true even though it may seem to the Law Court that the evidence as a whole preponderates against the jury finding. "Our power is limited to decisions of the question whether the verdict is so plainly contrary to the evidence that manifest-

ly the jury was influenced by prejudice, bias, passion or mistake." *Jannell* v. *Myers,* 124 Me. 229, 230.

After a careful study of the complete record of the trial the court cannot say that in these verdicts there is "clear" or "manifest" error.

Motion for new trial overruled in each case.

RONALDE J. BROWN

vs.

MARK T. MCCAFFREY, ET AL.

Kennebec. Opinion, July 13, 1948.

Deeds. Boundaries. Evidence. Appeal.

In the interpretation of deeds, it is the general rule that the intention of the parties, ascertained from the deed itself, if consistent with the rules of law, prevails.

In the matter of identifying descriptions in deeds, the words southerly and westerly are not always used to indicate a direction that is due south or west.

An agreement by holder of bond for a deed with owner of adjoining property relating to a disputed line, is not admissible against owner of property who was not a party thereto.

The court is entitled to know before exclusion of evidence, all the grounds of admissibility, that it may rule advisedly.

In line disputes, testimony of witness holding bond for deed that one Bradbury pointed out lines to witness before witness took bond for deed, from predecessor in interest defendant, is not admissible, without proof of agency and authority.

Factual decisions by triers of fact will not be disturbed in appellate proceedings, if supported by credible evidence.

ON EXCEPTIONS.

Plea of land heard by referee who dismissed suit and entered judgment for defendant. Exceptions were filed to acceptance of report.

Exceptions overruled.

McLean, Southard & Hunt, for plaintiff.

Goodspeed & Goodspeed, for defendant.

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

MURRAY, A. R. J. This is a plea of land. It was heard by a referee, who dismissed it and entered judgment for the defendant. Objections were filed to the acceptance of the report and, on its being accepted, exceptions were allowed.

The dispute between the parties is as to the line dividing their lots, the plaintiff being the owner of the west lot, No. 28, and the defendant the east lot, No. 26.

In the year 1855 a plot of land composed of both these lots was owned by Ephraim Ballard who, February 15, 1855, conveyed to the defendant's predecessors in title the east lot No. 26. The material portion of the description in that deed follows:

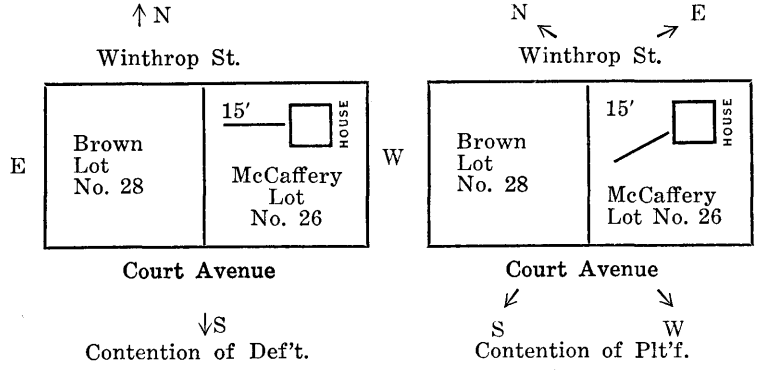
> "Being all that part of lot * * * which lies easterly of a straight line drawn from the south line of Winthrop Street southerly by the west end of the main body of the house on the lot hereby conveyed, keeping and preserving the distance of fifteen (15) feet westerly therefrom, and continuing this course across the lot * * * together with a right to a passageway out by the north side of the Baptist Meeting House, which passage shall be limited on the southerly side, by a line drawn from the northwest corner of the main body of the house hereby conveyed * * * my stable is to remain where it now stands until it is either removed, taken down, or destroyed, without charge."

The plaintiff took a number of exceptions, all of which he did not press in argument. We have considered all which he pressed.

Exception 1. That the referee erred in failing to interpret the phrase in the deed: "keeping and preserving the distance of fifteen (15) feet westerly therefrom" and in not determining "whether fifteen (15) feet from the main body of the house" means fifteen (15) feet perpendicular from said main body, or fifteen (15) feet due west therefrom.

The plaintiff contends that it means fifteen (15) feet due west, which would bring the dividing line nearer the house than would fifteen (15) feet perpendicular, which is the contention of the defendant.

The following rough plans might make the above explanation more clear:



"It is the general rule that the intention of the parties, ascertained from the deed itself, if consistent with the rules of law, prevails." *Pelletier* v. *Langlois, et al.*, 130 Me. 486, 490; 157 Atl. 577.

The referee found that the west line of the McCaffrey lot was established by the deed given in 1855, recorded in Vol. 197, Page 119, Ballard to Sawyer and Bangs, and that

line has not since been changed. The evidence justified him in so finding, and the further finding that that line on the face of the earth to be the one now relied upon by the defendant.

The evidence discloses that the parties to the above deed gave three monuments,—the south line of Winthrop Street, the west end of the main body of the house on the lot conveyed, and Court Avenue. They also gave courses from the monuments,—southerly from the south side of Winthrop Street to Court Avenue, westerly from the main body of the house.

It is plain that no matter whether Winthrop Street runs due east and west, or in a generally easterly and westerly direction, that the parties, for the purposes of the deed, considered it to be running east and west, because they referred to its south line.

Next, almost without lifting the pen from the deed, they wrote of a line, the fifteen foot line, running westerly from the main body of the house to the northerly and southerly line running from Winthrop Street. They must have meant this westerly line to be the same *westerly* as Winthrop Street, in other words, to run parallel with Winthrop Street. It thus would meet at right angles the line running from Winthrop Street, as the defendant contends.

"In the matter of identifying descriptions in deeds, the words southerly and westerly are not always used to indicate a direction that is due south or west." *Cilley* v. *Limerock R. R.*, 107 Me. 117; 77 Atl. 776.

The referee had the right to, and did, construe the deed to find out what the parties to it meant.

Exception 2. That if the finding of the referee was that the word westerly in the deed was not to be literally followed, it was error.

We have already answered that it is not error.

Exception 3. The referee erred as a matter of law in not recognizing the Longfellow-Pinnette agreement as fixing the disputed line.

One Longfellow, who was in possession of the McCaffrey lot under a bond for a deed from Frances Martin, without the knowledge of or authority from Martin, made an agreement with Ivy Pinnette who was then the owner of the Brown Lot. Martin later conveyed not to Longfellow, but to McCaffrey. The referee should not recognize this agreement. The evidence shows that neither Martin nor McCaffrey were parties to it and that neither had knowledge of it. McCaffrey does not hold under Longfellow.

Exception 4. The referee erred in excluding evidence of Longfellow's equity in the bond for a deed.

At the hearing, the following took place:

Q. What was the financial transaction when you were given that bond?

A. I purchased —

Objection.

McLean: The purpose is to show he has substantial interest in the property.

Court: Have you any objections?

Goodspeed: Yes. I feel it is immaterial.

Court: If you object, I will exclude it.

Exceptions.

McLean: The purpose of offering it, later on there was apparently an agreement made by Mr. Longfellow with the adjoining owner. We wish to bring out the facts. He did have a substantial equity.

Court: The amount involved isn't material, I think the bond for a deed shows he has an interest in it.

This ruling was correct. The plaintiff does not show himself to be aggrieved. All of the facts, if brought out,

might show that he did have a financial interest, but, that interest might be between himself and Martin. The bond for a deed is in evidence and shows that it was not recorded, so it would not affect McCaffrey. The plaintiff should have told the referee what the facts he was about to offer would prove. "The Court is entitled to know * * * before exclusion, all the grounds of admissibility. That he may rule advisedly." *Booth Brothers & Hurricane Island Granite Company* v. *Smith,* 115 Me. 89, 93; 97 Atl. 826.

Exception 5. To the exclusion of evidence that one Mr. Bradbury pointed out the lines to Longfellow before Longfellow took the bond for a deed.

This ruling was correct. Longfellow testified that Bradbury was an agent of Mr. Donald Foster and he believed that Foster had the property for sale. Belief that he was an agent is not enough. Even if Foster was the agent of Mrs. Martin, Foster could not in turn delegate agency to Bradbury. See C. J., Vol. 81, page 471, and cases there cited in note 92.

Exception 8. As we understand this exception, it is that the eaves of the Brown house extend east over the line of the disclaimed land, and are, of course, east of the line in dispute, and the plaintiff says that the referee erred in not allowing the land under the eaves to the plaintiff, who must have gained it by estoppel and adverse possession. To this we answer,—this is a matter of fact; the referee found for the defendant; there was evidence to sustain it.

Factual decisions made by triers of fact will not be disturbed in appellate proceedings, if supported by credible evidence. *Alpert* v. *Alpert,* 142 Me. 260; 49 Atl. (2nd) page 911.

Exceptions 13 and 15. Both of these exceptions were to findings of fact by the referee, and have been answered in the answer to Exception 8.

Exceptions overruled.

RALPH FARRIS, ATTORNEY GENERAL,
EX REL. BENJAMIN L. DORSKY,
RICHARD GUSTIN AND
CHARLES O. DUNTIN

vs.

HAROLD J. GOSS, SECRETARY OF STATE

Cumberland. Opinion, July 13, 1948.

Statutes. Constitutional Law. Initiation.

In construing a statute, or a constitution, the court looks primarily to the language used, which in cases of doubt may be illuminated by surrounding circumstances.

The Supreme Judicial Court is not concerned with the consequences of statutory provision, its duty being to interpret and not to make the law.

The right of the people, as provided by Article XXXI of the Constitution of Maine, to enact legislation and approve or disapprove legislation enacted by the Legislature, is an absolute one and cannot be abridged directly or indirectly by any action of the Legislature.

Neither by actions nor by inaction can the Legislature interfere with the submission to the people of initiated measures as provided by the Constitution.

Constitutional provision that if initiated measure is not enacted by Legislature without change it shall be submitted to the electors, together with any amended form, substitute, or recommendation of the Legislature, in such manner that the people can choose between the competing measures or reject both, places no curb on the enactment of legislation, but an enacted bill which is a substitute for the initiated measure must go to the electors with the initiated measure, and does not become a law until they approve it.

A bill which deals broadly with the same general subject matter, particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together, is a subsitute for such initiated measure.

The "Tabb Bill" so-called enacted by the Legislature was a substitute for the initiated "Barlow Bill" and both bills are required to be submitted to the people.

ON EXCEPTIONS.

Mandamus proceedings brought by the attorney general, on relation of the petitioners, to compel the Secretary of State to place on ballots to be submitted to the people, the "Tabb Bill" so-called, in such a manner that the electorate could choose between that measure and the "Barlow Bill" so-called, an initiated measure, as competing measures, or reject them both. Peremptory writ was ordered to issue as prayed for. Exceptions were taken to this order. Exceptions overruled.

Berman, Berman & Wernick, for petitioner.

Goodspeed & Goodspeed, for respondent.

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

THAXTER, J. The issue before the court in this case is a narrow one. The requisite number of electors of the state in accordance with the provisions of Article XXXI of the Constitution have taken the necessary steps to initiate a certain measure entitled "An Act to Protect the Right to Work and to Prohibit Secondary Boycotts, Sympathetic Strikes, and Jurisdictional Strikes." This proposed law which we shall hereinafter refer to as the "Barlow Bill," or the "initiated measure," was on March 25th and 27th, 1947, in accordance with Article XXXI, *supra,* proposed for enactment to the Legislature then in session. The Senate referred it to the Committee on Judiciary for the purpose of determining the sufficiency of the initiating petitions. The order of reference was concurred in by the House. The committee reported favorably and recommended that the "initiated measure" be submitted to the voters. The Legislature accepted this report and on April 15th at its direction

the committee report, the "initiated measure," and the petitions accompanying it were transmitted to the Secretary of State. Article XXXI, Sec. 18, of the Constitution provides in part as follows:

> "Any measure thus proposed by not less than twelve thousand electors, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both."

The Legislature did not enact the "initiated measure" without change and it is now to be submitted to the electors at the general election to be held in September. A number of bills dealing with labor relations were filed with the same Legislature. Only one of these, which is now found in P. L. 1947, Chap. 395, was enacted. We shall hereinafter refer to this as the "Tabb Bill."

The attorney general, on relation of the petitioners who are representatives and officers of the Maine State Federation of Labor, has brought a petition for a writ of mandamus to compel the Secretary of State to place on the ballots to be submitted to the people at the September election the "Tabb Bill" "in such manner that the people of the State of Maine can choose between the two measures as competing measures or reject both of them." The Justice before whom the petition for the writ of mandamus was brought ordered the peremptory writ to issue as prayed for. Two exceptions were taken to this ruling: the first based on the finding that "in substance and effect, the 'Tabb Bill' was the Legislature's substitute for the 'Barlow Bill,' within the meaning of Sec. 18 aforesaid"; the second based on the finding that "in substance and effect the enactment of the 'Tabb Bill' was a 'recommendation' of the Legislature, within the meaning of Sec. 18 aforesaid."

If the "Tabb Bill" is a substitute for the "Barlow Bill," the writ of mandamus was properly issued. In the view

which we take of the problem before us, we need consider only the first exception which covers this point.

We have here the problem of construing Article XXXI of the Constitution, perhaps not so much of construing it, for its language is not ambiguous, but of applying it to the problem before us; also we must determine whether the "Tabb Bill" is, within the meaning of Article XXXI, a substitute for the "Barlow Bill."

In construing a statute, and the same principle holds true with respect to the Constitution, we look primarily to the language used which may be illumined in cases of doubt by the surrounding circumstances. *Dominion Fertilizer Co.* v. *White,* 115 Me. 1, 4; *In re Frank McLay,* 133 Me. 175; *Guilford* v. *Monson,* 134 Me. 261; *Old South Association* v. *Boston,* 212 Mass. 299; *Plunkett* v. *Old Colony Trust Co.,* 233 Mass. 471; *Bayon* v. *Beckley,* 89 Conn. 154; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; 41 L. Ed. 1007; Note 70 A. L. R. 10.

Justice Holmes, before he became a member of the Supreme Court, made a statement which is peculiarly applicable here: "We do not inquire what the *Legislature* meant, we ask only what the *statute* means."

This court is not concerned with the consequences of statutory or constitutional provisions. Our duty is to interpret, not to make the law.

Article XXXI of the Constitution of this state became effective as an amendment on January 1, 1909, almost forty years ago. It made a fundamental change in the existing form of government in so far as legislative power was involved. Formerly that power was vested in the House of Representatives and the Senate. By the amendment the people reserved to themselves power to propose laws and to enact or reject the same at the polls independent of the Legislature, and also reserved power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the

Legislature. The amendment provides that after its adoption the style of acts and laws instead of being "Be it enacted by the Senate and House of Representatives in Legislature Assembled" shall be "Be it enacted by the People of the State of Maine." In short, the sovereign which is the people has taken back, subject to the terms and limitations of the amendment, a power which the people vested in the Legislature when Maine became a state. The significance of this change must not be overlooked, particularly by this court whose duty it is to so construe legislative action that the power of the people to enact their laws shall be given the scope which their action in adopting this amendment intended them to have.

The right of the people, as provided by Article XXXI of the Constitution, to enact legislation and approve or disapprove legislation enacted by the legislature is an absolute one and cannot be abridged directly or indirectly by any action of the Legislature. Sec. 18 of this article, it is to be noted, does not in any manner encroach on the prior power of the Legislature to enact legislation.

It does, however, provide and make it mandatory that, if an initiated measure is not enacted by the Legislature without change, it, "together with any amended form, substitute, or recommendation of the legislature" . . . . . shall be submitted to the electors . . . . . "in such manner that the people can choose between the competing measures or reject both." Neither by action nor by inaction can the Legislature interfere with the submission of measures as so provided by the Constitution. And if the constitutional provisions should not be so complied with in the submission of a substitute for the initiated measure, the people would be denied their right to choose between the two.

There is a clear distinction between a provision abridging the power of the Legislature to enact certain classes of legislation pending an initiated measure, and a provision requiring that if such class of legislation be enacted, the same be

submitted to the people, together with the initiated measure. As we have said, Sec. 18 places no curb on the enactment of legislation; but a bill enacted which is a substitute for the initiated measure must go to the electors with the initiated measure, and does not become a law until they approve it under the provisions of Sec. 18.

Sec. 22 of Article XXXI reads as follows:

> "Until the legislature shall enact further regulations not inconsistent with the constitution for applying the people's veto and direct initiative, the election officers and other officials shall be governed by the provisions of this constitution and of the general law, supplemented by such reasonable action as may be necessary to render the preceding sections self executing."

This section, when read in connection with Secs. 18 and 20, establishes that Sec. 18 is self executing. The machinery for submission of the initiated bill and the substitute is the same; and in each case the same obligation is on the Secretary of State.

Is the "Tabb Bill" a substitute for the "Barlow Bill"? In answering this question we are not concerned, as we have tried to point out above, with how the Legislature may have regarded it. We must decide only what it is in fact.

A bill which deals broadly with the same general subject matter, particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together, is such a substitute as was referred to in Article XXXI. This is the test laid down in *Starbird* v. *Brown,* 84 Me. 238, to determine whether one statute may either have amended or repealed an existing law. The court there said, page 240: "Can the new law and the old law be each efficacious in its own sphere?" And in *Maine Central Institute* v. *Inhabitants of Palmyra,* 139 Me. 304, the question was whether Sec. 92 of Chap. 9 of R. S. 1930, or Sec. 93 of the same chapter were so inconsistent that they could not stand together. Sec. 92 was in fact based on a later

enactment than Sec. 93. Sec. 93 provided that under certain specified conditions a youth residing in a town had the right to attend a school in any other town to which he might gain admittance, the tuition not exceeding $100 being charged to the town of his residence. Sec. 92 gave to the town of his residence the right under specified conditions to contract for such tuition. This court held that "all statutes on one subject are to be viewed as one and such a construction be made as will as nearly as possible make all the statutes dealing with the one subject consistent and harmonious." The court then called attention to the fact that the two statutes referred to the same subject matter; that they were repugnant; and that the later one must be regarded as a substitute for the former, on the theory as expressed in *Knight* v. *Aroostook Railroad,* 67 Me. 291, 293, that there is an inference "that the Legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time . . . . ." The "Tabb Bill," as we shall point out more fully later, did cover the same subject matter as the "initiated measure" and was inconsistent with it in essential respects. By parity of reasoning with the *Palmyra* opinion, the "Tabb Bill" must be regarded as a substitute for the "initiated measure" and must be submitted to the people as a "competing measure" in accordance with Article XXXI.

The Legislature had before it at the time the initiating petitions were filed a number of measures dealing with labor relations. One of these was a bill proposed by Representative Tabb, which was reported favorably by the Committee on Labor in a new draft on March 27, 1947. It was intended to ban the closed shop. Another was designated the Maine Labor Relations Act. Another was designed to prevent strikes against public utilities and municipal corporations; and another which we shall refer to as the "Woodbury Bill," introduced in the House on February 13, 1947, was identical with the "initiated measure." The House of Rep-

resentatives of the 93rd Legislature on March 12, 1947 asked the Justices of the Supreme Judicial Court for their opinion of the constitutionality of Secs. 122 to 129, inclusive, of the "Woodbury Bill." These are all the essential features of the bill. On March 25, 1947 five of the six justices of this court, the sixth being unable to act because of illness, declared that Sec. 123 would be constitutional; that Secs. 126, 127, 128 and 129 would be unconstitutional; and that Secs. 122, 124 and 125 would be within the power of the Legislature to enact, depending on the construction which the Supreme Court of the United States might place on the power of the federal government under the National Labor Relations Act to deal with their subject matter. Opinions of the Justices, 142 Me. 420. The important sections of the proposed bill were those which the justices of this court declared were unconstitutional, and Secs. 122 and 124 which we held the Legislature might have the power to enact, and Sec. 123. Sec. 125 barred an employer from conditioning employment on the payment of union dues or charges, and was really designed to aid in making effective Secs. 122 and 124, which dealt with the closed shop and the union shop. The Legislature did not enact the "Woodbury Bill" which we have said was identical with the "initiated measure"; but it did in the "Tabb Bill" deal with the same subject matter as was involved in the sections of the "Barlow Bill" which the members of this court, in their answers to the questions of the House with respect to the "Woodbury Bill," had said were or might be constitutional. And in some respects it dealt with this subject matter in either a different or inconsistent manner than it was dealt with in the "Barlow Bill."

In other words, the effective parts of the two measures cannot stand together. Under these circumstances, the ruling of the sitting justice that the "Tabb Bill" was a substitute for the "Barlow Bill" was correct, and the order that the peremptory writ issue was not error.

Exceptions overruled.

DISSENTING OPINION

MURCHIE, J. The constitutional construction accomplished by the majority opinion, by the surprisingly simple expedient of stating that the amendment construed, Amendment XXXI, is not being construed but applied, seems to me to constitute such a flagrant judicial usurpation of legislative power (by redirecting it in a manner the Constitution does not expressly authorize) and such a palpable disregard of executive power (by ignoring it) that a statement of the reasons underlying my personal views seems imperative.

The legislative power conferred on the Legislature by Article IV, Part First, Sec. 1, is stated in Article IV, Part Third, Sec. 1 to be the power "to make and establish * * laws" (subject to referendum). In the adoption of Amendment XXXI the framers deemed it necessary to write in a special grant of power to the legislature to authorize it to "enact measures expressly conditioned upon * * ratification by a referendum vote." Article IV, Part Third, Sec. 19. The words which the decision construes and applies, in professed application of unambiguous language, are:

> "together with any amended form, substitute, or recommendation of the legislature."

They grant power to the legislature, as the majority opinion recognizes. That opinion, however, construes them as if they were followed by the additional words "enacted by the legislature," or, perhaps, "which the legislature purports to enact." The word "enact" has no conditional meaning according to lexicographers, although it is used in the Constitution in a conditional sense in that part of Article IV, Part Third, Sec. 19 quoted above. In its usual and ordinary signification it is equivalent to the words "make and establish" used in Article IV, Part Third, Sec. 1. Whichever of the alternative sets of words (quoted above) the majority opinion has read into the Constitution, or whatever words

competent to accomplish the result have been read in, the effect is to negative the statement that Sec. 18 of Amendment XXXI:

> "does not in any manner encroach on the * power of the legislature to enact legislation."

The opinion declares that the Tabb Bill was "enacted" in one place but decides that it was not, that only the electors possess the legislative power to enact it. The words read into the Constitution, whatever they may be, convert a grant of power into a restriction on the legislative power of the legislature.

The opening words of the fourth paragraph of the majority opinion:

> "We have * the problem of construing Article XXXI of the constitution,"

state the issue of the case as I see it but there is a retraction of the effect of those words in the sentence in which they appear. It resorts to the expedient of declaring a different one on the ground that the language of the amendment "is not ambiguous" and is merely to be applied. Notwithstanding that declaration the two paragraphs immediately following, and much subsequent language, are devoted to principles of statutory construction. No reference is made to what 11 Am. Jur. 674, Par. 61 declares to be the fundamental principle of constitutional construction:

> "to give effect to the intent of the framers."

That intent is ascertainable in the Legislative Record of the legislature which proposed it. Amendment XXXI was proposed to the electors by Resolves of 1907, Chap. 121. That resolve was referred to and reported by the Committee on Judiciary of the Seventy-third Legislature. It was passed in the form reported by that committee, after debate in which one of the members of that committee construed

the words controlling the present case. Among the members of the committee were Luere B. Deasy, later the fourteenth Chief Justice of this Court, and Charles F. Johnson, later a Circuit Judge of the United States Circuit Court of Appeals. The construction declared in debate was that of Judge Johnson. Chief Justice Deasy offered no construction but his silence indicates his assent to that of Judge Johnson, appearing at Page 640 of the 1907 Legislative Record:

> "The Legislature if it sees fit may enact * * * (an initiated law). If not, it must submit * * * (it). The Legislature may submit a measure competing with * * * (it)."

This construction controlled the action of the Seventy-fifth Legislature in dealing with the initiated law which became P. L. 1913, Chap. 221. The manner of dealing is apparent when it is compared with P. L. 1911, Chap. 199. The Legislative Record for 1911 gives the details. The initiated law was not enacted by the legislature without change. The legislature enacted a law which is an apparent substitute for it, or a part of it. William R. Pattangall, who became the fifteenth Chief Justice of this court, was a member of that Legislature, wherein the initiated bill was known as the Davies Bill and the law enacted as the Pennell Bill. When they were debated Chief Justice Pattangall affirmed the construction of the amendment declared by Judge Johnson as one of the framers. His statement appears at Page 1065 of the 1911 Legislative Record:

> "There are only two courses open to us * * * to adopt the Davies Bill or the Pennell Bill. My * preference would be * to adopt the Pennell Bill at the present time, and submit the other bill to the voters * * *. * * they may adopt the Davies bill if they desire."

Immediately thereafter Mr. Davies presented an order directing that the Davies Bill and the Pennell Bill be sub-

mitted as competing measures, which was indefinitely postponed. Legislative Record, 1911, Page 1066.

Legislative Records, as sources of information concerning legislative intention, are brushed aside apparently in the majority opinion by its reference to a statement of Justice Holmes, the source of which is not identified. Justice Holmes was dealing with statutory as distinguished from constitutional construction, as the quoted language shows. If the source had been given his statement might not be at variance with the last word on the subject of the availability of legislative debate to determine legislative intention on a constitutional issue. *United States* v. *Congress of Industrial Organizations et al.* (No. 695, October Term 1947). The Supreme Court of the United States recognizes both that legislative intention is controlling on questions of constitutional construction and that courts may refer to legislative debates to ascertain it.

The majority opinion ignores the consequences of the construction it applies, and admits it frankly. Its reference to consequences carries recognition that they may be disastrous.

Several potentials are apparent. The most outstanding one is that the construction may operate to deprive the people of a right more valuable than that it assures. The reservation to the people in Article IV, Part First, Sec. 1 is not merely to "propose" but to "enact" (or reject) laws. Express provision is that the people may vote on a forthright issue if a law proposed is not enacted without change. The legislature is granted the power to change the issue to a more complicated one, but the amendment recognizes that the majority will might be rendered ineffective thereby in the absence of a second vote and grants such a vote if neither competing bill receives a majority and one garners more than a third. To illustrate the point apply the fraction used in the Constitution to control the second chance. Assume approximate thirds in favor of each of the com-

peting bills and against both, with just enough variation to put the second vote in operation, i.e. 34% for one bill, 33% for the other and 33% against both. The affirmative vote of 67% of the electors favoring the prohibition of yellow-dog contracts and closed shops will be frustrated until after the general election to be held in 1950 at least and longer if the 33% opposing both bills use the formula, set up by the court, of re-proposing the rejected initiated legislation or proposing some new legislation along the same lines, insulated against enactment without change by the inclusion of unconstitutional provisions. The illustration might be made more extreme. The action of the voters on the competing bills could record 97% of the electors as favoring the prohibition of yellow-dog contracts and closed shops, and render their votes ineffective if the division was 49% for one bill and 48% for the other.

A second disastrous result is the establishment of an uncertain field for the legislative power exercisable by the legislature. Such power should be ascertainable by any legislature when it convenes by reference to the Constitution and existing laws. Comparison of the provisions of our Constitution with those of Arizona illustrates the point. The Arizona Constitution denies the legislature the power to repeal or amend any law enacted by majority vote of the electors (see the quotation of it by the Arizona court in *McBride et al.* v. *Kerby,* 32 Ariz. 515; 260 Pac. 435.) Arizona gives a majority of the electors, and not the initiators of legislation, the power to curtail the legislative power of the legislature.

A third disastrous consequence is the impracticability of applying the construction declared in all contingencies. The majority opinion records that the present legislature considered a number of bills that might have been considered substitutes for the Barlow Bill within the broad meaning attributed to the word "substitute." If the legislature had enacted or purported to enact two of them, the

impracticability would be very apparent. The Constitution does not provide for the submission of more than one competing bill. The result of the vote on competing bills is to be determined by the action of the voters on "neither" or "both." The word "neither" might be applicable to more than two competing bills. The word "both" is more restrictive. If the legislature had enacted or purported to enact two laws coming under the ban declared applicable to the Tabb Bill, which of them would have been the competing bill to be submitted? What would be the status of the other? Obviously the Secretary of State could not declare it null and void. The power to do so is a judicial power. Would the court take that action without having the question raised in a manner always considered requisite heretofore to invoke that extraordinary judicial action?

When a construction of constitutional language which seems reasonable without reference to results carries the potential of disastrous ones, a construction should be sought which will avoid them if violence is not done to constitutional language. Such a construction was declared in this instance by one of the framers of Amendment XXXI. His construction has been applied heretofore by legislative power. It does no violence to the language but declares merely that the grant of power to the legislature is that and nothing more. It recognizes the power as one requiring a caveat indicating the risks involved in its exercise.

The construction which the majority opinion declares for the word "substitute" gives it the broadest possible meaning. Lesser meanings that would be proper are so apparent they do not need recital. The construction applied is supported by declarations that the Tabb Bill "deals broadly" with the Barlow Bill, in a manner "inconsistent" with it, and that the two "cannot stand together." The Barlow Bill deals with eight subjects, the Tabb Bill with two of them. Is that dealing "broadly"? I record my individual judgment that it is not. I am unwilling to rate the relative im-

portance of different provisions of a law the people seek to enact. The majority of the court does not hesitate to do so. It offers no specification of any inconsistency of the manner in which the two bills deal with yellow-dog contracts and closed shops. It cannot, because there is none. Both bills prohibit those things. The difference is one of phraseology and not of effect. If the changed phraseology can be said to produce any inconsistency, the answer is found in the cases cited in the majority opinion in the very paragraph where the fact of inconsistency is stated. If the Tabb Bill was recognized as effective law and the Barlow Bill should be enacted at the September election, the enactment of it would repeal any provision of the Tabb Bill inconsistent with it.

To support my opening statement that the construction applied by the majority opinion constitutes a flagrant judicial usurpation of legislative power, I note that prior to its issue no court of last resort in any jurisdiction operating under a written constitution has ever declared that judicial power has any right of control over enacted law except to construe it or determine it to be null and void. No court heretofore has assumed judicial power to construe legislative action taken under rules adopted by a legislature to govern its proceedings. Our Constitution vests authority in the legislature to "determine the rules of its proceedings." Article IV, Part Third, Sec. 4. In doing so it established long since rules for making and establishing law in accordance with the grant of power contained in Article IV, Part Third, Sec. 1. After the enactment of Article IV, Part Third, Sec. 19, it adopted rules to regulate the exercise of its power to enact laws conditionally. When, if ever, it determines to exercise the power granted to it by Article IV, Part Third, Sec. 18, and change the issue which the initiation of legislation requires to be submitted to the electors if an initiated law is not enacted without change, this court owes it the courtesy of recognizing that it will adopt rules sufficient for the purpose. Such rules are fore-

cast by those adopted to exercise the power granted in Article IV, Part Third, Sec. 19. In every case where that power has been exercised heretofore the law conditionally enacted has declared its conditional nature and framed a question to be submitted to the electors with reference to it.

The majority opinion identifies certain laws pending before the present legislature when the Barlow Bill was initiated. Original and new draft forms of the Woodbury Bill are Legislative Documents 754 and 1487. The latter is an amended form of the former and of the Barlow Bill. Original and new draft forms of the Maine Labor Relations Act are Legislative Documents 1299 and 1404. Either might might be considered a substitute for the Barlow Bill. The indefinite postponement of these two bills discloses that legislative action was exercised to leave unchanged the issue required to be submitted to the electors by the legislative refusal to enact the Barlow Bill without change. The legislature declared that intention in accepting the report of its Committee on Judiciary. It reaffirmed that intention by indefinitely postponing both an amended form and a substitute.

The opinion of the majority shows an utter disregard of the established principles of law that judicial power can neither coerce legislative power to act nor restrain it from acting although the constitutional mandate to act or not to act is entirely clear, 34 Am. Jur. 910, Par. 128, and that all doubts concerning the constitutionality of the exercise of legislative power should be resolved in favor of constitutionality. *Ogden* v. *Saunders,* 12 Wheat. 213; 6 L. Ed. 606. Both are subverted by decision that judicial power may construe legislative action as well as legislation, a principle of far greater range than that declared by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch 137; 2 L. Ed. 60, that judicial power might declare a law enacted by legislative power and approved by executive power null and void. Under it legislative action was not construed but recognized as taken for the purpose the legislature intended. The

ineffectiveness of the legislation was due to its unconstitutionality. Under the newly declared principle legislative action designed by legislative rules of proceedings to enact a law prohibiting yellow-dog contracts and closed shops "for the * * benefit of the people" (the words of Article IV, Part Third, Sec. 1) is not only declared ineffective for the legislative purpose it declares but rendered worse than futile because it is given another and different effect based on the fact that an initiated law seeking to impose the identical prohibitions sought more prohibitions. It is worse than futile because its conversion to an unintended legislative purpose deprives the electors of the right to vote directly upon an issue raised in a constitutional manner. The lesser rights to pass upon competing bills and to have a second election on one of them, if both are not defeated and one receives more than a third of the votes, are meaningless because of the inevitable delay involved. What the electors who proposed the Barlow Bill sought to determine by its proposal, so far as yellow-dog contracts and closed shops are concerned, was whether either the legislature or the people desired to prohibit them not later than September 1948. That issue cannot be resolved by a vote on the particular competing bills except in negative fashion unless one of them receives a majority of the votes cast for and against both. A majority vote against both bills will close the issue. If the negative votes constitute a minority and one, or both, of the competing bills receives more than a third of the total, the second opportunity to vote two years hence will salvage nothing worth while so far as the people's rights are concerned. Those rights will have been frustrated, temporarily or permanently, by construing the Constitution in a manner directly opposed to the intention of the framers.

In closing I note a result astounding. The decision lays the groundwork for future trouble of inestimable range. What is to be the result in a case on all fours with the present, except the intervention of mandamus? Suppose a ma-

jority of the electors vote to enact a law and a prosecution under it. Will the court say that law is unconstitutional because the legislature mussed things up? Will it throw the responsibility on the Secretary of State? The decision means that it will do one or the other. As an alternative, suppose a prosecution under the law enacted by the Legislature, if the electors reject the proposed legislation. Will the court say the law is unconstitutional because enacted at a time when the power of the legislature to enact it was temporarily suspended? That again is what the decision means. Under Judge Johnson's construction of the Constitution, on which the Legislature acted in 1911, neither of these absurd consequences would be possible. I believe the exceptions should be sustained on the ground that legislative power is not providing a substitute under Article IV, Part Third, Sec. 18 when it enacts a part of an initiated bill under Article IV, Part Third, Sec. 1, and that its rules of proceedings are an unfailing guide to indicate the purpose of its action.

STATE OF MAINE
vs.
DONALD M. STAIRS

Aroostook. Opinion, July 13, 1948.

Manslaughter Evidence.

A verdict of guilty of manslaughter is justified where the evidence, though circumstantial, was ample to satisfy the jury that the defendant drove his truck over a highway with a board projecting from the right side which struck a pedestrian and caused injuries resulting in death, and that the death occurred because of a violation of a statute limiting the width of motor vehicles operating on the highway. R. S. 1944, Chap. 19, Sec. 85.

ON APPEAL.

On an indictment for manslaughter, the respondent was tried before a jury and found guilty. He filed a motion for a new trial before the presiding justice which was denied, and from such ruling he has appealed. Motion overruled. Judgment for the state.

James P. Archibald, County Attorney for Aroostook County, for State of Maine.

Donald W. Sweeney, for respondent.

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

THAXTER, J. On August 31, 1947, Lloyd Lathrop, a boy eleven years old, while walking with his cousin, Eugene Tilley, westerly toward Washburn on the Washburn-Presque Isle Road, so-called, was struck by a truck proceeding easterly, and suffered injuries from which he died five days later. The boys were walking on their left side of the road. The Lathrop boy was on the gravel shoulder. The truck

approached them travelling on its right side of the highway. The Lathrop boy was ahead, the Tilley boy just behind him. It was shortly after eight o'clock and was getting dark. Both boys were hit either by some portion of the truck or by something protruding from it. These facts are not in dispute.

The respondent, who the state claims was the operator of the truck, was tried before a jury and found guilty of manslaughter. He filed a motion for a new trial before the presiding justice which was denied, and from such ruling he has appealed.

The evidence was circumstantial. The Tilley boy testified that there were three red lights over the cab of the truck, that the exhaust was making a great deal of noise, and that as the car came abreast of them something hit both him and his cousin. The truck passed on without stopping. The boys were picked up and an intensive search was made for the vehicle. A truck was found about midnight by police officers in a parking area near the home of the respondent, who, on being questioned by them, admitted that it was his, that he had been operating it on the road from Washburn to Presque Isle, and that he arrived home about eight o'clock. Allowing for some slight discrepancy in time, this could have placed him at the scene of the accident when it happened. He denied seeing the boys or having any knowledge of any untoward occurrence on the way home. His truck had three red lights over the cab. The muffler was broken and when the car was operated there was a great deal of noise. But there was more significant evidence as to the identity of the truck and as to what caused the accident. The truck when found had sideboards approximately four feet high. The left one was standing but canted in toward the center. The right one was lying down diagonally across the truck with some of the boards broken and scattered and a part of it toward the rear was extending out sideways beyond the truck. It was afterwards established that this extended out on the right side beyond the truck four feet

and two inches and there was extending out one foot two inches on the left side another piece of one of the sideboards. The total width of the truck and the broken pieces of the boards was thirteen feet two inches. On the board extending from the right were found human bloodstains, human hair, and human skin. Boards were found on the bridge east of the place of the accident, the splintered end of one exactly fitting into the splintered end of a broken sideboard of the truck. It also appeared that just westerly of the spot where the boys were hit the bushes beside the road had been broken down.

Also in evidence was the fact, admitted by the respondent, that earlier in the day he had been drinking beer and his blood from a sample taken at midnight showed an alcoholic content of .071%, and his urine, .116%. The content in the urine indicated according to the expert testimony that at some time prior the alcoholic content of the blood must have been as great as that of the urine.

The jury were instructed with great clarity and accuracy on the subject of involuntary manslaughter. The weight to be given circumstantial evidence was fully explained. There was called to their attention the statute relating to driving a motor vehicle while under the influence of intoxicating liquor, and the statute prohibiting the operation on a highway of a motor vehicle which with its load exceeds a certain width. And the jury were explicitly admonished that the violation of either statute would not render the respondent guilty of manslaughter unless such violation was the proximate cause of the accident.

There was in this case ample evidence from which the jury could have found beyond a reasonable doubt that this respondent drove his truck over this highway, that a board projecting from the right side struck the Lathrop boy and that his death resulted from the injuries then suffered and that such death occurred because of a violation by the re-

spondent of R. S. 1944, Chap. 19, Sec. 85, limiting the width of motor vehicles operated on a highway. The verdict was fully justified. It is not necessary to discuss whether it can be justified on any other ground.

Motion overruled.
Judgment for the state.

NORMAN LAFERRIERE, ADMINISTRATOR
vs.
AUGUSTA ICE COMPANY

Kennebec. Opinion, July 13, 1948.

Wrongful Death. Damages.

Damages of $3,930 awarded in an action to recover damages for the death of a child of three and a half years are excessive and the maximum recovery should be $1,150 since the statute limits recovery to what is a fair and just compensation not exceeding $10,000 with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, and in addition such damages as will compensate the estate of such deceased person for reasonable expenses of medical, surgical, and hospital care and treatment, and for reasonable funeral expenses. R. S. 1944, Chap. 152, Secs. 9, 10.

ON MOTION FOR A NEW TRIAL.

Action by a father as administrator to recover damages for the death of a child. After a verdict for the plaintiff, the case is before the Law Court on the defendant's motion for a new trial. Motion sustained, unless the plaintiff within thirty days from the filing of the rescript shall file a remittitur of all the damages in excess of $1,150.

William H. Niehoff, for plaintiff.

Locke, Campbell, Reid and Hebert,
Brooks Brown, Jr., for defendant.

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

THAXTER, J. This action was brought under the provisions of R. S. 1944, Chap. 152, Secs. 9 and 10, by a father as administrator to recover damages for the death of a child of the age of three and a half years killed as is alleged by the defendant's negligence. After a verdict for the plaintiff for $3,930, the case is before us on the defendant's motion for a new trial. And the only question before us on that motion is whether or not the damages are excessive.

The damages according to the statute are limited to what is a fair and just compensation not exceeding $10,000 "with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought," and in addition thereto the jury is directed to give such damages "as will compensate the estate of such deceased person for reasonable expenses of medical, surgical, and hospital care and treatment, and for reasonable funeral expenses . . . . ."

The plaintiff proved that there were funeral expenses of $150 and no question is raised as to these. The claimed excess is confined to the balance of $3,780. If we read the statute as written, and if we are governed by logic, it is hard to see, under the doctrine of *Bowley* v. *Smith,* 131 Me. 402, how we can do more than conjecture the "pecuniary loss" in such a case as this. We must project our minds into an unknown future in an effort to determine if there will ever be a pecuniary loss to parents under these circumstances. And yet we have permitted nominal or moderate recoveries under this statute for the death of children. We are aware that courts of high standing in other jurisdictions have sanctioned verdicts of larger amounts than has been the case with us. Whether or not these have been awarded under statutes similar to our own is not altogether clear.

Nor is it necessary to determine such question; for our own court has established certain limits beyond which we do not feel justified in going at this time.

In *Curran* v. *Lewiston, Augusta & Waterville Street R'y Co.*, 112 Me. 96, a jury awarded $1,811 for the death of an eight year old child. A *remittitur* was ordered of all the verdict in excess of $500. In *Blanchette* v. *Miles*, 139 Me. 70, an award by referees of $1,000 for the death of a twelve year old child was upheld.

In the instant case on the facts before us, we are of opinion that $1,150 is the maximum recovery which should be permitted.

Motion sustained, unless the plaintiff within thirty days from the filing of the rescript shall file a remittitur of all the damages in excess of $1,150.

ROBERT A. WILES, AN INFANT, BY ARTHUR D. WILES
vs.
CONNOR COAL AND WOOD CO.
ARTHUR D. WILES *vs.* CONNOR COAL AND WOOD CO.

Penobscot. Opinion, July 24, 1948.

Negligence. Pedestrians. Minors. Speed. Intersection. Due care. Evidence.

In considering the propriety of a refusal to direct a verdict for the defendant, the evidence must be viewed in the light most favorable to the plaintiff, giving him the benefit of every justifiable inference.

A pedestrian is not required as a matter of law to look and listen before starting to cross a road.

The degree of care required of a minor is measured with due regard to age and capacity.

Speed of fifteen miles per hour is applicable within fifty feet of an intersection where the view is obstructed, and express provision is that it shall be deemed obstructed if there is not a clear and uninterrupted view of the intersection and the traffic upon all ways entering it, for a distance of two hundred feet therefrom, during the last fifty feet of approach. R. S. 1944, Chap. 19, Sec. 102.

A speed not exceeding 25 miles per hour is *prima facie* reasonable and proper in a residential or business district except within fifty feet of an intersection of ways.

The act of a pedestrian in hurrying suddenly into the path of an approaching motor vehicle, within a few feet of it, is the sole proximate cause of an accident resulting therefrom, if the operator of the vehicle had no chance to see him and either stop before hitting him or take other action that would avoid doing so.

Due care in the operation of a motor vehicle does not require the operator to proceed so slowly that he can stop within three feet of a pedestrian hurrying suddenly into its path from between two cars standing in a traffic lane adjoining that in which he is traveling.

Considerable latitude is vested in the Trial Court on the competency of opinion evidence but relief is available in appellate proceedings if discretion is abused.

Opinion evidence concerning the speed of a motor vehicle should not be admitted from witnesses whose view covered a time interval so short as to preclude the opportunity for intelligent thought.

ON EXCEPTIONS.

A minor, by his next friend, and his father recovered verdicts in the Trial Court for damages suffered by the minor who was run over by the defendant's truck while attempting to cross a public highway. Exception was taken by the defendant to the refusal of the Trial Court to direct a verdict and to the admission of certain opinion evidence concerning the speed of the defendant's truck. Exceptions sustained. Case fully appears in the opinion.

Eaton and Peabody, for plaintiff.

James E. Mitchell,
Michael Pilot, for defendant.

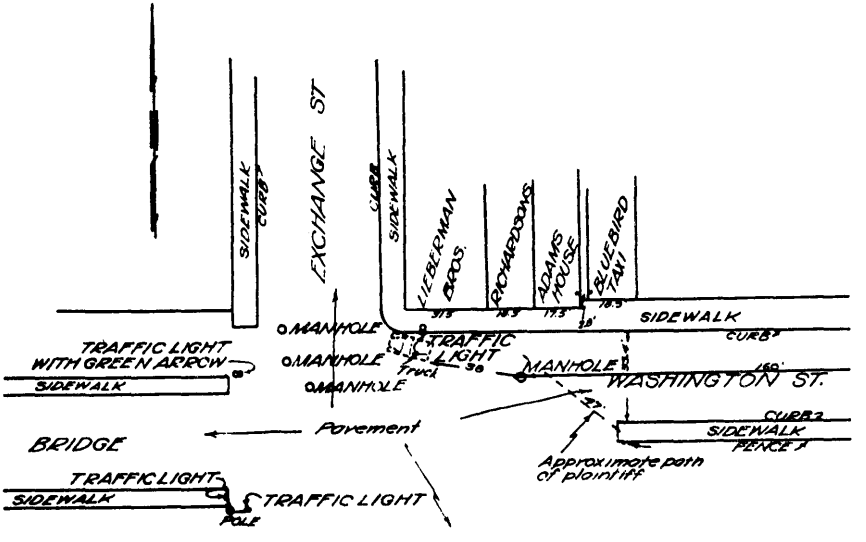
SITTING: STURGIS, C. J., THAXTER, MURCHIE, TOMPKINS, FELLOWS, JJ.

MURCHIE, J. In these two cases, tried together and brought forward by the defendant on identical exceptions, a minor, by his next friend, and his father, recovered verdicts in the Trial Court which represent jury findings on liability and jury estimates of the damage suffered by the minor, run over while attempting to cross a public highway by defendant's truck driven by its agent, and by both the minor and his father in the past and future expense of his medical treatment.

The exceptions are to the admission over objection of the opinion evidence of two witnesses as to the speed of defendant's motor vehicle at or immediately prior to the event, and the refusal of the Trial Court to direct verdicts for the defendant. One of the witnesses whose testimony is in question was just under ten years of age at the time of the accident, the other just over that age. Both were companions of the minor plaintiff and were crossing the road with him when he was injured, as was another boy who did not see the truck at all prior to the accident. Neither of the two who testified on the question of speed saw the truck until it was within a few feet of the point where the accident occurred.

The damage awards are not claimed to be excessive. The issue is liability. It must be resolved with full recognition of the principle that the facts must be viewed in the light most favorable to the plaintiffs, giving them the benefit of every justifiable inference. This principle controlled *Ross* v. *Russell,* 142 Me. 101; 48 A. (2nd) 403; and cases cited therein. Additional principles therein set forth, and supported, are that a pedestrian is not required as a matter of law to look and listen before starting to cross a road, and that the degree of care required of a minor is not that applicable to an adult but must be measured with due regard to age and capacity.

The exact location of the point where the accident occurred is not established more definitely than that it was within two or three feet of the southerly limit of the northerly of three traffic lanes on Washington Street in Bangor, just easterly of Exchange Street, and between seventy-five and a hundred feet easterly of the median line of the latter. The over-all width of Exchange Street, according to a plan in defendant's brief reproducing one in evidence with scaled measurements and a location of the truck added (see *infra*), is slightly in excess of sixty-five feet, approximately twenty feet of which is devoted to sidewalks of substantially the same width on the sides thereof. The distance between the sidewalk curbs approximates forty-eight feet. On Washington Street the curb to curb measurement is thirty-five and four-tenths feet, but the sidewalk on the southerly side stops more than a hundred and ten feet east of the median line of Exchange Street. The northerly traffic lane according to the only estimate in the record was about ten feet wide. The median line of Washington Street east and west of the intersection would jog something like twenty-five feet at Exchange Street, as is shown by the plan.



Some of the evidence referred to hereafter can be considered to best advantage by reference to the plan, and particularly to the location of the westerly end of the sidewalk on the southerly side of Washington Street and the identified business establishments on the northerly side.

The accident occurred at about half past three in the afternoon of a January day in broad daylight. The highway was dry and level but had a small accumulation of ice and dirt along the curb on the northerly side of it, extending into the highway about one foot. It had neither crossing lines nor traffic lines painted on its surface, but traffic at the intersection traveled in three lanes and was controlled by lights which at the pertinent time were holding all eastbound Washington Street traffic west of the intersection and all westbound traffic on that street east of it except that headed to make the turn north into Exchange Street. The northerly lane accommodated that traffic. Defendant's truck, so far as the record shows, was the only vehicle moving in it at the time of the collision, immediately prior thereto or thereafter for some minutes. In the interval the first officer to arrive on the scene made two chalk marks on the highway to identify the locations of a cap of the minor plaintiff found lying in the road and the left rear wheel of the truck where it stood at rest.

On the record the basis for liability must have been a finding that the speed at which the defendant's truck was being driven constituted negligence and was the proximate cause of the accident. This is alleged in the first count in each declaration. Another count in each alleges that it was in an unsatisfactory state of repair, but there is no basis for an affirmative finding thereon. The evidence directly contravenes that allegation. Speed is the issue. The controlling statute, R. S. 1944, Chap. 19, Sec. 102, provides in Sub-paragraph I that motor vehicles shall be driven:

> "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the

> traffic, surface, and width of the highway, and of any other conditions then existing * * *."

Sub-paragraph II specifies limits of fifteen miles per hour in approaching and traversing intersections and twenty-five miles per hour in business districts. The lesser speed is applicable within fifty feet of an intersection where the view is obstructed, and express provision is that it shall be deemed obstructed if there is not a clear and uninterrupted view of the intersection, and the traffic upon all ways entering it, for a distance of two hundred feet therefrom, during the last fifty feet of approach. Express statutory declarations are that speeds within the stated limits are *prima facie* lawful and that operation in excess thereof is *prima facie* not reasonable and proper.

The evidence would require factual decision that the minor plaintiff and his companions were crossing the highway diagonally northwesterly, faster than at a normal walking rate; that none of them looked to see if any westbound traffic was moving in the northerly lane, and none, except possibly the boy who brought up the rear, looked for any after leaving the southerly sidewalk; that neither the minor plaintiff nor the companion who was third in line saw the defendant's truck before the accident; that the minor plaintiff was in the lead and entered the northerly lane, from between two stationary motor vehicles in the middle lane, when the defendant's truck was moving westerly in it within a few feet of the place of entry; that he was struck by it when not more than two or three feet into the northerly lane; that he was thrown to the ground by the impact; that his injuries resulted from being run over by the left rear (dual) wheels; and that the truck came to a stop without leaving scuff marks on the highway and before its front wheels reached the traveled way in Exchange Street. A measurement taken by the police gives the distance from the place where the cap was picked up to the left rear wheels of the truck where it came to rest as thirty-eight feet.

The approximate location of the truck at that place is indicated on the plan, although the testimony does not place it definitely except that the front end was "not quite" into Exchange Street. The truck was of a ton and a half capacity, about sixteen feet long, with a body six and a half feet wide on the outside. Its location with reference to the business establishments at the time of impact is not shown but may be inferred with reasonable accuracy from the facts (a) that the boys were crossing the road from the westerly end of the sidewalk and fence on the southerly side of Washington Street to the Adams House, and (b) that there was a blood-spot on the highway only a few inches from the place where the cap was found, approximately in line with the most easterly manhole shown on the plan. The spot and manhole are a few feet easterly of the property line between Richardson's and the Adams House projected southerly, but the point of impact must have been easterly thereof, since both the impact and the passage of the truck over the minor plaintiff's body would tend to move him westerly. That projected line would be fifty feet from the easterly limit of Exchange Street, roughly sixty feet from the easterly side line of the traveled portion thereof, and upwards of eighty feet from its median line.

That it is the particular and peculiar province of a jury to resolve such issues of fact as are involved in the instant cases is so clearly established as to require no citation of authority. Those factual issues are (a) the rate of speed at which the truck was being operated, (b) the part of it which knocked the minor plaintiff to the ground, and (c) where he entered the northerly traffic lane. On all of them there is a conflict of testimony, as there is on the question whether the boy picked himself up and moved northerly or was picked up by a bystander, but the factual decision on that is not material to the controlling issues. As to those the record carries opinion evidence as to speed from five witnesses, including the two whose competency to testify on the point is challenged by the exceptions, which must be

considered in the light of the incontrovertible fact that the truck was brought to a stop within sixty feet without dragging its wheels; and the statements of four witnesses on each of the other questions, to be considered in the light of equally incontrovertible facts (a) that the injuries were caused by the rear wheels of the truck and not by the front; (b) that the boys were crossing the road diagonally from a place approximately eighty feet easterly of the limit of Exchange Street to a business place the entrance to which was slightly more than fifty feet easterly thereof; and (c) that the cap and blood-spot were more than forty feet east of that street limit.

Factual declarations as to the part of the truck which struck the minor plaintiff and where he entered the northerly traffic lane do not involve the evidence rulings which are challenged. Decision on the latter of these points must precede consideration of speed because of the conflicting *prima facie* speed rules established by the statute. The question whether the statutory last fifty feet of approach to an intersection is to be measured from a street limit or its median line has never been decided and need not be in the present cases. The examination by counsel for the plaintiffs of the draughtsman who prepared the plan indicates that he construes the statute as applicable to the limit rather than the median line, but unless the uniform testimony of the minor plaintiff and his companions is disregarded, the decision must be that he entered the northerly traffic lane and was struck by defendant's truck more than fifty feet from the easterly limit of Exchange Street. The only justifiable inference which will reconcile the testimony of the boys as to where they were crossing the highway with the location of the cap and blood-spot is that the boy was thrown, carried or moved more than ten feet westerly by the impact and passage of the truck. The "Approximate path of plaintiff," shown on the plan by a broken line, indicates that the boys were headed for Richardson's when they crossed the road. This is contrary to all the testimony which identifies the Adams House as their objective.

The verdicts do not disclose whether the factual decision of the jury on liability was based on finding that the accident occurred within fifty feet of the intersection, on the basis of a speed that was *prima facie* not reasonable and proper, or that despite a *prima facie* lawful speed there was negligence because it was in excess of what would have been "reasonable and proper, having due regard to the traffic" and other controls. If the former, it is obvious that the decision is not justified by the evidence, viewing it most favorably to the plaintiffs. To apply the same test to the alternative theory involves the speed evidence.

Disregarding, for the moment, the question of the competency of the opinion evidence challenged by the exceptions, the record contains speed estimates varying from a maximum of twenty-five miles per hour to a minimum of less than ten. The only flat twenty-five mile estimate was that of the boy who was just under ten years of age and was crossing the road with the minor plaintiff, next in line to him, and did not see the truck until it was within three or four feet of him and two or three feet of his leader who was hurt. That this estimate is high is shown by that of the only bystander who saw the truck prior to the accident—around fifteen or twenty—as well as by the boy's admission on cross-examination that as a matter of truth he did not know whether it was going "twenty-five, or ten, fifteen, or thirteen." The evidence of another bystander who gave a flexible estimate "Maybe twenty—twenty-five" must be disregarded. His own story indicates that he did not see either the truck or any of the boys before the accident, yet he averred and reiterated that the truck was traveling too fast, the last reiteration being when he was confronted in cross-examination with a statement to the police shortly after the accident, that it was proceeding at a moderate rate of speed. His reply was "It was going too fast. It might have been moderate."

The jury must have disregarded, as was its right, the opinion evidence of the three occupants of the truck and the

companion of the minor plaintiff who estimated the speed as "faster than seven or eight miles an hour. I know that," or reached its decision on the ground that even the speed indicated by that testimony was too fast in view of the traffic and other conditions. It may have considered the twenty-five mile speed estimate credible, or that of the bystander who estimated "around fifteen or twenty" and quoted the exclamation of some unidentified person "Look at those kids. That kid is going to get hit." That bystander saw the collision but did not specify, and was not asked, how far the truck was from the child when he saw it first. Assuming either view, it is apparent that the jury disregarded the only justifiable inference to be drawn from the stopping of the truck, and the undoubted fact that the injured boy stepped into the path of the truck within three feet of it. It is with reference to that undoubted stopping and stepping that the principle of law which controlled *Ross* v. *Russell, supra,* has its bearing. That case was decided, within the controlling principle, on the ground that a jury would have been justified in finding on the evidence that although the minor did not look and listen before entering a traffic lane between two motor vehicles stopped by a traffic light, she was not chargeable with contributory negligence. The controlling issue here is not contributory negligence but the negligence of the defendant. The only justifiable inferences to be drawn from the stopping of the truck and the stepping of the minor are that the truck was not travelling at more than moderate speed and that the stepping was at a point which gave the driver no opportunity to avoid an accident.

The present facts are not comparable with those presented in *Ross* v. *Russell, supra,* but rather with those in *Levesque* v. *Dumont et al.,* 116 Me. 25; 99 A. 719; and, in lesser degree, those in *Milligan* v. *Weare,* 139 Me. 199; 28 A. (2nd) 463. In both of those cases, as the writer of the opinion in the *Ross* case notes, the real basis for decision was that the act of the pedestrian was the sole proximate cause of the accident. So it was here. Without reference

to the age and capacity of the minor plaintiff or the question of his contributory negligence, the facts, viewed most favorably to the plaintiffs, do not justify a factual finding that the defendant's truck was being negligently driven. Due care in the operation of a motor vehicle under such circumstances as this case discloses does not require that an operator proceed so slowly that he can stop within a distance of three feet if a pedestrian hurries suddenly into the path of his vehicle. Verdicts for the defendant should have been directed.

An additional point on which there is a conflict of testimony, i.e. whether the minor plaintiff was struck by the front bumper of the truck, its fender or its body, may be said to support decision that the defendant herein was not chargeable with negligence, although there is no necessity for resolving the conflict. One of the companions of the minor plaintiff said it was the bumper, another that he thinks it was, and still another that it looked as if it was, or as if it was the fender, yet the second of these said that he did not see the truck at all. The bystander who saw the accident testified that it looked as if the body of the truck hit the boy. It would be hard to reconcile a finding that the boy was hit by the bumper with the undoubted fact that the front wheels did not run over him and the rear wheels did, as would be the natural result if he was knocked down by either the fender or the body. In either such case, and particularly if the impact was with the body of the truck, the inference would be that the minor plaintiff was never in a place where the truck driver had even a chance to see him and stop the truck.

While verdicts should have been directed for the defendant without reference to the question of the competency of the opinion evidence of the two boys about speed, the exceptions challenging the admission of that evidence merit consideration. If it was not competent it is even more apparent that the verdicts should have been directed. A considerable latitude on the issue of the competency of such

evidence is vested in the Trial Court, but relief is available in appellate proceedings if discretion is abused. *Masse* v. *Wing et al.*, 129 Me. 33; 149 A. 385. The Massachusetts Court, in *Koch* v. *Lynch*, 247 Mass. 459; 141 N. E. 677, declared the applicable rule although the exception which raised the issue was overruled on the ground that substantial rights were not injuriously affected by the admission of the incompetent testimony. Chief Justice Rugg declared in the *Koch* case that a witness ought not to be permitted to give opinion evidence on the speed of a motor vehicle when he did not see it "until just as it struck" a plaintiff, saying:

> "He could have had no intelligent thought about the speed, even though fifty-seven years of age."

The simplest mathematical calculation will show that a vehicle traveling at a rate of fifteen miles per hour traverses twenty-two feet in a single second. If we accept the testimony of the boy who saw it for the first time when it was three feet (taking the larger estimate) from the lad who was run over and assume a speed only three-fifths as great as his estimate, it would have reached that lad in less than a seventh of a second. The corresponding distances for speeds of twenty and ten miles per hour are a little more than thirty-two and fourteen and a half, respectively. The corresponding time calculations are a little less than a tenth and a fifth of a second. According to the testimony of the boy the speed would represent travel at more than thirty-six feet per second and the three feet would have been covered in less than a twelfth of a second. The corresponding figures for the other boy are not so extreme because his speed estimate was less than a third but neither time interval would permit intelligent thought. The opinion evidence challenged by the exceptions should have been excluded.

The case presents errors in the admission of evidence and in the refusal to direct verdicts.

Exceptions sustained.

RICHARD DESMOND, PRO AMI

vs.

ADELBERT H. WILSON

HAROLD DESMOND

vs.

ADELBERT H. WILSON

Kennebec. Opinion, August 3, 1948.

Negligence. Instructions.

The refusal of the presiding judge in a negligence action to give requested instruction that child must pay some attention before starting to cross, and while crossing road, is not prejudicial error where subject is covered clearly, fairly, and fully in the charge given.

A requested instruction even though it states law correctly need not be given unless it appears (1) supported by facts, (2) not misleading, (3) not already covered by the charge and (4) refusal would be prejudicial.

ON EXCEPTIONS.

Action of negligence brought by minor and his father and tried together. Verdict for plaintiffs. Defendant brings exceptions to refusal to give requested instructions. Exceptions overruled.

William H. Niehoff, for plaintiffs.

Locke, Campbell, Reid & Hebert, for defendant.

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

FELLOWS, J. These actions for negligence brought by a minor and his father, come to the Law Court on defendant's exceptions. The cases were tried together, and there is one

bill of exceptions for the two cases. There are two exceptions. One exception relates to a refusal to give a requested instruction relative to the rule of care for a child pedestrian crossing the highway, and the other exception relates to the pedestrian rule as given in the charge itself. These exceptions are overruled.

The record contains only the bill of exceptions and the charge of the presiding justice. None of the testimony was made a part of the bill, and none of the testimony, as presented to the jury, is before this court.

The facts stated in the defendant's bill of exceptions are these: On August 25, 1947 an automobile operated by the defendant, Adelbert H. Wilson, struck and seriously injured the plaintiff, Richard Desmond, aged ten years, five months while he was crossing a public highway within the town of Fairfield. The minor plaintiff was walking across the way from the defendant's right to defendant's left and "was struck on the defendant's extreme left side of the way as defendant veered to the left." The bill of exceptions states that the declarations are in the usual form. The declaration of the minor, Richard Desmond, was for his injuries, and that of his father, Harold Desmond, for the consequential expenses. The cases were tried together at the April Term of the Superior Court for Kennebec County and resulted in verdicts for the minor plaintiff in the sum of $10,000 and for the plaintiff father in the sum of $2,100.

The bill of exceptions also says that the evidence introduced by the plaintiff tended to prove that the defendant observed the plaintiff at his right side of the road while three hundred feet away, and that the plaintiff was struck on the defendant's extreme left side of the highway, when the defendant turned to his left. The plaintiff contended that the defendant's negligence of high speed, failure to keep to his right side, and failure to stop seasonably, constituted the proximate cause.

The bill says further that the evidence of the defendant tended to prove that the defendant blew the horn when he first observed the boy, that his speed was forty to forty-five miles per hour, that he veered to the left in an emergency in an attempt to avoid hitting. The defendant contended he was not guilty of negligence causing the damage and injury, but that, in any event, the plaintiff was guilty of contributory negligence.

The specific exceptions, as stated in the bill, are:

> "Exception 1. At the conclusion of the charge of the Presiding Judge, the defendant seasonably excepted to that portion of the charge relating to the duty of the pedestrian crossing the highway. Exception 2. Prior to the charge, the defendant requested the following instructions numbered 1, 2 and 3:
>
> 1. These plaintiffs assume the burden to establish by affirmative evidence that Richard Desmond was in the exercise of due care when he started and continued crossing the road. If they don't so prove under the rules of evidence I have given you, they cannot recover, and the verdict must be for the defendant in both cases.
>
> 2. Such due care of Richard Desmond, which must be proved to recover, means that standard of care which an ordinarily careful and prudent boy of his age (in this case 10 years, 5 months old) would use.
>
> 3. Applied here, such care of an ordinarily careful and prudent boy of that age would require that he pay some attention before starting to cross the road and while crossing it. If the plaintiffs fail to prove to you, under the rules I have given you, that Richard Desmond did pay such attention, they fail to prove his due care, and the verdict must be for the defendant in both cases."

Requested instructions numbered 1 and 2 were admitted to be adequately covered by the charge. The defendant sea-

sonably excepted to the refusal to give instruction numbered 3.

The defendant says:

> "The gist of defendant's contention raised by this bill of exceptions is that the Court failed and declined to instruct the jury that this plaintiff, Richard Desmond, crossing the highway, owed any duty to pay attention before starting to cross and while crossing the road."

The justice presiding at the trial instructed the jury upon the question of care to be exercised by the plaintiff, as follows:

> "Richard comes here and has the burden of satisfying you by a fair preponderance of the evidence, by the weight of evidence, first, that Mr. Wilson was negligent and that his negligence caused the injury and, secondly, that he, Richard, was free from negligence. That is, he did not contribute negligently or carelessly in any way to the injuries or the collision; and thirdly, the matter of damages."

Later in his charge the presiding justice said:

> "Now, the rule with respect to Richard—bearing in mind he has the obligation as plaintiff to satisfy you by the weight of evidence that Mr. Wilson was negligent and that he, Richard, was not—the rule for Richard is different. A child of young years, 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 his age and intelligence are accustomed to use under like circumstances. No hard and fast rule can be laid down as to the care required of children. It is a question of fact, peculiarly within the province of the jury. Mr. Wilson, the driver, is held to the duty of acting as the ordinarily prudent man would act under the circumstances. Richard is held to the care which ordinarily prudent children of his age and intelligence are accustomed to act under like circumstances."

The presiding justice also said:

"Now, a pedestrian—that is what Richard was, a pedestrian—about to cross a road is not flatly, as matter of law, bound to look and listen. It is not the same as crossing a railroad track. In that case it is a heavy train that goes speedily and must go along. The rule is different than in automobile cases of this type. And 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 a driver of a car. A pedestrian, adult or child for that matter, has a right to cross a street but, adult or child, he must use due care; in one instance the due care required of an adult and in the other the due care required of a child of his age and intelligence in crossing a street. You may find—and in speaking of matters of this nature I in no way suggest what you will find—you find the facts—I do not—but should you find some emergency arose you will consider that persons faced with emergencies do not always act with the same care and prudence which we may expect at other times. If the emergency was created by the fault of the defendant, for example, it is one thing. If the emergency was created by the fault of the plaintiff it is another thing. If the emergency was created by the fault of both parties or the fault of neither it is still another situation. The plaintiff is entitled to recover, as I said, if you find the defendant was negligent, and secondly, if you find the plaintiff was not negligent."

The charge also in conclusion summarized as follows:

"So, as I have said, and I summarize now on the point of liability. The cases are decided the same way, either for the plaintiff or the defendant. There is no difference in the question of liability. The burden is on the plaintiff to establish affirmatively that the defendant driver was negligent, that he failed to act as the ordinarily prudent man

should have acted under the circumstances and this negligence or lack of due care caused the injuries. Secondly, that Richard used the care that ordinarily prudent children of his age and intelligence are accustomed to use under like circumstances. That is, he must show the defendant was negligent and that he was not."

In the trial of an action it is the duty of the presiding justice, at the close of the evidence, to present the case, in his charge to the jury, by pointing out clearly and concisely the precise issues in controversy and the rules of law applicable thereto. The justice presiding should make the jury understand the pleadings, positions, and contentions of the litigants, by stating, comparing and explaining the evidence. "He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence and form a correct judgment. He is to see that no injustice is done." *York* v. *Railroad Co.*, 84 Me. 117, 128. The charge is, therefore, a general statement of the claims or theories of both parties, as indicated by the evidence, without expressing an opinion as to the correctness of any claim or theory. R. S. 1944, Chap. 100, Sec. 105; *State* v. *Jones*, 137 Me. 137.

"The correctness of a charge is not to be determined from isolated statements extracted from it without reference to their connection with what precedes or follows." *State* v. *Bragg*, 141 Me. 157, 163. Instructions are to be examined with relation to one another and as an entirety. *Reed* v. *Central Maine Power Co.*, 132 Me. 476, 480. If the instructions are substantially correct, and the legal situation was apparently made clear to the jurors, it is sufficient. *Mencher* v. *Waterman*, 125 Me. 178, 183; *Illingworth* v. *Madden*, 135 Me. 159, 163. When the jury has been properly instructed on a certain principle, the amplification or application of it is in the discretion of the presiding justice. *Glazer* v. *Grob*, 136 Me. 123. If the substance of a requested instruction has been given, the court is not required to repeat it in the language of the attorney. *Bedell* v. *Railway Co.*, 133 Me.

268. A trial judge is under no obligation to single out a part of the evidence and give an instruction on that part. *Young* v. *Potter,* 133 Me. 104.

A party is not entitled to have a requested instruction given, even if it states the law correctly, unless it appears that it is supported by facts, that it is not misleading, that it is not already covered by the charge, and that the refusal to give would be prejudicial. *Investment Co.* v. *Cratty,* 127 Me. 290.

Exception will not be sustained unless it appears affirmatively that the excepting party is aggrieved. *Perlin* v. *Rosen,* 131 Me. 481. It must appear that the error, if there was an error, was prejudicial. *Mencher* v. *Waterman,* 125 Me. 178; *Reed* v. *Power Co.,* 132 Me. 476. Where the evidence is not made a part of the bill of exceptions the evidence cannot be considered. *Jones* v. *Jones,* 101 Me. 447.

In this case, now before the Law Court, the defendant, by his bill of exceptions, claims that the charge was not sufficient, because the court failed, and declined, to instruct the jury that this plaintiff child in crossing the highway should "pay some attention before starting to cross the road and while crossing it." The defendant admits that all the general rules of law as given in the charge were correct "in the abstract," but he says that the jury without the words *"pay some attention"* gained "the layman's impression that defendant must be decidedly careful, the plaintiff, being young, was not bound by law to pay any attention."

After careful examination of the complete charge as given, the court cannot avoid the conclusion that the presiding justice clearly, fairly, and fully stated the case for the jury's determination. It was made plain that the burden was upon the plaintiff to establish his own due care, and that due care on the part of a child was that degree of care which ordinarily prudent children of his age and intelligence are accustomed to use under like circumstances. The words contained in the charge clearly express the distinctions ap-

plicable to the care required of adult and child. *Ross* v. *Russell,* 142 Me. 101; 48 A. (2nd) 403. "We are confident that no member of the panel was confused by it or misdirected in his deliberations." *Illingworth* v. *Madden,* 135 Me. 159, 163. See 5 Am. Jur. "Automobiles," 757-763.

The requested instruction was in the discretion of the presiding justice properly refused. The subject had been covered. The words "some attention" could well mislead, unless the evidence and circumstances warranted such an instruction. The testimony, not being made a part of this record, is not before us. "Some attention" could be considered as a very small or a very indefinite amount of care. Webster's New International Dictionary. This is not the law. It is the due care of the child under the circumstances, as was stated to the jury. Then, too, such an instruction, if not authorized by the testimony, might be improperly considered by the jury as a plain intimation on the part of the court that, in the opinion of the presiding justice, no due and reasonable care, even for a child, was here exercised.

We hold therefore,—(1) that the instructions given were sufficient and proper, and (2) that it was not prejudicial error, in this case, to refuse to give the third requested instruction that the plaintiff was required, in order to be in the exercise of due care, to "pay some attention before starting to cross the road, and while crossing it."

Exceptions overruled.

HAROLD LIPMAN, FRANK LIPMAN
& BERNARD LIPMAN, DBA LIPMAN
POULTRY CO.

vs.

JARVIS THOMAS

Penobscot. Opinion, August 25, 1948.

Partnership. Statutes.

Statute requiring the filing of a partnership certificate before commencing business, and imposing fine for default, is penal in its nature, and being in derogation of the common law must be strictly construed. R. S. 1944, Chap. 167, Secs. 4, 8.

The purpose of the statute is to enable person dealing with individuals transacting business under a partnership assumed name to ascertain the names of those with whom they are dealing, whether the particular business transacted is within the scope of the partnership, and to protect the public against fraud and deceit in extending credit. It was not intended to protect those who obtain credit from the partnership.

A debtor cannot escape payment of an otherwise legal debt because a creditor has failed to comply with statute requiring filing of partnership certificate.

ON EXCEPTIONS.

This is an action on account annexed, for goods, stock and equipment supplied. Plea, the general issue. At the close of the evidence defendant moved for directed verdict which presiding justice denied. Exception reserved. Jury returned verdict for plaintiff. Exceptions overruled.

Abraham M. Rudman,
Francis A. Finnegan, for plaintiff.

Thomas F. Gallagher, for defendant.

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

TOMPKINS, J. On exception by defendant. This is an action on account annexed, for goods, stock and equipment supplied by the plaintiffs to the defendant, Jarvis Thomas. The articles charged in the account were supplied between April 10, 1946 and July 30, 1946. The plaintiffs were Harold Lipman, Frank Lipman and Bernard Lipman, doing business as Lipman Poultry Co., at Bangor, Maine, and were engaged in buying and selling poultry. The defendant secured from the plaintiffs directly, or from various sources on the plaintiffs' credit, the articles enumerated in the account. Plea, the general issue.

The case was tried before a jury and at the close of the evidence defendant's counsel made a motion for a directed verdict. The presiding justice denied the motion and exceptions were reserved. The jury returned a verdict for the plaintiffs.

The defendant thereafter seasonably filed his bill of exception to the refusal of the presiding justice to direct a verdict. His exception is based on the sole ground that the plaintiffs had failed to file a partnership certificate with the city clerk of the city of Bangor as provided by Sec. 4 of Chap. 167 of the R. S. 1944 of Maine. The only question involved is whether the failure of the plaintiffs to comply with the provisions of the statute prevented recovery.

The material facts are not in dispute. The plaintiffs did not file the certificate of partnership as required by the statute. The evidence is conclusive that the defendant received the articles set forth in the account and there was no dispute as to price or credits, and such was the verdict of the jury.

The exception raises the question of the construction of Secs. 4 and 8 of Chap. 167 of the R. S. This question has never before been directly before this court. Sec. 4, as far

as it relates to this case, provides: "Whenever two or more persons become associated as partners or otherwise for the purpose of engaging in any mercantile enterprise, they shall, before commencing business, deposit in the office of the clerk of the city or town in which the same is to be carried on, a certificate signed and sworn to by them, setting forth their names and places of residence, the nature of the business in which they intend to engage, and giving the name under which they are to transact business . . . . ." Sec. 8 provides the penalty: "Whoever fails to deposit seasonably the certificate required by section 4 . . . . . shall be punished by a fine of $5 for each day he is in default."

The plaintiffs in associating as partners were exercising an ancient common law right. As a general rule, in the absence of statute, an individual or partnership may adopt any name it sees fit under which to transact a legitimate business, and contracts so entered into will be valid and binding if unaffected by fraud. *Ex parte First National Bank of Portland,* 70 Me. at 380; *Bath Motor Mart* v. *Miller,* 122 Me. 29; 118 Atl. 715; *William Gallagher Co.* v. *Casey, et al,* 205 Mass. 26; 91 N. E. 124; *Huey v. Passarelli,* 267 Mass. 578; 166 N. E. 727.

The transcript of the case does not disclose that there was any fraud or illegality in the transaction other than the failure to comply with Sec. 4 of Chap. 167 of the R. S. The record does not show that the defendant was in any way injured by the failure of the plaintiffs to comply with the statutes. The defendant urges that the plaintiffs' noncompliance with the statute invoked, so tainted with illegality an otherwise perfectly legitimate transaction, as to prevent recovery. The statute is penal in its nature and in derogation of the common law. It is to be strictly construed. *Campbell* v. *Rankin,* 11 Me. 103; *Rounds* v. *Stetson,* 45 Me. 598; *Wing* v. *Weeks,* 88 Me. 118; 33 Atl. 779; *State* v. *Bunker,* 98 Me. 389; 57 Atl. 95; *State* v. *Wallace,* 102 Me. 232; 66 Atl. 476; *State* v. *Peacock,* 138 Me. 339; 25 Atl. (2nd) 491.

The statute being in derogation of the common law is not extended by implication. *Wing* v. *Hussey,* 71 Me. 188; *Lyon* v. *Lyon,* 88 Me. 404; 34 Atl. 180; *Haggett* v. *Hurley,* 91 Me. 553; 40 Atl. 561; 41 L. R. A. 362; *State* v. *Peabody,* 103 Me. 332; 69 Atl. 273; *Mount Vernon Telephone Co.* v. *Franklin Farmers Co-operative Tel. Co., et als.,* 113 Me. 50; 92 Atl. 934; Ann. Cas. 1917B 649.

The fundamental rule in the construction of a statute is legislative intent. *Craughwell* v. *Mousam River Trust Co.,* 113 Me. 535; 95 Atl. 221. As an aid in ascertaining legislative intent the court will "Look at the object in view, to the remedy to be afforded and to the mischief intended to be remedied." The language of the statute "Is regarded in law as the vehicle best calculated to express the intention of the legislature," such intention, however, cannot be ascertained by adding to or detracting from the meaning conveyed by the plain language used. *Tremblay* v. *Murphy,* 111 Me. 38; 88 Atl. 55; 61 Ann. Cas. 1915B 1074.

The primary purpose of the statute was to enable persons dealing with individuals transacting business under a partnership or assumed name to know or be able to ascertain from a public record, the name or names of those with whom they are dealing and the nature of the business in which they are engaged. From this record an investigation of the financial responsibility of the partnership and the individuals composing it may be made, and whether the particular business to be transacted is within the scope of the partnership. The statute sought to protect the public against fraud and deceit in extending credit. It was not intended to protect those who obtained credit from the partnership. *Cumberland County P. & L. Co.* v. *Gordon,* 136 Me. 219; 7 Atl. (2nd) 619; *Segal* v. *Fylar et als.,* 89 Conn. 293; 93 Atl. 1027; L. R. A. 1915E 747; *Rutkowsky* v. *Bozza,* 77 N. J. L. 724; 73 Atl. 502; *Gay et al.* v. *Seibold,* 97 N. Y. 472; 49 Am. Rep. 533; *Huey* v. *Passarelli,* 267 Mass. 578; 166 N. E. 727.

The statute does not disclose directly or by implication that it was the intention of the Legislature to invalidate business transactions otherwise valid because of the failure of the plaintiffs to comply with its provisions. The statute does not declare the transaction void. It does not forbid doing business before complying with its provisions. It does not forbid recovery. It does not provide for forfeiture. "The prohibition of the statute extends to the use of a name not his own. It does not extend to the business done or contract made." *Segal* v. *Fylar, supra.*

The failure of the plaintiffs to file the certificate merely subjected them to the penalty provided, namely, a fine of $5 for each day of noncompliance after commencing business. No further penalty is attached. *Viracola* v. *Commissioners of Long Branch et al., Supreme Court of New Jersey,* 1 N. J. Misc. 200; 142 A. 252; *Rutkowsky* v. *Bozza, supra; Huey* v. *Passarelli, supra; Kusnetsky* v. *Security Ins. Co.,* 313 Mo. 143; 281 S. W. 47; 45 A. L. R. 189; *Segal* v. *Fylar et als, supra; Haynes* v. *Providence Citizens Bank & Trust Co.,* 218 Ky. 128; 290 S. W. 1028; 59 A. L. R. 450.

Defendant cites several cases in support of his contention. An examination of these cases denying recovery discloses that in *Buxton* v. *Hamblen,* 32 Me. 448, suit was brought against defendant for not completing a sale of unbranded hay. The statute provided for forfeiture of unbranded hay offered for sale or shipment. In *Lord* v. *Chadbourne,* 42 Me. 429; 66 Am. Dec. 290, the statute forbids an action of any kind for the recovery of spirituous liquors or their value. In *Durgin* v. *Dyer,* 68 Me. 143, the sale of unbranded hoops was by statute forbidden and a penalty added. In *Richmond* v. *Foss,* 77 Me. 590; 1 Atl. 830, the decision was governed by the same statute as in *Durgin* v. *Dyer.* In *Nelson* v. *Beck,* 89 Me. 264; 36 Atl. 374, recovery was prohibited by statute. In *Randall* v. *Tirrell,* 89 Me. 443; 36 Atl. 910; 38 L. R. A. 143, the decision is based on public policy and the prohibitory character of the statute. The purpose of the statutes involved in these cases would be wholly

thwarted unless the contracts were held void, and are not therefore decisive of the case at bar.

We cannot conceive that it was the intention of the Legislature that a debtor should escape payment of an otherwise legal debt because the creditor has by adopting a name other than his own rendered himself liable to a fine through failure to file the required certificate. The purpose of the statute is effected when we interpret its plain language to mean only that the failure to file the required certificate before commencing business subjects the offending party to the penalty of a fine.

Exception overruled.

CHARLES L. JONES

vs.

WILLIAM S. SILSBY

Kennebec. Opinion, August 26, 1948.

Brokers. Executors and Administrators.

A contract to compensate broker for selling real estate may be implied from facts and circumstances, but it must appear that the services were rendered in vendor's behalf with vendor's knowledge and consent, or the suggested contract for compensation must have been ratified.

A person acting for an estate in a representative capacity, such as executor, administrator, or trustee, may be liable personally on any contract made by him, unless the law (or a will) permits the credit of the estate to be pledged, and this is true even though the contract is in the interest and for the benefit of the estate.

A contract between a broker and administrator for sale of real estate by the broker without specifying any time therefor must be performed within a year.

ON EXCEPTIONS.

Action in assumpsit on an account annexed to recover a commission for the sale of real estate. Judgment for defendant and plaintiff brings exceptions. Exceptions overruled.

Harvey D. Eaton,
A. Raymond Rogers, for plaintiff.

Blaisdell and Blaisdell, for defendant.

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

FELLOWS, J. This is an action of assumpsit, on an account annexed to the writ, seeking to recover a commission for sale of real estate. It was heard by the presiding justice by agreement with right of exceptions reserved. The court found for the defendant. The case is now before the Law Court on exceptions by the plaintiff. The exceptions are overruled.

The suit was brought in the Superior Court for Kennebec County by Charles L. Jones, a licensed real estate broker, against two defendants, Dr. Archibald Ross and William S. Silsby. During the proceedings the plaintiff discontinued his action as to Dr. Ross, leaving William S. Silsby as the only defendant.

It appears that the late Fannie B. Haslam of China, Maine, died testate February 20, 1943 possessed of certain real and personal estate. Dr. Archibald C. Ross was appointed administrator of her estate with the will annexed, and, while acting as such administrator, on August 4, 1943 entered into an agreement with the plaintiff broker Jones, for the broker to sell for him as administrator certain real property belonging to the Haslam estate. On August 4, 1943 the plaintiff broker arranged for a sale of the property to Albert and Annie Allen for $2,700, and the plaintiff broker received from the Allens a down payment of $100.

This price of $2,700 was later changed on August 13, 1943 to $2,200, to which the $100 was to be applied.

The Allens made application to the Waterville Savings Bank for a loan to make up this purchase price, but Harvey D. Eaton, Esquire, then apparently the attorney for the bank, advised that Dr. Ross as administrator could give no valid title to the land because the personal assets of the estate were sufficient to pay all expenses. The Allens, however, took possession of the property and continued to occupy it.

The will of Fannie B. Haslam provided for a trust, and Mr. Eaton, as attorney for the bank, wrote Mrs. Goldie B. Higgins, daughter of Mrs. Haslam and beneficiary, about the contemplated sale which the bank considered to be for a fair figure. Mrs. Higgins agreed, and petitioned for the appointment of her attorney, (this defendant William S. Silsby) and on November 22, 1943 Silsby was appointed trustee. Mr. Eaton, acting for the bank in its arrangements to perfect the title and secure its loan to the Allens as prospective purchasers, wrote letters of advice and explanation to the plaintiff broker, to the Allens, to Dr. Ross, and to the defendant Silsby. It does not appear that the defendant Silsby ever had any arrangements or any conversation with the plaintiff or with any attorney acting for the plaintiff. Mr. Eaton was the attorney for the bank (or the estate) during all negotiations, and first acted as attorney for this plaintiff when he commenced this action. All the negotiations of the Allens, as purchasers, prior to receiving their deed, were with Dr. Ross the administrator, with the bank or bank's attorney, and with Jones the plaintiff broker. In fact, the plaintiff broker sent his bill on April 8, 1944 for $100 as balance of commission to Dr. A. C. Ross, administrator. Dr. Ross told the plaintiff broker to "send bill to William Silsby" which the broker did.

After the appointment of the defendant Silsby as trustee, Mr. Eaton in order to get the matter concluded, wrote

on June 15, 1944 to the defendant Silsby that "I think he (Jones) negotiated a very good sale" and "it would be to the advantage of the estate in your hands to make sure that the sale goes through as soon as possible." In answer to this letter from Mr. Eaton, the defendant Silsby wrote Mr. Eaton on June 19, 1944 "I have every intention to complete the sale of the Haslam real estate according to Mr. Jones negotiated tentative sale." and "will attend to matters as promptly as I can and trust all parties will be patient until I can get the transfer in proper order."

In answer to an inquiry by the Allens, who were occupying the house and anxious for a deed, the defendant Silsby on March 16, 1945 wrote them "I have no definite information in matter of your negotiations with Dr. Ross regarding the Fannie Haslam property although I assume Dr. Ross has acted in good faith. At this time I am not legally authorized to confirm or ratify any of Dr. Ross's acts. When I have acquired the proper authority from the Probate Court, Kennebec County, in the matter of sale of the property I will get in touch with you."

On April 23, 1945 the Probate Court granted to the trustee a license to sell, and on May 5, 1945 he wrote to the Allens "Some negotiations were made with you by the administrator to pay the sum of $2,200. Therefore, if you still desire to purchase the premises and care to pay $2,200 and assume the back taxes which I understand have not been paid, please advise." On June 25, 1945 the defendant Silsby executed a trustee's deed to C. A. Allen for an expressed consideration of $2,200.

Later, on September 30, 1946, in answer to an inquiry from Attorney Eaton, the defendant Silsby wrote Eaton "I do not understand that any contract was ever made between Mr. Jones and me to sell the property." As a result of this letter from Silsby, Mr. Eaton, acting then as attorney for the plaintiff, broker Jones, brought this action of assumpsit against both Dr. Ross and Silsby in Kennebec Superior

Court for balance of commission. The action was discontinued against Dr. Ross on the plaintiff's motion, and the case against Silsby heard by the court with jury waived and exceptions reserved.

The justice presiding in Superior Court, after hearing the evidence, found that, while Dr. Ross might be liable, there was no contractual or other personal liability on the part of the defendant Silsby, and ordered judgment for defendant. Exceptions were taken by the plaintiff to the court's ruling, and to the finding that the plaintiff failed to establish liability on the part of defendant Silsby.

A person acting for an estate in a representative capacity, such as executor, administrator, or trustee, may be liable personally on any contract made by him unless the law (or a will) permits the credit of the estate to be pledged. This is true even though the contract is in the interest and for the benefit of the estate. *Call* v. *Garland,* 124 Me. 27; 125 A. 225. An executor or other representative cannot create a debt against the deceased. *Davis* v. *French,* 20 Me. 21, 23; 37 Am. Dec. 36; *Baker* v. *Fuller,* 69 Me. 152. Even fees for necessary services of an attorney in settling an estate are claims against the representative personally, although "reasonable fees for necessary and beneficial legal services" are "frequently allowed by judges of probate." *Baker* v. *Moor,* 63 Me. 443, 446; R. S. 1944, Chap. 140, Sec. 44.

It is fundamental law that for a broker to recover compensation, there must be a valid and definite contract, and the right to compensation depends on that contract. The contract may be implied from facts and circumstances, but it must appear that the plaintiff rendered services in behalf of the defendant, with the knowledge and consent of the defendant, or there must be "ratification of a suggested contract." *Morrill* v. *Farr,* 130 Me. 384; 156 A. 383; *Jordan* v. *McNally,* 124 Me. 216; 126 A. 876.

The written contract here between the plaintiff broker and Dr. Ross, the administrator, made on August 4, 1943,

would also have to be performed within one year, where no time was specified. R. S. 1944, Chap. 106, Sec. 12; *Sawyer* v. *Land Bank,* 135 Me. 137; 190 A. 731.

In this case there was no written contract between the defendant Silsby and the plaintiff broker Jones. There was a contract between Jones and Dr. Ross, and the broker Jones procured for Dr. Ross, the administrator, a customer for the real estate in accordance with the contract. The bank's attorney discovered that Dr. Ross, as administrator, could not give a valid deed. A trustee however could give a deed if licensed by the Probate Court. The defendant Silsby was appointed trustee and secured the necessary license. The defendant Silsby, as trustee, sold on June 25, 1945 to the purchaser Allen, with modifications of the terms made by Ross.

The plaintiff contends that there was an implied promise on the part of the defendant Silsby to personally pay the commission agreed upon by Ross, because he "adopted" or "ratified" the original Ross-Jones contract. The court found otherwise, and the record certainly authorizes such finding.

Dr. Ross, as administrator, had no right or authority to sell the real estate, but he made the contract with the plaintiff broker to secure for him a customer. The defendant Silsby was at no time a party to this contract, had no conversation or arrangements with the plaintiff, and it does not appear that he ever had full knowledge of the contract. The defendant Silsby did receive a bill from the plaintiff broker, and he did later sell the property on new terms agreed upon between Silsby and the purchaser Allen. The sending of the bill and the acknowledgment of its receipt, are the only direct connections between the plaintiff broker and the defendant Silsby shown by the record. True, the terms of final sale were somewhat the same as originally offered by the administrator Ross, but, as the presiding justice correctly found, there is no evidence to connect the defendant Silsby and the plaintiff, broker Jones, in a manner to make the defendant Silsby personally liable.

Further than this, the defendant Silsby pleaded specially the statute of limitations, and under almost any view of the facts regarding "adoption" or "ratification" of the contract made on August 4, 1943 between Jones and Ross, this contract might well be considered legally barred as to this defendant as trustee. This defendant trustee received no license to sell until April 23, 1945. See R. S. 1944, Chap. 106, Sec. 12. The justice presiding, properly found that the plaintiff Jones produced to Dr. Ross, the administrator who employed him, a purchaser, but the plaintiff broker performed no further or later acts or services for Ross, or for Silsby.

The record discloses no error in the decision of the Superior Court.

Exceptions overruled.

STATE OF MAINE
vs.
ANTHONY KOLICHE

Oxford. Opinion, August 27, 1948.

Statutes. Intoxicating Liquor. Minors. Constitutional Law.

State liquor licensee selling malt liquor to a minor contrary to Sec. 55 of Chap. 57 of R. S. 1944 as amended by Chap. 194 of P. L. 1945 is not excused by fact he relied upon minor's misrepresentation of age since offense is *malum prohibitum* and intent is not necessary element of offense.

Fact that statute makes minor guilty of false representation and amenable to punishment does not relieve licensee.

ON REPORT.

Upon appeal to Superior Court from conviction in Rumford Falls Municipal Court for illegal sale of liquor to a

minor. Case reported to Supreme Judicial Court upon agreed statement of facts. Judgment for State. Case fully appears in opinion.

Robert T. Smith, County Attorney for Oxford County, for State of Maine.

Theodore Gonya, for respondent.

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

TOMPKINS, J. This case comes before the court on report, on an agreed statement and a stipulation that this court is to render judgment for the State if, under the facts stated, there has been a violation of Sec. 55 of Chap. 57 of the R. S. of this State, if not, then judgment for the respondent.

The respondent, Anthony Koliche of Mexico, in the county of Oxford was arrested upon a complaint and warrant issued from the Rumford Falls Municipal Court, in the county of Oxford, charging him with the offense of selling a quantity of intoxicating liquor, to wit, one case of Krueger ale, to Edward Joseph Bernard, a minor under the age of eighteen years. The respondent was the holder of license #277 issued by the State Liquor Commission authorizing him to sell malt liquors, not to be consumed on the premises, in the town of Mexico. To this complaint on arraignment he pleaded not guilty. He was adjudged guilty and sentenced. The respondent appealed to the November term of the Superior Court for Oxford County.

Before making the sale the respondent inquired of the said Bernard relative to his age and was advised that he was eighteen years old. Relying on that statement of the minor he made the sale in question. Bernard was on the day of the sale in fact only sixteen years of age. The respondent contends that no violation of the statute under the agreed statement of facts is shown, and therefore he should

not be adjudged guilty, because the criminal intent must be proven as a necessary element of the offense. The question presented is one of statutory construction.

The pertinent portion of Sec. 55 of Chap. 57 of the R. S. as amended by Chap. 194 of the P. L. of 1945, reads as follows: "No licensee, by himself, clerk, servant, or agent entitled to sell malt liquor not to be consumed on the premises shall sell, furnish, give or deliver such malt liquor to any person visibly intoxicated, or any insane person, to a known habitual drunkard, to any pauper, to persons of known intemperate habits, or to any minor under the age of 18 years . . . . ."

"Whoever, being a minor, misrepresents his age with intent to procure liquor shall be punished by a fine of not more than $50." This last provision was the amendment of 1945.

The fundamental rule in the construction of a statute is legislative intent. *Craughwell* v. *Mousam River Trust Co.*, 113 Me. 531; 95 A. 221. It is also a recognized rule of construction that a penal statute is to be interpreted strictly in favor of the respondent. *State* v. *Wallace*, 102 Me. 229; 66 A. 476. Although "Penal laws are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intent of the Legislature." *State* v. *Cavalluzzi*, 113 Me. 41; 92 A. 937, 938; *State* v. *Bass Co.*, 104 Me. 288; 71 A. 894; 20 L. R. A., N. S. 495. To arrive at legislative intent the statute must be construed as a whole, and different sections of the same statute may be read together to ascertain legislative purpose and intent. *Rackliff* v. *Greenbush*, 93 Me. 99; 44 A. 375; *State* v. *Frederickson*, 101 Me. 37; 63 A. 535; 6 L. R. A., N. S. 186; 115 Am. St. Rep. 295; 8 Ann. Cas. 48.

The business of selling intoxicating liquors is one attended with danger to the community and especially to the young. The police power of the State is fully competent to regulate it. *State* v. *Frederickson, supra.* This the Legis-

lature has done under Chap. 57 of the R. S. It has established certain safeguards to regulate and control the sale of intoxicating liquors. Sec. 6 enumerates the powers and duties of the State Liquor Commission in issuing licenses. Among other things, subsection 7 of this section provides that in issuing a license the character of the applicant shall be considered. Subsection 9 provides that no license shall be issued to those who have been convicted of any breach of any State or Federal law relating to the manufacture, sale, etc., of intoxicating liquors. Subsection 10 provides that the Commission is to prevent the sale by licensees of wine and spirits to minors. Sec. 60, among other things, provides for revocation or suspension of the license for making sales to persons under age as prohibited by law. Sec. 55 also provides that the licensee shall not sell for consumption on the premises "To any minor under the age of 21 years."

These sections of the statute when construed in connection with that portion of Sec. 55 under consideration dispel any reasonable doubt but what it was the intent and purpose of the Legislature to absolutely prohibit the sale to minors, regardless of the intent or knowledge with which the sale was made. Intent is not an essential element of the offense charged. The statute contains no words indicative of a legislative purpose to make knowledge or intention a necessary element of the offense. The offense charged is not *malum in se* but *malum prohibitum.* No intent need be alleged or proved because the act done was prohibited absolutely. *State* v. *Huff,* 89 Me. 521; 36 A. 1000; *State* v. *Eaton,* 97 Me. 289; 54 A. 723; *State* v. *Rogers,* 95 Me. 94; 49 A. 564; 85 Am. St. Rep. 395; *Church* v. *Knowles,* 101 Me. 264; 63 A. 1042; *State* v. *Chadwick,* 119 Me. 45; 109 A. 372.

It is further urged that the amendment to the statute making the minor guilty of an offense in misrepresenting his age for the purpose of obtaining liquor is, by implication, indicative of legislative purpose to make intent a necessary element of the offense charged, and to come within

the spirit of the law the respondent must know the minor to be such when he makes the sale. The amendment does not in our opinion directly or by implication modify the statute with the violation of which this respondent is charged. It is the duty of the vendor of intoxicating liquor to determine that the person to whom the sale is made is not a *minor* before a sale can be lawfully made to the vendee. The Legislature has seen fit to place that burden upon the licensee. The amendment was designed for the protection of the licensee, not to relieve him from the consequences of his own mistake in respect to the age of the minor, but as a restraint on the minor and a punishment for such false representation. *State* v. *Gulley,* 41 Ore. 318; 70 P. 385.

The respondent through his counsel admits in his brief that the weight of authority is against his position. However, it is strenuously urged that the majority view places too heavy a responsibility, and an unreasonable one, upon the licensee to hold him liable to the penalty provided by the statute, if he makes an honest mistake in the age of the minor to whom he makes a sale of intoxicating liquor. We fully realize that it is often difficult to determine the age of the person to whom a sale of intoxicating liquor is made. In case of doubt the licensee can without harm to himself keep on the safe side.

If there is to be any relaxation of the prohibition against the sale to minors under this statute, the persons who feel themselves aggrieved by present restrictions will have to look to the Legislature and not to the court. In view of the object manifestly sought to be accomplished and the mischief to be remedied by the statute we think it unreasonable that the Legislature intended to make intent on the part of the licensee an essential element of the offense. To do so, the statute would obviously be shorn of the principal part of its operation, and might be evaded with impunity, unless it absolutely prohibited the sale.

Judgment for the State.

LOUIS E. THROUMOULOS, ET AL.
vs.
EMMA FONTAINE BERNIER

York. Opinion, October 2, 1948.

Landlord and Tenant. Injunctions. Equity.

Lessee tenant and subtenant subjected to action of forcible entry and detainer on ground of violations of covenants in leases entitled to maintain suit in equity to enjoin landlord from prosecuting actions where there had been in fact a waiver of landlord's right to rely on violation of covenants, and tenant and subtenant had no adequate remedy at law.

Holding over by lessee is convincing evidence of intention to renew option in lease.

Waiver of covenant not to sublease without written consent of lessor presents question of fact, and waiver may be assumed where lessor with knowledge of subletting continues to treat original lease as in force.

Loss of possession of summer business property pending appeal in forcible entry and detainer action, which is summary process to obtain possession of real etate, may result in irreparable injury.

A mere remedy at law is not enough to prevent injunctive relief; it must be plain, adequate, and as practical and efficient to the ends of justice and prompt administration thereof as the remedy in equity.

ON APPEAL.

Bill in Equity to enjoin defendant from prosecuting actions of forcible entry and detainer against plaintiffs to evict them from property owned by defendant and leased to the plaintiff, Throumoulos. Defendant filed answer with demurrer and sitting justice sustained bill and issued injunction. Defendant appealed. Appeal dismissed. Decree below affirmed.

Simon Spill,
Louis Spill, for plaintiffs.

Lausier & Donahue, for defendant.

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

THAXTER, J. We have before us here a bill in equity brought to enjoin the defendant from prosecuting certain actions of forcible entry and detainer against the plaintiffs, Louis E. Throumoulos, and Lena Segal, or sublessees of theirs, to evict them or any of them from certain property in Old Orchard, Maine, owned by the defendant and leased by her to the plaintiff, Throumoulos. To the bill the defendant filed an answer with a demurrer therein; and, after a hearing, the sitting justice sustained the bill and issued a permanent injunction as prayed for. From this decree the defendant has appealed.

The plaintiff, Throumoulos, was the lessee of the defendant, Bernier, of two separate parcels of land located at Old Orchard. The first parcel was located on East Grand Avenue and was forty by sixty-five feet. This lease was dated September 21, 1935 and ran for ten years with an option to renew for five years on the same basis. The second parcel was likewise located on East Grand Avenue and consisted of lots 22 and 23 from which was excepted the parcel previously conveyed. This lease was dated September 12, 1936 and likewise ran for ten years with an option to renew for five years "to be exercised before the termination thereof."

There was no explicit exercise of the option to renew either lease but the lessor continued to accept rent from the lessee, Throumoulos, after the termination of the first lease, and in each case permitted him or his sublessees to remain in possession and exercise dominion over the property after the expiration of the ten year period. Such holding over by the lessee is convincing evidence of intention to renew the

option, obviated the necessity of further notice, and is binding on the lessor. *Oren Hooper's Sons* v. *Sterling-Cox Shoe Co.*, 118 Me. 404; 108 Atl. 353; 32 Am. Jur. 825.

Each lease contains a covenant that the lessee "will not assign or underlet the premises or any part thereof, without the consent of the Lessor in writing on the back of this lease." The lessee did on September 9, 1939 and again on September 8, 1944, without the consent of the lessor in writing as so prescribed, sublet for a term of five years at least a portion of the buildings on the second lot to Lena Segal, and also on March 25, 1946 did lease to Arthur Gillis and Leon Serunian for a term of five years the land without the buildings included in the first lease.

Because the defendant claims that these leases were made in violation of the covenant in each lease against subletting, she brought the actions of forcible entry and detainer, the prosecution of which was enjoined by the sitting justice. The plaintiffs claim that the defendant had waived the provision of each lease requiring written consent.

Waiver is a question of fact and may be proved by acts and circumstances. If a lessor with knowledge of the subletting continues to treat the original lease as in force instead of reentering for the breach of covenant a waiver of the breach may be assumed. *The Linn Woolen Company* v. *Brown*, 110 Me. 88; 85 A. 404.

In the instant case the sitting justice had found that there was a waiver. He says that the defendant "must have known of the subletting and acquiesced therein." The evidence is ample to support that finding. In fact we do not see how any other conclusion was possible. Mrs. Bernier operated a parking lot across the street; she saw the subtenants move in; she knew that they were making extensive improvements, that they had in one case put their own sign over the entrance to the restaurant building; and there is very strong evidence that she and Throumoulos and she and some of the sublessees talked over the subleases. Instead

of taking immediate advantage of the breach of the covenant of the lease against subletting, she evidently preferred to let those in possession remain, make their improvements, carry the property through the lean months and years, and then take it over with all its improvements and operate it in times of prosperity. What she did not know was that the law will not permit such an injustice. Before asserting what she claims was her right, she watched the subtenants in the spring of 1947 take off the shutters from the restaurant and prepare it for summer business. That troublesome work having been completed, she then brought her suit to evict them.

The defendant through her counsel argues that equity will not grant its extraordinary relief in such a case as this. Apparently this contention is based on the theory that the facts set forth in the bill could be set up as a defense to the actions brought at law to evict the plaintiffs. This issue could have been disposed of in a hearing on the demurrer, and it would have been better practice to have set the case down for such hearing before the merits were considered. Presumably this was not done and a formal hearing on the demurrer was thereby waived. In spite of that procedure the question raised by the demurrer is still before this court on the appeal; for we will not grant injunctive relief if on the record before us it appears that there is an adequate remedy at law. It is not enough that there is a remedy at law. That remedy "must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215; 7 L. Ed. 655, 657; 43 C. J. S. 480.

Clearly here the legal remedy is not adequate. The action of forcible entry and detainer is a summary process to obtain possession of real estate. If perchance the Judge of the Municipal Court should render judgment for the claimant, a writ of possession, in accordance with the provisions of R. S. 1944, Chap. 109, Secs. 8 and 9, could issue immedi-

ately and the tenants be ousted from possession. Even though that possession would be restored if the tenants should prevail on their appeal, they would receive only a reasonable rent for the premises during the time they were dispossessed. In the meantime the summer business would have been gone and they would have been irreparably damaged. The right of equity to intervene is clear, particularly in view of the unconscionable conduct of the defendant. *Oren Hooper's Sons* v. *Sterling-Cox Shoe Co., supra.*

Appeal dismissed.
Decree below affirmed.

PUBLIC UTILITIES COMMISSION
vs.
VAUGHN O. GALLOP

RE: CLARIFICATION OF CONTRACT CARRIER PERMIT 207

Cumberland. Opinion, October 20, 1948

Courts. Public Utilities Commission. Exceptions. Review.

The Supreme Court acting as a law court is a statutory court of limited jurisdiction performing those duties and exercising those powers conferred upon it by statute.

The statute providing questions of law may be raised "by alleging exceptions to ruling of the commission" on agreed statement of facts, or facts found by the commission, refers to a final ruling, order, or decree which disposes of the case, and this ruling must be found erroneous in law in order to sustain exceptions thereto. R. S. 1944, Chap. 40, Sec. 66.

In drafting exceptions to commission rulings form should yield to substance. Exceptions noted to a ruling of the commission at any stage of the proceeding, if allowed, and certified to law court after

final decree of the commission, may be treated in effect as an exception to such ruling, order or decree itself, but an exception so certified will not have the effect of subjecting the final decree to general attack upon any other ground than alleged therein.

Bill of exceptions must show wherein exceptant is aggrieved by the ruling of which he complains, together with showing of substantial prejudice.

The correctness of a ruling on admission of evidence is to be determined as of the time of its offer.

Failure to note an exception to excluded testimony waives the error, if any.

Statute making evidence of "regular operation" admissible means "actual operation" and not mere offer to operate. R. S. 1944, Chap. 44, Sec. 21, Par. III.

ON EXCEPTION from rulings of Public Utilities Commission.

Proceedings before Public Utilities Commission for clarification of permit to operate as a contract carrier. On exception to certain rulings of the commission. Exceptions overruled. Case fully reported in opinion.

Frank M. Libby, for Public Utilities Commission.

Nathan Solman,
Scott Brown, for respondent, Vaughn O. Gallop.
George Barnes, for Cole's Express and Maine Freightways.
Harry L. Milliken, for E. G. Congdon.

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

MERRILL, J. This case is before us on exceptions to certain rulings of the Public Utilities Commission. The proceedings before the Public Utilities Commission were instituted by the commission under R. S., Chap. 44, Sec. 21, Par. III, for the clarification of the permit to operate as a contract carrier held by Vaughn O. Gallop, doing business as Houlton Truck Express.

The original permit was issued by the commission November 15, 1933 to Charles O. McDonald, as a matter of right under the so-called grandfather clause found in P. L. 1933, Chap. 259, Sec. 5, Par. C. This permit was duly kept in force by renewals. With the consent of the commission obtained on February 26, 1946, it was transferred to Vaughn O. Gallop doing business as Houlton Truck Express, and on the same day the permit in question was issued to Gallop by the commission.

August 30, 1946 the proceedings for clarification of Gallop's permit were instituted by the commission and notice ordered thereon. Hearing was held on October 10, 1946 and by adjournment continued on October 16 and 17, 1946. The respondent Gallop appeared in person and was represented by counsel. The commission was represented by its examiner, acting as its counsel, and Cole's Express and Maine Freightways were represented by counsel, as was F. G. Congdon.

During the progress of the hearing several exceptions (numbered I-II-III-IV-V, in the Bill of Exceptions) were noted to rulings of the commission. In respondent's brief exception V was expressly abandoned and need not be considered.

Exception I is to the action of the commission allowing the participation by counsel of other carriers in the proceedings.

Exceptions II, III and IV are to the exclusion of evidence by the commission.

It is to be noted that there is no general or express exception to the final ruling (decree or order) of the commission.

Before considering the respondent's several exceptions, the general question of exceptions to rulings of the Public Utilities Commission and their determination by this court, should be examined.

This court acting as the Law Court is of limited jurisdiction. As such, the Law Court is a Statutory Court. As such, it performs those duties and exercises those powers only which are conferred upon it by statute. "The court cannot properly exceed its statutory powers, nor dispense with the conditions imposed." *Stenographer Cases,* 100 Me. 271, 275; 61 A. 782, 784. The Law Court is without jurisdiction except in cases brought before it *in the manner provided by statute;* viz: through the statutory course of procedure. *Cole* v. *Cole,* 112 Me. 315, 316; 92 A. 174; *Edwards, Appellant,* 141 Me. 219; 41 A. (2nd) 825.

The power of this court to review proceedings of the Public Utilities Commission on exceptions is conferred upon it by R. S., Chap. 40, Sec. 66. So much of that section as is germane to the question now under consideration reads as follows:

> "Questions of law may be raised by alleging exceptions to the ruling of the commission on an agreed statement of facts, or on facts found by the commission, and such exceptions shall be allowed by the chairman of the commission. . . ."

This was the language of the original act, P. L. 1913, Chap. 129, Sec. 53, and has been continued without change to the present day.

With respect to the Public Utilities Commission and the power of review of its findings by the Law Court, we said in *Hamilton* v. *Power Co.,* 121 Me. 422, 423; 117 A. 582, 583:

> "Acting within its powers, its orders and decrees are final except as a review thereof by the regularly constituted courts is authorized under the Act creating the Commission.
>
> Such and the only power of review is found in R. S., Chap. 55, Sec. 55, as amended by Chap. 28, P. L. 1917, and relates only to questions of law. 'Questions of law may be raised by alleging exceptions to the rulings of the Commission on an agreed statement of facts, or on facts found by the Commission.'

> The facts on which the rulings of the Commission are based must be either agreed to by the parties or be found by the Commission. Facts thus determined upon are not open to question in this court, unless the Commission should find facts to exist without any substantial evidence to support them, when such finding would be open to exceptions as being unwarranted in law."

See also *Utilities Commission* v. *Water Commissioners,* 123 Me. 389; 123 A. 177.

We held in *Stoddard* v. *Public Utilities Commission,* 137 Me. 320; 19 A (2nd) 427, that the remedy by way of exceptions provided R. S., Chap. 40, Sec. 66, is available in proceedings under R. S., Chap. 44, Sec. 21, Par. III for clarification of a permit issued under the grandfather clause so-called.

R. S., Chap. 40 is silent on the rules of procedure governing bills of exception and their form, except as provided in Sec. 70 which reads in part as follows:

> "In all actions and proceedings arising under the provisions of this chapter, all processes shall be served and the practice and rules of evidence shall be the same as in civil actions in the superior court except as otherwise herein provided . . ."

This court said in *Hamilton* v. *Power Co., supra:*

> "A bill of exceptions under this statute should accord with the general practice in the courts and comply with the requirements laid down in *Jones* v. *Jones,* 101 Me. 447, 450; 64 A. 815; 115 Am. St. Rep. 328; *Feltis* v. *Power Co.,* 120 Me. 101; 112 A. 906. It should not be general but should specifically set out in what respect the party excepting is aggrieved."

In the case, *In Re The Samoset Company,* 125 Me. 141, 143; 131 A. 692, 693, we said:

> "This court desires to further add, that the form of a bill of exceptions in such cases should, so far as possible, conform to the practice in the courts

> of law, Sec. 59, Chap. 55, R. S., *Hamilton* v. *Water Co.*, 121 Me. 422; 117 A. 582, and should be a summary statement of the contentions of the excepting party and, without referring to other documents or the evidence, except in cases where it is claimed that facts were found without any evidence, should show wherein the excepting party was aggrieved by the alleged rulings."

It is to be noted that the statute, R. S., Chap. 40, Sec. 66 provides how questions of law may be raised, viz., by alleging exceptions to the ruling of the commission (1) *"on an agreed statement of facts,"* (2) *"or on facts found by the commission,"*.

The foregoing provision presupposes that before an exception can be taken of which this court will have cognizance, there must either be an agreed statement of facts, or facts found by the commission, and a ruling upon the one or the other as the case may be. The ruling thus referred to, therefore, must be the final ruling which disposes of the case. In other words, the exceptions which are to come before this court are to the ruling, to wit, the order or decree of the commission upon the facts in the case. It is this ruling which we must find erroneous in law before we can sustain exceptions thereto. This ruling may be erroneous in law for any one of many reasons. Some may be inherent in the ruling itself, such as the making of an order or decree beyond the authority of the commission. Others may be errors arising during the conduct of the hearing, such as the reception of inadmissible evidence and basing the decree thereon, or the exclusion of material evidence and failure to give effect to facts which could be proven thereby in making the order or decree. These and many other things can give rise to orders and decrees erroneous in law. It is to such erroneous rulings, (orders or decrees) made upon either agreed statements of facts or facts found by the commission and, *to such rulings only,* that the statutory right of exception is given.

With respect to alleged erroneous rulings of law during the progress of the proceeding, it might be argued that strict compliance with the statute requires that the bill of exceptions set forth an exception *eo nomine* to the ruling (order or decree) on "the facts found by the commission," and that such alleged erroneous rulings during the progress of the proceeding be set forth as reasons for the exception. A literal interpretation of the language of the statute lends color to such view. On the other hand, if the purpose of the statute, which is to afford correction of rulings (orders or decrees) erroneous in law, is taken into consideration, mere form in the drafting of a bill of exceptions should not be allowed to defeat the purpose of the statute, but form should yield to substance. An exception noted to a ruling of the commission at any stage of the proceedings, if the same be allowed and certified to this court after final decree of the commission, may be treated in effect as an exception to such ruling (order or decree) itself, with the preliminary ruling alleged as the reason therefor. If the preliminary ruling be erroneous in law, and is prejudicial in the sense of being the proximate cause of an erroneous ruling (order or decree) on facts found by the commission, it is ground for vacating the final decree. An exception so certified will not have the effect of subjecting the final decree to general attack upon any other grounds than alleged therein. Furthermore, the bill of exceptions must show wherein the exceptant is aggrieved by the ruling of which he complains, and in addition he has the burden of affirmatively showing that he has suffered substantial prejudice thereby. While we have not before stated the above rule as to manner of alleging exceptions to preliminary rulings, and while the exact question, as such, has not heretofore been specifically called to the attention of this court for decision, the uniform course of action by the court, with respect to exceptions under this statute, has been in accord therewith. In *Hamilton* v. *Power Co., supra,* after quoting so much of the statute as reads as follows: "Questions of law may be raised by alleging exceptions to the rulings of the commission on

agreed statement of facts, or on facts found by the commission," we said in the next succeeding paragraph:

> "The facts on which the rulings of the commission are based must be either agreed to by the parties or be found by the commission. Facts thus determined upon are not open to question in this court, unless the commission should find facts to exist without any substantial evidence to support them, *when such finding would be open to exceptions as being unwarranted in law.*" (Italics ours.)

This language we quoted with approval in *Utilities Commission* v. *Water Commissioners, supra.*

In *Damariscotta-Newcastle Water Company* v. *Itself,* 134 Me. 349; 186 A. 799 we said:

> "There are three exceptions before this court. The first is to the exclusion of evidence offered to show the price for which the utility was purchased in 1924 by its present owner. The second is to the failure of the commission to consider such price. These two exceptions are substantially the same and will be considered together. The third exception is to the order of the commission concerning the amount to be paid by the Town of Damariscotta for fire service."

In that case there was no express exception to the decree itself with the exclusion of the evidence assigned as a reason therefor. The exception was taken to the exclusion of the evidence, and was considered by this court. In that case we further said:

> "Though it is true that under the provisions of R. S. 1930, Chap. 62, Sec. 67, in hearings before the Public Utilities Commission the ordinary rules of evidence apply, yet the mere erroneous admission or exclusion of evidence will not invalidate an order of the commission. Substantial prejudice must be affirmatively shown. See *Northern Pacific Railway Company* v. *Department of Public Works of Washington,* 268 U. S., 39, 44; 45 S. Ct. 412; 69 L. Ed. 836; *United States* v. *Abilene & Southern Railway Company,* 265 U. S., 274, 288; 44 S. Ct. 565; 68 L. Ed. 1016."

We then proceeded to overrule the exceptions not to dismiss them. The latter action is appropriate when the bill of exceptions is not properly before the court.

From this case it is seen that we have in effect treated exceptions to alleged errors in the reception or rejection of evidence as within our jurisdiction to hear and determine.

Guided by these principles of law, we have considered the various exceptions alleged by the respondent.

Exception I

There is no merit in this exception. These parties appeared in response to notice by the commission. It is within the power of the commission to allow appearance and participation in a clarification hearing "by such persons, firms and corporations as it deems necessary." See R. S., Chap. 44, Sec. 21, Par. III; P. L. 1933, Chap. 259, Sec. 5, Par. C.

Exception II

The second exception is based upon the exclusion of exhibit No. 2, which was the entire record of the hearing before the commission on the application for transfer of the McDonald permit to Gallop. It was offered for the alleged purpose of showing McDonald's and Gallop's then understanding of the scope of the business which was being transferred; also for showing the understanding with respect thereto of Mr. Libby, the examiner for the commission who was conducting the hearing.

The rule adopted by this court as to the form of bills of exceptions in this class of cases was clearly enunciated in *Hamilton* v. *Power Company, supra,* in the portion of the decision heretofore quoted herein. It was recognized and restated in *In Re The Samoset Company, supra.* The bill of exceptions, except in cases where it is claimed that facts were found without any evidence, *should show wherein the*

excepting party was aggrieved by the alleged rulings. In the latter case we announced "This court should not be compelled to search through volumes of testimony of exhibits and schedules and the findings of the commission, with which these cases are usually replete, to ascertain what rulings were made, *or wherein the party excepting was aggrieved.*" (Italics ours.)

Where the alleged erroneous ruling is to the admission or exclusion of evidence, not only must the *bill of exceptions* show wherein the excepting party was aggrieved thereby, but he must also, as a matter of substantive law, show substantial prejudice by reason of such admission or exclusion. We said in *In Re Damariscotta-Newcastle Water Co.*, v. *Itself, supra:*

> "Though it is true that under the provisions of R. S. 1930, Chap. 62, Sec. 67, in hearings before the Public Utilities Commission the ordinary rules of evidence apply, yet the mere erroneous admission or exclusion of evidence will not invalidate an order of the commission. Substantial prejudice must be affirmatively shown."

An examination of the rejected exhibit shows that its rejection does not constitute reversible error. It was irrelevant for the purpose offered. It did not bear out the contention of the respondent as to its contents. Its exclusion was non-prejudicial.

Exceptions III and IV

Both of these exceptions are directed to the exclusion of evidence of, or related to, operations by McDonald as a contract carrier subsequent to the test period, March 1, 1932 to June 30, 1933.

Before consideration of the exceptions themselves, it is necessary that we examine the nature and purpose of the proceeding in which the excluded evidence was offered.

The purpose of the proceeding before the commission was the clarification of the respondent's permit. "Clarification

means that the thing exists but is uncertain and cloudy but never non-existent." *Chisholm* v. *U. S.*, 19 Fed. Supp., 274, 279; 85 Ct. Cl. 199. The clarification proceeding assumes the existence of rights. It is instituted to make clear what those existing rights are by granting a new definitive permit, which shall neither extend nor abridge that which in reality already exists. In determining the issue and making a definitive permit, the commission under the statute was to consider the evidence taken in the original hearing and evidence to be submitted in the "further" hearing. The statute, R. S., Chap. 44, Sec. 21, Par. III provides that at the "further" hearing "evidence of regular operation as a contract carrier from March 1, 1932 to June 30, 1933, may be submitted, and the carrier may supplement same by evidence of regular operation subsequent to said period,". The question of the admissibility of evidence raised by exceptions III and IV depends upon the interpretation of what is meant by the phrase "may supplement same by evidence of regular operation subsequent to said period." Obviously, this provision was not designed to open the door so widely as in effect to extend the test period itself. Neither was it the purpose to enlarge the rights originally held by adding thereto new, different and unrelated transportation services which were subsequently performed. So to conclude would be to sanction the enlargement of the carrier's right as a result of illegal operations by him in violation of the "grandfather" permit. Its true purpose was to clarify the scope of the original permit.

In order to throw light upon the true meaning of the original permit, the subsequent operation must be a regular operation and it should be an operation based upon, connected with, and explanatory of the services performed during the test period. To meet this test, and to make the evidence of subsequent regular operation admissible, the groundwork therefor should be laid by the introduction of sufficient evidence of operations during the test period so that the relevancy of the offered testimony may appear at

the time when offered. It was upon this theory, and the failure by the respondent to connect or relate his offered evidence pertaining to subsequent operations with operations within the test period, that the commission excluded the testimony, which exclusions form the basis of exceptions III and IV.

The proceeding before the commission which is now under consideration was instituted to clarify the meaning of the Gallop permit, he having become assignee of the original permit granted to McDonald. Both the original McDonald permit and the Gallop permit limited the permittee to the business of a contract carrier "within the general area and/or for the general purposes within and for which Charles O. McDonald has been regularly engaged in transporting freight and merchandise for hire over the highways of this state from March 1, 1932 to June 30, 1933." The commission was seeking by the clarification proceedings to determine and define what the general area was, and what the general purposes were within and for which McDonald had been regularly engaged in transporting goods during the test period. In determining the admissibility of testimony this is the issue upon which its relevancy depends. The rights of Gallop were limited to the areas and purposes as stated in the permit which was the subject of clarification. It is only as relevant to this issue, and governed by the principles of law we have heretofore announced that evidence of "regular operation" subsequent to the test period was admissible.

All of the exclusions of testimony which are complained of in exceptions III and IV took place before Mr. McDonald had taken the stand and described the nature and extent of his operations within the test period, and at an early stage of the hearing.

In exception III there are two questions which were excluded. The first was addressed to a Mr. Campbell and was as follows:

"Q. Now after the test period, Mr. Campbell, did Houlton Truck Express haul any commodities for Fogg Company from points south of Houlton to Houlton?"

The bill of exceptions does not allege that this testimony was excluded or that exception was noted to its exclusion. A careful search of the entire record which is made a part of the bill of exceptions does show the exclusion, but it fails to show that any exception was noted thereto. The answer of the witness to the next previous question was that he did not recall whether the Houlton Truck Express hauled anything for Fogg & Company in the test period from southerly points to Houlton. Whatever the answer to this question might have been it would have no relation to, nor would it supplement evidence of regular operation as a contract carrier during the test period, within the rule heretofore stated. A sufficient groundwork had not been laid to show the relevancy of the question. On the state of the record at the time of its exclusion the question was inadmissible.

The correctness of a ruling on the admission of evidence is to be determined as of the time of its offer. If at a later stage of the trial the excluded evidence becomes admissible it should be reoffered. See *Melcher* v. *Merriman,* 41 Me. 601. Not only did the defendant fail to reoffer the excluded testimony, but the bill of exceptions and the record failing to show that any exception was noted to its exclusion, the error, if any was waived. Rule XVIII of the Superior Court. R. S., Chap. 40, Sec. 70.

Exception III further sets forth the following:

"Q. Mr. Hovey, in 1933, after you became superintendent of the First National Stores in the Aroostook Area and it was your duty to arrange for the transportation of commodities coming into Aroostook from southerly points in the state did you ever have any conversation with Charles O. McDonald, as owner of Houlton Truck Express, concerning the

> hauling of commodities other than those he had been regularly hauling. That can be answered 'yes' or 'no.'
>
> A. Yes.
>
> Q. What was those conversations?"

The latter question was excluded, and an exception which is contained in Exception III, noted.

Neither the bill of exceptions nor the record discloses what the answer would have been. Neither is it shown that any services were rendered in accord with such conversation. Counsel for the respondent stated "I think this witness should be permitted to testify to conversations which he had with McDonald which, will or will not, show what McDonald was holding himself out to do." In the absence of any showing as to what the answer would have been the respondent fails to show that because of the exclusion he suffered substantial prejudice under the rule heretofore stated. Basically, however, the question was inadmissible. The statute makes evidence of "regular operation" subsequent to the test period admissible. "Regular operation" to our minds means actual operation, not a mere offer to operate. It is only actual operation subsequent to the test period, and of the nature heretofore defined, that throws light upon what the actual operations were during the test period. A mere offer to transport, unconnected with any evidence of actual transportation, has no tendency to show the nature or extent of "regular operation" either within or subsequent to the test period. The respondent takes nothing by Exception III.

Exception IV is based upon the exclusion of the following question:

> "Mr. Hovey, after you became manager superintendent in 1933, was the Houlton Truck Express engaged to haul any commodities for First National Stores from southerly points in Aroostook County, which commodities were other than those hauled during the test period?

Mr. Barnes: I object.

Mr. Brown: Could I add this to the question—and which commodities were also commodities customarily stocked by the First National Stores in the test period."

This question was excluded, not on the ground that the carrier is necessarily limited to the particular commodities carried in the test period, but on the ground that sufficient evidence had not theretofore been introduced to connect the subsequent operation with that in the test period.

Whether or not sufficient foundation had in fact been laid for the question may be open to doubt. However that may be, the findings of the commission show that its exclusion was not prejudicial. In its decree which allowed the transportation of *groceries,* the commission did not limit the respondent to the specific articles transported during the test period. By express finding the commission held:

> "the test period haul of food products was so broad as to constitute transportation of groceries in general. We think it could not fairly be considered anything less than a service to grocers including *any and all commodities customarily dealt in by them.* (Italics ours.) The very item 'groceries' is in our opinion equally inclusive. It is defined in Webster's International Dictionary Second Edition, Unabridged as: 'The commodities sold by grocers, as tea, spices, etc.' We do not think it incumbent upon respondent in all cases to prove the handling of each specific commodity during the test period. If he shows, as we think he has with respect to groceries, a sufficient variety of goods of a particular class to warrant a finding that he was engaged in transporting that class of goods in general, it is sufficient to embrace all items falling, or which may subsequently fall, within the general category."

With this broad treatment of the subject matter of groceries in the decree as including any and all commodities customarily dealt with by grocers, the respondent fails to

show that he was prejudiced by the exclusion of the testimony which is the subject of Exception IV.

The entry must be:

Exceptions overruled.

STATE OF MAINE

vs.

WILLIAM M. MANN

Oxford. Opinion, October 22, 1948.

Criminal Law. Charge to Jury.

Charge of presiding justice in drunken driving prosecution alluding to witness as "a police officer, a State Police Officer, employed by the state to enforce the laws to see that the general public is protected" and alluding to another witness as "the jail keeper, a deputy sheriff, sworn to uphold the laws," and further alluding to their expression of opinion that respondent was "under the influence of intoxicating liquor" together with question by presiding justice referring to the latter witness "Does he know what he is talking about?" is not prejudicial error as being a direct or indirect expression of opinion prohibited by R. S. 1944, Chap. 100, Sec. 105.

Statement in charge by presiding justice that drunken driving law was for the protection of persons lawfully upon the highway and "we have no option but to take the law as we find it" not prejudicial error.

Statement in charge of presiding justice concerning the necessity for the jury to agree if possible, "if there is a disagreement, discuss it with an open mind and attempt to reach a conclusion" is not objectionable as being premature.

Statement in the charge of the presiding justice differentiating between "being intoxicated" and "at all under the influence of intoxicating liquor" and referring to the latter as being under the influence "no matter how little" is not error.

ON EXCEPTIONS.

The respondent was convicted of operating a motor vehicle on a public highway while under the influence of intoxicating liquor. After a verdict of guilty, the respondent filed exceptions to the charge of the presiding justice. Exceptions overruled.

Robert T. Smith, County Attorney, for the State.

Theodore Gonya, for respondent.

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

FELLOWS, J. This case is before the Law Court on respondent's exceptions to the charge of the presiding justice. In addition to the five portions of the charge complained of, the bill of exceptions makes the complaint, warrant, docket entries, report of evidence, and the entire charge a part of the bill. The exceptions are overruled.

The respondent was first tried and found guilty in the Norway Municipal Court upon complaint of operating a motor vehicle on a public highway while under the influence of intoxicating liquor. Upon appeal he was again tried in the Superior Court for Oxford County, and the jury returned a verdict of guilty.

The record shows that the state's case was based upon the testimony of a state police officer who made the arrest in the evening of June 17, 1947, and the testimony of a deputy sheriff who saw respondent at the time of arrest. This evidence for the state consisted of the identification of respondent as driver, the general appearance and actions of respondent indicating an intoxicated condition, manner of talking and statements made by respondent, opinions of the officers, and the physical tests made. The defense consisted of testimony of the respondent (who admitted taking three drinks that evening at a dinner some time before arrest),

who denied that he was under the influence, and also the testimony of two men (who had been with the respondent that evening) who denied that respondent was or appeared to be under the influence of liquor.

At the conclusion of the charge of the justice presiding the respondent excepted to certain portions, which he claims were erroneous and prejudicial.

Exception 1

> "You have in this case the opinion of Mr. Conant, and the opinion of another officer, the man at the jail, as to the man's condition. Mr. Conant is a police officer, a state police officer, employed, like many others, by the state to enforce the laws, to see that the general public in its proper and legal use of the highways is protected by those who ignore or violate the law. Mr. Conant tells you and gives it as his opinion that the man, the respondent here, was under the influence of intoxicating liquor."

Exception 2

> "The jail keeper, another officer, a deputy sheriff of this county, sworn to uphold the laws of this state, tells you that in his opinion this respondent was under the influence of intoxicating liquor when he was brought to the jail. Does he know what he is talking about? Has he had that experience, which is that of an ordinary officer, to judge the condition of people and judge the condition of this respondent?"

The respondent complains that the foregoing extracts from the charge were indirect "expressions of opinion" as to the credibility of the witnesses, and placed "a judicial halo over the heads of the two officers." We fail to see that these comments of the presiding justice were erroneous, even standing alone, and they certainly were not erroneous or prejudicial when the whole charge is examined and considered. *State* v. *Jones,* 137 Me. 137; 16 A. (2nd) 103; *Benner* v. *Benner,* 120 Me. 468; 115 A. 202. There was no

"obvious attempt to suggest the honesty of the law enforcement officers, as distinguished from the interest of the respondent" as in *State* v. *Brown,* 142 Me. 106; 45 Atl. (2nd) 442, 445; nor is there a direct or indirect expression of opinion as prohibited by R. S. 1944, Chap. 100, Sec. 105. The province of the jury to pass upon credibility was not interfered with. *State* v. *Smith,* 140 Me. 44; 33 A. (2nd) 718. There were no argumentative comparisons, as appear in the cases cited by respondent: *Strader* v. *United States (CCA),* 72 Fed. (2nd) 589; *Minner* v. *United States (CCA),* 57 Fed. (2nd) 506. It does not follow that there is an expression of opinion because interrogatories were addressed to the jury. *State* v. *Day,* 79 Me. 120, 125; 8 A. 544; *State* v. *Matthews,* 115 Me. 84; 97 A. 824. There was no speaking in a manner implying that the words were "entitled to obedience." *State* v. *Jones,* 137 Me. 137, 140; 16 A. (2nd) 103. In fact, the complete charge appears to be an impartial and judicial statement by the justice who presided, of conflicting claims made by capable attorneys for the state and the respondent. The jurors were left free to use their own judgment as to all matters of fact, and were so instructed. Whatever the emphasis, or whatever the tone, used by the presiding justice, it cannot now be known or considered. If the respondent felt that the justice in his charge "spoke daggers," the record discloses that there were no "daggers" used.

Exception 3

> "This law was enacted, Mr. Foreman and members of the panel, for the protection of the men and women and children who are legally and properly upon the highways. These laws were enacted and placed on the statute books to protect the general public, you and I, and we have no option but to take the law as we find it."

This instruction was not improper. It was not argumentative. It stated only what is well known to every person. It was also proper notice to some unreasoning or thought-

less juror, who might be inclined, for personal reasons, to dislike the law, that its enactment was a vital necessity.

Exception 4

> "It is important again that you should agree, whatever your verdict may be, so that when you come into this court there will be a unanimous verdict, as there must be, in order to settle the case finally. That is why you are allowed, Mr. Foreman and members, to retire to your room by yourselves with no one else present to discuss the case which you have heard. It may be it has made different impressions on different individuals on the jury. You should sit down as reasonable men and women and if there is any difference of opinion try to reconcile your opinions; try to see the other person's point of view, so that you will finally agree on a verdict and bring it into this court and end once and for all the litigation that is involved; because if you fail to agree, Mr. Foreman and members of the panel, at some other term of court before another jury, the same facts must be presented to them for settlement, to men and women who are not any better qualified than you are to settle the question. So you should, if there is a disagreement, discuss it with an open mind and attempt to reach a conclusion so that you will bring into court, as I said, a unanimous verdict."

The respondent's attorney in his brief admits that "There is no quarrel with the language used or the thoughts expressed. In the abstract, it is probably sound. The complaint is that the instruction was premature. There was nothing to indicate that this jury would not agree on a verdict." The court sees no force in this claim. The record shows this to be the first case tried during the term, and it has long been considered not only proper but necessary for the presiding justice to fully instruct jurors on their responsibilities and duties, either by a separate statement made at the commencement of the term, or by inclusion in the first charge, as was done here.

Exception 5

> "The charge here is that on the 17th of June the respondent operated his car while under the influence of intoxicating liquor; not that he was intoxicated; the charge is under the influence of intoxicating liquor. Our statute says, 'or at all under the influence of intoxicating liquor' and I am not going beyond that for a definition, Mr. Foreman and members of the panel, because if we discussed that angle, if I did or attempted to, having in mind all that has been said about it by different people who pretend to know, you and I would be in trouble and be confused. At all under the influence of intoxicating liquor is as plain English as anybody can use; plain English that anyone can understand. At all means at all, no matter how little. That is the charge against this respondent, and the state must satisfy you to a reasonable certainty that the respondent is guilty."

The respondent contends that this instruction was ambiguous, confusing and erroneous because it attempts "to distinguish between a state of intoxication and a state of being under the influence." The respondent says "there is no distinction between the two states."

The Legislature has, however, recognized that there is a difference. The statute says that a person is guilty of the offense if he operates, or attempts to operate, a motor vehicle "when intoxicated or at all under the influence of intoxicating liquor or drugs." R. S. 1944, Chap. 19, Sec. 121.

The word "intoxicated" is a synonym for "drunk." "Intoxicated" commonly and usually means inebriated to such an extent that the mental or physical faculties are materially impaired. While the difference may be only in the degree of impairment, the expression "at all under the influence" means simply what the words themselves say. "At all" has been defined as "in any way or respect" or "to the least extent or degree." See Webster's New International Dictionary, "intoxicated," "all"; *State* v. *Taylor,* 131 Me. 438, 441; 163 A. 777.

The opinions of courts in other states are of but little or no assistance, because the statutes are not identical. If there be any need beyond the words themselves to more fully explain the intention of the Maine Legislature, an examination of the original law and amendment thereto clearly show the legislative purpose. In R. S. 1916, Chap. 26, Sec. 38, the prohibition was in operating a motor vehicle "while under the influence of intoxicating liquor, so that the lives or safety of the public are in danger." This plainly did not meet the public necessity, for the reason that a jury too often had a difficult time to measure the extent of the liquor influence that would endanger. The attempts to prove the number and kind of drinks taken, the times when taken, and the lack of ability of the operator to carefully drive his car, usually failed. It is common and universal knowledge that individuals are affected in different manner and degree by amounts of liquor taken, and by their own physical condition at the time. Where a single drink might render one person "under the influence" to a noticeable degree, several drinks would not apparently affect another in any degree. It was therefore determined by the Legislature that the law be amended so that a jury need not measure the "capacity" of the automobile operator, and would not be obliged to find the dangerous extent of the liquor influence upon his abilities to properly operate his car. The amendment was also to avoid the common acceptance of "intoxicated,"—that the width of the way is of more importance to the intoxicated individual than the length.

Chap. 211, Sec. 14, P. L. 1919, changed the then existing statute and covered the condition of being "intoxicated" or "at all under the influence of intoxicating liquor." No matter how little the mental or physical faculties and abilities may be affected, if they are in fact affected, the law of "at all under the influence" now applies. The burden is of course upon the state to prove beyond a reasonable doubt that the car operator was *to some extent* under the influence of intoxicating liquor. This was so stated in the charge.

"The condition that makes a driver, under the influence of intoxicating liquor or drugs, a menace to the traveling public, is not only a lessening of his mental alertness, or an exhilaration thereof, but as well any weakening or slowing up of the action of his motor nerves, interference with the coordination of sensory and motor nerves, which may cause sluggishness where quickness of action is demanded." *Barnes, J. in State* v. *Taylor,* 131 Me. 441; 163 A. 777, 778.

All thoughtful citizens recognize this extraordinary and killing danger due to a motor vehicle whose operator is "intoxicated" or "at all" under the influence of liquor or drugs, and the statute should be interpreted to protect, so far as may be, every person lawfully upon the highway. The court finds no error in the instruction that "at all means at all, no matter how little."

The court fully realizes the importance of this case both to the respondent and to the state. It has carefully read and studied the briefs of counsel, the bill of exceptions, the evidence, and the whole charge. We do not hesitate to say that the complete record bears convincing witness to a fair trial and a just verdict.

Exceptions overruled.

STATE OF MAINE
vs.
FRANK A. BOYNTON

Penobscot. Opinion, October 22, 1948.

Criminal Law. False Arrest. Former Jeopardy.

Upon indictment for operating motor vehicle while under the influence of intoxicating liquor, respondent's plea to the jurisdiction of the court upon ground (1) that there existed a pending appeal upon docket of Superior Court from a conviction before Trial Justice for same identical offense and (2) that arresting officer never obtained legal warrant or presented him for trial before a court of competent jurisdiction, *overruled* where it appears that Trial Justice had no jurisdiction to hear and determine the cause and an indictment was regularly returned to Superior Court by the Grand Jury.

In the absence of specific statutory or constitutional provisions, neither illegality of arrest, nor arrest rendered illegal *ab initio* due to failure or delay in obtaining warrant, nor prosecution before a court without jurisdiction, amount to an immunity bath for crime, nor do they bar a new and independent prosecution for the same crime instituted before a court of competent jurisdiction.

Former jeopardy does not exist unless previous trial is before a court of competent jurisdiction.

R. S. 1944, Chap. 134, Sec. 4 imposing upon officer duty to arrest and detain persons found violating any law until legal warrant can be obtained is coextensive with common law powers of officer to make arrest without warrant for offenses committed in his presence, and failure to seasonably obtain warrant subjects officer to civil liability.

Constitutional right to speedy trial is a personal privilege which may be waived, and respondent's appeal to Superior Court without raising question of jurisdiction before Trial Justice amounts to waiver of right to speedy trial. Const. of Maine, Article I, Sec. 6.

Illegal arrest without warrant is no bar to legal prosecution subsequently instituted unless offense is one which cannot be maintained unless respondent is arrested therefor during its commission (i.e., "being found intoxicated in public place").

R. S. 1944, Chap. 19, Sec. 134, gives Superior Court and inferior court original concurrent jurisdiction of offence of operating motor vehicle while under influence of intoxicating liquor.

Consideration by Supreme Court of two distinct and separate defenses contained in dilatory plea does not amount to tacit approval of duplicitous dilatory pleading, since such plea is not bad for duplicity where neither defense is valid in substance as distinguished from form.

ON EXCEPTIONS.

Defendant indicted for operating a motor vehicle while under the influence of intoxicating liquor. Plea to the jurisdiction by respondent. General demurrer to the plea filed by the state. Demurrer sustained and plea overruled by court and respondent excepted to the ruling. Respondent ordered to plead over and proceed to trial and respondent filed exceptions to this ruling. Verdict guilty, and respondent filed exception to refusal of court to give instructions requested. Exceptions overruled. Judgment for the state.

John H. Needham, County Attorney for Penobscot County, for State of Maine.

James D. Maxwell, for respondent.

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

MERRILL, J. This case is before the court on exceptions by the respondent. The respondent was indicted at the January Term, 1948, of the Superior Court for Penobscot County for operating a motor vehicle on October 2, 1947, upon a public way in Brewer while under the influence of intoxicating liquor.

The indictment was returned on the ninth day of January 1948, being the fourth day of said term, and on that day *capias* was issued. On the nineteenth day of the term, the respondent was arraigned upon the indictment and on the same day filed a plea to the jurisdiction. On the same

day the state filed a general demurrer to the plea. The court after hearing sustained the demurrer and overruled the plea, whereupon the respondent seasonably excepted to said ruling. Thereafterwards, on the same day, the respondent was ordered to plead over and proceed to trial and exceptions were filed to this ruling. The respondent entered a plea of not guilty, the case proceeded to trial and a verdict of guilty was rendered. After the charge of the presiding justice the respondent took exceptions to his refusal to give a requested instruction.

The case is now before this court upon the respondent's exceptions to, (1) the sustaining of the demurrer and to the overruling of his plea to the jurisdiction, (2) the order of the court that he plead over and proceed to trial, and (3) the refusal to give the requested instruction. The respondent at the time of argument in the Law Court not only did not urge his exception to the refusal to give the requested instruction but expressly waived the same. We therefore consider only the exceptions to (1) the sustaining of the demurrer to the plea to the jurisdiction, and the overruling of the plea, and (2) the exceptions to the order to plead over and proceed to trial. Decision upon the first exception is decisive of the second.

By his plea the defendant attacks the jurisdiction of the Superior Court to hear and try him upon the indictment on two grounds.

The first ground of attack is that at the time of the finding of the indictment there was still pending upon the docket of the Superior Court his appeal from a conviction before a Trial Justice for the same identical offense, and which appeal he says was in effect still pending at the time he was required to plead to, and when he was tried upon the indictment. Although the complaint and warrant in the appeal case had been quashed after the indictment was found and before the plea to the jurisdiction was filed, the respondent claims that this action was ineffectual; and that therefore, the appeal was still pending at the time he was

required to plead over and proceed to trial upon the indictment.

In his plea, by appropriate allegations of fact, as well as by direct averment, the respondent sets forth that Edward F. Dow, the Trial Justice before whom he was tried and convicted, and from whose sentence he had appealed, had no jurisdiction, under the law as set forth in *State* v. *Harnum*, 143 Me. 133; 56 A. (2nd) 499, to either hear the complaint or sentence him thereon.

The second ground of attack upon the jurisdiction of the Superior Court to hear and try the defendant upon the indictment is that the defendant was originally arrested, for the offense for which he was later convicted, without a warrant; that the officer not only unreasonably delayed, but in fact never obtained a legal warrant from or presented him for his trial thereon before a court of competent jurisdiction; that because of such unreasonable delay and failure he was not subject to indictment for the same offense and trial thereon in the Superior Court.

There is no merit in either of these objections to the jurisdiction of the Superior Court to hear and try him upon the indictment upon which he has been convicted and sentenced.

Although there are many exhibits which are made a part of the bill of exceptions none of them were set out in the plea nor made a part of the same by reference. In determining the exceptions to the sustaining of the demurrer to the plea and the overruling of the plea, we are confined to the plea as filed. We must take our facts from the plea as therein alleged, and being confessed by the demurrer we must accept them as true. The plea must stand or fall by its own strength. In dilatory pleas, and a plea to the jurisdiction is a dilatory plea, "every material fact" necessary to its maintenance "must be clearly stated, and not left to inference or presumption. The court will take knowledge of an implication of law, but not of an inference of fact." *State* v. *Ward*, 64 Me. 545, 549.

The case of *State* v. *Harnum, supra,* is decisive of the proposition that if a Trial Justice assumes to take jurisdiction and convicts in a case over which he has no jurisdiction, and if there be an appeal from such conviction to the Superior Court, such original lack of jurisdiction carries through into the Superior Court and requires that the case be quashed in the Superior Court.

Even if the pendency of another prosecution is a bar to simultaneous prosecution subsequently instituted for the same offense in another court of concurrent jurisdiction (upon which question there is a conflict of authority, and upon which we need express no opinion) to constitute such bar the prior prosecution must be pending before a court of *competent jurisdiction* to determine the cause. Two courts cannot have concurrent jurisdiction when one of them is absolutely without jurisdiction. In this case the defendant's plea to the jurisdiction negatives all jurisdiction of the Superior Court in which it was pending to hear, try, or determine the respondent's pending appeal, as well as the jurisdiction of the Trial Justice who tried and convicted him in the first instance. Such want of jurisdiction is affirmatively shown in the plea both by direct allegation and by averment of facts which bring the case within the rules laid down in *State* v. *Harnum, supra.* It may be noted that the same Trial Justice acted in this case as in the Harnum case, and that the facts set forth in the plea in this case showing his lack of jurisdiction to hear and determine the case against this respondent are the same which were held to show his lack of jurisdiction in the Harnum case.

An appeal pending in the Superior Court from a conviction before a Trial Justice who had no jurisdiction to hear and determine the cause, is not a bar to a trial in the Superior Court for the same offense upon an indictment found and returned while such appeal is pending therein. This being true, the question as to whether the complaint and warrant were properly quashed in the Superior Court is of no importance, for if we should hold them to have been

improperly quashed and therefore in legal effect still pending, the pending appeal which the Superior Court is without jurisdiction to hear and determine would not be a bar to trial upon the indictment for the same offense as that alleged in such complaint and warrant.

The second ground of attack upon the jurisdiction of the Superior Court to hear and try the respondent upon the indictment is based upon the fact that in the first instance the respondent was arrested without a warrant and that there was an unreasonable delay in obtaining a valid warrant from, and presenting the defendant for trial thereon before a court of competent jurisdiction prior to the convening of the Grand Jury on January 6th, which Grand Jury returned the indictment on January 9th. By the plea the defendant alleges, though not by name, that the *Harnum* case, which it is alleged decided that Edward F. Dow had no jurisdiction to hear and try cases in Brewer, was decided by this Court December 26, 1947 and rescript therein was filed the 27th day of December. The plea further alleges "that from the 26th day of December, 1947, to the 6th day of January, 1948, being the day that the Grand Jury for the Superior Court for said County of Penobscot convened, was a period of eight days within which time the said officer who made said arrest could have obtained a warrant, but that the said police officer who made said arrest did not obtain a warrant within a reasonable time thereafter although said Bangor Municipal Court was in session every day from the 26th day of December, 1947, to the 6th day of January, 1948, and the said Harold A. Towle, Esquire, was available as a Trial Justice to hear and try said case." The plea by proper averments had previously stated that both the Bangor Municipal Court and Trial Justice Towle had jurisdiction to hear and determine the cause.

The situation of the plaintiff, so far as this ground of defense is concerned, *according to the facts set forth in the plea* may be summarized as follows: The respondent was arrested by an officer without a warrant, the next morning

the officer obtained a warrant from Trial Justice Dow, who was authorized to issue the same. See *State* v. *Harnum, supra,* where we stated "His authority to issue the warrant is undoubted. Any Trial Justice of the county had that authority." The officer then, instead of taking his prisoner before a court of competent jurisdiction, took him before Trial Justice Dow, *who according to the allegations in the plea* was without jurisdiction to determine the cause, and before whom trial and conviction was had and an appeal taken therefrom. On December 26, 1947 the lack of jurisdiction on the part of Dow became apparent upon the filing of the decision in the *Harnum* case. Between the 26th of December and the convening of the Grand Jury the officer took no steps to obtain a new warrant and prosecute before a court of competent jurisdiction. On this state of facts, by his plea, the respondent poses this question of law: Does the fact that a respondent who was arrested without a warrant, and for whose arrest a legal warrant was seasonably obtained, was presented for trial and tried before a court without jurisdiction to hear and determine the cause, prevent a new prosecution for the same crime before a court of competent jurisdiction? We unhesitatingly answer this question in the negative. On the facts alleged in the plea, the action by the magistrate in hearing and trying the case was void, he being without jurisdiction. *State* v. *Harnum, supra,* and cases cited therein. Former jeopardy does not exist unless the previous trial was before a court of competent jurisdiction. *State* v. *Slorah,* 118 Me. 203; 106 A. 768; 4 A. L. R. 1256; *State* v. *Elden,* 41 Me. 165. Trial and conviction or trial and acquittal before a court without jurisdiction do not prevent another prosecution for the same offense. See *Commonwealth* v. *Peters,* 12 Metc. Mass. 387, 396 where the court says:

> "It being clear that the indictment against the defendant, in the district court of the United States, for the same assault charged in this indictment, was not within the jurisdiction of that court, we may presume that the acquittal there was upon

> that ground and not upon the merits. But whether it was so in fact, or not, it is equally clear that no legal judgment could have been rendered on a conviction in that court, and therefore that an acquittal there is no bar to this indictment."
>
> "an acquittal, by a court having no jurisdiction, is in legal consideration no trial, and cannot be a bar to an indictment in a court of competent jurisdiction." *Idem* Page 392.

As said by the Supreme Court of the United States:

> "We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged."
>
> *Grafton* v. *United States,* 206 U. S. 333, 345; 27 S. Ct. 749, 751; 51 L. Ed. 1084; 11 Ann. Cas. 640.

We are not unmindful of the cases cited by the respondent as holding that unreasonable delay in procuring a warrant against one arrested without a warrant prevents prosecution thereon when obtained, the Maine cases being *State* v. *Riley,* 86 Me. 144; 29 A. 920; *Adams* v. *Allen,* 99 Me. 249; 59 A. 62; *Weston* v. *Carr,* 71 Me. 356 and *State* v. *Guthrie,* 90 Me. 448; 38 A. 368. These cases are readily distinguishable from the case at bar. The criminal cases *State* v. *Riley* and *State* v. *Guthrie* are both search and seizure cases. In the former a seizure was made without a warrant and there was an unreasonable delay in procuring one after the seizure. In the latter there was an unreasonable delay in the execution of the warrant after its issue and delivery to the officer. Due to the peculiar nature of the process, and the requirements of statutory and constitutional provisions with respect to search and seizure, the court held that unreasonable delay to procure, in the case of seizure without warrant, or to execute, in the event the officer proceeded under a warrant, rendered the warrants at the time they were executed, in the first instance void, and in the second *"functus officio,* except perhaps for return." In *Weston* v. *Carr,*

supra, trover was maintained against the officer who seized liquor without a warrant and unreasonably delayed in procuring one. In *Adams* v. *Allen* trespass *de bonis* was maintained against the officer who after seizing without a warrant obtained a defective one.

R. S. 1944, Chap. 134, Sec. 4 provides:

> "Every sheriff, deputy sheriff, constable, city or deputy marshal, or police officer shall arrest and detain persons found violating any law of the state or any legal ordinance or by-law of a town until a legal warrant can be obtained, and they shall be entitled to legal fees for such service; but if, in so doing, he acts wantonly or oppressively, or detains a person without a warrant longer than is necessary to procure it, he shall be liable to such person for the damages suffered thereby."

The duty thus imposed upon an officer is but co-extensive with the common law powers of an officer to make arrests without a warrant for offenses committed in his presence. Failure to obtain a warrant within a reasonable time makes the officer a trespasser *ab initio,* and subjects him to civil liability therefor. But unless the offense is one for which prosecution cannot be maintained unless the respondent is arrested therefor during its commission, (as, for example, the crime of "*being found* intoxicated in a public place") an illegal arrest without a warrant is no bar to a legal prosecution subsequently instituted. *State* v. *Bradley,* 96 Me. 121; 51 A. 816.

By his plea the respondent treats the proceedings before the justice and the appeal as void, which in fact they were upon the allegations in the plea. He then complains of unreasonable delay, to wit, a failure on the part of the arresting officer to institute a new prosecution before either a Trial Justice or Municipal Court having jurisdiction over the offense for which he had been arrested. The respondent, in taking this position, overlooks the fact that a prosecution before a court without jurisdiction is void, and that never having been in jeopardy his situation is the same as

if no prosecution had ever been had. The only bar because of lapse of time, to the institution of proceedings for "operating a motor vehicle while under the influence of intoxicating liquor" is the statute of limitations. The crime is not "*being found* operating a motor vehicle while under the influence of intoxicating liquor" but "operating a motor vehicle while under the influence of intoxicating liquor." Prosecution therefor may be had at any time, within that limited by the statute of limitations, and it may be prosecuted either before an inferior court or by indictment returned to the Superior Court. These courts have concurrent original jurisdiction of the offense. R. S. 1944, Chap. 19, Sec. 134.

That a prosecution for a crime was had before an inferior court which had no jurisdiction, is no reason for requiring that the new prosecution be instituted before a *similar* court which has jurisdiction. The new prosecution is *de novo,* and may be instituted before any court of competent jurisdiction. Delay or failure on the part of the arresting officer to institute new proceedings before a Trial Justice or Municipal Court having jurisdiction of the offense does not deprive the Superior Court of its jurisdiction to try the respondent upon an indictment regularly returned to it by the Grand Jury.

Insofar as the decisions from other jurisdictions cited by the respondent may be at variance with our opinion as expressed herein, we are neither impressed by their reasoning nor inclined to reach their conclusion.

In the absence of applicable specific statutory or constitutional provisions, neither illegality of arrest in the first instance nor the fact that an arrest is illegal *ab initio* due to failure or delay in obtaining a warrant, nor prosecution before a court without jurisdiction amounts to an immunity bath for crime; nor do they nor do any of them bar a new and independent prosecution for the same crime instituted before a court of competent jurisdiction. The statute of

limitations, the constitutional guaranty against double jeopardy and the constitutional provision vouchsafing to an accused a speedy and impartial trial are sufficient protection to the accused from unwarranted successive prosecutions for his crime. Ordinarily, the right to a speedy trial, is a speedy trial upon an existing charge. Conceivably, successive prosecutions each long delayed over the protests or demand for trial by the accused and then abandoned without reason, and a new one instituted might be so oppressive and prejudicial to the rights of a respondent that such conduct, as a whole, on the part of prosecuting officers would violate his constitutional right to a speedy trial even on a new prosecution. Upon this question we are not called upon to express an opinion. Certainly the facts alleged by the respondent's plea are insufficient to afford such defense, if indeed such a defense could be maintained.

The constitutional right to a speedy trial is a personal privilege granted to the accused and not a limitation upon the power of the state to prosecute for crime. It is a privilege that he may waive. *State* v. *Slorah,* 118 Me. 203; 106 A. 768; 4 A. L. R. 1256. "He must claim his right if he wishes for its protection. *State* v. *Slorah,* 118 Me. 203; 106 A. 768; 4 A. L. R. 1256. If he does not make a demand for trial, he will not be in a position to demand a discharge because of delay in prosecution. 8 R. C. L. 74." *State* v. *Kopelow,* 126 Me. 384, 386; 138 A. 625, 626.

The plea in this case alleges no facts which even tend to show a violation of the respondent's right to a "speedy trial." We have already held herein that the pendency of the respondent's appeal did not deprive the Superior Court of jurisdiction to try him on an indictment for the same offense returned while the appeal was pending. Neither was the respondent's right to a speedy trial violated by the finding of such indictment and his trial thereon. The Superior Court was without jurisdiction to try the respondent upon his pending appeal. He did not raise the jurisdictional question with respect to his former prosecution either be-

fore the Trial Justice or in the Superior Court until after the indictment was returned and after he was presented for arraignment thereon. He, and he alone brought the case to the Superior Court on appeal. If delay there was, it was due to his own conduct and failure to act. Delay in prosecution, caused either by action or inaction on the part of the respondent is a waiver of his right to a speedy trial. *State* v. *Kopelow, supra.*

So far, we have examined the respondent's plea on its merits according to the facts alleged therein, notwithstanding the fact that in a single dilatory plea he claims two distinct and separate defenses. However, lest this action upon our part be construed in the future as tacit approval of duplicitous dilatory pleas, we will consider the sufficiency of the plea from that aspect.

At common law double pleading, either by separate pleas, or by the inclusion in the same plea of more than one defense, each based upon distinct and independent traversable facts, was not allowable. In the case of dilatory pleas the rule against double pleading was relaxed to the extent that dilatory pleas of different classes could be successively pleaded in their proper order. However, even in dilatory pleas duplicity was not allowable in a single plea. See Gould Pleading, Chapter VIII, Part I, Sec. 1-5. Encyc. Pl. & Prac. Vol. 7, pp. 238-240, inc.

This rule has been recognized and applied by this court to dilatory pleas in criminal cases. With respect to such pleas we said:

> "The respondent must confine his plea to a single point. The point is not necessarily confined to a single fact. It may embrace as many facts as constitute one proposition or matter, making but one defense; but it must not consist of distinct and independent facts, making several matters or defenses. Good reasons for this strictness are found in all the books upon pleading at common law." *State* v. *Ward,* 63 Me. 225. See also *State* v. *Pike,*

65 Me. 111, 113; *State* v. *Heselton,* 67 Me. 598; *State* v. *Fleming,* 66 Me. 142, 150; 22 Am. Rep. 552.

In the instant case many of the facts alleged in the plea are common to each ground of defense. Some, however, are not. For instance, the pendency of the appeal at the time of the finding of the indictment has no tendency to establish the alleged failure of the officer to obtain a new warrant and his alleged unreasonable delay in so doing. The alleged failure of the officer to obtain a new warrant, and his alleged unreasonable delay in so doing, have nothing to do with establishing the defense based upon the ground that the respondent was indicted while his appeal from the sentence of the Trial Justice was pending in the Superior Court. The defenses of another prosecution pending on an appeal from a conviction in another court of concurrent jurisdiction at the time the indictment was found, and the defense that there was unreasonable delay in obtaining a new warrant and presenting him for trial thereon before a court of competent jurisdiction after it was made to appear, in a distinct legal proceeding against some other respondent, that his first trial was void, are separate and distinct defenses. In part at least each defense is based upon separate, independent and distinct issuable facts. If these were both *sufficient* defenses, as a matter of form the plea would clearly be bad for duplicity. *State* v. *Pike, supra; State* v. *Heselton, supra.* Such defect in a dilatory plea may be taken advantage of by a general demurrer. *State* v. *Heselton, supra.* Every defect in a dilatory plea may be taken advantage of by general demurrer. *Severy* v. *Nye,* 58 Me., 246, 251. *Bellamy* v. *Oliver,* 65 Me., 108; *Getchell* v. *Boyd,* 44 Me. 482. However, as *neither* defense set forth in the plea is valid in substance, as distinguished from form, the plea is not bad for duplicity. "To support this objection it must be made to appear, not only that several facts are alleged, which might be traversed by the plaintiff, and a material issue joined thereon; but each of the facts must be such as would alone be sufficient to abate the writ." *Hooper* v. *Jellison & Trs.* 22 Pick. Mass. 250. This same principle applies when

the separate defenses depend upon separate and distinct groups of facts, only some of which are common to both groups. Our consideration of the respondent's plea upon the merits therefore cannot by implication be considered as tacit approval of a duplicitous dilatory plea.

There was no error in the action of the presiding justice in sustaining the demurrer, and overruling the plea. Neither was there error in ordering the defendant to plead over and proceed to trial. There is no merit in the respondent's exceptions.

Exceptions overruled.
Judgment for the State.

STATE OF MAINE
vs.
CHARLES P. THOMPSON

Penobscot. Opinion, October 22, 1948.

Criminal Law. Intoxicating Liquor.

Upon indictment for operating motor vehicle while under influence of intoxicating liquor respondent's plea to the jurisdiction and exceptions overruled where in all material respects issues involved, indictment, plea, demurrer and rulings of the court are same as those in *State* v. *Boynton*, which opinion is filed simultaneously with this opinion and reported on the preceding pages.

ON EXCEPTIONS.

Trial by indictment for operating motor vehicle while under the influence of intoxicating liquor. Plea to jurisdiction. General demurrer sustained. Plea over, not guilty. Exception. Verdict, guilty. Exceptions overruled. Judgment for state.

John H. Needham, County Attorney for Penobscot, for state.

James D. Maxwell, for respondent.

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

MERRILL, J. This case is before the court upon exceptions by the respondent. The respondent was indicted at the January Term, 1948, of the Superior Court for Penobscot County for operating a motor vehicle on June 13, 1947, upon a public way in Brewer while under the influence of intoxicating liquor. To this indictment upon arraignment the respondent filed a plea to the jurisdiction. To this plea the state filed a general demurrer. The demurrer was sustained and the plea overruled; the respondent was ordered to plead over and proceed to trial, to all of which rulings the respondent took exception. The respondent entered a plea of not guilty, was tried and found guilty. The case is before the court on the foregoing exceptions.

In all respects material to the issues involved, the indictment, plea, demurrer and rulings of the court are identical with those in *State* v. *Boynton,* 143 Me. 313; 62 A. (2nd) 182. Opinion in which case is simultaneously filed herewith. There is no merit in the respondent's exceptions. *State* v. *Boynton.* Extended Opinion is unnecessary. For detailed discussion and statement of the legal principles upon which we base this decision see *State* v. *Boynton, supra.*

Exceptions overruled.

ROBERT H. JOSSELYN
vs.
GRANT DEARBORN AND JAMES PAYSON

Penobscot. Opinion, October 26, 1948.

Physicians and Surgeons. Negligence.

Where evidence is conflicting upon points vital to the results, the conclusion reached by the jury will not be reversed unless the preponderance against the verdict is such as to amount to a moral certainty that the jury erred.

Refusal of presiding justice in action for negligent injuries resulting from malpractice to charge jury that "a failure on the part of the patient to follow all reasonable and proper instructions given, which contributes to the injury claimed to have arisen because of the negligence of the physician, will bar recovery," is not error, since a patient may, while under treatment of a physician, injure himself, yet recover of the physician if he carelessly or unskillfully treats him afterwards, thus doing a distinct injury, and in such a case the plaintiff's fault does not directly contribute to produce the injury sued for.

Presiding justices charge that "a physician or surgeon impliedly agrees with his patient that he possesses that reasonable degree of learning and skill in his profession, which is ordinarily possessed by other physicians under like conditions" is sufficently broad so that presiding justice's refusal to charge that the "locality" of physician's practice is "important in determining the degree of skill and care required of him" is not error.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

Action against two osteopathic physicians for alleged malpractice. General issue pleaded. Jury returned verdicts against both defendants. The defendant Payson filed a general motion for a new trial and exceptions to refusal of presiding justice to give requested instructions. The defendant, Dearborn, filed general motion and exceptions to denial of presiding justice to direct verdict.

The mandate of court as to Grant Dearborn:

Motion sustained as to both joint and several liability. Verdict set aside. New trial granted.

On motion and exceptions of James Payson:

Exceptions overruled. Motion sustained as to damages. Verdict set aside. New trial granted for assessment of damages only.

Frank G. Fellows,
Randolph A. Weatherbee, for plaintiff.

James E. Mitchell,
James M. Gillin, for Grant Dearborn.
Michael Pilot, for James Payson.

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

TOMPKINS, J. This is an action against two osteopathic physicians to recover damages for alleged malpractice in the treatment of the middle finger of the left hand of the plaintiff. Each doctor was represented by separate counsel and both pleaded the general issue. Jury verdict against both jointly.

The plaintiff's declaration alleges due care on his part. The first count in the writ alleges that the defendant Payson "Disregarded his said duties and so carelessly, negligently and unskillfully carried out the extraction of blood from the middle finger of the plaintiff's left hand, and so unskillfully, carelessly and negligently conducted himself in that behalf that, through his want of skill and care said finger and hand of the plaintiff became so greatly infected inflamed, injured and diseased as to render amputation necessary, and the said middle finger of the plaintiff's left hand was thereafter amputated." The second count alleges that "Defendant Payson, not regarding his said duty as such physician

and surgeon . . . . . so unskilfully and carelessly and negligently conducted himself in that behalf that by and through want of skill and care the said sickness, malady, disease and injury of the said plaintiff became so greatly increased and aggravated that it rendered amputation of said finger necessary, and said middle finger of the plaintiff's left hand was thereafter amputated." The third count alleges that the defendant, Grant Dearborn, "So unskillfully and negligently conducted himself . . . . . that by and through his want of skill and care said sickness, malady, disease and infection of the plaintiff became so greatly increased and aggravated as to render amputation of said finger necessary, and the said middle finger of the plaintiff's left hand was thereby amputated." The fourth count is against both defendants alleging that "They so unskillfully and negligently conducted themselves in this behalf that by and through their want of skill and care the plaintiff's sickness, malady, disease and infection of and to the plaintiff became so greatly increased and aggravated that it rendered amputation of the said middle finger of the said plaintiff's left hand necessary, and the said middle finger of the said plaintiff's left hand was thereafter amputated."

The defendant Payson comes before this court on a general motion and exception to the refusal of the presiding justice to give seven requested instructions, two only of which, four and seven, are pressed in argument. The defendant Dr. Dearborn comes before this court on a general motion and exceptions to the denial of the presiding justice to direct a verdict in his favor.

It is clear from the testimony that Dr. Payson undertook to diagnose as well as to treat the plaintiff's malady after the trouble allegedly caused by the defendant, Dr. Payson, in negligently making and treating an incision made by him in the middle finger of the plaintiff's left hand. We construe the gravamen to charge Dr. Payson with negligence in the manner in which he made the incision for taking a sample of the plaintiff's blood, and with negligently and

unskillfully diagnosing the plaintiff's ailment, and negligent treatment of the same. The burden of proof is on the plaintiff to establish his case by a preponderance of the evidence. *Coombs* v. *King,* 107 Me. 376; 78 A. 468; Ann. Cas. 1912 C. 1121. The law of negligence requires that a casual connection must be established between the injury or loss suffered and the negligence with which the defendant is charged. *Kierstead* v. *Bryant,* 98 Me. 523; 57 A. 788; *Lesan* v. *Maine Central Railroad Co.,* 77 Me. 85, 87.

The sequence of events leading up to the plaintiff's alleged injury is as follows: the defendant stated that he had a Bachelor of Science degree from the Massachusetts State College, and had studied medicine for four years at the Philadelphia College of Osteopathy and held a Doctor of Osteopathy degree from that institution, and served one year internship at the Bangor Osteopathic Hospital. Shortly after completing the internship he located at Lubec, in the early part of March 1945. He there became acquainted with the plaintiff, who was employed at a pearl essence factory at Lubec. From informal discussion the defendant learned that the plaintiff had suffered from Raynaud's disease some four or five years previously.

On April 28th, to demonstrate the use of a newly purchased microscope and the method of making a blood count, the defendant incised the tip or end of the middle finger on the plaintiff's left hand. The plaintiff testified that when the incision was made in his finger the lancet was taken directly from the box in which it was resting and the incision made, and no dressing was placed on the finger afterwards, and he was given no instructions as to the care of the finger to prevent infection. The defendant however stated that he cleaned the lancet with a 70% alcohol solution and also the finger with a cotton swab saturated with alcohol, and after making the incision said "It is my habit after I do that to just let them hold it for a minute or two," meaning the cotton swab saturated with alcohol, which defendant said was a good practice.

Two days later, April 30th, a soreness developed in the plaintiff's finger at the point where the incision had been made and it felt as though something was in there. Plaintiff returned to the defendant on that day, told him of the soreness and feeling in the finger, and the defendant then made a minute opening at the point where the incision had been made, found nothing, and the plaintiff was told by the defendant to soak the finger in either a hot water or saline solution as hot as he could stand and as often as he could. Plaintiff stated this advice was followed. Thereafter the plaintiff saw the defendant daily for treatment, and on some days two or three times, up to May 4th. On May 5th the defendant left in the afternoon or evening for Bangor and did not see the plaintiff again until some time late in the evening of May 7th. Defendant left no physician in attendance, nor did he leave any information as to how or where he could be reached in case he was needed by the plaintiff. The plaintiff stated that from the moment he first noticed the pain it became more intense daily, even hourly, the finger began to swell and kept getting larger and larger daily. On Sunday, May 6th, the pain moved into the palm of the hand. The pain was so intense he tried to reach the defendant in Bangor without success, so he went to a local physician who refused to treat the case because the plaintiff was under the care of another doctor. Later on that Sunday he saw Dr. Bilodeau in Eastport. Dr. Bilodeau fluoroscoped the finger, and found some swelling in the hand but no evidence of infection or pus. The plaintiff continued the soaking and wet dressing and kept the hand elevated. He stated he followed instructions implicitly. That on May 7th "the finger had swollen to enormous size, the pain was tremendous, almost unbearable; the palm of the hand was equally sore and swollen; the color—the finger was turning black and the palm of the hand was turning black; pains up my left arm to the armpit, which was sore at the time." The plaintiff stayed in bed from Sunday, May 6th until May 11th, except when the pain was so intense he had to walk the floor. There were red streaks up

the arm which started approximately two days after April 30th, and soreness under the left armpit. Dr. Payson stated he saw no red streaks going up the arm, and that he took the patient to the hospital within twelve hours after he discovered the soreness in the armpit.

On the evening of May 10th the plaintiff decided to ask for further care and to be placed where he could get more treatment, because of the tremendous pain he was suffering. It was decided he should be placed in the hands of Dr. Dearborn at the Osteopathic Hospital in Bangor. Dr. Payson on the morning of May 11th carried the patient by automobile to the Osteopathic Hospital in Bangor, arriving there late in the afternoon. At that time the patient was in tremendous pain and he was given a hypodermic to ease the pain. Dr. Payson told the plaintiff he was going to see Dr. Dearborn, who was confined to his house with a cold. Before he left for home on the morning of May 12th he told the plaintiff that Dr. Dearborn would see him the following day. This Dr. Dearborn failed to do because of his illness. It was not until Monday forenoon, on the 14th day of May, that Dr. Dearborn saw the plaintiff. On the evening of May 14th the plaintiff informed Dr. Dearborn that he was going to the Eastern Maine General Hospital on the next day. On the morning of the 15th Dr. Dearborn redressed the finger. The plaintiff immediately thereafter went to the Eastern Maine General Hospital and was there examined by Dr. Samuel S. Silsby, Dr. Skinner and Dr. Woodcock, and was immediately sent to the operating room for an emergency operation. The middle finger of the left hand was amputated.

Dr. Silsby's qualification as an orthopedic surgeon of eighteen years' experience was admitted, and he stated that in his opinion when he saw the finger on the 15th day of May it was beyond saving, and from experience in similar cases it was beyond saving for twenty-four to forty-eight hours before. Dr. Silsby further stated that the middle finger on the left hand was tremendously swollen and dis-

colored, with a blister, which had apparently been taken away, on the side, and a small drain at the base of the finger; that the skin was discolored and it was necrotic, or, in other words it was rotten; that this necrotic condition involved considerable of the soft tissues, and X-rays revealed a moderate amount of the bone was infected. He also stated there was a palmar abcess from which about half a teaspoon of pus was taken, and pus exuded from the whole length of the finger, which might have been there several days. Dr. Silsby further testified that the presence of red streaks and difficulty in the armpit in an advanced case of this kind was indicative of some spreading of systemic infection, infection spreading to the lymph system which goes into the blood stream. Dr. Silsby was asked the following question: "In your judgment did this doctor exercise the degree of care and skill to be expected of a physician under these circumstances and in the locality of Lubec, Maine?" A. "Well, I feel that most any doctor with a history of the case as you show—infection beginning in the end of the finger—would sooner or later have incised this finger and drained it. When or just where I could not say without examining the finger."

Dr. Payson in defense stated that on May first, two days after the incision had been made by him in the plaintiff's finger, he saw nothing unusual about it, and that in the course of a ride that evening the plaintiff described his finger as whitening that afternoon, which Dr. Payson said indicated to him a recurrence of Raynaud's phenomena. On the second day of May the defendant stated there was indication of slight swelling, and the plaintiff described an occasion of tingling and numbness, which the defendant claimed was symptomatic of Raynaud's disease. From these symptoms he stated his conclusion that the plaintiff was having a recurrence of Raynaud's disease and he gave him advice as to what to do and what not to do, which was to keep his hands very warm, use boric acid soaks, and keep the part elevated as much as possible. On the 4th of May

the plaintiff complained of slight numbness and pain, and from this the defendant believed that the patient was suffering from Raynaud's disease, and advised him he had better not work at all, and the patient told him that all he had to do was to be there, and that he would be able to continue the treatments. When the defendant returned from Bangor late in the evening of May 7th and saw the finger the increase in swelling greatly surprised him. The patient was complaining of pain and was much excited. On the evening of May 10th the defendant discovered enlargement of the lymphatic gland under the arm but found no red streaks up the arm. As a result of finding the inflammation of the glands he suspected that the tissue was becoming infected. No penicillin was administered by Dr. Payson as it was not available in Lubec. The defendant had never treated Raynaud's disease. He had seen one case in the clinic while in medical school. He stated it was a rare disease.

It appeared from the defendant's testimony that the circulation is impaired and slowed down in an attack of Raynaud's disease; that infection is more likely to start; that he knew that the plaintiff had suffered from this disease, and that when he made the puncture in the finger infection might possibly enter through the incision; and that he knew there was more danger of infection where the patient was suffering from a circulatory disturbance. The form of treatment prescribed was for almost any infection; that this was also a treatment for Raynaud's disease because of the heat, and also for the prevention of any possible infection, but that it was not to combat infection that was there already. The defendant stated there was no complaint about severe pain in the finger up to May 4th, the day before he left for Bangor; that there was no increase of swelling in the first phalanx; there was swelling on the 4th of May into the second phalanx but no discoloration on that day; that so far as he knew the plaintiff followed the instructions he had been given in regard to the care of the

finger. He was not concerned about the condition of the finger at the time he left for Bangor because the indications were, in his opinion, that the plaintiff was suffering from Raynaud's disease, and that he did not feel it was necessary to remain in Lubec and treat the patient. Though the swelling continued to increase up to May 11th and went down into the second phalanx and the palm of the hand, yet it showed no symptoms of infection, in his opinion. At no time did the defendant make an attempt to incise the finger for drainage. There was nothing there to drain, so the defendant stated. Defendant denied that he ever told the plaintiff or the plaintiff's wife that the patient was suffering from an infected finger, but between May 4th and May 11th he told them the malady was Raynaud's disease. The provisional diagnosis at the hospital on May 11th, when the patient was admitted, was "Strep infection of the left hand." The final diagnosis was the same. The defendant left the patient in the care of the hospital until Dr. Dearborn should appear. Dr. Payson did not see the patient after the morning of May 12th. The history of the case given to the hospital was by the patient himself. Defendant stated that he was located 135 miles from Bangor and he was not able to give certain tests, as he did not have the equipment, although he had the facilities of the Stoddard Laboratory at the Eastern Maine General Hospital where these tests could have been made.

The other defendant, Arthur Grant Dearborn 2nd, testified that he was an osteopathic doctor and had practiced for eleven years. He first learned of the case under consideration on the 11th of May. At that time he was ill in bed and it was not until Monday, May 14, 1945, that he saw the patient. He said that in the course of his study and work he had occasion to diagnose or observe the features of Raynaud's disease, but his experience with the disease had been relatively limited outside of observing treatment, and it was a very rare disease. He described the disease as a circulatory disturbance peculiar to the extremities. When he ex-

amined the finger of the defendant it was swollen both front and back and had red streaks extending up his forearm, which meant inflammation of the lymphatic vessels. The glands under the arm were swollen and in his opinion the patient had an existing Raynaud's disease with secondary infection. To alleviate the condition he decided that the hand should be excised and drained. Under his direction an intern incised the very large blister which then existed. Under his direction the dead skin was excised and removed from the finger. After that penicillin was administered. Due to the improvement which he claimed had been made while the patient was in the hospital it seemed to be better not to amputate at that time, but it might be necessary to eventually remove the finger.

DR. PAYSON'S CASE

Motion: The principles of law applicable to the case are well established. "A physician impliedly agrees with his patient that he possesses that reasonable degree of learning and skill in his profession which is ordinarily possessed by other physicians under like conditions, that he will use his best skill and judgment in diagnosing his patient's disease or ailment and in determining the best mode of treatment, and that he will exercise reasonable care and diligence in the treatment of the case." *Nickerson* v. *Gerrish,* 114 Me. 354; 96 A. 235, 236. "A physician is not an insurer. He does not warrant favorable results. If he possesses ordinary skill, uses ordinary care, and applies his best judgment, he is not liable for mistakes in judgment. Medical science is not yet and probably never can be an exact certain science. The practitioner cannot be expected to know or be bound to diagnose correctly that which is unknowable, as many of our hidden ailments may be." *Coombs* v. *King,* 107 Me. 378; 78 A. 468; Ann. Cas. 1912C 1121. A physician or surgeon is not liable for want of the highest degree of skill, but for ordinary skill and of coure for want of ordinary care and ordinary judgment. *Cayford* v. *Wilbur,*

86 Me. 414; 29 A. 1117. One who employs a physician is entitled to an ordinarily careful examination by the attending physician. If he is shown to possess the qualifications stated and exercises his best skill and judgment, with care and careful observation of the case, he is not responsible for an honest mistake of the nature of the malady or as to the best mode of treatment, when there was reasonable grounds for doubt or uncertainty. "If the case is such that no physician of ordinary skill would doubt or hesitate and but one course of treatment would, by such professional men be suggested, then any other course of treatment might be indicative of want of ordinary knowledge or skill, or care and attention or exercise of his best judgment, and a physician might be held liable however high his former reputation." *Patten* v. *Wiggin,* 51 Me. 594; 81 Am. Dec. 593. His failure to discover where there was opportunity for examination and the patient's condition permits, the nature of the malady from which the patient was suffering would be held actionable negligence if reasonable attention by a physician of ordinary skill and intelligence would have discovered the nature of the malady. *Lewis* v. *Dwinell,* 84 Me. 497; 24 A. 945. The physician or surgeon is answerable for injury to his patient proximately resulting from his lack of ordinary skill or from the lack of its application, or from neglect or carelessness in the diagnosis and treatment of the case, or failure to exercise his best judgment. *Patten* v. *Wiggin, supra.*

The presiding justice gave the following instruction to the jury on the law governing the case: "A physician impliedly agrees with his patient that he possesses that reasonable degree of learning and skill in his profession which is ordinarily possessed by other physicians under like conditions; that he will use his best skill and judgment in diagnosing his patient's disease or ailment and in determining the best mode of treatment, and that he will exercise reasonable care and diligence in the treatment of the case. He does not warrant favorable results. If he possesses

ordinary skill, uses ordinary care and applies his best judgment, he is not liable for mistakes in judgment. Whether a physician was negligent in making a diagnosis, must be determined in the light of conditions existing and facts known at the time thereof."

We are of the opinion from all the evidence, viewed in the light most favorable to the defendant, that the jury could find that the defendant failed to exercise that skill, care and attention which it was his duty as a physician to exercise towards his patient, that he failed to discover the infected condition of the patient's hand, or failed to recognize its seriousness, and failed to give or procure proper treatment as promptly as he should have done and at a time when it should have been given. With the evidence conflicting it was the province of the jury to decide those controversial questions, and this they have done. "Where the evidence is conflicting upon points vital to the results, the conclusion reached by the jury will not be reversed, unless the preponderance against the verdict is such as to amount to a moral certainty that the jury erred." *Cayford* v. *Wilbur* 86 Me. 414; 29 A. 1117, 1118. There is no such preponderance in this case. Motion denied, except as to damages.

EXCEPTIONS

Exception four is based on the refusal of the presiding justice to give the following instruction: "A failure on the part of the patient to follow all reasonable and proper instructions given, which contributes to the injury claimed to have arisen because of the negligence of the physician, will bar recovery." The rule on this point has been stated by our court as follows: "It is the duty of the patient to follow the reasonable instructions and to submit to the reasonable treatment prescribed by his physician or surgeon. If he fails in his duty and his negligence directly contributes to the injury, he cannot maintain an action for malpractice against his physician or surgeon, who is negligent in treating the case." *Morrill* v. *Odiorne,* 113 Me. 424; 94 A. 753.

The evidence discloses that the plaintiff testified that he followed the instructions, and the defendant admitted that so far as he knew the plaintiff followed instructions. There was some controversial evidence that the plaintiff injured his finger while shovelling coal May 5th. There is no evidence of anything said or done by the plaintiff that led Dr. Payson into error in either the diagnosis or treatment, or had any part directly in the creation of the cause of action relied upon. If the plaintiff was negligent at all, his negligence merely superimposed itself upon that of the defendant, and for the damages which resulted from his own negligence he cannot recover. *DeBois* v. *Decker,* 130 N. Y. Reports, 325; 29 N. E. 313; 14 L. R. A. 429; 27 Am. St. Rep. 529; *Williams* v. *Marini,* 105 Vt. 11; 162 A. 796. "A patient may, while he is under treatment by his own carelessness injure himself, yet he may recover of the physician if he carelessly or unskillfully treats him afterwards, and thus does him a distinct injury. In such cases the plaintiff's fault does not directly contribute to produce the injury sued for." *Hibbard* v. *Thompson,* 109 Mass. 286. The requested instruction was too broad and properly refused.

Exception number seven is based on the refusal of the presiding justice to give the following instruction: "The locality in which a physician or surgeon practices is important in determining the degree of skill and care required of him." The defendant is sought to be charged with the failure to exercise that reasonable degree of care and skill which is ordinarily possessed by physicians and surgeons practicing under like conditions. The presiding justice in his charge instructed the jury that "A physician impliedly agrees with his patient that he possesses that reasonable degree of learning and skill in his profession, which is ordinarily possessed by other physicians under like conditions." The "like conditions" to be considered by the jury under this instruction would include the location of the defendant at Lubec, that he did not have at hand for the treatment of the case, as he testified, certain medicines and equipment

that were available in larger centers of population, where hospital and laboratory facilities are located, that Lubec is approximately 130 miles from Bangor where hospital and laboratory facilities are available, that the malady according to the defendant was a rare disease, and that his previous training and experience with this disease was very limited. The instruction was sufficiently broad to cover the degree of skill and care required of a physician and surgeon practicing in the locality of Lubec.

DR. DEARBORN'S CASE

At the conclusion of the evidence Dr. Dearborn, claiming there was not sufficient evidence in the case to warrant its submission to the jury, moved the presiding justice to direct a verdict in his favor. The presiding justice refused, to which ruling and refusal the defendant duly excepted. After jury verdict the defendant Dearborn filed a general motion for a new trial. The motion raised the same question as the exception. The exception is regarded waived. *Symonds* v. *Free Street Corporation,* 135 Me. 501; 200 A. 801; 117 A. L. R. 986. The motion for a new trial only is considered.

The evidence heretofore quoted shows that Dr. Dearborn first saw the plaintiff and commenced to treat him in the morning or at noon on May 14, 1945, and that during the interval from May 11th, when Dr. Payson left the patient in charge of the Osteopathic Hospital until Dr. Dearborn saw him on May 14th, the plaintiff was treated by other doctors who were on the staff of the Osteopathic Hospital, about which treatment Dr. Dearborn was not consulted and for which treatment Dr. Dearborn assumed no responsibility. The defendant Dearborn treated the patient from sometime in the morning of May 14th until sometime in the evening of that day. The following morning, May 15th, the plaintiff went to the Eastern Maine General Hospital. Dr. Silsby stated when he saw the finger on the 15th day of May it was beyond saving, and from experience in similar

cases it was beyond saving from twenty-four to forty-eight hours before.

The evidence covered both the joint and several liability of the defendants. It is evident from the testimony, viewing it in the light most favorable to the plaintiff, that the services rendered by Dr. Dearborn to the plaintiff were after Dr. Payson had severed his connection with the case and had left the patient in the care of the Osteopathic Hospital. Dr. Dearborn's undertaking was a new and independent consensual contract. He acted independently, upon his own initiative and without any direction from Dr. Payson. "Where an injury is caused by two causes concurring and co-operating or acting in conjunction, for one of which the defendant is responsible and not for the other, he cannot escape responsibility. But before both agencies may be held liable therefor the injury must be caused or contributed to by each, as concurring causes, co-operative and contributing to the injury." *Rogers* v. *Canfield et al.*, 272 Mich. 262; 262 N. W. 409; *Gordon* v. *Lee et al;* 133 Me. 361; 178 A. 353; *Rose* v. *Sprague et al.*, (Ky.) 59 S. W. (2nd) 554, 556 and cases there cited. The evidence discloses that the finger was beyond saving for at least twenty-four to forty-eight hours previous to the operation, and it was within this period of time that the services of Dr. Dearborn were rendered. We do not find in the record any testimony tending to prove that Dr. Dearborn in any way contributed to the proximate cause of the injury. Neither do we find in the record any testimony tending to prove that a joint undertaking or co-operative negligence of the defendants contributed to the plaintiff's injury. Motion sustained as to joint and several liability. Verdict set aside as to Dr. Dearborn and new trial granted.

DAMAGES

The verdict as to the defendant Payson is proper on the question of liability, but the award of damages made by the jury is excessive to such an extent that the court should in-

terfere. A remittitur might be ordered or the facts again submitted to the jury. The court of itself, however, does not feel justified from the record in reviewing the assessment of damages against Dr. Payson, inasmuch as it is a joint verdict. *Plante* v. *Canadian National Railways,* 138 Me. 215; 23 A. (2nd) 814.

A new trial in the case of James Payson is ordered for the assessment of damages only.

The mandate will be on motion of defendant Grant Dearborn,

Motion sustained as to both joint and several liability.

Verdict set aside.

New trial granted.

On motion and exceptions of James Payson,

Exceptions overruled.

Motion sustained as to damages.

Verdict set aside.

New trial granted for assessment of damages only.

DINSMORE'S CASE

Sagadahoc. Opinion, November 12, 1948.

Workmen's Compensation. Occupational Diseases. Premises.

Controls restricting compensation under the Workmen's Compensation Act for accidental injuries to those arising out of and in the course of employment are not changed by the Occupational Disease Law. R. S. 1944, Chap. 26, and P. L. 1945, Chap. 338.

In determining whether off the premises injuries of an employee are compensable as being in the course of employment each case must be decided on its own facts.

ON APPEAL.

Appeal from a *pro forma* decree of Superior Court entered pursuant to a decision of the Industrial Accident Commission awarding compensation to an employee injured while crossing a public highway after leaving the employer's premises at the close of a day's work. Appeal sustained. Case fully appears in the opinion.

Arthur F. Tiffin,
Berman, Berman and Wernick, for employee.

John P. Carey,
William B. Mahoney, for employer.

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

MURCHIE, J. The decision of the Industrial Accident Commission, underlying the decree of the Superior Court to which the present appeal relates, serves to emphasize the proper tendency of those charged with the duty of administering The Workmen's Compensation Act, R. S. 1944, Chap. 26, as amended, referred to hereafter as the "Act," to carry

the protection of employees coming within its provisions to the permissible limits of the controls established by it. Those controls, construed by this court in so many decisions that there is no point in citing any of them, restricted compensation under the Act, prior to the enactment of P. L. 1945, Chap. 338 (The Occupational Disease Law), to accidental injuries "arising out of and in the course of" employment. R. S. 1944, Chap. 26, Sec. 8. The Occupational Disease Law does not change the controls applicable to accidental injuries. The tendency noted is in accord with the Act. Liberal construction, to carry out its general purpose, is its express mandate. R. S. 1944, Chap. 26, Sec. 30. That purpose, as declared in *Harry Scott's Case,* 117 Me. 436, 104 A. 794, 797, is:

> "to transfer the burdens resulting from industrial accidents, * * * from the individual to the industry, and finally distribute it upon society as a whole * * *."

The decision of the commission recognizes as "generally accepted" the principles that injuries received in a public street "are not received in the course of the employment" and that such course covers a time interval longer than that between the beginning and the end of an employee's "actual work." This court accepted those principles in *Roberts' Case,* 124 Me. 129, 126 A. 573, where a compensation award, applicable to an injury suffered by an employee after leaving his employer's plant and while traveling over a private way, the use of which for his employee's ingress and egress to and from work had been granted the employer, was sustained.

The first of these principles is said by Schneider, in his Workmen's Compensation Law, to be supported by the weight of authority. Second Edition, Page 818, Par. 272. A note defines certain exceptions as they were stated by this court in *Rawson's Case,* 126 Me. 563; 140 A. 365. Both recitals of the exceptions are taken from *Whitney* v. *Hazard Lead Works et al.,* 105 Conn. 512; 136 A. 105; where it is

made plain, as in *Rawson's Case, supra,* that the four particular exceptions set forth are not exclusive of the possibility of others. Express recitals are that the general principle "is subject to many exceptions, 'based on the terms of the contract of employment,' " four only being defined.

The petition for compensation and the commission decision involve both the place and the time principles stated by Schneider and in *Rawson's Case, supra.* The employee alleges that the accident occurred when he had "just finished work * * * and was crossing the parking lot" (hereafter identified), and that he was injured "while on said parking lot." The decision carries express finding that the accident occurred at a point "clearly within the public way known as Water Street." Despite that finding, and clear recognition that no recovery under the Act has been permitted heretofore for injuries suffered in a public street except on the basis of one of the exceptions defined in *Rawson's Case, supra,* compensation is awarded under an additional exception. The issue is whether the facts justify the recognition of it as "based on the terms of the contract of employment."

The commission decision fortifies its award by the citation of cases from Alabama, California, Massachusetts, Ohio, Pennsylvania and Wisconsin. The brief submitted on behalf of the employee defends it by the citation of the same or different cases from some of those states and others from Connecticut, Louisiana, Utah and West Virginia. Both quote Honnold's Workmen's Compensation in defining the scope of the additional exception as applicable to injuries suffered by an employee:

> "on the premises of another than his employer, or in a public place, and yet * so close to the scene of his labors, within its zone, environments, and hazards, as to be, in effect, at the place and under the protection of the act."

The brief quotes an excerpt of somewhat similar import (but without reference to public places) from 71 C. J. 716, Par. 445:

> "As an exception to the general rule that injuries sustained by an employee while going to or from work are not ordinarily compensable, injuries which occur to an employee while going to or from his work and after he has come upon the employer's premises or at a place so close thereto as to be considered a part thereof, or before leaving such premises or place, as the case may be, are held to be compensable."

A foot-note cites cases from nineteen jurisdictions, including eight of the ten on which the commission and employee's counsel rely. An annotation in 85 A. L. R., Pages 97-100, cited in the decision and the brief, analyzes the Alabama, Ohio and Wisconsin cases cited in the decision and the Pennsylvania case cited in the brief. The omission of both the decision and the brief to refer to many decisions cited in the *Corpus Juris* note from jurisdictions not relied on by the decision or the brief appears to indicate, as we believe the fact to be, that they do not go beyond the exceptions to the public street rule stated in *Rawson's Case, supra.* We confine ourselves therefore to the cases on which reliance is placed.

The California case cited in the decision and that from Louisiana cited in the brief fall within the exceptions recognized in *Rawson's Case, supra.* The injured employee in *Globe Indemnity Co.* v. *Industrial Accident Commission,* 36 Cal. App. 280, 171 P. 1088, suffered the injuries for which compensation was awarded on a public highway while he was doing something incidental to his employment. His job required him to write and mail a letter, and mailing it involved crossing a street. He was injured while crossing the street. In *Le Blanc* v. *Ohio Oil Co.,* 7 La. App. 721, the employee was injured while on his way to work in front of his employer's premises on a street which bisected them.

The Connecticut, Ohio, Utah and Wisconsin cases relate to injuries suffered by employees off the premises of their employers but in places where they were required or per-

mitted to be in going to and from their work. They are comparable with *Roberts' Case, supra.* In *Corvi et al.* v. *Stiles & Reynolds Brick Co. et al.,* 103 Conn. 449; 130 A. 674, cited in the employee's brief, the place of the accident was on a railroad track where a path to the employer's plant crossed it. In *Industrial Commission* v. *Barber,* 117 Ohio St. 373; 159 N. E. 363, cited in the decision, it was at the end of a dead-end street maintained by the employer, extending from its plant to an intersecting street and leading nowhere from that street except to the plant. *Bountiful Brick Co. et al.* v. *Industrial Commission et al.,* 68 Utah, 600; 251 P. 555, affirmed in *Same* v. *Giles et al.,* 276 U. S. 154; 72 L. Ed. 507; 48 S. Ct. 221; 66 A. L. R. 1402, cited in the brief, presents another case of injury on a railroad track. *Northwestern Fuel Co.* v. *Industrial Commission,* 197 Wis. 48; 221 N. W. 396, cited in the decision, presents another injury on a highway maintained by the employer. In the particular case the highway was so tied into the employer's premises as to be used as part or parcel thereof.

From Pennsylvania the decision cites *Meucci* v. *Gallatin Coal Co.,* 279 Pa. 184; 123 A. 766; the brief cites *Wiles* v. *American Oil Co. et al.,* 105 Pa. Super 282; 161 A. 467; and a supplemental brief of the employee cites *Ganassi* v. *Pittsburgh Coal Co.,* 162 Pa. Super. 289; 57 A. (2nd) 717. The *Meucci* case relates to an injury suffered within the limits of a public highway comparable with that involved in *Northwestern Fuel Co.* v. *Industrial Commission, supra,* but with additional facts which distinguish it even more clearly from the present case. The injuries of the employee were suffered during his working hours, when he left a mine shaft to await the disappearance of smoke within caused by blasting and was called to the spot where he was injured by his foreman. The *Wiles'* case denies compensation for injuries suffered on a sidewalk in front of the premises of his employer. The employee was on his way to work. The court declared that while he had "stepped upon the sidewalk, he had not arrived on the premises occupied

or controlled by his employer." An excerpt quoted in the brief concludes with the recital:

> "there was no evidence that the sidewalk was occupied by the employer in the conduct of its business."

That recital portrays the situation with which we deal with entire accuracy. If it could be considered that the employer in this case was using a part of the street in question in the conduct of its business by utilizing the side opposite the plant where its employees worked for parking buses to carry some of its employees home (and there is no evidence in the record to indicate that the transportation of those employees was a part of their contracts of employment), there can be no basis for assertion that it was using the street as a whole in that manner. The side adjoining the employer's plant and the middle of the highway constituted a thoroughfare for public use passing to and by the employer's plant. The *Ganassi* case represents what must be the latest word of the Pennsylvania court on the particular question. The place of the injury was a road crossing of a railroad siding adjacent to the employer's property. At the time of the injury the crossing was blocked by standing cars. Several fellow employees of the injured employee crossed between them. In attempting to do likewise the injured employee slipped on the icy surface of the crossing and the car moved before he could extricate his foot. Recovery of compensation was permitted under a statutory definition of the phrase "injury by an accident in the course of * employment." The definition enlarges the coverage the phrase carries in the usual signification of the words. We have no such definition in our Act.

A Massachusetts case is cited in both the decision and the brief. *John Rogers' Case,* 318 Mass. 308; 61 N. E. (2nd) 341; 159 A. L. R. 1394. It presents the unusual situation of an employer furnishing a parking place for his employees' automobiles located where the employees using it were required to travel a short distance on a public high-

way in going to work after parking and returning to their automobiles after work. No injury in a public highway is presented by the case. The injury was suffered in the parking place before the employee reached the street to travel along it and enter the premises where his actual work would be performed. He was, as the court notes, "actually on his employer's premises and on his way to * * * work."

The Alabama case cited in the decision and the brief, *Barnett v. Britling Cafeteria Co.*, 225 Ala. 462; 143 So. 813; 85 A. L. R. 85, allows compensation for an injury suffered on the sidewalk in a public street. This is the only case cited in either the decision or the brief where an employee was allowed compensation for an injury in a public highway not maintained by his employer or used as a part of the employer's premises. The place of the accident was immediately in front of the place of work. The direct cause was ice formed from water used in washing the windows of the building in which the employee worked. An award was sustained by four justices in a court of seven. There was an opinion in which four joined, one of them filing a concurring opinion, and a dissenting opinion in which three joined. In the dissenting opinion the Ohio, Pennsylvania and Wisconsin cases cited in the present commission decision were reviewed. An Ohio statute is quoted showing a broader coverage for industrial accidents than that of Pennsylvania on which *Ganassi* v. *Pittsburgh Coal Co., supra,* turned. Words of the statute quoted and emphasized indicate that the place coverage includes *"wheresoever such injury has"* occurred.

One of the best statements of the condition of the authorities generally on the issue presented in the present case was made in a West Virginia case cited in the employee's brief, *Canoy* v. *State Compensation Commission,* 113 W. Va. 914; 170 S. E. 184, 185:

> "Courts have differed widely in their decisions involving compensability for accidents occurring not on the premises of the employer, while the employee was going to or from work. Careful read-

> ing of the whole unbalanced gamut of decided cases, from the early English compensation cases to those of the various states of the union, results in the formulation of only one general rule, and that not helpful, to the effect that each case of this nature must be dealt with and decided on its own facts and circumstances."

Without attempting to cover the entire gamut we accept that statement as correct on the basis of a considerable segment of it. We deal with the present case on its particular facts and circumstances.

The present employee was injured after he had finished his day's work in his employer's plant and left that plant to enter a street which was not maintained by the employer or used in the conduct of its business except in such manner as it was used by the public generally. The plant was located on the easterly side of the street. On the westerly side opposite, extending to another street lying westerly of it and running approximately parallel with it, the employer provided a parking lot for office employees but not for employees generally. The injured employee had no right to use it for parking purposes but was free to cross and recross it in going to and from work, as were a great many fellow employees. The injured employee rode many miles to and from work in an automobile which was parked in a lot on the westerly side of the street lying next westerly. The employer had no connection with that parking lot or with the automobile in which the employee traveled. When the employee left the plant and entered the street his natural course, the one he had followed without change during the full term of his employment, was to cross that street, the office employees' parking lot and the parallel street to the private parking lot. At the time a line of buses was drawn up opposite the plant to carry employees over a wide area. The employee attempted to pass between two of them, standing about two feet apart, following other employees. He was caught between the rear end of one and the bumper of the other when the latter moved forward. He had al-

ways gone, as he testified, directly to the automobile which would carry him home, and intended to do so, but he was undoubtedly a free agent when he entered the street. According to his own whim of the moment he might have moved north or south on the street instead of west to cross it. He might have gone to any home or place of business in the vicinity. Whatever he did would have been of no concern to his employer and could have no connection with his contract of employment. In crossing the street or traveling northerly or southerly on it he would suffer the same risks, and no more, that were confronting each and every traveler thereon at the time.

The language of Justice Spear in *White* v. *Eastern Manufacturing Co. et al.*, 120 Me. 62; 112 A. 841, 843; 16 A. L. R. 1165, seems very pertinent:

> "The employer has rights as well as the employed. Their rights stand upon an equality in the eye of the law. Perversion of the law, either to benefit the employee or protect the employer, has the tendency only to bring the law into contempt. This Compensation Act, * should be administered with great care and caution, with judicial discretion and impartial purpose, striving only to discover the spirit and the letter of the law, and to apply them without fear or favor."

We are not construing the language of the Act for the first time. The adherence of this court to the principle supported by the weight of authority that accidents occurring on the public highway when an employee is going to work or returning therefrom are not compensable under the Act was announced many years ago. In the interval many amendments of the Act have been adopted by the legislative branch of government, which alone has power to enlarge its coverage. An outstanding example of enlarged coverage is found in The Occupational Disease Law enacted in 1945 and already cited. Until the Legislature acts the court should not enlarge its coverage by changing the established

connotation of the phrase "injury by accident arising out of and in the course of * employment." R. S. 1944, Chap. 26, Sec. 8.

Appeal sustained.

Thaxter, J., does not concur.

DORIS PERKINS

vs.

INHABITANTS OF THE TOWN OF STANDISH

Cumberland. Opinion, November 23, 1948.

Appeal and Error. Schools and School Districts.

Provisions of R. S. 1944, Chap. 37, Secs. 158 and 159 require actual holding of a state teacher's certificate a condition precedent to the authority of the town to employ and right to teach and such requirement cannot be waived by the town or anyone acting in its behalf.

Irregularities in procedure disclosed by bill of exceptions may be disregarded where they are not shown to be in fact prejudicial.

ON EXCEPTIONS.

Action by school teacher to recover wages following alleged wrongful discharge. Nonsuit granted. Exceptions by plaintiff. Exceptions overruled. Case fully appears in opinion.

Udell Bramson, for plaintiff.

Francis W. Sullivan, for defendant.

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

MERRILL, J. On exceptions. Action was commenced by a writ dated March 3, 1947. The plaintiff, Doris Perkins, a school teacher, seeks to recover wages for the balance of the school year after her alleged wrongful discharge on January 24, 1947 by Mr. Jack, the Superintendent of Schools for a School Union of which the defendant town was a member.

The case was heard by the presiding justice with right of exceptions as to matters of law reserved. At the close of plaintiff's evidence, the defendant made a motion for a nonsuit based on the fact that the plaintiff did not have the teachers' certificate required by the Revised Statutes of the State of Maine. The presiding justice deferred ruling. After the defendant had introduced the direct testimony of Mr. Jack and following conference with counsel, the motion for nonsuit was granted. The plaintiff alleged exceptions thereto.

Taken in its most favorable light for the plaintiff, the evidence discloses that plaintiff was employed on January 6, 1947 to teach a public school in the defendant town for the balance of the school year, commencing January 13, 1947. At the time she was so employed she did not hold a teachers' certificate of the nature prescribed by R. S. Chap. 37, Sec. 156 and as required by Secs. 158 and 159 of said chapter. She had, some eight or ten years before, had such certificate but had not kept it renewed and in force. She informed Mr. Jack, the Superintendent of Schools who employed her, of this fact. He told her "it was all right to take the position without a certificate if I would send to Augusta for my renewal application." She commenced teaching January 13th and taught to and including January 24th and was paid her wages therefor. On January 24th she was informed by the Superintendent of Schools that her employment was at an end and that she could not teach any longer because she did not have a state teachers' certificate. She told the superintendent "But you knew that when you hired me. You told me to send for one and I sent for one and I am waiting for the application to come for it." She attempted

to obtain employment elsewhere and failed so to do. There was no evidence that she thereafterwards ever applied for or received a certificate.

Secs. 158 and 159 of Chap 37 are as follows:

> "**Sec. 158. Persons not holding state certificate not to be employed.** No person shall be employed to teach in any school under the supervision and control of any school board of any city, town or plantation of this state, who does not hold a state certificate as provided for in this chapter. Provided further, that all state certificates granted before July 12, 1913 shall continue in force in accordance with the terms stated therein. The commissioner is authorized to formulate all rules and regulations necessary for the carrying out of the provisions of this section and of the 2 preceding sections.
>
> **Sec. 159. Penalty for teaching without certificate.** Whoever teaches a public school without first obtaining a state teachers' certificate, as provided in this chapter, is barred from receiving pay therefor, and shall forfeit to the town in which he so taught such amounts as he shall have received for wages for such illegal teaching."

Under these sections of the statute, the actual holding of a state teachers' certificate by the plaintiff was a condition precedent to the authority of the town to employ her, and it was a condition precedent to her right to teach; such conditions precedent cannot be waived by the town or anyone acting in its behalf. Decisions of this court to this effect under similar statutes (which statutes required certificates from the Superintending School Committee before employment by the town, barred recovery of wages by a teacher who taught without such certificate, and allowed recovery back of a sum equal to wages paid if the teacher taught without such certificate) are controlling. See P. L. 1834, Chap. 129, Secs. 4 and 5, and R. S. 1840, Chap. 17, Secs. 43, 44 and 45 and the following decisions thereunder: *Jackson* v. *Hampden,* 20 Me. 37; *Rolfe* v. *Cooper,* 20 Me. 154; *Jose* v. *Moulton,* 37 Me. 367; *Dore* v. *Billings,* 26 Me. 56.

We are not unmindful of the authorities from other jurisdictions upon this and related issues. They may be found collected in the exhaustive notes to 12 L. R. A., N. S. at 614; 42 L. R. A., N. S. 412; 30 A. L. R. at 890; 42 A. L. R. 1226; 118 A. L. R. at 666; Ann. Cases, 1913 C. 372. Extended discussion, comparison and analysis of them would serve no purpose other than to show erudition on our part. It is not at all necessary for any court to justify its own *controlling decisions* by extended citation of those of other courts in accord therewith.

It might be suggested that we may treat the contract between the plaintiff and the town as a contract to employ her as a teacher, her employment to commence if, when and only upon condition that she obtain a state teachers' certificate. If such contracts could be legally entered into, upon which question we express no opinion, no such contract is declared upon in the plaintiff's writ. The contract declared upon is one of present unconditional employment on January 6, 1947, by which it is alleged that the defendant "agreed to and did employ the plaintiff to teach school in said Standish from January 6, 1947 for the rest of the school term. And the plaintiff further avers that she then and there entered into the employ of the said defendant, by and through its superintendent, George E. Jack, on January 6, 1947, continuing until January 13, 1947," when it is alleged she was discharged, etc. Her own testimony was that she was hired to teach commencing January 13th to the end of the term and that she was discharged on the 24th. The nonsuit might possibly be justified on the ground of variance between the proof and the contract declared upon. The presiding justice, however, granted the motion for nonsuit on the ground that she did not have the required certificate. We are basing our decision upon the same ground.

To the plaintiff's suggestion in her brief that the superintendent had no legal right to discharge her because that power was vested in the Superintending School Committee alone, that therefore she continued in the employ of the

town until the end of the school year, ready and willing to teach, and hence is entitled to her wages for the rest of the year, her lack of a teachers' certificate is a complete answer. It appeared that she had no certificate at the time she was employed, and had not even sent in her application for one at the time she was discharged on January 24th. The burden of going forward with evidence tending to show that she later applied for and received her certificate was upon her. This she failed to do. There is no evidence that she ever obtained or even sent application for, or would have received her certificate had she applied for it before the end of the school year. Without such certificate she could not have been legally employed during any of the period for which she seeks to recover wages. The same consideration would be a complete answer to the suggestion of a conditional contract. There is no proof of compliance with the condition.

It would indeed be incongruous to hold that a person could recover as damages, for not being allowed to teach, wages which she could not recover had she actually taught for the term for which she was employed, or which, received therefor, she would have forfeited to the town.

There being no valid contract of the nature declared upon, we do not need to consider the question as to whether or not the present action was premature, due to the fact that it was commenced on March 3rd to recover wages to become due for a period extending several months beyond the date of the commencement of the action.

There was no issue of fact which if resolved in favor of the plaintiff would justify a recovery on the contract declared upon. Her own testimony interpreted most favorably in her behalf disclosed facts which were an absolute bar to maintenance of the action. There was no evidence even tending to overcome the effect of her own testimony. The question of whether or not she could maintain her action under these circumstances was one of law for the presiding justice. His ruling upon this question was correct.

Irregularities in procedure disclosed by the bill of exceptions may be disregarded. They were neither shown by the bill of exceptions to be, nor were they in fact prejudicial. See *Jones* v. *Jones*, 101 Me. 447, 450; 64 A. 815; 115 Am. St. Rep. 328.

There being neither an issue of fact which if resolved in favor of the plaintiff would justify a finding for her, nor prejudicial error.

Exceptions overruled.

CLIFFORD L. SWAN CO., INC.

vs.

JOHN P. PORELL

Cumberland. Opinion, December 9, 1948.

Brokers.

In an action of assumpsit to recover a broker's commission, charge of the presiding justice that there was no evidence of fraud is not prejudicial error where issue upon which the case was tried was what was the contract, and no evidence was adduced that the contract had been obtained by fraud.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

Action of assumpsit to recover a commission on sale of certain real estate. Plaintiff's and defendant's copy of written contract differ. The question was which represented the understanding of the parties. Jury found for plaintiff. The case is before this court on general motion for new trial and exceptions to a portion of judge's charge. Motion and exceptions overruled. The case fully appears in the opinion.

Richard S. Chapman, for plaintiff.

Grover Welch,
Harry E. Nixon, for defendant.

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

THAXTER, J. This is an action of assumpsit to recover a commission on the sale of certain real estate. The plea of the defendant was the general issue with a brief statement that the supposed contract as submitted to him was not complete, in that it was the intention of the parties to strike out on the printed form submitted by the plaintiff the provision providing for an extension of the exclusive agency beyond the original one month period. In other words, to use the defendant's own language in his brief statement: ". . . . . the only agency was to be a thirty days' exclusive agency and none other and therefore the plaintiff's alleged contract was obtained by fraud." The case was tried before a jury who found for the plaintiff in the sum of $1,425, being five percent of the amount for which the property was sold by the defendant. It is now before this court on a motion for a new trial and on exceptions to a portion of the judge's charge.

The issue on which the case was tried was, not whether there was any fraud or misrepresentation in inducing the defendant to enter into the contract, but what was the contract. Was it as the plaintiff claims a contract for an exclusive agency to sell the property, which agency continued in effect for one month and thereafter until the defendant should revoke it by ten days' notice in writing; or was it as the defendant claims a contract for an exclusive agency which definitely ended at the expiration of one month? The plaintiff, if its version of the contract is correct, is entitled to hold the verdict, otherwise not.

In support of its claim the plaintiff introduced testimony of conversations which took place between the parties and a

copy of the plaintiff's claimed duplicate original of the contract, the original having been lost. The testimony together with the copy of the plaintiff's contract supports the plaintiff's contention. The defendant's own testimony, which was corroborated by others, was that the contract as discussed by the parties was for an exclusive agency ending at the expiration of one month, and he introduced in evidence what he claimed was his own original of the contract as finally reduced to writing. In this contract there appears to have been an attempt to strike out the provision for an extension of the agency beyond the period of one month. Milan O. Welch, an authorized agent of the plaintiff, who conducted the negotiations with the defendant claims that this provision was not stricken out on his original and was not intended to be stricken out.

Here was a clear issue of fact submitted to the jury, and their finding in favor of the plaintiff is amply supported by the evidence and cannot be disturbed. The motion for a new trial must be overruled.

The judge charged the jury in part as follows: "In the pleadings which were read to you, that is, the pleadings of the defendant, which are as we recall or term in law the general issue, and with a brief statement of cause of defense, it is alleged in the pleadings by defendant that the plaintiff's contract was obtained by fraud. I say to you there is no evidence in the case of any fraud." To this portion of the charge, wherein the judge states "there is no evidence in the case of any fraud," the defendant excepted, apparently on the ground that there was evidence of fraud which should have been submitted to the jury.

There is no merit in this exception. The case was tried on the issue whether the plaintiff's version of the contract or the defendant's was the correct one, and the jury were clearly instructed that it was their province to decide that question. The part of the charge objected to had reference only to that portion of the brief statement in which the

defendant alleged that the contract had been obtained by fraud. There was no evidence in the case to support an allegation that the contract had been obtained by fraud, the issue was whether there was a contract and what it was. We do not see how what the presiding justice said with reference to fraud could possibly be distorted into an expression of opinion on the question presented to the jury.

Motion overruled.
Exceptions overruled.

HERBERT T. POWERS

vs.

CHARLES ROSENBLOOM, APLT.

Cumberland. Opinion, December 8, 1948.

Sales. Pleadings. Specifications.

Sales Act provisions R. S. 1944, Chap. 171, Sec. 69, giving a buyer an election of remedies to rescind a contract of sale for breach of warranty and recover back the purchase price or sue on the warranty and recover damages are inconsistent remedies the former being based upon an implied contract and the latter upon an express contract of warranty.

To recover back the purchase price a buyer must adhere to his tender to return the goods and act consistently therewith.

Whether an allegation is *surplusage* depends upon the pleading not the proof, and an allegation of issuable fact necessary to the cause of action set forth in the pleading does not become *surplusage* by failure to prove it.

Money counts are inappropriate for the recovery of unliquidated damages caused by a breach of warranty respecting the quality of goods sold.

In an action for money had and received one cannot recover damages for breach of warranty amounting to less than a total failure of consideration.

Where specifications are made under money counts plaintiff is confined to specifications.

ON EXCEPTIONS.

Action in assumpsit upon an account annexed to recover purchase price, for breach of warranty, and upon money counts with a specification. Presiding justice of Superior Court rendered judgment for defendant. Plaintiff brings exceptions. Exceptions overruled. Case fully appears in opinion.

Pinansky & Pinansky, for plaintiff.

Clifford E. McGlaughlin, for defendant.

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

MERRILL, J. On exceptions. This case, which had been appealed from the Municipal Court for the City of Portland, was heard in the Superior Court for Cumberland County by the presiding justice who rendered judgment for the defendant. The plaintiff's exceptions to this ruling were allowed.

The declaration contains three counts. The first is assumpsit upon an account annexed. The second is a special count alleging both express and implied warranties by the defendant respecting the condition of a refrigerator sold by him to the plaintiff for the sum of one hundred dollars, which the plaintiff paid, a breach of the warranties, a tender of the return of the refrigerator to the defendant and a demand for the return of the purchase price and refusal thereof by the defendant. This count is for the recovery back of the purchase price as such, not for damages for breach of warranty. The third count consists of the consoli-

dated money counts with a specification. The specification is as follows:

> "Under this count the plaintiff will show that the defendant owes him the sum of one hundred dollars ($100.00) for money had and received for a certain box which the defendant sold to the plaintiff as a General Electric Refrigerator supposed to be in good working condition but which in truth and fact was unfit for the use for which it was sold by the defendant to the plaintiff and was entirely useless and of no value, all of which the defendant knew at the time he sold the same to the plaintiff and took the plaintiff's money, therefor, to wit, the sum of one hundred dollars ($100.00) which sum was paid to the defendant by the plaintiff, and the sum, therefore, was had and received by the defendant and which sum was demanded by the plaintiff from the defendant and he, the defendant, refused to pay back to the plaintiff, and, therefore, owes him said sum."

The Sales Act, which is found in Chap. 171 of the R. S. provides that where there has been a breach of warranty, the buyer may, at his election,

> "accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." R. S., Chap. 171, Sec. 69, Par. I, Subsec. B.
>
> "rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid." Sec. 69, Par. I *supra,* Subsec. D.

It is further provided in said section:

> "Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after

> an offer to return the goods in exchange for repayment of the price." Sec. 69 *supra,* Par. IV.
>
> "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty." Sec. 69 *supra,* Par. VI.
>
> "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." Sec. 69 *supra,* Par. VII.

These provisions of the statute are in accord with the common law decisions of this court which hold that the buyer may rescind a contract of sale for breach of warranty and recover back the purchase price; *Marston* v. *Knight,* 29 Me. 341; or he may sue on the warranty and recover as damages, the difference between the actual value of the goods at the time of sale and what they would have been worth if they had answered to the warranty; *Moulton* v. *Scruton,* 39 Me. 287; and in special instances additional damages. *Thoms* v. *Dingley,* 70 Me. 100; 35 Am. Rep. 310.

These remedies between which the buyer is given an election are inconsistent one with the other. The action to recover damages for breach of warranty, is an action on the contract of warranty. The contract is affirmed and the buyer seeks to recover the damages occasioned by its breach. On the other hand, the action to recover back the purchase price following a rescission based upon a breach of warranty, is not an action on the contract of warranty. Such action presupposes that the contract of sale has been avoided by the buyer because of the breach of warranty, that title to the goods sold has revested in the seller and that the seller is under an obligation to return the purchase price to the buyer. In the case of rescission the law implies a promise on the part of the seller to return the purchase price received by him to the buyer as so much money had and re-

ceived to the buyer's use. The action for breach of warranty is an action upon an express contract. The action to recover the purchase price following a rescission is upon an implied contract. In an action for breach of warranty, the purchase price paid by the buyer does not in any way form the basis of recovery. True the purchase price paid may be evidence on the question of value. Recovery, however, is not of what was paid, but it is the difference between the actual value of the article purchased and what it would have been worth had it answered to the warranty.

The first count in the plaintiff's declaration is in form assumpsit on an account annexed but the record discloses no account as so annexed. This count in the declaration was not referred to in the bill of exceptions nor in the oral or written arguments submitted, and in the determination of the exceptions may be disregarded as abandoned.

As stated above, the second count in the declaration sets forth a sale by the defendant to the plaintiff, warranties, breach thereof, rescission by the plaintiff, and seeks only to recover the purchase price as such. In this count, the alleged rescission by the plaintiff is based upon a tender back of the property purchased, which was refused by the seller. These allegations, if sustained by proof, are sufficient to entitle the plaintiff to recover the purchase price paid under R. S., Chap. 171, Sec. 69, Par. V.

In order to recover the purchase price, based upon an offer to return the goods purchased, the buyer must adhere to his tender and act consistently therewith.

> "Moreover, after an attempted rescission by the buyer of chattels, which the seller has not accepted, the buyer, if he intends to rely upon it, must adhere thereto and act consistently therewith, and if he thereafter continues to use the property as his own, he may be held to have waived or abandoned the rescission, and may be precluded from rescinding or asserting a claim that he has rescinded; in other words, the use of chattels sold, by the purchaser, after the seller has refused the latter's ten-

> der of them in a rescission of the contract defeats the attempted rescission, if the property was used for the personal benefit of the purchaser, and not merely in compliance with his duty as bailee of the seller. This doctrine finds support in numerous cases." 46 Am. J., Sales, Sec. 765 at Page 896.

These cases are collected in an exhaustive note found in 77 A. L. R. Page 1178 et seq. This principle is recognized in *Libby* v. *Haley*, 91 Me. 331; 39 A. 1004. In that case the court held that the question as to whether or not the plaintiff has abandoned his attempted rescission is one of fact for the jury. That case recognized the principle that if after a tender of return and its refusal, the buyer uses the property *as his own*, such use would be a waiver of his rescission.

In the present case, the undisputed evidence shows that after the plaintiff tendered the property back to the defendant and demanded repayment of the purchase price, he removed the working parts of the refrigerator, sold them for junk, replaced them with new parts at an expense of over one hundred dollars, and thereafterwards refused to redeliver the refrigerator to the defendant upon his offer to repay the purchase price, and that the plaintiff removed the property to his camp and there used the refrigerator as his own. These facts would justify the presiding justice in finding that the rescission had been abandoned and waived. Therefore, the decision of the presiding justice that the plaintiff could not recover the purchase price under the second count, based upon his rescission alleged therein must be sustained.

The plaintiff's suggestion that the presiding justice should have treated the allegations respecting the rescission and the claim to recover the purchase price as surplusage, and thus transform the count into a count to recover damages for breach of the special contract of warranty, is not tenable. The Sales Act, as above quoted, gives the buyer an election between remedies. He may sue upon the warranty for damages or rescind and bring an action to recover back

the purchase price following the rescission. As above held herein, these are separate, distinct and inconsistent grounds of action. In the second count, the plaintiff elected to sue to recover back the purchase price following rescission upon his part. The allegations which the plaintiff would have the court treat as surplusage were allegations necessary to the cause of action which he sought to enforce therein. The second count is manifestly though inartificially drawn to recover purchase price following a rescission. The allegations of warranty, breach thereof and rescission were necessary allegations to that cause of action. The allegations of warranty and breach thereof were not made as allegations of a cause of action, but were set forth as the grounds for the rescission which gave rise to the cause of action to recover the purchase price. Each of them tendered an issue which the defendant joined. Failure to prove any one of them, or proof that the rescission had been waived would defeat the cause of action upon which the plaintiff sought to recover in the second count. None of them were surplusage. Whether or not an allegation is surplusage depends upon the pleading, not upon the proof. If the allegation is one of an issuable fact necessary to the cause of action set forth in the pleading, it does not become surplusage because of failure to prove it. The character of the action is determined by the declaration. See *Heal* v. *Fertilizer Works,* 124 Me. 138-144; 126 A. 644.

> "Allegations necessary for recovery cannot be rejected as surplusage." 49 C. J. 85 n. 30 a. *Head* v. *Powell,* 211 (Mo. A.) 310; 245 SW 618; *Frick* v. *Freudenthal,* 45 Misc. 348; 90 N. Y. S. 344; *Buchanan* v. *Jencks,* 38 R. I. 443; 96 A. 307; 2 A. L. R. 986.
>
> "The rule permitting the deleting of words in a complaint as surplusage, is that where descriptive words are used, which, if deleted, *leave the cause of action stated as before,* (emphasis ours) such words may be treated as surplusage." *Palmer et al.* v. *Miller,* 43 N. E. (2nd) (Ill.) 973-976; 380 Ill. 256.

The allegations of a tender back of the refrigerator and its refusal by the defendant were necessary to the cause of action upon which the plaintiff sought recovery in the second count. The evidence, however, disclosed a waiver of the plaintiff's right to rely upon this tender and refusal and so defeated the cause of action upon which he sought to recover. Having failed to establish this cause of action, neither he nor the court can treat allegations which were necessary to the cause of action sought to be enforced as surplusage, and thereby transform the count into one based upon a separate, distinct and inconsistent cause of action. The proof showing that the rescission had been waived and abandoned, the decision of the presiding justice for the defendant on the second count should not be disturbed. The plaintiff has no cause for complaint when the presiding justice renders his decision on the facts as they apply to the cause of action which the plaintiff himself elected to pursue.

As a third count in the declaration the plaintiff inserted the consolidated money counts, with the specification heretofore set forth. Having specified the grounds of his cause of action under the money counts, the plaintiff is confined to his specification as a basis of recovery thereunder. *Carson* v. *Calhoun,* 101 Me. 456; 64 A. 838; *Gooding* v. *Morgan,* 37 Me. 419; *Carey* v. *Penney,* 127 Me. 304; 143 A. 100; *Dufour* v. *Stebbins,* 128 Me. 133; 145 A. 893. As said in *Carey* v. *Penney, supra*:

> "A count in ordinary form alleging a promise in consideration of money had and received is demurrer-proof though no specification is filed. If a specification is filed, whether by direction of court or without such direction, proof is limited by it."

If the count and specification be interpreted as seeking to recover the purchase price paid on the ground of total failure of consideration, the proof fails to sustain the claim. The presiding justice was justified upon the evidence in finding that the refrigerator as purchased was not so totally

valueless that the plaintiff could keep it, as he did, and recover back the entire purchase price on the ground of total failure of consideration.

Even if open to him under his specification, we have already shown that the plaintiff could not recover as a result of rescission on his part. That right had been waived.

Nor can the plaintiff in an action for money had and received recover damages for a breach of warranty of the quality of goods purchased, amounting to less than a total failure of consideration.

The money counts are inappropriate for the recovery of unliquidated damages caused by a breach of warranty respecting the quality of goods sold. *Russell* v. *Gillmore,* 54 Ill. 147; *Hunt* v. *Sackett,* 31 Mich. 18. See also *Towers* v. *Barrett* 1 T. R. 133; 99 Eng. Reprint 1014; *Payne* v. *Whale,* 7 East 105; 103 Eng. Reprint 105; *Power* v. *Wells,* 2 Cowp. 818; 98 Eng. Reprint 1379. See also Dane Abr. Chap. 9, Art. 5, Sec. 6, where the author says respecting the action of money had and received based upon a failure of consideration:

> "So if money be paid for a horse *warranted* sound, and he is *unsound,* and there is an immediate return of him, but otherwise the action must be on the *warrantee,* 'it is *not having the stipulated consideration,* and not its *want of value* which the doctrine respects.' "

The rule that a partial failure of a non-apportionable consideration may not be recovered in an action for money had and received is well stated by Keener as follows:

> "If, however, the failure of consideration is only partial, and the money paid by the plaintiff under the contract is not by the terms of the contract apportionable with reference to the performance of the defendant, there can be no recovery for money had and received." Keener Quasi Contracts, 304.

Speaking of the action for money had and received, American Jurisprudence says:

> "It lies where there is an express promise, if nothing remains to be done but the payment of money, but it is not a proper form of action to recover damages for breach of an actual subsisting or executory contract." 4 Am. J., 509. See *Cox* v. *Gross,* 122 So. (Fla.) 513; 97 Fla. 848.

If there be no rescission the contract of warranty remains in full force and recovery for its breach sounds in damages. Here the failure of consideration occasioned by the breach of warranty was only partial. The money paid by the plaintiff was not under the terms of the contract apportionable with reference to the performance of the defendant. Therefore, under the common counts, limited as they were by the specification to a claim for money had and received, no recovery may be had for the damages occasioned by the alleged breach of warranty.

The cases of *Mitchell* v. *Emmons,* 104 Me. 76; 71 A. 321 and *Berman* v. *Langley,* 117 Me. 559; 104 A. 65, cited and relied upon by the plaintiff are not at all inconsistent with the principles of law herein announced. Neither of these cases hold nor do they even intimate that there can be a recovery for breach of warranty respecting the quality of goods sold under a count in *indebitatus assumpsit.* In neither of these cases did the plaintiff recover damages for breach of the alleged warranty. In both of them recovery of the purchase price was allowed as money had and received by the defendant to the use of the plaintiff following a rescission of the contract of sale because of the breach of warranty. Such was the recovery sought by the plaintiff herein. Unfortunately, from his standpoint, the evidence disclosed that he had waived his right to the relief which he claimed.

The foregoing principles of law are decisive of the several exceptions alleged by the defendant.

The first and second exceptions are based on alleged erroneous findings as to the nature of the warranties. These errors, if errors they were, are immaterial. Under the law governing the case, the plaintiff could not have recovered *in this action* even if all of the warranties set forth in the declaration were made and broken.

We have already disposed of the third exception. Whether or not the refrigerator was utterly worthless was a question of fact for the determination of the presiding justice. His determination of fact, if there be any evidence to support it, is final. We cannot say that the evidence as a matter of law required him to find that the refrigerator as purchased was utterly worthless or even of so little value that the plaintiff could keep it as his own and not thereby waive his rescission. Nor was he required to find it so valueless that there was a total failure of consideration. Neither was there error in law in not finding for the plaintiff "upon the law and evidence in the case," as is alleged in the fourth exception; nor was there error in law in not finding for the plaintiff "on the common count with specifications" as alleged in the fifth exception.

The plaintiff takes nothing under any of his exceptions.

Exceptions overruled.

JAMES G. MITCHELL
vs.
C. CAPEN PEASLEE, JR.

Cumberland. Opinion, December 13, 1948.

Workmen's Compensation. Malpractice. Subrogation. Third Persons. Common Law Actions.

Under circumstances creating legal liability under the Workmen's Compensation Act in some person other than the employer, an employee claiming and accepting compensation does not lose his right to bring a common law action against such other person, but his right to enforce liability is suspended until the employer vested with subrogation rights fails to pursue its remedy for thirty days after written demand, or waiver. R. S. 1944, Chap. 26, Sec. 25.

Failure to make written demand or obtain waiver does not entitle defendant to judgment on the merits, but with pleadings waived, as in this report, entitles defendant to non-suit.

Statute allowing additional damages for injuries suffered through tort of a third person as well as compensation from his employer is not objectionable as allowing double indemnity, but prevents immunity of tort feasor for his wrongdoing.

ON REPORT.

Action to recover damages for alleged malpractice by the defendant, a practicing physician. The plea is a general issue with a brief statement that following treatment by the physician plaintiff prosecuted a claim against his employer under the Workmen's Compensation Act and secured an award and finally a lump sum settlement both of which were paid. Stipulated that if the action is barred by the Compensation Act, judgment shall be for defendant, otherwise the case stand for trial. Case remanded for entry of plaintiff non-suit. Case fully reported in opinion.

George H. Hinckley, for plaintiff.

Locke, Campbell, Reid and Hebert, for defendant.

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

STURGIS, C. J. This action to recover damages for alleged malpractice by the defendant, a practicing physician, is reported on an agreed statement of facts.

The declaration is that the plaintiff, as a result of an accident while employed by a local lumber concern, broke the radius of his left arm at the wrist, the defendant was called in as attending physician and through his negligence in only applying splints and no cast the broken bone did not knit properly or remain in normal position, the displacement was not corrected when the splints were removed and permanent partial loss of the use of the arm has resulted. The plea is the general issue with brief statement and as a special matter of defense that following the treatment of his physician the plaintiff prosecuted against his employer and its insurance carrier a petition for compensation under the Workmen's Compensation Law, obtained an award of specific compensation and finally secured a lump sum settlement, both of which were paid. And it is stipulated that if the plaintiff's action is barred by the compensation recovery judgment shall be entered for the defendant, otherwise the case stand for trial.

It is well settled at common law that in an action for negligence causing bodily injury the negligence or lack of skill of a physician or surgeon, selected with reasonable care, which aggravates or increases the injury is regarded as a consequence reasonably to be anticipated and a part of the injury for which the original wrongdoer is liable. *Wells* v. *Gould & Howard,* 131 Me. 192; 160 A. 30; *Andrews* v. *Davis,* 128 Me. 464; 148 A. 684; *Hooper* v. *Bacon,* 101 Me. 533; 64 A. 950; *Sacchetti* v. *Springer,* 303 Mass. 480; 22 N. E. (2nd) 42; *Purchase* v. *Seelye,* 231 Mass. 434; 121

N. E. 413, 8 A. L. R. 503. This principle is applied in workmen's compensation cases where an injury to an employee is aggravated by the negligent or unskillful treatment of a properly chosen physician or surgeon and if the chain of causation remains unbroken the resulting disability or death is compensable and an award of compensation includes the original injury and its ultimate results through malpractice. *Gauvin's Case,* 132 Me. 145; 167 A. 860; *Vatalaro* v. *Thomas,* 262 Mass. 383; 160 N. E. 269; *Parchefsky* v. *Kroll Bros., Inc.,* 267 N. Y. 410; 196 N. E. 308; 98 A. L. R. 1387. A lump sum settlement of such an employee's claim for compensation, made and accepted in accordance with the provisions of the Workmen's Compensation Act, is within this rule. Payment of the lump sum, approved by the Industrial Accident Commission, is in full settlement of all compensation to which the employee is or may be entitled under the Act. R. S. Chap. 26, Sec. 28; *Melcher's Case,* 125 Me. 426; 134 A. 542.

The provisions of the Workmen's Compensation Act of Maine, relating to the rights of recovery of an employee sustaining a compensable injury in respect to which a person other than the employer is liable to respond in damages, are as set forth in Sec. 25, Chap. 26, R. S. 1944, which in its part here material reads:

> "When any injury for which compensation or medical benefits is payable under the provisions of this act shall have been sustained under circumstances creating in some person other than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim such compensation and benefits or obtain damages from or proceed at law against such other person to recover damages. Any employer having paid such compensation or benefits or having become liable therefor under any decree or approved agreement shall be subrogated to the rights of the injured employee to recover against that person; provided if the employer shall recover from such other person damages in excess of the compensa-

> tion and benefits so paid or for which he has thus become liable, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action or collection * * *.
>
> The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within 30 days after written demand by a compensation beneficiary, shall entitle such beneficiary or his representatives to enforce liability in his own name, the accounting for the proceeds to be made on the basis above provided."

Under this statute an employee injured under circumstances creating in some person other than his employer a legal liability to pay damages in respect thereto does not by claiming and accepting compensation from his employer lose his right to bring a common law action against such other person, but his right to enforce liability in his own name is suspended until the employer, vested by subrogation with the injured beneficiary's right of action, fails to pursue its remedy for thirty days after written demand or waives that right. Failure to bring suit within the thirty-day period after demand or waiver of its right of action by the employer reinvests the employee with his original right of common law action and thereafter he alone can pursue it. The statute enables an injured employee suffering damage through the tort of a third person not only to receive the compensation allowed by law from his employer but also to obtain from the tort-feasor such additional damages as he would be entitled to had he elected to first bring suit at common law. This, in view of the required accountings by the employer and employee, is not an allowance of double indemnity. And immunity of the tort-feasor for his wrongdoing is prevented. *Foster* v. *Hotel Co.*, 128 Me. 50; 145 A. 400; 67 A. L. R. 239. See *Fournier-Hutchins* v. *Tea Co.*, 128 Me. 393; 148 A. 147.

It is agreed that following the completion of the defendant physician's treatment the plaintiff employee procured specific compensation and then a lump sum settlement as set

forth in the pleading and it must be assumed that compensation for the results of the physician's alleged malpractice as well as for the results of the original injury was included in the award and settlement. If this is not true it is not so stated in the report and failure of the Industrial Accident Commission to award and approve the compensation to which the employee was entitled cannot be inferred. It is also stipulated that the employee has made no written demand upon his employer or the compensation insurer to bring suit against the physician to recover damages for his alleged malpractice. On these facts, if the plaintiff's right to recover against the defendant is governed by the provisions of Sec. 25 of the Compensation Act it is now vested in and can only be enforced by his employer or the insurer. But contention is that the statute does not apply and this action by the employee in his own name can be maintained. The question raised is of novel impression in this jurisdiction.

It is argued orally and on the brief that if there was malpractice by the attending physician in the case at bar it was an independent, intervening cause of the employee's ultimate disability which arose after the original injury was received and not being that injury nor included in it, the employee's right of action against the physician is separate and distinct from his right to receive compensation from his employer and is in no way controlled by the statute. *Smith* v. *Golden State Hospital,* 111 Cal. App. 667; 296 P. 127; *Viita* v. *Fleming,* 132 Minn. 128; 155 N. W. 1077; L. R. A. 1916D, 644; Ann. Cas. 1917E, 678. This contention, however, disregards the rule stated, that aggravation through malpractice of an employee's injury is to be taken as a part of the original injury and included in the compensation to which the employee is entitled and insofar as research discloses, it has not been sustained in any jurisdiction where under comparable provisions of Workmen's Compensation Acts that rule prevails.

In *Parchefsky* v. *Kroll Bros., Inc., supra,* it is said:

> "The difficulty in this case arises from the fact that compensation under our statutes is awarded for the ultimate results of an injury which follow upon the intervening malpractice. Under the English Workmen's Compensation Act no compensation is awarded for such results. There the improper medical treatment is regarded as an intervening independent act which breaks the chain of causation. (Cases cited). The same rule has been followed in some jurisdictions in this country. (Cf. *Ruth* v. *Witherspoon-Englar Co.*, 98 Kan. 179; 157 P. 403; L. R. A. 1916E 1201; *Smith* v. *Golden State Hospital,* 111 Cal. App. 667; 296 P. 127; *Viita* v. *Fleming,* 132 Minn. 128; 155 N. W. 1077; L. R. A. 1916D 644; Ann. Cas. 1917E 678.) * * *.
>
> We have preferred to apply to awards under Workmen's Compensation Law the same rule applied to damages in common law actions. Compensation for the original injury includes the ultimate results of the injury, though the injury has been aggravated by intervening malpractice. Other jurisdictions have applied the same rule. (Cases cited).
>
> * * *. After malpractice has aggravated the original injury, the subsequent disablement is due to concurrent causes inextricably intertwined. More than that, these results would not have followed from the original injury but for the independent negligence of the physician. To the extent that the injury for which compensation may be made under the Workmen's Compensation Law includes the result of malpractice, the 'injury' is due to the negligence of the physician within the spirit and letter of the statute."

This decision is governed by Workmen's Compensation Law, Sec. 29 of New York which differs from Sec. 25 of the Maine statute in that if an employee injured by a third person elects to take compensation the award operates as an absolute assignment of the employee's cause of action against the tort-feasor to the employer or other person liable for payment of the compensation and no right of action is reserved to the employee.

In *Vatalaro* v. *Thomas, supra,* in a consideration of Massachusetts Workmen's Compensation Act, G. L. Chap. 125, Sec. 15, a substantially similar statute, the contention of an employee that his cause of action against a physician for malpractice which aggravated his accidental injury was different and independent from that for which he received compensation through his employer by way of a lump sum settlement was disallowed and it was held that the injury for which the employee received compensation included that which was the basis of his action for malpractice and action against the physician was governed by the statute.

In *Jordan* v. *Orcutt,* 279 Mass. 413; 181 N. E. 661, 662, the rule of *Vatalaro* v. *Thomas* is affirmed and of G. L. Chap. 125, Sec. 15, it is said:

> "The words of Sec. 15 'where the injury for which compensation is payable was caused under circumstances creating a legal liability * * * to pay damages in respect thereof' are not confined to the original event of injury but include all injury arising from circumstances of aggravation for which compensation may be had in the proceedings under the act."

And it is held that the right to maintain an action against a physician for alleged malpractice in treating an employee's injury is governed by Sec. 15 of the Compensation Act and is vested solely in and can be maintained by the employer.

In *Overbeek* v. *Nex,* 261 Mich. 156; 246 N. W. 196, under 2 Comp. Laws 1929, Sec. 8454, providing that where an injured employee elects to accept compensation the employer or his insurer is subrogated to the right of the employee to recover against a third person legally liable to pay damages for the injury, the contention that the employee, whose injury has been aggravated by the malpractice of his physician and has received compensation to the extent the law permits retains an independent right of action for the malpractice is rejected and the employee's right of action

against the physician held to be subject to applicable statutory provisions as to the liability of a third party wrongdoer. To like effect are *Polucka* v. *Landes,* 60 N. D. 159; 233 N. W. 264; *Williams* v. *Dale,* 139 Ore. 105; 8 P. (2nd) 578; 82 A. L. R. 922; *Revell* v. *McCaughan,* 162 Tenn. 532; 39 S. W. (2nd) 269; *Baker* v. *Wycoff,* 95 Utah 199; 79 P. (2nd) 77; *Anderson* v. *Allison* 12 (Wash.) (2nd) 487; 122 P. (2nd) 484; 139 A. L. R. 1003.

While the underlying statutes and issues in the cases just reviewed are somewhat different in form and substance they cannot in principle be distinguished from those in the case at bar. We are convinced that the weight of authority lies in these decisions and supports the conclusion, which reason dictates, that the right of action of an employee against his physician for malpractice which aggravates an injury for which he has claimed and accepted compensation is within the purview of and governed by the provisions of Sec. 25 of the Compensation Act relating to actions against persons other than the employer liable for the employee's injury.

On this report under the statute the plaintiff employee's right to recover against the defendant physician for malpractice is vested in his employer and for want of written demand this action by the employee in his own name cannot be maintained. This, however, does not entitle the defendant to judgment on the merits but, with pleadings waived as they are on the report, only to a nonsuit. The case is remanded to the trial court for entry of that judgment.

Case remanded
for entry of
Plaintiff nonsuit.

STATE OF MAINE
vs.
PETER B. JENNESS

Kennebec. Opinion, December 14, 1948.

Witnesses. Criminal Law. Moral Turpitude. Intoxicating Liquor.

Where statute provides that evidence of commission "of a felony, any larceny or any other crime involving moral turpitude" may be shown to affect the credibility of a witness, convictions for offenses which are not larcenies felonies nor involve moral turpitude cannot be shown. R. S. 1944, Chap. 100, Sec. 128 as amended by P. L. of 1947, Chap. 265.

Illegal sales and possession for illegal sales of intoxicating liquor do not involve moral turpitude.

Moral turpitude implies something immoral in itself regardless of its being punishable by law.

ON APPEAL AND EXCEPTIONS.

Upon indictment for assault and battery and unlawfully concealing a deadly weapon. For the purpose of affecting respondent's credibility, respondent was asked, subject to objections and exceptions, questions relating to conviction of illegal sales and possession of intoxicating liquor. Verdict of the jury was guilty on both counts. Respondent appealed from denial of motion to set aside the verdict and excepted. Exception sustained. Case fully appears in opinion.

James L. Reid, County Attorney for Kennebec County, for State of Maine.

McLean, Southard and Hunt, for respondent.

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

FELLOWS, J. This is an indictment in two counts, one count for assault and battery and the second for unlawfully concealing a deadly weapon. The verdict of the jury was guilty on both counts.

The case comes before the Law Court from the Superior Court in Kennebec County, on appeal from denial of motion to set aside the verdict, and on bill of seven exceptions.

The evidence in this affair is complex and conflicting in its details, but, briefly stated, the jury probably found: that the respondent, Peter B. Jenness, and his wife, Katherine M. Jenness, had been having some marital difficulties. They lived in Augusta, but on August 15, 1947, the wife, Katherine Jenness, was visiting at the cottage on Lake Cobbosseecontee belonging to her mother and stepfather, Mr. and Mrs. Ralph T. Park. The respondent went to the Park's cottage to talk with his wife, carrying, as the state claims, binoculars in his hand and a homemade "black jack" in a pocket of his pants. He went into the kitchen and asked for an opportunity to speak to his wife. He was told that he must speak to her outside. When Mrs. Jenness came out of doors the respondent seized his wife's hand and attempted to take a ring, or rings, from her fingers. Mrs. Jenness shouted "Mother — Dad," and Mr. Park came out of the cottage and attempted to stop the quarrel between them by pulling Mrs. Jenness away. The respondent Jenness then grabbed Mr. Park by his shirt. Park testified, concerning this, that "he let go of her and grabbed hold of my shirt with one hand and reached for his hip pocket with the other. I grabbed for his hand and before I did he had hold of the club, and I grabbed it away and hit him and it turned him around. He made a lunge for me and I hit him again, and I saw his head was cut, and I threw the club down." The respondent denied that he was the assailant, and denied that he had the weapon with him. The respondent insisted that he was first to be struck, and by someone from behind. What actually was said, what actually happened, and in what order were the happenings, depends up-

on whether two witnesses for the state or the testimony of the respondent, are to be believed. There was apparently much ill will between the various members of this family, and the guilt or innocence depends on the true facts. It is evident that the jury did not believe the respondent in any particular. No injury was suffered by Mr. Park beyond the torn shirt. The injuries to the respondent, however, were more or less severe.

FIRST EXCEPTIONS

For the purpose of affecting the credibility of respondent, the respondent was asked, subject to objections and exceptions, the following questions:

> "Were you convicted on September 30, 1930 of illegal possession of intoxicating liquor?"
> A. "I was."
>
> "On February 23, 1933 were you convicted of the crime of conspiracy in the possession and sale of intoxicating liquor?"
> A. "Yes."
>
> "On March 2, 1935 were you convicted of the crime of illegal sale of intoxicating liquor?"
> A. "I was."
>
> "On June 18, 1935 were you convicted of the crime of sale of intoxicating liquor?"
> A. "I was."

The objections of the respondent are based on the ground that the foregoing questions and answers are in violation of Chap. 265 of the P. L. of 1947 (amending R. S. 1944, Chap. 100, Sec. 128) which statute, as amended, provides as follows:

> "No person is incompetent to testify in any court or legal proceedings in consequence of having been convicted of an offence but ~~such~~ commission *of a felony, any larceny, or any other crime involving moral turpitude* may be shown to affect his credibility." (The line through "such," and the italics,

illustrate the changes in the statute made by the 1947 revision).

By this amendment the Legislature plainly intended that only convictions for a felony, or for any larceny, or for a crime involving "moral turpitude," can be shown to affect credibility. Convictions for offenses which are not larcenies or felonies or do not involve "moral turpitude," cannot be shown.

This brings directly before the court the question of whether these sales and the illegal possession of intoxicating liquor are crimes involving moral turpitude. The second question relating to conspiracy, involves a felony, and was admissible. *State* v. *Pooler,* 141 Me. 274, 280; 43 A. (2nd) 353. His conviction of a felony may be shown by his own cross-examination. *State* v. *Knowles,* 98 Me. 429; 57 A. 588; P. L. 1947, Chap. 265.

The two words "moral turpitude" have been defined as "inherent baseness or vileness of principle"; "the quality of a crime involving grave infringement of the moral sentiment as distinguished from *mala prohibita.*" Webster's New International Dictionary. Generally speaking, crimes *malum in se* involve moral turpitude, while most offenses that are unlawful only because made so by statute, do not. "Moral turpitude" implies something immoral in itself, regardless of its being punishable by the law. It is an act of baseness, vileness, or depravity in the private or social duties which man owes to his fellowmen or to society in general, contrary to the customary rule of right and duty between man and man. It is something done contrary to justice, honesty, modesty and good morals. The word "moral," in the phrase "moral turpitude," seems to be nothing more than emphasis on the word "turpitude." See Words and Phrases, Permanent Edition (1940), "moral turpitude"; 41 *Corpus Juris,* 212; 14 Am. Jur. 761, Secs. 11-14; 27 Cyc. 912; 2 Bouvier's Law Dictionary (Third Revision).

Driving an automobile while intoxicated involves moral turpitude, but not the driving when merely under the influence of liquor. "Intoxication in the public streets was always an evil thing." *State* v. *Budge,* 126 Me. 223, 228; 137 A. 244, 247; 53 A. L. R. 241.

Under ancient common law one who had been convicted of any criminal offense was not permitted to testify in court, upon the theory that such a person was probably incapable of telling the truth. That idea was early recognized in Maine as incorrect and unjust, and such an individual was permitted to testify, but his conviction might be shown to affect his credibility.

With the growth of the number of laws and regulations found necessary to protect the public under modern civilization, many of our citizens voluntarily or unintentionally have become offenders against the law. It is, therefore, the mature consideration of the Legislature that the commission of one or many of the minor statutory offenses, or the breaking of police regulations, do not necessarily show a tendency to testify falsely. It is the "evil" mind that may do so, and it may also be the person who commits a larceny or a felony.

It is well recognized that moral turpitude cannot be exactly defined by a rule to fit all cases. It may or may not be said to exist, depending on the facts, conditions and circumstances. The record of a conviction does not show moral turpitude when the offense is such that a majority of good citizens would not so consider it, even though other good citizens, with minority ideas of reform, might positively affirm its existence. As stated by Judge Hand in *United States* v. *Day,* 34 Fed. (2nd) 920 (C. C. A. 1929):

> "* * * * * All crimes violate some law; all deliberate crimes involve the intent to do so. Congress could not have meant to make the willfulness of the act a test; it added as a condition that it must itself be shamefully immoral. There are probably many persons in the United States who would so regard either the possession or sale of liquor; but

> the question is whether it is so by common conscience, a nebulous matter at best. While we must not, indeed, substitute our personal notions as the standard, it is impossible to decide at all without some estimate, necessarily based on conjecture, as to what people generally feel. We cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place; nor can we close our eyes to the fact that large numbers of persons, otherwise reputable, do not think it so, rightly or wrongly."

We hold that illegal sales, and possession for illegal sales of intoxicating liquors, do not involve moral turpitude. Sales, and possession for sale, of intoxicating liquors were considered entirely proper at common law. *Hamilton* v. *Goding,* 55 Me. 419; 30 American Jurisprudence, 259, Par. 14. Intoxicating liquor was freely sold, and it was not considered morally wrong, by our Colonial ancestors. When Maine became a State its citizens had the right under a state revenue license to possess and sell. *Lunt's Case,* 6 Me. 412. The State of Maine is now engaged in possession and sale of intoxicating liquors with the ballot approval and direction of a majority of the voters.

The state claims, in its brief, that even if the evidence of these three records of convictions of illegal possession and illegal sales of intoxicating liquors was not admissible evidence, it should not be considered prejudicial, and the respondent should "take nothing by his exceptions." These errors however, were not mere "technical" errors, nor was the admission of this illegal evidence so unimportant that it clearly would not, under all the circumstances, affect the jury decision. The question presented was a question of credibility. There was the word of a man and his stepdaughter against the word of the stepdaughter's husband on vital facts, and there was much ill will on both sides.

The attorney for the state intended to totally discredit the respondent. He may have improperly done so by this series of inadmissible questions. One question he asked

relating to conspiracy was admissible, because a felony. That question relating to one conviction might or might not indicate to the jury's mind that the witness was unworthy of belief. It was a matter for the jury, and depended on the attitude of the individual jurors. Several inadmissible questions, however, of convictions from which the attorney would argue moral turpitude, might show to the jury's mind a total depravity. If, as the state claims, all these additional and inadmissible questions are not to be considered prejudicial, why did the attorney ask more than the one relating to conspiracy? With an intended prejudice, improperly aroused in the jury's mind by many law violations, logic usually meets with a cool reception. The Legislature has said that such questions should not be admitted, and the court cannot say, as a matter of law, that if several such questions are asked and improperly admitted that they are not to be considered prejudicial under circumstances as here shown. It is not for the court to determine on this record whether there is guilt or innocence. The jury has the right and duty to find a verdict, but they must not find a verdict which may have been influenced by a mass of evidence admitted contrary to legislative order and direction.

Because of our decision that this evidence was inadmissible, as contained in the first exceptions, and because the jury may have been improperly influenced by its admission, it is unnecessary to consider other claimed errors.

Exceptions sustained.

SARAH M. O'CONNOR

vs.

JULIAN F. AND HATTIE L. BEALE

Kennebec. Opinion, December 21, 1948.

Easements. Time.

In an action on the case under R. S. 1944, Chap. 128, Sec. 16 for obstructing a right of way based on prescription, plaintiff has burden of proving open, visible, continuous, and unmolested use by her and her predecessors without interruption for twenty years.

Any closing of a way openly and visibly interrupts the use and prevents the running of the prescriptive period regardless of the fact that there may have been some special purpose for it other than interruption.

ON EXCEPTIONS.

Action on the case to recover damages for obstruction of a right of way, heard by a single justice and brought forward on defendant's exceptions to a decision for the plaintiff without specified factual findings. Exceptions sustained. Case fully appears in opinion.

Locke, Campbell, Reid and Hebert, for plaintiff.

Sanborn and Sanborn, for defendant.

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

MURCHIE, J. This action on the case was brought by the plaintiff, under R. S. 1944, Chap. 128, Sec. 16, to recover damages from the defendants for the obstruction of a right of way. It was tried by a single justice without the intervention of a jury and his award of damages to the plaintiff carries his decision that she sustained her claim by a preponderance of evidence. The claim is grounded in the assertion that her tenants, in property to be identified here-

after, used the way, in such an open, visible, continuous and unmolested manner, for twenty years or more, and under circumstances from which the knowledge and acquiescence of the defendants and their predecessors in title must be inferred or presumed, as to create a prescriptive right thereto. That such a right may be so acquired is undoubted. *Thompson et al.* v. *Bowes,* 115 Me. 6; 97 A. 1; 1 A. L. R. 1365; *Dartnell* v. *Bidwell,* 115 Me. 227; 98 A. 743; 5 A. L. R. 1320; *Burnham* v. *Burnham et al.,* 130 Me. 409, 156 A. 823.

The decision offers no specification of the particular twenty-year period of continuous use factually found, but such a finding, relative to some particular period, is necessarily involved in it, *Madigan* v. *Lumbert,* 136 Me. 178; 5 A. (2nd) 278, and must be tested within the well established principle that findings of fact by a single justice sitting without the intervention of a jury are final if there is competent evidence in the record to support them. *Ayer* v. *Railway Co.,* 131 Me. 381; 163 A. 270.

The case comes forward on five exceptions alleged by the defendants. The first challenges an evidence ruling which is not material in view of the fact that the exceptions must be sustained on other grounds. The others may be considered together since they assert, collectively, that the evidence did not justify a factual finding that plaintiff and her predecessors in title had used the way in that manner essential to establish a prescriptive right in any twenty-year period.

The parties are the owners of double tenement houses located on adjoining lots on Stone Street in Augusta. On December 10, 1908 both lots were owned by one Dr. Leander J. Crooker. On that day he conveyed the northerly one to a niece who lived with him. Late in the following year, or early in 1910, he, or they, had the houses constructed, on similar if not identical plans, and they rented the properties until September 9, 1915, when Dr. Crooker sold the

southerly lot to a predecessor in title of the plaintiff. The plaintiff acquired title on April 24, 1924. The northerly lot had been sold by the niece about a week earlier. Title to it came to the defendants on May 11, 1937. The issue arises in connection with the use of the way by the tenants of Dr. Crooker, and his successors in title, from late in 1909 or early in 1910 until 1943, when the way was obstructed and its use by a tenant of the plaintiff denied, temporarily.

The houses set back from the street line about twenty-five feet, disregarding porches or verandas a little more than seven feet deep extending across the full width of the fronts. They are fifteen feet apart, with front walls parallel to the street. The property line, dividing the lots, runs diagonally through points a little less than six feet northerly of the southerly house, at the front wall line, and a little more than six and a half feet southerly of the northerly one, at the rear. The way asserted is ten feet wide, according to a plan introduced as an exhibit by the plaintiff, and utilizes land on both sides of the property line.

From the time of the construction of the houses until July 1947 no owner, or tenant of any owner, forbade the use of the way to the occupants of the other house or placed any obstruction of a permanent nature on any part of the strip of land between the two houses. The defendants placed fence posts along the property line at that time, approximately ten feet apart. Except for a few short intervals of a week or more the fifteen-foot strip, or the narrower ten-foot way, accommodated vehicular traffic throughout the period from 1909, or 1910, to 1947, for the delivery of coal and wood to both houses and the removal of garbage and ashes therefrom. It was used by the owners and tenants of the northerly tenement more extensively than by the tenants of the southerly one, largely because there was a building on the northerly lot used at times as a stable or garage. The way was maintained, so far as it may be said to have been maintained at all, by the owners or tenants of the tenement on the northerly lot, spreading gravel and

ashes and removing snow. No contribution toward maintenance was ever made, or offered, by the plaintiff until April 1943, when the defendant Julian F. Beale was working on a strip of land northerly of his house, purchased in 1937, to prepare it for use as a right of way for the defendants' tenement. At that time plaintiff's husband sent a check for $25 as a contribution to maintenance, with a letter offering to pay more for either upkeep or improvement. The check was returned.

Notwithstanding the failure of the defendants and their predecessors in title to forbid the occupants of the southerly house to use the way, or to place any permanent obstruction upon it which would make such use impossible, the record establishes beyond question that they placed both signs and temporary obstructions either on their own part of the way or entirely across it in 1926 (or 1927), and thereafter on at least three occasions, two of which need not be identified. The last occasion was in 1943, already referred to, when a sign carrying the legend "Closed to trucks" was placed at the street line and a truck calling at the tenement on the southerly lot was not permitted to use the way. Among the exhibits introduced in evidence by the defendants is a picture which shows this sign and the evidence establishes definitely that it was put in place in 1943 and maintained for a few weeks. Without reference to these temporary obstructions, the record contains testimony given by both defendants, and by their immediate predecessor in title, which would have been more than sufficient to defeat the claim of the plaintiff if believed by the trier of facts. His decision indicates his rejection of it so there can be no point in repeating it here. The issue to be resolved arises in connection with the legal effect of the temporary obstruction placed in the way in 1926 (or 1927), since there can be no doubt that that which was placed at the street end of the way in 1943 was clearly sufficient to interrupt the kind of use made of the way by plaintiff's tenants and did in fact interrupt it. We have nothing to consider, therefore, except the years 1910 to 1943.

Since the temporary obstruction placed in the way by the defendants' immediate predecessor in title in 1926 (or 1927) falls midway between the commencement of the overall period and its close, and leaves less than twenty years on either end, the question is the narrow one whether that single obstruction prevented the running of the prescriptive period. The single justice must have decided that it did not, since the fact of the placing of it is undoubted, notwithstanding the testimony of plaintiff's husband that he never saw any obstruction prior to 1943. The then owner places the date as the very last of 1926 or 1927. One of the tenants of the house on the northerly lot places it between 1925 and 1930 or 1931, but says it was closer to 1925. One of the tenants of the house on the southerly lot says it was "not too long" after the predecessor in title bought the place, which was in April 1924. On the evidence as a whole the only factual finding which could be said to have the support of competent evidence is that the way was obstructed for a week or more by defendants' predecessors in title not earlier than 1924 and not later than some date in 1929 prior to the expiration of twenty years from the construction of the double tenements. For convenience we shall refer to it as the 1926 obstruction. The 1926 obstruction took the form of wooden horses placed across the strip carrying a sign forbidding trespassing. Several witnesses agreed that the horses and sign were left in place a week or more. The former owner of the northerly lot, who placed them, testified as a witness for the defendants and asserted in direct-examination that his purpose was to protect his legal rights. In cross-examination he admitted that the time may have been in March, in the mud season, and that he might have testified in another hearing that his purpose in obstructing the way temporarily was to keep trucks from using it in muddy weather, or to stop the development of ruts. Assuming this to have been his purpose there can be no doubt that his action constituted a closing of the way or that the closing interrupted the use of it by the tenants of the plaintiff. Plaintiff's counsel, in argument, makes

much of the fact that he stated, with reference to this temporary obstruction, that he was not "closing anybody off, anyway" and that this is apparent from the fact that he was using the way more extensively than anyone else, and in a manner that would not have been available to him if the owner of the southerly lot denied him the use of that part of it within the limits of the way.

The award must rest not only in the acceptance of the testimony given by this witness in cross-examination and disregard of his earlier declaration of a purpose to protect his rights, which was the right of the trier of facts, but also in a complete disregard of the interruption of use. This is contrary to the established principle that uninterrupted use for twenty years is requisite to establish a right by prescription. *Burnham* v. *Burnham et al., supra.* The requirement that user be uninterrupted in order to develop into right was mildly emphasized by Chief Justice Appleton in *Blanchard et al.* v. *Moulton et al.,* 63 Me. 434, in his statement that one might acquire a right equivalent to a grant:

> "if he continue to use the property * * * for twenty years or more * * *."

It is more definitely emphasized in 2 Greenleaf on Evidence, Par. 539, quoted and approved in *District of Columbia* v. *Robinson,* 180 U. S. 92; 21 S. Ct. 283; 41 L. Ed. 440; and in *Crosier* v. *Brown,* 66 W. Va. 273; 66 S. E. 326; 25 L. R. A., N. S., 174:

> "In order * that the enjoyment of an easement in another's land may be conclusive of the right, it must have been * * * uninterrupted; and the *burden of proving* this is on the party claiming easement."

On the record the plaintiff cannot be said to have carried the burden of proving that the way was used by her tenants without interruption for a period of twenty years. There can be no doubt that the owner of the northerly lot interrupted the use of it by her tenants prior to the expiration of twenty years from the construction of the houses and

within twenty years of the placing of the later (1943) temporary obstruction, which was recognized by those tenants as an assertion of the right of the owner of the northerly lot to close the way.

The plaintiff having failed to establish any full twenty-year period of uninterrupted use by competent evidence, it becomes unnecessary to consider other particular issues argued by counsel such as reciprocal use; whether the particular use was permissive at its inception, when the properties were owned by an uncle and niece living together; or whether a proper foundation was laid for tacking the use of the tenants of the uncle to that of those who occupied the southerly lot while it was owned by his successors in title.

Exceptions sustained.

JAMES H. TUTTLE

vs.

WILLIAM S. HOWLAND

AND

MARY A. HOWLAND

Hancock. July 25, 1947.

PER CURIAM.

This is a bill in equity to compel specific performance of a contract to convey real estate. The sitting justice sustained the bill and ordered the defendant, William S. Howland, on the payment to him of the sum of $1,500, the contract price, less costs, to convey to the plaintiff by warranty deed the premises described in the bill, in which deed the defendant's wife, Mary A. Howland, was ordered to join.

Mary A. Howland, the wife, was made a party defendant by amendment of the bill prior to the hearing. She filed a notice that she claimed her right by descent but no proper answer or sufficient plea was filed by her, nor was the bill taken *pro confesso* as to her.

Furthermore, there is an obvious error in the finding of the sitting justice that there was no value to the interest of Mary A. Howland. He claims to have figured this in accordance with the provisions of R. S. 1944, Chap. 156, Sec. 19. The problem under this provision was to find the present worth of $500 payable at the end of the owner's expectancy of life, computed at 3%, compound interest. It is not for us at this time to figure the exact amount of this. It is sufficient to say that there is here a substantial value which, if the bill is sustained, must be determined by the decree to be entered below.

The case must be remanded for further proceedings in the court below. In the first place, the pleadings have not been perfected. In the second place, there is an obvious error in the computation of the wife's interest. Furthermore, this court is of the opinion that the evidence is insufficient to prove that the premises described in the bill constitute what is known as the Willow Ledge property, which was the subject of the sale.

Appeal sustained.

Case remanded to court below for correction of pleadings, for a proper appraisal of the wife's interest, and for further evidence.

Charles J. Hurley, for plaintiff.

Clark & Silsby, for defendant.

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

H. PAUL RANCOURT
ADMINISTRATOR OF THE
ESTATE OF HONORE BEAUDET,
vs.
APPOLINE BEAUDET

Kennebec, October 10, 1947.

PER CURIAM.

On appeal by plaintiff. Bill in equity seeking to declare null and void a deed to real estate and to order the cancellation of the record of the same in order to remove a cloud on the title. The bill was brought by the administrator of the estate of Honore Beaudet, who died intestate in 1944, against Appoline Beaudet, the widow of the plaintiff's intestate. The plaintiff claimed the real estate as assets of the estate of his intestate. The issue was tried on bill, answer, replication and proof, before a single justice. The controversy involved both the question whether there was the delivery of the deed to the defendant by her husband in his lifetime and whether there was delivery of the deed with intent to pass title.

On March 26, 1932, Honore Beaudet executed and acknowledged a warranty deed, in usual form, conveying to his wife Appoline Beaudet his one-half interest in certain real estate. The deed was recorded on the same date. The learned justice hearing the case found that: "The deed was delivered by the husband to the wife in 1932 after it was recorded and was kept by the wife in her possession and control"; that it "Was delivered by the husband to the wife in 1932 with the intention of passing title to her, and that thereby the wife acquired title to the property, and that the administrator of the estate has no claim thereto." By decree the bill was dismissed with costs.

The court cannot disregard its oft repeated holding "That the findings of a single justice in equity upon questions of fact necessarily included are not to be reversed upon appeal unless they are clearly wrong, and that the burden is always upon the appellant to satisfy the court that such is the fact, and that otherwise the decree appealed from must be affirmed." *Adams* v. *Ketchum,* 129 Me. 221; *Gerrish Ex'r* v. *Chambers et al,* 135 Me. 74.

A careful examination of the entire record in the case leads us to conclude that the appellant has not sustained the burden of satisfying this court of error in conclusions of law or findings of fact on the part of the sitting justice in dismissing the bill. The evidence amply justified the findings of the sitting justice.

Appeal dismissed.

Decree fully affirmed, with additional bill of costs.

Jerome G. Daviau, for plaintiff.

Burleigh Martin,
Robert Martin, for defendant.

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

WALTER J. RANCOURT

vs.

SAUL TURGEON

Somerset, October 29, 1947.

PER CURIAM.

This is an action of trover for the cutting by the defendant of certain logs on land claimed to have been owned by the plaintiff. The question is as to the location on the ground of the boundary line between land of the defendant and the plaintiff. This line constitutes the northerly line of the plaintiff's land and the southerly line of the land of the defendant. The defendant claims that the cutting was all north of the plaintiff's line.

From the deeds it is impossible for this court to tell where this line is. We doubt if the jury could have told from such deeds even with all the aid which might have come from the explanation of opposing counsel. But the jury had certain definite information of the location of this line on the ground. According to the testimony of the plaintiff, he and his father-in-law who bought the land in 1926 from Arthur Boudreau were upon the land with Boudreau at the time of the purchase and Boudreau pointed out to them the line. The cutting was south of this line as so designated. And Thomas H. Lessard, a former owner forty years ago of the defendant's land, testified that there was a spotted cedar which marked the corner of his land and that farther along there was a white ash or a birch, a big tree. Another witness testified that he knew these two trees and from these there was a line of spotted trees running westerly which marked the line of the Manison farm which was the northerly line of the plaintiff's land. Winters, a surveyor, testi-

fied that he ran a line between the cedar tree and the ash tree and from there continued it, finding along it a number of old spotted trees and that along this line on both sides there had been cutting. There was other testimony corroborative of the above.

The question here was one of fact and we feel that there was ample evidence to warrant the jury in finding that this was the true line as claimed by the plaintiff.

Motion overruled.

Harvey D. Eaton, for plaintiff.

Roland J. Poulin, for defendant.

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

MYER GORDON, ABRAHAM GORDON,
MORRIS E. ORANSKY, IDA GORDON,
ANNA GORDON, MARCIA I. ORANSKY,
vs.
GEORGE I. LEWIS
PINE STATE BEEF CO.

Cumberland. November 10, 1947.

PER CURIAM.

This is an appeal from the decision of a single justice sitting in a case in equity. The rule to be followed is laid down in *Young* v. *Witham,* 75 Me. 536, and is thus stated: "The first inquiry is, What weight shall attach to the opinion upon matters of fact, decided by him, when the case is heard by the whole court upon a report of all the evidence adduced at the original hearing? We think the true rule to be that his decision as to matters of fact, should not be reversed, unless it clearly appears that such decision is erro-

neous. The burden to show the error falls upon the appellant . . . . . He must show the decree appealed from is clearly wrong; otherwise it will be affirmed." The rule has frequently been affirmed by this court. *Adams* v. *Ketchum,* 129 Me. at 221; and the recent case of *Tozier* v. *Pepin,* 140 Me. 92.

Applying this rule, we cannot say, after a careful examination of all the evidence, that the sitting justice was clearly erroneous in his decision of the case.

Decree below affirmed, with costs.

Wilfred A. Hay, for plaintiffs.

Bernstein & Bernstein, for defendants.

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

WILLIAM P. MCCOBB
vs.
PIONEER LUMBER COMPANY

Waldo. Opinion, December 15, 1947.

PER CURIAM.

This action of trespass comes forward for review on the defendant's general motion and exceptions.

The plaintiff is the owner of a cutover wood lot lying on the northerly side of Colman Pond in Lincolnville across which for many years there has been an unused wood road now grown up to bushes and small hardwood trees. In the Spring and Summer of 1946 employees of the defendant corporation which was lumbering on the land of an adjoining owner, without license or authority, cut the bushes and

trees on part of the plaintiff's wood road, did some corduroying and grading and used the road to haul logs out to the main highway. About a cord of small birch trees were cut and none were carried away. There was no entry outside the limits of the wood road.

In the court below the jury were instructed that the action was based on R. S. 1944, Chap. 111, Sec. 9, and, it being admitted that there was a trespass, were directed to return a verdict for the plaintiff for the actual damages to the land and the trees cut in the wood road but not for injury to the rest of the plaintiff's property or because of any intended use for cottage or house lots. The jury reported specially that the trespass was willful and awarded damages of $400 in their verdict. Double damages of $800 were allowed by the trial judge. The motion for a new trial is argued only on the ground that the damages are excessive.

An examination of the record leaves no doubt that the jury either misunderstood or entirely disregarded the instructions given them as to the elements and measure of damages to be considered. Small, indeed, was the worth of the trees cut in the wood road and the injury to the land cleared there could have been little more. The jury award far exceeded the actual damages caused by the trespass and the verdict is clearly wrong.

As the motion for a new trial must be granted consideration of the exceptions reserved is not necessary and they are dismissed without decision.

Motion sustained.
New trial granted.
Allowance of double damages set aside.
Exceptions dismissed.

Charles A. Perry, for plaintiff.

Charles T. Smalley, for defendant.

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

BESSIE M. BURDETT
vs.
CHARLES J. PETERS

Cumberland. Opinion, February 6, 1948.

PER CURIAM.

This case comes to the Law Court on defendant's general motion for new trial, after a verdict for the plaintiff for $400 as commission on sale of real estate. There are no exceptions.

The facts that the jury would be authorized to find from the evidence, and undoubtedly did find, are that:— In August 1946 the defendant orally placed for sale in the hands of the plaintiff, as a real estate broker, a certain apartment house in Portland at a selling price of $8,500 net. There was no limit of time in which to sell. The plaintiff immediately advertised the property at $8,900, and the plaintiff within a few days interested and introduced to the defendant one Leroy E. Goss as a prospective customer. The plaintiff broker made no written contract to sell to Mr. Goss but did make negotiations. A few days later, the defendant, without withdrawing the property from the hands of the plaintiff, and without the knowledge of the plaintiff, got in touch with Mr. Goss through his friend Clifford B. Cole, and deeded the property on September 10, 1946 to Goss for $8,500. No broker's commission was paid to Cole.

The defendant claims that the law stated in the case of *Smith* v. *Lawrence,* 98 Me. 92 entitles him to a new trial, because he says the plaintiff "did not produce a customer willing and prepared to purchase on the terms given by the defendant to the plaintiff." There was no date limit to an option fixed in the case at bar, as there was in *Smith* v.

Lawrence, 98 Me. 92, and also in this case there was conduct by the seller, namely, a sale by the owner, that prevented a completion of the broker's bargain with the seller. Modifications of the terms of the original contract, if there were modifications, were made by defendant owner when he sold to Goss.

The defendant claims that the charge of the presiding justice was incorrect, if so, he should have taken exceptions. We will say, however, that we have examined the charge as printed in the record, and find no error. The defendant also claims that "there is evidence of abandonment by the plaintiff" but the jury found otherwise and there was abundant evidence to sustain the finding. *Mercier* v. *Insurance Co.*, 141 Me. 376; 44 Atl. (2nd) 372.

A very recent case decided by this Court, of *Clifford L. Swan Co.* v. *Cook*, 143 Me. 109, 55 Atl. (2nd) 878 was on facts so similar that its authority seems decisive here. As stated by Mr. Justice Murray in the *Swan* case, "the record discloses not only that the plaintiff produced a customer to defendant who was ready and able to buy at the seller's terms, which is all that is necessary, but it also goes further and shows that the purchaser bought the premises."

Motion overruled.

Jacobson and Jacobson,
by
Hyman Jacobson,
Barnett I. Shur, for plaintiff.

Udell Bramson, for defendant.

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

STATE OF MAINE
vs.
ANTHONY J. JANNACE
AND
ADELINE SHIELDS

Oxford. Opinion, April 21, 1948.

PER CURIAM.

In a trial before a jury the respondents were found guilty of fornication. The case is before us on several exceptions to the judge's charge. The respondents object particularly to those portions of the charge where the judge discusses circumstantial evidence. The language used is unobjectionable in itself and states the law accurately. The mere fact that the presiding justice informed the jury that he was quoting from the language of Chief Justice Shaw of Massachusetts is not a ground for sustaining the exceptions. It is argued that the cumulative effect of the several quotations resulted in the respondents not having a fair trial. This is not true in this instance; and in any event it was within the province of counsel to ask for such explanation of these portions of the charge as they felt were proper. This was not done.

The judge told the jury that they must not be bothered by the fact that the evidence was circumstantial. Taken as a basis for his discussion of circumstantial evidence this statement was not prejudicial.

Likewise the somewhat casual and irrelevant remark to the jury that they must remember that "two and two still makes four," is not under the facts of this case prejudicial error. Nor is that portion of the charge in which the judge told the jury that they could assume that the law enforcement officers were on the premises lawfully where the respondents were found. The record does not disclose for

what purpose they were there. How or why they happened to be there is in this case a matter of no consequence.

Objection was taken to that portion of the charge where the court refers to the fact that the respondents' testimony is not corroborated, but the court, in referring to the state's claim that such testimony was available, does not say that it was in fact available.

Generally the record does not show that the respondents did not have a fair and impartial trial.

Exceptions overruled.
Judgment for the state.

Robert J. Smith, County Attorney
for Oxford County, for State of Maine.

Jacobson & Jacobson, for respondent,
Anthony J. Jannace.

Theodore Gonya, for respondent, Adeline Shields.

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

PRISCILLA P. STEWART
vs.
CHARLES A. STEWART

Waldo. Opinion, June 16, 1948.

PER CURIAM.

The libelee's exceptions herein challenge the validity of a divorce decree on the dual grounds that the justice who heard the case erred in refusing to dismiss the libel because of wrong venue and in granting the divorce on evidence which was not sufficient to establish cruel and abusive treatment.

Venue under the statute, R. S. 1944, Chap. 153, Sec. 55, depends on residence:

> "A divorce * * * may be decreed in the county where either party resides at the commencement of proceedings * * *."

The motion was urged by assertion that although the libelant was proved to have been physically present in the place alleged to be her residence in her libel at the time she signed it and for slightly more than a week prior thereto, there was no direct evidence that she intended to remain there "permanently, or for an indefinite period of time" and that without such proof her presence would not constitute residence. *Inhabitants of Warren* v. *Inhabitants of Thomaston,* 43 Me. 406, 69 Am. Dec. 69. That the trier of fact made a finding on the point in her favor is implicit in the granting of the divorce.

Residence is a question of fact. *Mather et al.* v. *Cunningham et al.,* 105 Me. 326; 74 A. 809; 29 L. R. A., N. S. 761; *Thorndike* v. *City of Boston,* 1 Met. 242. So also is the existence of cause for divorce, as is evidenced by a principle of general application, i.e. that factual decisions made by triers

of fact will not be disturbed in appellate proceedings if supported by credible evidence. This principle was applied in the divorce field in *Sweet* v. *Sweet,* 119 Me. 81; 109 A. 379; *Michels* v. *Michels,* 120 Me. 395; 115 A. 161; 18 A. L. R. 570; *Bond* v. *Bond,* 127 Me. 117; 141 A. 833; and *Alpert* v. *Alpert,* 142 Me. 260; 49 A. (2nd) 911.

It cannot be said that the record before us lacks credible evidence to support either finding. Libelant's allegation of her residence may be said to have the support of credible evidence in proof that she was paying board at the place where she was living. The jurisdiction of the court over the married status of the parties is undoubted. They were married in this state and had their domicile here during the full term of their married life. The only issue is *venue* and questions of residence have been decided under a liberal construction of the term heretofore in such cases. *Alley* v. *Caspari,* 80 Me. 234; 14 A. 12; 6 Am. St. Rep. 178; *Hodge* v. *Sawyer,* 85 Me. 285; 27 A. 153. As to the cause for divorce, the *Sweet* case declares that a finding of extreme cruelty may be grounded in the uncorroborated testimony of a libelant. This libelant's testimony relative to cruel and abusive treatment was supported in some respects by the evidence of several witnesses. It was the province of the trier of fact to pass on the question of credibility.

Exceptions overruled.

Roy L. Fernald, for libelant.

Pilot & Collins, for libelee.

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

GEORGE I. SIMMONS ET AL.
vs.
JAMES F. DURAN

Penobscot. June, 1948.

PER CURIAM.

This petition to establish the truth of exceptions under Rule 40 must be denied because it fails to set forth all facts essential for its consideration and discloses that in the Trial Court the case was submitted to the Justice presiding without the intervention of a jury and with no reservation of the right of exceptions.

HERBERT T. POWERS
vs.
CHARLES ROSENBLOOM

Cumberland. June, 1948.

PER CURIAM.

This case was entered in this court at the May Term, 1948, on a bill of exceptions allowed in the Superior Court at the term it was tried. The bill, by reason of an error in pleading or procedure, is insufficient to present the issues intended to be raised because of the failure to incorporate the pleadings and evidence in the record by appropriate reference.

After the entry of the case in this court the parties discovered the error, agreed upon an amendment to the bill which would supply the deficiency, secured its purported allowance in the Superior Court by the Justice who heard

the case at *nisi prius*, and inserted it in the record then in the custody of the clerk of this court.

All the action taken in the Superior Court after the case was entered in this court must be disregarded as a nullity. Papers in the custody of this court can never be altered in any manner except by its authority. When errors in pleading or procedure render it impossible to pass upon the issues intended to be raised by a bill of exceptions, and the ends of justice require such action, this court has authority under R. S. Chap. 91, Sec. 14 to order a remand for the correction of such errors. This is such a case and it is remanded to any justice of the Superior Court for correction of the bill of exceptions by incorporation of the pleadings and evidence and any other essential material in term time or vacation, and the reentry of the case at the September Term, 1948, of the Law Court.

WILLIAM H. CHAMPLIN
vs.
LEON I. BEAN

York. Opinion, July 10, 1948.

PER CURIAM.

On exceptions. Plaintiff and defendant having rested, the Presiding Justice, on motion by the defendant, directed a verdict for the defendant, and the plaintiff excepted. The case is brought here on plaintiff's exception.

The action is assumpsit upon an account annexed and the common counts. The account annexed specifies alleged shortages in the quantities of lumber sawed for, and of sawed lumber sold to the plaintiff by the defendant at agreed unit prices. It also specifies alleged overpayments by the plaintiff to the defendant for sawing and for the lum-

ber purchased because of said shortages. The account annexed also contains two charges for equipment ordered by the defendant.

No evidence was offered with respect to the two charges for equipment. There was evidence that the plaintiff paid the defendant at the agreed unit prices for sawing and for lumber purchased. Payments were made in accord with bills rendered by the defendant to the plaintiff. While the account annexed sets forth in board feet of lumber the claimed shortages and the amounts of the claimed overpayments because of said shortages, the record is devoid of any evidence that the amount of lumber sawed or sold was less than that billed and paid for or that there was any overpayment. There was no evidence to sustain the common counts or any of them.

The burden was upon the plaintiff to establish his claim. Upon the evidence a jury would not be justified in finding a verdict for the plaintiff. Had the case been submitted to the jury and a verdict rendered for the plaintiff, it could not be allowed to stand if motion were made to set it aside. Under such circumstances, both parties having rested their case, and motion therefor having been made, it was the duty of the Presiding Justice to direct a verdict for the defendant. There was no error in directing such verdict.

Exceptions overruled.

L. Orlo Williams, for plaintiff.

Joseph E. Harvey, for defendant.

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

BERTHA HASSEN
vs.
EUGENE K. HASSEN

Somerset. Opinion, July 20, 1948.

PER CURIAM.

Defendant's exceptions to the acceptance of a referee's report, awarding the plaintiff a recovery of $662.50 debt or damage for the conversion of property, allege thirteen grounds of error but raise no question to be resolved in deciding the case except to place in issue the sufficiency of the evidence to support the referee's decision.

The defendant filed seven objections to the acceptance of the report at *nisi prius* but they cover substantially the same field as the thirteen exceptions. Both the objections and the exceptions include allegations of error not essential to decision, as for example the first objection, that the "report does not decide all material matters in issue between the parties," and the tenth exception, that the report "does not state which articles were converted." The defendant does not deny the taking of the property (except for items of trifling value) from a dwelling occupied by the plaintiff. He asserts that her possession therein was his possession, because he was paying the rent on the property she was occupying although he was not living in it. The taking was on the Tuesday following a divorce granted her on the preceding Saturday.

The only issues to be resolved by the referee, and resolved by him, were title and value. His value finding is not challenged. His decision carries his finding that title was in the plaintiff at the time of the taking. Credible evidence was more than ample to support it, if believed by the referee as the trier of fact, as it must have been. In addition to her

own direct evidence on the point, there were the statements of defendant's counsel in the divorce proceedings that defendant authorized him to tell plaintiff's counsel in those proceedings that she could have all the furniture in the house, barring items on which plaintiff does not seek to recover, if the divorce was granted to her, and that he telephoned plaintiff's counsel in the divorce proceedings to that effect in the presence of defendant. That the divorce decree awards custody of a child, and provides for its support, with no mention of property is not controlling. In referred cases factual findings are final "provided there is supporting evidence." See *Francoeur* v. *Smith,* 132 Me. 185; 168 A. 781; and cases cited therein.

Exceptions overruled.

Francis H. Bate, for plaintiff.

Paul L. Woodworth, for defendant.

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

ELSIE KING, ADMINISTRATRIX
ESTATE OF ARTHUR KING
vs.
HENRY L. BARKER

Aroostook. Opinion, November 19, 1948.

PER CURIAM.

In this action the plaintiff as administratrix of the estate of Arthur King seeks to recover for labor and materials furnished by her intestate in cutting, yarding and hauling pine and spruce logs for the defendant on Township 39 in Hancock County. The declaration is in assumpsit and includes an omnibus count. The plea is the general issue with brief statement alleging a special contract and damages resulting from its breach. After verdict for the plaintiff the case comes forward on the defendant's motion for a new trial.

The record shows that the decedent having, some time in August 1946 entered into a contract with the defendant to cut one to two million feet or as many as he could of pine and spruce logs and deliver them at Milford for $26 a thousand, cut 559,000 feet, delivered 244,929 feet and on account of sickness from which he soon died, on January 11, 1947 abandoned the job leaving 314,071 feet of logs piled in the woods which the defendant loaded and hauled to his mill. It was agreed that the decedent had been paid $7,783.01 which was in full for his labor on logs delivered and $1,414.86 on account of those cut and yarded, and that his wangan worth $263.25 and left in camp had been appropriated and used. And the real controversy was as to the cost of delivering the logs in the yards.

Under the pleadings and on the facts in this case the plaintiff was entitled to recover for her intestate's labor in

cutting and yarding the logs he left in the woods the price agreed upon for delivery at the mill less such necessary and reasonable expenses as the defendant incurred in completing the contract. *Viles* v. *Lumber Company,* 118 Me. 148; *Jewett* v. *Weston,* 11 Me. 346; *Hayward* v. *Leonard,* 7 Pick. (Mass.) 181; *Britton* v. *Turner,* 6 N. H. 481; 28 *R. C. L.* 704. See *Collinsworth* v. *Ironton Lumber Co.,* 203 Ky. 419, 262 S. W. 592; 71 *C. J.* 172 and cases cited. Also for the value of the supplies and equipment left in the camp; but subject to proper credits for monies advanced on account. Guided by these rules the jury apparently found that there was a logging contract made and broken as alleged, credited the plaintiff's intestate with $8,429.10 for cutting and yarding the logs in the woods and for his wangan, deducted $1,414.86 for monies received on account, allowed $5,339.21 as the reasonable and necessary cost of completing the contract and computation disclosing that there was then a balance of $1,675.03 due from the defendant; this was their verdict. It is not made to appear that there are grounds for granting the motion for a new trial.

George B. Barnes, for plaintiff.

S. F. Needham,
James P. Archibald, for defendant.

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

Motion overruled.

CLYDE MOORES, D. B. A.
E. & A. MOORES
vs.
INHABITANTS OF THE TOWN OF SPRINGFIELD

Penobscot. Opinion, November 23, 1948.

PER CURIAM.

On exceptions to acceptance of a referee's report. This case having been referred under a Rule of Court, the referee filed a report "Judgment for the defendants." The plaintiff filed written objections to the acceptance of the report. On motion by the defendant, the presiding justice accepted the report and the plaintiff filed exceptions which were allowed. The plaintiff complied with an order "completed bill of exceptions and evidence to be filed on or before January 1, 1948." Although a transcript of the evidence is included in the printed case, the bill of exceptions fails to incorporate the evidence by appropriate reference.

The court in considering the exceptions cannot travel outside of the bill itself. In this respect the court cannot consider the evidence unless made a part of the bill of exceptions. *Jones* v. *Jones,* 101 Me. 447, 451. Without the evidence it is impossible for this court to pass upon the issues intended to be raised by the bill of exceptions.

From the docket entries which are made a part of the bill of exceptions, "completed bill of exceptions and evidence to be filed on or before January 1, 1948," and "Evidence filed as ordered" it is apparent that the failure to incorporate it in the bill of exceptions by reference was an inadvertent error.

"When errors in pleading or procedure render it impossible to pass upon the issues intended to be raised by a bill of exceptions, and the ends of justice require such action, this court has authority under R. S. Chap. 91, Sec. 14, to

order a remand for the correction of such errors." *Powers* v. *Rosenbloom,* 143 Me. 408; 59 A. (2nd) 844. This is such a case and it is remanded to any justice of the Superior Court for correction of the bill of exceptions by incorporating the evidence therein, in term time or vacation, and the re-entry of the case at the January term, 1949, of the Law Court.

Wendall Atherton, for plaintiff.

E. Donald Finnegan, for defendant.

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

ELEANOR M. PAULSEN
vs.
HERMAN D. PAULSEN

Cumberland. Opinion, December 31, 1948.

PER CURIAM.

This case was entered in this court at the September Term, 1948, on a bill of exceptions allowed in the Superior Court where it was tried. The bill, for want of signature of exceptant and other errors, in pleading or procedure patent in the record as certified, is clearly insufficient.

The case is, therefore, remanded to any justice of the Superior Court for correction in term time or vacation, of the errors of pleading and procedure in or incident to the bill of exceptions, and the reentry of the case upon a corrected record at the February Term, 1949, of the Law Court.

Berman, Berman and Wernick, for plaintiff.

Elton H. Thompson, for defendant.

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

Questions Submitted by the Governor and Council of Maine To the Justices of the Supreme Judicial Court of Maine November 17, 1948, with the Answers of the Justices Thereon.

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, Maine
November 17, 1948

To the Honorable Justices of the Supreme Judicial Court:

In accordance with the provisions of Sec. 50, Chap. 5, of the Revised Statutes of 1944, the Governor and Council, after the biennial election held on September 13 of 1948, opened, compared and tabulated the votes returned at said election. The Secretary of State thereupon caused to be printed copies of the tabulation of the votes of such election as provided by said section. Within twenty (20) days after the printed tabulation was made available to the public, Leon B. Berry of Waterville filed a written application with the Secretary of State alleging that the return or record of the votes cast in the said City of Waterville at the said State election, and at which election he was the Democratic candidate for the House of Representatives from the City of Waterville, does not correctly state the vote as actually cast in said city and specifying the grounds hereinafter more specifically set out as errors which have occurred in the counting of ballots for the office for which he was a candidate.

The errors assigned by the applicant involve the absentee ballots only. The only persons involved are the applicant and A. Perley Castonguay, Republican candidate for the House of Representatives. The applicant contends that none of the absentee ballots cast either for himself or Castonguay should be counted because the city clerk, the election officials, and, in many instances, the voters did not comply with the statutes relating to absent voting.

The facts are not in dispute. In all, 181 absent voting ballots were cast. Only 169 are here involved. Our inspection showed that of these Castonguay received 113 and Berry 56. Of the remaining ballots cast in said election Castonguay received 2,546 and Berry 2,592.

The parties have agreed upon the following facts as to the absent voting ballots counted by the election officials:

I. (13 ballots.) Thirteen ballots were contained in the ballot envelopes on which the affidavit is printed and this was signed by the voter only and the oath and certificate thereon were not signed by any person or official authorized to administer an oath. The space for the signature of the official in both the affidavit and the certificate was blank.

II. (29 ballots.) On the envelopes accompanying 29 ballots, the date of the jurat was September 13, the day of election. These envelopes were enclosed in mailing envelopes which were substantially intact and do not appear to have been mailed, as the said envelopes addressed to the City Clerk had no postmarks, nor did they have canceled postage stamps.

III. (54 ballots.) With relation to these ballots, the application for the ballot was certified by the board of registration and enrollment on a date subsequent to that of the date of the jurat of the affidavit on the ballot envelope. Of these, 47 appear to have been certified on the 13th of September, the day of election, and the balance of 7 were certified prior to that date, but subsequent to the date when the oath was taken of the voter's affidavit.

IV. (14 ballots.) These ballots, after the closing of the polls, were removed from the envelopes containing them and deposited in the ballot box, but the written applications did not accompany them, nor were they attached to the envelope containing the ballot at the time they were delivered to the polls. At a subsequent time, when the question was raised with regard to the applications for these ballots, the

applications were found in the safe of the city clerk, duly certified by the board of registration and enrollment.

The questions hereafter set forth involve only 110 ballots above referred to. The balance of 59 are not in question so far as any irregularity is concerned.

All absentee ballots used at the election were printed in accordance with Subsec. 1 of Sec. 2 of Chap. 6 of the Revised Statutes of 1944, and contain the endorsement in print that they are official absent voting or physical incapacity voting ballots.

Having heard the evidence and examined the proofs, the Governor and Council entertain grave doubts as to the disposition of these ballots; and, as the election of either of these candidates is involved in counting or excluding these ballots, we desire to be advised as to the manner of counting or disposing of these ballots.

There is no claim by any of the parties that any of the officials acted fraudulently. All persons involved were absolved from any fraudulent conduct. Both laxity and custom and usage in the handling of absent voting ballots have produced the problems which now confront the Governor and Council.

With respect, therefore, to these ballots, important questions of law having arisen, and believing the occasion to be a solemn one within the meaning of the Constitution, the Governor and Council respectfully request the Honorable Justices of the Supreme Judicial Court to advise them thereon. The questions are hereby propounded in the same order in which the facts are set out, with the corresponding numbers, except as to the last two questions.

QUESTIONS

1. Can an absent voting ballot be counted by the Governor and Council, where it appears from the affidavit on the ballot envelope printed and prepared in conformity

with Subsec. 4 of Sec. 2 of Chap. 6 of the Revised Statutes of 1944 that it was signed by the voter only and does not purport to show that it was sworn to by the elector, as it is not signed by any official authorized to administer an oath nor is the certificate thereon signed by any person giving his residence and official title?

2. Can the Governor and Council count absent voting ballots not mailed but delivered by the voter or someone in his behalf to the City Clerk in hand less than twenty-four (24) hours before the opening of the polls, or on the day of election while the polls are open, in view of the provisions of Sec. 8 of said chapter which in substance provides that all ballots cast under said law shall be mailed on or prior to the day of election or if delivered shall be delivered to the City Clerk at least twenty-four (24) hours before the opening of the polls?

3. Can the Governor and Council count absent voting ballots, or are they to be excluded, where the date of the oath on the affidavit on the ballot envelope antedated the date of the certificate by the board of registration and enrollment of voters as provided in Secs. 5 and 6 of said chapter?

4. When a City Clerk fails to attach to the envelope containing the returned absent voting ballot the corresponding application as provided in Sec. 9 of said chapter, before the said envelopes are by him delivered to the polling place, and the ballots are placed in the ballot box and counted, and it subsequently appears that such applications were in fact in existence and were regular in form and were in possession of the City Clerk, may those ballots be counted by the Governor and Council, or are they to be excluded?

5. If all absent voting ballots in question or any part thereof are not to be counted, they being indistinguishable from the absent voting ballots which are not in question, would the Governor and Council be obliged to

exclude all the absent voting ballots cast in said election for said representatives?

6. If the Justices should determine that only a part thereof may not be counted, what procedure should the Governor and Council adopt in ascertaining the will of the voters the validity of whose ballots either has been upheld or is unquestioned and whose names are ascertainable from the voting envelopes?

There are submitted herewith forms of applications for absent voting ballot, the ballot envelope on which is printed the affidavit of the voter, and the jurat and certificate of the official administering the oath, and the mailing envelope to the city clerk, prepared by the Secretary of State in accordance with the statutes and distributed amongst the city and town clerks.

Respectfully submitted,

HORACE HILDRETH
Governor of Maine

HAROLD N. HANOLD
ROBERT B. DOW
JOHN F. BLANCHARD
HERVEY R. EMERY
HAROLD W. WORTHEN
LEE C. GOOD
Members of the Executive Council

To His Excellency, Governor Horace Hildreth, and the Honorable Executive Council:

The undersigned Justices of the Supreme Judicial Court having considered the questions propounded by you under date of November 17, 1948, respectfully advise that the authority and power of the Governor and Council in respect to the election of a Representative to the Legislature are defined and limited by Article IV, Part I, Sec. 5, as amended by Article XLVII, and Article IV, Part III, Sec. 3 of the

Constitution of this State. Under the Constitution the House of Representatives of the Legislature is the sole judge of the elections and qualifications of its own members. R. S., 1944, Chap. 5, Sec. 50 recognizes the controlling force of these constitutional provisions by limiting its application, in determining the election of a Representative to the Legislature, to the examination and correction of returns. Neither the Constitution nor any statute confers right, power or authority on the Governor and Council to decide whether any ballots cast in an election of a Representative to the Legislature shall be counted or rejected. We, therefore, deem further answer unnecessary.

Very respectfully,

GUY STURGIS
SIDNEY ST. F. THAXTER
HAROLD H. MURCHIE
NATHANIEL TOMPKINS
RAYMOND FELLOWS
EDWARD F. MERRILL

December 1, 1948

A true copy.

ATTEST:

GUY H. STURGIS,
Chief Justice

INDEX

BIAS AND PREJUDICE

See Insurance, *Lawler* v. *Insurance Companies*, 40.

BONDS

See Replevin, *Archer* v. *Aetna Casualty Co.*, 64.
See Replevin, *Credit Assn.* v. *Kent*, 146.
See Trusts, *Sacre* v. *Sacre*, 80.

BOUNDARIES

See Deeds, *Brown* v. *McCaffrey et al.*, 221.

BROKERS

Real estate broker is entitled to commission if he brings prospective purchaser and seller together, and sale is consummated although at a modified price.

Swan Co., Inc. v. *Cook*, 109.

A contract to compensate broker for selling real estate may be implied from facts and circumstances.

A person acting for an estate in a representative capacity, such as executor, administrator, or trustee, may be liable personally on any contract made by him, unless the law (or a will) permits the credit of the estate to be pledged, and this is true even though the contract is in the interest and for the benefit of the estate.

A contract between a broker and administrator for sale of real estate by the broker without specifying any time therefor must be performed within a year.

Jones v. *Silsby*, 275.

In an action of assumpsit to recover a broker's commission, charge of the presiding justice that there was no evidence of fraud is not prejudicial error where issue upon which the case was tried was what was the contract, and no evidence was adduced that the contract had been obtained by fraud.

Swan Co., Inc. v. *Porell*, 358.

BURDEN OF PROOF

See Insurance, *Lawler* v. *Insurance Companies*, 40.
See Workmen's Compensation, *Baker's Case*, 103.

CHILDREN

See Divorce, *Grover, Petr.* v. *Grover*, 34.
See Wrongful Death, *LaFerriere, Adm.* v. *Augusta Ice Co.*, 248.

CONSTITUTIONAL LAW

In construing a statute, or a constitution, the court looks primarily to the language used, which in cases of doubt may be illuminated by surrounding circumstances.

The right of the people, as provided by Article XXXI of the Constitution of Maine, to enact legislation and approve or disapprove

CONSTITUTION CONSTRUED

CONTRACTS

CORPORATIONS

By statute a stockholder has the absolute right to inspect the list of stockholders provided his purpose in seeking the examination is not vexatious or unlawful, and such right will be enforced by mandamus.

At common law, a stockholder has a right to examine the books, records and papers, when the inspection is sought at proper times and for a proper purpose, which must relate to his interest as a stockholder.

Holdsworth, Petr. v. *Goodall-Sanford,* 56.

COURTS

The Supreme Court acting as a Law Court is a statutory court of limited jurisdiction performing those duties and exercising those powers conferred upon it by statute.

Public Utilities Comm. v. *Gallop,* 290.

See Intoxicating Liquor, *State* v. *Boynton,* 313.
State v. *Thompson,* 326.

See Trial Justices, *State* v. *Harnum,* 133.

CRIMINAL LAW

A voluntary plea of guilty, before a court having jurisdiction of the offense, followed by payment of penalty imposed, terminates the action and precludes an appeal.

State v. *Osborne,* 10.

See Intoxicating Liquor, *State* v. *Jenness,* 380.
See Intoxicating Liquor, *State* v. *Thompson,* 326.
See Intoxicating Liquor, *State* v. *Boynton,* 313.
See Intoxicating Liquor, *State* v. *Mann,* 305.
See Intoxicating Liquor, *State* v. *Koliche,* 281.
See Manslaughter, *State* v. *Stairs,* 245.
See Trial Justices, *State* v. *Harnum,* 133.

CUSTODY

See Divorce, *Grover, Petr.* v. *Grover,* 34.

DAMAGES

See Negligence, *Candage* v. *Belanger et al.,* 165.
See Replevin, *Credit Assn.* v. *Kent,* 146.
See Replevin, *Archer* v. *Aetna Casualty Co.,* 64.
See Sales, *Powers* v. *Rosenbloom Aplt.,* 361.
See Slander, *McMullen* v. *Corkum,* 47.
See Wrongful Death, *LaFerriere, Admr.* v. *Augusta Ice Co.,* 248.

DEBT

See Divorce, *Wilson* v. *Wilson,* 113.
See Replevin, *Archer* v. *Aetna Casualty Co.,* 64.

DEEDS

Minute descriptions of lands assessed and sold for taxes are not required but lands must be so described that they can be identified with reasonable certainty.

Description otherwise sufficient in a tax deed is not made uncertain by the inclusion of the approximate area of the property taxed.

Description otherwise sufficient in a tax deed is not made uncertain or impaired by reference to a plan without designation of the plan by name or place or deposit.

Oceanic Hotel Co. v. *Angell*, 162.

In the interpretation of deeds, it is the general rule that the intention of the parties, ascertained from the deed itself, if consistent with the rules of law, prevails.

In the matter of identifying descriptions in deeds, the words southerly and westerly are not always used to indicate a direction that is due south or west.

An agreement by holder of bond for a deed with owner of adjoining property relating to a disputed line, is not admissible against owner of property who was not a party thereto.

The court is entitled to know before exclusion of evidence, all the grounds of admissibility, that it may rule advisedly.

In line disputes, testimony of witness holding bond for deed that another pointed out lines before witness took bond for deed, from predecessor in interest defendant, is not admissible, without proof of agency and authority.

Brown v. *McCaffrey et al.*, 221.

See Trusts, *Sacre* v. *Sacre*, 80.

DIRECTED VERDICT

In considering the propriety of a refusal to direct a verdict for the defendant, the evidence must be viewed in the light most favorable to the plaintiff, giving him the benefit of every justifiable inference.

Wiles et al. v. *Connor and Wood Co.*, 250.

DIVORCE

The court issuing a decree for support of a minor child has the right to amend it as to payments which are to be made in the future as well as to those which have already accrued.

The provisions of R. S., 1944, Chap. 153, Sec. 63, authorizing the issuance of a *capias* execution on default in payments of installments of alimony or for support of minor children, contemplates the issuance of an execution only after proper notice had been given.

Money remaining unpaid when a minor child becomes of age on a decree for the payment of money to the mother for the support of such child, is not the property of the mother.

Wilson v. *Wilson*, 113.

The paramount consideration for the court at the time of a divorce or at the time of a requested alteration of a divorce decree regarding custody, is the present and future welfare and well-being of the child.

Grover, Petr. v. *Grover*, 34.

See Adoption, *Blue et al.* v. *Boisvert*, 173.

See Executors and Administrators, *Wilson* v. *Wilson et al.*, 121.

EASEMENTS

In an action on the case under R. S., 1944, Chap. 128, Sec. 16, for obstructing a right of way based on prescription, plaintiff has burden of proving open, visible, continuous, and unmolested use by her and her predecessors without interruption for twenty years.

Any closing of a way openly and visibly interrupts the use and prevents the running of the prescriptive period regardless of the fact that there may have been some special purpose for it other than interruption.

O'Connor v. *Beale*, 387.

ELECTION

See Wills, *U. S. Trust Co.* v. *Douglas et al.*, 150.

EQUITY

Although equity has jurisdiction of a case, it is for the sound discretion of the court as to whether or not it will exercise jurisdiction. When the exercise of jurisdiction will cause a result contrary to equity, and the complainant has an adequate remedy at law, a decree will be refused.

In equity a mistake by one party can be a reason for not taking jurisdiction.

Dunham v. *Hogan et al.*, 142.

A judge in equity is not required to answer separately each request for findings.

Sacre v. *Sacre*, 80.

See Landlord and Tenant, *Throumoulos et al.* v. *Bernier*, 286.
See Leases, *Medomak Canning Co.* v. *York*, 190.

ESTOPPEL

See Leases, *Medomak Canning Co.* v. *York*, 190.

EVIDENCE

Considerable latitude is vested in the Trial Court on the competency of opinion evidence but relief is available in appellate proceedings if discretion is abused.

Opinion evidence concerning the speed of a motor vehicle should not be admitted from witnesses whose view covered a time interval so short as to preclude the opportunity for intelligent thought.

Wiles, et al. v. *Connor Coal and Wood Co.*, 250.

Where convictions for offenses which are not larcenies, felonies nor involve moral turpitude cannot be shown to affect credibility of a witness. R. S., 1944, Chap. 100, Sec. 128, as amended by P. L. of 1947, Chap. 265.

State v. *Jenness*, 380.

See Bastardy, *Jordan* v. *Davis*, 185.
See Deeds, *Brown* v. *McCaffrey et al.*, 221.
See Manslaughter, *State* v. *Stairs*, 245.
See Public Utilities, *Public Utilities Comm.* v. *Gallop*, 290.

EXCEPTIONS

Where erroneous instructions are given, or a correct instruction is refused, if the Jury may have been misled, exceptions thereto must be sustained.

Levine v. *Reynolds*, 15.

If the only conclusion which can be drawn from the evidence in the case does not support the decision, the finding is an error in law and exceptions lie.

Grover, Petr. v. *Grover*, 34.

Factual decisions by triers of fact will not be disturbed in appellate proceedings, if supported by credible evidence.

Brown v. *McCaffrey et al.*, 221.

Bill of exception must be presented during the term in which the case was tried, provided that in all cases, such exceptions shall be presented within thirty days.

The complete report of evidence taken in any case is not necessarily a part of a bill of exceptions unless the bill states it is a part.

The bill of exceptions must state the grounds of exception in a summary manner, and the court cannot go outside the bill itself to determine that rulings are erroneous or prejudicial, even if the evidence accompanies the bill.

If the evidence taken out in the case is made a part of the bill of exceptions, it must be filed within the term, or within thirty days, if the term lasts over that time, unless there is an extension of time shown by docket entry.

The justice who presides over the term at which exceptions are taken is the only justice who has authority over the bill, except in cases of death, disability, resignation or removal.

Bradford v. *Davis et al.*, 124.

See Intoxicating Liquor, *State* v. *Mann*, 305.
See Municipal Corporations, *Perkins* v. *Inhabitants of Standish*, 353.
See Negligence, *Desmond, Pro Ami* v. *Wilson*, 262.
See Negligence, *Josselyn* v. *Dearborn et al.*, 328.
See Public Utilities, *Public Utilities Comm.* v. *Gallop*, 290.

EXECUTION

See Divorce, *Wilson* v. *Wilson*, 113.

EXECUTORS AND ADMINISTRATORS

The provisions of R. S., 1944, Chap. 153, Sec. 69, authorizing the court to employ any compulsory process which it deems proper to enforce decrees relating to the support of minor children, do not authorize the issuance of a mandatory injunction against a party not served within the jurisdiction, or give the court authority to order an executor, who was not a party to the original divorce proceedings, what to do in the administration of an estate over which the Probate Court is given exclusive jurisdiction.

Wilson v. *Wilson et al.*, 121.

See Brokers, *Jones* v. *Silsby*, 275.

FIRE INSURANCE

See Insurance, *Lawler* v. *Insurance Companies*, 40.

FORCEABLE ENTRY

See Landlord & Tenant, *Throumoulos et al.* v. *Bernier*, 286.

FRAUD

See Brokers, *Swan Co., Inc.* v. *Porell*, 358.
See Trust, *Sacre* v. *Sacre*, 80.

HABEAS CORPUS

See Adoption, *Blue et al.* v. *Boisvert*, 173.

ILLEGITIMACY

See Taxation, *Whorff, Petr.* v. *Johnson*, 198.

INITIATIVE AND REFERENDUM

See Constitutional Law, *Farris, Atty. Gen.* v. *Goss*, 227.

INSPECTION

See Corporations, *Holdsworth, Petr.* v. *Goodall-Sanford*, 56.

INSURANCE

Referees chosen under Maine Standard Fire Insurance Policy must be disinterested, not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad sense of being competent, impartial, fair and open-minded, substantially indifferent in thought and feeling between the parties, and without bias or partisanship.

The burden of proving bias and partiality is on the plaintiff.

Lawler v. *Insurance Companies*, 40.

INTOXICATING LIQUOR

State liquor licensee selling malt liquor to a minor contrary to Sec. 55 of Chap. 57 of R. S., 1944, as amended by Chap. 194, P. L., 1945 is not excused by fact he relied upon minor's misrepresentation of age.

Fact that statute makes minor guilty of false representation and amenable to punishment does not relieve licensee.

State v. *Koliche*, 281.

Statement of presiding justice not a direct or indirect expression of opinion.

State v. *Mann*, 305.

R. S., 1944, Chap. 19, Sec. 134, gives Superior Court and inferior court original concurrent jurisdiction of offense of operating motor vehicle while under influence of intoxicating liquor.

Where it appears that Trial Justice had no jurisdiction to hear and determine the cause an indictment was regularly returned to Superior Court by the Grand Jury.

State v. *Boynton*, 313.
State v. *Thompson*, 326.

Illegal sales and possession for illegal sales of intoxicating liquor do not involve moral turpitude.

Moral turpitude implies something immoral in itself regardless of its being punishable by law.

State v. *Jenness*, 380.

See Manslaughter, *State* v. *Stairs*, 245.
See Trial Justices, *State* v. *Harnum*, 133.

JEOPARDY

Former jeopardy does not exist unless previous trial is before a court of competent jurisdiction.

State v. *Boynton*, 313.
State v. *Thompson*, 326.

JOINT OWNERSHIP

See Taxation, *Hallett* v. *Bailey*, 1.

JUDGMENT

See Workmen's Compensation, *Mitchell* v. *Peaslee, Jr.*, 372.

LANDLORD AND TENANT

Lessee tenant and subtenant subjected to action of forcible entry and detainer on ground of violations of covenants in leases entitled to maintain suit in equity to enjoin landlord from prosecuting actions where there had been in fact a waiver of landlord's right to rely on violation of covenants, and tenant and subtenant had no adequate remedy at law.

Holding over by lessee is convincing evidence of intention to renew option in lease.

Waiver of covenant not to sublease without written consent of lessor presents question of fact.

Loss of possession of summer business property pending appeal in forcible entry and detainer action, which is summary process to obtain possession of real estate, may result in irreparable injury.

A mere remedy at law is not enough to prevent injunctive relief; it must be plain, adequate, and as practical and efficient to the ends of justice and prompt administration thereof as the remedy in equity.

Throumoulos et al. v. *Bernier*, 286.

LAST CLEAR CHANCE

See Negligence, *Barlow, Pro Ami* v. *Lowery*, 214.

LEASES

The party claiming a waiver of notice of renewal in a lease must prove the facts on which it relies for such waiver, and the intention to waive.

A waiver may be express or implied but it will not be implied contrary to the intention of the party whose rights would be injuriously affected unless by his conduct he has prejudicially misled the opposite party into the belief that such waiver was intended or consented to.

To constitute a waiver there must be a clear unequivocal and decisive act of the party showing such purpose or facts amounting to estoppel on his part.

Equity cannot aid a lessee to avoid the natural and reasonable consequences of his own negligence to which the lessor in no way contributed.

Medomak Canning Co. v. *York*, 190.

See Landlord and Tenant, *Throumoulos et al.* v. *Bernier*, 286.

LIENS

Only such labor and materials as are used in erecting, altering, removing or repairing a building are protected by a lien under R. S., 1944, Chap. 164, Sec. 34.

Neither the filing of a lien statement after 60 days from the date of the furnishing of the last lienable labor or materials nor the filing of a bill in equity after 90 days is seasonable. The lien period begins to run from the furnishing of the last item of labor and materials proved to have been used in erecting, altering, removing or repairing a building.

Marshall v. *Mathieu et al.*, 168.

LIMITATION

See Brokers, *Jones* v. *Silsby*, 275.

MALICE

See Slander, *McMullen* v. *Corkum*, 47.

MALPRACTICE

See Negligence, *Josselyn* v. *Dearborn et al.*, 328.
See Workmen's Compensation, *Mitchell* v. *Peaslee, Jr.*, 372.

MANDAMUS

See Corporations, *Holdsworth, Petr.* v. *Goodall-Sanford*, 56.

MANSLAUGHTER

A verdict of guilty of manslaughter is justified where the evidence though circumstantial, was ample to satisfy the jury that the defendant drove his truck over a highway with a board projecting from the

PARENT AND CHILD

PARTNERSHIP

PLEADING

Consideration by Supreme Court of two distinct and separate defenses contained in dilatory plea does not amount to tacit approval of duplicitous pleading, since such plea is not bad for duplicity where neither defense is valid in substance as distinguished from form.

State v. *Boynton*, 313.
State v. *Thompson*, 326.

Failure to allege an employer's knowledge of his employee's ignorance of his own heart ailment makes a declaration seeking recovery for damages through overwork defective.

Glidden v. *Bath Iron Works*, 24.

See Criminal Law, *State* v. *Osborne*, 10.
See Sales, *Powers* v. *Rosenbloom, Aplt.*, 361.
See Workmen's Compensation, *Bartley et al.* v. *Couture*, 69.

PRESCRIPTION

See Easements, *O'Connor* v. *Beale*, 387.

PROBATE COURT

See Adoption, *Blue et al.* v. *Boisvert*, 173.
See Executors and Administrators, *Wilson* v. *Wilson et al.*, 121.
See Taxation, *Whorff, Petr.* v. *Johnson*, 198.

PUBLIC UTILITIES

The statute providing questions of law may be raised "by alleging exceptions to ruling of the commission" on agreed statement of facts, or facts found by the commission, refers to a final ruling, order, or decree which disposes of the case.

In drafting exceptions to commission rulings form should yield to substance. Exceptions noted to a ruling of the commission at any stage of the proceeding, if allowed, and certified to Law Court after final decree of the commission will not have the effect of subjecting the final decree to general attack upon any other ground than alleged therein.

Bill of exceptions must show wherein exceptant is aggrieved by the ruling of which he complains, together with showing of substantial prejudice.

The correctness of a ruling on admission of evidence is to be determined as of the time of its offer.

Failure to note an exception to excluded testimony waives the error, if any.

Statute making evidence of "regular operation" admissible means "actual operation" and not mere offer to operate. R. S., 1944, Chap. 44, Sec. 21, Par. III.

Public Utilities v. *Gallop*, 290.

See Taxation, *Greaves* v. *Houlton Water Co.*, 207.

RATIFICATION

See Contracts, *Reed Bros.* v. *Giberson*, 4.

RECORDS

REFEREES

The ruling on the acceptance of a Referee's report is one of law and not of discretion.

Bradford v. *Davis et al.*, 124.

REPLEVIN

In replevin suit, under plea of *non cepit* and brief statement alleging that at the time the goods were recovered by the plaintiff the property of the same was not in the plaintiff, plaintiff must establish title or other right to the possession superior to that of defendant.

A chattel mortgagee who takes and retains possession of the mortgaged property, or records the mortgage, within twenty days after the date written in the mortgage, has a valid mortgage against all persons but registration does not date back to the date of the mortgage so as to give it priority over intervening titles or liens.

If a chattel mortgage is recorded or possession taken subsequent to twenty days, as provided by statute, it shall be valid against attachments made subsequent thereto, based upon causes of action arising subsequent thereto.

Where question of damages in replevin was not raised in statement facts in the report, such damages may be determined in suit on replevin bond.

Credit Assn. v. *Kent.* 146.

If defendant is entitled to return of goods in replevin action, he is entitled to damages for the taking, and costs, and the amount of damages may be assessed in the original replevin suit; or, if not then assessed or considered, by suit on the bond. After a decision for defendant in replevin suit by nonsuit, verdict or otherwise, defendant must file motion for a judgment for return, and he may then proceed with an action on the bond.

Archer v. *Aetna Casualty Co.*, 64.

RULES OF COURT

Rule of Court 40, 129 Me. 518.
Rule of Court 19A, 138 Me. 367.
Rule of Court 17, 129 Me. 509.
Rule of Court 42, 129 Me. 519.
Rule of Court 21, 129 Me. 511.

Bradford v. *Davis et al.*, 124.

Rule of Court 18, 129 Me. 510.

Public Utilities Comm. v. *Gallop*, 290.

SALES

Sales Act provisions R. S., 1944, Chap. 171, Sec. 69, giving a buyer an election of remedies to rescind a contract of sale for breach of

warranty and recover back the purchase price or sue on the warranty and recover damages are inconsistent remedies.

To recover back the purchase price a buyer must adhere to his tender to return the goods and act consistently therewith.

Whether an allegation in surplusage depends upon the pleading not the proof.

Money counts are inappropriate for the recovery of unliquidated damages caused by a breach of warranty respecting the quality of goods sold.

In an action for money had and received one cannot recover damages for breach of warranty amounting to less than a total failure of consideration.

Where specifications are made under money counts plaintiff is confined to specifications.

Powers v. *Rosenbloom, Aplt.*, 361.

SAVINGS BONDS

See Taxation, *Hallett* v. *Bailey*, 1.

SCHOOLS

See Municipal Corporations, *Perkins* v. *Inhabitants Standish*, 353.

SLANDER

Language imputing a criminal charge is actionable *per se*, from which malice in law may be implied.

Damages include the elements of mental suffering, humiliation, embarrassment, effect upon reputation and loss of social standing.

A jury would be warranted in increasing an award because of the failure of a defendant to establish by evidence a plea of truth.

Actual malice or malice in fact may be defined in the popular sense as rancor, personal animosity, or ill will.

Actual malice does not exist if the defendant had an honest belief in the truth of her accusations. The belief must be based upon reasonable and probable grounds.

Fact that accusations were not sustained by the jury is not justification for finding of actual malice where jury made no specific findings and elements necessary to establish the good faith of defendant are present.

Special damages with respect to dismissal from employment and efforts to secure employment elsewhere must be alleged and proved.

McMullen v. *Corkum*, 47.

SPECIFIC PERFORMANCE

See Equity, *Dunham* v. *Hogan et al.*, 142.

STATUTES

STATUTES CONSTRUED

PUBLIC LAWS

PRIVATE AND SPECIAL LAWS

STOCKHOLDERS

SUBROGATION

SUPPORT

SURVIVORSHIP

TAXATION

The lighting of public streets, and public or private buildings, is a public purpose and the Legislature can authorize this to be done by any appropriate means which it may deem expedient.

Property which has been appropriated and devoted to public use may be exempted from taxation.

What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively within the Legislature to say, without limitation, except such as are imposed by express constitutional provision.

In the construction of statutes, court must look to the purpose for which a law is enacted, and avoid a construction which leads to a result clearly not within the contemplation of the Legislature.

The Legislature in creating an exemption statute cannot bind itself so as to prevent a future change or repeal. R. S., 1944, Chap. 81, Sec. 6.

Greaves v. *Houlton Water Co.*, 207.

Illegitimate and natural child of a testatrix is to be treated as a

TRIAL JUSTICES

TRUSTS

WAIVER

WARRANTY

WILLS

WITNESSES

WORKMEN'S COMPENSATION

ployee claiming and accepting compensation does not lose his right to bring a common law action against such other person, but his right to enforce liability is suspended until the employer vested with subrogation rights fails to pursue its remedy for thirty days after written demand, or waiver. R. S., 1944, Chap. 26, Sec. 25.

Failure to make written demand or obtain waiver does not entitle defendant to judgment on the merits, but with pleadings waived, entitles defendant to nonsuit.

Statute allowing additional damages for injuries suffered through tort of a third person as well as compensation from his employer is not objectionable as allowing double indemnity, but prevents immunity of tort feasor for his wrong doing.

Mitchell v. *Peaslee, Jr.*, 372.

WRONGFUL DEATH

Statute limits recovery to what is a fair and just compensation not exceeding $10,000 with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought and in addition such damages as will compensate the estate of such deceased person for reasonable expenses of medical, surgical, and hospital care and treatment, and for reasonable funeral expenses. R. S., 1944, Chap. 152, Secs. 9, 10.

LaFerriere Adm. v. *Augusta Ice Co.*, 248.