MAINE REPORTS

144

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1949 TO DECEMBER 31, 1949

CECIL J. SIDDALL
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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. GUY H. STURGIS, *Chief Justice* [1]

HON. HAROLD H. MURCHIE, *Chief Justice* [2]

HON. SIDNEY ST. F. THAXTER

HON. NATHANIEL TOMPKINS [3]

HON. RAYMOND FELLOWS

HON. EDWARD F. MERRILL

HON. WILLIAM B. NULTY [4]

HON. ROBERT B. WILLIAMSON [5]

1 Active Retired March 9, 1949.
2 Appointed Chief Justice March 3, 1949.
3 Died April 22, 1949.
4 Appointed March 16, 1949.
5 Appointed May 5, 1949.

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

HON. ARTHUR CHAPMAN

HON. HARRY MANSER

HON. EDWARD P. MURRAY

HON. GUY H. STURGIS

JUSTICES OF THE SUPERIOR COURT

HON. ALBERT BELIVEAU
HON. ARTHUR E. SEWALL
HON. ROBERT B. WILLIAMSON [1]
HON. FRANK A. TIRRELL, JR.
HON. WILLIAM B. NULTY [2]
HON. PERCY T. CLARK
HON. DONALD W. WEBBER
HON. FRANCIS W. SULLIVAN [3]
HON. GRANVILLE C. GRAY [4]

1 Appointed to Supreme Judicial Court May 5, 1949.
2 Appointed to Supreme Judicial Court March 16, 1949
3 Appointed to Superior Court April 5, 1949.
4 Appointed to Superior Court May 18, 1949.

ACTIVE RETIRED JUSTICES
OF THE
SUPERIOR COURT

HON. WILLIAM H. FISHER

Attorney General
HON. RALPH W. FARRIS

Reporter of Decisions
CECIL J. SIDDALL

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

THE AMERICAN OIL COMPANY, IN EQUITY

vs.

EDWARD A. CARLISLE

AND

SUZANNE M. CARLISLE

Somerset. Opinion, January 17, 1949.

Equity. Appeal. Exceptions.

So-called "Law and Equity" Act does not enlarge jurisdiction of Court of Equity but merely provides a new method of placing a case which the Court of Equity has the power to consider before it for determination.

The fact that the defendant may have pleaded an equitable defense to an action of law under R. S., 1944, Chap. 100, Sec. 18 does not authorize a transfer from law to equity since the power to transfer depends upon the nature of the cause of action, not the nature of the defense alleged thereto.

Equity has no jurisdiction where neither the subject matter of the cause nor the relief sought are equitable in their nature.

Discretion in the matter of transferring cases from law to equity means "judicial discretion."

When absence of equity jurisdiction becomes apparent due to the fact that a plain adequate and complete remedy at law exists, an appeal

must be sustained even though the question of equity jurisdiction on that ground was not raised by the defendant.

Attempted appeal from the findings of the presiding justice and noted on the docket prior to the filing of the actual decree is premature as not being in accordance with R. S., 1944, Chap. 95, Sec. 21 relating to appeals from final decrees.

Findings of presiding justice prior to final decree do not amount to an interlocutory decree or order from which an appeal can be taken under R. S., 1944, Chap. 95, Sec. 23.

Either party aggrieved by a final decree has the right to take exceptions thereto under R. S., 1944, Chap. 95, Sec. 26.

ON EXCEPTIONS.

Action on the case to recover damages for breach of covenants in lease. The court ordered the case to be heard in Equity and upon conclusion thereof awarded damages to plaintiff. Defendant filed exceptions including a general exception to the judgment and decree. Exceptions sustained. Decree vacated. Cause remanded to the Superior Court in Equity, the court to strike out the pleadings in Equity, require the parties to plead at law in the same cause in the Superior Court, said court to hear and determine the cause at law.

Perkins, Weeks and Hutchins,
Richard M. Sullivan, for plaintiff.

Paul L. Woodworth, for defendants.

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

MERRILL, J. On exceptions by defendants. "This was an action on the case to recover damages for the breach of alleged covenants to make alterations, and to make repairs, contained in a lease. By order of court, plaintiff furnished specifications of its claims, and defendants furnished specifications of their defense. The court ordered the case to be heard in equity. At the conclusion, the court awarded

the plaintiff damages in the sum of two thousand eight hundred sixty-two dollars and sixty-four cents ($2,862.64) the full amount claimed." These facts are set forth in the bill of exceptions. It also appeared, and was freely admitted by counsel for the plaintiff, during argument, that the plaintiff's only claim was to recover pecuniary damages for the breach of certain alleged covenants by the defendants to make alterations and repairs as provided in a certain lease from the defendants to the plaintiff, and that it sought no equitable relief either before or after the transfer.

The defendants' bill of exceptions contains twenty-five specific exceptions directed to as many claimed errors in the course of the proceedings and in the findings of the presiding justice, also a general exception to the judgment and decree. The twenty-third exception was:

> "To the ruling that the moneys expended, labor and materials furnished by the plaintiff, in good faith and for amounts receivable, for its losses, caused proximately by defendants' breach of covenant are recoverable in the present action, the defendants except."

As this and the general exception must be sustained and the decree vacated, upon the grounds hereinafter set forth, there is no need to consider the other exceptions.

Neither the fact that the plaintiff had a "plain, adequate and complete" remedy at law, nor legal error, due thereto, in the transfer from law to equity were *specifically assigned* as the grounds upon which these two exceptions were taken. Each of these grounds is directed to the "equity jurisdiction" of the court, that is to the authority of a court of equity to take cognizance of and determine the cause upon its merits. In this limited sense they are jurisdictional in their nature. If they have been made to appear to the court, they require the sustaining of said exceptions even though not specifically assigned as grounds therefor.

Enough appears to make it clearly apparent that had the plaintiff, in the first instance, filed a bill in equity to enforce its claim for pecuniary damages for breach of covenant, it could not have maintained the same. Such claim would neither have required nor even justified equitable relief. The bill would have to be dismissed on the ground that the plaintiff had a plain, adequate and complete remedy at law. With some possible exceptions, of which this is not one, the statute conferring full equity powers upon the court excludes all cases where there is a "plain, adequate and complete remedy at law." Such cases are beyond the equity jurisdiction of the court.

In the instant case neither before nor after the transfer was the relief sought, nor was the relief awarded equitable in its nature to the slightest degree. The plaintiff's claim was purely legal in its nature. It did not even savor of equity as distinguished from law. All that the plaintiff sought, either before or after the transfer from law to equity, was a judgment for money damages, and such was the only relief obtained. His remedy at law was plain, adequate and complete, and there is not even a suggestion to the contrary.

We are here presented with a situation where it has been made to appear to this court that the Justice of the Superior Court at Nisi Prius has of his own motion transferred to the equity court and heard and determined in equity, and as a cause in equity, a cause of action strictly legal in its nature and in which the only relief asked, or which could be given, was the legal relief afforded by a judgment for money damages. The situation thus presented is to say the least a novel one.

At common law a Justice at Nisi Prius had no power to transfer an action at law to the equity court. Such power and authority as such justice now possesses must depend solely upon statutory provision. Such power and authority as he has in this respect is derived from R. S., Chap. 100,

Sec. 15. It was under authority of this section of the statute that the presiding justice in this case presumed to act. This section is as follows:

> "When, in an action at law in the superior court, it appears that the rights of the parties can be better determined and enforced by a judgment and decree in equity, the court may, upon reasonable terms, strike out the pleadings at law and require the parties to plead in equity in the same cause and may hear and determine the cause in equity."

This is the first section of the so-called "Law and Equity Act," R. S., Chap. 100, Secs. 15-21. It was originally enacted as P. L., 1893, Chap. 217. Except for changing the words "supreme judicial court" in the original act to "superior court" as in the present revision, Section 1 of the original act is identical with Section 15, *supra.*

The foregoing section of the statute does not enlarge the jurisdiction of a court of equity. It merely provides a new method of placing a case which a court of equity has the power to consider before it for determination.

If it is only when the rights of the parties can be *"better"* determined in equity that the justice may act, it is clear that it is a condition precedent to such action on his part that the rights of the parties *can be* determined in equity. Before the rights of the parties can be determined in equity, there must be a cause of action within the jurisdiction of the equity court to hear and determine. Then and only then can the court in the words of the statute "strike out the pleadings at law and require the parties to plead in equity in the same cause and hear and determine the cause in equity."

Unless a bill in equity sets forth a cause of action within the equity jurisdiction of the court it cannot be maintained. If after an order of the kind provided for in Section 15 the plaintiff cannot state his case as a cause of action within the equity jurisdiction of the court, it cannot be maintained,

and by the same token the justice cannot hear and determine the cause in equity.

We hold that the power of a Justice at Nisi Prius to act under Section 15 of the Law and Equity Act is limited to those cases only in which the plaintiff's cause of action may be stated as a cause of action within the jurisdiction of an equity court to hear and determine. Unless the cause of action is of this nature a Justice of the Superior Court has no power nor authority to order its transfer to equity under said section of the statute. Such order in excess of his power and authority would be legal error, and would confer no jurisdiction on the equity court to hear and determine the cause. Neither does the fact that in such a case the defendant may have pleaded an equitable defense to the action at law under R. S., Chap. 100, Sec. 18 authorize the transfer from law to equity. Section 18, unlike Section 15, does not contemplate pleading in equity and a transfer to the equity court and the hearing and determining of the case in equity. Under Section 18 the equitable defense is to be pleaded at law. Instead of striking out the pleadings at law and pleading in equity as in the cases provided for in Section 15, the statute provides that the equitable defense "shall be pleaded in the form of a brief statement under the general issue." Instead of providing that the case shall be heard and determined in equity, as in Section 15, Section 18 provides that he "shall receive such relief as he would be entitled to receive in equity, against such claims of the defendant." If in view of these provisions of the statute there be a doubt as to the question of whether Section 18 contemplates the transfer of the cause to a court of equity, Section 19 is conclusive. By that section the court in an action at law to which an equitable defense is pleaded under Section 18 is given the power to "make such decrees and restraining orders as may be necessary to protect and preserve such equitable rights, and may issue injunctions according to the usual practice in equity."

The power and authority to transfer an action at law to the equity court depends upon the nature of the cause of action, not upon the nature of the defense alleged thereto.

It becomes necessary, therefore, in determining the power of the presiding justice in the instant case to order the transfer of the action at law to equity and to hear and determine the same in equity, to examine the nature of the plaintiff's claim to see whether or not the same was within the jurisdiction of the equity court.

As we have heretofore shown, in the instant case the plaintiff had a plain, adequate and complete remedy at law. Under such circumstances, subject to certain exceptions of which this is not one, there can be no remedy in equity. Such cases are not within the jurisdiction of an equity court. We said in *Caleb* v. *Hearn,* 72 Me. 231:

> "The only relief sought, is compensation in damages for a wrong fully accomplished, and done to the estate of John O. Caleb, whose administrator would have upon the facts alleged, an abundant remedy at law. The bill cannot be maintained for two reasons: 1, because of the want of a proper party plaintiff; 2, because the only party directly injured, has an adequate remedy at law. *Fletcher* v. *Holmes,* 40 Maine, 364; *Crooker* v. *Rogers,* 58 Maine, 339; *Ins. Co.* v. *Hill,* 60 Maine, 178."

This case was cited with approval in the very recent case of *Hutchins* v. *Hutchins,* 141 Me. 183, 193; 41 A. (2nd) 612, 616. Further citation of authorities upon this proposition is unnecessary.

The case of *Hutchins* v. *Hutchins, supra,* stands for the further legal proposition, well established in this though not prevailing in some jurisdictions, with respect to lack of jurisdiction in equity because of an adequate remedy at law:

> "The fact that the question of equity jurisdiction was not raised by the defendant does not confer

> such jurisdiction when the absence of the same is apparent. *York* v. *McCausland,* 130 Me., 245, 154 A. 780."

Before the passage of the "Law and Equity Act" if equitable relief was denied the court could not retain the bill to afford legal relief. As said in *Gamage* v. *Harris,* 79 Me. 531, 536; 11 A. 422, 423:

> " 'The rule is, that when a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell* v. *Clark,* 7 Cranch, U. S. 69 [L. Ed. 270]. *Price's Patent Candle Co.* v. *Bauwens Patent Candle Co.* 4 Kay & J. 727; *Baily* v. *Taylor,* 1 Russ & M. 73; *French* v. *Howard,* 3 Bibb. (Ky.) 301; *Robinson* v. *Gilbreth,* 4 id. 153; *Nourse* v. *Gregory,* 3 Litt. (Ky.) 378;' *Dowell* v. *Mitchell,* 105, U. S. 430, [26 L. Ed. 1142]."

This being true, a court in equity cannot retain a bill in order to *itself* afford legal relief, when it appears that the nature of the plaintiff's claim is not cognizable by an equity court and that the relief sought is merely legal in its nature. In other words, while some claims based upon a legal right may be cognizable by an equity court for the purpose of the granting of equitable relief, and while in some cases the court in equity may grant monetary damages where the subject matter of the cause is within its jurisdiction, equity has no jurisdiction over causes where neither the subject matter of the cause nor the relief sought are equitable in their nature. The instant case is clearly within the latter classification.

When a cause of action falls within this classification, an action at law affords the plaintiff's only remedy, and when he seeks it by such an action, R. S., Chap. 100, Sec. 15 confers no power nor authority upon a Justice of the Superior Court at Nisi Prius to order its transfer to the equity court.

If he does so in such case, and it is made to appear, as here, that such cause in equity is not within the jurisdiction of the equity court, it is the duty of the court in equity to either dismiss it or to order it transferred to the law docket for disposition at law as provided in R. S., Chap. 100, Sec. 16. It cannot retain it to afford relief which may be had at law.

In argument counsel for the plaintiff urged that the transfer of an action at law to equity as provided in Section 15 of the "Law and Equity Act" was a matter wholly within the discretion of the presiding justice. He cited and relied upon Whitehouse Equity Practice, 1st Edition, Section 425 which reads as follows:

> *"Allowance within discretion of court and not subject to exceptions.*
>
> It will be seen from the opinion of the court above quoted in Ridley v. Ridley, 87 Me. 445, 452, 32 A. 1005 that such a change in the pleading does not depend solely upon the volition of the plaintiff, but may be ordered by the court sua sponte and it would therefore seem to be entirely within the discretion of the court whether to allow or refuse such change in any case. Furthermore the change properly comes under the head of amendments and should, it would seem, be governed by statute R. S. c. 77, sec. 11, allowing amendments at the discretion of the court at any time before final decree and the decision in Gilpatrick v. Glidden, 82 Me. 201, 19 A. 166, holding that exceptions do not lie to the exercise of such discretion."

If, as was suggested by counsel for plaintiff at the argument, this statement be interpreted to mean that a justice of the Superior Court has a discretion unrestrained and absolute and which is subject to no power of review, whereby he can transfer any case at law, to the equity court which court must retain and decide the cause even where there be no vestige of equitable jurisdiction over the cause or to grant equitable relief, this statement of the law cannot be

sustained. To be a correct statement of the law *discretion* as contained in the foregoing extract from Whitehouse must be interpreted as meaning *judicial discretion.* As was well said in *Bourisk* v. *Mohican Co.* 133 Me. 207-210; 175 A. 345, 346:

> "And it is well settled that judicial discretion must be exercised soundly according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. When some palpable error has been committed or an apparent injustice has been done, the ruling is reviewable on exceptions. *Charlesworth* v. *American Express Company,* 117 Me., 219, 103 A., 358; *Fournier (Hutchins)* v. *Tea Company,* 128 Me., 393, 148 A., 147. It is when judicial discretion is exercised in accordance with this rule that it is final and conclusive. *Chasse* v. *Soucier,* 118 Me., 62, 63, 105 A., 853."

To multiply authorities bearing upon this well established principle that that discretion which is to be exercised by a court is judicial discretion would serve no useful purpose. In the instant case, the presiding justice committed what is described in *Bourisk* v. *Mohican Co., supra* as "palpable error." He transferred from the law docket to the equity docket, to be heard in equity, a cause of action that had nothing equitable as distinguished from legal in its nature and which did not in any way demand or even justify the peculiar relief which can be afforded only in equity. This having been made to appear to this court it is evident that the cause of action was not cognizable in a court of equity. The equity court had no power nor did it have authority to hear and determine the same as a cause in equity.

It is to be noted that this cause is before the court only upon a bill of exceptions. The defendants also made an ineffectual attempt to appeal, and in pursuance thereof, presented to the court the complete record in the case. The

record, however, shows that the so-called appeal was taken from the findings of the presiding justice and was noted on the docket prior to the filing of the actual decree in the case. This appeal was premature for it is provided by Sec. 21 of Chap. 95 with respect to appeals from final decrees as follows:

> "From all final decrees of such justice, an appeal lies to the next term of the law court. Said appeal shall be claimed by an entry on the docket of the court from which the appeal is taken, within ten days after such decree is signed, entered, and filed, and notice thereof has been given by such clerk to the parties or their counsel."

The statement of the presiding justice at the close of his findings "the loss and damage to the plaintiff is in the sum of $2,862.64 and judgment for the plaintiff to be rendered in accordance herewith" is not a final decree from which an appeal can be taken. The final decree referred to in the statute from which an appeal may be taken is the final decree formally drawn, signed, entered and filed. See *Gilpatrick* v. *Glidden,* 82 Me. 201; 19 A. 166.

The record discloses that these findings were filed on April 26, 1948 and that on that date the defendants claimed their appeal and exceptions upon the docket. The docket further discloses that on May 11, 1948 the formal decree was filed and that the defendants then excepted thereto. There is no docket entry showing that an appeal was claimed from said decree. Neither are the findings of the justice an interlocutory decree or order from which an appeal can be taken under R. S., Chap. 95, Sec. 23. Such findings of fact and law may only be attacked by exceptions and then only for errors of law.

> "No questions of fact are open for consideration upon exceptions." *Emery* v. *Bradley,* 88 Me., 357, 359, 34 A. 167, 168.

Whether or not under the ancient rules of chancery practice a final decree was subject to exceptions, R. S., Chap. 95, Sec. 26 as interpreted by this court gives to either party aggrieved the right to take exceptions to a final decree. As said in *Emery* v. *Bradley, supra:*

> "The plaintiff's counsel insists at the outset that exceptions cannot be allowed to a final decree; that the only mode of obtaining a review by the law court of any part of the final decree is by appeal. The equity procedure act, however, seems to contemplate exceptions to a final decree, whatever may be the general rule. Of course, exceptions to any part of a final decree can only present a question of law. No questions of fact are open for consideration upon exceptions. An exception to a final decree may often be preferable to a general appeal. The latter opens up the whole case for rehearing on law and facts, and requires the transmission to the law court of copies of all the pleadings, orders and evidence. The former presents solely a question of law for rehearing and requires usually but a very small part of the record to be transmitted to the law court."

Sec. 26 of Chap. 95 among other things, after providing for the mechanics of taking exceptions, states "In all other respects, such exceptions shall be taken, entered in the law court and there heard and decided like appeals."

In the case of *Hutchins* v. *Hutchins, supra* we held that when the absence of equity jurisdiction became apparent due to the fact that the plaintiff had a plain, adequate and complete remedy at law, an appeal must be sustained even though the question of equity jurisdiction on that ground was not raised by the defendant. We further held that the fact that he did not raise the question does not confer jurisdiction upon the court when its absence for such reason is apparent. To hold otherwise would in effect confer upon the parties to the cause, by inaction upon their part, the power to confer equity jurisdiction upon the court. Jurisdiction to hear and determine causes in equity is con-

ferred upon the court only by law. It cannot be conferred upon the court either by consent, action or inaction on the part of the litigants. Neither can equity jurisdiction be conferred upon the court by the transfer of an action at law, purely legal as distinguished from equitable in its nature, by the action of a presiding Justice at Nisi Prius purporting to act under Section 15 of the Law and Equity Act. Only cases involving questions cognizable in equity and in which equitable relief can be granted can be so transferred. When we say that cases may be transferred from law to equity under the provisions of Section 15 in the discretion of the presiding justice, we mean judicial discretion as heretofore defined. The exercise of discretion in this matter if abused, within the legal meaning of the word abused, that is, exercised nonjudicially, may be attacked by exceptions. When so transferred in such abuse of judicial discretion, the transfer confers no jurisdiction on the equity court. To hold otherwise would empower a single justice to transfer from law to equity any action at law at his will and pleasure. Such authority, if not subject to challenge when exercised arbitrarily or in defiance of well established principles of law, would give to a single justice the power to destroy the right of jury trial as vouchsafed by Section 20 of the Bill of Rights in the Maine Constitution. As said in *Rockland* v. *Water Co.* 86 Me. 55, 57; 29 A. 935, 936.

> "The Supreme Court has always held its equity powers measured by the jurisdiction of the English chancery. Our jurisdiction may be limited from time to time by statutes bestowing equitable remedies upon courts of law, if the statute expressly so provides or plainly so intends; 1 Pom. Eq. Sections 276-281, and cases cited; but it cannot be enlarged, otherwise the right of trial by jury, according to the course of the common law, might be denied in violation of Art. 1, Sec. 20, of our Constitution that is similar to the VII amendment of the constitution of the United States, already considered by the Supreme Court. *Scott* v. *Neely,* 140 U.S. 106; 11 S. Ct. 712 [35 L. Ed. 358];

> *Whitehead* v. *Shattuck,* 138 U.S. 146; 11 S. Ct. 276 [34 L. Ed. 873]."

It is obvious that this cause was not within the jurisdiction of a court in equity to hear and determine. It was an action at law pure and simple in which no equitable relief was sought. As well stated by Whitehouse in his work on equity practice:

> "It is a fundamental and indispensable rule that the allegations of the bill must state a case within the jurisdiction of a court of equity. If the bill fails in this respect the error is fatal in every stage of the cause, and cannot be cured by consent of the parties. It is the duty of the court to stay proceedings whenever its lack of jurisdiction is manifest; and it matters not whether this defect is brought to the attention of the court by a party or by an amicus curiae, or is obtained by an inspection of the proceedings at the instance of the court itself." 2nd Edition, Sec. 90.

In this case it having been made to appear to the court that the cause was not within the equity jurisdiction of the court to hear and determine, the specific exception to the ruling that the plaintiff's "losses caused proximately by defendants' breach of covenant are recoverable in the present action" and the general exception by the defendants to the final decree must be sustained and the decree vacated. Under the Law and Equity Act, while the Law Court has power under Sec. 17 of Chap. 100 of R. S., to transfer an action at law commenced in the Superior Court and pending in the Supreme Judicial Court as a Law Court to the equity court, no such right is conferred upon us to make such transfer from equity to law. However, in this case as the cause was improperly transferred by a justice of the Superior Court from the law docket to the equity docket, the case should not be dismissed, but restored to the law docket of the Superior Court. The exceptions being sustained, the decree must be vacated, the case remanded to the Superior Court in Equity, that court should strike out the pleadings

in equity and require the parties to plead at law in the same cause in the Superior Court. This when accomplished will restore the case to the law docket of the Superior Court, which court will then proceed to hear and determine the case at law.

Exceptions Sustained.

Decree vacated. Cause remanded to the Superior Court in Equity, the court to strike out the pleadings in equity, require the parties to plead at law in the same cause in the Superior Court, said court to hear and determine the cause at law.

PAUL LANGE

vs.

LAURIER GOULET

Androscoggin. Opinion, February 1, 1949.

Negligence. Automobiles. New Trial.

The contention that operator of a motor vehicle striking a pedestrian must be held blameless as a matter of law when moving slowly under the direction of a traffic light does not stand the test of common sense and would establish an unwise public policy if adopted.

A defendant prosecuting a general motion for a new trial has the burden of establishing that the verdict is manifestly wrong.

Whether particular conduct of motor vehicle operator conforms to requirements of ordinary care are questions of fact for jury determination, and judgment of a court should not be substituted for that of a jury, based on evidence concerning which reasonable men may differ.

ON MOTION FOR NEW TRIAL.

Action to recover for injuries sustained by pedestrian crossing at street intersection. Jury returned verdict for plaintiff and defendant moves for new trial. Motion overruled. Case fully appears in opinion.

Lessard and Delahanty, for plaintiff.

Edward S. Beauchamp, for defendant.

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

MURCHIE, J. Defendant's motion for a new trial in this cause challenges a jury verdict for $1,500, returned in favor of a 73-year-old plaintiff, slightly lame and somewhat hard

of hearing, injured while walking on a cross-walk at an intersection of ways in broad daylight, when struck and knocked down, as he alleges, by a motor vehicle operated by the defendant. A light fall of snow was not sufficient to obscure vision.

The allegation of the motion that the damages are excessive has been waived. The sole issues are whether, on the record, the findings of the jury that the defendant was negligent and that the plaintiff was not, implicit in the verdict, were justified. They must be resolved within the established principle that the judgment of a court should not be substituted for that of a jury, based on evidence concerning which reasonable men may differ, *Eaton* v. *Marcelle*, 139 Me. 256; 29 A. (2nd) 162. The burden rests on the defendant to show that the verdict is manifestly wrong. *Searles* v. *Ross et al.*, 134 Me. 77; 181 A. 820.

The accident occurred at the intersection of Lisbon and Pine Streets in Lewiston. Traffic at the time was being controlled by lights operating in a 70-second cycle which permitted vehicular traffic on Lisbon Street to proceed during approximately 40 seconds of each cycle, and that on Pine Street to do so for 20 seconds, with two 5-second intervals for pedestrians. Lisbon Street measured a little less than 40 feet from curb to curb. When the plaintiff reached the curb from which he later stepped to make his crossing the lights were holding vehicles on Lisbon Street from entering the intersection. He waited until the cycle then in operation had been completed and started across that street when the vehicles on it were again stopped. He was roughly three-quarters of the way across when he fell, as the defendant asserts, or was struck, according to his own testimony. He was directly in the path the defendant would naturally follow in entering the intersection and turning to the right, as was his plan. The traffic light changed at that time and defendant's car moved forward very slowly,

as is evidenced by his own testimony and the fact that he stopped almost at the time plaintiff landed on the ground.

On the disputed points as to whether the injuries resulted from a fall or impact with the motor vehicle and whether plaintiff was lying in front of defendant's car or partly under it when help reached him in a matter of seconds, the record carries clean-cut conflicts of testimony. The verdict indicates that the jury accepted the evidence given by the plaintiff and on his behalf on both points. The motion would be overruled on the authority of the cases heretofore cited if it had not been urged on behalf of the defendant that a finding of negligence against the operator of a motor vehicle cannot be sustained on testimony establishing that it was moving slowly on the go-ahead signal of a traffic light, and that the plaintiff must be considered negligent as a matter of law because his own evidence indicates that he did not see the defendant's car prior to impact, although it must have been in plain view. On this point defendant's counsel cites *Gregware* v. *Poliquin,* 135 Me. 139; 190 A. 811. The principle therein declared, that a failure to see whatever should be seen in the exercise of due care constitutes negligence, is sufficient in and of itself to support the verdict under review so far as it carries a finding of negligence on the part of the defendant. His own statement was that he did not see the plaintiff until within a few feet of him.

The claim that the operator of a motor vehicle must be held blameless as a matter of law when moving slowly under the direction of a traffic light, notwithstanding his vehicle collides with a pedestrian moving normally in its path, has never been asserted heretofore in a litigated case, so far as this court is aware. No authority for it is offered. It must be rejected on the simple grounds that it does not stand the test of common sense, and would establish an unwise public policy if accepted. As was stated by this court in *Cameron* v. *Lewiston, Brunswick and Bath Street Rail-*

way, 103 Me. 482; 70 A. 534 at page 537; 18 L. R. A. N. S. 497; 125 Am. St. Rep. 315, later quoted with approval in *Savoy* v. *McLeod,* 111 Me. 234; 88 A. 721; 48 L. R. A. N. S. 971:

> "the court should establish, as the law, the rule which prevents injury or loss of life, rather than that which invites, or even permits it."

Whether under any particular circumstances, whatever the speed of a motor vehicle colliding with a pedestrian on a cross-walk may be, the operator of it, or the pedestrian, is using due care are questions of fact for jury determination, except in cases where the pedestrian enters the path of the vehicle so abruptly as to give its operator no opportunity to see him and avoid hitting him. Typical exceptions are found in such cases as *Milligan* v. *Weare,* 139 Me. 199; 28 A. (2nd) 463; and *Wiles* v. *Connor Coal and Wood Co.,* 143 Me. 250; 60 A. (2nd) 786. The general rule was well stated in *Shaw* v. *Bolton,* 122 Me. 232; 119 A. 801, as follows:

> "what ordinary care and prudence demands and whether the conduct of the traveler conforms to such demand are questions of fact to be left to the judgment of a jury."

This statement, made with reference to a pedestrian struck by an automobile while he was crossing a street, applies with equal force to the operator of a motor vehicle at a crossing for pedestrians. On the present record it cannot be said as a matter of law that there was error in either of the findings necessarily carried by the verdict.

Motion overruled.

MAXIME ALBERT

vs.

MAINE BONDING AND CASUALTY COMPANY

Aroostook. Opinion, February 7, 1949.

Insurance Contract. Notice. Denial of Liability.

Questions whether notice of insurance company of its refusal to defend was seasonable, whether rights of assured were prejudiced and in what manner, matter of necessity for immediate settlement, and whether settlement was fair and reasonable, are all questions of fact for the jury.

Under terms of an insurance policy not covering employees, question whether insured party being transported was employee at the time, depends upon contract, either express or implied, or whether transportation was incident of employment.

A denial of liability by an insurance company is equivalent to a declaration that it will not pay even if the amount of loss is determined and may render inoperative provisions for the benefit of the company precedent to right of action.

ON EXCEPTIONS.

Action of assumpsit on automobile insurance policy. Defendant denied coverage under policy exclusion. Plaintiff joined issued and claimed estoppel. Verdict for plaintiff. Case now before Law Court on exception to refusal of presiding justice to direct verdict and give requested instructions. Exceptions overruled. Case fully appears in opinion.

Harry C. McManus,
Scott Brown, for plaintiff.

William B. Mahoney,
George B. Barnes, for defendant.

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

FELLOWS, J. This is an action of assumpsit on an automobile liability insurance policy, brought in Aroostook County Superior Court under R. S., 1944, Chap. 100, Sec. 40. The defendant pleaded no coverage because it claimed that the person who was killed was an employee of the assured plaintiff, and as employee excluded by the policy; and also pleaded that the amount sued for was voluntarily paid by the plaintiff in settlement, without trial as provided in the policy and without the consent of defendant. The plaintiff filed replication stating that the injured man was not an employee at the time of the injury; and further that the defendant was estopped, by the acts and promises of its agents, to complain of the settlement which plaintiff made because of the lack of time to prepare for trial. The jury found a verdict for the plaintiff in the sum of $2,806.25. The case is now before the Law Court on defendant's exceptions to denial of motion to direct a verdict, and exceptions to refusal to give three requested instructions.

The facts that the jury probably found are, that Maxime Albert, the plaintiff, purchased of the defendant company an insurance policy to protect him against liability on a truck owned by him. The policy limits were five thousand dollars for "each person" and ten thousand for "each accident." The plaintiff was a farmer living in Frenchville, Maine, and raised potatoes on his farm in Frenchville, and also on a farm in St. Agatha eight miles away. During the harvesting season of 1944, one Pierre Langdo of Frenchville assisted in picking at twenty cents a barrel. Langdo furnished his own board, and there was no contract or arrangement between Langdo and the plaintiff for transportation to and from work. For transportation home Langdo rode in any automobile that might be going his way. Sometimes he rode in automobiles of other employees of the plaintiff, sometimes "in a truck he had," and he occasionally rode in the back of plaintiff's truck. When plaintiff was digging on the Frenchville farm Langdo always walked home.

After work on October 3, 1944, the plaintiff's truck, loaded with potatoes, left the field in St. Agatha for the potato warehouse in Frenchville. One employee named Bois, a resident of Quebec, was the driver, and the plaintiff was in the cab with the driver. The truck stopped at the warehouse in Frenchville and, while unloading, the plaintiff first learned that Langdo was riding on the rear of his truck. The truck turned sharply to go into plaintiff's home driveway, and Langdo was probably thrown off, receiving the injuries from which he died.

The assured plaintiff, Maxime Albert, immediately notified the defendant insurance company of the accident by communicating with its Madawaska agent, Cyr, who sold the policy. Cyr informed the plaintiff that the company would "take care" of the matter. An adjuster, Mr. Tidd, also interviewed the plaintiff later, while securing statements and other evidence, and told the plaintiff "don't worry, we will take care of it." During the fall and winter of 1944-5 the plaintiff made several other calls on Agent Cyr and was promised each time that "we will see to it" and "Mr. Tidd will take care of it."

On March 3, 1945 a writ with *ad damnum* of $15,000 was served on this plaintiff, Maxime Albert, brought by Odelie Langdo, administratrix, to recover for the death of Langdo, returnable to the April term of Superior Court (April 3, 1945) at Houlton, with notice for trial. The summons was at once given to the Agent Cyr by Maxime Albert, who again promised Albert that the matter would be taken care of by the company.

The evidence is conflicting as to whether the adjuster Tidd notified this plaintiff Albert on March 9, 1945 that the defendant claimed no coverage and would not defend, or whether the first notice of the company's definite intention to abandon was given by letter of the company dated March 28, 1945. The plaintiff did testify that some days after he had delivered the summons in the Langdo case to the Agent

Cyr, the company adjuster Tidd told "me he won't bother for that case; I could settle." In any event, it was but a matter of days before the April term of court when Maxime Albert knew that the defendant company would not defend the suit against him as was provided in the policy.

After the $15,000 Langdo suit was brought, and after Albert or his attorney learned that the company refused to defend, Albert endeavored to find Bois, who drove the truck, and Labrie who rode in the rear with Langdo, as his only witnesses. These two men were then outside the state and somewhere in Quebec or New Brunswick and Albert was unable to find them. The plaintiff Albert, therefore, on March 31, 1945 made in good faith a settlement with the administratrix of the Pierre Langdo estate for $2,500. This pending action by Maxime Albert against the defendant Casualty Company is brought to recover the amount of $2,500 paid in settlement, with interest.

EXCEPTIONS

At the close of the evidence the defendant company moved for a directed verdict for the reasons (1) that it claimed Pierre Langdo was an employee of the plaintiff at the time he was injured, and under the terms of the policy an employee was not covered, and also (2) that the policy prohibited settlement without consent of the company, or without judgment after actual trial. The presiding judge denied the motion.

The defendant's motion for a directed verdict was properly denied. By the terms of the policy the defendant agreed to defend in the name of the assured any suit brought against him to recover for personal injury or death, even though such suit was groundless, false or fraudulent, and it reserved the right to control the investigation, negotiation and settlement. The defendant company conducted the investigation, and by its promises to the plaintiff, through its agents, that it would "look after the matter,"

prevented the plaintiff from promptly protecting his own rights and preparing his defense to threatened suit. No intimation of denial of coverage came from the defendant company for months, and then not until after suit with demand for trial at the return term. An insurance company should, with reasonable promptness, deny liability to its assured, if it intends to deny liability, in order to give the assured a reasonable time to protect himself. The date when the company's refusal to defend was given to the plaintiff, whether the notice of refusal was in reasonable season under the circumstances, and whether the rights of assured were prejudiced and in what manner, were all questions of fact for jury determination. If it was necessary that immediate settlement be made under the existing facts, it was also a matter for determination by the jury whether the settlement was fair and reasonable. As stated by Mr. Justice Holmes in *St. Louis Beef Co.* v. *Casualty Company,* 201 U. S. 173, "a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution." No claim, that the settlement was unreasonable, was raised in the case at bar.

A distinct denial of all liability by an insurance company is equivalent to a declaration that it will not pay even if the amount of loss is determined. *Oakes* v. *Insurance Company,* 112 Me. 52; 90 A. 707. A denial of liability may render inoperative provisions for the benefit of the company precedent to right of action. *Jewett* v. *Insurance Company,* 125 Me. 234; 132 A. 523. See *Bryson* v. *Fire Ins. Co.,* 132 Me. 172; 168 A. 719, where waiver and estoppel are defined. For cases in other jurisdictions, holding that denial of liability waives provision requiring actual trial, see *St. Louis Dressed Beef Co.* v. *Maryland Casualty Co.,* 201 U. S. 173; 26 Sup. Ct. 400; 50 L. Ed. 712; *Interstate Casualty Co.* v. *Wallins Coal Co.,* 164 Ky. 778; 176 S. W. 217; L. R. A. 1915 F. 958; *Butler Bros.* v. *American Fidelity Co.,* 120 Minn. 157; 139 N. W. 355; 44 L. R. A. N. S. 609; *Rosenberg*

v. *Maryland Casualty Co.*, 130 Atl. 726; (N. J.) Misc. 1132; n. 41 A. L. R. 521; *Independent Milk Co.* v. *Aetna Life Ins. Co.*, 68 Mont. 152; 216 Pac. 1109.

The court cannot say, as a matter of law, under the circumstances here shown, that Pierre Langdo was an employee of plaintiff Maxime Albert while riding on the plaintiff's truck and therefore excluded under the policy. It was a question of fact, as to whether there was any express or implied contract for the plaintiff to convey Langdo as incident to or a part of his employment. The testimony of the plaintiff, that transportation was not a part, and that he did not furnish conveyance, and the evidence that Langdo used at times "a truck he had," and at times the vehicles of others who happened to be travelling his way, permitted the jury to find that Langdo was not then employed. *Chapman* v. *Cyr*, 135 Me. 416; 109 A. 736; *Littlefield's Case*, 126 Me. 159; 136 A. 724; *Michaud* v. *Taylor*, 139 Me. 124; 27 A. (2nd) 820; *Lunt* v. *Fidelity and Casualty Co.*, 139 Me. 218, 223; 28 A. (2nd) 736.

The defendant company requested an instruction that "even in the absence of evidence of an express agreement between employer and employee that employee was to be transported free of charge to and from work, you may find that employee was so transported by employer and fellow employees, and that deceased continued to be an employee until delivered at or near his home in such fashion." This instruction was properly refused. There must be either an express or implied agreement to transport as part of the employment, or transportation must be incident to the employment. There is no question in this case that the pay was for picking potatoes at so much per barrel. The fact that he was actually transported through the kindness of some fellow employees, or even by the employer, does not of itself make the transportation a part of the employment. He does not necessarily continue as an employee while riding towards home even if he finds a free ride on the em-

ployer's truck which is going in that direction. This requested instruction does not take into account that the jury should find some form of agreement, or find that the transportation was incidental to the employment to make him "continue" as an employee. *Littlefield's Case,* 126 Me. 159; 136 A. 724. The manner and kind of transportation may be some evidence of agreement or lack of agreement, but this requested instruction does not so state. It is incorrect and misleading.

The second requested instruction was "If you find, as a fact, that defendant, through its adjuster, notified plaintiff on March 9, 1945, that it declined, under the insurance contract, to defend his case, you are instructed, as a matter of law, that such notification was reasonable in point of time, and that defendant neither waived its right to withdraw nor is it estopped from invoking non-coverage * * *." The justice presiding in refusing to give such an instruction was clearly within his rights. Whether notification was reasonable in point of time was a jury question of fact under all the circumstances, as were all facts incident to whether there was or was not a waiver, or an estoppel.

The third refused instruction, to which refusal an exception was taken, states "If you find as a fact, that plaintiff paid deceased's administratrix for wrongful death $2,500 and that his obligation to pay had not been finally determined either by judgment against him after actual trial, nor by written agreement of plaintiff, the claimant and defendant, you must return a verdict for the defendant." This requested instruction was not a proper one. It contained the admitted facts. It invaded the province of the jury, in that it prohibited the jury from consideration of any fact regarding a possible waiver or estoppel. It was in effect the directed verdict which had previously been asked for and properly denied.

Exceptions overruled.

MACNEILL REAL ESTATE, INC.

vs.

CLINTON F. RINES ET AL. EXR.

Cumberland. Opinion, February 7, 1949.

Brokers. Referees.

When a contract to purchase is substituted for an actual sale it is a pre-requisite to the owner's liability for brokerage commission that such contract bind the purchaser to make the purchase; that if the purchaser is given the option between making the purchase and the forfeiture of the down payment, the contract is not such a mutual contract as will entitle the broker to a commission unless the purchase be consummated or consummation be prevented by the seller.

Whether retention of down payment by real estate vendor be called a forfeiture or liquidated damages constitutes no basic difference where contract effectively allows purchaser to avoid carrying out his purchase upon retention by vendor of down payment.

Findings of fact by Referee under Rule of Court are final and conclusive if there is any evidence to support them.

A contract containing an agreement to purchase which leaves performance of such agreement optional with the vendee is treated legally as of no more effect than a strict unilateral option.

ON EXCEPTIONS.

Action by real estate brokers to recover commissions for producing a customer. To the acceptance of referee's report and order of judgment for defendants the plaintiff excepts. Exceptions overruled. Case fully appears in opinion.

Berman, Berman and Wernick, for plaintiff.

Frank Preti,
Verrill, Dana, Walker, Philbrick and Whitehouse,
for defendant.

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

MERRILL, J. On exceptions to overruling objections to a report of Referees, acceptance of the report and ordering judgment for the defendants. In this case the plaintiff, MacNeill Real Estate, Inc., a licensed real estate broker, brought an action against the defendant, Clinton F. Rines and Adeline B. Rines, Executrix of the Estate of Henry P. Rines, by whom it had been employed, to recover a commission for producing a customer for, and also a commission for procuring a sale of certain real estate owned by the defendants. The referees found for the defendants with respect to both commissions. At the hearing before this court the plaintiff waived all claim to a commission on the sale. We are therefore only concerned with the claim for a commission for producing a customer for the real estate.

The plaintiff acted wholly through and by Mrs. Mary J. MacNeill, its treasurer and agent who was a licensed real estate broker. The defendants throughout were represented by their agent, George F. Kelley, Jr. Mrs. MacNeill interested one Clyde S. Esty in the purchase of the property. He agreed to the defendants' price but informed Mrs. MacNeill that he intended to finance the purchase from the sale of property of his own in the future. He was not ready to purchase immediately. Mrs. MacNeill communicated these facts to Mr. Kelley who told her to sign him up. Esty made a down payment of one hundred dollars to Mrs. MacNeill, executed the contract, hereinafter described, which had been prepared by Mrs. MacNeill's attorney. Mrs. MacNeill informed Mr. Kelley of these facts, paid him the one hundred dollars and presented the contract to him for execution. Mr. Kelley accepted the one hundred dollars and

executed the contract. Mr. Esty was not ready to purchase at the time specified in the contract and obtained one or two extensions at the request of Mrs. MacNeill. Finally, Mrs. MacNeill informed Mr. Kelley that Mr. Esty was not going to purchase the property. Question is made as to whether or not Kelley's execution of the contract was sufficient to bind the estate of Henry P. Rines; but in view of the legal principles upon which we rest the decision in this case, that question becomes of no moment.

The contract, dated April 5, 1945, was upon a printed form entitled "Agreement for Sale of Real Estate." In it the defendants were described as "Seller" and Esty as "Buyer." By its terms the Seller agreed to sell, and the Buyer to purchase the described property. Time was made of the essence of the contract. The price was $27,500 to be paid, cash on delivery of deed, "One Hundred Dollars having been paid to bind this agreement leaving a balance of twenty-seven thousand four hundred dollars." The contract also contained the following provisions: "A commission of 5% is to be paid by the Seller to the MacNeill Real Estate, Inc., Mary J. MacNeill agent." "The above mentioned deposit made upon the signing of this contract shall be retained by the Seller as liquidated damages in case the Buyer fails to carry out this contract."

The above provision relative to the payment of a commission was typewritten into the contract immediately following the payment clause. A printed clause relative to commission which provided that the commission should be paid *upon the signing of this agreement* was just before the testimonium clause and was not filled in. The clause as to the retention of the deposit as liquidated damages was a printed clause which an examination of the original exhibit shows originally read "as *part of the* liquidated damages." The underscored words "part of the" were stricken from the executed agreement.

The referees found that the provision for retention by the defendants of the down payment as liquidated damages, should Esty fail to carry out the contract, in the light of all of the circumstances of the case, left the actual purchase by Esty optional on his part. He had a choice between completing the purchase or suffering the loss of the down payment as liquidated damages.

The referees were justified in reaching this conclusion. There was evidence that Esty at the time he executed the contract was not in a position to complete the purchase. His ability to do so depended upon the sale of other property or obtaining financial aid elsewhere. These facts were known by the seller. Time was expressly made of the essence of the contract. The down payment of one hundred dollars was a part of the purchase price, and in case Esty failed "to carry out this contract" was to be retained as liquidated damages. The amount was reasonable and not disproportionate to the actual damages. This provision for the retention of the down payment was *in fact* as well as *in name* a provision for liquidated damages should Esty fail to carry out his agreement. It was not a provision for a penalty in the legal sense of the term, inserted to enforce performance of the contract, or as security therefor.

As well stated in 15 Am. Jur. 691:

> "A provision that a sum of money paid in part performance of a contract shall be forfeited to the payee in case of default is generally held to provide for liquidated damages; that is, it is to be regarded as a substitute for performance, and not as a penalty or merely a security for performance, especially where the damages so agreed on are reasonable and not disproportionate to the actual damages."

Having determined that this contract was an optional contract, the referees applied to this case the rule announced by this court in *Hanscom* v. *Blanchard,* 117 Me. 501; 105 A. 291; 3 A. L. R. 545.

It is unnecessary in this Opinion to reiterate with a citation of authorities all of the general rules governing the respective rights and liabilities between a real estate broker and a vendor of real estate respecting commissions. As applicable to this case they are well stated in *Hanscom* v. *Blanchard, supra,* and the authorities cited therein.

The primary object of a brokerage contract, unless otherwise expressly specified therein, is that the broker procure a sale of the real estate in question on the terms specified by his employer. His duty, however, is discharged by producing a customer ready and willing to meet the exact terms of sale proposed by his employer. If, however, he produces a customer who enters into a *mutually enforcible* contract with the owner for the purchase and sale of the real estate in question, upon terms satisfactory to the owner, the broker is entitled to his commission whether or not the customer actually carries out his contract. The principal is deemed to have accepted the contract in lieu of exact performance of the broker's contract.

Whatever may be the rule in other states, this court in *Hanscom* v. *Blanchard, supra,* decided that when a contract to purchase is substituted for an actual sale, it is a prerequisite to the owner's liability for commissions to the broker that such contract bind the purchaser *to make the purchase;* that if the purchaser is given an option between making the purchase and the forfeiture of the down payment, the contract is not such a mutual contract as will entitle the broker to a commission unless the purchase be consummated or consummation be prevented by the seller. In the instant case, the referees ruled that the following clause in the contract,

> "The above mentioned deposit made upon the signing of this contract shall be retained by the SELLER as liquidated damages in case the BUYER fails to carry out this contract"

taken together with all of the circumstances of the case gave the buyer the option of either carrying out the purchase or forfeiting the down payment as liquidated damages; and as the sale was not consummated wholly because of the fault of Esty, the plaintiff was not entitled to a commission. The exceptions are in effect all directed to this ruling by the referees who relied upon *Hanscom* v. *Blanchard, supra,* and authorities cited therein for such ruling. In *Hanscom* v. *Blanchard,* the contract contained the following clause:

> "In the event that the party of the second part shall fail to fulfill the agreements herein entered into, then the sum of one thousand dollars already acknowledged as paid shall be forfeited to the party of the first part."

Unless there is a legal distinction between this clause and the above clause in this case, *Hanscom* v. *Blanchard* is controlling.

It is urged by the plaintiff that the case of *Hanscom* v. *Blanchard, supra,* should be distinguished from the present case because in that case the contract provided for the retention of the down payment as a forfeiture instead of as liquidated damages. It is further suggested that in *Hanscom* v. *Blanchard* the *opinion* does not show that the persons entering into the contract with the owner, except for the above clause, were obligated to make a purchase. To avoid being misled in determining the controlling effect of *Hanscom* v. *Blanchard,* we have examined the original record in that case and find that the contract therein referred to was under seal, contained an express promise on the part of the purchaser to pay on or before a day certain a portion of the purchase price in cash and execute a mortgage to secure a balance of twenty thousand dollars, and that the one thousand dollars which was to be forfeited was to constitute a part of the purchase price so to be paid.

There is no basic difference between a contract which *effectively* allows the purchaser of real estate to avoid carrying out his purchase upon retention by the seller of the down payment, whether such retention be called a forfeiture or liquidated damages. In either event, it is optional on the part of the vendee whether or not he will complete his purchase. This *option* on the part of the vendee is the fundamental reason which prevents the contract from being treated as a substitute for exact performance by the broker. The production of a prospective customer who obtains an option from the owner is not performance or a substitute for performance on the part of a broker who is engaged to make a sale of real estate. The granting of the option by the owner is treated only as a step on his part in aid of the sale which the broker is attempting to effectuate, and will not sustain an action for a commission unless the purchaser either exercises his option or is prevented from exercising it by action of the optionor.

Under the decision in *Hanscom* v. *Blanchard,* a contract containing an agreement to purchase which leaves performance of such agreement optional with the vendee is treated legally as of no more effect than a strict unilateral option. Such was the contract in this case, and the defendants are not liable to pay a commission to the plaintiff under the terms of its contract of employment as a real estate broker.

Of course, by supplemental agreement between the parties, a vendor could make himself liable to pay a broker's commission upon the execution of an optional contract. The plaintiff urges that the clause relative to the payment of a commission in the Esty contract either imposes such liability or is evidence of such an agreement. With respect to this claim the referees said:

> "The statement in Plaintiff's Exhibit '2' that a 'commission of 5% is to be paid by the seller to * * * * *' does not entitle the broker to recover. The plaintiff was not a party to this instrument. Moreover, the printed form upon which the instru-

> ment was executed contains the skeleton provision for a statement that the owner is to pay a commission of ..... dollars upon the signing of the agreement. This sum, however, was not filled in; and, in place thereof, the provision that the seller is to pay a commission is inserted immediately following the provision for the future transactions that should consummate the sale. It is apparent that the provision was intended to become operative with the provisions for the consummation of sale."

This conclusion, considered in the light of the evidence as to the conduct of the parties, and especially that of the plaintiff with respect to assertion of its claim for commissions is justified by the record presented to us.

The contract was prepared and negotiated by the plaintiff who was fully aware of its terms at the time it procured its execution. It had actual knowledge that it was an optional contract. There is nothing in the record that would justify a finding that Mr. Kelley on behalf of the defendants accepted this optional contract, with liquidated damages of one hundred dollars, as performance by the plaintiff of a brokerage contract requiring payment to it of a commission of one thousand three hundred seventy-five dollars.

As well said in *Reiger* v. *Bigger,* 29 Mo. App. 421, 432, with respect to a broker's claim for a commission of five hundred dollars for negotiating an optional contract, where the amount to be retained in lieu of performance by the purchaser was also five hundred dollars:

> "It is inconceivable that the defendant accepted the contract negotiated by plaintiffs as performance by them of their undertaking, when that contract by its terms secured to the defendant only the sum of five hundred dollars. If the defendant did so, the forfeiture was intended to benefit the broker only, and in no sense can it be deemed an equivalent to the defendant for the performance of the contract. The contract negotiated by the

> plaintiffs was not such a contract as they were required to procure, and the defendant did not accept it as such."

Findings of fact by Referees under Rule of Court are final and conclusive if there is any evidence to support them. In this case the findings of fact of the referees are amply justified by the evidence and their legal conclusions drawn therefrom are correct. The presiding justice properly overruled the objections to the referees' report and accepted the same and ordered judgment for the defendants.

There being no legal error on the part of either the referees or the justice presiding, exceptions to his rulings should be overruled.

Exceptions overruled.

MILDRED ANDREU

vs.

EDWARD F. WELLMAN

ALBERT W. DOSTIE

vs.

EDWARD F. WELLMAN

Androscoggin. Opinion, February 7, 1949.

Automobiles. Negligence.

In negligence action verdict should not be ordered, if, giving to the plaintiffs the most favorable view of the facts and every justifiable inference to be drawn from them, different conclusions as to the defendant's negligence could fairly have been taken by different minds.

When an occurrence or series of occurrences necessary to support a cause of action are well-nigh incredible a directed verdict is correct.

ON EXCEPTIONS.

Actions of negligence for injuries suffered by plaintiff. Defendants' motions for directed verdicts were granted by presiding justice and plaintiff brings exceptions. Exceptions overruled. Case fully appears in opinion.

Benjamin L. Berman,
David W. Berman, for plaintiff.

William B. Mahoney, for defendant.

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

THAXTER, J. There are before us here two actions to recover for personal injuries growing out of the same alleged

negligence. By stipulation they were tried together. At the close of the plaintiffs' cases, the defendant rested and moved for a directed verdict in each. The cases are before us on exceptions to the granting of such motions. Exceptions to the exclusion of certain evidence were waived in argument.

The defendant was the owner of a 1936 Buick automobile. On August 26, 1944, he drove this car into the garage of the Lewiston Battery Service Company, the business of which was the selling and servicing of batteries. He had with him his grandson, a bright child five years old, who had been living with the defendant while the boy's father was in the service. The entrance to the garage was by a ramp leading from the sidewalk. The defendant stopped the car on the level floor of the garage, got out on the left side and the little boy on the right. Both doors which swung to the front were left open. Dostie, the plaintiff in one action, who was an employee of the Battery Service Company, proceeded to inspect the battery, which was under the front cushion on the right-hand side. He put his tools on the right running board, and tilted the cushion upwards toward the rear of the car. When his work was done he replaced the cushion and was picking up his tools when suddenly the motor started and the car moved backward toward the door of the garage with the little child in it. The open door on the right caught Dostie and threw him to the floor. He was severely injured. The automobile went through the door down the ramp and into the street where it hit a taxicab in which the other plaintiff, Mildred Andreu, was a passenger. She, too, was injured.

The evidence does not indicate how the defendant left the automobile, whether it was in gear or out, and whether the brakes were on or off. To start the motor it was only necessary to push the switch lever upward which was on the steering post under the steering wheel, and push hard on the accelerator pedal. On this type of car there was no

separate starting button or pedal. Dostie claims that he did not touch the gear shift or the switch lever and that the cushion when he lifted it up and replaced it did not touch either; but the possibility of either or both of these things having happened without his knowledge is not ruled out. The truth of the matter is we do not know what happened except that the child was in the car on the left side when it happened. If it was in gear, it could have started by the child throwing the switch lever and pushing down hard on the accelerator pedal. If it was not in gear, the little boy would in addition have had to have manipulated the gear shift.

The theory of the plaintiffs is that the car could easily have been started by the child and that it was the defendant's duty to have anticipated that the little boy might enter the automobile and start it, and that the defendant should have guarded against this mischance by locking the starting mechanism and by keeping a close watch on his grandson. Apparently the plaintiffs' claim is that the boy got into the car on the left side, threw the switch, put the car into gear, and stepped on the accelerator; for there is no evidence that at that time anyone else performed any of these operations. Furthermore, all this took place while Dostie was standing right there close to the open door and inside of it.

It is true, as stated by counsel for the plaintiffs, that a verdict should not have been ordered, if, giving to the plaintiffs the most favorable view of the facts and of every justifiable inference to be drawn from them, different conclusions as to the defendant's negligence could fairly have been drawn by different minds. *Haskell* v. *Herbert,* 142 Me. 133; 48 A. (2nd) 637; *Howe* v. *Houde,* 137 Me. 119; 15 A. (2nd) 740.

The case of *Hatch* v. *Globe Laundry,* 132 Me. 379; 171 A. 387, is called to our attention by the plaintiffs. The facts in that case are very different from the facts here but the principle of law there enunciated applies. The issue was

whether the defendant should have foreseen and guarded against the acts of children in starting a car left standing on a public street. In holding that under the particular facts this was a question for the trier of the facts, we applied the doctrine laid down by Judge Cardozo in *Palsgraf* v. *Long Island R. R. Co.*, 248 N. Y. 339; 162 N. E. 99, 101; 59 A. L. R. 1253, was what happened within "the range of reasonable apprehension." To apply that language to this case, the question is, was the defendant bound to foresee that his grandson might enter that car and do what he did, or what it is claimed he did, and besides, that all this would happen so suddenly that Dostie, who was right there and presumably in charge of the car, would not even see him. When we say that such an occurrence or series of occurrences seem to us well-nigh incredible, we have answered the question as to Mr. Wellman's negligence.

The granting of the motions for directed verdicts in these cases was correct.

Exceptions overruled.

ROMEO JENNESS

PLAINTIFF IN ERROR

vs.

STATE OF MAINE

Knox. Opinion, February 15, 1949.

Criminal Law. Plea. Statutes.

R. S., 1944, Chap. 136, Sec. 3 providing for punishment of persons alleged in an indictment and proved or admitted on trial to have been "before convicted and sentenced to any state prison" does not contravene Fourteenth Amendment to Constitution of United States nor deny equal protection even though the court in its discretion may for the same offense sentence an accused to the state prison, and in another case sentence an accused to the reformatory for men.

State prison sentence under R. S., 1944, Chap. 136 imposed without formal trial upon a plea of guilty to an indictment charging a previous conviction is not erroneous because statute requires the fact of previous conviction to be "proved or admitted on trial."

A voluntary plea of guilty when understood by a respondent has always been considered a solemn confession and admits all facts in an indictment sufficiently pleaded.

Even though penal statutes should be construed strictly, the intention of the Legislature constitutes the law, and the rule of strict construction is subordinate to the rule of reasonable sensible construction having in view the legislative purpose.

ON EXCEPTIONS.

Plaintiff excepts to a ruling of the presiding justice dismissing his writ of error. Exceptions overruled. Case fully appears in opinion.

C. S. Roberts, for plaintiff in error.

Ralph W. Farris, Attorney General,
Abraham Breitbard, Deputy Attorney General,
for State of Maine.

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

FELLOWS, J. This case comes to the Law Court on exceptions by the plaintiff in error to a ruling of a justice of the Superior Court in the County of Knox dismissing his writ of error.

The plaintiff was indicted at the October Term, 1945 in the Superior Court for Kennebec County. The indictment charged the crime of sodomy, and the indictment further alleged that the respondent (now plaintiff in error) had been previously convicted in 1939 of the crime of indecent liberties and sentenced to serve a term of two years in the State Prison of the State of Maine. Counsel was appointed by the court to defend the respondent, and upon arraignment of the respondent the plea was guilty. Later in the term, on October 12, 1945, he was sentenced to not less than 15 years nor more than 30 years in State Prison.

The indictment, found at the October Term 1945, alleged the crime against nature described in Revised Statutes (1944), Chapter 121, Section 3, and punishable by not less than one nor more than ten years. The allegation of previous conviction for indecent liberties was inserted under the authority of Revised Statutes (1944), Chapter 136, Section 3, which is as follows:

> "When a person is convicted of a crime punishable by imprisonment in the state prison, and it is alleged in the indictment and proved or admitted on trial, that he had been before convicted and sentenced to any state prison by any court of this state, or of any other state, or of the United States, whether pardoned therefor or not, he may be punished by imprisonment in the state prison for any term of years."

This Section 3 of Chapter 136 of our statutes first appears as Section 18 of Chapter 282 of the Public Laws of Maine passed by the Legislature in 1824. It then provided that the habitual offender when "convicted" of a felony might be sentenced for a limited term or for life. It was also provided by Section 19 of said Chapter 282, Public Laws 1824, that if the prior sentence was not known at the time of indictment and conviction, the warden and prison inspectors had authority to obtain legal process to have the convict tried on the fact of prior conviction, "and if it appear by the confession of the party, verdict of a jury or otherwise according to law" the court could sentence anew. This said Section 19 was repealed in 1897 by Chapter 180 of the Public Laws, but said Section 18 has appeared in each revision of the statutes until the present, with only slight verbal changes. The principal changes have been: (1) In Revised Statutes (1841), Chapter 167, Section 12 the words are "and admitted or proved on trial," in the later revisions these words are transposed to the present reading "and proved or admitted on trial," and (2) in the revision of 1903, Chapter 136, Section 2, the present punishment of "any term of years" was inserted, instead of "for a limited term or for life."

The pending writ specified as errors (1) that said Revised Statutes (1944), Chapter 136, Section 3, under the terms of which the plaintiff in error was sentenced to not less than fifteen nor more than thirty years, is unconstitutional under the XIV Amendment of the Constitution of the United States that "No state shall deny to any person within its jurisdiction the equal protection of the laws" and the writ further alleged error in that (2) "said statute further provides that the fact of a previous conviction must be 'proved or admitted on trial,' but that the conviction under this record is based upon an arraignment only."

The respondent (plaintiff in error) was under indictment at the October term, 1945, for the crime against na-

ture described in Revised Statutes (1944), Chapter 121, Section 3, and for that offense was liable to punishment for ten years. The above quoted statutory authorization for servitude in excess of ten years, because of prior sentence to State Prison, is what the plaintiff in error claims is unconstitutional.

Statutes that permit extra punishment for old or habitual offenders are constitutional, for the reason that all persons on conviction who have been previously convicted and sentenced to any State Prison, are subject to the same treatment. *Moore* v. *Missouri,* 159 U. S. 673; 16 Sup. Ct. 179; 40 L. Ed. 301; *Graham* v. *West Virginia,* 224 U. S. 616; 32 S. Ct. 583; 56 L. Ed. 917; *MacDonald* v. *Massachusetts,* 180 U. S. 311; 21 S. Ct. 389; 45 L. Ed. 542; *New York* v. *Gowasky,* 244 N. Y. 451; 155 N. E. 737; 58 A. L. R. 9. See also Annotations in 82 A. L. R. 345; 116 A. L. R. 209; 132 A. L. R. 91; 139 A. L. R. 673.

The plaintiff argues here, however, that for the same offense the court may, in its discretion, in one case sentence an accused to State Prison and in another case may sentence an accused to the Reformatory for Men (Revised Statutes 1944, Chapter 23, Section 66), and that thus the equal protection is violated because one person sent to State Prison may be punished as a second offender while the other not. We see no force to this argument. The wisdom for the enactment of the statute is for the legislature and not for the court. The legislature has seen fit to make the sentence to any State Prison the standard for prior conviction. In many instances there should be a sentence to the Reformatory for Men, because of age limit, previous good character, mitigating circumstances, probable reformation, or other legal considerations, and the legislature had the right and authority to fix the criterion to be a prior State Prison sentence.

The second contention of the plaintiff in error is that under Revised Statutes (1944), Chapter 136, Section 3, the

previous conviction must be not only "alleged in the indictment" but "proved or admitted on trial." It is here alleged in the indictment, and the plea was guilty on arraignment. The plaintiff, however, says it was not "proved or admitted on trial" because there was no "trial." In other words, the plaintiff claims that the previous conviction and sentence to State Prison cannot be ascertained by a formal and voluntary plea of guilty on arraignment, but it must be proved or admitted during a trial.

This is a writ of error and is based on the record alone. Facts outside the record are not to be considered. It is the record only that controls, and the writ can be brought only to obtain a correction of error on that record. *Nissenbaum* v. *State of Maine,* 135 Me. 393. Here the record shows an indictment alleging a crime punishable by imprisonment in the State Prison, and the same indictment also alleges that the respondent (now plaintiff in error) had been before convicted and sentenced in 1939 to the State Prison, for the crime of indecent liberties, by a court of this State, viz., the Superior Court in and for the County of Kennebec. The record further shows appointment of attorney to defend, arraignment, and voluntary plea of guilty to the indictment, with sentence afterwards imposed of not less than fifteen nor more than thirty years in State Prison.

What is the effect of such a plea of guilty upon arraignment? A voluntary plea of guilt when understood by a respondent has always been considered a solemn confession from the only person who "had the best possible knowledge of the truth." *State* v. *Siddal,* 103 Me. 144, 146; 68 A. 634, 635; 14 American Jurisprudence 951, Sections 270-272. It admits all facts in the indictment sufficiently pleaded. *Green* v. *Commonwealth,* 12 Allen (Mass.) 155, 172; 22 C. J. S. "Criminal Law," 656, Section 424. A plea of guilt is in itself a conviction. It is as conclusive as a verdict of a jury. The court has nothing to do but give judgment and

sentence. *Kercheval* v. *U. S.*, 47 S. Ct. 582; 274 U. S. 220; 71 L. Ed. 1009. "The sentence is the judgment." *State* v. *Stickney,* 108 Me. 136; 79 A. 370, 371. The plea being guilty, there is no "issue of fact joined on the indictment" as contemplated by Revised Statutes (1944), Chapter 135, Section 15.

There is nothing in our statutes that prohibits the court from accepting a plea of guilty, and by pleading guilty to an indictment there is no necessity for placing a respondent on trial before the jury. Had this respondent (plaintiff in error) pleaded not guilty, or had he pleaded not guilty to that part of the indictment charging his former conviction, a trial would thereby have been demanded and necessary. *State* v. *Beaudoin,* 131 Me. 31; 158 A. 863; 85 A. L. R. 1101; *State* v. *Lashus,* 79 Me. 504; 11 A. 180.

The court recognizes the well-known rules that a penal statute should be strictly construed, and that its effect cannot be extended beyond the meaning of language used; but even under a penal statute "the intention of the legislature constitutes the law." *Violette* v. *Macomber,* 125 Me. 432, 434; 134 A. 561, 562. The meaning here does not require proof of facts admitted, and the legislature certainly did not require the sometimes difficult and always expensive ceremony of a jury trial, when the respondent has formally, solemnly, and voluntarily admitted all that a jury trial could possibly achieve.

If the statute now had the words "and admitted or proved on trial," as it appears in the statute revision of 1841, Chapter 167, Section 12, instead of the present transposition of these words to "proved or admitted on trial," the plaintiff would never have invented his claimed construction.

In 1841 the prior conviction might clearly be either admitted or, if necessary, proved "on trial." There is nothing to indicate that there has been any change in the attitude

of the legislature for more than a century. Facts admitted do not have to be proved. In the revision of the statutes the above mentioned change in phraseology was not a change of the law, because there was no evident intention of the legislature to make a change. If any ambiguity exists in a statute resort may be had to the original to aid construction. *Tarbox* v. *Tarbox,* 120 Me. 407; 115 A. 164; *Hughes* v. *Farrar,* 45 Me. 72; *Hilton* v. *Shepherd,* 92 Me. 160, 164; 42 A. 387.

"The rule of strict construction of a penal law is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and is not to be so unreasonably applied as to defeat the true intent and meaning of the enactment." *Violette* v. *Macomber,* 125 Me. 432, 434; 134 A. 561, 562.

It would not only be useless ceremony to have a jury trial after solemn plea of guilty, but the construction claimed would also make it possible for an habitual offender, by pleading guilty, to perhaps escape the larger and proper punishment at a busy term of court.

The dismissal of the writ was proper.

Exceptions overruled.

NORTHEAST AVIATION CO.

vs.

FREDERICK ROZZI

Cumberland. Opinion, February 12, 1949.

Negligence. Bailments. Prima Facie Case. Aircraft.

The ordinary rule is that for a bailor to recover for damages occasioned to property while in the possession of a bailee, negligence of the bailee must be proved, but such negligence is presumed from a failure of the bailee to return the property or from his failure to return it in good condition. If nothing more appears a *prima facie* case is made out.

It is not necessary where a bailee was in charge of an airplane when it left the field for the bailor to show by direct and affirmative evidence that the bailee was operating it at the time of the crash.

ON EXCEPTIONS.

Action to recover damages to an airplane belonging to the plaintiff while it was in the possession of the defendant bailee. At the close of plaintiff's case the presiding justice granted defendant's motion for nonsuit and plaintiff excepted. Exception sustained. Case fully appears in opinion.

Charles A. Pomeroy,
Robinson, Richardson and Leddy, for plaintiff.

Robert A. Ferullo,
Harry E. Nixon, for defendant.

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

THAXTER, J. This is an action to recover for damages to an airplane belonging to the plaintiff suffered while it was in the possession of the defendant as bailee. At the close of the plaintiff's case, the presiding justice granted the defend-

ant's motion for a nonsuit. The case is before us on exceptions to such ruling.

The plaintiff, the owner of an airplane, rented it to the defendant, who with a companion as passenger flew it from the airport where it was kept. Within the next two hours, it fell into the sea at Old Orchard and was wrecked. These facts are not in dispute. The ordinary rule is that for a bailor to recover for damages occasioned to property while in the possession of a bailee, negligence of the bailee must be proved, but such negligence is presumed from the failure of the bailee to return the property or from his failure to return it in good condition. If nothing more appears, a prima facie case is made out. *Mills* v. *Gilbreth,* 47 Me. 320; 74 Am. Dec. 487; *Sanford* v. *Kimball,* 106 Me. 355; 76 A. 890; 138 Am. St. Rep. 345. It then becomes the duty of the bailee, whose knowledge of the loss or damage is presumed from his possession, to explain the cause or at least to show that it happened without his fault. In the instant case, if the defendant claims that the damage is explained by the fall of the airplane into the ocean, he still is under the obligation to show that such fall was not occasioned by his fault; for the facts as to how and why it happened are peculiarly within his knowledge. But the plaintiff went further than at such stage of the proof he really needed to go by offering evidence from which the jury would have been justified in finding that the accident occurred because of the defendant's negligent operation of the plane.

We are somewhat mystified as to what is the argument to sustain this nonsuit; for it can hardly be contended that, where the defendant was in charge of the airplane when it left the field, the bailor must show by direct and affirmative evidence that the bailee was operating it at the time of the crash. Such is not ordinarily the rule in the case of an automobile. *A fortiori* it should not be the case of an airplane. *Sigel* v. *Gordon,* 117 Conn. 271; 167 A. 719.

Exceptions sustained.

WADE AND DUNTON, INC.

vs.

REUEL W. GORDON

Androscoggin. Opinion, February 28, 1949.

Sales Contracts. Judicial Notice. Appeal and Error.

Finding by Justice of the Superior Court that contract prohibiting purchaser of automobile for stated period of six months from sale without first offering it to vendor on agreed depreciation scale is one provided for liquidated damages rather than unenforceable penalty is justified since elements of damage such as loss of good will and future business difficult of measurement are involved.

Short supply and irregular market concerning automobiles are proper subjects for judicial notice.

Factual decisions made by trier of facts are conclusive, if supported by any evidence.

Where no specific findings are made it must be assumed that a decision carries such findings as are necessarily involved in it.

ON EXCEPTIONS.

Action for breach of contract with automobile dealer not to sell automobile without first offering it to dealer at the price paid less depreciation. Judgment for plaintiff and defendant brings exception. Exceptions overruled. Case fully appears in opinion.

Benjamin L. Berman,
David V. Berman, for plaintiff.

John G. Marshall, for defendant,

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

MURCHIE, J. Defendant's exceptions in this case, heard by a single Justice of the Superior Court without the intervention of a jury, with the right of exceptions reserved on questions of law, allege as errors that there was no consideration for what was found to be a contract justifying the recovery allowed and that the provision of that contract for the payment of the $400 awarded as liquidated damages imposed a penalty having no connection with actual damages, none such having been suffered.

A breach of contract by the defendant is undoubted, if there was a contract. The plaintiff is an automobile dealer, holding the Studebaker franchise, so-called. The defendant ordered a Studebaker car on August 16, 1946, signing a New Car Order and making a deposit of $50 against a purchase price which could not be determined until a car was available for delivery and decision was made as to what extra equipment, if any, was to be installed. The order was not binding upon the plaintiff until accepted by one of its officers, but there was express recital that the plaintiff might retain "deposits sufficient to cover liquidating damages" if it was cancelled by the defendant. When the order was signed the plaintiff was not requiring those to whom cars were sold to contract against their resale within a stated period, but that policy had been adopted some months prior to the sale in question.

The defendant's order was never accepted by the plaintiff unless acceptance is to be inferred from the fact that approximately 20 months after it was signed the plaintiff notified the defendant that a car was available. The date of the notification is not given in the testimony but the defendant's wife called at the plaintiff's place of business on Thursday, June 17, 1948, saw the car and ordered extra equipment. On June 19, 1948, the defendant wrote the plaintiff saying that he would be unable to take the car and would appreciate being advised when another was available.

The plaintiff received the letter on June 21, 1948. Later that day the defendant appeared, paid for the car, signed a contract undertaking not to sell or transfer title to it for a period of 6 months without first offering it to the plaintiff at the price paid "less depreciation" at a stated rate, drove it away, and sold it in direct disregard of the contract. These facts are stipulated. The defendant did not take the stand. The record is silent as to the price obtained or the identity of the purchaser paying it.

The action was brought on the contract, quoted verbatim in the declaration. According to a recital of its preamble the defendant executed it "as a part of the consideration" of the sale. The plea was the general issue with a brief statement describing the instrument signed as "a document" and alleging that it was signed after the purchase of the car was completed; that it "provides for a penalty"; and that the plaintiff "has suffered no damages."

While two issues are raised, one of them must be resolved within the established principles that factual decisions made by a trier of facts are conclusive, if there is any evidence to support them, *Chabot & Richard Co.* v. *Chabot,* 109 Me. 403; 84 A. 892; *Graffam* v. *Casco Bank & Trust Co.,* 137 Me. 148; 16 A. (2nd) 106; and that where no specific findings are made it must be assumed that a decision carries such findings as are necessarily involved in it. *Chabot & Richard Co.* v. *Chabot, supra.* This disposes of the consideration issue. Assuming that the evidence would have supported a finding that the defendant had purchased and paid for the car before signing the contract restricting his right of resale, to bring the case within the principle controlling such decisions as *White* v. *Oakes et al.,* 88 Me. 367; 34 A. 175; 32 L. R. A. 592; there can be no doubt that it gives adequate support to the opposite finding implicit in the award, i. e. that the sale and the signing of the contract constituted a single transaction.

The question whether the contract provision for the payment of $400 liquidated the damages to be recovered by the plaintiff in the event of a breach by the defendant, or sought to impose a penalty on the defendant, is one of law. 15 Am. Jur. 673, Sec. 242, states this to be the general rule despite authority to the contrary. That is said to be well settled in a note following the report of the English case *Webster* v. *Bosanquet,* (1912) A. C. 394; Ann. Cas. 1912 C. 1019. See also *Robbins et al.* v. *Plant,* 174 Ark. 639; 297 S. W. 1027; 59 A. L. R. 1128, and the annotation following the case as reported in A. L. R.

The considerations which are controlling in determining whether a contract carries an enforceable provision for liquidated damages or an unenforceable penalty have been well stated by this court in *Dwinel* v. *Brown,* 54 Me. 468, and *Burrill* v. *Daggett,* 77 Me. 545; 1 A. 677. See also *Maybury* v. *Spinney-Maybury Co.,* 122 Me. 422 at 434; 120 A. 611 at 616, where an obvious typographical error in the opinion in *Dwinel* v. *Brown, supra,* is noted. The facts of the instant case are typical of those which justify agreement for the payment of liquidated damages, since the elements of damage are difficult of measurement in terms of money, particularly those which relate to losses in good will and future business. The decision of the single justice that the contract in question liquidated the damages instead of imposing a penalty on the defendant was fully justified.

It seems unnecessary on the particular facts to consider to what extent, generally, contracts purporting to limit the right of a purchaser of personal property to resell it without restriction should be recognized as lawful, or be declared unenforceable as intended to impose unlawful restraints. The particular contract dealt with personal property which was for a long period of time the subject matter of public regulatory authority in transactions between the manufacturer, or its distributing agents, such as the plaintiff, and the original purchaser. Courts cannot be unaware

that price regulation existed; that it produced markets sometimes described as either "black" or "gray"; and of the nature of those markets. There can be no doubt that the real purpose of the contract in question was to keep the car to which these proceedings relate out of the black market, the gray market or any market except one entirely legitimate. It is noted in 62 Harv. L. R. at Page 320, in a discussion of *Larson Buick Co.* v. *Mosca et al.*, 79 N. Y. S. (2nd) 654, that while the subject matter has been dealt with by numerous writers and repurchase options have been upheld wherever challenged, no case involving one "has as yet reached a court of last resort." In the *Larson* case decision that such a contract was enforceable was implicit in the holding that one buying a motor vehicle from a purchaser who had contracted not to resell it within a stated period except in a declared manner (other than that which the buying represented), if joined as a co-defendant with the offending contractor, might be temporarily enjoined, pending trial, from making a further sale of it. Notwithstanding the fact that public regulation in the field had stopped prior to the date when the defendant purchased the particular car, the facts that cars continued to be in short supply and that that short supply led to irregular markets are proper subjects for judicial notice. Without present consideration of the problem as to how far restraints on the alienation of personal property may go under normal circumstances, we have no hesitation in declaring the restriction imposed by the particular contract a lawful one.

Exceptions overruled.

CLYDE MOORES D.B.A.

E. & A. MOORES

vs.

THE INHABITANTS OF THE TOWN OF SPRINGFIELD

Penobscot. Opinion, February 28, 1949.

Referees. Towns. Constitutional Debt Limit. Burden of Proof.

Objections to Referee's report "that said decision is based upon an erroneous application of the established rules of law" is too general and not in compliance with Rule XXI of Supreme Judicial and Superior Court.

Objection to Referee's report that there is "no evidence to support the findings of such facts as must necessarily have formed the basis of said decision" raises a question of law upon which party is entitled to be heard on exceptions.

Orders drawn by selectmen upon town treasurer for some legitimate indebtedness of the town are mere vouchers and though frequently negotiable in form are nowise commercial paper free from equitable defenses in hands of bona fide indorsees.

In absence of special circumstances the law does not prevent a selectman, who was one issuing town order negotiable in form from acquiring the same as an indorsee and enforcing the same against the town.

Nonjoinder of a party plaintiff in an action *ex contractu* is a good defense under the general issue.

Whether town order payable at sight is void as being in excess of the constitutional debt limit, depends upon whether the obligation for which it was given was valid and enforceable when incurred, not when the town order was drawn.

Defense that indebtedness was in excess of that permitted under the Statutes is insufficient since debt limitation is constitutional and must be "exclusive of debts or temporary loans made in anticipation of collection of taxes and to be paid out of money raised by taxation, during the year in which they were made."

There is no presumption that because a town is indebted beyond its constitutional limit at the time its officers issue a town order that it was so indebted at the time it incurred the obligation.

Where there are no current revenues available at the time current expenses are incurred, such debt or liability comes within the constitutional debt limit notwithstanding the general principle that obligations for current expenses to be paid out of current revenues incurred by towns already beyond the constitutional debt limit are not debts or liabilities within the prohibition of the constitution.

Town orders signed by all three members of the Board of Selectmen, and issued to the plaintiff, one of the members of the Board of Selectmen, were not in violation of R. S., 1944, Chap. 80, Sec. 77.

The relief of paupers is in the hands of Overseers of the Poor and not in the Selectmen, and where case fails to show that plaintiff was an Overseer of the Poor or that he as Selectman had any duties to discharge with respect to pauper supplies, orders given to him for pauper supplies are not invalid at common law.

As a general principle, obligations for current expenses, to be paid out of current revenues, incurred by town already indebted beyond the constitutional debt limit, are not debts or liabilities within constitutional prohibition.

ON EXCEPTIONS.

Action of special assumpsit on town orders drawn by selectmen of the town upon treasurer. Plaintiff brings exceptions to acceptance by superior court of referee's findings. Exceptions sustained. Case fully appears in opinion.

Atherton and Atherton, for plaintiff.

E. Donald Finnegan, for defendant.

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

MERRILL, J. Exceptions to acceptance of report of referee. This is an action of special assumpsit brought by Clyde A. Moores, described in the writ as doing business under the name and style of E. & A. Moores, on twenty town orders drawn by the selectmen of the defendant town

upon the treasurer thereof. The orders were all negotiable in form, being payable in each instance to named persons or order. The orders were presented for payment and were all accepted in writing by the town treasurer with the exception of three which were accepted by the assistant treasurer, one of which was directed to the town treasurer, Jennie Monroe, and accepted by her as assistant treasurer. The declaration consists of twenty separate counts, one on each of the several orders. The plaintiff sues as either the payee of the order or as endorsee thereof. The orders were introduced in evidence and those payable to third parties are all endorsed with the exception of two, they being those numbered 576 and 145. The orders may be grouped as orders issued to pay for pauper supplies, for the salary of the plaintiff as a selectman, one for a bush scythe and the remainder for labor on roads. The pauper supplies are divided between supplies for state paupers and supplies for a pauper belonging to a neighboring town. The road work is divided between labor on third class road, maintenance of third class road, labor on town road, labor on state road, labor on improved road and "snow plowing."

The plea was the general issue with a brief statement. The brief statement set forth the following grounds of defense: (1) the statute of limitations to the first thirteen counts; (2) that at the time of execution of the several orders sued upon the defendant town was indebted in excess of the amount allowed by law; (3) that the officers executing the orders were never authorized to sign the same and had no authority to obligate the defendant town; (4) that the plaintiff at the time the orders were executed was a selectman of the town of Springfield and, as such, was an interested party because some of the orders were payable to him and the other orders came directly into his possession "which is contrary to R. S., Chap. 80, Sec. 78." The defendant also filed an affidavit denying signature and execution of the orders in accordance with Rule X of the Supreme Judicial and Superior Courts.

The case was referred under Rule of Court with right of exceptions in matters of law reserved. The referee filed a report finding for the defendant. Written objections were filed to the acceptance of the report. The Justice of the Superior Court presiding accepted the report and to his ruling exceptions were filed and allowed and it is on these exceptions that the case is before us.

Rule XXI of the Supreme Judicial and Superior Courts provides,

> "Objections to any report offered to the court for acceptance, shall be made in writing and filed with the clerk and shall set forth specifically the grounds of the objections and these only shall be considered by the court."

As said of this Rule in *Camp Maqua* v. *Town of Poland,* 130 Me. 485, 486; 157 A. 859, 860:

> "The invariable practice in this state has been that there must be a strict compliance with its provisions, if the exceptions are to be considered by this court. *Bucksport* v. *Buck,* 89 Me. 320; 36 A. 456; *Witzler* v. *Collins,* 70 Me. 290; 35 Am. Rep. 327; *Mayberry* v. *Morse,* 43 Me. 176."

The first objection, that there is "no evidence to support the findings of such facts as must necessarily have formed the basis of said decision," is in effect a statement that the referee found for the defendant without any evidence to support his findings. This raises a question of law upon which the plaintiff is entitled to be heard on his exceptions to the acceptance of the report. *Staples* v. *Littlefield,* 132 Me. 91; 167 A. 171.

The second ground of objection "that said decision is based upon an erroneous application of the established rules of law" is too general, and the exception based thereon cannot be considered. This objection does not in any way *specify* in what manner, or which rules of law were erroneously applied. *Thromulous* v. *Bank of Biddeford,* 132 Me. 232; 169 A. 307.

The other specific objections are in effect covered by the first general objection and the exceptions based thereon will be disposed of by our determination of the exception based on the first objection. They all relate to and are based upon the alleged erroneous application by the referee of the constitutional limitation of the amount of municipal indebtedness to the town orders given for pauper supplies, labor on town road and the order given for selectman's salary.

As above stated, this action is special assumpsit brought by plaintiff either as payee or endorsee of town orders. The fact that the orders are negotiable in form, and in some instances have been endorsed by the payee thereof to the plaintiff does not exclude any defense available to the town at the time of their issue. Whoever receives them either as payee or endorsee does so subject to any legal defense to the claim for which they were issued. *Sturtevant* v. *Liberty,* 46 Me. 457. As well stated in *Parsons* v. *Monmouth,* 70 Me. 262, 264:

> "The general financial officers of towns frequently draw orders upon the treasurers for the payment of some legitimate indebtedness of the town, but such instruments are mere vouchers for the treasurer's disbursements. And though frequently made negotiable in form and therefore have the quality of negotiability so far as to authorize the holder other than the payee to bring his action in his own name if occasion requires, still they are in nowise commercial paper free from equitable defenses, in the hands of *bona fide* indorsees. *Willey* v. *Greenbush,* 30 Maine, 452. *Sturtevant* v. *Libbey, (Liberty)* 46 Maine, 457. *Emery* v. *Mariaville,* 56 Maine, 315. *Bessey* v. *Unity,* 65 Maine, 342. Any new counter to this in *Chamberlain* v. *Guilford,* 47 Maine, 135, is not sound."

It therefore follows that any defense which existed in favor of the town against the claims for the payment of which these orders were issued is available to the town as a defense to the orders.

The defendant claims that the plaintiff cannot recover on any of these orders because he was a selectman of the town of Springfield and, as such, was an interested party in the orders which were made payable to him or which came into his possession by endorsement, as the defendant says, in violation of the provisions of R. S., Chap. 80, Sec. 78.

We held in *Tuscan* v. *Smith,* 130 Me. 36, 42; 153 A. 289; 73 A. L. R. 1344, that Sec. 43 of Chap. 4, R. S., 1916, of which R. S., 1930, Chap. 5, Sec. 61 and R. S., Chap. 80, Sec. 78 are verbatim reenactments, has reference only to cities, and has no application to towns or the municipal officers of the town. As all of the town orders in suit are signed by all three members of the respective Boards of Selectmen, the issuing of such orders to the plaintiff was not in violation of R. S., 1930, Chap. 5, Sec. 60, now R. S., Chap. 80, Sec. 77, the plaintiff being but one of the three selectmen acting in the premises. *Tuscan* v. *Smith, supra.*

The question of legality of these orders due to the fact that the plaintiff was a selectman of the defendant town must be determined by the rules of the common law. It is true that certain of the orders are for pauper supplies furnished by the plaintiff or the firm of which he was a member to the defendant town. The relief of paupers, however, is not in the hands of the selectmen of towns but in the hands of the overseers of the poor. The record in this case fails to show that the plaintiff was an overseer of the poor or that in his official capacity as selectman he had any duties to discharge with respect to the furnishing of these pauper supplies. The record does not disclose facts which would make the decision of *Lesieur* v. *Inhabitants of Rumford,* 113 Me. 317; 93 A. 838, applicable to the instant case.

In the absence of special circumstances, of which there is no evidence in the record in this case, the law does not prevent a selectman, who was one of those issuing a town order negotiable in form, from acquiring the same as an endorsee

thereof, and enforcing the same against the town to the same extent that the original payee thereof could have enforced the same.

There is, however, another defense which may prevent recovery on these orders for pauper supplies which are made payable to E. & A. Moores. None of these orders are endorsed. The plaintiff brought this action in his own name alleging in the writ that he was doing business under the firm name and style of E. & A. Moores. The present record leaves it doubtful as to whether or not E. & A. Moores was in fact a partnership, of which the plaintiff was a member, or whether it was a mere trade name under which the plaintiff alone conducted his business at the time these orders which are numbered 217, 284, 285, 12, 151, 697 and 157 were issued. The referee in his findings at one place states: "the plaintiff, who was one of the firm of E. & A. Moores," etc. If they were issued to a partnership of which the plaintiff was only one of the members, he has no right to maintain an action on them in his own name in the absence of endorsements to him or other special circumstances enabling him so to do. Nonjoinder of a party plaintiff in an action *ex contractu* is a good defense under the general issue. *Marshall* v. *Jones,* 11 Me. 54; 25 Am. Dec. 260; *White* v. *Curtis,* 35 Me. 534.

Neither is the plaintiff entitled in this action to recover on orders numbered 576 and 145, they having been issued payable to the order of Walter Boyington and not having been endorsed by him.

As to the defense of the statute of limitations, there were but two orders which were dated more than six years prior to the date of the plaintiff's writ, and as to these orders, the referee states in his report: "It was admitted that orders No. 6 and 166 were outlawed."

The referee further states in his report: "The signatures on all the orders were admitted; and it was admitted that

Selectman Clyde Moores, the plaintiff, who was one of the firm of E. & A. Moores, came into possession of the orders 'rightfully.' "

The remainder of the town orders, nine in number, are not affected by these apparent, possible or actual infirmities. To these orders as well as the others, the defendant seeks to interpose the defense that they were issued in violation of the debt limit provision of our constitution.

So much of Article XXII, as amended by Article XXXIV, as applies to the defendant town is as follows:

> "No city or town having less than forty thousand inhabitants, according to the last census taken by the United States, shall hereafter create any debt or liability, which single or in the aggregate, with previous debts or liabilities shall exceed five per centum of the last regular valuation of said city or town; xxxx; and provided further, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans, or for war or to temporary loans to be paid out of the money raised by taxes during the year in which they were made."

Whether or not a town order payable at sight, directing the payment of an obligation of the town is void because in excess of the constitutional debt limit of the town, depends upon whether the *obligation for which it was given* was valid and enforcible when incurred. This depends upon the amount of the indebtedness of the town in relation to the valuation of the town at the time of the incurring of the original obligation, not at the date of the drawing of the town order. *Cahill-Swift Mfg. Co.* v. *City of Bardwell,* 277 S. W. (Ky) 812; 211 Ky. 482. See also *Wakem* v. *Van Buren,* 137 Me. 127, 131; 15 A. (2nd) 873, 875, where we said:

> "The validity of a municipal debt upon which an action is brought, so far as limitation of indebted-

> ness is concerned, must be determined as of the time when the debt was incurred. *Addyston Pipe & Steel Company* v. *City of Corry,* 197 Pa. St. 41; 46 A. 1035; 80 Am. St. Rep. 812; *Scranton Electric Company* v. *Borough of Old Forge,* 309 Pa. 73; 163 A. 154."

The defendant's brief statement evidently sought to invoke the defense that all of the orders sued were void as in excess of the constitutional debt limit of the defendant town. The *brief statement,* as such, was not sufficient for the purpose. It set forth for the various pertinent periods the assessed valuation of the town, and the indebtedness of the town during each period and then alleged "said sum of indebtedness was in excess of that permitted under the *Statutes of the State of Maine.*" It is elementary that the limitation upon municipal indebtedness in this state is not *statutory* but *constitutional,* unless it be said that although silent thereon the statutes only permit a town to do that which the constitution permits. The brief statement, however, fails to properly set forth facts which show that the town had exceeded its debt limit in any of the periods mentioned. True in each period it sets forth facts which show that there was an indebtedness of more than five per centum of the appropriate referable valuation of the town. In no case, however, does it state that this indebtedness was "exclusive of debts or temporary loans made in anticipation of the collection of taxes, and to be paid out of money raised by taxation, during the year in which they were made,". In *Adams* v. *Waterville,* 95 Me. 242; 49 A. 1042, 1043, it was held that it was incumbent upon the town to prove such situation by competent testimony. As proof of the facts alleged in the brief statement would not have sustained the defense to the orders based on the claim that they exceeded the constitutional debt limit, the *allegations* are an insufficient statement of such defense. Neither does the proof cure the defect in allegation. No evidence was offered as to valuations or indebtedness. There was an admission or agreement which is as follows: "It has been agreed that

at the time these orders complained of were executed, that the town had exceeded its constitutional debt limit." There is no evidence as to when the obligations for which the orders were issued were incurred, nor is there evidence that the orders were issued contemporaneously with the incurring of the obligations. There is neither allegation nor evidence that at the time the services were rendered or the goods sold for which these orders were given the town of Springfield had exceeded its debt limit. As said in *Adams* v. *Waterville, supra:*

> "The burden of proving that this was the case, and that, therefore the municipality could not create this liability, was clearly upon the defendant, as was decided by this Court in *Lovejoy* v. *Foxcroft,* 91 Maine, 367; 40 A. 141."

It may well be that the necessary facts to establish that the defendant town had exceeded its constitutional debt limit are susceptible of proof. On that question we are not called upon to express an opinion. Cases are to be decided upon the record actually presented to the court, not upon what it may assume *could* have been established. Courts may draw legitimate presumptions from facts established by evidence. They have no right to make charitable assumptions without evidence to support them, to obviate results flowing from the omission to prove facts essential to maintain a cause of action or establish a defense. This is true whether such omission be the result of inexcusable carelessness or inadvertent error on the part of counsel. If and when this case is retried, perhaps a record will be taken out which will properly present *all* of the facts to the court, and so enable it to finally determine the case upon its real merits and in accord with all of the very important and grave constitutional questions which the present incomplete and inadequate record indicates may be involved in and necessary to its final decision. The amount in issue in this cause is comparatively small measured in dollars and cents. The indicated constitutional questions, however, bearing

upon the fiscal affairs of towns and their administration as subdivisions of the state are of grave importance.

The provisions of our organic law limiting the power of municipalities to incur indebtedness are binding not only upon the municipalities and those who deal with them, but upon the courts as well who must enforce them. They are not, however, self executing. Municipalities which seek to escape liabilities, otherwise incurred in good faith and within their corporate powers, on the ground that they thereby violated the debt limit provisions of the constitution have the burden of proving every essential fact to establish the bar. They are held to strict proof of the existence of the necessary facts. Of course, presumptions from proven facts will be available to them, but assumptions not based on proven facts are of no avail. There is no presumption that because a town is indebted beyond its constitutional limit at the time its officers issue a town order that it was so indebted at the time it incurred the obligation for the payment of which the order was issued. *Adams* v. *Waterville, supra,* is an example of how strict and technical are the requirements of proof imposed upon municipal corporations in establishing this defense.

While the foregoing considerations will dispose of the contention that these orders were void as issued in violation of the constitutional debt limit, even were the defendant town indebted beyond its constitutional limit at the time it incurred the obligations for which these orders were issued, there is another ground which requires that the exceptions be sustained.

These orders were all issued for ordinary "current expenses" of the town, viz.: support of paupers, labor on roads of various classes, snow plowing and the salary of a selectman. They were all of the type of expenses usually and ordinarily paid out of the available current revenues of the towns.

We have not heretofore been called upon to render actual decision as to whether or not obligations incurred by a town which is already indebted beyond the limit allowed by the constitution, for ordinary current expenses and to be paid out of available current revenues, are void. Upon this question the courts are not in entire harmony but as said in 38 American Jurisprudence, Page 126, Sec. 433:

> "The general rule with respect to constitutional or statutory debt limit provisions which do not specifically exempt from their operation obligations for which money is appropriated at the time of their creation is that even though such obligations are not specifically exempted, they are not within the operation of the debt limit provisions if an appropriation is made at the time of their creation from funds already in existence or prospective and subject to appropriation. The rule, as stated above, places emphasis upon the appropriation. There is another class of cases related to the cases supporting this rule in that they all involve anticipation of revenue. The decisions of the latter class emphasize the purpose of the expenditure. There is a relationship between the two situations and the decisions in the one are often cited for the other. There are many cases which may be said to support the view that an obligation pertaining to ordinary current expenses, which is, together with other like expenses, within the limit of dependable current resources, does not constitute indebtedness within provisions limiting the amount of indebtedness."

The authorities upon this subject are collected, discussed and analyzed in the cases referred to in the notes to the section just quoted, and especially in the exhaustive note found in 92 A. L. R. 1302 et seq., supplemented by note in 134 A. L. R. 1400 et seq., as well as in Dillon Municipal Corporations, 5th Ed., Secs. 194 and 195 and McQuillin Municipal Corporations, Sec. 2378 and 44 C. J., Page 1128.

If the words, *debt* and *liability,* be interpreted according to their most inclusive signification, one is forced to admit

that a liability incurred by a town for its "ordinary current expenses to be paid for out of its available current revenue" is a debt or liability of the town. This would be true no matter how brief the lapse of time between the incurring of the liability and its discharge, and whether or not there were cash on hand for its discharge. To avoid creation of such debts or liabilities the transactions of towns, indebted beyond their allowable limit, would have to be conducted on an absolutely *cash* basis. Goods purchased would have to be paid for either in advance or contemporaneously with their delivery; services, including labor, would have to be paid for in advance. Such payments would have to be made in *cash.* Checks and orders could not be used for they in turn would constitute liabilities. Town officers could not draw them, for they can only draw legal orders. Disbursing officers could not pay them, for they can only honor legal orders. Such a narrow interpretation of the words *debt* or *liability* in statutes or constitutions imposing a debt limit upon municipal corporations would paralyze the legal functioning of such of them as might have reached or exceeded their existing debt limits. Such a result would be absurd, and unless absolutely required, the words *debt* or *liability* in debt limit statutes or constitutions should not be so interpreted as to bring about such a result.

Consequently, the terms "debt or liability," in constitutional and statutory provisions limiting the same, have been interpreted, by many courts, in such a way as to allow towns indebted beyond their debt limit to function in the ordinary and normal manner in which municipalities must conduct their business; and the liabilities incurred for current expenses to be paid for out of current revenues have been treated as cash transactions and not as included in the phrase "debt or liability" contained in the constitutional or statutory provision. As above stated, our court has not heretofore been called upon to actually decide this question.

With the general principle that obligations for current expenses to be paid out of current revenues, incurred by towns already indebted beyond the constitutional debt limit, are not debts or liabilities within the prohibition of the constitution we are in accord. This general principle, however, is subject to qualifications and limitations. To attempt to define or to exclusively enumerate such qualifications and limitations at this time would be unwise. Such qualifications and limitations should be determined only when and if actual cases involving the same are presented to us for determination. There is, however, one general qualification of this principle which is involved in the issues here presented, and that is, that an obligation for a current expense to be paid out of current revenues will be a debt or liability within the terms of the constitutional prohibition if there are no current revenues available for its payment *at the time such current expense is incurred.* Revenues are not currently available unless they are produced or to be produced by taxes already assessed, or to be assessed for the instant municipal year to raise money already duly appropriated; or unless they are revenues already accrued or to accrue to the town absolutely and available or to be available for the purpose of paying or reimbursing payments for the current expense of the kind incurred. For example, such school, highway, pauper or other funds received or to be received from the state for the current municipal year absolutely and as of right under statutory provisions are to be included in current revenues, the same as are current uncollected taxes already assessed or to be assessed. Neither are revenues currently available after the revenue applicable to the discharge of the particular current expense in question has been exhausted or the full amount of the appropriation therefor expended or obligated.

Although we have not heretofore announced this rule the same seems to have been foreshadowed in the dictum found

in *Reynolds* v. *Waterville,* 92 Me. 292, 303; 42 A. 553, 555, where we said:

> "In interpreting this constitutional provision we believe we would be willing to adopt the middle doctrine on which some of the authorities stand, called by counsel for respondents the rule of reconciliation, which allows a municipal corporation, although its indebtedness has already reached the constitutional limit, to make time contracts in order to provide for certain municipal wants which involve only the ordinary current expenses of municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes; so that each year's services shall be paid for by each year's taxes; the scheme being variously denominated in the cases as a business, or cash, or pay-as-you-go transaction, and the like."

The question seems to have been reserved for later consideration in *Adams* v. *Waterville,* 95 Me. 242, 243; 49 A. 1042, 1043, where we said:

> "It is unnecessary to consider whether or not, if the liability created by the plaintiff's employment and performance was to be paid for as soon as the services were performed, and was thus a cash transaction, it would come within the inhibition of the provision of the constitution, because the case does not show that this liability in the aggregate with previous debts or liabilities exceeded five per centum of the last regular valuation of the city."

Neither is this conclusion inconsistent with the decision of *Tractor Co., Inc.* v. *Inhabitants of Anson,* 134 Me. 329, 331; 186 A. 883, 884, in which we said:

> "At the annual town meeting of March 5, 1934, under Article 22, the Town of Anson had voted to raise and appropriate $2,500
> 'for the removal of snow, sanding streets and

> walks, and erecting snow fence, said appropriation, if any, to be available for expenditure until May 1, 1935.'
>
> But the moneys of this appropriation had been entirely expended when this contract for the lease of the snow plow was signed. The record further shows that the town did not have sufficient funds to pay the rental charge agreed upon and could not negotiate a loan."

Under the rule in *Adams* v. *Waterville, supra,* the defendant town in this case in order to establish the defense that, in incurring the several liabilities sued upon, it violated the constitutional debt limit, has the burden of proof to establish its contention. As these obligations are all of the class known as "current expenses" to establish this defense as to them the burden of proof was upon the defendant to show that each obligation in question was incurred in violation of the constitutional provision. That burden of proof is not sustained by showing merely that at the time each obligation was incurred the town was indebted beyond the amount allowed by the fundamental law.

To maintain the burden of proof which is upon it, the defendant has to go further and prove by a fair preponderance of the evidence that the particular obligation for a current expense *was not incurred* to be paid out of revenues currently available therefor. To do this, the town must establish that there were no current revenues available for the payment of the current expense at the time it was incurred and this, whether such unavailability of current revenues be due to lack of appropriation therefor, prior exhaustion of current revenues or otherwise.

While it is true, as we said in *Tractor Co., Inc.* v. *Inhabitants of Anson, supra,*

> "One who contracts with a city or town, by which an indebtedness or liability is created, must, at his

> peril, take notice of its financial standing and condition and satisfy himself as to whether its debt limit is or will thereby be exceeded.",

nevertheless, there is nothing inconsistent with this principle in requiring the town which seeks to avail itself of this defense to establish it by a fair preponderance of the evidence. *Tractor Co., Inc.* v. *Inhabitants of Anson* by subjecting one who contracts with a town to the risk that his contract may be void, if in excess of the debt limit of the town, does not thereby cast upon him the burden of proving that it is within the limit set by the constitution. The burden of proof is not on the plaintiff to negative this defense but is upon the defending town to establish it.

Authorities from other states upon this precise phase of burden of proof are meager. So far, however, as we have discovered the views expressed by other courts are in accord with this rule which we have announced. In the case of *Rettinger* v. *School Board,* 109 A. (Pa.) 782 at 784; 266 Pa. 67, the court said:

> "In so far as disclosed by the record, the contract when made was within the limit of the current revenues of the school district, and, so long as the board did not exceed such revenues and such income as may be derived from special taxation, no objection can be made to the creation of the indebtedness. Erie City's App., 91 Pa. 398; Addyston Pipe & Steel Co. v. Corry, supra. The defendant failed to produce evidence showing current revenues were insufficient to meet the indebtedness, and, so far as the record shows, the school board did not violate the constitutional provision requiring it to pay as it goes when certain limits have been overstepped."

In another Pennsylvania case, *Athens Nat. Bank* v. *Ridgebury Tp.* 154 A. 791, 792; 303 Pa. 479, the court said:

> " 'If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them,

> however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created.' This is quoted with approval in Wade et al. v. Oakmont Borough et al., 165 Pa. 479, 488; 30 A. 959, 'Current revenues include taxes for the ensuing year and all liquid assets, such as delinquent taxes, licenses, fines, and other revenues which, in the judgment of the authorities, are collectible.' Georges Township v. Union Trust Co., 293 Pa. 364, 369; 143 A. 10, 15. The burden was upon the defendant to show that the temporary loans could not have been paid out of current revenues (Rettinger v. Pittsburg School Board, 266 Pa. 67; 109 A. 782), and it failed to do so."

In *McNeill* v. *City of Waco,* 89 Tex. 83; 33 S. W. (Tex.) 322, at 324, it is said:

> "If it should appear from the pleadings or the face of the obligation that the subject of the contract was clearly a matter of ordinary expenditure, such as repairing streets or salary of an officer, this would be sufficient to bring it within the exception, for the prima facie presumption would be that such claim was intended to be paid out of the current revenues annually collected for payment of such claims, and it would not be presumed the city had attempted to make contracts in excess of its revenues for the year;"

It is also to be borne in mind that this action is on *town orders.* Although orders are subject to any defense that existed to the original obligation for which they were issued, there is a general principle applicable thereto stated in Dillon Municipal Corporations, 5th Ed., Sec. 855, Page 1294 which is well substantiated by the authorities cited therefor. This statement is,

> "*County and City orders* signed by the proper officers *are prima facie binding and legal.* These officers will be presumed to have done their duty. Such orders make *a prima facie* cause of action. Impeachment must come from the defendant."

Of the very numerous authorities cited in support of this general principle, *Rollins* v. *Board of Com'rs.*, 8 Cir. 90 Fed. 577, *Board of Commissioners* v. *Keene Five-Cents Sav. Bank,* 108 Fed. 505, *Coffin et al.* v. *Board of Com'rs.,* 114 Fed. 518 and the same case on appeal in *Board of Commissioners* v. *Irvine et als.,* 126 Fed. 689, apply this presumption in favor of validity of warrants where the defense asserted was violation of the limitation on indebtedness. In *Rollins* v. *Board of Com'rs.,* supra, the court said:

> "Under such circumstances the introduction of the warrants, properly executed, and proof, which was introduced, of the ownership thereof by the plaintiff corporation, made out a prima facie case in favor of the plaintiff, and thereby the burden was placed upon the defendant county to prove by competent evidence the facts necessary to sustain the defense pleaded, to wit, that when *the indebtedness represented by the warrants* sued on was created the county was incapacitated from incurring *the same* by reason of the limitation imposed by the state constitution upon the debt-creating power of the county." (Emphasis ours.)

We hold that the rule announced in *Adams* v. *Waterville, supra,* which requires a defendant town, that defends against an indebtedness on the ground that it violates the constitutional debt limit of said town, to prove such violation, applies to obligations incurred for current expenses. We further hold that to maintain this burden of proof with respect to an obligation for current expenses the defendant town must not only show that the incurring of that obligation would be mathematically in excess of the limit fixed by the constitution, but, in addition thereto, it must also establish the fact that at the time it was incurred it was not to be paid out of current revenues available therefor as we have heretofore defined these terms. The unavailability of current revenues out of which such current expense was to be paid is not to be presumed; nor can it be found from the lack of evidence as to what the revenues were, coupled with the fact that the obligation has not been paid.

The referee in this case based his decision upon the non-payment of the various orders and the absence of evidence of the availability of revenues from which they could have been paid when incurred. This not only disregards but reverses the rule respecting the burden of proof in such cases, and was erroneous.

The court erred in accepting the report of the referee. The case must go back and be disposed of in accordance with the rule laid down in *Clark* v. *Clark,* 111 Me. 416; 89 A. 454. The court below may, in its discretion, strike off the reference, it may recommit it to the referee who heard it before; or, with the consent of the parties, it may, after this reference is stricken off, refer it anew to another referee or referees.

Exceptions sustained.

THERON A. WOODSUM

MAURICE A. BOWERS

AUBURN SAVINGS BANK

EASTPORT SAVINGS BANK

SKOWHEGAN SAVINGS BANK

vs.

PORTLAND RAILROAD COMPANY

CENTRAL MAINE POWER COMPANY

PORTLAND COACH COMPANY

CUMBERLAND COUNTY POWER AND LIGHT COMPANY

PUBLIC UTILITIES COMMISSION OF THE STATE OF MAINE

Cumberland. Opinion, February 28, 1949.

Equity. Securities and Exchange Commission. Corporations.

On an appeal by plaintiffs from final decree in a suit in Equity for a specific performance, all issues in the record were open for consideration, and failure of sitting justice in equity to give separate findings of law and fact is immaterial where entire record is before the Supreme Judicial Court on appeal.

The court in an equity action is not obliged to answer each request of counsel for a ruling whether it be of law or of fact. Where a court dictates into the record what the material facts are as he views them and what are his conclusions of law in reference thereto, he is complying with R. S., 1944, Chap. 95, Sec. 26.

The Securities and Exchange Commission, under the Public Utilities Holding Company Act, are given wide power, derived from the commerce clause of the Constitution, in the matter of reorganizing public utility holding companies and such powers, insofar as necessary to carry out the policy of the statutes, are exclusive.

The purpose of the Public Utilities Holding Company Act is to compel the simplification of the structures of holding company systems, without regard to the wishes of stockholders and in spite of charter provisions. Under the death sentence clause the commission is empowered to compel the dissolution of a company and take control of all of its assets provided the plan shall be "fair and equitable" to all concerned.

In a simplification proceeding which it finds is fair and equitable and necessary to comply with the provisions of the Federal Statute, the Securities and Exchange Commission has the power to modify the right granted to stockholders by the corporate charter or otherwise, and regardless of contract rights, change the form of securities back to debentures, and provide for their payment without regard to the premiums provided for in the indenture.

Action in the state court inconsistent with the power of the Securities and Exchange Commission will be enjoined.

Non-compliance by assignee of a lease given by a corporation of which assignee was a majority stockholder is not a mark of fraud where such action is in compliance with orders of Securities and Exchange Commission.

A statement in the Securities and Exchange Commission report that minority stockholders dissenting from plan had the right under state law to have the stock appraised confers no jurisdiction on state court where commission approved plan which provided that stockholders be paid a specific amount per share for their stocks.

If a Federal tribunal of exclusive jurisdiction has the subject matter before it power of the state court to take incompetible action of bond.

ON APPEAL.

Bill in Equity seeking to compel specific performance of a lease given by Portland Railroad Co., to put things back in *status quo,* and declare null and void certain acts complained of in the bill. A decree was rendered requiring Portland Railroad Company and/or Central Maine Power Company to deposit $119.25 for each share of stock held by the plaintiffs and intervenors, and dismissing bill as to other defendants. Plaintiffs appealed. Case remanded for entry of a decree dismissing bill.

Franklin R. Chesley, for appellants.

Nathaniel W. Wilson,
Everett H. Maxcy,
Hutchinson, Pierce, Atwood and Scribner,
for Central Maine Power Co. and
Cumberland County Power & Light Co.

Leon V. Walker, for Portland Railroad Co.

SITTING: THAXTER, TOMPKINS, FELLOWS, JJ., AND MURRAY, Active Retired Justice.

THAXTER, J. This is a Bill in Equity brought by the Auburn Savings Bank of Auburn, the Eastport Savings Bank of Eastport, and the Skowhegan Savings Bank in Skowhegan, all located in the State of Maine and being organized as banking corporations under the laws of the State of Maine, against the Portland Railroad Company, hereinafter referred to as Railroad Co., a public utility corporation organized under the laws of this state, which for many years prior to the abandonment of its trackage had operated a street railroad system in Portland and its environs, against the Central Maine Power Company, hereinafter referred to as Central Maine, a public utility corporation organized under Maine law, which operates an electric light and power system within the state, and against the Portland Coach Company, hereinafter referred to as Coach Co., also a corporation organized and existing under the laws of this state, which operates a bus transportation system in Portland and certain outlying communities. By amendment of the bill, the Cumberland County Power & Light Company, hereinafter referred to as Cumberland, another public utility corporation organized under Maine law, which has been merged with Central Maine, and the Public Utilities Commission of the State of Maine, were joined as parties defendant. Also Theron A. Woodsum and Maurice A. Bowers, both of Portland, stockholders in Railroad Co.,

were, subsequent to the filing of the bill, allowed to intervene as plaintiffs.

The bill which was filed February 5, 1945 alleges that the plaintiffs are stockholders in Railroad Co. and that they bring the bill on behalf of themselves and other stockholders similarly situated. The intercorporate relations of the defendants are described in detail, and particular attention is called to a lease dated February 1, 1912 by Railroad Co. to Cumberland of all of its street railroad, parks and other property, together with all the rights, privileges, and franchises owned or held under lease, except such franchises as are "necessary to preserve the corporate existence of the Railroad Company and its interest in the reversion of the demised estates and properties and its corporate seal and books of minutes." The lease was for the term of ninety-nine years, or until February 1, 2011. It is not necessary at this point in referring to the general allegations of the bill to discuss this lease or the consideration given by the lessee except to say that the rental to be paid and the method of payment were designed to assure to the stockholders of Railroad Co. dividends on their stock of $5.00 per annum during the term of the lease. The bill alleges that under an agreement dated November 18, 1942, Cumberland did, as of December 3, 1942, merge with Central Maine, which became the assignee of the railroad lease and agreed to assume the liabilities of its predecessors with respect thereto. The bill charges that this merger was a violation of the terms of the lease, participated in by interlocking directors and officers of the corporations concerned and that it culminated in a plan for dissolution of Railroad Co. which was to be submitted to its stockholders for approval at a stockholders' meeting to be held December 28, 1944. This plan, which we shall discuss in detail later, had been filed by Central Maine with the Securities and Exchange Commission purportedly under the provisions of the Public Utility Holding Company Act of 1935. The bill goes on to allege concealment from the stockholders of Railroad

Co. of facts with respect to the plan for dissolution, a failure of Central Maine to perform the covenants of the lease, a wasting and abandoning of the assets of Railroad Co., the unlawful substitution of a bus system for the street railroad, and a subsequent unlawful sale of such bus system. Interspersed with these specific allegations are assertions that these changes and unlawful acts were accomplished through the medium of interlocking directors and through a failure of the parties concerned to fulfill their fiduciary duties. The bill alleges that the reorganization plan submitted to the Securities and Exchange Commission was in fact conceived in fraud and for the purpose of terminating the obligations of the lessee or its assignee under the lease, all of this being done in collusion with those parties who were to benefit from the fraud; that the hearing on said plan before the Securities and Exchange Commission was solely on evidence prepared by the interested parties which was offered in pursuance of a scheme to create a self-serving necessity for its approval. The bill asserts that at the special stockholders' meeting of Railroad Co. called to consider the plan proxies were solicited on false information and that a sufficient number of them were invalid so as to render void the proceedings taken at the meeting, and furthermore that a majority of the total stock voted at the meeting was held by Central Maine whose action in voting it rendered the meeting itself invalid and all action taken to approve the plan void.

The relief sought under this bill is drastic in the extreme. In short, the bill sets forth certain alleged fraudulent and *ultra vires* acts engineered by the lessee and its assignee by reason of their control of the property of Railroad Co. under the lease, which acts it is claimed have destroyed certain rights of the stockholders of Railroad Co. under that lease, namely their right to have the street railroad system maintained in good repair and operated as a street railroad during the term of the lease, and at the expiration of the lease in 2011 A. D., or at its earlier termination, to have the de-

mised property surrendered to Railroad Co. "as a going concern, in condition not inferior to that existing at the date of the lease," together with all extensions, etc. In other words, the minority stockholders who bring this bill are insisting on the exact letter of their contract. In spite of changes in transportation methods in the thirty-five years since this lease was written, in spite of the abandonment of railroad trackage in our streets and the substitution of buses for street cars, the plaintiffs treat every variation from the exact terms of the contract as a breach of its terms, every sale of antiquated property as evidence of fraud. They ask this court to put things back in *status quo,* declare null and void all the acts complained of, in other words they seek to compel specific performance of the lease as written. To this end we are asked to issue mandatory injunctions and restraining orders and to appoint a receiver or receivers to take over the property involved. Prior to the bringing of this bill this matter had been submitted to the Securities and Exchange Commission which had already taken action under an overriding federal law inconsistent with the relief sought by this bill. It is therefore apparent that this court is being invited to take action which may well be in disregard of that delicate balance between state and federal power on which our system of government rests.

Answers were filed by all parties defendant admitting in part undisputed allegations of the bill; but each defendant in so far as it was concerned denied every charge of fraud. After the filing of replications, the bill came to a hearing before the Chief Justice who was fully conscious of the limits of his power set by the Public Utility Holding Company Act and endeavored as best he could to see that there was no conflict between federal and state authority. Had he had before him, as we have now, the recent case of *Schwabacher* v. *United States,* (U. S. Supreme Court May 3, 1948) 334 U. S. 182; 68 S. Ct. 958; 92 L. Ed. 1305, much of the exhausting drudgery of a long hearing might have

been avoided. As it is, we have to consider here a record of 2,242 pages, and briefs of well over 1,000 pages.

The issue before us as we see it is a narrow one, and might perhaps be disposed of in a more or less summary manner. And yet it may be conducive to a proper understanding of it if we give some of the background of this controversy.

As stated in the bill, Railroad Co. in February, 1912, leased its property to Cumberland for ninety-nine years. Cumberland agreed to pay as rental a sum sufficient to pay the interest on certain bonds of Railroad Co. and dividends at the rate of 5% on its capital stock, also $500 per annum to be used for the expense of maintaining the organization of Railroad Co. It is not necessary to consider whether there was any obligation enforcible against the lessee to pay the dividends at the rate of 5% direct to the stockholders of Railroad Co.; for such dividends were in fact paid. In the view which we take of the case, it makes no difference whether they were channeled through Railroad Co. or paid directly to the stockholders. We have here the mere shell of Railroad Co. left with the operation of its properties entirely in the hands of the lessee.

Railroad Co., as was the case in the country generally with street railroads, did not prosper. It was forced to seek rate increases and numerous other forms of relief. It finally failed to earn even its operating expense to say nothing of a sum sufficient to enable the lessee to pay the rental without reaching into its own pocket. One line after another was abandoned and the lessee took on itself the job of disposing of abandoned plant and equipment. In 1927 an amendment of the charter was obtained authorizing Railroad Co. to operate buses. P. & S. Laws, 1927, Chap. 47. Of course there is nothing to the suggestion of plaintiffs' counsel that such legislation is invalid and subject to collateral attack because of the failure to have stockholders' approval of the request for such extension of charter

powers. R. S., 1944, Chap. 49, Secs. 1, 2; *Greaves* v. *Houlton Water Co.*, 143 Me. 208; 59 A. (2nd) 217, 220. Substitution of bus service was gradually made in places where trolleys were not operating at a profit. By 1941 trolley service had been abandoned and bus service substituted. The new bus service was financed through the sale of abandoned railroad property in so far as the funds would go; the balance was furnished by the lessee or its assignee. The fact of the matter was that Railroad Co. as a separate operating entity was in an impossible situation. It was insolvent, and except in so far as the lessee or its assignee stood back of it, it would have ceased to operate. Under the terms of the Public Utility Holding Company Act of 1935, it appeared to the officials of Central Maine that the continuance of the lease of the street railroad, which had turned out to be so unprofitable for Central Maine, was inconsistent with the provisions of the Public Utility Holding Company Act and that the Securities and Exchange Commission could and probably would order a reorganization of the holding company system headed by the New England Public Service Company of which both Central Maine and Railroad Co. were parts. In fact while this reorganization was under way there had been conferences between representatives of Central Maine and the Securities and Exchange Commission as to the necessity of Central Maine divesting itself of its control of Railroad Co. These discussions finally culminated in the filing of a voluntary plan by Central Maine in accordance with the provisions of Section 11 (e) of the Public Utility Holding Company Act. The main purpose of this plan which was dated November 7, 1944 was to set forth a method for Central Maine to divest itself of its control of Railroad Co.

Before this plan could become effective, approval of it by the Securities and Exchange Commission was required. The implication of the bill of complaint is that this plan was a self-serving device on the part of Central Maine, not in the public interest, unfair to the stockholders of Rail-

road Co., and filed as a means to permit Central Maine to evade its obligation under the lease. There is not a shred of evidence to support these charges which are obviously based on the assumption that the Securities and Exchange Commission in approving the plan was either hoodwinked or joined with Central Maine in collusive action for the sole benefit of the stockholders of Central Maine. The Commission found that "Central Maine's interest in the transportation business is not retainable under the standards of Section 11 (b) (1)," of the Public Utility Holding Company Act and that the plan set forth a proper method by which Central Maine could comply with the provisions of the federal statute. Is it possible that a procedure required by federal law could be a badge of fraud as claimed in the plaintiffs' bill? It is true that the plan would operate to the financial advantage of Central Maine as claimed in the bill. But is that a reason why it should be condemned? Was the federal statute enacted solely as a means to harass public utilities? May it not have had a constructive purpose? And when the Securities and Exchange Commission has found that a certain plan is "fair and equitable" and "necessary" to effectuate the provisions of a federal law, how far can this court be expected to go in holding otherwise? These are all questions which are implicit in the bill of complaint now before this court.

At the time the plan was filed Central Maine was the owner of approximately 36% of the bonds and debentures of Railroad Co. and 49% of its capital stock. The essential features of the plan were that Railroad Co. would release Central Maine and Cumberland from all their liabilities under the lease; that Central Maine would procure a purchaser for all the assets of Railroad Co.; that Central Maine would purchase for $134,364 certain real estate and physical assets of Railroad Co.; that Central Maine would pay to Railroad Co. a sum which with other moneys on hand of Railroad Co. would be sufficient to pay off the bonds held by third parties and to distribute to stockholders of Railroad

Co. other than Central Maine an amount equal to $110 per share for their stock; and that Railroad Co. would take all necessary action to effectuate this result. Central Maine was also to hold harmless the stockholders of Railroad Co. against all liabilities and to pay counsel fees. This plan of course envisaged not only the termination of the lease but the dissolution of Railroad Co.

The Securities and Exchange Commission in accordance with its custom sent a notice of the filing of the plan and of a hearing thereon on December 7, 1944 to certain representatives of security holders of Railroad Co. to the Public Utilities Commission of Maine, and among other requirements ordered Central Maine to give notice to all stockholders of Railroad Co. This notice included a summary of the plan and there was sent with it a so-called report by the Commission to security holders prepared in accordance with the provisions of Section 11 (g) of the Public Utility Holding Company Act. This report is really an explanation of the plan prepared to assist the individual stockholders "in determining whether or not to vote in favor of the proposed plan to terminate the lease of Portland's transportation system to Central Maine Power Company (Central Maine), to sell the transportation system and to dissolve Portland." The report then calls attention to the fact that the plan has been found by the Commission to be necessary to effectuate the provisions of 11 (b) (c) of the Public Utility Holding Company Act. In the report attention is also called to the fact that "the security holders of Portland have the right under Maine laws to have their stock appraised and receive an amount for their stock based on such appraisal." Then follows this statement by the Commission: "Although this Commission has found the plan fair and equitable, whether or not any security holders should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his individual judgment."

After the hearing set for December 7, 1944, the Commission on December 19th filed its order which was preceded by Findings and an Opinion approving the plan. The Findings and Opinion are voluminous. The undisputed facts found by the Commission indicate a very shaky financial condition of Railroad Co. with bankruptcy inevitable unless Central Maine should continue to back it financially. Under the circumstances and in view of certain ambiguities in the lease with respect to the liability of Central Maine, the Commission pointed out that it has found that the plan is a fair and equitable settlement for all parties concerned and that the plan is "necessary" within the meaning of the statute to effectuate the provisions of 11 (b) of the federal statute. The Commission found that the real value of the stock of Railroad Co. lay in the guarantee by Central Maine of a rental which would permit the payment of dividends of $5.00 per share for 66 more years. It is also evident that the Commission considered the possibility that Railroad Co. might have other claims against Central Maine, but that none the less the price of $110 per share was fair to the stockholders of Railroad Co. and also to the security holders of Central Maine. The Commission directed that the plan be submitted to the stockholders of Railroad Co. for their approval or disapproval. It is then pointed out that the Skowhegan Savings Bank and certain other banks, holders of 1170 shares of the capital stock of Railroad Co., have stated that they regarded the price of $110 a share as inadequate. The Commission then makes the following statement and, in the view which we take of this case, it is the crux of the problem before us:

> "In addition it may be noted that any stockholders dissenting from the proposed plan will have a right, pursuant to Maine statute, to have their stock appraised."

The stockholders' meeting proposed by the Securities and Exchange Commission was held December 28, 1944. There were represented at the meeting 14,485 shares out of a

total of 19,990. Thirteen thousand seven hundred and thirty-five shares, of which 9,795 were owned by Central Maine, voted in favor of the plan. Seven hundred and fifty shares, of which 730 were owned by the plaintiffs and intervenors, voted in the negative.

This was the situation when the Bill in Equity was filed in February, 1945. It is important to note that the three original plaintiffs here had the right to appear at the hearing before the SEC and that they exercised that right. They had a right to a review in the proper United States Circuit Court of Appeals of the order of the SEC approving the plan. U. S. Code, Tit. 15, 79x. They did not exercise that right. Nor did they avail themselves of the remedy provided by state law to have their stock appraised. R. S., 1944, Chap. 49, Secs. 81, et seq. What these stockholders apparently want as we gather it from their bill is not reimbursement, not to be made whole under any of the provisions of law either state or federal, but rather by appealing to the broad equity powers of the state court to assume control over these corporations, and particularly to enforce the provisions of the lease of Railroad Co. exactly in accordance with its terms. They take pains to disclaim any purpose to avail themselves of their statutory rights.

The sitting justice gave to the claims of the plaintiffs the most painstaking consideration. They were granted wide latitude in developing their theories of fraud and oppression, and in his findings as amended covering ninety-three pages he disposed of their various contentions both specifically and in general terms. He found that the defendant power companies had not used the control which they possessed over Railroad Co. for oppressive purposes; that there was a perfectly honest purpose in changing from a railroad system to a bus system; that Cumberland and Central Maine in their merger had complied with all provisions of law; that the decree of the Public Utilities Commission in approving the assignment of the lease was valid; that it

was not fraudulent to propose a termination of the lease by mutual consent; that stockholders were not barred from voting on this question even though they might be stockholders in both companies; that Central Maine in proposing the plan acted legally; that it was not necessary to have a unanimous vote of stockholders to terminate the lease; that the termination of the power contract with Railroad Co. was proper; that full publicity of the plan was given to the stockholders of Railroad Co.; that counsel for Central Maine had been advised by the SEC that the plan was necessary to comply with the law; that the special stockholders' meeting of Railroad Co. held December 28, 1944 was a legal meeting and the action there taken in approving the plan was legal action. Then as applying to all the specific and general charges of fraud the sitting justice made this finding: "Actual fraud directly or indirectly chargeable to any defendant made a party to this cause is not proven." With all of these findings and rulings whether of fact or of law this court concurs.

It is not necessary at this point to attempt to define and limit the scope of the authority of the state court; but for the purposes of this case we shall assume that the sitting justice did have jurisdiction to determine the issue of fraud raised by the bill as well as other issues above set forth, including the legality of the stockholders' meeting. We call attention to this here because we are forced to hold as more fully explained later that the relief sought by this bill is beyond the power of the state court to grant in view of the jurisdiction given to the SEC under the Public Utility Holding Company Act of 1935.

The charges of fraud are without substance. Mistakes may have been made by the lessee or its assignee in the method of handling the leased property but they were honest mistakes and there is no evidence that in a single instance the lessee or its assignee received any improper financial gain. What was done, and it is particularly evident

in the shift from trolley cars to busses, was in an effort to keep the transportation system in the Portland area functioning as a going concern. As the plaintiffs attempt to develop their charges of fraud, they appear to rest on nothing more substantial than a failure of the lessee to maintain the property of Railroad Co. as a street railroad. True it is that they charge a misuse of the money received from the sale of abandoned equipment, but the money was used almost entirely in the purchase of new equipment, mostly busses. As we have already pointed out, and we will discuss it further later, the proposed plan by which Central Maine divested itself of control of Railroad Co. is not a mark of fraud. The action of Central Maine was fully justified in order to comply with the provisions of federal law. If fraud was as obvious as the plaintiffs claim, why was nothing said about it to the Securities and Exchange Commission at the hearing on December 7, 1944? It was certainly pertinent to the issue which the Commission was then considering. And these same banks which are now plaintiffs were represented at that hearing by Theron A. Woodsum, a statistician and security analyst employed by the Savings Bank Association of Maine. He said not one word about fraud. Not only have the plaintiffs failed to offer any direct evidence of the fraud which they have charged, but their silence when they should have spoken casts grave doubt on whether they ever had such evidence. To be sure, the briefs of counsel are filled as is the bill of complaint with charges of fraud. These are iterated and reiterated. But the vehemence with which an allegation is asserted is not a substitute for proof of it.

Though the sitting justice denied the main contentions of the plaintiffs, he did sustain the bill against Central Maine and Railroad Co. He computed the present worth of the stock of Railroad Co. at $119.25 per share and saw no reason for reducing this to $110.00, the figure found as fair and equitable by the Securities and Exchange Commission. He unquestionably recognized that the authority of the SEC

was exclusive in so far as the SEC chose to exercise its authority; but he construed the opinion and findings of the Commission as leaving open to the minority stockholders the right to apply to the state court in equity for such relief as they might have had had the matter never been submitted to the Securities and Exchange Commission.

The final decree was filed February 16, 1948. It sustained the bill against Railroad Co. and Central Maine and dismissed it as to the other defendants. Under its terms Railroad Co. and/or Central Maine were ordered within fifteen days after the effective date of the decree to deposit with the Clerk of Courts $119.25 for each share of stock held by the plaintiffs and intervenors, the Clerk of Courts to hold said moneys for distribution among the plaintiffs and intervenors on surrender of their certificates of stock. The two defendants were also ordered to pay $5,000 to the plaintiffs and intervenors as counsel fees together with a single bill of costs. The case is before us on the plaintiffs' appeal from this decree. It may be noted that during the protracted hearings numerous appeals were taken from interlocutory orders and decrees, also from the findings as filed by the sitting justice. In so far as these are properly before us and have any relevancy, we shall regard them as merged in the appeal from the final decree. We agree with the contention of counsel for the plaintiffs, concurred in by defendants' counsel, that all issues raised by the record are open for consideration and determination anew by this court. Such is the effect of R. S., 1944, Chap. 95, Sec. 21, which provides in part that in an appeal from a final decree in equity the law court shall "affirm, reverse, or modify the decree of the court below, or remand the cause for further proceedings, as it deems proper." See *Pride* v. *Pride Lumber Co.*, 109 Me. 452, 457; *Trask* v. *Chase*, 107 Me. 137, 150. Such being the case, we are not limited to a consideration of errors in the decree claimed by the parties filing the appeal but may consider issues raised by any party.

The plaintiffs requested in accordance with R. S., 1930, Chap. 91, Sec. 58, now R. S., 1944, Chap. 95, Sec. 26, separate findings of law and of fact. The requests for findings of law were 128 in number and cover 38 pages of the record; the requests for separate findings of fact are 58 in number and cover 39 pages of the record. The findings of the sitting justice as amended cover 93 pages of the record and discuss all relevant issues of law and of fact as we see them. In spite of this most conscientious effort to observe the provisions of the statute and the wishes of counsel, there was subsequently filed a motion that the sitting justice give specific findings to each separate request; a motion that there be entered a special finding of the material facts on which the sitting justice finally fixed the value of the stock at $119.25 per share; a motion for certain additional rulings of law. These last requested rulings are 37 in number and cover 42 pages of the record. In so far as there were specific rulings on these various motions, they were denied. And properly so. None the less it is insisted in the argument before this court that the failure of the court below to accede to the insistence of plaintiffs' counsel was error. In the posture in which this case is presented to us, that question is academic. For we have the entire record before us and are considering the issue anew. *Trask* v. *Chase, supra,* 150; R. S., 1944, Chap. 95, Sec. 21. In case, however, that there should be any doubt about the duty of the sitting justice, we will say that he fully performed his duty. The case of *Sacre* v. *Sacre,* 143 Me. 80; 55 A. (2nd) 592, settles this question. The court which hears an equity action is not obliged to answer each and every request of counsel for a ruling whether it be of law or fact. The language of the *Sacre* case applies here: "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." The plaintiffs have no just cause of complaint on this point.

Did the court below have jursidiction to decide the issue which the plaintiffs seek to raise?

By the terms of the Public Utility Holding Company Act of 1935, U. S. C. A. Tit. 15, Sec. 79k, the Securities and Exchange Commission was given wide powers to reorganize public utility holding companies throughout the country. These powers, assumed and exercised by the federal government, are derived from the commerce clause of the constitution and, in so far as necessary to carry out the policy of the statute, are exclusive. In other words, the states are barred, either by legislation or by court action from interfering in any way with the overriding federal authority. *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624; 89 L. Ed. 511; *Okin* v. *Securities and Exchange Commission,* 161 F. (2nd) 978; *Public Service Commission* v. *Securities and Exchange Commission,* 166 F. (2nd) 784. *In re Electric Bond & Share Co.,* 65 N. Y. S. (2nd) 23. Like other administrative agencies, such as the Interstate Commerce Commission, the Federal Trade Commission and the National Labor Relations Board, the SEC is in its control of public utilities dealing with the very special problems which are really beyond the competence of courts to handle. For a discussion of this general subject by Learned Hand, C. J., see *Herzfeld* v. *Federal Trade Commission,* 140 F. (2nd) 207, 209. Not only that, but there is an obvious danger in permitting two tribunals to deal with the same subject-matter, particularly where discretion plays so important a part in the determination of the issues involved. *Public Service Commission* v. *Securities and Exchange Commission, supra; In re Standard Power & Light Co.,* 48 F. Supp. 716. In the second of these two cases, the opinion of the court clearly points out this danger, page 720:

> "The liquidation of such companies creates special problems growing out of prolix intercorporate

> relations. Security holders are frequently scattered all over the country. The Commission is charged, as an administrative agency, with the duty and responsibility of investigating whether any proposed liquidation is fair and equitable to creditors and stockholders. The essential purposes of the Act will be aborted if any stockholder may substitute at random some other procedure for the machinery provided by Congress. While apposite machinery is available in the state court of chancery in Delaware to liquidate Standard Power, the utilization of such machinery would, it seems to me, invite confusion in administration, and delays would occur as a result of a state and federal jural dichotomy, followed by a lack of economies. The Commission has not sought the aid of the state tribunal, and, as we are dealing with an instrumentality of interstate commerce in a field in which Congress has spoken, state laws must yield to paramount federal authority;
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> "I conclude that this court should not allow the public duties of the Commission under the Act to be thwarted, or the safeguards of the Act to be circumvented. I find it was the intention of Congress that the Commission should have complete custody of any public utility holding company affected by the Act, with a right to enlist the aid of any court, state or federal, at its option, to enforce its orders. Hence, the Commission's order of June 19, 1942, directing Standard Power to present its plan of liquidation to the Commission was, in truth, an order to liquidate under Commission supervision and in no other manner."

There can be no question of the right of Congress under the commerce clause of the constitution to bar any action by the state inconsistent with the full and plenary exercise of the authority given to the federal government in a particular field. This is made clear in the case of *Schwabacher* v. *United States, supra.* Both the majority and minority opinions agree that Congress has such power. In matters

within its scope, a federal law is supreme. *Harvey* v. *Rackliffe,* 141 Me. 169; 41 A. (2nd) 455; 161 A. L. R. 296.

It was the avowed purpose of the Public Utility Holding Company Act to compel the simplification of the structures of holding company systems throughout the United States. To effectuate this purpose, the SEC was given wide powers which it could exercise in carrying out the policy of the Act without regard to the wishes of stockholders and in spite of charter provisions. The so-called death sentence clause meant that the Commission could compel the dissolution of a company whenever necessary to carry out the congressional mandate, and could take complete control of all of its assets. The important restriction on the authority of the Commission, whether the procedure is under Sec. 11 (b) (2), in opposition to the wishes of the company involved, or under Sec. 11 (e) to carry out a plan submitted by the company itself, is that the plan shall be "fair and equitable" to all concerned. How wide is the power of the Commission can be seen by a study of the cases which have arisen under the Act.

In *Otis & Co.* v. *Securities and Exchange Commission, supra,* the jurisdiction of the SEC over the dissolution of a holding company under Sec. 11 (b) (2) of the statute was upheld, and the court laid down the doctrine that priority given to preferred stockholders by the corporate charter could be disregarded. The case assumes that this is true whether the proceeding is under Sec. 11 (b) (2) or under Sec. 11 (e).

The court said, page 636 U. S. and 89 L. Ed. 521:

> "The applicability of the charter provision under the Public Utility Holding Company Act of 1935 is a matter of Federal law."

And further, at page 638 U. S. and 89 L. Ed. 522, we find the following:

> "The Commission in its enforcement of the policies of the Act should not be hampered in its de-

> termination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken. Where preexisting contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate."

In *American Power and Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90; 91 L. Ed. 103, the construction of the statute as laid down in the preceding case was again adopted and the power of the Commission to order reorganization or dissolution or any other appropriate remedy was upheld.

In *Schwabacher* v. *United States, supra,* the Supreme Court in construing a federal statute of similar purposes, held that "liquidation preferences provided by the charter do not apply."

Phillips v. *Securities and Exchange Commission,* 153 F. (2nd) 27, holds that the federal statute is "a specific overriding federal law" which takes precedence over the requirements of state statutes with respect to the reorganization or dissolution of a state chartered corporation. Hence a reorganization or dissolution under the federal statute could be carried through without stockholders' approval, which would be required under state law.

See also on this same point *Okin* v. *Securities and Exchange Commission, supra; Application of Securities and Exchange Commission,* 50 F. Supp. 965; *In re Electric Bond & Share Co., supra.*

In *Public Service Commission* v. *Securities and Exchange Commission, supra,* a voluntary plan was submitted under Sec. 11 (e) of the federal statute. The court in discussing

the intent of Congress to bar the states from any interference with the powers granted to the SEC said, at page 787:

> "Section 11 starts with imposing upon the SEC the 'duty' of ascertaining how far holding companies can be 'simplified' and the 'voting power fairly and equitably distributed'; and sec. 11 (b) vests it with power to accomplish these ends. Section 11 (e) makes it possible for the Company to forestall action by the Commission by taking the initiative; subject to such regulations as the Commission may promulgate, it may 'submit a plan * * * for the purpose of enabling' it 'to comply with the provisions of subsection (b).' Such a submission is a substitute for the performance of the Commission's 'duty'; it is another way of realizing purposes recited in the preamble—sec. 1, 15 U. S. C. A. sec. 79a. Whether the Commission or the company begins is only a matter of procedure; the outcome will be precisely the same, for in either case the end sought is measured by subsection (b), an end whose realization the Act affirmatively prescribes. This once understood, it becomes to the highest degree unlikely that Congress should have set up a system of dual control over the fulfillment of this purpose; for it is scarcely necessary to expatiate upon the obvious defect of so organizing any official control; we have already declared ourselves on the matter in Phillips v. Securities and Exchange Commission."

Action in a state court inconsistent with the power of the Securities and Exchange Commission will be enjoined. *In re Standard Power & Light Co., supra; Okin* v. *Securities and Exchange Commission, supra; In re United Gas Corporation,* 162 F. (2nd) 409.

The Securities and Exchange Commission in a simplification proceeding which it finds is fair and equitable, and necessary to comply with the provisions of the federal statute, has the power to modify the rights granted to stockholders by the corporate charter or otherwise. That is implicit in the opinions of the Supreme Court sustaining the Commis-

sion's authority to order a corporation dissolved. As has already been pointed out, it is apparent in the rulings in a number of cases where the right of the Commission has been sustained to modify or terminate preferences granted to preferred stockholders, and the Commission may, regardless of contract rights, change the form of the security back of debentures and provide for their payment without regard to the premiums provided for in the indenture. *In re Community Gas & Power Co.*, 71 F. Supp. 171; *In re Engineers Public Service Company*, 71 F. Supp. 797; *Massachusetts Mutual Life Insurance Company* v. *Securities and Exchange Commission*, 151 F. (2nd) 424; *In re North Continent Utilities Corporation*, 54 F. Supp. 527; *In re American Gas & Power Company*, 55 F. Supp. 756. The basis of the Commission's power in these respects is summed up in *Massachusetts Mutual Life Insurance Company, supra*, as follows: "For when the provisions of a contract are contrary to a new concept of public policy not foreseeable when the contract was made it becomes illegal and can not be enforced."

The plaintiffs' charges of fraud, as we have pointed out, are based on the fact that Central Maine has not complied with the provisions of the lease and has sought to terminate it. The non-compliance has been due not to a failure to meet the financial obligations which were imposed on the lessee but to a disposition of the assets of Railroad Co. in a manner inconsistent with the maintenance of the property of the lessor as a street railroad. There can be no question that the termination of the lease and the dissolution of Railroad Co. were required by an overriding federal statute which made unenforcible many of the provisions of the lease. Central Maine acted in conformity with the orders of the Securities and Exchange Commission. Such complaints as the plaintiffs had should have been addressed to the Commission, not to Central Maine which was complying with the Commission's orders. The Commission took extraordinary care to see that the stockholders of Railroad Co. were in-

formed as to all contemplated action and that the rights of dissenters were protected. Under the doctrine of *Phillips* v. *Securities and Exchange Commission, supra,* the Commission could have proceeded by compulsory process without stockholder approval to compel the dissolution of Railroad Co. and could have reached just the same result as was arrived at here. It chose to permit Central Maine to file a voluntary plan and to require assent to it at a stockholders' meeting. Such assent was forthcoming. The validity of the corporate action taken at such meeting is now attacked on two grounds, firstly, that action to terminate the lease could only be by unanimous vote, and secondly, that action taken at that meeting was oppressive and void as to the dissenting stockholders. The sitting justice has found that the action taken at the meeting was legal and that there was no oppression practiced on the minority. A careful reading of the record satisfies this court that such rulings were in all respects correct. The mere fact that Central Maine held enough stock to control that meeting does not render the action taken at it illegal. It had the right to acquire the stock of other companies and as an incident of the ownership of such stock had the right to vote it. See the Legislative Acts covering its charter powers. P. & S. Laws, 1905, Chap. 129; 1909, Chap. 298; 1913, Chap. 184. Moreover, to uphold plaintiffs' contention that unanimous consent of stockholders was necessary to terminate the lease would permit a small minority of stockholders of a public utility to circumvent the provisions of a federal statute which Congress has declared the public interest requires.

We think that the jurisdiction of the SEC in this case to approve the plan and to determine the amount which should be paid to all stockholders was exclusive. It really cannot perform its duties on any other theory. The Commission did approve the plan as fair and equitable. That is, the price was a fair price for the stockholders of Railroad Co. to receive and it was a fair price for Central Maine to pay. And we must remember that the SEC had jurisdiction of

both of these companies and that both were involved in this simplification proceeding. If the state court determines that Central Maine must pay more, it is certainly taking action inconsistent with that taken by the Commission which has found a less price to be a fair one for Central Maine. When the Commission assumed jurisdiction, the power of the state court to take any incompatible action was gone.

The wide and exclusive powers possessed by the Securities and Exchange Commission are evident by a glance at a very recent case, *In re North American Light & Power Co.*, 170 F. (2nd) 924 (C. C. A. 3rd Cir. November 5, 1948). Involved here was an approval by the SEC of a plan submitted under Sec. 11 (e). Certain stockholders claimed that the Commission erred in holding the plan fair and equitable. The court held that the Commission could suggest amendments to the plan which would cure the defects which the Commission found, and then could approve it so long as the plan as modified would come within the statutory requirement of being fair and equitable. It was likewise held to be within the authority of the Commission in determining the rights of all common stockholders and the extent to which they would share in corporate assets to approve the settlement of certain corporate claims without the necessity of considering the merits of each individual claim. It was only required to use its reasonable judgment broadly to determine the expediency of the entire settlement. The opinion also determines that there is no necessity even in the case of a voluntary plan under 11 (e) for the Commission to require stockholder approval.

Let us apply these principles to the case before us. In so far as stockholder approval goes, we have it here and it was given at a legal meeting. Though it may not have been necessary, it did no harm. It seems also to be implied, if not expressly asserted in the *North American* case, that the Commission which had the power to authorize the settle-

ment of claims for or against the corporation must also have the power to determine the value of the stock which is affected by those settlements and that its rights in this respect are exclusive. In other words, the Commission's power in the instant case to determine the value of each and every share of the stock of Railroad Co. was exclusive. Two independent tribunals cannot readily function in this field without great confusion. It is obvious that the sitting justice fully recognized this handicap. Why, then, did he consider this bill? His reason is made perfectly clear in his findings. He assumed that the Securities and Exchange Commission had specifically reserved to minority stockholders such rights as they might have had in the state court and that the Commission had the authority to make such delegation of its powers. We have already suggested that such supposed reservation was the crux of this case. How far did the Commission intend to go, how far did it go, and how far did it have the power to go in remitting minority stockholders to their remedies in the state court?

We have some question whether the Commission really intended to remit the dissenters to any and all remedies which they might have had in the courts of this state. What happened was this: The report which the Commission ordered sent to shareholders prior to the hearing on December 7, 1944 contained a statement already referred to which read as follows: "Although this Commission has found the plan fair and equitable, whether or not any security holder should vote in favor of the plan or choose to exercise his rights under the appraisal statute or by other means should be determined by his independent judgment." This report sent under the provisions of Section 11 (g) of the statute was not an order of the Commission nor even a part of the findings of the Commission on which its order was ultimately based. The learned justice below took the words "or by other means" to reserve to dissenting stockholders any rights which they might have had to bring an action in the state court. We doubt if such was the intent of the

SEC; for in the findings and opinion which are the basis for its order we find only this as to the rights of dissenting stockholders: "In addition it may be noted that any stockholders dissenting from the proposed plan will have a right, pursuant to Maine statute, to have their stock appraised." Counsel for the defendants claim that the right to an appraisal under the Maine statute was the only right which the Commission intended to reserve to dissenters. It is not, however, necessary to decide this question; for in view of the case of *Schwabacher* v. *United States*, heretofore referred to, we think it was beyond the power of the SEC to delegate to the state court any of its authority which, if exercised, might be inconsistent with action which might be taken by the Commission in approving the plan which had been submitted in accordance with the federal statute. We feel that this restriction certainly applies to the reservation of a right to pursue any and all remedies in the state court and probably applies to a reservation of the right to seek the remedy provided by the statutes of Maine for an appraisal. In the light of the *Schwabacher* case we must hold that it was beyond the power of the state court to grant the relief which it did in this case. It could enter no decree which would be inconsistent with such action as was taken or might be taken by the Commission in the exercise of the exclusive jurisdiction given to it by the Holding Company Act.

The *Schwabacher* case originated in the District Court E. D. Virginia, 72 F. Supp. 560, out of a merger of the Pere Marquette Railroad Co. into the Chesapeake & Ohio Railway Co. The Pere Marquette was incorporated under the laws of Michigan, the Chesapeake & Ohio under the laws of Virginia. The merger was a voluntary one requiring a finding by the Interstate Commerce Commission that it would be "consistent with the public interest," that it would be "just and reasonable," and thirdly the assent was necessary of a "majority, unless a different vote is required under applicable state law, in which case the number so required shall

assent, of the votes of the holders of the shares entitled to vote." Interstate Commerce Act, Sec. 5, (49 U. S. C. A. Sec. 5, 10 FCA, title 49, Sec. 5). It is easy to discern here a striking similarity in the procedure for approving by the I. C. C. of this merger under the Interstate Commerce Act and the provisions in the Public Utility Holding Company Act for approval by the SEC of a voluntary plan for simplification under Section 11 (e). The Supreme Court in its opinion in the *Schwabacher* case treats the plan for the merger on the assumption that it called for a liquidation of the Pere Marquette. This would mean that under Michigan law full payment in cash or its equivalent to dissenting stockholders "for both the par value of their preferred shares and accrued unpaid dividends thereon" would be required. The Supreme Court in its opinion refers to the two statutes as "of very similar purposes." It is true that the Transportation Act describes the jurisdiction of the I. C. C. as "exclusive and plenary" and that these words do not appear in the Holding Company Act with reference to the jurisdiction of the SEC. But this is not a matter of importance if it is apparent from the underlying purposes of both statutes that it was the intent that jurisdiction of the respective commissions within a certain ambit should be exclusive. And as the cases already cited establish, such intent is found in the Holding Company Act. The *Schwabacher* case was heard in the first instance by a three judge court in accordance with the provisions of the Transportation Act. The plaintiffs were preferred stockholders who sought to enjoin an order of the I. C. C. approving the merger. What they really wanted was not, however, to set aside the merger but to compel the Commission to modify its order to grant to the plaintiffs the preferential treatment to which they claimed they would be entitled under Michigan law. The court declined to do this and dismissed the action. It took this action not only because it felt that to give the dissenting stockholders a preference over those who approved the plan had "no support in practical eco-

nomics or in commercial ethics," but primarily because the order of the I. C. C. had left the two railroads "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." The case came before the Supreme Court on an appeal from this decision, which by a 5-3 opinion reversed the lower court.

The reversal of the Supreme Court was on the ground that the Interstate Commerce Commission had exclusive jurisdiction to determine the question of the validity of the merger which it had found just and reasonable. The court said, page 968 of 68 S. Ct., page 1317 of 92 L. Ed.: "We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable." The case was remanded to the Commission for a reconsideration of its findings in the light of this opinion of the Supreme Court holding that state law governing the rights of the dissenting stockholders had been supplanted by the federal statute. A glance at the opinion will show the striking analogy between that case and the one before us. In so far as the authority of the I. C. C. went, its duties in approving a railroad merger are almost identical with those of the SEC in approving a simplification plan. The I. C. C. must find a voluntary carrier-initiated plan "consistent with public interest," "just and reasonable" and assented to by a majority of the stockholders. The SEC must find a voluntary plan initiated under Section 11 (e) "necessary" to comply with the provisions of the statute, and "fair and equitable to the persons affected." The I. C. C. did approve the plan reserving to dissenting stockholders their rights under Michigan law; and as found by the sitting justice in the instant case the SEC did approve the plan submitted by Central Maine reserving to dissenting stockholders their rights under Maine law. If the jurisdiction of the I. C. C. was exclusive and it was under a duty to settle the rights of all stockholders, the

same is unquestionably true with respect to the SEC whose powers over the dissolution of public utility holding companies are broader than the powers of the I. C. C. over railroads.

Some extracts from the opinion in the *Schwabacher* case may be helpful. At page 966 of 68 S. Ct. and 92 L. Ed. 1315, we find the following:

> "It appears to us inconsistent with the Interstate Commerce Act for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. We think that the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger. If some greater amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company."

And again at page 1315 L. Ed.:

> "We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity."

And again, at page 1316 L. Ed.:

> "The Commission likely would not and probably could not be given plenary and exclusive jurisdiction to interpret and apply any state's law. Whatever rights the appellants ask the Commission to assure must be founded on federal, not on state, law.
>
> "Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable. These terms

> would be largely meaningless to the stockholders if their interests were ultimately to be settled by reference to provisions of corporate charters and of state laws. Such charters and laws usually have been drawn on assumptions that time and experience have unsettled. Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces. Cf. Market Street R. Co. v. Commission, 324 US 548, 89 L. ed. 1171, 65 S. Ct. 770. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good."

And we find the following at page 1317 L. Ed.:

> "We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable."

The sitting justice assumed jurisdiction in this case in reliance on the law as it had been declared by the only federal tribunals which up to that time had had this specific question before them, namely, the Interstate Commerce Commission, the Securities and Exchange Commission, and the United States District Court for the Eastern Division of Virginia. He could hardly have done otherwise. He assumed as did those tribunals that the particular federal agency involved had the right to remit to the state court the determination of the issue of the rights of minority stockholders. When, however, the Supreme Court of the United States tells us in the *Schwabacher* case that a state

court is without jurisdiction to take action when a federal tribunal of exclusive jurisdiction has the subject-matter before it, and that state law governing the rights of stockholders has been supplanted, we must accept that ruling as binding on us.

The case should be remanded to the sitting justice for the entry of a decree dismissing the bill.

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

FLORENCE K. WHEELER

vs.

PHOENIX ASSURANCE COMPANY, LTD.

Somerset. Opinion, March 7, 1949.

Insurance. Theft. Referee.

The word "theft" in an automobile insurance policy should be given its usual common law meaning and to be a theft within the meaning of the policy there must be an intent to permanently deprive the owner of her property and not merely an unauthorized use.

The finding of a referee that the one taking an automobile without the consent of the owner and contrary to Chapter 19, Section 120 of Revised Statutes of 1944 but with the intent to return the car is final and does not constitute a theft under the policy in the instant case.

Theft and larceny are synonymous terms and there must be a felonious intent to deprive the owner permanently of the property to constitute a theft.

ON EXCEPTIONS.

Action to recover damages under a fire and theft insurance policy. Finding of theft within meaning of policy by referee accepted by Superior Court and defendant brings exceptions. Exceptions sustained. Case fully appears in opinion.

Benjamin L. Berman,
David V. Berman, for plaintiff.

Locke, Campbell, Reid and Hebert,
Robert W. O'Connor, for defendant.

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

FELLOWS, J. This is an action to recover damages under an automobile fire and theft insurance policy, and the case comes to the Law Court from the Superior Court of Somerset County on exceptions, by the defendant company, to the acceptance of report of referee. Before hearing and by agreement the name of the defendant company was changed in the writ and pleadings to Phoenix Assurance Company, Ltd., a company authorized to do business in Maine. The exceptions are sustained.

The only question in issue is whether the referee was correct in ruling that, under the circumstances here shown, there was a "theft" within the meaning of the policy.

The referee found as facts, and his finding is supported by the evidence, that the plaintiff's automobile was subject to use, possession and control by her husband, Charles Wheeler, a travelling salesman, who stood in the position of the insured. On the afternoon of November 14, 1947 Wheeler told a young man named Philip Campbell to park the car for him near an office in Lewiston, where Wheeler intended to make a business call. Campbell took the car for the purpose of parking it. On arrival at this office, however, Wheeler found neither Campbell nor the car. The following day the car was located in a damaged condition in Portland, where Campbell had taken a young lady on an extended ride, and it had been in a collision. The referee found that "this taking and use by Campbell was without the authority or consent, expressed or implied, of Wheeler. Campbell, I find, intended to return the car when his unauthorized expedition should end."

The policy is in the "Standard Form." The coverage purchased was "A Bodily Injury Liability," "B Property Damage Liability," "C Medical Payments," "D Comprehensive—Loss of or Damage to the Automobile, except by Collision but including Fire, Theft and Windstorm."

The definition of this "COVERAGE D," as contained in the small print under "INSURING AGREEMENTS," is

> "COMPREHENSIVE—LOSS OF OR DAMAGE TO THE AUTOMOBILE, EXCEPT BY COLLISION: To pay for any loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset."

The defendant contends that the word "theft" in this policy should be given its usual and common law meaning, and that to recover there must be an *intent* to permanently deprive the owner of his automobile. The plaintiff, on the other hand, claims that in this case and under these circumstances the meaning is not so limited, and the usual proof of larceny is not required.

A contract of insurance, like every other contract, must receive a reasonable construction, and the whole contract is to be considered. Here, the insured purchased a "theft" policy. She did not buy "collision" insurance. The danger of collision is always imminent, and collision insurance demands additional premium. Was this unauthorized taking by Campbell, therefore, a "theft" within the meaning of the policy, thus permitting a recovery? The referee found that Campbell intended to return the car, and the intent to permanently deprive the owner was at all times lacking. The referee further found that "Campbell did not commit larceny," although "he did violate the statute against use of an automobile without authority of the owner. R. S., (1944), Chap. 19, Sec. 120." The conclusion of the referee was that "unauthorized taking and use," was a "theft" within the meaning of the policy, and that the plaintiff was on that account entitled to recover.

We find no opinion in Maine as a precedent, and our attention has been called only to decisions of other states. The general and majority rule is stated as follows:

> "The term 'theft' has not been uniformly defined. The difference of opinion arises over the question whether the term is practically synonymous with the term 'larceny' or whether it has a more extensive meaning. There is an undercurrent of thought, however, that the usual meaning attached to the term 'theft' is substantially equivalent to that attached to the term 'larceny,' and this is the majority view.
>
> A 'theft' within the meaning of a theft policy is shown if possession is actually taken by a wrongdoer, and if an intent to steal exists or may be inferred. This is true even though the possession is but temporary.
>
> To warrant a recovery on a policy insuring an automobile against theft, there must be more than a wrongful taking; the taking must be with the intent to steal. The intent to steal is a necessary ingredient of the offense and may be inferred from the facts and circumstances of the case."
>
> 5 American Jurisprudence "Automobiles," 820, Sections 568, 569, and cases, with A. L. R. Annotations, there cited.
>
> See also 45 C. J. S. 951, Sec. 886.

The small minority of cases in this country that have permitted recovery under some "theft" policies, where facts were similar to the case at bar, are collected in the A. L. R. Annotations above referred to. It will be noted, however, that in many of the cases that support this minority view, the State statutes defining larceny are held broad enough to mean use without the owner's consent.

In Maine our "conceptions of personal and property rights are based upon the common law." *Conant* v. *Jordan,* 107 Me. 227, 237; 77 A. 938; 31 L. R. A., N. S. 434. "Theft," under common law, is a popular term for larceny. Bouvier

Law Dictionary (Third Edition); Words and Phrases. It is in fact a synonym for larceny. Webster's New International Dictionary. This court in criminal prosecutions and in a libel suit has considered larceny as a carrying away with *animus furandi.* There must be a felonious intent to deprive the owner permanently. *State* v. *Coombs,* 55 Me. 477; 92 Am. Dec. 610; *Stanley* v. *Prince,* 118 Me. 360; 108 A. 328.

Cases, stating the rule of the overwhelming majority of states and including courts we most highly respect, hold that the word "theft," as used in an insurance policy, is definite and well established. There is no ambiguity. It means a taking with intent to deprive, and with no intention to return, as was found to the contrary by the referee in the case at bar. "Theft" is not necessarily the *permanent deprivation* of property. It is the taking with that *intent.*

Chapter 19, Section 120 of the 1944 Revision of the Statutes provides that whoever uses a motor vehicle without authority from its owner is guilty of a misdemeanor. This includes any unauthorized use, whatever the intention. It might apply to a member of the family, or to a neighbor for an emergency, with all intention on the part of the user to make immediate return. It does not appear to be a so-called "larceny statute," although a larceny would naturally be included in its terms. On the other hand, there is no theft unless there is at some time the intent to steal.

The plaintiff suggests that by R. S. (1944), Chap. 118, Sec. 25, the legislature has placed an unauthorized use within the scope of criminal larceny. This section 25, under the title of Malicious Mischief, provides that whoever wilfully or mischievously takes or uses any vehicle, boat, or aeroplane without the consent of the owner is guilty of a misdemeanor, but it expressly states that the provisions of the section do not apply to any case of taking "with intent to steal."

It may well be argued that in many instances the intention to steal an automobile could properly be inferred from the mere fact of taking without the owner's permission, especially where the taker was not a person who stood in friendly or blood relationship. Here, however, the opposite fact is found by the referee. He found no intent to steal, and he could so find under the evidence. His finding of fact is final. *Courtenay* v. *Gagne,* 141 Me. 302; 43 A. (2nd) 817.

A taker of an automobile without permission may be expected to pay for damage resulting from his trespass, but it does not follow that, if he cannot pay, the trespass can at all times be construed as theft. The legislature of Maine has not yet seen the necessity to make a larceny statute so inclusive, and any person may receive from insurance companies complete protection by application for the protection, and paying the premium.

This is a case where the definite word "theft," with meaning well understood for generations under our law, is opposed by the idea that its meaning should be here broadened to "unauthorized use." The referee having found no intent to steal, we are of opinion that he was in error in holding that "unauthorized use" was equivalent to "theft." The Superior Court should not have accepted the report.

Exceptions sustained.

ELMER C. AUSTIN

vs.

INHABITANTS OF ST. ALBANS

Somerset. Opinion, March 10, 1949.

Highways. Exceptions.

Exceptions to a directed verdict make evidence part of record whether made so by the bill of exceptions or not.

The fact that a presiding justice may have given the wrong reason for directed verdict is immaterial, if order was right.

Statute regarding maintenance and repair of ditches, drains and culverts constructed by municipal officers at town expense and providing for action against the town for damages for failure to maintain ited unless there is proof by record or othe municipal officers constructed the drain or di l from a failure to maintain and repair.

Proof t ssioner put on gravel, plowed out the side f pairs from time to time upon an "old road" blic for many years and that damage resui of size is not sufficient under statute.

In the d ditches the municipal officers act as publ a quasi-judicial capacity and their act ormality and entered of record and par luced where the record is incomplete, inc

Tow e resulting from insufficient size of di inal plan of construction where muni s to statutory board and make honest e

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s to land because of alleged failur ditches carrying water. Di-

rected verdict for defendant. Plaintiff brings exceptions. Exceptions overruled. Case fully appears in opinion.

Ames and Ames, for plaintiffs.

Clayton E. Eames, for defendant.

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

FELLOWS, J. This case is before the Law Court from the Superior Court in Somerset County on plaintiff's exceptions to a directed verdict. The evidence is necessarily a part of the case, whether made so by the bill or not, where a verdict is directed. *Brown* v. *Sanborn,* 131 Me. 53; 158 A. 855; *Bradford* v. *Davis,* 143 Me. 124; 56 Atl. (2nd) 68.

The statute, on which this action depends, is R. S., 1944, Chap. 84, Sec. 156 as amended by Chap. 219 of the Public Laws of 1945, which provides that "the municipal officers of a town may, at the expense of the town, construct ditches, drains and culverts to carry water away from any highway or road therein * * * such ditches, drains or culverts shall be under the control of said municipal officers * * * if such town does not maintain and keep in repair such ditches and culverts the owner or occupant of the lands through or over which they pass may have his action against the town for damages thereby sustained."

There was evidence to show that a roadway in the town of St. Albans extended easterly and westerly, and that the plaintiff owned a farm on the lower, or southerly, side of this way. The plaintiff testified that a road commissioner went on to this "old dirt road" in 1946 and put on a large quantity of gravel. The commissioner also used road machines, and "just turned the bank up, rolled the banks right up." "They didn't put enough ditch there to take care of the water and of course it come all over me." Gravel during a rainy season was also washed on to the plaintiff's property.

There is no record or other evidence to show that the municipal officers of the town ever constructed any ditch or drain, or ever took any action in that regard. The evidence shows no record of the establishment or existence of this way. It shows only the facts that it was an "old road" used by the general public as a highway for many years, and that the town's road commissioner had put on gravel, plowed out the sides for ditches, and made certain repairs from time to time.

The land of the plaintiff was apparently, in some places, on a lower level than the land upon the northerly side of the way, and thus received water, gravel and debris from the road, and from across the road, during the heavy rains. The plaintiff claims to be entitled to damages because the ditches were not "maintained and kept in repair," according to the statute, and says that the ruling by the presiding justice in directing a verdict for the defendant town was erroneous.

The statute in question, R. S. (1944), Chap. 84, Sec. 156, above quoted, gives authority to the municipal officers to construct ditches, in a similar manner to authority to construct drains and sewers in the same Chapter 84, Sections 134, 148. In the performance of their duties, including location, size, outlets, and type of construction, the municipal officers do not act as agents of the town, but they act as public officers of the State in a quasi judicial capacity. *Davis* v. *Bangor,* 101 Me. 311; 64 A. 617; *Keeley* v. *Portland,* 100 Me. 260; 61 A. 180.

The action of municipal officers, as such judicial board, must be taken with formality and entered of record. Parol evidence cannot supply a record, and parol evidence is inadmissible to prove the action of the board, unless the record is incomplete, incorrect, or lost. *Kidson* v. *Bangor,* 99 Me. 139, 147; 58 A. 900.

If a ditch is constructed by legal act of the municipal officers of the town, and is not large enough to care for the

water, there is no remedy under this statute. It is only through failure to maintain and keep in repair such ditch, as it was constructed by the municipal officers, that the resulting damage can be recovered. The municipal officers do not act under the statute as agents, and if damage results from insufficient size of a ditch, or other fault in original plan of construction, the town is not liable. When the municipal officers act judicially as a statutory board, the town is not liable for its honest errors of judgment. There must be a failure to repair, or maintain, to the standard of efficiency of its original plan of construction. *Keeley* v. *Portland,* 100 Me. 260; 61 A. 180; *Davis* v. *Bangor,* 101 Me. 311; 64 A. 617.

In the present case the writ contains three counts: (1) that there was a failure to repair a "ditch" and "turnout ditch" on the southerly side of the way; (2) that the ditch on the northerly side of the road was insufficient to care for the amount of water in times of rain, and water crossed the road onto plaintiff's land, and (3) that there was a bridge over a stream at the northwesterly corner of plaintiff's land, higher than the land roadway, so that in time of flood the water overflows "from said ditch," carrying gravel and rocks from the road onto plaintiff's land.

The claim of the plaintiff is based on the failure of a ditch or ditches, but there is no evidence that any ditch was ever legally constructed by the municipal officers. On the contrary, the only evidence was to the effect that a road commissioner, or road commissioners, put gravel onto the road and did not, as the plaintiff said, "put enough ditch." If there had been any evidence to show construction of a ditch under the authority of the municipal officers, there was nothing to show lack of repair. The proof related to sufficiency in size of a ditch, if anything.

The plaintiff states in his brief that he is entitled to damages for defective highway, in any event, because the town has "within six years before the injury made repairs on the

way" and cannot "deny the location of such way," citing R. S. (1944), Chap. 84, Sec. 89. This section of the statute, however, expressly refers to the preceding section (R. S., 1944, Chap. 84, Sec. 88), which section creates the well-known cause of action for defective way when a defect in the highway is the sole cause of any injury, upon previous notice of defect and notice of claim. There are no such allegations in this writ, no notice proved, and no defect in the highway, as sole cause shown. This pending writ and declaration, and the evidence introduced in support, claimed damage alleged to be due to a defective ditch or ditches under Revised Statutes, 1944, Chapter 84, Section 156.

The action of the presiding justice in directing a verdict for the defendant, was proper. The jury had no evidence before it on which a verdict for the plaintiff could be based. *Heath* v. *Jaquith,* 68 Me. 433; *Pike* v. *Smith,* 120 Me. 512; 115 A. 283; *Champlin* v. *Bean,* 143 Me. ; 60 Atl. (2nd) 140.

The record shows that the reason, or one of the reasons, given by the justice presiding for directing a verdict was, that there was no evidence that the road was properly laid out as a town, county or state highway. The plaintiff says the action of the presiding justice in directing a verdict was, therefore, error because there was *some evidence to show a road* by continued use, and cites *State* v. *Bunker,* 59 Me. 366. The status of the road is not the issue. The question is, whether there was a statutory ditch, or ditches, out of repair. The order directing the verdict was right, as we have before shown, and the fact that a wrong reason may have been given for the decision is immaterial. *Warren* v. *Walker,* 23 Me. 453; *Petition of Kimball,* 142 Me. 182; 49 Atl. (2nd) 70. No verdict other than a verdict for the defendant could be upheld.

Exceptions overruled.

ELIZABETH INMAN

vs.

LAWRENCE WILLINSKI

Piscataquis. Opinion, March 15, 1949.

Bastardy. Demurrer.

Statute conferring right to maintain bastardy action by pregnant woman for child which if born alive may be a bastard and conferring right to maintain action where delivered of a bastard child confers no right of action where woman has already been delivered of a dead foetus.

A general demurrer admits all facts well pleaded, and challenges their sufficiency in law upon which to maintain the action.

Bastardy statute contemplates a living child.

Fact that woman was not delivered of a bastard child is one of substance and may be reached by general demurrrer.

Bastardy proceedings are purely statutory and were unknown to the common law.

Statute providing for lying-in expense of mother enlarged the remedy, but not the right.

Procedure in bastardy cases is *sui generis* and it is hard to draw analogies from ordinary common law actions.

ON EXCEPTIONS.

Bastardy action. Demurrer to complaint sustained by presiding justice. Plaintiff brings exceptions. Exceptions overruled. Case fully appears in opinion.

Mathew Williams, for complainant.

Judson C. Gerrish, for respondent.

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

TOMPKINS, J. On exceptions to sustaining a general demurrer to the complaint in a bastardy action brought under Chapter 153, Section 23 et seq. which relates to bastards and their maintenance and reimbursement to the mother for lying-in expenses. Respondent waived argument and filed no brief.

From the copies of the proceedings before us it appears that on the 18th day of April, 1947, the complainant made her accusation on oath before a Justice of the Peace, stating that she was pregnant with a child, which was delivered dead November 21, 1946, and which, if it had been born alive, would have been a bastard, and accused the respondent of being the father of said child. In her complaint and accusation she stated the time and place where the child was begotten, and prayed for process that the respondent be apprehended and held to answer to the complaint and to be further dealt with relative thereto as the law directs.

The warrant was duly issued reciting the facts as set out in the accusation, and the respondent was arrested and brought before a Justice of the Peace. After hearing the Justice of the Peace ordered the respondent to give bond, conditioned for his appearance at the September term 1947 of the Superior Court for Piscataquis County. The bond was furnished and the case continued until the March term 1948. At the latter term the complainant filed a declaration as provided by Section 27 of Chapter 153 of the Revised Statutes, stating that she was delivered of a bastard child on the 17th day of November, 1946, that said child was begotten by the accused on the 30th day of May, 1946, and the place thereof; that during the time of her travail being put upon the discovery of the truth she accused the respondent of being the father of said bastard child of which she was about to be delivered; that she had been constant in said accusation; and that she still accused said respondent of being the father of her bastard child. Thereafter the respondent filed a general demurrer to the complaint.

Issue was joined, and after hearing, the Justice Presiding sustained the demurrer.

The demurrer, "Is a form of pleading incident to every kind of judicial proceeding." *Parks* v. *Crockett,* 61 Me. 489 at 496. A general demurrer admits all facts well pleaded, and challenges their sufficiency in law upon which to maintain the action. And the only issue is whether in the language used the plaintiff has stated a legal cause of action. *Brown* v. *Rhoades,* 126 Me. 186; 137 A. 58; 53 A. L. R. 834; *Bank* v. *Kingsley,* 84 Me. 111 at 113; 24 A. 794.

Bastardy proceedings are purely statutory and were unknown to the common law. *Woodbury* v. *Yeaton,* 135 Me. 147 at 148; 191 A. 278.

The complainant seeks to recover her costs of suit and expenses of her delivery and her nursing, medicine and medical attendance during the period of her sickness and convalescence.

Solution of the question depends upon the construction of the bastardy statute. A statute must be construed as a whole. *Rackliff* v. *Greenbush,* 93 Me. 99-104; 44 A. 375.

Section 23 of Chapter 153 provides, "When a woman pregnant with a child, which, if born alive, may be a bastard, or who has been delivered of a bastard child, accuses any man of being the father thereof before any Justice of the Peace, and requests a prosecution against him, such Justice shall take her accusation and examination on oath, respecting the accused and time and place when and where the child was begotten, as correctly as they can be described, and such other circumstances as he deems useful in the discovering of the truth."

Section 24 provides: "The Justice may issue a Warrant for apprehension of the accused . . . . ."

Section 25 provides: "When the accused is brought before such or any other Justice, he may be required to give bond to the complainant with sufficient sureties in such reasonable sum as the Justice orders, conditioned for his appearance at the next term of the Superior Court for the County in which she resides, and for his abiding the order of the Court thereon . . . . ."

Section 26 provides: "If at such next or any subsequent term, the complainant is not delivered of her child, or is unable to attend Court, or shows other good reasons, the cause may be continued."

Section 27 provides: "Before proceeding to trial, the complainant must file a declaration, stating that she has been delivered of a bastard child begotten by the accused, and the time and place when and where it was begotten, ... ; and that being put on the discovery of the truth during the time of her travail, she accused the respondent of being the father of her child, and that she had been constant in such accusation."

Section 28 provides: "When the complainant has made said accusation; been examined on oath; been put upon the discovery of the truth of such accusation at the time of her travail, and thereupon accused the same man with being the father of the child of which she is about to be delivered; has continued constant in such accusation, and prosecutes him as the father of such child before such Court; he shall be held to answer to such complaint; and she may be witness in the trial."

Section 29 provides: "If on such issue the Jury finds the respondent not guilty, he shall be discharged, but if they find him guilty, or the facts in the declaration filed are admitted by default or on demurrer, he shall be adjudged the father of said child; stand charged with its maintenance, with the assistance of the mother, as the Court orders; and shall be ordered to pay the complainant her costs of suit

and for the expenses of her delivery and of her nursing, medicine, and medical attendance during the period of her sickness and convalescence, and of the support of such child to the date of rendition of Judgment; and shall give a bond, with sufficient sureties approved by the Court, or by the Clerk of said Court . . . . . to the complainant to perform said order and a bond, with sufficient sureties so approved, to the town liable for the maintenance of such child . . . . ."

Under the statute as it existed prior to 1909 no provision was made for lying-in expenses. Chapter 111 of Public Laws of 1909 amended Section 7 of Chapter 99 of the Revised Statutes of 1903. This section now appears as Section 29 of the Revised Statutes of 1944. The amendment provided that a filiation order might include reimbursement to the complainant for costs of suit, expenses of her delivery, her nursing, medicine, and medical attendance during the period of her sickness and convalescence. There was no amendment, however, made to Section 23 or the other sections of the statutes corresponding to the sections of the Revised Statutes of 1944, which authorized the commencement and prosecution of the action. The right to institute action was confined to a woman who was, "Pregnant with a child which if born alive might be a bastard," or after the birth of the child was still confined to a woman who had, "Been delivered of a bastard child," and the statutory requirement that before proceeding to trial the complainant must file a declaration stating that she, "Has been delivered of a bastard child," remained unchanged. The sole object of the statute before the amendment of 1909 relating to bastard children was to compel the putative father to aid in supporting his illicit offspring. Without his assistance the support must fall on the mother or the municipality. *Woodbury* v. *Wilson,* 133 Me. 329; 177 A. 708 and cases there cited.

The purpose of the amendment of 1909 was to enlarge the order for the benefit of the mother, and thus compel the

father to render additional help in paying costs of suit, the expenses of her delivery, nursing, medicine, and medical attendance during the period of her sickness and convalescence. *Woodbury* v. *Wilson, supra.*

Will the fact that the child is born dead before complainant institutes proceedings abate the action and relieve the respondent from the expenses provided for by the 1909 amendment to Section 29? This is the first time the question has been before this court.

In *Canfield* v. *State,* 56 Ind. 168, there was a prosecution in which the complainant alleged she had been delivered of a bastard child. The evidence showed that the child was stillborn, that its lungs were never inflated, and the prosecution was commenced after the birth of the child. The court held that the proof did not sustain the averment of the complainant that she, "Had been delivered of a bastard child. That never having breathed it had never lived; Until a child is wholly born and has attained a separate existence, it is but a foetus *in utero* and not a human being, within the meaning of the law authorizing proceedings for the maintenance of bastard children after their birth."

In *State* v. *Beatty,* 61 Iowa 307; 16 N. W. 149, the statute provided that when, "Any woman . . . . . is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing . . . . ." The statute further provided, "If the accused be found guilty he shall be charged with the maintenance of the child, ... with the costs of suit." The action was commenced during pregnancy, the child was born dead, the court said, "It having been dead born it never was a being whose maintenance could be charged to anyone. It is true, the action was properly commenced before the delivery of the child, because the law authorized it to be commenced. But it does not follow that because the action was properly commenced, the right of action continued after it was demonstrated that there was not and could not be a bastard

child to maintain. The child not having been born alive, the action abated and no judgment could be rendered against the defendant for the maintenance of a person not in existence, and who never was in being, and if no judgment could be rendered against the defendant he was not liable for costs."

By analogy and by the reasoning in the above cases we hold that our statute contemplates a child born alive. That in the instant case our statute when it used the term, "Delivered of a bastard child," meant a living human being. The dead foetus cannot be substituted for the living organism and does not supply the requirements of the statute. We express no opinion upon what the result would be if the action was commenced before the delivery of the dead foetus. We are not confronted with that issue in the case under consideration.

Section 29 of the statute provides that upon the issue, "They (the Jury) find him guilty or the facts in the declaration filed are admitted by default or on demurrer, he should be adjudged the father of said child." No filiation order could issue because there was no child of which the accused could be termed the father. If no filiation order could issue then no order for payment for the expenses set forth in the statute could issue, unless the 1909 amendment changed the meaning of the words, "Delivered of a bastard child," and allowed the court to order reimbursement for lying-in expenses. The words in the prior sections of the statute were not changed and still retained the phrase, "Delivered of a bastard child," which means a living child, as we have heretofore stated.

It has been noted heretofore that before the amendment of 1909 the sole object of the statute was the maintenance of the bastard child, and as assumed in *Denett* v. *Nevers*, 7 Me. 399, the costs of suit.

To hold that the 1909 amendment changed the meaning of the phrase, "Delivered of a bastard child," would require a finding that the 1909 act amended the other sections of the statute by implication. "Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases. The Legislature will not be held to have changed the law it did not have under consideration when enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together." Sutherland Statutory Construction, Third edition, Section 1913. This principal has been recognized by our court in *Starbird* v. *Brown,* 84 Me. 238; 24 A. 824 and *Mace* v. *Cushman,* 45 Me. 250 at 260.

From the effective date of an amendment a statute is to be construed as if it originally contained the new provision. *State* v. *Goddard,* 69 Me. 181. Our court has said, "A Statute must be construed as a whole and the construction ought to be such as may best answer the intention of the Legislature. Such intention is to be sought by an examination and consideration of all its parts and not from any particular word or phrase that may be contained in it. This is the guiding star in the construction of any statute. Such a construction must prevail as will form a consistent and harmonious whole." *Rackliff* v. *Greenbush, supra.* In construing a statute the amendment should be confined to the subject matter of the statute in which the change is made. *Cushing* v. *Everett,* 82 Me. 260 at 265; 19 A. 456.

Applying these tests to the instant case it is readily seen that the amendment of 1909 did not change the original meaning of the phrase, "Delivered of a bastard child." The amendment was to Section 29 of the Act respecting the remedy and not to Section 23 giving the right. The amendment was designed solely for the purpose of giving an additional remedy to, "A woman who has been delivered of a bastard child," not to create a right where no right existed

before. If the Legislature had intended the respondent to pay for lying-in expenses caused by pregnancy, alone, it could have said so.

The final question confronting this court is a procedural one. Whether or not the fact of the delivery of a stillborn child as stated in the original accusation and complaint to the Justice of the Peace, and in the warrant which he issued thereon, is such a defect as is open to attack by a demurrer filed to the complaint in the Superior Court. The procedure in bastardy cases is *sui generis*, and it is hard to draw analogies from ordinary common law actions. "The Statute introduces provisions differing most materially from the course of proceedings of the common law, and the rights of the parties will depend upon their construction." *Blake* v. *Junkins*, 34 Me. 237.

By Section 28 of the Act, it is only when the complainant has made the accusation before the Justice of the Peace as provided for in Section 23, and further statutory requirements are fulfilled that the respondent has to answer to the complaint. The right to prosecute is derived wholly from Section 23 of the Statutes. That the complainant has been delivered of a bastard child is an essential preliminary to the adjudication. "To authorize an adjudication in her favor the complainant must show a compliance on her part with all the essential requirements of the Statute." *Palmer* v. *McDonald*, 92 Me. 125; 42 A. 315, 316. The accusation and complaint showed upon its face that the complainant had not been delivered of a bastard child, and she has not come within the provisions of Section 23 of the Act. The accusation she has made is one upon which a filiation order cannot be issued under Section 29. The complaint to the justice is that on which the filiation final order is to be made, and is the basis on which the respondent is brought before the court. Its sufficiency and substance to comply with Section 23 is one of the conditions precedent to requiring the respondent to answer thereto. Our court has

held that it was not error in the bastardy proceedings to make the adjudication upon the default of a defendant who has been duly served with process and who has given a valid bond for his appearance to abide the order of court, upon the complaint and before the filing of the declaration provided for in Section 27. *Priest* v. *Soule,* 70 Me. 414. This section also required that the complainant must file a declaration stating, "That she has been delivered of a bastard child." A dead foetus is not a bastard child, and she would not be entitled to recover under the bastardy statute. The issue in a case of this nature is whether the complainant has been delivered of a bastard child begotten by the respondent. She was not so delivered, because it was stillborn. In her complaint she states that if it had been born alive it would have been a bastard. This was a defect in substance in the complaint, and can properly be reached by a general demurrer to the complaint. Section 28 of the Statute provides that after all the preliminary statutory proceedings have been complied with that it is then "He shall be held to answer to such Complaint." He has answered to the complaint by a general demurrer.

We are not unmindful of the case of *Cooper* v. *Littlefield,* 45 Me. 549 cited in the complainant's brief. In that case the respondent filed a general demurrer to the declaration and the proceedings. The objection which the defendant there sought to raise was that he was never brought before any Justice of the Peace or Magistrate for a preliminary examination, and that the officer in taking the bond was unauthorized to do so, and thus gave the court no jurisdiction. The court said, "The copies, which are before us, show that the proceedings were authorized by law . . . . . but the defendant having submitted to the jurisdiction of this court, and filed his demurrer, is precluded from making successfully the objections on which he relies. The defects referred to were in preliminary proceedings, if they really existed, which cannot avail the defendant upon the demurrer. The copies exhibit sufficient to have entitled the

complainant to a judgment of filiation against the defendant, on proof of the facts as they appear in the documents. These facts being admitted as the case is presented, the demurrer was properly overruled, and the complainant is entitled to judgment thereon."

In the instant case the demurrer was to the complaint alone and not to the declaration and proceedings. The complaint as filed in the instant case clearly shows that the complainant is not entitled to judgment, because the complaint itself is insufficient in law. It is the complaint to which he is held to answer. It states on its face facts which preclude the complainant from recovery. The demurrer to such complaint in the Superior Court properly raised the issue as a matter of law, whether the complainant had been, "Delivered of a bastard child." She had not. The presiding justice properly sustained the demurrer. The respondent is entitled to judgment thereon.

Exceptions overruled.

LEO M. HADLEY

vs.

BARBARA H. HADLEY

Cumberland. Opinion, February 17, 1949.

Divorce.

A divorce may not be grounded on an act committed by one insane when it was performed.

The words insane and insanity as applied to conduct has a range of meaning sufficiently broad to include one ruled or possessed by an insane delusion intermittently and the acts of such a person while so ruled or possessed.

Whether one ruled or possessed at times by an insane delusion was so ruled or possessed at the times pertinent to the particular acts is a question of fact.

Factual decisions in divorce proceedings will not be disturbed in appellate proceedings if supported by credible evidence.

ON EXCEPTIONS.

The libellant was granted a divorce and the libellee brings exceptions. Exceptions overruled. Case fully appears in the opinion.

Berman, Berman and Wernick, for libellant.

Francis W. Sullivan, for libellee.

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

MURCHIE, J. The issue raised by this libellee's exceptions to the granting of a divorce to her husband on the ground of cruel and abusive treatment can be posed most clearly by quoting the language in which it is stated in the Bill of Exceptions:

> "The libellee asserts that there is no evidence to sustain * a decree in that the evidence and testimony submitted prove insanity of the libellee during the periods pertinent * * * and * * * disclose acts of the libellee caused or occasioned by unsoundness of mind and not constituting * * * cruel or abusive treatment to the libellant."

The allegation that the insanity, or unsoundness of mind, is a periodic or part-time one carries recognition that the evidence justified the finding made, assuming the libellee's responsibility for her conduct.

The parties were married in February 1919 and lived together from that time until June 1944 and for two periods thereafter. The first of the later periods commenced in August 1944 and extended to December 1945. The opening date of the second is not definitely fixed in the record, but it ended August 31, 1947, the date of the final parting. The libellant left home on each occasion, as he said, as the result of incessant nagging, taking the forms of constantly reiterated charges of infidelity, and somewhat trifling physical abuse. His first return was on libellee's promises to give up her work, in a shipyard, submit to a surgical operation, which both thought she needed and she later had, and quit her nagging, and her declaration that she believed her earlier charges untrue. The later returns were at the solicitation of one or more of three living children born to the marriage, and on the advice of counsel, who claimed to have the assurance of the wife that she would do better.

The allegation of insanity, in the exceptions, is grounded in proof that the libellee entered a hospital on May 25, 1946, and had fourteen treatments therein which the doctor who gave them describes as electric shock therapy. She left the hospital July 15, 1946. Two daughters who testified for her described her as much better thereafter. The doctor stated, in a letter admitted in evidence, that on his first examina-

tion he found the libellee a "fifty year old woman who expressed paranoid ideas;" that after the therapy she had "ideas of reference;" and that when she left the hospital she was insane. He explained "paranoid" and "ideas of reference" as meaning delusions of persecution without adequate ground and "that people talk about one in a way that is beyond reality," but made no attempt to explain what he meant by the word "insane." The general picture, as he said, was that of a woman in middle life developing a mental disease "characterized by delusions of persecution and abnormal jealousy directed against her husband."

There is ample authority for the principle that a divorce may not be grounded on an act committed by one insane when it was performed. That principle is generally accepted where a divorce is sought for adultery, although *Matchin* v. *Matchin,* 6 Pa. St. 332; 47 Am. Dec. 466, allowed a divorce therefor. The special basis on which that decision was rendered has been expressly repudiated in *Wray* v. *Wray,* 19 Ala. 522; *Nichols* v. *Nichols,* 31 Vt. 328; 73 Am. Dec. 352; and *Walker* v. *Walker,* 140 Miss. 340; 105 So. 753; 42 A. L. R. 1525. The principle has been applied in cases involving cruel and abusive treatment and desertion. See *Hansel* v. *Hansel,* 3 Pa. Dist. R. 724 (where the *Matchin* case was distinguished); 19 C. J. 76, Sec. 170; 27 C. J. S. 597, Sec. 55 b; 17 Am. Jur. 266, Sec. 227; *Broadstreet* v. *Broadstreet,* 7 Mass. 474; *Hartwell* v. *Hartwell,* 234 Mass. 250; 125 N. E. 208; *Storrs* v. *Storrs,* 68 N. H. 118; 34 A. 672. Nothing appears in the reports in the *Broadstreet* case except the notation of the reporter that a divorce libel was dismissed on the suggestion of libellee's counsel that she was insane at the time of her alleged act, that "being proved to the satisfaction of the Court."

This case presents the opposite situation. The granting of the divorce imports a factual finding that the libellee was answerable for her conduct at the time of the acts found to constitute cruel and abusive treatment. Whether that

finding carries decision that the libellee was not insane at any time or merely "during the periods pertinent," to use the language of the Bill of Exceptions, need not be decided. The words "insane" and "insanity" have a wide range of meaning, as reference as any dictionary will show. The coverage of either term is well stated in 28 Am. Jur. 656 et seq., Secs. 2 and 3. What is said of the decision of *Hansel* v. *Hansel, supra,* in a note in 34 L. R. A. at Page 165, indicates the range:

> "to establish insanity as a defense in an action for divorce for cruel and barbarous treatment * * * the defendant must have been in such a mental condition as to deprive him of the use of his reason to the extent that he did not know right from wrong and was incapable of willing the one or the other."

Authority for granting a divorce against a libellee suffering from an insane delusion as distinguished from insanity is found in *Smith* v. *Smith,* 40 N. J. Eq. 566; 5 A. 109, and in *Youmans* v. *Youmans,* 3 N. J. Eq. 576; 129 A. 122. It is well established in this State that the general principle applicable to factual findings, i. e. that those made by the trier of fact will not be disturbed in appellate proceedings if supported by credible evidence, is controlling in divorce proceedings. *Alpert* v. *Alpert,* 142 Me. 260; 49 A. (2nd) 911; *Stewart* v. *Stewart,* 143 Me. 406; 59 A. (2nd) 706. The issue here is not whether the record would support a decision of fact that the libellee was not legally responsible for conduct held to constitute cruel and abusive treatment within the purview of our divorce statute. R. S., 1944, Chap. 153, Sec. 55. The trier of fact found that she was. It cannot be said that she was not, as a matter of law, on the evidence in the record. No other issue is before us.

Exceptions overruled.

ELEANORA GAGNON'S CASE

Androscoggin. Opinion, March 17, 1949.

Workmen's Compensation. Total Incapacity. Evidence.

Employer or insurance carrier paying compensation for total incapacity must show that employee is able to perform such work as is ordinarily available in the community where she resides and thereby earn wages in order to maintain a petition for review on ground that employee is only partially incapacitated.

In the absence of competent evidence to sustain a finding of commission, the issue becomes one of law, and it is the duty of the court to set aside findings of commission.

Injured employee is entitled to compensation for total incapacity even though injury would ordinarily cause only partial disability where injury was coupled with preexisting malady, and where employee could still earn the same wages received at time of accident notwithstanding the disease, except for the accident.

ON APPEAL.

Appeal by employee from a *pro forma* decree entered by superior court in accordance with Industrial Accident Commission decision. Appeal sustained. Decree reversed. Court below to fix employees compensation on appeal.

Benjamin L. Berman, David V. Berman, for appellant.

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

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

THAXTER, J. This is a Workmen's Compensation case. The employee, Miss Gagnon, sustained a compensable injury on May 26, 1946, by slipping on a wet floor. She suffered a fracture of the twelfth dorsal vertebra; and a bone

graft operation to immobilize the joint was performed. She was paid compensation for total incapacity at the rate of $21.00 per week to April 27, 1948, when the insurance carrier, having previously filed a petition for review, stopped further payments. After a hearing the commission filed its decision to the effect that "as far as her back is concerned" she was not totally incapacitated but was partially incapacitated to the extent of 75 per cent. Her compensation was accordingly reduced from $21.00 per week to $16.66 to be paid to her from April 28, 1948. A *pro forma* decree was filed in accordance with the provisions of R. S., 1944, Chap. 26, Sec. 41, and from such decree an appeal was duly taken to this court by the employee.

After she was discharged from the hospital it was discovered that she was suffering from Parkinson's disease, otherwise known as *paralysis agitans*. This is an incurable degenerative disease which was in no way connected with the accident. There was evidence that she must have had it prior to the accident but it apparently had not interfered with her work. The expert testimony would have justified a finding that, though the accident and her confinement in bed may have lighted up the condition and made it acute, yet, according to the testimony of Dr. McDonald, the disease was no worse at the time the petition for review was filed than it would have been had there been no accident and no hospitalization growing out of such accident. There is ample evidence to support the finding of the commissioner that incapacity due to the back injury was 75 percent. In this case, as in others which have come before us, this commissioner has made an able and conscientious analysis of the evidence. It is not, however, altogether clear just what is the basis for his finding in this instance. There are two possible suppositions: (1) that Miss Gagnon is able to do some work at which she can earn 25 percent of the average weekly wage she was receiving at the time of the accident, or (2) that she is totally disabled because of the combination of the accidental injury and a diseased con-

dition. It makes no difference which one of these theories the commissioner adopted, the appeal must be sustained.

As to the first, it must be borne in mind that the burden of proof is on the petitioner, in this case the employer or insurance carrier, to show that the employee is able to perform such work as is ordinarily available in the community in which she resides and thereby can earn sufficient wages to justify the finding of the commissioner as to partial incapacity. *Connelly's Case,* 122 Me. 289; 119 A. 664; *Milton's Case,* 122 Me. 437; 120 A. 533.

In the instant case there is no competent evidence to sustain a finding that the employee is able to perform any remunerative work and the issue becomes one of law. The duty of this court under such circumstances is to set aside the finding of the commission. *Mailman's Case,* 118 Me. 172; 106 A. 606; *Robitaille's Case,* 140 Me. 121; 34 A. (2nd) 473; *St. Pierre's Case,* 142 Me. 145; 48 A. (2nd) 635.

On the second supposition that the employee is totally disabled because of an injury which of itself would cause only partial disability but which combined with the *paralysis agitans* causes total disability, we have a problem which has been given consideration by both courts and legislatures. In the case of Miss Gagnon there is no evidence to indicate that her capacity to earn the wages which she was receiving at the time of the accident has been impaired because of the disease. Except for the accident she might still be able to earn the same wages. Assuming that she could, the appellees would be responsible for her total incapacity.

This problem is discussed in *Nease* v. *Hughes Stone Co.* (Okla. Supreme Court 1926) 114 Okla. 170; 244 P. 778. An employee had lost the sight of an eye. By an industrial accident subsequently suffered he lost the sight of the other. It was held that the employer was liable for total permanent incapacity. The case was based on two Massachusetts decisions, *Madden's Case,* 222 Mass. 487; 111 N. E. 379;

L. R. A. 1916D, 1000; *Branconnier's Case,* 223 Mass. 273; 111 N. E. 792. The first of these was the case of an employee who was incapacitated because of a weakened heart, combined with an industrial accident; the second of an employee with but one eye, who lost the other in an industrial accident. Each case holds that if total incapacity resulted from the second injury the employer was liable irrespective of whether the incapacity may have been due in part to the prior condition.

Some jurisdictions by statute have attempted in such cases to apportion the liability for total incapacity between the employer and a so-called "second injury fund." The purpose of such statutes is, not only to relieve the employer from liability for incapacity occasioned by the first injury or diseased condition as the case may be, but to minimize the chance that wage earners may be denied employment because of a physical handicap. We have such a statute in Maine but it applies only to the specific injuries therein enumerated. R. S., 1944, Chap. 26, Sec. 14. The case now before us does not come within the terms of such statute. The general rule therefore applies, and if there is total incapacity here, the appellees are liable. In construing a federal statute setting up a second injury fund, a recent case decided by the Supreme Court of the United States, February 14, 1949, discusses this problem. *Lawson* v. *Suwanee Fruit & Steamship Co.,* 336 U. S. 198; 69 S. Ct. 503; 93 L. Ed. 470.

Appeal sustained.

Decree reversed.

Court below to fix employee's expenses on appeal.

EASTERN TRUST & BANKING CO.

vs.

THOMPSON L. GUERNSEY

AND

MAINE BROADCASTING COMPANY, INC.

Penobscot. Opinion, March 18, 1949.

Pleadings. Corporations. Negotiable Instruments.

Corporation and former president waive proof of signatures and authority to execute note on behalf of the corporation by failure to file affidavit denying signatures and execution of note.

The burden of proving that the note was for the accommodation of the individual maker, that the payee had knowledge or notice thereof, that as to the corporation the note was *ultra vires* and void, rests upon the defendants to sustain by proof of legal weight and sufficiency.

The title of a holder before maturity can only be defeated by proof that he took it with knowledge that it was accommodation paper or that under the facts, he is chargeable with notice.

A corporation may be estopped to invoke the defense that it acted *ultra vires* in executing accommodation paper where all stockholders of a corporation assent and no rights of creditors or the state intervene.

ON EXCEPTIONS.

Action on a note against a corporation and its former president. The jury were directed to return a verdict for plaintiff and the corporation brings exceptions. Exceptions overruled. Case fully appears in the opinion.

James E. Mitchell, Edgar M. Simpson, for plaintiff.

Verrill, Dana, Walker, Philbrick and Whitehouse, Brooks Whitehouse, Edward T. Gignoux, of counsel, for defendant.

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

STURGIS, C. J. This is an action on the joint and several promissory note of Thompson L. Guernsey and the Maine Broadcasting Company, Inc. payable on demand to the Eastern Trust & Banking Company. At the trial, issue having been joined on the defendant's several pleas of the general issue and the brief statement of the Maine Broadcasting Company, Inc. that its signature on the note was for the accommodation of Thompson L. Guernsey and of this the Eastern Trust & Banking Company had knowledge or notice, the plaintiff, proof of signature and execution not having been denied, introduced the note and rested, the defendant Thompson L. Guernsey made no defense, and at the close of the evidence the jury were directed to return a verdict of $43,482.67 for the Eastern Trust & Banking Company and to this and other rulings the Maine Broadcasting Company, Inc. reserved exceptions.

The note in suit dated June 25, 1941, and for $50,500 is a renewal of a note of similar tenor for $60,000 made by Thompson L. Guernsey and the Maine Broadcasting Company, Inc., as comakers, on November 28, 1939, and discounted by the Eastern Trust & Banking Company. At that time the Broadcasting Company operated a radio station in Bangor and Thompson L. Guernsey was its President and Treasurer, owned all of its capital stock, managed its business and had absolute and exclusive control of its corporate affairs and this was known to the officers of the Trust Company where the Broadcasting Company was a depositor and had frequently negotiated substantial loans. And the Broadcasting Company was not only solvent but owed no debts and had no creditors.

On November 28, 1939, Thompson L. Guernsey called at the Trust Company, interviewed its president and requested a loan of $60,000 on a joint and several note of even date for that amount, payable on demand with interest at five per cent and signed Thompson L. Guernsey and Maine Broadcasting Co., Inc., Thompson L. Guernsey, President. Although no information was given or inquiry made as to the use which was to be made of this loan or for whose benefit it was being negotiated the note as made was accepted and, apparently assuming that the loan was for the Broadcasting Company, credit on its checking account was suggested. But this was not satisfactory to Mr. Guernsey and at his request the Second National Bank of Boston, a correspondent of the Trust Company, was directed to pay "Maine Broadcasting Company or Thompson L. Guernsey $60,000 upon identification" and on November 29, 1939 it issued its checks in that aggregate amount to Thompson L. Guernsey and notified the Trust Company of the payment and a charge to its account. As to what became of these checks or their proceeds is not here disclosed and Thompson L. Guernsey although present at the trial and available as a witness was not called upon to reveal.

The record also shows that Thompson L. Guernsey still owning all of the stock of the Broadcasting Company, and continuing to manage and control its affairs, not only never denied his own liability or that of the Maine Broadcasting Company, but, without suggestion that it was made for his own accommodation, caused the note given the Trust Company on November 28, 1939, as related, to be reduced by regular monthly payments to $50,500 and on June 25, 1941 renewed it by the note of similar tenor and execution for that amount, which with interest accrued has since been reduced to $43,482.67 and is now here in suit. And it was not until Mr. Guernsey lost his offices in and control of the Broadcasting Company on February 17, 1944, when all of his stock in that Corporation which he had pledged in January 1938 to the Congress Square Hotel Company of Port-

land as security for a personal loan of $180,000 was sold at judicial sale, that the Broadcasting Company, then under a new management, advanced the claim that these notes were made for accommodation and denied liability.

As this case was presented at the trial proof of the signatures on and the authority of Thompson L. Guernsey to execute the notes of June 25, 1941 and November 28, 1939 for the Maine Broadcasting Company, Inc. was waived. *Rule X Supreme Judicial and Superior Courts; Bank* v. *Merriam,* 114 Me. 437, 439; 96 A. 740; *Gilman* v. *Carriage Co.,* 125 Me. 108; 131 A. 138. And under the pleadings the issues to be determined were whether the notes were for Thompson L. Guernsey's accommodation, the Eastern Trust & Banking Company had knowledge or notice thereof and therefor, as to the Maine Broadcasting Company, Inc. the notes in their execution were *ultra vires* and void. The burden rested on the Maine Broadcasting Company, Inc. to sustain these issues by proof of legal weight and sufficiency.

The note of June 25, 1941 was negotiable and regular upon its face and as and when the Eastern Trust & Banking Company received it the Maine Broadcasting Company, Inc. is deemed prima facie to have become a party thereto for value. *Uniform Negotiable Instruments Act,* R. S., 1930, Chap. 164, Sec. 24. But the note was made only for the purpose of renewing the note of November 28, 1939 which Mr. Guernsey and the Broadcasting Company had made and given to the Trust Company, no new consideration was then paid, and on the record the Broadcasting Company had received no value for becoming a party to the original note. For, as related, Thompson L. Guernsey at his own request received the loan, and with no proof that any part of it was ever paid to the Broadcasting Company or used for its benefit, the conclusion is not without warrant that Thompson L. Guernsey obtained that money as an individual and used it for his own purposes. It cannot be held that the presumption that the Broadcasting Company became a party for

value to either of these notes of November 28, 1939 and June 25, 1941 was not rebutted.

So too a finding that the Maine Broadcasting Company, Inc. not only executed the note of November 28, 1939 but also the renewal note of June 25, 1941, which we are considering, for the accommodation of Thompson L. Guernsey, the other maker, and of this the Eastern Trust & Banking Company had notice could be sustained. There is no doubt that Mr. Guernsey made out both of these notes and signed his own name and subscribed the name of the Broadcasting Company upon them. He applied for the loan on the original note and, rejecting a proposal that the money be credited to the account of the Broadcasting Company, requested and obtained payment of it in checks to his own order and the Trust Company is charged with knowledge of the incidents of that transaction. Thompson L. Guernsey also made out the note of June 25, 1941, subscribed the name of the Maine Broadcasting Company, Inc. on it and, receiving no new consideration, gave it to the Eastern Trust & Banking Company as a renewal of the original note. These facts and the inferences that lie in them, unexplained and never clarified, are sufficient to put the Trust Company on inquiry and notify it that when it accepted these notes of June 25, 1941 and November 28, 1939 it was taking accommodation paper. In principle, as to notice, this case cannot be distinguished from *Boyle* v. *Lewiston Trust Company,* 126 Me. 74; 136 A. 292.

The general rule is that unless a private corporation is expressly authorized to do so by its charter its execution of accommodation paper merely for the benefit of a third person is beyond the scope of its corporate authority. And where the charter is not before the court it will not be presumed that the corporation has been granted unusual and extraordinary powers. 6 *Fletcher Cyclopedia Corporations,* § 2505. But the paper is not null and void and if the corporation has creditors the title of a holder before maturity

can only be defeated by proof that he took it with knowledge that it was accommodation paper or under such facts and circumstances that he is chargeable with notice. This rule was applied to an insolvent corporation in receivership where the rights of creditors were involved. *Johnson* v. *Johnson Bros.*, 108 Me. 272; 80 A. 741, Ann. Cas.; 1913 A. 1303, and cases cited. The rule is not in conflict with Section 29 of the Uniform Negotiable Instruments Act as construed in *Madigan, Receiver* v. *Lumbert,* 136 Me. 178; 5 A. (2nd) 278.

But there is convincing authority that a corporation cannot rely on *ultra vires* and is liable on accommodation notes it has executed in excess of its corporate authority where all the stockholders assent and there are no corporate creditors.

In *Thompson on Corporations,* (3d Ed.) Vol. 3, § 2301, it is said:

> "The rigid rule that corporations can neither execute, accept nor endorse negotiable paper for accommodation is not without its limitation. * * * Undoubtedly a private corporation may become an accommodation endorser or surety or it may issue its notes, stocks or bonds below par or even without consideration; it may even give away its assets or mortgage its property for the benefit of individual stockholders or officers, where all the stockholders assent to any such transaction and where there are no corporate creditors." See *Cook on Corporations,* (3d Ed.) Vol. 1, § 3.

This rule has been generally accepted and the fact that a corporation exceeded its authority in executing accommodation paper and acted *ultra vires* rejected as a defense where all the stockholders assent to the transaction and no rights of the state or creditors intervene. *Murphy* v. *Arkansas & L. Land & Improvement Co.,* 97 Fed. 723; *In Re Amdur Shoe Co.,* 13 F. (2nd) 143; *Thomas* v. *E. J. Curtis Sons Co.,* 7 F. Supp. 114; *Sargent* v. *Palace Cafe Co.,* 175

Cal. 737; 167 P. 146; *Perkins* v. *Trinity Realty Co.*, 69 N. J. Eq. 723; 61 A. 167; *Martin* v. *N. F. P. Mfg. Co.*, 122 N. Y. 165; 25 N. E. 303. Decisions in these cases expressly or by implication rest on the doctrine of estoppel. That doctrine is approved in *Dome Realty Co.* v. *Gould,* 285 Mass. 294, 301; 189 N. E. 66. It was not considered in *Johnson* v. *Johnson Bros.*, 108 Me. 272; 80 A. 741, Ann. Cas.; 1913 A. 1303. We think it should be adopted and applied in this case.

When the Maine Broadcasting Company, Inc. on June 25, 1941 and November 28, 1939, executed its notes, even if they were for the accommodation of Thompson L. Guernsey, he was the only stockholder of the corporation, necessarily assented and there were no creditors. He was the alter ego of the Broadcasting Company, undoubtedly handled its moneys and affairs as if they were his own and for practical purposes the corporation was a fiction. With general knowledge at least of this situation the Eastern Trust & Banking Company loaned $60,000 on these notes of which $43,482.67 remains unpaid and it must be assumed that the granting of that loan was induced in part, at least, by the fact that the Broadcasting Company was a maker. Thompson L. Guernsey has paid his personal loan for which his stock was pledged when the notes were made, and as the pledge had been extinguished when the present stockholders acquired his stock, they cannot complain. *McCampbell* v. *Railroad,* 111 Tenn. 55, 75; 77 S. W. 1070; 102 Am. St. Rep. 731. And the rights of the Maine Broadcasting Company, Inc. were not affected by that transaction. In these circumstances the Maine Broadcasting Company, Inc. is estopped to invoke the defense of *ultra vires* in this action.

The Exceptions relating to the exclusion of evidence are without merit. The ruling below directing a verdict for the Eastern Trust & Banking Co. was not error. The mandate is,

Exceptions overruled.

DEPOSITORS TRUST COMPANY
TRUSTEE OF THE ESTATE OF
JOSEPH M. CLOUTIER
vs.
RICHARD E. BRUNEAU
AND
MAURICE H. DREW

RICHARD BRUNEAU
AND
MAURICE DREW
vs.
DEPOSITORS TRUST COMPANY
TRUSTEE OF THE ESTATE OF
JOSEPH CLOUTIER

Kennebec. Opinion, April 29, 1949.

Contracts. Deeds. Referees. Incumbrances.

Where contract by trustee for sale of real estate is silent as to the kind of a deed by which conveyance was to be made, all that vender could demand would be an ordinary trustee's deed. In the absence of a special agreement, a vendor who has a good title need tender only a quit claim deed to satisfy a contract to convey, but impliedly contracts to tender a marketable title.

Referee's finding that a drain across certain land was maintained by a town without right and constituted at best an encroachment is conclusive where there is a failure to offer record evidence of the

legal establishment of the drain to support contention that it was a legal drain built and maintained by a town under legal authority.

Whether an encroachment will justify a vendee in rejecting a tendered title depends upon whether the encroachment is substantial enough seriously to interfere with the use and enjoyment of the premises, and each case must be determined upon its own merits.

Even though an encroachment or encumbrance be of such a nature to justify the assertion thereof as a defect in title, the right to assert it as such a defect in title as would justify rescission is dependent upon its existence at the time of the performance of the contract, and a vendor is entitled to remove the encroachment or encumbrance if he can do so prior to performance, provided the premises are not subject to such permanent restrictions or servitudes as would render the encumbrances presumably not removable.

In this state, objections to referees reports shall set forth specifically the grounds of the objections, and these only shall be considered by the court and the excepting party is confined to these in his bill of exceptions.

ON EXCEPTIONS.

Action by vendor for breach of contract and cross action by vendee to recover back money paid to bind contract following acceptance of bid. Vendee filed *exceptions to* acceptance by Superior Court of referee's report in favor of vendor in both cases. In case of *Depositors Trust Company, Trustee* v. *Bruneau and Drew* exceptions overruled. In case of *Bruneau and Drew* v. *Depositors Trust Company*, exceptions overruled.

Locke, Campbell, Reid, and Hebert,
for Depositors Trust Co.

Benjamin L. Berman, David V. Berman,
for Richard E. Bruneau and Maurice H. Drew.

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

MERRILL, J. On exceptions to the acceptance of reports of a referee. The first action is brought by Depositors

Trust Company in its capacity as trustee under the will of Joseph M. Cloutier, (hereinafter called the vendor) against Richard E. Bruneau and Maurice H. Drew (hereinafter called the vendees) to recover damages for the breach of a contract to purchase certain real estate. The real estate was located in or near the business district of Winthrop and consisted of three contiguous lots numbered 3, 4 and 5 on a plan introduced in evidence. The second action is brought by the vendees against the vendor to recover back $1,000 paid by them to it to bind the contract after their bid in response to an advertisement for bids had been accepted. Their bid for the three lots was $6,100. Each case was referred under a Rule of Court with right of exceptions in matters of law reserved. The cases were heard together by the referee who found for the plaintiff (vendor) in the first case and for the defendant (vendor) in the second case. Objections to the referee's reports were duly filed in both cases. The court overruled the objections in each case and accepted the reports. Exceptions to the rulings of the court were duly filed and allowed, and it is upon these exceptions that the cases are before this court. The entire record of the cases, including the exhibits and the transcript of the evidence, is made a part of the bills of exceptions and is before this court.

The evidence discloses that the vendor and vendees entered into a contract for the sale and purchase of the land in question, and that the vendees made a down payment of one thousand dollars thereon on November 8, 1946. Conveyance was to be made by the vendor when it obtained license therefor from the Probate Court. The time of performance on the part of the vendor was postponed to such time as it obtained said license. A few days after the down payment was made to the vendor, the vendees discovered that an underground drain bisected lot 5 diagonally in a sweeping curve from corner to corner thereof. The drain was constructed of twelve inch tile (inside measurement) laid with the top approximately two and one-half feet below

the surface of the ground. It was an integral part of a drain extending from a catch-basin on Bowdoin Street to Mill Stream. The drain, starting at the catch-basin, crossed Bowdoin Street, Lot 5, other private lands, to and across Union Street, other private land and discharged into Mill Stream. It was a drain maintained by the Town of Winthrop for street drainage as distinguished from a sewer. Its physical maintenance, as then existing, would prevent the vendees from constructing a contemplated building on Lot 5, with a cellar thereunder of the planned depth. At the time of entering into the contract the vendees and the vendor were both ignorant of the existence of the drain. Before the execution of the contract the vendees had communicated to the vendor enough of their contemplated building plans, so that had the vendor known of the existence of the drain, it would also have known that with it permanently maintained where and as it was, the vendees could not use the lot for its contemplated purpose.

Within a day or two after discovering the existence of the drain, the vendees informed the vendor of its existence, that they could not use the lot for its intended purpose, could not locate the building elsewhere on the lots and demanded the return of the down payment. The vendor did not comply with this demand.

Later, the vendor applied for license to sell, which was granted January 6, 1947. After writing some letters to vendees' attorneys, the vendor tendered a Trustee's Deed of the premises on or about March 12, 1947. The deed being refused, the suit for damages was instituted by the vendor against the vendees August 18, 1947, and on December 17, 1947, the vendees commenced their action against the vendor to recover back the down payment of one thousand dollars.

The referee as before stated, found in favor of the vendor in both actions.

The only issue raised by the objections and the bills of exceptions which we need discuss is whether or not the existence of the drain justified the attempted rescission of the contract by the vendees. As to all other questions, the evidence so clearly justified the findings of the referee with respect thereto that we will not consider them in detail.

As the issues are presented to us, the determination of both cases depends upon whether or not the vendees were justified in their attempted rescission. If they were, they are not liable to the vendor in damages and are entitled to recover back the down payment. If they were not, the findings of the referee in favor of the vendor must be sustained and the exceptions overruled.

In determining whether or not the vendees were justified in their attempted rescission of the contract, we have to consider not only whether or not the title of the vendor was such that the vendees could reject it, but also whether or not they were justified in rejecting it when they did, viz.: prior to the time for performance by the vendor.

As the contract was silent as to the kind of deed by which conveyance was to be made, all that the vendees could demand would be an ordinary Trustee's Deed. In fact, in this State in the absence of a special agreement to the contrary, a vendor who has a good title need tender only a quitclaim deed to satisfy a contract to convey. *Garcelon* v. *Tibbetts,* 84 Me. 148; 24 A. 797.

In purchases from a trustee the purchaser, at his own risk, must satisfy himself not only that the title to the property is good, but that the sale has been made according to the decree or order. 54 Am. J. 342, Sec. 430.

However, these principles do not, in the absence of a special contract as to the nature of the title to be conveyed, compel a vendee to accept from a trustee a defective or unmarketable title. Every vendor in the absence of provision otherwise in the contract, impliedly contracts to tender a

marketable title. Restatement of the Law, Restitution, Page 109, Chap. 2, Sec. 24, Par. e. If he fails to do so the vendee can reject the tendered title and if he has made partial advance payments can recover such payments back. Restatement of the Law, Restitution, *supra, idem.*

We consider first the question as to whether or not the existence of this drain rendered the title unmarketable.

If the drain was being maintained and its maintenance could be permanently continued by the Town of Winthrop as a matter of right against the owner of Lot 5, it would be such an encumbrance as would render the title unmarketable.

The vendees claimed that the drain was being maintained and its maintenance in the future could be continued by the town as of right. The referee made the following finding:

> "I find from the evidence that this drain was being maintained on lot number five without legal right and is, at best, an encroachment on lot number five."

This finding is challenged by the exceptions. Unless this finding constitutes error in law the exception thereto must be overruled. To constitute an error in law a finding of fact by a referee must be made without evidence from which such fact may be found. If there be any evidence which supports the finding of fact, such finding is conclusive. These principles have been reiterated so many times by this court that citation therefor is unnecessary.

Not only did the vendees, in the hearing before the referee, have the burden of proving that this drain was a legal encumbrance, but they *now* must show that the contrary finding by the referee constitutes an error in law.

The evidence negatived any possibility that the drain was being maintained on lot number 5 under a grant either of the land or of an easement. The drain had not been in

existence long enough for the town to have acquired any rights by prescription.

The defendants claim that this was a legal drain built and maintained by the Town of Winthrop under authority of R. S., 1930, Chap. 25, Secs. 26 and 27, which sections are as follows:

> "**Sec. 26. Towns may construct ditches and drains to drain highways; control; liability for damages.** The municipal officers of a town may at the expense of the town construct ditches and drains to carry water away from any highway or road therein, and over or through any lands of persons or corporations when they deem it necessary for public convenience or for the proper care of such highway or road, provided that no such ditch or drain shall pass under or within twenty feet of any dwelling-house without the consent of the owner thereof. Such ditches or drains shall be under the control of municipal officers, and wilful interference therewith shall be punished as is provided by statute for obstruction in a traveled road. If such town does not maintain and keep in repair such ditches and drains, the owner or occupant of the lands through or over which they pass may have his action against the town for damages thereby sustained.
>
> **Sec. 27. Procedure.** Before land is so taken, notice shall be given and damages assessed and paid therefor as is provided for the location of town ways."

To establish its claim that this drain was built and maintained under the authority of said sections of the statute (which are now found in R. S., Chap. 84, Sec. 156), the vendees rely upon evidence which shows the following facts: The drain was constructed for the Town of Winthrop by the road commissioner and his crew who were paid therefor by the town. The town appropriated money in town meeting for its construction. It was built in 1938, and the town has since maintained it. At the time it was

built the vendor's testator who then owned Lot 5 objected to its being built, as did at least one other land owner. The town employed a lawyer, and the drain was built without further objection.

No attempt was made by the vendees to establish the legal existence of this drain by the production of any record of the proceedings of the municipal officers of the Town of Winthrop. The transcript in these cases is entirely devoid of any testimony as to why such record was not produced and offered in evidence. In fact the transcript fails to show whether or not any such record was ever made.

Proceedings under the sections of the statute above quoted are in the nature of eminent domain. As stated by this court with respect to this same statute, in the case of *Austin* v. *Inhabitants of St. Albans,* 144 Me. 111; 65 Atlantic (2nd) 32-34, which case was argued on the same day as the instant cases:

> "In the performance of their duties, including location, xxxxxx the municipal officers do not act as agents of the town, but they act as public officers of the State in a quasi judicial capacity. *Davis* v. *Bangor,* 101 Me. 311; 64 A. 617; *Keeley* v. *Portland,* 100 Maine, 260, 61 A. 180.
> The action of municipal officers, as such judicial board, must be taken with formality and entered of record. Parol evidence cannot supply a record, and parol evidence is inadmissible to prove the action of the board, unless the record is incomplete, incorrect, or lost. *Kidson* v. *Bangor,* 99 Maine, 139, 147; 58 A. 900."

Whether or not from long use and lapse of time a presumption of lost record of the location of a drain may arise, as is intimated with respect to highways in certain cases, we express no opinion.

Because of the unexplained failure of the vendees to offer record evidence of the legal establishment of this drain, the referee was justified in making the finding that from the

evidence "this drain was being maintained on lot number five without legal right."

As said by the New Jersey Court in *Hoffman* v. *Rodman*, 39 N. J. Law, 252, 255, relative to the recording of the return of the laying out of a highway:

> "The best evidence of this essential fact is the record itself or a properly authenticated copy of it; and until the absence of this evidence has been satisfactorily accounted for, no other, of inferior degree, will be permitted to supply its place. Why the best evidence of the existence of the alleged road has not been produced in this case, remains entirely unexplained."

The referee in this case found that this drain was at best an encroachment. With respect to encroachments and their effect upon the marketability of title the rule is well stated in 55 American Jurisprudence, 706, Sec. 252:

> "In determining whether encroachments are of such a character as to justify the vendee in refusing to take title, the court will weigh the object of and inducement to the vendee in entering into the contract, and, looking into the merits and justice of each particular case, relieve the vendee from the contract to purchase if the character of the transaction, the circumstances, and the equities require. There can, of necessity, be no fixed rule for determining the extent of an encroachment necessary to bring any particular case outside the rule 'de minimis non curat lex,' since the facts of each case are invariably different, and the test to be applied is whether the encroachment is substantial enough seriously to interfere with the use and enjoyment of the premises. Hence, each case must be determined upon its own merits."

The referee, in his report, recognizing this rule, made the following finding:

> "What are the facts in the instant case? It seems clear that the drain is not being maintained with legal right so that the owner of lot number five

> may have it removed. The Road Commissioner for the Town of Winthrop who put the drain in says he could dig it up, remove it and refill the trench for the amount of One hundred twenty-five dollars ($125).
>
> It seems as if the plaintiff or vendor should have been given an opportunity to remove the encroachment and the evidence shows it could have been removed for a comparatively small amount. This, the defendants (Vendees) did not do.
>
> I find that the defendants (Vendees), upon the law and the facts, were not justified in their attempted rescission of the contract."

This brings us to a consideration of the second phase of the question as to whether or not the presence of this drain as an encroachment justified the vendees in their attempt at rescission *at the time they attempted to rescind.*

> "The vendee's right to assert an encroachment as a defect in the vendor's title is dependent upon whether such encroachment exists at the time for the performance of the contract. A vendor is entitled to remove an encroachment if he can do so at any time within the period during which he has the right to tender a deed to the vendee under the contract of sale." 55 Am. J. 709, Sec. 256.

This is but an application to encroachments of the following rule:

> "The general rule is that although the title of one who enters into an executory contract for the conveyance of land may be defective at the time he enters into such contract, if the vendor is able to convey a good title when the time for the conveyance of the land arrives, this is sufficient." 55 Am. J. 717, Sec. 270.
>
> "Ordinarily, if the vendor in a contract for the sale of land is able to convey a good title when the time for the performance of the contract arrives, he is deemed to have fulfilled his obligation although his title may have been defective at the time he entered into the contract, and it is the pre-

> vailing American doctrine that ordinarily, in the absence of misrepresentation or fraud, a vendee cannot, prior to the time fixed by the contract for conveyance, complain that the vendor's title is defective or encumbered." 55 Am. J. 722, Sec. 277.

These general rules are subject, however, to the following limitation:

> "Almost all of the cases wherein the point has been in any way touched upon either hold or recognize that if defects or encumbrances of title are of such a character that the vendor has neither the title which he has agreed to convey nor in a practical sense any prospect of acquiring it—that is, if the vendor probably or presumably will not have the agreed title at the time set for the conveyance, the defects or encumbrances being probably or presumably not removable—the vendee is not required to continue with the contract, but may rescind, even though the time set for conveyance has not arrived. A vendee is not required to perform, but may rescind prior to the time set for conveyance, where the premises are subject to permanent restrictions or other servitudes of a character which would justify rescission at the time of conveyance." 55 Am. J. 726, Sec. 283.

Applying these rules to the attempted rescission by the vendees, the referee found that the encroachment was not being legally maintained, that it could be easily removed at a relatively small expense, and that its presence did not justify rescission by the vendees before an opportunity had been afforded the vendor to remove it. There was evidence in the record to support these findings of the referee and exceptions to the acceptance of the reports based upon objections to these findings of fact and rulings of law by the referee cannot be sustained.

As the cases were tried everyone, counsel for both parties and the referee, treated the justification or lack of justification of the *attempted rescission* by the vendees as determinative of the rights of the parties. The vendees'

position is well illustrated by the following quotation from their reply brief: "The rights of the parties became fixed on the date when Bruneau and Drew attempted to rescind." The referee found, and we have held rightfully found, that the attempted recission was not justified.

From the record it appears that no one even considered the question of whether or not the failure of the vendor to remove the drain in the period between the abortive attempt at rescission and the tender of the deed, and the consequent existence of the drain at the time of the tender, affected or could affect the rights of the parties. The referee having found the attempted rescission unjustified decided both cases in favor of the vendor.

In effect, the referee made two findings. First, that the attempted rescission was unjustifiable; second, that because the attempted rescission was unjustifiable the vendor was entitled to judgment in both cases. The objections to the acceptance of the referee's reports and the exceptions to the rulings of the justice at *nisi prius* are directed to the first of these findings by the referee, as distinguished from the second. The second finding is not specifically set forth as one of the grounds of the objections to the acceptance of the reports, nor is it made the basis of the exceptions to the action of the justice in overruling the objections and accepting the reports. We are not called upon to approve or disapprove said second finding by the referee. Nor do we even intimate our opinion as to its correctness. Neither do we express any opinion as to the effect upon the rights of the parties of the failure of the vendor to remove the drain after the attempted rescission and before the tender of the deed, or of the continued presence of the drain at that time. These questions are not raised by the bills of exceptions and are not presented to us for determination.

"Reports of Referees are only open to attack on certain definite lines and according to certain definite procedure." *Staples* v. *Littlefield,* 132 Me. 91, 92; 167 A. 171.

Rule XXI of the Supreme Judicial Court and Superior Court requires that objections to the reports of a referee shall be in writing and shall set forth specifically the grounds of the objections and that these only shall be considered by the court.

The invariable practice in this State has been that there must be strict compliance with this rule if the exceptions are to be considered by this court. *Camp Maqua* v. *Town of Poland,* 130 Me. 485, 486; 157 A. 859. The excepting party is confined in his bill of exceptions to those contentions *specifically set out* by him in his written objections at *nisi prius. Staples* v. *Littlefield, supra,* 93.

These are salutary rules, binding not only upon the parties but upon the court as well. Parties cannot have just cause for complaint because the court does not consider questions which they have failed to present to it in the manner prescribed by law. As we said in *Throumoulos* v. *Bank of Biddeford,* 132 Me. 232, 233; 169 A. 307:

> "The parties have selected their own tribunal to try this case, and under such circumstances are held to a strict compliance with the provisions of the statutes and rules of court governing the procedure authorized in such instances."

The factual findings of the referee so far as attacked by the objections and exceptions were supported by the evidence. The rulings of law by the referee attacked by the objections and exceptions were correct. The action of the justice at *nisi prius* in overruling the objections and accepting the reports was correct, and the exceptions to his rulings in each case must be overruled.

In the case Depositors Trust Company, Trustee of the Estate of Joseph M. Cloutier v. Richard E. Bruneau and Maurice H. Drew,

Exceptions overruled.

In the case Richard Bruneau and Maurice Drew v. Depositors Trust Company, Trustee of the Estate of Joseph Cloutier,

Exceptions overruled.

ELEANOR M. PAULSEN

vs.

HERMAN D. PAULSEN

Cumberland. Opinion, May 18, 1949.

Contracts. U. S. Savings Bonds. Minors.

The general rule requires all promisees to join as parties plaintiff whether the contract be express or implied.

When legal grounds exist for omitting one of the several promisees, such as death or refusal to join, the declaration must allege the reason for the non-joinder to establish the right of less than all to sue.

Bonds issued by the United States, with the applicable statutes and Treasury Regulations, constitute valid binding contracts determining the rights of the parties thereunder.

The status of the title to bonds of the United States is controlled by the contract between the government and the owners and is not subject to change by any statute or rule of law of the State of Maine.

Under the terms of the contract represented by the bonds either parent of the minor child who was a co-owner, with whom the parent resided or from whom her chief support came, was entitled to present them to the government for payment.

The rights of the minor as one of the registered co-owners of the bonds to which the proceedings relate could not be litigated in a suit to which she was not a party.

The law does not permit a defendant to be harassed with a multiplicity of suits when the subject matter in controversy might be settled more appropriately and equitably in a single action.

ON EXCEPTIONS.

Action of assumpsit for the recovery of proceeds of certain U. S. Savings Bonds. Defendant excepts to the acceptance of a referee's report awarding a recovery to the plaintiff. Exceptions sustained. Case fully appears in opinion.

Berman, Berman and Wernick, for plaintiff.

Elton H. Thompson, Walter F. Murrell, Robert D. Rich, for defendant.

SITTING: THAXTER, MURCHIE, TOMPKINS, FELLOWS, MERRILL, JJ.

TOMPKINS, J. This case comes before the court on exceptions by the defendant to the order of the Presiding Justice in the Superior Court, allowing and confirming the report of the referee.

The plaintiff had commenced an action of assumpsit on an account annexed together with a money count. The defendant pleaded the general issue. The case was referred to a referee for a decision, each party reserving the right to except as to matters of law. "Reports of Referees are only open to attack on certain definite lines, and according to certain definite procedures . . . when cases are referred with the right of exceptions reserved as to matters of law, the same procedure is followed as to objections, and the excepting party is confined to those specifically set out by him at *nisi prius.*" *Staples* v. *Littlefield,* 132 Me. 91; 167 A. 171. Defendant filed nine objections in writing to the acceptance of the report in accordance with Rule 21, and is, therefore, properly before this court to be heard on such matters as are put in issue by the objections filed by him.

The matter in controversy involved the proceeds of certain United States Government Savings Bonds of Series E, issued in November, 1943, to the plaintiff and to the minor daughter of plaintiff and defendant.

The referee's finding was as follows: "The defendant and the plaintiff were husband and wife until they were divorced in January, 1947. During coverture the defendant redeemed for cash certain United States Savings Bonds which were registered in the name of the plaintiff, Eleanor M. Paulsen or Roberta J. Paulsen, the minor daughter of the defendant and the plaintiff, and he retained the proceeds derived therefrom. The plaintiff contends that she was the owner of the bonds and further contends that if her husband, the said defendant, ever had any right, title, or interest in them, it was released by him to her, long before the date of the redemption. The defendant also contends that he was the owner of the bonds and denies that he ever released his interest therein."

The referee finds after consideration of all the evidence that the plaintiff has established by the weight of the evidence her ownership of the bonds and her right to the proceeds derived therefrom.

The defendant further contends that the plaintiff cannot maintain her action for the reason that the transactions which are the basis thereof occurred during coverture.

The referee finds that the transactions which are the basis of the plaintiff's action did occur during coverture but that the date of the action is subsequent to the date of the divorce of the defendant and the plaintiff.

The referee holds therefore that the action being one sounding in contract and commenced subsequent to the date of the divorce is properly maintained. *Webster* v. *Webster,* 58 Me. 139; 14 Am. Rep. 253.

The referee further finds that the plaintiff has established by the weight of the evidence all the essential elements necessary to sustain her allegations.

Judgment, therefore, should be rendered for the plaintiff for the sum of $346.50 with interest, in the sum of $25.99 . . . ."

The evidence presented to the referee, except for a few selected exhibits, is not contained in the Bill of Exceptions, and is not part of the record which is brought before this court. While the amount involved in the case is small, the principle is very important in determining the ownership of the proceeds of bonds of the character of those under consideration, where they are so widely held in such large amounts throughout the state and nation.

We deem it sufficient for the present disposition of the case to consider only the 2nd objection: "That the Honorable and learned Referee erred in the matter of law in overlooking the fact that the husband acted legally as father of the child, Roberta J. Paulsen, and as he had a good right to do and in accordance with Section 315.40 of Department Circular 530 of the U. S. Treasury Department, regulations covering U. S. Savings Bonds. Thus the wife is not the proper person to bring the above suit against the husband alone, nor has she sustained any damages by the husband's act which she can recover in this action against him."

This objection raised a question of law. "In assumpsit, if a party, who ought to join as plaintiff be omitted, the Defendant may take advantage of such omission under the general issue." *Jones* v. *Lowell,* 35 Me. 538. The general rule is that all joint promisees must join as parties plaintiff in an action of assumpsit. This is true whether the contract be express or implied. *White et al.* v. *Curtis,* 35 Me. 534; *Holyoke* v. *Loud,* 69 Me. 59; *Evelyth* v. *Sawyer,* 96 Me. 227; 52 A. 639; *Gilmore* v. *Wilbur,* 12 Pick. 120, 124; 22 Am. Dec. 410. "If there be a legal ground for omitting one of several co-obligees as plaintiff, as his death, refusal to join, etc., the declaration must show such excuse for the non-joinder, in order to show the right of less than all to sue." 15 Encyc. Pl. and Prac. 532. See *Moody* v. *Sewall,* 14 Me. 295; *Holyoke* v. *Loud, supra.*

"The law does not permit a Defendant to be harassed with a multiplicity of suits when the whole matter in con-

troversy can be more appropriately and equitably settled in one." *White et al.* v. *Curtis, supra. Evelyth* v. *Sawyer, supra.*

The bonds were purchased under the United States Government Public Debt Act of February, 1941, and the applicable Federal Treasury Regulations authorized thereunder, as hereinafter set forth. United States Treasury Department Regulation Circular 530, sub-part L, Section 315.45, (a) provides: "During the lives of both co-owners the bonds will be paid to either co-owner upon his separate request without requiring the signature of the other co-owner; and upon payment to either co-owner the other person shall cease to have any interest in the bond."

Treasury Regulation 315.4 (a) (1) sub-part B, provides, "That a bond may be registered in the names of two (but not more than two) persons in the alternative as co-owners .... No other form of registration establishing co-ownership is authorized."

Section 315.2 sub-part B of the regulation provides, "United States Savings bonds will be issued only in registered form. . . . the form of registration used must express the actual ownership of and interest in the bonds, and except as otherwise specifically provided in the regulations in this part by the Treasury Department, will treat as conclusive the ownership of and interest in the bonds so expressed. . . ."

Treasury Regulations, sub-part B, Sections 315.4 (B) (2) provides, "A minor, whether or not under legal guardianship, may be named as owner, co-owner or beneficiary on bonds purchased by another person with such person's own funds. . . ."

Treasury Regulation 530, sub-part J, Section 315.40, provides, "If the owner of a Savings Bond is a minor and the form of registration does not indicate that a guardian or similar legal representative of the estate of such minor has

been appointed by a Court, or is otherwise legally qualified, and if such minor is not of sufficient competency and understanding to execute the request for payment, payment will be made to either parent of the minor with whom he resides, or if the minor does not reside with either parent, then to the person who furnishes his chief support. Such parent or other person must surrender the bond with the request for payment properly executed, and furnish a certificate, which may be typed on the back of the bond, showing their right to act for the minor, ..."

Each United States War Savings Bond, together with the Statutes, Treasury Regulations and circulars constitute a valid binding contract determining the rights of the parties therein, and ownership and title of the bond is controlled by the Federal Statutes, pursuant to which it was issued, and applicable Treasury Regulations and circulars. *Harvey* v. *Rackliff,* 141 Me. 169; 41 A. (2nd) 455; 161 A. L. R. 296. Succession of Tanner (Court of Appeals of Louisiana) 24 Southern (2nd) 642. *Davies* v. *Beach et al.* (District Court of Appeals, California) 74 Cal. App. (2nd) 304; 168 Pacific Reporter (2nd) 452; *United States* v. *Dauphin Trust Company,* 50 Fed. Supp. 73; *Ervin* v. *Conn,* 225 N. C. 267; 34 South Eastern Reporter (2nd) 402.

The status of the title to these bonds was fixed by the contract between Eleanor M. Paulsen and Roberta J. Paulsen and the United States Government, when purchased from the latter and paid for under an agreement that the government would pay the amount of the bonds to Eleanor M. Paulsen or Roberta J. Paulsen before or at their maturity, and no State Statute or rule of law may stand in the way of such status. *United States* v. *Dauphin Trust Company, supra. Harvey* v. *Rackliff, supra. Mason* v. *Briley* (Supreme Court of Florida) 155 Fla. 798; 21 Southern (2nd) 595. *Murray* v. *Muldoon* (Supreme Court of Iowa) 20 N. W. (2nd) 49; 236 Iowa 807.

The Treasury Regulations were not devised solely for the protection of the treasury, to simplify its task of determining whom to pay. The regulations have the further effect of defining the rights of the registered owners between themselves. For these rights, as between themselves, are the reflection of the contract obligation of the United States to the owners. *Harvey* v. *Rackliff, supra. Ervin* v. *Conn,* 225 N. C. 267; 34 S. E. (2nd) 402; *In re Di Santos Estate* (Supreme Court of Ohio) 51 N. E. (2nd) 639; 142 Ohio St. 223. *Murray* v. *Muldoon, supra.*

Under the Treasury Regulations the minor was named as co-owner of the bonds. The bonds could be cashed by the minor if of sufficient competency and understanding to execute the request for payment, or payment could be made to either parent of the minor with whom she resides, or if the minor does not reside with either parent, then with the person who furnishes her chief support. Regulation 530, sub-part J, Section 315.40, *supra.*

The bonds were cashed by the father of the minor, who was one of the parties designated by the Treasury Regulations to whom payment could be made. The form of the registration expressed the actual ownership in the bonds. This ownership was declared under the Treasury Regulations, to be conclusive. On payment to either co-owner without the signature of the other co-owner, the other person ceases to have any interest in the bonds, under the Treasury Regulation 315.45 (a) *supra.*

The minor was one of the two registered co-owners of the bonds. She was not a party to the suit. Her right to the proceeds of the bonds could not be litigated. The rights of parties not before the court, by due process of law, cannot be safely determined in their absence.

In accepting the report of the referee, the judge erred.

Exceptions sustained.

SIMPSON'S CASE

Sagadahoc. Opinion, May 18, 1949.

Workmen's Compensation. Statutes. Services and Aids.

The expenditures of an employer for services and aids furnished an employee in accordance with the provisions of Section 9 of the Workmen's Compensation Act do not constitute a part of the compensation payable to him under Section 11 of the act.

The Workmen's Compensation Act is intended primarily, to provide employees injured in industrial accidents with compensation during periods of total and partial incapacity limited in terms of both time and money.

The services and aids contemplated by Section 9 of the act are incidental to the compensation payable to him under subsequent sections, except so far as they are available before the beginning of the period during which such compensation is payable.

The services and aid to which an employee is entitled under Section 9 of the act are available to him before and during the time compensation is payable to him but not thereafter.

At the expiration of the maximum period, during which an injured employee is entitled to have compensation paid to him, or upon the payment, or accrual, of the maximum amount so payable, the authority of the commission in connection with the services and aids to which Section 9 is applicable terminates, except so far as it may be called upon to determine allowances for services and aids furnished during the compensation period.

ON APPEAL.

Appeal from *pro forma* decree entered pursuant to Industrial Accident Commission order. Appeal sustained. Case fully appears in opinion.

Hutchinson, Pierce, Atwood, Scribner, for petitioner.

William B. Mahoney, John P. Carey,
for Bath Iron Works Corporation and American Mutual Liability Insurance Company, respondents.

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

MURCHIE, J. The propriety of the decision of the Industrial Accident Commission, referred to hereafter as the "Commission," under review, on this appeal of the defendants from a *pro forma* decree of the Superior Court entered pursuant thereto, must be determined by construing the second and closing sentence of the first paragraph of Section 9 of The Workmen's Compensation Act, referred to hereafter as the "Act," as it was effective at the time of the industrial accident to which the proceedings relate, November 21, 1941, R. S., 1930, Chap. 55. The controlling language is:

> "The amount of such *services and aids* shall not exceed one hundred dollars unless a longer *period* or a greater sum is allowed by the commission."

The emphasized words (emphasis having been supplied) refer to the "reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical surgical aids" which the preceding sentence declares an employee shall be entitled to and the "first thirty days after the injury," during which it is there said he shall be so entitled. The "services and aids" will be so referred to hereafter. The quoted language has been contained in the Act since the enactment of P. L., 1919, Chap. 238, referred to hereafter as "the 1919 Act," where the services and aids were reenumerated instead of being referred to by a collective phrase. Section 10. It is now found in R. S., 1944, Chap. 26, Sec. 9, with immaterial changes.

The employee of the present proceedings, Donald J. Simpson, was injured so severely, while working as a welder in

the employ of Bath Iron Works Corporation, that complete paralysis from the waist down resulted. In the period commencing November 28, 1941, and ending April 8, 1948, compensation was paid to him, or accrued in his favor, aggregating the maximum amount of $6,000, payable to him under the Act, and his employer, or its insurer, paid out in addition thereto a substantial sum in excess of $100 for services and aids to him, the exact amount of which is not disclosed in the record. The settlement receipt given the employer, or its insurer, by the employee, acknowledging that the full sum of $6,000 had been paid to him, is dated June 26, 1948. During the period commencing April 6, 1948 and ending May 24, 1948, the employee paid money, and incurred charges, for services and aids, and for living expenses, all of which he and a nurse, supplying some of them, considered payable by his employer. When they were not paid, petitions were filed by the employee and the nurse, appropriate for having the amount payable therefor determined by the Commission, if its authority to act in connection therewith had not terminated. Awards of $39.69 and $105 were made thereon, covering a part of each claim, the amounts in excess being disallowed as representing "the ordinary expense of living" or as not representing expenses the employee "would not have had if he had had no injury."

The importance of the principle involved cannot be measured by the amount of money in issue. This is manifest when consideration is given to the claims of the parties. The petitioners assert that the Commission has authority to enlarge the period of time during which an employee shall be entitled to services and aids, and the amount to be paid therefor, without limit, except as the latter may be controlled by the words "reasonable and proper" in the first sentence of Section 9 of the Act, references in the sentence carrying the language to be construed to "the nature of the injury or the process of recovery," and an over-all provision in Section 32 that no "petition of any kind, except for review of incapacity, may be filed more than seven years fol-

lowing an accident." The employer asserts that the authority terminates as to each employee when he has been paid the maximum amount of compensation payable to him.

The petitioners ground their claim on the declaration of Section 8 of the Act, that an employee:

> "shall be paid compensation and furnished medical and other services;"

the references to "compensation and medical benefits," "compensation or other benefits," "compensation or medical benefits," "compensation and benefits" and "compensation or benefits" in Sections 15, 17, 24 and 27 of the Act, and of P. L., 1929, Chap. 300, referred to hereafter as "the 1929 Act," by contract with the references in the corresponding sections of the 1919 Act, Sections 13, 8, 26 and 28, to "compensation" alone; and particularly a change made in Section 9 of the 1919 Act, with which Section 10 of the 1929 Act compares, whereby the provision that no "compensation except" services and aids should be paid during a waiting period was changed to one that "compensation" should begin at a stated time after incapacity. Special emphasis is laid on the fact that this court in *Melcher's Case,* 125 Me. 426; 134 A. 542, said by way of dictum, on September 28, 1926, that money paid by an employer for services and aids must be considered as compensation because Section 9 of the 1919 Act, then effective, referred to them as such, and that, thereafter, the 1929 Act made it plain that such expenditures do not constitute a part of the maximum compensation payable to an employee.

Authorities are cited, both in the Commission decision and in the petitioners' brief, to support such a construction and they would be adequate for the purpose if authority on the point was needed. It is not. Those authorities, without distinguishing between those cited by the Commission and the petitioners, are *Petraska* v. *National Acme Co. et al.,* 95 Vt. 76; 113 A. 536; *Industrial Commission et al.* v. *Hammond,* 77 Colo. 414; 236 P. 1006; *Cardillo et al.* v. *Liberty*

Mutual Insurance Co., 69 App. D. C. 330; 101 F. (2nd) 254; *Morris* v. *Laughlin Chevrolet Co.* et al., 217 N. C. 428; 8 S. E. (2nd) 484; 128 A. L. R. 136, and an annotation following the report of the last of these cases in A. L. R.

If there was any point in deciding whether the money spent by the employer, or its insurer, for services and aids to Donald J. Simpson on account of the injuries he suffered on November 21, 1941 should be counted as a part of the $6,000 in compensation payable to him under the Act, the decision that it should not would have to be made without reference to any of the authorities aforesaid. The intention of the Act in that regard is made crystal clear by its language. On the actual issue, i. e. whether the authority of the Commission to extend services and aids beyond the period of 30 days, and the amount of $100, terminated as and when he had received, or became entitled to, the maximum amount of compensation payable to him, those authorities have no bearing.

On that issue the position taken by the employer has support in the decision of the Massachusetts Court in *George A. Meuse's Case,* 270 Mass. 29; 169 N. E. 517, 518. That the Massachusetts law in the sections corresponding to Sections 8, 15, 17, 24 and 27 of our Act makes no reference to "medical benefits," "other benefits" or "benefits," but to "compensation" alone, supplies no warrant for construing our Act, as the petitioners do, as intended to provide "two distinct types of benefits" for an employee, each having no relation to the other. The Act was intended primarily to provide employees with compensation for incapacity. Services and aids are incidental to such compensation, except so far as they are available before the beginning of the period during which compensation is payable. The Massachusetts Court, referring to the phrase "for a longer period" in the Massachusetts Act, said, in *Meuse's Case, supra,* that it:

> "means a period longer than two weeks; a period which is to continue for such a part of the compen-

> sation period as the * * Board * * should in its discretion determine,"

and later:

> "But the jurisdiction of the board was entirely at an end * * * when the compensation period was passed."

A further statement of the Massachusetts Court in that case is eminently appropriate in the present one, i. e. that it:

> "is a hard case; * * * no amount of money * * * will compensate the employee; but that affords no justification for reading into the statute a meaning * it does not contain."

The function of the Commission, and of this court in a case brought to it by appeal from a decision of the Commission, is to construe the Act without either adding to or subtracting from its language. The mandate of Section 29 of the Act for liberal construction of its provisions (now R. S., 1944, Chap. 26, Sec. 30) provides no warrant for administrative or judicial creation of rights or liabilities under the guise of construction. The measure of liberality is for legislative and not judicial determination. The enactment of the first Workmen's Compensation Act in this state, P. L., 1915, Chap. 295, established two measures for limiting the time during which its benefits should be available to employees. A time measure was fixed at 500 weeks, and a money measure at $3,000. Sec. 14. The money measure was increased to $4,200 in the 1919 Act, Sec. 14, to $6,000 in the 1929 Act, Sec. 11, and stands at $7,500 since the enactment of P. L., 1943, Chap. 328. The time measure has remained constant. The petitioners do not claim that the language to be construed, when written into the Act by Section 10 of the 1919 Act, evidenced such a legislative intention, or could have been construed, as they now claim. Their assertion is that the changes made in other sections of the Act by the 1929 Act, coupling compensation with

services and aids by a variety of wordings, show the intention they assert. The particular sections and the pertinent words are quoted *supra.*

Collectively the changes made by them cannot be said to show any intention with reference to services and aids except to eliminate the possibility that money paid for them should be considered a part of the maximum amount of compensation payable to an employee. They did not enlarge the overall controls except so far as time should be measured by money when $4,200, instead of $3,000, was paid out in less than 500 weeks; nor did the change made in Section 10 of the 1919 Act, in rewriting it as Section 9 of the 1929 Act, providing that an employee should be "entitled" to services and aids where the earlier recital had been that an employer should "promptly furnish" them. The provision of Section 8, quoted *supra,* is followed by the words "as hereinafter provided," indicating that the measures of the compensation and the services, by which term services and aids are there designated, are to be found in subsequent sections. Those measures are the ones stated in terms of time and money. Since the enactment of the 1929 Act, as before, services and aids are available to an employee before and during the time he is entitled to draw compensation but not thereafter. At the expiration of the maximum period during which he is entitled to draw it, or upon the payment, or accrual, of the maximum amount payable to him, without reference to services and aids, the Commission's authority in connection with services and aids terminates, except so far as it may be called upon to determine allowances for those furnished during the compensation period. The Commission had no authority to make the awards carried in the decision under review.

Appeal sustained.

PAUL E. THOMAS

vs.

HANES GIBSON

Knox. Opinion, June 8, 1949.

Assault and Battery. Damages.

In an assault and battery action, excessive damages awarded by a jury which can be explained only as the result of sympathy or prejudice and an entire disregard of applicable law requires a new trial unless the plaintiff remits excess.

ON MOTION FOR A NEW TRIAL.

In an action for assault and battery the jury rendered a verdict in favor of the plaintiff in the sum of five hundred dollars. The defendant filed a general motion to have the verdict set aside and waived all grounds for his motion except that damages were excessive. If the plaintiff, within sixty days after the certificate of decision is received by the clerk, shall remit all of the verdict in excess of $50.00, motion overruled; otherwise, motion sustained.

Charles E. Perry, for plaintiff.

Jerome C. Burrows, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

MERRILL, J. This is an action for assault and battery brought by the plaintiff, an operator of a truck upon the highway, against the defendant, who is a member of the State Highway Police. The defendant had stopped the plaintiff upon the highway to make a routine check of a panel truck which was being operated by the plaintiff. Up-

on examination of the plaintiff's registration certificate, the officer found that the truck was registered as a tractor and claimed that the truck was improperly registered. The plaintiff claimed that it was properly registered as a tractor because of certain welding equipment which was built into the truck. This welding equipment could not be seen without opening the rear doors of the truck. A dispute arose between the plaintiff and the defendant as to whether the officer should open the doors or whether the plaintiff would get out of the truck and open them. During the altercation the plaintiff alleged that the officer caught hold of his arm, attempted to remove him from the truck and threatened personal violence unless he got out and opened the doors. The plaintiff also testified that the officer used profane language towards him. He admitted that he in turn may have used profane language towards the officer. There was no evidence to show that any physical injury was inflicted by the officer upon the plaintiff, or that the plaintiff was in any way incapacitated from pursuing his ordinary vocation as a result of what took place. The plaintiff, however, did testify that he had not been well and had been doctoring for a period of five or ten years, but worked all the time. He further testified that the occurrence "upset me quite a lot. My nerves kind of went to pieces and I went to see a doctor to get some pills to calm me down. Things do upset me quite easily."

The jury rendered a verdict in favor of the plaintiff in the sum of five hundred dollars. The defendant filed a general motion addressed to this court to have the verdict set aside. At argument before us, he waived all grounds for his motion except that the damages were excessive.

The damages awarded by the jury cannot be justified on any rational basis. They can only be explained as the result either of sympathy for the plaintiff or prejudice against the defendant, and in either event, an entire disregard of applicable law in arriving at the sum awarded.

Scrupulously regarding all the elements of damage applicable to this case as disclosed by the record, the verdict was manifestly excessive and we must order a new trial unless the plaintiff remits all of the verdict in excess of fifty dollars, and the order is

If the plaintiff, within sixty days after the certificate of decision is received by the clerk, shall remit all of the verdict in excess of $50.00, motion overruled; otherwise, motion sustained.

HELEN H. CARROLL, LIBELLANT

vs.

VICTOR V. CARROLL, LIBELLEE

York. Opinion, June 8, 1949.

Divorce. Courts. Exceptions.

A motion captioned "Superior Court—York County" to have a decree set aside and a new trial granted in a divorce case can be received and accepted as addressed to either the Superior Court or the Supreme Judicial Court as a Law Court depending upon which court it is presented to for action.

There is neither express nor implied statutory authorization for a motion for a new trial being received and accepted by Supreme Judicial Court sitting as a Law Court in divorce cases.

Decrees granting or denying divorces can be attacked before Supreme Judicial Court as a Law Court only for errors in law presented by bills of exception.

The Supreme Judicial Court sitting as a Law Court is a statutory court of limited jurisdiction and does not have supervisory jurisdiction over inferior courts since that power is vested in the Supreme Judicial Court sitting at *nisi prius*.

ON MOTION.

On libellee's motion to dismiss libellant's motion for a new trial. Case dismissed.

Lausier and Donahue, for libellant.

Waterhouse, Spencer and Carroll, Titcomb and Siddall, for libellee.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

MERRILL, J. On motion to dismiss from the docket of this court. The libellant, Helen H. Carroll, commenced divorce proceedings against the libellee, Victor V. Carroll, by libel inserted in a writ of attachment. After hearing at the return term, the justice made the following notation on the back of the libel: "Hearing. Denied A. B." The libellant thereafterwards, and before the formal order dismissing the libel was entered, filed the following motion:

"SUPERIOR COURT — YORK COUNTY

No. October Term, 1948

Helen H. Carroll v. Victor V. Carroll

And now said Helen H. Carroll after decree against her and before judgment, moves that said decree be set aside and a new trial granted, for the following reasons:

I. Because it was against the law and the charge of the Justice

II. Because it is against evidence

III. Because it is manifestly against the weight of evidence in the case.

HELEN H. CARROLL

By LAUSIER & DONAHUE

Her Attorneys"

The case was brought to this court upon the foregoing motion, was entered at the January Law Term, 1949, and thence continued. On the twentieth day of April, 1949, the libellee filed a motion to dismiss the case from the docket of this court for the following reasons: 1. That the Motion for a New Trial was addressed to the Superior Court for the County of York and not to this court. 2. That no Bill of Exceptions to any rulings of the Superior Court thereon has been filed. 3. That this case is not properly upon the docket of this court for consideration. Hearing before this court was upon the libellee's said motion to dismiss.

There is no merit in the first reason for dismissal. It is evidently based upon the fact that the motion contains no *specific written address* to this court. In fact, examination of the motion discloses that it contains no specific written address, either to this court or to the presiding justice. Motions for new trials *in this form,* in appropriate cases, have been in use in this State, and have been accepted, treated as addressed to, and acted upon by this court for so many years that it is too late for us to now hold, except in cases where the same were presented to and acted upon by the Justice of the Superior Court, that they are addressed to him within the meaning of Rule XVII or R. S., Chap. 100, Sec. 60. Neither does the fact that the caption of the motion contains the words "Superior Court — York County" necessarily indicate that the motion was addressed to the Justice of the Superior Court. Motions for new trials in appropriate cases when addressed to the Law Court are filed in the Superior Court.

The careful practitioner might well commence his motion with a specific written address to the tribunal which is to pass upon it. Especially is this true when similar motions may be made to different tribunals at the election of the moving party. See R. S., Chap. 100, Secs. 59 and 60, Rule XVII. Motions without *specific written address,* in

cases to which the foregoing statutory provisions are applicable, have been universally received and accepted as addressed either to the Law Court or to the presiding justice, as provided in Rule XVII, depending upon whether they were presented to the former or the latter for action thereon. This treatment of such motions has continued unquestioned for so many years that it must now be considered as accepted practice in our courts. There being nothing in the record to show that this motion was ever presented to the presiding justice for action thereon by him, or that he ever ruled thereon, the motion bearing a notation "The pleadings, exhibits and testimony to constitute the printed case.", and the case having been printed and entered on the docket of this court, we hold that this motion by the libellant was addressed to the Law Court and not to the presiding justice.

There is no merit in the second alleged ground for dismissal, that no bill of exceptions to any rulings of the Superior Court on the motion for a new trial has been filed. The motion being addressed to this court and not to the presiding justice he had no occasion to rule thereon. We do not intend, however, to imply by the foregoing statement that such motion could properly be addressed to the presiding justice to be acted upon by him. Upon that question we intimate no opinion.

The motion to dismiss, however, must be sustained. This court has no jurisdiction to entertain or pass upon the merits of the motion for a new trial.

The Supreme Judicial Court sitting as a Law Court is of limited jurisdiction. As such, it is a statutory court and can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. *Edwards, Appellant,* 141 Me. 219; 4 A. (2nd) 825; *Cole* v. *Cole,* 112 Me. 315; 92 A. 174. *Public Utilities Commission* v. *Gallop,* 143 Me. 290; 62 A. (2nd) 166. The motion for a new trial filed in this case is within these rules.

There is neither express nor implied statutory authorization for its use.

The Supreme Judicial Court sitting as a Law Court has no jurisdiction to entertain and pass upon such motions to set aside divorce decrees and grant new trials in divorce cases. The action of the presiding justice in granting or denying a divorce can be attacked in this court only for errors in law. Such errors can be presented to this court only by bills of exceptions and are not reached by motions. *Simpson* v. *Simpson,* 119 Me. 14; 109 A. 254.

The Supreme Judicial Court sitting as a Law Court does not have supervisory jurisdiction over inferior courts under R. S., Chap. 91, Sec. 7. That is vested in the Supreme Judicial Court sitting at *nisi prius.* Nor can this court sitting as a Law Court extend its statutory powers. *Edwards, Appellant, supra.*

It has been urged by the libellant that we should retain and determine the present motion under that portion of the last paragraph of R. S., Chap. 91, Sec. 14 reading as follows:

> "When the issues of law presented in any case before the law court can be clearly understood, they shall be decided, and no case shall be dismissed by the law court for technical errors in pleading alone, or for want of proper procedure if the record of the case presents the merits of the controversy between the parties."

The foregoing provision of the statute was not intended to confer, nor does it confer, jurisdiction upon the Law Court in cases over which it has no jurisdiction. A case presented to the Law Court over which it has no jurisdiction is not "before the Law Court." A motion for a new trial such as was filed in this case is not authorized by statute and does not bring forward for review by this court any phase of the case in which it is entered. A case brought to this court which is beyond our jurisdiction to hear and determine is

not "before the court." The proceeding so far as this court is concerned is a nullity. "When lack of jurisdiction is patent, proceedings stop." *Kelley, Appellant,* 136 Me. 7; 1 A. (2nd) 183, 184; *Edwards, Appellant, supra.* The libellee's motion to dismiss the case from the docket is sustained.

Case dismissed.

SIDNEY ST. F. THAXTER

AND

MONTGOMERY BLAIR, JR.

TRUSTEES

vs.

THE CANAL NATIONAL BANK OF

PORTLAND, TRUSTEE, ET AL.

Cumberland. Option, June 13, 1949.

Trusts. Bonds. Wills.

A bond is a contract and a mortgage securing it is a separate contract for that purpose.

Bondholders or trustees of an indenture executed to secure the bonds, when precluded by the terms of their contracts from reaching particular property to enforce a deficiency judgment, are not entitled to have the income derived from said property applied in payment of either principal or interest of their bonds.

The rights of holders of bonds issued by trustees and secured by a mortgage indenture on realty held in trust can be no greater than the provisions of the will warrant.

The operation of the language of a will excluding those otherwise entitled to its benefits from participation therein on stated grounds is controlled by the status of those entitled at the date of the death of the testatrix.

ON REPORT.

Bill in Equity by trustee under a will for a determination of the effect and construction of a will and to resolve certain issues. On report from Superior Court. Case remanded for a decree in accordance with opinion.

Linnell, Nulty, Brown, Perkins, and Thompson,
for Sidney St. F. Thaxter et al., Trustees.

Hutchinson, Pierce, Atwood, and Scribner,
for Canal National Bank of Portland.

Clement F. Robinson,
for Sheridan Brook Fry.

Berman, Berman, and Wernick,
for George Gardner Fry, Jr.
Elizabeth F. Newhouse
Edgar L. Newhouse III
Alan I. Newhouse
Olney M. Fry
Olney M. Fry, Jr.

H. Warren Paine,
for Montgomery Blair, Jr.

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

TOMPKINS, J., sat at argument and participated in consultation but died prior to the preparation of the opinion.

MURCHIE, J. In this Bill in Equity, which comes to the court on report, the plaintiffs seek determination of "the effect and construction" of the will of Mary J. E. Clapp, late of Portland, and four codicils thereto, admitted to probate in October, 1920, and referred to hereafter as the "Will," to resolve two issues hereafter stated. The process discloses that the Will was construed by a single justice of the court, in earlier proceedings which have a direct bearing (although not a controlling one), on one of them, in a

decree entered May 10, 1922, referred to hereafter as the "Decree."

The testatrix died a resident of Portland on September 9, 1920. The plaintiffs are successor trustees of a trust established under the Will, referred to hereafter as the "Trust," and will be referred to hereafter as the "Plaintiffs," to distinguish them from the trustees named in the Will, and earlier successor trustees, referred to hereafter as the "Trustees" and the "Successor Trustees," respectively. The Trustees administered the Trust from its establishment until March 1924 and the Successor Trustees thereafter until January 1941. Since the latter date it has been administered by the Plaintiffs. The defendants are the trustee of an Indenture executed by the Trustees to secure bonds issued by them, pursuant to the Decree, referred to hereafter as the "Trustee" and the "Indenture," respectively, as the representative of the holders of the bonds secured thereby, and all persons entitled to share currently in any distribution of the net income of the Trust, including minors represented by a guardian *ad litem* and one individual whose status is one of the issues to be resolved, and all contingent remaindermen, a guardian *ad litem* representing all those unascertained or not in being. Unless the text indicates otherwise, references to "Bonds" hereafter will be to the bonds outstanding at the time of reference. They are now outstanding in the principal amount of $295,000, out of an original issue of $300,000. The term "Beneficiaries" will designate, collectively, all persons entitled to the benefits of the Trust at any one time. In reference to the present process it will identify all the defendants except the Trustee.

The Trust was established to continue "during the period of the entire natural life of the last survivor" of eight persons named in the Will, referred to hereafter as the "Named Beneficiaries," or such of them as were living at the death of the testatrix and entitled to share in the net income of it, and "during the additional period of twenty-one (21) years

and (sic) after the death of such last survivor." That it will continue more than 21 years from the date the evidence in the record was taken out is established by the fact that one of the Named Beneficiaries, so entitled, was then living. A particular purpose of the Trust was to provide for the erection of "a handsome, imposing and substantial block," referred to hereafter as the "Block," on the property which the father of the testatrix, and his father, had occupied as a residence, designated hereafter, as in the Will, the Decree and the Indenture, as the "Homestead Lot," as a memorial to them. The testatrix declared that she had held the property unencumbered since the death of her father and directed that it should be retained in the Trust during the full term thereof; that no portion of it should be sold or otherwise disposed of "except by ordinary and customary leases;" and that the principal of the Trust, at its termination, necessarily including the Homestead Lot and its improvements, should be "transferred, conveyed and distributed" to those entitled to it "as tenants in common." The Will carried the recommendation of the testatrix that the original construction of the Block should cost not less than $300,000, exclusive of the Homestead Lot and any materials taken from the structures standing thereon which might be used in connection therewith.

The Will made an elaborate and complete disposition of all the tangible personal property of the testatrix, provided legacies aggregating $65,000, $25,000 payable only if the beneficiaries named survived the testatrix, or were in her employ at the time of her death (payment being deferred until after the construction of the Block, unless a delay of more than five years from the death of the testatrix was thereby involved), set up annuities representing a maximum annual charge of $2,774, and let the entire residue fall into the Trust. The "entire net income" of the Trust, except as otherwise provided in the Will (in manners not pertinent to the present issues), was to be "paid over to or applied for the benefit of" descendants of the grandfather

the Block was to commemorate, and a grandmother, "annually, or oftener," and it was stated specifically that the "net rents" of the Homestead Lot should be "taken as a part" thereof. The term "Net Rents" was not defined, but must have been intended to designate the annual excess of gross income over operating expenses and taxes, and will be so used hereafter. The descendants of the grandfather and grandmother among whom the Trust income was to be distributed, or for whose benefit it was to be applied, were the Named Beneficiaries and their descendants, not including any "divorced or * * * living apart from * * * wife or husband" at the time of the death of the testatrix, or the child or children of any such.

In the proceedings in which the Decree was entered the Trustees sought to have the Will construed with reference to their authority to borrow money for the construction of the Block and to issue evidences of indebtedness secured by a mortgage on real estate held in the Trust. In the allegations of their process they referred to a provision of the Will directing that a particular parcel of land, which was the only property subjected to the lien of the Indenture at the time of its execution, should not be sold to raise the construction funds, unless "absolutely necessary" in their judgment, and declared their judgment that such a sale was not desirable, partly because the particular parcel was leased advantageously and yielded a substantial part of the income of the Trust available for the Beneficiaries, and was not necessary, and their belief that it was advisable to borrow money for construction of the Block, upon the security of the property held in the Trust, or some portion of it. The Decree construed the Will as authorizing the Trustees to borrow and to mortgage, but stipulated explicitly that they should not mortgage the Homestead Lot and should not issue evidences of indebtedness enforceable against it. Definite recitals were that the Trustees "in the discharge of their duties" as such and "for the purpose of effecting the objects of said trust" were authorized by the Will "to

borrow money from time to time on the credit" of the Trust and "to borrow money and procure loans from time to time," the borrowing recitals being followed, in each instance, by declaration of their authority, under the Will, to issue obligations "enforceable against the whole trust estate" except the Homestead Lot, and to mortgage the whole or any part of the real estate, with the same exception.

Pursuant to the Will, as construed by the Decree, the Trustees executed the Indenture and issued the Bonds on June 1, 1922, using a form for the latter substantially identical with one set out in the Decree. The Bonds were payable on June 1, 1937, but were extended as of that date to June 1, 1947, under an agreement between the Successor Trustees and the Trustee, referred to hereafter as the "Extension Agreement," to which holders of Bonds might become parties by depositing their Bonds and having them stamped. The record does not disclose what Bonds, if any, were deposited and stamped, but no rights are asserted in the process on the basis of unstamped Bonds. As of May 16, 1947, in compliance with a covenant of further assurance contained in the Indenture, the Plaintiffs executed a supplemental indenture, referred to hereafter as the "Supplemental Indenture," subjecting all the real estate held in the Trust to the lien of the Indenture, except that already subject thereto and the Homestead Lot. The Plaintiffs had earlier notified the holders of the Bonds that they would not be paid on their extended maturity date. They instituted the present process on May 26, 1947, and on June 1, 1947 defaulted on the payment of the final instalment of interest and the principal of the Bonds. The record discloses that the Trustee has foreclosed the Indenture and that liquidation of all the property of the Trust except the Homestead Lot will not provide for the payment of principal and interest of the Bonds. It carries no evidence to establish the amount of the deficiency, or the rental yield of the Homestead Lot, or the amount of Net Rents in any year or ac-

cumulated and on hand. Whether such rental yield might be sufficient to pay such deficiency as there may be, if available for the purpose (one of the issues of the process), and applied to that purpose exclusively, during the remaining term of the Trust, cannot be determined on the record.

In the administration of the Trust, prior to an approximate month before the filing of the process, when one of the Beneficiaries requested the Plaintiffs not to apply income of the Trust derived from the Homestead Lot to the payment of interest on the Bonds, all the income of the Trust from whatever source derived, including the rental of the Homestead Lot, was treated as gross income, and was held available for, and applied to, the payment of expenses and taxes applicable to the property of the Trust, indiscriminately, treating the interest requirements of the Bonds as expenses of the Trust. Periodic accountings filed in the Probate Court having jurisdiction of the Trust by the Trustees, the Successor Trustees and the Plaintiffs, who, properly, support neither the Beneficiaries nor the holders of the Bonds in this proceeding, have been rendered on that basis and allowed. It is asserted on behalf of the holders of the Bonds that an estimate of the income of the Trust, following the completion of the Block, given to the purchaser of the Bonds by the Trustees, when the Bonds were issued, carries an implied promise that the Net Rents would be available to meet the obligations of the Bonds. An express promise to that effect was given to the Trustee by the Successor Trustees in the Extension Agreement.

The issues to be resolved are (1) whether the current and accumulated Net Rents shall be paid to the holders of the Bonds, in payment of such deficiency of interest and principal as may be established in the foreclosure proceedings, or belong to the Beneficiaries and should be paid to them or applied for their benefit, and (2) whether Sheridan Brooks Fry, a son of one of the Named Beneficiaries, is excluded from all benefits under the Will because he was married

while a minor without the consent of his parents, obtained a decree of divorce from the wife so married, and married another, prior to the death of the testatrix, the wife so divorced having had the decree of divorce vacated, thereafter, and secured a divorce for herself.

The first issue is so clearly one of novel impression that no counsel has been able to cite a decided case in any jurisdiction, or any legal text, which has a direct bearing on it. It is asserted on behalf of the Beneficiaries that the language of the Will directing that the Net Rents "shall be taken as a part of the net income" of the Trust and that the net income shall be distributed among them, or for their benefit, "annually, or oftener," is clear, explicit and unambiguous and requires that such Net Rents shall be so "paid over * or applied," and that they are entitled thereto, without reference to that language under the recognized principle of law that rents accruing on real property after the death of an owner pass with the property, to heirs or devisees, and do not become a part of the estate of a decedent to be handled by an administrator, or by an executor unless so provided by the will under which he holds. See *Paradis, Appellant,* 134 Me. 333; 186 A. 672, the authorities cited therein, and 32 Am. Jur. 364, Sec. 448.

This issue must be resolved by determining the rights of the parties without reference to any promise of the Trustees or the Successor Trustees, implied or express, to the purchaser of the Bonds, or to the Trustee; the method of handling the Net Rents prior to the time when the propriety of that method was challenged by the Beneficiaries; the allowance of accounts in the probate court; or the purported authorizations of the Decree. The rights of the Beneficiaries are controlled by the provisions of the Will. Those of the holders of the Bonds can be no greater than such provisions warrant and need be no less, except so far, if at all, as the provisions of the contracts represented respectively by the Bonds and the Indenture give such holders some-

thing less than the Will would have warranted. A bond is a contract. *Harvey* v. *Rackliffe,* 141 Me. 169; 41 A. (2nd) 455; 161 A. L. R. 296; *Paulsen* v. *Paulsen,* 144 Me. 155; 66 A. (2nd) 420; 11 C. J. S. 399, Sec. 2. So also is a mortgage indenture. As the writer of the text in *Secundum* states, a bond is the "primary contract," a mortgage a separate contract "to secure payment." What the situation might be if the Trustees, in executing the contracts represented by the Bonds and the Indenture, or either of them, had exceeded the authority conferred upon them by the Will, or the Decree, or if the Decree had purported to authorize them to do something the Will did not warrant, we do not need to consider. No claim is asserted that the Trustees exceeded in any way the authorizations of the Decree and while the brief submitted on behalf of the Trustees, and the holders of the Bonds, asserts that courts have authority to authorize trustees to borrow money without specific authority conferred by the instrument establishing the trusts in their hands, and cites decided cases and text writers to support that contention, it was stated by counsel for those parties at oral argument that no claim was asserted in the instant case that the Decree deviated in any respect from the provisions of the Will.

Analysis of the Will, the Decree and the contracts represented by the Bonds and the Indenture discloses that they are of identical import in their application to the Homestead Lot. The Will provided, among other things with reference thereto, that it should constitute a part of the Trust, during the full term thereof; that it should not be encumbered by the Trustees except "by ordinary and customary leases;" that its Net Rents should be distributed, "annually, or oftener," among a changing group of Beneficiaries; and that title to it should vest in the Beneficiaries, as the group was constituted at the termination of the Trust, "as tenants in common." The Decree excepted the Homestead Lot from the property the Trustees were authorized to mortgage, and from that against which obligations of the estate

issued by them might be enforced. The Bonds and the Indenture recognized the limitations imposed upon the Trustees by the Decree. The Bonds incorporated the Indenture by reference. The Trustees did not subject the Homestead Lot to the lien of the Indenture. They excluded it from their undertaking to furnish additional security. The Bonds, it is true, carry the unconditional promise of the estate (the Trust) to pay the bearer, or registered holder, of each, its principal amount, with interest, but the promise carried in each of them is common to all. There are express recitals in the Bonds that all of them "are issued under and equally secured by" the Indenture, and that reference thereto should be had "for a description of the mortgaged real estate and of the rights and remedies of the holders * * * in regard to the mortgage security." Those references incorporate in the Bonds the extended provisions of an Article of the Indenture entitled "Remedies on Default," wherein it is stated plainly that if default is made in the payment of the principal of the Bonds the Trustee may recover judgment against the Trust, but that no such judgment "shall run against the Homestead Lot." An additional reference to that lot is contained in an Article entitled "Unencumbered Property and Accounts and Audit." Therein it is declared that that property "is free from any claims of the holders of the bonds."

The Trustee, and the holders of the Bonds, being precluded by the terms of their contracts with the Trust from enforcing any judgment against the Homestead Lot, are not entitled to have the income from it applied in payment of either the principal of the Bonds or the interest thereon. The Plaintiffs are authorized to pay the Net Rents now in their hands, and that available thereafter, after paying all operating expenses and taxes applicable to the Homestead Lot, to the Beneficiaries.

The second issue, involving the status of Sheridan Brooks Fry, is controlled by the testatrix's final statement of the

scope of the clause under which she excluded descendants of her grandparents from her bounty for what she must have regarded as an objectionable matrimonial record. That final statement, appearing in the ninth paragraph of the second codicil of her Will, where she struck out the original one, as earlier modified, reads:

> "I expressly exclude * * * any * * * descendants * * * set out and enumerated * * * who may be living at my decease * * * divorced or * * * living apart from * * * wife or husband, together with the child or children of such descendant, it being my intention that such descendant and child or children shall not be * * * entitled to receive income and principal * * * and * * * shall be forever debarred from any participation in my estate."

Sheridan Brooks Fry was not one of the descendants "set out and enumerated." His father, Alfred Fry, now deceased, was. The father survived the testatrix, became one of the Beneficiaries and shared in all distributions to them during his lifetime. His status, at the death of the testatrix, controls that of his children and their descendants, without reference to their individual matrimonial records. The Plaintiffs are authorized to pay a proportionate share of such income of the Trust as is available for distribution among the Beneficiaries during his lifetime to Sheridan Brooks Fry.

Reasonable costs and counsel fees for the Trustees and the Beneficiaries may be fixed by the sitting justice and allowed in the account of the Trustees.

Case remanded for a decree in accordance with this opinion.

GEORGE M. DAVIS, JUDGE OF PROBATE

vs.

AMERICAN SURETY COMPANY OF NEW YORK

GEORGE M. DAVIS, JUDGE OF PROBATE

vs.

MAINE BONDING & CASUALTY COMPANY

Somerset. Opinion, June 20, 1949.

Evidence. Executors and Administrators. Bonds. Referees.

The fact that an executor had given a general bond for the faithful discharge of his trust as executor does not authorize the extension of a special bond for the sale of certain real estate to cover money or property received from sources other than sale of the real estate.

The failure of an executor to account for money received by him as proceeds for a 1934 sale of real estate is not a breach of bonds prior given for the sale of real estate on licenses issued in 1926 and 1927.

A decree of the Probate Court disallowing the final account of an executor is admissible in evidence for the purpose of showing a breach of a bond for the sale of real estate since an executor must charge himself with proceeds of the sale in an account duly filed and allowed.

In an action of debt on a bond against a surety company, the referee should not find the amount due for breach but should find in the penal sum of the bond, and so much of the penalty as is due should be determined by the court in subsequent proceeding.

ON EXCEPTIONS.

Two actions of debt to recover on executors bonds to permit the sale of realty. In the action against the American Surety Company of New York, the referee found for the defendant. In the action against Maine Bonding and Casualty Company, the referee found for the plaintiff. Plaintiff and Maine Bonding and Casualty Company bring excep-

tions. Exceptions overruled in the action against American Surety Company of New York. Exceptions sustained in the action against Maine Bonding and Casualty Company. Case fully appears in opinion.

Seth May, Rupert F. Aldrich, Edmund Muskie,
for plaintiff.

Perkins, Weeks and Hutchins,
James R. Desmond,
William B. Mahoney,
for defendant, Maine Bonding and Casualty Company.

Merrill and Merrill,
for defendant, American Surety Company.

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

TOMPKINS, J., sat at argument and participated in consultation, but died prior to the preparation of the opinion.

FELLOWS, J. These two actions of debt from Somerset County, brought in the name of the Judge of Probate, on executor's bonds to permit sale of real estate, were heard together by a referee. In the action against American Surety Company the referee found for the defendant company. In the action against Maine Bonding & Casualty Company the referee found for the plaintiff in the sum of $7,373.83. To the acceptance of the referee's report in the American Surety Company case the *plaintiff* filed written objections and took exceptions to allowance. To the acceptance of referee's report in the Maine Bonding & Casualty Company case the *defendant* objected in writing and excepted.

THE AMERICAN SURETY CASE

This was an action of debt on two bonds of Daniel M. Marshall, executor of the will of Columbus Marshall, each in the penal sum of $20,000. One bond for sale of real estate was dated April 16, 1926, and the other, as security

for renewal of license to sell real estate, was dated May 7, 1927. The bonds were executed by the defendant American Surety Company of New York in connection with the executor's license to sell certain real estate of the deceased testator, under and according to R. S. (1944), Chap. 150, Secs. 3, 4 and 18. The original license to sell the real estate was granted to the executor on April 13, 1926 and the second license was granted May 4, 1927. There was no sale of the testator's real estate made until 1934, under another license dated September 12, 1934. When the sale was made the defendant American Surety Company did not issue the accompanying bond. The surety in 1934 was the other defendant.

The conditions of the bonds issued in 1926 and 1927 by this defendant, American Surety Company in this case were as provided by R. S. (1944), Chap. 150, Sec. 3, that, the executor would (1) "observe all provisions of law for the sale" and "use due diligence in executing the trust" and (2) that he would "truly apply and account for the proceeds of said sale."

There was no sale made by the executor within a year, while either the 1926 or 1927 licenses to sell were in force. R. S. (1944), Chap. 150, Sec. 18. The referee found no liability on the part of the American Surety Company because no breach of the bond. In other words, the referee found as facts that there was no sale and no lack of due diligence.

It does not appear by the record before us that this executor, at the time when he was appointed executor, gave a general bond for the faithful discharge of his trust as executor. He was probably excused under the will. R. S. (1944), Chap. 141, Sec. 10 and Sec. 11. The fact that the executor did not give a general bond, does not authorize the extension of a special bond, for sale of certain real estate, to cover money or property received from sources other than

sale of the real estate. *Judge of Probate* v. *Toothaker,* 83 Me. 195; 22 A. 119; *Williams* v. *Morton,* 38 Me. 47; 61 Am. Dec. 229.

No sale was made of property belonging to the testator's estate while the above-mentioned licenses of 1926 and 1927 were in force. The sale was made years afterward and under another license to sell. The failure to account for any money received by the executor as the proceeds of the 1934 sale is not a breach of either of the bonds issued in 1926 and 1927 by the defendant American Surety Company. The referee could find, and did find, that the executor was not at fault in not selling under these licenses issued in 1926 and 1927. *Miller* v. *Meservey,* 107 Me. 158; 77 A. 697.

The plaintiff has no valid exceptions to the acceptance of the referee's report in this case against the American Surety Company.

THE MAINE BONDING CASE

This second action of debt, on a $10,000 bond for executor's sale of real estate, was brought by Rupert F. Aldrich as administrator d.b.n.c.t.a of Columbus Marshall, in the name of the Judge of Probate for the benefit of the estate, against the defendant Maine Bonding & Casualty Company. The bond of defendant was dated September 20, 1934. "The condition was such" (as the declaration states) "that whereas said Daniel Mann Marshall, in the capacity of executor of the will of Columbus Marshall, late of Anson, in said County of Somerset, deceased, at a court of probate held at said Skowhegan on the 12th day of September A. D. 1934, was licensed to sell and convey certain of the real estate belonging to said Columbus Marshall, described in the petition of said Daniel Mann Marshall for license to sell, dated September 12, 1934, then if said Daniel Mann Marshall should first, well and truly observe all provisions of law for the sale, leasing or exchanging of such real estate, or interest therein, and use due diligence in executing said trust, and

second, truly apply and account for the proceeds of sale or lease according to law, then said obligation was to be void, otherwise to remain in full force." The plaintiff further alleged that within the year covered by the license the executor did not observe the provisions of law for the sale of property, nor use due diligence, but "with intent to defraud the estate of Columbus Marshall, gave executor's deeds thereof dated November 28, 1934, to one Hemon S. Blackwell of Stratton, Franklin County, Maine, conveying to him the title and ownership of said lands in ostensible execution of his said license to sell the same, but with a secret agreement whereby said Blackwell was not to pay for said lands but was to cut and remove the wood and timber therefrom and deliver the same to said Daniel Mann Marshall, personally, or to parties designated by him in return for $100 a month to be paid said Blackwell by said executor," and the plaintiff further claimed that the "fraud and secret agreement were concealed by said executor, who on December 20, 1934 at Skowhegan aforesaid filed certificates of sale of said land to said Blackwell, in said court, purporting to show a bona fide sale thereof for $2,000, as to part thereof and for $1,000, as to the remainder thereof." Blackwell gave back a mortgage to the executor personally, who assigned the mortgage to a bank, which bank foreclosed. There were other and additional allegations of fraud, "neglect, inattention and indifference" regarding the testator's property in Somerset County, covered by the license to sell.

The defendant pleaded the general issue and by brief statement pleaded performance. The plaintiff by counter brief statement denied performance, realleged the breaches, and the defendant joined. The case was heard by a referee who awarded damages to the plaintiff for $7,373.83.

The defendant, Maine Bonding Company, filed written objections to the allowance of the referee's report when presented before the Superior Court for Somerset County, and

to the allowance took exceptions. One exception is that at the hearing before the referee the decree of the Judge of Probate was objected to as evidence, which decree showed that the final account of Daniel M. Marshall, executor, as filed by Lena S. Marshall the administratrix of Daniel M. Marshall, was disallowed, also that the Probate Court charged Marshall for use and occupation of real estate $2,485.83 and $738.71 interest thereon; for rentals collected of tenants $1,988.67 and $590.85 interest; for loss or damage sustained by misconduct in fraudulently selling to Hemon Blackwell according to secret agreement and falsely stating the consideration as being $2,000 and $1,000, the sum of $5,452 "for which neither said executor, nor his estate, has accounted" with interest amounting to $1,921.83; and for additional loss in the sum of $10,500 due to "neglect, inattention and indifference;" for loss or damage due to a forfeiture of a policy of insurance on life of Daniel M. Marshall assigned to the testator, which the Probate Court found to be the property of the estate, $2,374.70; with other losses due to maladministration of the executor in the total sum of $26,052.59.

The account as filed by Lena S. Marshall as administratrix of Daniel M. Marshall was specifically disallowed by the Probate Court, but in the decree the Judge of Probate found facts and found damages as declared on in the above declaration. The referee found for the plaintiff in this action on the bond for the sale of the real estate to Hemon S. Blackwell in the above sums stated by the Judge of Probate to be $5,452.00, plus interest of $1,921.83, or the total of $7,373.83 "for which neither said executor nor his estate, has accounted."

The exception presents the question of the admissibility, in this actoin, of the above decree of the Judge of Probate.

This action is on special bond of the defendant for sale by the executor of real estate. It is not an action on an executor's general bond for faithful discharge of his trust as

executor. There was apparently no general bond. The bond in suit covers only the amount that was received from the sale within the year, or that should have been received at the sale, taking into consideration its fair market value or other pertinent facts, and the bond was also given to "truly apply and account for the proceeds." *Judge of Probate* v. *Toothaker,* 83 Me. 195; 22 A. 119; *Miller* v. *Meservey,* 107 Me. 158; 77 A. 697.

The record shows that the plaintiff offered in evidence the bond in suit, originally given on September 20, 1934 with Daniel Mann Marshall as principal, and Union Safe Deposit & Trust Company of Delaware as surety, conditioned as required by statute to observe "all provisions of law for the sale," * * * "and use due diligence" and to "apply and account for the proceeds." The record further shows that it was stipulated and agreed that the defendant, Maine Bonding & Casualty Company, "stands in the place of The Union Safe Deposit & Trust Company." The authority to bring the suit in the name of the Judge of Probate was admitted. The plaintiff offered in proof of his case the above mentioned decree of the Judge of Probate, which was objected to.

This decree of the Judge of Probate specifically disallowed the executor's final account, and, for the purpose of showing a breach of the conditions of the bond by non-allowance of the account, the decree was admissible. Chapter 150, Section 4 of the Revised Statutes of 1944 provides that the executor "shall be deemed to have performed the conditions" when, among other things, he has charged himself in an "account duly filed and allowed."

Under the view that we take in this case, the only other exception, that becomes material, is that the referee erred in finding for the plaintiff in the amount of $7,373.83. We believe this contention correct. The referee found, as he could find, from the decree of the Judge of Probate, that there was a breach of the conditions of the bond, because no

account was "duly filed and allowed." R. S. (1944), Chap. 150, Sec. 4. Judgment should be for the plaintiff in the penal sum of the bond, for the reason that others may be interested.

The statute provides that "when judgment is for the plaintiff by verdict, default, or otherwise in any suit on a probate bond, it shall be entered for the penalty in common form, and the subsequent proceedings shall be had by the court as hereinafter provided." R. S. (1944), Chap. 151, Sec. 10. Various sections follow, providing for suits by creditors or others interested, and for *scire facias*. R. S. (1944), Chap. 151, Sec. 16 then provides that in subsequent proceedings the court shall order an execution to issue for "so much of the penalty of the bond as appears to be due, with interest and costs." See *Potter* v. *Titcomb*, 12 Me. 55; *Potter* v. *Titcomb*, 11 Me. 157; *Cook* v. *Titcomb*, 115 Me. 38; 97 A. 133; *Warren* v. *Leonard*, 115 Me. 323; 98 A. 824; *Miller* v. *Kelsey*, 100 Me. 103; 60 A. 717; *Brackett* v. *Thompson*, 119 Me. 359; 111 A. 416. Interest is added to the amount of the penalty of a bond from the date of the breach. *Foster* v. *Kerr and Houston*, 133 Me. 389, 402; 179 A. 297; *Wyman* v. *Robinson*, 73 Me. 384, 387; 40 Am. Rep. 360.

The rule of reference in this case was in the usual form and gave no authority to find the amount of the execution. When a referee finds a breach of any of the conditions of a bond for sale of real estate, as here, he should find for the plaintiff in the penalty of the bond. R. S. (1944), Chap. 151, Sec. 10. In subsequent proceedings the amount of execution is to be determined. R. S. (1944), Chap. 151, Sec. 16.

In the case of George M. Davis, Judge of Probate v. American Surety Company,

Exceptions overruled.

In the case of George M. Davis, Judge of Probate v. Maine Bonding & Casualty Company,

Exceptions sustained.

GERALDINE PEASE

vs.

DAVID SHAPIRO

EDWARD PEASE

vs.

DAVID SHAPIRO

Androscoggin. Opinion, June 23, 1949.

Negligence. Buildings. Directed Verdict.

The person in control of a building is bound, as between himself and the public, to keep buildings and other structures abutting upon the streets and sidewalks safe for travellers lawfully passing along the same.

The owner, who has general supervision or control of a building, is liable when damage to the lawful pedestrian or traveller from snow or ice results wholly from the shape and condition of the roof, and the proximity of the building to the street or sidewalk.

The presiding justice at a jury trial is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence.

General motions for new trial do not reach an order directing verdicts for the plaintiff. On exception for failure to direct a verdict, a general motion after jury verdict is often considered because of waiver.

ON EXCEPTIONS.

Action for negligent injuries and action for medical expenses and loss of wife's services and companionship suffered as the result of negligence of defendant. On motion for a new trial and exceptions to an order of the presiding justice directing verdict for plaintiff. Exceptions sustained. Case fully appears in opinion.

John G. Marshall and John A. Platz, for plaintiff.

Harris M. Isaacson, James R. Desmond and William B. Mahoney, for defendant.

SITTING: STURGIS, C. J., THAXTER, MURCHIE, FELLOWS, MERRILL, JJ. TOMPKINS, J., sat at argument and participated in consultation but died prior to the preparation of the opinion.

FELLOWS, J. The first of these two cases is brought by Geraldine Pease against David Shapiro, for alleged negligence on the part of the defendant in "creating a condition" or by suffering "a condition to exist" whereby snow and ice fell from the defendant's building, and injured the plaintiff Geraldine Pease, then upon the sidewalk. The second case is brought by the husband of Geraldine Pease for medical expenses incurred by him resulting from the alleged injuries, and also for loss of his wife's services and companionship. No claim is made, and no evidence appears to show that the defendant had any personal knowledge of the accident or of snow conditions before. The plea was the general issue in both cases. The actions were tried together before a jury in the Androscoggin Superior Court. The amount of the verdict for Geraldine Pease was found by the jury to be $2,000 and for Edward Pease $500.

The cases are before the Law Court on exceptions by defendant to the order of the presiding justice for the jury to return a verdict for the plaintiff in each case; on excep-

tions by defendant to refusal of presiding justice to direct a verdict for defendant; on exceptions by defendant because, on defendant's motion for new trial to the presiding justice, the justice did not consider the merits of the motion, but ruled "in order that the cases might go promptly to the Law Court." The defendant also filed general motions for new trials.

The record shows that on February 16, 1947 the defendant was admittedly the owner of a three story building at No. 331 Main Street in Auburn. The evidence as to existing conditions and alleged negligence came from three witnesses only, George Barron, a civil engineer who made a plan and measurements, and the testimony of Geraldine Pease, and her mother Laura C. Comeau.

It appears that on February 16, 1947 the plaintiff Geraldine Pease and her mother were walking at noontime on the sidewalk in front of defendant's building. The plaintiff lived next door. The plaintiff testified that "I was talking with my mother and all of a sudden I felt something hit me, and at the same time I saw a red light, a ball of fire, and I collapsed there," and further, the plaintiff said "There was an awful lot of ice on the ground * * * on the sidewalk * * * I didn't know what had struck me * * * there were some big pieces of ice on the sidewalk some two feet long and eighteen inches thick * * * and some small ones." The mother, Laura C. Comeau, who was with the plaintiff and who testified through an interpreter, said "I saw the first piece fall. Then I saw the second piece fall * * * from the roof of the building, * * * near the piazza." "The first one I didn't see, but the second ice it fall from the roof of the building and I stepped away. The piece fall and broke and pieces fall on her, right against her." Mr. Barron said that the eaves of the building were five feet ten inches from the line of the inside edge of the sidewalk. There was a gutter but no guard rail or snow fence. The roof pitched toward the sidewalk. There was no evidence of any defect

in the roof. There was no lack of repair. There was no evidence of any previous gathering of snow or ice, and no evidence of snow or ice falling before. There was no evidence as to how long snow or ice had been on the roof, and except for the snow and ice on the sidewalk there was no evidence as to how much had accumulated or where. There was no evidence of any city ordinance regarding roofs or protection from snow. The defendant introduced no testimony.

The plaintiff's action is for negligence and the defendant can be held liable only on the ground that he was negligent, and that there was no negligence on the part of the plaintiff that contributed to the injury. The person in control of a building is bound, as between himself and the public, to keep buildings and other structures abutting upon streets and sidewalks safe for travellers lawfully passing along the same. *Lee* v. *McLaughlin,* 86 Me. 410; 30 A. 65; 26 L. R. A. 197. The owner, who has general supervision or control of a building, is liable when damage to the lawful pedestrian or traveller from snow or ice results *wholly* from the shape and condition of the roof and the proximity of the building to the street or sidewalk. *Meyers* v. *Manufacturing Co.,* 122 Me. 265; 119 A. 625.

As to the direct evidence of negligence, in this case under consideration, the plaintiff testified that something hit her while she was on the sidewalk in front of defendant's building. She did not know what. Her mother who was with the plaintiff said that she saw the second piece of ice fall from the roof and that her daughter was struck. The presiding justice in directing that the jury must find for the plaintiffs in both cases, left to the jury, as triers of facts, the question of the amount of damages only. The testimony of the mother, in effect, was by the court taken as true, and any inferences that might be drawn from facts and circumstances as testified to by other witnesses were, by the presiding justice, resolved in favor of the plaintiffs. The de-

fendant did not admit liability and expressly denied it. No testimony was offered in defense.

It is the well settled law of procedure that at a jury trial the presiding justice is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence. When, on the other hand, a case is doubtful, or different conclusions might be drawn from the evidence by different minds, the facts should be submitted to the jury. *Young* v. *Chandler,* 102 Me. 251; 66 A. 539; *Heath* v. *Jaquith,* 68 Me. 433. The rule is clear, but often the application of the rule presents difficulties.

The presiding justice in directing a verdict for the plaintiff where the evidence is oral, must necessarily accept the plaintiff's contention as true or draw inferences favorable to the plaintiff from facts and circumstances. In some cases, all persons might not be able to accept at face value the testimony of a witness, even if that testimony is not contradicted. There is no law that can compel a human mind to believe, or to disbelieve, uncontradicted oral testimony. It may be inherently improbable. It may be impossible. It may be exaggerated. The silent facts and circumstances may raise doubts. It may not "ring true." The appearance, manner, or interest of a witness makes a vast difference to the mind of him who hears testimony and who must decide as to truth or value. A witness who may appear worthy of credence to one person may not so appear to another.

In this case an interested witness testified through an interpreter that she saw ice fall from the roof, and that this ice or snow from the roof struck her daughter. This was the only witness who positively testified as to where the ice came from. Inferences only may be drawn from the story of the plaintiff. Was the mother's appearance, manner of testifying and the circumstances such that all minds would necessarily accept the story at full value? Was any fact or inference gained or lost through the interpretation from a

foreign language? Was the defendant's building so situated and so constructed that if there was snow or ice on its roof that it could or would fall in the manner as described? As to the plaintiff's testimony, did any ice and snow that she says she saw on the sidewalk fall from the roof of the defendant's building to her injury, and was she free from negligence that contributed to her injury? Was it probable that the plaintiff was struck by one of the pieces of ice that may have been, as she says, "two feet long and eighteen inches thick?" How large were the pieces that struck the plaintiff, if any from the roof struck her? Were all the alleged injuries due to ice or snow falling from the defendant's roof? Did she, by any chance, carelessly stumble and fall over ice on the walk? The plaintiff lived next door, and from what she stated the weather conditions to have been for some time previous, should she have known of a dangerous condition, if one existed, and taken any precautions? If so, did she take any precautions? In brief, did the claimed injuries of the plaintiff result "wholly from the shape and condition of the roof and the proximity of the building to the sidewalk?" *Meyers* v. *Manufacturing Co.*, 122 Me. 265; 119 A. 625.

It would appear in this case that different minds might draw different conclusions from the evidence, and the fact that the testimony is not directly contradicted does not necessarily make it conclusive and binding, although uncontradicted testimony is not to be utterly disregarded and arbitrarily ignored without reason. "It should be carefully considered and weighed with all other evidence in the case, and with all of the inferences to be properly drawn from facts established * * * the court is not required to put the stamp of verity upon it, merely because it is not directly contradicted by other testimony." *Mitchell* v. *Mitchell,* 136 Me. 406; 11 A (2nd) 898, 904.

We are of the opinion that the right of the jury to pass upon the evidence of liability in these negligence cases

should not have been taken away. The cases present doubts and different conclusions might be drawn by different minds.

As previously stated, these cases are before the Law Court on exceptions by the defendant. There was also a general motion for a new trial filed in each case by the defendant. We find it necessary to decide only the question of defendant's exceptions to the direction of verdicts for the plaintiffs. We do not pass upon the general motions.

The general motions for new trials filed by the defendant do not reach this order directing verdicts for the plaintiffs. The defendant's exceptions only apply. Complaints as to the rulings, opinions, or directions of a justice presiding, must be by exceptions. *Rhoda* v. *Drake,* 125 Me. 509; 131 A. 573; *Stephenson* v. *Thayer,* 63 Me. 143; *First Parish* v. *McKean,* 4 Me. 508. On exceptions for *failure* to direct, a general motion after jury verdict is often considered because of waiver. *Symonds* v. *Free Street Corp.,* 135 Me. 501; 200 A. 801; 117 A. L. R. 986. The civil rule apparently differs somewhat from the rule in criminal cases. See *State* v. *Bobb,* 138 Me. 242; 25 A. (2nd) 229. The general motions, because of claim of excessive damages as assessed by the jury, would be applicable here on that question if it were necessary to consider damages. We do not find it to be necessary.

We sustain the defendant's exceptions to the order of the presiding justice directing verdicts for the plaintiffs.

The entry in each case to be
Exceptions sustained.

GRANVILLE W. ANGELL

vs.

GERALD GILMAN

Cumberland. Opinion, June 23, 1949.

Contempt. Equity. Injunctions.

In contempt proceedings jurisdictional questions may and should be brought to the attention of the court at any time and when it appears that the court has no jurisdiction the proceedings should be stayed and amendments, if allowable, be permitted, or the action dismissed.

In equity, all persons who are legally or beneficially interested in the subject matter and results of the suit are to be made parties, and if not made parties, injunction will not issue against them.

ON EXCEPTIONS.

Suit to enjoin defendant from carrying on a certain type of business in accordance with specific agreement. An injunction was issued against the defendant and also certain lessees of the defendant's wife who were not made parties to the suit. On plaintiff's petition the latter were adjudged guilty of contempt and bring exceptions. Exceptions sustained and case remanded to sitting justice. Case fully appears in opinion.

Pinansky and Pinansky, for complainant.

Harry C. Libby, Phillip F. Thorne, for respondents.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ. TOMPKINS, J., was a member of the court at the time the case was assigned, but died prior to the preparation of the opinion.

NULTY, J. This case arises out of a petition charging Dorothea Wilson and Freeman C. Wilson with contempt of court.

The record discloses that the plaintiff in the bill in equity purchased and acquired from the defendant on May 15, 1948, certain real estate in the Town of Sebago, Cumberland County, Maine, consisting of a dwelling house and store (known as Bob's Store) and the fixtures, good will and stock in trade, etc. of said store. The transaction was evidenced in part by two bills of sale, each of which contained a similar specific agreement on the part of the defendant that he would not enter or engage in the same line of business, either alone or in partnership, directly or indirectly, in the Town of Sebago for a period of five (5) years from May 15, 1948, in competition with the plaintiff or his successors. There were certain minor exceptions not pertinent in this case. The record further discloses that on or about the latter part of July, 1948, the plaintiff filed a bill in equity in the Supreme Judicial Court for Cumberland County praying for an injunction, both temporary and permanent, alleging that the defendant had violated the specific agreements with respect to competitive business hereinbefore mentioned. The matter came on to be heard on October 15, 1948, on bill and answer, and subsequently, on November 5, 1948, the findings of the court were filed and on November 23, 1948, a final decree was filed which granted a permanent injunction not only against the defendant, Gerald Gilman, but also against Alice Gilman, Dorothea Wilson and Freeman C. Wilson, and forbade the said defendant and said Alice Gilman and said Dorothea Wilson and said Freeman C. Wilson from carrying on a business such as was conveyed to the plaintiff, Angell, by the defendant, Gerald Gilman, and it also forbade the use by said Dorothea Wilson and said Freeman C. Wilson of certain equipment transferred and sold by the defendant for use in the business such as was conveyed to the plaintiff by the defendant. Attested copies of the permanent injunction

issued as aforesaid were served upon said Dorothea Wilson and said Freeman C. Wilson on November 26, 1948.

From the findings of the sitting justice it is apparent that the defendant, shortly after the conveyance of the business and good will thereof to the plaintiff with the specific agreement not to engage in competitive business, either directly or indirectly, began the construction of a building in proximity to the store which had been conveyed to the plaintiff by the defendant which building was to be adapted to a store on property owned or in the name of the defendant's wife, Alice Gilman. It further appears that on October 1, 1948, while the present action was pending, said Alice Gilman, with knowledge of her husband's specific agreement contained in the bills of sale hereinbefore mentioned, made a lease of the property upon which the new store building was located to said Dorothea and said Freeman C. Wilson and at the same time the defendant conveyed to said Dorothea and said Freeman C. Wilson equipment to be used in a general store, together with his gasoline business. After the issuance of the injunction and the service thereof, a petition for contempt was filed by the plaintiff against said Dorothea Wilson and said Freeman C. Wilson, returnable December 10, 1948. Answer of the respondents was filed as was also a stipulation which, in substance, admitted that said Dorothea Wilson and said Freeman C. Wilson, after the service of the attested copies of the permanent injunction had been served upon said Dorothea Wilson and said Freeman C. Wilson, continued to sell groceries and to carry on and operate a business such as was conveyed to the plaintiff by the defendant in the Town of Sebago, Maine. A hearing was held December 10, 1948, and at the conclusion of said hearing, said Dorothea Wilson and said Freeman C. Wilson filed a motion to dismiss said petition for contempt alleging as grounds therefor that the court had no jurisdiction as to said Wilsons on the ground that they were not made parties defendant in the bill in equity which motion

was denied by the court and the respondents seasonably excepted.

On January 14, 1949, the court adjudged the respondents to be guilty of contempt to which ruling the respondents, namely, said Dorothea Wilson and said Freeman C. Wilson, seasonably excepted and subsequently said exceptions were allowed by the sitting justice and the matter is now before this court for decision.

At no stage in the proceedings were said Alice Gilman, said Dorothea Wilson or said Freeman C. Wilson made parties to the bill in equity.

The motion to dismiss the petition for contempt filed December 10, 1948, raises a jurisdictional question. If jurisdiction is lacking, it is fatal in every stage of a cause and may be and should be brought to the attention of the court at any time, and when it appears that the court has no jurisdiction, it becomes the duty of the court to stay the proceedings and permit amendments, if allowable, or dismiss the action. *Darling Automobile Company* v. *Hall et al.*, 135 Me. 382; 197 Atl. 558; *Powers* v. *Mitchell*, 75 Me. 364; *Charles Cushman Co. et als.* v. *William J. Mackesy et al.*, 135 Me. 490; 200 Atl. 505; 118 A. L. R. 148; Whitehouse Equity Practice (1st Ed.) Sec. 193.

The real issue raised by the exceptions has to do with the question of whether or not an injunction may be issued under such conditions as exist from the record in this case against persons not made parties to the cause before the court. If the writ of injunction, which is an extraordinary remedy and discretionary, as well, can be issued under such circumstances as have been here described, then the court had jurisdiction of the parties. If it cannot be issued under such circumstances, then jurisdiction is lacking and the motion to dismiss should have been granted. In this State it has long held that all persons are to be made parties who are legally or beneficially interested in the subject matter

and result of the suit. *Evans* v. *Chism,* 18 Me. 220, 222. This fundamental principle concerning parties is stated in another way in the following language:

> The fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject matter and the relief granted that their rights or duties might be effected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit.

Pomeroy Equity Jurisprudence, Vol. 1, Page 98, Sec. 114. To the same effect see Story's Equity Procedure, 8th Ed., Sec. 72, 76c; also Whitehouse's Equity Practice, Sec. 153, 156 inclusive. There are certain exceptions to this general rule which are not pertinent in the instant case. The following cases are in point in all of which the general rules hereinbefore mentioned are followed: *Felch* v. *Cooper,* 20 Me. 159; *Hussey* v. *Dole,* 24 Me. 20, 24; *Bailey* v. *Myrick,* 36 Me. 50, 52; *Beals* v. *Cobb,* 51 Me. 348, 349; *Chamberlain* v. *Lancy,* 60 Me. 230, 234; *Hichborn* v. *Bradbury,* 111 Me. 519, 525; 90 Atl. 385; *Hyams* v. *Old Dominion Cl.,* 113 Me. 337, 340; 93 Atl. 899. The more recent case of *Medico* v. *Assurance Corp.,* 132 Me. 422, 425 (172 Atl. 1) summarizes the present law as to who are necessary or indispensable parties.

Applying the general rules set forth in the above cited cases to this case leads only to one conclusion and that is that under the findings of the sitting justice said Dorothea Wilson and said Freeman C. Wilson, the respondents in the petition for contempt and also the persons named in the permanent injunction herebefore mentioned, had a material interest in the subject matter of this case and, therefore, should have been made parties defendant before an injunction should have been issued against them. It, therefore, follows that the petition for contempt cannot, under such

circumstances, be maintained for lack of jurisdiction of the respondents nor had the sitting justice any right under the existing law to issue an injunction against the respondents, said Dorothea and said Freeman C. Wilson, under the bill in equity filed in this proceedings until and unless said Dorothea Wilson and said Freeman C. Wilson were made parties to the cause, either on motion of the complainant or on the court's own motion. The exceptions are sustained and the contempt proceedings are ordered dismissed and the injunction against the respondents, said Dorothea Wilson and said Freeman C. Wilson, is hereby ordered vacated and dissolved. Inasmuch as there may be equities between the parties in this cause which should be determined and adjusted, the case is remanded to the sitting justice below for action in accordance with the opinion.

So ordered.

JOSEPH TARDIFF

vs.

M-A-C PLAN OF NE

Androscoggin. Opinion, June 27, 1949.

Conditional Sales. Recording.

The signature of the "person to be bound" by a conditional sale agreement satisfied all the requirements of R. S., 1944, Chap. 106, Sec. 8, to make its provisions effective between the original parties to it.

Nothing less than full compliance with the statutory requirements as to the recording of such an instrument can make it effective against a purchaser for value.

Only an agreement signed by the person to be bound is available for record under R. S., 1944, Chap. 106, Sec. 8, to control the title to the property to which it relates.

The action of a recording officer in copying an unsigned agreement on the record is a nullity.

ON EXCEPTIONS.

The plaintiff, after purchasing an automobile from the vendee to which a conditional sales agreement related, paid the defendant the unpaid part of the purchase price upon demand, on its representation that the conditional sales agreement had been recorded. Plaintiff demanded a refund upon discovering that the recorded instrument bore a typewritten signature and was merely a copy. The demand was refused. Defendant filed exceptions to a judgment rendered by a Justice of the Superior Court for the plaintiff. Exceptions overruled. Case fully appears in the opinion.

Israel Alpren, Harris M. Isaacson, Irving Friedman,
for plaintiff.

John Mahon, Nathan W. Thompson, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ.

MURCHIE, C. J. The sole issue raised by the defendant's exceptions in this case involves the propriety of a decision by a Justice of the Superior Court, to whom it was submitted on the Agreed Statement of Facts presented here, that:

> "the recording of an unsigned copy of a conditional sale agreement is not a recording of the agreement"

within the meaning of R. S., 1944, Chap. 106, Sec. 8. It is stipulated expressly in the Agreed Statement that if the recording disclosed therein "was not valid between the parties" to the action, neither of whom was a party to the instrument, i.e. if the plaintiff was not chargeable with constructive notice of it, judgment should be rendered for the plaintiff for $680, without costs. Such was the award.

The case involves two sales of an automobile. The first occurred on August 3, 1946, when the conditional sale agreement involved in the decision, hereafter called the "Agreement," was executed between the vendor, therein and hereafter called the "Dealer," and the vendee, therein and hereafter called the "Purchaser." It was a form of considerable length universally used in the trade, according to the Agreed Statement, which was neither intended for record nor recorded. The second was on October 4, 1946, when the plaintiff acquired the automobile from the Purchaser as a purchaser for value. In the interval the Dealer had assigned the Agreement to the defendant and the defendant had caused two condensed, or summarized, or "Short Form," copies of it to be prepared, setting forth all the essential terms of the Agreement, including the provision that title to the automobile should remain in the Dealer until the purchase price was paid in full. One of these was forwarded to

the Purchaser for his signature, signed, and returned. That copy was never recorded. The other was completed by the defendant, by having the name of the Purchaser typewritten on the signature line, and forwarded to the municipality where the Purchaser resided on August 3, and continued to reside, for record. This, undoubtedly, was intended to provide the Dealer and his assigns with the protection afforded by the statute, but the copy was never signed by the Purchaser, as was noted on the records of the municipality where it was received for record on August 23, 1946. While it has no bearing on the issue, it should be noted, perhaps, that the surname of the Purchaser was misspelled in the typing of it.

On December 12, 1946, the defendant made written demand on the plaintiff for $704.86, being the unpaid part of the purchase price under the Agreement, advising him of the Agreement and asserting that it was recorded. Plaintiff paid the sum demanded and later secured an insurance rebate of $24.86. When the original documents were delivered to him, he discovered the facts relative to the record and demanded the refund of the balance of $680. His claim therefor being rejected, the present action was commenced.

The rights of the parties are controlled by R. S., 1944, Chap. 106, Sec. 8, which provides that no agreement that personal property sold and delivered shall remain the property of the seller shall be valid unless:

> "in writing and signed by the person to be bound"

and that, although so written and signed, it shall not be valid:

> "except as between the original parties thereto unless it is recorded"

in the town where the party to be bound resides.

The requirement of record for instruments intended to control the title to chattels has been a part of our law since P. L., 1839, Chap. 390 imposed it with reference to per-

sonal property mortgages securing amounts in excess of $30. P. L., 1870, Chap. 143 made that law, as contained in R. S., 1857, Chap. 91, Sec. 1, applicable to conditional sales. Prior to the time when the statute stated that where there was more than one mortgagor the requirement contemplated a record in each town where any mortgagor resided, the court had placed that construction on it. *Rich* v. *Roberts,* 48 Me. 548; *Morrill* v. *Sanford,* 49 Me. 566. It has been declared also in decided cases that the burden of establishing that a personal property mortgage, or a conditional sale agreement, encumbers, or controls, the title of the property involved rests upon the party relying on it, *Horton* v. *Wright,* 113 Me. 439; 94 A. 883, and that nothing less than full compliance with all statutory requirements will satisfy that burden. *Gould* v. *Huff,* 130 Me. 226; 154 A. 574.

The instant case presents an agreement "in writing and signed" by a single "person to be bound," which satisfies the requirements of the statute as far as the original parties to it are concerned, but although the signature of that party was affixed to two writings setting forth that the title had been retained by the Dealer, it is stipulated expressly that neither was presented to any recording official for record, or recorded, and that what was so presented, and spread upon the records, was not "signed by the person to be bound."

Such facts present an issue that is of novel impression in this jurisdiction, but has been decided in other courts. Decisions in adjudicated cases, cited *infra,* justify the statement made with reference to it in 23 R. C. L. 226, Sec. 88, substantially repeated in 48 Am. Jur. 487, Sec. 118, that where an instrument:

> "as it appears on the record, contains defects which would render it void, if they existed in the original * * * (it) is treated as not recorded, whether the defect is apparent on the face of the record or not."

Both texts state this to be the rule:

> "although there are no such defects in the original"

but that situation is not presented in the instant case, where the lack of signature, if it is a defect, is a defect of the instrument presented for record, and the record so states.

Cases in which the record of a defective instrument has been declared insufficient to provide constructive notice that would bind a bona fide purchaser of the property to which it relates are *Hodgson* v. *Butts,* 3 Cranch 140; 7 U. S. 140; 2 L. Ed. 391; 2 S. Ct. 391; *Heister* v. *Fortner,* 2 Binn. (Pa.) 40; 4 Am. Dec. 417; *Carter* v. *Champion,* 8 Conn. 549; 21 Am. Dec. 695; *Sawyer* v. *Adams,* 8 Vt. 172; 30 Am. Dec. 459; *Herndon* v. *Kimball,* 7 Ga. 432; 50 Am. Dec. 406; *Shepherd* v. *Burkhalter,* 13 Ga. 443; 58 Am. Dec. 523; *Pringle* v. *Dunn,* 37 Wis. 449; 19 Am. Rep. 772. See also, *Churchill* v. *Demerritt,* 71 N. H. 110; 51 A. 254, and *General Motors Acceptance Corp.* v. *Brackett & Shaw Co.,* 84 (N. H.) 348; 150 A. 739; 70 A. L. R. 591.

In *Pringle* v. *Dunn, supra,* the court declares it to be a familiar rule:

> "that an instrument must be properly executed and acknowledged so as to entitle it to record, in order to * * * operate as constructive notice to a subsequent purchaser."

As authority for that statement Mr. Justice Story is cited and quoted (1 Eq. Jur., Sec. 404), with several cases, including *Heister* v. *Fortner, supra.* To the same effect is the declaration of the Connecticut Court in *Carter* v. *Champion, supra,* which dealt with a deed to realty. The statement there was that the deed to be recorded under the statute was that:

> "spoken of in the statute,"

wherein it was said that a deed was not valid unless written, subscribed, witnessed, and acknowledged, as that un-

der consideration was not. Under our statute the instrument to be recorded, to give such a party as the Dealer, in the instant case, or his assignee, the benefit of the protection it affords, is one "signed by the person to be bound." That presented for record, and recorded, was unsigned. The lack of a signature is as outstanding a defect as the omission of any one formality could be. That a duplicate of the unsigned instrument presented for record had been "signed by the person to be bound" cannot benefit the defendant. Its sole reliance under the statute must be on the one submitted to the recording officer for record. That was not entitled to record. The action of the recording officer in spreading it upon the record was a nullity.

Exceptions overruled.

ARTHUR A. FONTAINE

vs.

THOMAS PEDDLE

Kennebec. Opinion, July 6, 1949.

Abatement. Nonsuit.

The fact that a second suit was commenced while the first suit was pending does not show that the second suit was vexatious and upon a plea in abatement, the court must determine whether the second suit was vexatious or necessary to protect and secure the plaintiff's rights.

Voluntary nonsuit is a matter of right.

The overruling of a plea in abatement to second suit and the order of the case to trial upon the merits is not error where it appeared that real estate attached in first suit was heavily encumbered and of doubtful security and plaintiff had filed motion for a voluntary nonsuit.

ON EXCEPTIONS.

Action in assumpsit with account annexed and a later action in the same cause in the same court. Plaintiff filed a motion for a voluntary nonsuit in the first action, and defendant filed a plea in abatement in the second suit both of which were heard simultaneously by the court. Defendant brings exceptions to granting of the voluntary nonsuit, and overruling of the plea in abatement. Exceptions overruled.

Charles A. Peirce, for plaintiff.

McLean, Southard and Hunt, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

FELLOWS, J. This case is on exceptions by defendant to rulings by the presiding justice at a term of Kennebec County Superior Court. The Bill of Exceptions is based on the fact that the plaintiff Arthur Fontaine sued out a second action in the same court against Thomas Peddle while a first action was pending for the same cause. The plea in abatement filed by the defendant to the second suit and the plaintiff's motion for voluntary nonsuit in the first suit were heard by the court at the same time. Exceptions were taken by the defendant to the granting of motion for nonsuit, and to the overruling of plea in abatement. A trial was then had in the second action, and the jury found for the plaintiff in the sum of $591.25, as claimed in the account annexed.

It appears that an account for labor and materials performed and furnished for construction of a road on defendant's premises was claimed by the plaintiff, Arthur Fontaine, to be due him from the defendant, Thomas Peddle. The plaintiff sued out a writ of assumpsit with account annexed, *ad damnum* $1,000, and attached the defendant's real estate on July 29, 1947 and obtained service August 22, 1947. The writ was entered at the October Term 1947 of Kennebec Superior Court and continued from term to term to the October Term 1948. On September 1, 1948 the plaintiff brought the second action and attached the defendant's Pontiac automobile. This second suit was entered at the October Term 1948, and was the action which the defendant desired to abate and which was tried. On the first day of the October Term 1948 the plaintiff filed motion for voluntary nonsuit in the first action which was granted, and the costs ordered paid forthwith to defendant. On the same first day of the October Term 1948 the defendant filed a plea in abatement to the second action on the ground that there was another action pending between the parties for the same cause. After demurrer to the plea had been overruled, the plaintiff, under right reserved and permission granted, filed replication that the prior suit had been terminated by voluntary nonsuit. Defendant filed rejoinder that

plaintiff "began his second action to vex and harass the said defendant." To this rejoinder plaintiff answered that he did not "bring the second action to vex and harass." This issue of fact was submitted to the presiding justice for his decision thereon.

Evidence was presented by the defendant of the value of the real estate, the encumbrances thereon, the facts and circumstances relative to bringing the first and second actions, the claimed detrimental effect on defendant's personal and business affairs, the conversations between parties and counsel, and the giving of bond to release automobile. The presiding justice, in effect, found that the plaintiff did not "vex and harass" by bringing the second suit, that it was not in fact "vexatious" but was necessary to "protect plaintiff's rights," and overruled the defendant's plea in abatement. Exceptions were taken and the case went to a trial resulting in verdict for the plaintiff for the amount claimed.

It does not appear that there was any defect in the first suit brought, but it does appear that the real estate attached as belonging to the defendant was heavily encumbered. The appraisal value of defendant's real estate, set by experts who testified for the defendant and one of whom had the property to sell, was $11,500. The amount due on two mortgages thereon was about $3,700. There was a wife's one-third interest in expectancy, and there were attachments in the sum of $1,575 ahead of the attachment made by plaintiff. In addition there was a tax lien. To satisfy a judgment for the plaintiff's claim for $591, according to the defendant's own contentions, it would be necessary for plaintiff to arrange to pay prior claimants approximately $7,500. In other words, there was a possible equity of $4,000 from which the plaintiff might be paid the amount of a judgment, if the property brought as much as the $11,000 at sheriff's sale.

The mere fact that a second suit was commenced by the plaintiff while the first suit was pending does not show that the second suit was necessarily vexatious. The rule allowing a plea in abatement for pendency of another action is applied to promote justice. The court may inquire and determine whether the second suit was vexatious or was necessary to protect and secure the plaintiff's full rights. In fact, the plea in abatement may sometimes be avoided by discontinuance of the former action even after the plea is filed. *Brown* v. *Brown,* 110 Me. 280; 86 A. 32. Where two actions, however, are brought for the same cause at the same time both actions will be abated upon plea seasonably filed. *Garoufalis* v. *Agia Trias,* 119 Me. 452; 111 A. 757.

Here, the record shows that the plaintiff had a real estate attachment in the first case but the real estate was heavily encumbered and its sale value uncertain. The plaintiff had an account for goods and materials sold and delivered. What apparently disturbed the defendant was the necessity to secure a bond to release the attachment of his automobile, and the fact that he was deprived of its use for several days. The plaintiff, as the presiding justice found, should not be compelled under the circumstances here to rely on doubtful and most uncertain security, when, long after his first suit, the certain security appeared. If there was delay for the defendant in securing bond to release the attachment, the evidence indicates that he himself was at fault for the greater part of the delay. Then, too, the plaintiff went to voluntary nonsuit in the first action at the return term of the second, and on the same day of the filing of plea in abatement. The nonsuit costs were ordered paid forthwith as required by R. S. (1944), Chap. 100, Sec. 164, and that the payment of the costs was duly made is not questioned. The voluntary nonsuit was a matter of right. *Washburn* v. *Allen,* 77 Me. 344; *Hayden* v. *Railroad,* 118 Me. 442; 108 A. 681.

The evidence does not indicate that the defendants had been in any manner disturbed by the attachment of his real estate in the first suit. There were many prior encumbrances and attachments of long standing. The plaintiff, however, was undoubtedly troubled by lack of apparent ability to collect a judgment, and as a result allowed his case to be continued term after term for the period of a year. When the plaintiff found certain security he brought the second suit, and then moved for nonsuit in the prior suit at the first opportunity.

It was the duty of the presiding justice, on plea in abatement filed in the second action, to balance the annoyance or expense to the defendant, if any, as against the rights of the plaintiff, and "if it appears that the second suit was not brought to harass or vex the defendant, and is not in fact vexatious, it is more equitable to allow the second suit to stand and the first to be discontinued upon proper terms, if not already discontinued, than to order an abatement of the second suit and thereby subject the plaintiff to the possible loss of substantial rights, and in any event to the expense and delay of beginning anew." *Brown* v. *Brown,* 110 Me. 280, 284.

The rulings of the presiding justice in the case at bar have legal and sufficient evidence to support them.

Exceptions overruled.

CHARLES A. PERRY

AND

FRANK C. PERRY

vs.

FRED DODGE

Waldo. Opinion, July 8, 1949.

Equity. Weirs.

The adequacy of a statutory remedy for a violation of rights created by statute is for the legislature and not for the court.

The principle that the court in equity may assess damages recoverable at law incidentally to the end that complete relief may be granted is not applicable in the absence of a special prayer or of a prayer for general relief.

Plaintiff not entitled to an accounting for monies received from the sale of fish nor have proceeds impressed with a trust where fish were caught in a weir maintained by defendants below low water mark contrary to the statute and without consent of the plaintiff.

Fish are *ferae naturae* and belong to the first taker.

ON APPEAL.

Bill in Equity for an accounting. From a decree for the defendant plaintiff appeals.

Charles A. Perry, for plaintiff.

Clyde R. Chapman, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

WILLIAMSON, J. The plaintiffs appeal in equity from the denial of an accounting sought under prayers in their

bill that the defendant account to the plaintiffs for all monies or other benefits received by him by the sale of fish from a certain weir for the season 1948 and that such monies or other benefits be impressed with a trust for the benefit of the plaintiffs. The appeal is dismissed.

The plaintiffs are the owners of shore property. The defendant maintained a fish weir over the tide-waters and flats off the uplands owned by the plaintiffs without the license from the town and the consent of the owners required by statute. *R. S., Chap. 86, Secs. 7-11, inc., and Sec. 12, enacted in the Laws of 1947, Chap. 257.* The plaintiffs at no time had a license from the town, required by the same statute, for the erection and maintenance of a weir.

The weir proper, or the pound or enclosure, was below low-water mark. The findings of the single justice indicate that a leader reached from the weir to a point on the plaintiffs' shore above low-water mark.

The defendant had maintained and operated a fish weir for several seasons ending with 1947 under a lease from the then owners of the flats and uplands of a fish weir privilege on the property "with right to construct a weir on said privilege, providing permit is secured from lawful authorities, to use and fish the same, with all rights and privileges thereto pertaining." At no time did he have the required license from the town, but the then owners did not object to the use of the weir privilege on this ground.

In March 1948 the plaintiffs acquired the property, and the defendant was forbidden by them to maintain and operate the weir. The defendant thereafter rebuilt the weir at substantial expense, completing the construction about May 1, 1948, and maintained and operated it during the 1948 season. The bill in equity was filed on June 4, 1948.

By the final decree filed December 4, 1948 the plaintiffs' bill was sustained and a permanent injunction issued, restraining the defendant "from trespassing over the tide-

waters and flats off the uplands of these plaintiffs — and from maintaining or operating said fish weir. . . ." No appeal was taken from these provisions of the decree.

The plaintiffs' urge that the provisions of R. S., Chap. 86, Sec. 11, reading:

> "and no fish weir, trap, or wharf shall be erected or maintained in tide-waters below low-water mark in front of the shore or flats of another, without the owner's consent, under a penalty of $50 for each offense, to be recovered in an action of debt by the owner of said shore or flats."

provide inadequate relief for interference with their rights.

In *Sawyer* v. *Beal,* 97 Me. 356, at 358; 54 A. 848, 849, Chief Justice Wiswell, in an action of debt to recover the penalty under the above statute, said,

> "The very purpose of the statute is to extend to him (the shore owner) additional protection in the enjoyment of his rights as such owner, and to give him a remedy for injury, where, prior to the statute, there was neither remedy nor injury in the legal sense."

The Legislature created both the right of the shore owner to be protected against injury from a weir below low-water mark and the penalty for violation of such right. The adequacy of the statutory remedy against an injury existing only by virtue of the statute is for the Legislature and not for the Court to determine.

> "Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain, and incomplete." *Pomeroy's Equity Jurisprudence,* 5th Ed. 1941, Sec. 281.

Insofar as the plaintiffs have been injured by the existence of a leader to the weir above low-water mark, they

have full and adequate remedies at law for trespass and for such interference with their exclusive right of fishing by erecting or attaching fixtures to their shore and other rights as they may be able to establish. *Matthews* v. *Treat,* 75 Me. 594.

The court in equity may assess damages recoverable at law incidentally to the end that complete relief may be granted. *Whitehouse, Equity Jurisdiction Pleading and Practice,* 1900 Ed., Sec. 560. In the instant case, however, there is neither a special prayer for such relief nor a prayer for general relief. Accordingly, assessment of such damages as an incident to the granting of injunctive relief is not here available to the plaintiffs. *Whitehouse, supra,* Sec. 223.

The plaintiffs also seek to bring their case within the jurisdiction of equity on the theory that a trust in the proceeds of the fish taken in the weir and sold by the defendant was created by a wrongful interference with their rights. The prayer for an accounting is based on such theory. For the purpose of determining jurisdiction, we may consider the bill was brought to establish such a trust without the prayer for injunctive relief. It is apparent that the remedy by an accounting under the trust theory is not incidental to the injunctive relief. There was no reason for the court in equity to declare a trust existed for the reason that the bill was properly brought and maintained for an injunction.

The plaintiffs' bill for the purpose of establishing a trust was brought substantially to recover damages for trespass or conversion of fish, for which adequate remedies at law exist.

Equity had no jurisdiction to entertain the bill for such purpose. Nor did equity acquire jurisdiction on the ground an accounting was necessary. It does not appear that any evidence here sought could not be obtained in actions at law.

United States v. *Bitter Root Development Co.*, 200 U. S. 451; 50 L. Ed. 550; 25 Sup. Ct. Rep. 318; see note 53 A. L. R. 815.

It is further to be noted that there was no conversion of the fish by the defendant Fish are *ferae naturae* and belong to the first taker. Here the fish were fish taken by the defendant in the pound or enclosure of the weir below low-water mark. *Treat* v. *Parsons*, 84 Me. 520; 24 A. 946. For this reason alone, without considering under what circumstances a trust may arise from unlawful conversion of property, the relief sought is not available to the plaintiffs.

The entry will be,

Appeal dismissed.

Decree below affirmed.

ALICE M. HILL, EXECUTRIX
WILL OF PAUL S. HILL

vs.

PAUL S. HILL, JR., AND
TRULL HOSPITAL

York. Opinion, July 12, 1949.

Gift.

To constitute a valid gift *inter vivos*, the donor must part with all present and future dominion over the property given.

In gift *inter vivos* delivery to donee must be accompanied with intent to surrender all present and future dominion over property, and, evidence of such intention must be full, clear, and convincing. The burden to prove a gift is on the donee.

If it is the intention of a donee that alleged gift is to take effect only at death of donor, gift is ineffectual as an attempted testamentary disposition of property, which can only be accomplished by will.

ON APPEAL.

Action by executrix against defendants to recover certain personal property as property of the estate. From decree for defendants, plaintiff appealed. Appeal sustained and case remanded for entry of decree in conformity with opinion.

Berman, Berman & Wernick,
Vincent L. Hennessy, for plaintiff.

Linnell, Brown, Perkins,
Thompson and Hinckley, for defendant, Paul S. Hill.

Margaret Currie, for Trull Hospital.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, WILLIAMSON, JJ.

WILLIAMSON, J. The case arises on appeal from a decree in equity upholding a gift *inter vivos* of certain corporate stock by plaintiff's testator (the donor) to the defendant, Paul S. Hill, Jr. (the donee). Delivery of the stock is not in dispute. The issue is: Was there error in finding the donor had the requisite intention to make a valid gift *inter vivos?* The appeal is sustained.

The donor was the owner of one-half of the capital stock, or one hundred and fifty shares, of the Trull Hospital, a corporation. In 1941 he conferred with an attorney at law about the disposition of his estate. The attorney was requested to accept delivery of the certificate representing the one hundred and fifty shares of stock and "to hold that certificate during his life and upon his death to deliver it to his son, Stanley Hill, Jr. (the donee)." The attorney testified: "He (the donor) said he wanted to fix his affairs for his son and his wife in a manner which would cause them the least inconvenience after he died;" and further, "He (the donor) said he wished to fix things for his widow and his son with the least inconvenience to them. He said that making the stock over to be held until his death and executing the deed to be held until his death would enable his son, upon his death, to have possession of the stock in the course of the administration of the hospital, and would enable his wife to have immediate possession of the Pool property; then they would not be obliged to wait for the course of administration."

The attorney informed the donor "that he, of course, was putting that (meaning the stock) entirely out of his hands, out of his control, it would have to remain so;"

The stock, which bore an assignment in usual form to the donee, was placed by the donor in an envelope on which the

attorney had typed the following inscription with the name of the attorney:

> "This envelope contains Certificate of Stock, Trull Hospital, 150 shares, Paul S. Hill, dated November 16, 1923, assigned to Dr. Paul Stanley Hill, Jr. March 15, 1935, for delivery to Dr. Paul Stanley Hill, Jr. upon the decease of Paul S. Hill. Delivered to me this second day of April, 1941 by Paul S. Hill for delivery as above stated."

The envelope was sealed and delivered by the donor to the attorney, who retained possession until after the donor's death. At the same time the attorney gave to the donor a signed receipt, as follows:

> "Received from Dr. Paul S. Hill one Certificate of Stock, Trull Hospital, one hundred and fifty shares, dated November 16, 1923, for delivery according to instructions given.
> April 2, 1941."

As part of the same transaction, the donor requested the attorney to prepare a deed conveying certain real estate to his wife, to be held by the attorney during his lifetime and delivered upon his death to his wife, and a will leaving his entire estate to his wife.

On the following day the deed and will were executed and were left with the attorney. The will, which was allowed in 1947, reads insofar as the donee is concerned, as follows:

> "I leave my best wishes to my son, Paul S. Hill, Jr., who is well situated in life and whom I have gladly assisted."

From the delivery of the stock in 1941 until his death in 1947, the donor continued his active interest in the management and operation of the Hospital. Negotiations by the donor for the sale of the Hospital were in progress at the time of his death.

So far as the record discloses, the delivery of the stock and the instructions to the attorney were known only to the donor and the attorney.

There is no suggestion of fraud in the case and, as before stated, the issue is whether or not the donor at the time the stock was delivered to the attorney had the requisite intenion to make a valid gift *inter vivos.*

The law applicable to gifts *inter vivos* is fully stated in *Rose* v. *Osborne,* 133 Me. 497, 500-501; 180 A. 315, 317.

> "To constitute a valid gift *inter vivos* the giver must part with all present and future dominion over the property given. He can not give it and at the same time retain ownership of it. There must be a delivery to the donee or to someone for the donee and the gift must be absolute and irrevocable without any reference to its taking effect at some future period." *Norway Savings Bank* v. *Merriam, et als.,* (88 Me. 146) on page 149; 33 A. 840, 841.
>
> "Delivery to the donee is not enough unless accompanied with an intent to surrender all present and future dominion over the property. The burden to prove the gift is on the donee."

In *Barstow, et als.* v. *Tetlow, Aplt.,* 115 Me. 96, 99; 97 A. 829, 831, the court said:

> "If the intention be that the gift is to take effect only at the death of the donor it is ineffectual, because that would be an attempted testamentary disposition of property which can be accomplished only by means of a valid will."

The retention of a life interest in the property by the donor does not defeat a gift. For example, dividends on stock. *In re Chapple's Estate,* 332 Pa. St. 168; 2 A. (2nd) 719; 121 A. L. R. 422; *Woolley* v. *Taylor,* 45 Utah 227; 144 P. 1094; *Fall River National Bank* v. *Estes,* 279 Mass. 380; 181 N. E. 242.

The requisite intention, as set forth in *Eddy* v. *Pinder,* 131 Me. 139, 143; 159 A. 727, must clearly appear; and evidence of such intention, for reasons stated in *Gledhill* v.

McCoombs, 110 Me. 341; 86 A. 247; 5 A. L. R., N. S. 726; Ann. Cas. 1914 D. 294, should be full, clear and convincing.

In *Tripp* v. *McCurdy,* 121 Me. 194; 116 A. 217, involving a gift *inter vivos* by a deed delivered to a third party, Chief Justice Cornish, after pointing out that the intent of the grantor or donor is the controlling factor, said on Page 197:

> "Whether or not delivery to a third person is absolute and irrevocable or qualified and revocable depends in the first instance upon the intention of the grantor, and that is to be gleaned from his words and acts at the time, the attendant circumstances and from his subsequent conduct."

The intention of the donor to make an absolute, irrevocable, and complete delivery of the stock rests upon the inferences to be drawn from the statement to him by the attorney to the effect he was putting the stock entirely beyond his control, and from the fact that he executed a will leaving nothing to the donee.

Apart from these facts and whatever inferences may be drawn therefrom, the case is substantially like *Eddy* v. *Pinder, supra,* in which delivery of a deed by a grantor to his attorney, with instructions to deliver it to the grantee after his decease, with no one having knowledge of the transaction except the grantor and his attorney, was held not to be a valid gift *inter vivos.*

In executing his will the donor no doubt had in mind the delivery of the stock and deed to the attorney. The will, however, is consistent either with a completed gift of the stock or with an attempt to pass ownership of the stock and the real estate, not then, but at the donor's death, to avoid delay and inconvenience of administration.

The statement by the attorney about putting the stock beyond the donor's control remains the only fact on which to base by inference an intent on the part of the donor to make

a present gift. The statement is unsupported by any other evidence clearly pointing to such intent.

The intention by the donor to make a gift *inter vivos* was not clearly manifested. The light thrown upon his intention at the time of the delivery by his subsequent acts, and particularly by his continued active interest in the Hospital, his failure to disclose a gift, and the negotiations for sale, makes clear, and indeed compelling, the inference that the donor did not intend to make a gift *inter vivos* but to make a gift to take effect at his death in evasion of the statute of wills. The statement by the attorney, above referred to, provides too narrow a base for an inference that the donor intended, to use the words of the decree, "said stock to become the property of (the donee) subject only to his life interest."

Facts, here lacking, pointing to a completed gift, distinguish the following cases from the present situation. The gift was known to the donee, in *Tripp* v. *McCurdy, supra.* The certificate of deposit had been transferred to the donee's name, in *Streeper* v. *Myers,* Ohio, 132 Ohio St. 322; 7 N. E. (2nd) 554. There was a memorandum that the stock was the property of the donee in *Woolley* v. *Taylor, supra.* Delivery was made by the donor to the donee in *Gledhill* v. *McCoombs, supra,* and *In re Chapple's Estate, supra.* The deed contained a reservation of a life estate in *Dickerson* v. *Dickerson,* 322 Ill. 492; 153 N. E. 740.

In *Innes* v. *Potter,* 130 Minn. 320; 153 N. W. 604; 3 A. L. R. 896, the stock assigned to the donee, and a letter from the donor to the donee stating that the donor had transferred the stock to the donee, were deposited with a third party for delivery to the donee after the donor's death. In the present case there is no such memorandum.

In our opinion, the finding by the single justice was clearly wrong, and the appellant has sustained his burden of showing the error. *Brickley* v. *Leonard,* 129 Me. 94; 149 A.

833; *Gatchell* v. *Gatchell,* 127 Me. 328; 143 A. 169; *Holmes* v. *Vigue et alii,* 133 Me. 50; 173 A. 816.

The transaction must fail as a gift *inter vivos.* It was an attempted testamentary disposition.

> "There is but one way of making a testamentary disposition of property and that is by will; the statute of wills was invented and adopted for the express purpose of establishing a legally defined procedure to be employed in giving post mortem effect to an ante mortem disposal of property." *Maine Savings Bank* v. *Welch,* 121 Me. 49, 51; 115 A. 545.

The single justice erred in finding that plaintiff's testator intended the stock to become the property of the defendant, Paul S. Hill, Jr., subject only to his life interest; that the delivery of the stock to the attorney was absolute, unqualified and irrevocable; and that title thereby passed to the defendant, Paul S. Hill, Jr.

The stock was the property of the plaintiff's testator at his decease. The certificate is to be delivered by the defendant to the plaintiff in her capacity as executrix. The plaintiff is entitled to costs against the defendant, Paul S. Hill, Jr.

Appeal sustained.

Remanded for entry of a decree, in accordance herewith.

STATE OF MAINE

vs.

JERRY D. BELLMORE

Oxford. Opinion, July 15, 1949.

Intoxicating Liquor.

Complaint charging respondent with unlawful sale of "liquor" does not sufficiently charge respondent with a crime under the constitution of the state notwithstanding provision of the statute that wherever the word "liquor" is used, it shall mean "intoxicating liquor" since the crime is the unlawful sale of intoxicating liquor.

ON EXCEPTIONS.

Respondent demurred to a complaint charging the unlawful sale of liquor. From the overruling of the demurrer, respondent filed exceptions. Exceptions sustained.

Robert T. Smith, County Attorney, for State of Maine.

Benjamin L. Berman, David V. Berman, for respondent.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

NULTY, J. This case comes forward on exceptions allowed by the presiding justice to the overruling of a demurrer joined in by the County Attorney for the State.

The record discloses that the respondent was charged with an unlawful sale of liquor in a complaint issuing out of the Rumford Falls Municipal Court. The body of the complaint avers:

> "that Jerry D. Bellmore of Rumford in said County of Oxford at said Rumford on the 3rd day of December A. D. 1948, did unlawfully sell a certain quantity of liquor, to wit, approximately two ounces of liquor to one Philip Violette, the said Jerry D. Bellmore not having then and there a li-

> cense therefor issued by the State Liquor Commission as provided by law, against the peace of said State, and contrary to the form of the Statute in such case made and provided."

The demurrer sets forth that the matters contained in said complaint are not sufficient in law because no judgment can be given thereon, there being no allegation that the "liquor" referred to and mentioned in said complaint as being the subject of the unlawful sale was "intoxicating liquor" and, therefore, that no violation of law is charged therein. The complaint purports to charge an unlawful sale of a certain small quantity of liquor and it should be noted that the liquor so alleged to have been the subject of the unlawful sale was not described as intoxicating liquor. The State asserts that it is unnecessary to allege that the liquor is intoxicating because the definition of liquor as found in the Revised Statutes of 1944, Chapter 57, Section 1, defines the meaning of the word "liquor" when used in any statute or law relating to intoxicating liquor and likewise defines intoxicating liquor as having the same meaning as the word liquor.

It should be noted and the State asserts that the complaint follows the words of the Revised Statutes of Maine, Chapter 57, Section 66, governing the penalty for illegal sale of liquor. However, Section 97 of said Chapter 57 relating to the form of complaint for single sale contains the word "intoxicating." It should be further noted in this connection that said Section 97 provides that the form therein set out and herein referred to is sufficient in law. It should not, however, be understood that other suitable language could not be used to properly describe a single sale.

The respondent contends that the complaint violates Article 1, Section 6 of the Constitution of Maine which reads as follows:

> "In all criminal prosecutions the accused shall have a right * * * * * to demand the nature and cause of the accusation."

In other words, the respondent claims that all facts alleged to constitute a crime shall be stated in the complaint with certainty and precision of designation sufficiently requisite to enable him to meet the exact charge and that the want of a direct and positive allegation in the description of the substance, nature or manner of the offense cannot be supplied by any intendment, argument or implication whatever.

The issue, then, before this court is whether or not the language set forth in the complaint, following the statute as it does, charges the respondent with a crime.

The crime is the unlawful sale of intoxicating liquor. Revised Statutes of Maine, 1944, Chapter 57, Section 66. To be sure, the statute uses the word "liquor" and omits the word "intoxicating" and the State attempts to justify the omission by stating that under said Chapter 57 wherever the word "liquor" is used it shall mean intoxicating liquor. See Revised Statutes of Maine, 1944, Chapter 57, Section 1. Prior to the enactment of the Revised Statutes of 1944 the statutes relating to unlawful sale of intoxicating liquor used the word "intoxicating," but in said Chapter 57 the Legislature defined what it meant by the use of the word "liquor." It has long been held in the State of Maine that the Legislature has the power and right to prescribe, change or modify the forms of process and proceedings in civil actions, but it has also been held in criminal prosecutions that the exercise of this right is limited and controlled by the paramount law of the Constitution. The Constitution protects with zealous care the rights of the accused and requires that no person shall be required to answer until the accusation against him is formally, fully and precisely set forth * * * that the respondent may know of what he is accused and be prepared to meet the exact charge against him. The Legislature cannot dispense with the requirement of a distinct presentation of an offense against the law. It cannot compel an accused person to answer to a complaint

which contains no charge, either general or particular, of any offense. *State* v. *Learned,* 47 Me. 426 (1859). This has been the basic law of this State from the beginning of statehood down to the present time. It has recently been expressed by this court in the case of *State* v. *Beckwith,* 135 Me. 423, 426; 198 Atl. 739, 741, in the following language:

> "It is the constitutional right of all persons accused of crime to know without going beyond the record the nature and cause of the accusation and to insist that the facts alleged to constitute a crime shall be stated in the complaint or indictment with that reasonable degree of fullness, certainty and precision requisite to enable them to meet the exact charge against them and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense. In criminal prosecutions, the description of the offense in the complaint or indictment must be certain, positive and complete. State v. Strout, 132 Me., 134, 167 A. 859; State v. Crouse, 117 Me., 363, 104 A., 525; State v. Mace, 76 Me., 64; State v. Learned, 47 Me. 426; State v. Moran, 40 Me., 129; Const. of Maine, Art. 1, Sec. 6."

See also *State* v. *Peterson,* 136 Me. 165; 4 Atl. (2nd) 835, which cites *State* v. *Beckwith, supra,* 135 Me. 423; 198 Atl. 739.

It is common knowledge that the word "liquor" includes both intoxicating and non-intoxicating liquor. Webster's Dictionary, Standard Dictionary. The statute only authorizes a prosecution for the sale of intoxicating liquor and in spite of the fact that the complaint in this case follows the language of the statute, we hold, by virtue of the cases herein cited, that the law set forth in said cited cases is conclusive of the issue in this case because any other holding would infringe upon the rights of a respondent guaranteed him under the Constitution of our State. It was reversible error to overrule the demurrer of the respondent.

Exceptions sustained.

MELISSA A. SMITH, ADM.

APLT. FROM DECISION OF JUDGE OF PROBATE

IN THE MATTER OF SARAH AUGUSTA SMITH

Washington.

Wills. New Trial. Exceptions.

A will which has been mislaid in the office of the Register of Probate is a lost will so far as petitioner was concerned and the time during which it was lost is not to be taken as part of the limitation period.

Motion for a new trial is not a proper procedure to review action of the Supreme Court of Probate sustaining a ruling of the judge of probate dismissing a petition for probate of will under Statute of Limitations. Exceptions, however, bring the case properly before the court.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

On motion for a new trial and exceptions to sustaining by Supreme Court of Probate a dismissal of a petition for probate. Exceptions sustained.

Dunbar and Vase, for appellant.

Colon J. Campbell, John M. Dudley, for appellee.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ.

THAXTER, J. A petition for the probate of the will of Sarah Augusta Smith, late of Jonesport in the County of Washington, was filed in the Probate Court for the County of Washington, January 6, 1948, by Benjamin H. Smith, her son, who was the executor named in the will. He was also the sole beneficiary therein named. The will was dated October 29, 1919. Mrs. Smith, the testatrix, died December

3, 1925. February 3, 1948, Geneva S. Huntley, an heir at law of the testatrix, filed a motion to dismiss the petition for probate on the ground that the testatrix died over twenty years prior to the filing of the petition and that it did not appear that there were moneys due to said estate from the State of Maine or the United States.

The statute of limitations, on which said motion was based, has been in effect for many years and reads in part as follows, R. S., 1944, Chap. 141, Sec. 1:

> "After 20 years from the death of any person, no probate of his last will or administration on his estate shall be originally granted except as provided in the following section, unless it appears that there are moneys due to said estate from this state or the United States."

We are not concerned with the exception referred to. The appellant does, however, rely on that provision of Section 9 of said chapter which reads as follows:

> "When such original will is produced for probate, the time during which it has been lost, suppressed, concealed, or carried out of the state shall not be taken as a part of the limitation provided in section 1."

It is not contended by the appellant, who prosecuted this case as administratrix of the estate of Benjamin H. Smith, or by her successor as administrator d. b. n. of Benjamin H. Smith's estate, that the will of Sarah Augusta Smith was "suppressed, concealed, or carried out of the state." But it is claimed that it was lost to Benjamin H. Smith for a sufficient interval after the death of his mother, the testatrix, that its probate is not barred by the twenty year limitation imposed by Section 1. This is the sole issue before us. Was this a lost will within the meaning of Section 9?

The judge of probate dismissed the petition for probate of the will because of the lapse of more than twenty years

between the date of the death of the testatrix and the date of filing the petition for probate. The petitioner appealed and the Supreme Court of Probate sustained the ruling of the judge of probate and dismissed the appellant's petition. The case is before us on a motion for a new trial and on exceptions. The motion for a new trial is not a proper procedure to bring the issue before this court; but it is properly before us on the bill of exceptions.

After the death of Sarah Augusta Smith in 1925, her widower Henry E. Smith, until his death August 19, 1934, continued to live with Benjamin, the son. It was apparently not until the father's death that a thorough search was made for the will of Mrs. Smith. It was sought in a chest at the homestead where she had kept some of her private papers, and at the Machias Savings Bank which had custody of other papers. Benjamin even looked behind pictures on the wall and under a rug on the floor. It was nowhere to be found. The importance of finding it was not fully recognized until a bank deposit was found standing in the name of the testatrix of which Mrs. Geneva Huntley apparently claimed her share as an heir at law of Mrs. Smith, the testatrix. Then Benjamin H. Smith, still having reason to believe that his mother had made a will, employed an attorney, who made an inquiry at the probate office on the possibility that someone having had possession of the will might have filed it there. The register of probate could find nothing. The register made a second search among inactive files and in one of these the will was found. The only clue as to how it got there was a notation on the will in the handwriting of the then register of probate "filed January 14, 1926." It was not indexed or docketed so that a party in interest could find out anything about it. Only the person having custody of the papers in the probate office could have discovered it and then only by laboriously checking each individual document in a dust collecting file. It does not appear whether or not Benjamin H. Smith ever made inquiry at the probate office to see if under the provisions of

the statutes, now R. S., 1944, Chap. 141, Sec. 4, the person having custody of the will may have filed it there. Unless he had done so within a reasonably short time after Mrs. Smith's death it would apparently have not been brought to light; for Miss Bradbury, the register from 1923 to 1939, had completely forgotten all about its having been brought there by anyone and neither of her successors knew anything about it. By reason of the failure to make any written record of its having been filed and the subsequent lapse of memory of the register of probate as to the circumstances of its filing, it was certainly a lost will to Benjamin H. Smith who wished to have it probated. And this is so even though there is testimony from two of the heirs at law that they examined it in the probate office, a fact which they did not report to their brother. Apparently they were not interested as they were excluded from its benefits.

The judge who ruled in the Supreme Court of Probate based his decision on the fact that it was the duty of the executor to have made a diligent search in the probate office for it before the statutory period of twenty years ran out. There is, however, no evidence that he did not do so, and, if he had, such search might well have been fruitless. It was none the less a lost will because eventually it was discovered within the confines of the probate office. It was obviously misplaced or unintentionally concealed by those whose duty it was to take charge of it. That it was there where it should have been only added to the mystery of its disappearance.

It was error to refuse to consider the petition for probate.

Exceptions sustained.

M. JAY KRAMER

vs.

INHABITANTS OF THE TOWN OF LINNEUS

Aroostook. Opinion, July 20, 1949.

Taxes.

An assessment of real estate taxes against devisees of deceased owner, was a proper assessment.

The fact that lots were assessed in gross without showing the assessment for each individual lot, and the amount due from each individual owner, is of no consequence, when the assesssd value of each lot and the liabilitv of each owner was apparent.

P. L., 1933, Chap. 224, providing for enforcement of tax liens, is unconstitutional as to non-resident owner of real estate, as it required no notice to non-resident owner that time was running against him.

ON EXCEPTIONS.

Real action brought by record titleholder of land against town claiming title by virtue of a matured tax lien. Referee found for defendant. Plaintiff excepted to allowance of referee's report. Exceptions sustained.

M. P. Roberts, James P. Archibald, for plaintiff.

W. S. Lewin, Francis W. Sullivan, for defendant.

SITTING: THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON.

THAXTER, J. This is a real action. The plaintiff claims title to an undivided half interest in certain real estate located in the Town of Linneus. It is admitted that the plaintiff holds the record title to the land in question and is en-

titled to recover unless the defendant has a valid title acquired by proceedings taken under the provisions of P. L., 1933, Chap. 244, entitled "An Act to Provide for Alternative Method of Enforcement of Tax Liens."

In the view which we take of the case we need consider only the action taken by the town with respect to the enforcement of the tax for 1934 which antedated the title acquired by the plaintiff. And it is agreed that the status of Lot 7, Range 12, is typical of the others. This is treated as a yardstick for all the other parcels. If the plaintiff has a good title to that lot, he has a valid title to all the others.

The case was referred with right of exceptions in matters of law. The referee, sustaining the tax title, found for the defendant. The plaintiff filed seven objections to various rulings of the referee which were overruled and the report was accepted by the presiding justice of the Superior Court. The case is now before us on the plaintiff's exceptions. The first objection which raises a fundamental issue, attacking as it does the constitutionality of P. L., 1933, Chap. 244, we shall consider last.

OBJECTIONS 2 AND 3

The referee upheld the validity of the assessment of one-quarter of the tax in 1934 to Mrs. Rivett Carnac, one-quarter to James Pierce, Hazel Lumbert, and Robert Williams, Trustees, who were the trustees of the estate of Ansel L. Lumbert, the deceased owner of a half interest in the premises. The plaintiff claims that such ruling of the referee was error. Surely an assessment to the devisees designated in or acting under the will by naming them was a proper assessment. To do so in no way contravened the provisions of R. S., 1930, Chap. 13, Sec. 23. There is nothing in *Morrill* v. *Lovett,* 95 Me. 165; 49 A. 666; 56 L. R. A. 634, which supports a contrary construction of the statute. The statutory provision in question permitted the assessment of a tax to the heirs or devisees of a deceased person

without naming them until they gave notice of the division of the estate. It did not require that the assessment should be so made. The waiver of the provisions of the will by the widow on May 3, 1934 surely had no effect on the validity of the 1934 assessment. The plaintiff's claim to the contrary is without merit. Nor did the representation of insolvency of the Lumbert estate in any way affect the validity of the 1934 assessment. Assessment to the owners was proper until their title was divested by a sale. See *Hill* v. *Treat*, 67 Me. 501.

OBJECTION 4

The fact that the lots were assessed in gross without showing the assessment for each individual lot and the amount due from each individual owner is of no consequence. From a glance it was apparent what was the assessed value of each lot and what was the liability of each owner and the exact amount in dollars and cents appeared in the lien certificate. There is no merit in this objection.

OBJECTIONS 5 AND 6

These objections are without merit. They relate to certain irrelevant comments by the referee which were not the basis of any ruling adverse to the plaintiff.

OBJECTION 7

The plaintiff claims that it was a necessary requirement of the statute that the tax collector should file, at the time of recording the lien certificate in the registry of deeds, a copy with the town treasurer. The record shows that the statutory provision was complied with.

OBJECTION 1

The plaintiff claims that the statute, P. L., 1933, Chap. 244, is unconstitutional because it provides for a forfeiture of the title of non-resident owners of real estate without

giving to them any notice. And the owners from whom the defendant claims its title under the proceedings taken to enforce the tax lien were non-residents. The referee, though formally sustaining the validity of the statute, conceded that this question should be finally determined by this court and not by him as a referee.

The statute in question here provided that any officer to whom a tax had been committed for collection, except a collector elected or appointed under Section 90 of Chapter 14 of the Revised Statutes of 1930, might in the case of a non-resident, within one year of the date of the commitment to him of the tax, record in the registry of deeds of the county or registry district where the real estate was situated a certificate signed by him setting forth the amount of the tax, a description of the real estate on which the tax was assessed and an allegation that a lien was claimed on said real estate to secure the payment of said tax. At the time of the recording of said certificate said officer was required to file with the town treasurer a true copy of said certificate and also to mail by registered letter to each record holder of a mortgage on said real estate addressed to said record holder at his place of last and usual abode a true copy of said certificate. Then it was provided that the filing of the statutory certificate should create a mortgage on said real estate in the town in which the real estate was situated taking precedence over all other mortgages, liens, attachments and encumbrances. The only qualification was that the mortgagee should not have any right of possession of said real estate until the right of redemption provided by the statute should have expired.

Section 3 of the statute then provided:

> "If said mortgage, together with interest and costs, shall not be paid within 18 months after the date of the filing of said certificate in the registry of deeds as herein provided, the said mortgage shall be deemed to have been foreclosed and the right of redemption to have expired."

A resident taxpayer was treated in a different manner. He was either given a notice in writing signed by the tax collector, or the notice was left at his last and usual place of abode, stating the amount of the tax, describing the real estate, stating that a lien was claimed on said real estate and demanding payment within ten days. After the end of said ten days and within ten days thereafter the certificate heretofore mentioned was required to be filed in the registry of deeds. Thereafter the procedure was the same as heretofore mentioned in the case of a non-resident.

No reason is suggested why some form of notice could not have been given to a non-resident. A complete answer to the claim that it was not feasible to do so is indicated by the fact that in 1939 the legislature provided by amendment for such notice. P. L., 1939, Chap. 85.

Sections 1 and 2 of Chapter 244 seem to assume that the tax lien which is provided for constitutes a mortgage and that the right of redemption can be cut off by a method analogous to our procedure for the strict foreclosure of mortgages. But the tax lien, though referred to as a mortgage, was different from a mortgage in one important respect. A mortgagor in this state by his deed transfers his title to his property. The statutory provisions relating to the creation of the lien were not concerned with the transfer of title. They authorized only the creation of a lien taking precedence over all other encumbrances. Something more was necessary to divest a landowner of his title. Section 3 of the statute assumes that, if the provisions of the statute have been complied with, this can be accomplished by the mere lapse of time after the recording of the lien in the registry of deeds. The vice of the procedure is that this automatic divestment of title took place without any notice to a non-resident owner by publication or otherwise that time was running against him. This is not due process. A delinquent taxpayer is entitled to some notice, as the procedure provided by the statute with respect to residents

seems to recognize. In sustaining the validity of the procedure permitted by the statute in question in so far as it applied to residents, this court took pains to point out that: "Notice to the taxpayer is required both by delivery in hand or at his last and usual place of abode, or by registered mail . . . . .". *Inhabitants of the Town of Warren* v. *Norwood,* 138 Me. 180, 205; 24 A. (2nd) 229, 241. And previously at page 197 of 138 Me. at page 237 of 24 A. (2nd) the court intimated that the challenge that the statute did not provide due process to the taxpayer cannot be sustained because "the statute requires a particular form of notice ten days prior to the filing of the lien certificate . . . . .". Furthermore, the court quoted with approval the language of this court in holding invalid another statutory provision: "Notice and opportunity for hearing are of the essence of due process of law." *Randall* v. *Patch,* 118 Me. 303, 305; 108 A. 97, 98; 8 A. L. R. 65. The reasoning which the court used to sustain the statute in so far as it applied to residents would seem to invalidate its provisions as applied to non-residents.

There are no direct adjudications which we have found holding that no more notice to a taxpayer than is here provided for non-residents renders a statute unconstitutional but the authorities all assume that some notice sufficient to appraise a taxpayer that he is about to lose his property is necessary beyond the mere recording of the lien. See *Price* v. *Slagle,* 189 N. C. 757; 128 S. E. 161; *State* v. *Whittlesey,* 17 Wash. 447; 50 Pac. 119; 12 Am. Jur. 336.

In so far as this statute applied to non-residents, it was unconstitutional.

Exceptions sustained.

SADIE R. LEVESQUE

vs.

ANTOINE B. PELLETIER

Aroostook. Opinion, August 4, 1949.

Equity. Injunction. Evidence Appeal.

The court has authority to use the extraordinary power of injunction, when it is properly applied for, when justice urgently demands it, and when there is no legal remedy, or the remedy at law is inadequate.

When it is shown that a judgment at law on a contract would be worthless, the legal remedy may be considered inadequate.

A cause of action that is capable of being determined at law, but is entertained in equity on jurisdictional grounds of equitable relief sought, if it appears from the evidence, or from lack of sufficient proof, that relief in equity cannot be granted, the court may be without jurisdiction and the bill in equity should be dismissed without prejudice.

Appellant has the burden of satisfying the Law Court that the findings of the sitting justice are clearly wrong.

In the absence of a showing that a judgment at law for legal damages would not be adequate or that such could not be collected, and in the absence of other appropriate necessity, the court properly dismissed the bill without prejudice on the evidence submitted in the instant case.

The usual and ordinary rule as to weight and sufficiency of evidence to show equitable jurisdiction must be complied with and the proof must be convincing.

ON APPEAL.

Bill in Equity for an accounting, restoration of business to plaintiff, and an injunction to restrain the defendant from doing business with alleged customers of the plaintiff.

From a decree dismissing the bill without prejudice plaintiff appeals. Appeal dismissed, and decree affirmed.

F. Harold Dubord, William H. Niehoff, for plaintiff.

Harry C. McManus, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

FELLOWS, J. This cause in equity is before the Law Court from Aroostook County on plaintiff's appeal from the decree of the sitting justice dismissing without prejudice the plaintiff's bill.

The record shows that in the year 1935 Albenie Roy, the former husband of the plaintiff, commenced a business of selling Tingleys Bread, Berwick Cakes, bleach water, and other goods, to stores and homes in that part of northern Aroostook County commonly called the St. John River Valley. Mr. Roy carried on this business until his death in 1944. The defendant, Antoine Pelletier, was for a time a competitor of Albenie Roy in the same line of business, and later had been employed by Albenie Roy in the delivery of breads and pastries. The defendant Pelletier was engaged by the plaintiff after her husband's death in 1944 "to manage the business just as if it had been his own" for the sum of forty dollars per week. At the end of three months Pelletier asked for an increase of wages and his pay was increased by the plaintiff to fifty dollars. In February 1945, the plaintiff says, she offered "him to be on commission and we agreed I would pay him five per cent of the products he would sell—bread and pastries, and five cents a gallon for every gallon of bleach water." Later, in October 1945 the defendant desired to purchase the business, and as a result an agreement was made in writing whereby Sadie Roy Levesque "leased" to Antoine B. Pelletier "all her bread and pastry business" for which Antoine B. Pelletier agreed to pay fifty dollars per week from October 29, 1945 "until the

death of said Sadie Roy Levesque, or until the death of said Antoine B. Pelletier." Pelletier was to make his $50.00 weekly payments every Monday, and it was also agreed that the "bread and pastry business will revert back to said Sadie Roy Levesque" on the death of Pelletier or on thirty day notice by Pelletier. The plaintiff in the agreement further reserved "the privilege to retake said bread and pastry business at any time upon giving a thirty day written notice" to Pelletier. Failure to make weekly payments for two weeks waived the written notice. The notice was also to be considered waived if "bread and pastry business bills were not paid by Pelletier when due, and the business shall immediately revert back to said Sadie Roy Levesque." The plaintiff was given the right to examine the books of the business when she desired.

On May 10, 1946 the defendant, Pelletier, gave written notice to the plaintiff of his intention "to return the business to the plaintiff." His last weekly payment to the plaintiff was on June 20, 1946. The defendant, however, did not "return" the business to the plaintiff, but continued to carry on as before in selling the same products to the same customers and has since made no payments to plaintiff. After the notice by the defendant that he intended to return the business, there was some talk between the plaintiff and defendant relative to a purchase of the business by the defendant for $2,500, but no sale was made and the defendant continued as before. Previously, the plaintiff had sold to defendant a truck, and the other equipment that she owned and that he had used in deliveries, so that so far as physical assets were concerned there was nothing to "return."

The plaintiff's Bill in Equity brought June 2, 1948, set out the facts and asked for a decree that the "defendant is holding and operating the aforesaid business in trust for the benefit of the complainant." She asked that an accounting be had; that the business be restored to her, and that an injunction issued to restrain the defendant Pelletier

"from doing business with the customers of said plaintiff and with the firms and persons listed in paragraph one of this bill."

The record and briefs indicate that the request for an accounting was not pressed by the plaintiff, but she did urge fraud, deceit, a trust relationship, that the business be "returned," and that injunction issued.

After full hearing, the sitting justice did not apparently find convincing evidence to establish the material allegations of the plaintiff's complaint in regard to a relationship of trust or of any fraud or deceit, and made final decree "that the plaintiff's bill be dismissed without prejudice." It is the appeal from this decree that the court now considers.

The court has authority to use the extraordinary power of injunction, when it is properly applied for, when justice "urgently demands it" and when there is no legal remedy, or the remedy at law is inadequate. R. S. (1944), Chap. 95, Sec. 34; Whitehouse Equity (1900), 584, Sections 563-565. The writ of injunction is, and always has been, granted in Maine with great caution and only when necessary on clear and certain rights. *Morse* v. *Machias Water Co.,* 42 Me. 119; *Haskell* v. *Thurston,* 80 Me. 129; 13 A. 273; *Boynton* v. *Hall,* 100 Me. 131; 60 A. 871; *Lapointe Machine Co.* v. *Lapointe Co.,* 115 Me. 472; 99 A. 348. When it is shown that a judgment at law on a contract would be worthless, the legal remedy may be considered inadequate. *Laundry Co.* v. *Debow,* 98 Me. 496; 57 A. 845.

The established rule seems to be that when a cause of action is capable of being heard and determined at law, but is entertained in equity on the jurisdictional grounds of equitable relief sought, and it appears from the evidence, or from lack of sufficient proof, that relief in equity cannot be granted, the court may be without jurisdiction and the bill should be dismissed without prejudice. *York* v. *McCaus-*

land, 130 Me. 245; 154 A. 780; *Gamage* v. *Harris,* 79 Me. 531; 11 A. 422.

The findings necessarily made by a sitting justice in equity of facts proved, or that there was a lack of proof, are not to be reversed on appeal unless the findings are clearly wrong. The burden to satisfy the Law Court that they are clearly wrong is upon the appellant, and unless so shown the decree appealed from must be affirmed. *Adams* v. *Ketchum,* 129 Me. 212; 151 A. 146.

We have carefully examined the record in this case and are unable to say that the sitting justice was in error. The claim was made by the plaintiff that the defendant was operating the business in trust for the benefit of the plaintiff but the evidence and inferences to be drawn therefrom show that there was no trust, and that the defendant was operating under a "lease," or contract; that the territory covered was the same, or portions were the same, worked by the defendant as competitor or employee during the lifetime of plaintiff's former husband, Albenie Roy; that the defendant obtained knowledge of the business through his former employment or in competition; that there was no covenant or agreement between the parties that restrained or prohibited the defendant from carrying on a similar business of his own; that the claim of the plaintiff that the defendant made false representations to plaintiff's customers that he had purchased the business is not clearly demonstrated nor is it material; that the charges of fraud and deceit are not substantiated; that there were no "trade secrets" learned by the defendant from the plaintiff; that it does not appear that a judgment at law could not be collected; and a judgment at law for damages (if there are legal damages) would be adequate.

In equity, jurisdictional facts should not only be alleged but those facts must be proved. The usual and ordinary rule as to weight and sufficiency of evidence must be complied with. One cannot "guess himself" into a right to have

the equity powers of the court exercised in his favor. There must not be a random judgment. It requires more than conjectures or strained and unnatural inferences. The proof must be convincing. *Adams* v. *Ketchum,* 129 Me. 212, 221; 151 A. 146.

There was no error on the part of the sitting justice in dismissing the bill without prejudice.

Appeal dismissed.

Decree below affirmed.

SEARS, ROEBUCK AND COMPANY

vs.

CITY OF PORTLAND

AND

CITY OF SOUTH PORTLAND

Cumberland. Opinion, August 4, 1949.

Courts. Declaratory Judgment. Appeal. Taxes.

The Law Court is a statutory court and can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure.

The right of review and the method of obtaining a review of a decision of a court having jurisdiction over a cause whether by exception, motion, or appeal is statutory, and jurisdictional, and this applied to declaratory judgments.

In this jurisdiction whether review be entertained by motion, exceptions, or appeal depends not only upon the nature of the cause but also upon the nature of the question of which the review is sought.

In all cases at law, when court is held by a single justice, his opinions, directions or judgments may be attached by exceptions, and then only for errors in law and they cannot be reviewed on motion, nor,

in the absence of a specific statute, on appeal. On the other hand, rulings of a single justice in equity may be reviewed either upon exception or appeal.

The review by the Law Court whether by appeal or exceptions determines the scope of inquiry by the Law Court.

The Uniform Declaratory Judgment Act does not enlarge the jurisdiction of the courts, but provides a more adequate and flexible remedy in cases where jurisdiction already exists and the nature of the case determines the appropriate forum.

Where a plaintiff by an action under the Declaratory Judgment Act sought to determine which of two municipalities had the right to assess and collect a personal property tax and the right to collect such tax could only be enforced by an action of debt at law, the essential nature of the case is that of a proceeding at law rather than in equity; consequently, the procedure for obtaining review is that which is appropriate for such actions namely by exceptions and not by appeal.

Provision of the Declaratory Judgment Act that all orders, judgments and decrees may be reviewed as other orders, judgments, and decrees means that the same method must be employed to obtain a review of orders, judgments and decrees of a justice made or rendered in proceedings for a declaratory judgment, as would have to be employed to obtain a review of orders, judgments and decrees made or rendered by a single justice in an action to enforce the right or obligation of which the declaration is obtained or sought to be obtained by declaratory judgment.

Where the Law Court is without jurisdiction to hear and determine an appeal, it is a nullity; neither can the parties confer by consent jurisdiction upon the Law Court to hear and consider such cases.

ON APPEAL.

On appeal from a decree of a Justice of the Superior Court entered on a petition for a declaratory judgment.

Appeal dismissed. Case fully appears in the opinion.

Richard M. Sullivan,
Philip F. Chapman, Jr., for plaintiff.

Barnett I. Shur, for defendant—City of Portland.

George W. Weeks, for defendant—City of South Portland.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, WILLIAMSON, JJ.

MERRILL, J. This is an appeal from a decree of a Justice of the Superior Court entered on a petition for a declaratory judgment. The cause was heard by the justice upon an agreed statement of facts and under a stipulation that all parties reserved the right to *except* or *appeal* in matters of law. The plaintiff, Sears, Roebuck and Company, a foreign corporation, maintained a retail store in the City of Portland and a storehouse in the City of South Portland. The storehouse contained goods, wares and merchandise upon which, based upon different valuations by the respective cities, the defendant, City of Portland, assessed a tax of $2,578.81, and the defendant, City of South Portland, a tax of $2,578.61. The plaintiff petitioned for a declaratory judgment determining which of the two defendants was entitled to levy a tax on the personal property.

In its Portland store the plaintiff conducted a retail business for the sale of personal property, consisting of goods, wares and merchandise. The goods, wares and merchandise in the storehouse in South Portland were kept for the purpose of supplying customers in Portland, South Portland and vicinity as a result of sales negotiated in the Portland store. The personal property stored in the storehouse in South Portland arrived directly at the storehouse from the various sources of supply of the plaintiff company. All deliveries of goods, wares and merchandise contained in the storehouse were made as the result of sales negotiated in the retail store in Portland. No prospective customers could examine merchandise or negotiate a purchase and sale of the merchandise at the storehouse in South Portland. About eighty-three per cent of the goods placed in the storehouse was delivered directly to the customer without being actually transferred to the Portland store. The remaining

seventeen per cent was from time to time moved to the Portland store.

It was stipulated:

> "The sole question is whether the personal property of the Plaintiff located in the storehouse in the City of South Portland is 'personal property employed in trade' in the City of South Portland or in the City of Portland within the meaning of Chapter 81, Section 13, sub paragraph I, Revised Statutes of Maine, 1944, and, therefore, legally taxable in either of said cities."

It was further stipulated that if said property in the storehouse was taxable in either city that the amount of the tax assessed, together with interest and costs, should be ordered paid to the city where taxable.

The justice found that the property in question was "personal property employed in trade" *in Portland* within the meaning of the statute and was there taxable; that it was not so employed or taxable in South Portland. The justice further ordered the plaintiff to pay the City of Portland the sum of $2,578.81, with interest and costs. This decree was dated the twenty-sixth day of January, 1949.

It is to be noted that the parties by stipulation reserved the right to *except* or *appeal* in matters of law. On the fourth day of February, 1949, the City of South Portland *appealed* from said decree and it is upon said *appeal* that the case is before this court.

In *limine* we are met by the question: Did the City of South Portland, *by appeal,* adopt the proper course of procedure to entitle it to a review of this decree? The jurisdiction of this court to hear and determine the cause depends upon the answer thereto.

In seeking the solution of this question, certain elementary principles must be kept in mind. This court has said many times, the Supreme Judicial Court sitting as a Law

Court is of limited jurisdiction. As such, it is a statutory court and can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. *Edwards, Appellant,* 141 Me. 219; 41 A. (2nd) 825; *Cole* v. *Cole,* 112 Me. 315; 92 A. 174; *Public Utilities Commission* v. *Gallop,* 143 Me. 290; 62 A. (2nd) 166; *Carroll* v. *Carroll,* 144 Me. 171; 66 A. (2nd) 809.

At common law there was no right to review the decision of a court having jurisdiction over a cause, either by bill of exceptions or by appeal. The right to attack rulings upon questions of law by a bill of exceptions was introduced by the statute of Westminster II (St., 13, Edw. I c. 31). The history of this right of exception in lieu of, and supplementing the common law writ of error, and its extension by our statutes is exhaustively treated in *Colley* v. *Merrill,* 6 Me. 50; *Bridgton* v. *Bennett,* 23 Me. 420; and *McKown* v. *Powers,* 86 Me. 291; 29 A. 1079. This right to review by bills of exceptions is now preserved by the express provisions of R. S., Chap. 91, Sec. 14; R. S., Chap. 94, Sec. 14; R. S., Chap. 100, Sec. 39; and R. S., Chap. 95, Sec. 26.

"But for the statute there would be no right of exception and no Law Court." *Cole* v. *Cole, supra.* "While the statute grants the right to defeated litigants to bring their grievances to the Law Court for review, that is not a constitutional, nor even a common law right. The legislature has authority to repeal that statute, and withhold the right of an appeal or motion, (and we add, *exceptions*), and compel suitors to be content with results reached in the trial courts. Or the right may be granted subject to such restrictions, limitations and conditions as the legislature may annex." *Stenographer Cases,* 100 Me. 271, 275; 61 A. 782, 784; "The common law knows no right of appeal." *Simpson* v. *Simpson,* 119 Me. 14, 15; 109 A. 254, 255. These fundamental principles apply to declaratory judgments. *Murray Motor Co.* v. *Overby,* 217 Ky. 198; 289 S. W. (Ky.) 307.

The right to bring cases to the Law Court by bills of exceptions is general, and extends generally to all rulings of law in cases heard by a single justice. No statute specifically confers upon litigants such general right of appeal to the Law Court; nor is there any statute which confers upon the Law Court jurisdiction to hear and determine appeals in general, from which it might even be argued that the existence of a general right of appeal is inferentially granted to suitors in all cases. The right of appeal to the Law Court exists only in cases where it is *specifically* conferred by statute.

In equity cases, not only is there a statutory right to exceptions, R. S., Chap. 95, Sec. 26, but the right of appeal to the Law Court has been specifically granted, R. S., Chap. 95, Secs. 21 and 23. Furthermore, R. S., Chap. 91, Sec. 14, confers jurisdiction upon the Law Court to hear and determine all questions arising in equity cases. Reference to other instances where the right of an appeal to the Law Court is conferred by statute is unnecessary.

In this jurisdiction we have long had and recognized three distinct statutory methods for obtaining a review of cases by the Law Court, *motion, exceptions* and *appeal.* These various methods of obtaining a review by this court are not interchangeable and equally applicable to all cases. The method to be used depends not only upon the nature of the cause in which, but also upon the nature of the question of which the review is sought. As the right to review is wholly statutory, so too the method for obtaining the review is likewise regulated by statute. Only cases in which a statutory right of review before this court is granted can be heard and determined by the court, and then only when brought to the court by the course of procedure, that is, the method, authorized by a general or specific statute applicable to the particular cause of action and the nature of the question presented for review.

These requirements are jurisdictional, and the Law Court has no jurisdiction to consider a case upon "appeal" or "motion" which should be presented to it by "bill of exceptions." *Edwards, Appellant, supra; Bronson, Appellant,* 136 Me. 401; 11 A. (2nd) 613; *Tuck* v. *Bean,* 130 Me. 277; 155 A. 277; *Heim* v. *Coleman,* 125 Me. 478; 135 A. 33; *Tozier, Coll.* v. *Woodworth and Land,* 136 Me. 364; 10 A. (2nd) 454; *Simpson* v. *Simpson, supra; Carroll* v. *Carroll, supra.* When the remedy to obtain review is by bill of exceptions, and an appeal is erroneously taken, consent cannot confer jurisdiction. *English* v. *Sprague,* 32 Me. 243.

The plaintiff seeks relief under the "Uniform Declaratory Judgments Act," R. S., Chap. 95, Secs. 38-50, both inclusive. The Act provided an entirely new remedy, a form of relief not theretofore possessed by plaintiffs. *Maine Broadcasting Co., Inc.* v. *Eastern Trust and Banking Co.,* 142 Me. 220; 49 A. (2nd) 224. In doing so it was competent for the Legislature to withhold altogether the right of review, or to enact such restrictions and qualifications thereon as a prerequisite to the right as it saw proper, since the right of review by the Law Court is not a constitutional one but only a matter of grace. *Murray Motor Co.* v. *Overby, supra.* The right to review declaratory judgments is granted by Sec. 44 of the Act, which provides, "All orders, judgments, and decrees under the provisions of Sections 38 to 50, inclusive, may be reviewed as other orders, judgments, and decrees."

In all cases at law when court is held by a single justice his opinions, directions or judgments may be attacked by exceptions. See R. S., Chap. 94, Sec. 14; extended to hearings held, and judgments rendered in vacation. R. S., Chap. 100, Sec. 39. Such directions, judgments or opinions may be attacked only for errors in law. *Dunn* v. *Kelley,* 69 Me. 145; *Pettengill* v. *Shoenbar,* 84 Me. 104; 24 A. 584; *Ayer* v. *Harris,* 125 Me. 249; 132 A. 742. They cannot be reviewed on motion nor, in the absence of a specific statute, such as

applies to the denial of a motion for a new trial by the presiding justice in a felony case, can they be reviewed on appeal. *Carroll* v. *Carroll, supra; Simpson* v. *Simpson, supra; Edwards, Appellant, supra; Bronson, Appellant, supra; Tuck* v. *Bean, supra; Heim* v. *Coleman, supra; Tozier, Coll.* v. *Woodworth, supra.*

On the other hand rulings and decrees of a single justice *in equity* may be reviewed either upon exceptions or appeal.

The distinction between the right to a review of a final decision of the court below by the Law Court on appeal and the right to a review of such decision on exceptions is not merely one of nomenclature and procedure. Not only is the procedure different, but the scope of inquiry by the Law Court is different. Exceptions reach only errors in law. Exceptions when taken to findings of fact by a single justice must attack such findings because of, and reach only errors in law. There is no error in law in a finding of fact by a single justice unless such fact be found without any evidence to support it. Examples of the application of this rule by this court may be found in cases where we have applied it to the decision of a single justice hearing a case at law without the intervention of a jury. *Ayer* v. *Harris, supra;* to a decree of divorce, *Bond* v. *Bond,* 127 Me. 117, 129; 141 A. 833; and to the decree of a Justice of the Superior Court sitting as the Supreme Court of Probate, *Cotting* v. *Tilton,* 118 Me. 91, 94; 106 A. 113. The rule has been so universally applied by this court that citation of further authorities is unnecessary.

If exceptions to the decision of a single justice are brought to the Law Court, the effect of the exceptions is not to vacate the judgment to which they are taken, but to hold it in abeyance until the validity of the exceptions is determined, and if the exceptions are overruled, the judgment rendered by such single justice remains in full force and effect. On the other hand, ordinarily an appeal vacates the judgment below and the case when heard on appeal is

heard *de novo* and judgment is entered upon the new decision. As no right of appeal was known to the common law, and as its existence is only statutory, its effect must be determined from the statute which authorizes it. The effect of appeals upon the decision from which an allowable appeal is taken has been fully discussed by this court in the recent case of *Shannon* v. *Shannon,* 142 Me. 307; 51 A. (2nd) 181.

The distinction between appeals and exceptions is well illustrated in our equity practice. By R. S., Chap. 95, Sec. 26, aggrieved parties in an equity case may take exceptions to any ruling of law made by a single justice. Such exceptions are to be heard in the Law Court and decided like appeals "provided that no question of fact is open to the Law Court on such exceptions." See *Emery* v. *Bradley,* 88 Me. 357; 34 A. 167. Section 21 of the same chapter grants the right of appeal to the Law Court from final decrees of a single Justice in Equity.

In equity appeals to the Law Court, it hears the case anew upon the record. *Redman* v. *Hurley,* 89 Me. 428; 36 A. 906; *Trask* v. *Chase,* 107 Me. 137, 150; 77 A. 698, 704. "Upon the whole case the court is required to affirm, reverse or modify the decree of the court below, or remand the cause for further proceedings, as it may think proper; R. S. (1903), Chap. 79, Sec. 22. (Now R. S., Chap. 95, Sec. 21.)" *Trask* v. *Chase, supra.* "Decree shall be entered therein by a single justice, in accordance with the certificate and opinion of the Law Court." Sec. 21, *supra.* Although the findings of fact by the justice below will be conclusive unless clearly wrong, and the burden is on the appellant to prove it, *Young* v. *Witham,* 75 Me. 536; *Paul* v. *Frye,* 80 Me. 26; 12 A. 544, as said by the court in *Leighton* v. *Leighton,* 91 Me. 593, 603; 40 A. 671, 675: "Such is the general rule, but it does not necessarily require proof beyond a reasonable doubt. And sometimes circumstances and conditions are to be considered which prevent the rule applying

so literally as it otherwise would." This rule does not mean that the findings of fact of the justice below will not be reversed on appeal unless such findings constitute error in law. They may be disregarded on an appeal when clearly wrong. Not so when exceptions are taken to the decree, for by express statutory provision exceptions to a decree in equity reach only erroneous rulings of law.

From the foregoing consideration of the diverse nature of exceptions and appeals, and the powers of the Law Court respecting the same, it is seen that the rights of the parties, the nature of the review of a declaratory decree by this court, and the extent of our authority with respect thereto are affected and determined by whether the right to review such decree is on exceptions or by appeal. Therefore, while the question may be procedural in the general sense, as its solution determines the authority of this court to consider and decide the case, it is also jurisdictional.

In *Maine Broadcasting Co., Inc.* v. *Eastern Trust and Banking Co., supra,* we considered the real nature of a proceeding to obtain a declaratory judgment for the purpose of determining jurisdiction of the court below to hear the cause and declare the rights of the parties. We there held: "The purpose of this statute is not to enlarge the jurisdiction of the courts to which it is applicable but to provide a more adequate and flexible remedy in cases where jurisdiction already exists." And we further held: "It is plain from the whole statute that the remedy must be sought in the appropriate court and 'the nature of the case,' not the pleasure of the petitioner, is the test of the forum."

In that case the plaintiff sought a declaration as to its liability on a promissory note. We held that this question was a legal question, exclusively cognizable by the Superior Court, and that the proceeding for obtaining a declaratory judgment thereon was likewise exclusively within the jurisdiction of the Superior Court, and that the Supreme Judicial Court was without jurisdiction in the premises.

In the instant case the petitioner sought a judicial declaration as to which of the two defendant cities had the right to assess and collect a tax on the personal property in question. A tax on personal property creates a right in the taxing municipality, and subjects the owner to a duty.

The method of enforcing the collection of taxes is wholly statutory. There is no method of enforcing a tax on personal property in equity. The duty to pay and the right to collect such tax may be enforced *in the courts* only by an action at law, viz., an action of debt either in the name of the collector or of the municipality, under the prescribed circumstances set forth in the applicable statute, R. S., Chap. 81, Sec. 93 (collector), Sec. 131 (municipality). There being no right conferred upon municipalities or their collectors of taxes to enforce taxes assessed upon personal property in equity, no such right exists.

As the present petition is to obtain a declaration of a right enforcible only by an action at law, as distinguished from one in equity, the essential nature of the case is that of a proceeding at law rather than in equity. No question cognizable by a court of equity is presented by the petition in ths case.

Even as in *Maine Broadcasting Co., Inc.* v. *Eastern Trust and Banking Co.*, the nature of the proceeding determined *the jurisdiction of the court below* to consider and decide the case, so in this case the nature of the same determines the course of procedure for obtaining a review; and *the jurisdiction of this court* to consider and determine the case depends upon the use of the appropriate method to bring the case before us.

Section 44 of the Declaratory Judgments Act provides that "all orders, judgments, and decrees," under the Act "may be reviewed as other orders, judgments, and decrees." We interpret this to mean that the right of review granted by the Act as applicable to a specific case is the same as in

other cases of the same nature. We hold that the same method must be employed to obtain a review of orders, judgments and decrees of a justice made or rendered in proceedings for a declaratory judgment, as would have to be employed to obtain a review of orders, judgments and decrees made or rendered by a single justice in an action to enforce the right or obligation of which a declaration is obtained or sought to be obtained by declaratory judgment.

As a judgment enforcing the declared duty to pay and the corresponding right to collect the tax could only be recovered in an action at law, and as such judgment could not be reviewed by an appeal, the declaratory judgment declaring the same cannot be reviewed by appeal. This case should have been brought to this court upon a bill of exceptions not by an appeal. The appeal being unauthorized we have no jurisdiction to hear and consider the same.

This court being without jurisdiction to hear and determine the unauthorized appeal, it is a nullity. "When lack of jurisdiction is patent, proceedings stop." *Kelley, Appellant,* 136 Me. 7; 1 A. (2nd) 183, 184; *Edwards, Appellant, supra; Carroll* v. *Carroll, supra.* The fact that the jurisdictional question was not raised by the parties is of no importance. Absence of jurisdiction is apparent from an inspection of the record. Neither action nor inaction of the parties can confer jurisdiction upon this court to hear and consider cases. When the remedy to obtain a review is by bill of exceptions, and an appeal is erroneously taken, consent cannot confer jurisdiction upon this court. *English* v. *Sprague, supra.* It is the duty of this court when lack of jurisdiction to consider and decide the cause appears to dismiss the same of its own motion. We must dismiss the appeal.

As the dismissal of the appeal leaves the judgment below in full force, and as the question involved so far as it affects the course of procedure for the review of declaratory judgments is of novel impression, following the precedent

set in *McKown* v. *Powers, supra, in this particular case* in order not to take the parties by surprise, we have carefully examined the record and the most excellent and exhaustive briefs furnished by counsel for both parties and all authorities cited in the same, and we find no error in the ruling of the justice who heard the case; nor do we find that the legal rights of the defendant, City of South Portland, were prejudiced thereby. The result would be the same had it brought the case to this court on exceptions.

For the reasons heretofore stated the entry must be,

Appeal dismissed.

ALFRED M. STROUT, ADMR. EST.

OF CHARLES T. BURGESS

vs.

CHARLES M. BURGESS

Knox. Opinion, August 12, 1949.

Equity. Joint Tenants. Judicial Notice. Tenants in Common. Trusts.

Stock certificates are within meaning of statutes authorizing suits in equity to compel delivery when so situated that they cannot be replevied.

At common law, four essential elements must be present in the creation of a joint tenancy, to wit, unity of time, title, interest and possession. In attempted transfer of stocks by owner directly to himself and another, to hold as joint tenants, the unity of title and unity of time were absent, and the transferor still holds under his original title.

The law of the state where certificates of stock are located and the transfer takes place, determines the title to the certificates.

At common law, in the absence of proof to the contrary, there is a presumption that the common law of another state is the same as that of Maine, the forum, and even though statute provides that court take judicial notice of the laws of foreign states, the common law presumption continues and will prevail unless overcome by evidence or by pertinent decision or statutes called to or coming to the attention of the court.

An attempt to create a joint tenancy of personal property between grantor and another by a direct conveyance to himself and another, creates a tenancy in common between the parties.

In the instant case, where attempted creation of joint tenancy fails because of mutual mistake of the parties to the transaction, where corporate stock is conveyed for consideration, the grantor holds the legal title to such stock impressed with a constructive trust of an undivided interest in favor of the other party.

Except in cases where plaintiff is ordered to do certain things as a condition precedent to obtaining relief decreed to him, affirmative relief will not be decreed in favor of a defendant in equity, except where defendant seeks relief by original or cross bill.

ON APPEAL.

Bill in Equity by administrator to recover certificates of corporate stock issued to deceased and defendant as joint tenants with right of survivorship and not as tenants in common. The presiding justice held void the transfer of the certificates from decedent to himself, and defendant as joint tenants. Defendant appealed. Appeal sustained. Decree dismissing bill with costs to be entered by the court below.

Jerome C. Burrows, for Alfred M. Strout, Adm. and heirs of Charles T. Burgess.

Alfred M. Strout, Admr. pro se.

Frank F. Harding, for defendant.

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

MERRILL, J. This is an appeal from a decision of a single Justice of the Superior Court sitting in equity. The bill was filed by Alfred M. Strout, Administrator of the Estate of Charles T. Burgess against Charles M. Burgess, a nephew of the deceased. It was brought to recover certain certificates of corporate stock contained in a safety deposit box in The Thomaston National Bank in the name of "Charles T. Burgess or Charles M. Burgess." The certificates and the shares represented thereby were claimed by the plaintiff as assets of the estate of Charles T. Burgess, and by the bill he sought to recover them from the defendant, who also claimed title thereto. Each of the certificates was issued to "Charles T. Burgess and Charles M. Burgess as joint tenants with right of survivorship and not as tenants in common." Included were shares in corporations organized un-

der the laws of some six different states, including Maine. The certificates represented some six hundred fifty shares approximating in value the sum of $13,000. All of the shares were originally the sole property of Charles T. Burgess.

The evidence clearly established that Charles T. Burgess, hereafter called the decedent who at the time of his decease was eighty-nine years of age, had made his home with the defendant for almost six years next prior to his death, except for a period of three months, commencing early in January, 1944 when he was in a nursing home. Prior to making his home with the defendant the decedent had conveyed his farm to another person by a deed conditioned for his support and burial. This arrangement not being satisfactory it had been cancelled by mutual consent and the property reconveyed. Sometime in the early part of 1941, the decedent came to live with the defendant, his nephew, under an arrangement whereby it was agreed that he would live with him, on trial as it were, to see whether or not conditions would be to his satisfaction, he paying board in the meantime. If things were satisfactory to him a permanent arrangement was to be effected whereby the defendant would receive his property in return for his support and burial.

After his return from the nursing home the transfer of the shares here in question was made, and shortly afterwards the farm was conveyed to the defendant by a deed conveying full title.

We are here concerned only with the effect of the transfer of the shares in question. It is clear from the evidence, and no other conclusion can be drawn therefrom, that at the time of the alleged transfer of the shares it was agreed between the defendant and the decedent that the shares were to be transferred to him in joint tenancy with the decedent, it being understood that in this manner the decedent would be protected if the defendant should die first, and that the

defendant would be protected with full title at his uncle's death.

It is also clear from all of the testimony in the case that the transfer of the shares in question and the later transfer of the farm were made to carry out the tentative arrangement entered into at the time the defendant's uncle first came to live with him, the situation evidently being to the satisfaction of the decedent, and that it was understood that the defendant would carry on in the same manner as had been previously agreed by his predecessor. The evidence clearly established that the defendant fully performed his part of the agreement, supported the decedent for the remainder of his life and paid for his burial. This was not only a technical, but a valuable consideration for the transfer of the shares in question. No other conclusion can be reasonably reached from the testimony taken as a whole.

As above stated, we are here concerned only with the effect of the transfer of these shares in the manner in which they were transferred and with the title thereto.

The evidence clearly establishes that the stock certificates were endorsed at the home of the defendant and that the endorsements were witnessed by a neighbor. Subsequently, the decedent and the defendant went to The Thomaston National Bank, delivered the certificates to the cashier of the bank and directed him to send the certificates to the various corporations for transfer of the shares to them as joint tenants. Subsequently, some of the corporations required joint tenancy agreements to be filed with them before they would issue the joint tenancy certificates. One such agreement with the Knox County Trust Company was introduced in evidence. The other joint tenancy agreements were not produced and introduced in evidence. When the certificates so issued were returned from the various corporations, they were taken by the defendant and placed in the safety deposit box, heretofore referred to, in The Thomaston Na-

tional Bank, which box stood in the name of "Charles T. Burgess or Charles M. Burgess." The evidence disclosed that the only person who went to the box after the deposit of the certificates was the defendant, Charles M. Burgess, or someone at his direction. This box had been rented by Charles M. Burgess in the joint names as above but the decedent had never signed the bank rental card. When checks for dividends declared upon the various stocks were received they were endorsed by both Charles T. and Charles M. Burgess, cashed by the defendant who brought the money back, delivered it to the decedent, who deducted therefrom such amount as he desired to use and turned the balance over to Charles M. Burgess or to his wife. Certain Central Maine Power Company Preferred Stock was called and the decedent eventually received and retained the proceeds thereof, about one thousand dollars.

The justice presiding who heard the case held that no joint tenancy was created by the transfer of these stocks and that the transaction was void as an attempted testamentary disposition not executed in accordance with the statute of wills.

The defendant claimed the determination of the issues raised by the bill in equity and the relief sought were beyond the equity powers of the court. He further claimed that as numerous shares of the corporate stock in question were in corporations, organized under the laws of, and located in, states other than the State of Maine, the validity of the transfers of such stocks should be determined according to the laws of the respective states where the corporations were organized. Counsel for the defendant requested that the court take judicial notice of the laws of the several states of incorporation of each of the corporations whose stock is in issue, and counsel for the plaintiff agreed that reasonable notice had been given to the plaintiff. The court required counsel to aid it in obtaining such information. The purpose of this request and stipulation was evidently

to invoke the provisions of the Uniform Judicial Notice of Foreign Law Act, R. S., Chap. 100, Secs. 135, 140, both inclusive, together with Sec. 141.

There is no merit to the defendant's contention that the subject matter and relief sought is beyond the equity powers of the court under R. S., Chap. 95, Sec. 4, Paragraph 11.

The defendant, so far as the record shows, possessed the only key to the safe deposit box in which the securities were deposited, and the safe deposit box was registered in his name. No suit at law would be effectual. *Farnsworth, Administratrix* v. *Whiting et als.*, 104 Me. 488; 72 A. 314. Stock certificates are within the true meaning of the statutes authorizing suits in equity to compel delivery when so situated that they cannot be replevied. *Farnsworth, Administratrix* v. *Whiting et als. supra, Reid* v. *Cromwell et al.*, 134 Me. 186; 183 A. 758. "Such possession and withholding, though not fraudulent, are enough to give the Equity Court the right to compel the surrender of the certificates. Equity has jurisdiction both under the statutes . . . and under general Equity jurisdiction. *Farnsworth, Admx.* v. *Whiting et als.*" *Reid* v. *Cromwell et al. supra*, 134 Me. at 189; 183 A. 759.

This court adheres to the common law rule that in the creation of joint tenancies, four essential elements must be present, unity of time, unity of title, unity of interest and unity of possession. *Garland, Appellant*, 126 Me. 84; 136 A. 459, affirming *Staples* v. *Berry*, 110 Me. 32; 85 A. 303. This doctrine has since been approved in *Bank* v. *Brooks*, 126 Me. 251; 137 A. 641; *Reid* v. *Cromwell*, 134 Me. 186; 183 A. 758; *MacDonough* v. *The Bank*, 136 Me. 71 at 76; 1 A. (2nd) 768; and *Rose* v. *Osborne*, 133 Me. 497; 180 A. 315. It is now too late to successfully question before this court the necessity of the presence of the four unities in the creation of joint tenancies, in either real or personal property.

In the attempted transfer of the various stocks from Charles T. Burgess to himself and Charles M. Burgess, to hold as joint tenants with right of survivorship and not as tenants in common, two of the necessary unities were lacking. At common law a man cannot make a conveyance to himself. Such action on his part is nugatory and if attempted he still holds under his original title. It follows therefore that after an attempted transfer from one to himself and another the transferor still holds under his original title which accrued to him at the time of his original aquisition of the property, be the same real or personal. No better statement can be found as to the requisities of the unities of "title and time" than that of Blackstone.

> "*Secondly,* joint-tenants must also have a unity of *title;* their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party: and, unless that act be one and the same, the same tenants would have different titles;" x x x
>
> "*Thirdly,* there must also be a unity of *time;* their estates must be vested at one and the same period, as well as by one and the same title."
> Blackstone, Commentaries, Book II, Chap. 12, Sec. II.

The transfer in question lacks at least two of the essential unities, those of title and time. Charles M. Burgess received such interest as he acquired by the transfer from Charles T. Burgess at the time of the transfer. Charles T. Burgess received such title as he had from his original transferor as of the time the stocks were originally acquired by him. The transfer in question although intended to create a joint tenancy failed to accomplish its purpose. It may be urged that this result defeats the intent of both parties. However, intent alone is not sufficient to create rights. To create intended rights, the intent must be car-

ried into effect by acts which are legally sufficient to accomplish the intended purpose. Even if the creation of a joint tenancy be intended it cannot be accomplished unless the four unities be present in the acts by which it is sought to be created. A direct transfer from a sole owner to himself and another as joint tenants lacks two of the necessary unities of joint tenancy, to wit, title and time.

At common law to create a joint tenancy between the present owner of property and another, in order to preserve the four unities, it was necessary to convey the property to a third party and have him convey to the intended joint tenants. In this way the four unities were preserved in the creation of the estate. After the enactment of the statute of uses, *if the appropriate form of conveyance* were used, it became possible for the owner of real estate to create a joint tenancy between himself and another by a single conveyance. The statute of uses, however, had no application to personal property. Therefore, it still remained necessary, if the owner of personal property desired to create a joint tenancy between himself and another, to convey the same to a third person and have him in turn convey the property to the original owner and his intended joint tenant, thus preserving the four unities necessary for the creation of a joint tenancy.

We are not unmindful of the fact that some American courts have held that a joint tenancy between the owner of property and another can be created by a direct transfer to himself and another as joint tenants. In some jurisdictions, as in Massachusetts which has anthorized by a specific statute a conveyance "by a person to himself jointly with another person in the same manner in which it might be transferred to another person" a joint tenancy may be created by such conveyance. See *Ames* v. *Chandler,* 265 Mass. 428; 164 N. E. 616. Other courts have reached the same result, as in New York, on the ground that the conveyance to a third party was a meaningless unnecessary re-

quirement. This court, however, in the decisions heretofore cited has adhered to the common law requirement that the presence of the four unities is essential to the creation of a joint tenancy. The unities of title and time cannot be present in a direct conveyance by the owner of personal property to himself and another as joint tenants.

After the decision in *Garland, Appellant, supra,* with its clear statement that the presence of the four unities was essential to the creation of a joint tenancy, had the legislature seen fit it could have provided new methods, of general application, for the creation of joint tenancies. This it did not do, but did enact a law, carefully restricted in its application, providing for survivorship in the shares of loan and building associations and comparatively small bank accounts jointly held by a limited class of persons, "even though the intention of all or any one of the parties be in whole, or in part, testamentary, and though a technical joint tenancy be not in law or fact created." P. L., 1929, Chap. 307, later R. S., 1930, Chap. 57, Sec. 25, now R. S., Chap. 55, Sec. 36, amended by P. L., 1947, Chap. 48. If the law with relation to the creation of joint tenancies or with relation to survivorship between co-owners is to be further modified it should be accomplished by the legislature and not by the court.

It is therefore held that insofar as the law of Maine is to be applied to the transfer of these certificates of stock or these corporate shares of stock, a joint tenancy therein was not created by the transfers.

It is to be noted that the shares of stock which form the subject matter of this litigation are issued by corporations organized under the laws of several states, to wit, Delaware, Indiana, Massachusetts, New York, Pennsylvania and Maine. The defendant claims that the validity of the transfers and the effect of the several transfers are to be governed by the laws of the respective states in which the several corporations are organized.

The transaction between Charles T. Burgess, the decedent, and Charles M. Burgess took place in the State of Maine, and the several *certificates* representing the corporate shares in question were present here in Maine, were here endorsed and here delivered to the cashier of the bank to be by him forwarded to the various corporations for transfer upon the books of the corporations. The determination of whether or not the validity and effect of the transfer of capital *stock* is governed by the law of the place where the transaction takes place and where the *certificate* representing the shares is located, or by the law of the state where the corporation is organized is of novel impression in this state.

In approaching this problem one must bear in mind the distinction between *shares* of stock and stock *certificates*. A share of stock is a proportional ownership in the corporation itself. The corporation being a legal entity created by and existing under the law of the state where it is organized and located, it therefore follows that the legal *situs* of the *shares of stock* is in the state where the corporation is created, and their actual transfer must be in accord with the law of that state. *Certificates* of stock, however, are tangible personal property and their transfer is subject to the law of the place where they are situated. This distinction is recognized in Restatement of the Law, Conflict of Laws, Sec. 53:

> "(1) Shares in a corporation are subject to the jurisdiction of the state in which the corporation was incorporated.
>
> (2) The share certificate is subject to the jurisdiction of the state within whose territory it is.
>
> (3) To the extent to which the law of the state in which the corporation was incorporated embodies the share in the certificate, the share is subject to the jurisdiction of the state which has jurisdiction over the certificate.

Comment:

a. The state in which the corporation was incorporated has jurisdiction to determine the title to and disposition of the shares.

b. The title to or disposition of the certificate is subject to the jurisdiction of the state where the certificate is at the time of the transaction in question.

c. At common law the state of incorporation will order the transfer of the shares on the books of the corporation to the holder of the legal title to the certificate; and to that extent the title to the shares depends upon the title to the certificate."

These same principles are well stated by Beale in his Treatise on The Conflict of Laws, Sec. 192.5 as follows:

"The question of who are shareholders in a corporation is clearly a question of the internal management of the corporation and is therefore not to be determined by a foreign state. But the share is evidenced by a certificate issued by the corporation to certify that the person therein named is a stockholder on the books of the corporation. By business practice this certificate is treated as the tangible representative of the stock and the owner of the certificate is entitled to be registered on the books of the corporation. If this certificate happens to be in the foreign state and is there transferred, the law of that state must determine the title to the certificate though it cannot determine the title to the share. The foreign state having determined the title to the certificate, the title to the share follows as a matter of course."

The leading English case upon this subject is *Williams* v. *Colonial Bank,* 38 Ch. D. 388, affd. 15 A. C. 267, and the leading American case is *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp.,* 267 U. S. 22; 69 L. ed. 495; 45 Sup. 207. Both of these cases are in accord with the foregoing statement of legal principles.

Although the law actually governing the transfer of *shares* is that of the jurisdiction within which the corporation is organized, at common law such jurisdiction will recognize and effectuate transfers of shares in accordance with the *title to the certificates* created by the law of the place where the *certificate* is located and its transfer takes place, unless such transfer of the certificate conflicts with some positive rule of law of the State of incorporation relative to the transfer of shares in corporations created by it. We recognize this common law rule as the law of this State. Therefore the law of Maine, the state where the certificates were located and the transfer took place, determines the title to the certificates.

Under the law of Maine, the transfer by the decedent, to himself and Charles M. Burgess, did not create a joint tenancy, though that was clearly intended. Defendant claims that with respect to shares in foreign corporations this question should be determined by the laws of the several states of incorporation, which he urges are more liberal toward the creation of joint tenancies than is the law of Maine.

This state has adopted the Uniform Judicial Notice of Foreign Law Act, R. S., Chap. 100, Secs. 135-140. This is supplemented by R. S., Chap. 100, Sec. 141.

Sections 135 and 136 are as follows:

> "**Sec. 135. Judicial notice.** Every court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.
>
> **Sec. 136. Information of the court.** The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information."

Literally interpreted, Section 135 would require every court of this state from the Trial Justice in a remote country hamlet to the justices of this court to know and apply

the entire common and statutory laws of each and every separate jurisdiction within the United States, to cases in hand as occasion might arise. Such an interpretation of this statute would ascribe to justices of our courts an omniscience in the law far beyond the capabilities of mortal man, or in the alternative would require, as in this case, an independent research, on their part, into the common law and statutes of numerous jurisdictions. Statutes are to be interpreted in the light of reason, with a view to accomplishing the intended result. The purpose of the act in question was undoubtedly to simplify the method of properly bringing to the consideration of the court applicable principles of foreign law and to leave its determination to the court instead of the jury.

In Massachusetts by G. L. (Ter. Ed.) c. 233, sec. 70, it was provided:

> "The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof, or of a foreign country, whenever the same shall be material."

In its interpretation of this statute the Massachusetts Court stated in *Smith* v. *Brown,* 302 Mass. 432; 19 N. E. 2nd (Mass.) 732, 733:

> "It is provided by G. L. (Ter. Ed.) c. 233, sec. 70, the court shall take judicial notice of the law of another State, but we are not required to take judicial notice of the law of another State except as it is brought to our attention by the record or the briefs. *Bradbury* v. *Central Vermont Railway, Inc.,* 299 Mass. 230, 12 N. E. 2nd, 732 and cases cited."

See also *Hanson* v. *Hanson,* 287 Mass. 154; 191 N. E. (Mass.) 673, 674; 93 A. L. R. 701; *Lennon* v. *Cohen,* 264 Mass. 414; 163 N. E. (Mass.) 63, 67; *Bergeron* v. *Bergeron,* 287 Mass. 524; 192 N. E. (Mass.) 86, 88; *Dadmun* v. *Dadmun,* 279 Mass. 217; 181 N. E. 264, 265.

This rule of interpretation we adopt as applicable to our own statute. Unless pertinent decisions or statutes of foreign jurisdictions are called to our attention either in the record or in the briefs, and if no evidence as to the foreign law is offered, as permitted both by the common law or by R. S., Chap. 100, Secs. 138 and 141, it is not the *duty* of court to inform itself thereof, *suo moto*. We do not mean to deny our authority to do so. Section 136 of the statute confers such authority upon the court. The foregoing construction of our statute is fortified by the further provision of Section 136 authorizing the court to "call upon counsel to aid it in obtaining such information."

The record in the instant case recites:

> "Counsel for the Defendant has requested that the Court take judicial notice of the laws of the State of incorporation of each of the corporations whose stock is in issue, and counsel for the Plaintiff agrees that reasonable notice has been given to the Plaintiff. The Court requested counsel to aid it in obtaining such information."

As already stated, the attempted transfer from the decedent to himself and Charles M. Burgess having taken place in Maine did not create a joint tenancy in the certificates, irrespective of whether or not such transfer of certificates, had it taken place within the jurisdiction of incorporation of the several corporations, would have there created a joint tenancy therein.

Except as hereinafter noted with respect to the law of Delaware, the defendant has neither called to the attention of the court, nor have we discovered any pertinent decisions or statutes from any of the foreign jurisdictions involved which would deny the general rule of the common law that the title to the corporate shares follows title to the certificate. We hold that the title to the various shares of stock represented by the several certificates in all cases (except as hereinafter noted with respect to shares in the Delaware corporation) followed the title to the certificates; that as no

joint tenancy was created in the certificates no joint tenancy was created in the shares of stock represented thereby.

Defendant's brief called attention of the court to *Skinner* v. *Educational Pictures Securities Corp.*, 14 Del. Ch. 417; 129 A. 857; also *Cantor* v. *Sachs*, 18 Del. Ch. 359; 162 A. 73. These decisions in and of themselves do not seem to us at all decisive of any issue in the case with respect to the law of Delaware, and more especially the effect of the foreign transfer of certificates of shares in Delaware corporations upon the shares themselves. We might rest our determination of the law of Delaware relative to the transfer of corporate shares upon the pertinent decisions called to our attention in this case in the brief. However, we have chosen to exercise our statutory right to consider other pertinent Delaware decisions bearing upon this issue in accord with the principles enunciated in *Bradbury* v. *Central Vermont Railway, supra.*

The Delaware decision, *Hunt* v. *Drug Inc.*, 5 W. W. Harr., Del. 332; 156 A. (Del.) 384, relying upon *Bouree et al.* v. *Trust Francais etc.*, 14 Del. Ch. 332; 127 A. 56 rejects the doctrine of *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp. supra,* and holds that title to shares in corporations organized under the laws of Delaware are to be determined by the laws of Delaware, and not by the law of the state where the transfer of the certificate takes place. This result was based upon a Delaware statute Rev. Code 1915, Sec. 1986 which reads as follows:

> "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purposes of taxation, the situs of ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

Even assuming that we must determine the title created by the transfer of said stock in accord with the law of

Delaware respecting the creation of joint tenancies, we arrive at the same result reached with respect to the other corporate shares.

At common law, in the absence of proof to the contrary, there is a presumption that the common law of another state is the same as that of Maine, the forum. This presumption was applied by this court to the creation of a joint tenancy in capital stock of a foreign corporation. *Reid* v. *Cromwell,* 134 Me. 186, 189; 183 A. 758; see also *Rose* v. *Osborn,* 133 Me. 497, 505; 180 A. 315, and authorities cited therein. Even though the statute provides that the court shall take judicial notice of the law of other states this presumption with respect to the common law continues, and will prevail unless overcome by evidence or by pertinent decisions or statutes called to or coming to the attention of the court. *Hanson* v. *Hanson, supra, Bradbury* v. *Central Vermont Ry., supra, Seeman* v. *Eneix,* 172 Mass. 189; 172 N. E. (Mass.) 243. *Lennon* v. *Cohen, supra.*

No pertinent decisions or statutes of Delaware relative to the creation of joint tenancies being called to the attention of the court we give effect to the presumption that the common law of Delaware with respect thereto is the same as our own. Therefore, we hold that no joint tenancy was created in the capital stock of Crowell Collier Publishing Company, the Delaware corporation.

It is evident that Charles T. Burgess made sufficient delivery of these endorsed certificates of stock to transfer title. Both the transferee and the transferor were present at the bank with these stock certificates endorsed in blank. The stock certificates in the presence of both parties were delivered to the cashier of the bank to forward for transfer on the books of the various corporations by whom they had been issued, in accordance with directions given to him. This constitutes sufficient delivery by the transferor to the transferee. Had the transfer been of the entire interest no one could question the sufficiency of the delivery to pass title

from the transferor to the transferee. The disposition of the new certificates upon their return is entirely consistent with co-ownership therein between Charles T. and Charles M. Burgess. This is true whether the interest created by the transfer be a joint tenancy or a tenancy in common in the shares. In either event, either co-tenant would be entitled to possession of the certificates. Here the certificates when received back were placed by the defendant in a safety deposit box standing in the name of both and everything that was done was in accord with an irrevocable transfer. The court below found that this transaction did not create a joint tenancy and that it was an attempted testamentary disposition of the stock and as such was void; that the stocks belonged to the estate of Charles T. Burgess and ordered that Charles M. Burgess deliver the stocks to the plaintiff and execute such instruments as were necessary to accomplish a transfer of the certificates and of the income therefrom subsequent to the death of Charles T. Burgess to the estate of Charles T. Burgess. Upon the record this decree cannot be sustained.

A joint tenancy is not a testamentary disposition of property. A joint tenancy is a present estate in which both joint tenants are seized in the case of real estate, and possessed in the case of personal property *per my* and *per tout.* One of the characteristics of a joint tenancy is a right of survivorship between the joint tenants, if the joint tenancy is still in existence. The right of survivorship, however, does not pass anything from the deceased joint tenant to the surviving joint tenant. By the very nature of joint tenancy, the title of the first joint tenant who dies terminates with his death, and as both he and his co-tenant were possessed and owners *per tout,* that is of the whole, the estate of the survivor continues as before. *Attorney General* v. *Clark,* 222 Mass. 291; 110 N. E. 299; L. R. A. 1916 c. 679; Ann. Cas. 1917B 119.

The creation of an estate in joint tenancy (if accomplished) between one who is a sole owner and another is not a testamentary transfer, but is the creation of a present estate between the then owner and another person which has as an incident to its nature survivorship in the survivor. As above noted, the survivorship, when it takes effect, is not a transfer. The termination of the estate of the deceased joint tenant is the result of its own inherent nature and limitation. The survivorship is but a continuance of the prior existing estate of the survivor. Therefore, an attempt to create a true joint tenancy, as in this case, is not an attempt at testamentary disposition. It is an attempt to create a present estate which will assure to whichever joint tenant survives absolute ownership of the whole subject matter of the joint tenancy, provided that the tenancy has not been severed during the life of both joint tenants.

Plaintiff urges that the decedent had no intent to convey a present interest to the defendant by the transfer of the securities in question. As supporting his contention he calls attention to the disposition of the proceeds of the dividend checks and the Central Maine Power Company Preferred Stock which was called. In the absence of any evidence that the decedent claimed either of them as of right, or that the defendant yielded them to the decedent in recognition thereof, the treatment of these proceeds by the parties is insufficient to overcome the effect of the other evidence, which clearly establishes the intent of the parties to create a joint tenancy in the securities which form the subject matter of this controversy.

The transfer of shares not being void as an attempted testamentary disposition, and it being ineffectual to create a joint tenancy, the determination of the rights of the parties is not without difficulties and presents questions upon which the authorities are not in accord.

It is an accepted principle of the common law that if a devise or conveyance *inter vivos* be made to two or more *as joint tenants,* if one of the intended joint tenants did not take under the conveyance because of prior death, disability, refusal to accept or otherwise, the other intended joint tenant took as sole owner of the whole estate. Tiffany, Real Property (3rd Ed.) Vol. 2, p. 200, 2 Am. & Eng. Encyc. Law (2nd Ed.) pp. 666 and 667, 4 Thompson Real Property (Perm. Ed.) Sec. 1778 on p. 316. This doctrine was recognized with respect to devises and bequests in 14 Am. J., p. 80 and in *Anderson* v. *Parsons,* 4 Me. 486, 489, which recognizes the doctrine as to intended joint tenancies and denies its application to tenancies in common. The doctrine is also recognized in *Humphrey* v. *Tayleur,* Ambler 136, 27 Eng. Reprint, 89; *Dowset* v. *Sweet, Ambler* 175, 27 Eng. Reprint, 117; *Shelley's Case,* 1 Coke 88 b., 101 a, 76 Eng. Reprint, 199, 226-7; *Alexander* v. *Alexander,* 2 Ves. Sr. 640, and Supp. 434, 28 Eng. Reprint, 408 and 569; *Overton* v. *Lacy,* 6 T. B. Monroe (Ky.) 13, 17 Am. Dec. 111; *McCord* v. *Bright,* 44 Ind. App. 275; 87 N. E. (Ind.) 654. See also *Lockhart* v. *Vandyke,* 97 Va. 356; 33 S. E. (Va.) 613. This rule to which, thus avoiding restatement, we will hereinafter refer as the *general rule,* seems to have been universally applied when the intended joint tenancy was to be created between persons other than the grantor.

In such cases due to the nature of the intended estate, the grantor intended to invest each grantee with an estate which he would hold *per tout* as well as *per my,* that is to say, each joint tenant is seized by the whole as well as by the moiety; furthermore, the grantor intended to part with his entire title, retaining no interest in himself. Therefore, no equitable principle could be invoked entitling the grantor to retain an undivided interest in himself as a tenant in common with the grantee or grantees who did take under the grant. This is well illustrated by the case of *Overton* v. *Lacy, supra,*

which distinguishes between tenancies in common and joint tenancies. In that case the court said:

> "Tenants in common do not hold a joint title; their titles to land are in their nature several, and are so treated throughout all judicial proceedings. It was, therefore, no doubt correct to decide that a patent which is intended to grant an estate in common to two, does not, on account of one being dead at the time it issues, pass the entire title to the whole of the land to the survivor. A contrary decision would be giving an operation to the grant that never was intended by the grantor, and confer upon the survivor a title to which, by the clear import of the grant, he was not to be invested. But not so as respects patents which purport to grant land to two or more jointly. The title of joint tenants is not like that of tenants in common; it is not several but joint. They hold a unity of title, are said to be seised *per my et per tout*, and as the law stood at the date of the patent in question, upon the death of either tenant, the title would go to the survivor. It is not, therefore, as in the case of tenants in common, necessary to effectuate the intention of the grantor, to limit the operation of a grant to two as joint tenants, one of whom being dead at the date of the grant, to a moiety of the land only. The intention of the grantor and the object of the grant will be better attained by admitting the title to the whole to pass to the living grantee. The title must be so admitted to pass, unless we suppose what is altogether inadmissible, that by the very act of granting a joint title to two, one of whom is dead, a sort of legal severance of the title intended to be granted is produced, and we thereby, instead of making the grantee in being take a title which, as survivor, he would have held to the whole of the land, if the other grantee had been living at the date of the grant, and afterwards departed this life, we split the title, and make him, contrary to the plain import of the grant, take an estate in a moiety only, and hold the title to that moiety as tenant in common with the commonwealth."

The court then held that full title passed to the surviving joint grantee.

In the instant case if we attempt to apply the *general rule* to the transfer of the corporate shares we are faced with a somewhat different situation, not because of the nature of the property or of the estate intended to be created, but because of the situation of the parties to the transfer.

Here, there was, as we have held, a clear intent to create a joint tenancy. There being an intent to create a joint tenancy, it was an intent to create such an estate with all of its inherent qualities and attributes. There was an intent to invest the defendant with a title to these shares to be held by him *per tout* as well as *per my,* that is, a title by the whole as well as by the half. There was also an intent to confer upon him the right of survivorship. The attempted transfer was made upon a valuable consideration, moving from the defendant to the decedent. On the other hand, had the *decedent* accomplished his intended purpose, had he been able to take as a joint tenant by means of the transfer, his title would have had the same qualities that would have obtained with respect to that of the defendant. In addition to the above qualities, each joint tenant would have had the power during their joint lives to sever the estate and transform it into a tenancy in common and thus destroy the right of survivorship. The decedent, however, took nothing by the *transfer* of the shares. As no title passed to him by the transfer a joint tenancy was not created. So far as the record shows, neither the decedent nor the defendant did anything which would have severed the joint tenancy had it been created, and had it been created on the facts disclosed by the record the defendant would now be sole owner by virtue of the right of survivorship.

The instant case presents the problem whether the foregoing *general rule* applies when the intended joint tenant

who cannot or does not take under the conveyance is the grantor.

The overwhelming weight of authority, in states which deny the power on the part of a grantor to create a joint tenancy between himself and another by a direct conveyance to himself and another, is that such conveyance creates a tenancy in common between the grantor and his intended joint tenant. This result is reached upon the ground that the *grantor* did not intend to divest himself of his complete title, and the conveyance will be interpreted in such a manner as to best carry out its intent. The same result has been reached with respect to estates by the entireties which in common with joint tenancies have the quality of survivorship between the tenants and in which estates both tenants are seized or possess *per tout.* In some of the authorities, hereafter cited, the *general rule* is discussed and its application denied. In others without discussion it is held that a tenancy in common between the grantor and the grantees results from such conveyance. These cases are *Stuehm* v. *Mikulski,* 139 Neb. 374; 297 N. W. 595; 137 A. L. R. 327. *Deslauriers* v. *Senesac,* 331 Ill. 437; 163 N. E. 327; 62 A. L. R. 511. *Green* v. *Canady,* 77 S. C. 193; 57 S. E. 832. *Breitenbach* v. *Schoen,* 183 Wis. 589; 198 N. W. 622. (This case was later overruled on another point by *In Re: Staver's Estate,* 218 Wis. 114; 260 N. W. 655, 659, also *Estate of Skilling,* 218 Wis. 574; 260 N. W. 660, 662.) *Fay* v. *Smiley,* 201 Iowa 1290; 207 N. W. 369. (On rehearing, the portion of the opinion on this subject was withdrawn as not before the court. See *Fay* v. *Smiley,* 209 N. W. 307) ; *Wright et al.* v. *Knapp,* 183 Mich. 656; 150 N. W. (Mich.) 315. (In this case a majority of the court held that the estate created was a tenancy in common. Two justices held that the *general rule* would apply.) *Michigan State Bank* v. *Kern et ux.,* 189 Mich. 467; 155 N. W. 502. *Stone* v. *Culver,* 286 Mich. 263; 282 N. W. 142; 119 A. L. R. 512. *Price* v. *National Union Fire Ins. Co.,* 294 Mich. 289; 293 N. W. 652. The case of *Pegg* v. *Pegg,* 165 Mich. 228; 130 N. W. (Mich.) 617; 33

L. R. A. (N. S.) 166 Ann. Cas. 1912 c. 925, often cited with respect to creation of estate by entireties by direct conveyance from husband to wife has no bearing on the point in issue and need not be considered. In that case the conveyance by the husband to the wife was of an undivided half of the property.

The one case which holds that the intended joint tenant takes the whole title under a conveyance from the grantor to himself and others as joint tenants is *Cameron* v. *Steves,* 9 New Brunswick 141. The one case applying the same rule to a conveyance by a husband to himself and wife as tenants by the entireties is *Hicks* v. *Sprankle,* 149 Tenn. 310; 257 S. W. (Tenn.) 1044.

It is to be noted, however, that in none of the cases above cited which hold that the grantor and grantee become tenants in common does it appear that the conveyance was made upon a valuable consideration or in pursuance of a contract. In most of them the inference is plain that the conveyance was voluntary and without consideration. In *Stuehm* v. *Mikulski, supra,* the court especially calls attention to the fact that the conveyance in question was not upon a valuable consideration nor was it in pursuance of a contract.

So far as the *legal title* is concerned, and in accord with the manifest weight of authority, we hold that the transfer in question created a tenancy in common between the decedent, Charles T. Burgess and the defendant, Charles M. Burgess.

The defendant, Charles M. Burgess, further claimed that if no joint tenancy in these stocks was created they were impressed with a trust for his benefit. The justice below found that the stocks were not impressed with such trust.

Even though joint tenancies were not favored in equity a contract to convey real estate to two as joint tenants could be specifically enforced. Annotated Cases, 1917 B, 64 n.

Equity has likewise enforced agreements for survivorship between co-tenants. *Hayes* v. *Kingdome,* 1 Vern. 33, 23 Eng. Reprint, 288 and note 289.

Equity has decreed the reformation of a deed which conveyed land to two as tenants in common instead of as joint tenants according to the intent of the parties. This reformation of the deed was made after the decease of one of the co-tenants, and although the result was to give the other the entire estate by survivorship. *McVey* v. *Phillips et al.,* 259 S. W. (Mo.) 1065.

In the instant case there was a valid contract between the decedent and the defendant that the former would transfer the stocks in question in such manner that a joint tenancy therein would be created. The existence of such contract is clearly established. The contract was founded upon a valuable and sufficient consideration. Instead of the intended joint tenancy a tenancy in common was created. One of the incidents to the intended joint tenancy was the right of survivorship. Nothing was done during the lifetime of the decedent to sever the joint tenancy had the same been created, and had it been created the defendant by virtue of his right of survivorship would now be sole owner of the joint estate. The failure to create the joint tenancy was not at all due to the unwillingness of the decedent to carry out his contract to create it, nor was it due to the fact that it was impossible to create a joint tenancy in the stocks between the parties, but solely to the fact that the means employed were insufficient and inappropriate for the intended purpose. There was clearly a mutual mistake on the part of both parties in the choice of method of making the transfer, and as to its legal effect. Because of this mutual mistake the decedent became a tenant in common with the defendant instead of a joint tenant, a result not intended by him, and of which, so far as the record discloses, he never knew.

The *plaintiff*, as the personal representative of the decedent, is a tenant in common with the defendant. This title which he now holds is solely the result of the mutual mistake. The defendant, due solely to the mutual mistake, now holds legal title to an undivided half interest in the stocks, instead of full title to the same by virtue of his right of survivorship, which he would have had but for said mutual mistake.

As this transfer was founded upon a valuable consideration, the rule that an intended gift cannot be enforced as a trust as stated in *Brown v. Crafts*, 98 Me. 40, 47; 56 A. 213, has no application to the present situation. For the same reason, the rule which is subject to certain qualifications of no importance here, that a *voluntary* express trust that fails because the settlor does not effectively convey title to the trustee will not be enforced in equity by impressing the subject matter of the trust in the hands of the settlor with a constructive trust in favor of the intended beneficiary, likewise has no application to this case.

We are therefore faced with the question as to whether or not the defendant is entitled to equitable relief, either by a reformation of the transfer or by virtue of a constructive trust impressed upon the plaintiff's legal interest in these shares in favor of the defendant. If so, we must determine whether or not such relief is available to the defendant in the present action.

In determining these questions it must be remembered that the subject matter in dispute is personal property, shares of stock, and not real estate. Whether or not during the lifetime of Charles T. Burgess equity could or would have ordered the parties to convey the stocks in question to a third party, who in turn would be directed to convey them to the decedent and defendant as joint tenants, we need not decide, nor do we intimate any opinion thereon.

In *Cole* v. *Fickett,* 95 Me. 265, 270; 49 A. 1066, 1068, after having stated the equitable jurisdiction with respect to reformation of written instruments, the court made the following statements:

> "But there is another principle recognized in equity, that when one person, through mistake or fraud, obtains the legal title and apparent ownership of property which in justice and good conscience belongs to another, such property is impressed with a use in favor of the equitable owner."

Another analagous principle recognized in equity is well stated as follows in Scott on Trusts, Vol. 1, Sec. 31.3:

> "Where property is conveyed for consideration, and not as a gift, and the conveyance is ineffective to transfer the property, a court of equity will treat the transaction as though there were a precedent contract to transfer the property, and will compel the person making the conveyance to transfer the property. This, however, is not based upon the notion that the transferor declared himself trustee of the property. There is a constructive trust rather than an express trust, based upon the duty of the transferor to complete the transfer for which he received consideration."

This principle applies whether the ineffectiveness of the conveyance extends to the whole or part of the subject matter of the conveyance, and whether the ineffective nature of the conveyance is due to either fraud or mutual mistake. Scott on Trusts, Vol. III, Sec. 466. Of the cases cited in the footnotes to this section, *Finch* v. *Green,* 255 Ill. 304; 80 N. E. 318, is especially in point, as there the consideration was personal services rendered and to be rendered in the home, as in this case. The court after holding that there was a valuable consideration further held that it would not enter into an inquiry as to the adequacy of the consideration fixed by the parties themselves.

We hold that these principles apply to the instant case, and to the extent that the plaintiff, because of the mutual mistake of the original parties to the transfer, holds legal title to these shares, he holds the same impressed with a constructive trust in favor of the defendant.

The mere fact that personal property is held upon a constructive trust does not give equity jurisdiction to order its transfer in specie to the person in favor of whom such trust exists. The transfer in specie of personal property which is the subject matter of a constructive trust will only be ordered when in addition to the existence of the trust there are present additional facts which justify and require the exercise of the equitable powers of the court in this respect, as inadequacy of legal remedy, insolvency of the constructive trustee, the unique character of the chattel, etc. See Restatement of Law, Restitution, Sec. 160 e, f, Sec. 163 d. Also see Scott on Trusts, Volume 3, Sec. 462.3. However, as said in Sec. 160 e, *supra:*

> "The refusal of the court to permit specific recovery of property in a proceeding in equity, however, does not necessarily mean that there is no constructive trust."

Although the present record discloses that the plaintiff's interest in these shares of stock is impressed with a constructive trust in favor of the defendant, the present record does not disclose such additional facts as would justify an order compelling the release of the plaintiff's legal title in these shares to the defendant. Although the defendant asserted a claim that the shares were held in trust for him before the justice below, and in his brief filed in this court reiterated his claim, he did not assert such claim either in his answer nor did he do it by cross bill. To order the plaintiff to release his legal title to the defendant would be granting to the defendant affirmative relief. The ordinary rule is, except in cases where the plaintiff is ordered to do certain things as a condition precedent to his obtaining relief

decreed to him, that affirmative relief will not be decreed in favor of the defendant in an action in equity. To obtain affirmative relief the defendant must seek it by an original bill or by a cross bill. This general principle is of especial application when no relief is decreed in favor of the plaintiff. The general rule that the defendant cannot obtain affirmative relief based upon a claim set up in his answer is found in Whitehouse Equity Practice, First Edition, Sec. 371. If the defendant cannot obtain affirmative relief based upon an answer, much less can he obtain it when his claim therefor is not even set forth in an answer.

Whether or not additional facts, not disclosed by the record, exist which would justify a court in equity in enforcing the constructive trust in the defendant's favor by compelling the plaintiff to release his legal title to an undivided interest in the stocks does not appear. If such facts do exist, the defendant should assert them and seek appropriate relief by bill in equity to enforce his equitable rights under the constructive trust. In his brief the defendant asserts that if relief is not afforded to him in the present action, he is without remedy because of the statute, R. S., Chap. 152, Sec. 15, requiring the filing of claims against estates in the Probate Court within a limited time, which time has now elapsed. Whether the provisions of R. S., Chap. 152, Sec. 15 requiring the presentation and filing of claims within a certain time and limiting the time within which actions against executors and administrators must be instituted, would apply to a bill in equity brought by the defendant to enforce the constructive trust of the legal title to specific corporate shares in his favor, he already having the certificates in his possession, or whether in case said section does apply to the defendant's claim, the defendant might have relief in equity under R. S., Chap. 152, Sec. 22, are questions not now before this court and upon which we intimate no opinion. It is to be noted in this connection that the decedent died on the fifth day of October, 1946, and that the present bill had been filed and served on the de-

fendant on the seventeenth day of June, 1947. The defendant therefore had ample opportunity to file his claim against the estate and institute action thereon well within the time limits prescribed in Section 15, *supra.* If the defendant is barred by the statute from maintaining his action, it is only because of his own delay in presenting and prosecuting his claim.

Under the present bill, for reasons before stated, the court cannot order the transfer of the plaintiff's undivided legal interest in these shares of stock to the defendant. Because the court is unable to afford the defendant affirmative relief, it by no means follows, however, that it should afford affirmative relief to the plaintiff in aid of the legal title which he holds as a constructive trustee for the defendant. It would be inequitable to order affirmative relief to the plaintiff by compelling the defendant to release to him an interest in the shares or the dividends declared upon the shares, the legal title to which in equity and good conscience the plaintiff as constructive trustee for the defendant should release to him. The plaintiff was not entitled to the relief granted him under the decree below. The defendant's appeal must be sustained. As no relief can be granted to either party under the bill, the bill should be dismissed with costs.

Appeal sustained.

Decree dismissing bill with costs to be entered by the court below.

(TOMPKINS, J., having died, did not join in this opinion.)

Concurring Opinion

MURCHIE, J. Judge Thaxter and I feel very real regret that we cannot give our unqualified adherence to all that Judge Merrill says in the very able opinion he has prepared in this case, in which, we feel, the court can well take pride. We can, and do, concur in the result, but we cannot subscribe to the declaration that the court foreclosed the possibility of recognizing a joint tenancy under the present facts in either *Staples* v. *Berry,* 110 Me. 32; 85 A. 303, or *Garland, Appellant,* 126 Me. 84; 136 A. 459.

In those cases, the court recognized the unities Judge Merrill notes, and their application to joint tenancies, but was dealing with bank accounts exclusively, and both opinions make it clear that the unities would not, necessarily, preclude the possibility of a joint tenancy on the present facts. Judge Cornish said, in the *Staples* case, that the requirement of the unities:

> "would seem to contemplate conveyance or devise by A, the sole owner, to B and C, as joint tenants, not a splitting up of A's ownership so that B becomes a joint tenant with A. But granting for the sake of argument that this might be done by carefully worded conveyance, it can hardly be said that this naked book entry meets the requirements which is so jealously guarded by the law, and that is the only evidence in the case to disclose the husband's intention."

Chief Justice Wilson said, correspondingly, in the *Garland* case, that:

> "Even if the four essentials of a joint tenancy can be present in case of a gift of property direct from one person to another, at least all the essentials of a gift as to surrender of absolute control and delivery must be complied with."

The "conveyance or devise" to which Judge Cornish referred might cover a field of lesser range than the "gift" of

Chief Justice Wilson, but while a "devise" relates exclusively to real estate, the word "conveyance" has a scope sufficiently broad to embrace both real and personal property and in the form "convey" is used regularly in bills of sale. The outstanding language of Judge Cornish, to us, in his declaration that the unities:

"would seem to contemplate,"

rather than they would require something other than a "splitting up."

The *ratio decidendi* of these cases, as of each of those Judge Merrill declares approves their common doctrine, is not that the unities are essential to the creation of joint tenancies, but that such tenancies cannot exist in the absence of proof of a gift, or an intention to give. We make no reference to any of the cases said to carry approval of a doctrine of absolutism with reference to the unities and their application to joint tenancies, except *Reed* v. *Cromwell et al.*, 134 Me. 186; 183 A. 758, which is the only one of them where the court was dealing with corporate stock. In that case, it is true, a stock certificate standing in the name of A and B "and the survivor" was held not to create a joint tenancy, but the *ratio decidendi* is carried in the words that the substitution of the particular certificate for an earlier one:

"did not effect a valid gift inter vivos."

The opinion in the *Reed* case was written by Judge Hudson for a court of which Judge Thaxter was a member. I was not. Neither at the time it was issued, nor now, can he, or I, find anything in it repudiating the dicta of Judges Cornish and Wilson declared for the express purpose, as we believe, of eliminating the possibility that the decisions could be read as closing the door against the recognition of joint tenancies created by the "splitting up" of titles of unusual facts. Judge Hudson noted that the *Garland* case, without dissent, discussed the contract doctrine which may be said

to have ruled *Chippendale* v. *North Adams Savings Bank et al.*, 222 Mass. 499; 111 N. E. 371, and rejected it, but his opinion, like that in the *Garland* case, shows that the rejection was on the ground that no gift *inter vivos* had been proved. Thereafter, it is true, he said that the opinion demonstrated:

> "how the four essential elements of joint tenancy, viz: unities of time, title, interest and possession, did not exist"

in the transaction with which the case dealt. It is true, also, that express declaration was made that the court did not choose to overrule the *Garland* case. Such a statement, however, can give that case no broader scope than it had when the opinion it carries was issued.

We subscribe to the view that attempts to create joint tenancies should be tested by the common law rule of the four unities. We believe they were satisfied in the instant case. They were declared at a time when the principal, if not the only, type of property available to be held in joint tenancy was tangible property. Each and every item of it, real or personal, had to be owned, at all times, by some one or more persons. The ownership of any one person in any single item of it was not interrupted when he executed a conveyance which conveyed some part of his title to another and purported to convey another part of it to himself. He continued to hold the latter part under his earlier, or original, title. Title to tangible personal property passes by delivery, if so intended, but title to a part of it cannot pass except by a writing describing or identifying it, the person conveying it, the part conveyed, and the person to whom it is conveyed. The same limitations, so far as they relate to conveying property, are applicable to real estate. They cannot be applied to corporate stock. Any one share of stock in a corporation is identical with each and every other. It is neither tangible nor identifiable. It cannot be described. It cannot be segregated or set apart from others

of its kind. It is represented by a certificate, it is true, and that certificate is tangible but the certificate itself has no value, as such, and is not property which can be placed in joint tenancy. A certificate representing stock may be endorsed, and will pass by delivery.

The opinion of Judge Merrill recognizes a distinction between shares of stock and the certificates representing them. We believe the distinction goes deeper. He asserts that a certificate, being tangible, comes within the rule of the unities. Recognizing that it is in fact tangible, we believe that it can be distinguished from tangible property by reason of its representative quality, and the freedom with which, when endorsed, it may pass from hand to hand and carry title not only to itself but to the stock it represents. We believe, for those reasons, that the unities may be said to be satisfied, in a stock transaction, when the owner of the certificate and the stock endorses the former and surrenders it to the corporation which issued it to secure a new certificate issued in the names of himself and another as joint tenants, without the formality of requiring as a preliminary that a new certificate be issued in the name of, and endorsed by, some third party. The only tangible things owned in such a case are the old certificate and the new. The title of the intended joint tenants in such a case to the stock and to the certificate representing it accrued at the same time and is represented by the same instrument. Such is not the case where tangible property is involved.

We are not unmindful of the fact that application of the unities principle to stock transactions will for all practical purposes preclude the possibility of joint tenancies in such property except in cases where the parties act at the place where a particular corporation has its domicile or a transfer office. Nor can we be unmindful of the fact that recognition of their application in the strict manner in which that application is made in Judge Merrill's opinion has forced such strained construction as that parties have cre-

ated tenancies in common contrary to their express intention, that an owner has conveyed away his full title when he never intended to do so, and that he has created either an estoppel against himself or a contract which binds him, and his estate.

Judge Merrill's opinion records that in more than one instance the corporations which issued the stock certificates in controversy required the parties to the contract the opinion declares was validly entered into by them to execute what are designated as "joint tenancy agreements" before they would issue the joint tenancy certificates. Because of this recognition, we refer back to the language used by Judges Cornish and Wilson in the *Staples* and *Garland* cases. Judge Cornish declared that a:

"naked book entry"

could not meet the requirements of the law. Judge Wilson said merely that there must be:

"surrender of absolute control and delivery."

When parties have executed a formal agreement to evidence their undertaking to place property in joint tenancy, it cannot be said that they are attempting to rest on a "naked book entry," nor can it be denied that there have been both "surrender of absolute control and delivery."

We would reach the result declared in the opinion of Judge Merrill by holding that after the issue of the stock certificates in question, Charles T. Burgess and Charles M. Burgess were joint tenants by reason of the fact that the unities of time, title, interest and possession were all satisfied in the transaction in which they engaged.

In all other respects we concur in Judge Merrill's opinion.

JOSEPH ELZEAR COTE, ET AL., APPELLANTS
IN RE ESTATE OF RAE CECILE COTE

JOSEPH ELZEAR COTE, ET AL., APPELLANTS
IN RE ESTATE OF JULIETTE MARY COTE

Penobscot. Opinion, August 12, 1949.

Adoption. Evidence.

Where there is ample evidence, if believed by the trier of facts in the Supreme Court of Probate to jusitfy the finding made, the factual decision is conclusive and exception thereto will not lie.

ON EXCEPTIONS.

Two Bills of Exception in identical allegations of error, bring forward a single decree entered in the Supreme Court of Probate dismissing appeals from two Probate Court decrees which dismissed petitions to reverse and annul decrees of adoption. Exceptions overruled. Case fully appears in opinion.

Stanley F. Needham, for appellants.

C. J. O'Leary, for appellees.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ.

MURCHIE, C. J. Two Bills of Exceptions, in identical allegations of error, bring forward a single decree entered in the Supreme Court of Probate in these cases, dismissing appeals from two Probate Court decrees which dismissed petitions to reverse and annul decrees of adoption wherein Rae Cecile Cote and Juliette Mary Cote were adopted by Irving H. Cann and Anna E. Cann, and the surname "Cann" was substituted for that of "Cote." The adoption decrees

are both dated October 28, 1947, and were entered on petitions dated October 27, 1947. The children were born out of wedlock to one Genevieve M. Cote on March 20, 1940 and March 20, 1939, respectively. She signed both petitions to indicate her consent to the adoptions, as R. S., 1944, Chap. 145, Sec. 36 requires. The decrees record that the Judge of Probate entering them was "satisfied," to use the statutory word, in each case, with reference to each and all of the requirements declared in R. S., 1944, Chap. 145, Sec. 37.

The decrees here under consideration are not the adoption decrees but decrees entered on petitions to annul them. The petitions are dated November 28, 1947. The grounds asserted as a basis for the annulment each seeks are that one of the petitioners, somewhat inartistically alleged to be the "father" of the children, had been providing for their support for six years at the time the adoption petitions were filed, and that the consents of the mother were obtained under duress. The appeals and reasons of appeal reassert those grounds, in somewhat amplified form, and add allegations that the mother had abandoned the children prior to signing the petitions, and that the adoptive parents, knowing said "father" would not consent to the adoptions, "wilfully and deceitfully" acted without either notice to or consent by him. The sole allegation of error in either Bill of Exceptions is that the finding in the Supreme Court of Probate, that the appellants had:

> "failed to sustain their burden of proving that the consent of the mother was not freely and voluntarily given,"

was not justified. The issue presented, as has been declared in numerous cases, is whether there is any credible evidence in a case to justify a particular finding. *Chabot & Richard Co.* v. *Chabot,* 109 Me. 403; 84 A. 892, and cases cited therein.

When the cases were argued the appellants relied not only on the error alleged in the exceptions, but also on an issue

not raised in either the Probate Court or the Supreme Court of Probate, namely, that the consent of the mother did not meet the requirements of Section 36 of the statute, cited *supra,* because she had abandoned the children long before it was given.

The exceptions might well be overruled without reference to these additional issues, on the ground that they were not presented in the Supreme Court of Probate, or could not have been raised there because not presented in the Probate Court, and not assigned as one of the reasons of appeal therefrom, or that the father of an illegitimate child has no standing in adoption proceedings. Neither the stipulation of the parties as to the paternity of the children nor the evidence which undoubtedly establishes that he whom they say is the "father" provided for their support during most, if not all, of their lives, can change the status of the children or vest him with any right of control over them. We cite no authority on these points because the exceptions must be overruled in any event on the merits of the issue they raise.

The record shows clearly that the factual decision challenged by the exceptions has support in credible evidence. The finding is conclusive, and exceptions do not lie. *Chabot & Richard Co.* v. *Chabot, supra.* There was a square conflict of the testimony between the mother and the adoptive mother of the children as to whether the consent of the former was given voluntarily, or under duress. Under such circumstances the question of credibility was for the trier of facts. *Parsons* v. *Huff,* 41 Me. 410; *Barrett* v. *Greenall,* 139 Me. 75; 27 A. (2nd) 599.

Exceptions overruled.

MARY J. MORNEAULT

vs.

BOSTON & MAINE RAILROAD

Cumberland. Opinion, August 15, 1949.

Negligence. Railroads. Referees.

In negligence action before a referee and exception to acceptance by Superior Court of referee's report on the ground that there was no evidence of probative value tending to establish the contention of the plaintiff raises a question of law upon which plaintiff is entitled to be heard.

Mere fact that plaintiff fell over a suitcase in the passageway between two railroad coaches raises no presumption of negligence on the part of the employees of the railroad.

The liability of a carrier for an injury to a passenger caused by an obstruction of a car isle or platform by property of another passenger arises only in case the carrier has been negligent in permitting the obstruction. Unless the carrier can be charged with reasonable notice of such obstruction, no neglect of duty is shown.

ON EXCEPTIONS.

On exceptions to the acceptance by Superior Court of the referee's report awarding judgment to the plaintiff. Exceptions sustained. Case fully appears in opinion.

Saul H. Sheriff, for plaintiff.

Hutchinson, Pierce, Atwood & Scribner,
Leonard A. Pierce, and Jotham D. Pierce, for defendant.

SITTING: THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

NULTY, J. This case comes before us on exceptions to the acceptance of the report of the referee, the parties hav-

ing agreed to refer this action with the right of exceptions as to matters of law reserved. The referee reported judgment for the plaintiff. The defendant filed objections in writing to the acceptance of the referee's report which objections were overruled and the report accepted and exceptions were allowed the defendant.

The record discloses that shortly after 9 o'clock in the evening of January 22, 1948, plaintiff and her daughter were at North Station, Boston, Massachusetts to board a train scheduled to leave at 9:30 o'clock that night for Portland, Maine. The makeup of the train was such that the two coaches in service were connecting cars. Coach passengers could enter the train by either the forward steps of the rear one of the two coaches or by the rear steps of the forward coach. One trainman was supervising the loading of passengers onto these two coaches by directing them up one or the other of these two sets of steps. Plaintiff and her daughter walked down the platform until they met the trainman standing at the foot of the forward steps of the rear coach and entered the train by those steps. The plaintiff was assisted onto the steps by the trainman and after the plaintiff and her daughter had reached the vestibule of the rear coach they noticed through the open door to the main part of the rear coach that this coach seemed full. Plaintiff's daughter preceded her mother across the passageway between the two cars and reached the door of the forward coach. Plaintiff followed and in crossing through the passageway between the two cars stumbled over a piece of luggage commonly known as a suitcase which was located for the most part in the rear vestibule of the forward car but which extended some distance into the passageway between the two cars. Plaintiff fell and claimed to have broken her wrist for which damage this action was brought.

Reports of referees are only open to attack on certain definite lines and according to certain definite procedure. When cases are referred with the right of exceptions re-

served as to matters of law, referees are final judges of fact in the absence of fraud, prejudice or mistake and the excepting party must comply with Rule XXI. In this case Rule XXI was complied with and defendant is, therefore, properly before this court to be heard on such matters as are put in issue by the objections filed by it. *Staples* v. *Littlefield,* 132 Me. 91; 167 Atl. 171; *Courtenay* v. *Gagne et als.,* 141 Me. 302; 43 Atl. (2nd) 817. The first two objections of the defendant assert that there was no evidence of probative value tending to establish the contention of the plaintiff. This raises a question of law upon which plaintiff is entitled to be heard. The rule is too well established in our State to require more than passing mention that if there is any evidence to support the findings of fact by referees, exceptions will not lie. *Staples* v. *Littlefield (supra), Wood* v. *Balzano,* 137 Me. 87; 15 Atl. (2nd) 188; *Bradford* v. *Davis,* 143 Me. 124; 56 Atl. (2nd) 68; *Paulsen* v. *Paulsen,* 143 Me. 416; 66 Atl. (2nd) 420. According to the record, the trainman, before the accident and during the period of the accident, was standing at the foot of the forward steps of the rear coach. From that position he assisted the plaintiff and her daughter up the forward steps of the rear coach. Almost immediately the plaintiff, preceded by her daughter, crossed the passageway to the forward coach and, according to her testimony, fell over the suitcase located by the plaintiff as mostly in the rear vestibule of the forward coach but projecting six inches into the passageway between the two coaches. It would have been impossible for the trainman to have had an unobstructed view of the passageway from his position. He, therefore, could not have seen the suitcase located as above described. No evidence was produced by the plaintiff as to how long the suitcase had been in the location described by the plaintiff and her witness. From aught that appears from the evidence, the suitcase may have been left by a passenger next preceding the plaintiff. Plaintiff in this case must prove negligence on the part of the railroad. The mere fact that plaintiff fell over a

suitcase in the passageway raises no presumption of negligence on the part of the employees of the railroad. *Pelerin* v. *International Paper Co.*, 96 Me. 388, 391; 52 Atl. 842, and cases cited, nor does the doctrine of *res ipsa loquitur* have any application for the suitcase was not shown to be under the exclusive control of the railroad. *Stinson* v. *Milwaukee L. S. & W. Ry. Co.*, 75 Wis. 381; 44 N. W. 748 (1890). See also *Ala. G. S. R. Co.* v. *Johnson,* 14 Ala. App. 558; 71 So. 620 (1914); *Burns* v. *Penna. R. R. Co.*, 233 Pa. 304; 82 Atl. 246; Ann. Cas. 1913B, 811.

The general rule of law in cases involving obstructions of aisles or platforms of railroads is stated in 10 Am. Jr., Section 1307:

> "The liability of a carrier for an injury to a passenger caused by the obstruction of a car aisle or platform by property of another passenger arises only in case the carrier has been negligent in permitting the obstruction. Ordinarily, the carrier is liable only where one of its employees in charge of the car knows of the obstruction in time to have it removed before it can cause injury or where the obstruction exists for such a length of time that an employee, in the proper discharge of his duties, should know of its presence."

The *Stinson* case *(supra)* contains language which very forcefully sets forth what evidence is necessary to prove negligence on the part of the railroad. The court in its opinion said (75 Wis. 381; 44 N. W. 749):

> "There may be a duty on the part of the employees of the Company to remove the personal baggage of passengers from the passageways of the cars, but, in order to make it their duty to act, there must be evidence showing, or at least tending to show, that such employees had notice of such obstruction being in the aisle or passageway, or that it had remained there so long before the accident, that, in a reasonably vigilant discharge of their duties, they could have discovered the obstruction before the accident happened and failed to remove it. The

> evidence in the case shows that none of the employees of the Company were in the car at the time the accident happened, and, in the absence of any proof to the contrary, we must presume that the duty of the employees required them to be at some other place while the train was at the station. All we have, therefore, is the one fact that, at the exact time of the accident, these satchels were in the aisle, and that the plaintiff fell over them and was injured. The personal baggage of passengers is not 'a thing under the management of the defendant and its servants,' within the meaning of the rule stated in the cases above cited; and it therefore becomes necessary for the plaintiff to show by other proof that the Company or its servants were guilty of some negligence or want of ordinary care in regard to these satchels. It seems very clear that there is no evidence tending to prove such negligence. There is no evidence showing or tending to show how long these satchels had been in the aisle."

In this case there is no evidence that any employee of the railroad had actual knowledge of the presence of the suitcase and no evidence as to how long the suitcase had been in the vestibule and passageway of the train before the alleged accident. The briefs of both parties aver that Massachusetts law governs this case and this State has adopted the Uniform Judicial Notice of Foreign Law Act, R. S., Chap. 100, Secs. 135-140, supplemented by R. S., Chap. 100, Sec. 141, recently interpreted in the case of *Strout, Admr.* v. *Charles M. Burgess,* 144 Me. 263; 68 Atl. (2nd) 241, and the law of Massachusetts in the case of *Jackson* v. *Boston Elevated Railway Company,* 217 Mass. 515; 105 N. E. 379, 380; 51 L. R. A. (N. S.) 1152, holds:

> "The carrying of travelling bags or bundles by passengers is an ordinary incident of travelling and unless the carrier can be charged with reasonable notice that such articles are so placed as to become obstacles to the safe entrance or exit of passengers no neglect of duty is shown."

See *Lyons* v. *Boston Elevated Railway,* 204 Mass. 227; 90 N. E. 419, and cases cited; also, *Hotenbrink* v. *Boston Elevated Railway,* 211 Mass. 77; 97 N. E. 624; 39 L. R. A., N. S. 419. The law above set forth is applicable to both street cars and the cars of steam railroads, 19 A. L. R. 1372.

A careful examination of the record within which we are confined fails to disclose that the findings of fact by the Referee were supported by any evidence of probative value. *Staples* v. *Littlefield (supra).* A mere scintilla of evidence is not sufficient. *Nason* v. *West,* 78 Me. 253; 3 A. 911. In the view we take of the instant case the plaintiff has not sustained the burden of proving that the defendant or its servants were negligent. It therefore follows that it was error to overrule the objections of the defendant to the acceptance of the Referee's report.

Exceptions sustained.

BOSTON AND MAINE RAILROAD

vs.

HANNAFORD BROS. CO. AND
CASCO BANK AND TRUST COMPANY, TRUSTEE

Cumberland. Opinion, August 18, 1949.

Carriers. Estoppel. Exceptions.

Exceptions to exclusion of evidence not brought forward to Supreme Judicial Court are abandoned.

Consignee of property transported in interstate commerce, by acceptance of delivery makes himself liable for the transportation charges, except that a consignee who is an agent only and has no beneficial ownership in property, may avoid liability by compliance with terms of Interstate Commerce Act.

The doctrine of estoppel rests on an act that has misled one, who relying on it, has been put in a position where he will sustain a loss or injury, and should be applied with great care in each case.

The burden of proof is upon the one who asserts an estoppel, and such proof must be full, clear, and convincing in every essential element.

There can be no estoppel where there is no loss, injury, damage, or prejudice to the party claiming it.

If facts are undisputed, it is a question of law for the court to decide whether or not there is an estoppel.

The obligations of the shipper and consignee, as between each and carrier, were primary and independent and neither obligation was subordinate to the other, and the carrier could proceed against the defendant without exhausting its remedy against shipper.

ON EXCEPTIONS.

Action by carrier against principal defendant to recover transportation charges on shipment of bananas. Defendant

files exception to granting of motion for directed verdict. Exceptions overruled.

E. S. Miller,
Hutchinson, Pierce, Connell, Atwood, and Scribner,
for plaintiff.

Leonard A. Pierce and Sigrid E. Tompkins, of counsel.

Frank P. Preti, for defendant.

SITTING: THAXTER, FELLOWS, MERRILL, WILLIAMSON, JJ.

MERRILL, J. On exceptions. This case is before the court on exceptions to the direction of a verdict in favor of the plaintiff by the presiding justice. The amount is not in dispute. The action was brought by the Boston and Maine Railroad, the delivering interstate carrier, to recover transportation charges on four carloads of bananas delivered by it to the defendant, Hannaford Bros. Co. One of these carloads was shipped, without prepayment of freight, by Lord and Spencer Company of Boston from Laredo, Texas, to the defendant. This car was carried from Boston to Portland by the plaintiff carrier and delivered to and unloaded by the defendant on October 14, 1943. The defendant admits ownership of the shipment in this car. On October 3, 1943, four other cars loaded with bananas were shipped without prepayment of freight from Laredo, Texas, by Pan American Banana Producers. "Advice Lord and Spencer, all charges guaranteed by shipper." On October 14, 1943, Lord and Spencer notified the plaintiff to divert these cars to the defendant at Portland, "all charge to follow the cars." The defendant accepted delivery of these shipments from the plaintiff on October 15, 1943 and unloaded the cars. The defendant received these four carloads as agent only of Lord and Spencer and had no beneficial title in the property. In accordance with rules and regulations of the Interstate Commerce Commission, the plaintiff carrier had an arrangement whereby the defendant was allowed a period

not exceeding ninety-six hours after delivery within which to pay transportation charges upon freight delivered to it by the plaintiff. Within this period after the delivery of these carloads of bananas to the defendant, the plaintiff presented to it freight bills for the transportation charges thereon. As to the four carloads which it received as agent, the representative of the defendant who received the freight bills testified as follows:

> "On the arrival of the freight bills I called Mr. McDuffie, cashier of the Boston & Maine railroad and told him the cars were not ours because they were commission cars and to make collection from Lord & Spencer and he advised me to write it on the statement that I was returning for colletcion from Lord & Spencer, which I did."

It is not clear from the evidence whether the statement was written on the bills or in the form of an independent statement. The statement or statements were not introduced in evidence by either party. The defendant also requested the plaintiff to collect from Lord and Spencer the freight charges on the car which it received on its own account.

The testimony disclosed that prior to the receipt of the carloads of bananas in question the defendant had previously received on its own account some twenty carloads of bananas from Lord and Spencer, and that at its request the railroad had collected transportation charges thereon from Lord and Spencer.

The plaintiff after the defendant had returned the freight bills to it, attempted to collect the same from Lord and Spencer and succeeded in collecting the total charges upon one of the commission cars and a portion of the charges on another. This left unpaid the total charges on three cars, including the carload received by the defendant on its own account, and a portion of the charges on a third car received on commission, amounting in all to $2,048.35.

Some thirteen months after the return of the freight bills to the plaintiff, during which time it had been endeavoring to collect the same, Lord and Spencer informed the plaintiff that it was unable to pay the bills. The plaintiff notified the defendant that Lord and Spencer were financially embarrassed and not in a position to pay the bills and demanded payment of the bills from the defendant. Payment being refused, this action was brought to recover the balance of the transportation charges amounting to $2,048.35. The defendant admitted the legality of the charges according to filed tariffs and its liability therefor unless absolved from payment by its notice to the plaintiff, the return of the bills to the plaintiff for collection from Lord and Spencer and the conduct of the plaintiff subsequent to the receipt by the defendant of the freight bills. The defendant claimed that the plaintiff discharged it from its liability for these transportation charges by its consent to the return of the freight bills to it for collection from Lord and Spencer, and by attempting to collect from Lord and Spencer, and by its failure to notify the defendant within a reasonable time thereafter of its inability so to do, during which time the defendant claims it had funds of Lord and Spencer in its hands from which it could have retained sufficient moneys to discharge its liability for these transportation charges, which funds it remitted to Lord and Spencer.

The plaintiff in addition to relying upon absolute liability of the defendant under applicable federal legislation, claimed that its action in attempting to collect transportation charges from Lord and Spencer was undertaken only as a favor to the defendant who was absolutely liable for the charges and that it did not constitute a novation. To the claim that the defendant paid money in its hands to Lord and Spencer which it could have retained to discharge its liability for these transportation charges, it replies that even if this be true the defendant before it paid said funds to Lord and Spencer could at any time have ascertained

from the plaintiff the progress of collection from Lord and Spencer, and that there was no estoppel in favor of the defendant. While the defendant has asserted that it had sufficient funds in its hands belonging to Lord and Spencer from which it could have retained a sufficient amount to reimburse itself for these charges, had the plaintiff within a reasonable time notified it of its failure to collect from Lord and Spencer, there is no direct evidence of this fact. All evidence directed thereto was excluded by the presiding justice. Exceptions to this exclusion were taken by the defendant, but these exceptions were not brought forward to this court and were thus abandoned. While the defendant did testify that these cars of bananas were received on a commission basis for Lord and Spencer and that it had remitted all sums to Lord and Spencer, there is no testimony in the record as to when funds belonging to Lord and Spencer were received by the defendant or when the same were remitted by it to Lord and Spencer, nor is there any evidence in the case as to the amount of said funds if any which it had had in its hands. Nor is there evidence showing that had it been notified of its failure to collect by the plaintiff, that it *could* have made collection itself.

The consignee of property transported in interstate commerce by acceptance of delivery makes himself liable for the transportation charges. *Pittsburg, etc. Ry. Co.* v. *Fink,* 250 U. S. 577; 40 S. Ct. 27; 63 L. Ed. 1151; *L. & N. R. Co.* v. *Central Iron Co,* 265 U. S. 59, 70; 44 S. Ct. 441; 68 L. Ed. 900. This is the general rule. By appropriate Federal Statute, 49 U. S. C. A. 3 (2nd), a consignee who is agent only, and who has no beneficial ownership in the property transported may avoid liability for the transportation charges by compliance with its terms. The statute contains the following provision:

> "Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not

> be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made."

This statute has no application to the car received by the defendant upon its own account. It would apply to the four cars received by the defendant on a commission basis as it received them only as agent and had no beneficial ownership in the property. Had the defendant taken appropriate steps and complied with the provisions of this statute, it could have avoided liability for the charges. The defendant does not claim that it complied with the terms and conditions of this statute, and the evidence clearly shows that it did not. It took no action whatsoever prior to its acceptance of the delivery of the goods transported. By its acceptance of delivery without availing itself of the provisions of this statute, the defendant made itself liable for the transportation charges upon the four cars which it received as agent only and without beneficial ownership in the property transported. There was no difference between the defendant's liability for the transportation charges on the car which it received upon its own account and the ones which it received as agent once the liability became fixed.

By 49 U. S. C. A. Sec. 3 (2nd) it is provided in part as follows:

> "No carrier by railroad subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination."

The fact that under appropriate rules and regulations of the Interstate Commerce Commission the plaintiff allowed the defendant to accept delivery of freight without first paying the transportation charges, and allowed it a period of not exceeding ninety-six hours within which to pay the same, did not extend the time within which the defendant could file notice of non-beneficial ownership. If the defendant, as agent only and non-beneficial owner, wished to take advantage of the provisions of 49 U. S. C. A. Sec. 3 (2nd) *supra,* it was necessary that it comply with the terms and provisions thereof.

The defendant once having made itself liable for the transportation charges on these cars, that liability continued unless discharged. There is no suggestion in the record that such discharge has been effected by compliance with any applicable statute, rule or regulation of the commission, or even that such statute, rule or regulation exists.

There is no evidence from which the jury could have found a contract of novation by which the plaintiff agreed to discharge the defendant from its liability for these transportation charges and look only to Lord and Spencer for payment thereof. Even if such contract would be enforcible under applicable Federal Law, upon which we intimate no opinion, a finding of the existence of such a contract upon the record could not be sustained.

Nor is the evidence sufficient to sustain a finding that the plaintiff is estopped to collect these transportation charges from the defendant even if an estoppel would or could be recognized under applicable Federal Law, as a bar to the collection of these charges, a question upon which we need intimate no opinion.

From the record it appears that the defendant upon receipt of these freight bills, for which it had already become liable, returned them to the plaintiff with a request that it collect them from Lord and Spencer. The plaintiff made some twenty to twenty-five calls upon Lord and Spencer in attempting to collect from them, and eventually, a little more than a year after the return of the bills, being unable to collect the balance in question, returned them to the defendant and demanded payment. Accepting the bills from, and attempting to collect them for the defendant would not estop the plaintiff from enforcing its liability against the defendant. Nor, as above stated, did it amount to a novation discharging the defendant. The defendant bases its defense upon the fact that the plaintiff remained silent as to its progress in collecting from Lord and Spencer. In other words, the defendant seeks to set up an equitable estoppel, often called an estoppel *in pais*, based upon the silence or inaction of the plaintiff.

The doctrine of equitable estoppel was well stated by this court in *Hooper* v. *Bail*, 133 Me. 412, 416; 179 A. 404, 406, in the following language:

> "Aptly it has been said:—'The doctrine of estoppel rests on an act that has misled one who relying on it has been put in a position where he will sustain a loss or injury.' *Box Machine Makers* v. *Wirebounds Company*, 131 Me. 70; 159 A. 496, 499. This rule of equity has been freely and repeatedly applied in proper cases both at law and in equity, but it has long been recognized that it must be applied with care and caution lest it encourage and promote fraud instead of preventing and defeating it. When a party is to be deprived of his property

> or his right to maintain an action by an estoppel, the equity ought to be strong and proof clear. *Rogers* v. *Street Railway,* 100 Me. 86, 60 A., 713; 70 L.R.A. 574; *Stubbs* v. *Pratt,* 85 Me., 429, 27 A., 341; *Martin* v. *Maine Central R. R. Co.,* supra. 'Every estoppel because it concludeth a man to allege the truth must be certain to every intent, and not to be taken by argument or inference.' *Coke Litt.,* 352b. See 21 *Corpus Juris* 1139 and cases cited."

Again, we said in *Rogers* v. *Street Railway,* 100 Me. 86, 91; 60 A. 713, 715; 70 L. R. A. 574:

> "But it is undoubtedly true that this doctrine of equitable estoppel should be applied with great care in each case, so that a person may not be debarred from the maintenance of a suit based upon his legal rights, unless the conduct relied upon as creating an estoppel has been of such a character, and *has resulted in such injury to the person relying upon such conduct,* that, in equity and good conscience, he should be thereby prohibited from enforcing the legal rights which he otherwise would have, nor unless in any given case *all the elements exist which have been universally held to be essential for the purpose of creating an estoppel.'* (Emphasis ours.)

These general princpiles of equitable estoppel are so well recognized that further citation respecting them is unnecessary.

The burden of proof is upon the one who asserts the estoppel. This burden must be maintained by proof that is clear. *Hooper* v. *Bail, supra; Lagrange* v. *Datsis,* 142 Me. 48; 46 A. (2nd) 408, 410. Not only must the proof be clear but estoppel cannot rest upon mere conjecture. *Augusta Trust Co.* v. *Railroad Co. et als.,* 134 Me. 314, 329; 187 A. 1. This rule as to the quantum of proof, which is another way of stating that the proof of an estoppel must be full, clear and convincing, applies to every essential element necessary to the creation of estoppel. The estoppel here sought to be

enforced against the plaintiff is based upon its failure to report to the defendant, within a reasonable time after receiving the freight bills in question, its failure to make collection. In other words, the defendant relies upon an estoppel based upon silence. Silence may give rise to estoppel but only when there is a duty to speak. Furthermore, as said by this court in *Denison* v. *Dawes,* 121 Me. 409; 117 A. 314, 317:

> "Silence alone will not constitute an estoppel unless it appears that it is known that it will be acted upon to the injury of the other party or is maintained with a deliberate intent to deceive, or to obtain an advantage. The burden of proving the facts to establish it is upon those who claim it. *Hunt* v. *Reilly,* 24 R. I., 68; 10 R.C.L. 692, Sec. 21; 52 A. 681, 59 L.R.A. 206."

As said in 19 Am. Jur. 662:

> "There must be some element of turpitude or negligence connected with the silence or inaction by which the other party is misled to his injury. In other words, to give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and, in addition, an obligation or duty to do so.
>
> The mere fact that another may act to his prejudice if the true state of things is not disclosed does not render silence culpable or make it operate as an estoppel against one who owes no duty of active diligence to protect the other party from injury."

As well stated in 19 Am. Jur. Sec. 85, Page 735:

> "Estoppel rests largely upon injury or prejudice to the rights of him who asserts it. Since the function and purpose of the doctrine are the prevention of fraud and injustice, there can be no estoppel where there is no loss, injury, damage, or prejudice to the party claiming it. Moreover, the injury or prejudice involved must be actual and substantial, and not merely technical or formal. xxxxxxxx The rule that estoppel arises only where

> there is prejudice applies whether the estoppel is based upon words, conduct, silence, delay, negligence, or acceptance of benefits."

On the record as presented to us there is no clear evidence that the defendant has been prejudiced by the failure of the plaintiff to report within a reasonable time its failure to collect from Lord and Spencer. The plaintiff for more than a year, at the request of the defendant, was attempting to collect these charges from Lord and Spencer, and was being promised payment by them, and succeeded in collecting a substantial sum upon the claim. If the defendant at any time saw an opportunity or had an opportunity to collect from Lord and Spencer it could easily have made inquiry from the plaintiff as to its progress in the matter. There is no evidence in the record which would justify a jury in finding that had the plaintiff, within a reasonable time, notified the defendant of its inability to collect from Lord and Spencer that the defendant itself could have collected the charges from Lord and Spencer and thus discharged its own liability therefor. There is no evidence in the case which would justify a finding by the jury that the defendant had suffered prejudice by the action or inaction of the plaintiff of which it complains.

There were no disputed facts in this case. "The rule is well established that it is a question of law for the court, in any proceedings, even though the case may involve a trial by jury, whether the facts constitute an estoppel, if the facts are undisputed." 19 Am. Jur. Sec. 200, Page 855. No estoppel existed in this case. There being neither novation nor estoppel in this case, we have no need to determine whether either by novation or by estoppel, under applicable Federal Law the plaintiff *could* have thereby discharged the defendant from its liability for these freight charges.

The defendant, as to the four carloads of bananas in which it had no beneficial title, alleges that the shipper, Pan American Banana Producers, was primarily liable for the transportation charges, and cites authorities sustaining this

position. Under the bills of lading used, this is true. The shipper was obligated to pay the transportation charges, and this liability, *as between itself and the carrier,* was primary and not secondary to that of anyone else. The same thing is true of the liability of the defendant. By accepting delivery of these carloads of bananas, without availing itself of 49 U. S. C. A. 3 (2nd) it became obligated to pay these transportation charges and its liability therefor *as between itself and the carrier was primary and not secondary* to that of anyone else.

These two obligations, of the consignor and the consignee respectively, are independent obligations to the carrier. So far as the carrier is concerned, neither of these obligations is subordinate to the other. The obligation of the consignor arises from his express contract to pay contained in the bill of lading which among other things states "the consignor shall be liable for the freight, etc.," except under certain conditions not present in this case. The liability of the consignee is founded upon an implied contract to pay the freight, which is founded upon his acceptance of the shipment.

In discussing the relative liability of a consignor and one who accepted delivery of freight shipped on a bill of lading like that in the instant case, the court said in *Atchison T. & S. F. Ry. Co.* v. *Hunt Bros. Fruit Co.,* 34 Fed. (2nd) 582, 583:

> "The liability of the defendant (consignor) arising from the written contract, and that of McNeill (who as assignee of the bill of lading accepted delivery) arising from an implied contract, *are independent of each other. Neither is subordinate to the other.* Before the defendant can successfully maintain that its liability is subordinate to McNeill's, it must point to something in its contract with the plaintiff so providing. It cannot do that." (Emphasis ours.)

It may well be that as between the consignee and the consignor, the consignor should reimburse the consignee for

transportation charges which the consignee pays to the carrier, even though the consignee's liability to the carrier is a primary one. As between each other the liability may be the secondary obligation of the consignee and the primary obligation of the consignor. But the nature of the rights of the consignor and consignee *inter sese* does not determine the nature of their respective obligations *to the carrier*. Here, *as between themselves and the plaintiff*, the shipper and the defendant were *each* primarily liable to the plaintiff for these transportation charges.

As the liability of the defendant to the plaintiff was a primary one, the plaintiff could proceed against it without first making a demand upon or exhausting its remedy against the shipper. It is only when the *defendant* is secondarily liable *to the plaintiff* that it can interpose the defense that the plaintiff has made no demand upon or has not exhausted its remedy against the one whose liability to the plaintiff for the same obligation is a primary one.

The defendant has assumed that because the liability of the shipper *to the carrier* is primary, that of the consignee *to the carrier* must be secondary. In this it is in error. This erroneous major premise leads to its erroneous conclusion that failure on the part of the plaintiff to make a demand upon or to exhaust its remedies against the shipper is a bar to recovery against the defendant.

The defendant's arguments based upon the primary liability of Pan American Banana Producers are without merit and there was no question of fact in connection therewith which should have been submitted to the jury.

There was no evidence from which a novation could be found. Nor did the evidence require that the question of estoppel be submitted to the jury. The undisputed *admitted* evidence negatives the existence of an estoppel. The court below excluded all evidence tending to show that the defendant suffered damage by the action or inaction of the

plaintiff upon which the defendant's claim of an estoppel is grounded. It excluded all evidence tending to show that the plaintiff could have reimbursed itself for the charges in question from funds in its hands belonging to Lord and Spencer, or that it could have otherwise collected these funds from Lord and Spencer, had it been seasonably notified by the plaintiff of the progress of its efforts to collect from Lord and Spencer. The defendant took exception to the exclusion of such testimony. It is undoubtedly true that the court excluded this testimony on the theory that under applicable Federal Law, *the defendant* having become absolutely liable for the transportation charges by acceptance of the delivery without availing itself of the provisions of 49 U. S. C. A. Sec. 3 (2nd), *the plaintiff* could not thereafterwards estop itself from asserting its legal right to collect these charges from the defendant. Had these exceptions been brought forward to this court, we would of necessity have to decide this issue of law. The decision of this issue would be necessary in determining the question as to whether or not the defendant was prejudiced by the exclusion of the testimony. The defendant, failing to perfect these exceptions by including them in its bill of exceptions, abandoned them. We are confined in our determination of exceptions to the bill of exceptions presented.

Having held that the record as presented to us would be insufficient to sustain the existence of an estoppel against the plaintiff, the question of whether or not under applicable Federal Law the plaintiff *could* estop itself from enforcing the liability of the defendant for these transportation charges is immaterial and decision thereof is unnecessary to the determination of the validity of the defendant's exceptions to the direction of a verdict for the plaintiff.

The ruling of the presiding justice directing a verdict for the plaintiff *on the evidence in the record* was correct. The defendant takes nothing by its exceptions.

Exceptions overruled.

STATE OF MAINE

vs.

NORMAN MITCHELL

Aroostook. Opinion, September 12, 1949.

Criminal Law. Evidence. Exceptions.

Whether a fracas was started by a respondent or by the person alleged to have been assaulted, is a question of fact to be determined by the jury.

Threats of violence by a person alleged to have been assaulted, if communicated to the respondent before the act with which he is charged, are evidence of his reasonable apprehension of physical harm, but not where respondent had already testified that he had no knowledge of any threats at the time of the assault.

While threats by a person alleged to have been assaulted, against respondent, made prior to an alleged assault show a declaration of purpose, and testimony of such threats might tend to establish that the person who made them was seeking to carry out such a purpose, they cannot be proved by hearsay evidence.

Respondent not entitled to testify that threats had been communicated to him after the alleged assault.

Allegations in a bill of exceptions which are contrary to the evidence, as reflected in the official stenographer's record of the testimony, are controlled by that record.

Exceptions to the general rule against admission of hearsay testimony, are not applicable when from the nature of the testimony offered, it is apparent that better evidence exists and is accessible.

ON EXCEPTIONS.

Respondent was convicted of assault and battery and brings exceptions to refusal of presiding justice to direct a verdict of not guilty, and to the exclusion of testimony.

Exceptions overruled.

James P. Archibald, County Attorney, for State of Maine.

Harry E. Nixon and *Milton A. Nixon,* for respondent.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ.

MURCHIE, C. J. This respondent was convicted of assault and battery on one Manley Sharpe, under an indictment alleging an assault with a knife with intent to kill and murder. When the state rested the jury was instructed that the evidence would not justify a finding of intent to murder and the case was finally submitted for decision whether assault with intent to kill had been proved. The Bill of Exceptions alleges error in the refusal of the justice presiding in the Trial Court to direct a verdict of "not guilty" and to permit the respondent to testify concerning his knowledge, either before or after the event, that Sharpe had made threats against him.

The evidence establishes, beyond doubt, that Sharpe was cut badly by a knife wielded by the respondent during a physical fracas between them at the time and place alleged. The respondent sought to justify his action as self defense and testified both that the row was started by Sharpe and that the cutting was done when he was afraid of his life and thought that Sharpe was killing him. Immediately following these declarations he testified definitely, in answering an inquiry whether Sharpe had threatened previously to kill him:

> "I didn't know at that time, I didn't know nothing about it. I didn't know he had anything against me to get me for."

Thereafter he said that he learned later of Sharpe's threat to kill him. That statement was stricken from the record, because the respondent did not hear the threat, personally, and immediately thereafter the questions in controversy, quoted *infra,* were asked and excluded, on objection. Ex-

ceptions to the rulings involved are the subject matter of the second exception set forth in the bill.

The first was to the refusal to direct a verdict. It was not argued either orally or in writing, nor could it have been with any prospect of success. The record presents a particularly clean-cut conflict of testimony as to whether the fracas was started by the respondent or by Sharpe. The evidence of the latter, and of the only eye witness to the start, was that the respondent was the aggressor. It was for the jury to determine the fact. The issue on that exception is well stated in *State* v. *Bobb*, 138 Me. 242; 25 A. (2nd) 229, 234, and cases cited therein. There is no suggestion of merit in it.

The exception to the exclusion of evidence quotes a little more than a page of the record, carrying three questions relative to threats made against the respondent by Sharpe which the respondent was not permitted to answer, some colloquy of counsel and court with reference thereto, and a question answered without objection which establishes that Sharpe had never made any threats against the respondent in his hearing. The first of the three questions excluded made no reference to the time when the respondent heard of the threats to which it alludes, and requires no consideration because the subsequent ones cover the full time range from that standpoint, although neither fixes the time when the threats to which they were intended to relate were made. The questions were:

> "Did you know at the time of this altercation whether or not Sharpe had made threats against you?"

and

> "Have you learned since whether or not he made any threats against you prior to this altercation?"

Both questions involve hearsay evidence, which is not admissible as a general rule. There are exceptions to that

rule but they are not applicable "when, from the nature of the testimony offered, it is manifest that better evidence exists and is accessible." *Gould* v. *Smith,* 35 Me. 513; *State* v. *Butler,* 113 Me. 1; 92 A. 819. Both were designed to get evidence before the jury that threats had been made against the respondent by the person he is charged with having assaulted. The distinction between them lies in the fact that the first relates to threats communicated to him prior to the time of the alleged assault, while the second admittedly refers to knowledge acquired by him at a later time.

It is only with reference to the first question that the allegation of the Bill of Exceptions that, because the respondent was prepared to show that threats had been communicated to him, he had reason at the time of the alleged assault:

> "to believe that he was in imminent danger of great physical harm"

has any point. The issue thus presented is not whether threats had been made, but whether, if so, they had been communicated to the respondent and he was apprehensive of great physical harm. It is undoubtedly true, as the exception alleges, that such apprehension is an important element of justifiable self defense. That explains the exception to the general rule which makes hearsay evidence of communicated threats admissible. The respondent cites numerous authorities to sustain his claim that it is always permissible to prove communicated threats by hearsay. The Massachusetts Court in 1945, in *Commonwealth* v. *Rubin,* 318 Mass. 587; 63 N. E. (2nd) 344, 345, recognized the principle as somewhat more limited in operation. There Mr. Justice Lummus stated that:

> "Where self defense is invoked by a defendant, threats of violence made against him by the person hurt or killed by him are generally admissible, when known to the defendant before the act, as evidence of his apprehension for his own safety, and the reasonableness of that apprehension."

There can be no point in this case in resolving the issue as to the scope of the exception. This respondent could have had no ground for apprehension concerning his safety on the basis of communicated threats at the pertinent time, since he had already testified, when the question with reference thereto was excluded, as heretofore noted, that he had no knowledge about any threats at that time. The allegation of his Bill of Exceptions as to communicated threats is entirely contrary to his own sworn testimony. As to such threats, therefore, his exception will have to be overruled on the principle recognized in *Tower* v. *Haslam,* 84 Me. 86; 24 A. 587; *Charles* v. *Harriman,* 121 Me. 484; 118 A. 417; *State* v. *Rice & Miller Co.,* 130 Me. 316; 155 A. 804; *Smith* v. *Davis et al.,* 131 Me. 9; 158 A. 359; 81 A. L. R. 78. In the first of these cases the court said that, when the evidence was incorporated in the exceptions, as it is in this case:

> "the stenographer's report * * * must control the allegations in the bill as to matters of fact, if there be a conflict between them."

Note has already been made that the allegation of the Bill of Exceptions relative to apprehension of imminent danger can have no bearing on the second quoted question excluded. The testimony of the respondent, immediately prior to his statement that he knew nothing about the threats at the time of the assault, was that he was afraid of his life and thought that the person with whom he was fighting was killing him. It is permissible, however, under some circumstances, to prove that a person on whom an assault is alleged to have been been committed had made threats against the person charged with the assault. The issue in such a case is not whether the respondent knew of them, but whether in fact the threats had been made. The reason for the admission of evidence of such threats, as stated in *Commonwealth* v. *Rubin, supra,* is that:

> "A threat is a declaration of purpose, and like other declarations of purpose is evidence that an

> occurrence that might be in execution of that purpose was in fact in execution thereof."

That case declares evidence of uncommunicated threats admissible whenever a person charged with assault asserts that he was acting in self defense and there is evidence of some act on the part of the person injured by him that might constitute such an attack as the "declaration of purpose" threatened. The issue for jury decision is which of two persons committed an assault, and which was assaulted, and a respondent is entitled to prove by direct evidence that threats had in fact been made by the other person. In this case the person alleged to have been assaulted appeared as a witness for the state and denied, in cross-examination, having made any threats against the respondent in the presence of any one of three named individuals. Each of those individuals was called as a witness for the defense. Two of them testified definitely that they had heard Sharpe threaten to "get" the respondent, while the third repeated the threat of an intention to "pick a fight" with him. The issue had no reference to the respondent's knowledge of the threats, but was merely whether or not they had been made so far as they might have a bearing on who started the fight. The verdict carries the factual decision that the respondent did so, notwithstanding the evidence that Sharpe had made threats against him of which he had no knowledge at the time, and the impeachment of the testimony of Sharpe that that evidence carried. The respondent was not entitled to testify that the threats had been communicated to him after the assault.

Exceptions overruled.

ISABEL D. CASSIDY, GUARDIAN, ET AL.

vs.

EDWARD P. MURRAY, TRUSTEE, ET AL.

Penobscot. Opinion, September 15, 1949.

Wills.

Intention of the testator must prevail in the construction of a will, but that intention must be found from the language of the will, read as a whole, and illuminated in cases of doubt by the light of circumstances surrounding its making.

Deviation from exact provisions of will permitted where a change is necessary to carry out avowed purpose which testator had in mind, and customarily applied only to methods and means prescribed for carrying out his intent.

When language of will is clear, extrinsic circumstances can shed no further light on construction thereof.

ON APPEAL.

Bill in Equity seeking construction of will. The presiding justice hearing the case dismissed the bill and plaintiffs appealed. Appeal dismissed. Bill dismissed with costs. Sitting justice directed to fix reasonable counsel fees for all parties to which shall be added amounts for necessary disbursements, all of which seems including. Costs shall be paid by the trustees and allowed in their account.

John H. Needham, for plaintiffs.

Pilot and Collins, for defendants.

Frank G. Fellows,
for guardian *ad litem* for persons unborn.

SITTING: MURCHIE, C. J., THAXTER, NULTY, WILLIAMSON, JJ.

THAXTER, J. This is a Bill in Equity seeking a certain construction of the will of John Cassidy who died testate March 26, 1918. It is brought by four of his grandchildren, who are the children of his son, John F. Cassidy, who died intestate in 1939.

The point in issue is whether under the will as modified by the codicils each of said grandchildren is entitled to be paid out of the income of the trust fund established by the will an annual income of not exceeding ten thousand dollars annually, or whether the said grandchildren must share as a class in a sum not exceeding ten thousand dollars. If the latter should be held to be the correct construction, the court is asked to order the trustees to pay certain additional amounts to the plaintiffs beyond a proportion of said ten thousand dollars in order to compensate them for certain hardships and exigencies which are set forth in the bill. This in effect would be asking the court to authorize a deviation from the express provisions of the will.

All other parties in interest have been joined as defendants in the bill.

The essential part of the will which has been presented to us for construction reads as follows:

> "During the continuance of this Trust, the Trustees of my estate shall provide for the comfortable support and maintenance of each of my five children, James W. Cassidy, Mary A. Cassidy, Rosella Cassidy, John F. Cassidy and Lucy C. Cassidy, during the life of each of them and at the decease of each of them, then of the lineal descendants together if any, of each of them to an amount not exceeding for each child, or for all the lineal descendants, if any of each child, ten thousand dollars per year, beginning at the time of my decease. And upon the decease of each of my said five children, leaving no lineal descendants living at the time of the death of each of them, then said payment of a sum not exceeding ten thousand dollars per year, as aforesaid, for each shall immediately cease."

It is clear that it was the intention of the testator that the children of a deceased child should take as a class only the share to which their parent was entitled. What else could the words mean which apply to his children and their descendants "during the life of each of them and at the decease of each of them, then of the lineal descendants together if any, of each of them to an amount not exceeding for each child, or for all the lineal descendants, if any of each child, ten thousand dollars per year . . ."?

It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making. *Lord* v. *Bourne,* 63 Me. 368; 18 Am. Rep. 234; *Nash* v. *Simpson,* 78 Me. 142; 3 A. 53; *Davis* v. *Callahan,* 78 Me. 313; 5 A. 73; *Bryant* v. *Bryant, et als.,* 129 Me. 251; 151 A. 429.

In this case the language used is perfectly clear. The words above quoted taken by themselves leave no doubt of the testator's purpose and they are consistent with the will when read as a whole. Under such circumstances it is unnecessary, even if it would be proper, to seek further light from extrinsic circumstances.

Such being the case, the plaintiffs ask the court to authorize the trustees to deviate from the terms of the will.

Deviation from the exact provisions of a will has been permitted in some instances; but this has been where a change has been necessary to carry out the avowed purpose which the testator had in mind, and customarily applies only to the methods and means which the testator has prescribed for carrying out his intent, which methods and means changed conditions have shown to be inappropriate to carry out his purpose. The court is without power to modify the primary end which the testator sought to attain, but will go a long way in an effort to carry it out. *Elder* v.

Elder, 50 Me. 535; *Mann* v. *Mann,* 122 Me. 468; 120 A. 541; *Porter et al* v. *Porter et al,* 138 Me. 1; 20 A. (2nd) 465.

How do these simple and fundamental principles apply to the case before us?

It is because of changed conditions, which it is alleged result in hardship to them, that the plaintiffs seek to support their claim that this court can modify this will. As we read the will, we conclude that this testator was a reasonably wise and certainly a very practical man. That this court could now perhaps make a better will for him than he made for himself is altogether beside the point. He knew his own family and he had the right to solve his own problems in his own way. It was his property that he was disposing of. By his first codicil he materially raised the amount of the share given to each child and he was unquestionably within his rights in providing that on the death of a child the distribution should be *per stirpes.* He knew that during the period for which the trust would continue conditions in the world would not remain static. They never had over such a contemplated length of time. That he did not foresee the violence of the change, the coming of two wars, and the onset of the industrial revolution through which all of us have lived is of no consequence. He provided each of his children and the issue of a deceased child with a generous income expressly limited to $10,000, and with the benefit of that backlog committed them to the same happenings of time and chance which have been the fate of all of us. If the court is empowered because of these changed conditions to rewrite this will, it will have to do the same to a great many others where beneficiaries have been adversely affected by the conditions of a changed world. The government of necessity has restricted many of the rights and privileges which we enjoyed four decades ago, but it still permits us to write our own wills.

The ruling of the sitting justice in dismissing the bill was correct. In view of the fact that it is in the interest of all

the heirs of this estate that the issue raised by this bill in equity should be definitely settled, we feel that it is proper that the costs of this litigation with reasonable counsel fees for all counsel should be paid from the trust estate, the funds being ample for that purpose.

Appeal dismissed.

Bill dismissed with costs.

Sitting justice directed to fix reasonable counsel fees for all parties to which shall be added amounts for necessary disbursements, all of which sums including costs shall be paid by the trustees and allowed in their account.

WINIFRED H. KIMBALL

vs.

LENISE S. CUMMINGS

Cumberland. Opinion, October 10, 1949.

Husband and Wife. Trial.

In suit brought for alienation of husband's affections by wife, she must allege and prove such alienation within three years of the date of the writ, or if prior to that time, then she must allege and show that discovery thereof by her was within three years of bringing action.

In alienation suit, question of whether or not affections were alienated, and if so when such alienations occurred, and when discovered by plaintiff, are facts to be determined by jury.

A verdict should not be directed for a defendant, if upon any reasonable view of testimony, under the law, the plaintiff can recover.

ON EXCEPTIONS.

Action for alienation of husband's affections, brought by wife. Presiding justice directed verdict for defendant. Plaintiff excepted. Exceptions sustained.

Walter M. Tapley, Jr., for plaintiff.

Harry C. Libby, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

NULTY, J. This matter comes before this court on exceptions to a directed verdict for the defendant granted at the close of the testimony, the defendant having rested without introducing any evidence. The action is for alienation of affections and the writ is dated August 25, 1947, and the

case was heard before a jury at the February Term 1948 of the Superior Court for the County of Cumberland. The action is brought under the provisions of Sec. 41 of Chapter 153 of the Revised Statutes of 1944, and is a special remedy given by statute upon particular facts and is subject to the conditions and limitations defined by the Legislature. *Pray* v. *Millett*, 122 Me. 40; 118 A. 721. The essential part of the statute relating to this action directs that action shall be "brought - - - - - - - within 3 years after the discovery of such offense." Under this statute the plaintiff must allege and prove the alienation of the husband's affections as of a day within three years of the date of the writ, or, alleging the alienation as of a day before that time, then she additionally must allege and show that the discovery thereof by her was within three years of the bringing of the action. *Pray* v. *Millett, supra.* Plaintiff's allegation of the alienation is laid within three years of the date of the writ, to wit, January 1, 1945. There is evidence from the record that the plaintiff and her husband resided in Cape Elizabeth, Maine, next door to the defendant for the period from 1939 to 1943 and that during that time plaintiff, on one occasion, had a conference with the defendant in which the subject of defendant's attentions to plaintiff's husband was discussed, and it further appears that defendant resided on Broadway in South Portland, Maine, during the period from 1943 to 1945 and, during that time the automobile of plaintiff's husband was seen by plaintiff on numerous occasions parked in that vicinity. There is further evidence in the record that plaintiff frequently remonstrated with her husband at various times during the period from 1940 to 1945 because of defendant's attentions to plaintiff's husband. The record further shows that plaintiff's husband either in 1944 or 1945 (the record is not entirely clear as to the exact time) began to frequently stay away from his home in Cape Elizabeth and that he stayed at times when he was away with a former friend in Yarmouth, Maine. However, plaintiff's husband returned to Cape Elizabeth

from time to time up to March, 1945, when he definitely went to live in Yarmouth and had a room in the home of his former friend. There is also evidence that during the summer of 1945 plaintiff's husband spent a portion of his time, at least, on the family farm in Freeport where he became interested in the poultry business and that plaintiff occasionally visited him at the farm in Freeport. The record further shows that plaintiff's husband, after March, 1945, continued to occasionally visit plaintiff at the Cape Elizabeth home and that these occasional visits continued until the first of January, 1948, during a part of which time plaintiff was in a hospital where plaintiff's husband visited her practically every day. The record also shows that in 1945 defendant left South Portland and went to live in Yarmouth in the same house in which plaintiff's husband had a room.

Some of the important questions of fact in this case are, did the defendant alienate the affections of the plaintiff's husband? If so, when did the alienation occur, and, if occurring, when was it discovered by the plaintiff? These facts and all other facts connected with the action are peculiarly within the province of the jury.

The record clearly contains sufficient evidence to warrant the submission to the jury of the question "Did the defendant alienate the affections of the plaintiff's husband?" This being true and inasmuch as there is evidence of an association between the defendant and the plaintiff's husband sufficient to submit to the jury the question of whether or not this association culminated in the alienation of the affections of plaintiff's husband by the defendant, it would be a question of fact when, if at all, such alienation was finally accomplished. Was it accomplished within three years of the commencement of plaintiff's action or had it been accomplished prior thereto? If accomplished more than three years prior to the commencement of plaintiff's action, it became a question of fact when it was discovered by the plain-

tiff. The evidence in the case of an association by the defendant with the plaintiff's husband extending over a period of more than three years prior to the commencement of this action, taking into consideration that there was evidence that the plaintiff was aware of the association and made protests respecting it more than three years prior to the date of the writ, does not as a matter of law establish either that the defendant had accomplished the alienation of the affections of her husband three years prior to the institution of this action nor does it establish as a matter of law that the plaintiff had discovered the same even had it existed. Alienation of affections alone usually does not consist of a single act but rather a culmination of cumulative acts. It is ordinarily progressive in its nature and the record certainly presents a question of fact as to when, if at all, the conduct of the defendant culminated in the alienation of affections of plaintiff's husband and also, if accomplished, when it was discovered by the plaintiff. See *Palladino* v. *Nardi,* 133 Conn. 659, 1947; 54 A. (2nd) 265; *Smith* v. *Lyon,* 9 Ohio Appeals, 141 at 144; *Farneman* v. *Farneman,* 46 Ind. App. 453; 90 N. E. 775; 91 N. E. 968.

Our court has many times defined the principles of law relating to the propriety of granting a nonsuit or a directed verdict for the defendant and these rules are clearly set forth in the case of *Barrett* v. *Greenall,* 139 Me. Page 75 at Page 80; 27 A. (2nd) 599, in the following language:

> "The principle of law which controls the action of this Court, when exceptions are presented to test the propriety of a nonsuit or a directed verdict for the defendant in the Trial Court, is to determine only whether upon the evidence under proper rules of law 'the jury could properly have found for the plaintiff,' *Johnson et al.* v. *New York, New Haven and Hartford Railroad et al.,* Ill Me., 263, 88 A., 988, 989 and in determining that issue, the evidence must be considered in that light which is most favorable to the plaintiff, *Shackford* v. *New England Tel. and Tel. Co.,* 112 Me., 204,

> 91 A., 931. The issue here is not whether the evidence adduced is sufficient to establish the controverted facts, but whether or not it has a tendency to establish those facts, and if this is so, although 'it may not be strong in its support, and the Judge may well apprehend that the jury will find it insufficient,' the Court has no 'right to weigh it, and determine its insufficiency as matter of law.' *Sawyer* v. *Nichols,* 40 Me., 212. It is the province of the jury, and not of the justice presiding in the Trial Court, to judge of the testimony of the witnesses appearing in the cause and to weigh their evidence, *Sweetser* v. *Lowell, et al.,* 33 Me., 446; *Blackington* v. *Sumner et al.,* 69 Me., 136. The credit to which the testimony of a witness is entitled is entirely a question of fact for decision by the jury. *Parsons* v. *Huff,* 41 Me., 410."

See also *Talia* v. *Merry,* 130 Me. 414; 157 A. 236, which was an alienation case wherein a verdict was directed for the defendant. Our court said in that case:

> "Giving the most favorable view to the evidence introduced by the plaintiff, a *prima facie* case of alienation of the affections of the plaintiff's husband may be found. It is settled law that a verdict should not be directed for a defendant if, upon any reasonable view of testimony, under the law, the plaintiff can recover. *Tomlinson* v. *Clement Bros.* 130 Me. 189; 154 A. 355."

Applying the principles of law set forth in the above cited cases to the instant case, it is the opinion of this Court that it was reversible error to direct a verdict for the defendant.

The mandate will be

Exceptions sustained.

VITO MININNI

vs.

INHABITANTS OF THE CITY OF BIDDEFORD

York. Opinion, October 14, 1949.

Equity. Appeal.

The burden is on the appellant to show that order vacating decree in equity was erroneous.

Where officer's return on bill in equity fails to show service of subpoena on defendant, a final decree against him was erroneous, and order vacating decree was proper.

ON APPEAL.

City of Biddeford obtained decree in equity against Vito Mininni. Mininni filed petition to vacate decree which was granted. City of Biddeford appeals. Appeal dismissed.

Lausier & Donahue,
William P. Donahue, for respondent.

Waterhouse, Spencer & Carroll, for petitioner.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

THAXTER, J. This case is before us on appeal from an order of a justice of the Superior Court vacating a final decree which he had rendered on a bill in equity brought by the present defendant against the petitioner and his wife.

This defendant, a municipal corporation, on July 31, 1945 filed a bill in equity against the petitioner and his wife seeking a mandatory injunction to compel them to remove from a building alleged to be owned by them in the City of Bidde-

ford certain materials added to the outside walls of the building. The basis for the relief sought was that no permit for the improvements had been issued in accordance with sections 10 and 13 of chapter 11 of an ordinance of the City of Biddeford. Therefore it was claimed that the building with such improvements constituted a nuisance. The defendants in that action were enjoined from making any transfer of the property pending a hearing on the bill. On January 14, 1947, more than two years after the filing of the bill, the City of Biddeford moved to take it *pro confesso* against Vito Mininni for want of appearance and answer and on the same day a decree *pro confesso* was filed. It is doubtful if this procedure was a compliance with either section 14 or section 15 of R. S., 1944, Chap. 95, but the deviation from the statutory provisions is not of importance under the circumstances of this case. See also *Glover* v. *Jones,* 95 Me. 303; 49 A. 1104. On February 25, 1947 a final decree was entered which required the owner to remove the materials which had been added to the outside walls of the building without a permit having been obtained therefor. Nothing further happened until August 11, 1948, when a petition was filed by Vito Mininni that the decree be vacated on the ground that the petitioner had no knowledge that the contractor whom he employed to do the work on the building had not obtained the permit for the work, that the building did not constitute a public or private nuisance, and that to compel the petitioner to remove the materials constituted an undue hardship on him. Notice of hearing on this petition for August 11, 1948 was ordered to be given to the City of Biddeford. No report of what took place at the hearing appears in the record before us, but after reciting that due to hardship and loss resulting to the petitioner if the decree should be enforced, it was ordered vacated. From such ruling this appeal was taken.

The burden is on the appellant to show that the order vacating the decree was erroneous. We are left in the dark as to the real reason why it was vacated. We do not, how-

ever, need to speculate as to reasons; for the officer's return of service on the bill does not show that service of the subpoena was ever made. A default should not have been entered under these circumstances. On the record before us, the sitting justice was without jurisdiction to enter a decree against the defendants. Because of that without more the order vacating the decree was proper.

Appeal dismissed.

PHILIP J. SPANG, JR.

vs.

ROBERT COTE AND LOUIS DAIGLE

York. Opinion, October 18, 1949.

Negligence. Automobiles. New Trial.

It is the duty of an automobile driver to stop his car when, for any reason, he cannot see where he is going and he must drive at a speed that he can bring his car to a stop within the distance illuminated by his headlights.

An automobile must be equipped with headlights capable of rendering any substantial object clearly discernible at least 200 feet ahead.

On motion for a new trial after verdict for the plaintiff in a negligence action, the evidence must be viewed in the light most favorable to the plaintiff, and when the testimony is conflicting, the verdict will stand.

A verdict of a jury on matters of fact and within their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic.

ON MOTION FOR NEW TRIAL.

In negligence action, the jury returned a verdict for the plaintiff. The defendant moved for a new trial. Motion for new trial sustained. New trial granted.

Robert A. Wilson, I. Edward Cohen, for plaintiff.

John M. Curley, for defendant Cote.

Verrill, Dana, Walker, Philbrick, Whitehouse,
Leon V. Walker,
Leon V. Walker, Jr., for defendant Daigle.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

FELLOWS, J. This case is before the Law Court on general motion for new trial filed by each of two defendants after jury verdict for the plaintiff in Superior Court for York County.

This is an action for negligence and, while the witnesses differ in some details, the principal facts appear to be as follows: On August 20, 1948 at about 8:30 P. M., the plaintiff, Philip Spang, Jr., was driving a Ford sedan in an easterly direction on "Guinea Road" in Biddeford. The defendant, Robert Cote, in a Farmall Tractor with trailer loaded with hay, was ahead of the plaintiff and headed in the same easterly direction as was the plaintiff, but Cote had stopped or parked, because of tire difficulty, on the righthand side of the tar surface. The defendant Cote did not attempt to drive off the road into a driveway, or onto the shoulder of the road. The Cote tractor and trailer of hay were not disabled but a trailer tire was rubbing. The defendant, Louis Daigle, in a Chevrolet sedan that was headed in a westerly, or opposite direction, had come along the highway and had stopped to speak to the defendant Cote, who was on the tractor.

The official hour of sunset on this day was stipulated to be 7:37 P. M. The collision was about an hour later. There were no lights or reflectors on the rear of the load of hay. Exactly where the defendant Daigle was with his Chevrolet at the instant of collision, is in dispute. In any event, Daigle, with his lights on and facing toward the on-coming

plaintiff, had stopped to talk with Cote and had been blocking the road just prior to the collision of the plaintiff's car with the trailer of hay.

The plaintiff Spang, going easterly toward the load of hay at a speed, as he says, of forty miles an hour, claims that he saw the lights of the Daigle car when about 800 feet away and thought that they were on a vehicle approaching him and intending to meet and pass him. The plaintiff saw no hay load. Plaintiff Spang says he dimmed the lights of his car and, when he found that the Daigle car (approaching him as he thought) did not respond by dimming, he put his lights on bright and dimmed them again. Spang says he was not then sure that this Daigle car was moving and approaching him, so he says he reduced his speed. Spang says that he was not "blinded" by the Daigle car's lights, but his vision was "reduced" thereby. He testified that he continued on and, when he thought he was about to pass the Daigle Chevrolet, suddenly saw the rear of the load of hay directly in his path and twenty-five feet away. At the time he saw the hay the plaintiff says he was driving "probably thirty miles an hour; maybe between twenty-five or thirty. I wouldn't really know." The plaintiff was, therefore, travelling about 40 feet a second, on his own estimate. Witnesses who saw the accident estimate the speed much greater, and state that the plaintiff did not reduce his speed.

The impact of the plaintiff's Ford pushed the parked tractor and trailer, which weighed five or six tons, more than ten feet. Large heavy posts, tongue bolt, trailer bracket, and other parts of the trailer and tractor were broken. The plaintiff said his car was "just junk" and worth fifteen dollars after the collision. It was stated, without contradiction, that the seat cushion of the rear seat of the plaintiff's car was thrown to the front and on top of the plaintiff's head, so that the cushion had to be removed before the plaintiff could be extricated from the front seat by bystanders.

The plaintiff testified that he could not have gone on the left side of the hay had he seen the hay, because it seemed to him that the road on his left was blocked by the Daigle car. The defendant Daigle and all the witnesses deny this, and say that Daigle had slowed up, or stopped for an instant to speak to defendant Cote, and that he (Daigle) was not beside the tractor and the hay. He moved ahead out of the road onto the adjoining lawn or driveway to permit the plaintiff's car that he saw fast approaching him to pass the load of hay. The defendant Daigle further testified that the plaintiff did not reduce his speed; that he got out of his car and tried to stop the plaintiff, and that the plaintiff passed by him without reducing speed while the Daigle car was off the road.

There was an electric street light on a pole near the road and over the point where the load of hay was stopped. Three rural mail boxes on a post were beside the pole, and the defendant Cote testified that his hay touched the boxes. One witness said that the load of hay was "under the light." The same witness also said there was room for a car to pass between the load of hay and the Daigle car. Another witness stated that at the time of the accident the Daigle car was not *wholly* off the tarred surface because the front left wheel of the Daigle car was "six to ten inches" on the tar.

We have, therefore, this picture: The plaintiff was approaching the rear of defendant Cote's load of hay, which load was then stopped on the right-hand side of the highway. Facing the plaintiff and by the side of the Cote tractor and trailer of hay, and blocking plaintiff's left side of the road (as the plaintiff says), or not blocking and off the road (as defendants and the other witnesses say), was the car of defendant Daigle with its lights shining toward the on-coming plaintiff. The plaintiff says that he did not see the hay load until it was too late to avoid hitting it, because his vision was "reduced" by the lights.

Four witnesses testified as to visibility of the load of hay, although what others saw is not material. The question is: Should the plaintiff have seen, and should the plaintiff have stopped or otherwise avoided the load of hay, or did some negligence on his part contribute to his injury? Had the jury the right to say, under the evidence, that the plaintiff was exercising proper care while either or both of the two defendants were negligent? Or was the verdict clearly wrong, as claimed by the motions of the defendants?

Every witness, except the plaintiff, testified that Daigle moved off the highway when the plaintiff was a long distance away. The plaintiff himself stated that the Daigle car did not move while he (the plaintiff) was travelling the last 300 or 400 feet. The plaintiff's first impression, when he was 800 feet away, he says, was that the Daigle car was "approaching." The plaintiff says he dimmed his lights and Daigle did not. The plaintiff says he fully realized that Daigle was not moving when plaintiff was 300 or 400 feet distant. The plaintiff, therefore, on his own testimony, knew that Daigle was stopped, and that his own vision was "reduced." He did not see what was the reason for the unusual action of the Daigle car, if it was unusual, or what was ahead in his own path as he was about to pass the Daigle car. He says he did not see the hay load until 25 feet away from it, although his lights were in "good condition." At the speed he was then travelling, "probably thirty miles an hour; maybe between twenty-five or thirty miles. I wouldn't really know," he was not able to control his car to avoid the collision with it.

The estimate of speed made by the plaintiff cannot be other than erroneous when the physical effects of the crash are taken into consideration. *Esponette* v. *Wiseman,* 130 Me. 297; 155 A. 650. There is also a tendency for drivers of automobiles to have their cars going much more slowly, on the court room witness stand, than they actually travel upon the highway.

It is the duty of an automobile driver to stop his car when for any reason he cannot see where he is going. *Haskell* v. *Herbert,* 142 Me. 133; 48 Atl. (2nd) 637; *House* v. *Ryder,* 129 Me. 135; 150 A. 487; *Cole* v. *Wilson,* 127 Me. 316; 143 A. 178; *Day* v. *Cunningham,* 125 Me. 328; 133 A. 855; 47 A. L. R. 1229.

Automobiles must be equipped with front lamps capable of rendering any substantial object clearly discernible at least 200 feet ahead. R. S. (1944), Chap. 19, Sec. 34; *Witherly* v. *Bangor and Aroostook Railroad Co.,* 131 Me. 4; 158 A. 362.

The automobile driver must drive at such a speed that he can bring his car to a stop within the distance illumined by his headlights. *Baker* v. *McGary Transportation Co.,* 140 Me. 190; 36 A. (2nd) 6; 5 Am. Jur. 647 "Automobiles", Section 263; *Barker* v. *Perry,* 136 Me. 510; 2 A. (2nd) 625.

An automobile driver is "bound to use his eyes, bound to see seasonably that which is open and apparent." *Callahan* v. *Bridges Sons, Inc.,* 128 Me. 346; 147 A. 423, 424; *Rouse* v. *Scott,* 132 Me. 22, 24; 164 A. 872.

It is not a question of which person is the more negligent. The burden is upon the plaintiff to show that no lack of care on his part contributed to his injuries, and a jury has no right to so "guess" or "suppose." He must "establish" that he was exercising due care. *Baker* v. *McGary Transportation Co.,* 140 Me. 190; 36 A. (2nd) 6. The evidence must be such as would authorize the jury to find that the damage was occasioned solely by the negligence of the defendant. *Witherly* v. *Bangor and Aroostook Railroad Co.,* 131 Me. 4, 7; 158 A. 362.

The evidence here is to be viewed in the light most favorable to the plaintiff, *Daughraty* v. *Tebbetts,* 122 Me. 397; 120 A. 354; 34 A. L. R. 1507, and the general rule is that when the testimony is conflicting the verdict will stand. *Moulton* v. *Railway Co.,* 99 Me. 508, 509; 59 A. 1023. There

must be, however, sufficient reasonable and credible evidence, consistent with the circumstances, to be the basis for the judgment of the jury. *Raymond* v. *Eldred,* 127 Me. 11; 140 A. 608; *Pollard* v. *Grand Trunk Ry.,* 62 Me. 93. Sympathy must not sway judgment. *Morin* v. *Carney,* 132 Me. 25, 29; 165 A. 166. "A verdict of a jury on matters of fact and within their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic." Emery J., in *Day* v. *Railroad,* 96 Me. 207, 216; 52 A. 771, 773; 90 Am. St. Rep. 335.

The question for decision is, whether the verdict for the plaintiff is manifestly wrong. *Barlow* v. *Lowery,* 143 Me. 214; 59 Atl. (2nd) 702.

The court does not say that the finding of negligence, by the jury, on the part of the defendants is manifestly wrong, but it must say that because of the plaintiff's negligence the verdict is plainly wrong. The record impels us to this decision, for the contributing factor of the plaintiff's own lack of care makes this conclusion unavoidable.

The plaintiff failed to see and failed to avoid hitting the load of hay directly in his path. His automobile lights were good. He was not blinded by lights. He says he could see the road ahead, although his vision was "reduced." Whatever his speed, it was much too great to stop, or to avoid the load, when he suddenly saw it 25 feet away. The plaintiff so testified.

The plaintiff could either see, or he could not see, where he was going. If he could not see, it was his duty, under the law, to bring his car to a stop. It is not a question of whether he could see at all, but whether he could see where he was going and whether or not there was a substantial object or obstruction ahead. If, as he stated, he could see, the failure to see in time what should have been seen, is negligence. If there was a reduction of vision it added the

necessity for increase of care. An automobile driver is safe from danger only when he is on guard when he is safe. In the words of Benjamin Franklin, "Want of care does us more harm than want of knowledge."

In any event, and under any view of the evidence, it is clear that the plaintiff was either inattentive and anxious only to pass a car, or else he was driving at such an excessive speed that he could not stop within his range of vision. He either failed to see what he should have seen had he been paying necessary attention to the road ahead, or he exceeded the speed at which he could stop within range of his lights. In either event he was so clearly negligent, and his negligence so contributed to his own injuries, that the jury verdict in his favor was clearly wrong. *Baker* v. *McGary Transportation Co.*, 140 Me. 190; 36 A. (2nd) 6; *Barker* v. *Perry*, 136 Me. 510; 2 A. (2nd) 625; *Callahan* v. *Bridges Sons, Inc.*, 128 Me. 346; 147 A. 423; *Rouse* v. *Scott*, 132 Me. 22; 164 A. 872.

Every practicing attorney well knows that when a case is submitted to a jury where bodily injuries have been sustained by a plaintiff, sympathy will often outweigh good judgment. If a jury believes a defendant to have been negligent, it will sometimes fail to consider that the plaintiff's thoughtless neglect, or inattention may, in fact, have been the proximate cause of the disaster. The plaintiff may have "taken a reckless chance" but, in the mind of the jury, he should be recompensed for his suffering. Legal justice, as an abstract proposition and under calm conditions, might be easily seen by any juror, and mentally observed. When justice, however, becomes the concrete example to be decided under and according to the law, and the necessity for decision is immediate, a sympathy (or perhaps a prejudice) may throw the scales out of true balance. Juries have been known to decide cases according to the popular demand, and deliberately to leave correction of their errors, if any, to the court. Often too, the suspicion

of the jury that an insurance company is involved, will affect, if not decide, the facts on trial. A sympathetic nature is not a fault. Sympathy is a noble virtue, but sympathy must not so blind the one who is to decide a factual or legal problem that he does not wish or intend to follow the rules of law. The law must control. Otherwise, the law will neither be respected nor obeyed, and each case will be "a law unto itself."

This court, as all courts, is not devoid of sympathy and has given the record in this case most careful consideration. We regret that we must so decide, but it is the unanimous opinion that the entry should be

Motions for new trial sustained.

New trial granted.

PIERRETTE GENDRON, PRO AMI

vs.

ROGER GENDRON

FLORIA GENDRON

vs.

ROGER GENDRON

Oxford. Opinion, November 17, 1949.

Negligence. Res ipsa loquitur.

Question of negligence on the part of the driver of a skidding car is for jury.

When there is no explanation of what caused a car to leave a road, when the operation thereof is exclusively within the control of the defendant, and it is not reasonably in the power of an injured guest to prove the cause of the accident, which is one not commonly incident to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on defendant's part.

The fact that operator of automobile goes to sleep while driving is a proper basis of negligence sufficient to make out a *prima facie* case if no circumstances tending to excuse or justify his conduct are proven.

ON MOTIONS FOR NEW TRIAL.

Suit brought by minor for personal injuries and by her father for hospital bills, expenses of case and loss of income of his minor daughter. Verdict for plaintiff. Motions for new trial filed by defendant. Motions overruled.

John G. Marshall, for plaintiffs.

William B. Mahoney,
and
Theodore Gonya, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

THAXTER, J. We are concerned here with two cases, one brought by Pierrette Gendron, a minor, who seeks to recover damages against her brother, Roger Gendron, for personal injuries suffered because of his alleged negligence while she was a passenger in his automobile when the car driven by him left the highway and crashed into a telephone pole; the other brought by her father, who was also a passenger, to recover for hospital bills, for expenses for medical care and treatment, and for loss of income of his minor daughter, all of which expenses and loss were occasioned by the accident. A jury returned a verdict of $6,000 for the daughter and $2,000 for the father. Both cases are before us on general motions for new trials.

The parties on April 11, 1948 were returning from a trip to Canada in the defendant's automobile. The defendant was driving, next to him on the front seat was his sister, Pierrette, and next to her on the outside was a younger brother. The father, Floria, was asleep on the back seat. When near Bethel the car suddenly left the road without warning and struck a pole beside the road. Pierrette was severely injured. It had been raining on the way back with intermittent snow flurries in Vermont. It is not clear whether there was any snow on the road, but the testimony indicates that there was not. There is not a suggestion that it was icy. When the accident happened at about half past eleven it was dark and raining. The conditions were typical of what would be encountered in this area in the early spring. Counsel for the defendant argue that the car skidded. The evidence does not support such allegation. The plaintiff, Pierrette, says in her written statement that the car skidded and went off the road, but from her whole

testimony it is apparent that this was a mere conclusion instead of a statement of fact. She obviously did not know just what did happen. The skidding of the automobile even if it did happen would not necessarily constitute a defense. It would still be a question for the jury whether under the conditions the defendant was driving with due care. But the evidence establishes fairly conclusively that the car did not skid. Albert G. Grover, a deputy sheriff, testified that after the accident he saw the wheel tracks of the car and that they went in a straight line, forty feet from the road to the pole, and his testimony is uncontradicted.

If there were no explanation of what caused the car to leave the road, the rule laid down in *Chaisson* v. *Williams,* 130 Me. 341; 156 A. 154; *Shea* v. *Hern,* 132 Me. 361; 171 A. 248;*Sylvia* v. *Etscovitz,* 135 Me. 80; 189 A. 419, would apply. The rule is stated in *Chaisson* v. *Williams, supra,* page 346, as follows:

> "Where an automobile, and the operation thereof, are exclusively within the control of the defendant, whose guest is injured, and it is not reasonably in the power of such guest to prove the cause of the accident, which is one not commonly incident, according to everyday experience, to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on the part of the defendant. *Res ipsa loquitur,* the thing speaks for itself."

But to sustain the jury's verdict it is not necessary to rely on the doctrine of *res ipsa loquitur.* There was ample evidence from which the jury could have found that the defendant fell asleep at the wheel. He told the deputy sheriff who investigated the accident that he fell asleep, and he gave the same explanation to his sister and his father. There is nothing in the evidence to show any other reason for the accident. If the defendant was asleep there is sufficient to warrant an inference of negligence. The Connecticut court has in our opinion stated the rule correctly

in *Bushnell* v. *Bushnell,* 103 Conn. 583, 592; 131 A. 432, 435; 44 A. L. R. 785, 791, as follows:

> "In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent; it lies within his own control to keep awake or cease from driving; and so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a prima facie case, and sufficient for a recovery, if no circumstances tending to excuse or justify his conduct are proven."

It is argued in support of the motions that the damages are excessive. In so far as the father's case is concerned, he has spent $750.35 in medical and hospital bills and incidentals. After his daughter graduated from high school in June she was unable to go to work until the following January. During that period she lost in wages approximately $650 to which her father would have been entitled, and there was evidence from which a jury would have been justified in finding that he would have to pay further medical bills and that her earning capacity during her minority may be less than it would have been if she had not been injured. We cannot hold that the verdict in favor of the father is unreasonable.

She was awarded $6,000. She was in bed eight weeks in the hospital and was unable to walk for another month after she got home. She could not work until the following January. Her pelvis was fractured and she had great pain and discomfort for a considerable time, and there is evidence of changes in the sacro-iliac joint and in the spine which may cause permanent trouble. On these facts which are not in serious dispute, we certainly cannot say that the sum awarded by the jury is manifestly excessive.

Motions overruled.

HELEN E. JORDAN

vs.

KENNETH N. MACE

Hancock. Opinion, November 19, 1949.

Bastardy. Blood Tests. Twins. New Trial.

A verdict that a respondent is the father of twins is indivisible so that if the paternity of one child is excluded the verdict may not stand.

Exclusion of paternity by blood grouping tests where properly made under the biological law is scientific proof that a respondent is not the father.

Where motion for a new trial is sustained, there is no necessity of remanding the case for correction of a bill of exceptions not properly before the court.

Objections to the jurisdiction on the grounds that a complainant

(1) must bring a separate action for each twin child and

(2) must make a separate accusation with respect to each child, when accusation is made after the birth of twins, are without merit.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

The respondent in a bastardy action was found by the jury to be the father of twins. Respondent made a motion for a new trial and presented exceptions to certain rulings of the presiding justice. Motion sustained. New trial granted. Case fully appears in the opinion.

William S. Silsby, for complainant.

Blaisdell and Blaisdell, for respondent.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

WILLIAMSON, J. The respondent in a bastardy action was found by a jury to be the father of twins. His motion for a new trial is sustained.

The issue is: Is the verdict manifestly wrong in the light of biological law and of evidence of exclusion of paternity based upon the blood grouping tests taken under R. S., Chap. 153, Sec. 34?

On October 23, 1945 the complainant had sexual intercourse with the respondent. On November 1 she told the respondent that she had missed her monthly period and that she thought she was pregnant. The twins were born on June 27, 1946. When asked if she had accused anyone else of being the father, she replied, "No, I haven't. There is no other one to accuse." The respondent discussed marriage and other matters with the complainant in a manner consistent only with a belief that he was responsible for her condition.

Pursuant to orders of court, blood specimens were taken and collected by two local physicians, and submitted by them to Dr. Hooker of Boston "for said blood grouping tests for the purpose of determining whether or not the paternity of the respondent can be excluded." Blood specimens were taken on July 31, 1947 for the first test and on February 25, 1948 for the second test. The physicians testified about the manner in which the blood specimens were taken and prepared for shipment, and one physician testified about mailing the specimens to Dr. Hooker by registered mail. Their qualifications were not questioned.

Dr. Hooker, whose qualifications were admitted, and who, in the words of the court in *Jordan* v. *Davis,* 143 Me. 185; 57 A. (2nd) 209, 210, is "one of the leaders" in research work relating to the exclusion of paternity by blood grouping tests, stated the results of the tests made by him or at least under his direction and the conclusions he drew therefrom based upon biological law.

The tests to determine the group and type of the blood were performed eleven times. The results in each instance were, as follows:

	Group	Type
Complainant	A	M
Child A	A	M
Child B	A	MN
Respondent	A	N

Dr. Hooker gave his opinion, based on the two following reasons, that the respondent could not be the father of the twins:

> First, by the operation of the biological law, sometimes called "the blood test law," a parent with blood of type "N" can not have a child with blood of type "M", and thus respondent's paternity of Child A was excluded.
>
> Second, the father of twins must be one and the same man.

It is not necessary for decision in this case that we accept, reject or consider Dr. Hooker's testimony with respect to his second reason. The verdict that the respondent is the father of the twins is indivisible. If paternity of one child is excluded, the verdict may not stand. We, therefore, consider in reaching our decision only the biological law relating to exclusion of paternity by blood grouping tests.

Our court has stated in *Jordan* v. *Davis, supra,* with reference to the blood grouping tests:

> "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."

> "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."

Discussion of the scientific basis of the blood grouping tests, with charts illustrating the blood groupings and types, may be found in 163 A. L. R., 939 n., 941, in 23 American Bar Association Journal, 472 (1937), and in 34 Cornell Law Quarterly, 72 (1948).

The three physicians named by the court to conduct the tests stated in detail the manner in which their duties were performed from the taking of the blood through the repeated tests to the making of the reports. Their testimony discloses great care was taken at all stages. The possibility of error was minimized by the making of two complete blood tests at intervals of time. Eleven tests by or under the direction of Dr. Hooker produced identical results.

What further safeguards could reasonably have been taken to protect the integrity of the tests? If the jury may disregard the fact of non-paternity shown here so clearly by men trained and skilled in science, the purpose and intent of the Legislature, that the light of science be brought to bear upon a case such as this, are given no practical effect.

Jordan v. *Davis, supra,* is not authority for the proposition that a jury may give such weight as it may desire to biological law. Such a law goes beyond the opinion of an expert. The jury has the duty to determine if the conditions existed which made the biological law operative. That is to say, were the tests properly made? If so made, the exclusion of the respondent as father of one child follows irresistibly.

The basis of the decision in *Jordan* v. *Davis, supra,* is clearly set forth in the last paragraph of the opinion, as follows:

> "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."

The absence of evidence that anyone else could have been the father should not react to the disadvantage of this respondent. He presented clear and precise tests which excluded paternity under biological law.

By the very nature of such a case evidence excluding the possibility of opportunity for another to be the father is limited to the statement of the complainant. No corroboration of total lack of opportunity could well be expected. On the part of the respondent, chance alone would produce evidence tending to show acts of intercourse by another with the complainant within the limited period.

The blood grouping test statute was enacted to provide, in our view, for the very situation in which a respondent, as a matter of ordinary proof without the tests, can do no more than create a doubt about the paternity of a child. Exclusion of paternity by blood grouping tests under biological law is scientific proof that a respondent is not the father.

The skill and accuracy with which the blood grouping tests were here conducted were clearly and convincingly demonstrated by the testimony of disinterested witnesses. There is nothing in their testimony which even casts suspicion upon the accuracy of the findings or the consequent exclusion of the respondent as the father of Child A.

The statement by the complainant, "There is no other one to accuse," even if interpreted as a denial of intercourse

with any man other than the respondent, is not sufficient to overcome the overwhelming effect of this positive testimony by disinterested witnesses.

If the jury found that the results of the blood grouping tests were inaccurate, such finding must have been based on mere conjecture or understandable sympathy for the complainant and prejudice against the respondent. Such finding is not supported by any believable evidence in the record. The motion must be sustained.

In addition to the motion for a new trial, the respondent has presented exceptions to certain rulings of the presiding justice. The bill of exceptions taken alone does not clearly and succinctly set forth the case and the issues, the materiality of the points raised, or the erroneous or prejudicial character of the rulings. The evidence is not incorporated therein. The court cannot look outside the bill of exceptions. *Moores* v. *Inhabitants of Town of Springfield,* 143 Me. 415; 62 A. (2nd) 210. The exceptions are not properly before us. In view of our decision upon the motion for a new trial, it would be unnecessary to consider the exceptions were they properly presented. Accordingly, there is no necessity of remanding the case for correction of the bill of exceptions under R. S., Chap. 91, Sec. 14, as in the *Moores* case.

We find no merit in the suggestion of the respondent that the court was without jurisdiction to hear the cause for the reason there should have been a separate action for each child. Under R. S., Chap. 153, Sec. 29, after the respondent has been adjudged to be the father, he stands charged, under order of court, with maintenance, with the assistance of the mother, and with payment of costs, expenses and support to the date of rendition of judgment. We see no reason why the court may not provide for the needs and necessities of one child or more by appropriate action.

The first step in a bastardy action is the accusation by "a woman pregnant with a child, which, if born alive, may be

a bastard, or who has been delivered of a bastard child." R. S., Chap. 153, Sec. 23. One accusation is obviously sufficient when made during pregnancy. We see no reason why duplication of an accusation should be required against a respondent, when made as here, after the birth of twins.

If a more narrow reasoning is required, we point to R. S., Chap. 9, Sec. 21, II, which says:

> "The following rules shall be observed in the construction of statutes, unless such construction is inconsistent with the plain meaning of the enactment.
>
> "Words of the singular number may include the plural; - - - -"

The entry will be

Motion sustained.

New trial granted.

ESTATE OF ANNIE E. MEIER

Lincoln. Opinion, November 26, 1949.

Taxation. Statute of Limitation.

The power of disposition of property is the equivalent of ownership.

The state of Maine is not precluded from taxing the succession to property held in a trust administerable without its borders if it is within the control of a decedent domiciled within the state under the terms thereof.

The inheritance tax, so-called, imposed by R. S., 1944, Chap. 142, Secs. 2 and 3 is applicable to all the property of persons domiciled in Maine at the time of death which the state has the power to tax by appropriate legislation, including intangibles represented by paper evidence physically located outside its borders, notwithstanding the legal title thereto is held by a trustee so residing.

The succession to fractional interests in mortgages secured by real estate located in other states or jurisdictions is neither more nor less than intangible property, taxable as such.

As a general principal, statutes of limitation do not run against the sovereign unless the state is necessarily included by the nature of the mischief to be remedied.

ON REPORT.

Petition for abatement of an inheritance tax filed in Probate Court and reported to the Law Court. Abatement denied. Case remanded to the Probate Court in and for the County of Lincoln.

Sanford L. Fogg, for petitioner.

Ralph W. Farris, Attorney General,
Boyd L. Bailey, Assistant Attorney General,
for respondent.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

MURCHIE, C. J. This petition for the abatement of an inheritance tax, filed in the Probate Court in Lincoln County, and reported to this court, on agreed facts, for the determination of questions of law, as authorized by R. S., 1944, Chap. 142, Sec. 30, involves a tax assessed against the Estate of Annie E. Meier, late of Boothbay Harbor, more than 11 years after her death. She died March 10, 1937. The Trustee of a revocable Trust established by her on June 22, 1933 advised the Inheritance Tax Commissioner, the official then charged with the assessment of inheritance taxes, of the death on April 2, 1937. The income of the trust was payable to Mrs. Meier, or was to be applied for her use by the trustee, as long as she lived. An inventory of the property held in it at the time of her death was filed with commissioner on September 26, 1938. No tax was assessed against the estate until July 22, 1948. That under review was assessed on November 16, 1948, when the earlier one was vacated and the time of payment extended to December 1, 1948, without interest.

At the death of Mrs. Meier, who died holding the legal title to no property whatsoever, real estate in Maine valued at $3,200 and intangibles amounting to $107,590.58, including $21,992.50 in fractional interests in mortgages secured by real estate not located in Maine (less all proper debts and expenses, and taxes, if any), all held in the trust aforesaid, passed to her two daughters under its provisions. The State Tax Assessor, who succeeded the Inheritance Tax Commissioner as the taxing authority (see P. L., 1947, Chap. 354), fixed the allowable deduction for debts and expenses of administration at $5,163.77. The tax is based on the succession to all the property held in the trust, less that allowance.

The Indenture establishing the Trust was executed in New York, and provides expressly that it is to be construed under the laws of that state. The trustee named was a New York bank. No provision was made for a successor trustee

if that bank should elect to resign its trust. In lieu thereof, it was provided that the trust should terminate on such a resignation. The indenture reserved the right to the grantor, however, to alter or amend its provisions and an amendment made November 10, 1934 wrote in a provision for the selection of a successor trustee. A later amendment, effected July 25, 1935, confirmed the appointment of the Petitioner, an individual residing in the State of Missouri, as such. The indenture reserved to the grantor, also, the powers "to direct the sale or other disposition" of any or all of the trust property; to control "the investment or reinvestment" of cash, and the "exercise or non-exercise" of conversion and subscription rights held in the trust; and to revoke the trust "in whole or in part." None of these was ever exercised.

While the entire net income of the trust was payable to Mrs. Meier, or was to be applied for her use, so long as she lived, and the trustee was authorized, in its discretion, to use out of the principal to provide for her care and support and that of the two daughters who took the property at her death, and provision was made that payments to or for said daughters, or either of them, were to be considered as made for her use, there is nothing in the agreed facts to indicate that any of the principal was used in the lifetime of Mrs. Meier or that any income was paid to or applied for the daughters. The result would not be affected had such facts, or either of them, been established. The tax as computed is applicable to the succession of all the property passing to the daughters under the trust.

The shares of the daughters were controlled by the terms of their respective lives. The money value of such shares, if both survived Mrs. Meier, as they did, was not ascertainable definitely at the time of her death, or thereafter until after March 29, 1944, when one of the daughters died. Subsequent to that time the petitioner furnished complete information concerning the trust, on the understanding, to

which the taxing authority agreed, that he was not "waiving any limitations or estoppel or other defense" against the assessment or collection of any tax which might be assessed. This information disclosed that the gross value of the property held in the trust had declined to $73,037.18 in the interval between March 10, 1937 and March 29, 1944, and that the paper evidences of all the intangibles were physically located outside the State of Maine and had been so located at all times. When Mrs. Meier died they were located in the States of New York and Missouri, but the money value represented by those held in each is not stated in the agreed facts.

The petitioner does not deny that the tax assessed, $1,062.20, is computed properly under P. L., 1933, Chap. 148, Secs. 2 and 3, now R. S., 1944, Chap. 142, Secs. 2 and 3, if the succession of the daughters is taxable and the fractional interests in mortgages secured by real estate located outside the State of Maine should not have been disregarded in determining the amount. The questions of law to be resolved, stated in language of identical effect with that in which they are set out in the report, although in different order, are (1) whether the intangibles, considering the place where the trust was established and was to be construed, and the location of the paper evidences thereof, were within the jurisdiction of Maine for inheritance tax purposes; (2) whether the fractional interests in mortgages secured by real estate located outside the state were includable in determining the amount of the tax, if any; and (3) whether the delay in the assessment has provided a complete defense against the taxation of the estate, or the trust, in any event.

That Maine is not precluded constitutionally from imposing an inheritance tax on the succession of intangible property subject to the control of one of its inhabitants at the time of death, because the legal title thereto is held in a revocable trust administerable without its borders, when

the *indicia* thereof are so located, does not admit of doubt since the Supreme Court of the United States, in deciding the cases of *Curry et al.* v. *McCanless,* 307 U. S. 357; 59 S. Ct. 900; 83 L. Ed. 1339; 123 A. L. R. 162; and *Graves et al.* v. *Elliott et al.,* 307 U. S. 383; 59 S. Ct. 913; 83 L. Ed. 1356, on May 29, 1939, declared, and reiterated, that the power of disposition of property "is the equivalent of ownership." Such a power was exercised by the will of its holder in the *Curry* case, it is true, but in the *Graves* case, as in the instant one, property passed under a trust indenture when the holder of the power died without exercising it. The instant case may be said to be more favorable to the imposition of a tax by the state of the decedent's domicile than the *Graves* case, since the facts seem to indicate that Mrs. Meier was domiciled in Maine when she placed her property in trust, as at her death, whereas in the *Graves* case the trust was established in Colorado by a resident of that state who moved to New York thereafter and died while domiciled there. The right of the state of New York to tax the succession was upheld.

There can be no point in multiplying authorities to support the principle that the state of domicile may tax intangibles passing under trusts, regardless of the facts that the legal title is held by a trustee residing in another state and that the *indicia* representing them are located physically outside its borders, but it may be well to note that while four Justices of the Supreme Court of the United States dissented from the *Curry* and *Graves* decisions, Mr. Justice Douglas, a little more than three years later, speaking for an unanimous court in *Central Hanover Bank & Trust Co. et al.* v. *Kelly,* 319 U. S. 94; 63 S. Ct. 945, 947; 87 L. Ed. 1282, cited the *Curry* case among others as authority for the declaration that:

> "It is much too late to contend that domicile alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled with-

> in the state, keeps the paper evidences of the intangibles outside its boundaries."

He said, in closing that opinion, that:

> "The significant facts are that the rights of the remaindermen derived solely from the trust agreement and that the grantor died domiciled in * * *"

the state whose power to tax was under review. Such are the facts here presented. The first stated claim of the petitioner must be denied so far as it is grounded, if at all, in challenging the right of Maine to impose the tax in question.

The constitutional right of the State to impose it being undoubted, it remains to be resolved whether the tax assessed was imposed by P. L., 1933, Chap. 148, Sec. 2, the law in effect at the time of Mrs. Meier's death. That issue cannot remain in doubt when reference is had to the statute. It imposes an inheritance tax "for the use of the state" on:

> "All property within the jurisdiction of this state and any interest therein belonging to inhabitants of this state * * * which shall pass:
>
> * * *
>
> 2. By deed, grant, sale or gift except in case of a bona fide purchase for full consideration * * * made or intended to take effect in possession or enjoyment after the death of the grantor or donor * * *."

If any authority was needed to indicate that the words "within the jurisdiction" were intended to cover, and do cover, all the property of all persons domiciled in Maine at the time of death which the state has authority to tax by appropriate legislation, it may be found in the statement of Mr. Justice Stone in *Curry et al.* v. *McCanless, supra,* that:

> "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to con-

> tribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax."

Directly in point on the coverage of the statutory words "within the jurisdiction of this state," it may be noted also, is the Massachusetts case of *Frothingham et al.* v. *Shaw,* 175 Mass. 59, 55 N. E. 623; 78 Am. St. Rep. 475, where similar language, and facts, were in issue. There is no merit in the first stated claim of the Petitioner.

The same thing must be said with reference to the second. In support of it counsel for the Petitioner cites the single case of *Bates* v. *Decree of Judge of Probate,* 131 Me. 176; 160 A. 22. That case involved fractional interests in a trust, it is true, and denied the right of Maine as the state where the owner died domiciled to tax them, but the trust was one holding title to no property except real estate in Massachusetts and under the law of that state such interests were held to constitute real estate. The decision was controlled by the law of Massachusetts. The fractional interests here in question are not comparable. They constitute neither more nor less than intangibles as such property is generally known and fall clearly within the property defined by the statute as "within the jurisdiction of this state."

The Petitioner's final claim, that delay in assessing the tax has provided a defense against it, must also be denied. The claim is asserted in full recognition of the general principle that statutes of limitation do not run against the sovereign, *Inhabitants of Topsham* v. *Blondell,* 82 Me. 152;

19 A. 93; 34 Am. Jur. 307, Sec. 393, on the ground that the exception thereto, stated in the cited text in the words:

> "unless the state is necessarily included by the nature of the mischiefs to be remedied"

controls. We can see no basis for such a claim. A particular reason for the adoption of the general principle which was a part of the common law of England, as declared in *United States* v. *Hoar,* Fed. Cas. No. 15373; 2 Mason 312, was said in *Inhabitants of Topsham* v. *Blondell, supra,* to be:

> "that public remedies in preserving the public rights, revenues and property ought not to be lost by the laches of public officers."

If it could be said that this is not a complete answer to the suggestion that the State of Maine, as a sovereign, is "necessarily included," to use the controlling words of the excerpt quoted from the text of American Jurisprudence, we are referred to no particular statute of limitations said to carry any implication to that effect. In the instant case it is apparent that there can be no bar to the state's claim to a tax on the succession unless it accrued in a period of less than six years. We know of none. The tax assessable against the estate of Mrs. Meier was not susceptible of exact measurement for more than seven years after her death. Exactitude became possible only when one of her daughters, taking under her Trust, died. Even in cases where the sovereign loses rights under statutes of limitation the period thereof does not begin to run until the time when the measure of its claim can be accurately determined, as was the case in *Ex parte State ex rel. Davis* v. *Attorney General,* 206 (Ala.) 393; 90 So. 871. See also *Ware* v. *Greene,* 37 Ala. 494. In *Estate of John Cassidy,* 122 Me. 33; 118 A. 725; 30 A. L. R. 474, where the inheritance tax law of this state was under consideration, it was decided that no such tax could be levied, despite the provision for compromise carried by what is now R. S., 1944, Chap. 142, Sec. 12, until the amount of it was determinable with exactness. An

annotation following the report of the *Cassidy* case in A. L. R. calls attention to several types of statutes dealing with the taxation of interests not ascertainable at the time when inheritance or succession taxes are normally required to be paid. There can be no doubt that the tax in question could not have been assessed prior to March 29, 1944. It was assessed November 16, 1948. The elapsed time prior thereto is no bar to its collection.

The terms of the report provide that this court shall make final decision in the cause and that the State Tax Assessor shall determine and assess the tax in accordance with its decree. That assessed being in the proper amount the abatement sought must be denied and the case remanded to the Probate Court for dismissal of the petition and further appropriate action.

Abatement denied.

Case remanded to the Probate Court in and for the County of Lincoln.

BODWELL-LEIGHTON CO.

vs.

COFFIN & WIMPLE, INC.

Cumberland. Opinion, November 19, 1949.

Courts. New Trial.

By rule of court, no appeal lies to denial of motion for new trial addressed to presiding justice, except in prosecutions for felony.

The Law Court can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. These limitations are jurisdictional, and neither of them can be waived nor can consent of the parties confer jurisdiction upon the court.

ON EXCEPTIONS.

Action on case brought by plaintiff for work and labor and materials furnished. Verdict for plaintiff. Defendant filed motion for new trial on usual grounds, and upon the overruling of such motion brings exceptions. Exceptions dismissed as improvidently allowed.

Jacobson & Jacobson, for plaintiff.

Wilfred A. Hay,
Charles A. Pomeroy, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

NULTY, J. Action on the case brought by the plaintiff, Bodwell-Leighton Co. against the defendant, Coffin & Wimple, Inc., seeking to recover from the defendant the amount due for work and labor performed and parts and materials used in repairing a 1947 Plymouth four door sedan owned

by the defendant. The action was entered at the February 1949 Term of the Superior Court for Cumberland County and was tried before the jury at the March Term of the Superior Court for said County of Cumberland and a verdict returned for the plaintiff. No exceptions were taken by the defendant either to the charge of the presiding justice or to any of the evidence. After verdict and before judgment the defendant filed a motion for a new trial before the presiding justice alleging the usual grounds, namely, that the verdict was (1) Against the law and charge of the presiding justice, (2) Against the evidence, (3) Manifestly against the weight of the evidence. The presiding justice overruled the motion and, according to the record as set forth in the Bill of Exceptions, the defendant seasonably took exceptions which were allowed by the presiding justice.

The case purports to come before this court in regular form and this court is asked to sustain the exceptions of the defendant. At the outset this court is confronted by Rule 17 of the Rules of Court, 129 Me., Page 503, 509; 43 A. 507, under the paragraph entitled "Motions for New Trials." Among other things Rule 17 states:

> "If addressed to the presiding justice, it shall be heard either at term time or vacation at his discretion and in either case, the decision may be rendered in vacation and no exceptions lie to such decision and no appeal except in prosecution for felony."

This rule of court is conclusive on the right to exceptions. In the case of *Hill* v. *Finnemore,* 132 Me. 459, 471; 172 A. 826, 832, this court said "Rules of Court" lawfully established "have the force of law and are binding upon the court, as well as upon parties to an action, and cannot be dispensed with, to suit the circumstances of any particular case." *Cunningham* v. *Long,* 125 Me. 494, 496; 135 A. 198; *Fox* v. *Conway Fire Insurance Co.,* 53 Me. 107; *Nickerson* v. *Nickerson,* 36 Me. 417; *Mayberry* v. *Morse,* 43 Me. 176.

At common law in both civil and criminal cases the granting of a new trial rested wholly within the discretion of the justice presiding at the trial and all motions seeking relief through a new trial must be directed to him. His decision thereon was final and not subject to review. *State* v. *Dodge,* 124 Me. 243, 244; 127 A. 899; *Moulton* v. *Jose,* 25 Me. 76, 85; *Averill* v. *Rooney,* 59 Me. 580. In 1841, R. S., Chap. 115, Sec. 101, for the first time provided that motions for a new trial might be presented to the whole court (Law Court) upon a report of the evidence. *State* v. *Dodge, supra.* Although under R. S. (1944), Chap. 100, Sec. 60, such motion could have been made to this court within ten days after denial of the motion by the presiding justice, no such action was taken or even attempted.

It was suggested to the Law Court at the time of argument, although not mentioned in the briefs of the parties, that the last paragraph of R. S., Chap. 91, Sec. 14, might have some application in this matter, but in view of the fact that that section has recently been construed by this court in *Carroll* v. *Carroll,* 144 Me. 171; 66 A. (2nd) 809, and in *Sears, Roebuck & Co.* v. *City of Portland,* 144 Me. 250; 68 A. (2nd) 12, this court is of the opinion that the last paragraph of said Section 14 does not apply for the very reasons stated in *Carroll* v. *Carroll, supra,* and *Sears, Roebuck & Co.* v. *City of Portland, supra.* This court said in the two cases last cited that the Law Court can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. Both of these limitations on the power of the court are jurisdictional and neither of them can be waived nor can consent of the parties confer jurisdiction upon the court. The instant action purports to come to this court upon exceptions when exceptions do not lie. In fact, this case is an attempt to have this court review a non-reviewable ruling of the presiding justice. Neither by exceptions, appeal or motion could this ruling be reviewed. There is now no way prescribed by statute or rule of court by which this action can now be brought be-

fore this court and it is the opinion of this court that the exceptions were improvidently allowed and must be dismissed but inasmuch as this court has examined the record and briefs of Counsel for both parties and considered the oral arguments, this court is of the opinion that if the case were properly before it, the ruling of the presiding justice would have been sustained. See *Sawyer* v. *Chase,* 92 Me. 252, 254; 42 A. 391.

It, therefore, follows that the exceptions are dismissed as improvidently allowed.

So ordered.

GERRY BROOKS

vs.

EARLE R. CLIFFORD

FRED L. CHAPMAN

Oxford. Opinion, December 5, 1949.

Certiorari.

On hearing of petition for writ of *certiorari,* the only question for the court to decide is whether it will issue the writ. If the writ issue, the court at *nisi prius* has the jurisdiction to decide what should be done.

When parties in *certiorari* are in court, the court is not confined to the irregularities alleged by the petitioner to be in the record, but can rule on the whole record.

Where record shows neither service of disclosure petition and subpoena, nor appearance of respondent at return term, the commissioner had no jurisdiction of the subject matter, and all entries in the record after return term have no judicial effect.

Where record shows no jurisdiction, writ of *certiorari* should issue as a matter of right.

ON EXCEPTIONS.

Petition for writ of *certiorari* by judgment creditor, who had cited respondent to appear before a disclosure commissioner. Debtor was adjudged in contempt and committed to jail, and was later, without notice to the creditor, brought before the commissioner and was purged for contempt. Petition denied by justice of Supreme Judicial Court and petitioner brings exception to refusal to order writ to issue.

Exceptions sustained.

Gerry Brooks, pro se,
Robert T. Smith,
Albert J. Stearns, for defendant.

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

MURRAY, J. This case is a petition for a writ of *certiorari.* It is here on exceptions to the refusal of the court below to order the writ to issue. The history of the case is that the petitioner was the owner of a judgment against one Fred L. Chapman, and cited him to disclose before Earle R. Clifford, Register of Probate, acting as a disclosure commissioner.

At the time and place of hearing of the disclosure, Chapman did not appear. The commissioner issued a *capias* and Chapman was brought before the commissioner, where he refused to answer questions, would not pay costs, and would not turn over certain property. As a result, the commissioner adjudged him in contempt and committed him to jail.

After a time, without notice to the judgment creditor, the commissioner brought Chapman before him and adjudged that he had purged himself of contempt and ordered his release.

The petition asks that the writ issue to quash all the proceedings of the commissioner subsequent to the commit-

ment for contempt, and that Chapman be ordered recommitted until he purge himself of contempt, or be otherwise discharged by law.

On a hearing of the petition for a writ of *certiorari,* the only question for the court to determine is whether it will issue the writ. The granting of leave for the writ to issue is not a judgment that the record below be quashed. *Rogers* v. *Brown,* 134 Me. 88; 181 Atl. 667. If the writ issues, the court at *nisi prius* has the jurisdiction to decide what should be done. R. S. (1944), Chap. 116, Sec. 14.

In this case, to the petition, as there should be, is annexed a copy of the disclosure commissioner's record. On inspection, this record fails to show service upon Chapman. "The subpoena may be served by any officer qualified to serve civil process in the county by giving to the debtor * * * * * in hand an attested copy of the petition and subpoena, which said service shall be at least twenty-four hours before the time of said disclosure for every twenty miles travel to the place of disclosure." R. S. (1944), Chap. 107, Sec. 25. Nor does the record show that there was an appearance at return time.

Officer's return is a matter of record. *Clark* v. *Foxcroft,* 6 Me. 296-302; 20 Am. Dec. 309. So, of course, is appearance.

Jurisdiction of inferior courts cannot be presumed, but must appear affirmatively of record. *Inhabitants of South Berwick* v. *County Commissioners,* 98 Me. 108; 56 Atl. 263; *Faloon* v. *O'Connell,* 113 Me. 30; 92 Atl. 932.

It appearing that there was neither service nor an appearance, the commissioner had no jurisdiction to proceed further. *Dow* v. *Marsh,* 80 Me. 408; 15 Atl. 26.

It might be well at this time, to point out that the only error complained of in the petition is that the commissioner had no jurisdiction to adjudge the debtor purged of con-

tempt and to order him released. However, because it applies to the case at bar, we quote from *Inhabitants of South Berwick* v. *County Commissioners, supra.* "It may be here observed that the petitioners do not specifically allege the errors upon which the decision in this opinion is based, but the respondents appeared and answered and presented a copy of the record of the proceedings duly certified which is made a part of this case. We shall therefore consider the case as if the petition contained the proper allegations."

We assume, without deciding, because it is unnecessary to do so, that the commissioner had jurisdiction from the time that he signed the subpoena up to the time of the return. We do decide, from the record, showing no service and no appearance at time of return, that the commissioner lost jurisdiction. His judicial duty was at an end, and he had no jurisdiction to revive the case before him. *Tuttle* v. *Lang,* 100 Me. 123; 60 Atl. 892; *Comm.* v. *Maloney,* 145 Mass. 211; 13 N. E. 482. The commissioner was then in the same position in which a court of general jurisdiction with terms would be, if a writ upon which there was no service, had been entered at a term, and the term adjourned without day.

The commissioner then issued a *capias* at the request of the petitioner and Chapman was brought before him. Chapman did not object, at that time, to the jurisdiction and on his refusal to comply with certain orders was adjudged in contempt and was committed to jail. After being in jail a short time, he invoked the power of the commissioner to release him, which the commissioner did.

It is argued that in this way Chapman cured want of service and therefore, the commissioner had jurisdiction. In support of this argument is cited the case of *West Cove Grain Co.* v. *Bartley,* 105 Me. 293; 74 Atl. 730.

In that case, the commissioner, by statute had county wide jurisdiction of the subject matter. He issued a sub-

poena commanding the debtor to appear at Dover. The debtor could not be compelled to appear at any place except Sebec. The debtor appeared at Dover and without objection, participated in the disclosure. The court held that the debtor waived his right to appear only at Sebec; that the commissioner had jurisdiction of the subject matter; and debtor, by appearing at Dover, gave commissioner jurisdiction of the person also. In the case at bar, when the commissioner issued the *capias,* he had jurisdiction neither of the subject matter, nor of the person. The commissioner could not revive his jurisdiction, nor could the debtor give him jurisdiction.

The commissioner's court is a temporary one for each case, at the end of the session all jurisdiction of the cause and the person has ceased. *Tuttle* v. *Lang, supra; Comm.* v. *Dowdican's Bail,* 115 Mass. 133, 136; *People* v. *Court of Sessions,* 141 N. Y., 288; 36 N. E. 386; 23 L. R. A. 856.

He could not insert in the record anything after return time, because he had no official connection with it. All the entries in the record, after return time, issuing the *capias,* hearing, adjudging contempt, committing, purging and releasing, are mere personal memoranda—have no judicial effect—and if given effect would result in changing, or enlarging the record by parol. *State* v. *Houlehan,* 109 Me. 281; 83 Atl. 1106.

He could not acquire jurisdiction by process, and because he could not acquire by process, he could not by consent of the debtor. *Cote* v. *Cummings,* 126 Me. 330; 138 Atl. 547; *Comm.* v. *Maloney, supra.* Writ should issue, as a matter of right, for want of jurisdiction apparent in the record.

Exceptions sustained.

TOMPKINS, J., sat at argument and participated in consultation but died prior to the preparation of the opinion.

HARLAND L. RAWLEY

vs.

PALO SALES, INC., and

KNOX COUNTY TRUST COMPANY, TRUSTEE

Knox. Opinion, December 29, 1949.

Assumpsit. Evidence.

In an action of assumpsit where evidence on issues of fact is conflicting and the court cannot say that the verdict is "clearly wrong" or that prejudice, bias, passion, or mistake has been shown, a motion for a new trial must be overruled.

Relevancy and materiality are dependent on probative value and any evidence tending to prove a matter in issue is admissible, within the judicial discretion of the presiding justice, unless it is excluded by some rule or principle of law.

Rules of evidence are usually rules of exclusion, and evidence is often admitted by the Trial Court, not because it is shown to be competent, but because it is not shown to be incompetent.

ON MOTION FOR A NEW TRIAL AND EXCEPTIONS.

Action of assumpsit to recover a claim for items furnished by the plaintiff to the defendant. The jury returned a verdict for the plaintiff. The defendant brought exceptions and moved for a new trial. Motion for new trial overruled. Exceptions overruled. Case fully appears in opinion.

A. Alan Grossman, for plaintiff.

Samuel W. Collins, Jr., for defendant.
Alan L. Bird

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

FELLOWS, J. This case is before the Law Court on defendant's general motion and exceptions, after jury verdict for plaintiff in Superior Court for Knox County.

The action in assumpsit, with account annexed to the writ and a count in *quantum meruit*. The account was for the following items furnished to the defendant corporation during the years 1946, 1947 and 1948: 64 spiles at $6, $384; 2 platform scales at $80, $160; 140 feet double bar chain, $400; mooring in harbor $150; water supplied from well 2 years at $600 per year, $1,200; use of ice house 2 years at $200 per year, $400; use of barn 2 years at $240 per year, $480. The total claim was $3,174. The jury verdict was $2,171.

The defendant corporation was engaged in the lobster and fish business at Tenant's Harbor. The plaintiff leased certain of his property there to the corporation in 1946, and was employed by the corporation as the Branch Manager. The items for rent of ice house and barn were not covered by the lease, nor was there a lease of the well. The plaintiff testified that he often talked with H. K. Draper, president of defendant Palo Sales, Inc., who had full power to act for the corporation, and at his request, or order, furnished the items in the account, and that during the various transactions and after the items had been furnished, he talked several times personally or by telephone with Mr. Draper about payment, and that each time Mr. Draper assured the plaintiff that the corporation was not then making money but he would be paid. The plaintiff said "every time I would ask him he would say 'you are losing money down there. You are getting your pay every week. Now wait awhile. I will pay you. I will pay you the full amount and more too.' "

The defendant offered testimony of officers and employees in an endeavor to show to the jury that there was no understanding with the defendant corporation, or its president, as claimed by the plaintiff in regard to the items sued for;

that they were furnished to the defendant by the plaintiff free of any charge or expectation of pay; that the plaintiff was employed by the defendant on a salary, which salary had been increased; and that the defendant did work for the plaintiff on plaintiff's home and other property, and furnished some building materials to the plaintiff in return for these items. Mr. Draper, the president of the corporation, however, who was the only person other than the plaintiff that knew the complete facts, did not testify to deny the statements of the plaintiff regarding arrangements or agreements to obtain the items from the plaintiff, and the subsequent promises to pay. Further than this, a deposition of Draper, which the record shows was taken in Boston at the request of defendant, was never offered by defendant's counsel. Many witnesses testified for the defendant during the long trial, but the testimony related to market values primarily, although some testimony was produced by defendant in an attempt to show contrary and contradictory statements by the plaintiff, relative to giving the rent and materials to the corporation with no expectation of pay.

The evidence for the plaintiff of the fair market values of the foregoing articles and items furnished, came from the plaintiff himself, and in several instances the cross examination of the plaintiff elicited the information that his opinion may have been based wholly, or in part, on replacement values. The jury was carefully instructed that, if the verdict was for the plaintiff, replacement was not the criterion but fair market value was, and that if there was no evidence from which fair value of any item could be ascertained, nominal damages only were to be assessed. No exceptions to the charge were taken.

The evidence introduced by the defendant challenged every value of every item as claimed, and as testified to by the plaintiff. For example, witnesses for defendant placed values on long spiles at less than one dollar each, because of board measure; on the platform scales at one dollar each,

and one dollar for 140 feet of double bar chain, and one dollar for the mooring in harbor. The defendant in its brief claims that the total values of all the items does not exceed $245.19. The defendant corporation also denies any agreement or expectation to pay, and claims that the circumstances were such that the plaintiff had no ground to expect pay.

The law applicable to this case was fully and very clearly given by the presiding justice. There is nothing to indicate that the jury did not follow the law as stated in the charge. There were no exceptions to the instructions as given, and no other or further instructions requested. There are about 400 pages of testimony taken during a careful and hotly contested four-day trial. The evidence is conflicting. The jury found for the plaintiff, but the claim of the plaintiff was reduced in the verdict by more than one thousand dollars. It is only possible to conjecture what items were reduced by the jury, and what items, if any, were not favorably considered. The jury could find under the evidence the amount that it assessed, or it could have found for a lesser or a larger amount. It could have rendered a verdict for defendant.

This court cannot say that the verdict here is clearly wrong. There is competent evidence on which reasonable men might differ in conclusions. *Eaton* v. *Marcelle,* 139 Me. 256. We do not have the benefit of a "close up picture" of the witnesses upon the stand, and those indefinable impressions gained during a trial, that may indicate where the real truth lies. A Knox County jury composed of capable Maine citizens with experience, and having a first hand knowledge of the manner of the witnesses and existing conditions in local affairs, should be better able to decide the disputed questions of fact than is anyone who reads only a printed page. It certainly has not been shown to the court that there was "prejudice, bias, passion or mistake."

Jannell v. *Myers,* 124 Me. 229. The motion for a new trial must be overruled.

EXCEPTIONS

The first complaint in the defendant's bill of exceptions is that the plaintiff, while offering proof of his claim that $600 a year was a fair amount to charge for the water from his well, was permitted under objection to tell a conversation between Mr. Draper, the president of defendant corporation, and a Mrs. Morris who carried on a hotel. Mrs. Morris was obtaining her water supply from the same well and apparently was not getting a sufficient amount. The record is as follows:

> "Mr. Draper said he wasn't going to be without water whether she was or not, and she wanted to put the pipe down in the well deeper, and he told her on the wharf, he said 'You can put the pipe in the well two inches more for a thousand dollars' and she said: 'Well, I only want it for four more weeks.' 'Well,' he says: 'That is the price if you want it.' So if he was going to charge her a thousand dollars for four weeks I thought $600 for twelve months was a fair price, and I could have got $300 from her — (objected to) — for four months."
>
> The court: "That may be stricken out, and the jury will disregard it."

Later the attorney for the defendant asked the plaintiff on cross examination:

Q. "You charge on a yearly basis of $600 a year for the use of that water. What is your basis for it?"

A. "Mrs. Morris would give me $300 for four months a year."

The defendant's attorney having asked the question then objected to the answer without giving a reason for his objection and not requesting it to be stricken from the record.

The bill of exceptions further complains that when the defendant attempted to show in defense, the cost of digging a new well in another place at a later time, the evidence of the cost of the new well was excluded. It is also a complaint that the defendant's witness, Milton M. Griffin, who owned a well on Spruce Head Island, several miles distant, and who sells water from his well, was not permitted to testify for the defendant as to fair market value of water from his (Griffin's) well, or what he (Griffin) charged his customers.

The matter then under consideration was the fair value at Tenant's Harbor of the water furnished by the plaintiff from his well to the defendant corporation. The fact that the president of the corporation, with full authority to act, may have stated the price to reset a pipe, might be some evidence for the jury to consider as to value. The last and argumentative portion of the plaintiff's answer was stricken and the jury instructed not to consider it, although defendant's attorney asked in cross examination for it later, and then objected to the answer. The charge of the presiding justice removed any improper effect of these admissions and exclusions by correctly stating the law of damages.

Relevancy and materiality are dependent on probative value. Any evidence tending to prove a matter in issue is admissible within the judicial discretion of the presiding justice, unless it is excluded by some rule or principle of law. Rules of evidence are usually rules of exclusion, and evidence is often admitted by the trial court, not because it is shown to be competent, but because it is not shown to be incompetent. *McCully* v. *Bessey,* 142 Me. 209; 49 Atl. (2nd) 230. This evidence, if true, was not of an unaccepted offer of sale or purchase of an article, as in *Norton* v. *Willis,* 73 Me. 580 cited by defendant, but related to the price the defendant fixed to "put the pipe in the well two inches more." As said in the *Willis* case, "something must be left to the judgment and discretion of the presiding justice."

The only reason for objection stated by the defendant's attorney was, "I don't see the relation of this." If he had other reasons for objection he should have then stated them. *Booth* v. *Hurricane Island Granite Co.*, 115 Me. 89, 93; *Brown* v. *McCaffrey*, 143 Me. 221; 60 Atl. (2nd) 792.

We fail to see error on the part of the trial court in admitting the alleged conversation of the president of the corporation for what it might be worth for the jury's consideration. We do not see error in failing to strike out the responsive answer of the plaintiff to the defendant attorney's question to give "basis for it," when the record shows no request to strike. The cost of digging another well in another place was not improperly excluded. It was also within the judicial discretion of the trial judge to exclude the price asked for, or the market value, or water from a witness' well in another location and under different conditions. In fact, we find no abuse of the judicial discretion of the trial court in admitting or excluding any of the testimony quoted in the defendant's bill of exceptions.

Exceptions overruled.

Motion for new trial overruled.

AARON LEVINE

vs.

SANFORD REYNOLDS

Kennebec. Opinion, February 2, 1949.

PER CURIAM.

This is an action on the case for money had and received by the defendant for the use of the plaintiff. The jury returned a verdict for the plaintiff in the sum of $351.00. It is now before the Law Court on defendant's motion for a new trial, because he alleges it is against the law and the charge of the justice, and against the weight of the evidence. No exceptions were taken to the charge of the presiding justice and no special instructions were requested by defendant.

This is the second time that this case has been before this court, brought after the first trial upon defendant's motion for a new trial and upon exceptions taken by the defendant to portions of the charge of the presiding justice and the refusal to give certain instructions requested by the defendant. The exceptions were sustained and the verdict set aside and a new trial granted, 143 Me. 16; 54 A. (2nd) 514. The sole issue in the second trial was on questions of fact.

The evidence was conflicting. 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 result, the conclusion reached by the jury will not be reversed, unless the preponderance against the verdict is such as to amount to moral certainty that the jury erred." *Cayford* v. *Wilbur*,

86 Me. 414. The burden of showing that the verdict is wrong is on the defendant. *Harvey* v. *Donnell,* 107 Me. 541.

This burden the defendant has failed to sustain.

Motion overruled.

Judgment affirmed.

F. Harold Dubord,
Richard J. Dubord, for plaintiff.

Harvey D. Eaton, for defendant.

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

STATE OF MAINE

vs.

KENNETH W. FRAIZER, JR.

Waldo. Opinion, February 23, 1949.

PER CURIAM.

In this case, the respondent having been indicted in the Superior Court for Waldo County for violation of R. S., Chap. 118, Sec. 2, filed a motion to quash the indictment alleging that the offense there charged was not punishable "by imprisonment for life or for any term of years," and being a minor child under the age of seventeen years the Waldo County Municipal Court, as a juvenile court, had exclusive, original jurisdiction to hear and determine prosecutions therefor as provided in R. S., Chap. 133, Sec. 2, as amended by P. L., 1947, Chap. 334, Sec. 1. The case comes forward on Report.

The indictment sufficiently charged the violation of the following provision contained in Sec. 2 of Chap. 118, *supra:*

> "Whoever wilfully and maliciously sets fire to any meeting-house, court-house, jail, town house, college, academy or other building erected for public use, or to any store, shop, office, barn, or stable of his wife or another within the curtilage of a dwelling-house, so that such dwelling-house is thereby endangered, and such public or other building is thereby burned in the night-time, shall be punished by imprisonment for any term of years;"

The offense with which he was charged being punishable by imprisonment for any term of years, was indictable and the Superior Court had jurisdiction to hear and try the respondent on the indictment.

Therefore, in accordance with the terms of the report the motion to quash is overruled and the case remanded to the Superior Court, the defendant to plead to said indictment and the case to be there tried or otherwise disposed of.

So ordered.

Hillard H. Buzzell, County Attorney for County of Waldo, for State of Maine.

H. C. Buzzell, for respondent.

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

WALTER H. FLANDERS

vs.

GRACE A. SMITH

Androscoggin. Opinion, June 13, 1949.

PER CURIAM.

The plaintiff in this action seeks to recover for damage to his truck and for personal injuries occasioned by the defendant's alleged negligence in so operating her automobile on a public highway that it collided with the plaintiff's truck. The case was tried before a jury. At the close of the evidence the defendant moved for a directed verdict. The motion was denied and the jury returned a verdict for the plaintiff. The case is before us on exceptions to the denial of the motion.

The accident happened in midwinter on a slippery road which had been plowed to a twelve-foot width with a snowbank on each side. The plaintiff with his truck was engaged in extricating an automobile which had become stuck in the snowbank on one side. He was standing in the rear of the truck pushing it while it was being operated by another with a towline fastened to the stalled automobile. At this juncture the defendant appeared and collided with the truck throwing it backward against the plaintiff who was injured. It is not altogether clear just where the plaintiff's truck was located with respect to the middle of the plowed portion of the highway. Apparently with careful driving the defendant could have passed in safety. But, in the view which we take of the case, it makes no difference. The defendant came over the brow of a hill fifty paces, as testified to by one witness from where the plaintiff's truck was work-

ing, by actual measurement approximately one hundred and seventy-five feet, and struck the plaintiff's truck.

By no possibility can we hold that as a matter of law the plaintiff was negligent in failing to warn the operator of a car approaching from over the hill that there was an obstruction in the road at least one hundred and fifty feet beyond, nor as a matter of law was the plaintiff negligent in any other respect. Furthermore it was clearly a question for the jury whether the defendant was negligent.

Exceptions overruled.

Benjamin L. Berman and David V. Berman, for plaintiff.

Robinson, Richardson, and Leddy, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, AND WILLIAMSON, JJ.

STATE OF MAINE

vs.

CARMINE CARTONIO

Cumberland. Opinion, September 27, 1949.

PER CURIAM.

This case comes before the Law Court on appeal, after verdict of guilty and after denial of motion to the presiding justice for a new trial. There were no exceptions.

The indictment found at the Superior Court for Cumberland County at the September Term, 1948, alleges that the respondent, Carmine Cartonio, "on the second day of September, A. D. 1947, at said Portland, being then and there more than eighteen years of age, did feloniously and unlawfully have carnal knowledge of the body of one Rose Marie Guidi, she, the said Rose Marie Guidi, being then and there an unmarried female child between the ages of fourteen and sixteen years."

The respondent was tried on this indictment, and the jury returned a verdict of guilty.

The evidence indicates that the unmarried female child was between the ages of fourteen and sixteen years, and that the respondent was more than eighteen. The respondent testified in denial of guilt; but the testimony of the complainant, and the surrounding circumstances, are capable of standing the test of probability and reasonableness to be applied by the jury under proper instructions.

After careful study, the court is of the opinion that the jury was warranted in finding the respondent guilty beyond a reasonable doubt. *State* v. *Merry,* 136 Me. 243, 262; 8

Atl. (2nd) 143; *State* v. *Hudon,* 142 Me. 337; 52 Atl. (2nd) 520; *State* v. *Manchester,* 142 Me. 163; 48 Atl. (2nd) 626.

Appeal dismissed.

Judgment for the State.

Daniel C. McDonald, for State of Maine.
Arthur Chapman, Jr.

Walter M. Tapley, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ.

WILLIAM E. BUZZELL

vs.

ABRAHAM KRASKER

Cumberland. Opinion, November 17, 1949.

PER CURIAM.

This is an action on the case to recover damages for personal injuries and property damage resulting, as the plaintiff alleges, from an upset of the plaintiff's car caused by the sudden application of brakes when the road was found to be blocked by the parked, unlighted beach wagon of the defendant, and the two vehicles immediately preceding the plaintiff, which were thereby caused to occupy the road to the immediate left and right of the parked, unlighted beach wagon. Exception was taken to the direction of a verdict for the defendant.

The evidence and the reasonable inferences to be drawn therefrom disclose the following situation.

The automobiles involved in the accident were proceeding at night southerly on the south-bound traffic lane of the Maine Turnpike. The lane has a tarred surface about twenty-four feet in width, with a raised embankment or grass plot, separating the south- and north-bound traffic lanes, on the east, and with a gravelled shoulder six or eight feet in width on the west. The Turnpike at the scene of the accident is level and straight for a mile northerly.

The defendant, operating a beach wagon seventeen feet in length, struck a deer and brought his car to a stop, headed westerly and across the tarred surface.

The witnesses Craig, Carson and the plaintiff, engaged in delivery of used cars at a market in Massachusetts, left Portland together and were proceeding in line, each operating a car to which was attached a second car by means of a three-foot towbar. Their speed was variously stated to be between forty-five and fifty miles per hour. The space between the units of two cars was approximately one hundred feet.

The leader, Craig, first saw the beach wagon one hundred to one hundred and fifty feet distant. He applied his brakes, reduced his speed, turned left, and with the towed car swaying and striking the edge of the grass plot, passed to the rear of the beach wagon.

Carson, second in line, travelling one hundred feet behind Craig, saw the towed car sway and turn left. On seeing the beach wagon sixty feet distant, he turned sharply to the right, and passed in front of the beach wagon.

The plaintiff, third in line, travelling one hundred feet behind Carson, first saw the defendant's car sixty to one hundred feet distant. He tells how the accident happened.

"A. Well, I was following Mr. Craig and Mr. Carson, and Mr. Craig took a sharp left and Mr. Carson took a right; and I come onto a beach wagon parked crossways of the road which, as I see it, whole road was blocked when I see it; and my first thought was to try to stop so I shoved the brakes on hard to stop and rolled over."

- - - - - -

"Q. Now, did you see the brake lights of either the car that Mr. Craig was driving or Mr. Carson was driving go on before the accident?

"A. No. I wouldn't be able to see the brake lights because they are on the forward car.

"Q. On the forward car?

"A. That's right.

"Q. What lights were running?

"A. Just his running lights. Tail lights were on on each car he was towbarring."

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"Q. How fast do you say you were going?

"A. Between 45 and 50 miles an hour.

"Q. As you were going along you saw one ahead of you turn to the right and one turn to the left?

"A. That's right.

"Q. You put your brakes on, tipped your car over?

"A. Tipped both cars over.

"Q. How do you account for it?

"A. How do I account for it? Well, I had to stop and avoid hitting the beach wagon.

"Q. How do you account for your car tipping over?

"A. I had to stop so sudden to keep from hitting the beach wagon, that's why I rolled over. Back car jackknifed and turned me over."

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The evidence and the inferences reasonably to be drawn therefrom, taken most favorably for the plaintiff, clearly and sharply disclose that plaintiff's own negligence contributed to the accident, if indeed it was not the sole cause.

Plaintiff was driving at night at a high rate of speed in a line, with only a short distance between cars. He was aware that no warning of lessening speed could reach him from the brake lights of the cars in line ahead. He knew, or should have known, that in the event of a sudden stop there was present a risk of damage from the "jackknifing" of his towed car. Of greatest importance he either did not, or, it is more likely, could not see the road ahead beyond the rear of Carson's towed car.

As the plaintiff proceeded along the Turnpike, he blindly relied upon the leaders in line to guide his speed and course. In substance, he now complains that he was led by them into a place of danger. Such reliance, under such conditions, is not due care.

The plaintiff does not come within the description of the ordinarily prudent man under the circumstances.

A verdict for the plaintiff would have been manifestly wrong. *Spang* v. *Cote et al.*, decided by the court October 15, 1949. The presiding justice properly directed a verdict for the defendant.

In view of plaintiff's lack of due care, it is not necessary that we comment upon the asserted negligence of the defendant.

The entry will be

Exceptions Overruled.

Robert A. Wilson,
I. Edward Cohen, for plaintiff.

William B. Mahoney, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ.

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE SUPREME JUDICIAL COURT SITTING AS A LAW COURT ON DECEMBER 14, 1948, AT AUGUSTA

IN MEMORY OF HONORABLE JAMES H. HUDSON

Late Associate Justice of the Supreme Judicial Court

Born, March 21, 1878 Died, August 21, 1947

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

Honorable Ernest L. Goodspeed, Vice President of the Kennebec Bar Association, opened the Exercises with the following remarks:

May it please this Honorable Court:

We are met here today to pay tribute to the memory of a beloved former Justice of this Court. Although never a legal resident of Kennebec County, Judge Hudson practically lived with us during the fourteen years that he had his office in this Court House as a member of this Court, and for many years he was considered in the nature of an honorary member of Kennebec Bar Association. During that period of intimate association with him, we all came to love and respect him for those rare qualities of heart and mind which distinguished him not only as a patient, conscientious, wise and just judge, but also as a sympathetic friend and counsellor.

For this reason Kennebec Bar desires to offer to this court resolutions expressive of its appreciation, love and respect for this truly great judge, and its keen sense of loss at his passing, and I call upon Honorable Carroll N. Perkins, who will present the same in behalf of the committee and speak for the Kennebec Bar Association.

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Honorable Carroll N. Perkins thereupon spoke for and presented the resolutions of the Kennebec Bar Association:

May it please this Honorable Court:

My brothers of the Kennebec Bar have entrusted to me the duty of making formal announcement to this court of the death of one of its justices, Honorable James Henry Hudson.

James Henry Hudson was born in Guilford, Maine, on March 21, 1878. His father, Henry Hudson, Jr. and his grandfather, Henry Hudson, were both lawyers and prominent in their profession. He was educated in the schools of Guilford and graduated from Coburn Classical Institute in 1896. He attended Colby College from which he was graduated with the degree of A.B. in 1900. His activities at the college had been varied. He was an outstanding third baseman and heavy hitter on the Varsity baseball team; a prominent member on the debating team and president of the Glee Club. He was a member of Delta Kappa Epsilon and elected to the honorary fraternity of Phi Beta Kappa.

He received his legal education at Harvard Law School where he proved to be a superior scholar and from which he received the degree of LL.B. in 1903. On September 15 of that year he was admitted as a member of the Piscataquis County Bar. Immediately upon his admission to the bar he formed a law partnership with his father, Henry

Hudson, Jr. which partnership continued until the latter's death in 1927. Thereafter he continued to practice with his son-in-law, John Powers White as an associate, until his appointment to the Superior Court by Governor William Tudor Gardiner. He assumed office as a Justice of the Superior Court on January 1, 1930.

The years between 1903 and 1930 had been busy ones. In the earlier years he served the town of Guilford as Town Agent. He became a member of the School Board, and for three years was Chairman of the Board of Selectmen. He was a member, and Past President, of the Guilford Board of Trade and Chamber of Commerce. For years a valued and active member of the Methodist Church, he served as chairman of its Board of Trustees.

His practice was an active one. For three terms he was elected County Attorney for the County of Piscataquis and was appointed to fill a vacancy in that office for a part of a fourth term. He was Judge of Probate for Piscataquis for one term. He served for several years as a member of the Board of Trustees of Colby College and was honored by that institution which in 1932 conferred on him the degree of LL.D.

He was instrumental in organizing the Piscataquis Valley Country Club and was chosen as its first president. He was a trustee of the Guilford Trust Company for many years and up to the time of his death. He was a member of the Knights of Pythias, the Masons and was a Knight Templar. For several years he served as a member of the State Board of Legal Examiners. He was a member of the Piscataquis Bar Association and the Maine State Bar Association and in the latter served on the Executive Committee.

Judge Hudson at the time of his appointment to the Superior Court was admirably qualified to perform his duties, by education, experience and, perhaps most important, by

temperament. His years of active and varied experience as trial attorney had equipped him to prove a most competent judge. He was patient, kindly and tolerant with the mistakes made by less experienced attorneys who practiced before him. His office was always open to the young attorneys who needed counsel and his genuine friendliness and desire to be of assistance encouraged them to seek his counsel.

It was a pleasure to try a case before him. He was impartial. His rulings were clear and easily understood and his charges were of a character to be of real assistance to a jury in understanding the law involved and the issues before them for determination.

The lawyers who tried before him, while they rejoiced in his promotion, nevertheless felt his loss when, after serving as a Justice of the Superior Court for a little less than four years, on November 20, 1933, he was appointed by Governor Brann as a Justice of the Supreme Judicial Court, an office which he held up to the time of his death on August 21, 1947 at Augusta, Maine.

To the Supreme Judicial Court he brought the splendid equipment which I have before detailed and here, as in every position of trust which he had held, he brought a tremendous capacity for work, and industry which taxed that capacity. At about the time of his appointment an unusual burden had been placed upon the members of our Court through the closing of many banks and receiverships of those, which, in some cases, went on for a decade or more. Many complications arising from these not infrequently required the blazing of new trails. It was not at all unusual to find the light in Judge Hudson's office burning well into the night. No claim was too trivial to demand a thorough research. On account of the great pressure of work during several years it was necessary for Judge Hudson to maintain his headquarters at Augusta. He came to seem like one of them to the members of the Kennebec Bar. He was

always a friendly man — to know him was to love him. He had and retained a lively sense of humor and I can see him now as he laughed heartily while reciting some of his early experiences as a campaign speaker.

His family life was ideal. His widow, Mary M. Hudson, was always his pal and a co-worker with him. He is survived by her and by a daughter, Charlotte Frances (Mrs. John Powers White) and three grandchildren, Mary, now a student at Colby, James Hudson White and Betsey Louise White, both attending Guilford schools. It was a red letter day when his daughter and some of the grandchildren stopped at Augusta for a brief visit and he took real grandfather's pride in their doings.

During the last two years of his life his health began to fail and while warned by his physician, it was hard for him to fail to do the things that he felt should be done. The thought that by his failure to do his full share of the work he was imposing on the other members of the court continued to press him despite their repeated assurance that they were delighted to help him as he had helped them in the past. Nearly until the end he continued to go to his office and perform such work as his strength would allow and he continued his interest in the affairs of the court, state and nation. The end came suddenly and although we had been apprehensive for months the shock of our loss was still great. He was buried in the cemetery on a hilltop in his native town of Guilford on a beautiful summer afternoon. Although we may not see him again, his influence for the carrying out of what seems just and right, through his example and teachings to the many with whom he had contact will go on from generation to generation.

I am instructed to present these resolutions and to move that they be made a part of the permanent records of this court:

RESOLUTIONS

RESOLVED, that in the death of JAMES H. HUDSON, Associate Justice of the Supreme Judicial Court of Maine there has gone from us a Christian gentleman, a splendid citizen, a friend, loyal, staunch, and true, a man who in his individual, family, and civic life has left an impress for good that will long endure,—a dignified and learned judge, just, upright, and impartial, who, with probity, courage, and conscience so performed his duties on the bench as to preserve the dignity of our courts and the sanctity of justice.

RESOLVED, that we rejoice that he lived and wrought and left behind him the memory of a character worthy of all emulation; that in his passing we recognize an irreparable loss to the Bench and Bar and citizenship of Maine; that though he has departed from fireside and from forum he still lives in the hearts of his many friends who will cherish his friendship, his character, and his memory as a rich and abiding heritage.

RESOLVED, that these resolutions be presented to the Court with the request that they may be entered upon its permanent records, and that a copy thereof be sent to his widow in token of our respect and sympathy.

CARROLL N. PERKINS
HARVEY D. EATON
JOHN E. NELSON
HERBERT E. FOSTER
ARTHUR TIFFIN
Committee on Resolutions

Honorable Stacy C. Lanpher for the Piscataquis Bar Association then paid the following tribute to the memory of Judge Hudson:

May it please the Court:

The members of the Piscataquis Bar heartily endorse all that has been said here concerning Justice Hudson's life, character, and accomplishments, and join in expressing their respect and admiration for his life and services as a citizen, an attorney and as a distinguished Justice of the Superior and Supreme Judicial Courts of this State, and in sincerely mourning his passing.

In Piscataquis County we knew him as a young man, as a student and athlete in school and college, as a professional student eager and ambitious to emulate his distinguished ancestors in the practice of his profession, and later as a young lawyer appearing in court with his father, the late Henry Hudson, Jr.

In his professional life he paid close attention to business and his practice afforded an ample field for active and remunerative mental exercise. The companionship of friends of congenial tastes and sympathies gave him opportunity for the enjoyment of those literary and social recreations which add such a charm to our daily life. Quiet enjoyment of home and family filled the measure of content in a life so much in unison with his warm and genial nature.

In court in the trial of causes, he was always prepared and had a complete grasp of the facts and applying law. He had marked success in winning verdicts and with brilliant eloquence as an advocate he achieved many triumphs and soon established his position as an able and accomplished orator and lawyer.

He held many public offices of trust and importance, notably as selectman of his town, as County Attorney for several years and as Judge of Probate, in all of which, strict

fidelity and devotion to duty determined all his judgments and acts.

Called into the field of politics as a speaker, his rare candor and sincerity, rapid, vigorous and eloquent speech made him a powerful advocate of the principles he espoused, and everywhere he met with cordial and enthusiastic reception.

As a jurist we knew him as kind, courteous, helpful, sound and impartial, more interested in the accomplishment of substantial justice than in meticulous technicalities. His conspicuous contribution to the exposition and development of the law in Maine is on perpetual record in the decisions and reports of this court.

He loved nature and out of doors sports and liked to seek recreation and inspiration in hunting and fishing. For many consecutive seasons some of us were members of a hunting party, known locally as the "Official Hunting Party" in which he was a leading spirit, and on those occasions in the woods and in the camp, he was always a cheerful and altogether a delightful companion and friend.

Another aspect of Judge Hudson's character is perhaps not so well known. In a corner of his barn at his Guilford home, he had fixed up a small room which served him as a modest retreat. In it was a stove, one or two of his comfortable old chairs, some of his best loved books, and hither he would occasionally take his favorite pipe and slippers and relax—forgetting the affairs of a troublous world, and seek peace in solitary reading and reflection, or pass a pleasant evening in reminiscence with one or more of his closer friends.

So we remember him, as a student, a lawyer, a public official, a Justice and as a friend.

At a meeting of the Maine State Bar Association held on January 11, 1939, Justice Hudson delivered a most stimulating and thought-provoking address. He directed his con-

cluding remarks especially to the younger members of the Bar. These remarks so aptly epitomize his professional and personal philosophy that it seems particularly apt that they be quoted here. During the preceding Christmas season, he had received from the author a poem written by Ina Ladd Brown, one time resident of Piscataquis County, former clerk in the office of the Clerk of Courts, later secretary to the late Chief Justice Dunn, and whose mother was a friend and schoolmate of Judge Hudson. The poem is entitled, "A Young Lawyer's Prayer," and the Judge read it.

"I want success, oh Lord, and fame,—and wealth,
If that be possible to gain;
I'll prize position in the higher ranks
If such I may in time attain.

I'll strive to uphold justice; honest cause
I'll fight with fervor to the end.
I'll try to do so fairly and with pride;
I want respect of foe and friend.

But, most of all, dear Lord, I want to live
So I can face myself and see
No shame or self-reproach to mock the way
I do the work that comes to me.

And may I not become a dullard but
A saving sense of humor keep;
May I have zest for life, and appetite
For simple joys and restful sleep.

And when my work is over, let the words
That at the journey's close they say
Be brief—just these: 'He was a man, a friend,
Whose spirit lives beyond the day.' "

Then he said "To me the profession of the Law stands at the top. Son, grandson, and great-grandson of men who

practiced law, it is only natural that I should be of that opinion. Today, more than ever, just law and its faithful observance are essential to the continued existence of our state and nation. Without either, government will fail. Heavy is the public as well as the private responsibility of every attorney.

For you lawyers—old, middle-aged, and young—as we start this New Year, my fondest wish is that always you give without stint of the best in you for the general welfare of your fellow citizen and that in your private practice you may always prevail when you stand for the right and never, when for the wrong.

When your life's work is done, may it be truthfully said of each and every one of you, 'He was a man, a friend, whose spirit lives beyond the day.' "

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Honorable Leonard A. Pierce, representing the Maine State Bar Association, was the next speaker and said:

May it please the Court:

To be chosen from the friends of Justice Hudson in all the sixteen counties of Maine to represent the State Bar Association on the occasion of these Exercises is an honor of which I am deeply sensible. I am grateful to the officers of the Association for their designation.

On the occasion of Justice Hudson's first term as a Superior Court Justice in Cumberland County, I happened to be among the speakers at the dinner tendered him by that Bar Association. I then said that I did not know any member of the Maine Bar more ideally fitted to perform the duties of the important position to which he had recently been appointed than their guest of honor that evening. From personal association, which had then extended for many years, I knew that my estimate of the man and the manner

in which he would fill important judicial office was entirely warranted. His whole career on the Bench, both of the Superior and of this, our Highest Court, has so proved.

By chance I recently came across a quotation which is very apt today. A wise man said, "Fill the seats of justice with good men, but not so absolute in goodness as to forget what human frailty is." Although no instance or characteristic can be found wherein Justice Hudson was not "absolute in goodness," nevertheless never once did he "forget what human frailty is." An outstanding characteristic of his whole life was the broad humanity which characterized every instance of his judicial career and his every act or thought. While no man could have set for himself higher personal standards, no man was more tolerant in appraising the character or conduct of others whose standards might not have been as high as his, no man more kindly in his judgments.

On the personal side: while he was in no respect of the type known as "Hail fellow, well met," yet, as a companion with whom to spend an evening no one contributed more to the pleasure of others. Mr. Justice Manser of this court and Mr. Perkins, who has spoken for the Kennebec Bar today, will, as well as I, recall so long as we live and as among the most pleasant of our lives the evenings spent with him when we were on the Board of Bar Examiners together and when our discussions after dinner covered every type of subject, professional, personal or political. We have envied the members of this court because of their opportunities for frequent personal contact with him.

The Justice who responds for the Court can, far better than I, speak of the addition which Justice Hudson has made to the progress of judicial decisions in our State. Speaking, however, for those whose contact with the court has been that of practitioners before it rather than as members, a characteristic of his which has impressed all of us who have had occasion to participate in hearings before him as a

single justice, or argued cases before him in the Law Court, was his keen sense of practical justice. His reasoning was not confined within an ivory tower, dealing with the mythical A, B and C found in supposititious cases in law school lectures; not once did he forget that a decision by the court adjudicates finally, and often vitally, the rights of real, living people. Always he was mindful that the function of his public office was epitomized in the title borne on his commission. He was a *Justice* of the Supreme Judicial Court of Maine. His duty was to see that *justice* was accomplished. While he was too sound a lawyer not to be mindful of the maxim that "hard cases make bad law," he applied that maxim practically and humanly with the realization that law is not static but fluid, though within defined channels, and that the basic design and purpose of every rule of law is that fairness and equity may prevail between citizen and citizen and between citizen and State.

On a beautiful day in August a year ago, all the Bench and many of the Bar gathered from all over the State to join those from his own town and county in paying our last respects not merely to a judge whom we honored because of the high office which he held but to a man whom we loved because of what he was. None of us will admit that on that day the influence of his life, kindly and beneficent upon all of us, had come to an end. On the contrary, we are confident that it will be felt throughout the State for many years to come.

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Honorable Robert B. Williamson, Justice of the Superior Court, for that Court, then spoke as follows:

May it please the Court:

It is my high privilege to take part in these proceedings as a representative of the Superior Court. I am fully aware that there are others of my colleagues who could better describe the character and attainments of our late beloved

judge. There is, however, no task that I more willingly undertake than to share in expressions of tribute and affection to him.

No man whose way of life touched Judge Hudson's ever so slightly could speak at exercises such as these on the cold record of an honorable career. No such man could fail to make clear by his manner and his feelings, however, inadequate his words, the deep and lasting effect upon him of his contact with the Judge.

Judge Hudson was among the original members of the new Superior Court. With the four justices of the county courts and two colleagues drawn from the bar, he shared in its establishment in 1930. It seems to me that these seven men had a more difficult task than have their successors. They were in a real sense pioneers. The success or failure of the plan depended in large measure upon the efficiency of their work and their ability to establish the new court in the confidence of the Bar and of the public.

The Judge—may I call him simply "Judge," for that is how he was addressed, brought to the Bench the rich experience of a long and general practice of the law. He was well armed with integrity, loyalty and a high sense of obligation of duty to be performed cheerfully and well, and with devotion to service. He came marked as a leader in his profession and in his community and County and State.

It would not be appropriate for me to comment in detail on his work upon the appellate bench. I have, however, noted that his first opinion of *State* v. *Rand and Henry* is dated January, 1934, hardly six weeks from the time he became a member of the Court. His last opinion, *Preston* v. *Reed,* involving a difficult point in the law of divorce, was filed in December, 1946. In over 100 opinions he covered the field of law. I find but one dissent—*State* v. *Old Tavern Farm, Inc.* in 1935—in which he argued for the constitutionality of a statute.

The written record in eleven volumes of Maine Reports will bear testimony, not of the forgotten past, but of the living law, to generations to come in the State he loved and served so well.

No statement, however brief, of his judicial record would be complete without mention of his continued activity in equity and bank receiverships and reference cases and all the other problems which come before a judge. His close attention, general kindliness and reasoned judgments will long be remembered by practitioner and litigant.

But I must speak of the man I knew, not of his record—I cannot do otherwise.

The background of a witness is necessary to a full understanding of his testimony. It is no less helpful in measuring the meaning of a speaker here today. You will therefore forgive me for the personal note.

I have been singularly fortunate in having had the friendship and confidence—on far more than a professional basis—of four members of this Honorable Court. Their portraits are on the walls of this courtroom. I could tell of the kindly and valuable interest Judge Bassett and Judge Farrington had in me; of the encouragement so freely given by Judge Pattangall.

And so it has been with Judge Hudson.

In his chambers and on the bench and outside of the courthouse, he was an inspiration to the Bar, and deeply so to the younger attorneys. That he was learned in the law goes without saying. His technical equipment was superb, and we of the Bar, even the younger men, quickly recognized his ability.

Judges are not merely technicians—they are, or should be, men of warmth and understanding, men who measure to the high demands of justice, men of compassion and sympathy, men who probe the depths to find the truth, who are

steeped in traditions of their ancient office, and yet understand and make justice part of the present world.

Judge Hudson was such a judge and such a man. There is no member of our Kennebec Bar from the year he became our Judge, who did not feel the comforting pressure of his personality and who did not leave his presence with a firmer pride that he, the lawyer, was a member of such an honorable profession.

The Judge worked long hours. Decision did not come by intuition, but after study and consideration. He taught us—nearly a generation of the younger members of the Bar —to do, or try to do, our work well. We are a better and a stronger Bar because of his life among us.

His friendly word, his quiet humor, his calmness, his consideration, and his judicial manner are a part of the life of our Bar and our community no less than in his native Piscataquis.

I could not turn from speaking of Judge Hudson in the years I practiced before him, without speaking of the nearly two years when I occupied the chambers next to his. At the outset, he offered help and assistance—not, he was careful to say, in deciding cases—but there are problems apart from decision for a Superior Court Judge. How many pleasant and valuable hours I spent with him, and how many days I saw him, tired and exhausted, manfully force his mind and body to his work.

In the dark of an afternoon before Christmas in 1946, he came into the library to speak with me. There were the usual cheerful greetings of the season. And then he gave me words of help and encouragement, words which made me then see how worthwhile was the work in which he, and I too in a more humble capacity, were then engaged.

It was, I knew, an effort, a very real effort, an exhausting effort, for him to come to where I was studying and to

speak with me. I would cherish his memory for this, if nothing more.

It is not in the belief that his influence upon me is of importance, but to illustrate by what he did for me—and he touched many others as he touched me—that I have so spoken. I speak for each and every one of the many, so many, men of younger years whose lives have been enriched by him, and by whom and by whose children Judge Hudson will be forever held in deep affection and high honor.

Are not the lines of John Bunyan applicable to his life?

"Who would true valour see
Let him come hither,
One here will constant be,
Come Wind, come Weather."

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Chief Justice Guy H. Sturgis responded for the Supreme Judicial Court:

Members of Piscataquis and Kennebec County Bar:

The Justices of this Court are deeply moved by the resolutions and addresses which have been presented here this afternoon. We rejoice in your expressions of love and respect for Mr. Justice James H. Hudson and your portrayal of his life of achievement, his wonderful character, and his distinguished career, for there lie the thoughts which are in our hearts and amid the deep, rich colors of a true understanding and appreciation of his splendid qualities of heart and mind there is the golden glow of sincere affection. Your gracious tributes to his memory are gratefully received and will be enrolled at length in the records of this court.

While many days since have passed, time has never dimmed the memory of that dark and dreary hour when word came that for him life's journey was at an end and in the Great Beyond he had found eternal rest. Although

we had watched him, weary and worn, with mighty effort and a courage that never failed, struggle to carry on his judicial labors until broken in health his great strength ebbed away, and we knew that the last dread summons could not be long delayed, the tragedy of his sudden passing came as a distinct and grievous shock. To me it was one of the saddest hours of my life for ours had been a glorious friendship which began in the days of our youth and, never marred by rift or discord, grew closer and deeper as the years went by and words cannot adequately express my sorrow. And to all the Justices who sat with him upon this Bench and whose admiration, love and respect for him knew no measure it was the close of a long and happy association enriched, strengthened and made more worthy by his presence, and great was our bereavement.

It was on January 1, 1930, when Judge Hudson began his service on the Superior Court then given state-wide and exclusive jurisdiction of the trial of cases at law and concurrent jurisdiction in equity. Schooled in the arts and sciences and splendidly trained in the law, practicing for many years with his father, Honorable Henry Hudson, one of the best known and most eminent leaders of the Bar of that time, County Attorney and Judge of Probate for Piscataquis County, of long experience and unusual skill in the trial of cases both civil and criminal and a wise counsellor renowned for his learning, his wisdom and above all his absolute integrity, he had become one of the most successful lawyers of Northern Maine and he brought to that Bench a capacity and a fitness for judicial service rarely equalled and never excelled. He presided with a calm and serious dignity which commanded respect. He was always courteous, considerate and impartial. His charges to the jury were clear and comprehensive and his rulings accurate and in them legal error was indeed rare. In equity his inherent and abiding sense of right and wrong and of what was fair and just were the dictates of his conscience, his findings and his decrees. Great was his contribution to the establish-

ment of the new Superior Court and to the attainment of the respect and confidence which it now enjoys throughout the length and breadth of this State.

On November 20, 1933, Judge Hudson was appointed an Associate Justice of the Supreme Judicial Court of the State of Maine by Governor Louis J. Brann. He was reappointed November 20, 1940, by Governor Lewis O. Barrows. He died on August 21, 1947, in his 69th year and after having served just a few months short of fourteen years upon this Bench. Although his home was always at Guilford and he was named as a resident Justice of Piscataquis County, his appointment came just after those trying days when the banks throughout the State were closed and he was immediately called to Augusta to assist in the administration of their liquidation and relieve the overwhelming burden which had fallen upon that Court. Within two years he was the only Justice of Supreme Judicial Court remaining at Augusta and was exercising sole jurisdiction in these and other pending proceedings in equity and his temporary assignment having been made permanent there he spent the remaining years of his life. Years of unremitting toil and filled with cares and responsibilities of a magnitude too few realize and appreciate. Years of devoted and faithful service unsurpassed in the excellence of its performance and its accomplishments. Years which brought him honor and renown without compass but by their demands overtaxed his strength, impaired his health and hastened the day of his untimely death. His service was outstanding and his sacrifice supreme.

Judge Hudson's work on the Law Court was of the same high order. There his great learning, the abundance of his experience and his sound judgment inspired confidence among his associates and his reasoning and counsel usually carried conviction and always received careful attention and consideration. Never a theorist but always practical, in the law as long recognized and established he found safe

guidance for his judicial concepts and conclusions and for him ideologies had no charm and the substitution of a legal philosophy for legal principles, as of some schools of thought, was never to be tolerated. In his opinions his review of the facts and statement of the law reflected careful and exhaustive study, deep thought and mature deliberation and written in clear, simple and apt language were always logical and sound, and models of composition. His first opinion, *State* v. *Rand and Henry,* 132 Me. 246, was issued on January 4, 1934, less than two months after he came upon this Bench. His last opinion, *Preston* v. *Reed,* 142 Me. 275; 50 A. (2nd) 95, bears date of December 6, 1946, and marks the end of his active service on the Law Court. His written opinions, 108 in number and appearing in eleven volumes of the Maine Reports, are most valuable contributions to the jurisprudence of this State and enduring memorials of his distinguished judicial career.

I am confident that were Judge Hudson here today he would tell us that the years which he spent upon the courts were among the happiest of his life, filled with that contentment which comes to him who is devoted to the calling in which he is engaged, is privileged to live and work with those for whom he has great affection and are his friends, and knows that by the excellence of his service he has gained the confidence, the esteem and the respect of all people and a high and honored place on the rolls of judicial history. Judge Hudson will always be remembered as one of the ablest, best loved and most distinguished Justices of the Supreme Judicial and Superior Courts of Maine.

We reverently join with you in paying homage to his memory and as a mark of our esteem and respect this court will now adjourn for the day.

OPINION OF THE JUSTICES

STATE OF MAINE

In the Senate
April 14, 1949

Whereas, a bill has been introduced and is now before the Legislature known as H. P. 2046, L. D. 1481, "An Act Imposing a Personal Income Tax" with a referendum annexed thereto and it is important that the senate be informed as to the constitutionality of that portion of the proposed referendum clause which calls for a special state-wide election to be held on the 2nd Monday in June, 1949, at which time the voters are to act upon the acceptance or rejection of said act, in accordance with the following referendum clause, a part of said act:

Referendum. The aldermen of cities, the selectmen of towns and the assessors of the several plantations of this state are hereby empowered and directed to notify the inhabitants of their respective cities, towns and plantations to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of senators and representatives, at a special state-wide election to be held on the 2nd Monday in June, 1949, to give in their votes upon the acceptance or rejection of the foregoing act, and the question shall be: "Shall an act to provide appropriations for more adequate educational aids to the cities and towns; more adequate provisions for old age assistance, aid to dependent children, board of neglected children; more adequate appropriations for institutional care; continuation of existing state wages; payment by the state of towns' share of the cost of the aid to dependent children program; establishment of a state fire control system,

and certain other services of state government become law together with a 2% individual income tax law to provide revenue necessary to finance these services, as passed by the 94th legislature, be accepted?"

And the legal voters of said cities, towns and plantations shall indicate by a cross or check mark placed within a square upon their ballots their opinion of the same, those in favor of said act voting "Yes" and those opposed to said act voting "No"; and the ballots shall be received, sorted, counted and declared in open ward, town and plantation meetings, and return made to the office of the secretary of state in the same manner as votes for governor and members of the legislature, and the governor and council shall count the same, and if it shall appear that a majority of the legal voters voting on the question are in favor of the act, the governor shall make known the fact by his proclamation and the act shall take effect 90 days after the recess of the 94th legislature in regular session.

And, whereas Section 16 of Article XXXI of the Constitution of Maine provides as follows:

> "Sec. 16. No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency, (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3)

provision for the sale or purchase or renting for more than five years of real estate."

And whereas Section 19 of said Article XXXI provides as follows:

"Sec. 19. Any measure referred to the people and approved by a majority of the votes given thereon shall, unless a later date is specified in said measure, take effect and become a law in thirty days after the governor has made public proclamation of the result of the vote on said measure, which he shall do within ten days after the vote thereon has been canvassed and determined. . . . The legislature may enact measures expressly conditioned upon the people's ratification by a referendum vote."

And whereas the senate desires that the special election to ratify said act be held on the 2nd Monday of June, 1949, which day it is certain would be within ninety days after the recess of the legislature; and

Whereas, the senate is uncertain whether the special election to ratify said act may be held within the ninety days after the recess of the legislature; and

Whereas, the state appropriations for the next biennium and the allotment thereof are dependent upon enactment of the law as soon as it may be legally permissible, and the senate deeming that the questions hereinafter propounded present important questions of law and that the occasion is a solemn one; now, therefore, be it

Ordered, in accordance with the provisions of the Constitution of the State, that the Justices of the Supreme Judicial Court are hereby respectfully requested to give the senate their opinion on the following questions:

(1) Where the legislature enacts a measure expressly conditioned upon the people's ratification by a referendum vote, can the legislature fix the day of holding a special election thereon within ninety days after the legislature recesses?

(2) When the legislature enacts a measure expressly conditioned upon ratification by the people by a referendum vote and orders a special election on such measure, is it governed by any provision as to the time of holding such election as is provided in the 17th and 18th Sections of Article XXXI, or is the time left to the judgment and discretion of the legislature?

In Senate

April 14, 1949

Passed

CHESTER T. WINSLOW,
Secretary of Senate

To the Honorable Senate of the State of Maine:

In obedience to the mandate of Section 3 of Article VI of the Constitution, the undersigned Justices of the Supreme Judicial Court, having considered the question submitted to them by the foregoing Senate Order, respectfully advise that they are individually, and unanimously, of opinion that:

The Legislature has power and authority to enact a law carrying a referendum provision submitting it to the people for ratification by acceptance at a referendum election.

The Legislature has power and authority to fix the day on which such an election shall be held in accordance with its judgment and discretion, which may be within ninety days after the recess of the Legislature, as that term is defined in Section 20 of Part Third of Article IV of the Constitution.

The Constitution carries no provision governing the time

at which such an election shall be held. That time is left to the judgment and discretion of the Legislature.

Dated this 20th day of April, 1949.

Respectfully submitted,

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
NATHANIEL TOMPKINS
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY

A true copy.
Attest:

HAROLD H. MURCHIE
Chief Justice

OPINION OF THE JUSTICES

STATE OF MAINE

In Senate
April 28, 1949

Whereas, there is now pending before the legislature Senate Paper No. 584, Legislative Document No. 1258, "An Act to Create the Waterville Sewerage District," copies of which are herewith submitted and made a part hereof; and

Whereas, questions have been raised regarding the constitutionality of the act which creates a body politic and corporate under the name of Waterville Sewerage District, which is comprised of the territory and people within the limits of the City of Waterville, and the purpose of which act is to take over, control, manage and operate the sewers now owned by the City of Waterville with all the appurtenances thereto, and to extend, enlarge and improve the present system now serving the city, which has proved to be inadequate; and

Whereas, it is provided in said act that the district shall be managed by five commissioners resident therein, who shall be appointed by the mayor of the City of Waterville with the approval of a majority of the city council, two of whom shall be appointed from the minority political party; and

Whereas, the commissioners are authorized to issue the notes and bonds of the district in an amount not exceeding $1,000,000 for accomplishing the purposes of the act, and these are made legal investments for Maine savings banks; and

Whereas, doubt as to the constitutionality of the act would tend to impair the sale and marketability of the notes

and bonds of the district, and it having been represented to the Senate that there is a necessity for the creation of a district to begin immediately the enlargement, extension and improvement of sewerage facilities in said city in the interests of the health and welfare of the inhabitants of said district, and the Senate deeming that the questions hereinafter propounded present important questions of law, that the occasion is a solemn one, and that any doubt as to the power of the legislature to enact this measure should be resolved by the Honorable Justices of the Supreme Judicial Court,

Now, Therefore, Be It Ordered, that in accordance with the provisions of the Constitution of the State the Justices of the Supreme Judicial Court are hereby respectfully requested to give the Senate their opinion on the following question:

1) Would Senate Paper No. 584, Legislative Document No. 1258 entitled "An Act to Create the Waterville Sewerage District," if enacted by the legislature in its present form, be constitutional?

2) Would the provisions of Section 7 thereof providing that the board of five commissioners shall be appointed by the mayor of the City of Waterville with the approval of the majority of the city council, rather than a provision for their election by the inhabitants of the district, affect the constitutionality of said act?

3) Would notes and bonds issued in accordance with and under the authority of Section 8 of said proposed act be valid and legal obligations of the district?

In Senate

April 28, 1949

Passed

CHESTER T. WINSLOW,
Secretary of the Senate

To the Honorable Senate of the State of Maine:

Complying with the provisions of Section 3 of Article VI of the Constitution, the undersigned Justices of the Supreme Judicial Court, having considered the questions submitted to them by the foregoing Senate Order, and the pending legislation to which they relate, incorporated by reference in said Order, respectfully advise that they are individually, and unanimously, of opinion that:

The only question that can be definitely answered is the second. The provisions of Section 7 providing that the board of five commissioners shall be appointed by the mayor of the City of Waterville with the approval of the majority of the city council, rather than a provision for their election by the inhabitants of the district, standing alone, does not affect the constitutionality of the proposed act.

It is not possible to answer the other questions specifically. The constitutionality of a legislative enactment depends not only upon whether the same violates some limitation on legislative power imposed by the constitution, but also whether or not its application to existing rights would violate the constitutional guarantee of those possessing the same. Within the limitation set forth in *Kelley et als.* v. *Brunswick School District et als.*, 134 Me. 414, the legislature may create distinct and separate bodies politic and corporate with identical inhabitants and territory. The identity of inhabitancy and territory existing between the proposed Sewer District and the City of Waterville does not affect the constitutionality of the proposed act; nor is the purpose of the act such that in and of itself it would prevent the creating of the proposed body politic and corporate.

On the other hand the determination of questions dependent upon the application of the provisions of the proposed act to existing vested rights can only be made with full knowledge of all pertinent facts. For example we have

no knowledge of the history and development of the present sewer system in the City of Waterville.

Our statutes relative to sewers are of such ancient origin and the duties of cities and towns with respect thereto are of such nature, that there may be vested rights, which if infringed upon might render action taken under some provisions of the proposed act unconstitutional. Conclusive determination of these questions can only be had upon proper proceedings in the courts where all parties are heard, all facts presented, and judgment pronounced after full hearing.

The constitutionality of the proposed act, and the validity of such notes and bonds as might be issued under authority of Section 8 thereof, depend to such an extent upon the existence of facts beyond our knowledge that further definite answers respecting the same cannot be given.

Dated this 4th day of May, 1949.

Respectfully submitted,

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY

A true copy,

Attest:

HAROLD H. MURCHIE,
Chief Justice

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ASSAULT AND BATTERY

In an assault and battery action, excessive damages awarded by a jury which can be explained only as the result of sympathy or prejudice and an entire disregard of applicable law requires a new trial unless the plaintiff remits excess.

Thomas v. *Gibson,* 169.

Threats of violence by a person alleged to have been assaulted are generally admissible, when self defense is the issue, if communicated to the respondent before the act with which he is charged, as evidence of his reasonable apprehension of physical harm, but not where respondent had already testified that he had no knowledge of any threats at the time of the assault.

While threats by a person alleged to have been assaulted, made prior to an alleged assault, show a declaration of purpose, and testimony of such threats might tend to establish that the person who made them was seeking to carry out such a purpose, they cannot be proved by hearsay evidence.

Respondent not entitled to testify that threats had been communicated to him after the alleged assault.

Allegations in a bill of exceptions which are contrary to the evidence, as reflected in the official stenographer's record of the testimony, are controlled by that record.

Exceptions to the general rule against admission of hearsay testimony are not applicable when, from the nature of the testimony offered, it is apparent that better evidence exists and is accessible.

State v. *Mitchell,* 320.

BAILMENTS

The ordinary rule is that for a bailor to recover for damages occasioned to property while in the possession of a bailee, negligence of the bailee must be proved, but such negligence is presumed from a failure of the bailee to return the property or from his failure to return it in good condition. If nothing more appears a *prima facie* case is made out.

It is not necessary where a bailee was in charge of an airplane when it left the field for the bailor to show by direct affirmative evidence that the bailee was operating it at the time of the crash.

Northeast Aviation Co. v. *Rozzi*, 47.

BASTARDY

Statute conferring right to maintain bastardy action by pregnant woman for child which if born alive may be a bastard and conferring right to maintain action where delivered of a bastard child confers no right of action where woman has already been delivered of a dead foetus.

A general demurrer admits all facts well pleaded, and challenges their sufficiency in law upon which to maintain the action.

Bastardy statute contemplates a living child.

Fact that woman was not delivered of a bastard child is one of substance and may be reached by general demurrer.

Bastardy proceedings are purely statutory and were unknown to the common law.

Statute providing for lying-in expense of mother enlarged the remedy, but not the right.

Procedure in bastardy cases is *sui generis* and it is hard to draw analogies from ordinary common law actions.

Inman v. *Willinski*, 116.

A verdict that a respondent is the father of twins is indivisible so that if the paternity of one child is excluded the verdict may not stand.

Exclusion of paternity by blood grouping tests where properly made under the biological law is scientific proof that a respondent is not the father.

Where motion for a new trial is sustained, there is no necessity of remanding the case for correction of a bill of exceptions not properly before the court.

Objections to the jurisdiction on the grounds that a complainant (1) must bring a separate action for each twin child and (2) must make a separate accusation with respect to each child, when accusation is made after the birth of twins, are without merit.

Jordan v. *Mace*, 351.

BILLS AND NOTES

Corporation and former president waive proof of signatures and authority to execute note on behalf of the corporation by failure to file affidavit denying signatures and execution of note.

The burden of proving that the note was for the accommodation of the individual maker, that the payee had knowledge or notice thereof,

that as to the corporation the note was *ultra vires* and void, rests upon the defendants to sustain by proof of legal weight and sufficiency.

The title of a holder before maturity can only be defeated by proof that he took it with knowledge that it was accommodation paper or that under the facts, he is chargeable with notice.

A corporation may be estopped to invoke the defense that it acted *ultra vires* in executing accommodation paper where all stockholders of a corporation assent and no rights of creditors or the state intervene.

Eastern Trust and Banking Co. v. *Guernsey et al.*, 135.

See Municipal Corporations, *Moores* v. *Springfield*, 54.

BROKERS

When a contract to purchase is substituted for an actual sale it is a pre-requisite to the owner's liability for brokerage commission that such contract bind the purchaser to make the purchase; that if the purchaser is given the option between making the purchase and the forefeiture of the down payment, the contract is not such a mutual contract as will entitle the broker to a commission unless the purchase be consummated or consummation be prevented by the seller.

Whether retention of down payment by real estate vendor be called a forfeiture or liquidate damages constitutes no basic difference where contract effectively allows purchaser to avoid carrying out his purchase upon retention by vendor of down payment.

A contract containing an agreement to purchase which leaves performance of such agreement optional with the vendee is treated legally as of no more effect than a strict unilateral option.

MacNeill Real Estate v. *Rines*, 27.

BUILDINGS

See Negligence, *Pease* v. *Shapiro*, 195.

CARRIERS

Exceptions to exclusion of evidence not brought forward to Supreme Judicial Court are abandoned.

Consignee of property transported in interstate commerce, by acceptance of delivery makes himself liable for the transportation charges, except that a consignee who is an agent only and has no beneficial ownership in property, may avoid liability by compliance with liens of Interstate Commerce Act.

The doctrine of estoppel rests on an act that has misled one, who relying on it, has been put in a position where he will sustain a loss or injury. It should be applied with great care in each case.

The burden of proof is upon the one who asserts an estoppel, and such proof must be full, clear, and convincing in every essential element.

There can be no estoppel where there is no loss, injury, damage, or prejudice to the party claiming it.

If facts are undisputed, it is a question of law for the court to decide whether or not there is an estoppel.

The obligations of the shipper and consignee, as between each and carrier, were primary and independent and neither obligation was subordinate to the other, and the carrier could proceed against the defendant without exhausting its remedy against shipper.

Boston and Maine R. R. v. *Hannaford Bros. Co.*, 306.

See Negligence, *Morneault* v. *Boston and Maine Railroad*, 300.

CERTIORARI

On hearing of petition for writ of *certiorari*, the only question for the court to decide is whether it will issue the writ. If the writ issue, the court at *nisi prius* has the jurisdiction to decide what should be done.

When parties in *certiorari* are in court, the court is not confined to the irregularities alleged by the petitioner to be in the record, but can rule on the whole record.

Where record shows neither service of disclosure petition and subpoena, nor appearance of respondent at return term, the commissioner had no jurisdiction of the subject matter, and all entries in the record after return term have no judicial effect.

Where record shows no jurisdiction, writ of *certiorari* should issue as a matter of right.

Brooks v. *Clifford et al.*, 370.

CONFLICT OF LAWS

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CONTRACTS

Finding by Justice of the Superior Court that contract prohibiting purchaser of automobile for stated period of six months from sale without first offering it to vendor on agreed depreciation scale is one providing for liquidated damages rather than unenforceable penalty. Elements of damage such as loss of good will and future business difficult of measurement are involved.

Short supply and irregular market concerning automobiles are proper subjects for judicial notice.

Wade and Dunton, Inc. v. *Gordon*, 49.

See Brokers, *MacNeill Real Estate* v. *Rines*, 27.

See Deeds, *Depositors Trust Co. et al.* v. *Bruneau, et al.*, 142.

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See Savings Bonds, *Paulsen* v. *Paulsen*, 155.

CORPORATIONS

On an appeal by plaintiffs from final decree in a suit in Equity for a specific performance, all issues in the record were open for consideration, and failure of sitting justice in equity to give separate findings of law and fact is immaterial where entire record is before the Supreme Judicial Court on appeal.

The court in an equity action is not obliged to answer each request of counsel for a ruling whether it be of law or of fact. Where a court dictates into the record what the material facts are as he views them and what are his conclusions of law in reference thereto, he is complying with R. S., 1944, Chap. 95, Sec. 26.

The Securities and Exchange Commission, under the Public Utilities Holding Company Act, are given wide power, derived from the Commerce Clause of the Constitution, in the matter of reorganizing public utility holding companies and such powers, insofar as necessary to carry out the policy of the statutes, are exclusive.

The purpose of the Public Utilities Holding Company Act is to compel the simplification of the structures of holding company systems, without regard to the wishes of stockholders and in spite of charter provisions. Under the death sentence clause the commission is empowered to compel the dissolution of a company and take control of all its assets provided the plan shall be "fair and equitable" to all concerned.

In a simplification proceeding which it finds is fair and equitable and necessary to comply with the provisions of the federal statute, the Securities and Exchange Commission has the power to modify the right granted to stockholders by the corporate charter or otherwise, and regardless of contract rights, change the form of securities back to debentures, and provide for their payment without regard to the premiums provided for in the indenture.

Action in the state court inconsistent with the power of the Securities and Exchange Commission will be enjoined.

Non-compliance by assignee of a lease given by a corporation of which assignee was a majority stockholder is not a mark of fraud where such action is in compliance with orders of Securities and Exchange Commission.

A statement in the Securities and Exchange Commission Report that minority stockholders dissenting from plan had the right under state law to have the stock appraised confers no jurisdiction on state court where commission approved plan which provided that stockholders be paid a specific amount per share for their stocks.

If a federal tribunal of exclusive jurisdiction has the subject matter before it power of the state court to take incompatible action is gone.

Woodsum et al. v. *Portland Railroad Co., et al.*, 74.

See Bills and Notes, *Eastern Trust and Banking Co.* v. *Guernsey et al.*, 135.

COURTS

See Divorce, *Carroll* v. *Carroll*, 171.

CRIMINAL LAW

R. S., 1944, Chap. 136, Sec. 3 providing for punishment of persons alleged in an indictment and proved or admitted on trial to have been "before convicted and sentenced to any state prison" does not contravene Fourteenth Amendment to Constitution of United States nor deny equal protection even though the court in its discretion may for the same offense sentence an accused to the state prison, and in another case sentence an accused to the reformatory for men.

State prison sentence under R. S., 1944, Chap. 136 imposed without formal trial upon a plea of guilty to an indictment charging a previous conviction is not erroneous because statute requires the fact of previous conviction to be "proved or admitted on trial."

A voluntary plea of guilty when understood by a respondent has always been considered a solemn confession and admits all facts in an indictment sufficiently pleaded.

Even though penal statutes should be construed strictly, the intention of the legislature constitutes the law, and the rule of strict construction is subordinate to the rule of reasonable sensible construction having in view the legislative purpose.

Jenness v. *State*, 40.

Complaint charging respondent with unlawful sale of "liquor" does not sufficiently charge respondent with a crime under the constitution of the state notwithstanding provision of the statute that wherever the word "liquor" is used, it shall mean "intoxicating liquor" since the crime is the unlawful sale of intoxicating liquor.

State v. *Bellmore*, 231.

See Assault and Battery, *State* v. *Mitchell*, 320.

See Insurance, *Wheeler* v. *Phoenix Assur. Co., Ltd.*, 105.

DAMAGES

See Assault and Battery, *Thomas* v. *Gibson*, 169.

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DECLARATORY JUDGMENT

The Law Court is a statutory court and can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure.

The right of review and the method of obtaining a review of a decision of a court having jurisdiction over a cause whether by exception, motion, or appeal is statutory, and jurisdictional, and this applies to declaratory judgments.

In this jurisdiction whether review be entertained by motion, exceptions, or appeal depends not only upon the nature of the cause but also upon the nature of the question of which the review is sought.

In all cases at law, when court is held by a single justice, his opinions, directions or judgments may be attached by exceptions, and then only for errors in law and they cannot be reviewed on motion, nor, in the absence of a specific statute, on appeal. On the other hand, rulings of a single justice in equity may be reviewed either upon exception or appeal.

The review by the Law Court whether by appeal or exceptions determines the scope of inquiry by the Law Court.

The Uniform Declaratory Judgment Act does not enlarge the jurisdiction of the courts, but provides a more adequate and flexible remedy in cases where jurisdiction already exists and the nature of the case determines the appropriate forum.

Where a plaintiff by an action under the Declaratory Judgment Act sought to determine which of two municipalities had the right to assess and collect a personal property tax and the right to collect such tax could only be enforced by an action of debt at law, the essential nature of the case is that of a proceeding at law rather than in equity; consequently, the procedure for obtaining review is that which is appropriate for such actions namely by exceptions and not by appeal.

Provision of the Declaratory Judgment Act that all orders, judgments and decrees may be reviewed as other orders, judgments, and decrees means that the same method must be employed to obtain a review of orders, judgments and decrees of a justice made or rendered in proceedings for a declaratory judgment, as would have to be employed to obtain a review of orders, judgments and decrees made or rendered by a single justice in an action to enforce the right or obligation of which the declaration is obtained or sought to be obtained by declaratory judgment.

Where the Law Court is without jurisdiction to hear and determine an appeal, it is a nullity; neither can the parties confer by consent jurisdiction upon the Law Court to hear and consider such cases.

Sears Roebuck & Co. v. *Portland*, 250.

DECREE

See Equity, *American Oil Co.* v. *Carlisle et al.*, 1.

DEEDS

Where contract by trustee for sale of real estate is silent as to the kind of a deed by which conveyance was to be made, all that vendor could demand would be an ordinary trustee's deed. In the absence of a special agreement, a vendor who has a good title need tender only a quit claim deed to satisfy a contract to convey, but impliedly contracts to tender a marketable title.

Referee's finding that a drain across certain land was maintained by a town without right and constituted at best an encroachment is conclusive where there is a failure to offer record evidence of the legal establishment of the drain to support contention that it was a legal drain built and maintained by a town under legal authority.

Whether an encroachment will justify a vendee in rejecting a tendered title depends upon whether the encroachment is substantial enough seriously to interfere with the use and enjoyment of the premises, and each case must be determined upon its own merits.

Even though an encroachment or encumbrance be of such a nature to justify the assertion thereof as a defect in title the right to assert it as such a defect in title as would justify rescission is dependent upon its existence at the time of the performance of the contract and a vendor is entitled to remove the encroachment or encumbrance if he can do so prior to performance, provided the premises are not subject

to such permanent restrictions or servitudes as would render the encumbrances presumably not removable.

Depositors Trust Co. et al. v. *Bruneau et al.*, 142.

DIRECTED VERDICT

The fact that a presiding justice may have given the wrong reason for directed verdict is immaterial, if order was right.

Austin v. *St. Albans*, 111.

See Husband and Wife, *Kimball* v. *Cummings*, 331.

See Negligence, *Andreu* v. *Wellman*, 36.

DIVORCE

A divorce may not be granted on an act committed by one insane when it was performed.

The words insane and insanity as applied to conduct has a range of meaning sufficiently broad to include one ruled or possessed by an insane delusion intermittently and the acts of such a person while so ruled or possessed.

Whether one ruled or possessed at times by an insane delusion was so ruled or possessed at the times pertinent to the particular acts is a question of fact.

Factual decisions in divorce proceedings will not be disturbed in appellate proceedings if supported by credible evidence.

Hadley v. *Hadley*, 127.

A motion captioned "Superior Court—York County" to have a decree set aside and a new trial granted in a divorce case can be received and accepted as addressed to either the Superior Court or the Supreme Judicial Court as a Law Court depending upon the court to which it is presented for action.

There is neither express nor implied statutory authorization for a motion for a new trial being received and accepted by Supreme Judicial Court sitting as a Law Court in divorce cases.

Decrees granting or denying divorces can be attacked before Supreme Judicial Court as a Law Court only for errors in law presented by bills of exception.

The Supreme Judicial Court sitting as a Law Court is a statutory court of limited jurisdiction and does not have supervisory jurisdiction over inferior courts since that power is vested in the Supreme Judicial Court sitting at *nisi prius*.

Carroll v. *Carroll*, 171.

EQUITY

So-called "Law and Equity" Act does not enlarge jurisdiction of Court of Equity but merely provides a new method of placing a case which the Court of Equity has the power to consider before it for determination.

The fact that the defendant may have pleaded an equitable defense to an action of law under R. S., 1944, Chap. 100, Sec. 18 does not authorize a transfer from law to equity since the power to transfer depends upon the nature of the cause of action, not the nature of the defense alleged thereto.

Equity has no jurisdiction where neither the subject matter of the cause nor the relief sought are equitable in their nature.

Discretion in the matter of transferring cases from law to equity means "judicial discretion."

When absence of equity jurisdiction becomes apparent due to the fact that a plain adequate and complete remedy at law exists, an appeal must be sustained even though the question of equity jurisdiction on that ground was not raised by the defendant.

Attempted appeal from the findings of the presiding justice and noted on the docket prior to the filing of the actual decree is premature as not being in accordance with R. S., 1944, Chap. 95, Sec. 21 relating to appeals from final decrees.

Findings of presiding justice prior to final decree do not amount to an interlocutory decree or order from which an appeal can be taken under R. S., 1944, Chap. 95, Sec. 23.

Either party aggrieved by a final decree has the right to take exceptions thereto under R. S., 1944, Chap. 95, Sec. 26.

American Oil Co. v. *Carlisle et al.*, 1.

In contempt proceedings jurisdictional questions may and should be brought to the attention of the court at any time and when it appears that the court has no jurisdiction the proceedings should be stayed and amendments, if allowable, be permitted, or the action dismissed.

In equity, all persons who are legally or beneficially interested in the subject matter and results of the suit are to be made parties, and if not made parties, injunction will not issue against them.

Angell v. *Gilman*, 202.

The adequacy of a statutory remedy for a violation of rights created by statute is for the legislature and not for the court.

The principle that the court in equity may assess damages recoverable at law incidentally to the end that complete relief may be granted is not applicable in the absence of a special prayer or of a prayer for general relief.

Plaintiff not entitled to an accounting for monies received from the sale of fish nor have proceeds impressed with a trust where fish were caught in a weir maintained by defendants below low water mark contrary to the statute and without consent of the plaintiff.

Fish are *ferae naturae* and belong to the first taker.

Perry v. *Dodge*, 219.

The court has authority to use the extraordinary power of injunction, when it is properly applied for, when justice urgently demands it, and when there is no legal remedy, or the remedy at law is inadequate.

When it is shown that a judgment at law on a contract would be worthless, the legal remedy may be considered inadequate.

A cause of action that is capable of being determined at law, but is entertained in equity on jurisdictional grounds of equitable relief sought, if it appears from the evidence, or from lack of sufficient proof, that relief in equity cannot be granted, the court may be without jurisdiction and the bill in equity should be dismissed without prejudice.

Appellant has the burden of satisfying the Law Court that the findings of the sitting justice are clearly wrong.

In the absence of a showing that a judgment at law for legal damages would not be adequate or that such could not be collected, and in the absence of other appropriate necessity, the court properly dismissed the bill without prejudice on the evidence submitted in the instant case.

The usual and ordinary rule as to weight and sufficiency of evidence to show equitable jurisdiction must be complied with and the proof must be convincing.

Levesque v. *Pelletier*, 245.

The burden is on the appellant to show that order vacating decree in equity was erroneous.

Where officer's return on bill in equity fails to show service of subpoena on defendant, a final decree against him was erroneous, and order vacating decree was proper.

Mininni v. *Biddeford*, 336.

See Corporations, *Woodsum et al.* v. *Portland Railroad Company et al.*, 74.

See Joint Tenancy, *Strout* v. *Burgess*, 263.

ESTOPPEL

See Carriers, *Boston and Maine R. R.* v. *Hannaford Bros.*, 306.

EVIDENCE

In an action of assumpsit where evidence on issues of fact is conflicting and the court cannot say that the verdict is "clearly wrong" or that prejudice, bias, passion, or mistake has been shown, a motion for a new trial must be overruled.

Relevancy and materiality are dependent on probative value and any evidence tending to prove a matter in issue is admissible, within the judicial discretion of the presiding justice, unless it is excluded by some rule or principle of law.

Rules of evidence are usually rules of exclusion, and evidence is often admitted by the trial court, not because it is shown to be competent, but because it is not shown to be incompetent.

Rawley v. *Palo Sales, Inc., et al.*, 375.

See Assault and Battery, *State* v. *Mitchell*, 320.

EXCEPTIONS

Exceptions to a directed verdict make evidence part of record whether made so by the bill of exceptions or not.

Austin v. *St. Albans*, 111.

In this state, objections to referees reports shall set forth specifically the grounds of the objections and these only shall be considered by the court and the excepting party is confined to these in his bill of exceptions.

Depositors Trust Co. et al. v. *Bruneau et al.*, 142.

Where there is ample evidence, if believed by the trier of facts in the Supreme Court of Probate to justify the finding made, the factual decision is conclusive and exception thereto will not lie.

Cote et al. Appellants, 297.

See Assault and Battery, *State* v. *Mitchell,* 320.

See Carriers, *Boston and Maine R. R.* v. *Hannaford Bros.,* 306.

See Municipal Corporation, *Moores* v. *Springfield,* 54.

See Negligence, *Morneault* v. *Boston and Maine R. R.,* 300.

See Wills, *Smith Appellant,* 235.

EXECUTORS AND ADMINISTRATORS

The fact that an executor had given a general bond for the faithful discharge of his trust as executor does not authorize the extension of a special bond for the sale of certain real estate to cover money or property received from sources other than sale of the real estate.

The failure of an executor to account for money received by him as proceeds for a 1934 sale of real estate is not a breach of bonds prior given for the sale of real estate on licenses issued in 1926 and 1927.

A decree of the Probate Court disallowing the final account of an executor is admissible in evidence for the purpose of showing a breach of a bond for the sale of real estate since an executor must charge himself with proceeds of the sale in an account duly filed and allowed.

In an action of debt on a bond against a surety company, the referee should not find the amount due for breach but should find in the penal sum of the bond, and so much of the penalty as is due should be determined by the court in subsequent proceeding.

Davis v. *Am. Surety Co.,* 187.

See Gifts, *Hill Exr.* v. *Hill et al.,* 224.

See Joint Tenancy, *Strout* v. *Burgess,* 263.

See Taxation, *Estate Annie E. Meier,* 358.

See Trusts, *Thaxter Trustee et al.* v. *Canal Nat'l Bank et al.,* 176.

FISH AND GAME

See Equity, *Perry* v. *Dodge,* 219.

GIFTS

To constitute a valid gift *inter vivos,* the donor must part with all present and future dominion over the property given.

In gift *inter vivos* delivery to donee must be accompanied with intent to surrender all present and future dominion over property, and, evidence of such intention must be full, clear, and convincing. The burden to prove a gift is on the donee.

If it is the intention of a donor that alleged gift is to take effect only at death of donor, gift is ineffectual as an attempted testamentary disposition of property, which can only be accomplished by will.

Hill, Exr. v. *Hill et al.,* 224.

HIGHWAYS

See Municipal Corporations, *Austin* v. *St. Albans,* 111.

HUSBAND AND WIFE

In suit brought for alienation of husband's affections by wife, she must allege and prove such alienation within three years of the date of the writ, or if prior to that time, then she must allege and show that discovery thereof by her was within three years of bringing action.

In alienation suit, question whether affections were alienated, and if so when such alienations occurred, and when discovered by plaintiff, are facts to be determined by jury.

A verdict should not be directed for a defendant, if upon any reasonable view of testimony, under the law, the plaintiff can recover.

Kimball v. *Cummings*, 331.

INDICTMENTS

See Criminal Law, *Jenness* v. *State*, 40.
State v. *Bellmore*, 231.

INJUNCTIONS

See Equity, *Angell* v. *Gilman*, 202.
Levesque v. *Pelletier*, 245.

INSURANCE

Questions whether notice of insurance company of its refusal to defend was seasonable, whether rights of assured were prejudiced and in what manner, matter of necessity for immediate settlement, and whether settlement was fair and reasonable, are all questions of fact for the jury.

Under terms of an insurance policy not covering employees, question whether insured party being transported was employee at the time, depends upon contract, either express or implied, or whether transportation was incident of employment.

A denial of liability by an insurance company is equivalent to a declaration that it will not pay even if the amount of loss is determined and may render inoperative provisions for the benefit of the company precedent to right of action.

Albert v. *Maine Bonding*, 20.

The word "theft" in an automobile insurance policy should be given its usual common law meaning and to be a theft within the meaning of the policy there must be an intent to permanently deprive the owner of her property and not merely an unauthorized use.

The finding of a referee that the one taking an automobile without the consent of the owner and contrary to Chapter 19, Section 120 of Revised Statutes of 1944 but with the intent to return the car is final and does not constitute a theft under the policy in the instant case.

Theft and larceny are synonymous terms and there must be a felonious intent to deprive the owner permanently of the property to constitute a theft.

Wheeler v. *Phoenix Assur. Co., Ltd.*, 105.

See Workmen's Compensation, *Eleanora Gagnon's Case*, 131.

INTOXICATING LIQUOR

See Criminal Law, *State* v. *Bellmore*, 231.

JOINT TENANCY

Stock certificates are within meaning of statutes authorizing suits in equity to compel delivery when so situated that they cannot be replevied.

At common law, four essential elements must be present in the creation of a joint tenancy, to wit, unity of time, title, interest and possession. In attempted transfer of stocks by owner directly to himself and another, to hold as joint tenants, the unity of title and unity of time were absent, and the transferor still holds under his original title.

The law of the state where certificates of stock are located and the transfer takes place, determines the title to the certificates.

At common law, in the absence of proof to the contrary, there is a presumption that the common law of another state is the same as that of Maine, the forum, and even though statute provides that court take judicial notice of the laws of foreign states, the common law presumption continues and will prevail unless overcome by evidence or by pertinent decision or statutes called to or coming to the attention of the court.

An attempt to create a joint tenancy of personal property between grantor and another by a direct conveyance to himself and another, creates a tenancy in common between the parties.

In the instant case, where attempted creation of joint tenancy fails because of mutual mistake of the parties to the transaction, where corporate stock is conveyed for consideration, the grantor holds the legal title to such stock impressed with a constructive trust of an undivided interest in favor of the other party.

Except in cases where plaintiff is ordered to do certain things as a condition precedent to obtaining relief decreed to him, affirmative relief will not be decreed in favor of a defendant in equity, except where defendant seeks relief by original or cross bill.

Strout v. *Burgess*, 263.

JUDICIAL NOTICE

See Contracts, *Wade and Dunton, Inc.* v. *Gordon*, 49.

JURISDICTION

See Certiorari, *Brooks* v. *Clifford et al.*, 370.
See Corporations, *Woodsum et al.* v. *Portland R. R. Co. et al.*, 74.
See Declaratory Judgment, *Sears Roebuck & Co.* v. *Portland et al.*, 250.
See Equity, *Angell* v. *Gilman*, 202.
See New Trial, *Bodwell-Leighton Co.* v. *Coffin & Wimple, Inc.*, 367.

LEASES

See Corporations, *Woodsum et al.* v. *Portland Railroad Co. et al.*, 74.

LIENS

See Taxation, *Kramer* v. *Linneus*, 239.

MINORS

See Savings Bonds, *Paulsen* v. *Paulsen*, 155.

MORTGAGES

See Trusts, *Thaxter Trustee et al.* v. *Canal National Bank et al.*, 176.

MUNICIPAL CORPORATIONS

Objections to Referee's report "that said decision is based upon an erroneous application of the established rules of law" is too general and not in compliance with Rule XXI of Supreme Judicial and Superior Court.

Objection to Referee's report that there is "no evidence to support the findings of such facts as must necessarily have formed the basis of said decision" raises a question of law upon which party is entitled to be heard on exceptions.

Orders drawn by selectmen upon town treasurer for some legitimate indebtedness of the town are mere vouchers and though frequently negotiable in form are nowise commercial paper free from equitable defenses in hands of bona fide indorsees.

In absence of special circumstances the law does not prevent a selectman, who was one issuing town order negotiable in form from acquiring the same as an indorsee and enforcing the same against the town.

Nonjoinder of a party plaintiff in an action *ex contractu* is a good defense under the general issue.

Whether town order payable at sight is void as being in excess of the constitutional debt limit, depends upon whether the obligation for which it was given was valid and enforceable when incurred, not when the town order was drawn.

Defense that indebtedness was in excess of that permitted under the statutes is insufficient since debt limitation is constitutional and must be "exclusive of debts or temporary loans made in anticipation of collection of taxes and to be paid out of money raised by taxation, during the year in which they were made."

There is no presumption that because a town is indebted beyond its constitutional limit at the time its officers issue a town order that it was so indebted at the time it incurred the obligation.

Where there are no current revenues available at the time current expenses are incurred, such debt or liability comes within the constitutional debt limit notwithstanding the general principle that obligations for current expenses to be paid out of current revenues incurred by towns already beyond the constitutional debt limit are not debts or liabilities within the prohibition of the constitution.

Town orders signed by all three members of the Board of Selectmen, and issued to the plaintiff, one of the members of the Board of Selectmen, were not in violation of R. S., 1944, Chap. 80, Sec. 77.

The relief of paupers is in the hands of Overseers of the Poor and not in the Selectmen, and where case fails to show that plaintiff was an Overseer of the Poor or that he as Selectman had any duties to discharge with respect to pauper supplies, orders given to him for pauper supplies are not invalid at common law.

As a general principle, obligations for current expenses, to be paid out of current revenues, incurred by town already indebted beyond the constitutional debt limit, are not debts or liabilities within constitutional prohibition.

Moores v. *Springfield*, 54.

Statute regarding maintenance and repair of ditches, drains and culverts constructed by municipal officers at town expense and providing for action against the town for damages for failure to maintain and repair is not violated unless there is proof by record or other evidence to show that municipal officers constructed the drain or ditch and damage resulted from a failure to maintain and repair.

Proof that town's road commissioner put on gravel, plowed out the side for ditches and made repairs from time to time upon an "old road" used by the general public for many years and that damage resulted from an insufficiency of size is not sufficient under statute.

In the construction of drains and ditches the municipal officers act as public officers of the state in a quasi-judicial capacity and their action must be taken with formality and entered of record and parol evidence can only be adduced where the record is incomplete, incorrect or lost.

Town is not liable for damage resulting from insufficient size of ditch or other fault in original plan of construction where municipal officers act judicially as to statutory board and make honest errors of judgment.

Austin v. *St. Albans*, 111.

MUNICIPAL CORPORATIONS

See Declaratory Judgments, *Sears Roebuck & Co.* v. *Portland*, 25.

NEGLIGENCE

The contention that operator of a motor vehicle striking a pedestrian must be held blameless as a matter of law when moving slowly under the direction of a traffic light does not stand the test of common sense and would establish an unwise public policy if adopted.

Lange v. *Goulet*, 16.

In negligence action verdict should not be ordered, if, giving to the plaintiffs the most favorable view of the facts and every justifiable inference to be drawn from them, different conclusions as to the defendant's negligence could fairly have been taken by different minds.

When an occurrence or series of occurrences necessary to support a cause of action are well-nigh incredible a directed verdict is correct.

Andreu v. *Wellman*, 36.

The person in control of a building is bound, as between himself and the public, to keep buildings and other structures abutting upon the streets and sidewalks safe for travellers lawfully passing along the same.

The owner, who has general supervision or control of a building, is liable when damage to the lawful pedestrian or traveller from snow or ice results wholly from the shape and condition of the roof, and the proximity of the building to the street or sidewalk.

The presiding justice at a jury trial is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence.

General motions for new trial do not reach an order directing verdicts for the plaintiff. On exception for failure to direct a verdict, a general motion after jury verdict is often considered because of waiver.

Pease v. *Shapiro*, 195.

In negligence action before a referee and exception to acceptance by Superior Court of referee's report on the ground that there was no evidence of probative value tending to establish the contention of the plaintiff raises a question of law upon which plaintiff is entitled to be heard.

Mere fact that plaintiff fell over a suitcase in the passageway between two railroad coaches raises no presumption of negligence on the part of the employees of the railroad.

The liability of a carrier for an injury to a passenger caused by an obstruction of a car aisle or platform by property of another passenger arises only in case the carrier has been negligent in permitting the obstruction. Unless the carrier can be charged with reasonable notice of such obstruction, no neglect of duty is shown.

Morneault v. *Boston and Maine R. R.*, 300.

It is the duty of an automobile driver to stop his car when, for any reason, he cannot see where he is going and he must drive at a speed that he can bring his car to a stop within the distance illuminated by his headlights.

An automobile must be equipped with headlights capable of rendering any substantial object clearly discernible at least 200 feet ahead.

On motion for a new trial after verdict for the plaintiff in a negligence action, the evidence must be viewed in the light most favorable to the plaintiff, and when the testimony is conflicting, the verdict will stand.

A verdict of a jury on matters of fact and within their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic.

Spang v. *Cote*, 338.

Negligence on the part of the driver of a skidding car is for jury.

When there is no explanation of what caused a car to leave a road, when the operation thereof is exclusively within the control of the defendant, and it is not reasonably in the power of an injured guest to prove the cause of the accident, which is one not commonly incident to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on defendant's part.

The fact that operator of automobile goes to sleep while driving is a proper basis of negligence sufficient to make out a *prima facie* case if no circumstances tending to excuse or justify his conduct are proven.

Gendron v. *Gendron*, 347.

See Bailments, *Northeast Aviation Co.* v. *Rozzi*, 47.

NEW TRIAL

A defendant prosecuting a general motion for a new trial has the burden of establishing that the verdict is manifestly wrong.

Whether particular conduct of motor vehicle operator conforms to requirements of ordinary care are questions of fact for jury determination, and judgment of a court should not be substituted for that of a jury, based on evidence concerning which reasonable men may differ.

Lange v. *Goulet*, 16.

By rule of court, no appeal lies to denial of motion for new trial addressed to presiding justice, except in prosecutions for felony.

The Law Court can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. These limitations are jurisdictional, and neither of them can be waived nor can consent of the parties confer jurisdiction upon the court.

Bodwell-Leighton Co. v. *Coffin & Wimple, Inc.*, 367.

See Evidence, *Rawley* v. *Palo Sales, Inc. et al.*, 375.

See Negligence, *Spang* v. *Cote*, 338.

NONSUIT

See Pleading, *Fontaine* v. *Peddle*, 214.

PLEADING

The fact that a second suit was commenced while the first suit was pending does not show that the second suit was vexatious and upon a plea in abatement, the court must determine whether the second suit was vexatious or necessary to protect and secure the plaintiff's rights.

Voluntary nonsuit is a matter of right.

The overruling of a plea in abatement to second suit and the order of the case to trial upon the merits is not error where it appeared that real estate attached in first suit was heavily encumbered and of doubtful security and plaintiff had filed motion for a voluntary nonsuit.

Fontaine v. *Peddle*, 214.

See Bastardy, *Inman* v. *Willinski*, 116.

See Municipal Corporations, *Moores* v. *Springfield*, 54.

See Savings Bonds, *Paulsen* v. *Paulsen*, 155.

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See Exceptions, *Cote et al. Appellants*, 297.

See Executors and Administrators, *Davis* v. *American Surety Co.*, 187.

See Gifts, *Hill Exr.* v. *Hill et al.*, 224.

See Taxation, *Estate of Meier*, 358.

See Trusts, *Thaxter Trustee et al.* v. *Canal National Bank et al.*, 176.

See Wills, *Smith Appellant*, 235.
Cassidy Gdn. et al. v. *Murray et al.*, 326.

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See Equity, *Mininni* v. *Biddeford*, 336.

PUBLIC UTILITIES

See Corporations, *Woodsum et al.* v. *Portland Railroad Co. et al.*, 74.

RAILROADS

See Carriers, 423.

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See Sales, *Tardiff* v. *M-A-C Plan*, 208.

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See Negligence, *Gendron* v. *Gendron*, 347.

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Rule X, *Eastern Trust and Banking Co.* v. *Guernsey et al.*, 135.
Rule XVII, *Carroll* v. *Carroll*, 171.
Bodwell-Leighton v. *Coffin-Wimple Inc.*, 367.
Rule XXI, *Depositors Trust Co. et al.* v. *Bruneau et al.*, 142.
Moores v. *Springfield*, 54.
Morneault v. *Boston and Maine R. R.*, 300.

SALES

The signature of the "person to be bound" by a conditional sale agreement satisfies all the requirements of R. S., 1944, Chap. 106, Sec. 8, to make its provisions effective between the original parties to it.

Nothing less than full compliance with the statutory requirements as to the recording of such an instrument can make it effective against a purchaser for value.

Only an agreement signed by the person to be bound is available for record under R. S., 1944, Chap. 106, Sec. 8, to control the title to the property to which it relates.

The action of a recording officer in copying an unsigned agreement on the record is a nullity.

Tardiff v. *M-A-C Plan of N. E.*, 208.

See Contracts, *Wade and Dunton, Inc.* v. *Gordon*, 49.

SAVINGS BONDS

The general rule requires all promisees to join as parties plaintiff whether the contract be express or implied.

When legal grounds exist for omitting one of the several promisees, such as death or refusal to join, the declaration must allege the reason for the non-joinder to establish the right of less than all to sue.

Bonds issued by the United States, with the applicable statutes and Treasury Regulations, constitute valid binding contracts determining the rights of the parties thereunder.

The status of the title to bonds of the United States is controlled by the contract between the government and the owners and is not subject to change by any statute or rule of law of the State of Maine.

Under the terms of the contract represented by the bonds either parent of the minor child who was a co-owner, with whom the parent resided or from whom her chief support came, was entitled to present them to the government for payment.

The rights of the minor as one of the registered co-owners of the bonds to which the proceedings relate could not be litigated in a suit to which she was not a party.

The law does not permit a defendant to be harassed with a multiplicity of suits when the subject matter in controversy might be settled more appropriately and equitably in a single action.

Paulsen v. *Paulsen*, 155.

SECURITIES AND EXCHANGE

See Corporations, *Woodsum, et al.* v. *Portland Railroad Co., et al.*, 74.

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R. S., 1944, Chap. 9, Sec. 21,
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R. S., 1944, Chap. 81, Sec. 13,
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R. S., 1944, Chap. 94, Sec. 14,
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R. S., 1944, Chap. 95, Sec. 4,
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R. S., 1944, Chap. 95, Sec. 34,
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Albert v. *Maine Bonding and Casualty Co.*, 20.
R. S., 1944, Chap. 100, Sec. 60,
Bodwell-Leighton v. *Coffin and Wimple, Inc.*, 367.
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R. S., 1944, Chap. 100, Secs. 135-141,
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R. S., 1944, Chap. 100, Sec. 164,
Fontaine v. *Peddle*, 214.
R. S., 1944, Chap. 106, Sec. 8,
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R. S., 1944, Chap. 116, Sec. 14,
Brooks v. *Clifford et al.*, 370.
R. S., 1944, Chap. 118, Sec. 25,
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Cote et al. Appellants, 297.

R. S., 1944, Chap. 150, Sec. 4,
R. S., 1944, Chap. 151, Secs. 10, 16,
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Strout v. *Burgess*, 263.
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Eastern Trust and Banking Co. v. *Guernsey et al.*, 135.

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Estate of Meiers, 358.

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P. & S., 1905, Chap. 129,
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P. & S., 1927, Chap. 47,
Woodsum et al. v. *Portland R. R. Co. et al.*, 74.

SURVIVORSHIP

See Joint Tenancy, *Strout* v. *Burgess*, 263.

TAXATION

An assessment of real estate taxes against devisees of deceased owner, was a proper assessment.

The fact that lots were assessed in gross without showing the assessment for each individual lot, and the amount due from each individual owner, is of no consequence, when the assessed value of each lot and the liability of each owner was apparent.

P. L., 1933, Chap. 224, providing for enforcement of tax liens, is unconstitutional as to non-resident owner of real estate, as it required no notice to non-resident owner that time was running against him.

Kramer v. *Linneus*, 239.

The power of disposition of property is the equivalent of ownership.

The state of Maine is not precluded from taxing the succession to property held in a trust administerable without its borders if it is within the control of a decedent domiciled within the state under the terms thereof.

The inheritance tax, so-called, imposed by R. S., 1944, Chap. 142, Secs. 2 and 3 is applicable to all the property of persons domiciled in

Maine at the time of death which the state has the power to tax by appropriate legislation, including intangibles represented by paper evidence physically located outside its borders, notwithstanding the legal title thereto is held by a trustee so residing.

The succession to fractional interests in mortgages secured by real estate located in other states, or jurisdictions, is neither more nor less than intangible property, taxable as such.

As a general principal, statutes of limitation do not run against the sovereign unless the state is necessarily included by the nature of the mischief to be remedied.

Estate Annie E. Meier, 358.

See Declaratory Judgment, *Sears Roebuck and Co.* v. *Portland et al.,* 250.

TOWNS

See Municipal Corporations, *Moores* v. *Springfield,* 54.
Austin v. *St. Albans,* 111.

TRUSTS

A bond is a contract and a mortgage securing it is a separate contract for that purpose.

Bondholders or trustees of an indenture executed to secure the bonds, when precluded by the terms of their contracts from reaching particular property to enforce a deficiency judgment, are not entitled to have the income derived from said property applied in payment of either principal or interest of their bonds.

The holders of bonds issued by trustees and secured by a mortgage indenture on realty held in trust can be no greater than the provisions of the will warrant.

The operation of the language of a will excluding those otherwise entitled to its benefits from participation therein on stated grounds is controlled by the status of those entitled at the date of the death of the testatrix.

Thaxter et al. v. *Canal Nat'l Bank et al.,* 176.

See Equity, *Perry* v. *Dodge,* 219.

See Joint Tenancy, *Strout* v. *Burgess,* 263.

See Taxation, *Estate Annie E. Meier,* 358.

WILLS

A will which has been mislaid in the office of the Register of Probate is a lost will so far as petitioner was concerned and the time during which it was lost is not to be taken as part of the limitation period.

Motion for a new trial is not a proper procedure to review action of the Supreme Court of Probate sustaining a ruling of the judge of probate dismissing a petition for probate of will under Statute of Limitations. Exceptions, however, bring the case properly before the court.

Smith, Appellant, 235.

Intention of the testator must prevail in the construction of a will, but that intention must be found from the language of the will,

read as a whole, and illuminated in cases of doubt by the light of circumstances surrounding its making.

Deviation from exact provisions of will permitted where a change is necessary to carry out avowed purpose which testator had in mind, and customarily applied only to methods and means prescribed for carrying out his intent.

When language of will is clear, extrinsic circumstances can shed no further light on construction thereof.

Cassidy, Gdn. et al. v. *Murray et al.*, 326.

See Gift, *Hill Exr.* v. *Hill et al.*, 224.

See Trusts, *Thaxter Trustee et al.* v. *Canal National Bank et al.*, 176.

WORDS AND PHRASES

Insane, see Divorce, *Hadley* v. *Hadley*, 127.

Theft, see Insurance, *Wheeler* v. *Phoenix Assur. Co., Ltd.*, 105.

WORKMEN'S COMPENSATION

Employer or insurance carrier paying compensation for total incapacity must show that employee is able to perform such work as is ordinarily available in the community where she resides and thereby earn wages in order to maintain a petition for review on ground that employee is only partially incapacitated.

In the absence of competent evidence to sustain a finding of commission, the issue becomes one of law, and it is the duty of the court to set aside findings of commission.

Injured employee is entitled to compensation for total incapacity even though injury would ordinarily cause only partial disability where injury was coupled with preexisting malady, and where employee could still earn the same wages received at time of accident notwithstanding the disease, except for the accident.

Eleanora Gagnon's Case, 131.

The expenditures of an employer for services and aids furnished an employee in accordance with the provisions of Section 9 of the Workmen's Compensation Act do not constitute a part of the compensation payable to him under Section 11 of the act.

The Workmen's Compensation Act is intended primarily, to provide employees injured in industrial accidents with compensation during periods of total and partial incapacity limited in terms of both time and money.

The services and aids contemplated by Section 9 of the act are incidental to the compensation payable to him under subsequent sections, except so far as they are available before the beginning of the period during which such compnesation is payable.

The services and aid to which an employee is entitled under Section 9 of the act are available to him before and during the time compensation is payable to him but not thereafter.

At the expiration of the maximum period, during which an injured employee is entitled to have compensation paid to him, or upon the payment, or accrual, of the maximum amount so payable, the authority of the commission in connection with the services and aids to which Section 9 is applicable terminates, except so far as it may be called upon to determine allowances for services and aids furnished during the compensation period.

Simpson's Case, 162.