MAINE REPORTS

145

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1950 to NOVEMBER 1, 1950

MILTON A. NIXON
REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
Printers and Publishers

1952

DAILY KENNEBEC JOURNAL
AUGUSTA, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. HAROLD H. MURCHIE, *Chief Justice*

HON. SIDNEY ST. F. THAXTER

HON. RAYMOND FELLOWS

HON. EDWARD F. MERRILL

HON. WILLIAM B. NULTY

HON. ROBERT B. WILLIAMSON

HON. LESLIE E. NORWOOD, *Clerk*, Portland

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OF THE

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Reporter of Decisions
MILTON A. NIXON

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

JUNE I. JENSEN, ADMX. C. T. A.

APPLT. FROM DECREE OF JUDGE OF PROBATE

Cumberland. Opinion, January 5, 1950.

Exceptions. Judgment. Probate Court. Courts. Vacation.

Where an appeal from the Probate Court was submitted to Supreme Court of Probate at the June, 1949 term and dismissed in vacation on August 12, 1949 without Bill of Exceptions being filed within 30 days period as provided by statute and without further extension of time, the court is without jurisdiction to re-open or further extend the time for filing exceptions, notwithstanding the fact that the clerk's office did not notify petitioner's counsel of the August 12th judgment until September 13th and the further fact that the clerk's office, within the week prior to September 13, had informed petitioner that judgment had not been rendered.

A judgment in vacation becomes final upon resting without attack for the thirty-day period or such further extended period.

The right to take exceptions is wholly statutory and does not spring from any inherent power of the courts.

ON EXCEPTIONS.

On exceptions to the denial of a petition for allowance of a time for filing a bill of exceptions. Exceptions overruled. Case fully appears in the opinion.

Sherman I. Gould,
Adelbert L. Miles, for appellant.

Fred W. Small,
Saul H. Sheriff, for appellee.

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

WILLIAMSON, J. The case arises on exceptions to the denial of a petition for the allowance of a time for filing a bill of exceptions. An appeal from the Probate Court was submitted to the presiding justice at the June 1949 term of the Superior Court in the County of Cumberland, sitting as the Supreme Court of Probate. In vacation, on August 12, the appeal was dismissed and the decree of the Probate Court affirmed. No bill of exceptions was filed within thirty days from the rendition of judgment, and the first and only petition for an extension of time was presented to a justice of the Superior Court in October. The justice denied the petition on the ground that jurisdiction ceased with the expiration of the thirty-day period and that he had no right to use discretion in the matter.

The agreed statement of facts shows that the clerk's office did not notify petitioner's counsel that the judgment of August 12 was filed until September 13, and that in the week prior to September 13, within thirty days of the judgment, on inquiry by petitioner's counsel, the clerk's office had informed him that judgment had not been rendered.

The statute relative to hearings and judgments in vacation reads, in so far as it is here material, as follows:

> "Any such justice may in vacation render judgment in any case heard by him in term time. Parties shall have the right of exception to such orders and judgments, and to other rulings on questions of law, as if judgment had been rendered in term time. Bills of exceptions in such cases shall be filed within 30 days from the rendition of judgment, unless the time is further extended by any justiee of such court." *R. S. Ch. 100, Sec. 39 (1944),* as amended by Laws of 1945, Ch. 136.

The so-called vacation statute was first enacted in Laws of 1915, Chap. 305. The statute then provided that a bill of exceptions be filed "within such time as the justice orders." The present language was adopted by Laws of 1929, Chap. 234. The statute applies to probate appeals heard in term time and decided in vacation. *Robinson, Appellant,* 116 Me. 125; 100 A. 373 (1917).

It is apparent that the petitioner has not complied with the terms of the statute. A judgment in vacation, upon resting without attack by exceptions for the thirty-day period or such period "further extended," becomes final. To "further extend" is to prolong or lengthen an existing time for filing. In this instance, the petitioner did not seek to "further extend" an existing time, but to create a new period of time for filing the bill of exceptions, unrelated and unattached to the statutory period. In short, the petitioner sought to reopen a closed case.

The right to take exceptions is wholly statutory. Jurisdiction is founded upon and limited by the act of the Legislature, and does not spring from any inherent power of the courts. *Sears, Roebuck & Co.* v. *City of Portland,* 144 Me. 250; 68 A. (2nd) 12 (1949); *Bradford* v. *Davis,* 143 Me. 124; 56 A. (2nd) 68 (1947); *Nissen* v. *Flaherty,* 117 Me. 534; 105 A. 127 (1918); *Cole* v. *Cole,* 112 Me. 315; 92 A. 174 (1914); *Stenographer Cases,* 100 Me. 271; 61 A. 782 (1905).

Relief of the nature here requested may be granted by the courts in certain types of cases under specific statutory

provisions. For example, the Supreme Court of Probate may allow a probate appeal, accidentally omitted, under R. S., Chap. 140, Sec. 34, and the Superior Court may grant a review under R. S., Chap. 110, Sec. 1, VII. *Edwards* v. *Estate of Williams,* 139 Me. 210; 28 A. (2nd) 560 (1942), and *Richards Co.* v. *Libby,* 140 Me. 38; 33 A. (2nd) 537 (1943), are illustrated cases.

In equity, we find that the ten-day period for claiming an appeal does not commence until "notice (of a decree) has been given by such clerk to the parties or their counsel," under R. S., Chap. 95, Sec. 21.

Jurisdiction in the present case, however, cannot be based by analogy upon a statutory right to relief which may be given by courts in other types of cases or to the required notice in equity. Indeed, enactment by the Legislature of the statutes noted accords with our view that jurisdiction in such matters exists by virtue of, and to the extent granted by, the statutes.

Whether or not provision should be made for relief from hardship, arising as alleged by the petitioner, is for the Legislature not for the courts to determine. The bounds of jurisdiction mark the limits of the courts' authority. The petitioner failed to comply with the statute, and at that point our inquiry must end.

The petition was properly denied for lack of jurisdiction.

The entry will be

Exceptions overruled.

STATE OF MAINE
vs.
RAYMOND C. HUME

Kennebec. Opinion, January 5, 1950.

Criminal Law. Indictments. Evidence.

It is the duty of the court to arrest a judgment without motion if the verdict does not find the respondent guilty of an offense in law.

When indictment employs language which makes the offense charged clear and unambiguous, it will not be declared defective because of a failure to meet all the technical refinements of criminal pleadings. Under this rule, the omission to allege in an indictment for breaking and entering and larceny that the owner of property named in the indictment is a corporation, if it is, does not render it defective.

The failure of counsel to specify a ground for an objection does not require the overruling of an exception to the admission of the testimony to which it relates, if that ground is apparent to the trial court.

Under the provisions of P. L., 1947, Chap. 265, Sec. 1, the credibility of witnesses testifying in our courts may not be impeached by evidence of their earlier conviction for a crime other than a felony, a larceny, or other crime involving moral turpitude.

ON EXCEPTIONS.

Respondent was convicted of breaking and entering and larceny. Respondent, after verdict and before judgment, filed a motion in arrest, alleging a defective indictment. Motion denied. Respondent brings exceptions to denial of motion. Respondent also excepted to admission of testimony. Exceptions sustained.

James L. Reid, County Attorney, for State of Maine.

William H. Niehoff, for respondent.

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

MURCHIE, C. J. A jury found this respondent guilty of breaking and entering and larceny, under an indictment alleging his entry into:

> "the office of the Maine Central Railroad Station, * * * of one Maine Central Railroad Company,"

and the stealing, therefrom, of certain metallic and paper currency:

> "the property of said Maine Central Railroad Company."

There was no allegation that the owner of the premises and property named was a corporation, or was incorporated. After verdict, and before judgment, the respondent filed a motion in arrest, alleging the indictment defective, or insufficient in law, because of that omission, and on an additional ground waived when the case was argued. The motion was denied.

Respondent's exceptions allege error in rulings on the motion and on the admission, over objection, of two items of evidence. Exceptions were reserved, and perfected, on each ruling. We consider the motion first, not merely because it appears first in the Bill of Exceptions, but because there would be no point in considering the others unless the indictment is sufficient to support a conviction on a retrial of the case. The County Attorney argues that the defect in the indictment, if any, which he denies, is one of form only, and that the motion was not open to the respondent after verdict. There is no merit in this assertion. Even if the motion had not been filed it would be the duty of this court to arrest the judgment if the verdict did not find the respondent guilty of an offense in law. *State* v. *McAloon*, 40 Me. 133.

Copies of the indictment and the motion, and a transcript of the evidence of the witnesses whose testimony is in question, and nothing more, are incorporated in the Bill of Exceptions. These are sufficient to permit the court to pass

upon the issues raised, so far as they are essential to a disposition of the case. Nothing more is required. *Merrill* v. *Merrill,* 67 Me. 70. See also *Jones* v. *Jones et al.,* 101 Me. 447; 64 A. 815; 115 Am. St. Rep. 328, and cases cited therein.

In considering the indictment and its alleged defect, we note at the outset that there is "much contrariety" in reported decisions on the question whether the owner of property mentioned in an indictment must be alleged to be a corporation, if it is. Such is the statement of *People* v. *Mead,* 200 N. Y. 15; 92 N. E. 1051; 140 Am. St. Rep. 616, and 17 R. C. L. 62, Sec. 67 In both, as in 32 Am. Jur. 1028, Sec. 114, it is said that the rule which prevailed long ago in England, and required "great particularity in the description of persons," had been followed in some jurisdictions in this country, and relaxed in others. This court has never been called upon to take a position on it. There is adequate authority either way. An annotation, and a note, following the reports, in A. L. R., of *People* v. *Cohen,* 352 Ill. 380; 185 N. E. 608; 88 A. L. R. 481, and in Ann. Cas., of *State* v. *Clark,* 223 Mo. 48; 122 S. W. 665; 18 Ann. Cas. 1120, group many jurisdictions according to their conflicting positions. The note in Ann. Cas. states the reasons underlying the requirement of an allegation of incorporation, where it is held requisite, as does *Fisher* v. *State,* 40 N. J. L. (11 Vroom) 169, where they are said to be:

> "in fairness, to inform the defendant of the precise offense with which he is charged, and also to secure him against another prosecution for the same offense."

The Indiana Court, in *Norton* v. *State,* 74 Ind. 337, declared, the view that it was fairly deducible from the authorities that when a name was used in an indictment which was apparently a corporate one, a corporate existence might be implied without being averred. We are in accord with that view, as with the further statement of that court, in that case, that no innocent person could be imperiled by

the absence of an allegation of incorporation under such circumstances, although many guilty ones might escape merited punishment if its omission was held to render an indictment defective. It is interesting to note, in considering the old rule, which the cases and notes seem to indicate has been relaxed to some extent in England, that Virginia dispensed with it as far back as 1822. *Lithgow* v. *Commonwealth,* 2 Va. Cas. 297.

The tendency of this court to avoid adherence to refinements in criminal pleading was asserted in *State* v. *Littlefield,* 122 Me. 162, 163; 119 A. 113, in language sufficiently broad to cover such a case as the present. There it was said:

> "When an indictment employs * * * language which makes clear and unambiguous the offense * * * charged, * * * we are of the opinion that such indictment is sufficient and should not be quashed."

This statement was quoted with approval in *State* v. *Smith,* 140 Me. 255, 282; 37 A. (2nd) 246, 258. The *Littlefield* and *Smith* cases involved a liquor nuisance and embezzlement, respectively, but the principle asserted in the quoted excerpt is applicable generally. The indictment in this case satisfies fully the requirement of notice to the respondent of the exact crime with which he is charged there emphasized and the additional one of security for him against a later prosecution for it, whether acquittal or conviction results. The omission in the indictment under review to allege that the owner named was a corporation, or was incorporated, does not render it defective.

The evidence rulings challenged by the exceptions relate to (1) a question asked of a witness for the state, challenged as to form on the ground that it was leading, which we shall not consider because the case must be controlled by the other, and (2) a question asked of a defense witness for the purpose of impeaching her credibility. Her testimony if it had been believed, would have given the respond-

ent a complete alibi. She was asked whether she had been "convicted of a criminal offense." The answer "Yes" was given after express admonition by the Trial Court that it must be answered categorically. The immediately preceding question, not pressed after objection, was whether the witness had served a sentence in the Women's Reformatory. The County Attorney stated in colloquy, after objection was made, that it was for a crime involving moral turpitude.

The alibi was the vital point in the defense and whatever would have cast doubt on the credibility of the witness was prejudicial if the ruling was erroneous. Our sole inquiry therefore will be whether it was erroneous.

The County Attorney argues that the exception should be overruled because counsel for the respondent assigned no specific ground for his objection, citing *Moulton* v. *Perkins,* 116 Me. 218; 100 A. 1020, and other cases, on the point. The foundation for the rule on which he relies is that a trial court is entitled to know what it is ruling on and should not be chargeable with error unless advised of the ground of an objection. The comment of the County Attorney on the preceding question, not pressed, recognized that the objection thereto was based on P. L., 1947, Chap. 265, Sec. 1. The Trial Court could not have been unaware that the objection to the question in issue was based on that law, which was before the court in *State* v. *Jenness,* 143 Me. 40; 62 A. (2nd) 867. Its language is so clear and unambiguous that it cannot be said to require construction or interpretation, but it was said in the *Jenness* case that it disclosed a plain legislative intention that after its effective date the credibility of witnesses testifying in our courts should not be impeached by evidence of their earlier convictions for crime except, to use the statutory words, such as involved:

> "a felony, any larceny or any other crime involving moral turpitude."

This precludes the possibility of impeaching witnesses for earlier convictions of crime except those described by the

quoted language. An affirmative answer to any question of the general type in issue produces the very damage the statute was designed to prevent. The protection of a witness' credibility from attack it was intended to furnish would be destroyed by evidence of a conviction which might or might not be of any of the designated types. It would be impossible to frame a question more manifestly contrary to the intention and purpose of the statute than the one here presented. The ruling was erroneous and the exception to it must be sustained.

Exceptions sustained.

ADRIENNE M. NADEAU, ADMX.
OF ESTATE OF EDMUND J. NADEAU
vs.
ROBERT N. FOGG

LYDIA N. WATIER, ADMX.
OF ESTATE OF FREDERICK WATIER
vs.
ROBERT N. FOGG

Pleadings. Negligence. Automobiles.

It does not necessarily follow that because uncertainty in a declaration may be attacked by a special demurrer, that in all cases of alleged uncertainty, a special demurrer will lie, when a motion for specifications should and could have been filed in the Superior Court before trial.

In negligence actions, the plaintiff must inform the defendant of the facts upon which he relies to establish liability for the alleged injuries, and must set up a situation sufficient in law to establish a

duty of its defendant toward the plaintiff, and that the acts complained of were a violation of that duty. In this instant case, the question whether plaintiff's intestates were guest passengers or passengers for hire was a matter of proof rather than pleading.

"Ordinary care" varies with the attendant and surrounding circumstances.

ON EXCEPTIONS.

Actions of negligence. Defendant filed special demurrers to complaints claiming that allegations failed to show whether plaintiffs' intestates were guest passengers or passengers for hire. Demurrers were overruled. Defendant filed exceptions. Exceptions overruled in both cases.

Gendron & Gendron, for plaintiffs.

William B. Mahoney, for defendants.

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

NULTY, J. Two cases come before this court on exceptions by the defendant to the overruling of the first cause set forth in two special demurrers filed by the defendant, said special demurrers being similar in each case. The actions are in tort and purport to charge the defendant with negligence. The special demurrers in each case assigned several causes of demurrer, but, according to the bill of exceptions and briefs, only one cause of special demurrer remains in each case to which the defendant's exceptions now apply.

Both actions were entered at the May Term 1949 of the Superior Court for York County and on the first day of said term the defendant filed a special demurrer in each case alleging that the declaration was vague, indefinite and uncertain and that defendant was not reasonably informed as to what he would be obliged to meet in the trial of the action in that it did not appear from said declarations

whether the plaintiffs claimed that plaintiffs' intestates were riding in the motor vehicle as guest passengers or were being transported in said motor vehicle under contracts of carriage with the defendant. The presiding justice in each case overruled the first cause of defendant's special demurrer which was set forth in the first paragraph of said special demurrer to which ruling defendant excepted. Certain other causes of demurrers to the declaration were sustained and the plaintiffs amended their declarations in both cases so that the issue now raised in both cases by the special demurrers may be said to concern the sufficiency of the form of plaintiffs' claim as stated in the declarations. The declaration in each case alleges, among other pertinent facts, that plaintiff's intestate "was riding as a passenger in a certain motor vehicle, to wit, a 1947 Plymouth sedan then being operated by its owner, Robert N. Fogg," (defendant in both cases), etc. The second paragraph of the declarations sets forth the facts with respect to a certain motor vehicle with which defendant's motor vehicle collided and its location, etc. In other paragraphs the plaintiffs set forth proper allegations of due care on the part of plaintiffs' intestates as well as specifications of the defendant's negligence and also the damages to plaintiffs' intestates. Under such a situation as described above the defendant asks this court to sustain his exceptions in each case to the overruling of his special demurrer asserting that there is sufficient uncertainty in the declaration so that it may be successfully attacked by a special demurrer such as was filed in these cases. The demurrer in the instant cases attempts to point out a particular imperfection in the declarations and under the decisions of this court when the defect in the declaration is a matter of form and not of substance it must be specially set forth. In other words, there must be special demurrers such as have been filed in these cases. See *Neal* v. *Hanson*, 60 Me. 84 at Page 86. It is the opinion of this court, however, that it does not necessarily follow that because uncertainty in a declaration may be attacked by a special de-

murrer, it necessarily is true that in all cases of alleged uncertainty a special demurrer may be filed when, as it seems to the court in these cases, a motion for particulars or specifications should and could have been filed in the Superior Court before trial. This is particularly true of the declarations in the instant cases after the allowance of the amendments which in the opinion of this court set out a cause of action. The only complaint that the defendant now has, according to his bills of exceptions and his briefs, is the failure of the plaintiffs to allege whether or not their intestates were guest passengers or were being transported under contracts of carriage with the defendant. These matters, it appears to this court, go to the proof rather than to the cause of action. They are incidental facts which the defendant could have ascertained by a motion for particulars or specifications, although it might be pertinent to add at this point that the knowledge as to whether or not the plaintiffs' intestates were passengers for hire or gratuitous passengers undoubtedly is within the knowledge of the defendant particularly in these cases since both of plaintiffs' intestates are alleged to be deceased as a result of the accident.

Under the law of this state it is the duty of the plaintiff in an action of negligence to inform the defendant of the facts upon which he relies to establish liability for the injuries alleged and a plaintiff must set out a situation sufficient in law to establish a duty of the defendant towards the plaintiff and that the act complained of was a violation of that duty. *Knowles* v. *Wolman,* 141 Me. 120; 39 A. (2nd) 666. The well established applicable principles of pleading in negligence cases have been concisely stated in *Chickering* v. *Power Company,* 118 Me. 414, 417; 108 A. 460, and again restated in *Ouellette* v. *Miller,* 134 Me. 162, 166; 183 A. 341, and also in *Estabrook* v. *Webber Motor Co.,* 137 Me. 20, 25; 15 A. (2nd) 25. In *Chickering* v. *Power Company, supra,* it is stated "actionable negligence arises from neglect to perform a legal duty. - - - - - By direct averment a pleader must

at least state facts from which the law will raise a duty, and show an omission of the duty with injury in consequence thereof. - - - - - Reasonable certainty in the statement of essential facts is required to the end that defendant may be informed as to what he is called upon to meet on the trial. Facts showing a legal duty, and the neglect thereof on the part of the defendant, and a resulting injury to the plaintiff, should be alleged." In the instant cases the plaintiffs allege that their intestates were passengers. The term "passenger," particularly in automobile law, signifies some person rightfully taking a passage in, without exercising control over the management of a motor vehicle as distinguished from the operator or person responsible at the time for its operation, *Blashfield, Cyclopedia of Automobile Law and Practice,* Vol. 4, Page 301, Section 2291, and it is the opinion of this court that the word "passenger" as used in both declarations indicates the relationship between the plaintiffs' intestates and the defendant and is a sufficient averment of fact so that the defendant is informed of his legal duty towards the plaintiffs and what he, the defendant, would be obliged to meet in the trial of the actions.

The legal duty of the defendant towards plaintiffs' intestates in negligence cases of this type in this jurisdiction is to use due or ordinary care under the attendant circumstances. It makes no difference what type of carriage is averred in the declaration. However, in the observance of due care differing facts necessarily change the rule of conduct of one who would perform his duty as to such care. There are no degrees of care and no degrees of negligence in this state. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. See *Avery* v. *Thompson,* 117 Me. 120 at Page 123; 103 A. 4; *Raymond* v. *Portland R. R. Co.,* 10 Me. 529; 62 A. 602; *Pomroy* v. *B & A. R. R. Co.,* 102 Me. 497; 67 A. 561; *Young* v. *Potter,* 133 Me. 104 at Page 112; 174 A. 387. In other words, the fact as to whether the plaintiffs claimed that their intestates were passengers for hire or gratuitous pas-

sengers goes to the proof rather than to the cause of action. It is an incidental fact that the defendant was entitled to know, if he wished to know it, and a fact which was, as before pointed out, a proper subject for a motion for particulars or specifications. It is not, in the opinion of this court, a fact essential to the cause of action. In the opinion of this court the declarations as amended state a good cause of action and the action of the presiding justice in overruling the special demurrers set forth in the first paragraph of said both special demurrers was correct and the mandate will be

Exceptions overruled in both cases.

LINNA M. POULSON

vs.

JOHN H. POULSON

York. Opinion, January 14, 1950.

Joint Tenant. Divorce.

A joint tenancy as distinguished from a tenancy of entirety is unaffected by the marital relation of the tenants, or by a divorce in and of itself.

A surviving joint tenant holds the entire estate, not by acquisition of an interest from the deceased, but by right of the instrument creating the joint tenancy. The estate of the deceased joint tenant is extinguished and he leaves no inheritable estate.

The interest, if any, acquired upon divorce by libellant husband in real estate held in joint tenancy with the libellee, arises by operation of R. S., 1944, Chap. 153, Sec. 64 which provides "He shall be entitled to 1/3 in common and undivided of all her real estate, except wild lands, which shall descend to him as if she were dead.

As there is no estate in libellee wife who is "as if she were dead" for the purposes of the instant case, to descend, there is no interest in the joint tenancy in the wife upon which Sec. 64 may operate, and the joint tenancy remains unchanged by the divorce and by Sec. 64.

ON REPORT.

Petition for partition. Petitioner and respondent held real estate in joint tenancy at time of divorce granted respondent for fault of petitioner. Petitioner claimed the interest or the parties in such real estate were equal and respondent claimed a two-thirds interest due to divorce. The petitioner and respondent are each entitled to a one-half interest in the real estate described in the petition. Judgment for partition accordingly.

Willard and Willard, for petitioner.

Harry S. Littlefield,
Simon Spill, for respondent.

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

WILLIAMSON, J. The case arises on report in partition proceedings for determination of the interests of the parties in certain real estate.

The petitioner contends that the interests of the parties are equal; and the respondent, that his equal interest has become a two-thirds' interest by divorce for fault of the petitioner, formerly his wife.

The issue is: What interest, if any, does the husband, by divorce for fault of his wife, obtain in real estate held by husband and wife in joint tenancy?

R. S., Chap. 153, Sec. 64 (1944), under which the husband makes his claim, reads as follows:

> "When a divorce is decreed to the husband for the fault of the wife, he shall be entitled to 1/3 in

> common and undivided of all her real estate, except wild lands, which shall descend to him as if she were dead; and the court may allow him so much of her personal estate as seems reasonable. In all cases the right, title, and interest of the libelee in the real estate of the libelant shall be barred by the decree."

The statute has remained without change since enacted in Laws of 1903, Chap. 209. Prior to the 1903 Act, the husband had a limited right in real estate of his wife upon divorce for her adultery. *R. S., 1883, Chap. 60, Sec. 10.*

Title to the real estate in joint tenancy was acquired by the parties, then husband and wife, by deeds in 1941 and 1945. The husband in 1948 obtained a divorce for fault of his wife. Nothing has taken place, apart from a conveyance of a portion of the real estate in 1946, which does not affect the present controversy, and the divorce, to change the title or interest of the parties.

In light of the agreed statement of facts, that the property was conveyed to the parties "as joint tenants and not as tenants in common," and that they "were seized in fee simple and as joint tenants with equal interest" in the real estate, we treat the estate held by them as a joint tenancy, with the usual incidents thereof, including the right of survivorship, within the protection of R. S., Chap. 154, Sec. 13, which reads as follows:

> "Conveyances not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed. Estates vested in survivors upon the principle of joint tenancy shall be so held."

The language in the 1941 and 1945 deeds, by which the joint tenancy in each instance was created, is not set forth in the record. Better practice calls for including the exact language, that the court may determine the true character of the estate from the deeds without the necessity of reliance upon the interpretation given to the deeds by the parties.

No question arises about the propriety of the partition proceedings. The interests of the parties are to be determined by the judgment for the partition. *R. S., Chap. 162, Sec. 1, et seq.*

It is unnecessary that we discuss at length the nature and incidents of joint tenancy or the effect of divorce in and of itself upon such a tenancy. Joint tenancy has been recently defined in *Burgess* v. *Strout,* 144 Me. 263; 68 A. (2nd) 241, 252 (1949), as follows:

> "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 cotenant were possessed and owners per tout, that is of the whole, the estate of the survivor continues as before."

See also 2 *Tiffany, Real Property,* 196, 198 (3d ed. 1939); *Garland, Appellant,* 126 Me. 84, 93; 136 A. 459, 464 (1927); 14 *Am. Jur.* 79; 48 *C. J. S.* 910, 927.

The joint tenancy was unaffected by the marital status of the tenants. Tenancy by entirety, consistent only with marriage, and terminating with the end of the marriage relation, does not exist in Maine.

Tenancy by entirety has not existed in Maine since the 1844 Act, entitled "An Act to Secure Married Women Their Rights in Property" *(Laws of 1844, Chap. 17),* presently found in R. S., Chap. 153, Sec. 35, *et seq. Robinson, Appellant,* 88 Me. 17; 33 A. 652; 30 L. R. A. 331; 51 A. S. R. 367 (1895). In *Garland, Appellant, supra,* the court said on Page 93, "This Court does not recognize any joint interest

in either real or personal property, except that of copartners, tenants in common and joint tenancies."

From the time the property was here acquired until the moment of divorce the joint tenancy existed with all the usual incidents thereof. Either husband or wife could alienate his or her share in the joint tenancy, thus destroying the right of survivorship and creating a tenancy in common. Such severance could also be accomplished by forfeiture, or taking of the share of either tenant, by operation of law.

Divorce, in and of itself, does not affect the joint tenancy of husband and wife. The distinction between the effect of divorce upon a joint tenancy and an estate by entirety is set forth clearly in *Warren, Schouler Divorce Manual* (1944), on Page 270, as follows:

> "It seems to be the general rule that a joint tenancy is not affected by a divorce but remains in its original character. The law is thus different from that applied to tenants by the entirety. The reason for this is that while tenants by the entirety must necessarily be husband and wife, any two persons can be joint tenants. Their relationship, so far as the property is concerned is not changed by the divorce."

The rule is also stated that "Where husband and wife take as joint tenants and by virtue of the relation become tenants by the entirety, a divorce will restore the joint tenancy." 1 *Schouler, Marriage, Divorce, Separation and Domestic Relations,* 594 (6th ed. 1921).

The interest, therefore, if any, acquired upon divorce by the husband in the real estate held in joint tenancy, must arise by operation of *Section 64 of the statute, supra,* and is dependent upon the meaning of the words, "He shall be entitled to 1/3 in common and undivided of all her real estate, except wild lands (with which we are not concerned), which shall descend to him as if she were dead."

To arrive at the meaning of the statute, we must consider as well the statutory provision for the wife upon divorce for her husband's fault, and the Rules of Descent.

R. S., Chap. 153, Sec. 62, reads, in so far as it is here material:

> "When a divorce is decreed to the wife, for the fault of the husband for any other cause (except impotence), she shall be entitled to 1/3 in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead; and the same right to a restoration of her real and personal estate, as in case of divorce for impotence."

Both Sections 64 and 62 use the terminology of the Rules of Descent in R. S., Chap. 156, Sec. 1, of which the pertinent part reads:

> "The real estate of a person deceased intestate—descends according to the following rules:
>
> "I. If he leaves a widow and issue, 1/3 to the widow. If no issue, ½ to the widow. If no kindred, the whole to the widow; and to the widower shall descend the same shares in his wife's real estate. There shall likewise descend to the widow or widower the same share in all such real estate of which the deceased was seized during coverture, and which has not been barred or released as herein provided. In any event, 1/3 shall descend to the widow or widower free from payment of debts, except as provided in section 222 of chapter 150."

An amendment by Laws 1949, Chap. 439, effective since the divorce, and enlarging rights when no issue, has no bearing upon the principle here involved.

The law of divorce is wholly statutory. *Wilson, Pet.* v. *Wilson,* 140 Me. 250, 251; 36 A. (2nd) 774 (1944). We cannot travel beyond the purpose and intent of the statutes.

The relationship of husband and wife upon divorce, in so far as the source of the interest in real estate acquired

under Section 64 is concerned, is that of widower and deceased wife. The extent of such interest, however, is measured by Section 64, and is limited to a one-third share. The provisions of the Rules of Descent for differing interests dependent upon the existence or non-existence of issue or kindred are not applicable. Our court has set forth the nature of the interest acquired by a wife in real estate of her husband upon divorce for his fault in the cases mentioned below. The construction there given in cases of the innocent wife applies with equal force in the case of the innocent husband.

The court in *Leavitt* v. *Tasker,* 107 Me. 33; 76 A. 953 (1910), discussed the change from dower to an interest by descent upon divorce, and said at Page 37:

> "Taking all the provisions of chapter 157 of the Laws of 1895 together they disclose clearly, we think, a legislative intent to make the provision for a divorced wife in her husband's real estate, when the divorce is for his fault, similar to the provisions for a widow, so that she will be entitled to the same share in the same real estate, except wild lands, as she would be entitled to "if he were dead."

In *McAllister* v. *Railroad Company,* 106 Me. 371; 76 A. 891; 29 L. R. A., N. S. 726 (1910), the court, in passing upon dower of a wife upon divorce "to be recovered and assigned to her as if he were dead," by the effective statute, said at Page 377:

> "We have thus far treated the case as if the plaintiff became a widow in 1891. But she did not. She then became divorced for her husband's fault. But her rights, such as they were in 1891, were the same as if her husband had then died. - - - - - And such a divorce affected the right of dower precisely as would the husband's death. *Stilphen* v. *Houdlette,* 60 *Maine,* 447. Therefore, at the outset, we have only to inquire what would have been a widow's rights under the same circumstances."

In *Kelsea* v. *Cleaves,* 117 Me. 236; 103 A. 527 (1918), the court said at Page 237:

> "The act of 1895, in plain terms, abolished dower and in place thereof provides that upon the death of the husband one-third of his real estate descends to his widow, if there be issue, one-half to his widow if no issue and all if there be no kindred. Thus it will readily appear that it was the plain intention of the legislature, having abolished dower and provided for the descent of real estate to his widow at his decease, in lieu thereof, to guard the interests of the wife who obtained such a decree of divorce as we have referred to, by making provisions similar to those made for the widow in case of the husband's death. The two provisions are correlative."

The provisions for the innocent party on divorce are to be construed in connection with the Rules of Descent. Provision for the innocent wife by descent was created, as we have seen, in the 1895 Act which abolished dower, and in 1903 a like provision was made for the innocent husband.

The husband here is entitled only to such an interest as he would have obtained as a widower.

The question becomes: What interest in real estate held in joint tenancy by husband and wife passes by descent to the husband on death of the wife?

The surviving joint tenant holds the entire estate, not by acquisition of an interest from the deceased, but by right of the instrument creating the joint tenancy. The estate of the deceased joint tenant is extinguished, and he leaves no inheritable estate. *Strout* v. *Burgess, supra;* 48 *C. J. S.* 911; 14 *Am. Jur.* 80; 2 *Tiffany, supra,* 198.

There being no estate in the wife, who is as if she were dead for this particular purpose, to descend, it follows that there is no interest in the joint tenancy in the wife upon which Section 64 may operate. Thus the joint tenancy remains unchanged by the divorce and by Section 64.

If we treat the present right by descent as the equivalent of dower, the result is unchanged. At common law, dower does not attach to an estate in joint tenancy. The possibility of the estate being defeated by survivorship prevents dower. *Mayburry* v. *Brien,* 15 Pet. (U. S.) 21; 10 L. Ed. 646; 14 *Am. Jur.* 80. See Haskins, *"The Development of Common Law Dower,"* 62 Harvard L. Rev., 42, 49 (1948).

The Act of 1895 abolished both "her dower at common law" and the interest of the widower for life in real estate of his deceased wife "to be recovered and assigned in the manner and with the rights of dower." The common law rule of no dower was thus applicable to the rights of the widower. *Laws of 1895, Chap. 157; R. S., 1883, Chap. 103, Sec. 1*—dower for widow—words quoted unchanged since R. S., 1841, Chap. 95, Sec. 1; *R. S., 1883, Chap. 103, Sec. 14*—dower for widower—first enacted in Laws of 1857, Chap. 8.

To extend the operation of the statute, as urged by the husband, to accomplish a severance of the joint estate, with the creation of a tenancy in common, and the taking of a one-third interest in the wife's share held in common, would be to violate the plain meaning and intent of the statute. Such an estate, so obtained, would not be the interest to which a widower is entitled on decease of his wife, and such only, limited to a one-third share, is the interest a husband obtains on divorce.

It follows, as the judgment of the court, that the petitioner and the respondent are each entitled to a one-half interest in the real estate described in the petition.

Judgment for partition accordingly.

MATTIE STURTEVANT FLOOD
vs.
GEORGE L. EARLE, JR.

Kennebec. Opinion, January 19, 1950.

Referees. Trespass. Right of Way by Necessity. Navigable Waters.

The report of a referee made under a rule of court, pursuant to the statute, is equivalent to a finding by a single justice with jury waived and if there is evidence of probative value to support the findings of fact made by the referee, such findings are conclusive.

Where one conveys to another a tract of land surrounded by the grantor's own land, or inaccessible except through the grantor's own land, he is considered to have granted by implication a right of way to and from it. The test is necessity and whether the party claiming can at reasonable cost on his own estate and without trespass, create a substitute.

No right of way of necessity exists across the remaining land of the grantor, where the land to which such right of way is claimed borders on the sea. It must be necessity and not mere convenience.

No right of way can be implied, if there is free access to the land over public navigable water, although an easement of necessity is sometimes recognized where the expense to be incurred in creating or using another way is excessive.

Bodies of water are navigable when they are used or capable of being used, in their ordinary condition as highways. This is a question of fact.

Ponds containing more than ten acres are known as great ponds and they are public ponds which with the soil under them are held by the state in trust for the public.

The location of ways arising from necessity may be changed by the concurrence of the parties and such location or change need not be in writing nor formally agreed to, but may be inferred from the acts or acquiescence of the parties.

ON EXCEPTIONS.

Action of trespass to real property. The defense is a right of way by necessity and the referee found such a way

to exist. The case comes before the law court on plaintiff's objections and exceptions to the acceptance of the referee's report. Exceptions overruled. Case fully appears in the opinion.

Perkins, Weeks, and Hutchins,
William H. Niehoff, for plaintiff.

Locke, Campbell, Reid, and Hebert, for defendant.

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

FELLOWS, J. This case comes before the Law Court on objections and exceptions to an acceptance of a referee's report.

The action is one of trespass, brought before the Superior Court in Kennebec County, for travelling "over and across said (plaintiff's) close and defendant did wrongfully operate and propel a motor vehicle over and across said close and did wrongfully leave his said vehicle parked on said close thereby wrongfully excluding said plaintiff from her rightful possession of said close." The defendant's plea is not guilty, with a brief statement "that he has a right of way over and across the plaintiff's close and that the alleged trespass was only the rightful use of said right of way." The action was referred, and the referee found that the defendant, George L. Earle, Jr., had "a right of way by necessity from the main highway" but because the defendant had improperly parked on the plaintiff's lot, the referee found "the defendant guilty and assessed damages at one dollar." The defendant, Earle, moved acceptance of the referee's report, and the plaintiff, Flood, filed objections. The objections were overruled, the report accepted, and exceptions to the action of the Superior Court in accepting the report were taken by the plaintiff.

The principal question before the Law Court, as raised by the objections and exceptions, is whether the referee was

correct in determining from the evidence that the defendant had a right of way by necessity across the plaintiff's land.

The report of the referee says:

> "After hearing in the above cause a view of the premises was taken by the referee by agreement.
>
> The plaintiff and the defendant with his father are owners of adjoining cottage lots on the shore of Messalonskee Lake, a great pond. For convenience, the lots are respectively called the 'Flood lot' and the 'Earle lot.' The lots were at one time part of the Cummings farm extending from the main highway to the lake shore. The Earle lot was conveyed in 1906 to predecessors in title of the defendant and his father and was the first shore lot sold from the farm.
>
> I find the defendant has, and his predecessors in title have had, a right of way by necessity from the main highway to the Earle lot. Since 1906 the right of way has been located in part across the Flood lot. Changes in location of the right of way, including the change to the present location, have been made by agreement.
>
> The defendant, however, has done more than use his right of way. He has parked his automobile on the plaintiff's lot, and this he had no right to do. Accordingly, I find the defendant guilty and assess damages at one dallar ($1.00)."

It does not appear from the report of the evidence that "Snows Pond," now called "Messalonskee Lake," has any public landing place. It does not appear from the evidence that the defendant has any road or way to reach the pond from the main highway, except to cross land of other owners. The evidence does not disclose any method or way to reach the defendant's property by land except by crossing the land of the plaintiff. The referee could find, and undoubtedly did find, either that there was no public way to the lake, or that the lake was not "navigable," in the sense that it could be used as a highway. The referee could, in fact, find either or both to be true.

There was no express grant of any right of way made to the defendant or to defendant's predecessors in title by the owner of the "Cummings Farm," so-called, from which farm came the adjoining shore lots of the plaintiff and defendant. Arthur M. Alexander and Aimee Alexander, the owners in 1931 when the plaintiff purchased, made an express grant to the plaintiff of a right of way across the farm, "said right of way to be used in common with other cottage owners." The defendant's lot was sold out of the farm in 1906, twenty-five years before the lot of the plaintiff, and the defendant and his predecessors in title have been accustomed to cross and recross the other portions of the farm (including the plaintiff's lot) in going to and from the main highway. The location of the way, as used by the defendant and other cottage owners including the plaintiff, was changed somewhat during the years by use and apparent acquiescence of all parties. The sale of other lots and the building of garages etc. probably made such changes more convenient.

The report of a referee made under a rule of court, pursuant to the statute, is equivalent to a finding by a single justice with jury waived. It is prima facie correct. *Bourisk* v. *Mohican Co.*, 133 Me. 207; *Hanson* v. *Loan Association*, 132 Me. 397. If there is any evidence of probative value to support the findings of fact made by a referee, such findings are conclusive. *Bradford* v. *Davis*, 143 Me. 124; 56 Atl. (2nd) 68; *Wood* v. *Balzano*, 137 Me. 87.

It was early decided in Maine that where one conveys to another a tract of land surrounded by the grantor's own land, or inaccessible except through the grantor's own land, he is considered to have granted by implication a right of way to and from it. *Trask* v. *Patterson*, 29 Me. 499; *Whitehouse* v. *Cummings*, 83 Me. 91. The test is necessity and whether the party claiming can at reasonable cost on his own estate and without trespass create a substitute. *Watson* v. *French*, 112 Me. 371, 375.

No right of way from necessity exists across the remaining land of the grantor, where the land to which such right of way is claimed borders on the sea. *Kingsley* v. *Goldsboro Land Improvement Co.*, 86 Me. 279. It must be necessity and not mere convenience. If free access to the land over a public navigable water exists, a way by necessity cannot be implied. *Hildreth* v. *Googins*, 91 Me. 227. An easement of necessity is sometimes recognized, however, where the expense to be incurred in creating or using another way is excessive. *Littlefield* v. *Hubbard*, 124 Me. 299.

Bodies of water are navigable when they are used, or are capable of being used, in their ordinary condition as highways. This is a question of fact. *Smart* v. *Lumber Co.*, 103 Me. 37.

Ponds containing more than ten acres are known as "great ponds." They are public ponds. The state holds them and the soil under them in trust for the public. The public, in the absence of statute, have the right to fish and fowl and to cut ice upon them, by virtue of the Colonial Ordinance of 1641, provided the citizen can reach the pond by "passing to it on foot without trespassing upon any man's corn or meadow." *Conant* v. *Jordan*, 107 Me. 227; *Barrows* v. *McDermott*, 73 Me. 441; *Barstow* v. *Rockport Ice Co.*, 77 Me. 100.

The location of ways arising from necessity may be changed by the concurrence of the parties. Such location or change need not be in writing nor formally agreed to. It may be inferred from the acts or acquiescence of the parties. *Rumill* v. *Robbins*, 77 Me. 193.

Although there was no express grant of a right of way to the defendant's lot across the remaining portions of the farm, when the original deed was given in 1906, there was a reservation of such a way in the plaintiff's chain of title. The common grantor was Warren P. Cummings, who as owner of the farm, conveyed what is now the defendant's lot to Ernest L. Booker and Justin A. Sawtelle by warranty

deed April 19, 1906. From Booker and Sawtelle the title to the defendant's lot passed by several mesne conveyances to the defendant, George L. Earle, Jr. and his father, in 1941. The lot of the plaintiff, on the other hand, was purchased by her in 1931 from Arthur M. Alexander, who had received title to the farm through Warren P. Cummings and Elmer Cummings. The 1930 deed of the "Cummings Farm" from Elmer Cummings to Alexander, after describing the whole farm, specifically said "excepting and reserving from the above described premises so much of the same as was conveyed by Warren P. Cummings to Ernest Booker and Justin A. Sawtelle * * * together with a right of way across the above described premises to said land of Booker and Sawtelle as now used and travelled by cottage owners." The immediate deeds to the plaintiff, Mattie Sturtevant Flood, of her lot and right of way, were given to her in 1931 by Arthur M. Alexander and Aimee L. Alexander. The deed of the plaintiff's right of way says "A right of way across the so-called Cummings Farm * * * from the County Road to the premises * * * said right of way to be used in common with other cottage owners."

An implied grant of a way by necessity, to the defendant's lot, might be found by the referee to have been recognized by these subsequent owners of the Cummings Farm, and might be found by the referee to have been expressly reserved when the plaintiff herself received title to her lot.

It further appears that after a full hearing of this case by agreement of parties, the referee personally viewed the premises. What the referee may have seen and learned through observation does not, of course, appear. In such a case as this, a view of all the existing places, such as the lots of plaintiff and defendant, the way as travelled, the farm, the lake, and the surrounding country, might be, and should be a factor in his decision. He had the opportunity to learn, at first hand, how the defendant could reach the main highway from his lot. He could perhaps see whether the lake was or was not in fact a navigable highway, and

whether the defendant had free access to the lake from the main road. The court cannot say that the referee was not fully justified in finding, either from the record, which in itself presents sufficient evidence of "probative value," or from the record and his personal examination, that there was a way from necessity, and that the way had been changed to its present location by agreement.

The action of the Superior Court in accepting the report of the referee was proper.

Exceptions overruled.

STATE OF MAINE
vs.
EDWIN JOHNSON

Waldo. Opinion, January 26, 1950.

Criminal Law. Breaking, Entering. Exceptions. Waiver. Directed Verdict. Rule 40.

It is elementary that exceptions must be allowed or their truth otherwise established before they will be heard by the Law Court. R. S., 1944, Chap. 94, Sec. 14. Rules of Court 40.

An exception does not lie to the failure of the presiding justice to grant a motion for a directed verdict at the close of the State's case, when the respondent does not then rest his case; the further introduction of evidence in defense results in a waiver of the exception.

ON EXCEPTIONS.

On indictment for breaking, entering and larceny with a verdict of guilty. The printed record contained exceptions

which had not been allowed and it appeared that the bill of exceptions was not presented to the presiding justice for allowance. Exceptions dismissed. Judgment for the State. Case fully appears below.

Hillard H. Buzzell, for the State.

Ross St. Germain, for respondent.

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

WILLIAMSON, J. At the October 1948 Term of the Superior Court in the County of Waldo, the respondent was found guilty of breaking and entering a house and committing larceny therein. The case is presented to us with written arguments. The printed record contains a bill of exceptions which has not been allowed. As the court said in *Manheim* v. *Carr,* 62 Me. 473, 475 (1873), "but the exceptions do not appear to have been allowed and cannot, therefore, be considered."

It is an elementary rule that exceptions must be allowed or their truth otherwise established before the exceptions will be heard in this court. Unless and until there is at hand a true bill of exceptions, there is nothing before us.

Under the statute, R. S., Chap. 94, Sec. 14 (1944), applicable to both civil and criminal proceedings in the Superior Court, the party aggrieved by an opinion, direction, or judgment of the single justice "may, during the term, present written exceptions in a summary manner, signed by himself or counsel, and when found true they shall be allowed and signed by such justice." The statute also provides, "if the justice . . . disallows or fails to sign and return the exceptions, or alters any statement therein, in either civil or criminal proceedings, and either party is aggrieved, the truth of the exceptions presented may be established" in manner therein provided. *Rules of Court 40,* 129 Me. 518.

We have quoted only the parts of the statute which illustrate the necessity of presentation of exceptions to the presiding justice and the establishment of the truth of the exceptions by the allowance thereof by the justice or otherwise before the exceptions are properly before the Law Court. We are not here concerned with proceedings for allowance of exceptions in case of the death or disability of the presiding justice. *R. S., Chap. 95, Sec. 51.*

It is the well understood and long continued practice for the presiding justice to grant an extension of time beyond the close of the term for filing an extended bill of exceptions and, where necessary, for filing the transcript of the testimony. See *Bradford* v. *Davis,* 143 Me. 124; 56 A. (2nd) 68 (1947), and cases cited. In the present case the bill of exceptions was filed with the clerk on April 1, 1949, the last day of a second extension of time for filing the extended bill. The record is barren of any evidence that the respondent presented the bill to the presiding justice. If it be said the bill may have been presented to the presiding justice and returned to the clerk unsigned, then the respondent would necessarily have sought to have established the truth of his exceptions under the Rule of Court. No suggestion is made that any steps in this direction were taken. We may fairly infer, therefore, that counsel was content merely to leave the bill of exceptions drafted by him in the hands of the clerk, without presentation to the presiding justice, and to have the case marked "Law" and placed upon the docket of this court.

We pass the point that the docket contains no entry at the October 1948 Term to the effect "Exceptions filed and allowed."

As the court said in *Poland* v. *McDowell,* 114 Me. 511, at 513; 96 A. 834 (1916), "There is another reason why these exceptions should not be allowed. They were not presented to the presiding justice until after the term adjourned, and it does not appear that any privilege was reserved during

term time to present them later. . . . The presiding justice is not only not required to allow exceptions after the term is adjourned, but without waiver and consent he has no power to do it."

That during the term the presiding justice with the consent of the parties granted a further time for filing the extended bill of exceptions, would indicate that the docket entry was inadvertently omitted. If the correction of such error were here material, then the cause could be remanded for correction of the error under R. S., Chap. 91, Sec. 14. See *Moores* v. *Inhabitants of Springfield,* 143 Me. 415; 62 A. (2nd) 210 (1948).

The stark facts here are: (1) that at no time has the bill of exceptions printed in the record ever been presented to the presiding justice for his consideration; (2) that the period within which the bill could have been presented to the presiding justice has expired; and (3) that the bill bears no stamp of the truth of the exceptions. The exceptions are not properly before us and for this reason alone must be dismissed and judgment entered for the State.

We have, however, read the bill of exceptions and the record to determine what issues the respondent's counsel sought to present. Counsel has not stated the case or the issues succinctly and clearly. The bill of exceptions as drawn does not fall within the limits of proper practice. In *McKown* v. *Powers,* 86 Me. 291; 29 A. 1079 (1894), the court discusses the history and origin of bills of exceptions and the practice and rules governing their preparation and presentation. And in *Bradford* v. *Davis, supra,* and the cases cited therein, proper procedure is set forth in detail.

The respondent sought, as we have said, to present the case to us on exceptions. A motion to set aside the verdict was denied and no appeal therefrom was taken.

The respondent in his bill notes an exception to the failure of the presiding justice to grant a motion for a directed verdict at the close of the State's case. The transcript of testimony does not show that such exception was taken. The respondent, however, did not rest his case, and accordingly the refusal to grant the motion was not subject to exception. Further, by introduction of evidence in defense, the exception was waived. *State* v. *Shortwell,* 126 Me. 484; 139 A. 677 (1928).

Other exceptions relative to the admissibility of evidence and to the failure to give a requested instruction are without merit. We do not find that the respondent was prejudiced by any of the rulings of which he complains. Had the exceptions been properly before us, the result would be unchanged.

Exceptions dismissed.

Judgment for the State.

KENNEBUNK, KENNEBUNKPORT AND WELLS WATER DISTRICT

vs.

MAINE TURNPIKE AUTHORITY

York. Opinion, February 9, 1950.

Referees. Municipal Corporations.

Ponds and Brooks. Riparian Owners. Rule 42, 21.

An objection to a referee's report that it is "against the law and evidence" and the "weight of evidence" is insufficient under Court Rules XLII and XXI."

A general finding by a referee has the effect of finding in favor of the cause as alleged.

If the ruling of a presiding justice is right in rejecting a referee's report the fact that the wrong reason was given is immaterial.

Where the only right to the use by a quasi municipal corporation of the waters of a brook is predicated upon a charter provision authorizing such use, an alleged damage to the quality of the water by an upper riparian owner can be sustained only upon a showing that the principal corporation had made a legal taking of the waters of the brook.

A municipal corporation cannot by virtue of the ownership of riparian lands abstract water from a brook on which they are located for public distribution since such abstraction for sale to others is not a reasonable use.

Unless a lower riparian proprietor establishes its right to use the waters of a brook for public sale, injury to the quality of the water resulting from a proper use of its land by an upper riparian proprietor is *damnum absque injuria;* that is damage without invasion of a legal right.

The doctrine that a charter authorizing the use of the water of a great pond as a source of water supply operates as a grant of the water and use thereof does not apply to brooks and streams.

Neither the state nor any agency thereof can take private property for use without payment of just compensation.

ON EXCEPTIONS.

Action by the Wells Water District against the Maine Turnpike Authority to recover damages for injury to its water supply. A referees' report awarding damages to plaintiffs was rejected by the presiding justice. Exceptions were taken and allowed. Exceptions overruled. Case fully appears below.

Hutchinson, Pierce, Atwood and Scribner,
Waterhouse, Spencer & Carroll, for plaintiffs.

Varney, Levy & Winton,
Charles W. Smith, for defendants.

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

MERRILL, J. On exceptions. This is an action on the case instituted by Kennebunk, Kennebunkport and Wells Water District, hereinafter called the District, against Maine Turnpike Authority, hereinafter called the Authority. The District is a body politic and corporate created by the Legislature of this State for the purpose of supplying water to towns and individuals within its territorial limits. P. & S. L., 1921, Chap. 159. The Authority is a body politic and corporate created in like manner for the purpose of constructing and operating a turnpike from a point at or near Kittery to a point at or near Fort Kent. P. & S. L., 1941, Chap. 69.

The District in this action seeks to recover damages for injury to its water supply, Branch Brook, which injury and damages it alleges were caused by the Authority by the construction of its turnpike across Branch Brook and its watershed. The injury claimed was the creation of a turbid condition of the water. To remedy this condition the Dis-

trict claims that it was compelled to construct a sedimentation plant which cost between $163,000.00 and $164,000.00.

The writ was dated April 16, A. D. 1947, returnable to the Superior Court in York County at the May 1947 Term. In said court the case was referred to three referees with the right of exceptions as to matters of law reserved. After hearing, the referees filed their report, finding for the plaintiff and assessing damages in the sum of $70,000.00. At the January Term of the Superior Court, 1949, the District moved for acceptance of the report and the Authority filed written objections thereto. The presiding justice rejected the report and exceptions to his ruling were taken and allowed.

The written objections to the report were as follows, viz.:

"(1) It is against the law and the evidence

(2) It is against the weight of the evidence

(3) The referees fell into a plain mistake as there is no evidence to justify a finding of any unreasonable use by the defendant of its property or that any damage actually accrued to the plaintiff by reason of any acts of the defendant.

(4) The amount of the report is obviously the result of a compromise on the part of the referees as the plaintiff claimed as damages only the cost of the Filtration Plant which amount was conceded to be one hundred sixty-three odd thousand dollars, while the defendant claimed no damage at all."

The report of the referees is general in its terms announcing a finding for the District and assessing damages in the sum of $70,000.00. It contains no statement of facts found upon which the report is based. Neither does the report contain any statement of the legal principles which the referees applied in determining liability or in assessing damages.

The only cause of action submitted to the referees for decision was the cause of action set forth in the declaration. This is the only cause of action upon which they were authorized to find for the District. The report of the referees in favor of the District was a decision that it had *such* cause of action. It is presumed that in finding for it they confined their inquiry thereto and based their decision thereon. Such is the effect of the general finding by the referees in favor of the District.

By Rule XXI "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." In interpreting the objections so filed, they, and the words used therein, must be interpreted as they apply to the report attacked as a decision of the specific cause of action set forth in the declaration. To so interpret such objections they should also be interpreted as they apply to such cause of action.

Objections (1) and (2) are so manifestly insufficient under Rule XLII and Rule XXI as interpreted in *Staples* v. *Littlefield,* 132 Me. 91 and *Throumoulos* v. *Biddeford,* 132 Me. 232 that they could not be considered by the justice to whom the report was presented for acceptance, nor need we give them further consideration.

Objection (3) presents two questions of law. A finding by referees without any evidence to justify it is an error of law. *Staples* v. *Littlefield, supra.* These alleged errors of law are, (a) that "there is no evidence to justify a finding of any unreasonable use by the defendant of its property" and (b) that there is no evidence to justify a finding "that any damage actually accrued to the plaintiff by reason of any acts of the defendant."

If rejection of the report by the presiding justice can be sustained upon one or the other of these legal grounds, the

exceptions to its rejection by him must be overruled. If the rejection of the report was justified under objection (3), it will become unnecessary for us to consider the validity of objection (4).

As the case comes to this court, although the record is very voluminous, the issues for our determination are contained within narrow compass. The plaintiff seeks to recover damages for injury to its claimed property right to take water from Branch Brook under legislative charter and to make use of said water for distribution to the public under the same. It claims that the defendant, although it was a governmental agency created by legislative charter, and although it was engaged in a governmental function, within the authorization of its charter, to wit, building a turnpike across Branch Brook and the watershed thereof, so constructed the same and used such methods of construction that the quality of the water of Branch Brook was rendered so impure, viz., so turbid, that it was unfit for distribution by the plaintiff to its customers. The sole injury claimed by the plaintiff was to the waters of Branch Brook as used by it for a source of public water supply, and the sole damages claimed were to its use by the plaintiff as such.

The only *right* to the use of the waters of Branch Brook by the District set forth *in the declaration* was that Branch Brook was included in the sources of supply it was authorized to use under its charter. The declaration contains no allegation that the District owned any riparian land touching Branch Brook. The declaration did not set forth that the District was the owner of, possessed, used or that there even existed any riparian rights based upon its ownership of riparian land, nor does it set forth the existence of facts from which the same may be inferred, nor does it assert any invasion or damage to such rights by the Authority. The sole claim for damages was based upon the District's right as a quasi municipal corporation under its charter to dis-

tribute water from Branch Brook, and an invasion of such rights by the Authority and injury caused thereby.

The report of the referees, therefore, must be interpreted in the light of this alleged cause of action; and the reasons assigned as objection thereto must likewise be interpreted as applicable to the report sustaining such cause of action.

It might be inferred from the evidence that the District owned land on the brook where its pumping station and intake were situate and also that it owned some riparian land on the brook above its pumping station and below the riparian land owned by the Authority. The only purpose for which the District's ownership of such riparian land can be considered, however, is whether or not such ownership conferred upon it the right to use the waters of Branch Brook as a source of supply for public distribution, this being the only right that the District claimed to have and the only right which it claimed was invaded by the Authority.

The defendant was an upper riparian proprietor, it had title to its right of way across Branch Brook and its watershed. As such riparian proprietor it asserted that it had a right to use its land for all reasonable purposes; that so far as the rights of the plaintiff are concerned, the building of the turnpike across the watershed of Branch Brook and Branch Brook, and all acts which it did in connection therewith were authorized by its charter and constituted only a reasonable use of its own land by it as an upper riparian proprietor; and that if in so acting it injuriously affected the quality of the water of Branch Brook, such injury was only the result of a reasonable use by it of its own land and was *damnum absque injuria* so far as the plaintiff was concerned.

The only cause of action set forth in the declaration was injury to the right of the District to use the waters of Branch Brook as a source of supply for public distribution.

This was the only use or right of use set forth in the declaration. Unless the District, as against the Authority as an upper riparian proprietor, had the right to use the waters of Branch Brook for such purpose, the damage to the quality of the water would be *damnum absque injuria,* that is, damage without the invasion of legal right.

Objection (3) that "there is no evidence to justify a finding of any unreasonable use by the defendant of its property" raises a question of law which goes to the very essence of the plaintiff's claim. If there is "no evidence to justify a finding of any unreasonable use by the defendant of its property" the report of the referees should not be accepted. Unreasonable use may be either such a use as is unreasonable because of its very nature, or a use which, though reasonable in and of itself, becomes unreasonable because of the negligent manner in which it is exercised with respect to the legal rights of others to whom the one exercising the use owes a duty of care. Objection (3) is sufficient to raise the legal question as to whether or not there is any evidence of unreasonable use of either character. Interpreted by the rule we have heretofore set forth, this objection means that there was no evidence from which the referees could find that the Authority as a riparian proprietor made any unreasonable use of its riparian land as against any right owned, possessed or used by the District which it set forth in its declaration and which the referees could find that the District legally owned, possessed or used.

To determine whether or not a particular use of his riparian land and the waters of a stream flowing through the same by an upper riparian proprietor is reasonable as against a lower riparian proprietor on the same stream is not always simple and may involve many conflicting factors.

In certain cases the use and the manner of the use of upper riparian land which injuriously affects the quality of the stream flowing through it is so clearly reasonable

that it is the duty of the court to hold that the upper riparian proprietor is within his rights as a matter of law. In other cases, the use or the manner of the use of his land by an upper riparian proprietor may be so extraordinary and unreasonable and the damage to the quality of the water so great, and the lower proprietor's legal rights to the use of the water so clearly invaded that it is the duty of the court to rule as a matter of law that the upper proprietor's use of his land is unreasonable. There are, however, intermediate cases where the question is so close that it is a question of fact, instead of law, whether the use of his land by the upper proprietor is a reasonable one or, if reasonable in and of itself, the manner of use is so negligently conducted that it becomes unreasonable with respect to the legal rights of the lower riparian proprietor. The solution of this question of whether or not the use is a reasonable one depends not only upon the nature and manner of the use by the upper proprietor but also upon the use that is being made by the lower proprietor of his land and of the waters of the stream passing through the same.

The case here presented to us is of novel impression in this State, and so far as we can discover, there is no precedent exactly in point. However, an application of general principles of law governing the rights and duties of land owners, one to another, and of the law respecting the correlative rights and duties of riparian proprietors upon the same stream will afford a solution.

The leading case in this State, and one which had been approved by many text writers and many courts of last resort, is *Lockwood Company* v. *Lawrence,* 77 Me. 297. In this case on pages 316 and 317 we said:

> "Every proprietor upon a natural stream is entitled to the reasonable use and enjoyment of such stream as it flows through or along his own land, taking into consideration a like reasonable use of such stream by all other proprietors above or below him. The rights of the owners are not absolute

> but qualified, and each party must exercise his own reasonable use with a just regard to the like reasonable use by all others who may be affected by his acts. Any diversion or obstruction which substantially and materially diminishes the quantity of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use of it for any of the reasonable and proper purposes to which it is usually applied, is an infringement of the rights of other owners of land through which the stream flows, and creates a nuisance for which those thereby injured are entitled to a remedy. *Merrifield* v. *Lombard,* 13 Allen, 17.
>
> 'In determining what is a reasonable use, regard must be had to the subject matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration.' "

It is true that this case related to the casting of mill waste into the stream by an upper riparian proprietor. Nevertheless, this case is a leading case upon the doctrine that reasonable use by *both the upper and lower riparian proprietors* is the underlying principle which determines their correlative rights. Although texts and opinions are replete with the statement that the general rule of law is that every man has a right to have the advantages of a flow of water on his land without diminution or alteration of its quality or

quantity, this statement is subject to qualifications. This qualification is well stated in 56 Am. Jur. 827, Sec. 406 where it is stated:

> "The general rule above stated as to the right of every riparian owner to have a stream flowing by or through his land flow in its natural purity does not mean that a riparian owner has a right to a stream absolutely pure, without any pollution whatever. Riparian owners are entitled to the reasonable use and enjoyment of streams flowing by their land, and it is incident to such enjoyment that the purity of the water should be impaired to some extent. It is impossible to use a stream for domestic, manufacturing, commercial, or other purposes without impairing its original purity. The law recognizes the right to such reasonable use and the result which of necessity flows therefrom, and provides that the right of one riparian owner to the use of a stream in its purity must yield to the right of every other riparian owner to make a reasonable use of the same stream. If a proper and reasonable use by an upper owner causes damage to a lower owner, such damage is damnum absque injuria. This question of reasonableness is usually one of fact to be determined in each case according to the circumstances, such, for instance, as the size and character of the stream, the purposes to which it is or can be applied, the nature and importance of the use claimed and exercised by one party, and the inconvenience and injury to the other."

It is to be noted that in the rule as laid down in *Lockwood Company* v. *Lawrence, supra,* it is stated: "The rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with a just regard to the like *reasonable use by all others who may be affected by his acts.*" (Emphasis ours.) Therefore, in determining whether or not the use made by the Authority of its land and the stream was a reasonable one *as against the District* as a lower riparian proprietor, we must determine whether

or not the use by the District of the stream, as its source of public water supply, and which is the only use that it claims was injuriously affected by the acts of the Authority, was itself a reasonable use thereof.

Unless the acts of the Authority in the use of its land injuriously affected some reasonable use by the District of the waters of Branch Brook, the Authority was not making an unreasonable use of its land with respect to the District. Whether or not the District was making a reasonable use of the waters of the brook depends not only upon the use which it was actually making of the same but also as said in ***Lockwood Company*** v. *Lawrence, supra,* upon whether it was using the same for a *proper purpose* and in the *kind of business* to which the stream was *subservient.* Unless the District had the legal right, that is, the proprietary right, to use Branch Brook as a source of public water supply, its use of water therefrom for such purpose was neither a *proper one* nor was it a use to which the brook was *subservient.* Reasonableness of its use depends upon its legal right to exercise the same.

By this action the District seeks to impose a restriction upon the use by the Authority of its own land. The only right to impose this restriction, if it exists, is the use of the water exercised by the District. To the extent that such restriction is imposed it prejudices the legal right which the Authority would otherwise have to use the land belonging to it. It would be a strange doctrine indeed that the exercise of a use of water which the user has no legal right to exercise prevents the use of his own land by another, which use of the land but for such use of the water he would have the legal right to exercise. The only legal ground upon which the use of riparian land by the owner thereof is restricted in favor of the user of water is that the use of the land is an unreasonable one. However, as said in *Rindge* v. *Sargent,* 64 N. H. 294, "A use is reasonable which does not

unreasonably prejudice the *rights* of others." (Emphasis ours.)

Reasonable use is a relative term not an absolute one. The reasonableness of a use in any given case must be measured against some norm, that is, against the authoritative standard applicable to that case. To constitute such norm or authoritative standard against which the reasonableness of the lawful use of its own land by the Authority is to be measured, the use of the water exercised by the District must itself have been one which it was legally exercising. In other words, unless the invaded use exercised by the District was a use which it was legally exercising, it cannot be considered in determining whether the lawful use of its own land by the Authority was a reasonable one.

The District was created a body politic and corporate by Chapter 159 of the Private and Special Laws of 1921. Sections 2 and 3 of said charter read as follows:

> "**Sec. 2. Source of water supply; may take and hold land by purchase or otherwise, subject to general provisions.** Said district is hereby authorized, for the purposes aforesaid, to take and hold sufficient water of any surface or underground brooks, streams, springs, or ponds in said district and may take and hold by purchase or otherwise any land or real estate necessary for erecting dams, power, reservoirs, stand-pipes, or for preserving the purity of the water or watershed and for laying and maintaining aqueducts for taking, discharging and disposing of water.
>
> The provisions of sections twenty-three to twenty-six inclusive, of chapter sixty-one of the revised statutes shall apply to all land taken under this section.
>
> **Sec. 3. Damages, how ascertained.** Said district shall be liable for all damages sustained by persons or corporations in their property by the taking of any land whatsoever, or water, or by

> flowage, or by excavating through any land for the purpose of laying pipes, building dams, or constructing reservoirs, or stand-pipes. If any person sustaining damage as aforesaid and said corporate district shall not mutually agree upon the sum to be paid therefor, such person or corporation shall cause his or her or its damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in the case of damages by the laying out of highways."

Claiming to act under its charter, which created it "for the purpose of supplying the inhabitants of said district and said municipalities, etc., with pure water for domestic and municipal purposes," the District was using Branch Brook, which was located within its territorial limits, as its source of water supply for said purpose.

Sec. 2 of the charter is not a grant to the plaintiff of a proprietary right and ownership in or to the use of the waters mentioned therein. It but marks out and defines the sources of water supply which the plaintiff, within the terms of its charter, may use. In other words, Sec. 2 is not a grant to the plaintiff of water rights but authorizes it to use as its source of supply, if proprietary rights are properly acquired, any waters named therein. This construction of Sec. 2 is borne out by Sec. 3 which provides for the ascertainment of damages to persons and corporations by the taking, among other things, of "water."

It is to be remembered that the plaintiff District was not using a great pond, the waters of which are owned by the State, as its source of water supply, but was using the water of a brook or stream.

The rights of the District, derived from its charter, to use the waters of Branch Brook are governed by the law as set forth in *Hamor* v. *Bar Harbor Water Company,* 78 Me. 127, and not by the law as set forth in *Auburn* v. *Water Power*

Co., 90 Me. 576. The former decision lays down the principles of law which determine the extent of the rights conferred upon the holder of a charter authorizing it to use a brook as a source of public water supply. The latter decision, although it held that a charter authorizing the use of the water of a great pond as a source of public water supply was a grant of the water and use thereof for such purpose, was carefully limited in its application when the court said:

> "And it is only of our great public ponds and lakes that we are now speaking. We are not declaring or attempting to define the rights appertaining to wells, springs, rivulets or small ponds. It is only of great ponds and lakes, the titles to which are held by the state for the use of the public, that we are now speaking."

Brooks and streams differ materially from great ponds and lakes. As said in the Auburn case: "The waters of great ponds and lakes are not private property. They are owned by the state; and the state may dispose of them as it thinks proper." This doctrine has no application to the waters of brooks and streams, to the use of the waters of which the riparian proprietors upon their banks have certain rights recognized and limited by law. It is true that the waters of such streams may be taken for a public use. This may be done by the State itself, by a public Agency created by the State, or by a private public service corporation duly organized and upon which such power has been conferred by the State. Such taking and diminution of the rights of the riparian proprietors, be they either upper or lower proprietors, however, is the taking of private property for a public use, and this can be accomplished only in the manner prescribed by law and then only when fair compensation is paid therefor.

In *Hamor* v. *Bar Harbor Water Co.*, 78 Me. 127, 132, we said:

"There can be no question but that the act granting the right to the defendants to take, detain and use the water from the sources and for the purposes therein specified, is constitutional. The decisions are numerous that private property may be taken by the sovereign power of the government in the exercise of the right of eminent domain for purposes of public utility. That this may be done when the object is to supply a village or community with pure water, and though the agency by which it is done may be a private corporation thereby deriving profit and advantage to itself, is not denied. In such case the interests of the public, from considerations affecting the health and comfort of densely populated communities, require that private property may be thus appropriated for uses which are deemed public. It is thus that the right of property of private individuals, whether it be lands, or the usufructuary interest in flowing water, is made to subserve the public exigencies, and for which, under the constitution, 'just compensation' is guaranteed and must be made. 'It is true that the injury in the one case is to the land, and in the other to the water; but this can make no difference in the result. Interests in water, as well as in land, may be taken under this act; and both are equally the subjects of compensation.' *Denslow* v. *New Haven and Northampton Co.* 16 Conn. 103; *St. Helena Water Co.* v. *Forbes,* 62 Cal. 182; S. C. 45 Am. Rep. 659.

Neither can water be diverted from a private stream under authority granted by the legislature in the exercise of the right of eminent domain for the purpose of supplying a town or village with pure water without making compensation to the riparian proprietors whose rights are thereby injuriously affected. *Bailey* v. *Woburn,* 126 Mass. 416; *Lund* v. *New Bedford,* 121 Mass. 286; *Wamesit Power Co.* v. *Allen,* 120 Mass. 354. Nor can individual property be taken, or individual rights impaired, for the benefit of the public without such compensation. *Canal Commissioners* v. *People,* 5 Wend. 456."

In the *Hamor* case the court further held that a mere use of the water did not constitute a taking, but that all of the required steps incident to the accomplishment of a legal taking by the exercise of the power of eminent domain must be followed.

In the instant case the record is barren of any evidence from which it could be found that the District ever made or even attempted to make a legal taking of any of the waters of Branch Brook. Although in the *Hamor* case the Water Company was a private public service corporation, the same law applies to quasi municipal public service corporations. Neither the State nor any Agency of the State can take private property for public use without the payment of just compensation therefor. To enable a party to obtain just compensation for property taken he must know with certainty the extent of the taking. With respect to taking water from a stream we said in the *Hamor* case, *supra,* at 134:

> "There is no reason why the same requirements should not apply equally to the taking of water from a stream in which the plaintiffs have valuable riparian rights, as to the taking of land. Both are equally the subjects of property and of compensation. *Ex parte Jennings,* 6 Cow. 526. By the statutes of this state the word land includes all tenements and hereditaments connected therewith, and all interests therein. The riparian proprietor may insist that his right to the use of water flowing in a natural stream shall be regarded and protected as property. *Nuttall* v. *Bracewell,* L. R. 2 Exch. 9. Such right is not a mere easement or appurtenance but is inseparably annexed to the soil itself. *Dickinson* v. *Grand Junction Canal Co.* 7 Exch. 299; *Cary* v. *Daniels,* 8 Met. 480. And the damage for the taking of such right may be greater or less according to the quantity of water diverted as the damage may be greater or less when measured by the quantity of land taken. If it be necessary, therefore, that the taking of land thus appropri-

> ated to public use be evidenced by some writing defining it by definite and specific boundaries, for the same reason should there be like evidence of the measure or quantity of water thus taken. Without this, no proper estimate of damages could be made. Without this, no proper protection would be afforded to the parties without resorting to the 'uncertainties of conflicting testimony.' "

The fact that the District may be a riparian proprietor does not confer upon it the right to abstract water from Branch Brook for distribution under its charter. The right of a riparian proprietor to draw water from the stream is only for a riparian use, viz., a reasonable use upon the riparian land. Abstraction for sale to others is not such reasonable use. As said in Restatement Torts, Vol. 4, Chap. 41, Sec. 855, page 374, "Non-riparian uses are those made neither on nor in connection with the use of the riparian land and include such uses as the diversion and sale of water from the stream for non-riparian consumption." Neither does the fact that the District is a quasi-municipal corporation enlarge its rights as a riparian proprietor. The great weight of authority is that a municipal corporation cannot by virtue of the ownership of riparian lands abstract water from a brook on which they are located for public distribution. The authorities are collected in an extensive note in 141 A. L. R. 639. The majority rule is the necessary consequence of the principles enunciated by us in *Hamor* v. *Bar Harbor Water Co. supra.* To hold otherwise would allow a municipal corporation to take private property without the payment of just compensation.

The only use of the water of a stream which will restrict the rights of a lower riparian proprietor in its use of such water, or which will restrict the use which an upper riparian proprietor may make of his own land, is a use which the one exercising the same has the legal right to exercise. If the use exercised by a riparian proprietor be a riparian use, the right to exercise it was acquired as a usufructuary

right growing out of and annexed to the ownership of the riparian land. If, however, as here it be a non-riparian use, the right to exercise the same must be acquired by purchase or grant from, or by the exercise of the right of eminent domain against those whose rights it is sought to restrict by the exercise of such use. Unless so acquired, the non-riparian use will not be a reasonable use against either upper or lower riparian proprietors, and its exercise will not be a factor entering into the determination of whether or not the use of his land by an upper riparian proprietor is a reasonable use thereof. The upper proprietor may make any use of his land not forbidden by law that he could make if such use by the lower proprietor was not being exercised.

There is no evidence in the record that the District had ever acquired, either by purchase, grant or the exercise of its right of eminent domain, any right to use water from Branch Brook as a source of public water supply.

We hold as a matter of law that as against such use of the water by the District, the use by the Authority of its own land was a reasonable use.

There is no evidence in the record that the District was making, ever had made, or even intended to make, any use of the water of Branch Brook for any purpose to which it was entitled to use the same as a riparian proprietor, nor did it claim damages for any injury to any such right of user.

As before stated herein, the declaration does not allege either the ownership by the plaintiff of any riparian land on Branch Brook or that it owned, possessed or was exercising any rights as such riparian owner. As before stated, the situation of the District as a lower riparian proprietor has no bearing upon the issues that were before the referees except as the same might give the District the right to use the water for the purpose alleged in the declaration. In-

vasion of the rights of the District as a riparian owner was not an issue before the referees, unless the right to use the water of Branch Brook as a source of public water supply be a riparian right. We have already held that it is not.

The only cause of action set forth in the declaration is a violation of the District's right to use the water as a source of water supply for public distribution by rendering the same turbid. This was a use of the water which on the record before the referees they could not find the District had a legal right to exercise.

The rights of the District against the Authority, so far as the present decision is concerned, are confined and limited to those claimed in the declaration and established by the evidence before the referees. So confined and limited, the District did not allege in its declaration any right to use the water which, as against the Authority, the evidence before the referees shows it legally possessed, and it sought to recover only for an injury to an alleged right which on such evidence, as against the Authority, it did not possess. The acts of the Authority, an upper riparian proprietor, herein complained of, as against the District, in view of the cause of action set forth in the declaration, are not an unreasonable use by the former of its riparian land. This we hold as a matter of law.

This decision is not to be interpreted as holding as a matter of law that the use by the Authority as an upper riparian proprietor of its own land would have been reasonable against a lower riparian owner making riparian use of the water. Upon this question we need not, nor do we intimate an opinion as it is not here in issue. Neither is this decision to be interpreted as holding such acts reasonable as a matter of law as against one, who having obtained the requisite legal rights as against an upper riparian proprietor, is legally using the water of a brook as a source of

public water supply. Upon this question we need not express nor do we intimate an opinion. There was no evidence in the record from which such a situation could have been found to exist. We confine this decision strictly to the cause of action set forth in the declaration and the evidence with respect thereto contained in the record. As this determination by us justifies the rejection of the referees' report by the presiding justice there is no need for us to consider ground of objection numbered (4).

It is to be borne in mind that this is not a final decision of the cause of action. It is not finally decisive even of the rights of the present parties. Those must be determined in a trial *de novo* upon the facts then in evidence and an application thereto of the controlling principles of law.

Much less is this opinion a final determination that the District has no right to draw water from Branch Brook for public distribution. Wherever we have herein made the statement that the District does not have that right, implicit in such statement is the qualification "on the evidence before the referees."

It is unnecessary for us to consider the contention of the plaintiff that the acts of the defendant resulted in the creation, and maintenance by it, of a public nuisance, nor do we intimate an opinion with respect thereto. An individual can recover damages for the creation or maintenance of a public nuisance only by showing that he has suffered *special damage* caused thereby. Such special damage must be alleged and proved before recovery may be had. *Low* v. *Knowlton*, 26 Me. 128; *Cole* v. *Sproul*, 35 Me. 161; *Brown* v. *Watson*, 47 Me. 161; *Holmes* v. *Corthell*, 80 Me. 31. The only damage claimed by the plaintiff as we have heretofore shown was to its alleged right to use the water of Branch Brook as a source of supply for public distribution. This was a proprietary right which, although exercised by the

District, the evidence before the referees did not show that it legally possessed. This does not constitute such special damage to the plaintiff as would entitle the plaintiff to recover, even if the acts of the defendant amounted to the creation or maintenance of a public nuisance. The action of the presiding justice in rejecting this report must be sustained, even though he did not assign the proper reason therefor, and even if some of the reasons he assigned for his action in rejecting the report are erroneous.

If a report be rejected, and the rejection can be sustained on *any ground specifically set forth in the written objections, exceptions to the rejection cannot be sustained even though an erroneous ground be assigned for the rejection.* The question of whether a report be accepted or rejected is wholly a question of law and not at all one of fact. Therefore, it is not prejudicial error on the part of the presiding justice to assign the wrong reason for the rejection of a report when the record discloses legal grounds for its rejection, provided such grounds are specifically set forth in the written objections. In other words, if the ruling is right, the fact that a wrong reason has been assigned therefor is immaterial. *Warren* v. *Walker,* 23 Me. 453; *Petition of Kimball,* 142 Me. 182; 49 Atl. (2nd) 70; *Austin* v. *Inhabitants of St. Albans,* 144 Me. 111; 65 Atl. (2nd) 32.

We sustain the action of the presiding justice only upon the grounds set forth in this opinion, which grounds are within the objections specifically set forth in writing, and the exceptions are overruled. The case is remanded to the Superior Court.

Exceptions overruled.

DISSENTING OPINION.

THAXTER, J. Ordinarily in a case of this kind, where I find that I am unable to assent to the views of my associates,

I would content myself with a mere notation of non-concurrence. Here, however, because I feel that the court is disregarding a well established principle of practice, I believe I should explain the reasons for my disagreement.

We have been able in this jurisdiction to soften the asperities of common law pleading and adapt its forms to the needs of changing conditions because of the wisdom of our predecessors on this court who interpreted liberally statutes and rules designed to settle promptly the issues which the parties have intended to try. Thus to avoid a variance between allegations and proof, an amendment of a declaration has been permitted even after verdict; and in other instances specific proof of a necessary fact has been held to have been waived, if the case has been tried on the assumption that such proof was not required. *Cowan* v. *Bucksport,* 98 Me. 305; *Wyman* v. *American Shoe Finding Co.,* 106 Me. 263; *Cyr* v. *Landry,* 114 Me. 188; *Clapp* v. *Cumberland County Power & Light Co.,* 121 Me. 356; *Burner* v. *Jordan Family Laundry,* 122 Me. 47; *Isenman* v. *Burnell,* 125 Me. 57; *Benson* v. *Inhabitants of the Town of Newfield,* 136 Me. 23. In *Cowan* v. *Bucksport, supra,* it was argued on a motion for a new trial that there was no evidence in the record before the Law Court to show that the fourteen days' notice required by the statute to render a town liable for a highway defect had been given within the required time. Justice Emery, afterwards Chief Justice, who by no possibility could be regarded as tolerant of loose pleading or practice, had this to say in disposing of this contention, page 308, "There was no evidence or suggestion at the trial that the notice was not received within the fourteen days. Must the verdict now be set aside, and the parties and the court subjected to the burden of another trial of the case, because it was not more explicitly or precisely stated in the colloquy over the notice that it was received within fourteen days? We think not. We think the point now made is within the category of points to be made at the trial, or to be considered

as waived. It was not made at the trial and no intimation was given that it would be made. Had it been made at the trial and sustained, the plaintiff would either have supplied the evidence or submitted to an adverse verdict. If not sustained, the defendant could have excepted and thus regularly and seasonably brought the question here. The point, not having been made at the trial, cannot be sustained here, even if it be otherwise sustainable."

The instant case between two quasi-municipal corporations was tried by agreement of the parties before three referees. Although the specific source of the plaintiff's title is not directly alleged or proved, it is obvious that the case was tried on the theory that the plaintiff had lawfully acquired the right to take water from Branch Brook to serve the territory wherein it was authorized to supply water for domestic and municipal purposes. It had been so using the water of Branch Brook for more than twenty years, and its predecessor in title for some time prior to that. Its right to do so had never been questioned. It was not questioned at the hearing which lasted for many days and resulted in a record of well over a thousand pages. The taxpayers have been put to great expense not only for court charges but for attorneys' fees and expenses. Is it possible that this case must go back for a hearing *de novo* simply because the plaintiff did not affirmatively show the source of its title, a title which the parties have inferentially admitted? If the plaintiff did not have a valid title, there was a complete defense and no need of going through a long and expensive hearing. Should we not apply the language of Judge Emery: "The point, not having been made at the trial, cannot be sustained here, even if it be otherwise sustainable."

LYMAN R. SHANNON

vs.

WILFRED N. BAKER

(TWO CASES)

Aroostook. Opinion, February 9, 1950.

Entry. Trespass. Adverse Possession.

What acts of dominion create title by adverse possession are matters of law; whether such acts have been performed or maintained are matters of fact.

The lack of actual knowledge of an adverse claim of ownership on the part of the holder of a record title is no bar to the acquisition of title by adverse possession.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

Actions of entry and trespass tried together before a jury with verdicts for the plaintiff. The defendant made a general motion for a new trial in each case and excepted to the refusal to give a requested instruction. Motion overruled. Exception overruled. Case fully appears below.

George B. Barnes, for plaintiff.

James P. Archibald, for defendant.

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

MURCHIE, C. J. The plaintiff herein, in two processes, commenced a week or more apart, but heard together in the Superior Court and brought forward by the defendant, after jury verdicts against him, on separate general motions, containing all the usual allegations, and a single Bill

of Exceptions, sought to establish his title to a described tract of land in Molunkus Plantation, on which a dwelling house is located, and to recover damages for a trespass by the defendant which involved the removal of two doors therefrom. That the defendant removed them is admitted by stipulation. Obviously that would constitute a trespass if plaintiff had title, by adverse possession, as he claims, and he would be entitled to damages. The damage award was $25. The allegation that it was excessive was not argued and must be considered as waived. *Reed et al.* v. *Central Maine Power Co.*, 132 Me. 476; 172 A. 823; *Marr* v. *Hicks*, 136 Me. 33; 1 A. (2nd) 271. This narrows the issue, on the motions, to whether the verdict on the writ of entry, that the defendant disseized the plaintiff, after he acquired title by adverse possession, is supported by evidence in the record.

The Bill of Exceptions alleges no error except the refusal of the Trial Court to give a requested instruction, quoted in full hereafter. It must be assumed, in the absence of other exceptions to the charge, that if the refusal was not error, the instructions given were proper and sufficient. *Archibald* v. *Queen Insurance Co.*, 115 Me. 564; 99 A. 771; *Frye* v. *Kenney*, 136 Me. 112; 3 A. (2nd) 433.

The motions and exceptions are overruled for the reasons hereafter stated.

The processes involve a tract of land lying in the southwest corner of Lot No. 26 in the plantation aforesaid, adjoining Lot No. 25 therein. In addition to the stipulation concerning the removal of the doors, there are stipulations that the record title to Lot No. 26 is in the defendant; that the plaintiff is the owner of Lot No. 25; that the latter acquired the ownership thereof by descent from his father and a conveyance from his brothers and sisters who, with him, acquired it in that manner; and that the father held his title under a conveyance from his own father, the plaintiff's

grandfather. The conveyance to the plaintiff from his brothers and sisters is in evidence as an exhibit and covers all the real estate owned by the father at the time of his death.

The evidence would justify factual findings that the father died two days before his eightieth birthday; that he was born on the property and lived there most of his life, although not at the time of plaintiff's birth; that at the time of his death he and the grandfather, and their families, had occupied the house for more than eighty years, using it for the storage of household goods when not living in it; and that the house was within a block and rail fence, enclosing the property in question including a garden used in connection with the house, for more than twenty years. It would require finding that the defendant was familiar with the property for a few years around 1905 and knew that the grandfather was living in the house at that time.

Without any denial of the evidence given on behalf of the plaintiff as to the occupation of the property by the plaintiff and his predecessors, or the time interval thereof, the defendant testified that he acquired title to all of Lot No. 26 under a warranty deed from a grantor not identified; that thereafter the plaintiff's father acknowledged that he did not own the house and asked permission for the plaintiff to occupy it; and that such permission was given by him. He testified also that he had a conversation with the plaintiff about the title to Lot No. 25, in which he assured the plaintiff that he might continue to live in the house (on Lot No. 26) whatever action his brothers and sisters might take about Lot No. 25, and thereafter that he had one with reference to the property in dispute in which he asserted his title and told the plaintiff he must move his "stuff" out of the house. The testimony with reference to conversations with the plaintiff was in direct conflict with that of the plaintiff.

Considering the established principles of law that factual questions and the credibility of witnesses are for the determination of a jury, and that courts should not usurp such functions, *Parsons* v. *Huff,* 41 Me. 410; *State* v. *Lambert,* 97 Me. 51; 53 A. 879; *Barrett* v. *Greenall,* 139 Me. 75; 27 A. (2nd) 599; *State* v. *McKrackern,* 141 Me. 194; 41 A. (2nd) 817, the motions must be denied on the ground that the evidence would justify all the factual findings necessary to support the verdict returned in the real action including the rejection of defendant's testimony about conversations with the plaintiff and his father. It was recognized in *Webber et al.* v. *Barker et al.,* 121 Me. 259; 116 A. 586, that while courts, as distinguished from juries, should decide what acts of dominion would create a title by adverse possession, if maintained for a sufficient period of time, the question whether such acts had been performed and maintained and the circumstances in connection therewith were issues for a jury. The jury was charged properly on these points and the only issue presented in the Bill of Exceptions in that connection arises on the refusal to give the requested instruction.

The real foundation of the defendant's claim is apparent when reference is had to the requested instruction. This was that:

> "To exclude real estate from the area described in a recorded deed, the grantee must have actual knowledge of the adverse claim of ownership prior to accepting the deed; otherwise the real estate is included and conveyed by a deed from its record owner to a new grantee."

The defendant, pressing his allegation that the refusal to give it constituted error, cites us to *Parker* v. *Prescott,* 86 Me. 241; 29 A. 1007, and 45 Am. Jur. 465-6. The principle declared in that case and text is applicable to unrecorded conveyances and has no bearing on possessory rights. That a title may be acquired under proper circumstances by a

possession of appropriate kind maintained for a sufficient period of time is undoubted. See *Worcester* v. *Lord*, 56 Me. 265; 96 A. D. 456. The requisites of a possession which may ripen into title, as stated in 1 Am. Jur. 864, are that it be "actual, open, notorious, hostile, under claim of right, continuous, and exclusive." None of these terms carry the semblance of suggestion that the holder of the record title must have "actual knowledge of the adverse claim of ownership." On the contrary, they indicate clearly that it is the nature of the possession which is controlling. The requested instruction was properly refused.

Motions overruled.

Exceptions overruled.

GIROUARD'S CASE

(OLIVER GIROUARD *vs.* BATES MANUFACTURING CO., ANDROSCOGGIN DIVISION)

Androscoggin. Opinion, February 17, 1950.

Workmen's Compensation. Pro Forma Decrees.

Appeal and Exceptions. Record. Waiver.

If the answer to a petition for compensation raises issues of fact there are only three methods whereby the Commission may determine such facts—(1) upon the testimony of witnesses (2) by agreement upon affidavits presenting the claims of both parties or (3) upon an agreed statement of facts.

The jurisdiction of the Industrial Accident Commission is purely statutory and cannot be enlarged by waiver consent or express stipulation.

R. S., 1944, Chap. 26, Sec. 41 provides for the only review by the courts.

Pro forma decrees can be reviewed by the Law Court as in the case of equity appeals, i.e., by appeal or exceptions.

R. S., 1944, Chap. 95, Sec. 31 relating to equity appeals makes mandatory and jurisdictional the filing of either a report of the evidence or an abstract thereof approved by the justice hearing the case.

Either party before the Industrial Accident Commission may as a matter of right demand that the proceedings be reported even though there is no statutory requirement therefor.

Failure to demand that proceeding be reported constitutes a waiver.

R. S., 1944, Chap. 95, Sec. 26 relating to exceptions to equity decrees requires only the filing with the Law Court of such parts of the case as are necessary to a clear understanding of the issues.

ON APPEAL.

This case is before the Law Court on appeal from a *pro forma* decree of the Superior Court. The record contains no report of the evidence. Appeal dismissed. Decree below affirmed.

Lessard and Delahanty, for claimant.

Kneeland and Splane,
Sanford L. Fogg, for employer.

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

MERRILL, J. On appeal. This is an appeal from a *pro forma* decree by a Justice of the Superior Court in accord with a decision of the Industrial Accident Commission

awarding compensation to the petitioner, Oliver Girouard. To the petition for compensation, the respondent filed an answer denying each and every allegation thereof. R. S., Chap. 26, Sec. 37 provides as follows:

> "If from the petition and answer there appear to be facts in dispute, the commissioner shall then hear such witnesses as may be presented, or by agreement the claims of both parties as to such facts may be presented by affidavits. If the facts are not in dispute, the parties may file with the commission an agreed statement of facts for a ruling upon the law applicable thereto. From the evidence or statements thus furnished the commissioner shall in a summary manner decide the merits of the controversy. His decision, findings of fact and rulings of law, and any other matters pertinent to the questions so raised shall be filed in the office of the commission, and a copy thereof attested by the clerk of the commission mailed forthwith to all partes interested. His decision, in the absence of fraud, upon all questions of fact shall be final."

This provision of the statute is mandatory. Not only is it mandatory but it is jurisdictional. If an answer to a petition, as here, raises issues of fact the Commission has no authority to hear and determine those issues except in one of the three methods set forth in the statute, (1) upon the testimony of witnesses, (2) by agreement upon affidavits presenting the claims of both parties, or (3) upon an agreed statement of facts filed with the Commission by parties for a ruling upon the law applicable thereto.

As we said in *Maguire's Case,* 120 Me. 398:

> "The tribunal known as the Industrial Accident Commission, and all proceedings thereunder, are purely creatures of the statute. No jurisdiction is conferred except as the statute confers it. Therefore, the statutory requirements must be strictly complied with."

The Industrial Accident Commission cannot clothe itself with a jurisdiction it does not possess, nor can the parties confer upon it such jurisdiction either by waiver, consent or express stipulation. Jurisdiction may be conferred only by law, never by act or omission of the tribunal or, except over their persons, of the parties appearing before it.

This case was heard before the Industrial Accident Commission upon the testimony of witnesses. Decree was rendered and the parties notified as required by the foregoing provision of the statute. As before stated, the case is now before this court on an *appeal* from the *pro forma* decree of a Justice of the Superior Court in accordance with the decree of the Industrial Accident Commission., The record presented to us contains *no report of the evidence* before the Commission, nor does it contain any abstract thereof approved either by the Justice of the Superior Court rendering the *pro forma* decree, or by the Industrial Accident Commission, or any of its members hearing the case.

The only review of orders and decrees of the Industrial Accident Commission by the courts is that provided for in R. S., Chap. 26, Sec. 41. This section setting forth the procedure to be followed and conferring jurisdiction upon the court to review is as follows:

> "Any party in interest may present copies, certified by the clerk of the commission, of any order or decision of the commission or of any commissioner, or of any memorandum of agreement approved by the commissioner of labor and industry, together with all papers in connection therewith, to the clerk of courts for the county in which the accident occurred; or if the accident occurred without the state, to the clerk of courts for the county of Kennebec; whereupon any justice of the superior court shall render a pro forma decree in accordance therewith and cause all interested parties to be notified. Such decree shall have the same effect and all proceedings in relation thereto shall there-

after be the same as though rendered in a suit in equity duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact found by said commission or by any commissioner, or where the decree is based upon a memorandum of agreement approved by the commissioner of labor and industry.

Upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure, and the law court may, after consideration, reverse or modify any decree so made by a justice based upon an erroneous ruling or finding of law. There shall be no appeal however from a decree based upon any order or decision of the commission or of any commissioner unless said order or decision has been certified and presented to the court within 20 days after notice of the filing thereof by the commission or by any commissioner; and unless appeal has been taken from such pro forma decree within 10 days after such certified order or decision has been so presented. In cases where after appeal aforesaid by an employer the original order or decision rendered by the commission or by any commissioner is affirmed, there shall be added to any amounts payable under said order or decision, the payment of which is delayed by such appeal, interest to the date of payment. In all cases of appeal the law court may order a reasonable allowance to be paid to the employee by the employer for expenses incurred in the proceedings of the appeal including the record, not however to include expenses incurred in other proceedings in the case."

It is to be noted that the foregoing statute provides with respect to the *pro forma* decree:

"Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact found by said commission or by any commissioner, or where the decree is based upon a

> memorandum of agreement approved by the commissioner of labor and industry."

Such decrees, therefore, may like equity decrees (see R. S., Chap. 95, Sects. 20, 21 and 26, and *Emery* v. *Bradley,* 88 Me. 357), be brought before this court for review either by an appeal therefrom or on exceptions thereto. The procedure on such review will depend upon the method chosen to obtain the same and the statutory procedural requirements with respect to the method of review chosen must be strictly complied with.

In the case of equity appeals, R. S., Chap. 95, Sec. 31 provides in part as follows:

> "All evidence before the court below, or an abstract thereof, approved by the justice hearing the case, shall on appeal be reported."

This provision of the statute by a long line of cases has been held to be both mandatory and jurisdictional. In the absence of either a report of the evidence or an abstract thereof approved by the justice hearing the case, an equity appeal must be dismissed. *Stenographer Cases,* 100 Me. 271; *Sawyer* v. *White,* 125 Me. 206; *Ryan* v. *Megquier,* 130 Me. 50; *Foss* v. *Maine Potato Growers' Exchange,* 126 Me. 603; *Usen* v. *Usen,* 136 Me. 480, 485. The failure to furnish such report or abstract thereof approved by the justice is not excused by inability to furnish the same. This is true even if such inability be due to death of the reporter or loss of the report. Nor can the parties by agreement dispense with the same or substitute anything therefor. The requirement as above stated is jurisdictional and must be strictly complied with.

By express provision of Sec. 41 of the Workmen's Compensation Act, *supra,* with respect to *pro forma* decrees, it is provided:

"Upon any appeal therefrom the proceedings shall be the same as in appeals in equity procedure,".

This provision we hold is both mandatory and jurisdictional, and it appearing from the record in this case that the case was heard before the Commission on testimony of witnesses, and there being no report of such testimony nor any abstract thereof in the record, the appeal has not been perfected as required by R. S., Chap. 95, Sec. 31, and it must be dismissed.

In Workmen's Compensation cases, if the record *on appeal* does not contain a report of the evidence from the witnesses, or an abstract thereof, it should affirmatively appear in the record that it was heard before the Commission in one of the alternative methods provided in R. S., Chap. 26, Sec. 37, and if so heard, the affidavits presented as therein prescribed, or the agreed statement of facts for a ruling upon the law applicable thereto as therein provided for, should form a part of the record presented to this court on appeal for they would constitute the evidence under R. S., Chap. 95, Sec. 31.

It may be urged that if the filing with this court of a report of the evidence or an abstract thereof as provided for in R. S., Chap. 95, Sec. 31, be a prerequisite to the perfecting of an appeal, that the right of appeal is not available in cases where the evidence before the Commission is not reported.

Although there is no statute which requires the use of a reporter in proceedings before the Commission, from the provisions of R. S., Chap. 26, Sec. 29, which provides that the Commission shall appoint a reporter, and from the fact that a report of the evidence may be necessary to perfect an appeal, we hold that in cases heard upon the testimony of witnesses before the Commission, either party may as a matter of right demand that the reporter be used and that

he make a record of the proceedings. Refusal or neglect to accede to such demand would constitute error in law on the part of the Commission or Commissioner before whom the case was heard, and on exceptions the decree would be set aside and the cause remanded under appropriate order to the Commission for a hearing *de novo* in one of the statutory methods.

There being no statute making the use of a reporter mandatory in proceedings before the Commission, such use may be waived by the parties. If neither of the parties requests the use of a reporter, in hearings before the Commission or Commissioners, the use of the reporter is waived. Even if waived by the parties it rests within the discretion of the Commission or the Commisioners before whom the case is heard whether or not a reporter will be used. This rule does not subject the parties to hardship, nor does it deprive them of any rights. Hearings are held only after due notice to the parties, and they have full opportunity to be present and to demand the services of the reporter if they so desire, in order to enable them to perfect a future appeal from the decision therein. R. S., Chap. 26, Sec. 36.

The inability of a party aggrieved by a decree of the Industrial Accident Commission or a Commissioner to perfect an appeal because of inability to obtain a report of the evidence or an abstract thereof is not necessarily fatal to the obtaining of a review on questions of law. R. S., Chap. 95, Sec. 26, with respect to decrees in equity, provides:

> "Either party aggrieved may take exceptions to any ruling of law made by a single justice, the same to be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby."

This statute differs materially from the statute with respect to appeals. In all appeals it is necessary that all of

the evidence or an abstract thereof be reported in accordance with the provisions of R. S., Chap. 95, Sec. 31. When the review is sought on exceptions to the decree, the exceptions need "be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby." See *Emery* v. *Bradley, supra.* This statutory provision applies to exceptions to *pro forma* decrees in accordance with the decision of the Industrial Accident Commission. If the case comes to this court on exceptions to such a decree, it is only required that the exceptions be accompanied by such parts of the case as are necessary to a clear understanding of the questions raised by the exceptions. Although there may be exceptions where a report of all of the evidence in the case would be necessary to a clear understanding of the questions raised thereby, yet in many cases the legal questions raised by the exceptions could be clearly understood without a report of all the evidence, and in such cases, the exceptions need not be accompanied by the same.

This case, however, is before us only on appeal, and as the record does not contain a report of all of the evidence in the case or any abstract thereof as required by R. S., Chap. 95, Sec. 31, the appeal must be dismissed.

Appeal dismissed.

Decree below affirmed.

KATHERINE C. COE

vs.

MARTIN V. B. COE AND TRUSTEES

Cumberland. February 17, 1950.

Divorce. Property Settlement. Decrees.

A valid judgment or decree in a divorce case is conclusive in any future action between the parties as to all facts directly in issue and actually or necessarily determined therein.

Property settlement agreements made upon separation are valid if not against public policy.

Where Nevada Law regards a wife's allowance as final, unless the decree or approved agreement reserves the right of modification, suit may be brought in Maine upon the agreement for past due installments.

ON EXCEPTIONS.

Action of assumpsit based upon a support agreement executed in Reno, Nevada which was incorporated into the divorce decree of the Nevada Court. The case is before the Law Court on exceptions to the acceptance of a referee's report. Exceptions overruled. Case fully appears below.

James R. Desmond, for plaintiff.

Walter M. Tapley, Jr., for defendant.

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

FELLOWS, J. This case, brought by Katherine C. Coe of Boston, Massachusetts against Martin V. B. Coe of Portland, Maine, was heard by a referee and comes to the Law Court, from the Superior Court of Cumberland County, on

defendant's objections and exceptions to the acceptance of the referee's report. The report awarded damages to the plaintiff in the sum of $9,250.00.

The action is assumpsit, based on a written agreement for support which was executed in Reno, Nevada, and entered into between the plaintiff and defendant September 16, 1942 while husband and wife. The parties were divorced by decree of the First Judicial District Court of the State of Nevada on September 19, 1942.

According to the terms of the agreement on which this suit is brought, Martin V. B. Coe paid to Katherine C. Coe, at the time of the execution of the agreement, the sum of $7500.00, and agreed to pay "to the second party the sum of eighteen hundred twenty dollars ($1820.00) per year in equal weekly installments of thirty-five dollars ($35.00) on the first day of each and every week from and after the date hereof, during the life of the second party provided she remains unmarried." The agreement also provided for other matters, including the relinquishing of rights by each in the property of the other, and further stated that "all of the covenants herein contained shall remain in full force and effect whether the parties shall resume the marital relation and live together as man and wife, whether as now they live separate and apart, or whether either of the parties hereto be granted a decree of divorce, regardless of where such decree shall be obtained or upon what grounds the same shall be based; and in the event of such decree of divorce the terms of this agreement shall be presented to the Court with the request that the same be ratified, approved and confirmed by the Court."

The decree of the Nevada Court, on September 19, 1942, awarded judgment of divorce to Katherine C. Coe on "her answer and cross complaint" and further ordered "that the written agreement entered into by the plaintiff and defend-

ant herein on the 16th day of September, 1942, be, and the same is hereby ratified, approved and confirmed, and adopted by the Court as a part of its judgment herein, and each of the parties is hereby ordered and directed to comply with the terms thereof."

The objections filed by the defendant to the acceptance of the referee's report in the pending case were, in substance: (1) That the agreement was adopted by the Nevada Court as part of its judgment. (2) That the agreement became merged in the decree and "lost its legal effect as an agreement between the parties." (3) That because of the adoption and ratification of the agreement by the Nevada Court "it caused any action on the agreement, which is the basis of this action, to be Res Judicata." In other words, the defendant by his objections and exceptions, in effect, says that no action lies against him on the agreement because there is now a court decree which vacated the agreement, and any action should be on the decree. The record shows that this contention, that the agreement was a nullity, was the only defense offered by the defendant at the hearing before the referee. In the words of the defendant's counsel to the referee: "The defense in this matter, your Honor please, is that the action should not be brought upon the contract but upon the decree itself in that the contract was made a part of the decree by the Court and by agreement of parties."

The Supreme Court of the United States, in a case involving these same parties and this same decree, has decided that this decree of the Nevada Court is entitled to full faith and credit. *Martin V. B. Coe, Petitioner* v. *Katherine C. Coe,* 334 U. S., 378-384; 92 L. Ed., 1451; 68 S. Ct. 1094; 1 L. R. A. (2nd) 1376.

It is well established that a valid judgment or decree in a divorce case is conclusive in any future action between the

parties as to all facts directly in issue and actually or necessarily determined therein. *Lausier* v. *Lausier,* 123 Me. 530; 124 Atl. 582; 27 C. J. S. 831 "Divorce", Section 174.

Agreements made upon the separation of a husband and wife for the purpose of making a division of property, or to make a provision for the support of the wife, are valid, provided the agreements are fairly made and in a manner not against public policy. There must not be collusion for procuring a divorce. *Stratton* v. *Stratton,* 77 Me. 373; *Greenwood* v. *Greenwood,* 113 Me. 226; *Carey* v. *Mackey,* 82 Me. 516; *Snow* v. *Gould,* 74 Me. 540; *McIntire* v. *McIntire,* 130 Me. 521; 17 Am. Jur. "Divorce and Separation," 408, Section 499.

Massachusetts holds, in a case involving a separation agreement and a Nevada divorce decree, that an action may be brought on the contract, although the decree awarded the sums stipulated "by way of approval of the agreement of the parties." The Massachusetts Court in its opinion said that "there is no reason why the wife may not have the protection of both." *Welch* v. *Chapman,* 296 Mass. 487. See also *Schillander* v. *Schillander,* 307 Mass. 96; *Carey* v. *Mackey,* 82 Me. 516; *Holahan* v. *Holahan,* 79 N. Y. S. (2nd) 786; 191 Misc. 47.

The defendant relies strongly on the case of *Fleming* v. *Yoke,* 53 Fed. Supp. 552 (District Court, West Virginia) which cites Nevada cases, but our attention has been called to no Nevada case, and we have found none that indicates that the parties have no right to maintain an action on the original contract. In *Fleming* v. *Yoke,* 53 Fed. Supp. 552 the construction of a Federal statute was involved and the question was whether a payment by the administrator, of the former husband's estate, to the wife was deductible under the Federal statute in an estate tax return as founded on a court decree. The Nevada cases cited by defendant:

Lewis v. *Lewis,* 53 Nev. 398; 2 Pac. (2nd) 131; *Drespel* v. *Drespel,* 56 Nev. 368; 45 Pac. (2nd) 792; *Aseltine* v. *District Court,* 57 Nev. 269; 62 Pac. (2nd) 701 involved questions of the right of the trial court to modify original decrees, and whether by agreements of separation the court was bound by contract stipulations. The Nevada Court held in these cases that the Trial Court in its divorce decrees is not bound by agreements of the parties, and that the financial terms of a decree may later, under some circumstances, be modified. The Supreme Court of the United States, in *Helvering* v. *Fuller,* 310 U. S. 69; 84 L. Ed. 1082 discussing a separation agreement and a decree of divorce in Nevada, states: "It seems to be admitted that under Nevada law the wife's allowance once made is final, *Sweeney* v. *Sweeney,* 42 Nev. 431; 179 P. 638, unless the decree itself expressly reserves the power to modify it. *Lewis* v. *Lewis,* 53 Nev. 398; 2 P. (2nd) 131, or unless the decree approves a settlement which in turn provides for a modification. *Aseltine* v. *Second Judicial Dist. Ct.,* 57 Nev. 269; 62 P. (2nd) 701. Here, no such power was reserved in the decree or in the agreement approved by the decree."

The case of *Carey* v. *Mackey,* 82 Me. 516, involved a separation agreement and a divorce decree by a court in Florida. The separation agreement did not provide for rescission or termination upon the wife's divorce. The failure of good behavior or remarriage were the only causes mentioned to permit termination of the contract. There were no conditions or modifications imposed by the decree, although the decree in Florida did provide for her support. There was in the Carey case therefore, a decree of the court for support and also an agreement between the parties for the same purpose. In an action on the agreement our court held the contract valid and enforcible in this state, and that the defendant should be credited for sums paid under the Florida decree. *Carey* v. *Mackey,* 82 Me. 516; see also 42 C. J. S. 187, "Husband and Wife," Section 602; 17 Am. Jur. 553 "Divorce," Section 736.

The validity of this contract of September 16, 1942, at the time of its execution, is not questioned by the defendant. The contract contemplated a possible divorce, and expressly provided for the contract to remain in full force and effect thereafter. The contract provisions were not stated or copied in the decree. It was made a part of the decree through reference to it by its date only. In accordance with the contract terms the contract was "presented to," and was "ratified, approved and confirmed" by the Nevada Court. It was not collusive or against public policy, as the contract was recognized with court approval. It was not changed in any manner by the decree, and did not lose its identity or force as an existing contract between the parties. Whether the Nevada Court could change the terms of the contract, or terminate the contract, are not the questions now before us. It did not and has not. The decree in no way nullifies or terminates the contract. The Nevada Court when it granted the divorce reserved no right to change, imposed no conditions, and ordered no alimony. On the contrary, it ordered the parties and each of them "to comply with the terms thereof." It is, therefore, not a decree with provision for alimony that is in issue, but the terms of a contract. There was no merger as claimed by the defendant and no order by the Nevada Court that prevents action on the contract. In fact, by the very terms of the court's decree the contract itself determines the property and other financial rights of the parties.

The defendant is not prejudiced by the plaintiff's election to rely on the contractual remedy, as the decree makes the terms of the contract the controlling factor. A compliance with the contract fulfills all the obligations imposed by the decree, and payments thereunder completely satisfies the order of the court.

We find no error on the part of the Superior Court in its acceptance of the referee's report.

Exceptions overruled.

STATE OF MAINE

vs.

RODNEY L. ROBINSON, APLT.

Somerset. March 8, 1950.

Criminal Law. Assault and Battery. Instructions. Arrest.

A requested instruction which is not in its totality sound law, is properly withheld.

Whether a respondent is intoxicated at the time of arrest is a question of fact for the jury.

To entitle a respondent to an instruction that he should be acquitted if the jury find or fail to find the existence of a single fact—that fact must be absolutely determinative of the guilt or innocence of the respondent.

An illegal arrest is an assault and battery and may be repelled as any other assault and battery.

Words alone do not justify an assault. A mere statement by an officer that a person is under arrest, even if the officer has no authority, does not justify an attack by him upon the officer before any physical attempt is made to take him into custody.

ON EXCEPTIONS.

Upon complaint and warrant charging assault and battery defendant was found guilty. At the close of the testimony, defendant excepted to the refusal to grant a directed verdict. Defendant also excepted to the refusal of the presiding justice to give certain instruction. The case is before the Law Court on the Exceptions.

Exceptions overruled. Judgment for the State.

Lloyd H. Stitham, for the State.

Dubord and Dubord,
Lewis L. Levine, for defendant.

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

MERRILL, J. On exceptions. The respondent, Rodney L. Robinson, was tried at the May Term of the Superior Court in the County of Somerset, upon a complaint and warrant charging him with assault and battery upon one John B. Gallant. At the close of the testimony, motion for a directed verdict of not guilty was seasonably made, denied, and exceptions alleged and allowed. At the conclusion of the charge, the respondent in writing requested eleven instructions to the jury. To the denial of the eleventh request, the respondent seasonably alleged exceptions which were allowed. The jury having found the respondent guilty, the case is now before this court upon the foregoing exceptions.

The record clearly discloses that the complaining witness, John B. Gallant, a deputy sheriff, and the respondent engaged in a serious physical struggle in which both parties were severely and grievously injured. Each of them complained that the other was the unprovoked aggressor and struck the first blow. The respondent's plea was not guilty. He admitted striking the complainant, and relied upon self defense in justification thereof. He sought to justify his acts upon two grounds, repelling an unwarranted attack by the complaining witness upon him, and resistance of an unlawful arrest.

It would be profitless to relate the conflicting testimony of the complaining witness and the respondent and the witnesses called on behalf of the State and the respondent. Issues of fact were raised and their solution in a large measure depended upon the credence given by the jury to the conflicting testimony of the complaining witness and the respondent. The determination of these questions of fact was peculiarly within the province of the jury which ob-

served and heard the witnesses. As said by this court in *State* v. *Hume,* 131 Me. 458, 460:

> "We are of opinion that, if the testimony of the State's witnesses was believed, it was sufficient to establish the guilt of the respondent beyond a reasonable doubt. A direct denial of the State's charges and a contradiction of its witnesses raised an issue of fact which was for the jury. There was no error in the denial of the respondent's motion for a directed verdict. *State* v. *Donahue,* 125 Me., 517, 133 A., 433; *State* v. *Harvey,* 124 Me., 226, 127 A., 275."

The exception to the refusal to direct a verdict of not guilty must be overruled.

The requested instruction which was refused was as follows:

> "The jury is instructed as a matter of law that the evidence adduced by the State is insufficient for you to find that the respondent at the time of the alleged assault was intoxicated to that degree sufficient to authorize the officer to arrest the respondent without a warrant for intoxication. This being true, the attempted arrest without a warrant was unlawful and the respondent had a right to resist with reasonable force. You are further instructed that unless you are convinced beyond a reasonable doubt that the respondent used more force to resist the unlawful arrest than was reasonable, that you should find the respondent not guilty."

The rule of law with respect to the denial of requested instructions is correctly stated in *State* v. *Cox,* 138 Me. 151, 169, where we said:

> "A requested instruction which is not, in its totality, sound law, is properly withheld. It is no part of the duty of the court to eliminate errors in a re-

quested instruction. *State* v. *Cleaves,* 59 Me. 298, 303, 8 Am. Rep., 422."

Neither is it the duty of the court to supply omissions in a requested instruction in order that the same may be applicable to the case at bar.

Whether or not the respondent was intoxicated was peculiarly a question of fact for the jury. The jury were properly instructed by the court as to what constituted intoxication, and this at the request of the respondent. The determination thereof depended upon the condition of the accused as exhibited by conduct. There was a sharp conflict of testimony between the respondent and his witnesses and the State's witnesses, including the complaining witness, as to the conduct of the accused.

It was an undisputed fact that the respondent had been drinking at the time the alleged assault occurred. This fact, coupled with his unprovoked assault upon the complaining witness, his use of vile epithets, and his appearance both to the witness and to the other officers at the scene of the altercation and later at the jail as related by the State's witnesses, even though denied by the respondent, was sufficient to justify the court in submitting the question of his intoxication at the time of the alleged assault to the jury.

The requested instruction, however, has another infirmity. The instruction taken as a whole was a direction to the jury to return a verdict for the respondent unless they were convinced beyond a reasonable doubt that the respondent used more force than was reasonable in resisting unlawful arrest.

To entitle a respondent to an instruction that he should be acquitted if the jury find or fail to find the existence of a single fact set forth in the instruction, the fact so set forth must be absolutely determinative of the guilt or innocence

of the accused upon the entire evidence before the jury. In other words, the record must show that such fact is the only disputed fact upon which the guilt or innocence of the accused depends.

An illegal arrest is an assault and battery. The person so attempted to be restrained of his liberty has the same right, and only the same right, to use force in defending himself as he would have in repelling any other assault and battery. See 4 Am. Jur. Sec. 41, Page 148.

According to the testimony of the complaining witness, he was seated in his truck behind the steering wheel with the door closed and the window open. The respondent was in the street close to the truck. The State's witness testified as follows as to the beginning of the trouble:

> "A. After I saw Mr. Robinson I thought he was waving at me to stop, so I stopped, rolled down the window and asked him if he wanted to see me and he said no, that he was talking to his wife. Then I started rolling back up the window and he run up, opened the door and said: 'You sons of bitches are laying for me.' I said: 'We are watching you and if you continue to drive as you are we will pick you up.' Then he said: 'You sons of bitches, you are laying for me now and this is once you can't pick me up.' And then he came into the truck, grabbed me by the throat, choked me in the truck, cut off my wind. We had some struggling and scuffling in the truck."

Even if the officer told the respondent that he was under arrest before he entered the officer's truck, which is denied by the respondent, this evidence would show that the respondent violently assaulted the officer before the officer made the slightest attempt to take physical custody of him. While it is true that a person who is illegally arrested may use such force as is reasonably necessary to resist the force used against him, he cannot initiate the use of force. We recognize that there are circumstances under which an assault may be repelled by a battery, and a show of force may

be repelled by actual force. But words alone do not justify an assault. A mere statement by an officer that a person is under arrest, even if the officer has no authority to arrest, does not justify an attack by him on the officer before any physical attempt is made to take him into custody.

As said in *Harris* v. *State,* 95 S. E. (Ga. App.) 268:

> "The officer must, by some physical attempt, endeavor to make the unlawful arrest before the other person can lawfully strike him or otherwise resist him by the use of physical force."

Absent physical attempt to arrest, the question is not whether the respondent used reasonable force but whether he used any force whatsoever.

Even though the complaining witness, an officer, without right told the respondent he was under arrest, it was a question of fact for the jury whether or not the respondent attacked the officer before the latter made any physical attempt to make the arrest. If so, the respondent was not entitled to use any force whatsoever and he would be guilty. The requested instruction ignored this question of fact. It did not leave its determination to the jury. It presupposed the right of the respondent to use some force and that the only question of fact was whether the force actually used was reasonable. As the instruction did not require the jury to pass upon this issue of fact which could be determinative of the respondent's guilt it was properly refused and the exception to its refusal should be overruled.

Exceptions overruled.

Judgment for the State.

THOMAS CRAWFORD WILDE
vs.
THE INHABITANTS OF THE TOWN OF MADISON

Somerset. Opinion, March 25, 1950.

Municipal Corporations. Dump Fires. Towns.

Where a statute authorizes or requires a municipal corporation to do some governmental act or carry out some duty, the corporation is not liable for the negligent acts of its officers in its performance, unless the liability is created by statute.

The furnishing and maintenance of a town dump is a governmental function.

ON REPORT.

Action against the Town of Madison for negligent maintenance of a town dump. The cause was reported to the Law Court by agreement under R. S., 1944, Chap. 91, Sec. 14. Judgment for defendant. Case fully appears below.

Dubord and Dubord,
James G. Davian, for plaintiff.

Bernard Gibbs, for defendant.

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

FELLOWS, J. This case is on report. The record shows that a forest fire occurred in the town of Madison on October 21, 1947 and the plaintiff suffered damage to his woodlands thereby. The season was very dry. The fire started near a dump, whereon was a fire or fires kept burning to dispose of rubbish. Not far from the dump with its fires there was much accumulated slash, underbrush, and other combustible material. On the day in question there was a high wind blowing in a direction from the dump towards this debris.

The land on which this dump was situated belonged to one Harry E. Fall, and on February 24, 1948, after the forest fire, the town of Madison paid to Fall the sum of $75.00 for permitting its use as a dump for the year 1947. There was no collection of rubbish by the town, but any resident was allowed to bring and to deposit his refuse there without charge.

The facts indicate that the town of Madison, or its citizens, had been accustomed for many years to use this dumping ground, and the town paid to one Max Daigle in 1947 the sum of $160.00 for smoothing and otherwise caring for the dump, with other items for labor in clearing and constructing the road to the dump, amounting to $464.56.

The plaintiff claims that the dumping ground was maintained by the defendant town; that the town was negligent during this dry season in maintaining it; that the fire which damaged the plaintiff originated at the dump and spread to the plaintiff's property; that this dumping ground negligently maintained, although not a nuisance *per se,* became and was a nuisance, and the plaintiff is entitled to recover for his loss.

The defendant denies the plaintiff's contentions and says that the town was not negligent; that if the town did maintain the dump, its conduct was in the exercise of a governmental function from which the town derived no benefit or advantage; that there is no statute authorizing suit; that the acts were *ultra vires;* that if there was any negligence, the municipality, under the circumstances, is not liable.

This case is by agreement of the parties "reported to the Law Court in pursuance of the provisions of Revised Statutes, Chapter 91, Section 14 for submission of the whole controversy and for final decision including the questions of damages." In a case "on report" the plaintiff has the burden of proof. *Kerr* v. *State of Maine,* 127 Me. 142, 143; *Linn* v. *Barker,* 106 Me. 339.

Harry Webber testified that he lived only 200 feet from the dump; that on October 21, 1947 he went home to noon meal; that there were slash and dry underbrush southeast of the dump where one Pinkham had been cutting lumber; that fires were burning on the dump; that he was at the dump and "we looked it over" at a "quarter or ten minutes of twelve;" that there was a strong northwest wind; that he saw no one about the dump at the time; that later while he and his son were eating, his son "noticed the fire" and "he started to call the fire department but somebody called ahead of him;" that he does not know whether any person brought papers or other inflammables to the dump between 10:30 and 12 o'clock.

The forest fire was seen by the State Forest Service from the fire station on Kelley Mountain at 12:30. The report of the Forest Service shows a strong northwest wind.

Max Daigle, paid by the town of Madison as caretaker, testified that he left the dump at 10:30 and as usual went to his home for lunch; that he did not know of any person being at the dump or going to the dump while he was at home; that there was some slash 50 or 60 feet away from the dump; that fires were always burning on the dump; that on October 21 the dump was "smudging, no blazes;" that at times the town furnished another man to help; that the town furnished some items of fire fighting equipment; that while at home on October 21 he saw from his porch the fire and it looked to be "somewhere around 400 feet from the dump;" that when he arrived at the fire men were fighting fire 150 to 200 feet from the dump; that after the fire was under control, he saw that the fire had burned "right up to the dump."

Charles Worster, a member of Madison Fire Company, testified that he went to the dump in the middle of the forenoon and found a "small amount of fire smouldering at the base of the dump;" that Mr. Daigle "got a shovel and put the fire out;" that later in the day he helped to fight the for-

est fire, and that the forest fire, because of the high wind and dry conditions, could have started from the dump but he could not tell whether it actually did or not.

Other witnesses testified as to the dry season; the fires always burning on the dump; the atmospheric conditions of the day of the forest fire, and the apparent path of the fire. No person, however, saw the forest fire when it started, and witnesses disagreed as to the exact point where it started, but stated that it was "near" the dump fire. The dump had been used for nearly forty years as a dumping ground, and during that period no fires had previously "got away from the dump." No one had ever complained that the dump was a danger, or that the conditions were dangerous. The town had no notice at any time that the dump was a "nuisance" or that anyone claimed that it was.

The court finds that the forest fire started from the dump because of the proximity of its starting point to the dump fire; the direction of the wind; the slash and brush nearby; the dry conditions, and the absence of other probable sources. The facts proved compel this inference, although no eye saw the "flying spark." *Duplissey* v. *Railroad Company*, 112 Me. 263; *Jones* v. *Railroad Company*, 106 Me. 442.

Is the defendant town liable under the facts in this case? It has long been the general rule in Maine, as in most other jurisdictions, that towns and other public corporations are not liable for unauthorized and wrongful acts of their officers, though done in the course and within the scope of their employment. In the case of private corporations the rule is that a corporation is liable for unlawful acts and neglects of their officers and agents when done within the scope of their employment. *Small* v. *Danville*, 51 Me. 359.

Where the statute authorizes or requires a municipal corporation to do some governmental act or carry out some duty, the corporation is not liable for the negligent acts of its officers in its performance, unless the liability is created

by statute. Towns are then but subdivisions of the state. If the statute permits, authorizes, or directs, and the municipal corporation for its own profit or advantage negligently performs some act, there may be liability as in the case of private corporations. *Moulton* v. *Scarboro,* 71 Me. 267; *Libby* v. *Portland,* 105 Me. 370; *Palmer* v. *Sumner,* 133 Me. 337. There is no liability on the part of a town, however, if the act is *ultra vires. Seele* v. *Deering,* 79 Me. 343.

The law exempts municipal corporations from neglect, or negligent performance of public or governmental duties that have been imposed, or authorized by statute. *Woodcock* v. *Calais,* 66 Me. 234; *Burrill* v. *Augusta,* 78 Me. 118; *Tuell* v. *Marion,* 110 Me. 460; *Bowden* v. *Rockland,* 96 Me. 129; *Keeley* v. *Portland,* 100 Me. 260, 265; *Palmer* v. *Sumner,* 133 Me. 337.

When a public benefit, as a hospital authorized by statute, "descends to private profit, even incidentally, liability (of the municipality) attaches." *Anderson* v. *Portland,* 130 Me. 214; *Libby* v. *Portland,* 105 Me. 370; or negligence in the keeping of stock for profit on a farm used in support of paupers, *Moulton* v. *Scarborough,* 71 Me. 267.

There may be, of course, an express statute authorizing action where otherwise there would be no liability, as in the case of defective highways. R. S., (1944), Chap. 84, Sec. 88; or drains and sewers, R. S., (1944), Chap. 84, Sec. 148.

The courts have always recognized that a town may act within the scope of its authority as a town in two capacities. One is its governmental and the other its private capacity, although the line of demarcation is often indistinct and difficult to ascertain. Speaking generally, the public or governmental capacity of the municipal governmental agency is the discharge of acts or duties for the benefit of the general public. The private capacity is acting in its own matters, such as the acts as owner of property held for profit or advantage. In almost all affairs of local concern some indirect

relation may be traced to a matter of health, safety, or other subject of governmental cognizance. The test is not the casual or incidental connection, it is whether there is a duty or an authorization under the statute. *Libby* v. *Portland,* 105 Me. 370; *Anderson* v. *Portland,* 130 Me. 214. See also *Opinions of the Justices,* 58 Me. 591; *Bulger* v. *Eden,* 82 Me. 352.

It is well known to all citizens of this state that for more than a generation some towns and some municipal corporations have provided and maintained places as dumping grounds for the disposal of rubbish. In fact, some municipalities have had methods and arrangements for collection by the town. The statutes have not imposed a duty to provide a dump, nor directly authorized a dump, but it has been considered, in certain towns and cities, that under modern conditions and in many instances it is a service which should be rendered to the inhabitants by the municipality. Some towns have therefore assumed the right, through long custom and usage, to raise money for the maintenance of a dump. R. S., (1944), Chap. 80, Sec. 90. See *Spaulding* v. *Lowell,* 33 Pickering (Mass.) 71. A town may pass ordinances for health purposes. R. S., (1944), Chap. 80, Sec. 83. No rubbish shall be placed on any way. R. S., (1944), Chap. 19, Sec. 86. No bottles or cans shall be deposited within the limits of a highway. R. S., (1944), Chap. 128, Sec. 5. No filth to be allowed to collect in any place to the prejudice of others. R. S., (1944), Chap. 128. Sec. 7.

The plaintiff, in his brief and argument, states that the defendant town of Madison was fully authorized by the statute to maintain and operate a dump. He says it was "an act which the municipality has a right to perform" because the town has maintained the dump for forty years; because many other municipalities in Maine under this statute have maintained similar dumps as a "necessary charge." The plaintiff's claim is, that, although authorized

by the statute, this dump became and was a nuisance through negligence. The plaintiff also states that "if the defendant was engaged in a governmental function in the creation and maintenance of fires upon its land, the rule is well established that it is not responsive in damages for negligence."

The line between nuisance and negligence is not well defined and may be coexisting and inseparable. "A thing may be lawful in itself, and yet become a nuisance through negligence in the maintenance or use of it." *Foley* v. *Farnham Co.*, 135 Me. 29. There is no evidence in this case at bar that this Madison dump was a nuisance at any time. No one ever complained until this action was brought.

In the case of *Tuell* v. *Marion*, 110 Me. 460, an applicable rule is stated to be "that municipal corporations are not liable to private action for their neglect to perform, or their negligent performance of corporate duties imposed by statute; but if the acts complained of are not authorized by statute and are done by authority of the municipal corporation, or are afterwards ratified by the corporation, they are liable, as an individual would be, for the same wrongful acts." The law exempts municipal corporations from neglect, or their negligent performance of their public or corporate duties imposed or authorized by statute.

The facts in the case of *Tuell* v. *Marion*, 110 Me. 460, were that the town of Marion in the exercise of a governmental function, constructed a bridge over a navigable stream in such a manner as to obstruct navigation, without a special act of the legislature. It did not appear by the pleadings that the town was authorized by the legislature to erect and maintain such an obstructing bridge. The court held, on demurrer, that if the allegations were proved and there was an obstruction to navigation, to the injury of the plaintiff, not authorized by the legislature, an action could be maintained. The court, in this opinion, indicates that had the legislature authorized this bridge, and the construction of

the bridge was authorized in the manner as actually constructed, there would have been no liability. The court, in the *Tuell* case and in many other decided cases relative to towns, has apparently used the word "imposed" in some instances, when the legislature has "authorized."

In the *Tuell* v. *Marion* opinion the court said in one paragraph that the law exempts when the duties are imposed by statute, although elsewhere the opinion indicates that authorization by a statute is sufficient. Many previous decisions directly state, or plainly indicate that authorization is all that is necessary. If the court, in the *Tuell* case, intended to convey the idea that non-liability depends *only* where a duty is clearly ordered by statute, we must add that the rule also applies where the action is *authorized* by statute.

We believe that the rule of law adopted in Maine and actually followed by the court in deciding *Tuell* v. *Marion,* 110 Me. 461, is the same rule we have endeavored to restate in this case. The old maxim says that "peril lurks in definitions," and in order that there may be no misapprehension in the future as to the effect of the decision in *Tuell* v. *Marion,* we now say that if the rule stated in the *Tuell* case contravenes the principle of law as expressed herein, the case of *Tuell* v. *Marion* is to that extent overruled.

Whether the town of Madison had implied power and authority under the statute to furnish and maintain the dump, or whether the furnishing and maintenance of a dump by the town was contrary to the statute, unauthorized, wholly beyond its corporate powers and therefore *ultra vires,* are questions we need not determine and upon which we need not and do not express an opinion, for there is no liability in either event. We have already decided that the dump was not a nuisance as alleged in the plaintiff's declaration.

The furnishing and maintenance of this dump, if under an express or implied authority, would be the exercise of a

governmental function by the town. There was no profit and no liability. On the other hand, if there was no authority upon the part of the town of Madison to furnish or maintain this dump, and the furnishing and maintenance was contrary to the statute and *ultra vires,* as claimed by the defendant, the controlling rule is laid down in *Seele* v. *Deering,* 79 Me. 343, 346, 347, where the court said:

> "The authority and liability of our *quasi* public corporations known as towns as distinguished from municipal corporations incorporated under special charters, are generally only such as are defined and prescribed by general statutory provisions. Some things they may lawfully do and others they have no authority for doing. To create a liability on the part of a town not connected with its private advantage, the act complained of must be within the scope of its corporate powers as defined by the statute. If the particular act relied on as the cause of action be wholly outside of the general powers conferred on towns, they can in no event be liable therefor whether the performance of the act was expressly directed by a majority vote or was subsequently ratified."

> "It is quite evident that a town independent of any statutory authority, has no corporate power to dig ditches across anothers land. Such an act is ultra vires * * * * and would create no liability on the part of the town."

There is no liability in this case as against the defendant town under either view. If there is implied statute authorization, it is a governmental function and no profit was realized by the town. If it was an *ultra vires* act, the rule in *Seele* v. *Deering,* 79 Me. 343, is controlling. *Bulger* v. *Eden,* 82 Me. 352; *Libby* v. *Portland,* 105 Me. 370, 378.

For the law relative to municipal dumps as stated in other jurisdictions, see 38 American Jurisprudence 269, "Municipal Corporations," Sections 575, 576, 581, 583; McQuillin on Municipal Corporations, Vol. 3, Section 954, Vol. 6, Sections 2807-2840; *Moulton* v. *Fargo,* 39 N. D. 502; 167 N. W.

717; L. R. A. 1918 D 1108; *Haley* v. *City of Boston,* 191 Mass. 291; 5 L. R. A. (N. S.) 1005; 77 N. E. 888; *Gosselin* v. *Town of Northbridge,* 296 Mass. 351; *Saperstein* v. *Everett,* 265 Mass. 195; *Baumgardner* v. *Boston,* 304 Mass. 100; *Hayes* v. *Cedar Grove (W. Va.),* 30 S. E. (2nd) 726; 156 A. L. R. 702, and extensive note.

We find no liability on the part of the town of Madison under the record of this case.

Judgment for defendant.

FOREST C. BOSWORTH
AND
LELAND D. BOSWORTH, APLTS.
FROM THE DECREE OF JUDGE OF PROBATE
Somerset. Opinion, March 29, 1950.

Joint Accounts

A bank account made payable to a decedent and her daughter or the survivor in 1944 is payable to daughter as survivor under R. S., 1944, Chap. 55 even though it was originally opened in 1920 in decedent's individual name and decedent retained the bank book after 1944.

ON REPORT.

On petition of administrators of the estate of Lizzie H. Bosworth to determine ownership of bank deposits. Cause remanded for decree against the administrators. Case fully appears below.

Butler and Bilodeau, for petitioners.

Gould and Shackley, for respondents.

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

THAXTER, J. This case is before us on report on an agreed statement of facts.

Lizzie H. Bosworth died November 30, 1946. The appellants are the administrators of her estate. The defendant, Lulu B. Shepley, was her daughter. The administrators claim as the property of the estate the amount on deposit in the Skowhegan Savings Bank, Account No. 27,771, amounting to $2,938.32. All funds in this account were deposited by Lizzie H. Bosworth in whose name the account was originally opened June 22, 1920. It remained in her name until December 6, 1944 when she had it made payable to "Mrs. Lizzie H. Bosworth or Mrs. Lulu B. Shepley, Payable to Either or the Survivor." She retained possession of the bank book on which the account was so designated. The case arises on a petition of the administrators to the Judge of Probate of the County of Somerset to determine whether this deposit belongs to Mrs. Shepley, the daughter, or to the estate of Mrs. Bosworth. The Judge of Probate found that it was the property of the daughter and not of the estate. From this decree the administrators appealed and the case is now before us on report from the Supreme Court of Probate.

The daughter claims this deposit under the provisions of R. S., 1944, Chap. 55, Sec. 36, relative to accounts standing in the names of two or more persons payable to either or the survivor. This statute reads in part as follows:

> "II. All such accounts opened or such shares in loan and building associations issued on or after the 1st day of August, 1929, payable to either of two or more, or the survivor, up to, but not exceeding an aggregate value of $3,000, exclusive of interest and dividends, in the name of the same persons in all savings banks, loan and building associations, or trust companies within this state, to-

> gether with the additions thereto and increment thereof, including interest and dividends, shall, in the absence of fraud or undue influence, upon the death of any of such persons, become the sole and absolute property of the survivor or survivors, 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."

If this account had been opened prior to August 1, 1929, it would have been on the facts here stipulated the property of the estate of Mrs. Bosworth. If opened on or after August 1, 1929, it would have belonged to the daughter as the survivor. The only question therefore is whether this account was opened as claimed by the daughter on December 6, 1944. The Judge of Probate found that it was. That ruling was correct. The provisions of R. S., 1944, Chap. 55, Sec. 36, III, provide that accounts opened prior to August 1, 1929 may be brought within the provisions of Section 36, II, by filing a written declaration in form prescribed by the bank commissioner. Paragraph III does not apply here; for the account here in question was opened subsequent to August 1, 1929. Mrs. Bosworth could have withdrawn the money on deposit in her individual name and redeposited it immediately in the joint names of herself and her daughter; and there seems not the slightest reason why she could not have accomplished that result by having such change noted on the existing bank book. The method employed did not affect the substance of the transaction. It was purely a matter of convenience.

In accordance with the stipulation of the parties the case is remanded to the Supreme Court of Probate for the entry of a decree that the money represented by the account in question is the property of Lulu B. Shepley and not of the Estate of Lizzie H. Bosworth.

So Ordered.

RALPH W. FARRIS, ATTORNEY GENERAL
ON RELATION OF CARL E. ANDERSON, ET AL.
vs.
EDWARD T. COLLEY, ET AL.

Cumberland. Opinion, March, 1950.

Municipal Corporations. Ordinances. Salaries. Initiative.

A city is the creation of and subject to the control of the legislature. The powers are derived from the charter, special legislation directed to the particular city, the state constitution, and statutes of general application.

The charter of a city is the organic law of the corporation and an ordinance must conform, be subordinate to, and not exceed the charter.

An ordinance violative of or not in compliance with a city charter is void.

No action by the city through the city council or the people can alter or change the charter which was enacted not by the people of the city but by the people of the state.

Where the power and authority to fix and approve salaries is found in the city charter and not otherwise such is part of the organic law of the city and cannot be altered by local law.

Where a proposed ordinance if adopted, would be void it is not a proper matter for submission to the voters.

ON REPORT.

The Attorney General on relation of certain persons, who are members of the police department and qualified voters, seek by mandamus proceedings to compel respondents, members of the city council, to take steps to submit a proposed ordinance to the voters. The case is presented on demurrer to the return to the alternative writ and an agreed statement. Petition dismissed. So ordered.

Case fully appears below.

Wilfred A. Hay,
Charles Pomeroy,
Theodore R. Brownlee, for plaintiff.

Barnett I. Shur, for defendant.

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

WILLIAMSON, J. On report. The Attorney General on relation of certain persons, who are members of the police department and voters of the City of Portland, seeks by mandamus proceedings to compel the respondents, members of the city council, to take the necessary steps to submit a proposed ordinance to the voters under the initiative provisions of the city charter. It is agreed that the proposed ordinance was duly initiated and presented to the city council, and that action by the council is required if the proposal is to be voted upon by the people.

The case is presented on demurrer by the relators to the return of the respondents to the alternative writ, together with an agreed statement of facts.

The controlling issue is whether the proposed ordinance, if adopted, would be valid. In other words, may the proposed ordinance legally be adopted by the city? If so, the proposal must be submitted to the voters, but not otherwise.

The title "An ordinance fixing the minimum wages and the maximum hours for patrolmen of the Police Department of the City of Portland, Maine" fully and adequately describes the proposed ordinance, and for our purposes it is unnecessary to consider its details.

At the outset we point out that the only question before us is the existence or non-existence of power in the City of Portland, "a body politic and corporate," to use the terms of the charter, to adopt the proposed ordinance. Whether the policy expressed in the proposal is wise or unwise is not for us to consider or pass upon.

It must be kept firmly in mind that a city is the creation of and subject to the control of the Legislature. The powers of a city are derived from two sources: first, from the charter and special legislation directed to the particular city; and second, from the Constitution of the State and statutes of general application. Within the charter, except as otherwise provided by statute and constitution, we find the framework of the municipal government with the various powers and duties therein established and distributed.

Chief Justice Dunn said in *Burkett, Attorney General* v. *Youngs et al.*, 135 Me. 459 at 465, 199 A. 619, 621 (1938):

> "Purely of legislative creation, the municipality, as an instrument of government, a hand of the state, is always subject to public control through the Legislature."

Like principles were stated by the justices of our court in answering questions submitted by the governor as follows:

> "Municipal corporations are but instruments of government, created for political purposes and subject to legislative control.
> Legislative authority to create and incorporate political sub-divisions of the State clearly embraces the right to alter or amend the original charter or act of incorporation as the public welfare demands and the wisdom of the lawmaking power dictates."
>
> 133 Me. 532 at 535, 178 A. 613 at 615 (1935)

For a thorough discussion of the underlying principles, see *2 McQuillin, The Law of Municipal Corporations (3d Edition 1949) Sections 9.01 and 9.03.*

The charter of Portland was enacted by the Legislature and accepted by the voters in accordance with the Act in 1923. *P. & S. L., 1923, Chap. 109.* Subsequent amendments by the Legislature do not bear upon the present problem, nor do we find any statute of general or local application touching the issue here presented.

That the principle of control of a municipality by the Legislature has force and vitality is well illustrated by acts of the Legislature of 1949 affecting Portland. Statutes which granted authority to provide by ordinance for adjusting pensions of members of the police and fire departments and for an annuity to dependents of any member of such departments who has lost his life in performance of his duties were amended by *P. & S. L., 1949, Chap. 37 and Chap. 90.* The city was authorized to provide by ordinance for an annuity to the dependents of any member of its department of electrical appliances who has lost his life in performance of his duties. *P. & S. L., 1949, Chap. 73.* The charter was amended with respect to issuance of bonds and form of the ballot, and in neither case was the amendment referred to the people. *P. & S. L., 1949, Chap. 72 and Chap. 103.*

Our court has said in *Ellsworth* v. *Municipal Officers of Portland,* 142 Me. 200, 49 A. (2nd) 169 at 171 (1946):

> "When the new city charter was granted to the City of Portland in 1923, Priv. & Sp. Laws, Ch. 109, it was clearly the intention to provide a new and comprehensive system for the government of the city."

Under the charter the administration, in general, of all the fiscal, prudential, and municipal affairs, with the exception of the schools, is vested in the city council, a body of nine members which acts only by ordinance, order, or resolve. The city manager, chosen by the council "solely on the basis of his character and executive and administrative qualifications, is "the administrative head of the city" and "responsible to the city council for the administration of all departments." *Charter: Art. II "City Council." Sec. 1 and Sec. 8; Art. VI "Administrative Officers," Sec. 1 (a), Sec. 6, and Sec. 7.*

The initiative and referendum established by the charter are applicable in terms to "any proposed ordinance, order or resolve," or to "any ordinance, order or resolve enacted

by the city council which has not yet gone into effect." *Charter: Art. III, Sec. 1.*

Our constitution, in Section 21 of Amendment XXXI, permits the city council of any city to establish the initiative and referendum in regard to its municipal affairs on ratification at a municipal election, and authorizes the Legislature to provide at any time "a uniform method for the exercise of the initiative and referendum in municipal affairs."

The City of Portland has not adopted an initiative and referendum ordinance under the constitution nor has the Legislature enacted a uniform method applicable to cities generally. The source of the initiative and referendum in Portland is in the charter alone and not elsewhere.

No action by the city through the city council or the people can alter or change the charter which was enacted not by the people of Portland but, to use the words of the legislative act, "by the People of the State of Maine." The rule is clearly stated in *5 McQuillin, Law of Municipal Corporations* (3d Edition 1949), *Sec. 15.19,* as follows:

> "The charter of the city is the organic law of the corporation, being to it what the constitution is to the state, and the charter bears the same general relation to the ordinances of the City that the constitution of the state bears to the statutes.
> The proposition is self-evident, therefore, that an ordinance must conform, be subordinate to, and not exceed the charter and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state. Consequently, an ordinance violative of or not in compliance with the city charter is void. Ordinances must not only conform with the express terms of the charter, but they must not conflict in any degree with its object or with the purposes for which the local corporation is organized."
>
> ---
>
> "The rule that contravention of the charter voids an ordinance is applicable to an ordinance adopted by the electors of the city."

We turn to the charter to ascertain how and in what manner the salaries of the patrolmen are established.

Patrolmen are appointed by the city manager upon recommendation of the chief of police. The charter in Article VI, Section 1 (c), reads: "All other employees shall be appointed by the city manager upon recommendation of the heads of their departments." Relators and respondents agree that appointments of patrolmen are so made. Salaries of patrolmen are fixed by the city manager subject to the approval of the city council. Article VI, Section 5 of the Charter reads: "Compensation of Officers. The city council shall fix by order the salaries of the appointees of the city council. Salaries of the appointees of the city manager shall be fixed by the city manager, subject to the approval of the city council."

In words clear and precise the charter fully and completely covers the steps of appointment of patrolmen and the fixing of their salaries by the city manager with action by the city council, limited only to approval or disapproval. The council has in fact only a veto power. The relationship of the city manager and the city council is not unlike that of the Governor and Council in matters of executive action accomplished only with the advice and consent of the council. *Constitution Art. V, Part First, Sec. 8.* It is the organic law of the city,—the charter that cannot be altered or changed by city council or the people of Portland—, which provides for the appointment and fixing of salaries of patrolmen and certain other employees by the administrative head of the city subject only to the approval of the city council.

The proposal is an attempt to adopt by local law a salary scale, limited to be sure in scope to a minimum standard for a particular group of city employees. Obviously the term "wages" used in the ordinance is included within the term "salaries" in the charter and for our purposes we will generally use the term "Salaries."

We need not enter into a discussion whether the proposal is legislative or administrative in nature, or whether the initiative operates in one case and not in the other, or whether the Constitution prohibits the exercise of the initiative on the proposal here presented. Such questions have been well and ably argued by counsel for relators and respondents, but in our view need not and should not be here decided.

Our problem is *not* whether by act of the Legislature or provision of the Constitution *the power* to adopt such an ordinance and to establish the policy expressed therein *may be granted* to the city but whether *under the existing charter the city now has such power.*

The purpose of the ordinance clearly and unmistakably is to prohibit the city manager and the city council from fixing and approving salaries of patrolmen below the minimum. The powers of both the city manager and the city council are thereby to be governed and controlled by an ordinance which "shall not be repealed or amended except by a vote of the people," there being no express provision otherwise in the ordinance. *Chapter, Art. III, Sec. 10.*

If the proposed ordinance is valid, it would be equally proper by ordinance to amend the charter provision in Article VI, Sec. 5, *supra,* by adding a clause to this effect: "provided, however, that the city manager shall not fix and the city council shall not approve salaries of patrolmen below the minimum wages fixed by ordinance." The ordinance is without value unless it has the force and effect of such an amendment.

There must of necessity exist the power and authority at some point to fix and approve salaries. The principle that, subject to applicable constitutional provision, this power is in the Legislature and may be exercised within the municipality only to the extent granted by the Legislature is well illustrated by legislative acts affecting the City of Lewiston.

In 1917 the Legislature established a police commission, appointed by the governor, and established the salaries of patrolmen. In 1939 the salaries of the patrolmen were again fixed by the charter. In 1945 the appointment of the police commission was placed in the mayor, and in 1947 it was provided that the salaries of patrolmen be fixed by the police commission subject to approval of the board of finance. *P. & S. L., 1917, Chap. 37; P. & S. L., 1939, Chap. 8; P. & S. L., 1945, Chap. 131; P. & S. L., 1947, Chap. 113.* See also *Lemaire* v. *Crockett,* 116 Me. 263, 101 A. 302 (1917). In Portland the distribution of such authority is found in the charter and not elsewhere.

There is much more at stake in the present case than the limited issue of the power by ordinance to fix and approve minimum wages and maximum hours of employment for patrolmen. If the charter, in effect, can be amended by the proposed ordinance, where then does the power to change and alter the government of Portland by act of city council or the people under the initiative end? The answer lies in the application of the principle that there can be no beginning of such a process of change in government by charter.

The proposed ordinance, if adopted, would be void. It is not a proper matter for submission to the voters.

Accordingly, the peremptory writ of mandamus will not issue. The demurrer of the relators is overruled. The petition for mandamus is dismissed without costs.

So Ordered

HARRY KAYE, PETITIONER
FOR WRIT OF HABEAS CORPUS
vs.
KEEPER OF THE JAIL

HARRY KAYE, PLAINTIFF IN ERROR
vs.
STATE OF MAINE

Cumberland. Opinion, April 6, 1950.

Habeas Corpus. Writ of Error. Probable Cause. Larceny. Jeopardy.

On writ of error court is limited to consideration of the record.

A verdict which fairly and fully describes the offense of which defendant was found guilty; namely, that he was guilty of larceny of a horse of a value not exceeding one hundred dollars is proper.

On habeas corpus the petitioner is not entitled of right to consideration of the issue of double jeopardy.

The finding of "probable cause" on a complaint and warrant charging grand larceny does not include a finding of "not guilty of petit larceny" where jurisdiction was taken only for the purpose of determining if there was "probable cause" and, if so, to "bind over" the accused to the trial court. The accused was not on trial or in jeopardy for petit larceny before the magistrate, and has not been placed in double jeopardy by the verdict of the jury.

ON REPORT.

Kaye, petitioner for writ of habeas corpus and plaintiff in error, was held for the grand jury on a finding of "probable cause" on a complaint and warrant charging larceny of a horse of the value of four hundred dollars. Upon trial on indictment for the identical offense, he was found by the jury to be "guilty of misdemeanor." Under *R. S., Chap. 119, Sec. 1 (1944),* if the value of the property which is the subject of the larceny is found to exceed one hundred dollars, the offense, commonly known as grand larceny, is

a felony; and, if the value of the property does not exceed one hundred dollars, the offense, commonly known as petit larceny, is a misdemeanor. Petition dismissed. Writ dismissed.

Nixon & Nixon, for petitioners.

Daniel C. McDonald,
Arthur Chapman, Jr., for respondent.

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

WILLIAMSON, J. Harry Kaye, petitioner for writ of habeas corpus and the plaintiff in error, seeks his release from the county jail where he is now serving a six months' sentence. The cases arise on report with an agreed statement of facts.

On a complaint and warrant charging Kaye with larceny of a horse of the value of four hundred dollars, "probable cause" was found in the Portland Municipal Court. After a plea of not guilty and examination, described in the agreed statement as "a full hearing upon said warrant before the court with both the state and the defendant producing testimony and evidence thereon," Kaye was "bound over to the September Term of the Superior Court" and gave the bail required by the magistrate.

In the Superior Court, Kaye was indicted for the identical offense set forth in the complaint and warrant, pleaded not guilty, was tried, and found by the jury to be "guilty of misdemeanor." Judgment of six months' sentence in the county jail was rendered on the verdict.

On the writ of error we are limited to consideration of the record. *Nissenbaum* v. *State of Maine,* 135 Me. 393, 197 A. 915 (1938). The issue is whether the recorded verdict of "guilty of misdemeanor" fairly and fully describes

the offense of which Kaye was found guilty and on which the judgment was rendered.

Larceny is defined in *R. S., Chap. 119, Sec. 1* (1944). If the value of the property, which is the subject of the larceny, is found to exceed $100, the crime is punishable by imprisonment in the state prison. Such crime, commonly known as grand larceny, is a felony. If the value of the property does not exceed $100, the crime is not so punishable. Such crime, commonly known as petit larceny, is a misdemeanor.

What meaning can the words "guilty of misdemeanor," taken in the setting of the indictment and trial, have other than that the jury found Kaye guilty of larceny and the horse was of a value not exceeding $100? The record is clear and unmistakable to one who reads with care and understanding.

In the habeas corpus proceedings, Kaye contends that a finding of "probable cause" of grand larceny included a finding of "not guilty" of petit larceny, and that by the verdict he has been placed for a second time in jeopardy for petit larceny. For this purpose, he accepts the jury verdict as a finding that the horse was a subject for petit but not for grand larceny.

The petitioner is not entitled of right to consideration of the issue of former jeopardy on habeas corpus. 25 *Am. Jur.* 182; 39 *C. J. S.* 474. Indeed there is no record that the issue of former jeopardy was raised at any stage of the trial or at the time of sentence.

In *Clawans* v. *Rives,* U. S. Ct. of Appeals, D. C., 104 F (2nd) 240, 122 A. L. R. 1436 (1939) cited by the petitioner, and in *Hans Nielsen, Petitioner,* 131 U. S. 176 (1889) cited in the *Clawans* case, the issue of former jeopardy, held to be properly raised on habeas corpus proceedings, had as well been presented below. For illustrative cases on the proper procedure in case of former jeopardy see *State* v. *Barnes,*

32 Me. 530 at 534 (1851); *State* v. *Houlehan,* 109 Me. 281, 83 A. 1106 (1912); *State* v. *Slorah,* 118 Me. 203, 106 A. 768 (1919); *State* v. *Cohen,* 125 Me. 457, 134 A. 627 (1926); *State* v. *Shannon,* 136 Me. 127, 3 A. (2nd) 899, 120 A. L. R. 1166 (1939).

In *O'Malia* v. *Wentworth,* 65 Me. 129 (1876), the court said at page 132, "The writ (habeas corpus) cannot be used as a substitute for a plea in abatement, a motion to quash, or a writ of error. Nor can it be substituted for an appeal."

We are not, however, prohibited from consideration of the *habeas corpus,* and under the circumstances of this case we proceed to decide the issue on its merits.

The petitioner has failed to note that there was no trial before the committing magistrate as was the situation in *Cunningham* v. *State,* 80 Ga. 4, 5 S. E. 251 (1888). On the offense charged in the complaint and warrant, which we have seen was a felony, the magistrate had no jurisdiction to determine guilt or innocence. Jurisdiction of the complaint was taken only for the purpose of determining if there was "probable cause," and, if so, to "bind over" the accused to the trial court. *Commonwealth* v. *Hamilton,* 129 Mass. 479 (1880); *State* v. *Morgan,* 62 Ind. 35 (1878); 15 *Am. Jur.* 47; 22 *C. J. S.* 483.

The petitioner was not in jeopardy before the magistrate for the larceny of a particular horse of a value not exceeding $100, that is, for the misdemeanor of which he was found guilty in the Superior Court.

There were no errors in the proceedings resulting in the six months' sentence now being served.

The writ of error must be dismissed, and the petition for habeas corpus dismissed and the writ discharged.

It is so Ordered.

GEORGE B. BARNES ET AL.

vs.

FRANCIS A. WALSH

Aroostook. Opinion, April 6, 1950.

Attorneys-at-Law. Courts.

The inherent power of the Supreme Judicial Court to discipline attorneys is in the court itself and not the individual justices and the provisions of R. S., 1944, Chap. 93, Secs. 14-19 are not exclusive but in aid of the inherent powers.

ON REPORT.

Upon information of the Aroostook Bar Association under R. S., 1944, Chap. 93, Sec. 14, and an answer thereto the cause was reported to the Law Court by agreement of the parties. Cause to stand for hearing upon information, denial and proof.

James P. Archibald, for informant.

Irvine E. Peterson, for respondent.

MERRILL, J. On report. On the fifth day of October, A. D. 1949, George B. Barnes, Albert F. Cook and Fred N. Beck, Grievance Committee of the Aroostook Bar Association, filed in the office of the Clerk of the Supreme Judicial Court in Aroostook County an information address to said court, within and for said county, against Francis A. Walsh of Caribou in said county, an attorney at law.

Said information alleged that said Walsh had become and was disqualified for the office of attorney and counsellor at law for reasons specified therein. The Supreme Judicial Court, within and for said county, being then in vacation, the Chief Justice of said court, on the seventh day of October, 1949, issued a rule commanding the said Francis A. Walsh to appear before said court at the term thereof to be

holden at Houlton in said county on the first Tuesday of November, 1949, then and there to show cause why his name should not be struck from the roll of attorneys. The rule further prescribed how the same should be served, and was duly served upon the respondent.

There being no justice of said court resident in Aroostook County, the Chief Justice duly assigned one of the Associate Justices of said court to preside over said November term to hear and determine any matters there pending, and especially said information. Prior to the first day of said term the respondent filed in the office of the Clerk of Courts in said county of return a denial of the charges specified in the information.

At said term and on the first day thereof, the respondent not having appeared, the Associate Justice so assigned to preside at said term ordered that said information stand upon the docket for hearing before said court at Houlton on the twelfth day of November, 1949, at 10 o'clock in the forenoon, to which time and place he then and there adjourned said court.

On the twelfth day of November the respondent appeared before said court personally and with counsel, and suggested to the court, said Associate Justice presiding, that it was without jurisdiction to hear and determine said cause for the reason that the information having been filed under the provisions of R. S., Chap. 93, Sec. 14, the only justice who had jurisdiction to set said cause for hearing and to hear the same was the Justice of the Supreme Judicial Court who issued the rule provided for in said Sec. 14. Whereupon, the parties agreeing thereto, the justice presiding, by appropriate order, reported the cause to the next term of the Law Court, with the following stipulation agreed to by the parties:

> "If upon the foregoing statement of facts the Law Court shall determine that the Supreme Judicial Court is now without jurisdiction to hear said

Information the same is to be dismissed; otherwise the cause is to stand for hearing upon the Information, Denial and Proof."

The case is now before this court upon said report.

By R. S., Chap. 93, Secs. 14, 15 and 20 it is provided:

"**Sec. 14. Information may be filed by attorney-general, or committee of bar against attorney.** Whenever an information is filed in the office of the clerk of courts in any county, by the attorney-general, or by a committee of the state bar association, or by a committee of the bar or bar association of such county, charging that an attorney at law has become and is disqualified for the office of attorney and counselor at law, for reasons specified in the information, any justice of the supreme judicial court may, in the name of the state, issue a rule requiring the attorney informed against to appear on a day fixed to show cause why his name should not be struck from the roll of attorneys, which rule, with an attested copy of the information, shall be served upon such attorney in such manner as the justice directs, at least 14 days before the return day, and shall be made returnable, either in the county where such attorney resides or where it is charged that the misconduct was committed.

Sec. 15. Upon denial, information to stand for hearing. If the attorney on whom such service has been made, on or before said return day, files in the office of the clerk of courts in said county of return a denial of the charges specified in the information, the information shall thereupon stand upon the docket for hearing at such time and place as said justice shall order, upon such lawful evidence as may be produced either by the state or by the respondent.

Sec. 20. Interpretation of Secs. 14-19. The provisions of the 6 preceding sections do not annul or restrict any authority hitherto possessed or exercised by the courts over attorneys."

The specific issue raised by the report is: "If a Justice, as here in a cause of this nature, issue a rule returnable to

a regular term of the Supreme Judicial Court, and some Justice of said Court other than the Justice who issues the rule is the Justice presiding at said term, may such presiding Justice order the time and place for hearing said information and hear the same?" The respondent seizes upon the phrase contained in Sec. 15 above quoted "the information shall thereupon stand upon the docket for hearing at such time and place as *said* justice shall order" (emphasis ours) as restricting all jurisdiction in the premises to the justice who issued the original rule.

The power and authority of the Supreme Judicial Court to discipline or remove attorneys at law for misconduct is inherent. As said by this court in *Penobscot Bar* v. *Kimball,* 64 Me. 140, 145, 146:

> "An attorney at law is an officer of the court as appears from the terms of his oath of office, to wit: 'you will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as your clients.' The order of his admission to the bar is the judgment of the court that he possesses the requisite legal qualifications and good moral character to entitle him to practice the profession of an attorney at law. From the moment of his entrance upon the duties of his office, he becomes responsible to the court for his official misconduct. The tenure of his office is during good behavior, and he can only be deprived of it for misconduct ascertained and determined by the court after opportunity to be heard has been afforded. In the absence of specific provision to the contrary the power of removal is commensurate with the power of appointment. *Ex parte Garland,* 4 Wall., 378; case of *Austin et als.,* 5 Rawle, 203."

This inherent power to discipline and remove is in the court itself, not in the individual justices as such. Such authority and power has been possessed by the Supreme Judicial Court in this state from its inception.

The provisions of R. S., Chap. 93, Secs. 14-19, are not exclusive, either as to the procedure therein authorized or in conferring authority upon the Supreme Judicial Court to act in the premises. These provisions are in aid of the authority and power inherent in the court. These provisions in the statute in no way limit this power and authority of the court to discipline and remove unworthy attorneys, nor its power and authority to adopt appropriate procedure therefor. When an attorney is formally charged before the court with conduct unworthy of an attorney, the court may adopt any appropriate procedure to enable it to exercise its inherent power and authority in the premises. The court is limited in the exercise of such power and authority only by the general principles of law which require that sufficient notice be given to the respondent to enable him to appear and defend against the charges, that it afford to him a fair and impartial hearing upon the charges made against him, and that discipline be administered or removal ordered only for misconduct ascertained by the court in proceedings so conducted. R. S., Chap. 93, Sec. 20 recognizes and preserves this power and authority of the court when it declares:

> "The provisions of the 6 preceding sections do not annul or restrict any authority hitherto possessed or exercised by the courts over attorneys."

The information in this case was addressed to the Supreme Judicial Court. Under statutory authority the Chief Justice of the Court ordered the respondent to appear before the court at a regular term thereof to show cause why his name should not be struck from the roll of attorneys. Being served with this order and rule as therein prescribed, the respondent was given ample opportunity to appear and defend himself against the charges contained in the information. He availed himself of the opportunity so presented and filed an answer denying the charges. He then challenged the jurisdiction of the court on the grounds hereinbefore set forth.

The justice presiding at a regular term of the Supreme Judicial Court at *nisi prius,* duly assigned as such by the Chief Justice, has charge of the docket of said court. Unless prevented by clear and specific provision to the contrary, he has the power and authority to make all necessary and appropriate orders for the orderly conduct of the business before the court. Acting within his authority as such, the justice presiding ordered this information to stand upon the docket for hearing before said court on the twelfth day of November, 1949, and adjourned said term to said date.

Although a literal reading of the phrase relied upon by the respondent gives color to his contention, the contention cannot be sustained. To sustain his contention, that jurisdiction is exclusively in the justice who issues the rule, would deprive the court, as such, of its authority and control over its attorneys, and confer the same upon one of the justices, as such.

In view of the provisions of Sec. 20 above quoted, the Chief Justice was authorized to make the rule returnable to a regular term of said court. The information was a cause standing upon the docket of the court at said term for disposal therein and thereby. The presiding justice was authorized, as such, to make all appropriate orders with respect to the cause, including setting the same for hearing before said court on a day certain, and on said day, as the justice presiding over said court to hear and determine the cause. It necessarily follows that the Supreme Judicial Court, at *nisi prius,* now has jurisdiction to hear said information.

In accord with the stipulation of the parties, the cause is to stand for hearing before the Supreme Judicial Court, at a term thereof hereafter to be begun and holden at Houlton within and for the County of Aroostook, upon the Information, Denial and Proof.

So ordered.

RICHARD M. RUSSELL, LIBELANT

vs.

MARION A. RUSSELL, LIBELEE

Cumberland. Opinion, April 6, 1950.

Divorce. Non-Support. Res adjudicata.

A separate support order in favor of a wife does not of itself bar a husband from a divorce.

The issues involved in the support order (that the husband, being of sufficient ability, wilfully and without reasonable cause, refused and neglected to provide suitable maintenance for his wife) are *res adjudicata.*

The issue involved in the support order (that the wife was living apart from her husband for just and reasonable cause) is not *res adjudicata* since such fact is not a statutory prerequisite to the support order and *a fortiori* not necessarily determined.

Uncondoned misconduct of a libelant which would justify a divorce to a libelee bars a divorce to libelant.

Living apart for just and reasonable cause may not be for such a cause as would justify a divorce.

Grossness, wantonness and cruelty are not necessary ingredients of a separate support order (R. S., 1944, Chap. 153, Sec. 43 (Sec. 55) as amended by P. L., 1949, Chap. 239, Sec. 137.)

ON REPORT.

Action for divorce. The cause was reported to the Law Court upon an agreed statement to determine whether a separate support order in favor of a wife is a bar to the husband's libel for divorce on the ground of cruel and abusive treatment. Cause remanded for trial. Case fully appears below.

I. Edward Cohen,
Robert A. Wilson, for libelant.

Max L. Pinansky,
Thomas Tetreau, for libelee.

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

WILLIAMSON, J. The case arises on report with an agreed statement of facts that we may determine whether a separate support order in favor of the wife, the libelee, is a bar to the libel for divorce brought by the husband, the libelant, on the ground of cruel and abusive treatment.

On April 20th last the wife commenced proceedings in the Portland Municipal Court under R. S. Chap. 153, Sec. 43 (1944) as amended by Laws of 1949, Chap. 349, Sec. 137 to obtain contribution to her support. In her petition she alleged that "she is living apart from her husband for just and reasonable cause and that he, being of sufficient ability to labor and provide for her, wilfully and without reasonable cause, refuses and neglects to provide suitable maintenance for her."

On June 7th the Municipal Court entered an order "that (the husband) pay $8.00 each week—first payment on June 16, 1949." The order remains unchanged on the records of the Municipal Court. No suggestion is made that the husband has failed to make the payments ordered.

On June 17th, ten days after the entry of the support order, the husband brought a libel for divorce against his wife, alleging that he "has ever been faithful to his marriage obligations" and that his wife "has been guilty of cruel and abusive treatment."

The issues necessarily decided in the Municipal Court, the wife urges, show conclusively that her husband has not been faithful to his marriage obligations and that she has cause for divorce on the ground commonly known as "non-support."

The rule stated by Justice Wilson in *Lausier* v. *Lausier*, 123 Me. 530 at 532; 124 A. 582 at 583 (1924), is applicable:

> "Where, however, although the parties are the same, the cause of action or issue is different, a prior judgment is only conclusive upon such issues as were actually tried, and the burden is on the party setting up the judgment as an estoppel to show that the same issue was involved and determined on its merits in the prior proceeding."

We are limited to consideration of the petition of the wife, the order, and the statute authorizing the proceedings in establishing what issues necessarily were tried and determined in the Municipal Court.

The decision must have been grounded on the following issue which, therefore, is *res adjudicata* between the parties; namely, that the husband being of sufficient ability, wilfully and without reasonable cause, refused and neglected to provide suitable maintenance for his wife, which for convenience we will call "nonsupport."

In her petition the wife alleged that she was living apart from her husband for just and reasonable cause. The allegation, however, did not raise an issue necessarily present in the proceedings. A requirement that the husband or father be living apart from his wife or minor child found in the statute when first enacted in 1895 was stricken from the statute in 1905. *Laws of 1895, Chap. 136; Laws of 1905, Chap. 123, Sec. 6.* The principle of *res adjudicata* is accordingly not applicable.

A libelant who is guilty of misconduct, not condoned, which in itself would be a ground for divorce is barred from obtaining a divorce. Whether we say the libelant is barred by a recriminatory charge raised in defense or fails through inability to establish that he has been faithful to the marriage obligations or vows is not material. See *Reddington* v. *Reddington,* 317 Mass. 760; 59 N. E. (2nd) 775; 159 A. L. R. 1448 (1945), and note. We are not here concerned with a problem of burden of proof.

> "It is well settled in this country under the doctrine of recrimination that the defendant to an

> action for divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself would be a ground for divorce."

17 *Am. Jur.* 268 and 352; 27 *C. J. S.* 623.

In *Berman* v. *Bradford,* 127 Me. 201 at 202; 142 A. 751 at 752 (1928), the court said:

> "Except for one cause, impotence, divorces are granted only upon proof of wrong doing by one spouse.
>
> Before decreeing a divorce the Court must be reasonably satisfied that the libellant has been faithful to the marriage vows, that the libellee has been guilty of one or more of the grievous offenses against the marital relations specified in the statute, that there has been no condonation, and that there is no collusion."

Was there an issue that the husband was guilty of misconduct which in itself would be a ground for divorce involved and determined in the separate support proceedings?

A wife may be justified in leaving her husband, that is in living apart for just and reasonable cause, and yet not have a ground for divorce. That such "living apart" may be a good defense, let us say to a charge of desertion, is not this case where the charge is cruel and abusive treatment. *Lyster* v. *Lyster,* 111 Mass. 327 (1873); *Burke* v. *Burke,* 270 Mass. 449; 170 N. E. 384 (1930). As we have seen in this instance, the issue of "living apart" was not of necessity determined in the support proceedings.

The "nonsupport" of the Municipal Court order differs markedly from "nonsupport" as a cause for divorce.

The divorce statute reads:

> "or, on the libel of the wife, where the husband being of sufficient ability or being able to labor and provide for her, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her;" *R. S. Ch. 153, Sec. 55.*

The separate support order was entered in a civil proceeding under a statute which reads "wilfully and without reasonable cause" and not, as in the divorce statute, "grossly or wantonly and cruelly." It is apparent that grossness or wantonness and cruelty are not necessary ingredients of the separate support order.

In *Cotton* v. *Cotton,* 103 Me. 210; 68 A. 824 (1907), the court pointed out the intent of the Legislature to give to the municipal and certain other courts jurisdiction and authority to grant prompt and summary relief. The court said on Page 213, "Such orders are ordinarily of a temporary character subject to revision by the court which makes them, ..."

From 1895 when the Legislature first gave the right to petition for such support until 1927, there was no right of appeal from the court entering the order. *Laws of 1895, Chap. 136; Laws of 1927, Chap. 98.*

Further the support ordered in such sums "as are deemed reasonable and just" marks the limit of the wife's right to support and maintenance from her husband, until further order. *Inh. of Vienna* v. *Weymouth,* 132 Me. 302; 170 A. 499 (1934).

As we have pointed out, the order can be made while the parties live together. The order does not create a judicial separation. The marital status of the parties remains unchanged. *Slavinsky* v. *Slavinsky,* 287 Mass. 28; 190 N. E. 826 (1934).

No question of whether the effectiveness of the support order of the Municipal Court ended upon the husband bringing a libel for divorce against his wife here arises. So far as the record discloses, the husband is complying with the support order of the Municipal Court, and no order for support pending libel has been sought by the wife in the Superior Court.

Divorce with all its attendant problems is within the jurisdiction of the Superior Court. Not only is the life or death of the marriage there decided, but also in its watch and keeping are the problems which follow the broken marriage. There are determined questions of property, support for the innocent wife, and, of the highest importance, the care and support and comfort of children, the wards of the court.

Without doubt issues may become *res adjudicata* between husband and wife affecting the proceedings for divorce. Care must be taken, however, that only such issues as necessarily have been determined, not merely in words but in fact, within the meaning and intent of the divorce statute, be considered as finally and conclusively decided.

In support proceedings in the nature of the present Municipal Court proceedings it may be that neither party wishes or desires a divorce, that there has been no gross, wanton or cruel refusal or neglect to support, and that the dispute between husband and wife, living apart perhaps by agreement, arises not from a total failure to support but from a disagreement upon the amount of support.

Whether the husband was guilty of "nonsupport" within the divorce statute was not necessarily involved or determined in the Municipal Court proceedings.

The only other cause for divorce which it could be said is contained in the findings of the Municipal Court would be cruel and abusive treatment. "Extreme cruelty" is more serious in its nature than "cruel and abusive treatment," and, if the findings do not measure up to the latter, then assuredly they do not reach the former. "Cruel and abusive treatment" as a ground for divorce has been defined in *Holyoke* v. *Holyoke,* 78 Me. 404 at 411; 6 A. 827 at 828 (1886), as follows:

> "Deplorable as it is, from the infirmities of human nature, cases occur where a wilful disregard

> of marital duty, by act or word, either works, or threatens injury, so serious, that a continuance of cohabitation in marriage cannot be permitted with safety to the personal welfare and health of the injured party. Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either, is like a withering blast and endangers "life, limb, or health," and constitutes the (6) (Cruel and abusive treatment) cause for divorce in the act of 1883."

It is apparent that the findings in the Municipal Court do not necessarily show that the husband was guilty of cruel and abusive treatment as above defined.

We mention "cruel and abusive treatment" for the reason that if it is disclosed at the hearing that the libelee has grounds for divorce, the court may not grant a divorce to the libelant. Whether the libelee chooses to raise the issue is not material.

The record does not disclose whether the libelant relies on acts of cruel and abusive treatment occurring before or after, or both before and after, the separate support order of June 7th. It is unlikely that his complaints commence after June 7th, although this is not impossible. In our view it is immaterial when the acts he will seek to prove on hearing occurred. What effect proof of living apart and of failing to support his wife at the date of the support order, or before or since such order, may have upon the force and effect of the evidence presented in his behalf is for the trier of facts, not for us to determine.

Nor is it necessary that we discuss the possibility of condonation by the wife of grounds of divorce for no such grounds were established in her favor in the Municipal Court.

In *Cochrane* v. *Cochrane,* 303 Mass. 467; 22 N. E. (2nd) 6; 138 A. L. R. 341 and note (1939), there may be found a

thorough discussion of several of the questions here presented. See also *Harrington* v. *Harrington,* 189 Mass. 281; 75 N. E. 632 (1905); *Watts* v. *Watts,* 160 Mass. 464; 36 N. E. 479; 23 L. R. A. 187; 39 A. S. R. 509 (1894); *Krasnow* v. *Krasnow,* 280 Mass. 252; 182 N. E. 338 (1932).

We hold, therefore, that the separate support order does not bar the husband from a divorce upon his libel. In accordance with the stipulation of the parties, the case is remanded to the Superior Court for trial.

It is so Ordered.

FRANKLIN DELANO WADE
PETITIONER FOR WRIT OF HABEAS CORPUS
vs.
WARDEN OF THE STATE PRISON

Cumberland. Opinion, April 25, 1950.

Criminal Law. Courts. Juvenile Delinquency.

Grand Jury. Manslaughter. Record.

The excepting from the juvenile jurisdiction of juvenile courts of crimes "the punishment for which may be for *any term of years*" means those serious offenses such as rape, robbery, and burglary where the courts may sentence for "any term of years."

Juvenile courts are courts of special and limited jurisdiction and authority.

A juvenile delinquent is a child under the age limit who violates the criminal law or who is disobedient or incorrigible, or unmanageable, or immoral, or growing up or likely to grow up in idleness and crime.

All felonies are considered infamous.

Manslaughter is not a crime punishable by "any term of years."

The juvenile court can hold a child guilty of juvenile delinquency for the grand jury upon a determination that it should be dealt with as a criminal for the protection of the community and the best interests of the child.

The original jurisdiction of the common law courts over the offense of manslaughter when committed by juveniles has been taken away by legislative enactment.

The juvenile has the right to be treated as a delinquent until there is a judicial determination under Section 6 of R. S., 1944, Chap. 133, as amended, that he be held for the grand jury and such determination being jurisdictional cannot be waived.

The record of a juvenile court must show by express declaration or necessary implication the judicial determinations requisite under Section 6 of R. S., 1944, Chap. 133 as amended.

ON REPORT.

Petition for writ of habeas corpus. The cause was certified, by agreement of counsel, for immediate decision by the Law Court pursuant to R. S., 1944, Chap. 91, Sec. 14. Writ to issue. Case fully set forth below.

Richard S. Chapman, for petitioner.

Daniel C. McDonald, for State.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (MURCHIE, C. J., dissenting; MERRILL, J., concurring with majority specially; WILLIAMSON, J., concurring with majority with reservations; MURCHIE, C. J., further dissenting.)

FELLOWS, J. This is a petition for writ of habeas corpus of Franklin Delano Wade of Portland, Maine who brings

the petition by Catherine A. Wade, his mother. Franklin Delano Wade is a child under the age of seventeen years.

The petition comes to the Law Court on report upon facts agreed, Revised Statutes, (1944), Chapter 91, Section 14, and certified for immediate decision, by agreement of counsel. *Welch Petr.* v. *Sheriff*, 95 Me. 451, 454. The Law Court is to determine whether or not the writ shall issue.

The facts are these: Franklin Delano Wade was born in Portland, Maine on July 27, 1933. He was 16 years old when the offense was alleged to have been committed, and when he was arrested upon a complaint and warrant issued November 22, 1949 from the Portland Municipal Court. He was charged with manslaughter. The record of the Municipal Court shows "Date of hearing—November 22, 1949. Plea — Not guilty — waived reading and hearing. Judgment of Court — Probable cause. Result in Full — Bound over to the January Term of the Superior Court, A. D. 1950 — Bail — $5000."

The stipulation made by counsel says that the Judge of the Municipal Court "refused to exercise jurisdiction over the offense with which the Defendant was charged, and rendered judgment of 'Probable Cause.' "

Wade was indicted for manslaughter at the January Term, 1950 of Superior Court for Cumberland County, to which indictment he pleaded not guilty. He was placed on trial and the jury returned a verdict of guilty. He was sentenced by the Presiding Justice to a term of not less than seven years nor more than fourteen years in the State Prison, where he is now held under warrant of commitment issued by the Superior Court.

The petition for the writ of habeas corpus alleges that Wade is now unlawfully imprisoned by the Warden of the State Prison because, in the words of the petition, "the offense for which he was charged, not being one the punishment for which may be imprisonment for life or for any

term of years, the Superior Court was without jurisdiction to try and sentence him upon the indictment which was returned against him, but that the exclusive original jurisdiction over the offense with which he was charged in said Complaint and Warrant and in the Indictment returned in the Superior Court, was and now is in the Portland Municipal Court as a Juvenile Court."

The statutes under consideration are Revised Statutes (1944), Chapter 133, Section 2 and Section 6, as amended by Chapter 334, of the Public Laws of 1947. The pertinent parts of these sections, as amended, are as follows:

> "**Section 2.** Judges of Municipal Courts within their respective jurisdictions shall have exclusive original jurisdiction over all offenses, except for a crime the punishment for which may be imprisonment for life or for any term of years, committed by children under the age of 17 years, and when so exercising said jurisdiction shall be known as juvenile courts. Any adjudication or judgment under the provisions of sections 4 to 7, inclusive, shall be that the child was guilty of juvenile delinquency, and no such adjudication or judgment shall be deemed to constitute a conviction for crime.
>
> **Section 6.** A municipal court may place children under the age of 17 years under the supervision, care and control of a probation officer or an agent of the department of health and welfare or may order the child to be placed in a suitable family home subject to the supervision of a probation officer or the department of health and welfare or may commit such child to the department of health and welfare or make such other disposition as may seem best for the interests of the child and for the protection of the community including holding such child for the grand jury or commitment of such child to Pownal State School upon certification of two physicians who are graduates of some legally organized medical college and have practiced three years in this state, that such child is mentally defective and that his or her mental age is

not greater than ¾ of subject's life age nor under 3 years, or to the state school for boys or state school for girls; but no boy shall be committed to the state school for boys who is under the age of 9 years and no girl shall be committed to the state school for girls who is under the age of 9 years, and no municipal court shall sentence a child under the age of 17 years to jail, reformatory or prison; any child or his next friend or guardian may appeal to the superior court in the same county in the same manner as in criminal appeals, and the court may accept the personal recognizance of such child, next friend or guardian, and said superior court may either affirm such sentence or order of commitment or make such other disposition of the case as may be for the best interests of such child and for the peace and welfare of the community.

Where, however, an appeal is taken and the offense is one that must be prosecuted by indictment, the county attorney shall submit the evidence relating to such crime to the grand jury convening at the criminal term at which the appeal is to be heard, and if the grand jury return an indictment for such offense the accused may, in the discretion of the court, be tried on such indictment, or the court may order it placed on file, or make such other disposition thereof as it may determine, including the dismissal thereof, and proceed to hear the appeal, and either affirm such sentence or order of commitment, or make other disposition of the case in accordance with the provisions relating to appeal hereinbefore provided."

The above statute makes every municipal court a juvenile court when exercising its exclusive original jurisdiction over offenses committed by a child under the age of seventeen years. It has such jurisdiction over all offenses committed by such children "except for a crime the punishment for which may be imprisonment for life or for any term of years." The sixteen year old petitioner stands committed to the State Prison by the Superior Court for the offense of manslaughter. He was so committed without prior action by the Municipal Court acting as a Juvenile

Court. We must therefore determine whether or not manslaughter is a crime *"the punishment for which may be * * * for any term of years,"* as that phrase is used in the foregoing exception to the exclusive original jurisdiction of the juvenile court.

The punishment for murder, kidnapping, and for treason, is imprisonment for life. Such offenses are clearly excepted from the jurisdiction of the juvenile court. What crimes are excepted by the phrase "the punishment for which *may be * * * for any term of years?"* Does it, as claimed by the State, except *all* crimes which may be punished by *a* term of years, *a* term of years being two years or more? Or does it except *only those crimes* which may be punished by a term of years, the length of which term is limited only by the discretion of the judge imposing sentence? In other words, does the phrase in the foregoing exception have the same meaning as when used in the statutes to fix punishment for many serious offenses like robbery, R. S. (1944), Chap. 117, Sec. 16; rape, R. S. (1944), Chap. 117, Sec. 10; corrupting water, R. S. (1944), Chap. 124, Sec. 1; burglary, R. S. (1944), Chap. 118, Sec. 8; perjury, R. S. (1944), Chap. 122, Sec. 1; burning of buildings in the night time, R. S. (1944), Chap. 118, Sec. 2; counterfeiting, R. S. (1944), Chap. 120, Sec. 5; depositing bomb to cause injury, R. S. (1944), Chap. 117, Sec. 22; conviction of felony after prior conviction and sentence, R. S. (1944), Chap. 136, Sec. 3, in all of which foregoing offenses the punishment is "any term of years?" *State* v. *Fraizer*, 144 Me. 383; 64 Atl. (2nd) 179.

For some felonies like manslaughter, R. S. (1944), Chap. 117, Sec. 8, the punishment is restricted to not more than so many years, and in a multitude of other offenses the amount of punishment is restricted, and varies from months to years, depending on whether made a misdemeanor or a felony. There are very few felonies, if any, where punish-

ment for the felony has been restricted to a period of *less* than two years.

The purpose of juvenile courts, and laws relating to juvenile delinquency, is to carry out a modern method of dealing with youthful offenders, so that there may be no criminal record against immature youth to cause detrimental local gossip and future handicaps because of childhood errors and indiscretions, and also that the child who is not inclined to follow legal or moral patterns, may be guided or reformed to become, in his mature years, a useful citizen.

The work of the judge of a municipal court, sitting as the judge of a juvenile court, is vitally important to the welfare of our state. He does not pass upon the crimes and misdemeanors of childhood wholly from the legal standpoint. The basic and primary idea of the legislature is salvation, not punishment. The nature of juvenile work is more philanthropic than the work of the common law jurist. The legislature of Maine has therefore placed this authority in the hands of men who know humanity and can inspire the child with confidence and with a desire, in most instances, to become an upright citizen.

The history of the juvenile law in Maine shows that there is now a growing tendency in legislation to enlarge the jurisdiction and authority of juvenile courts, and if possible to save every child from a criminal record. The age of the child has been increased from 15 to 17 years, and jurisdiction has been extended from misdemeanors to some felonies. The jurisdiction has been enlarged from concurrent to exclusive and original.

The early common law treated alike the crimes of the adult and the offenses of those minors who had reached the age of criminal responsibility. The administration of the old criminal law with relation to children differed only according to the possession of paternal and benevolent attributes of the judges who presided in the courts. There are

many instances, in days long past, where a humane and understanding judge has dismissed or filed the charges against a first offending minor child, or has created, without statute authority, a juvenile probation system of his own to fit the circumstances.

In the past the fundamental idea of the law has been punishment and not reformation, but modern legislation recognizes that the treatment of a child should be correctional and rehabilitative rather than punitive. The child of today is the adult citizen of tomorrow and should be removed from the influence of improper environments and directed into the paths of rectitude by preventative and corrective means, if the next generation is to live in a peaceful and law abiding community. The immature must be given the chance to become the good citizen, or if necessary be forced to give up an immoral or criminal life. It is the welfare of the child *and* the State, that the statute is aimed to protect, by exercising a parental control, without the scar of the so-called criminal record. Unfortunately, it will be necessary at times to inflict punishment on the vicious or depraved, and this the statute recognizes.

Juvenile courts are courts of special and limited jurisdiction and authority. Children are to be dealt with in a different manner than are adults. The offending child is not found by the juvenile court to be a criminal but guilty of juvenile delinquency. The cases are heard at such times and at such places as the court may determine, and the general public is excluded. The records are not open to inspection by the public except by permission of the court. R. S. (1944), Chap. 133, Sec. 4. Special probation officers may be appointed to care for offenders under the age of seventeen. R. S. (1944), Chap. 133, Sec. 5. A child may be placed under the care of a probation officer or an agent of the department of health and welfare, or placed in a suitable home or in the State School, or "such other disposition as may seem best for the interests of the child and for the

protection of the community including holding such child for the grand jury * * * and no municipal court shall sentence a child under the age of 17 years to jail, reformatory or prison." R. S. (1944), Chap. 133, Sec. 6 as amended by Chapter 334 of the Public Laws of 1947. This statute also provides for appeal to the Superior Court by the child or by his guardian or next friend from the decision or order made by the juvenile court, and on appeal the Superior Court has jurisdiction to affirm the sentence or order of the juvenile court or to make such other disposition as may be for the best interests of the child and for the peace and welfare of the community. Public Laws of 1947, Chapter 334.

"Delinquency," as the term is used in the present juvenile law, was unknown to the common law. A delinquent child is a child under the age limit who violates the criminal law or who is disobedient or incorrigible, or unmanageable, or immoral, or growing up or likely to grow up in idleness and crime. The statute says delinquency is not crime, and a delinquent child is not a criminal. 43 C. J. S. "Infants," 228, Section 98, 99. "Delinquency, as distinguished from crime, usually implies a psychological rather than a judicial attitude toward the child offender." Webster's New International Dictionary.

At the common law, the same court had jurisdiction over juvenile offenders that had jurisdiction over those of mature years. Children under seven years of age were conclusively presumed to lack mental capacity to commit a crime. In the case of felonies, if the child was over seven years, he could be proceeded against by complaint and warrant before a magistrate, and if the magistrate found that a crime had been committed, and that there was probable cause that the infant was guilty, he could be held for the grand jury; or a prosecution could be instituted before the grand jury without going before the magistrate in the first instance. Such was the law in Maine until the year 1931. *Richardson* v. *Dunn,* 128 Me. 316; *Knight* v. *Fort Fairfield,* 70 Me. 500.

By Chapter 241 of the Public Laws of 1931, it was provided that judges of municipal courts should have exclusive original jurisdiction over all offenses committed by children under the age of fifteen years, and that no adjudication or judgment should be deemed to constitute a conviction for crime. A child could be held for the grand jury if the offense was aggravated. *State* v. *Rand,* 132 Me. 246. By Public Laws of 1943, Chapter 322, an exception was made, and after the enactment of R. S. (1944), Chap. 133, Sec. 2, the municipal courts, when acting as juvenile courts, had exclusive original jurisdiction over all offenses, except for a *capital or otherwise infamous crime* committed by children under the age of 17 years. The wording of this exception in the Statutes of 1944 was probably suggested by the Constitution of Maine, Article 1, Section 7, that "no person shall be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury." Maine now has no capital crime punishable by death, but all felonies are considered infamous. *State* v. *Vashon,* 123 Me. 412.

From 1943 to the time of the amendment by Chapter 334 of the Public Laws of 1947, the municipal courts, as juvenile courts, had no exclusive original jurisdiction over any cases of felony, and the child over seven and under 17 accused of felony was dealt with as a common law criminal and could only be held for action by a grand jury. The amendment of 1947 struck out of the law the words "capital or otherwise infamous crime" and inserted in place thereof the words that we are now considering "a crime the punishment for which may be imprisonment for life or for *any term of years.*"

The municipal courts have had, from the establishment of the juvenile courts, jurisdiction over all misdemeanors and authority to find juvenile delinquency when the child offender has broken a law where the punishment was less than one year. The juvenile court had no exclusive original jurisdiction over any felony from 1943 to the amendment

of 1947. It now has exclusive original jurisdiction over all felonies "except for a crime the punishment for which may be imprisonment for life or for any term of years."

The largest number of felonies, and felonies likely to be committed by the child under 17 years, carry a statute term of punishment of "not more than." Examples of such felonies are maliciously killing or injuring domestic animals, R. S. (1944), Chap. 127, Sec. 1; assault with intent to kill, R. S. (1944), Chap. 117, Sec. 6; assault with intent to rape, R. S. (1944), Chap. 117, Sec. 12; assault with intent to rob, R. S. (1944), Chap. 117, Sec. 17; breaking and entering with intent to commit a felony, R. S. (1944), Chap. 118, Sec. 11. In all felonies where the maximum allowed is two years, or more than two years, it can be said that punishment is for "a term of years." It is not punishment for "*any term of years*" because only in those serious crimes formerly capital, or punishable by life imprisonment, such as rape, robbery and burglary, does the statute permit the court to sentence for "*any term of years.*"

In view of the manifest plan of the legislature to broaden the authority of the juvenile court, it is plainly apparent that *a* term of years is not *any* term of years. To give to "any term," the meaning of "a term," does not enlarge the jurisdiction of the juvenile court to an appreciable extent, if it does to any degree. The felonies where the juvenile court would have jurisdiction, under such interpretation, would be only those where punishment may be for one year and for less than two years, and such felonies, if any, are very few. If the legislature had meant to give jurisdiction in only those felonies where punishment may be less than two years, it would have been a simple matter to say so. The legislature, on the contrary, has used the term commonly used by it in the statutes to fix punishment for some of the very serious offenses.

There are some cases where terms of years have been defined, as in a lease where right to renew for "a term of

years," meant not less than two years. *Metcalf* v. *Norton,* 119 Me. 103, and in Massachusetts "any term of years" was construed as two or more years where a particular statute provided for punishment in cases of former conviction. *Ex Parte Seymour,* 14 Pickering 40; *Ex Parte Dick,* 14 Pickering 86. We have found no case where a statute excluded from jurisdiction a crime punishable by "any" term of years where the construction was "a" term, and we cannot believe the legislature intended to exclude the very many felonious acts of which juvenile offenders are so frequently guilty. It would limit, in effect, the jurisdiction of the juvenile court to misdemeanors only, as was provided in the statute before the last amendment of 1947. There would be no real, sufficient, or sensible reason for the 1947 amendment "any term of years" if there was not an intention to extend the jurisdiction of the municipal courts. See P. L. of Maine (1931), Chap. 241; P. L., 1933, Chap. 18 and Chap. 118; P. L., 1937, Chap. 238; P. L., 1941, Chap. 245; P. L., 1943, Chap. 177 and Chap. 322; R. S. (1944), Chap. 133 as amended by the Public Laws of 1947, Chap. 334; see also 43 C. J. S. "Infants" 228, Sections 98 and 99; 31 Am. Jur. "Juvenile Courts" 796, Sections 24-44.

Manslaughter is not a crime punishable by imprisonment for any term of years, as that phrase is used in our statutes. It is punishable for *a* term of years. The juvenile court has jurisdiction. It is a crime, however, where the facts may be serious, in every sense of the word, and if the proper procedure is taken by the juvenile court, there is no question but that it may hold the child for grand jury action. If in the determination of the municipal court, acting as a juvenile court, a child guilty of juvenile delinquency should be dealt with as a criminal, for the protection of the community as well as for the interests of the child, it can hold such child for the grand jury. R. S. (1944), Chap. 133, Sec. 6 as amended by Chapter 334 of the Public Laws of 1947. The only adjudication or judgment of guilt making final disposition of the case that the judge of the municipal court can

make is that the child is guilty of juvenile delinquency. By express provision of Section 6 he cannot sentence a juvenile offender to prison or even to jail. By constitutional provision no one can be sent to the state prison except on conviction on an indictment returned by the grand jury. Neither does the judge of the municipal court, in dealing with the juvenile offender and in the exercise of his exclusive original jurisdiction, have authority to find a crime committed and probable cause in the same manner as when dealing with an adult. If the child is held for the grand jury when charged with an offense within the exclusive original jurisdiction of the municipal court, it is only because as a juvenile delinquent it seems under the circumstances to be for the best interest of the child and for the protection of the community that he be so held.

The legislature has seen fit to provide a separate and distinct method of handling certain offenses when committed by juveniles under the age of seventeen years, and manslaughter is one of these offenses. The original jurisdiction of the common law courts over such offenses has been taken away by legislative enactment. The original jurisdiction has been exclusively conferred upon the municipal courts acting as juvenile courts. The Law Court has no legal power or ethical right to determine or to express an opinion as to the wisdom of legislative enactments. We are only permitted to interpret the laws as enacted by the legislature and to determine if they are within constitutional requirements or have been properly applied to the case then before us.

It is clear that the legislature has recognized that under certain conditions juvenile offenders under the age of seventeen years should be dealt with as criminals and made amenable and accountable to the rigors of the criminal law.

It is the right of the juvenile and the state that the juvenile be treated as a delinquent unless and until there be a judicial determination by the municipal court, exercising

its jurisdiction as a juvenile court and exercising its discretion as to disposition of the case and the juvenile with which it is invested by Section 6 of the juvenile law, that the juvenile be held for the grand jury. The requirement that such jurisdiction be exercised and that the determination to hold for the grand jury as an act of discretion under the authority conferred by Section 6 are both jurisdictional and must be complied with before the Superior Court has jurisdiction to hear, sentence, or commit after a conviction on an indictment. These statutory requirements being jurisdictional cannot be waived.

The record of the municipal court must show, either by express statement or by necessary implication from what is expressly stated therein, that the aforesaid necessary action has been taken in and by the municipal court. And especially must the record of the municipal court show by express declaration or by necessary implication that in holding for the grand jury it exercised the discretion conferred upon it by Section 6 of the juvenile law in making such disposition of the case. *Brooks* v. *Clifford,* 144 Me. 370; 69 Atl. (2nd) 825; *Faloon* v. *O'Connell,* 113 Me. 30; *Porell* v. *Cousins,* 93 Me. 232; *State* v. *Hartwell,* 35 Me. 129.

A finding of probable cause and the fixing of bail is not in and of itself sufficient for such purposes. Especially is it not sufficient in this case where there is an express stipulation that after a plea of not guilty "the judge of said municipal court then refused to exercise jurisdiction over the offense with which the defendant was charged and rendered judgment of 'Probable Cause.'" Such docket entry and such stipulation not only fail to show that the municipal court in this case did exercise its jurisdiction over the offense with which the petitioner was charged and that it held him for the grand jury in the exercise of the discretion as to disposition of the case and the juvenile with which it was invested by Section 6 of the juvenile law, but establish that it did not do so. The sentence was pro-

nounced by a court which lacked the jurisdiction to try and sentence and the juvenile must be discharged. *Wallace* v. *White,* 115 Me. 513; *State* v. *Elbert,* 115 Conn. 589; 162 Atl. 769.

Writ to issue.

DISSENTING OPINION.

MURCHIE, C. J. I am unable to concur in the opinion of Mr. Justice Fellows. It construes a provision in that section of our municipal court law which vests such courts with power to punish a child for juvenile delinquency or, in the alternative, to hold him for a grand jury, in a manner which seems, to me, entirely without justification. R. S., 1944, Chap. 133, Sec. 6. It does so without stating, except by implication, the principle of statutory construction it applies. The implication is that it gives statutory language its usual and ordinary meaning. It is undoubted that the rules of statutory construction declare that language which is plain and unequivocal needs no construction. It is obvious, however, that the opinion has dealt with a single provision without reference to the section, or the law of which it is a part, "as a whole," as a well established rule of construction requires.

Reliance on the unequivocal nature of the language is implicit in the manner in which the opinion casts full responsibility for the decision it carries on the legislature which wrote the provision into our law. That was our Eighty-fifth Legislature, of which I was a member. P. L., 1931, Chap. 241, Sec. 4. The provision stands today, in R. S., 1944, Chap. 133, Sec. 6, in the exact language in which it was originally stated, without change in punctuation or context.

The provision follows express grant of power to place a child found guilty of juvenile delinquency on probation and carries a further express grant of power to:

> "make such other disposition as may seem best for the interests of the child and for the protection of the community including",

the power to commit him to a correctional institution. That is the only "other disposition" identified in P. L., 1931, Chap. 241, Sec. 4. Additional "other dispositions" since identified are to hold him for a grand jury and to commit him to the Pownal State School. When P. L., 1931, Chap. 241 became effective municipal courts were given a limited power to punish a child for juvenile delinquency, without reference to his interests or the protection of the community, by subjecting him to some form of probationary control, and they have been so limited at all times since. An express restriction was carried in the second paragraph of P. L., 1931, Chap. 241, Sec. 4, which prohibited a municipal court from holding a child for a grand jury except for an offense which this court in *State* v. *Rand et al.,* 132 Me. 246; 169 A. 898, declared was beyond its jurisdiction. This curtailed the authority such a court would have had under R. S., 1930, Chap. 145, Sec. 13 (now R. S., 1944, Chap. 134, Sec. 13) if the jurisdiction over juvenile delinquency included any indictable offenses.

To get the complete historical picture in the record, it should be noted that P. L., 1943, Chap. 322, Sec. 2 deleted the paragraph restricting the authority of municipal courts to hold a child of juvenile age for a grand jury and declared such a power in terms of an express grant, by writing the words "holding such child for the grand jury or" into what is now R. S., 1944, Chap. 133, Sec. 6 immediately following the word "including" which closes the provision construed. Simultaneously it purported to enlarge the jurisdiction of municipal courts over juvenile delinquency by rewriting the definition of such jurisdiction and providing that when such courts were exercising it they should be "known as juvenile courts." P. L., 1943, Chap. 322, Sec. 1. That the enactment did not enlarge the jurisdiction, because the language used was inept, is of no importance.

It does not seem to me that it can be doubted that criminal jurisdiction involves both the adjudication of guilt and the imposition of appropriate punishment. P. L., 1931, Chap. 241, in its original form, and as amended from time to time, has always contemplated that the jurisdiction vested by Sec. 1 (now the second paragraph of R. S., 1944, Chap. 133, Sec. 2) should be exercised by an adjudication of guilt of juvenile delinquency, under that section, and the imposition of punishment under Sec. 4 (now R. S., 1944, Chap. 133, Sec. 6), if, but only if, the power in that regard seemed adequate for the purpose. Otherwise, it has been contemplated, at all times, as the opinion recognizes, that:

> "(under certain conditions) juvenile offenders * * * should be dealt with as criminals and made amenable and accountable to the rigors of the criminal law."

The clearest declaration in that regard is carried in the 1943 law already cited, where the power of a municipal court to hold a child for a grand jury is stated in terms of an express grant.

As the law stood at all prior times, the purpose that grant was designed to accomplish could not have been accomplished by repealing the restriction on the authority of a municipal court to hold a child for a grand jury to cases involving offenses that were aggravated. All the authority of a municipal court to hold anyone for a grand jury was then stated in R. S., 1930, Chap. 145, Sec. 13 (now R. S., 1944, Chap. 134, Sec. 13), the closing mandate of which is that if an offense is within the jurisdiction of a magistrate (a term including municipal courts and trial justices):

> "he shall try it and award sentence thereon."

Writing the power of a municipal court to hold a child for a grand jury in terms of an express grant must have indicated legislative intention that a municipal court having exclusive original jurisdiction over an offense, limited to finding him guilty of juvenile delinquency and punishing

him as a juvenile delinquent, might terminate such jurisdiction by refusing to impose a limited punishment and by exercising, simultaneously, jurisdiction over the child, as distinguished from his alleged offense, in ordering him held for a grand jury, under bail.

The result reached in the opinion is accomplished by declaring that the provision construed imposes a jurisdictional requirement on the power to hold a child for a grand jury, rather than its power to impose bail. The course of reasoning by which it is accomplished is not made apparent. The opinion indicates that the provision imposes no jurisdictional requirement on the power to commit a child to a correctional institution, or that, if it does, the requirement is satisfied by necessary implication in exercising the power to commit. It cannot be doubted that when the provision was written into our law it related to nothing except the power to commit. The power to which the opinion finds that it relates exclusively was granted as an alternative to that power, and involves the exercise of no jurisdiction, within the ordinary meaning of that word, except that of imposing bail. Whenever the power to hold a child for a grand jury is exercised by any court having the power to take such action, its effect, undoubtedly, is to terminate all the jurisdiction of the court exercising it.

I digress to note that it is within the judicial knowledge of the court that for many years, if not at all times since the enactment of P. L., 1931, Chap. 241, children committed to our correctional institutions under its provisions have been committed by the use of printed mittimuses supplied by such institutions, or the administrative body which governs them. The forms so supplied require the courts to declare that there has been an adjudication of guilt of juvenile delinquency, but make no reference to the interests of the child or the protection of the community as the basis for the commitment. In all probability every child now held in such an institution under a commitment of a munici-

pal court is held under that form of *mittimus*. It is obvious that if the law establishes a jurisdictional requirement applicable to one of the powers vested in terms of an express grant following the provision, it must be equally applicable to each and every other such power. If that is so, a child committed in disregard thereof and now restrained of his liberty thereby is restrained as unlawfully as the opinion finds the Petitioner to be. This possibility is sought to be cleared in the opinion, as I read it, by declaration that in the limited field of commitments, the requirement is supplied by the "necessary implication" of a record. Why it is not supplied as effectively when a child is ordered held for a grand jury as when he is committed is not stated.

The implication, perhaps, is that it is satisfied by an adjucation that the child is guilty of juvenile delinquency, but reference to the law will show that this is not so and cannot be so. The only power vested in a municipal court to punish a child on the basis of such an adjudication, without more, is to place him on probation in some form. This has been true at all times since the enactment of P. L., 1931, Chap. 241.

The decision is not supported by the citation of any authority. Eminent jurists and lawyers have been writing on juvenile delinquency and juvenile delinquency courts for more than half a century. Juvenile courts have been in operation in many states for many years. There must be a multitude of cases construing laws establishing them. Yet notwithstanding the undoubted great bulk of writings and decisions, no case or writing is cited declaring, or advocating, a jurisdictional requirement for terminating an exclusive original jurisdiction over juvenile delinquency. Neither is there any such citation for construing a juvenile delinquency law as requiring, or even permitting, a court vested with exclusive original jurisdiction over juvenile delinquency to adjudicate guilt thereof and simultaneously transfer jurisdiction on that issue to a higher court. The

same thing is true with reference to the particular language involved. Neither a decided case nor a legal periodical is said to have declared or suggested, heretofore, that a jurisdictional requirement could be or should be found imposed on any court by a requirement limiting its action to what, to it, *seemed best.* It seems the worst kind of sophistry to me to say that a court empowered to take any one of several actions which may seem best to it must in exercising one of them make a record that it does so because it seems best. I am in entire accord with the declaration or implication of the opinion that if the provision restricts a municipal court to take the particular action among those authorized which may seem best to it, the taking of it carries the necessary implication that it does. The place where I disagree with the opinion is that I think it is as clearly and necessarily implied in holding a child for a grand jury as it is in committing him to a correctional institution.

A jurisdictional requirement, as that term is generally understood, operates to prohibit a court from exercising a power to sentence a person or subject him to bail, without compliance with it. I have never known the term to be applied heretofore to a refusal to exercise jurisdiction over an offense and hold the person accused of it for a higher court. My point is illustrated by *State* v. *Hartwell,* 35 Me. 129, cited in the opinion, where the validity of a recognizance was in issue. An exercise of jurisdiction over the person, as distinguished from the offense alleged against him, was undoubtedly involved, and the recognizance was held ineffective. The issue here has nothing to do with the effectiveness of the bail the petitioner was ordered to furnish.

I cannot be certain that the opinion declares an additional jurisdictional requirement because the particular term is not applied. It seems apparent, however, that it declares a formal hearing in a municipal court a necessary preliminary to holding a child for a grand jury. It makes no ref-

erence to R. S., 1944, Chap. 133, Sec. 24, which is a part of the chapter carrying the section of law in which the provision is contained, and has been at all times since our municipal court law was revised by P. L., 1933, Chap. 118. The express provision of that section is that in:

> "all prosecutions before municipal courts * * *, the respondent may plead not guilty and waive a hearing."

Why this is not applicable to the present case is not stated. It seems obvious that a municipal court is authorized to find a child guilty of juvenile delinquency, without a hearing, on his plea of guilty, and that it may commit him to a correctional institution, without a hearing, on such a plea. The opinion does not negative either procedure. I see no reason why it may not hold a child for a grand jury without a hearing if the child waives it, particularly when, as the record before us shows, he is represented by counsel in the municipal court. The record makes it apparent that the petitioner was represented there by the same able counsel who is prosecuting this petition. It cannot be doubted that the waiver was made as a considered action in the interests of the petitioner, or that it carried recognition that the inevitable result of a hearing would have been the holding that was ordered without one, on his waiver. No substantial right of the petitioner was prejudiced thereby.

The opinion carries many references to juvenile courts and to the necessity that our municipal courts in proper cases should act as juvenile courts, as well as to juvenile delinquency laws. It seems to ignore the facts that Maine has no juvenile courts and that it has not had a juvenile delinquency law except as part and parcel of our municipal court law since P. L., 1933, Chap. 118 incorporated the provisions of P. L., 1931, Chap. 241 into our municipal court law. The Legislature which enacted P. L., 1931, Chap. 241 rejected an act to establish a system of juvenile courts and gave us that law in its stead. See the Legislative Record

for 1931 and particularly the act in question, Legislative Document No. 236, and the legislative action thereon.

In this case it is undoubted that the Portland Municipal Court was vested with power to hold the petitioner for a grand jury and that it purported to do so. It could have done so and placed the petitioner under effective bail under R. S., 1944, Chap. 133, Sec. 6, if the offense with which he was charged was within its jurisdiction, and under R. S., 1944, Chap. 134, Sec. 13, if it was not. The record before us shows clearly that it did not purport to act under the latter law, within the principle declared in *State* v. *Hartwell, supra.* The inference is strong that it purported to act under the former and that the refusal of its judge to "exercise jurisdiction over the offense," charged in the complaint on which it was acting, was a refusal to adjudicate that he was guilty of juvenile delinquency and impose any punishment a municipal court was empowered to impose, accompanied by the decision that it seemed best under the circumstances to exercise jurisdiction over the person instead of the offense and hold the petitioner for the grand jury under bail. Assuming that the provision established a jurisdictional requirement to the imposition of effective bail, I can see no reason why the decision of the court to terminate its jurisdiction should not be recognized.

Before calling attention to one circumstance that should not be overlooked, I must refer casually to the construction placed on the phrase "any term of years." It seems to me that the construction placed on it might be proper under the principle of liberal construction applicable to such laws as those providing limited punishment for juvenile delinquency, but such principle has never been declared applicable, so far as I know, to any particular phrase in a statute. It is applicable to statutes as a whole, and has been recognized in decided cases involving juvenile delinquency laws. It has never been applied in my knowledge in a manner that would infringe on another well established

principle of statutory construction requiring that statutes in derogation of common law should be strictly construed. It would be one thing to construe it in a manner which would enlarge the exclusive original jurisdiction of a court to deal with juvenile delinquency if such jurisdiction was one, as I believe it has always been intended by our legislature that it should be, which was terminable by action of a municipal court in holding a child charged with a serious crime for grand jury action.

The sequence of past events is entirely plain. The petitioner feloniously and wilfully committed a homicide on November 20, 1949. He was taken before the Portland Municipal Court, charged with that offense, on November 22, 1949. That court, having the authority to hold him for a grand jury, purported to take that action. He was tried and convicted in the only court which can ever try him for it as a criminal. He is restrained of his liberty under a sentence imposed in that court. The current event is that he is to be discharged therefrom forthwith. For future events the opinion offers nothing except complete uncertainty. It contemplates, probably, that new proceedings will be instituted to impose corrective treatment on the petitioner for juvenile delinquency or punish him for manslaughter, whichever he may deserve. Such proceedings must be commenced in the court which purported to hold him for the grand jury when complaint was made to it heretofore. That court had power to adjudicate his guilt of juvenile delinquency and subject him to corrective treatment, or hold him for the grand jury, that it might be determined in the only proper manner whether he had committed a crime which should be punished as such. It did not find him guilty of juvenile delinquency. It imposed no corrective treatment. The opinion does not say what the court should have done to hold the petitioner for the grand jury effectively. It does not construe the law except to declare that what was done was not effective. It furnishes no guide to future action for our courts or our prosecuting attorneys.

What effect, if any, are the events of the past to have on the future? The opinion does not say. The Kentucky Court in *Tabbutt* v. *Commonwealth,* 179 S. W. 621, in setting aside a conviction in a court which would have had jurisdiction of the offense charged against a child, if proceedings had been instituted in the court of original jurisdiction (which was a juvenile court) and appropriate action had been taken therein to terminate such jurisdiction, declared expressly that the proceedings set aside would not constitute a bar to new proceedings in either the juvenile court, or the higher court, if the original jurisdiction of the juvenile court was terminated. In that case, as in *Ex Parte Parnell,* 200 Pac. (Okla.) 456, and *Fifer* v. *State,* 90 Tex. Cr. R. 282; 234 S. W. 409, the jurisdictional requirement involved was age, something far different from what might *seem to be best.* Yet in the last cited case it was held that even an age requirement might be waived in a court trying the child as a criminal if the waiver was made on the advice of counsel, as was the case with this petitioner. In each and every one of the cited cases the decision related to proceedings in a higher court commenced without prior proceedings in the court of original jurisdiction.

Is there a principle of law applicable to offenses over which municipal courts have a complete jurisdiction similar to that involving double jeopardy? What is the future of one convicted of crime in a criminal court, sentenced to a punishment the court has no jurisdiction to impose, and discharged therefrom on *habeas corpus?* Is a municipal court entitled to two chances to find a child guilty of juvenile delinquency for a single act? or to hold him for the grand jury? These are questions that will confront this court if and when the petitioner is called upon to answer to a new complaint. If a hearing is a jurisdictional requirement and cannot be waived, what is the situation to be when a child not only waives one but insists on his right not to participate vocally in one on the ground of his constitutional right not to give evidence which might incriminate him?

Many more questions may arise when a new attempt is made to prosecute the petitioner. The result can be that he will neither be subjected to corrective treatment nor punished. For that result, if it comes, I deny the responsibility of the Eighty-fifth Legislature. That is the particular purpose of this dissent.

The responsibility is a judicial one, accomplished by an unusual combination of liberal and strict statutory constructions of separate parts of a single law. Each operates for the benefit of one who stands in the position of a convicted felon, after proceedings in the two courts and the only two courts where prosecution of him was or is possible. I believe the construction erroneous and that our municipal court law, as a whole, should be construed liberally to give the maximum power and authority to our municipal courts to clear children from punishment for offenses, and records declaring them criminals, in all cases where it seems to the court that corrective treatment may accomplish its intended purpose, or, in the alternative, to permit them to hold children for a grand jury, without fetters of any kind, when it seems that that is not so.

* * * * *

CONCURRING.

MERRILL, J. While I heartily concur in the majority opinion of the court, because of the dissenting opinion, I feel that it is my duty to set forth at length certain fundamental reasons which underlie some of the conclusions tersely and I believe correctly stated in the majority opinion, and which require my concurrence therein.

Important as the result of this case is to the petitioner, and it cannot be denied that it is of the utmost importance to him, the determination of the fundamental principles of law upon which it must be decided and the application of the same to his case are even more important to the State itself.

It is a fundamental principle of law that no accused may be tried in, or sentenced and committed by a court that does not have jurisdiction over the offense with which he is charged and over his person. Lacking such jurisdiction the court is without legal right, authority or power to try, sentence or commit the accused. Lacking such jurisdiction, no matter how fairly and impartially the proceedings may be conducted, no matter how scrupulously the legal requirements and other safeguards applicable to trials of persons charged with the commission of crime may have been complied with, no matter how clearly the respondent's guilt may appear from the evidence presented in the proceedings, no matter how just the sentence may seem to be, the respondent has not had *the trial nor has he been convicted* as required by the organic law of this State.

The only concern of this court in this case, as in every other case, is that the decision thereof is in accord with law. If the petitioner, as held by this court and so declared in the majority opinion was tried in, sentenced by and is now imprisoned under an order of commitment issued from a court without such jurisdiction it is our duty to so declare and order the writ of habeas corpus to issue. In arriving at our decision the ultimate question for our consideration is the legality of the imprisonment of the petitioner. In arriving at our decision of that question we are not concerned, except as it may affect the jurisdiction of the trial court, with the magnitude of the offense with which the petitioner was charged. As well said by the Supreme Court of Alabama in *Seay* v. *State,* 93 So. (Ala.) 403:

> "But the law should prevail, without any reference to the magnitude or brutality of the offense charged. No matter how revolting the accusation, how clear the proof, or how degraded, or even brutal the offender, the Constitution, the law, the very genius of Anglo-American liberty demand a fair and impartial trial."

Although that declaration of the Alabama court was made with respect to the conduct of a trial within the juris-

diction of the trial court, it is equally applicable to the situation when an accused is tried before a court which is not clothed with jurisdiction over the offense with which he is charged and over his person. No man can have a fair and impartial trial save in a court clothed with such jurisdiction. Such is the law of this State. By undergoing such a trial the accused has not even been in jeopardy. As we said in *State* v. *Boynton,* 143 Me. 313; 62 Atl. (2nd) 182, 187:

> "Former jeopardy does not exist unless the previous trial was before a court of competent jurisdiction. State v. Slorah, 118 Me. 203, 106 A. 768, 4 A. L. R. 1256; State v. Elden, 41 Me. 165. Trial and conviction or trial and acquittal before a court without jurisdiction do not prevent another prosecution for the same offense."

Even though it is of the utmost importance to the individual that he be tried and sentenced only by a court of competent jurisdiction, it is of far greater importance to the State itself that this principle of law be scrupulously maintained. Unless so maintained, the fundamental guaranties vouchsafed to us by the Constitution of this State in Article I, Par. 6, that no accused shall "be deprived of his life, liberty, property or privileges but by judgment of his peers or by the law of the land" are but meaningless words. It is a fundamental principle of the law of the land that no man can be tried before, sentenced by, or committed in consequence of a sentence of a court which did not have jurisdiction over the offense with which he is charged as well as over his person. Such is the law of this State.

Before discussing the specific question of whether or not the Superior Court in this case had jurisdiction over the offense with which the petitioner was charged and over his person, it is necessary to examine the basic principles of public policy which underlie the special treatment of juvenile offenders under our statutes.

The special treatment of juvenile offenders is not a personal privilege extended to them to enable them to escape the rigors of the punishment for crime meted out to adult offenders. Its purpose is to deflect their feet from the crooked paths of the wayward, to return them to the highway of rectitude, to enable them to conduct themselves properly during minority, and to rehabilitate them so that they may become in manhood the good citizens of the future. Important as this may be to them, it is of far more importance to that society at large which we term the State. The quality of the State of the future depends upon the quality of the citizenry which is turned into its bloodstream. The boy of today is the man of tomorrow. Just as we cannot foretell the ultimate effect of a virulent germ or virus introduced into the bloodstream of the body, so we cannot foresee the effect of turning a criminal-minded citizen into the bloodstream of the body politic. Just as preventive medicine has gone far in assuring the health of the body and has reduced to a minimum scourges which ravished the peoples in the past, it is now hoped that preventive treatment applied to juvenile offenders may reduce the prevalence of crime that in recurrent waves, like the plagues of the past, attacks, undermines, and if not checked will endanger and injure, if not ultimately destroy, the body politic.

Juvenile delinquency, as the term is used in its broadest sense, including crimes committed by juveniles, is one of the crying evils of the day and as such presents a challenge which must be met.

One of the methods devised and employed to meet the challenge of this evil is special treatment of juvenile offenders. Instead of treating them as criminals, the State as *parens patriae* takes them into protective custody and seeks to cure their criminal tendencies and rehabilitate them, to the end that they may become the good citizens of tomorrow. To enable it, so far as possible, to reach this de-

sired end, exclusive original jurisdiction is conferred upon the municipal courts of this State over certain offenses committed by juveniles under the age of seventeen years. By conferring upon such courts exclusive original jurisdiction of such offenses, the State assures in its own interest as well as in the interest of the juvenile offender, that every juvenile charged with an offense which is within the exclusive original jurisdiction of such court shall be brought in the first instance before such tribunal, and that such court, acting in its capacity as a juvenile court, shall judiciously determine the disposition that shall be made of such child. Such required judicial action with respect to the disposition of the child includes the determination of whether or not the child is to be treated merely as a juvenile delinquent or whether he is to be subjected to criminal prosecution. If it seems best for the interests of the child and for the protection of the community, the juvenile court may hold the child for the grand jury, which body may formally present him for the commission of the offense. R. S., Chap. 133, Sec. 6.

With respect to such offenses as are within the exclusive original jurisdiction of the municipal court acting as a juvenile court, such preliminary determination by it, acting within such jurisdiction is essential, and unless and until it is made, the Superior Court has no jurisdiction to try, sentence or commit a juvenile therefor. A prosecution on an indictment returned to the Superior Court without such preliminary exercise of jurisdiction by the municipal court acting as a juvenile court is the exercise by the Superior Court of original jurisdiction. *State* v. *Elbert,* 115 Conn. 589; 162 Atl. 769. See also *Ex Parte Albiniano,* 6 Atl. (2nd) (R. I.) 554.

It is in recognition of the foregoing principles of public policy that juvenile courts have been established in most, if not all, of our states. To carry that public policy into full effect it has been recognized that it is necessary to

clothe the juvenile court with exclusive original jurisdiction over such offenses committed by juveniles as in the opinion of the legislature may be treated as juvenile delinquency. This is true whether the juvenile court be a separate court or whether juvenile jurisdiction be conferred upon an already existing court. The offenses over which the exclusive original jurisdiction has been conferred upon juvenile courts varies in the different states which have adopted the system. In some states all crimes, including even those punishable by the infliction of the death penalty, have been so committed to the juvenile court. In others, only those crimes punishable by death or imprisonment for life are excluded, but in almost all states the juvenile courts are given exclusive original jurisdiction over serious felonies. The majority opinion correctly interprets the extent of such jurisdiction conferred upon municipal courts in this State.

Recognizing the broad principles of public policy which underlie the juvenile court acts, the great weight of authority is that the exclusive original jurisdiction conferred upon the juvenile court is a true jurisdiction, as distinguished from a mere privilege extended to the juvenile. That this is so is established by decisions which hold that failure to institute proceedings therein for offenses within the exclusive original jurisdiction of the juvenile court is fatal to a trial, conviction and sentence in the criminal courts. There are many cases in which convictions for very grave offenses have been set aside on appeal, or the convicted juvenile discharged from imprisonment on habeas corpus for failure to take the juvenile before the juvenile court in the first instance, and included are many cases where the age of the juvenile was first raised either on the appeal or in the habeas corpus proceedings. Examples may be found in *Clark* v. *Commonwealth,* 256 S. W. (Ky.) 398 (appeal, murder). *Talbott* v. *Commonwealth,* 179 S. W. (Ky.) 621 (appeal, malicious wounding and cutting). *Watson* v. *Commonwealth,* 57 S. W. (2nd) (Ky.) 39 (appeal, manslaughter). *Powell* v. *State,* 141 So. (Ala.) 201 (appeal,

rape). *Sams* v. *State,* 180 S. W. (Tenn.) 173 (carrying concealed weapons—motion in arrest of judgment). *Wilson* v. *State,* 82 Pac. (2nd) (Okl.) 308 (appeal, murder). *Ex Parte Powell,* 120 Pac. (Akl.) 1022 (habeas corpus). *Ex Parte Hightower,* 165 Pac. (Okl.) 624 (habeas corpus, charge murder, conviction manslaughter). *State* v. *Alexander,* 196 Pac. (Okl.) 969 (appeal by State to quashing charge of murder). *Ex Parte Parnell,* 200 Pac. (Okl.) 456 (habeas corpus, larceny). *Ex Parte Alton,* 262 Pac. (Okl.) 215 (habeas corpus, larceny). *Ex Parte Humphries,* 237 Pac. (Okl.) 624 (habeas corpus, burglary). In one of these cases failure of the record on appeal to disclose proceedings in the juvenile court was sufficient ground for sustaining the appeal. *Watson* v. *Commonwealth, supra.* In *Talbott* v. *Commonwealth, supra,* it was stated "the circuit court has jurisdiction only to indict and try juvenile offenders when they have been transferred to that court *in the manner authorized by statute.*" (Emphasis mine.)

In Louisiana, the juvenile court has exclusive original jurisdiction over manslaughter but not over murder, The Louisiana court held that the conviction of manslaughter of a juvenile charged with murder and who had not previously been before the juvenile court could not be sustained and amounted only to a verdict of not guilty of murder, and that the child was still subject to proceedings before the juvenile court based upon manslaughter as juvenile delinquency. *State* v. *Dabon,* 111 So. (La.) 461. It is to be noted, however, that a contrary result was reached by the Tennessee court in *Howland* v. *State,* 268 S. W. (Tenn.) 115, which holds that if a juvenile is properly indicted for murder, that crime not being within the jurisdiction of the juvenile court, the jurisdiction of the criminal court having attached, it attached for all purposes and the juvenile could be convicted of the minor included offense. This question not being before us, no opinion upon it is either expressed or intimated by calling attention to these latter cases.

In some states, Illinois for instance, jurisdiction over criminal offenses is specifically conferred upon certain courts by constitutional provision. In such states it is held that the legislature is without power to confer exclusive original jurisdiction over offenses upon juvenile courts. *People* v. *Lattimore,* 199 N. E. (Ill.) 275. In the case of *Ex Parte Mei,* 192 Atl. 80, the New Jersey court held that its constitution prevented original exclusive jurisdiction over the crime of murder being conferred by the legislature upon juvenile courts. The effect of this decision, however, has been modified with respect to crimes other than murder in the later case of *State* v. *Goldberg,* 11 Atl. (2nd) (N. J.) 299 affirmed in *State* v. *Goldberg,* 17 Atl. (2nd) 173.

Some may question the authority of the foregoing cases on the ground that the statutes in the states where rendered materially differ from our own. It may be objected that in some, if not all of those states, the jurisdiction over juveniles is committed to separate distinct juvenile courts. It may be further objected that in these cases the juvenile had not been taken before the juvenile court prior to the institution of criminal proceedings either by indictment or information filed in the criminal courts. All of these so-called differences may exist, but the fundamental reasoning upon which these cases are decided is not merely that the juvenile had not been taken before the juvenile court, but that there had been no exercise of the exclusive jurisdiction possessed by the juvenile court to determine that the juvenile should be prosecuted as a criminal. As will be hereinafter set forth, it is the exercise of jurisdiction by the juvenile court, not the mere taking of the juvenile before it which is required. This is just as essential in the case of a single court which possesses dual jurisdiction over juveniles and adults, as it is in the case of a separate juvenile court. Also, as will hereinafter be shown, if the juvenile be taken before a court of dual jurisdiction and held for the grand jury, it is essential that the record show that the court exercised its exclusive original jurisdiction and that

it was in the exercise thereof that it so disposed of the juvenile.

The creation of juvenile courts and the special treatment of juveniles in a manner unknown to the common law has been of gradual development. As stated in the Twelfth Edition of Wharton's Criminal Law published in 1932, Vol. 1, Page 485:

> "These courts have not come quietly into existence without strong opposition both from criminally inclined juveniles and from that class of 'conservative' lawyers whose footsteps are guided entirely by the light of the past, - - by the glimmer of the dying torch of the Dark Ages, who are guided by 'precedent' rather than by principle, and are ever found planted in the pathway of civic advancement. But these laws have, in the main, been upheld; and where not upheld, it was due to defect in drafting the act, and not to the fact that the principle upon which such courts rest is disapproved."

The attitude towards juvenile courts has gradually changed. As said in the February 1950 issue of the Journal of the American Judicature Society:

> "Fifty years ago a revolutionary preventive device was created in the field of crime by the establishment of courts to deal with juvenile delinquents. The full flowering of this device has been at a slow pace, but the hour has at last arrived when the leaders of the profession are beginning to know where we are heading. They not only have sighted the target but are preparing actively to promote what appears to be necessary revisions of statutes, court procedures and practice."

Maine has adopted the principle of preventive treatment of crime with respect to juveniles, yet in so doing it has also recognized that there are cases where juveniles must be subjected to criminal prosecution. Our juvenile court system and the method of its administration, including the power of municipal courts acting as juvenile courts to hold juveniles for criminal prosecution, is found in R. S., Chap.

133, Secs. 2 to 7, both inclusive, and the amendments embodied in P. L., 1945, Chap. 63 and P. L., 1947, Chap. 334. It is the duty of this court to see that the provisions of this law are given full effect. To this end we must by our decisions scrupulously enforce the provisions of the juvenile law which require that before a juvenile can be tried as a criminal for an offense within the exclusive original jurisdiction of the municipal court, in its capacity as a juvenile court, that the required proceedings be had in said court, and then only after that court has determined in the manner provided by the law that such criminal proceedings be had. I do not feel that any justice of this court disagrees with this conclusion. The difference of opinion which obtains among the members of the court is not so much with respect to the basic principle which requires action by the municipal court as a condition precedent to the indictment of a juvenile for an offense within its exclusive original jurisdiction, but with respect to what action the municipal court must take if it holds the juvenile for the grand jury, and whether or not it took the required action in this case.

If public policy and legal jurisdictional requirements prevent the prosecution of a juvenile for an offense in the criminal courts, unless and until proceedings have been instituted in the juvenile court possessed of exclusive original jurisdiction over such offense, the same principles of law and the same public policy require that the juvenile court exercise the jurisdiction which it possesses. It is not the mere taking of the juvenile before the juvenile court which is important. A *judicial determination* by the juvenile court of the disposition to be made of the juvenile delinquent, such determination being made in the exercise of its jurisdiction as such, is what is required. If when a juvenile is brought before the juvenile court charged with an offense within its exclusive original jurisdiction, such court be allowed to refuse to take jurisdiction of the offense and be allowed to proceed in the same manner as in the case of an adult, the spirit, purpose and letter of the juvenile law

are violated and defeated. There is no difference in legal effect between taking a juvenile before a juvenile court which wrongfully refuses to exercise jurisdiction and an omission to take the juvenile before such court. Neither course is sufficient to enable the Superior Court to exercise jurisdiction over the juvenile and the offense with which he is charged.

It is the *exercise* of exclusive original jurisdiction by the juvenile court not its refusal to exercise it that confers jurisdiction upon the Superior Court to try a juvenile offender for an offense within the exclusive original jurisdiction of the juvenile court.

Neither in the juvenile court nor in the Superior Court may the juvenile waive the exercise by the juvenile court of its exclusive original jurisdiction. To allow such waiver by the juvenile in either court would be against public policy and the law respecting jurisdiction. As above stated, compliance with the requirements of the juvenile law is jurisdictional in the strict sense of that term. Until such requirements are complied with, the Superior Court has no jurisdiction over the offense or the juvenile. Jurisdiction cannot be acquired by express consent and a waiver can amount to no more. *State* v. *Bonney,* 34 Me. 223. Not only sound legal reasoning, but the weight of authority as well, supports this doctrine with respect to waiver in juvenile delinquency cases. *Talbott* v. *Commonwealth,* 179 S. W. (Ky.) 621, *Ex Parte Parnell,* 200 Pac. (Okl.) 456, *Ex Parte Albiniano,* 6 Atl. (2nd) (R. I.) 554. As said in the latter case where the question was first raised in a habeas corpus proceeding:

> "The state also urges that the petitioner waived any right he may have had to attack the validity of the indictments on the ground of his age, because he permitted himself to be arraigned before the superior court on said indictments and voluntarily pleaded thereto, without then raising any question regarding his age. The state's contention in this

> connection is supported by authority which rests, in substance, on the theory that, while one under a certain age may have a legal right to be proceeded against in a juvenile court when accused of crime, yet such right may be waived, under the proper circumstances, by the conduct and acts of the accused; and he may consent to stand trial and take sentence in the same manner as an adult. See Fifer v. State, 90 Tex. Cr. R. 282, 234 S. W. 409.
>
> Granting that the above holding as to waiver is the law in certain other jurisdictions, we find ourselves unable to adopt such holding because of our view of the meaning and intent of the statute we now have under consideration. We construe our statute providing for juvenile courts and the care of delinquent children as establishing certain jurisdictional limitations and requirements, and not merely personal rights or privileges in favor of a juvenile, which the latter may waive or not as he desires. Jurisdiction in proceedings such as are involved herein cannot be conferred on the superior court by the conduct of the accused minor, but depends upon the proper construction of the statute as applied to the facts then before the court. We find, therefore, that this contention advanced by the state, that the petitioner by his conduct waived certain rights, has no application in the present case."

The cases to the contrary in Texas and California are based upon statutory requirements which set forth the manner and time for raising the issue. Because of these requirements the courts in these states held that preliminary proceedings in the juvenile court were a personal privilege of the juvenile and were not strictly jurisdictional requirements and that they could be waived by failure to raise the issue at the time and in the manner provided by statute.

Notwithstanding the fact that R. S., Chap. 133, Sec. 24 provides,

> "In all prosecutions before municipal courts or trial justices the respondent may plead not guilty and

> waive a hearing, whereupon the same proceedings shall be had as to sentence and appeal as if there had been a full hearing.",

this provision of the statute in my opinion does not relieve the municipal court from its duty to exercise the exclusive original jurisdiction which it has over a juvenile offender. It is to be noted that in this case it is stipulated that the judge of the municipal court after plea of not guilty "refused to exercise jurisdiction over the offense" with which the Defendant was charged and rendered judgment of "Probable Cause" and bound the respondent over to the Superior Court, etc. Even if the above statute permitting waiver of hearing before municipal courts applies to juvenile offenders, such waiver does not permit the municipal court to refuse to exercise its exclusive original jurisdiction over the offense and refuse to determine whether or not the juvenile is to be treated as a juvenile delinquent only, or held for criminal prosecution. To hold otherwise would permit the juvenile not only to waive the hearing but to waive the provisions of the juvenile law.

It must be borne in mind that although this particular case involves a juvenile sixteen years of age charged with manslaughter, the principles of law which we herein decide are applicable to his case may apply to all juveniles between the ages of seven and seventeen years, and will apply to all over twelve years of age and under seventeen, and to all offenses within the exclusive original jurisdiction of the municipal court. If the juvenile court can refuse to take jurisdiction or refuse to exercise its jurisdiction in the case of this boy, it can do the same thing in the case of a seven year old or a child of any of those intermediate ages, in which age group so many of the juvenile delinquents are found. It is to eliminate possibility of such action so at variance with the purposes of the act that it must clearly appear that, in holding the juvenile for the grand jury, the municipal court actually exercised its exclusive original

jurisdiction before we can sustain a sentence imposed by the Superior Court.

I agree with the majority opinion that manslaughter is one of the offenses within the exclusive original jurisdiction of the municipal court as a juvenile court. I also agree with the majority opinion that the Superior Court was without jurisdiction to try, convict, sentence or commit the petitioner because proper proceedings to hold the petitioner for the grand jury to enable his prosecution for the crime of manslaughter in the Superior Court were not had in the municipal court. The reasons for this latter conclusion are as follows:

The Superior Court is a statutory court. It has only such jurisdiction as is conferred upon it by statute. The jurisdiction of the Superior Court over offenses is conferred by R. S., Chap. 132, Sec. 5, which is as follows:

> "The superior court shall have original jurisdiction exclusive or concurrent, of all offenses except those of which the original exclusive jurisdiction is conferred by law on municipal courts and trial justices, and appellate jurisdiction of these."

Nor is this jurisdiction of the Superior Court enlarged by R. S., Chap. 94, Sec. 5, as amended by P. L., 1947, Chap. 16 which is its general grant of jurisdiction, because the jurisdiction of the Supreme Judicial Court over offenses prior to January 1, 1930 was limited by a statute similar to that limiting the jurisdiction of the Superior Court above quoted.

The petitioner being less than seventeen years of age and being charged with manslaughter, the municipal court, acting in its capacity as a juvenile court, had exclusive original jurisdiction over the petitioner and the offense with which he was charged. Therefore, the only way that the Superior Court could acquire jurisdiction over the offense with which the petitioner was charged was under the provisions of the so-called juvenile law and especially R. S., Chap. 133, Sec.

6. Under this section the Superior Court could only acquire jurisdiction by an appeal or by an indictment returned by the grand jury in pursuance of and subsequent to the holding for the grand jury by the municipal court under authority conferred upon it by Section 6 *supra.*

The distinction between holding a juvenile and a non-juvenile for the grand jury for felony and the basis thereof is as follows:

In the case of the *non-juvenile* charged with a felony, the municipal court has no jurisdiction whatever over the offense with which the respondent is charged. R. S., Chap. 133, Sec. 2, Par. 1. It cannot make any final disposition with respect to the offense nor render any judgment either of innocence or of guilt. The non-juvenile respondent, if a felony be charged, is before it not for trial but for examination. R. S., Chap. 134, Sec. 9. It can find that the crime has been committed by someone and that there is probable cause to charge the respondent with its commission. If so, it causes him to be held for trial by requiring him to recognize to await action of the grand jury and answer to any indictment that may be found. R. S., Chap. 134, Sec. 13. If it fails to find *either* that the crime has been committed or that there is probable cause to charge the respondent, the respondent is discharged. R. S., Chap. 134, Sec. 13. This, however, is not to the slightest degree a determination of the guilt or innocence of the accused. The magistrate or municipal court has no jurisdiction over the offense, and if the respondent is charged or discharged he has never been in jeopardy. If discharged, he may be arrested on a new warrant and brought before the same magistrate again, and held for the grand jury. Even if charged, should the grand jury fail to indict, he may be again arrested on a warrant and brought before the same or another magistrate and again held for the grand jury. However, he is held for the grand jury because the magistrate has no jurisdiction over the offense and cannot make a final disposition of the case.

On the other hand, when a juvenile is charged with a felony within the exclusive original jurisdiction of the municipal court, it does have jurisdiction to hear and try the case. It can make a final determination of the case, subject to the right of appeal. It can find the juvenile guilty of juvenile delinquency, and can then deal with the juvenile in any of the methods prescribed in Section 6 of the juvenile law. R. S., Chap. 133, Sec. 6. The constitutionality of the grant of such authority over offenses committed by juveniles is assured, even though the offense, if committed by a non-juvenile, would be a felony. The only adjudication or judgment of guilt that the municipal court can make is that the child was guilty of juvenile delinquency. All power to punish the child as a criminal by imprisonment, either in jail, reformatory or prison, is expressly negatived. R. S., Chap. 133, Secs. 2 and 6. Juvenile delinquency is not a crime. Section 2 *supra.* None of the dispositions that the municipal court can make of the juvenile amount to punishment for crime. However, when the municipal court deals with a juvenile charged with any offense over which it has exclusive original jurisdiction, it has to determine whether he is to be ultimately dealt with as a juvenile delinquent or a criminal. If, however, the municipal court determines that the best interests of the juvenile and the safety of the community require a criminal prosecution of the juvenile, it may hold him for the grand jury.

If it so determines it does so not because it had no jurisdiction over the offense, not because it could not make any final disposition of the cause, but because it has exercised the discretion of judgment as to disposition of the cause with which it was invested by Section 6 of the statute.

In holding the juvenile for the grand jury, the juvenile court does not act as a mere examining magistrate as in the case of a non-juvenile. In so doing it acts as a court clothed with jurisdiction over the offense and the juvenile authorized to make disposition of the juvenile. Holding him for

the grand jury is only one of the dispositions it may make of the juvenile. Such action by the juvenile court is no less a disposition of the juvenile in the exercise of its jurisdiction because it contemplates other and further action may be taken by the grand jury and the Superior Court.

When the municipal court holds the juvenile for the grand jury, unless it exercises the jurisdiction with which it has been invested and holds for the grand jury as an act of discretion under Section 6 the legal effect of such action is just the same as though the juvenile had never been before the court.

If the municipal court expressly ruled that it had no exclusive original jurisdiction over the crime of manslaughter committed by the juvenile and held for the grand jury, it would take that action because under its interpretation, except to discharge it could take no other action. It would fail entirely to exercise the judgment of choice with which it is invested in juvenile cases, and it would not hold for the grand jury because that course of action seemed for the best interests of the child and the safety of the community as provided under Section 6 of the statute.

Under such an interpretation of the statute, the municipal court would do just exactly what the record and the stipulation show that it did do in this case. It would refuse to exercise jurisdiction over the offense with which the juvenile was charged, and find Probable Cause and hold for trial.

It is common knowledge in the profession and it is well known to those of us who have served on the Superior Court subsequent to the enactment of P. L., 1947, Chap. 334, that there has been a lack of uniformity in the interpretation of the phrase "the punishment for which may be imprisonment for any term of years" by municipal courts. Some municipal courts have erroneously held that their exclusive original jurisdiction did not extend to offenses which might

be punishable by imprisonment for two years or more. Such municipal courts have therefore felt that the law required them to hold every juvenile charged with such an offense for the grand jury as the only disposition which they could make of a child so charged other than ordering him discharged. Such offenses include nearly all if not all felonies. It was to settle this question that in January, 1948, I reported the case of *State* v. *Fraizer,* 144 Me. 383; 64 Atl. (2nd) 179, from the Superior Court to the Law Court. However, upon a careful analysis of the indictment by this court it was found that the crime charged therein was within the provision of R. S., Chap. 118, Sec. 2 authorizing punishment by imprisonment "for any term of years" and not within that provision of said section which provided for imprisonment "for not less than one year nor more than ten years." As the question was not in issue and as any discussion thereof would have been *obiter dictum,* the case was disposed of by *per curiam.*

The majority opinion in this case settles this question of interpretation. Under the record and stipulation in this case it may well be that the Municipal Court of Portland erroneously interpreted the extent of its jurisdiction and held the petitioner for the grand jury because it felt that it was the only course of action it could legally take in the premises. The record alone is consistent with such action. The stipulation established that it refused, either for that or some other reason, to exercise jurisdiction over the offense with which the petitioner was charged. When dealing with juvenile offenders charged with offenses within the exclusive original jurisdiction of the municipal court, both the municipal court and the Superior Court are courts of limited jurisdiction. The jurisdiction of the Superior Court depends upon the precedent exercise by the municipal court of its exclusive original jurisdiction. It is for this reason that the record of the municipal court must show either by express declaration or by necessary implication that the municipal court has exercised its jurisdiction as a

juvenile court and that in the exercise thereof and of the discretion with which it is invested by Sec. 6 of R. S., Chap. 133, held the juvenile for the grand jury, before the jurisdiction of the Superior Court can attach.

I interpret the record and the stipulation as establishing that the Municipal Court of Portland in this case never exercised its exclusive original jurisdiction over the petitioner or the offense with which he was charged. The *record,* though not to be commended and open to criticism, if it is sufficient for any purpose, is consistent with such action. The *stipulation,* however, taken together *with this record* is conclusive with respect thereto. The statute gives the court exclusive original jurisdiction over the offense. The stipulation is that the "Judge of said Municipal Court then refused to exercise jurisdiction over the offense with which the Defendant was charged and rendered judgment of 'Probable Cause.' " To my mind this cannot mean that he exercised the jurisdiction with which he was invested, that he considered whether he would treat the accused as a juvenile delinquent and make a final disposition of the case *and the juvenile,* decided against that course and as an exercise of the discretion as to disposal of the case vested in him by Section 6, held the child for the grand jury because it seemed for the best interests of the child and the safety of the community. To my mind the record and the stipulation show that he refused to exercise this jurisdiction. The child was not properly held for the grand jury, and when the Superior Court tried and sentenced upon the indictment, it was exercising original jurisdiction over the offense, a jurisdiction that it did not possess.

To construe the provisions of Section 6 relating to holding a juvenile for the grand jury, as conferring upon the municipal court the unfettered right to hold a juvenile for the grand jury as in the case of an adult would in my opinion destroy the effectiveness of the juvenile law. It would open the door for municipal courts which wrongfully

construed the extent of their jurisdiction as a juvenile court as not covering any felonies to hold for the grand jury without consideration of the case as a juvenile case.

To my mind it is of the utmost importance not only to the juvenile but to the State itself that cases within the exclusive original jurisdiction of the municipal court as a juvenile court be first considered as juvenile cases and a legal determination made by that court whether it will finally dispose of them as such or, within the discretion with which it is vested by Section 6 of the juvenile law, hold them for the grand jury. In my opinion such action upon the part of the juvenile court is a prerequisite to an indictment by the grand jury which is cognizable by the Superior Court and to trial and sentence in that court upon an indictment. In my opinion this is the intent of the amendment in P. L., 1943, Chap. 322, which struck out the prohibition against holding for the grand jury "unless the offense is aggravated or the child is of a vicious or unruly disposition," and which expressly included holding for the grand jury among the dispositions that could be made as seemed to the court for the best interests of the child and for the protection of the community. The deleted prohibition had been in the law since its enactment in 1931. It had been interpreted by this court as excepting cases within its terms from the exclusive original jurisdiction of the municipal court. *State* v. *Rand and Henry,* 132 Me. 246. The amendment not only struck out the prohibition but it deleted the provision of the prior law which the court held excepted cases within its terms from the exclusive original jurisdiction of municipal courts. By doing this and giving the court authority to hold for the grand jury as it did and in the clause where it did, it is my opinion that the amendment of 1943 made holding for the grand jury one of the dispositions of the juvenile which the court could, in the exercise of its exclusive original jurisdiction, make of the juvenile.

In my opinion the record of the municipal court holding for the grand jury should be such that it shows either expressly or by necessary implication that it has taken the required action, and that it has held the child for the grand jury in the exercise of the discretion conferred upon it by Section 6 of the juvenile law and not under the authority conferred upon it by Section 13 of Chapter 134 as in non-juvenile cases.

It may be argued that as the municipal court, either acting under R. S., Chap. 133, Sec. 6 or under R. S., Chap. 134, Sec. 13, may hold for the grand jury, it makes no difference which route the case takes to arrive at the same destination and that this is a distinction without a difference. This argument is based upon a misconception of the functions of the municipal court and its jurisdiction when acting as a juvenile court. The confusion is due to the fact that in this State a single municipal court acts in a dual capacity and exercises a dual jurisdiction. If we had a separate juvenile court which had exclusive original jurisdiction over offenses by juveniles, it would be perfectly clear that that court would have the exclusive right to exercise such jurisdiction over the juvenile. If such court were given the authority to deal with the juvenile as a juvenile offender in the manner provided in Section 6, it would have to choose the disposition it made of the case from those authorized by that section. Such choice would have to be made in the exercise of its judicial discretion. Such choice would necessarily involve a consideration by the court of the various possible dispositions which could be made and the selection of the one to be carried out. It would only be in the exercise of this discretion of choice that the court could hold for the grand jury. It is the right of both the State and the juvenile that the court exercise this discretion and that the disposition actually made be chosen from among the various dispositions that it could make. It is only by this exercise of its discretion of choice that the court exercises the jurisdiction conferred upon it.

This is also true of our municipal court with its dual jurisdiction. When a juvenile is brought before it for an offense over which it has exclusive original jurisdiction, it must exercise that jurisdiction. If it would hold such child for the grand jury, it must exercise the discretion as to disposition which has been conferred upon it by Section 6. If it holds for the grand jury it can only do so acting within its jurisdiction and by virtue of the authority conferred by Section 6 as one of the dispositions it is authorized to make of the delinquent. If it fail or refuse to exercise its exclusive original jurisdiction it necessarily fails and refuses to exercise the discretion of disposition conferred upon it by Section 6. If it refuses to exercise jurisdiction over the offense and finds probable cause and holds the juvenile for the grand jury, as in this case, the only construction that can be placed upon such action is that it assumed to do so under the provisions of R. S., Chap. 134, Sec. 13. The legal effect of such action is exactly the same as though there were a separate juvenile court, a failure to take the juvenile before it, or if he were taken before it that court refused to act in the premises, and then without action by the juvenile court a prosecution was commenced by indictment.

As heretofore shown herein, in my opinion the record and stipulation in this case not only fail to show that the municipal court did exercise its jurisdiction as a juvenile court but show that it did not, and that it held the juvenile for the grand jury in the belief that such was the only action it could take in the premises. In my opinion the Municipal Court of Portland in this case never exercised its exclusive original jurisdiction over the offense nor over the petitioner. It treated the juvenile throughout as though it had no exclusive original jurisdiction over the offense or the right to treat the juvenile as a juvenile delinquent. It is my further opinion that in this case the juvenile was improperly held for the grand jury. A holding for the grand jury in accord with Section 6 is a condition precedent to jurisdiction in the Superior Court. This being true, the Su-

perior Court exercised original jurisdiction in trying and sentencing the juvenile. See *State* v. *Elbert, supra.* The commitment under such sentence is therefore illegal and there is no justification for the detention of the petitioner and the writ of habeas corpus should issue.

I realize that there are contingencies and situations which may arise in the administration of the present juvenile law which are not specifically or even by implication provided for therein. If so, it is for the Legislature not the Court to make the necessary revision of the law. To interpret a law in such a manner as to either read provisions into it which it does not contain or to read out of it those which it does contain is to legislate not to interpret. It may be possible, though not probable, that either lack of necessary action or improper action taken in the municipal court may enable some juveniles to escape well merited punishment. However that may be, in an attempt to avoid such result, this court should not by construction of the law permit a municipal court, by its refusal or neglect to exercise its exclusive original jurisdiction, to defeat the purpose of the law itself. It is further my opinion that the reasons which I have stated for my conclusions at length are implicit in the majority opinion of the court and I therefore concur therein.

WILLIAMSON, J. I concur in the opinion of Mr. Justice Fellows except insofar as it is susceptible of interpretation that an adjudication or judgment of "guilty of juvenile delinquency" is required before a child may be held for the grand jury. I concur in the result.

MURCHIE, C. J., further dissenting.

The concurring opinion of Mr. Justice Merrill having been written to set forth the fundamental reasons underlying the opinion from which my dissent is recorded, it seems proper for me to note that, despite my entire accord that the issue is most important and my complete recognition of the principle that trial in a court having no juris-

diction is meaningless, I cannot see that he has supplied the deficiencies of the principal opinion as I see them. That principle was declared by this court in *State* v. *Bonney,* 34 Me. 223. It is in accord with that controlling all the decisions cited from states having juvenile courts which have set aside convictions of children not taken before such courts, on appeal or by habeas corpus. Our own case, *State* v. *Bonney, supra,* presents a statute which vested an exclusive original jurisdiction that was final, except for appellate proceedings, R. S., 1840, Chap. 166, Sec. 2. Our court emphasized the fact that the Legislature had provided no machinery for the transfer of any case within it to another court. R. S., 1944, Chap. 133, Sec. 6 does provide such machinery. The court of exclusive original jurisdiction purported to use it. That cannot be said of any of the cases cited by Mr. Justice Merrill.

My views may be controlled, as the quotation from Wharton's Criminal Law intimates, by over-conservatism, but it is a conservatism which stems from recognition of the limitations intended to be placed on judicial power by our Constitution rather than from "the dying torch of the Dark Ages." Only legislative power, in my view, can establish a system of separate juvenile courts. That the court is exercising a legislative function, as distinguished from a judicial one, seems to be conceded in the statement made by Mr. Justice Merrill near the close of the third paragraph from the end of his opinion, that:

> "The legal effect of such action is exactly the same as though there were a *separate* juvenile court * * *."

The emphasis is mine. Our Legislature has refused to give us such courts. This court both declares and supplies the deficiency. Mr. Justice Merrill refers to what he calls the refusal of the Portland Municipal Court to exercise jurisdiction over the offense of the petitioner. Undoubtedly it refused to exercise its jurisdiction to adjudicate that the

petitioner in the killing with which he was charged was guilty of juvenile delinquency. Rightly so, in my view. Our Legislature has vested a considerable exclusive original jurisdiction over juvenile delinquency in our municipal courts, or the judges thereof, but has made it entirely clear, at all times, that children might be held for a grand jury *by such courts*. Granting the desirability of rehabilitating children whose feet have strayed to wayward paths, it has provided that children may be punished as criminals, when circumstances require such action, and has left to our municipal courts the determination whether a particular offense of a particular child should, or should not, be treated as an act of juvenile delinquency. I can understand why the State has an interest sufficient to deprive a child of the right to waive such a jurisdictional requirement as age, but not why a court would refuse one sixteen years of age, on the advice of able counsel, the right to recognize that the inevitable result of a municipal court hearing on a charge which might involve either juvenile delinquency or crime would be that the child would be held for the grand jury. What distinguishes our law seeking to salvage children from paths of crime from that of any other state is the express provision of the chapter which carries it that a hearing may be waived "in all prosecutions before municipal courts." R. S., 1944, Chap. 133, Sec. 24. Certainly when a child is indicted, after being held for a grand jury, it must be recognized that his prosecution started in the municipal court which had exclusive original jurisdiction of his alleged offense. It can hardly be a tenable view that "the broad principles of public policy which underly the juvenile court acts" (quoting Mr. Justice Merrill) of other states, assuming that all except Maine have recognized them, have imposed a constitutional limitation on legislative power in Maine which prohibits legislation providing that a child may waive a hearing of the issue whether a felonious and wilful killing charged against him constitutes nothing more than an act of juvenile delinquency.

It does not seem to me that Mr. Justice Merrill has made the future clear with reference to either the petitioner herein or children charged, hereafter, in our municipal courts, with crimes for which they should be prosecuted as criminals. There is intimation that the petitioner has no assurance against a new prosecution and that a municipal court, adjudicating that a child is guilty of juvenile delinquency, supplies all jurisdictional requirements for holding him for a grand jury by necessary implication. On the first point the statements do not seem conclusive because unlike one tried in a court having no jurisdiction of his offense, the petitioner has been arraigned in one which had. The issue as to whether he can be arraigned again can arise. On the second a single thought seems controlling. It seems entirely inconsistent to require a court to find a respondent guilty of an offense constituting juvenile delinquency as a preliminary to holding him for a grand jury that, if indicted, a traverse jury may determine his guilt or innocence. If a case arises hereafter, in which a child adjudicated guilty of juvenile delinquency and held for the grand jury is acquitted of the crime to which the adjudication related, the adjudication of guilt of juvenile delinquency will not be eliminated. In this connection I note the closing statement of Mr. Justice Baker of the Rhode Island Court in *Ex Parte Albiniano,* 62 A. (2nd) 554 at 558:

> "appropriate proceedings should be had * * * to clear the record * * *."

This court has no machinery by which in such a case the record can be cleared. It may be that a system of juvenile courts established by the Legislature would make provision for such a contingency. When courts legislate they have no power to provide therefor.

EMMA DUBIE
vs.
MAURICE A. BRANZ D/B/A
THE GUARDIAN FINANCE CO.

Cumberland. Opinion, May 4, 1950.

Exception. Conversion. Fraud. Rule 21.

Exceptions based upon written objections must strictly comply with Rule 21 (Rules of Court).

Any distinct act of dominion over property in denial of owner's right, or inconsistent with it amounts to conversion.

Legal right of possession or the right of special property in the article bailed or pledged cannot be acquired from a person who obtained possession of the article attempted to be pledged by fraud.

Fraud vitiates all contracts into which it enters verbal or written.

ON EXCEPTIONS.

On exceptions to the acceptance of a report of referees awarding judgment for plaintiff. Exceptions overruled. Case fully appears below.

Saul H. Sheriff, for plaintiff.

Wilfred A. Hay,
Charles A. Pomeroy, for defendant.

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

NULTY, J. On exceptions to acceptance of report of referees awarding judgment for the plaintiff.

The record discloses that the plaintiff, Emma Dubie, early in May 1948 delivered her platinum ring set with a 1.25 carat diamond and 22 chip diamonds to one Albert F. Allen as security for $1,000 which he promised to advance and use to purchase for her certain oil leases, agreeing not

only that the advance should be paid from income from the leases which he assured her would begin the following June, but also that the ring would be kept in his safe deposit box at Brunswick until her payments were completed. It should be noted that Allen and his wife had for some months occupied a room in a tourist house on State Street in Portland, Maine, operated by the plaintiff. This pledge agreement was not reduced to writing and no receipt for the ring was given. On May 17, 1948, said Allen called upon the defendant, Maurice A. Branz, who conducted a small loan business in Portland under the name of Guardian Finance Co., exhibited the ring pledged to him by the plaintiff, stated that the ring belonged to his wife, that he needed money to carry on his antique business, that she had authorized him to use the ring as security, and borrowed $400 for which he gave his note payable in monthly installments of $40 with interest at 3% and pledged the ring as collateral security for the loan. The record further discloses that said Allen disappeared after this transaction and all search for his whereabouts have proved futile. The referees found as a fact that said Allen neither advanced or intended to advance any money for the plaintiff, Emma Dubie, to buy oil leases or for any other purpose and that his procurement of her ring from her and its sub-pledge to the defendant thereafter was clearly a fraud but that the defendant Branz was ignorant of the fraud and accepted delivery of the ring in pledge in good faith. About November 1st, not having received any payment on account of Allen's loan, the defendant Branz published notice of his intention to enforce his pledge of the ring by Allen in the Bridgton News, as required by statute, and of this publication the plaintiff subsequently was advised and she made demand for the ring on the defendant and he refused either to exhibit or surrender it, whereupon the plaintiff instituted the instant action of trover.

Exceptions based upon written objections must strictly comply with *Rule 21*, 129 Me. 511, 157 A. 859, *Staples* v. *Littlefield*, 132 Me. 91, 93, 167 A. 171. Defendant filed seven

written objections. Objection 4 cannot be considered because said objection does not in any way specify how or why the referees' conclusion with respect to the possession of the defendant of the plaintiff's ring is contrary to law. Objections 5, 6 and 7 are manifestly insufficient in that they are general and not specific and they cannot be considered. *Throumoulos* v. *First National Bank of Biddeford,* 132 Me. 232, 169 A. 307; *Moores* v. *The Inhabitants of the Town of Springfield,* 64 A. (2nd) 569, 573. Objections 1, 2 and 3 raise questions of law which under the rule of reference were properly reserved. Referees' findings of fact will not be disturbed provided there is any evidence to support the findings. *Staples* v. *Littlefield, supra; Morneault* v. *Boston & Maine R. R. Co.,* 144 Me. 300, 68 A. (2nd) 260.

It is the opinion of this court, after examination of the record not only that there was ample evidence to support the various findings of fact by the referees, but the inescapable conclusion reached by this court is that the referees would not have been warranted in arriving at any other conclusions. Such being the case, in accordance with the well established decisions of this court we hold that there was ample evidence to support the findings of fact and the conclusion of the referees and that said findings are conclusive and finally decided and exceptions do not lie. *Staples* v. *Littlefield, supra.* The defendant takes nothing under the first two objections.

The third objection also raises a question of law which will necessitate the determination of whether or not under the referees' conclusion said Allen was guilty of conversion of the diamond ring of the plaintiff. In *McPheters* v. *Page,* 83 Me. 234, 22 A. 101, this court said:

> "It is established as elementary law by well settled principles and a long line of decisions that any distinct act of dominion over property in denial of the owner's right, or inconsistent with it, amounts to conversion."

See also *Wyman* v. *The Carrabasset Hardwood Lumber Co.*, 121 Me. 271, 276, 116 A. 729. The referees ruled, and there was ample evidence to support their findings, that said Allen was guilty of conversion. The ruling was correct and said Allen, as a matter of law, never had legal possession of the plaintiff's ring. He acquired no special property or right of possession in the diamond ring which could be legally sub-pledged or transferred to the defendant. Said Allen never was a legal bailee or pledgee of property for a special purpose and his attempted sub-pledge to the defendant, although defendant acted in good faith and with reasonable care, was a nullity and said defendant never acquired any special property or even legal right of possession from said Allen. Legal right of possession or the right of special property in the article bailed or pledged cannot be acquired from a person who obtained possession of the article attempted to be pledged by fraud. Fraud is any cunning, deception or artifice used to circumvent, cheat or deceive another. *Great Northern Manufacturing Co.* v. *Brown,* 113 Me. 51, 53, 92 A. 993. Fraud vitiates all contracts into which it enters, verbal or written. *Warren* v. *Kimball,* 59 Me. 264, 266; *Stewart* v. *Winter,* 133 Me. 136, 139, 174 A. 456. In other words, when an alleged bailee or pledgee of property sells, transfers or assigns property obtained by fraud without right, the purchaser or sub-bailee or sub-pledgee does not thereby acquire a lawful title or lawful possession and the owner may maintain trover against the alleged purchaser or sub-bailee or sub-pledgee without demand. *Hotchkiss* v. *Hunt,* 49 Me. 213, 224. The defendant takes nothing under his third objection.

The action of the presiding justice in overruling the objections of the defendant was correct and the mandate will be

Exceptions overruled.

IN RE: CARL G. SMITH
PETITIONER FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

May 10, 1950.

Courts. Oral Argument. Habeas Corpus.

Neither the Constitution of the United States nor the Constitution of this state requires the personal presence in court of a person charged with a crime when his case is argued before an appellate court upon a bill of exceptions taken in a court below.

The right of exceptions in this state is wholly statutory.

Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates.

There is no general statute in this state authorizing the Law Court to issue process in aid of its jurisdiction. If such right does exist, the right is limited to cases of strict necessity and then only to enable the court to function and exercise its powers as a statutory court and within its statutory jurisdiction.

ON PETITION.

On petition to the Supreme Judicial Court sitting as a Law Court for writ of habeas corpus ad testificandum to permit petitioner, an inmate of the state prison, to appear and argue orally a bill of exceptions before the Law Court. Petition denied. Writ denied. Case fully appears below.

Carl G. Smith, Pro Se.

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

MERRILL, J. Carl G. Smith, the petitioner, was convicted in the Superior Court for our County of Cumberland at the May 1949 Term thereof, upon an indictment to which he pleaded guilty. Said indictment charged him with an escape

from the Cumberland county jail where he was being held for the grand jury in default of bail on a charge of felony. At said May Term, to wit, on the tenth day of May, A. D., 1949, he was sentenced to imprisonment at hard labor for not less than three and one-half years and not more than seven years, said sentence to be executed upon him within the precincts of our state prison at Thomaston, in the County of Knox, and ordered to stand committed until he should be removed in execution of said sentence. Warrant of commitment issued May 10, 1949. The petitioner was committed to said state prison where he is now confined in execution of said sentence.

On January 19, 1950, a writ of error was granted said petitioner to review the legality of his conviction and sentence. Hearing was had thereon before a Justice of the Superior Court, the said Smith being produced in person before said justice on a writ of habeas corpus *ad testificandum* to enable him to be present at said hearing. After hearing, the writ was discharged and Smith alleged exceptions to this court and the case is now pending in this court on said exceptions.

In a letter dated May 4, 1950 addressed to Chief Justice Harold H. Murchie, Maine Supreme Judicial Court, the petitioner requested as a petitioner for redress leave to file

> "a petition for writ of Habeas Corpus ad. Testificandum in order that I may appear before this court at such time and place as the court may designate to present my arguments and evidence in support of my pending appeal for redress for the 7 year sentence under which I am confined. Hoping that this Honorable Court and justices thereof deem the request meet and proper."

On the day of the date of the above letter, to wit, May 4th, written brief and argument of the petitioner in support of his bill of exceptions was actually received and filed in the office of the Clerk of the Law Court in Portland. The exceptions will be in order for argument at the next term of this court which is the June Term.

Although the letter itself, if strictly construed, is a request for leave to file a petition for habeas corpus *ad testificandum,* with the petitioner's consent, and at his request, we treat it as an actual petition therefor.

The record on the bill of exceptions has been duly filed in this court and is in our possession. The cause is now before this court as a court of law and is to be decided only upon such questions of law as are raised in and by the bill of exceptions.

The question before us on the present petition for a writ of habeas corpus is whether in this case the court will issue a writ of habeas corpus to bring before us this petitioner, who is now committed to the state prison and stands convicted of an escape, and who has already filed his written brief and argument in this court, to enable him to orally argue in person his bill of exceptions to the order discharging the writ of error.

In cases brought to this court on bills of exceptions, there is no occasion for the testimony of witnesses, even of the parties to the cause. The case is heard upon the bill of exceptions as presented. In deciding the same we are confined to and cannot travel outside the bill of exceptions as allowed by the court below. Even the record of the court below, unless made a part of the bill of exceptions, is not open to our consideration. The proceedings before this court on bills of exceptions are confined to arguments submitted in favor of and against the sustaining of the bill of exceptions.

In this case there is no occasion for the petitioner to be present in this court *for the purpose of giving evidence,* and the writ cannot be issued to enable him so to do.

Neither the Constitution of the United States nor the Constitution of this State requires the personal presence in court of a person charged with crime when his case is argued before an appellate or law court upon a bill of ex-

ceptions taken in the court below. Unlike prosecutions for felony at *nisi prius,* the proceedings here may be conducted without the *personal* presence of either party. *Schwab* v. *Berggren,* 143 U. S. 442, 36 L. ed. 218. Neither is the *right to appear in person* before an appellate court or, as here, a "court of law," and orally argue questions of law presented to it by bills of exceptions a right conferred upon the individual by the Constitution of the United States. *Price, Petitioner,* v. *Johnston, Warden,* 334 U. S. 266, 92 L. ed. 1356. Nor is such right conferred by the Constitution of this State.

The right to exceptions in this state is wholly a statutory right and does not exist except as conferred thereby. The right to exceptions can be wholly withheld, and if granted, its exercise may be regulated by such express restrictions as may be imposed in the law creating the right or as may be reasonably implied from it. If the right to exceptions can be wholly withheld, if granted, the method of the presentation of arguments in support thereof may be regulated either by such express restrictions as may be imposed in the law creating the right, by rule of court, or as reasonably required under the circumstances of the case to preserve the safety of the public.

Arguments before this court upon bills of exceptions may be (a) written and oral, or (b) written. The choice of whether the case will be argued both in writing and orally, or only in writing, is for the parties. As said by this court in *Cole* v. *Cole,* 112 Me. 315, 317:

> "Except in cases which are certified to the Chief Justice in accordance with some provision of statute, the excepting party has a right to be heard orally in argument before the Justices sitting together, and under such circumstances that the Justices may conveniently advise together upon the merits of the argument. This right is an important one, and a party ought not to be denied its exercise, except in cases where the statute authorizes the denial."

The foregoing statement, however, must be interpreted in connection with the issue therein raised. In that case exceptions had been *improperly certified* to the Chief Justice *to be argued in writing,* WITHOUT opportunity afforded for oral argument in behalf of the parties either in person or by counsel. The question involved in that case was not whether the parties had a right to argue their exceptions *orally in person* but whether all right to oral argument of a bill of exceptions, either in person or by counsel, could be denied. The case of *Cole* v. *Cole,* merely decides that, unless there by restriction imposed by statute, the right to an oral argument as well as a written argument exists, and it further holds that a denial of all opportunity for oral argument was error. In passing may we add that even though such right exists, it may be lost by failure to comply with the rule of court respecting the same.

In this state there is no general statute authorizing this court, *sitting as a court of law,* to issue process in aid of its jurisdiction. R. S., Chap. 113, Sec. 37 has been enacted and is now in force:

> **"Habeas corpus may issue to bring a prisoner as a WITNESS.** A court may issue a writ of habeas corpus, when necessary, to bring before it a prisoner for trial in a cause pending in such court, or to testify as a witness, when his personal attendance is deemed necessary for the attainment of justice."

The foregoing statute is broad enough to allow this court to issue a writ of habeas corpus if occasion arose in cases within its terms. The present case, however, is not within the terms of that statute because the petitioner is not to be tried in this court in the hearing before us when his exceptions are argued, nor as we have hereinbefore pointed out, is there any occasion for him to testify as a witness before us.

We do not mean to deny that this court in cases properly before it has inherent power to issue any process which may

be necessary to enable it to exercise its jurisdiction as conferred upon it by statute. If such right does exist, the right is limited to cases of strict necessity and then only to enable the court to function and exercise its powers as a statutory court and within its statutory jurisdiction.

Parties are authorized to plead and manage their own cases by R. S., Chap. 93, Sec. 23 which is as follows:

> "Parties may plead and manage their own causes in court or do so by the aid of such counsel, not exceeding two on a side, as they see fit to employ."

Under authority of this statute, parties are permitted and have the right to argue and manage their own cases before the courts and this is true whether the case be before a court at *nisi prius* or in an appellate or law court. Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates. *Price* v. *Johnston, supra.* If circumstances in the interests of justice made the presence of one incarcerated in prison compelling, and if the circumstances were such that his presence in the law court was necessary to enable the court to function, and do justice, we should hesitate to hold that we were without power to issue process to bring such prisoner who had a case pending in this court before us.

It has been for many years a practice in this state to submit cases upon written arguments alone. The petitioner in this case has already submitted a written argument to the court. We do not find any circumstances in this case which would require us to exercise the extraordinary power of issuing a writ of habeas corpus, even if such power exists, to bring this prisoner before the court to supplement his written argument by oral argument. It must be remembered that this prisoner has been convicted and is now imprisoned for making an escape from confinement. He has already been brought before the court at *nisi prius* by a writ of habeas corpus for the trial of his writ of error which was discharged. Competent counsel was assigned to him in the proceedings at *nisi prius.* He had had the aid of such

counsel in prosecuting his writ of error, in drawing his bill of exceptions, and in the preparation of his argument before this court. He states in his petition for habeas corpus that counsel so assigned to him exhibited to him his brief to be filed before this court but stated he did not intend to argue orally. It has been accepted practice in this state for years to allow counsel to submit cases before this court on written arguments alone. Now that the petitioner has personally taken over the conduct of his case before this court, and has submitted his written argument in support of his bill of exceptions, we see no sufficient reason for the issue of a writ of habeas corpus to bring the respondent from the state prison at Thomaston before this court solely for the purpose of making oral argument therein. The application for the writ stated that it was for the purpose of presenting arguments and evidence in support of his pending appeal (bill of exceptions). As hereinbefore stated, no evidence is receivable in those proceedings, and the question before us is solely that of bringing him before the court for the purpose of oral argument. The practice of bringing a prisoner confined in the state prison before this court, sitting as a court of law, to personally argue his exceptions to the discharge of a writ of error by which he seeks his release from such imprisonment would be an undesirable practice, and one not to be encouraged. This is especially true of one who has already been convicted of and is now imprisoned for escape. While we do not foreclose or deny our power so to do, we should not exercise such power, if it exists, save under compelling contingencies and circumstances not easily foreseeable. No such circumstances exist in this case. Every legitimate right of the prisoner can be safeguarded by means much more consonant with the fair, seemly and wise administration of justice. See dissenting opinion of Mr. Justice Frankfurter in *Price* v. *Johnston, supra.* The writ as prayed for is therefore denied.

Petition denied.

Writ denied.

LAURENCE T. ADAMS
vs.
BERT MERRILL, ALIAS HERBERT MERRILL

Sagadahoc County. Opinion, June, 1950.

New Trial. Bias. Prejudice. Evidence.

Where a verdict is not supported by the evidence and is predicated upon bias and prejudice it should be set aside and a new trial granted.

The general rule is that the admission of improper evidence is not available as a ground for new trial unless objection is made thereto at the time; but when improper evidence is so prejudicial that the jury verdict indicates that an unjust decision was due in part to sympathy or prejudice occasioned thereby the verdict should not be allowed to stand.

ON MOTION.

This is an action of assumpsit for money had and received. The jury returned a verdict for the plaintiff and the cause comes to the Law Court on defendant's general motion for a new trial. Motion sustained. New trial granted. Case fully appears below.

Edward W. Bridgham,
Harold J. Rubin, for plaintiff.

Sherwood Aldrich, for defendant.

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

FELLOWS, J. This action of assumpsit for money had and received, with specifications under omnibus counts, was tried before a jury in the Superior Court for Sagadahoc County. The jury returned a verdict for the plaintiff for $520. The case comes to the Law Court on the defendant's general motion for a new trial. The grounds stated in the

motion are that the verdict is against the law and the evidence. There is no claim for excessive damages.

The specifications under the common counts allege that "on or about December 2, 1946 he (plaintiff) paid to the defendant the sum of $500, and on March 17, 1947 he paid the defendant an additional $500 whereby the defendant was to sell and deliver to him logs at the rate of $30 per thousand feet mill scale or a total of 33,333 board feet, mill scale, but that the said defendant only delivered to the plaintiff 16,000 feet mill scale of logs and refuses to deliver any more to the plaintiff, whereby the plaintiff is entitled to receive from the defendant the sum of $520."

At the trial the plaintiff testified, and offered other evidence tending to prove, that the defendant delivered 16,441 board feet to him under the agreement, and refused to deliver additional logs sufficient to make up the necessary number of board feet paid for by the plaintiff. The defendant claimed that "log scale" and not "mill scale" was the agreement and that he had delivered logs to the plaintiff in excess of 48,000 board feet. The jury returned a verdict for the exact amount claimed by the plaintiff in the declaration.

There is no dispute that there was an agreement between the parties for the purchase and sale of logs at $30 per thousand. It is admitted that the plaintiff paid to the defendant the sum of $1,000. The question of whether log scale or mill scale controlled the measurements became unimportant as the trial progressed, because the defendant's testimony if believed, showed a delivery of logs to the plaintiff which would more than satisfy the contract.

The real question before the jury was the number and amount of logs delivered by the defendant to the plaintiff at the mill of the plaintiff. The question before the Law Court, presented by the motion for new trial, is whether the verdict of the jury was clearly wrong. The defendant as the moving party has the burden of showing that the

verdict was the result of "prejudice, bias, passion or mistake." *Jannell* v. *Myers*, 124 Me. 229; *McCully* v. *Bessey*, 142 Me. 209, 49 Atl. (2nd) 230; *Rawley* v. *Palo Sales, Inc.*, 144 Me. 375, 70 Atl. (2nd) 540.

There is an irreconcilable conflict in the testimony. The plaintiff Adams testified that he received at his mill a total of exactly 16,441 feet, based on the scale of the marker. The marker, whose duty was to determine the number of board feet in the lumber as sawed, kept a record, as he testified, of the days worked and the number of feet sawed each day, which record substantiated the plaintiff's story. Both the plaintiff and his marker testified that all the logs delivered by the defendant to the plaintiff's mill were sawed by the plaintiff before March 17, 1947. All logs delivered by the defendant were sawed, and the total delivered was only 16,441 feet. Another witness for plaintiff testified that when the operation ended in March 1947, all the logs had been sawed with the exception of "four or five" on the bank near the mill. The plaintiff testified that he sold 7,071 feet to a Lewiston lumber company, and of the remainder, 2,000 feet was used to "build the mill and put a roof over the engine and the remainder was in the pit."

The defendant Merrill testified that "before Christmas, when operations ceased for a while, we put 48,000 feet of logs on the ramp," and that in addition to the 48,000 defendant says he delivered in March 9,000 feet more. Defendant "estimated" that in March "there might have been fifteen or twenty thousand there." The defendant stated that he measured the logs that he delivered, although he had no experience in scaling logs. Defendant says he kept a record but "I don't know where it is." The foreman, cutting for the defendant on the defendant's wood lot, stated that he showed the defendant Merrill how to scale the logs and that he as foreman scaled "some of the logs as they were cut" but "didn't scale any of the logs on the brow." The defendant's foreman gave as his judgment that 48,000 feet went to the "brow" at the mill before Christmas, and that

9,000 more went in March. The man who took logs out of the woods in November for the defendant, and who placed them on the "brow" at the plaintiff Adams' mill, said that he hauled "approximately" 48,000, but he did not haul any in March.

Clifford W. Gray, a deputy sheriff called by the defendant, testified that he sold on execution in favor of First Auburn Trust Company against this plaintiff Adams on July 3, 1947, as property of this plaintiff Adams, "logs, lumber, slabs and a Fordson tractor for $480." The property sold had been attached previously and was "close by the mill." On the day of the sale the deputy sheriff said "we estimated 12,000 board feet of logs and about 10,000 feet of sawed lumber." There was only one bidder at the sale, a Mr. Coverly from the bank, and neither this plaintiff nor this defendant were present. The bid was the amount of the execution held by the bank.

The testimony of the plaintiff and his witnesses is that there were only 16,441 feet delivered altogether. The evidence of the defendant and his witnesses was that 48,000 feet of logs were delivered by the defendant before March and 9,000 feet more in March, or a total of 57,000 feet. The plaintiff says that at the time he stopped sawing in March there were no logs on the ramp or about the mill, and that after the plaintiff paid defendant the second payment of $500 on March 6th, there were only "two scootfulls put on" or "approximately" 1,100 feet. The deputy sheriff's testimony however, and the deputy was the only witness on either side who was apparently disinterested, was that later on July 3, 1947 there were 12,000 board feet of logs and 10,000 feet of sawed lumber at the mill. The plaintiff admits that he was "told" logs were sold by the sheriff in July but they could not have been "my logs" because there were "none left, not a single log." The plaintiff further said "I know there were logs bought, I don't know where they came from."

The court does not intend to indicate that the testimony of the deputy sheriff is entitled to full and absolute credence on the question of the amount of logs and lumber belonging to the plaintiff and near the mill. The deputy is only a witness, but his estimate of amount is to be seriously considered as testimony of a disinterested witness who had an official purpose in being there and who had certain duties to perform. As bearing on the correctness of the plaintiff's statement that there was no lumber and that there were no logs during March and after March, in, near, or about the mill (if plaintiff intended to convey that idea), the testimony of a sworn officer of the law, who was enforcing a judgment of the Superior Court, that there were approximately 22,000 feet, should be entitled to very respectful and most careful consideration. There was an execution sale and the deputy sheriff says that he sold the logs and lumber as property of the plaintiff.

The jury verdict of the exact sum of $520 claimed by the plaintiff in his declaration, must necessarily represent the fact that the jury found (as declared in the writ and declaration) that the plaintiff paid defendant $1,000 and only received 16,000 feet at $30, or $480 value, according to the contract. The verdict is wrong because on the plaintiff's own testimony he received at least 16,441 feet, or a value of $493.23. The defendant was not given, under any view of the record evidence, sufficient credit for logs delivered. The verdict is not "supported by the evidence." *Mizula* v. *Sawyer,* 130 Me. 428.

The jury verdict in this case was not the result of "mistake." In our opinion it was plainly "bias" or "prejudice" against the defendant and in favor of the plaintiff. In cross examination of the defendant Merrill, the fact came to the attention of the jury that the mill of the plaintiff Adams, located on the defendant Merrill's property, was sold by the defendant Merrill for $50. The plaintiff testified that its value was $1,000. The defendant admitted that he had no

right or authority to sell. The defendant had no title, no permission, and no bill of sale. He says he had brought no suit in order to place an attachment. He sold without the plaintiff's knowledge or consent at a price fixed by himself. His only excuse was, "he didn't make any effort to move his mill, and in October I sold his mill and got it off of there." The defendant did not even notify the plaintiff that he had sold his mill. The defendant did tell Mr. Coverly of the bank, in January 1948, that he had sold the mill for $50, and a "little lumber" for $25. Mr. Coverly said to defendant "be a good fellow and give the money to Mr. Adams." The defendant Merrill stated that after his talk with Coverly he went to the plaintiff Adams and offered to him the $75, but the plaintiff "refused to take it."

It is interesting to note that this collateral and prejudicial fact, of the unauthorized sale of the plaintiff's mill by the defendant for $50, was brought out at the trial by the attorney for the plaintiff in his cross examination of the defendant, without objection. The plaintiff then in rebuttal, to contradict and to impeach, was permitted (without exception) to testify regarding the sale and to state his opinion that the fair market value of his mill was $1,000. See *State* v. *Kouzounas,* 137 Me. 198.

The high-handed, unauthorized, and perhaps spiteful act of the defendant in thus selling the plaintiff's mill at his own figure of $50 and without notice to the plaintiff, could, and we believe did, unlawfully prejudice the jury. The issue in this case was the amount of logs delivered. No action relative to sale of the mill was before the court. This evidence of the sale, although brought from the lips of the defendant in cross examination by plaintiff's attorney, could well prejudice, whether the questions were intended to raise a prejudice or not. The jury not only lost sight of all the testimony of the disinterested deputy of the sheriff, but the jury also failed to consider the testimony of the plaintiff himself, and failed to allow an admitted credit.

A jury has the undoubted right to accept the testimony on a plaintiff's side as true, unless the circumstances and probabilities reveal a situation that proves the testimony of the plaintiff to be inherently wrong. *Daugraty* v. *Tebbetts,* 122 Me. 397. The jury in the case at bar, however, considered the testimony of neither side. It did not give admitted credit, and awarded the full amount claimed in the declaration. The jury did not even accept the plaintiff's story as true. It is clear that the jury did not attempt to decide the disputed question raised by the testimony as to the amount delivered by the defendant. Because of its prejudice, which may have been a "righteous indignation," the jury took matters into its own hands in an attempt to settle all of the various disputes between the parties, by rendering a verdict in this case for the full claim, without regard to the evidence.

Courts have always endeavored to prevent a prejudicial fact that is not relevant, to "creep" into testimony, and to correct by the charge, so far as possible, the effect when it is inadvertently or boldly brought out in evidence, and not objected to. If it is prejudicial, and if it probably affected the improper decision of the jury, a new trial may be granted on motion. Insurance in a negligence case, *Sawyer* v. *Shoe Company,* 90 Me. 369; *Raymond* v. *Eldred,* 127 Me. 11, 17; *Ritchie* v. *Perry,* 129 Me. 440; other accidents at same place in negligence case, *Johnson* v. *Railroad,* 141 Me. 38, 45; possible or probable improper effect of inadmissible questions, *State* v. *Jenness,* 143 Me. 380, 62 Atl. (2nd) 867, are examples. A general motion will even reach a defect in a judge's charge, without exceptions, if injustice results. *Cox* v. *Insurance Co.,* 139 Me. 167, 172. Jurors are human, and like all human beings are so influenced by extraneous, erroneous, and often malicious, acts or statements, that they fail to distinguish what is important, true, or material. Anything that might prejudice the ordinary person will probably throw the mental viewpoint of some, if not all, the jurors out of alignment. The warnings in a judge's

charge will many times fall on ears deafened by a prejudice. The estimate of the value of vital evidence depends, too often, on the manner in which it affects a juror's likes, dislikes, and emotions. Some prejudices may be laudable, but the court room is no place in which to indulge in any good or bad prejudice where legal and even-handed justice is the goal. A decision influenced by sympathy or prejudice is mob regulation.

The general rule of course is, that the admission of improper evidence is not available as ground for new trial unless objection was made thereto at the time, but when improper evidence is so prejudicial that the jury verdict indicates that an unjust decision was in part due to a sympathy or a prejudice occasioned by that evidence, the verdict is clearly wrong. *Raymond* v. *Eldred,* 127 Me. 11, 17; *Ritchie* v. *Perry,* 129 Me. 440.

"The jury did not fully and impartially weigh the testimony in the case, that consequently the verdict was manifestly wrong and should not be allowed to stand." *Luce* v. *Davis,* 115 Me. 561, 563.

Motion sustained.

New trial granted

ROY C. KNAPP, APPELLANT
FROM DECREE OF JUDGE OF PROBATE
ESTATE OF FRED E. KNAPP

Androscoggin. Opinion, June 9, 1950.

Probate Courts. Rules. Wills. Proof. Affidavits.

A rule of court has the force of law if not repugnant to law.

A rule of court cannot change a statute.

The provision of Rule 31 of the Probate Court Rules requiring wills be "proved and allowed in open court" and the preservation of testimony "by an affidavit taken before the Judge or Register" and "in no case shall evidence be taken out to prove said will before the return day" does not preclude the introduction into evidence of an affidavit taken before the return day where there are no objections to the will, since the statutes provide "when it clearly appears . . . that there is no objection thereto, (the judge) may decree the probate of any will upon the testimony of one or more of the 3 subscribing witnesses required by law, . . . and the affidavit of such witness or witnesses taken before the register of probate may be received as evidence. . . ." (R. S., 1944, Chap. 141, Sec. 7.)

ON EXCEPTIONS.

This case is before the Law Court on exceptions by the appellant to the ruling of the Superior Court, sitting as the Supreme Court of Probate, in refusing to revoke certain decrees allowing the will, the first and final account, and decree of distribution. Exceptions overruled. Case fully appears below.

John G. Marshall,
Frank T. Powers, for appellant.

James E. Philoon,
Carl F. Getchell,
John C. Crockett,
George C. Wing, Jr., for respondents.

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

FELLOWS, J. This case is before the Law Court on exceptions by the appellant to the ruling of the Superior Court, sitting as the Supreme Court of Probate, in refusing to revoke certain decrees of the Probate Court for Androscoggin County. The exceptions are overruled.

These are the facts: Fred E. Knapp, late of Auburn, Maine, deceased, testate, died November 17, 1944 leaving a widow, Lida A. Knapp, and as his only heir at law, his brother Roy C. Knapp who is the appellant petitioner here.

The will of Fred E. Knapp provided a life estate for the wife, with remainder to the Salvation Army, Stanton Bird Club, and the Society for Prevention of Cruelty to Animals. The will was presented for probate November 21, 1944, due notice was given to all parties interested and no objections to the probate were made. December 12, 1944 was the return day, and the petition for probate was in order for hearing on that date. Forest E. Luddon, as one of the subscribing witnesses to the instrument, made an affidavit before Donat J. Levesque, Register of Probate, on December 6, 1944. The Luddon affidavit was offered as evidence on December 12, 1944, and the will was allowed on December 12, 1944.

More than four years after allowance of the will, on March 21, 1949 the appellant, Roy C. Knapp, as sole surviving heir at law, filed a petition in the Probate Court for Androscoggin County stating that "the witness' affidavit in support of the allowance of said will of said late Fred E. Knapp was taken before the term of the Probate Court to which the petition for allowance was returnable and that to allow said will would be contrary to the Rules of the Probate Court," and the petitioner asked for revocation of the order and decree allowing the will, the revocation of decree allowing the first and final account, and revocation of decree for distribution.

This petition of Roy C. Knapp was denied by Armand A. Dufresne, Jr., Judge of Probate, on September 26, 1949.

The petitioner appealed to the Superior Court as the Supreme Court of Probate, which court on January 16, 1950 "denied and dismissed" the appeal. The petitioner then filed the exceptions now before the Law Court.

Rule XXXI of the Probate Court, 130 Me. 534, is as follows:

> "Wills must in every case be proved and allowed in open court, and in case the testimony of the witness or witnesses proving the will is not taken down by the court stenographer and certified, the testimony shall be preserved by an affidavit taken before the Judge or Register, and filed with the other papers in the case, and in no case shall evidence be taken out to prove said will before the return day of the petition for probate thereof."

This Rule XXXI of Practice and Procedure in the Probate Courts of Maine was adopted in 1931 under the authority of Revised Statutes (1930), Chapter 75, Section 48; Revised Statutes (1944), Chapter 140, Section 49; Rules of Probate Court, 130 Me. 527, 534. A rule has the force of law and is binding upon the court, as well as upon parties, "if not repugnant to law." *Fox* v. *Conway Ins. Co.*, 53 Me. 107, 110; *Cunningham* v. *Long*, 125 Me. 494; *Nickerson* v. *Nickerson*, 36 Me. 417; *Maberry* v. *Morse*, 43 Me. 176; *Hill* v. *Finnemore*, 132 Me. 459, 471; "Courts" 14 Am. Jur., 355, Section 150-152. The rule cannot change a statute. The statute controls. *Nissen* v. *Flaherty*, 117 Me. 534; 21 C. J. S. 260, Sections 170-172, citing *Nissen* v. *Flaherty*.

The statute relating to practice and procedure in proving a will where (as in this case), there are no objections, is as follows:

> "When it clearly appears to the judge by the written consent of the heirs at law or otherwise that there is no objection thereto, he may decree the probate of any will upon the testimony of one or more of the 3 subscribing witnesses required by law, who can substantiate all the requisite facts,

> and the affidavit of such witness or witnesses taken before the register of probate may be received as evidence, or, in the cases described in the preceding section, upon the depositions of one or more of the subscribing witnesses, substantiating the facts."
>
> Revised Statutes (1944), Chapter 141, Section 7.

A Probate Court may, of course, vacate or annul a prior decree, upon petition therefor, which is clearly shown to be without foundation in law or in fact, or "wrongfully obtained without legal evidence produced in court." When the statute provided (as it formerly did) for regular terms of court in the Probate Court, for example, the judge had no authority to hear evidence in vacation. *Merrill Trust Company, Appellant,* 104 Me. 566. Probate courts are but creatures of statute and have special and limited jurisdiction. They have no jurisdiction and no powers except such as are derived from statute. The course of proceedings prescribed by law must be complied with to give jurisdiction. *Waitt, Appellant,* 140 Me. 109. See analogy by Chief Justice Cornish in *Conners* Case, 121 Me. 37, 41.

The petitioner claims, in this case, that the Probate Court, had no jurisdiction to make the decree of December 12, 1944 allowing the decedent's will, because he says the affidavit of the subscribing witness was signed before the Register on December 6, 1944, and that this decree of December 12, 1944 was void, and all the succeeding decrees are void.

It was stipulated and agreed that the petitioner had notice "in time to appear and object to the allowance of the will." There was no appearance and no objections. The probate docket further shows a claim filed by the estate of Lida A. Knapp, the executrix widow, and life tenant, and the appointment of Oral E. Holmes as administrator d. b. n. c. t. a., and that distribution was ordered and final accounts allowed.

The attorneys representing the administrator c. t. a. and the residuary legatees maintain, with reason, that the statute controls, that the rule does not conflict with the statute, and that the records here show no violation of the statute or the rule.

The statute contemplates the testimony of one or more of the subscribing witnesses (or a deposition) to be sufficient when there is no objection raised to the probate of a will. The statute further contemplates, when no objection to the probate, that the proponent may offer for evidence the affidavit of a subscribing witness taken before the register. The affidavit becomes and is evidence by virtue of the statute. No time is stated in the statute as to when the affidavit may be made before the register. It must, of course, be made before it is offered, and before it becomes statutory evidence. It may be made sometime before the coming in of the court on return day, because the court return day does not commence until the hour for the court to come in. There is nothing to prevent the making of the affidavit with the register at any time after the petition for probate is filed and before the return day. It cannot be used if there are objections to the probate of the will, and it is not evidence if there are objections. There is no necessity for an affidavit to be taken before the register, when the court is in session, on or after return day, because the rule then permits the Judge of Probate as well as the register, to take an affidavit to preserve testimony. The rule supplements the statute and is not in conflict with it. *Witzler* v. *Collins*, 70 Me. 290.

The rule simply provides that no evidence to prove the will shall be taken out before the Judge of Probate until the return day. The Judge of Probate cannot take testimony or receive evidence until return day. If there is no objection to the allowance of the will, an affidavit taken at any time before the register, may be received by the Judge of Probate as evidence (so provided by the statute), or to pre-

serve testimony given at a hearing, an affidavit may be taken before the judge or register (as provided by the rule).

A brief history of the statute and the rule may clarify and be of interest. Under the statutes of 1903, if there were no objections, the Judge of Probate could decree the probate of any will upon the testimony (or deposition) of one of the three subscribing witnesses. The witness must, however, testify or give his deposition under a commission. Revised Statutes of Maine (1903), Chapter 66, Sections 6 and 7. In the year 1915 by Chapter 289 of the Public Laws, the legislature made this matter of routine practice more convenient and less expensive for parties and attorneys, in providing that whenever no objections are offered by any party interested, "the affidavit of such witness or witnesses taken before the Register of Probate may be received as evidence." No time was fixed as to when the affidavit was to be taken, and, as the statute was to remedy inconvenience and unnecessary expense, it must be presumed that the affidavit could be taken at any convenient time after the petition for probate was filed.

Probate Rule XXXI, is not inconsistent with the statute. The rule does not state that the affidavit shall not be taken by the register before return day. It is the *evidence* that shall not "be taken out to prove said will before the return day." Rule XXXI, 130 Me. 534. This differs from the probate rule pertaining to depositions, because it is distinctly stated in Rule IX that "no commission to take a deposition of witnesses to a will shall issue before the return day of the petition for probate." Rule IX, 130 Me. 530. We must assume that the learned judges and registers of probate who drafted these rules, which were approved by the Supreme Judicial Court, wrote them with the statutes in view. That no definite time was fixed for the making of affidavit, and a definite time was fixed for a commission to issue, is a compelling fact. The purpose is clear. The affidavit may be taken at any time because it cannot become evidence if objection is raised. A commission should not issue until re-

turn day because of the possibility of appearances and objections on that day.

The rules of the Probate Court adopted in 1916 provided in Rule XXXII that wills must be proved in open court and in "term time," and if the testimony to prove the will was not taken by a stenographer it should be preserved by affidavit taken before the judge or register. Rules of Probate Court, 114 Maine, 576, 582. The terms of the Probate Court were abolished by Public Laws of Maine 1923, Chapter 180, since which time Probate Courts are in constant session. Revised Statutes (1944), Chapter 140, Section 5. Therefore, the Rule XXXII of 1916 was not applicable after 1923 because wills were no longer to be proved in "term time." The present Rule XXXI takes into consideration the return day, or thereafter, as the court is in constant session. The judge may now on the return day, or after, receive evidence of the witness to a will through the oral testimony from the witness, or by receiving an affidavit previously taken before the register if there are no objections.

The interested parties to a petition for probate have an absolute and unqualified right to expect that legal notice of the return day of the petition will be given. Notice and hearing is fundamental. After notice of the pendency of the petition, any interested party may appear in the Probate Court for the purpose of making objections. If there is written consent by the heirs at law, or if there is no appearance, or if there are no objections, and if it clearly appears to the Judge of Probate "that there is no objection thereto he may decree the probate of any will upon the testimony of one or more of the three subscribing witnesses" or "the affidavit of such witness or witnesses taken before the Register of Probate may be received as evidence." Revised Statutes (1944), Chapter 141, Section 7. "Wills must in every case be proved and allowed in open court," Rule XXXI, 130 Me. 534, and it is in open court on, or after, the return day that the Judge of Probate may receive an affi-

davit previously taken before the register. It is only when there is no objection that such an affidavit becomes or is evidence. An affidavit is "evidence taken out" when no objections and when presented to the Judge of Probate on, or after, the return day of the petition for probate.

If an affidavit taken before the register is the evidence upon which the decree is made, because no objections to the probate of the will, an appeal may still be entered by any "person aggrieved." Revised Statutes (1944), Chapter 140, Section 32.

The petitioner in this case received notice and raised no objection to the petition for probate. The affidavit taken before the register on December 6, 1944 was proper evidence on December 12, 1944 under the circumstances in this case. The petitioner took no appeal from the decree of December 12, 1944 allowing the will. Revised Statutes (1944), Chapter 155, Section 15. The decision of the Judge of Probate denying this petition to reopen and to annul the decree of December 12, 1944 was correct, as was the succeeding decision of the Justice of the Superior Court sitting as the Supreme Court of Probate.

Exceptions overruled.

HARLEY J. DEBLOIS ET AL.

vs.

ROY C. DUNKLING ET AL.

Sagadahoc. Opinion, June 12, 1950.

Bills and Notes. Damages. Courts. Remittitur.

In motions to set aside verdicts for admitted error in awarding damages in excess of the amount which could be awarded in the cause, whether the motion be directed to the presiding justice or to this court, the court under appropriate circumstances may (a) set the verdict aside unconditionally and order a new trial, (b) may set the verdict aside and order a new trial on the question of damages only, or (c) may make a conditional order overruling the motion if the plaintiff within a time fixed by the court remits all of the verdict in excess of the amount specified in the order, and further providing that unless the same be done as specified, the motion be sustained.

Whether a *remittitur* will remove the infirmity of excess will depend upon the facts in the case, the judgment of the court in view of the whole evidence, and the justness of the verdict except for its amount.

ON MOTION.

Action to recover a balance due plus interest upon a promissory note. After verdict for the plaintiff defendants made a motion to the presiding justice to set aside the verdict and grant a new trial. The presiding justice ordered a *remittitur,* otherwise motion sustained. Plaintiffs thereupon remitted the excess as directed. Defendants filed a motion to the Law Court under R. S., 1944, Chap. 100, Sec. 60 for a new trial, alleging the same grounds set forth before the court at *nisi.* Motion overruled. Judgment to be entered on the verdict as diminished by the *remittitur.*

Case fully appears below.

Harvey R. Pease,
Burleigh Martin, for plaintiffs.

Edward W. Bridgham,
Harold J. Rubin, for defendants.

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

MERRILL, J. On motion. This action was brought by the plaintiffs against the defendants on a promissory note dated February 1, 1946, signed by the defendants and payable to the plaintiffs in the principal sum of $5,445 in payments as follows:

> "The sum of Twenty-eight Hundred Dollars ($2800.) on or before August 25, 1946; the sum of not less than One Thousand Dollars ($1000.) on or before October 1, 1947; the sum of not less than One Thousand Dollars ($1000.) on or before October 1, 1948 and the sum of Six Hundred and Forty-five Dollars ($645.) or the balance remaining unpaid on or before October 1, 1949, with interest on said sum at the rate of five and one half per centum per annum, during said term and for such further time as said principal sum or any part thereof shall remain unpaid, payable semi annually on the first days of August and February."

On August 26, 1946 the defendant, Ray C. Dunkling, paid the plaintiff, Harley J. DeBlois $3,000, which sum the latter endorsed on the note as a payment thereon. The action was brought to recover the entire balance of the note, together with interest. The writ was dated May 5, 1948. At the trial the note having been introduced in evidence and it appearing that none of the principal of the note payable after October 1, 1947 was due and payable at the time the action was commenced, the plaintiffs waived any claim to recover any installments of principal or interest accruing after the date of the writ. On the fifth day of the June

Term 1949 the jury rendered the following verdict, which verdict was affirmed and recorded:

"(Verdict)

For Plaintiff

STATE OF MAINE

SAGADAHOC COUNTY, ss.

SUPERIOR COURT June Term, A.D. 1949

No. 9500

HARLEY J. DeBLOIS, et als Plaintiff
versus
RAY C. DUNKLING, et al Defendant

The Jury find for the Plaintiff Harley J. DeBlois et als and assess damages for the Plaintiff in the sum of Twenty-three hundred and ninety-four dollars 2394.00 plus interest at five and one-half per cent (5-½) from Aug. 26, 1946 to May 5, 1948

JUSTUS R. RIPLEY Foreman of Jury"

After verdict and on the tenth day of the term at which the verdict was rendered, defendants made a motion to the presiding justice to set aside said verdict and grant a new trial on the following grounds:

"1st. Because the verdict is against law.
2nd. Because the verdict is against evidence.
3rd. Because the verdict is against the weight of evidence.
4th. Because the damages are illegal, to wit, uncertain, not in proper form, inconclusive and improper, and cannot be reduced to certainty by computation."

Whereupon the presiding justice, on June 27, 1949, and during the term at which said verdict was rendered made the following order:

"If the plaintiffs, within 30 days, shall remit all of the verdict in excess of $1231.41, motion overruled; otherwise motion sustained."

On the same day the plaintiffs remitted the excess as stipulated in the order of the presiding justice. Thereafterwards, on the same day, and during said term, defendants, as authorized by R. S., Chap. 100, Sec. 60, filed a motion to this court to set the verdict aside and for a new trial, alleging in identical language the same reasons contained in their prior motion to the presiding justice. It is on this motion that the case is now before this court.

During argument before this court, the first three grounds of the motion were expressly waived, and the cause was argued solely upon the fourth ground. During the argument it was admitted and agreed that $1,231.41, to which sum the verdict had been reduced by *remittitur*, was the exact amount for which verdict should have been rendered by the jury if they found for the plaintiffs.

Although the form of the verdict is not to be commended, it sufficiently identifies the case in which, and the parties in favor of and against whom it is rendered. It clearly indicates that it was rendered in favor of the plaintiffs and against the defendants. Furthermore, its amount, although not stated with technical accuracy, can be determined from what is stated therein with mathematical certainty. These technical errors which are in form rather than substance are not in and of themselves sufficient to vitiate the verdict nor to justify setting the same aside unconditionally.

The amount of the verdict as rendered and as affirmed and recorded was erroneous. The damages assessed are in excess of any amount which properly or legally could have been awarded. The amount awarded clearly included the installments of the note which were not due and payable at the time the action was commenced.

On the other hand, the exact amount for which the verdict, if for the plaintiffs, should have been rendered can be computed with mathematical accuracy. The presiding jus-

tice admittedly correctly computed this amount at $1,231.41 and set it forth in his conditional order hereinbefore quoted. The plaintiffs had remitted all of the verdict in excess of this amount prior to the filing by the defendants of their motion directed to this court. As this *remittitur* was filed subsequent to the making of the order by the presiding justice hereinbefore set forth, it must be held that the remission was made with the consent of the presiding justice.

This case, as presented to us, does not involve the exercise of its authority, by the court at *nisi prius*, to cause the correction of verdicts erroneous upon their face, either in matters of form or of substance, nor when, nor under what circumstances such authority as is possessed by the court with respect thereto may be exercised. The authorities cited by the defendants with respect to these questions, *Bolster, Exr.* v. *Cummings*, 6 Me. 85; *Blake* v. *Blossom*, 15 Me. 394; *Ward* v. *Bailey*, 23 Me. 316; *Little* v. *Larrabee*, 2 Me. 37; *Snell* v. *Bangor Steam Navigation Company*, 30 Me. 337; *Doe* v. *Scribner*, 36 Me. 168; *Beal* v. *Cunningham*, 42 Me. 362; *Weston* v. *Gilmore*, 63 Me. 493 and *Childs* v. *Carpenter*, 87 Me. 114, are not in point. These cases all relate to corrections or suggested corrections of the verdict itself. Neither the court nor the jury made or attempted to make a correction of this verdict.

The foregoing cases cited by the defendants neither discuss nor decide whether the plaintiff may file a *remittitur* of the excess over and above the amount for which a verdict should have been rendered, when that amount is demonstrable with mathematical certainty and the jury has erroneously rendered a verdict in excess thereof. Neither do the cases cited discuss nor decide the effect of such *remittitur*. Nor do the cases cited either discuss or decide the power and authority of the court to make an order overruling a motion to set aside such erroneous verdict, conditioned upon the filing of such *remittitur* by the plaintiff, and in the alternative, upon failure to file such *remittitur*,

sustaining the motion and setting the verdict aside. These are the questions involved in this case as now before us, and it is upon their solution that our decision must rest. The power and authority of the trial court to correct or to direct or permit the correction of an erroneous verdict either in matters of form or substance is not before us for decision in this case.

In motions to set aside verdicts for admitted error in awarding damages in excess of the amount which could be awarded in the cause, whether the motion be directed to the presiding justice or to this court, the court under appropriate circumstances may (a) set the verdict aside unconditionally and order a new trial, (b) may set the verdict aside and order a new trial on the question of damages only, or (c) may make a conditional order overruling the motion if the plaintiff within a time fixed by the court remits all of the verdict in excess of the amount specified in the order, and further providing that unless the same be done as specified, the motion be sustained. The authority of the courts to make such orders is such an established rule of practice in this state that no citation of authorities is needed in support thereof.

We are not unmindful that the court in its opinion in *Weston* v. *Gilmore,* 63 Me. 493, 495, made the following statement:

> "where the error has been committed by the jury, either by returning a verdict for the wrong party, or for a larger or smaller sum than they intended, and by the amendment proposed the verdict would be reversed, or the damages increased or diminished, and the substantial rights of the parties thus changed, when the verdict has been affirmed in open court, and the jury have separated and become accessible to the parties, the only remedy for a mistake is by setting the verdict aside and granting a new trial."

We do not understand nor do we believe that the court in that statement intended to deny the power of a court to

overrule a motion for a new trial, where the mistake was in rendering a verdict in excess of the amount for which it is mathematically demonstrable that the verdict should have been rendered, conditioned upon the filing of a *remittitur* of the excess. The case of *Weston* v. *Gilmore* was before the court upon exceptions to the action of the trial court directing a jury, after its verdict had been declared, affirmed, recorded, and the jury had separated, to increase the amount of the verdict which had been unintentionally rendered only for the amount of the interest reckoned by it upon the principal sum found by the jury to be due, by including therein such principal sum. The statement "the *only* remedy for a mistake is by setting the verdict aside and granting a new trial" (emphasis ours) is at best *dictum.* If that statement be interpreted as denying the right of the court to overrule the motion for a new trial conditioned upon filing a *remittitur* of the excess over and above the amount for which it may be demonstrated with mathematical certainty that the verdict should have been rendered, it is not in accord with sound legal principles and must yield to the rule as heretofore announced herein.

Although the effect of filing a *remittitur* is to reduce the verdict by the sum so remitted, and although no judgment in excess of the balance remaining can be rendered upon the verdict, it does not necessarily follow that by a voluntary *remittitur* of all sums in excess of the amount for which the verdict should have been rendered, a plaintiff may cure all of the infirmities in the verdict flowing from the awarding of excessive damages by the jury. Such *remittitur* will, especially if made with the consent of the court, remove the infirmity of excess as such. However, it may or may not cure the effect of the return of an excessive verdict. This will depend upon the facts in the case and the judgment of the court in view of the whole evidence. The determination of this question in large measure will depend upon the justness of the verdict except as to its amount. With respect to curing a verdict by a *remittitur,* when the verdict was

in excess of that which could be rendered in the case, we said in *Holmes* v. *Gerry,* 55 Me. 299 at 328:

> "This is often done, where it is clear that an unintentional mistake has been made by the jury, and that the party is entitled to a verdict in his favor, and the amount is a matter of mere calculation, and not seriously in dispute. But it does not follow, as a settled rule, that in every case where a jury gives all that is demanded and something beyond, that the verdict may be amended by a remission of the excess. This must depend upon the facts in the case, and the judgment of the Court in view of the whole evidence."

Of the alternate courses of conduct open to this court with respect to this motion, we cannot make an order overruling the same on condition that the plaintiffs remit the excess over and above the proper amount. It would be meaningless to make an order conditioned upon the doing of that which has already been effectively done. To set aside the verdict and order a new trial on the question of damages only would likewise be an idle gesture. The verdict has already been reduced to the exact sum for which it should have been, and except for the accrual of interest since the former trial, would have to be rendered upon a new trial on the question of damages only.

The choice lies between (a) overruling the motion, or (b) sustaining it unconditionally and ordering a new trial.

The real issue between the parties in this case was whether the $3,000 payment made on August 26, 1946 was a payment on account of the note or was made to and accepted by the plaintiffs in full payment and satisfaction of the note. As the case was tried the controverted issue was liability, not the amount for which the defendants were liable, if at all. The amount of recovery, if any, was incidental and was a mere matter of a mathematical computation of the amount due on the note, according to its tenor at the time the suit was instituted. On the controverted

issue of liability, the testimony was conflicting. It was so clearly a question of fact for the jury that the defendants have waived and abandoned the grounds of their motion to set aside the verdict as against law, evidence or the weight of evidence.

After a careful study of the entire record of the case, we are convinced that the jury were not only warranted in finding a verdict against the defendants but of the justness of such finding.

Nor does the error in the amount of the verdict, in our opinion, indicate that the jury misunderstood the real issue of the case, to which the conflicting testimony was principally directed, that of liability. We must assume that the presiding justice correctly instructed the jury on the question of damages. However, considering the declaration as it was framed and the case as it was tried, in our opinion the error as to the amount of damages recoverable was an unintentional mistake on the part of the jury.

Had the amount of the verdict not been reduced by *remittitur*, we would not, on the record before us, set the verdict aside unconditionally but would make the same conditional order which was made by the presiding justice. As the verdict had been reduced by *remittitur* to the correct amount before the present motion directed to this court was filed, the mistake in its amount made by the jury should not vitiate its finding on the question of liability, nor should we now set the verdict aside unconditionally.

The verdict already having been reduced by *remittitur* to the exact amount for which the defendants admit it should have been rendered, the motion is overruled.

Motion overruled.

Judgment to be entered on the verdict as diminished by the remittitur to the sum of $1,231.41.

RULE 2 (AMENDMENT)

STATE OF MAINE

Supreme Judicial Court June 13, 1950.

All of the Justices of the Supreme Judicial Court concurring, Rule 2 of the Revised Rules of the Supreme Judicial Court, 129 Me. 523, as amended February 6, 1942, 138 Me. 366, is further amended so as to read as follows:

Regular sessions of the Supreme Judicial Court may be held on the first Tuesday of each month, with the exception of July and August in any county whenever such sessions become necessary for the presentation of matters and transaction of business within the exclusive jurisdiction of said court or within the concurrent jurisdiction of the Supreme Judicial and Superior Courts, and process may be made returnable to the Supreme Judicial Court on said dates. Special sessions of the Supreme Judicial Court for the transaction of any business within its jurisdiction may be held in any county at any time whenever the Chief Justice determines that public convenience and necessity so require.

HAROLD H. MURCHIE
Chief Justice of the Supreme Judicial Court.

A true copy.
Attest:

LESLIE E. NORWOOD
Clerk of said Supreme Judicial Court

[SEAL]

ISABEL A. CASSIDY, ET AL.
vs.
EDWARD P. MURRAY
AND
LUCILLE O'BRIEN, TRUSTEES, ET AL.

Penobscot. Opinion, June 16, 1950.

Attorneys Fees. Estates.

Attorneys fees in cases involving the construction of a will should be moderate and may be thrown upon the estate unless the cause is frivolous.

There are many different elements which affect the value of legal services—skill, standing of person employed, nature of controversy, amount involved, time bestowed, ultimate results, and charges made by other attorneys in same locality.

ON APPEAL.

This is an appeal from a decree of a sitting justice awarding attorneys fees in accordance with a direction of the Law Court. Appeal sustained. Case remanded to sitting justice with directions to fix the reasonable counsel fees and disbursements in accordance with this opinion.

John H. Needham,
Frank G. Fellows, for plaintiff.

Michael Pilot, for defendant.

SITTING: MURCHIE, C. J., THAXTER, NULTY, WILLIAMSON, JJ. (FELLOWS, MERRILL, JJ., did not sit.)

NULTY, J. This case comes before this court on appeal by the defendant trustees from a decree of the sitting justice awarding counsel fees for services rendered by all attorneys in accordance with a direction from this court in the case of *Cassidy et al.* v. *Murray et al.*, 144 Me. 326, 68 A. (2nd) 390, seeking a certain construction of the will of

John Cassidy who died testate March 26, 1918. Said direction reads in part as follows: "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 by said decree in their account."

It is the contention of the defendant trustees that the allowance of the fees was unreasonable and constitutes an abuse of discretion. The fees and disbursements allowed by said decree from which said appeal is now taken were as follows:

John H. Needham, Attorney for the Plaintiff	$10,516.22
Frank G. Fellows, Guardian Ad Litem	10,060.50
Michael Pilot, Attorney for the Trustees	10,000.00

It should be noted that the fees of the various attorneys were fixed at the sum of $10,000 each.

Appeals in equity to the Law Court from decrees and orders of a sitting justice under the familiar law of our state are heard anew on the record. *Redman* v. *Hurley,* 89 Me. 428, 36 A. 906; *Trask* v. *Chase,* 107 Me. 137, 150, 77 A. 698, 704; *Sears, Roebuck & Co.* v. *City of Portland,* 144 Me. 250, 68 A. (2nd) 12, 16.

Revised Statutes (1944), Chap. 95, Sec. 21, in part directs with respect to equity appeals and the duty of the Law Court therein: "and shall on such appeal, affirm, reverse, or modify the decree of the court below, or remand the cause for further proceedings, as it deems proper." Our court has held that 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. Our court also said in *Leighton* v. *Leighton,* 91 Me. 593, 603, 40 A. 671, 675, speaking of findings of fact:

> "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."

In *Sears, Roebuck & Co.* v. *City of Portland, supra,* we said (speaking of findings of fact):

> "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."

In the instant case we have before us the decree of the sitting justice in the court below, made, we assume, in conformity with the direction of this court referred to herein and we assume that it reflects his judgment with respect to the fixing of reasonable counsel fees for all parties, having in mind the meaning of the direction. The Massachusetts Court in *Cummings* v. *The National Shawmut Bank,* 284 Mass. 563, 569, 188 N. E. 489, 143 A. L. R. 725, in a case involving reasonable attorneys' fees, said:

> "In determining what is a fair and reasonable charge to be made by an attorney for his services many considerations are pertinent, including the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, and the results secured. Neither the time spent nor any other single factor is necessarily decisive of what is to be considered as a fair and reasonable charge for such services."

Our court in *Peabody et al.* v. *Conley et al.,* 111 Me. 174, 177, 88 A. 411, in a suit involving the value of professional legal services (although the case was decided on a pleading question) said:

> "Many different elements affect their value, such as skill and standing of the person employed, the nature of the controversy, the amount involved, the time and labor bestowed, and the ultimate success or failure of the litigation. A litigated case in fact is so nearly a unit that it should be considered in its entirety when determining the value of services rendered in its prosecution or defense."

Our court also said in *Moore* v. *Alden,* 80 Me. 301, 307, 14 A. 199, a case which involved the construction of a will, as did the original *Cassidy* case referred to herein, in speaking of requested allowances for the expense of professional services and disbursements:

> "Parties to the bill ask for allowances for the expense of professional services and disbursements. Such expense may be thrown upon the estate, unless the petitioner discloses a frivolous or unnecessary case. *Howland* v. *Green,* 108 Mass. 283; *Straw* v. *Societies,* 67 Maine, 493. But such charges should usually be moderate, for several reasons. Because there should not be strong temptation to multiply applications to the court for the exposition of wills; because representatives of estates have not the same stimulus for their protection as living owners have; and because, as a rule, such cases involve a peculiar kind of litigation which casts less responsibility than usual upon counsel, and more upon the court."

With the principles set forth in the last three cited cases in mind and having examined and considered not only the record in the instant case, which sets forth at considerable length the qualifications of the attorneys and also describes their services performed in this matter, and having had the benefit of the entire record in the original *Cassidy* case decided September 15, 1949, and referred to herein and also having in mind, as said in *Moore* v. *Alden, supra,* that such charges should usually be moderate, it is our opinion that the decree of the sitting justice should be modified in conformity with what we consider should be the settled law with respect to the meaning of the direction relating to the

allowance of reasonable counsel fees in matters of this kind. The appeal of the trustees is sustained. The case is remanded to the court below with instructions to the sitting justice to fix the counsel fees of the attorneys involved in this case in the following amounts:

John H. Needham, Attorney for the Plaintiff	$5,000.00
Frank G. Fellows, Guardian Ad Litem	7,500.00
Michael Pilot, Attorney for the Trustees	1,500.00

to which in each case may be added the actual disbursements.

The mandate will read

Appeal sustained. Case remanded to Sitting Justice with directions to fix the reasonable counsel fees and disbursements in accordance with this opinion.

So ordered.

LOREN MORNEAULT

vs.

THE INHABITANTS OF THE TOWN OF HAMPDEN

Penobscot. Opinion, June 17, 1950.

Negligence. Towns. Highways.

The liability of a town for damages caused by a defect in a highway arises solely by virtue of statute.

Where it appears that the jury was plainly wrong in finding freedom from contributory negligence, a new trial will be granted.

ON MOTION.

This is an action of negligence to recover damages caused by a defect in the highway. After a verdict for the plaintiff, the defendant moved for a new trial. Motion sustained. New trial granted.

Eaton & Peabody,
Arnold L. Veague, for plaintiff.

Randolph A. Weatherbee, for defendant.

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

WILLIAMSON, J. On motion for a new trial, the defendant town has the burden of establishing that the jury was plainly wrong in finding first, that the motor vehicle accident with resulting damage was caused by a defect in the highway, or second, that the plaintiff was free from contributory negligence. The ground in the motion that the damages were excessive was not argued by the defendant and is, therefore, considered to have been abandoned.

The testimony taken in the light most favorable to the plaintiff discloses the following facts.

About midnight on May 26, 1949 the plaintiff, a young man twenty years of age and a licensed driver, alone in his automobile which was registered in his name, was proceeding northerly on Route 1 in the defendant town at the rate of 35 miles per hour. From a distance of two-tenths of a mile he first observed two lighted flares apparently placed one on each side of the traveled way. The flares were of the type commonly used to warn of danger and were visible to him the entire distance to the scene of the accident. Without slackening his speed and without observation of the dangerous condition existing, he continued between the flares and collided with a pile of dirt. The plaintiff concisely described the cause of the accident in these words, "I see two lights, never saw the pile. I went between them. That is all I recall." Further, a state police officer testified that shortly after the accident the plaintiff told him, "he had been out for the evening and was coming back from Hampden and said he didn't see the pile of dirt at all. Remembered seeing the lights and he thought he should go between the lights which he did."

Route 1 is a main highway with a traveled surface twenty feet in width of concrete covered with tar. Traveling conditions were bad. To use the words of the plaintiff, "It was raining, a little foggy-like. Hard to see. Pretty dark." In answer to a question by the court, the plaintiff said, "I could see where my headlights showed."

On the day of the accident the town had deposited dirt from an excavation of a sewer trench on the easterly side of the way in a pile higher at its peak than an automobile and covering the easterly and substantially all of the westerly half of the twenty-foot pavement. Traffic passed the obstruction by turning through the entrance yard of a roadside diner located a few feet westerly of the highway.

Three flares, lighted at the time of the accident, were placed by the town to warn of the excavation and the pile

of dirt; one near the excavation, and one on the easterly side and one on the westerly side of the pile of dirt.

A barricade guarded the open trench. Neither the exact nature of the barricade nor how far it extended into the highway along the southerly edge of the pile of dirt nor what protection, if any, it gave to the approaching traveler is clear.

In addition to the three flares, a street lamp located a few feet southerly of the pile of dirt was lighted. There were lights in the diner as well but again it is not clear to what extent, if at all, the light therefrom affected conditions on the highway.

Three miles southerly of the scene, a construction project in no way connected with the excavation of the sewer trench was marked by flares, one on each side of the highway. The plaintiff properly proceeded between the flares at that point.

In passing upon the case, we are governed by the familiar rule that the evidence with all proper inferences drawn therefrom is to be taken in the light most favorable to the jury's findings. Only if the jury verdict was manifestly wrong, is the verdict to be set aside. *Tibbetts* v. *Central Maine Power Company,* 142 Me. 190, 49 A. (2nd) 65 (1946); *Spang* v. *Cote et al.,* 144 Me. 338, 68 A. (2nd) 823 (1949)

Liability of a town in an action of this nature arises solely by virtue of the statute. Whether a town has failed to maintain a way in a manner reasonably safe and convenient for travelers by night as well as by day within the meaning of the statute is a question of fact. *R. S., Chap. 84, Sec. 62 (as amended by Laws of 1949, Chap. 349, Sec. 117) and Sec. 88 (1944). Barnes* v. *Rumford,* 96 Me. 315 at 325, 52 A. 844 at 848 (1902). The jury here found that the condition of the way constituted a defect and was not reasonably safe and convenient.

The statute in Section 88 provides as a requirement of liability that certain town officers had 24 hours actual notice of the defect and further that, if the sufferer had notice previous to the time of the injury, he cannot recover unless he has previously given notice of the defective condition. It was not necessary here that a twenty-four hour notice be had inasmuch as the town itself, by its town agent who acts as the road commissioner, caused the creation of the defect of which the plaintiff complains. *Holmes* v. *Paris,* 75 Me. 559 (1884). Nor did the plaintiff have notice of the defective condition prior to his injuries. It was stipulated at the trial that the plaintiff gave the proper notice of his claim within fourteen days after the accident.

The requirements of the statute were properly met by the plaintiff and he was entitled to have the jury determine whether or not a defect existed in fact. We cannot say that the jury manifestly erred in its finding on this issue.

The remaining and decisive issue involves contributory negligence of the plaintiff. The rule has been stated in *Barnes* v. *Rumford, supra,* at page 321 as follows:

> "If the negligence of the plaintiff, or any other efficient independent cause for which neither the plaintiff nor the town is responsible, contributes to produce the injury, the plaintiff cannot recover. It must appear that the defect in the way was the sole cause of the injury."

See also *Whitman* v. *Lewiston,* 97 Me. 519, 55 A. 414 (1903).

We are faced with the familiar problem of determining whether as a matter of law the jury manifestly erred in finding that the plaintiff in his conduct was the reasonably prudent man under the circumstances.

A lighted flare spells danger. The traveler is so warned that he may be on guard against whatever lies ahead.

Our reasonably prudent man with whom we measure the plaintiff does not assume that lighted flares on opposite

sides of the highway mark a danger outside of and not within the way. The place of danger is somewhere in the near vicinity. The flares do not necessarily tell more.

Such a man does not enter the zone of danger in the darkness and fog and rain without slackening speed and without observing what must have been seen had he been attentive and in blind reliance that the path of safety lies between the flares. He does not assume from the fact that travel passed between flares three miles southerly that such will be the case when warning of new danger is given. The facts do not here disclose a stretch of highway under construction with the traveler guided at the outset between flares and then directed to a place of danger.

It is unnecessary to restate the rule of law here applicable. The principles are set forth in *Spang* v. *Cote, supra,* and in cases there cited.

The jury manifestly erred in finding the plaintiff was free from contributory negligence. The verdict must be set aside.

The entry will be

Motion sustained

New trial granted.

THE ST. JOHNSBURY TRUCKING CO., INC.

vs.

JOSEPH ROLLINS

Cumberland. Opinion, June 20, 1950.

Negligence. Automobiles.

The driver of an automobile faced with a sudden emergency and possible impending collision caused by the negligence of the defendant is not necessarily guilty of contributory negligence because he turns so far to the right in attempting to avoid such collision that his wheels slip off the shoulder of the road, concealed by drifting snow, and overturns his vehicle. The determination whether such action is that of an ordinarily prudent man under like circumstances is a question of fact which should be left to the jury.

While the standard of care required is that which would be exercised by the ordinarily prudent person, it is only that degree of care which such person would use under the same circumstances.

ON EXCEPTIONS.

This is an action of negligence. At the close of the plaintiff's testimony, the presiding justice ordered a non-suit. The case is before the Law Court on plaintiff's exceptions to this ruling. Exceptions sustained. Case fully appears below.

Wilfred A. Hay,
Charles A. Pomeroy, for plaintiff.

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

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (THAXTER, J., sat during argument, but did not participate in consultation or opinion.)

MERRILL, J. On exceptions. This case was tried before a jury at the November 1949 Term of the Superior Court

for Cumberland County. At the close of the evidence the presiding justice ordered a nonsuit. The case is before us on plaintiff's exceptions to this ruling.

The facts in the case were comparatively simple. In attempting to avoid collision with the defendant's truck which was stopped diagonally across the plaintiff's right-hand lane of a public highway and headed somewhat towards the plaintiff's approaching vehicle, the plaintiff's agent drove his tractor-trailer-milk-tank vehicle so far to his own right that although he was able to stop the same short of collision, the right-hand wheels of the trailer slipped over the concealed right-hand shoulder of the road and overturned the vehicle with the resulting damage complained of. The accident happened at about 5:30 in the afternoon of the second day of January, A. D., 1948. It was dark. It was snowing. Because of drifting snow the exact location of the shoulders of the road was obscured. The plaintiff's truck was proceeding at not exceeding twenty-five miles per hour. It was equipped with air brakes which, at that speed and on that road, could have been operated to stop the vehicle within a distance of fifty feet. It was equipped with riding lights, headlights and fog lights. At the time the accident occurred all these lights were on, the headlights being on low beam for the purpose of giving better visibility in the snowstorm. The accident happened just as the plaintiff's vehicle was entering a slight curve and just as it was leaving a straightway approximately one-fourth of a mile long.

The defendant's truck, which was painted a drab gray, as above stated, had stopped diagonally across the plaintiff's right-hand lane of the highway and was facing somewhat towards the plaintiff. The defendant's truck occupied the plaintiff's entire lane of the highway, which highway was about twenty feet wide, and left about eight feet of the highway at the plaintiff's left of the defendant's truck unoccupied.

As the nonsuit was granted at the close of the plaintiff's testimony, the defendant gave no explanation of the presence of his truck or his conduct. From the record it might be deduced that the defendant's truck was stopped for the purpose of pulling a third automobile, which had left the road on the plaintiff's right-hand side, back into the road. There was some evidence that a tow line extended from the defendant's truck to this automobile which was entirely outside of the road.

The defendant's truck was equipped with headlights which were in working order. Although the defendant's truck was thus situated either just within or at the beginning of a slight curve in the road, although it was after dark and was snowing, as the plaintiff's vehicle approached it, the defendant's truck was unlighted. Just as the plaintiff came within about one hundred fifty feet of the defendant's truck, the defendant being personally present, the headlights of the defendant's truck were suddenly turned on. As a result thereof, plaintiff was momentarily blinded. He stated that at first he thought the defendant's truck was approaching him on his own side of the highway. The plaintiff swerved to the right, slowed his vehicle, changed gears and brought the vehicle to a stop within ten feet of the defendant's truck. In doing so, the right-hand wheels of the trailer slipped over the shoulder and overturned the plaintiff's vehicle.

For the defendant to have his truck standing as it was, under the conditions then and there present, unlighted, when it was equipped with headlights in working condition, was a breach of the duty to use due and reasonable care which he owed to travelers approaching his truck from the direction in which the plaintiff was coming. A finding to the contrary by the jury could not be sustained. Such unexplained conduct on such a night and under such conditions was a wanton disregard of the rights and safety of the travelling public.

The defendant, however, urges that even if his conduct was negligent, such negligence was not the proximate cause of the plaintiff's damages because the plaintiff stopped his vehicle before actual collision with that of the defendant. This contention is without merit.

The defendant further urges that the record not only fails to establish that the plaintiff's agent was free from contributory negligence but conclusively shows that the plaintiff's damage ws proximately caused by the negligent management of its vehicle by its agent who was driving the same. In support of his contention the defendant cites the case of *Spang* v. *Cote*, 144 Me. 338, 68 Atl. (2nd) 823 as decisive.

In *Spang* v. *Cote* the plaintiff crashed into the rear end of an unlighted truck which was parked on his and its own side of the road. In that case, although the plaintiff claimed he was not blinded by the lights of a third approaching car which finally stopped, he did admit that his vision was reduced thereby. He admitted that he saw the lights of this approaching car at a distance of some eight hundred feet and that it came to a stop at least three or four hundred feet away from him. Although he admitted he was travelling at least forty miles per hour when he first observed the lights of the approaching car, and although he claimed he reduced his speed to about thirty miles per hour, the evidence clearly demonstrated that he did not reduce his speed to the extent to which he testified. In that case the plaintiff further claimed that he did not see the parked vehicle until he was within twenty-five feet of the same. In *Spang* v. *Cote* we held that on the evidence the plaintiff either negligently failed to discover the presence of the parked truck in the road or was driving his own car at such a rate of speed that he could not stop it within the range of his headlights and therefore crashed into the defendant's vehicle. In either event, we held he was guilty of contributory negligence which barred his right of action.

In the instant case the jury could well find that considering the condition of the night and the snowstorm, the plaintiff's agent driving at a rate of speed so that he could stop his vehicle within the range of his headlights, could not and should not have discovered the presence of the defendant's unlighted truck until its lights were turned on. This did not take place until the plaintiff's agent was within one hundred fifty feet of the defendant's unlighted truck. The plaintiff's agent not only could, but did stop his vehicle before collision with the defendant's truck. In this case the jury could have found that when the plaintiff's agent was suddenly and unexpectedly confronted with the lights of the defendant's truck, that they were directed along the road towards him at such an angle that at first he could not tell whether they came from an approaching or stationary car apparently on his side of the road. The jury further could have found that although the plaintiff was momentarily blinded by the defendant's lights, and that although the plaintiff could have stopped his car within a distance of fifty feet, he was faced with a sudden emergency created and caused by the negligent conduct of the defendant. The jury could have further found that the plaintiff's agent was presented with a choice which he must apparently instantaneously exercise to avoid an impending collision. His choice was between stopping his truck at the first possible moment, or swerving his truck to the right and attempting to so control it by either increasing or diminishing its speed, or ultimately stopping it, as the eventual unfolding of the situation might require. The inability to determine at the outset whether or not the defendant's truck was moving towards him or was stationary might well be an important factor in making such choice. He did all that was necessary to avoid collision with the defendant's truck. The jury could have further found that the damage was due to the fact that in seeking to avoid what he may well have reasonably believed was the threat of an imminent collision, a situation created by the defendant's negligence, he pulled

what proved to be too far to the right and that the wheels of the truck slipped over the concealed edge of the shoulder of the road and thus turned over.

It may well be that, in retrospect, it is demonstrable that had the plaintiff's agent held his course, brought his vehicle to a dead stop at the first *possible* moment there would have been neither collision nor upset. This, however, is deducible only by the use of "hindsight." But "hindsight" is not available to a person faced with an emergency with which he is suddenly confronted and which requires instantaneous action upon his part. He must act promptly, taking into consideration the circumstances as they then present themselves.

It is true that even though he was confronted by a sudden emergency created by the defendant's negligence, the plaintiff's agent was required to exercise ordinary care, that is, the care that the ordinarily prudent person would exercise under like circumstances, so that no want of such care on his part contributed to the damage suffered by the plaintiff. The burden of proof to establish this proposition was upon the plaintiff. It is to be remembered, however, that in such case the sudden emergency created by the defendant's negligence is one of the existing circumstances which must be considered in determining whether or not the plaintiff's agent was guilty of contributory negligence. While the standard of care required is that which would be exercised by the ordinarily prudent person, it is only that degree of care which such person would use under *the same circumstances.*

If one uses that degree of care which an ordinarily prudent person would have used under the same circumstances and in the same emergency, the emergency having been created by the negligence of the other, and without any prior negligence on his part contributing to produce the emergency, negligence cannot be predicated on such conduct. See *Byron* v. *O'Connor,* 130 Me. 90 and *Coombs* v.

Mackley, 127 Me. 335. This principle of law is applicable whether conduct in issue be that of the plaintiff or the defendant. Under the circumstances disclosed by the evidence in this case, the governing rule is authoritatively stated in *Coombs* v. *Mackley,* 127 Me. 335 at 339 as follows:

> "The question of ordinary care, depending on answers to other questions, some of law and some of fact, is properly left to the jury with appropriate instructions. *Larrabee* v. *Sewall,* 66 Me. 376. When a person is required to act in an emergency and in a place of impending personal peril, the law will not declare that reasonable care demands that he must choose any particular one of the alternatives presented. In such cases the law invokes the judgment of a jury. *Blair* v. *Lewiston, etc., Railway,* 110 Me. 235. Unless in extreme cases and where the facts are undisputed, which of two alternatives an intelligent and prudent person traveling the highway should select as a mode of escape from collision the law will not say, but will send to the jury the question whether the traveler acts with ordinary care. *Larrabee* v. *Sewall,* supra."

The driver of an automobile faced with a sudden emergency and possible impending collision caused by the negligence of the defendant is not necessarily guilty of contributory negligence because he turns so far to the right in attempting to avoid such collision that his wheels slip off the shoulder of the road, concealed by drifting snow, and overturns his vehicle. The determination of whether or not such action is that of an ordinarily prudent man under like circumstances is a question of fact which should be left to the jury. An affirmative answer would be justifiable. As the jury could have found that these circumstances existed in this case, it could have found that the action of the plaintiff's agent was that of a reasonably prudent man in like situation and that no negligence on his part contributed to the damage suffered by the plaintiff. As heretofore shown, the jury would have been well justified in finding that the

defendant was negligent and that his negligence was the proximate cause of the plaintiff's damage.

This case should not have been taken from the jury but should have been submitted to it for decision. There was evidence from which the jury could well find that the plaintiff had sustained the burden of proving that the defendant's negligence was the proximate cause of the damage it suffered, and that no negligence on its part or that of its agent was a contributing proximate cause thereof. Under such circumstances, to order a nonsuit was legal error and the exceptions to such order must be sustained.

Exceptions sustained.

THE LEWISTON TRUST COMPANY
vs.
THOMAS DEVENO
AND
HARRY PERLSTEIN

Androscoggin. Opinion, June 21, 1950.

Trover. Chattel Mortgages.

The sale of mortgaged personal property constitutes a conversion of the mortgagee's interest.

After the expiration of the statutory time for recording a chattel mortgage, the holder thereof, has no rights in the property mortgaged as against a purchaser, attaching creditor, or subsequent mortgagee.

One who aids or assists another in the conversion of property is a party to the conversion.

Mere advice, even when motivated by the selfish desire of personal benefit, does not constitute such aid or assistance as will make the advisor liable for the conversion advised.

ON EXCEPTIONS.

This is an action of trover. The trial court directed a verdict in favor of one of two defendants, the plaintiff having secured judgment by default against the other. The case is before the Law Court upon plaintiff's exception to the directed verdict. Exceptions overruled. Case fully appears below.

Brann & Isaacson, for plaintiff.

Frank W. Linnell, for defendant.

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

MURCHIE, C. J. On plaintiff's exceptions to the direction of a verdict for the defendant Perlstein in the Trial Court. Therein the plaintiff recovered judgment against the defendant Deveno by default. The action is trover, alleging the conversion of a motor truck owned by Deveno, which he mortgaged to the plaintiff on November 17, 1947, and sold to Morris Auto Mart on January 27, 1948, the mortgage never having been recorded. At the time of the sale there was an unpaid balance on the mortgage debt, payable at the rate of $25 per week. The sale was undoubtedly a conversion of the plaintiff's interest in the truck. *Dean* v. *Cushman,* 95 Me. 454, 50 A. 85, 55 L. R. A. 959, 85 Am. St. Rep. 425.

In testing the propriety of the directed verdict all the evidence must be viewed in the light most favorable to the plaintiff. *Heath* v. *Jaquith,* 68 Me. 433; *Burnham et al.* v. *Hecker,* 139 Me. 327, 30 A. (2nd) 801; *Stevens* v. *Frost,* 140 Me. 1, 32 A. (2nd) 164. Within this principle that given by the defendant Deveno as a witness for the plaintiff must be accepted as true. He declared that the defendant Perlstein, who was also a creditor of his, knew of the mortgage held by the plaintiff and of the offer made for the truck by

Morris Auto Mart. He says that Perlstein advised him to make the sale and implied that if the approximate $650 due him was paid, he would make Deveno a new loan of $2,500, part of which Deveno says he intended to use to pay the mortgage debt. The sale brought $1,050, all of which he turned over to Perlstein, but the new loan was never made.

On these facts the plaintiff asserts that Perlstein must be held to have participated in the conversion of the truck. The principle is undoubted that one who aids or assists another in the conversion of property is a party to it with the one aided or assisted. *Scott* v. *Perkins*, 28 Me. 22, 48 Am. Dec. 470. The principle under which he is held answerable is stated in broad terms in 65 C. J. 63, Par. 103; 26 R. C. L. 1138, Par. 51; and 53 Am. Jur. 919, Par. 138. In the first of these authorities it is declared that every person is holden for a conversion, who participates:

> "by instigating, aiding or assisting *, or * knowingly benefits by its proceeds in whole or in part."

The other authorities lay special emphasis on aiding and abetting, citing *Scott* v. *Perkins, supra,* but R. C. L. declares that liability may be grounded on advice and assistance, coupled with the acceptance of benefits, and Am. Jur. includes "conniving" with "aiding or abetting." None of the cases cited on the point, however, holds a party on facts comparable with those in the instant case so far as they are applicable to Perlstein. The statement in Am. Jur. is that the rules concerning aiding, abetting or conniving:

> "are particularly applicable where the defendant received benefit from the conversion, and subsequently approved and adopted it."

No case has been cited to us, or come to our attention, where mere advice, even when motivated by the selfish desire to benefit by having the proceeds of a conversion applied to the payment of a debt, has been held to constitute the adviser a converter.

On the facts presented we cannot be unmindful of the definiteness with which it has always been declared in this court that an unrecorded mortgage of personal property gives the mortgagee no rights against one who purchases that mortgaged property after the expiration of the recording period fixed by statute, R. S., 1944, Chap. 164, Sec. 1, even though the purchaser had knowledge of the mortgage, or against such a one who attaches it, or takes a mortgage on it (and records it). *Hayden* v. *Russell et al.*, 119 Me. 38, 109 A. 485, and cases cited therein. When Deveno made the sale the money representing the proceeds was paid to him. He owed both the plaintiff and Perlstein. He might not have applied any of the money to the payment of his debt to either. Had such been the course of events there could be no possible foundation in the authorities for the claim that Perlstein's advice constituted participation in the conversion. Thereafter all that Perlstein did was to accept the proceeds of the sale. From the fact that he accepted approximately $400 more than was due him, it must be assumed that Deveno was induced to pay the debt, and the excess, to him in the expectation of borrowing the larger sum. Whatever the fact, and with full recognition that the conduct of Perlstein does not commend itself to a desirable standard of honesty, we must decide that the plaintiff cannot hold him as a converter, liable jointly with Deveno, without giving an unrecorded mortgage of personal property a force and effect always heretofore denied it. The verdict was directed properly.

Exceptions overruled.

TREFFLE GASTONGUAY

vs.

JEAN M. MARQUIS

Androscoggin. Opinion, July 17, 1950.

Exceptions. Rules of Court.

The objections to the acceptance of a referee's report which are not specific and do not comply with rule 21, and do not raise an issue of law, cannot be considered by the Law Court.

Where the evidence amply supports a referee's interpretation of contract, objections cannot be considered which require a holding that the referee's interpretation is erroneous as a matter of law.

ON EXCEPTIONS.

This is an action on a contract to recover for money expended for labor and material and other items. Defendant pleaded the general issue and a plea of set-off. The referee found against the plaintiff and in favor of the defendant on the counter claim. The court overruled plaintiff's written objection and the case is before the Law Court on exceptions to the acceptance of the referee's report. Objection overruled.

Adrian A. Cote,
Irving Friedman,
Harris M. Isaacson, for plaintiff.

Clifford & Clifford, for defendant.

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

THAXTER, J. This is an action on a contract to recover for money expended for labor and materials and for other items of expense alleged to have been paid out by the plaintiff at the request of the defendant. The defendant filed a

plea of the general issue and a plea of set-off for sums claimed to be due the defendant in the amount of $1,238.

The dispute arose out of a written contract entered into by the parties June 18, 1948. The plaintiff claims that the plea of set-off was improperly filed, the issue being only whether there was a breach of the contract. The referee found against the plaintiff on this issue and, if that question is properly before us on the objections filed by the plaintiff, we can see no error in the referee's ruling on this point.

The defendant had started to build a house on a lot owned by him in Lewiston but abandoned his undertaking and entered into a contract with the plaintiff under the terms of which the plaintiff would, as found by the referee who heard the case, complete the erection of the house, assume the bills for lumber and materials which had been delivered on the site, and all other bills and liabilities for the construction and would pay the defendant the sum of $2,665 for the real estate on or before November 1, 1948, or at the time the property should be sold. The bills and other items which the plaintiff agreed to pay were in addition to the purchase price of $2,665 which the referee found was not involved in this suit. This action was brought to recover the sum of $294.17 which was the amount the plaintiff claimed the defendant agreed orally to pay him for protecting the work which had already been done on the property. The referee found that there was no such oral contract proved and ruled against the plaintiff on this issue. On the counterclaim amounting to $1,238, the referee found for the defendant in the sum of $1,162.34.

To the acceptance of this report the plaintiff filed thirty-one objections. The report was, however, accepted by a justice of the Superior Court and the case is before us on exceptions to such ruling.

In agreeing to the rule of reference, the parties selected their own tribunal to hear this case. Under Rule XLII ex-

ceptions are allowed only on questions of law, and in bringing forward such questions there must be a strict compliance with the provisions of Rule XXI which requires that the objections to the acceptance of the report "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." The objections, with the the possible exception of those numbered 12, 13, 14 and 24, are not specific but general. They do not raise an issue of law and cannot be considered. *Staples* v. *Littlefield,* 132 Me. 91; *Throumoulos* v. *First National Bank of Biddeford,* 132 Me. 232; *Moores* v. *Inhabitants of Town of Springfield,* 64 A. (2nd) 569, (Me. 1949); *Kennebunk, Kennebunkport & W. W. D.* v. *Maine Turnpike Authority,* 145 Me. 35, 71 A. (2nd) 520, (Me. 1950); *Dubie* v. *Branz,* 145 Me. 170, 72 A. (2nd) 219, (Me. 1950).

Objections 12, 13 and 14 are, if properly within the rule, valid only if we hold that the referee's interpretation of the contract between the parties was erroneous as a matter of law. But the evidence amply supports his construction. There was evidence to sustain the finding of the referee with reference to the allowance of the counter-claim. The 24th objection as well as all the others was properly overruled.

Exceptions overruled.

STATE OF MAINE
vs.
RAYDON COREY

Aroostook. Opinion, July 17, 1950.

Intoxicating Liquor. Continuance. Oral Argument.

The denial to a respondent of an opportunity to have a doctor's testimony and then the using of the failure against him are so prejudicial as to require a new trial.

ON EXCEPTIONS.

On complaint for operating a motor vehicle while under the influence of intoxicating liquor. At the opening of the trial, respondent filed a motion for continuance, which was denied. Exceptions were taken and allowed. During oral argument, respondent took exceptions to the court's permission to the prosecutor to pursue argument relating to a blood test which had not been introduced in evidence. After a verdict of guilty, exceptions were brought before the Law Court.

Exceptions sustained. New trial granted. Case fully appears below.

James P. Archibald, County Attorney, for State.

Donald N. Sweeney, for respondent.

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

THAXTER, J. The respondent was tried in the Superior Court for the County of Aroostook on a complaint charging that he was guilty of operating a motor vehicle while under the influence of intoxicating liquor. After a verdict of guilty the case is before us on exceptions. We shall consider but one of these.

The respondent had a blood test taken shortly after the accident by Dr. Gerald H. Donahue for the purpose of showing the percentage of alcohol by weight in his blood. R. S., 1944, Chap. 19, Sec. 121, provides that if there was at that time 7/100 percent or less by weight of alcohol in his blood it was prima facie evidence that he was not under the influence of intoxicating liquor; that if there was from 7/100 to 15/100 percent of alcohol by weight such fact was relevant but raised no presumption either way; and that if there was 15/100 percent or more, the evidence was prima facie that the respondent was under the influence of intoxicating liquor within the meaning of the statute. Then follows a provision to the following effect: "The failure of a person accused of this offense to have tests made to determine the weight of alcohol in his blood shall not be admissible in evidence against him . . . . . ."

The respondent at the opening of the trial on September 17th filed a motion for a continuance with an affidavit which stated that effort had been made by a deputy sheriff to serve a subpoena on Dr. Donahue on September 16th for his attendance at court on September 17th, but that Dr. Donahue was absent from Presque Isle until September 18th and could not be located elsewhere; that Dr. Donahue would testify that at the time he took the sample of blood with which to make the test the respondent gave no outward appearance of being under the influence of intoxicating liquor. The judge overruled the motion for a continuance on the ground that due diligence had not been used to serve the subpoena and the respondent excepted to such ruling. The motion had nothing to do with the blood test which was not put in evidence during the trial. Rule XV of the Rules of Court sets forth the necessary conditions for the filing of a motion for a continuance on the basis of a want of material testimony, and the trial court is given a wide discretion to "judge whether due diligence has been used" in fulfilling them. Without deciding whether the court in this instance abused its discretion by denying the motion, the request for

a continuance has an added significance in view of a colloquy which took place between the court and both counsel during the argument to the jury by the county attorney. He commented to the jury on the effect of the statute relating to blood tests and then apparently inferred that the failure of the respondent to put the test in evidence could be used against him. This comment was objected to in the absence of testimony as to what the test showed. The court said: "There is evidence there was a blood test taken, and what a blood test means, under the law, is arguable, I suppose." In spite of some ambiguity in further comments by the court the jury could not but have been left with the impression that the failure of the respondent to show what the test indicated raised a presumption that it was adverse to him. For what other possible purpose did the county attorney comment on the statute? Exceptions were taken to the permission given by the court to pursue this line of argument.

These comments after a refusal by the court to grant the motion for a continuance to enable the respondent to produce the doctor as a witness were highly prejudicial. It was a case of denying the respondent the opportunity to have the doctor's testimony and then using the failure to have it against him. See 53 Am. Jur. Trial: 476.

Exceptions sustained

New trial granted.

MARY H. TORREY
vs.
CONGRESS SQUARE HOTEL CO.

Cumberland. Opinion, July 22, 1950.

Negligence. Evidence. Relevancy and Materiality.

Directed Verdict.

Whether in a negligent injuries case an orthopedic surgeon may be questioned on the power of the eye to accommodate itself to different degrees of light is discretionary and the exclusion is not prejudicial.

Whether because of light conditions a waiter in a cocktail room could read a check is evidence in the nature of an experiment and its admissibility is discretionary.

Admission of testimony as to how a room "appeared" under subdued light is discretionary.

Whether others were injured at a similar location on previous occasions involved collateral issues and evidence thereof is properly excluded.

"Relevancy" is applicability to the issue which has been joined in order to determine the truth or falsity and demands a close connection between the fact to be proved and the fact offered to prove it. Relevancy depends upon the legitimate tendency to establish a controverted fact.

"Materiality" is the capability of properly influencing the result of the trial. It is the important, weighty, essential thing that vitally affects the determination of the case.

The admission or exclusion of evidence must be prejudicial to constitute error.

Where it cannot be said as a matter of law that the defendant was or was not negligent or that there was or was not due care on the part of a plaintiff it is improper to direct a verdict.

ON EXCEPTIONS.

This is an action of negligence. During the trial the presiding justice excluded certain testimony to which exclu-

sions exceptions were taken and allowed. At the close of the evidence a verdict was directed for defendant to which exception was duly taken and allowed. Exceptions sustained. Case fully appears below.

Robert A. Wilson,
I. Edward Cohen, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

FELLOWS, J. This is an action for alleged negligence tried in the Superior Court for Cumberland County. At the close of the evidence a verdict was directed for the defendant. The case is before the Law Court on plaintiff's exceptions to the granting of the motion for directed verdict, and exceptions to the exclusion of certain testimony offered by the plaintiff.

The defendant company owns the Eastland Hotel in the city of Portland. In the basement of the Eastland Hotel, or on the floor below the street level, there is a cocktail lounge operated by the defendant and known as the "Coral Room." The walls of the room are painted a coral shade with the woodwork painted white. It is a room approximately forty-seven feet long. The floor of the Coral Room is on two levels, one level being twelve inches higher than the other. The "sunken floor" portion of the Coral Room, or the "Pit," is approximately 28 feet long by 21 feet wide, and is located about 18 feet from the entrance to the Coral Room. In other words, one must walk 18 feet on the higher level from the entrance to reach the steps to the "Pit" or "sunken floor" on the lower level. From the upper to the lower level "the first riser is eight inches to a twelve-inch tread, then four inches to the lower floor level." On the day of the accident the entire floor including the steps was cov-

ered with dark green carpeting which had in it a lighter colored floral design. The right-hand wall of the lower level is mirrored and draped to represent windows, although all lighting in this basement cocktail lounge is artificial.

On the lower level there are tables and chairs to the right and left with an aisle between. There are also tables on the upper level. As one enters the room the steps down to the lower level are marked by a short white iron "fence" on the right and left side, each of these "fences" being 43 inches long and 3½ feet high. Immediately in front of these "fences" is a table with two chairs. There is also a column two feet square from floor to ceiling at the outer ends of the "fences."

The upper, or entrance level of this room is lighted by wall lights, the lower level by four chandeliers hanging from the ceiling. There are also small portable lamps for some, if not all, tables. The light in the room is made dim through the use of electric bulbs of small candle power and colored shades. The bar is on the left-hand wall of the room, and on the upper level.

On January 28, 1946 a little after 12:30 P. M. the plaintiff Mary H. Torrey, 69 years of age and a resident of Portland, went with a friend into the Eastland Hotel for lunch. As she entered the hotel, on the street level, she saw a sign indicating the Coral Room to the right and downstairs. They decided to visit the room, as they had never seen it, and they desired to have a cocktail before lunch. The plaintiff, with her friend went down the stairs and turned left at the bottom. She says she then "saw a large door open; and I looked in and stepped in. It was very dimly lighted and I walked into it a ways and I saw the waiter coming this way (indicating) and I walked towards him." She knew him to be a waiter because she saw his white coat. She continued to walk towards the waiter. "Then before he got to me, I caught my right foot, went down a step and turned over and rested on my ankle." Later she testified "it was so dim-

ly lighted I couldn't see much ***** I walked towards the waiter." She says she could see no steps down, as there were no lights there and nothing to indicate or to call attention to where the steps were. The waiter coming from the bar was on the same floor level as plaintiff. "He was going to seat us at a table." There was no hand rail. There was not sufficient lighting and no warning of any kind. She could see no posts in the room. She saw no iron fence upon the right and left side. She could not see the waiter's features but identified him as a waiter by the white coat. "I fell down. One foot went down on the first step, right on my ankle, and then there was another step and I fell forward." Her injuries were serious.

On cross examination the plaintiff said "the place was so dimly lighted you couldn't tell the color of anything," and on redirect she stated that while she was lying on her back after her fall "the room became much lighter than when I came in," which, if true, might indicate that additional lights were then turned on.

One of the witnesses for the plaintiff testified that at the time the plaintiff entered, the light in the room "was very dim," and that "the lights in the Pit were not on." After the plaintiff's fall the lights were turned on. This witness further stated that he saw a waiter start diagonally from the center of the bar towards the plaintiff when she came into the room. The light was so dim that the witness could not see more "than the white of her face" as plaintiff came towards the steps leading to the lower level. The witnesses for the defendant contradicted the witnesses for the plaintiff by insisting that "all the lights were on," and that the room was well lighted although "dim."

FIRST EXCEPTION

The counsel for the plaintiff asked in direct examination of an orthopedic surgeon, several questions relative to the power of the eye to accommodate itself to different degrees

of light and darkness, and the variations in different individuals. The surgeon had stated that he did not know "too much about the eye." These questions were objected to and excluded. The allegations in the declaration were to the effect that the defendant created and maintained a defective and dangerous trap, particularly "because plaintiff came into the hotel from the brightness of snow-covered ground." The admission or exclusion of these questions from this doctor was discretionary on the part of the presiding justice. We cannot see that there was any abuse of discretion here, because of lack of proper foundation and qualification, and because of the fact that it is common knowledge to every juror that eyes vary with individuals, and all normal eyes adjust themselves somewhat to different degrees of light. In any event, the exclusion was harmless and no exception lies unless prejudicial. *McCully* v. *Bessey,* 142 Me. 209, 49 Atl. (2nd) 230.

SECOND EXCEPTION

The plaintiff offered evidence tending to show that employees of the defendant had previously reduced the amount of light in the Coral Room, and to show the extent of reduction, a witness employed on January 1, 1946 was asked "were you able to read your checks in the pit?" This was objected to and excluded. Counsel for plaintiff insists that what this employee could do in relation to reading a newspaper or check was material and important. The admission of this evidence was also discretionary and we do not see abuse of discretion. Even if it were proved that light conditions were the same on January 1 as on January 28 there are so many factors involved that evidence in the nature of experiments might not assist the jury. There must be similarity of all conditions. *Baker* v. *Harrington,* 196 Mass. 339; *Eastport Water Co.* v. *Holmes Packing Co.,* 121 Me. 345; 20 American Jurisprudence "Evidence," 627, Sections 755, 756.

THIRD EXCEPTION

This third exception is similar to the second. The same former employee was asked in substance from his observations after the light was subdued, as one goes into the Coral Room, "what is the appearance?" This was excluded. It was discretionary and the discretion was not abused. "Appearance" embraces too many facts, circumstances, and conditions. How the room "appeared" to this witness might not be the same as it appeared to some other person, and perhaps at some other time and under other conditions.

FOURTH EXCEPTION

This exception was to the exclusion of a question, asked by counsel for the plaintiff, of a witness who stated that he had entered the Coral Room for the first time in the preceding November. "Whether or not in November when you went to get that wine at the Coral Room, whether or not you fell into the pit?" This was objected to by the counsel for defendant and excluded. Exception was taken. Counsel for the plaintiff stated in his offer of proof that "if we are allowed to pursue the question further, we will show that the reason for this fall was because he could not see the presence of the two steps leading from the upper level to the lower level in that room under the conditions of light then and there obtaining." The presiding justice in excluding the question stated that "it is very dangerous to open the door to collateral issues of other accidents, each one of which may have had its separate causation and which might introduce a whole series of trials involving separate facts, separate questions of contributory negligence and separate conclusions. I do note a dictum of our court in the *Bath Iron Works* case (140 Me. 287). That case appears to have been limited to a situation where a number of workmen doing the same work contracted the disease ***** I prefer to apply the language in the *Portland Publishing Company* case (69 Me. 173) to my ruling here." The presiding justice was correct.

Relevancy and materiality present some of the most difficult phases of the law of evidence. Relevancy is applicability to the issue which has been joined, in order to determine the truth or falsity of the matter in dispute. Legal relevancy generally requires a higher standard than mere logical relevancy. It includes the logical, but demands a close connection between the fact to be proved and the fact offered to prove it. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Materiality is the capability of properly influencing the result of the trial. Materiality is the important, weighty, essential thing that may vitally affect the determination of a case. In other words, material evidence is important evidence that must be carefully considered in order to fairly decide the merits of a proposition.

"Evidence is incompetent if not fit for the purpose for which it is offered. Irrelevant evidence indicates that kind of incompetence which results from having no just bearing on the issue." *Gray* v. *Railroad,* 114 Me. 530, 532; *Mayhew* v. *Sullivan Mining Co.,* 76 Me. 100; *Nevens* v. *Bulger,* 93 Me. 502, 511; *Parker* v. *Portland Publishing Co.,* 69 Me. 173. "If the only bearing of evidence offered is to prove a collateral fact, it is not relevant and should be excluded." *Perlin* v. *Rosen,* 131 Me. 481, 483; *Damren* v. *Trask,* 102 Me. 39, 46. "Where the ruling is within the discretionary power of presiding justice, and there appears no abuse of such discretion the exception must be overruled." *Grant* v. *Dolley,* 131 Me. 500; *Mayhew* v. *Sullivan Mining Co.,* 76 Me. 100. "Mere immateriality of evidence if admitted is not necessarily error. It may be, if the evidence is mischievous and calculated to mislead the jury." *Dutch* v. *Granite Co.,* 94 Me. 34. "It is not enough for the excepting party to show that excluded evidence was legally admissible. He must show that its exclusion was prejudicial to him." *Pitcher* v. *Webber,* 104 Me. 401.

Both relevancy and materiality depend on probative value. If it is necessary for a jury to know a certain fact in order to reach a just conclusion, the evidence bearing on that fact is admissible, unless it is excluded by some rule or principle of law. Rules of evidence are usually rules of exclusion, and evidence is often admitted by the trial court, not because it is shown to be *competent,* but because it is *not* shown to be *incompetent.* The determination of relevancy and materiality must necessarily rest largely in the sound discretion of the presiding justice as of the time, and under the pleadings, circumstances, and conditions when offered. *McCully* v. *Bessey,* 142 Me. 209; 49 Atl. (2nd) 230; *State* v. *O'Toole,* 118 Me. 314.

Authority for the action of the presiding justice in excluding evidence of the fall of another person at another and previous time is the case of *Parker* v. *Portland Publishing Co.,* 69 Me. 173, where a person fell down an elevator shaft and evidence was erroneously admitted to show the condition of the hallway as to light at other times, together with evidence of what had happened to other men at other times. The opinion states: "It was immaterial to the issue whether, on some particular day or night previous to the plaintiff's injury, the gates to the elevator had been closed or not; whether there had been sufficient light in the hall or not, or whether some individual had or had not been exposed to injury and had escaped. If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them." The opinion in the *Parker* case further states, "the declaration charges negligence by the defendants on a particular occasion and at a particular place, and this the defendants deny. The only issue, therefore, for the determination of the jury was whether there was the negligence charged, on the occasion and at the place alleged, resulting in damage to some amount to the plaintiff." *Parker* v. *Portland Publishing Co.,* 69 Me. 173, 174. See also *Hubbard* v. *Railroad Co.,*

39 Me. 506; *Mayhew* v. *Sullivan Mining Co.*, 76 Me. 100; *Swasey* v. *Railroad Co.*, 112 Me. 399; *Damren* v. *Trask*, 102 Me. 39, 46.

In certain cases, to show capacity or capability, the court has permitted evidence to be introduced of other instances, as in the following: That escaping steam has frightened other horses, in order to show "the action of an inanimate thing upon an animal acting from instinct," *Crocker* v. *McGregor*, 76 Me. 282; other fires at other times, to show "the capacity of the inanimate thing (locomotive) to set fires," *Thatcher* v. *Railroad Co.*, 85 Me. 502; that other horses had been frightened by a hay cap in action for injuries by alleged nuisance, *Lynn* v. *Hooper*, 93 Me. 46; that a red push car was capable of frightening horses, *Mitchell* v. *Railroad*, 123 Me. 176, and evidence of other events, occurring at same approximate time and same conditions, to prove damage traceable to a particular cause (infection or poison from cables), *Spence* v. *Bath Iron Works*, 140 Me. 287, 292.

Facts which all persons of ordinary intelligence are presumed to know, need not be proved. *State* v. *Kelley*, 129 Me. 8. It is a fact of common and universal knowledge that a fall may be occasioned to any individual in many ways, and for many causes, when stepping down to a lower level, whether in darkness or in the light, especially when the step down is totally unknown and unexpected. The questions at issue here are the negligence, if any, of this defendant at this particular time as alleged, and, even if negligent, whether this plaintiff at the time was in the exercise of the care required of the ordinarily careful and prudent person.

There is no merit in this exception to the action of the presiding justice in excluding evidence of a prior accident to a different person at a different time, especially without proof that the individuals were alike in age, intelligence, abilities, and amount of care exercised, and that all the conditions in the room relative to lighting and other circumstances were the same.

EXCEPTION FIVE

This exception was taken to the directed verdict for the defendant, and involves the question of whether the presiding justice was authorized to do direct for the reason that a contrary verdict could not be sustained by the evidence. We do not think he was so authorized under the record of this case, and this exception must be sustained. The controverted facts should have been decided by the jury. More than one inference can be drawn from the evidence. We can neither say, as a matter of law, that the defendant was or was not negligent, nor can we say, as a matter of law, that the testimony shows due care or the lack of due care on the part of the plaintiff.

The evidence viewed in a manner most favorable to the plaintiff, shows that the plaintiff came at noontime from the daylight of out of doors. She was "invited" by the hotel management to visit and to patronize, as she planned, this cocktail lounge, or Coral Room in the basement. It was a room lighted, when at all lighted, by artificial light. She and the friend with her had never before been in this room. The room was open for patrons, and customers were sitting on the upper level. At the bar, which was at the distant left-hand corner of the large room as the plaintiff came to the entrance, stood the bar tender and waiters. The room was dimly lighted, and the central and far portion of the room, which was on a twelve-inch lower level than at the entrance, may or may not have been then lighted by its lamps or chandeliers. One witness stated that the lights in the "Pit" were not on, and that the room was "very dim." Another witness claimed that "all the lights were on." In any event, the size of bulbs used, the shades, the paint on the walls, the floor carpeting, and the color and arrangement of furniture, made for a subdued light effect.

The burden is on the plaintiff to show that she exercised due care for her own safety under the circumstances. Due

care is the care of the ordinarily careful and prudent person. It is not the care of the most careful person or the most careless, but the care under the circumstances then existing of one who is ordinarily careful and prudent.

The plaintiff endeavored to show, and perhaps a jury would say she did show, that she walked from bright light, as an invitee, into a darkened room, if it was darkened, with an attractive, alluring and enticing interior. She says she saw a waiter, or a person in a white coat, apparently approaching from the distant corner and walked towards him. It was not light enough, she says, to see his features. Did the circumstances warrant the thought, or belief, in the mind of the ordinarily careful person, that this white coat indicated that she should walk ahead to be seated and be waited upon? Did she use ordinary care, in walking forward as she did, towards and to the steps that led down to the lower level? Were there any objects to warn the ordinarily careful and prudent person of danger? Was there light sufficient and so located that she should have seen? Should she have looked at the room or watched the floor? Was there anything that required the plaintiff to shuffle her feet and to test the floor for a rope across her path, or for an excavation made by repairs, or a lower level that might exist with a step or two steps down? Should she have anticipated an abrupt change in level? It is a well-known rule of law that it is not contributory negligence on the part of an invitee in not looking for danger when there is no reason to apprehend any. *Patten* v. *Bartlett,* 111 Me. 409. Was there anything to indicate danger here? Did she have reason to apprehend any? It is not necessary to show a positive act of care if it appears that there is absence of fault. *Guthrie* v. *Railroad,* 81 Me. 572, 580; *McLane* v. *Perkins,* 92 Me. 39, 44. What would the ordinary person who is ordinarily careful have done or refrained from doing? There is evidence enough in this record to warrant a finding by the jury as to whether or not the plaintiff exercised legal care.

There is also sufficient evidence of negligence (or of care) on the part of the defendant, to authorize a favorable or other finding by the jury, depending on what testimony is believed. The evidence conflicts. How was the room constructed and maintained? Was there proper lighting in the room? If insufficient light, or improper light on the lower level, was there under the circumstances, a trap or dangerous condition? It is true that it is not negligence *per se* to have a floor of two levels. *Ware* v. *Evangelical Society,* 181 Mass. 285, 63 N. E. 885; but if there are two levels, and the two levels make a dangerous condition due to improper or insufficient lighting, or lack of proper warning or other circumstance, to protect the invitee who is using the legal care demanded, the jury might find negligence on the part of the defendant company. The defendant company is held to the care of the ordinarily careful and prudent person who invites a customer in for business purposes. The premises must be reasonably safe. The jury must decide whether or not this Coral Rooom used by the public was constructed and maintained with that due care which to an ordinarily prudent man, in view of its purpose, should have been exercised by the defendant to prevent injuries to customers using it. The defendant must not, by any lack of ordinary care, cause injury to the customer who is himself in the exercise of ordinary care.

Where an actor as an invitee was injured by striking a damp spot on the floor, the defendant owed a duty to have the stage free from hidden defects which, by the exercise of reasonable care, could not have been discovered and guarded against. "What may be apparent in the daytime may become a pitfall in the darkness or when the light is dim; and, likewise, a condition obvious to one with an opportunity to investigate, may be a trap to him who is precluded by the nature of his work from making a careful examination." Thaxter, J. in *Franklin* v. *Amusement Co.,* 133 Me. 203, 205. See also *Low* v. *Grand Trunk Ry.,* 72 Me. 313; *Mayhew* v. *Sullivan Mining Co.,* 76 Me. 100; *Camp-*

bell v. *Portland Sugar Co.*, 62 Me. 552; *Foren* v. *Rodick*, 90 Me. 276.

The action of the presiding justice in directing a verdict for the defendant was error. The facts present questions for determination by a jury.

Exception sustained.

JAMES H. TUTTLE
vs.
WILLIAM S. HOWLAND ET AL.

Hancock. Opinion, July 24, 1950.

Equity. Appeal. Variance. Specific Performance.

Equity appeals are heard anew on the record.

A variance requires a real difference between allegation and proof. The test to be applied is the tendency of the evidence substantially to prove the allegation not the literal identity of facts alleged and facts proven.

ON APPEAL.

This is a bill in equity to compel specific performance of a contract to convey real estate following corrections ordered in 143 Me. 394. Following the corrections and after further evidence the presiding justice ordered and decreed specific performance. Defendant appealed. Appeal dismissed. Decree below affirmed. Case fully appears below.

Charles Hurley, for plaintiff.

William S. Silsby, for defendant.

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

NULTY, J. This is a bill in equity to compel specific performance of a contract to convey real estate and is before this court for the second time, having been remanded to the court below for the correction of pleadings, for a proper appraisal of the wife's interests, and for further evidence. See 143 Me. 394, 54 A. (2nd) 534. The pleadings were corrected and Mary A. Howland, the wife, stipulated that she would waive her rights to any and all parts of the consideration to which she was entitled under the law of descent. Further evidence was taken out before the sitting justice and by stipulation the evidence taken out at the prior hearing was made a part of the record. The sitting justice by final decree sustained the bill and ordered the defendant and his wife to convey the premises described in the bill of complaint to the plaintiff as prayed for in the bill and the matter is before us on an appeal by the defendants. The controversy arose out of the failure of the defendant, William A. Howland, to convey certain real estate situated on Little Deer Isle in Hancock County, Maine, to the plaintiff after the plaintiff had made an offer to the defendant in writing which was accepted by the defendant in writing through his attorney. In the acceptance the defendant, through his attorney, described the premises as follows:

> "The Willow Ledge property means the cottage and all property on the Penobscot Bay or west side of the Main road through the middle of Little Deer Isle—which property is properly known as the Willow Ledge property—bounded on north by Miss Isabel Howland's property (The Stone Turtle cottage and property) and on the South by the Allchin property, consisting of a strip of land from the Willow Ledge property back to the main road, probably some 25 or 30 acres or better. I do not include in the 'Willow Ledge' property any of the property belonging to me on The Eggemoggin Reach or east side of the main road, which is part

> of another piece of land which I intend to keep—known as the Douglas place."

Subsequently, further negotiations were carried on between the parties or their attorneys with reference to the title and the preparation of a deed and a better description of the premises. There was some delay due to the fact that the defendant was out of the country. Subsequently, it appears from the record that the title was examined and a description prepared by a local attorney from which a deed was prepared and submitted to the defendants for signatures. There were other incidental delays and finally it became evident to the plaintiff that the defendants were not going to execute the prepared deed and the present bill in equity was brought in which the plaintiff described the premises as described in the prepared deed with a prayer for specific performance.

The defendants claim that the description in the bill in equity praying for specific performance is not the same premises as set forth in the letter of acceptance and that, therefore, there is a material variance between the allegations of the plaintiff's bill and the premises offered by the defendant for sale to the plaintiff in the letter of acceptance. The sitting justice, after hearing all the evidence, including the evidence taken at the prior hearing, concluded that the plaintiff had sustained the burden on all the allegations of the bill and the premises described in plaintiff's bill were the same premises referred to and described in defendant's acceptance.

Final decree was filed which ordered the defendants to convey the premises described in the bill of complaint to the plaintiff and also ordered the wife, Mary A. Howland, to join in said deed and release her right and interest by descent.

This court has said many times that equity appeals are heard anew on the record. *Cassidy et al.* v. *Murray et al.*, 144 Me. 326, and cases cited. Our court has also held that

findings of fact by the justice below will be conclusive unless clearly wrong and the burden is upon the appellant to prove it. *Cassidy et al.* v. *Murray et al., supra,* and cases cited.

As we stated above, the defendants assert that there is a variance between the allegations and proof. This court said in *Emery* v. *Wheeler, Admr.*, 129 Me. 428, 431, 152 A. 624:

> "A variance requires a real difference between allegation and proof. If the proof corresponds to the substance of the allegation, there is no variance, the test to be applied being the tendency of the evidence substantially to prove the allegation, not the literal identity of facts alleged and facts proven, 49 C. J., 807. 'It is not indispensable to recovery that a party should make good his allegations to the letter.' *Sposedo* v. *Merriman,* 111 Me., 530; and it is now held that no variance between pleading and proof will be deemed material if the adverse party is not surprised or misled to his prejudice in maintaining his action or defense upon the merits."

To the same effect, see *Peoples Savings Bank* v. *Chesley,* 138 Me. 353, 361, 26 A. (2nd) 632.

In addition to the testimony taken out at the prior hearing the sitting justice at the second hearing heard the testimony of two local engineers, both of whom testified at length from notes and prepared plans made by them. The description of the premises in the bill describes a certain parcel of land in Little Deer Isle that lies on the south side of the town road crossing Little Deer Isle and is a metes and bounds description of the real estate owned by the defendant on Little Deer Isle which lies on the south side of the town road. The letter of acceptance of the defendant stated that the Willow Ledge property means the cottage and all the property on the Penobscot Bay or west side of the main road leading through the middle of Little Deer Isle. The description of the premises used in the bill is that taken

from the records in the Hancock County Registry of Deeds and was prepared by an Attorney who, according to his testimony, was somewhat familiar with the location, and it describes the premises that are situated on the Penobscot Bay side of the highway passing through the middle of Little Deer Isle. The testimony of the local attorney who investigated the title and prepared the description taken together with the testimony of the two engineers, when carefully analyzed in connection with the plans of the engineers, makes it plain that the defendant in his letter of acceptance substantially described the Willow Ledge property even though there is some confusion in the use of the terms "south" and "west" side of the road. We do not regard this failure to correctly observe the points of the compass as material and we are of the opinion, after a careful examination of the record of both hearings, that there was ample evidence to support the findings and conclusions of the sitting justice. In our opinion there is no substantial variance and the substance of the allegations corresponds substantially to the proof. We are further of the opinion that the case of *Emery* v. *Wheeler, Admr., supra,* governs the question of variance and must be resolved in favor of the plaintiff and that the conclusions reached by the sitting justice are not unsupported by evidence of probative force, and, under the oft repeated holdings of this court, the findings of a sitting justice in equity upon questions of fact necessarily involved are not to be reversed upon appeal unless they are clearly wrong and the burden is always on the appellant to satisfy the court that such is the fact. See *Adams* v. *Ketchum,* 129 Me. 212, 221, 151 A. 146, and cases cited. See *Cassidy et al.* v. *Murray et al., supra.* It, therefore, follows that the final decree entered in the Superior Court by the sitting justice should be affirmed and the appeal of the defendants dismissed. Let the entry be

Appeal dismissed.

Decree below affirmed.

GEORGE SEMO
vs.
ARCHIE GOUDREAU ET AL.

York. Opinion, July 24, 1950.

Equity Appeal. Equity Rule 28.

R. S., 1944, Chap. 95, Sec. 31 is mandatory and jurisdictional. In the absence of either a report of the evidence or an abstract thereof approved by the justice hearing the case an equity appeal must be dismissed.

ON APPEAL.

This is a Bill in Equity seeking reformation of a deed on the grounds of mutual mistake. From a final decree sustaining the bill and granting injunctive relief, defendant appeals. Appeal dismissed. Case fully appears below.

Lausier & Donahue, for complainant.

Frank Morey Coffin,
Philip H. Graves,
Frank T. Powers, for respondent.

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

NULTY, J. The present proceeding was commenced by a Bill in Equity seeking the reformation of a deed given by the plaintiff to the defendants on the grounds of mutual mistake by the parties. Answer by the defendants was seasonably filed and subsequently a replication by the plaintiff and, after hearing, according to the docket entry, the bill was sustained and thereafter, but before the final decree was made, entered and filed, defendants claimed an appeal by an entry on the docket of the court. It does not require citation of authorities that the claiming of an appeal before a decree is made, entered and filed is not a notice of appeal

—there being no decree on file upon which an appeal could be claimed. Later, a final decree was filed sustaining the bill and granting injunctive relief. An appeal from this decree, according to the docket, was filed and entered February 17, 1950, which was almost two months from the date of the filing of the final decree, said filing date being December 20, 1949. R. S. (1944), Chap. 95, Sec. 21 provides for equity appeals and reads in part 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 10 days after such decree is signed, entered and filed, and notice thereof has been given by such clerk to the parties or their counsel."

It is apparent from the record in this proceeding that the appeal in this case was not seasonably filed in accordance with the above statute. Regardless of the statute last quoted, it is claimed by the defendants that Equity Rule 28, 129 Me. 533, was not complied with in that no notice of the filing of the final decree was given said defendants as required by said rule which reads in part as follows:

> "When a party is entitled to a decree in his favor, he shall draw the same and file it, and give notice.
>
> "If corrections are desired they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the justice, who heard the case, for approval. If they are not adopted, notice shall be given of the time and place, when and where the matter will be submitted to such justice for decision, and he shall settle and sign the decree."

The defendants further claim that the decree does not follow the allegations of the bill and that it grants relief for a ground not set forth in the pleadings and, therefore, is a nullity and may be attacked collaterally and should be va-

cated on appeal where apparent from the record. However meritorious the claims of the defendants with respect to the omission of the plaintiff to follow said Equity Rule 28 and the failure of the final decree to follow the allegations of the bill may be (and it should be understood that upon these matters we express no opinion), there is at the very outset of this proceeding before this court a fatal defect in the proceedings which is vital and cannot be cured. This defect is the failure of the defendants to comply with R. S. (1944), Chap. 95, Sec. 31, which provides in part as follows:

> "All evidence before the court below, or an abstract thereof, approved by the justice hearing the case, shall on appeal be reported."

This is an equity appeal and as such is governed by the statute last quoted. This provision of the statute by a long line of cases has been held to be both mandatory and jurisdictional. In the absence of either a report of the evidence or an abstract thereof approved by the justice hearing the case an equity appeal must be dismissed. *Stenographer Cases,* 100 Me. 271, 61 A. 782; *Sawyer* v. *White,* 125 Me. 206, 132 A. 421; *Ryan* v. *Megquier,* 130 Me. 50, 153 A. 296; *Foss* v. *Maine Potato Grower's Exchange,* 126 Me. 603, 139 A. 85; *Usen* v. *Usen,* 136 Me. 480, 485, 13 A. (2nd) 738, 128 A. L. R. 1449; *Girouard's Case,* 145 Me. 62, 71 A. (2nd) 682, 685. In view of the statute it will be of no value to further discuss the failure to follow the provisions of said Equity Rule 28 nor what the record shows or in what respects, as claimed by the defendants, the final decree is contrary to law as set out in the brief of the defendant.

This court has said many times that the 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, Appeal of,* 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; *Sears, Roebuck & Co.* v. *City of Portland,* 144 Me. 250, 68 A. (2nd) 12, 14.

It, therefore, follows that the appeal must be dismissed for failure to furnish this court with a record of all the evidence taken out before the court below or an abstract thereof approved by the justice hearing the case, as required by said Chapter 95, Sec. 31.

Appeal dismissed.

STATE OF MAINE
vs.
LAWRENCE A. MCNALLY

Aroostook. Opinion, July 26, 1950.

Criminal Law. Warrant and Complaint. Judges. Recorder.

A demurrer reaches only matters apparent on the face of the pleading demurred to.

A statutory provision respecting the drafting of all criminal warrants by the recorder is directory rather than mandatory.

ON EXCEPTION.

Upon complaint charging the defendant with "being found intoxicated in a public place," defendant demurred on the ground that the complainant was drafted by the Judge of the Municipal Court and not by the Recorder. (Chapter 84, Private and Special Laws, 1949). The presiding justice of the Superior Court overruled the demurrer and granted leave to plead over. The matter is before the

Law Court on exception to the overruling of the demurrer. Exception overruled. Respondent to plead over. Case fully appears below.

James P. Archibald, County Attorney, for State.

Nathan H. Solman, for respondent.

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

FELLOWS, J. The respondent Lawrence A. McNally was arrested on September 6, 1949 on complaint of Alfred A. Ayotte and on warrant issued by the Houlton Municipal Court for the offense of intoxication. The complaint alleges "that Lawrence A. McNally of Houlton on the 4th day of September 1949 at Houlton, was found intoxicated in a public place, to wit, Bangor Street." The complainant made oath before Harry H. Baulch, Judge of the Municipal Court. The warrant was signed by Judge Baulch. The respondent was adjudged guilty by the Houlton Municipal Court and fined $30.00 and costs, from which decision the respondent appealed to the Superior Court for the County of Aroostook. At the September term of the Superior Court 1949, the respondent filed a demurrer to the complaint, with a statement of fact alleged in the demurrer "that said complaint was drafted by the Judge of the Houlton Municipal Court and was not drafted by the recorder of said court all in violation of Chapter 84 of the Private and Special Laws of Maine 1949." There is nothing whatever in the record to indicate who did or did not draft the complaint, or who did or did not draft the warrant. The complaint was signed by one Ayotte who made oath to the truth before the Judge of the Municipal Court. The form of the complaint and warrant is the usual form used in the Municipal Courts of Maine.

The demurrer was overruled by the justice presiding in the Superior Court and "leave granted to plead over." Exceptions were taken to the overruling of the demurrer, and the case is before the Law Court on these exceptions. No briefs were submitted, and there was no oral argument. The exceptions are not sustained.

The demurrer in this case filed by the respondent's attorney is a demurrer which states that it is a demurrer to the *complaint,* and that the *complaint was not drafted by the recorder.* The bill of exceptions, however, refers to the fact that Chapter 84 of the Private and Special Laws of 1949 states (as it does state) the recorder *"shall draft all criminal warrants."* To "draft" is to draw up, to write a form of, to compose. Webster's New International Dictionary. The statute does not require the *complaint* to be drafted by the recorder. Any person having knowledge may make a complaint. The statute does not require the warrant to be *signed* by the recorder. From all that appears in the record, the complaint, or the warrant, or both, were drafted by the recorder. It was signed by the judge, as permitted by the act establishing the Houlton Municipal Court. See Chapter 154, Private and Special Laws of 1911, amended by Chapter 63 of the Private and Special Laws of 1945, and further amended, to give authority to recorder to draft warrants, by Chapter 84 of the Private and Special Laws of 1949.

A demurrer is a signed statement in writing filed in a proceeding in court, to the effect that admitting the facts of the proceeding pleading to be true, as stated by the adverse party, legal cause is not shown why the party demurring should be compelled to proceed further. Demurrers are general where no particular cause is assigned, and special where the particular defects are pointed out. Bouvier's Law Dictionary; *Neal* v. *Hanson,* 60 Me. 84; *State* v. *Dresser,* 54 Me. 569; *State* v. *Godfrey,* 24 Me. 232.

In the case at bar the demurrer is to the complaint, and it attempts to point out "that said complaint was drafted by the Judge of the Houlton Municipal Court and was not drafted by the recorder of said court all in violation of Chapter 84 of the Private and Special Laws of Maine 1949." Chapter 84 of the Laws of 1949, however, mentions the warrant only. The statute says nothing about the complaint. No such defect, in any event, if a defect exists, can be reached by demurrer. The complaint is in proper form and the court cannot go beyond the complaint upon this demurrer. A demurrer reaches only the matters apparent on the face of the pleading demurred to. The Superior Court was correct in overruling the demurrer. *State* v. *Kyer,* 84 Me. 109; *State* v. *Walsh,* 96 Me. 409; *State* v. *Sheehan,* 111 Me. 503; *State* v. *Pio,* 111 Me. 506; *Mitchell* v. *Sutherland,* 74 Me. 100; *Delcourt* v. *Whitehouse,* 92 Me. 254; Standard Ency. Procedure, Vol. VI "Demurrer," 888; American Jurisprudence, Vol. 41, Page 465 "Pleading," Section 246.

Even if Section 2 of Chapter 84 of the Private and Special Laws of Maine, 1949, were applicable to the drafting of complaints, and the issue here presented were properly raised by plea instead of demurrer, it would avail the defendant nothing. The provision respecting drafting by the recorder is clearly *directory—not mandatory*—within the rule set forth in *State* v. *Wilkinson,* 76 Me. 317, 320. We there stated:

> "Where a departure from the statute can work no harm or injury, and the thing to be done can be accomplished in some way other than by strict statutory compliance, and there is nothing to indicate that the legislature designed that the act should be done exclusively in the manner prescribed or not at all, in such cases the duty imposed is directory merely."

In this case the record shows that the respondent, in connection with his demurrer, filed a reservation of a right to

plead anew. It appears also that the presiding justice, when overruling the demurrer, expressly granted this right to plead. *State* v. *Cole,* 112 Me. 56. The entry will therefore be,

Exceptions overruled.

Respondent to plead over.

JACOB H. BERMAN, ET AL.
ASSIGNEES
vs.
CLIFTON T. GRIGGS, ET AL.

Cumberland. Opinion, August 4, 1950.

Equity Appeal. Attorney-Client. Estoppel.

Equity appeals are heard anew on the record and findings of fact may be disregarded on appeal when clearly wrong.

When an attorney acts within the scope of his authority the principal is estopped from repudiating such acts as his attorney, clothed with authority, may have taken.

When one by his words or conduct, wilfully causes another to believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his previous position, or to omit to assert some right which he otherwise would have asserted, he shall not afterwards be permitted to set up a different state of facts to the injury of him thus deceived. This is on the principle of estoppel.

ON APPEAL.

This is a bill in equity instituted to compel defendants to deliver and record a deed to property. The sitting justice

dismissed the bill and plaintiffs appeal. Appeal sustained. Case remanded to the sitting justice with directions to enter a final decree in accordance with this opinion. Case fully appears below.

Berman, Berman & Wernick,
George H. Hunt,
Raymond S. Oakes, for plaintiffs.

Albert Knudsen, for defendants Griggs and Christianson.
Jacob Agger, Pro Se.

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

NULTY, J. This case comes before this court on appeal from the decree of the sitting justice dismissing the bill in equity filed by the plaintiffs as assignees of a Maine corporation known as Associated Builders & Construction Co. The defendants, Clifton T. Griggs and Paul M. Christianson, were in reality the sole active owners of the company, the other defendant, Jacob Agger, an attorney, being joined as party defendant because of the facts which will subsequently appear.

The company found itself, in July, 1948, somewhat embarrassed by financial troubles, and, on August 10, 1948, a letter, prepared under the direction of defendant Agger as attorney for the company, was signed by said Agger and mailed to the creditors of the company asking them to be present or be represented at a meeting of creditors of the company to be held at the office of the company on August 13, 1948. The record discloses that a large proportion of the creditors either attended the meeting in person or were represented by attorneys and the business situation of the company was discussed at considerable length. Various procedures were considered and a creditors' committee was suggested. It developed that the warehouse which was the

office of the company and which was a valuable piece of property had been deeded by the company on June 22, 1948, to defendants Griggs and Christianson. The corporate records of the company do not disclose any official acts of the board of directors or stockholders with respect to this conveyance and at the creditors' meeting more or less discussion ensued with respect to the defendants Griggs and Christianson reconveying the property to the company in order that it might be considered an asset of the company and be reflected in the financial statements for the benefit of the creditors. A creditors' committee was tentatively named at said meeting held August 13, 1948, and the record discloses that after said meeting of August 13, 1948, defendant Agger addressed another letter to all creditors in which he reported to them the results of said creditors' meeting, and, in addition to giving said creditors considerable information with respect to the company's financial affairs, enclosed in said letter a formal assent for all creditors to sign and asked that the creditors give their formal assent to allow a creditors' committee to operate the business. In said letter which was prepared and signed by said Agger the following statements were made:

> "After a lengthy discussion as to what would be best for the creditors and the corporation the officers of the corporation, namely Paul Christianson and Clifton T. Griggs, were asked what they would do to assist the financial structure. Both Mr. Griggs and Mr. Christianson, who are the owners of the warehouse and which represents an actual outlay to them within the past few months of $10,000.00, agreed to convey the property to the corporation as additional assets. They further agreed to reduce their own salaries to a bare minimum.
>
> "There is approximately $18,000 in completed contracts which were to have been refinanced through a local bank, but because of complications which had arisen in the past six or seven weeks the paper was not acceptable to the banks but those

> contracts can now be financed through the Shawmut Bank, and a representative of the Shawmut Bank, who was present at the meeting, stated that his Bank would accept this paper if all of the creditors agree to go along with a creditors committee, otherwise they would not be interested in discounting the contracts.
>
> "The creditors present, representing approximately $50,000.00 of the total $61,000.00 of liabilities, agreed that if a creditors committee was appointed for the benefit of the creditors and the corporation, they would not press their claims and were willing to allow the corporation to continue in business. Several of the creditors present who had attachments and trustees agreed to dismiss and discharge their attachment or trustee."

From the record it appears that as a result of the letter and the work of the creditors' committee practically all the creditors agreed to permit the company to continue its operations under the guidance of the creditors' committee and that those creditors who had attachments agreed to discharge and did subsequently discharge said attachments which had been hampering the company's business.

Another meeting of the creditors' committee was held on August 24, 1948, which was about the time that the creditors' committee really began to function, and at this meeting it developed that a deed of the property in question had been drawn and was subsequently executed by defendants Griggs and Christianson and their wives and delivered to defendant Agger, who was also a member of the committee and secretary thereof.

It appears to be unnecessary from the view we take of this matter to go further into the facts of the case other than to say that sometime later it was discovered by certain members of the creditors' committee that the deed in question had not been delivered and recorded although all attachments against the company's property had been released and the creditors' committee was functioning, having made

arrangements for bank financing. The failure to deliver and record the deed necessitated some changes in the company's financing due to the fact that the bank financing was withdrawn because of the failure to deliver and record the deed to the corporation, and, finally, on October 28, 1948, the company made an assignment for the benefit of creditors to the plaintiffs in this action and the present action was instituted by the assignees to compel defendants Griggs and Christianson or Agger, who was admittedly their attorney, to deliver and record the deed of the property to the company so that it would become a part of the assets for the benefit of creditors.

This court has said many times that equity appeals are heard anew on the record. See *Cassidy et al* v. *Murray et al.*, 144 Me. 326, and cases cited. We said in *Sears, Roebuck & Co.* v. *City of Portland*, 144 Me. 250, 68 A. (2nd) 12, 16 (speaking of findings of fact):

> "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."

It appears from the record that defendant Agger, under whose direction the information with respect to the proposed reconveyance of the real estate referred to above was communicated to the creditors, was admittedly the attorney not only of the corporation but of the two defendants, Griggs and Christianson, and it very frequently happens when an attorney acts within the scope of his authority, the principal is estopped from repudiating such acts as his attorney, clothed with authority, may have taken. *Burgess* v. *Stevens*, 76 Me. 559, 562. This court said in *Beale* v. *Swasey*, 106 Me. 35, 37, 75 A. 134:

> "An Attorney, within the scope of his authority, represents his client. His acts of omission as well as commission are to be regarded as the acts of the

> party he represents. The neglect of the Attorney is equivalent to the neglect of the party himself."

Other cases hold that the authority of an agent, irrespective of actual relation, comprises not what is expressly conferred but also as to third persons what he is held out as possessing. *Packard* v. *Fire Insurance Co.*, 77 Me. 144, 150. In the instant case defendant Agger sent to the creditors, who subsequently acted upon the information, the information with respect to the reconveyance of the real estate herein mentioned. It is apparent from the record that defendant Agger, as above stated, was not only attorney for the defendants but also for the corporation, and, under the circumstances in this case, there is no material difference between his capacity as attorney or his capacity as agent, and, in our opinion, the law relating to principal and agent applies. We said in *Frye* v. *E. I. duPont deNemours & Company*, 129 Me. 289, 296, 151 A. 537, with respect to the liability of principals and the authority of agents the following:

> "It is well settled that the liability of a principal is not limited to such acts of the agent as are expressly authorized or necessarily implied from express authority. All such acts of an agent as are within the apparent scope of the authority conferred upon him are binding upon the principal, apparent authority being that which, though not actually granted, the principal knowingly permits the agent to exercise or holds him out as possessing. And whether or not a principal is bound by the acts of his agent when dealing with a third person, who does not know the extent of the agent's authority, depends not so much upon the actual authority given or intended to be given by the principal as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority from the acts of the principal. When a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business uses and the nature of the par-

> ticular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act in question, and such particular act has been performed, the principal is estopped to deny the agent's authority to perform it, *Feingold* v. *Supevitz,* 117 Me., 371; *Davies* v. *Steamboat Co.,* 94 Me., 379, 385; *Heath* v. *Stoddard,* 91 Me., 499; 21 R. C. L., 856, 907; 2 C. J., 461. This doctrine is established to prevent fraud and proceeds upon the ground that, when one of two innocent persons must suffer from the act of a third, he is to sustain the loss who has enabled the third person to do the injury. *Packard* v. *Insurance Co.,* 77 Me., 144; *Thorne* V. *Casualty Co.,* 106 Me. 274, 281."

The plaintiffs assert that the defendants are estopped by their conduct in this case and it is our opinion that their assertion is correct.

Estoppel has been many times defined by our court. In general it arises "When one by his words or conduct, wilfully causes another to believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his previous position, or to omit to assert some right which he otherwise would have asserted, he shall not afterwards be permitted to set up a different state of facts to the injury of him thus deceived." *Allen et al.* v. *Goodnow et al.,* 71 Me. 425. In *Holt* v. *New England Tel. & Tel Co.,* 110 Me. 10, 12, 85 A. 159, we said:

> "Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. His conduct need not be characterized by an actual intent to mislead or to deceive. His acts, declarations, or silence must be of such a character as to have the natural effect of influencing the person to whom it is addressed to do, or not to do to his detriment, what he would not otherwise have done. --------- Estoppel is a question of law."

Applying these familiar principles of law to the conduct and acts of defendant Agger, acting as attorney and agent for defendants Griggs and Christianson, it becomes apparent that proper consideration was not given to the relationship of the defendants, it being the opinion of this court that the plaintiffs in this action, acting for the creditors, had a right to rely upon the representations of the defendants as communicated to the creditors in writing and that the only proper conclusion that can be made is that the defendants placed themselves in such a position with respect to the creditors that they are now estopped to deny such representations. Equity and justice must be done. It, therefore, follows that the appeal of the plaintiffs must be sustained and the action remanded to the sitting justice in order that a decree be made ordering defendants Griggs, Christianson and Agger to deliver and record the deed to the company of the warehouse property referred to herein so that it will be available for the benefit of the creditors of the company. The mandate will be

Appeal sustained. Case remanded to the Sitting Justice with directions to enter a final decree in accordance with this opinion.

ESTELLE V. FOTTER

vs.

HUGH M. BUTLER

Hancock. Opinion, August 5, 1950.

Negligence. Damages.

It is too late for a defendant to argue before the Law Court on general motion for new trial that there was an error of law in not submitting to the jury an issue abandoned by him before the trial court.

The assessment of damages is the sole province of the jury unless it is apparent that the jury acted under some bias, prejudice or improper influence or made some mistake of fact or law.

ON MOTION.

This is an action of negligence. After a jury verdict for the plaintiff in the sum of $10,000 defendant brings the cause to the Law Court upon a general motion for a new trial. Motion overruled. Case fully appears below.

R. C. Masterman, for plaintiff.

W. B. Blaisdell, for defendant.

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

WILLIAMSON, J. The case is before us on issues of liability and excessive damages raised by defendant's general motion for a new trial after a jury verdict for plaintiff in an action arising from an automobile accident. Damages were assessed at $10,000.

Liability:

A collision between a four-door Plymouth sedan driven by plaintiff's husband and a truck driven by defendant took

place at about 8:30 o'clock on the evening of March 27, 1948 on the main highway from Bar Harbor to Ellsworth as the vehicles approached from opposite directions to pass. The highway ran in a straight course approximately north and south for a substantial distance either way from the scene. It was what is often called a two-lane cement highway. The paved surface was twenty feet in width with a five-foot shoulder easterly of the cement and a four-foot shoulder westerly, and with a ditch on the outer edge of each shoulder. The sedan was proceeding northerly from Bar Harbor and the truck southerly from Ellsworth under conditions of fog and mist variously described by the witnesses.

It is apparent from the record that the decisive fact upon negligence was whether the collision took place on plaintiff's right-hand side, or the easterly side, of the center line of the highway. There could have been no reason for either driver in passing to encroach upon the traffic lane to his left-hand side of the center line.

In the sedan were plaintiff's husband, their eleven-year old son, Roland, beside his father, and in the rear the plaintiff holding their four-year-old daughter in her lap. The plaintiff's husband was killed in the accident. The plaintiff on her part could tell nothing of the circumstances of the collision.

Roland, the only eye witness for the plaintiff, testified in substance that, while his father was driving on his right-hand side of the road, the truck came "over the black line at us" and the sedan and truck collided.

Mr. Foster, a state police officer, reached the scene at nine o'clock. He observed that the sedan had not been moved and was then partly off the cement on the westerly side headed southerly. Of great importance he "found a lot of debris" from the collision including stakes and boards evidently from a truck "in the road in the easterly ditch," and "practically all of the debris was east of the center line."

The almost complete destruction of the left side of the sedan was sharply disclosed by a photograph. The jury could well have concluded that the damage was caused by an object striking the left front mudguard above the bumper and ripping through the entire length of the car.

The defendant was driving a Ford one and one-half ton truck of a common type with enclosed cab and a stake body with removable sideboards. Defendant's wife was beside him and on the right side the witness Murphy was seated holding the sister of defendant's wife in his lap. The defendant's story in substance follows: He was on his right side of the road "as snug to the (guard) rail as I could get." He saw the lights of the Fotter car "over on my side quite a bit." There was a slight bump. He opened the door to look, assumed the car had continued without harm, and without stopping drove several miles to his home.

The witness Murphy testified that he knew the truck was "well on his (defendant's) side of the road," and "I knew something had hit us but we didn't think it done any damage."

About midnight the state police officer talked with defendant at his home. Defendant at first denied and then admitted that he had been in a collision. We quote from defendant's testimony:

> "Q. When did you tell Mr. Foster first that you were up to Ellsworth that night?
>
> A. We went out back of the house and going out back he said, 'Where have you been?' And first I told him I hadn't been anywhere and then we went out and looked the truck over and after we looked I see the body had been moved back a little and he said, 'Are you sure you ain't been out of the house?' And I said, 'I have been to Ellsworth and on the way back someone hit the side of the truck.' "

The jury chose to accept plaintiff's version of the accident. That it did not believe the testimony of defendant

and witness Murphy involves only a question of credibility for the jury and not for us to decide. *Wyman* v. *Shibley,* 145 Me. 391, 72 A. (2nd) 450 (1950).

The jury placed the collision on defendant's wrong side of the highway; that is, on the easterly side of the center line. From such fact it could properly find negligence on the part of defendant. *Atherton* v. *Crandlemire et al.,* 140 Me. 28, 33 A. (2nd) 303 (1943); *Bragdon* v. *Kellogg,* 118 Me. 42, 105 A. 433, 6 A. L. R. 669 (1919).

> "The question of ordinary care, depending on answers to other questions, some of law and some of fact, is properly left to the jury with appropriate instructions."
>
> *Coombs* v. *Mackley,* 127 Me. 335 at 339, 143 A. 261 (1928).

On the issue of liability the case falls within the principle stated by the court in *Eaton* v. *Marcelle,* 139 Me. 256 at 257, 29 A. (2nd) 162 (1942) as follows:

> "The jury heard the evidence and determined the facts. It must have adopted as true Mr. Eaton's version. Where there is sufficient evidence upon which reasonable men may differ in their conclusions, the Court has no right to substitute its own judgment for that of the jury.—— To obtain a new trial the movant has the burden of proving that the jury's verdict is manifestly wrong."

The defendant in his argument presents for the first time in the case two issues: (1) that the jury manifestly erred in not finding plaintiff's husband was negligent, and (2) that his negligence is a bar to recovery by plaintiff under the principle that negligence of a driver is imputed to a passenger who is the owner of the automobile. See *Fuller* v. *Metcalf,* 125 Me. 77, 130 A. 875 (1925). No suggestion is made that plaintiff in her conduct was not in the exercise of due care or that negligence of a husband is a bar to a wife. The argument is limited to the case of the driver with passenger-owner.

The issue of negligence of plaintiff's husband not only was not raised at the trial, but was abandoned by defendant. The pertinent parts of the charge follow:

> "Now I say to you the late husband of Mrs. Fotter was operating the car and if he were negligent in the operation of the car at the time and place of the accident, his negligence at that time and place and in connection with this case is not imputable to Mrs. Fotter who is the plaintiff in the present case.
>
> So, as counsel have properly observed in connection with their arguments to you, the sole issue for you to decide by all the evidence that is presented in this case is bearing on the negligence of the defendant, and the burden of the plaintiff is to show that the defendant was negligent and that his negligence caused this accident. If she carries that burden by a fair preponderance of the evidence then she is entitled to recover.
>
> I say to you that there is one other legal proposition and that is this—and it is alleged in the plaintiff's writ—that the plaintiff was then and there in due care. I do not understand that it is seriously contended that she was or could have been charged with want of due care at the time under the circumstances. However, it remains a proposition for you to decide and it is not for me to decide."

Surely there can be no better evidence that the issue of the husband's negligence was removed from the case with the approval of defendant than the clear-cut statement by the presiding justice that the only issue was defendant's negligence. It is too late for defendant to urge on general motion that there was an error of law in not submitting to the jury an issue abandoned by him.

The case is not within the principle stated in *Pierce* v. *Rodliffe*, 95 Me. 346 at 348, 50 A. 32 at 33 (1901) as follows:

> "while the practice of raising questions of law upon a motion is not to be encouraged, in cases where manifest error in law has occurred, and injustice

> would otherwise inevitably result, the law of the case may be examined upon a motion, and if required, the verdict be set aside as against law."
>
> *Cox* v. *Metropolitan Life Insurance Company*, 139 Me. 167, 28 A. 2d 143 (1942).

In the *Cox* and *Pierce* cases decisive issues were submitted under erroneous instructions. Here at most the defendant complains of error upon an issue abandoned by him. The instruction did not relate to defendant's negligence, and could in no way have confused the jury in its consideration of the vital issue on liability. He cannot well urge the jury erred in not passing upon an issue not submitted to it.

Indeed, in the development of the case, it may well be said that the instruction was correct in that it was fairly intended by the court and was understood by both parties to cover the situation of the husband-driver and wife-passenger but not owner. In the declaration we find "the plaintiff's automobile was being driven" and "was demolished," and yet the claim for damages is limited to the personal injuries of the plaintiff. In the record and charge there is neither mention of ownership of the sedan nor claim for damages. The instruction given was not in terms within the principle of *Fuller* v. *Metcalf, supra,* and yet it applied exactly to the situation which the presiding justice could properly have believed to be presented for decision by the parties.

The defendant has shown no convincing reasons why the verdict should be set aside because against law, or against evidence, or against the weight of the evidence.

Damages:

Apart from cuts and bruises of a relatively minor nature, plaintiff suffered a very severe fracture of both bones of the left forearm. She was hospitalized from the night of the accident until May 8th. The attending surgeon told the

jury of the injury and treatment including an operation upon the arm for the purpose of placing "fragments in apposition." He also described the condition of the arm at the time of the trial as follows:

> "A. The forearm now has a good contour but she has a healed operative scar. She has incomplete use of the elbow but it has nearly full range of motion. The fingers and hand she uses well but not completely. The forearm now rests not completely palm up but about seventy degrees, considering ninety degrees as normal. She has absolutely no ability to turn the hand palm down. The wrist has fair range of motion in flexion and extension and in ulna bending but in radial bending, which is the opposite direction of the wrist, it is useless."

Doubt was expressed by the doctor "if (the condition of the forearm and hand) will improve much beyond what it is now." When asked his opinion of the ratio of permanent impairment to the arm and hand, he testified: "That is a hard question to answer. I would say sixty to seventy-five percent." The plaintiff was about forty-one years of age at the time of the accident.

The plaintiff testified she was unable to work for a period of fifteen months, and then secured employment as a telephone operator at a wage of $135 a month. There was no evidence that plaintiff was employed at the time of the accident. Such fact, however, would not prevent recovery of damages for the loss of the time during incapacity.

That plaintiff suffered severe pain which to some extent continued at the time of the trial and which could reasonably be expected to continue in the future, and that she was subject to serious shock readily appears from the record.

The hospital and medical bills, no item of which was questioned by the defendant, amounted to $1,149.40. The attending surgeon indicated a second operation to remove a metal screw might become necessary without estimating the probable expense.

It is a difficult task to measure damages for personal injuries, and made, indeed, the more difficult when the loss must be projected beyond the trial into the future. There is no market value for pain and suffering or for permanent disability. The jury must, however, determine in dollars what sum will recompense the injured party for hospital and medical expense, pain and suffering, loss of time, and disabilities not only to the date of the trial but in the future. Wide differences of opinion are to be expected.

The test to be applied has been set forth recently in *Pearson* v. *Hanna,* 145 Me. 379, 70 A. (2nd) 247 (1950):

> "In actions of this nature there can be but one recovery. The jury's award of damages is in full for all injuries proximately caused by the accident, be they past, present or future.
>
> The assessment of damages is the sole province of the jury. Although we have the power to set aside verdicts because of excessive damages, it is not for this Court to substitute our judgment for the considered judgment of the jury. As said in Cayford v. Wilbur, 86 Me. 414, 416, 29 A. 1117, 1118 with respect to the amount of damages awarded by a jury: 'As a general rule, the parties are entitled to the judgment of the jury, and not of the court upon that question. There are cases, to be sure, where the court will intervene; but those cases will be governed by the evidence and circumstances of each particular case. The court will not, however, set verdicts aside on the ground that the damages are excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice, or improper influence, or have made some mistake of fact or law.' "

Although the verdict may seem large, it is to use the words of Chief Justice Savage in *Felker* v. *Bangor Railway & Electric Company,* 112 Me. 255 at 257, 91 A. 980 at 981 (1914) "within the bounds of reason." It does not appear that the jury acted under bias, prejudice, or improper influence or made a mistake of fact or law. There is no rea-

son for us, in applying the rule stated above, to say the damages recovered are excessive.

The entry will be:

Motion overruled.

GERTRUDE A. TEMPLE
vs.
THE CONGRESS SQUARE GARAGE, INC.

Cumberland. Opinion, August 7, 1950.

Negligence. Invitees.

To an invitee a landlord has the duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils.

ON EXCEPTIONS.

This is a negligence action to recover damages for personal injuries. The case is before the Law Court on exceptions to the direction of a verdict for defendant. Exceptions overruled.

Wilfred A. Hay,
Charles A. Pomeroy, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

WILLIAMSON, J. This tort action for personal injuries is before us on exceptions to the direction of a verdict for defendant.

Plaintiff, a woman eighty years of age, at about noon on June 15, 1948 entered defendant's apartment house to visit a friend at the latter's invitation. On leaving the elevator at the third floor to walk along the hall, plaintiff was warned by a tenant who was operating the self-service elevator that, to use plaintiff's words, "The janitor had just washed the floor and I must be very careful."

Light reached the hall from three windows on plaintiff's right; one in the shaft of the elevator which had an open grille front, and one opposite each of two stair landings. There was also a forty-watt electric light in the ceiling between the elevator and the friend's room.

At a point opposite the door of the friend's room and about fourteen feet from the elevator, plaintiff slipped and fell, suffering severe injuries. She testified, "I didn't know what I stepped on I went down so quickly, but when I was lying on the floor I looked and there was water on the floor" —"enough to wipe up," and it was "about where I fell." Plaintiff also said that she did not see any water on the floor before her fall. "I was not looking for it," and again "I wasn't looking down. I was walking with my head up and wasn't looking for anything like that." Although there is no direct evidence that plaintiff slipped on a spot of water, nevertheless we assume for the purposes of this case that a jury would have been warranted in finding by inference that plaintiff slipped on a spot of water which the janitor had failed to remove in mopping the floor. The linoleum floor had been washed with hot soapy water and mopped by the janitor about twenty minutes before the accident.

The issues before us are whether a jury would be warranted in finding both that the defendant was negligent and that the plaintiff was in the exercise of due care, taking the evidence and inferences in the light most favorable to the plaintiff. It is with this rule in mind that we have summarized the facts.

The rule was clearly stated by Chief Justice Savage in *Johnson* v. *New York, New Haven & Hartford R. R.*, 111 Me. 263 at 265, 88 A. 988 at 989 (1913):

> "Upon exceptions to an order of nonsuit or of verdict for the defendant, the duty of the court is simply to determine whether, upon the evidence, under the rules of law, the jury could properly have found for the plaintiff. We are not called upon to express our own judgment of the probative force of the testimony. Whatever our own conclusions might have been, if there was evidence which the jury was warranted in believing, and upon the basis of which honest and fair minded men might reasonably have decided in favor of the plaintiffs, then the exceptions must be sustained. In such a case it is reversible error to take the issue from the jury."

Bubar v. *Bernardo*, 139 Me. 82, 27 A. (2nd) 593 (1942); *Shaw* v. *Piel*, 139 Me. 57, 27 A. (2nd) 137 (1942); *Lander* v. *Sears, Roebuck & Co.*, 141 Me. 422, 44 A. (2nd) 886 (1945); *Pease* v. *Shapiro*, 144 Me. 195, 67 A. (2nd) 17 (1949); *Torrey* v. *Congress Square Hotel Co.*, 145 Me. 234, (July 1950).

Plaintiff's status as an invitee on defendant's premises is not questioned. The defendant owed a duty to plaintiff to exercise due care to have its premises in a reasonably safe condition and to give warning of latent or concealed perils. *Lander* v. *Sears, Roebuck & Co., supra; Manning* v. *Sherman*, 110 Me. 332, 86 A. 245 (1913); 118 *A. L. R.*, note, 425, 426; 38 *Am. Jur.* 754 and 762; 52 *C. J. S.* 58; 65 *C. J. S.*. 521.

The plaintiff asserts defendant was negligent in failing:

(1) to maintain the floor in a reasonably safe condition,

(2) to warn of dangerous conditions not apparent to plaintiff, and

(3) to maintain proper lighting.

The floor in our judgment was clearly maintained in a reasonably safe condition. The floor was in the condition which one would normally expect to find a short time after it had been washed with hot soapy water and dried with a mop. It is within common knowledge that a recently washed floor is wet and slippery and that after washing floors are not wiped entirely dry. To say that negligence could be based upon a failure to remove all spots of water in washing a floor would be to establish an unreasonable standard far above that of our everyday experience.

There was no negligence on the part of the defendant in failing to warn plaintiff of dangerous conditions not apparent to her. When plaintiff stepped from the elevator, she had warning that the floor was wet and slippery. The dangerous condition—and every wet and slippery floor constitutes a hazard—was known to her. The plaintiff did not, for example, fall into a hole hidden from view. There was no latent or concealed peril in this instance. Indeed, if defendant had the duty under the circumstances to warn plaintiff that the floor had been recently washed, it cannot be said that failure of defendant to give warning was a proximate cause of the accident. Plaintiff, in fact, had warning and by whom she was warned is not material.

Turning to the question of inadequate lighting, it appears that, if such were the fact, it was not a cause of the accident. Plaintiff did not look at the floor and one who fails to look cannot well complain of lack of light.

A jury would not be warranted in finding negligence on the part of the defendant on any of the grounds asserted.

No more would a jury be warranted in finding the plaintiff free from contributory negligence. Plaintiff accepted the risks and hazards of walking on a recently washed floor. No urgency existed so far as the record discloses that compelled her to proceed from the elevator to the friend's room. Had plaintiff watched her step, she would have seen the

spot of water which she argues was an additional hazard. If it be said the light was inadequate, she should not have walked from the elevator toward her friend's room. On this view with full warning that the floor had been recently washed, she chose to proceed although she could not see where she was going.

In the exercise of due care plaintiff could not rely upon perfection by defendant or its agents in washing and mopping the floor. As a reasonably prudent person under the circumstances she should have anticipated that there might be wet spots which, if she were to proceed safely, she must take care to avoid.

The case may be distinguished from *Franklin* v. *Maine Amusement Co.*, 133 Me. 203, 175 A. 305 (1934) and *Torrey* v. *Congress Square Hotel Co., supra,* in which exceptions were sustained to the direction of verdicts for the defendants.

In the *Franklin* case an actor slipped on a wet spot on the stage and in the *Torrey* case a customer fell on a step in a cocktail lounge. It is apparent that the factors which make for negligence or due care in these situations differ materially from the factors present in the case of the invitee who chooses to walk upon a floor known to have been recently washed and to be slippery.

The presiding justice properly directed a verdict for the defendant.

The entry will be:

Exceptions overruled.

STATE OF MAINE
vs.
CARL PETERSON

Aroostook. Opinion, August 11, 1950.

Murder. Manslaughter. New Trial. Confession. Presumption of Innocence.

The probative value of a written confession should be measured by the intelligence of the person signing it and the accuracy of its recitals with established facts.

A new trial should be ordered on a general motion notwithstanding the omission of exceptions to a charge to the jury when it appears that the instructions given were highly prejudicial to the rights of respondent.

When the evidence indicates death by accident or suicide on the one hand and by a criminal agency on the other a conviction cannot be sustained unless it appears affirmatively that the criminal agency was the cause of the death.

The presumption of innocence is entitled to greater force than the presumption against suicide.

ON APPEAL AND EXCEPTIONS

Upon indictment for murder respondent was convicted of manslaughter. The case is before the Law Court on appeal from the overruling of his motions for a new trial and exceptions to several evidence rulings. Appeal sustained. Motion granted. Verdict set aside. New trial ordered.

James Archibald, for State.

Donald Sweeney,
Asa Roach, for respondent.

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

MURCHIE, C. J. This case presents an appeal by the respondent from the denial of his motion for a new trial, fol-

lowing a verdict of guilty of manslaughter, on an indictment alleging murder, and exceptions to the admission and exclusion of certain items of evidence. Two of the exceptions relate, respectively, to the admission in evidence, as exhibits, of three photographs of the person alleged to have been killed and a statement signed by the respondent, in the nature of a confession, declaring that he put lye in a glass of beer drunk by the decedent, intending to kill two men. That confession represents the only evidence in the record connecting him with the alleged killing, except subsequent verbal admissions consistent with it which can give it no additional force. He was one of nine persons, including the decedent, who were in the room where the beer was dispensed some part of an approximate hour before the death occurred. It resulted from the ingestion of the strong caustic contained in the lye. The other exceptions challenge the exclusion of two items of evidence offered on behalf of the respondent.

The appeal is sustained. Consideration of it involves both the photographs and the confession, but not the issue of the propriety of admitting them in evidence. There seems to be no necessity for considering the evidence excluded.

The case involves the death of Yvonne Pelletier Poitras, in the kitchen of the home of her father, at or about midnight on November 20, 1948, in the presence of the eight persons who had gathered there with her, an hour or more earlier, to prepare and enjoy a chicken stew. These included the father, mother and brother of Yvonne, an aunt and a friend of the aunt, all of whom, with Yvonne and the respondent, had been together for some hours. The two others were men who had joined the group in a restaurant, shortly before it started for the Pelletier home. These are the men the respondent intended to kill, according to his signed statement. One of them was an acquaintance of

Yvonne, the other a stranger to all. They joined the party at the invitation of Yvonne.

The kitchen measured fifteen feet seven inches by eleven feet five inches. A sitting room adjoined it, access thereto being through an archway seventy-three inches wide. In the kitchen were a cook stove, two tables, six chairs, and a small heating stove, the latter located near the archway, to furnish heat for the sitting room. Along one wall were a sink, with a cupboard below and a shelf above. The smaller of the two tables was on the right of it. The shelf and table play a most important part in the testimony. A can of lye, from which the poison must have been taken, was found on the table when the officers arrived, in a carton containing meats and groceries. All the evidence in the case relating to its location when the party entered the kitchen, except the declaration of the respondent in his written statement that he "knew there was some lye in the cupboard," indicates that while at some earlier time it had been kept in the cupboard under the sink, it had been taken therefrom and placed on the shelf something like two weeks earlier.

Along another wall were the cook-stove and a built-in cabinet containing four cupboards and three drawers, one of the cupboards being projected into the room the full depth of a shelf somewhat higher than a table, under which it was located. That shelf is referred to in the evidence as a sideboard. Above it were three smaller cupboards. The cupboard under the sink was enclosed by a door wide enough to make it improbable that the respondent could have swung it open into the room without being observed. There is no evidence that it was opened at any time while the party was in progress, although the fact that Yvonne's father opened the door of one of the cupboards over the sideboard to get the glasses used for the beer is established.

To complete the description of the room, although the case hinges on that already identified, there was a door giving access to the shed in the corner formed by the walls against

which the sink and stove were placed. A rocking chair filled some of that corner area. Along a third wall were the larger (dining) table and some chairs. The remaining wall divided the kitchen and the room to which the archway led.

An investigation was commenced late in the morning following the death and extended to midnight of that day. Each and every member of the party except of course the deceased girl was examined. Recesses were taken for meals at noon-day and in the early evening. At the former all were permitted to go free to seek food. At the latter, however, the respondent was locked up, "as a material witness." He was confined without food until late in the evening, when his examination, conducted by a considerable group of officers and lasting for a time estimated at from an hour and a quarter to three hours, began. Earlier in the day he had said, in answer to a question about the cause of death, that Yvonne had eaten some glass, a statement obviously wrong. When his turn to be questioned exhaustively came, he had become a suspect, as is apparent from the statements of the officers that he maintained his innocence for a long time. He did so until the exhibits challenged by the first exception were presented to him. These showed Yvonne lying in a corner of the kitchen, where she fell after a period of agony, with blood covering her features and a part of her clothing, and spreading over a section of the floor. The reaction of the respondent was immediate. Despite his consistent denials of guilt theretofore, he stated immediately "that he shouldn't have done it," exclaimed "I did it," and "went in some kind of a spell," a state of semi-consciousness, to quote one of the officers. Thereafter he was given water, with a suggestion that there might be lye in it, "the same thing you gave Yvonne," some doughnuts and coffee. Again quoting the officer, "after he had told us what he had done, he regained his posture." He was taken to another room where it is said that he told, twice, the full story related in his statement. This was typed out by an officer and read to

him. He signed it, as did two officers. It opens with declarations that he was advised of his constitutional rights (that he could not be compelled to make any statement that could be used against him in a criminal prosecution), and that he was speaking of his own free will and accord, without promise of favor or threats.

The second exception challenges the admission of the statement in evidence, on the ground that it was not voluntary. We do not deem it necessary to consider the issue raised thereby because, assuming the propriety of the ruling admitting it, its probative value, when weighed in the light of respondent's mentality, and with reference to the other evidence in the case, is not sufficient to establish his guilt beyond a reasonable doubt. The issue in that regard arises on the motion, and the appeal from its denial. The State's case must be held to rest entirely on the statement. If it is not adequate, in and of itself, the admissions already alluded to, made by the respondent while he was being transported to jail, offer no fortification of it.

The probative value of any statement of the kind must be measured by the intelligence of the person signing it, and the accuracy of the recitals it carries with established facts. These tests can do little to give value to that in question. The intelligence of the respondent is of a very low order. He was committed to the Bangor State Hospital for observation on November 27, 1948, and discharged therefrom after the term of court at which he was tried convened. The medical testimony, from the doctor who was the acting superintendent of the hospital during the respondent's stay there, places his intelligence quotient at forty-four and his mental age at six years and eight months. He was thirty-nine years old. Under these circumstances it is difficult to determine what implication was carried, or intended to be carried, by the statement of the officer with reference to the regaining of his "posture." The word may have no bearing upon the issue, as would be the case if it was used,

in accordance with its usual and ordinary meaning, to indicate nothing more than that he stood, or sat, up after a period of semi-consciousness. If it was intended, however, to indicate that he had regained his composure, questions inevitably arise as to the effect the questioning he had undergone on the basis of an assumed guilt would have had on a person of his mental age; the reaction of such a person when relieved of the pressure of such questioning by admitting what he had persistently denied; and whether such reaction would vary if his admission was true on the one hand or false on the other. The record is not helpful in determining any of these questions, but it does throw a considerable light on the issue whether the admissions were true or false.

The recitals of the statement carry admissions of motive and intent to kill, opportunity, and the grasping of it. It might be questioned whether the motive declared was a sufficient one to induce an intent to kill, even with a person of respondent's mental age. The statements of the respondent are that the two men who joined the party in the restaurant were with his "girl" when he came back to the booth in which he and others had been sitting with her; that he "did not like this"; that the girl invited them to the house; and that when the party reached there he "was still burned up to think these other men were bothering my girl." There is evidence that the respondent said something to one of them, or both, after they reached the house, to the effect that they should not pay attention to her, but there is no suggestion that either did so, or attempted to do so thereafter.

The answer as to the sufficiency of the declared motive may be that for one of the mental age of the respondent nothing more than a trivial one is essential to induce an intent to kill. It must be assumed, perhaps, that the jury weighed the evidence in the light of the particular mentality and decided that factual question with full recognition that

proof beyond a reasonable doubt was requisite. It may even be said that the inconsistency of his statements that he intended to kill two persons; was attempting to do so by putting poison in the glasses (plural); and that the girl got "the glass" (singular) in which he placed it casts no such doubt. His own statement as to an intent to kill, assuming the written statement to be his, is more than adequate to cover that issue.

It is when we pass to opportunity, as distinguished from motive and intent, that the evidence demonstrates the death could not have occurred in the manner the statement recites. His recital that he knew "there was some lye in the cupboard" could not be true if it was not there. The brother who testified for the state, and the father and mother of Yvonne testified that it was on the shelf above the kitchen sink. All three stated that it had been kept, at some earlier time, in one of the cupboards. The brother identified it as that under the sink. All said that the mother of Yvonne had moved it to the shelf some days before the respondent, who was visiting at the house, arrived to begin his stay there. He could not have known it was ever kept in a cupboard. Neither could he have taken it from the shelf where it was placed according to all the evidence on the point. There is nothing in the record to show that he was ever in a position close enough to the sink so that he could have reached it there at any time during the evening. The size of the room, its furniture and equipment have been noted. With nine people, or such lesser number as may have been within its small space parts of the time, it is difficult to believe that the respondent could have been near the sink at any time, if no member of the party could testify affirmatively to that effect. None did.

The respondent was the only member of the party who was out of the house a considerable part of the time in the approximate hour which passed between the arrival at the house and the death of Yvonne. During that time the

father of Yvonne poured beer into glasses he took from one of the cupboards and Yvonne passed them. Later he, or she, poured more, and she again passed the glasses. The aunt and her friend, possibly with help from Yvonne and her mother, prepared the chicken stew and started to cook it. It was not finished at the time of death. The aunt and her friend, with the two men who had joined the party at the restaurant, spent some minutes of the time in the room to which the archway led. Generally speaking, all except the respondent were in the kitchen all the time, although Yvonne passed back and forth between the two rooms, dancing and singing, to some extent. Yvonne's mother spent the major portion of the time in the rocking chair.

None of the members of the party except the brother of Yvonne, fourteen years old, and one of the men the respondent intended to kill, according to his statement, who had devoted himself to the friend of the aunt with considerable diligence, testified for the state. The aunt and the father and mother of Yvonne testified for the respondent. If it be assumed that the jury decided as a question of fact that the recital of the statement is true and the testimony of Yvonne's brother, father and mother on the point untrue or incorrect, it is even more apparent that the testimony as a whole does not establish the guilt of the respondent beyond a reasonable doubt. The only cupboard in which the lye had ever been kept was in that under the sink. It would have been virtually impossible for the respondent to have opened the door and take anything out of that cupboard without being observed.

A particular inconsistency of the statement should, perhaps, be noted. After declaring his decision to put lye in the "glasses," the respondent declares therein:

> "Then I saw Yvonne take the glass * * *. She took one drink then *sat* it down * * *. Then she began to sing and dance * * *. Then she drank some more * * *. Next thing I knew she went into a spell * * *."

Thereafter it recites:

> When I put the lye in the glass, there was a little beer in the glass *. Then Vital poured more beer in the glass * * *. Then Yvonne got this glass * * *."

These statements cannot both be true. Neither can be any more true than the recital that he knew there was lye where there was not. It seems apparent that the statements made by the respondent and reduced to writing by the officers do not present the true facts, or his recollection of them, but recount them in accordance with the consolidated effect of what all the other persons present at the death had told the officers. Their normal course would be to urge admissions from him consistent with the facts as disclosed to them by statements made by the witnesses examined earlier, insofar as they believed them to be true.

All of the foregoing is without reference to an additional ground for reasonable doubt about the guilt of the respondent. That lies in a very considerable bulk of evidence about Yvonne's intention for self-destruction on the very date of her death. It cannot be doubted on the record that some minutes before her death she procured a butcher knife and not only attempted to end her own life with it, and proclaimed the intention to die that night when it was taken from her, but asserted, when her aunt remonstrated with her, that she had brought the aunt with her to see her die. There was additional evidence, the credibility of which may have been lessened by cross-examination and somewhat indirect rebuttal testimony, that she had told two different persons at earlier times that she was going to die on the anniversary of her husband's death, which was the day her death actually occurred if on the right side of midnight. The exact time is not entirely clear.

The complete lack of evidence that Yvonne complained that someone had put something in her beer argues strongly for the theory of self-destruction. It is difficult to under-

stand, otherwise, how she could have drunk beer so thoroughly charged with lye as hers must have been and said nothing. There is evidence that some minutes before her death, when she was sitting on the knee of the respondent, she complained that her "stomach was burning," but she made no complaint that anyone had put anything in her beer. All the evidence indicates that the poison should have been apparent from the taste and must have caused intense anguish almost at the moment it was consumed.

The verdict would be inexplicable on the suicide issue, without reference to any other, if an apparent explanation of it was not available in the instructions given the jury to guide its deliberations. Those instructions disclose errors so highly prejudicial to the rights of the respondent as to cause, or contribute to, a result which, under such circumstances, must be considered unjust and require that a new trial be ordered on the general motion, notwithstanding the fact that no exceptions were taken to the charge. *Cox* v. *Metropolitan Life Insurance Co.*, 139 Me. 167, 28 A. (2nd) 143, and cases cited therein. One error relates to an instruction with reference to the burden of proof. After stating definitely that the burden was upon the respondent to satisfy the jury by a fair preponderance of the evidence of the truth of the defenses of suicide and lack of his own mental capacity, the court continued:

> "It is not incumbent upon the State to prove to you beyond a reasonable doubt that Yvonne Pelletier Poitras did not take her own life * * *."

A second involves the presumption with reference thereto, where it was said that:

> "the presumption of the law is against self-murder, and stands unless and until prima facie evidence is adduced by the opposite party * * *. Love of life is presumed. Men naturally heed the instinct of self-preservation. In human experience, it is the common desire * * to preserve life, rather than to destroy it, and hence the law, where a person is

> found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence."

There were carefully worded statements in the charge emphasizing that the respondent was clothed with a presumption of innocence and that proof of his guilt must be established beyond a reasonable doubt to justify a verdict of guilty, but they cannot be considered adequate to offset the prejudicial force and effect of the quoted excerpts.

The true rule on burden of proof, where possibilities of accident, suicide and crime are involved, is well stated in Wharton's Criminal Evidence, Vol. 2, Sec. 872, as follows:

> "To sustain a conviction, proof of the criminal agency is as indispensable as the proof of death. The fact of death is not sufficient; it must affirmatively appear that the death was not accidental, that it was not due to natural causes, and that it was not due to the act of the deceased. Where it is shown by the evidence, on one side, that death may have been accidental, or it may have been the result of natural causes or due to suicide, and on the other side, that it was through criminal agency, a conviction cannot be sustained. Proof of death cannot rest in the disjunctive. It must affirmatively appear that death resulted from criminal agency."

With reference to the presumption against self-destruction, the proper rule is that declared by the New York Court in *People* v. *Creasy*, 236 N. Y. 205, 140 N. E. 563, as follows:

> "The defendant was presumed not to have killed * * until it had been proven beyond a reasonable doubt. It is true there is a presumption that one does not take his own life. * * * Certainly the presumption as to the living is greater than as to the dead, and every presumption is to be indulged in as to the former as against the latter. The dead need no presumption; the facts as to them are

> fixed, upon which time has placed an unchangeable and immutable end; the living do."

The verdict demonstrates that the jury had some doubt about the respondent's guilt. He was not found guilty of murder, although the instruction was as clear as it was proper that if his intention to kill one, or both, of the two men was established, sufficiently, and the instrumentality he attempted to apply to the purpose did in fact kill the decedent, he was guilty of murder. That principle is too well established to require the citation of authority. The verdict that the respondent was guilty of killing the decedent but not under circumstances that would make the act murder must have been influenced by the erroneous instructions with reference to the burden of proof and the force of the presumption against suicide. The mandate must be:

Appeal sustained.

Motion granted.

Verdict set aside.

New trial ordered.

HERBERT BERRY
vs.
REGINALD ADAMS

HERBERT BERRY
vs.
REGINALD ADAMS

STELLA BERRY
vs.
REGINALD ADAMS

York. Opinion, August 22, 1950.

Negligence. Directed Verdict.

Where a defendant fails to take the stand and offers no reason or excuse to explain his failure to tell what happened it is proper for the jury to infer that he preferred the adverse inference of his adversary's testimony to any definite testimony on his behalf.

ON EXCEPTIONS.

These are four negligence actions tried together before a jury. One case by the operator of plaintiff's car ended by a directed verdict for defendant. The remaining three cases by passengers before the Law Court after a verdict for plaintiffs upon defendant's exceptions to the refusal of the trial court to direct verdicts. Exceptions overruled. Case fully appears below.

Lausier & Donahue, for plaintiffs.

Robinson, Richardson & Leddy, for defendant.

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

WILLIAMSON, J. The cases arise from a collision in a street intersection between the Berry car operated by Wal-

ter F. Berry in which plaintiffs were passengers and the Adams car operated by defendant. Four actions against defendant were tried together by the jury. The case of the operator of the Berry car ended with a directed verdict for defendant. Actions by Herbert Berry and his wife Stella for personal injuries and by Herbert Berry for losses and expenses incurred as a result of the injuries received by his wife are before us after verdicts for plaintiffs on exceptions to the refusal of the court in each instance to direct a verdict for defendant.

We are not concerned with contributory negligence on the part of plaintiffs. The only issue urged by defendant is whether the jury was warranted in finding that defendant was negligent. Our duty is to determine the issue taking the evidence and inferences to be drawn therefrom in the light most favorable to plaintiffs, and we examine the record with this rule in mind. *Torrey* v. *Congress Square Hotel Company,* 145 Me. 234, (July 1950) ; *Johnson* v. *New York, New Haven & Hartford R. R.,* 111 Me. 263, 88 A. 988 (1913).

The accident took place at ten o'clock in the evening of August 28, 1949 in Biddeford at the intersection of Washington Street running east and west and thirty-six feet in width, and Jefferson Street running north and south and thirty feet in width. The night was clear and the streets dry. The intersection is "obstructed" within the meaning of the statute which reads in part as follows:

> "A driver's view shall be deemed to be obstructed when at anytime during the last 50 feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the ways entering such intersection for a distance of 200 feet from such intersection."

R. S., Chap. 19, Sec. 102, II-B (1944).

At the southeast corner the view is obstructed by a building. The distance from the building across the sidewalk

to each street is about eight feet. The motorist approaching westerly on Washington Street has little view of Jefferson Street on his left until reaching the corner, and no more has the motorist approaching northerly on Jefferson Street a view of Washington Street on his right.

The Berry car was proceeding westerly on Washington Street at the rate of ten or fifteen miles per hour. At a point thirty-five or forty feet from the intersection, the driver testified "when I didn't see any cars coming I stepped on the gas and was doing probably twenty."

The cars collided at a point about three-fourths of the distance across Washington Street in the northwest quarter of the intersection. The front end of the Berry car struck the right side of the Adams car to the rear of the right headlight. The Berry car came to rest on the east side of Jefferson Street and the Adams car after crossing the sidewalk stopped upon an embankment against a house and stone steps leading to the sidewalk on the west side of Jefferson Street. No one of the occupants of the Berry car, who included the driver, his wife, and the plaintiffs, nor a witness on Washington Street easterly of Jefferson Street, saw the Adams car before the crash. From their evidence the jury could find that the Berry car entered the intersection before the Adams car.

Defendant presented no evidence except photographs of damage to the cars offered through plaintiffs' witnesses.

The plaintiffs alleged that defendant was proceeding northerly on Jefferson Street and that he "carelessly and negligently operated said Adams car and negligently failed to yield the right of way." The defendant in argument urges there is no proof of the direction from which the Adams car entered the intersection. The evidence, he says, is consistent with the Adams car approaching easterly on Washington Street and making a left turn or approaching northerly on Jefferson Street, and he argues that only by guess or conjecture could the course of Adams car be deter-

mined. We assume, for we need not decide, that the plaintiffs' case hinges on proof that the Adams car was proceeding northerly on Jefferson Street.

Here lies the vital issue. Was the jury warranted in finding defendant was proceeding northerly on Jefferson Street? If such were the fact, the failure of the driver in approaching a blind intersection to observe, and to yield the right of way to, and to enter the intersection after the car approaching from his right, with the surrounding circumstances, clearly justified a finding of negligence.

The words of Justice Sturgis in *Gregware* v. *Poliquin*, 135 Me. 139 at 143, 190 A. 811 at 813 (1937) in which the court held as a matter of law that negligence was established are applicable. Here we need go no further than say that, if such were the fact, the jury was entitled to find negligence and liability based thereon.

> "The defendant in the case at bar, failing to use reasonable care to watch for and see traffic approaching and about to enter the intersection, denied the car in which the plaintiffs rode the right of way which the law gave it and he persisted in his wrong to the moment of the collision which produced the damage. Had he slowed down or stopped, the cars would not have come together. The defendant's negligence is clearly established and no serious doubt can arise as to the causal connection between his tortious acts and the injuries which resulted."

In the brief time from the entrance of the Berry car into the intersection until the collision, the Adams car came from without the intersection. If the Adams car were approaching easterly on Washington Street, we have the case of a driver with the view unobstructed making a sharp left turn in front of an on-coming car less than the width of Jefferson Street distant. On this view, indeed, there would have been no collision had the Adams car passed beyond the center of the intersection before making the left

turn. To turn left, as here suggested, before passing beyond the center is a clear violation of the traffic laws. *R. S. Chap. 19, Sec. 107.*

The jury properly sought a more reasonable explanation and found that, if the Adams car was proceeding northerly on Jefferson Street, the picture became complete and understandable. The Berry and Adams cars were hidden, as we have indicated, from each other's view until both cars were very near the corner. A person may be negligent, and yet not wholly unreasonable in his conduct. The failure to note the dangers at a blind intersection which may result in an accident within a second's time may properly be the basis of a finding of negligence. Surely, the defendant has little ground to complain that the jury found that he was momentarily forgetful of his obligation to guard against hidden dangers on his right and not that with his view in no way obstructed he turned sharply to the left in the path of an on-coming car. The jury could well find that defendant, observing the Berry car and unable to avoid striking the Berry car on its left side, turned his car to the left and attempted to pass through the intersection in front of the Berry car.

The defendant did not take the stand. No reason or excuse was offered to explain his failure to tell what happened. It was proper for the jury to infer that "(he) preferred the adverse inferences of the testimony introduced on behalf of the (plaintiffs) to any definite testimony presented on (his) behalf." *Bubar* v. *Bernardo,* 139 Me. 82 at 89, 27 A. (2nd) 593 at 596 (1942); *2 Wigmore on Evidence, Sec. 289, Page 171, (3d Edition 1940).*

A jury question was here presented. There was no error in the refusal to direct a verdict for defendant. The entry in each case will be:

Exceptions overruled.

JOHN E. LESSARD
vs.
SAMUEL SHERMAN CORPORATION

Kennebec. Opinion, August 28, 1950.

Assumpsit. New Trial.

The jury is the arbiter of facts and the Law Court will not interfere with a jury verdict unless it is clearly and manifestly wrong.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit. The jury found for the plaintiff. The case is before the Law Court on defendant's general motion for a new trial. Motion overruled. Case fully appears below.

Joly & Marden, for plaintiff.

Wilfred Hay,
Charles Pomeroy,
Edmund S. Muskie, for defendant.

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

THAXTER, J. This action of assumpsit was tried before a jury in the Superior Court in the County of Kennebec. The jury found for the plaintiff for $4,624.66 which was within about $250 of the balance claimed to be due on an account for work and labor performed, materials furnished, and equipment used by the plaintiff for the defendant at its request. The case is before us on the defendant's general motion for a new trial.

The case has been argued with great care and forcefulness by both sides and we have before us a record of more than two hundred fifty pages and numerous exhibits. Because of these facts we have read the entire record with

great care and have given full consideration to the briefs filed by respective counsel.

It hardly seems necessary to reiterate the rule, so well known and so consistently applied in this state, that the jury is the arbiter of the facts and that this is a court of law which will not interfere with a jury's verdict unless it is clearly and manifestly wrong. *Inh. of Enfield* v. *Buswell, et al.,* 62 Me. 128; *Weeks* v. *Inh. of Parsonsfield,* 65 Me. 286; *Harvey* v. *Donnell,* 107 Me. 541; *Hill* v. *Finnemore,* 132 Me. 459, 464. Then only does the issue on a general motion become one of law, of which we take cognizance. Not only is this verdict not clearly against the evidence, but there is ample evidence to sustain it.

The plaintiff was engaged in the business of grading and clearing land and employed the necessary men and motor equipment for such work. The defendant corporation owned land near Rome on the westerly side of Long Pond which it proposed to use for a boys' camp. Samuel Sherman was an officer of the defendant and in the dealings which he had with the plaintiff was authorized to act for his company. Negotiations were opened by Mr. Sherman with the plaintiff relative to rough grading about two acres of land for use as a ball field and play ground. The timber had been cut from this field the preceding year and it was left with the stumps of the trees and boulders still there in their natural condition. Mr. Lessard looked over the field with Mr. Turner who was acting for Mr. Sherman in finding someone to do this work. There was a subsequent conference between Turner, Lessard and Sherman. Mr. Lessard thought that the work could be done for from $3,500 to $5,000, but there was a distinct refusal by him to do it for any stated sum. It was left that the work was to be done on a "day work basis"; and the start was made either May 31 or June 1, 1949. The time of the men employed and of the equipment used was kept in part by Mr. Lessard and in part by Mr. Pelotte, one of his employes. Also a Mr. Mosby,

employed by the defendant, assisted and checked the time as figured by the others. Mr. Sherman was there off and on as the work progressed. It is significant that in the attack made on the verdict no complaint is made of any specific item in the account annexed, either as to time or rate charged for men or equipment. The account annexed covers work done by numerous men using trucks, bulldozers, power shovels and other equipment for a period extending a few days over a month. It totals $7,874.51 and there is a credit for payments made of $3,000. On this motion the burden is on the defendant to show wherein the verdict is wrong. There is a complete failure to sustain that burden.

The plaintiff clearly was not a man of very much education and his time records leave much to be desired. We have examined the originals and they are adequate even though rough. There is no evidence of any padding; and to us they seem, when taken in conjunction with the plaintiff's testimony, to show his sincerity.

The defendant's attack on the verdict seems to be based on the discrepancy between the plaintiff's original rough estimate and the size of the verdict. There are a number of explanations of that. The original estimate was for rough grading a ball field. In the first place that work turned out to be more rather than less difficult than was anticipated. In the second place there were numerous extras. Not only was the ball field rough graded, but it was covered with loam. Some work was done on the beach, tennis courts, septic tank holes were dug, and a road was rebuilt.

The defendant's most bitter complaint is that about the middle of June Mr. Sherman asked how much more work there was to be done and the plaintiff said about two days, and that it continued for about two weeks thereafter, and that up to that time the plaintiff's charges were only about $3,000. In the record it does not appear that Mr. Lessard intended to give to anyone the figure of the total cost to that time. In the second place, Mr. Sherman was there

during the subsequent two weeks and knew perfectly well the work which was being done and specifically directed Mr. Lessard to keep on with it. In any event, no claim is made that the work was not done or that the rates for labor or equipment are unreasonable. On the contrary, the plaintiff has produced credible evidence that they are reasonable.

The truth of the matter is that Mr. Sherman knew perfectly well what work was being done and permitted it to go on without protest with an apparent determination to make his attack on the charges after Mr. Lessard should have finished. It was a procedure in which he had nothing to lose. The charges may have been more than he expected to pay, perhaps it would be more accurate to say more than he wanted to pay. But whichever it is, his contention is beside the point. The question is whether the work was done as alleged, and whether the charges were reasonable. The plaintiff has produced substantial evidence to sustain those issues, and the defendant has failed to make any valid attack on the finding of the jury.

Motion overruled.

GEORGE R. ROBINSON ET AL.

vs.

HENRY J. LeSAGE

York. Opinion, September 1, 1950.

Negligence. Emergencies. Rule of Road.

When damage is caused by the negligence of two persons, acting independently, either is liable therefor.

One acting in an emergency is not chargeable with the same degree of care applicable to normal conditions.

Whether one is acting in an emergency is a question of fact.

The emergency principle is not applicable to one whose negligence has contributed to the creation of the emergency.

A violation of the law of the road constitutes *prima facie* negligence which unexplained is conclusive. (R. S., 1944, Chap. 19, Sec. 106, 102.)

ON EXCEPTIONS.

This is a negligence action before the Law Court upon plaintiff's exceptions to the acceptance of a referee's report. Exceptions sustained. Case fully appears below.

Libby & Thorne, for plaintiffs.

Richard Small, for defendant.

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

MURCHIE, C. J. A stipulation herein establishes factually that plaintiffs are the owners of a dwelling house, and that it was damaged to the amount of $622 by the impact of a trailer truck operated by the defendant.

The house is situated on the westerly side of a three-lane highway on which the defendant was operating his truck.

It stands immediately north of a road which intersects the highway on the west. Defendant's truck was the third of three approaching the intersection from the south, on a slight downgrade, just prior to the accident. That resulted from his attempt to follow the truck immediately ahead of him in passing a lumber truck which was first in line when it stopped at the easterly limit of the traveled portion of the highway, opposite the intersecting road, to enter the latter. The stopped truck started across the highway without signal after one had passed, turning directly into defendant's path. The negligence of the driver of the stopped truck was undoubtedly a proximate cause of the damage suffered by the plaintiffs. In the present process they are seeking recovery from the defendant alone, alleging that he was negligent in driving at excessive speed and in failing to keep his vehicle under control, to stop it, and to avoid colliding with the house. The plaintiffs were not present when the accident occurred. There can be no question of contributory negligence. The sole issues are whether the defendant was negligent, and, if so, whether his negligence was also a proximate cause. It is well established law that where two persons acting independently are negligent, one damaged thereby may recover from either. *Hutchins* v. *Emery*, 134 Me. 205, 183 A. 754, and cases cited therein. As that case declares:

> "Each of two independent torts may be a substantial factor in the production of injury."

The case was referred to a referee who decided for the defendant on the ground, as his report shows, that the negligence of the vehicle which started across the highway was the sole proximate cause of the damage. He found, specifically, that defendant was not negligent "prior" thereto; that that development created an emergency in which he should not be charged with the same strictness as to care otherwise applicable; and that he was not negligent in acting, or failing to act, thereafter, as he did. The right of

exceptions on matters of law was reserved to the parties in the reference.

Objections in writing to the report of the referee were filed in court, pursuant to Rule 21 of the Rules of Court, and were overruled. The exceptions, challenging the acceptance of the report, like the objections, are four in number and are identically stated, except that the third exception amplifies the third objection. That objection closes with the recital that the finding that defendant was not negligent prior to the time the lumber truck started to cross the road "is clearly against the evidence." The exception repeats the objection verbatim and adds, to quote the controlling words:

> "inasmuch as it is clear, from all the evidence, that the Defendant was plainly guilty of negligence",

asserting that such negligence was a proximate cause of the damage. The exception would satisfy, as the objection would not, the distinction drawn by Mr. Justice Manser in *Courtenay* v. *Gagne, et al.*, 141 Me. 302, 43 A. (2nd) 817, between the function of this court in reviewing a verdict on a motion to set it aside and the action of a referee when exceptions are prosecuted involving any factual decision on his part. In the *Courtenay* case it is stated that:

> "In this respect there is a clear distinction between the verdict of a jury and the award of a referee. Upon a motion to set aside a verdict, the Court is called upon to pass on the question of whether such verdict was against the evidence and manifestly against the weight of the evidence. Upon this award, as the question is one of law, it is whether there is any evidence, or as stated in some decisions, any evidence of probative value to support the finding."

The first and second exceptions must be overruled summarily on the basis of what was said very recently in *Kennebunk, Kennebunkport & Wells Water District* v. *Maine*

Turnpike Authority, 145 Me. 35, 71 A. (2nd) 520. They are in language of identical effect with those disposed of therein, except that the second in this instance declares the report "against the law," where in that case the second declared it "against the weight of the evidence." Those exceptions were disposed of by saying:

> "Objections (1) and (2) are so manifestly insufficient under Rule XLII and Rule XXI as interpreted in Staples v. Littlefield * * * that they could not be considered by the Justice to whom the report was presented for acceptance, nor need we give them further consideration."

The third exception, with its amplification of the third objection, may indicate recognition that, as stated by Mr. Justice Merrill in *Kennebunk, Kennebunkport & Wells Water District* v. *Maine Turnpike Authority, supra,* the latter "could not be considered by the justice to whom the report was presented for acceptance." Whether the allowance of an exception indicating that an objection was overruled on a ground broader than the usual import of its language gives it the standing it would have had if that broader ground had been alleged need not now be decided. The fourth exception is not only adequate to require that the exceptions be sustained, but involves the implicit reassertion of the factual finding challenged by the third. The decision that the defendant was acting in an emergency involves a finding that no negligence on his part contributed to its origin. The authorities make it clear that otherwise the emergency principle is not applicable. *Coombs* v. *Mackley,* 127 Me. 335, 143 A. 261; 5 Am. Jur. 600, Sec. 171.

The fourth exception challenges directly nothing more than the decision that the emergency was created for the defendant, with all the implications incident thereto, although its allegation that "all the evidence" shows that such emergency as existed, if any, was created by his own negligence and that, notwithstanding it, the damage might have been avoided by reasonable care on his part, involves the findings

that he was in the exercise of due care both prior, and subsequent, to the negligence found by the referee to be the sole proximate cause of the damage. What constitutes due care in an emergency, as under normal conditions, is undoubtedly a question of fact. *Larrabee* v. *Sewall,* 66 Me. 376; *Shannon* v. *Boston & Albany Railroad Co.,* 78 Me. 52, 2 A. 678; *Bragdon* v. *Kellogg,* 118 Me. 42, 105 A. 433, 6 A. L. R. 669; *Coombs* v. *Mackley, supra.* The exception raises the issue whether there was any credible evidence, or evidence of probative value, before the referee to justify the finding of due care on the part of the defendant which was an essential part of the decision that an emergency was created for him, and not in any degree by him.

This brings us to a consideration of the facts. It has already been stated that three trucks were traveling northerly on the highway. Disregarding the evidence of a brother of one of the plaintiffs, who was operating a motor vehicle that was following the defendant, which confirms his testimony that the lumber truck stopped at the southerly limit of the highway, and turned to cross it, in his path, without signal, all the evidence touching the circumstances of the accident was given by the defendant and a truck driver named Haney. They were traveling together, Haney leading. They had overtaken and passed the lumber truck at a point approximately five miles southerly of the scene of the accident, had stopped at a roadside diner for breakfast, and were overtaking the lumber truck, to pass it a second time. They were traveling about fifty feet apart, in direct violation of R. S., 1944, Chap. 19, Sec. 106, unless within a business or residential district, see *infra,* although the provisions thereof were not applicable to Haney. The statute does not apply, according to its terms, to "one motor truck overtaking and passing another." It applies very definitely to the defendant. His disregard of its mandate constitutes prima facie evidence of negligence. *Rawson* v. *Stiman,* 133 Me. 250, 176 A. 870, and cases cited therein. Unless explained, it represents evidence that is not only "strong,"

but conclusive. *Larrabee* v. *Sewall, Coombs* v. *Mackley, Rawson* v. *Stiman,* all *supra.* That defendant's negligence constituted a part of the origin of what the referee found to be an emergency cannot be doubted, under the peculiar facts. The evidence indicates that when truck drivers are traveling together, as the defendant and Haney were, the operator of the leading truck uses the lights of his vehicle to signal to the driver of the one following that danger impends, or that the way is clear. Both Haney and the defendant had observed, when they passed the lumber truck the first time, that it was being driven erratically, weaving or swerving back and forth on the road. Haney, when overtaking it the second time, signalled to the defendant that there was danger, and shortly thereafter that all was clear. He then pulled into the center lane of the highway and passed it. The defendant attempted to follow. It is obvious that in doing so he was not proceeding on his own judgment that the conditions for passing were right, but entirely in reliance on the signal of Haney that such was the fact.

The foregoing indicates, we believe, that the decision of the referee that an emergency was created for the defendant, without negligence on his part, is not supported, as a finding of fact, by any evidence in the record which is credible or has probative force if, as we have assumed, he was not traveling in a business or residential district, as defined in R. S., 1944, Chap. 19, Sec. 102, IV, so that the provisions of Section 106 were applicable. The result would be the same, however, if he was. His own estimate of speed was 25 to 30 miles an hour before he started to pass the lumber truck, and he accelerated his speed at that time. Our statutory speed regulations are found in R. S., 1944, Chap. 19, Sec. 102. The fundamental requirement is stated in Par. I, that vehicles shall be driven:

> "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic"

and other conditions. Par. II declares speeds "prima facie lawful" in different locales, but adds that:

> "in any case when such speed would be unsafe it shall not be lawful."

The defendant at the pertinent time was operating a heavy truck at a speed so great that when the unexpected happened, on the part of the driver of a vehicle he had seen and was intending to pass, he could neither stop it nor control its course sufficiently to avoid collision with a building situate outside the limits of the highway on the opposite side from that on which he was traveling. That his speed was neither "careful and prudent" as Par. I of the speed section requires, but, on the contrary, was "unsafe" as Par. II forbids, was established beyond peradventure of doubt when he could neither stop nor, turning farther left, enter either a field south of the intersecting road or that road itself. Actually, as he testified himself, his truck went out of control before he ever applied his brakes, and he omitted to do so earlier because, at his speed and under the existing conditions, his judgment said that the truck would "jackknife." Without reference to Sec. 106, the evidence indicates that he contributed to the emergency which confronted him so conclusively that an opposite finding cannot be said to have the support of credible evidence.

Exceptions sustained.

MABEL D. WEEKS
vs.
STANDISH HARDWARE AND GARAGE CO.
AND TRUSTEE

Cumberland. Opinion, September 9, 1950.

Landlord and Tenant. Life Estate.

Statute of Frauds. Contracts.

A residuary devisee of real estate, although not claiming under the life tenant, is a successor in title to the real estate. After the death of the life tenant he has a right to disaffirm an unenforceable contract for the sale of the property of which he is now the sole owner entered into by the life tenant with the power of disposal.

If the purchaser in possession continues to hold possession of the property which was the subject matter of a contract after disaffirmance, the law will imply an obligation on his part to pay for subsequent use and occupation.

In the absence of special circumstances the purchaser in possession under a contract unenforceable because not in compliance with the Statute of Frauds is not liable for use and occupation.

ON EXCEPTIONS.

Action to recover for use and occupation of certain premises. The cause was heard by a referee with the right of exceptions reserved. The cause is before the Law Court upon defendant's exceptions to the acceptance of the referee's report. Exceptions overruled.

Saul H. Sheriff, for plaintiff.

Gould & Shackley,
Adelbert L. Miles,
Robert K. Miles, for defendant.

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

MERRILL, J. On exceptions to acceptance of a referee's report finding for the plaintiff in the sum of $648. This was an action to recover for the use and occupation of certain described premises from June 6, 1946 to November 6, 1947, 17 months at $40 per month, amounting to $680. The plea was the general issue without brief statement. No account in set-off was filed. It was heard before a referee with right of exceptions reserved. To the referee's report written objections were filed by the defendant. These objections were overruled and the report accepted. The case is now before us upon exceptions allowed to the acceptance of the report.

The property in question was formerly owned by one D. D. Decormier. It was devised to his wife for life and the plaintiff was the residuary devisee under his will. Mrs. Decormier was executrix of her husband's will. By the will she was given a power of disposal over the real estate. The nature of this power and whether the same was granted to her as executrix, and if so whether it was a power granted to her personally as executrix or to the executrix of the estate generally, or whether it was granted to her as life tenant, and if so and exercised, the proceeds of the sale were to become hers absolutely or for life or were to form a part of the general assets of the estate cannot be determined from the record. The will of D. D. Decormier was not introduced in evidence.

During her lifetime, and after the death of Mr. Decormier, Mrs. Decormier entered into an oral contract with the defendant to sell it the property for $5,000 and received on account of the purchase price two payments, one of $40 and another of $1,000. Prior to entering into the contract the defendant had been occupying at least a portion of the premises as a tenant at will under Mrs. Decormier at a rental of $40 per month. It continued to hold as tenant at will under Mrs. Decormier at this same rental until the contract to purchase was entered into. In fact, it appeared

that the $40 payment was first offered as rent, but that Mrs. Decormier accepted it as payment on the purchase price.

The referee ruled as a matter of law that the oral contract was unenforcible not only because it did not satisfy the requirements of the statute of frauds, but also because it was indefinite.

After the death of the life tenant (Mrs. Decormier) the remainderman (the plaintiff) disaffirmed the contract and notified the defendant that the rent would be $40 per month. The referee found that $40 per month was a reasonable rental and found for the plaintiff at that rate from the date of disaffirmance to November 6, 1947.

The defendant claimed that it was not liable to pay rent, claiming to have been a purchaser in possession under a contract for purchase. It also claimed that if liable to the plaintiff for rent, the $1,040 which it had paid to Mrs. Decormier should be credited against the rent due the plaintiff as remainderman.

The referee ruled that the defendant was liable to the plaintiff for use and occupation of the premises formerly held in possession under the unenforcible contract entered into with Mrs. Decormier for the period of occupancy subsequent to the disaffirmance. He refused to allow the payment made to Mrs. Decormier, the life tenant, against the plaintiff's claim for rent.

Although the defendant did not by its objections or exceptions challenge the rulings of law by the referee with respect to the enforcibility of the contract, it did by appropriate objections and exceptions challenge the referee's ruling as to the legal effect of the disaffirmance of the contract by the plaintiff, and the ruling of the referee that the plaintiff did not have to allow the payments to Mrs. Decormier against the defendant's liability to the plaintiff for use and occupation of the premises.

A residuary devisee of real estate, although not claiming under the life tenant, is a successor in title to the real estate. After the death of the life tenant he has a right to disaffirm an unenforcible contract for the sale of the property which he is now the sole owner entered into by the life tenant with a power of disposal.

If the purchaser in possession continue to hold possession of the property which was the subject matter of the contract after such disaffirmance, the law will imply an obligation on his part to pay for such subsequent use and occupation.

In the absence of special circumstances the purchaser in possession under a contract for the purchase of land, which contract is unenforcible because it does not comply with the requirements of the statute of frauds, is not liable for the use and occupation of the premises. However, if the vendor disaffirm the contract, from that time on, if the vendee continue to occupy, the law will imply an obligation to pay for the subsequent use and occupation. The general rule is well stated in 49 Am. Jur. Page 864, Sec. 559:

> "Where, however, it is the vendor who refuses to perform an oral contract for the sale of land, seeking the protection of the statute of frauds, the general rule is that the vendee named in the contract who has gone into possession of the land in pursuance of it cannot be held liable for use and occupation prior to the vendor's disaffirmance of the contract, although he may be held liable to account for rent for the time which he may have occupied the premises after the vendor's disaffirmance. The parties to the oral contract of purchase may, if they choose to do so, carry out such contract, and until it is disaffirmed by one or the other the relation between them is that of vendor and vendee and not that of landlord and tenant; since this is true, the vendor is therefore not entitled to recover for use and occupation until disaffirmance."

The general principle that the implied obligation to pay rent by a vendee in possession arises upon disaffirmance was recognized in *Patterson* v. *Stoddard,* 47 Me. 355. It is true that in that case it was the vendee who disaffirmed, but the general principle upon which the rule is founded is the same whether it be the vendor or vendee who disaffirms. Upon disaffirmance the relationship of vendor and vendee is terminated and the law implies an obligation to pay for use and occupation. The extent of the obligation depends upon which party disaffirms. If the vendee disaffirm the law implies an obligation to pay for use and occupation *ab initio,* whereas if the vendor disaffirm, the implied obligation is to pay only for use and occupation subsequent to the disaffirmance. Such at least is the general rule in the absence of controlling circumstances not here present. As hereinbefore stated, the plaintiff as a successor in title to the premises which formed the subject matter of the unenforcible contract for sale had a right to disaffirm the same. The finding of the referee, therefore, of an implied promise upon the part of the defendant to pay for use and occupation of the premises from the time of disaffirmance to November 6, 1947 was correct and the amount thereof correctly computed at $648.

If a vendor, having received payment of or on the purchase price from his vendee under a legal but unenforcible contract, disaffirm the contract, the law will imply a promise on his part to return what he has received from the vendee. "This rule rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act." See 49 Am. Jur. Page 872, Sec. 566.

As between the original parties the amount paid by the vendee can by proper procedure be offset against a liability to pay for use and occupation after disaffirmance. Whether as between the original parties this can be done by way of *recoupment* or must be taken advantage of by an account in

set-off need not be determined in this case, and upon that question we neither express nor intimate an opinion. The instant case is not between the original parties to the contract.

The plaintiff as remainderman does not claim by, through or under Mrs. Decormier. Her right to recover for use and occupation is her individual right given to her by virtue of her ownership of the land as remainderman. Although her right to recover for use and occupation did not arise until she disaffirmed the contract, her right to recover therefor is in nowise dependent upon the contract nor is it derived by, through or under it.

The defendant's right to recover back the portion of the purchase price paid to Mrs. Decormier is a right which, Mrs. Decormier having died, exists against her estate or the estate of D. D. Decormier, depending upon the nature of the right of disposal which Mrs. Decormier possessed and attempted to exercise. If under any circumstances the nature of her power of sale was such that the plaintiff is liable to allow the payment made to her against the defendant's liability to her for use and occupation, a question upon which we neither express nor intimate an opinion, that could only be made to appear by showing the exact nature of her power of sale and the exact terms of the will of D. D. Decormier. The burden of establishing either *set-off* or *recoupment* is upon the one who seeks *set-off* or *recoupment*. The will of D. D. Decormier was not introduced in evidence. The nature of Mrs. Decormier's right to dispose of the property cannot be determined from the record. If there could be a situation where the defendant had a right of *recoupment* against its liability to the plaintiff for use and occupation to the extent of the purchase price paid Mrs. Decormier, which as before stated is a question upon which we neither express nor intimate any opinion, the record is entirely void of evidence from which such right can be found. If a right of *set-off* existed the defendant failed to file an

account in set-off or otherwise plead in *set-off* as required by statute.

On the record, as presented, the ruling by the referee that he found an implied obligation on the part of the defendant to pay the plaintiff for use and occupation in the amount of $648, and his further ruling that the amount paid by the defendant to Mrs. Decormier was not allowable against that obligation were not only justified but were without legal error. These rulings in favor of the plaintiff and against the defendant are decisive of all of the objections to the referee's report and of the exceptions to its acceptance. The defendant takes nothing by its exceptions.

Exceptions overruled.

CARL G. SMITH, PETITIONER FOR
(NOW PLAINTIFF IN) A WRIT OF ERROR

vs.

STATE OF MAINE

Knox. Opinion, September 9, 1950.

Writ of Error. Escape. Indictments. Lawful Detention.

If a writ of error lies to reverse a sentence imposed because it is in excess of that authorized by law, *a fortiori* it lies when the record does not set forth the commission of any crime by the respondent for which sentence may be imposed.

Any escape by a prisoner from lawful custody was an escape at common law, and such are now common law crimes in this state punishable under R. S., 1944, Chap. 136, Sec. 2 except those escapes expressly provided for by statute.

An indictment for escape which alleges a lawful detention by virtue of commitment to jail, but which fails to allege by what authority the commitment is made is defective.

The allegation that plaintiff in error was "committed (to jail) for want of bail for his personal appearance," at a named term of court "to answer to a felony" does not mean and is not equivalent to allegations that he was "detained for a criminal offense" or that he was "in custody for a felony."

Penal statutes are to be construed strictly.

ON EXCEPTIONS.

On writ of error. Plaintiff in error was convicted of an escape from the Cumberland County jail and sentenced to state prison. A writ of error proceeding was commenced on the ground that the indictment did not charge a crime and even if it did, the sentence was not authorized by law. The case is before the Law Court upon exceptions to the dismissal of the writ.

Exceptions sustained.

Carl G. Smith, pro se.

Ralph W. Farris, Attorney General,
John S. S. Fessenden, Deputy Attorney General, for State.

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

MERRILL, J. On exceptions to the dismissal of a writ of error. The plaintiff in error was convicted of an escape from the Cumberland County jail and sentenced to imprisonment in the state prison for a term of not less than three and one-half years, nor more than seven years. He was sentenced on the tenth day of May, A. D., 1949 and the warrant of commitment issued the same day, since which time the plaintiff has been and now is held in the state prison in execution of said sentence. On the nineteenth of

January, A. D., 1950, writ of error seeking reversal of the judgment and sentence was issued by a Justice of the Superior Court. Hearing was had before said Justice of the Superior Court who, on February 6, A. D., 1950, found no error apparent on the record, dismissed the writ and ordered petitioner to serve original sentence as imposed. Exceptions to this ruling were taken and allowed, and it is upon these exceptions that the case is now before the court.

The assignments of error and the grounds of the exceptions may be summarized as follows: First, that the indictment does not charge the plaintiff in error with the commission of any crime cognizable under any law or statute of the State of Maine; Second, that the indictment does not charge the plaintiff in error with the commission of any offense which would authorize the sentence imposed.

In the recent case of *Smith* v. *State,* 142 Me. 1, 45 Atl. (2nd) 438, 439, we said:

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

See also *Rell* v. *State,* 136 Me. 322, 327.

If error lies to reverse a sentence imposed because it is in excess of that authorized by law, *a fortiori* it lies when the record does not set forth the commission of any crime by the respondent for which any sentence may be imposed. In either case he is attacking the validity of the sentence. As said in *State* v. *Galeo, supra,* which was a case of an excessive sentence upon a plea of guilty:

> "It is not the indictment but the sentence that the plaintiff attacks. He only confessed the allegations

> in the indictment. He now raises the question that those allegations did not describe or make out an offense for which the court could lawfully impose sentence of imprisonment for eleven years in the State Prison. We think he is entitled to raise that question after sentence and by writ of error."

Any escape by a prisoner from lawful custody was an offense at common law. Except in those cases expressly provided for by statute, and those cases, if any, excluded by necessary implication by the terms of some statute, escapes which were crimes at the common law, are now common law crimes in this state. No penalty, however, is provided for common law criminal escapes as such. Except for escapes defined by statute and for which statutory penalties are provided, the punishment for criminal escapes is governed by the provisions of R. S., Chap. 136, Sec. 2, which provides:

> "When no punishment is provided by statute, a person convicted of an offense shall be punished by a fine of not more than $500, or by imprisonment for less than 1 year."

The indictment upon which the plaintiff in error was sentenced, he having pleaded guilty thereto, omitting caption and signatures, is as follows:

> "THE GRAND JURORS FOR SAID STATE upon their oath present that CARL G. SMITH, whose full, true and correct name is to your Grand Jurors unknown, of Gary, State of Indiana, on the fifth day of April, A. D. 1949, at Portland in the County of Cumberland and State of Maine, while being then and there lawfully detained in the Cumberland County Jail, having been theretofore, to wit, on the third day of March, A.D. 1949, committed thereto for want of bail for his personal appearance at the Superior Court to be holden at Portland in said County of Cumberland on the first Tuesday of May, A.D. 1949, then and there to answer to a felony, to wit to answer to a charge of Breaking, Entering and Larceny of property having a value of more than One Hundred Dollars, and while being then and there in the lawful custody of the

> Sheriff of Cumberland County, and being then and there in custody in said Cumberland County Jail, at said Portland, did then and there break and escape from said custody and confinement, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The plaintiff in error contends that this indictment does not sufficiently charge him with the commission of any offense either under the statutes of this state or at common law, and that therefore the sentence imposed was unauthorized. He further contends that even if it does charge him with an offense, the punishment inflicted is in excess of that provided by law therefor, and that the sentence imposed is void and must be vacated.

The only statutory provision relative to escapes that might be applicable is R. S., Chap. 122, Sec. 28, which is as follows:

> "**Escapes from jail; penalty.** Whoever, being lawfully detained for any criminal offense in any jail or other place of confinement, except the state prison, breaks or escapes therefrom, or forcibly attempts to do so, shall be punished, if such prisoner was in custody for a felony, by imprisonment for not less than 1 year, nor more than 7 years; and if for any other offense, by imprisonment for not more than 11 months; such imprisonment shall commence after the completion of any sentence imposed for the crime for which he was then in custody."

Unless the foregoing indictment sufficiently sets forth a violation of this statute, the sentence imposed was excessive, even should the indictment be sufficient to sustain a conviction for common law escape, the maximum penalty for which is imposition of a fine of not more than $500 or imprisonment for less than 1 year.

R. S., Chap. 122, Sec. 28 only applies to escapes by persons "being lawfully detained for any criminal offense." The applicability of this statute to escapes from jail depends

upon two facts; First, the escapee must be *"lawfully detained"* in the jail; Second, the detention must be *"for a criminal offense."* Both of these elements of the crime are traversable facts. Both must be established by the state beyond a reasonable doubt. Both must be sufficiently set forth in the indictment. Unless the allegations of fact set forth in the indictment show the *"lawful detention"* of the escapee, and that the detention was *"for a criminal offense,"* the indictment is fatally defective so far as setting forth a violation of this statute is concerned.

> "Indeed it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment." *State* v. *Doran,* 99 Me. 329, 332.

It is to be noted that of these two elements of the statutory offense the first, "lawful detention" is also an element of common law escape. The effect of the statute is not the creation of a new and distinct offense. It merely provides a specific penalty for certain common law escapes which are brought within its terms by the other requirements as to the place from which the escape is made and the cause of the detention. It makes certain escapes felonies which were misdemeanors.

One of the essentials of a lawful detention in a jail is that the commitment thereto be made by lawful authority. That is an essential traversable fact which must be established by the state to make out a prima facie case. The indictment charges that the respondent escaped, having been committed to the jail "for want of bail for his personal appearance at the Superior Court" at a named term "then and there to answer to a felony." The indictment fails to show upon its face any facts from which the lawfulness of the commitment may be determined. It does not show by whom or by what authority the commitment was made. There is not even a direct allegation that he was *"lawfully"* committed. Although the indictment follows the language of

the statute and alleges the escape "while being then and there lawfully detained in the Cumberland County Jail," this allegation is not sufficient. It sets forth no facts from which the lawfulness of the detention may be determined. Nor is it aided by the allegation with respect to the commitment. That allegation neither alleges its lawfulness nor sets forth any facts from which its lawfulness may be determined. In passing it may be noted that the indictment does not even allege that the detention was by virtue of and under the commitment.

> "An indictment or information against a prisoner for effecting his escape should show the original cause of imprisonment, and by what authority he was delivered into custody—so that the lawfulness of the custody will appear—and that the prisoner did escape and go at large." 7 Ency. Pl. & Prac. 914. See also 2 Chitty's Crim. Law (5th Am. Ed.) 159. 1 Russell on Crimes, 430.
>
> "The Indictment (for escape) will in detail vary with the form of the offence; and, if statutory, the particular terms of the statute; and with the special facts. But it must contain such a setting out that the custody under which the defendant was held and its lawfulness will appear, on its face showing the escaping or breaking away to be a crime. It may then charge that then and there the defendant, so being in the lawful custody of etc, 'out of, etc, unlawfully did escape'." 2 Bishop New Crim. Procedure, Sec. 943.

Although we have no decision in this state directly passing upon the validity of an indictment for either common law or statutory escape, general principles of criminal pleading heretofore declared by this court are sufficient for the decision of this issue. As the statutory requirement of "lawful detention" is merely declaratory of one of the elements of the common law crime, the facts with respect to detention should be set forth, with sufficient particularity to satisfy common law requirements. Whether or not the detention is lawful is a conclusion of law based upon the facts

of detention. This is equally true both under the statute and at common law. An allegation that the escapee was "lawfully detained," unless sufficient facts are alleged to show the lawfulness of the detention is but the statement of a legal conclusion so far as the lawfulness of the detention is concerned. This applies both to the common law and the statutory offense. As heretofore stated the allegations in this indictment respecting the commitment, upon which the lawfulness of the detention is wholly dependent, neither allege the lawfulness thereof nor do they set forth any facts by which its lawfulness may be conclusively established.

As well said by the Kansas Court in *State* v. *Hollon,* 22 Kan. 580, 584, of an information for a "statutory escape *from lawful custody*":

> "Of course, the information says the defendant was in 'lawful custody'. But in 'lawful custody' how? This is merely a conclusion of law from the matters and things afterwards alleged in the information."

As we said in *State* v. *Lashus,* 79 Me. 541, 542:

> "The complaint follows the language of the statutory provision (R.S., c. 27, s. 31,) which creates the offence intended to be charged; but such a mode of setting out a violation of a penal or criminal statute is not necessarily sufficient. *State* v. *And. R. R. Co.* 76 Maine, 411; *Com* v. *Pray,* 13 Pick. 359. The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offence as shall apprise him of the criminal act charged; and to the end, also, that if he again be prosecuted for the same offence he may plead the former conviction or acquittal in bar."

This same doctrine was reiterated in *Moulton* v. *Scully,* 111 Me. 428 at 458 when we said:

> "And it is not sufficient, even, to use the words of the statute unless they contain a reasonably par-

ticular statement of all the essentials which constitute the intended offense."

The Constitution of the State of Maine, Art. 1, Sec. 6 provides:

"In all criminal prosecutions, the accused shall have a right xxxxx

To demand the nature and cause of the accusation, and have a copy thereof."

In *State of Maine* v. *Beckwith,* 135 Me. 423 at 426, we said:

"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."

These principles of law have been recognized in a long line of cases. See *State* v. *Lashus, supra, State* v. *Doran, supra, Moulton* v. *Scully, supra, State* v. *Hosmer,* 81 Me. 506, *State* v. *Bushey,* 96 Me. 151, and *State* v. *Conant,* 124 Me. 108, and the very recent case *State* v. *Bellmore,* 144 Me. 231, 67 Atl. (2nd) 531.

The foregoing requirements as to the statement of facts in indictments and complaints as set forth in *State of Maine* v. *Beckwith, supra,* and as specifically reaffirmed in *State* v. *Bellmore, supra,* it is to be noted, are for two distinct purposes, (1) to enable the accused to meet the exact charge

against him and (2) to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense. An essential element of lawful detention is a commitment to the place of detention by lawful authority. An indictment for escape which alleges a lawful detention by virtue of a commitment to jail, but which fails to allege by what authority the commitment is made does not allege the facts constituting the crime "with that reasonable degree of fullness, certainty and precision" which the common law and the Constitution of this State require. It does not enable the party accused to meet the exact charge against him. The lawfulness of the detention is the very gist of the crime of criminal escape, and the commitment by lawful authority is the very essence of the lawfulness of the detention. Well established principles of criminal pleading require that sufficient facts be alleged so that the lawfulness of the detention may be determined from the facts so stated. We are not unaware that there are decisions by courts of other states that in indictments or complaints for statutory escape by one "lawfully detained" or "lawfully imprisoned" a general allegation of "lawful detention" or "lawful imprisonment" in the words of the statute have been held to be sufficient. However, in view of the provisions of the Bill of Rights, Art. I, Sec. 6 of the Constitution of this State, as interpreted by this court in *State* v. *Beckwith, supra,* and the long and unbroken line of authorities hereinbefore cited, and recently reaffirmed in *State* v. *Bellmore, supra,* it is our considered judgment that an indictment for an escape from lawful detention must at least set forth the *court* by which, or the *authority* under which the accused was committed to the place of detention from which it is alleged that he has escaped. Without such a statement in the indictment or complaint the accused is not informed thereby of an essential fact upon which the lawfulness of his detention depends. Whether or not in the case of either common law or statutory escapes, in accord with ancient precedents for common law escapes, the indictment must go fur-

ther and set forth the proceedings of and before the court or other committing authority with sufficient detail so that their lawfulness and regularity may be determined from the indictment we need not, nor do we intimate an opinion. But see Archbold Criminal Pl. & Ev. 5th Am. Ed. 551 et seq., also Davis Criminal Justice, 3rd (Heard's) Ed. 443, Whitehouse and Hill, 96. There is, however, an admonition in *State* v. *Lynch,* 88 Me. 195, which those drafting indictments could well heed: "It is always advisable to follow the forms which have received judicial approval, or which have long been in unquestioned use."

The indictment in this case failing to set forth the court or authority by which the commitment was made clearly fails to show a lawful detention of the plaintiff in error. It does not sufficiently charge a crime either under the statute or at common law. It affords no jurisdiction for the imposition of any sentence. The sentence attacked by plaintiff in error is void.

There is yet another ground upon which the plaintiff's writ must be sustained. As already shown herein, the sentence imposed was in excess of that permitted for common law escape. In order to justify the sentence imposed under the only statute which might be applicable to this case, to wit, R. S., Chap. 122, Sec. 28, *supra,* the indictment must allege a violation thereof. To justify the sentence imposed the indictment must not only set forth with that exactitude demanded by the requirements of criminal pleading the legality of the detention of the plaintiff in error, but in addition thereto it must show upon its face that the detention from which the escape is charged was for a *"criminal offense"* and that the alleged escapee "was in custody *for a felony."*

The indictment contains no direct allegation that the plaintiff in error was detained for a "criminal offense" or that he "was in custody for a felony," nor does it contain any direct allegation that he was in custody "for any other

offense." If, however, the allegations of fact necessarily show upon their face that the plaintiff in error was "detained for a criminal offense" and that he "was in custody for a felony" the indictment would sufficiently charge that he was so detained and so in custody.

As said in *State* v. *Lynch,* 88 Me. 195 at 196-7:

> "It is also necessary that the indictment should employ 'so many of the substantial words of the statute as will enable the court to see on what one it is framed; and, beyond this, *it must use all the other words which are essential to a complete description of the offense;* (emphasis ours) or, if the pleader chooses, words which are their equivalents in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise.' Bishop on Criminal Procedure, vol. 1, sec. 612.
>
> In *State* v. *Hussey,* 60 Maine, 410, it is said: 'An indictment should charge an offense in the words of the statute or in language equivalent thereto.' In that case the language used was not equivalent to the statutory words, nor did it have a broader meaning, including the significations of the words of the statute.
>
> We think it is sufficient if the words used in the indictment are more than the equivalent of the words of the statute, 'provided they include the full significations of the statutory words.' "

See also *State* v. *Keen, State* v. *Hutchinson,* 34 Me. 500.

Applying the principles set forth in these decisions to the indictment here under examination, unless the facts set forth therein with respect to the detention of the plaintiff in error are equivalent to an allegation that he was detained for a criminal offense and was in custody for a felony, the indictment is insufficient to set forth a violation of the above statute which would justify the sentence imposed. The allegation that the plaintiff in error was "committed (to jail) for want of bail for his personal appearance" at a

named term of court "to answer to a felony" does not necessarily mean and is not equivalent to allegations that he was "detained for a criminal offense" or that he was "in custody for a felony." The indictment does not even directly allege nor does it necessarily imply that the felony had been actually committed by any one, much less by the plaintiff in error. Under these allegations of fact the defendant might have been committed for want of bail fixed by a magistrate for his appearance before the Superior Court to answer to an indictment for the named felony, which may never have been committed by anyone and which indictment might never be returned by the grand jury. A person in such situation is not even charged with a felony. He is merely ordered to recognize to answer to a charge of felony if the grand jury, which is the charging body, finds an indictment therefor against him. He is neither detained for a criminal offense nor is he in custody for a felony. He is in custody for want of bail.

This interpretation of the statute is borne out by the provision therein with respect to penalty for escapes thereunder:

> "Such imprisonment shall commence after the completion of any sentence imposed for the crime for which he was then in custody."

This provision indicates an intent upon the part of the legislature that the statutory phrases "detained for a criminal offense" and "in custody for felony" mean exactly what in terms they say, to wit, that the escapee must be detained *for* the criminal offense and in custody *for* the felony itself as distinguished from being detained and in custody charged with the criminal offense or charged with the felony. Much less, as here, could it apply to an escape by one who, probable cause to charge him with the commission of a felony having been found, is committed for failure to recognize with sufficient sureties to answer to an indictment charging

him with the commission thereof, should the grand jury see fit to indict him and thereby charge him therewith.

It is a well recognized principle of statutory construction that penal statutes are to be construed strictly, yet the intention of the legislature is to govern and they are not to be construed so strictly as to defeat the intention of the legislature. *State* v. *J. P. Bass Co.*, 104 Me. 288, *State* v. *Cavalluzzi*, 113 Me. 41.

Prior to the enactment of this statute all escapes from jail under the laws in force in this state were but misdemeanors, as the maximum penalty therefor was imprisonment for less than one year. In many felonies the convicted felon could be and was sentenced to a term in jail. This was and now is true of all felonies where the punishment inflicted may be for less than a year. Any crime that *may* be punished by imprisonment for one year or more is a felony under the laws of this state. See R. S., Chap. 132, Sec. 1; R. S., Chap. 136, Sec. 4. It is the punishment that *may* be imposed, not that which *is* imposed, that determines whether or not an offense is a felony or a misdemeanor. *State* v. *Vashon*, 123 Me. 412.

As the statute in question makes some escapes from jail, which prior to its enactment were misdemeanors, felonies, the rule for its interpretation is that which we expressed in *State* v. *Blaisdell*, 118 Me. 13, 14, in the following language:

> "The amendment enlarges the offense from a misdemeanor to a felony and was in force when the act complained of was committed. While the rule requiring strict construction of penal statutes was more rigorously applied in former times, when the number of capital offenses was more than one hundred and sixty, yet the rule still obtains, and is so well recognized that citation of authorities is unnecessary. And the rule is equally well established that 'the degree of strictness applied to the construction of a penal statute depends in great measure upon the severity of the statute.' Endlich on

> the Interpretation of Statutes, Sec. 334. As a corollary to this rule it follows that a statute declaring an act to be a felony calls for more strict construction than one which declares an act to be a misdemeanor."

We are not unmindful of the rule that even in penal statutes words in a statute are to be taken in their common and popular sense, unless the context shows the contrary. *State* v. *Blaisdell, supra, State* v. *Cavalluzzi, supra, State* v. *Cumberland Club,* 112 Me. 196.

While in a colloquial sense it may be said that one who is arrested on a charge of crime is arrested for a criminal offense and that one who is detained in jail to await trial for a criminal offense with which he is charged, or to answer to an indictment for a criminal offense if the same may be returned against him, is detained for a criminal offense, he is not in fact detained in jail *for the criminal offense* nor is he in fact in custody *for the crime.* In view of the fact that this statute categorically provides that the sentence for its violation shall commence "after completion of any sentence imposed for the crime for which he was then in custody," and in view of the fact that the statute provides for a maximum penalty of imprisonment for a term of seven years, thus changing a common law crime from a misdemeanor to a felony, we believe that the purpose of the act was to provide for the punishment of those who, having been convicted of crime, escape from jail or other place of detention, except the state prison, either before or after sentence. Had the legislature intended to include within the terms of the statute those charged with the commission of crime, or those committed in default of bail to await action by the grand jury, it could easily have employed apt language therefor.

The statute under which the plaintiff in error was sentenced does not apply to an escape of the character (defectively) set forth in the indictment. This statute is the only statute under which a sentence of the magnitude imposed upon the plaintiff in error could be justified. Even

did the indictment sufficiently set forth an unlawful escape of the kind (defectively) set forth therein it would be but a common law escape and only a misdemeanor and the only sentence which could be imposed therefor would be for less than one year. However, as the indictment does not sufficiently set forth the commission of any offense either under the statutes of this state or at common law, the sentence imposed is entirely without legal justification and is void. The writ of error should have been sustained, the conviction reversed and the sentence vacated. Upon the vacation of said sentence, the prisoner, unless held upon some process in no way dependent upon said conviction or sentence, should have been discharged. The exceptions must be sustained.

Exceptions sustained.

EDWARD H. MOODY, JR.,
PETITIONER FOR WRIT OF HABEAS CORPUS
vs.
J. WALLACE LOVELL
WARDEN, MAINE STATE PRISON

Knox. Opinion, October 6, 1950.

Assault. Rape. Carnal Knowledge. Attempt. Intent.

An indictment charging that a defendant "feloniously did make an assault and . . . then and there feloniously and unlawfully did attempt to carnally know and abuse" . . . sufficiently charges an assault with intent to commit rape in violation of R. S., 1944, Chap. 117, Sec. 12.

The phrase "with intent to commit *rape*" as used in R. S., 1944, Chap. 117, Sec. 12 means an intent to commit those acts punishable under Sec. 10, including unlawfully and carnally knowing and abusing a female child under 14 years of age.

An *attempt* to do an act necessarily includes an *intent* to do the act. Words which are the equivalent of, or more than the equivalent of the allegation of the required specific intent are sufficient.

ON REPORT.

This is a writ of habeas corpus reported with stipulation to the Law Court by order of the presiding Justice of the Superior Court. Writ discharged. Petitioner remanded to the Warden of Maine State Prison in execution of sentence. Case fully appears below.

Christopher S. Roberts, for petitioner.

Ralph W. Farris, Attorney General,
John S. Fessenden,
Deputy Attorney General, for J. Wallace Lovell.

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

MERRILL, J. On report. At the term of the Superior Court held in Skowhegan, in the County of Somerset, on the second Tuesday of January, A.D. 1946, the petitioner, Edward H. Moody, Jr., was found guilty on an indictment which alleged that on April 10, 1944, at Pleasant Ridge Plantation, in said county, he:

> "on one Catherine Beaudoin, a female child under fourteen years of age, to wit: of the age of thirteen years, feloniously did make an assault, and her the said Catherine Beaudoin, then and there feloniously, and unlawfully, did attempt to carnally know and abuse, against the peace of the State and contrary to the form of the statute in such case made and provided."

Upon his conviction he was sentenced to imprisonment in the state prison for a term of twenty years and was duly committed thereto in execution of said sentence. At the time of the institution of the habeas corpus proceedings

here in question, he was in the custody of the defendant, J. Wallace Lovell, as Warden of the State Prison, in pursuance of said sentence.

On March 3, 1950 Moody filed a petition for a writ of habeas corpus. By order of a Justice of the Superior Court the writ of habeas corpus was issued and Moody brought before said justice for a hearing thereon. The defendant sought to justify his detention of the prisoner under the order of commitment issued in pursuance of the foregoing sentence. The sole question in issue was the validity of the sentence. The case was reported to this court for final decision with the following stipulation:

> "The sole question being whether the indictment, conviction and record upon which said petitioner was sentenced to imprisonment, at hard labor, for twenty (20) years in the State Prison at Thomaston, in the County of Knox was authorized and was a legal sentence, or whether the indictment only alleged an aggravated assault and upon conviction for which only a sentence of a maximum of five years was authorized."

The issue is whether the indictment sufficiently charges an assault with an intent to commit a rape on a female child under the age of fourteen years in violation of R. S., Chap. 117, Sec. 12, or charges an assault in violation of Chap. 117, Sec. 21. If the indictment sufficiently sets forth a violation of the statute providing a punishment for an assault with intent to commit a rape the sentence imposed was authorized by Sec. 12, *supra,* and the writ of habeas corpus must be discharged. On the other hand, if the indictment charges only an assault in violation of Sec. 21, *supra,* even though the assault was of a high and aggravated nature, the maximum sentence which could have been imposed was imprisonment for five years. With the statutory time off for good behavior which has been credited to him, the petitioner would have fully completed and served a sentence of five years on February 24, 1950. If he could have been sen-

tenced only for violating the provisions of Sec. 21, *supra,* he should be discharged because he has already served the maximum sentence which could have been imposed therefor.

R. S., Chap. 117, Sec. 12 is as follows:

> "**Assault with intent to commit rape; penalty.** Whoever assaults a female of 14 years of age or more, with intent to commit a rape, shall be punished by a fine of not more than $500, or by imprisonment for not more than 10 years. If such assault is made on a female under 14 years, such imprisonment shall be for not less than 1 year, nor more than 20 years."

R. S., Chap. 117, Sec. 10 is as follows:

> "**Rape, definition; penalty.** Whoever ravishes and carnally knows, any female of 14 or more years of age, by force and against her will, or unlawfully and carnally knows and abuses a female child under 14 years of age, shall be punished by imprisonment for any term of years."

The word "rape" as used in Sec. 12 means the offense for which punishment is provided in Sec. 10. It includes not only the ravishment of a female of 14 or more years of age by force and against her will but also the unlawful carnal knowledge and abuse of a female child under the age of 14 years. The question of whether or not carnal knowledge and abuse of a female child under the age of consent is rape or a distinct statutory offense sometimes denominated "statutory rape" is one upon which text writers and learned justices have differed. The question *here* is not whether the offense of unlawfully carnally knowing and abusing a female under the age of 14 years is or is not rape within the strict meaning of that word. The question *here* is whether or not the legislature by the use of the word "rape" in Sec. 12 intended thereby to include the offense punishable under Sec. 10 whether the same be perpetrated on a female over 14 years of age by force and against her will or by the un-

lawful carnal knowledge and abuse of a female child under the age of 14 years.

Sections 10 and 12 of R. S., Chap. 117 have their sources in statutory provisions of the mother Commonwealth of Massachusetts in force long before and at the time of the separation. A complete history of the Massachusetts legislation prior to the separation is to be found in the case of *Commonwealth* v. *Roosnell,* 143 Mass. 32. The statutes in existence at the time of the separation in all essentials were re-enacted in this state in Laws of Maine 1821, Chap. 3, Secs. 1, 2, 3 and 4. Except for changes in the severity of punishment and the raising of the age of consent, first to 13 years, and then to 14 years, all of the essential elements of Sec. 10 of the present law are the same as those in Sec. 1 of said Chap. 3 of the Laws of 1821, and except for the same changes the provisions with respect to an assault on a female child under the age of 14 years with intent to commit a rape in Sec. 12 of the present law are the same as those in P. L., 1821, Chap. 3, Sec. 4.

In the case of *Commonwealth* v. *Roosnell, supra,* after reviewing the history of the Massachusetts statutes the Massachusetts court said:

> "The Rev. Sts. c. 125, s. 18, provided for the punishment of any person who should ravish and carnally know any female of the age of ten years or more, by force and against her will, or should unlawfully and carnally know and abuse any female child under the age of ten years; and, in s. 19, provided for the punishment of any person who should 'assault any female with intent to commit the crime of rape.' No other provision was made for assault upon a child with intent to carnally know and abuse her, and no mention was made by the commissioners of any intention to change the law, by omitting altogether all provision for this offence. It is apparent that s. 19 was intended to be as comprehensive as the Sts. of 1805, c. 97, s. 3, and 1815, c. 86, both of which are referred to in the margin; and that the offence of assaulting a

> young female child with intent unlawfully and carnally to know and abuse her was included under the description of assaulting 'any female with intent to commit the crime of rape.' The language of the Gen. Sts. c. 160, s. 27, and of the Pub. Sts. c. 202, s. 28, is in substance the same, and bears the same construction.
>
> It thus appears that the Legislature intended, by the Pub. Sts. c. 202, s. 28, to punish, as a criminal offence, an assault upon a female child under the age of ten years, with intent carnally to know and abuse her."

To this construction of the Massachusetts statutes by the Massachusetts court we give our unqualified approval, and we construe our own similar statutes derived from the same previous legislation in force here before the separation in the same way.

The changes made by the amendments raising the age of consent of the female child first to 13 years and then to 14 years should not and do not change the construction of the phrase "with intent to commit a rape." No changes were made in the provisions of the statute except with respect to the age of the female child. In each instance when the age of consent was raised in the statute punishing the crime of rape, a corresponding raise in the age of consent was made in the section punishing assault with intent to commit a rape. See Public Laws 1887, Chap. 127, Secs. 1 and 2 and Public Laws 1889, Chap. 180, Secs. 1 and 2.

The phrase "with intent to commit a rape" as used in R. S., Chap. 117, Sec. 12 means an intent to commit those acts punishable under Sec. 10, including unlawfully and carnally knowing and abusing a female child under 14 years of age.

An assault with intent to commit a rape upon a female child under 14 years of age requires the specific intent to unlawfully and carnally know and abuse such female child. As the statutory crime of assault with intent to commit a

rape requires *proof* of a specific intent, the long established rules of criminal pleading require that the indictment set forth that the assault was made with the required specific intent. *Galeo* v. *State,* 107 Me. 474. The crime interdicted by Sec. 10 is "unlawfully and carnally knowing and abusing" and the indictment for assault with intent to commit that crime must set forth that the assault was made with such intent.

The indictment here in question does not use the words "with the intent" but after alleging the making of the assault continues "and her the said Catherine Beaudoin, then and there feloniously, and unlawfully, did attempt to carnally know and abuse, against the peace of the state and contrary to the form of the statute in such case made and provided." The question upon which the decision of this case turns is whether or not the foregoing allegation in the indictment sufficiently sets forth the required specific intent.

In the case of *State* v. *Lynch,* 88 Me. 195, which was an indictment for an assault with intent to kill and murder, a statutory offense which requires a specific intent, this court laid down the rule with respect to the use of the words of the statute setting forth the elements of a statutory crime. In that case we said:

> "It is also necessary that the indictment should employ 'so many of the substantial words of the statute as will enable the court to see on what one it is framed; and, beyond this, it must use all the other words which are essential to a complete description of the offense; or, if the pleader chooses, words which are their equivalent in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise.' Bishop on Criminal Procedure, vol. 1, Sec. 612.
>
> In State v. Hussey, 60 Maine, 410, it is said:
>
> 'An indictment should charge an offense in the words of the statute or in language equivalent

> thereto.' In that case the language used was not equivalent to the statutory words, nor did it have a broader meaning, including the significations of the words of the statute.
>
> We think it is sufficient if the words used in the indictment are more than the equivalent of the words of the statute, 'provided they include the full significations of the statutory words.'"

The court then applied this rule to the required allegation of the specific intent to kill and murder. See also *State* v. *Hussey,* 60 Me. 410 and *State* v. *Keen, State* v. *Hutchinson,* 34 Me. 500. The above rule laid down in *State* v. *Lynch, supra* was approved in the very recent case of *Smith, Petitioner* v. *State of Maine,* 145 Me. 313. If, therefore, the word "attempted" as used in this indictment is the equivalent of or more than the equivalent of the statutory phrase "with the intent" the indictment sufficiently sets forth the intent.

In the case of *Fowler* v. *State,* 148 S. W. (Tex.) 576, the court said at 577:

> "It is thus seen that in charging a violation of article 608 on a female under fifteen years it is only necessary to allege and prove that an *assault* was made with the intent to commit the offense of rape. In this indictment it is alleged that defendant made an assault on the female, and did then and there *attempt to ravish* and have carnal knowledge of the said Cora Lee Stout. In the case of Taylor v. State, 44 Tex. Cr. R. 153, 69 S.W. 149, it is held that an indictment drawn in terms similar to this one charges an offense under article 608; and the use of the word 'attempt,' in lieu of the word 'intent,' in the indictment is held to be a sufficient compliance with the Code. Mr. Bishop, in his Procedure, says: 'It seems impossible to doubt that the only distinction between an "intent" and an "attempt" to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into

> execution.' Atkinson v. State, 34 Tex. Cr. R. 424, 30 S.W. 1064; Hart v. State, 38 Tex. 383; Brown v. State, 27 Tex. App. 330, 11 S.W. 412; Witherby v. State, 39 Ala. 702; State v. Bullock, 13 Ala. 413; Gandy v. State, 13 Neb. 445, 14 N.W. 143; Scott v. People, 141 Ill. 195, 30 N.E. 329; United States v. Barnaby (C.C.) 51 Fed. 20; State v. Evans, 27 Utah, 12, 73 Pac. 1047; Johnson v. State, 27 Neb. 687, 43 N.W. 425; State v. McGinnis, 158 Mo. 105, 59 S.W. 83. It is thus seen the allegations in the indictment are sufficient to charge an offense on a female under 15 years of age, under article 608."

The attorney for the petitioner in his brief cites *State* v. *Goldston,* 103 N. C. 323 which is directly contrary to the rule laid down by the Texas court in *Fowler* v. *State, supra.* He seems to have been unaware, however, that the North Carolina court in *State* v. *Hewett,* 158 N. C. 627, 74 S. E. 356, overruled the *Goldston* case and *State* v. *Martin,* 14 N. C. 329, the case cited as authority therefor. In *State* v. *Hewett* the North Carolina court said:

> "We are unable to see how a man can commit a felonious assault upon a female, and attempt to ravish her, without intending it. The words used in the bill, ex vi termini, necessarily import an intent to commit rape, and are amply sufficient to give the defendant full notice of the crime with which he stands charged, and that is the chief purpose of a bill of indictment."

The results reached in *Fowler* v. *State* and *State* v. *Hewett, supra,* are in accord with the decisions by this court that it is sufficient in charging the commission of a statutory crime to use words which are the equivalent or more than the equivalent of the statutory language setting forth the necessary elements constituting the statutory crime. Counsel for the respondent strenuously urges that to follow the rule laid down in the foregoing cases would in effect overrule *Galeo* v. *State, supra.* In this he is clearly in error. *Galeo* v. *State* did not overrule *State* v. *Lynch, supra.* The

two cases are entirely consistent one with the other. In *State* v. *Lynch* equivalent words were used. In *Galeo* v. *State* there were no allegations of fact which were the equivalent or more than the equivalent of an allegation of the specific intent required by the statute, to wit, the "intent that any person or property passing on the same (railroad tracks) should be injured." There is no exception to the general rule set forth in *State* v. *Lynch* which applies to the manner in which the specific intent which is a necessary element of a statutory crime must be alleged. Words which are the equivalent of, or more than the equivalent of the allegation of the required specific intent are sufficient. In fact, in *State* v. *Lynch* the court applied this rule to the allegation of the specific intent which was a necessary element of the statutory crime involved in that case.

An attempt to do an act necessarily includes an intent to do the act. An allegation that one attempted an act *ex vi termini* alleges an intent to do the act. Therefore, an allegation that one made an assault and attempted to commit an offense is the equivalent of an allegation that he made the assault with the intent to commit such offense. In reaching this conclusion we are further borne out by the decision in *State* v. *Jones,* 125 Me. 42. In that case it was urged that an indictment for an attempt did not sufficiently set forth the intent with which the alleged overt acts were committed. The indictment alleged that they were done "in attempting to commit said offense." We said in that case:

> "If done in attempting to commit the offense, it follows *ex vi termini* that they were done with the intent to commit the offense.
>
> While not in commendable form, we think it is a sufficient allegation that the overt acts were done with the intent to commit the principal offense."

We hold that the words used in this indictment which sufficiently charged that the defendant assaulted a female

child under 14 years of age, to wit, of the age of 13 years and her "feloniously, and unlawfully, did attempt to carnally know and abuse against the peace of the State, etc.," sufficiently charged an assault upon such child "with intent to commit a rape" and sufficiently charged a violation of R. S., Chap. 117, Sec. 12. This being true, the sentence imposed upon the petitioner, being authorized by said Sec. 12, was a legal sentence and the writ of habeas corpus by the terms of the report must be discharged. The record further shows that the Justice of the Superior Court who issued the writ of habeas corpus and who reported the cause to this court ordered the "prisoner remanded pending decision by Law Court on report." As the writ must be discharged the petitioner should also be remanded to the custody of the Warden of Maine State Prison in execution of sentence.

Writ discharged.

Petitioner remanded to the Warden of Maine State Prison in execution of sentence.

JENNIE D. TARBELL
vs.
LESLIE F. COOK, ET AL.

Washington. Opinion, October 6, 1950.

Equity. Deeds. Cancellation.

An equity appeal is heard anew on the record and findings of a sitting justice will be conclusive unless clearly wrong.

ON APPEAL.

This is a bill in equity seeking cancellation of a deed. The case is before the Law Court upon appeal by plaintiffs' executor from a decree dismissing the bill. Appeal dismissed. Decree below affirmed. Case fully appears below.

Oscar L. Whalen,
John J. Mahan, for appellant.

Francis E. Day, for appellees.

Linnell, Brown, Perkins,
Thompson & Hinckley, for executor.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (THAXTER did not sit.)

NULTY, J. This case comes before this court on appeal by the plaintiff from the decree of the sitting justice dismissing the bill in equity filed by the plaintiff.

According to the docket entries the plaintiff died before this action was argued in the Law Court and the executor appears to prosecute this appeal. The bill in equity seeks the cancellation of a deed given by the plaintiff to the defendants dated December 3, 1947, as well as other incidental relief. The hearing before the sitting justice was had on bill, replication and proof and from a careful reading of the evidence the following facts could be found:

Plaintiff was a lady ninety years of age of remarkably good reason and memory for a person of that age. Her hearing was somewhat impaired but to no considerable degree. Her eyesight was defective but sufficient and adequate for all general purposes.

Some time in the fall of 1947 the plaintiff and defendants began negotiations to provide the plaintiff with a home, care and companionship for the remainder of her days and to assure to the defendants the ownership of the plaintiff's home after plaintiff's death with the right of co-occupancy by the defendants with plaintiff during the balance of plaintiff's life. Before all arrangements had been completed the defendants moved into plaintiff's house. Negotiations continued and from the record it appears that plaintiff was reluctant to convey her real estate to the defendants during her lifetime and the defendants were equally adverse to rely upon a devise by will of plaintiff. Plaintiff suggested that perhaps the practicing attorney who had acted for plaintiff in the settlement of her husband's estate might be able to assist both plaintiff and the defendants and the defendants arranged a conference of all parties with the attorney. After a somewhat lengthy session during which the attorney represented the plaintiff and defendants, plaintiff executed and delivered a deed of her property to the defendants as joint tenants which contained the following condition:

> "This conveyance is made upon the following condition — That the said Jennie D. Tarbell hereby reserves to herself a life tenancy in said real estate together with the right to the use and occupancy of said home in common with the grantees during the remainder of her lifetime."

There is ample evidence in the record—and the sitting justice so found—that plaintiff was fully informed of the nature, effect and significance of the deed which she executed and delivered to the defendants and while different arrangements could have been made which would have ac-

complished the same result, the sitting justice found, and there was ample evidence to support it, that the steps which had been taken were adequate and were the agreement of the parties fairly and voluntarily made. The effect of the deed with the condition attached accomplished what was sought by the parties and the defendants agreed to maintain the home, provide food for plaintiff, pay the taxes, look out for incidentals and care for plaintiff in the usual and customary way. The sitting justice also found that there were no variant understandings of the trade and no mistake or fraudulent or inequitable conduct and that plaintiff had received from her contract with the defendants the consideration belonging to her until outside parties intervened.

It will serve no useful purpose to further discuss the facts. In our opinion there was ample credible evidence to support all the findings of the sitting justice. The plaintiff claims that there was no meeting of the minds of the parties and that plaintiff, by reason of mistake, misconception, misunderstanding and ignorance, signed and delivered the deed. The sitting justice, who saw the witnesses and heard the evidence, ruled otherwise and stated in his findings that the evidence warranted a finding that the plaintiff intended to give a deed of the remainder of her property to the defendants with right of co-occupancy in plaintiff during plaintiff's life and that the credible evidence did not warrant the issuance of a decree cancelling the deed.

Under the law of the State of Maine an equity appeal is heard anew on the record. See *Cassidy et al.* v. *Murray et al.*, 144 Me. 326, 74 A. (2nd) 230; *Tuttle* v. *Howland et al.*, 143 Me. 394, 75 A. (2nd) 374.

It is also the law that findings of fact by a sitting justice will be conclusive unless clearly wrong and the burden is upon the appellant to prove it. We said in *Levesque* v. *Pelletier*, 144 Me. 245, 68 A. (2nd) 9:

> "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."

There was a very full and adequate hearing in this matter and it is our opinion, after consideration of the same, that the findings of the sitting justice were correct and that there was ample credible evidence to support them and, under the decisions of this court they will not be disturbed, there being no error of law apparent and the factual findings being correct. It, therefore, follows that the final decree entered by the sitting justice should be affirmed and the appeal of the plaintiff dismissed. Let the entry be

Appeal dismissed.

Decree below affirmed.

GEORGE J. REYNOLDS ET AL.

vs.

W. H. HINMAN COMPANY

Sagadahoc. Opinion, October 9, 1950.

Pleading. Demurrer. Negligence. Res Ipso Loquitur.

When the defect in a declaration is a matter of form and not of substance it must be specially set forth.

A declaration which fails to set forth in what particular or particulars a defendant or its servants or agents were negligent is demurrable.

The doctrine of *res ipsa loquitur* is a rule of evidence and not a substantive rule of law.

Under the law of this state it is the duty of a plaintiff in an action of negligence to inform the defendant of the facts upon which he relies to establish liability.

By direct averment a pleader must at least state facts from which the law will raise a duty, and show an omission of the duty with injury in consequence thereof.

The rule of absolute liability whereby one acting entirely without fault is liable for damages resulting from his innocent acts has never been adopted in this state and the only logical rule for this court to adopt is the rule that fault is a requisite for liability.

ON EXCEPTION.

This is an action of negligence. Defendant demurred specially setting forth several causes thereof. Plaintiff joined in the special demurrer. The demurrer was sustained. Plaintiff filed exceptions. Exceptions overruled.

Case fully appears below.

Edward W. Bridgham,
Harold J. Rubin, for plaintiffs.

Verrill, Dana, Walker and Whitehouse, for defendant.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (THAXTER did not sit.)

NULTY, J. This case comes before this court on exceptions by the plaintiffs to the sustaining of a special demurrer setting forth several causes of demurrer filed by the defendant. The declaration contains three counts. The first count alleges that the plaintiffs on or about the first day of December, 1946, owned real estate and a dwelling house in Bath, Maine, in close proximity to U. S. Highway No. 1, a public highway on which the defendant was engaged in public construction work; that in the course of said construction work the defendant, through its servants and agents, blasted rock formations and ledges by the use of an explosive, namely, dynamite; that it was defendant's duty to so carefully do the blasting that plaintiffs' property would not be damaged by the force of the explosions; and that the explosions and vibrations from the blasting did cause severe damage to the plaintiffs' property. The second count in the declaration is substantially the same as the first count, the difference being that there is an allegation that the defendant so negligently blasted rock formations that the force of the explosions and vibrations caused severe and serious damage to the plaintiffs' property. The third count in the declaration is substantially the same as the first two except that it alleges that the defendant negligently, carelessly and wantonly blasted with excessive amounts of explosives.

One of the causes of demurrer set forth in the special demurrer to the first count in the declaration is that it is not sufficient in law because the plaintiffs have averred that it was the duty of the defendant, its servants or agents, to so carefully and properly blast the rock formations that the property of the plaintiffs would not be destroyed or damaged by the force of such explosives, whereas the duty of the defendant, its servants or agents, was only to use reasonable care in such blasting. Another cause of special de-

murrer to the first count is that it is not sufficient in law because the plaintiffs have failed to allege in said first count that the damage complained of was caused by any negligence or want of due care on the part of said defendant, its servants or agents. The first cause for special demurrer to the second count in the declaration is that the plaintiffs have alleged it to be the duty of the defendant to so carefully and properly blast that the property of the plaintiffs would not be damaged by the force of said explosions, whereas, the duty of the defendant, its servants or agents, was only to use reasonable care in such blasting. Another cause for special demurrer to the second count challenges its sufficiency because it alleges that defendant so negligently blasted as to cause damage to plaintiffs' property without setting forth in what particular or particulars the defendant, or its servants or agents, were negligent. The cause for demurrer to the third count of the declaration challenges its sufficiency because it states that it was defendant's, or its servants' or agents', duty to so carefully blast that plaintiffs' property would not be damaged by the force of said explosions, whereas its duty was only to use reasonable care in such blasting. The plaintiffs joined in the special demurrer and it was sustained as to all three counts in the declaration and plaintiffs seasonably filed exceptions.

The special demurrer in this case, in the opinion of this court, points out particular imperfections in the declaration and under our decisions beginning with *Neal* v. *Hanson,* 60 Me. 84, 85, when the defect is a matter of form and not of substance it must be specially set forth. See also *Boardman* v. *Creighton,* 93 Me. 17, 44 A. 121; *Couture* v. *Gauthier,* 123 Me. 132, 122 A. 54; *Estabrook* v. *Webber Motor Co.,* 137 Me. 20, 15 A. (2nd) 25, 129 A. L. R. 1268.

Passing for a moment the first count in the declaration and taking up the second and third counts, an examination discloses that the second count attempts to invoke the doctrine of *res ipsa loquitur,* which is, according to the author-

ities, merely a rule of evidence and not a substantive rule of law and the most that may be said for it is that the doctrine allows an inference that may constitute evidence of negligence which may be weighed and considered either by a jury or a court as against the evidence adduced by the defendant in rebuttal thereof. It is sometimes said to be an exception to the general rule that negligence is not to be presumed but in fact it probably is a qualification rather than an exception to the general rule of evidence that negligence must be affirmatively proved in that it relates to the mode rather than the burden of establishing negligence. See 38 Am. Jur., Par. 298, Page 994, also *Edwards* v. *Cumberland County Power & Light Co.*, 128 Me. 207, 214, 146 A. 700, and *Chaisson* v. *Williams*, 130 Me. 341, 156 A. 154. In any event, the second count, as above stated, does not set forth in what particular or particulars the defendant or its servants or agents were negligent. This failure will be commented upon later, after we consider the third count in the declaration.

Said third count charges the defendant, its servants or agents, with negligently, carelessly and wantonly blasting with excessive amounts of explosives without any specific allegation or description of the defendant's, its servants' or agents', negligence.

With respect to the second and third counts of the declaration, the plaintiffs set forth in their brief and practically admitted in oral argument that they did not expect this court to adopt the rule of *res ipsa loquitur* and that so far as the third count was concerned they admitted both in their brief and at oral argument that the third count depended upon proof of specific acts of negligence. This court has on many occasions set forth the law of this state with respect to the duty of a plaintiff in an action of negligence. In *Nadeau* v. *Fogg*, and *Watier* v. *Fogg*, 145 Me. 10, 70 A. (2nd) 730, we said:

> "Under the law of this state it is the duty of the plaintiff in an action of negligence to inform the

> defendant of the facts upon which he relies to establish liability for the injuries alleged and a plaintiff must set out a situation sufficient in law to establish a duty of the defendant towards the plaintiff and that the act complained of was a violation of that duty. *Knowles* v. *Wolman,* 141 Me. 120, 39 A. (2nd) 666. The well established applicable principles of pleading in negligence cases have been concisely stated in *Chickering* v. *Lincoln County Power Company,* 118 Me. 414, 417, 108 A. 460, 461, and again restated in *Ouelette* v. *Miller,* 134 Me. 162, 166, 183 A. 341, and also in *Estabrook* v. *Webber Motor Co.,* 137 Me. 20, 25, 15 A. 2d 25, 129 A.L.R. 1268. In *Chickering* v. *Lincoln County Power Company,* supra, it is stated 'actionable negligence arises from neglect to perform a legal duty. * * * By direct averment a pleader must *at least state facts* from which the law will raise a duty, and show an omission of the duty with injury in consequence thereof. * * * * * Reasonable certainty in the statement of essential facts is required to the end that defendant may be informed as to what he is called upon to meet on the trial. Facts showing a legal duty, and the neglect thereof on the part of the defendant, and a resulting injury to the plaintiff, should be alleged.' "

The special causes of demurrer with respect to the second and third counts in any event reach the questions raised by the defendant and under the authority of *Nadeau* v. *Fogg* and *Watier* v. *Fogg, supra,* it is our opinion that the special causes of demurrer applicable to each count were properly sustained because the declarations in the second and third counts do not conform to the well recognized principles of negligence pleading set forth above. This leaves for disposal and consideration the first count in which there is no allegation of negligence. The plaintiffs seek to apply to their alleged damage from concussion and vibration the rule of absolute liability which rule is that a man, though acting entirely without fault, is liable for the damaging consequences of his innocent acts. This rule is not founded on

negligence or fault or liability but is presumed from the circumstances of the action. Our state has never adopted such a rule, but it has been adopted in a number of states and the special causes of demurrer to the first count in the declaration squarely put the question before this court. In passing it should be noted that unless we do adopt the rule of absolute liability sought by the plaintiff, the exceptions to the sustaining the special causes of demurrer to said first count should be overruled for the reasons hereinbefore set forth in that said first count does not conform to the well recognized and decided principles of negligence pleading in use in this state. Professor Jeremiah Smith, in 33 Harvard Law Review, 542, 550, in an article entitled "Liability for Damage to Land by Blasting," in which article the authorities are extensively reviewed, says, in part:

> "The history of law as to the former absolute liability in the absence of fault, and as to the present general requirement of fault as a requisite to liability, can be stated very briefly. Speaking generally, the modern law is a reversal of the ancient law.
>
> "In old days it was the general rule that a man, though acting entirely without fault, was liable for the damaging consequences of his innocent acts. In some cases where this doctrine worked extreme hardship, an innocent actor was exonerated; but these instances of nonliability were exceptions.
>
> "At the present time, it is the general rule that fault is requisite to liability. In rare instances the law imposes liability in the absence of fault; cases where a defendant is held to have 'acted at peril.' But these instances are exceptions to the general rule which requires fault as an element of liability."

The author continues in Note 35:

> "These exceptions are attempted to be justified on the ground that they are cases of 'extra hazardous uses.' It is alleged that there are various

> classes of extra hazardous acts 'which are performable only at the peril of the doer'. * * * * * This doctrine imposing absolute liability for nonculpable accident—this holding that a man in certain cases acts at his peril—is regarded unfavorably by some of the best modern text writers (see Salmond on Torts, 4 ed., Preface v; Pollock's Law of Torts, 10 ed., 505, 511, 671, note s; 1 Street, Foundations of Legal Liability, 84, 85.) One objection to this classification is found in the difficulty of drawing 'the line between the danger which calls for care and the 'extra hazard.' 'There are, as yet no unanimously approved rules or criteria' as to this subject. * * * *"
>
> "The earlier and later standards are thus compared by Professor Ames." 22 Harvard Law Review, 99:
>
> > " 'The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of today, except in certain cases based upon public policy, asks the further question "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril.' "

Professor Smith continues:

> "The gradual adoption of the modern and now prevailing doctrine—that fault is generally a requisite element of liability in tort—has naturally induced an examination of the essence of fault in the legal sense. And this has given rise to the modern conception of a particular fault which formerly was hardly mentioned; viz., negligence."

Professor Smith, in the Harvard Law Review, Vol. 33, Page 551, then quotes from an article by him entitled "Tort and Absolute Liability":

> "I. The doctrine that a man, in certain cases, acts at peril and is absolutely liable for nonculpable accidents is, as we

have already said, a survival from the early days when *all* acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional instances.

"II. There was 'a time when the common law had no doctrine of negligence.' It has been said that, in the earlier stages of the law, 'there is no conception of negligence as a ground of legal liability.' In Holdsworth's 'History of English Law,' the author speaks of 'the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines.' Mr. Street says that the law of negligence 'is mainly of very modern growth.' 'No such title is found in the year books, nor in any of the digests prior to Comyns (1762-67).' Sir Frederick Pollock says: 'The law of negligence, with the refined discussions of the test and measure of liability which it has introduced, is wholly modern; . . .' Professor E. R. Thayer says 'that law' (the law of negligence) 'is very modern — so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power.' '. . . the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it.'

> "III. At the present time it is generally unnecessary, in order to do justice to a plaintiff, to adopt the doctrine of acting at peril. Professor E. R. Thayer says: '. . . the law has at its hands in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet.' If the case is a meritorious one and proper emphasis is laid on the test of *'due care according to the circumstances,'* then 'the theory of negligence' will generally be 'sufficient to carry the case to the jury.' 'How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. . . .' "

Professor Smith continues:

> "At the present time, in an action for blasting, if the courts apply the modern law as to negligence, a plaintiff who has a meritorious case can generally recover without calling in aid the old rule of absolute liability (acting at peril).
>
> "The plaintiff is likely to derive material assistance from two doctrines, one as to the amount of care required from defendant, the other as to the method of proving negligence."
>
> "Assuming that there are no degrees of care *as matter of law,* yet there must obviously be a great difference in the amount of care required in various cases *as matter of fact.* A jury will be told, and will usually find, that the amount of care required *in fact* will increase in proportion to the danger to be apprehended in case of neglect. Hence they will generally find that the amount of care required of a blaster is *in fact* very great.
>
> "But not only is great care in fact required of the blaster. In addition the plaintiff is much aided, as to the method of proving defendant's absence of care, by the application of the doctrine of *res ipsa loquitur.*

"This rule, taken literally, and without explanation, is liable to misapprehension.

"The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The isolated fact that an accident has happened does not afford *prima facie* evidence that the accident was due to the negligence of the defendant. But if the accident, viewed in the light of the surrounding circumstances, is one which 'commonly does not happen except in consequence of negligence,' then if no explanation is offered, the jury *may*, not *must*, find that it was due to the negligence of the defendant. There is, however, no presumption of law, or fact, to this effect. The existence of negligence is 'an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw.

"This rule, even on a very conservative statement of it, would permit a jury to find the fact of negligence (a *prima facie* case of negligence) in a very large proportion of instances of damage due to the blasting, and the jury would often so find."

In 38 Am. Jur., Pars. 139 and 140, Pages 799 and 800 and Page 801 under "Negligence" the following statements with respect to "Escaping Substances" and "Particular Substances" appear in part:

"Par. 139. *Escaping Substances; Doctrine of Rylands* v. *Fletcher.*—The right of an owner to use his property and to perform acts thereon is not so absolute or so unlimited as to permit him to use it without taking into account injuries which a particular use is causing other persons or their property. There is a well-recognized class of cases which hold that a person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril; and if he does not do so, he is prima facie liable for all the damage which is the natural consequences of its escape. The leading case in support of this rule is *Rylands* v. *Fletcher,* LR 3 HL 330, one of the most cele-

brated of common-law precedents. * * * * * * * * The doctrine of *Rylands* v. *Fletcher* is that a landowner may be liable for injuries caused by the escape of a substance from his premises, even in the absence of fault on his part. However, his liability, as declared under the doctrine of that case, is not absolute. No liability exists where the escape of the dangerous substance from the defendant's premises is due to the plaintiff's own fault, or to vis major, the act of God, or to acts of third parties which the defendant had no reason to anticipate. While some American authorities hold that an owner or occupant who stores upon his premises a substance in such quantity and of such a dangerous character that its escape from the premises will result in an injury to others can be held liable for damage so occurring, although the escape occurs without negligence on his part, the weight of authority in American jurisdictions stands for the proposition that an owner or occupant is liable for damage caused by the escape of substances from the premises only where some fault can be attributed to him. * * * * * * * * *"

"Par. 140.—Particular Substances.—Rylands v. Fletcher generally has been understood to hold that an owner or occupant of land who brings water on his premises by artificial means, and stores it in tanks or reservoirs for his use, is liable if the water escapes and injures the property of an adjoining owner, and to this extent the doctrine of the case has been approved quite generally, but subject to the important modification insisted upon by some authorities, that the owner or occupant is liable only where he is negligent or otherwise at fault. Extension of the principle to substantially different facts has met with some judicial disfavor. * * * * * * * * * The rule is that where an owner or occupant of property sets a fire on his premises for a lawful purpose, he is not, in the absence of a statute to the contrary, liable for damage caused by the spread of the fire to the property of another, unless he was negligent in starting or in not controlling the fire. The same is true of explosive instrumentalities according to

> most of the decisions on the subject. The owner is not liable for injuries caused others in the absence of proof of negligence, unless he is shown to have created a nuisance."

We have set forth at some length the results of the studies of eminent jurists and legal students with respect to the rule of absolute liability and its conflict with the rule and growth of law of negligence and with those principles in mind let us now examine what our court has held with respect to those matters.

In *Bachelder* v. *Heagan,* 18 Me. 32 (1840), in an action of trespass on the case to recover damages, alleged to have been done to the plaintiffs' land, and to the fences and growth thereon, by the negligence of defendant in setting a fire on his own land, near to the land of the plaintiffs, and in not carefully keeping the same, our court said:

> "By the ancient common law, or custom of the realm, if a house took fire, the owner was held answerable for any injury thereby occasioned to others. This was probably founded upon some presumed negligence or carelessness, not susceptible of proof. The hardship of this rule was corrected by the statute of 6 *Anne,* c. 31, which exempted the owner from liability, where the fire was occasioned by accident. The rule does not appear to have been applied to the owner of a field, where a fire may have been kindled. It may frequently be necessary to burn stubble or other matter, which incumbers the ground. It is a lawful act, unless kindled at an improper time, or carelessly managed. * * * * * * * * * * *
>
> "In *Clark* v. *Foot,* 8 Johns, R. 421, it was held, that if A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A., unless there was some negligence or misconduct in him or his servants. * * * * * Negligence or misconduct is the gist of the action. And this must be proved. In certain cases, as in actions

> against inn-keepers and common carriers, it is presumed, by the policy of the law, where property is lost which is confided to their care. * * * * * * * * The defendant's fire was lawfully kindled on his own land. It is an element, appropriated to many valuable and useful purposes; but which may become destructive from causes, not subject to human control. Hence the fact, that an injury has been done to others, is not in itself evidence of negligence. * * * *"

In *Noyes* v. *Shepard,* 30 Me., 173, 178 (1849), in a case involving a pond of deep water from which the plaintiff had obtained permission of the defendant to tap the pond so that said plaintiff could get more water to run his mill, upon condition that he, the said plaintiff, would insert a flume and secure the water thoroughly from gullying and letting out the mass of water from the pond, plaintiff made a narrow canal to let the water flow into the brook above his mill but he did not entirely secure it so as to prevent the water from washing away some of the earth upon the bottom and sides of the canal. The action of the water created alarm to the defendant for fear the water would burst out of the pond and do extensive damage and the defendant put a dam across the canal but not of sufficient tightness to stop the water from leaking around the dam through the bank which were of gravel and quicksand. The defendant attempted, by degrees, to remove the dam but the flow of water got out of control and the channel grew wider and deeper and the pond burst out and serious damage was caused to the plaintiff's dam and mill and houses of many other persons. In that action we said:

> "The rules of law applicable to cases of injury, occasioned by the lawful acts of one person to the property of another, appear to be quite well established.
>
> "A person is required so to conduct in the exercise of his own rights and in the use of his own property, as not to do injury by his misconduct or

by the want of ordinary care to the rights or property of another.

* * * * * * * * * * *

"Imminent danger expected from fire or flood, cannot excuse or exempt one from the use of ordinary care to prevent unnecessary injury to the property of others. What would under such circumstances be ordinary care must be determined by a jury; and it might not be the same care or an equal degree of caution, which would reasonably be expected, when there was little or no cause to apprehend immediate danger. However imminent the danger may be, a person must be held responsible for an injury to the property of another, occasioned by negligence of a less culpable character than such gross carelessness, as would reasonably authorize an inference, that it was done with an evil intent."

In another fire case wherein the plaintiff charged the defendant with kindling a fire upon his own land for a lawful purpose "at an unsuitable time and in a careless and imprudent manner" and that the fire, for want of proper care on his part spread, and caused great damage to the plaintiff's woodland, down timber, wood and bark, we said in *Hewey* v. *Nourse,* 54 Me. 256, 259 (1866):

"Every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. *Batchelder* v. *Keagan*

(Bachelder v. Heagan), 18 Maine, 38; *Barnard* v. *Poor,* 21 Pick., 380; *Tourtellot* v. *Rosebrook,* 11 Met., 462."

In *Simonton et al.* v. *Loring et al.,* 68 Me. 164 (1878), which was an action wherein the plaintiffs alleged that they had a stock of goods occupying the first floor of a block and the defendant occupied the hall in the third story together with the appurtenances thereto, including a urinal supplied with water, that the water faucet regulating the flow of the water into the urinal having been left wide open overflowed the bowl and flooded the store and injured plaintiff's stock. The defendants had possession, control and management of the hall and the appurtenances and we said:

"What is the rule regulating the liability of persons having the possession, control and management of tenements supplied with water as this was? The plaintiffs contend, *inter alia,* that the defendants were bound at their peril absolutely to prevent injury to others by the escape of the water, upon the principles enunciated by the English courts in *Fletcher* v. *Rylands,* 1 Exch. 265, S. C. Ho. L. 330. *Smith* v. *Fletcher,* 7 Exch. 305. *Nichols* v. *Marsland,* L. R. 2 Exch. Div. (C. A.) 1. This doctrine has received a *quasi* approval in *Ball* v. *Nye,* 99 Mass. 582. *Wilson* v. *New Bedford,* 108 Mass. 261, 266. While it has been criticised in *Swett* v. *Cutts,* 50 N. H. 437; *Brown* v. *Collins,* 53 N. H. 442; and utterly denied in Losee v. Buchanan, 51 N. Y. 476, 486. Whether the same principles will be applied by this court to similar circumstances we need not stop to inquire until such an occasion presents itself.

* * * * * * * * * * *

"The rule of ordinary care affords reasonable freedom in the use, as well as reasonable security in the protection of property. For the degree of care which this rule imposes must be in proportion to the extent of injury which will be likely to result should it prove insufficient. In other words, ordinary care depends wholly upon the particular facts of each case—the degree of caution and dili-

> gence rising, conforming to and being commensurate with the exigencies which call for its exercise. It must be equal to the occasion on which it is to be used, and is always to be judged of according to the subject matter, the force and dangerous nature of the material under one's charge. *Holly* v. *Boston Gas Light Co.,* 8 Gray, 123."

In *Burbank* v. *Bethel Steam Mill Co.,* 75 Me. 373, 379, (1883) which was an action to recover damages for burning of property caused by the use of a stationary steam engine from which a fire was communicated to plaintiff's house and barn, we said:

> "Can the action be maintained at common law without proof of negligence of the defendants, or that their steam engine was a nuisance, in fact? It is claimed by the counsel for the plaintiff, that it can be, on the ground that the defendants erected their engine in violation of law, and having done so were insurers against all damage, which any one might sustain from its use; and in support of this proposition he cites and relies on *Ryland* v. *Fletcher,* 3 Law Rep. H. L. 330; *Jones* v. *Festiniog R. Co.* 3 L. R. (Q. B.) 733; *Salisbury* v. *Herchenroder,* 106 Mass. 458; *Frye* v. *Moor,* 53 Maine, 583.
>
> "We think these cases are all distinguishable from the case at bar. The authority of *Rylands* v. *Fletcher,* has been denied by many of the courts in this country, and by some accepted. This court has neither denied nor accepted it, and we have no occasion now to do so. Its authority, however, is not to be extended beyond the class of cases possessing all the elements upon which the judgment of the court was based. It is believed that the courts in this country—certainly in this state—have never held it applicable to fires, rightfully set upon one's own premises, which escape and extend on to the property of others. (Simonton v. Loring, 68 Maine, 164).
>
> "The case was before the House of Lords, on appeal from the exchequer chamber, (1 L. R. Exch. Cases, 265.) In the exchequer chamber the judg-

ment of the court was delivered by Blackburn, J., who stated the legal proposition upon which the case was decided as follows: 'We think that the true rule of law is, that the person, who for his own purposes, brings on his lands and collects, and keeps there *anything likely to do mischief* if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.' The House of Lords affirmed this rule as the law of the case. The essential element in this legal rule is, that the thing must be one *'likely to do mischief.'* The court cannot declare, as matter of law, that the defendants' stationary steam engine, if located in a proper place, and properly constructed and used, was, in its nature, calculated to do mischief to the property of any person. *Brightman* v. *Bristol,* 65 Maine, 435; *Losee* v. *Buchanan,* 51 N. Y. 476.

* * * * * * * * * * *

"*Frye* v. *Moor,* does not sustain the rule claimed for the plaintiff. The law of the case is stated by Tapley, J., in the opinion of the court, as follows: 'The defendants caused an *unnatural* accumulation of water in a reservoir above the mill of the plaintiff. If accumulated rightfully as to this plaintiff, they must at least exercise ordinary care in letting it again pass into its ordinary and accustomed channels over the plaintiff's property. If accumulated wrongfully, and without any right or authority, as against this plaintiff, if they let it into its ordinary and accustomed channels, they do so at their peril, and they must be held responsible for the consequences of their wrongful act.' *It is believed to be the settled law of this state, that, to render the defendant liable without negligence, his act must be shown to be wrongful as against the plaintiff.*" (Emphasis ours.)

In *Chickering* v. *Power Co., supra,* an action was brought to recover pecuniary damages resulting from the immediate death in consequence of alleged wrongful neglect of the defendant. The defendant owned and operated a line of posts and wires extending along a certain highway used for the

purpose of transmitting electricity at high voltage. The plaintiff alleged that the defendant wrongfully, negligently and carelessly maintained said wires with no insulation whatever and that said wires were strung from cross arms on the poles among the branches of a shade tree in plaintiff's yard and that the plaintiff's intestate, a minor of twelve years, climbed the tree where the wires were run and without any fault on his own part was electrocuted and instantly killed. In this case a general demurrer was filed which had the effect of denying that the plaintiff had stated a cause of action. On the record the posts and wires were the rightful property of the defendant and we said:

> "It would be difficult, in an acceptable general rule, to set bounds to the extent to which ownership makes it possible for one to use his own property without incurring liability for injury to the person or property of another, resulting from such use. The test is not whether the use caused injury, or whether injury was the natural consequence, but whether the use was a reasonable exercise of that dominion which the owner of property has, having regard to his own interests, the rights of others, and having too in view public policy. *When a person attempts to do that which is useful, usual or necessary, as well as lawful, if done under proper conditions, and injury unexpectedly results, it would be at variance with legal principles to say that he does it at the peril of being adjudged guilty of inexcusable wrong, if it errs as to fitting manner of performing it. For the doing of an act without right, a person may be adjudged guilty as a trespasser, but if he had a right to do the act, the question of whether he reasonably exercised that right turns upon his negligence, within the latitude for discrimination or distinction which that form of action affords.*" (Emphasis ours.)

It will be seen from the above quotation that the question of whether the use of the property of the defendant was reasonable or unreasonable has considerable bearing on the question of liability, particularly if it turns out that the

defendant is engaged in a lawful act. In other words, use or dominion over one's own property is not absolute or unlimited but relative in that one is not permitted to use it without taking into account injuries that may be caused other persons and their property. The New York court in the case of *Losee* v. *Buchanan et al.*, 51 N. Y. 476, 485, which was a boiler explosion case and in which the authorities were extensively reviewed by the court, including the case of *Rylands* v. *Fletcher, supra,* makes the following statement after reciting various situations wherein one's own property is subject to the uses of others:

> "Most of the rights of property, as well as of person in the social state, are not absolute but relative and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare."

Our court very recently in the case of *Kennebunk, Kennebunkport and Wells Water Dist.* v. *Maine Turnpike Authority,* 145 Me. 35, 71 A. (2nd) 520, had occasion to examine and define what was reasonable and unreasonable use with respect to the rights of riparian owners on the same stream and came to the conclusion that a proper and reasonable use of the stream by an upper riparian owner did not necessarily give a right of action to a lower riparian owner provided the use was reasonable.

From our examination of the authorities mentioned herein, it is our opinion that the only logical rule for this court to adopt is the rule that fault is a requisite for liability. The other rule—that of absolute liability—seems to this court to be a rule of hardship which if used would necessitate many exceptions. In these days it is undoubtedly necessary that blasting be permitted. In other words, it is a lawful act and such being the case it is, if properly conducted, a reasonable relative use of one's property.

We, therefore, conclude from the record as it is before us that blasting was not only a lawful act but as said in

Chickering v. *Power Co., supra,* useful, usual and probably necessary and, so far as the record discloses, done under proper conditions; in fact, we must consider it a reasonable use of property. Such being the case, we believe the better rule to be that negligence not only must be alleged, but it must be proved. The plaintiffs in this action have not, therefore, alleged a cause of action under our rules of negligence pleading and the special demurrer to the first count, as well as to the second and third counts which we have heretofore commented upon, were properly sustained.

Exceptions overruled.

CHARLES A. PERRY AND FRANK C. PERRY, PETITIONERS
vs.
THE INHABITANTS OF THE TOWN OF LINCOLNVILLE

Waldo. Opinion, October 14, 1950.

Taxation. Assessments.

The requirement of R. S., 1944, Chap. 81, Sec. 35 that inhabitants "make and bring in" to the assessors a true and perfect list of polls and estates real and personal is fulfilled by sending a true and perfect list by registered mail. *Inhabitants of Winslow* v. *County Commissioners of Kennebec* overruled.

ON EXCEPTIONS.

On petition for abatement. Following the refusal of the county commissioners to abate as requested an appeal was taken to the Superior Court where the petition was dismissed. Exceptions were taken and allowed. Exceptions sustained.

Charles A. Perry, for petitioners.

Clyde R. Chapman, for respondents.

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

FELLOWS, J. This appeal from assessment of tax comes before the Law Court on exceptions to the ruling of the Superior Court in Waldo County dismissing the appeal. See Revised Statutes (1944), Chapter 81, Sections 35-41.

The agreed facts are as follows: "The petitioners in compliance with a posted notice of the assessors of Lincolnville did send in a true and perfect list of all their taxable property for the year 1949; that they did this by sending said list by registered mail and that the same was mailed and received April 1st, 1949; that November 15th, 1949 the petitioners requested in writing an abatement on the grounds of being overvalued; that this petition was sent by registered mail to Ralph M. Hunt, chairman of the assessors, and receipted for November 16th, 1949; that November 19th, 1949, said chairman and all other assessors refused to abate the tax of your petitioners and notified them to that effect by registered mail; that to this decision your petitioners appealed to the County Commissioners' Court of Waldo County who heard the parties and rendered a decree in favor of your petitioners dated January 10th, 1950; that to this decree your petitioners seasonably appealed, said appeal being duly and seasonably entered at this April term."

Section 35 of Chapter 81, Revised Statutes of 1944, is as follows: "Before making an assessment, the assessors shall give seasonable notice in writing to the inhabitants by posting notifications in some public place in the town, or shall notify them, in such other way as the town directs, to make and bring in to them true and perfect lists of their polls and all their estates real and personal, not by law exempt from

taxation, of which they were possessed on the 1st day of April of the same year. If any resident owner after such notice, or any non-resident owner after being reasonably requested thereto by the assessors, does not bring in such list, he is thereby barred of his right to make application to the assessors or the county commissioners for any abatement of his taxes."

The Superior Court ruled that the petitioners failed to comply with this statute, and are barred; following the decision in *Inhabitants of Winslow, Petitioners* v. *County Commissioners of Kennebec,* 37 Me. 561, wherein the court says: "Before this mode of redress can be made available by any inhabitants he must personally carry in such list to the assessors and be ready to make oath to its correctness if required or make it appear to the commissioners that he was unable to offer such list at the time appointed." The petition was dismissed, and the petitioners filed exceptions.

The question for decision is the meaning of the words in Revised Statutes (1944), Chapter 81, Section 35, "to make and bring in," referring to the list of polls and estates asked for by the assessors in their notice to the inhabitants of the town. Do the words of this statute mean that the lists must be carried to the assessors *personally* by the individual taxpayer, or may they be filed with the assessors by any method?

The statute under consideration is one of our oldest. It was enacted in Maine by the first legislature and approved by the Governor on March 21, 1821. See Smith's Laws of Maine (1834), Volume 2, Chapter 116, Section 12. It continues through each revision of the statutes with only a very few and minor changes.

From the year 1715 to the year 1735, while Maine was a part of Massachusetts, the annual or special tax acts of Massachusetts provided that before making the assessment the assessors should call upon the inhabitants to "bring in

true and perfect lists of their polls and rateable estate." The bringing in of such lists was not made a condition to the right of abatement by the assessors or the courts until the year 1735, when a statute required the taxpayer "to give or bring in" lists to the assessors before application could be made to the court for any abatement. The statute in Massachusetts passed in the year 1785 was the model for our statute passed by the Maine Legislature in 1821. The case of *Sears* v. *Assessors of Nahant,* 205 Mass., 558 contains the history of this law.

The purpose of this statute, which requires notice by the assessors and the furnishing of lists by the taxpayer, is to assist the assessors in making a correct and complete assessment. If no lists are supplied, the assessors must use their own judgment on information they may otherwise obtain, and the owner of property has no right to make application for abatement if he files no lists. The lists are used by the assessors, in arriving at the amount of property and values, in making their assessments. By the notice, the assessors require these lists to be brought in within a time specified so that they can make a valuation, and if no lists are supplied they estimate according to their best information and belief. The assessors do not proceed in the assessment until the time has expired for bringing in the lists. The lists, if filed, are the basis of the assessment but are not conclusive. If a party intends, however, to put himself within his strict legal rights, and secure a right of appeal, he must file his list according to the notice given by the assessors. *Freedom* v. *County Commissioners,* 66 Me. 172; *Terminal Company* v. *Portland,* 129 Me. 264; *Powell* v. *Old Town,* 108 *Me.* 532; *Lambard* v. *County Commissioners,* 53 Me. 505; *Edwards* v. *Farrington,* 102 Me. 140; *Porter* v. *County Commissioners,* 5 Gray (Mass.) 365; *Orland* v. *County Commissioners,* 76 Me. 460. The lists, required under the notice and given to the assessors, are therefore to furnish correct information to the assessors, and if the assessors desire, they have the right to require the individual, who files the list,

to make oath to the same and to furnish other and additional information.

In the case at bar the petitioners admittedly furnished a list to the assessors of Lincolnville in compliance with a posted notice. They furnished it by sending the list by registered mail and the list was seasonably received by the assessors. The assessors made the assessment and upon petition refused to abate. On appeal to the County Commissioners of Waldo County, the commissioners made an abatement in a small amount which was not satisfactory to the petitioners. From this decision of the commissioners the petitioners appealed to the Superior Court, and the appeal was there dismissed because the list furnished was not *personally carried* to the assessors according to the statement in *Inhabitants of Winslow* v. *County Commissioners of Kennebec,* 37 Me. 561.

When the statute was first enacted, requiring the taxpayer to "bring in" his list, and at the time of the decision in the above case of *Winslow* v. *County Commissioners,* the rule that the individual making his list should *personally* carry his list to the assessors, was correct and proper. There was then no mail service to and in many communities, and no way to communicate with far separated inhabitants, except to travel to them in some manner over poor roads or trails. If the assessors desired to interrogate the taxpayer they could not do so without great trouble or inconvenience unless he personally brought in the lists, and was personally present and ready to make oath if oath was required, and ready to answer any pertinent inquiry. The reason for the rule has now ceased, and as Lord Coke expressed it many generations ago, *"Cessante ratione legis cessat et ipse lex."* When the reason of the law ceases, so does the law itself. Co. Litt 70 B 122 A: Bouvier's Law Dictionary, "Maxims."

Under modern conditions, and under the present and well recognized definitions of the effect of the words "bring in," it is sufficient if the lists are "filed" with the assessors, and

so recognized by Chief Justice Pattangall in *Terminal Company* v. *Portland,* 129 Me. 264. See Webster's New International Dictionary which gives the definitions "produce," "to convey," "to cause to come before a person or body for consideration," "to report to or to lay before a court."

All that the assessors require is that the lists be filed with or furnished to them in some manner at a time specified in their notice. With modern mail service and with the telephone it is a simple matter to notify the maker of a furnished list to come before the board to make oath, or to give further or other information. The taxpayer should be ready at any time to testify to the correctness of his list, but there is no present day need to personally bring it. Should the crippled person or the invalid be deprived of the benefit of the statute because he is unable to personally bring on some particular day? Then too, with our increased population it would be a practical impossibility in some cities or in some large towns for all the taxpayers to get into a municipal office on one day, to say nothing of opportunity on the part of the assessors to examine the lists furnished. The assessors should have and do have a reasonable time to examine the furnished lists. *Powell* v. *Old Town,* 108 Me. 532.

The Massachusetts Court recognizes that, under the similar statute in that Commonwealth, the list may be sent in by the taxpayer, and the assessors may notify him by letter of insufficiency, and that neglect to reply is considered a refusal to appear and to make oath. *Cody* v. *Spear,* 214 Mass. 241; *Dexter* v. *Beverly,* 249 Mass. 167; Volume 2, Annotated Laws of Massachusetts (1945), Page 303, Chapter 59, Section 29.

An examination of the case of *Inhabitants of Winslow* v. *County Commissioners,* 37 Me. 561, on which the Superior Court based its decision to dismiss the pending appeal, shows these facts: One Joseph Eaton, in the year 1850, sent in his list by a third person. Later, Eaton asked the asses-

sors for an abatement. The abatement was denied and he applied to the county commissioners. The county commissioners denied a motion to dismiss because the list was not personally brought in, and ordered abatement and reimbursement. On petition by the inhabitants of the town for *writ of certiorari,* alleging in the petition that the motion to dismiss should have been granted and that reimbursement should not have been ordered, the presiding judge refused to grant the writ. In overruling the exceptions because no "real injury" done, Judge Cutting says: "The case finds that the person applying for, and obtaining, an abatement, did not personally hand in his list, and no reason is offered or excuse made for such neglect. The true reason in some cases may be a willingness to avoid the oath, in which event the party delinquent throws himself upon the final judgment and discretion of the assessors. In this instance the county commissioners erred in making the abatement. But the case further discloses that no real injury has been done to the petitioners; for it is admitted that *such* a list was before the assessors, as they had notified to be produced, which was a true and perfect list, and it could not have been made more true and perfect, even by an oath."

In other words, this court, in the year 1854, stated that the taxpayer must personally bring in his list; but if the assessors received it by a third person and it was "true and perfect," there was no "real injury" and a *petition for certiorari* "must be dismissed."

The literal statement in the statute to the effect that the inhabitants must "bring in such list" or be barred of right to make application for abatement, may not have been changed through all the years, but the law and the interpretation of the law does not and must not stand still. It moves to meet the changing times and conditions. With the adoption of each revision of the statutes the legislature speaks as of the date of revision, and although certain words may convey a certain idea to an earlier generation, the changing

conditions make that idea inappropriate and inapplicable today. The legislature of a century ago meant the words as *then* understood, and intended them to meet the *then* existing conditions and circumstances. The legislature that adopted the statute revision of 1944 necessarily meant to convey an idea that would meet the needs and conditions of today.

We cannot subscribe to the interpretation contained in *Inhabitants of Winslow* v. *County Commissioners,* 37 Me. 561. The legislature of 1944 never intended that in these days the taxpayer must personally carry to the assessors his list in order to obtain the benefit of his right to an appeal. The taxpayer need only file such list with the assessors at the time appointed, and stand ready to make oath and give other information if required. The sending by registered mail so that the list is received by the assessors, as in the case at bar, is sufficient.

The opinion in the case of *Inhabitants of Winslow* v. *County Commissioners of Kennebec,* 37 Me. 561 is overruled.

Exceptions sustained.

ADELBERT H. WILSON

vs.

THE AETNA CASUALTY AND SURETY CO.

Kennebec. Opinion, October 30, 1950.

Insurance. Negligence. Bad Faith. Damages.

One contracting to defend actions seeking recovery for negligence in the operation of a motor vehicle, and to pay all recoveries therefor within stated limits, owes the person insured both good faith and the exercise of proper care in the preparation and conduct of the defense of cases litigated.

An insurer is liable to his insured beyond the stated amount of his limited liability for bad faith or for negligence in the preparation or defense of any action he has contracted to defend.

An insurer may be liable to his insured for failure to accept an offer of compromise of an action he is defending pursuant to his insurance contract.

The present case requires no decision whether this court will adopt the "bad faith rule" or the "rule of negligence" in determining whether an insurer is liable to his insured for failure to accept an offer of compromise within the insurance coverage if there is a recovery in excess thereof.

The failure of an insurer to interview all available witnesses and visit the *locus* of an accident in the course of preparing the defense of an action does not constitute negligence therein when the defense is conducted on the issue of damages.

The reliance of an insurer on the opinion of a qualified expert on the question of damages does not constitute negligence.

An insurance policy for limited coverage does not obligate the insurer to pay the full amount thereof to relieve his insured from the hazard of a recovery in excess thereof.

ON REPORT.

This is action of negligence alleging negligence on the part of defendant in the preparation of a defense and in refusing to accept a compromise offer. The case comes to the

Law Court on report and agreed statement. Judgment for the defendant. Case fully appears below.

William H. Niehoff, for plaintiff.

Locke, Campbell, Reid & Hebert,
Brooks Brown, Jr., for defendant.

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

MURCHIE, C. J. The plaintiff and defendant herein will be referred to, respectively, at all times hereafter, as the "insured" and the "insurer," to avoid confusing their present positions with those they occupied in two cases in which the insured was the defendant and the insurer conducted his defense, referred to hereafter, collectively, as the "Desmond Cases." The present litigation grows out of those cases. The insurer, under a policy of insurance, had contracted to defend any actions against the insured seeking damages on account of the operation of a designated automobile, and to pay all sums the insured might become obligated to pay for bodily injuries and property damage caused thereby, not exceeding specified amounts. The coverage for bodily injuries to any one person was $10,000. In the Desmond Cases a minor and his father secured judgments against the insured, aggregating $12,100, applicable to injuries suffered by the minor.

The Desmond Cases were before this court in *Desmond* v. *Wilson,* 143 Me. 262, 60 A. (2nd) 782, under a single bill of exceptions alleging errors in the instructions to the jury on the question of negligence on the part of the minor, and the refusal of certain requested instructions with reference thereto. The exceptions were overruled. Thereafter the insurer paid the judgment of the minor, for $10,000, with the costs and interest applicable thereto, and to the suit of the father. The insured satisfied the judgment of the

father, for $2,100, by giving him a promissory note. He seeks to recover that amount, and interest, in this action. It comes to this court on Report and an Agreed Statement of Facts, referred to hereafter as the "Agreed Statement." It incorporates by reference the testimony, exhibits, pleadings and docket entries in the Desmond Cases. It stipulates that if the insured is entitled to any recovery, judgment shall be given him for $2,160.22, with interest from December 4, 1948 to the date thereof.

The minor was severely injured on August 25, 1947. He was unconscious for two weeks, hospitalized for three, and confined to bed at home for an additional three weeks after leaving the hospital. He was not fully recovered when the cases were tried. The actions against the insured were commenced February 20, 1948. Nine days before the trial commenced, in April 1948, counsel for the plaintiffs in the Desmond Cases advised counsel for the insurer, in writing, that $10,000 would be accepted in settlement of both cases, making it plain that the insurance coverage was known. Two days later, the insurer filed offers to be defaulted for $5,050 in the case of the minor and for $1,550 in that of the father. These offers were immediately rejected.

The policy of insurance gave the insurer complete control over the defense of the insured. Explicit recital was that it should:

> "make such investigation, negotiation and settlement of any claim or suit"

as it might deem expedient. In the particular cases the insurer recognized, early in its investigation, that the minor and his father might secure judgments exceeding the insurance coverage, and notified the insured that it might be advisable for him to employ his own counsel, offering full cooperation with any counsel so employed. It made no attempt to negotiate a settlement, until the offer of settlement was made by the plaintiffs, or thereafter, except to file the default offers. Insured employed counsel, who, after the

settlement offer was made, urged settlement "anywhere within the policy limit."

Reference to the record of the Desmond Cases makes it apparent that there was ample evidence to justify the factual findings of the jury, including the $10,000 damage award. It cannot be said, however, that an aggregate recovery exceeding $10,000 was certain at any time before the trial ended, perhaps not even at that time. The insurer, at all times, had believed, or professed to believe, that liability could not be established, particularly because of the claim that the minor was negligent, although the default offers indicate its recognition of the hazard thereof. The insured insisted, throughout, as the Agreed Statement recognizes, that the negligence of the minor was the sole cause of his injuries. The urging of his counsel for a settlement may indicate a lesser inclination than that of the insurer to be influenced by his statements. On the other hand, it may be that the explanation lies rather in an excess of caution on the part of such counsel, to which reference will be made hereafter.

A neurologist, whose qualifications as an expert were admitted at the trial by counsel then representing the plaintiffs in the Desmond Cases (appearing in the present case for the insured), presented a more hopeful prognosis for the recovery of the minor than another who examined him, in his behalf, a little more than two weeks prior to the trial, or a third, who examined him shortly after the accident. The reports of the two latter were presented as a part of the case of the minor. The verdict awarded the minor indicates that the jury rejected, probably in its entirety, the report and testimony of the neurologist employed by the insurer.

The Agreed Statement recites that prior to the filing of the default offers in the Desmond Cases, counsel for the parties, conferring, computed the expenses applicable to the injuries of the minor, for which his father was seeking re-

covery, at a total of something less than $1,500. The spread between that amount and the $2,100 verdict is accounted for, in part at least, by estimated future expenses, not disclosed at the conference.

The Agreed Statement discloses that counsel for the insurer, prior to the trial, neither interviewed nor questioned three of the police officers who investigated the accident, and did not visit the *locus* thereof until the day preceding. It records also that after the neurologist employed by the insurer examined the minor, he conferred with the one who had examined him approximately two weeks before the trial and adhered to his own judgment. The testimony in the Desmond Cases makes it plain that the examination which laid the foundation for it was made in a period of approximately thirty minutes, something like half of which was devoted to conversation with the mother of the minor "getting the past history." The time devoted by the others to their examinations is not stated.

The insured, in his declaration, alleges that the insurer owed him the duty "to act in good faith and in a careful and prudent manner" in investigating the accident to which the Desmond Cases related and "in the conduct of the defense" thereof, as well as in "the negotiation for settlement." We shall deal with the last of these allegations hereafter, recognizing at the outset that the requirements of good faith and the exercise of proper care in the preparation and conduct of the defense are well established. The case was thoroughly and ably argued by counsel for both parties. Their researches into the decisions of other jurisdictions were exhaustive. It seems unnecessary to review or to analyze the authorities they have cited to us, or any of them, although we declare recognition of the principle of law, on which there seems to be no dispute, that an insurer is liable to his insured for bad faith or for negligence in the preparation or conduct of the defense of any action he has contracted to defend. It is well established also that he may be subject

to liability, under appropriate circumstances, for a failure to accept an offer of compromise.

On the latter question, which involves the duty of an insurer, if any, in the negotiation of a settlement, there is a clean-cut conflict of authority whether liability may be grounded in negligence, or exists only where fraud or bad faith is proved. Identifying the opposing views declared in the decisions as they are designated in Appleman's Insurance Law & Practice, the "bad faith rule" is undoubtedly the majority one, although the author asserts that there is a trend toward "the rule of negligence." Vol. 8, Sec. 4712-3. Without referring to particular cases, cited in the briefs, we note that many of them are identified in the footnotes of Appleman and are discussed, in some aspects, in the following annotations, so cited: 21 A. L. R. 766; 34 A. L. R. 730; 37 A. L. R. 1484; 43 A. L. R. 326; 71 A. L. R. 1467; 131 A. L. R. 1499.

The present case does not require us to give any consideration to the "bad faith rule." The declaration of the insured, although carrying an allegation of the duty of the insurer to act in good faith, carries no assertion of the breach of that duty, nor would such an assertion, if it had been included, find any color of support in the record. The "rule of negligence" is the more favorable one from the standpoint of an insured and is the one on which the insured relies. He alleges specifically that the insurer was negligent in its preparation of the defense of the Desmond Cases on the issues of both liability and damages. His claim with reference to defense on the issue of liability is grounded in the facts, disclosed by the Agreed Statement, that counsel for the insurer did not visit the locus of the accident until the day preceding the opening of the trial and neither interviewed nor questioned, prior thereto, certain witnesses who might have been expected to testify, and did testify, on that issue. There can be no point in this contention if the insurer, without taking either action, anticipated liability,

and believed that the real issue of fact to be tried was the measure of damages. The default offers constitute substantial evidence to that effect. Reference thereto indicates that they must have been made with R. S., 1944, Chap. 100, Sec. 42, and its control over costs, in mind, and that the insurer, anticipating liability, believed that the verdicts might be held below the amounts offered. The facts do not justify a decision that the insurer was negligent in its preparation of the defense on the issue of liability.

Passing to the question of negligence in the preparation of the defense on the issue of damages, it is obvious that we deal only with the case of the minor. In his case the offer of settlement must be regarded as contemplating a recovery not exceeding $8,500, because of the settlement offer and the obvious fact that something like $1,500 of the $10,000 would represent reimbursement of expenses. Once again the costs statute indicates an attempt by the insurer to appraise the damages recoverable if liability was established. The appraisal represents substantially sixty percent of the settlement offer, assuming expenses of $1,500, and is in excess of that percentage when the full recovery of the father is considered. The appraisal was made in part, undoubtedly, on the basis of the report of the neurologist which was rejected by the jury. Council for the insured argues that the insurer was negligent in giving weight thereto because of the limited time devoted to the examination on which it was based. That his qualifications as an expert were admitted when he was offered as a witness is a sufficient answer to this argument. It is not essential that the counsel now urging it is the very one who admitted the qualifications, although that fact may make the decision as desirable as it is inevitable. Counsel cites us to no decided case, nor are we aware of any, which declares that one employing an admittedly qualified expert is under obligation to inquire into the manner in which he has performed his work before relying on his opinion. It may be pertinent to say in this connection that the true issue relates to the reliance the

insurer was entitled to place on his expert at the time of the damage appraisal. The facts do not justify a decision that the insurer was negligent in its preparation of the defense on the issue of damages.

This leaves the issue whether there was negligence in the refusal of the insurer to settle the Desmond Cases for $10,000. The allegations of the declaration pertinent thereto are that the insurer "carelessly and negligently" refused "to accept the offer" of settlement, despite the urging of counsel for the insured. For the purpose of considering these allegations we assume, although declaring expressly that our assumption should not be considered as the expression or intimation of an opinion on the issue, that this court will adopt the "rule of negligence," as distinguished from the "bad faith rule" (the words of Appleman) in "compromise" cases, to use that term as embracing all those in which, after an offer of compromise within insurance coverage is refused, verdicts exceeding it are returned, when a case is presented in which that rule must be accepted or rejected. This is not such a case. In this connection we cannot be unmindful that the urging of settlement by counsel for the insured may have represented an excess of caution on his part. That urging, as already noted, was for a settlement "anywhere within the policy limit." Such a settlement would involve no contribution thereto by his client, who had contracted for limited coverage and was facing a liability, or the possibility of one, in excess of it. Whether advice urging settlement by or on behalf of one who was to contribute to its payment might have more persuasive weight, we do not need to decide at this time. For the purposes of any insured who has contracted for limited insurance coverage, there can be no doubt that any settlement costing him nothing would favor his interest, however slight the hazard to which he was exposed. The situation of the insurer was in sharp contrast to that of the insured. The insurer was obligated to pay such recoveries as might be secured, not exceeding $10,000, and the first $10,000

thereof if the aggregate exceeded that figure. It did not contract to pay $10,000 to relieve the insured from the hazard of a recovery in excess of that amount, but only to pay all sums the insured might become obligated to pay, not exceeding it.

The issue is neither more nor less than whether a contractual liability may be increased by negligent action. We have stated our recognition of the principle that it may, as a result of negligence in the preparation or conduct of a defense. We have said also that for the purposes of this case we shall assume, without deciding, or either expressing or intimating any opinion with reference thereto, that the rule of negligence, as it is styled by Appleman, should be recognized in compromise cases. Within that principle, as we would construe it, if we adopted it, we do not consider that the facts entitle the insured to recover from the insurer.

Reference to *Rumford Falls Paper Co.* v. *Fidelity & Casualty Co.*, 92 Me. 574, 43 A. 503, discloses that in this jurisdiction the holder of limited insurance coverage has been denied recovery against his insurer following an excess verdict after the rejection of an offer of settlement within the coverage. In the earlier case to which that action related, *Sawyer* v. *Rumford Falls Paper Co.*, 90 Me. 354, 38 A. 318, 60 Am. St. Rep. 260, the real issue was liability and this court, in refusing to set aside the plaintiff's verdict in its entirety, on a general motion, recognized that it was in saying that:

> "After a careful examination of all the evidence and of the arguments of the learned counsel, it is the opinion of the court that while neither the prudence of the plaintiff nor the negligence of the defendant can be regarded as conclusively established, the verdict of the jury is not so utterly without support * * * as to justify the court in saying that it is manifestly wrong and must be set aside."

On the basis of the record in the Desmond Cases it cannot be said that there was no reasonable prospect, prior to the trial, that the recovery of the minor might be held to something less than $8,500, or that an appraisal of it at $5,050 by one holden to pay the first $10,000 of whatever it might be, if it should prove to be in excess of $10,000, or all of it, if it was less than that, did not represent the action of a reasonably prudent man. Neither can it be said that such a man, holden personally for the full recovery, whatever it might prove to be, would not have proceeded to trial in an attempt to hold the recovery to the lowest possible figure as an alternative to the acceptance of the settlement offer. That, perhaps, should be the true test.

Judgment of the defendant.

T. ARTHUR PEARSON

vs.

LLOYD G. HANNA

Lincoln. Opinion, January 3, 1950.

PER CURIAM.

On motion. This is an action to recover damages for personal injuries suffered in an automobile accident which occurred between 12 o'clock noon and 1 P. M. on the eighth day of July, 1947. The case was tried at the November Term 1948 of the Superior Court held in Lincoln County. The jury returned a verdict for the plaintiff in the sum of $5,000. The defendant filed a motion for a new trial on the

sole ground that the damages were excessive. The case is now before this court on said motion.

As a result of the accident the plaintiff was rendered unconscious and so continued until the following day. He suffered what is commonly known as a brain concussion. His nose was broken, his face was discolored to a marked degree about both eyes, his right eye was completely closed and for four or five weeks he had a complete numbness of the right side of his face which extended from the lower part of his right eye, the side of his nose, and included a portion of his lip and all of his right cheek. He lost blood and required the administration of blood plasma. In addition to the foregoing injuries, the jury were justified in finding that as a result of the accident the plaintiff received an injury to his brain; that, although the plaintiff had never had headaches before the accident, commencing in April, 1948, his brain injury caused recurring headaches of increasing frequency, severity and duration. The jury were further justified in finding that the brain injury itself was progressive in its nature and that the ultimate result thereof could not be predicted with certainty.

In actions of this nature there can be but one recovery. The jury's award of damages is in full for all injuries proximately caused by the accident, be they past, present or future.

The assessment of damages is the sole province of the jury. Although we have the power to set aside verdicts because of excessive damages, it is not for this court to substitute our judgment for the considered judgment of the jury. As said in *Cayford* v. *Wilbur,* 86 Me. 414, 416, with respect to the amount of damages awarded by a jury:

> "As a general rule, the parties are entitled to the judgment of the jury and not of the court upon that question. There are cases, to be sure, where the court will intervene; but those cases will be governed by the evidence and circumstances of

> each particular case. The court will not, however, set verdicts aside on the ground that the damages are excessive or inadequate unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law."

This case presents no such situation. Although the damages here awarded may seem to be upon the liberal side, they are not so disproportionate to the injuries suffered as to require us to set aside the verdict either unconditionally or conditioned on the filing of a remittitur.

Motion overruled.

Robinson, Richardson and Leddy, for plaintiffs.

William B. Mahoney, for defendant.

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

STATE OF MAINE
vs.
KENNETH WHITE

Aroostook. Opinion, February 2, 1950.

Juvenile Delinquency. Appeal. Rule 6.

PER CURIAM.

The respondent herein, a boy between the ages of 9 and 17 years, was charged with "leading an idle or vicious life," as defined in R. S., 1944, Chap. 23, Sec. 91, on June 17, 1948, when he was 15 years old. He was adjudged guilty in the Caribou Municipal Court on June 23, 1948, and ordered committed to the State School for Boys. His appeal from

that commitment, to the Superior Court, was dismissed at the November Term therein following, on motion of the State, on the ground that the right of appeal conferred by R. S., 1944, Chap. 23, Sec. 92, as in effect then and at the time of respondent's commitment, was limited to girls committed to the State School for Girls, and that the appeal provided for any child (his next friend or guardian) by R. S., 1944, Chap. 133, Sec. 6 was available only for those found guilty of juvenile delinquency on the basis of conviction for some specific crime, juvenile delinquency being the only finding of guilt which can be made under R. S., 1944, Chap. 133, Secs. 4 to 7 inclusive, according to the express mandate of R. S., 1944, Chap. 133, Sec. 2.

The respondent has taken no action to prosecute his exceptions to the dismissal of his appeal, alleging the controlling force of the appeal provision of R. S., 1944, Chap. 133, Sec. 6. They were entered in the Law Court at the January 1949 Term, and continued therein from term to term until the December 1949 Term. The brief record and a written argument for the State were filed on October 12, 1949. Oral argument for the State was waived at said December Term and the respondent was ordered, pursuant to Rule 6 of the rules applicable to proceedings in the Law Court, to argue in writing, within 30 days. 129 Me. 523 at 525. No brief or argument on his behalf having been filed within the time limited, the case must be decided under the rule, "without argument" on his behalf.

The contention of the respondent is answered amply by a reading of the two statutes, since the principle is thoroughly established that statutory language which is clear and unambiguous must be held to mean what it declares plainly. *Davis* v. *Randall,* 97 Me. 36; 53 A. 835; *Inhabitants of Wellington* v. *Inhabitants of Corinna,* 104 Me. 252; 71 A. 889; *Van Oss et al.* v. *Premier Petroleum Co.,* 113 Me. 180; 93 A. 72. The field of operation of R. S., 1944, Chap. 23, Sec. 92 was controlled, prior to the amendment carried in

P L., 1949, Chap. 71, by the word "girl", describing those granted a right of appeal by its terms. The 1949 amendment extended its operation to "minors", but while the respondent would be entitled to an appeal against such a commitment as he seeks to set aside if made presently or at any time after P. L., 1949, Chap. 71 became effective, the enlarged law has no bearing on the propriety of the dismissal of the appeal here in question.

The field of operation of the appeal provided in what is now R. S., 1944, Chap. 133, Sec. 6, since it was written therein by P. L., 1943, Chap. 177, is equally clear. That right of appeal is not such a personal right as is carried by R. S., 1944, Chap. 23, Sec. 92, but is available to "any child or his next friend or guardian" against any sentence imposed under the particular section of the statutes of which it is a part. The section is part and parcel of our juvenile delinquency law which vests exclusive original jurisdiction over offenses committed by children under the age of 17 years, with exceptions not now pertinent, in our municipal courts, constitutes them as "juvenile courts" when considering such offenses, and restricts their judgments or adjudications of guilt to findings of guilt of juvenile delinquency. R. S., 144, Chap. 133, Sec. 2. It is from such a judgment or adjudication, and no other, that the appeal provided by R. S., 1944, Chap. 133, Sec. 6 may be taken.

Exceptions overruled.

James P. Archibald, for the State.

Francis A. Walsh, for respondent.

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

STATE OF MAINE
vs.
HOWARD TOWNSEND

TWO CASES

Oxford. Opinion, February 7, 1950.

Criminal Law. Crime Against Nature.

PER CURIAM.

The respondent was tried on two indictments, the one, charging him with the crime against nature under R. S. (1944), Chap. 121, Sec. 3, the other, charging him with a violation of R. S. (1944), Chap. 121, Sec. 6, commonly known as indecent liberties. By stipulation, both cases were tried together at the March Term, 1949, of the Superior Court of Oxford County held at Rumford and verdicts returned against the respondent in both cases. The two cases come forward on respondent's single bill of exceptions, all allegations of which aver that the presiding justice erred in charging the jury in certain particulars.

It should be noted at the outset that the indictments, the evidence, the exhibits and the justice's charge are not made a part of the bill of exceptions by reference or otherwise and while it is not necessary in all cases to include all the evidence, etc., this court has repeatedly ruled that it cannot "travel outside the bill of exceptions" and consider documents or evidence not made a part thereof though contained in the printed case. The bill of exceptions must be "able to stand alone." See *Jones* v. *Jones,* 101 Me. 447; 64 A. 815; *State* v. *Cohen,* 125 Me. 457, 458; 134 A. 627; *State* v. *Holland,* 125 Me. 526; 134 A. 914; *Bradford* v. *Davis,* 143 Me. 124; 56 A. (2nd) 68, 71. At all events, the bill of exceptions must in itself show in what respects that the respondent and excepting party was aggrieved. See *State* v. *Belanger,* 127 Me. 327; 143 A. 170. It is further noted that counsel, both

for the State and respondent, in their briefs refer to an exception taken by the respondent to the refusal of the presiding justice to direct a verdict of not guilty in both cases which exception is not included in the extended bill of exceptions signed by the presiding justice and for the reasons set forth above that exception is not before us, although the record and the docket entries show that it was seasonably taken. Even if some of the omissions in the bill of exceptions could be corrected by returning the bill to the Superior Court under R. S. (1944) Chap. 91, Sec. 14, inasmuch as the complete record of the cases is before us we have considered all the exceptions referred to in the bill of exceptions and, in addition, the exceptions arising out of the refusal of the presiding justice to direct a verdict in both cases, and the decision of this court would be unchanged had all the exceptions, including the exceptions to the refusal to direct a verdict in both cases been properly brought forward.

Specifically, exceptions 1, 2, 3, 4, 8, 9, 10 and 11 complain that the presiding justice erred in charging the jury either by the use of language which would prejudice the jury or in using language which implied that he was expressing an opinion contrary to the provisions of R. S. (1944), Chap. 100, Sec. 105. It is possible that certain isolated sentences standing alone might justify that conclusion but the correctness of the charge is to be determined from the whole charge and not isolated sentences. See *State* v. *Benner*, 64 Me. 267, 291; *State* v. *Jones et al.*, 137 Me. 137, 142; 16 A. (2nd) 103. We find no merit in the above exceptions.

Exception 5 deals with the materiality of proof with respect to proof of the date of the offense charged. The charge discloses no error.

Exceptions 6 and 7 raise the question of whether the detestable practice known in medical phrase as cunnilingus is made criminal by R. S. Chap. 121, Sec. 3, which reads:

> "Sec. 3. Whoever commits the crime against nature with mankind or with a beast, shall be punished by imprisonment for not less than 1 year, nor more than 10 years."

Although several courts have stated and some have held that the phrase "crime against nature" is synonymous with and includes only the common law crimes of sodomy and buggery and does not include other destestable sexual perversions not embraced within those included in sodomy and buggery according to strict common law definitions of these terms, such has not been the interpretation of the phrase by this court. In *State* v. *Cyr,* 135 Me. 513, 514; 198 A. 743, we did not hesitate to include fellatio in "the crime against nature." In that case we said:

> "The statute gives no definition of the crime but with due regard to the sentiments of decent humanity treats it as one not fit to be named, leaving the record undefiled by the details of different acts which may constitute the perversion. The generality of the prohibition brings all unnatural copulation with mankind or a beast, including sodomy, within its scope."

The same reasoning that would include fellatio within "the crime against nature" impels us to interpret the phrase as including cunnilingus.

As said by the North Carolina court in *State* v. *Griffin,* 175 N. C. 767, 769; 94 S. E. 678, in interpreting their statute which is couched in language almost identical with R. S. Chap. 121, Sec. 3:

> "While the crime against nature and sodomy have often been used as synonymous terms, our statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified."

Although the offense considered in *State* v. *Griffin, supra,* was fellatio, the language used by the North Carolina court

with respect to that practice is equally applicable to cunnilingus and we adopt it as expressing our own views. "The method employed in this case is as much against nature, in the sense of being unnatural, indecent, and against the order of nature, as sodomy or any other bestial and unnatural copulation."

There appear to be no errors of law in the parts of the judge's charge to which respondent objected and the mandate will be

Exceptions overruled.

Judgment for the State.
In both cases.

Robert T. Smith, for the State.

Max L. Pinansky,
Thomas Tetreau, for respondent.

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

ASSOCIATED FISH PRODUCTS COMPANY

vs.

PHIL R. HUSSEY

Kennebec. Opinion, February 15, 1950.

Insurance. Brokers.

PER CURIAM.

This action on the case is before us on report. The declaration contains five counts, the first three alleging that the defendant, an insurance broker, negligently failed to keep certain property of the plaintiff protected by insurance policies or binders as the defendant had agreed to do, that a fire resulted, and that, in consequence thereof and of such negligent failure of the defendant, the plaintiff suffered loss. The last two counts are to the same general effect, except that it is alleged that the defendant's neglect with respect to the failure to insure was wilful and fraudulent. The plea was the general issue.

Under the terms of a letter to the plaintiff's president dated May 27, 1948, the defendant did bind this insurance. The defendant contends that these binders were cancelled by a telephone conversation, confirmed immediately by a letter from the defendant to the plaintiff's president on July 8, 1948. The fire occurred July 17th following. The plaintiff's president admits that he did talk with the defendant on July 8th and that the purpose of the conversation was to assure himself that the binders were in force and he denies that he ever received the letter of July 8th. The defendant's testimony as to the purport of the conversation is diametrically opposed and he is emphatic in his statement that he wrote and mailed the letter.

Whether the story of the plaintiff's president is correct, or that of the defendant, is the only issue in the case, and that is a question of fact not of law. There is no issue of

law before this court and this case is not properly here on report. Apparently there is raised a simple issue of veracity between Mr. Wight, the president of the plaintiff, and the defendant. The triers of the facts who can see and hear the witnesses should decide this, not this court sitting as a court of law which has before it nothing but the printed record. The case should be remanded to be heard at *nisi prius*.

Report discharged.

McLean, Southard and Hunt, for plaintiff.

Michael Pilot,
Ernest L. Goodspeed, Sr., for defendant.

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

EMMA DUBIE
vs.
MAURICE A. BRANZ, D/B/A
THE GUARDIAN FINANCE CO.

Cumberland. Opinion, March 20, 1950.

Exceptions. Corrections.

PER CURIAM.

This case is before this court on exceptions to acceptance of a referees' report. The defendant now moves in this court to remand the cause to the Superior Court within and for the County of Cumberland, it being the court below, for the purpose of there making a motion to amend his bill of exceptions by striking out the words: "The writ, declara-

tion, pleadings, the Referees' Report, the report of the evidence, and the exhibits are hereby incorporated in and made a part of this Bill of Exceptions." and substituting in place thereof the words: "The writ, declaration, pleadings, the Referees' Report, the defendant's objections to the allowance thereof, the report of the evidence, and the exhibits are hereby incorporated in and made a part of this Bill of Exceptions. To the overruling of the objections and to the allowance of the report of the referees the said Maurice A. Branz says that he is aggrieved and excepts, and prays that his exceptions may be allowed." The effect of such amendment is to correct the bill of exceptions by making the objections to the referees' report a part of the bill of exceptions, which the bill of exceptions now before us does not do. We are authorized to so remand to the court below. R. S. Chap. 91, Sec. 14. *Moores* v. *Inhabitants of the Town of Springfield,* 143 Me. 415; 62 A. (2nd) 210. This case is remanded to the Superior Court within and for the County of Cumberland, it being the court below, for correction, that the bill of exceptions may be there corrected by amendment in accordance with the prayers in said motion and reentry of the case either at this March term of the Law Court or at the May term of the Law Court next following.

Case remanded to Superior Court for action in accordance with the foregoing opinion.

Saul H. Sheriff, for plaintiff.

Charles A. Pomeroy, for defendant.

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

KENNETH WYMAN
vs.
RAYMOND SHIBLEY

Waldo. Opinion, March 24, 1950.

PER CURIAM.

The plaintiff herein, after a jury verdict against him, alleges in a motion for a new trial that it is against the law and the evidence and the weight of the latter.

The issue of the case is whether the defendant is liable to the plaintiff for the damage caused to a motor truck owned by him when it was in collision with one owned by the defendant. The agency of the operator of defendant's truck is admitted.

The verdict indicates that the jury found factually that the driver of defendant's truck was not negligent or, if he was, that contributory negligence was chargeable against the plaintiff.

The authority of this court under the circumstances is strictly limited. The verdict must stand, unless it can be said that there was no credible evidence to support it on either ground that would clear the defendant of liability. *Young* v. *Potter,* 133 Me. 104; 174 A. 387; *Eaton* v. *Marcelle,* 139 Me. 256; 29 A. (2nd) 162. Stated in other fashion, when the evidence in a case will support either of two theories or states of fact "and one is reflected in a jury verdict, this court is without authority" to set such a verdict aside. *Mizula* v. *Sawyer et al.,* 130 Me. 428; 157 A. 239.

It is as true in this case as in that last cited that a discussion of the evidence would be meaningless. There was a conflict of credible evidence, sufficient either to establish or to defeat the claim of the plaintiff. The degree of credibility to which witnesses are entitled is for a jury and not a court to decide. *Parsons* v. *Huff,* 41 Me. 410; *Kimball* v.

Cummings, 144 Me. 331; 68 A. (2nd) 625. The jury made its election as to what should be accepted as true.

Motion overruled.

Clyde R. Chapman, for plaintiff.

James E. Mitchell,
H. H. Buzzell,
James M. Coyne, for defendant.

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

OWEN L. ROBBINS
vs.
MARJORIE CARTER

Waldo. Opinion, March 29, 1950.

PER CURIAM.

This is an action to recover for damage to the plaintiff's automobile as a result of a collision with an automobile operated by the defendant. The declaration alleges that the accident happened because of the negligence of the defendant. The defense is contributory negligence. After a verdict for the plaintiff the case is before us on the defendant's motion for a new trial.

The accident occurred in Belfast. The plaintiff was driving westerly on Grove Street, the defendant northerly on Cedar Street. The cars came together at the intersection of the two streets. The defendant, though apparently conceding that there was evidence which would have justified the jury in finding her negligent, claims that the plaintiff

was negligent in that he approached the intersection at a rate of speed in excess of fifteen miles per hour which she claims was the *prima facie* lawful rate of speed when approaching that intersection. The violation of the statutory provision would have been evidence of negligence. It would not have been conclusive. It was for the jury to determine whether the conditions were such at that intersection that the statutory limit of speed prescribed by R. S., 1944, Chap. 19, Sec. 102, II (B), applied and whether if so the violation of the statute was a contributing cause of the accident. The issues in this case were within the province of the jury and their verdict cannot be disturbed.

It is argued that the damages are excessive but this is not alleged in the motion as a reason why the verdict should be set aside. Even if that question had been properly raised, our decision would be the same.

Motion overruled.

Clyde R. Chapman,
Hillard H. Buzzell, for plaintiff.

William S. Silsby,
Wendall R. Atherton, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ. (WILLIAMSON, J., did not sit.)

CONSTANCE O'BRIEN, PRO AMI
HAROLD G. O'BRIEN
vs.
MAE MARSTON

Androscoggin. Opinion, July 15, 1950.

Negligence. Horses.

WILLIAMSON, J. In this action heard by a referee the plaintiff recovered damages for the loss of a runaway horse which was struck and injured with resulting death by an automobile operated by the defendant. The reference was made with right of exceptions as to questions of law reserved. In the Superior Court objections duly filed by the defendant were overruled and the report was accepted. The case is before us on exceptions to the acceptance of the report.

The single objection to the report was that the referee erred as a matter of law in ruling that the defendant was negligent in the operation and control of her automobile. Accordingly the sole issue here presented is whether there is any evidence of probative value to support such ruling or finding. If such evidence exists, exceptions do not lie. *Morneault* v. *Boston & M.R.R.*, 144 Me. 300, 68 A. (2nd) 260 (1949) and *Staples* v. *Littlefield*, 132 Me. 91, 167 A. 171 (1933).

In brief, the defendant observed some distance ahead at the top of a hill a runaway horse, "this horse which was loose," and several people of whom at least one, carrying a bucket of grain, was endeavoring to catch the horse. Within seconds the accident took place on the defendant's right side of the traveled way.

The plaintiff, a girl ten years of age, and her father testified that the horse was standing still for an appreciable time before the accident.

The defendant, however, saw the matter differently. The horse approached her on-coming car in the ditch on her left side of the highway. She slowed down and then, assuming the horse would stay in the ditch, increased her speed. When she was about to pass, the horse bounded "as a deer would" into the path and within a car length of the automobile.

Distances from the point of observation of the runaway horse by the defendant to the top of the hill or the place of the accident are not material. Without question the defendant readily could have avoided the accident by stopping her car before the horse bounded into the highway, if such were the fact.

The referee in a report setting forth his findings of fact and rulings of law in detail said after noting the divergence of testimony:

> "It is an admitted fact, however, that the defendant did not stop her car, but proceeded, at a rate which she estimated was probably not over twenty miles per hour, and whichever side the horse was on, the distance between the horse and the car was lessening, and the horse was not under control."

The referee also found as follows:

> "The Referee further finds that the defendant, not realizing that her continued driving of her car was fraught with peril to herself, her car, and the runaway horse, the probabilities are that the horse would not be likely to rush into a stationary object, while the continuing advance of the car was apt to further excite it.
>
> The defendant was unwittingly, yet legally negligent in not stopping her car."

The defendant urges that the referee by use of the words "The defendant was unwittingly, yet legally negligent in not stopping her car." adopted the defendant's version of the accident.

In our view the report of the referee does not necessarily show that he accepted completely either the plaintiff's or

the defendant's version. Certainly he was not required to accept in full the evidence of either side. It is not surprising that witnesses, whom the referee may have believed to be equally truthful, did not agree upon the relative positions of the horse and automobile during the brief period of action. The defendant's version is most favorable to her contention and, if we assume for purposes of discussion that such were the facts, we may safely test the findings of the referee with no possibility of prejudice to the defendant.

On the basis of the defendant's version, the defendant says:

> (1) That according to the rule laid down by the referee, it now becomes necessary for a motorist traveling the highway to stop whenever he sees an animal unattended, standing, or proceeding along the ditch in proximity to the highway; and
>
> (2) That the defendant was not negligent as a matter of law because in this day and age there is no adequate reason for the defendant to reasonably anticipate that a horse, entirely off the road to the defendant's left, would suddenly cross the defendant's right of way.

The instant problem is that of a motorist, who insists upon attempting to pass an approaching runaway horse, although there is ample time and opportunity to stop and thereby avoid the accident. It was to this situation and none other that the referee applied familiar rules of negligence.

The defendant is in error in his statement of the rule applied by the referee.

The rule advanced by the defendant is too broad. It covers the case not of the runaway but of any horse.

Surely it cannot be said that a runaway horse does not present a danger to the motorist. It is common knowledge that the course of a runaway horse is unpredictable and that it may be further excited by a moving automobile. The

reasonably prudent man may well consider the possibility of the horse bounding into the highway from a ditch.

The referee found the defendant in failing to stop did not exercise the care of the reasonably prudent person under the circumstances. Assuming, as we have said, that the referee found the facts to be as the defendant contends, the evidence substantially supports his finding. There was no error in the acceptance of the report.

The entry will be:

Exceptions overruled.

Clifford & Clifford, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

BETTY E. GIFFORD
vs.
HERBERT L. YORK

Kennebec. Opinion, July 18, 1950.

PER CURIAM.

This is an action of contract to recover a real estate commission. The plaintiff alleged and offered evidence to prove that she was a duly licensed real estate broker, that the defendant listed with her certain real estate to sell and promised to pay her as a commission all that she could get for it over $3,000, that the plaintiff found a buyer for it for $3,500 and that it was sold for that price and a warranty deed was given, and that the defendant paid the plaintiff $100 on ac-

count of the price. The plea was the general issue and the case was tried before a jury who found for the plaintiff for the balance due with interest. The case is before us on a general motion for a new trial and on certain exceptions to the exclusion of evidence.

The defendant takes nothing by his motion. The question was one of fact as to the making of the contract for the commission and there is ample evidence to sustain the finding on that point. There seems to be no question about the sale having been made for a price of $3,500.

The court excluded evidence offered by the defendant tending to show that a mortgage note given in part payment of the purchase price was not paid when it was due. The first two exceptions are based on the exclusion of such evidence. The evidence was properly excluded. What happened subsequent to the making of the contract between the plaintiff and the defendant could not alter the rights of the plaintiff in the absence of a new contract between her and the defendant. And there was no such new contract. The third exception is to the exclusion of a receipt given by one J. E. Reynolds purporting to cover a commission to said Reynolds for the sale of the same real estate. If the payment to Reynolds was otherwise relevant, such receipt was hearsay and inadmissible, particularly as it appears of record that Reynolds was in the court room and not called as a witness.

Motion overruled.

Exceptions overruled.

Charles A. Peirce, for plaintiff.

Ames & Ames, for defendant.

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

BURTON H. KENNEDY
vs.
PHILIP E. FLAGG, SR.

Knox. Opinion, October 14, 1950.

PER CURIAM.

On plaintiff's exceptions to the direction of a verdict for the defendant. Plaintiff rested his case on his own testimony. In testing the propriety of directing the verdict, all the evidence must be viewed in the light most favorable to him. *Lewiston Trust Co.* v. *Deveno et al.*, 145 Me. 224, 74 A. (2nd) 457, and cases cited therein.

Plaintiff testified that he was proceeding at moderate speed along a highway approximately 18 feet wide, on his proper side thereof; that the road "didn't look too good," and he decided to turn back and take another; that he saw a driveway on his left and elected to use it as a place to turn around; that he looked in his rear view mirror and out both sides of his car, saw no vehicle approaching him from the rear and heard no horn; that he swung across the highway, without signal, and started to enter the driveway, being struck by defendant's truck when halfway into it. The road was straight enough to give a clear view for some distance ahead of him, where there was a slight curve, and to his rear. Defendant's truck must have been close to him when he started to swing across the road and must have been overtaking him, to pass on his left. The record contains no evidence about the speed of defendant's truck except that the driver of it told an officer of the State Highway Police after the accident that he was gathering speed for the grade ahead. There were no skid marks on the road surface.

Viewing the evidence most favorably to the plaintiff, he is not entitled to recover. He cannot charge the driver of the truck with negligence because of his own failure to give notice of his intention to cross the highway by appropriate

signal. The driver of a motor vehicle intending to cross a highway in the path of another approaching to meet, or overtake, and pass him, has the duty to watch and time the movements of both vehicles to insure his own safe crossing. He owes the driver of the other vehicle the duty of signalling his intention to cross the highway. *Fernald* v. *French,* 121 Me. 4, 115 A. 420; *Esponette* v. *Wiseman,* 130 Me. 297, 155 A. 650; *Verrill* v. *Harrington,* 131 Me. 390, 163 A. 266.

Exceptions overruled.

George W. Wood, Jr., for plaintiff.

Stuart C. Burgess, for defendant.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. THAXTER J., did not sit.

FRANK S. CARPENTER
TREASURER OF STATE OF MAINE
vs.
ESTATE OF JOSEPH COULOMBE

Kennebec. Opinion, October 19, 1950.

PER CURIAM.

On report with agreed statement of facts and argument in writing. This is an action by the Treasurer of the State brought on March 1, 1950 in the Superior Court in Kennebec County to recover from the defendant the cost of his support at the Augusta State Hospital.

The defendant in 1934 upon trial for murder was found "not guilty by reason of insanity" and was then committed to and remains confined at the State Hospital. Defendant is a veteran of the armed services and on March 4, 1936 the guardian, who appears for his ward in this action, was appointed pursuant to the provisions of the Uniform Veterans' Guardianship Act (then R. S., Chap. 81, 1930). The estate of the ward as of March 4, 1950 consisted of assets derived from non-service connected benefits paid by the Veterans Administration.

The report must be discharged. There is nothing in the record before us to show that the office of Veterans Administration having jurisdiction over Kennebec County has received any notice whatsoever of the pending action. In absence of proof of the required notice or waiver thereof, our courts cannot proceed. We cannot assume that the Administrator (the Administrator of Veterans Affairs of the United States) has no interest in the case. *Uniform Veterans' Guardianship Act (Laws of 1949, Chap. 230, Sec. 2).*

It may be noted that the obligation of the defendant to pay for support at the State Hospital arises not from a contract, expressed or implied, but solely by statute. During the period covered by the action, the statute remained unchanged and is now found in *R. S., Chap. 23, Sec. 122 (1944).*

To enable a court to render final and complete legal determination, the record must contain necessary information to determine liability. Cases to which reference may be made are: *Orono* v. *Peavey,* 66 Me. 60 (1876); *Cape Elizabeth* v. *Lombard,* 70 Me. 396 (1879); *Bangor* v. *Wiscasset,* 71 Me. 535 (1880); *Greenville* v. *Beauto,* 99 Me. 214, 58 A. 1026 (1904); *Chaplin* v. *National Surety Corp.,* 134 Me. 496, 185 A. 516 (1936).

The entry will be:

Report Discharged.

Ralph W. Farris, Attorney General,
John S. S. Fessenden, Deputy Atty. Gen., for plaintiff.

Nunzi Napolitano, for defendant.

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

PETER B. JENNESS
vs.
RALPH T. PARK

Androscoggin. Opinion, October 30, 1950.

PER CURIAM.

The plaintiff herein, after a jury verdict against him, alleges in a motion for a new trial that it is against the law and the evidence and against the weight of the evidence.

The issue in this case was whether or not the defendant committed an assault and battery on the plaintiff. It should be stated that the record discloses no exceptions and so it must be presumed that the jury which heard the case was properly instructed as to the applicable law.

We have many times stated that the authority of this court under such circumstances as set forth is strictly limited. The verdict must stand unless it can be said that there was no credible evidence to support it. See *Young* v. *Potter,* 133 Me. 104, 174 A. 387; *Eaton* v. *Marcelle,* 139 Me. 256, 29 A. (2nd) 162. Stated another way, the general rule is that when the testimony is conflicting, the verdict must stand. It was pointed out by our court in *Moulton* v.

Sanford & Cape Porpoise Railway Company, 99 Me. 508, 59 A. 1023, that conflict of testimony cannot be said to arise simply because one witness testifies contrary to another. We said, in that case, speaking of the general rule:

> "It means that there must be substantial evidence in support of the verdict,—evidence that is reasonable and coherent and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence."

We also said in *Mizula* v. *Sawyer et al.*, 130 Me. 428, 430, 157 A. 239:

> "No citation of authorities is needed to establish the proposition that when two arguable theories are presented, both sustained by evidence, and one is reflected in a jury verdict, this Court is without authority to act."

See also *Wyman* v. *Shibley*, 145 Me. 391, 72 A. (2nd) 451. In the instant case there is a conflict of credible evidence sufficient either to establish or to defeat the claim of the plaintiff. The weight of credibility of witnesses is for the jury and not for the court to decide. See *Parsons* v. *Huff*, 41 Me. 410; *Kimball* v. *Cummings*, 144 Me. 331, 68 A. (2nd) 625.

The jury in the instant case made its selection as to what should be accepted as true and its decision is final.

Motion overruled.

McLean, Southard & Hunt, and
Frank M. Coffin, for plaintiff.

John G. Marshall, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ. WILLIAMSON, J., sat at the argument but did not participate in the opinion.

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ATTORNEYS AT LAW

The inherent power of the Supreme Judicial Court to discipline attorneys is in the court itself and not the individual justices and the provisions of R. S., 1944, Chap. 93, Secs. 14-19 are not exclusive but in aid of the inherent powers.

Barnes et al. v. *Walsh*, 107.

Attorneys fees in cases involving the construction of a will should be moderate and may be thrown upon the estate unless the cause is frivolous.

There are many different elements which affect the value of legal services skill, standing of person employed, nature of controversy, amount involved, time bestowed, ultimate results, and charges made by other attorneys in same locality.

Cassidy et al. v. *Murray et al.*, 207.

See Equity, *Berman et al.* v. *Griggs et al.*, 258.
See Insurance, *Wilson* v. *Aetna Casualty and Surety Co.*, 370.

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See New Trial, *Adams* v. *Merrill*, 181.

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See Damages, *DeBlois et al.* v. *Dunkling et al.*, 197.

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See Landlord and Tenant, *Weeks* v. *Standish Hdwre. and Garage Co.*, 307.
See *Lessard* v. *Sherman Corporation*, 296.

COURTS

Neither the Constitution of the United States nor the Constitution of this state requires the personal presence in court of a person charged with a crime when his case is argued before an appellate court upon a bill of exceptions taken in a court below.

Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates.

There is no general statute in this state authorizing the Law Court to issue process in aid of its jurisdiction. If such right does exist, the right is limited to cases of strict necessity and then only to enable the court to function and exercise its powers as a statutory court and within its statutory jurisdiction.

Smith Petr., 174.

CRIMINAL LAW

DAMAGES

In motions to set aside verdicts for admitted error in awarding damages in excess of the amount which could be awarded in the cause, whether the motion be directed to the presiding justice or to this court, the court under appropriate circumstances may (a) set the verdict aside unconditionally and order a new trial, (b) may set the verdict aside and order a new trial on the question of damages only, or (c) may make a conditional order overruling the motion if the plaintiff within a time fixed by the court remits all of the verdict in excess of the amount specified in the order, and further providing that unless the same be done as specified, the motion be sustained.

Whether a *remittitur* will remove the infirmity of excess will depend upon the facts in the case, the judgment of the court in view of the whole evidence, and the justness of the verdict except for its amount.
DeBlois et al. v. *Dunkling et al.*, 197.

DEEDS

DECREES

DEMURRER

DIRECTED VERDICT

DIVORCE

A joint tenancy as distinguished from a tenancy of entirety is unaffected by the marital relation of the tenants, or by a divorce in and of itself.

A surviving joint tenant holds the entire estate, not by acquisition of an interest from the deceased, but by right of the instrument creating the joint tenancy. The estate of the deceased joint tenant is extinguished and he leaves no inheritable estate.

The interest, if any, acquired upon divorce by libellant husband in real estate held in joint tenancy with the libelee, arises by operation of R. S., 1944, Chap. 153, Sec. 64 which provides "He shall be entitled to 1/3 in common and undivided of all her real estate, except wild lands, which shall descend to him as if she were dead."

As there is no estate in libellee wife who is "as if she were dead" for the purposes of the instant case, to descend, there is no interest in the joint tenancy in the wife upon which Sec. 64 may operate, and the joint tenancy remains unchanged by the divorce and by Sec. 64.

Poulson v. *Poulson*, 15.

A valid judgment or decree in a divorce case is conclusive in any future action between the parties as to all facts directly in issue and actually or necessarily determined therein.

Property settlement agreements made upon separation are valid if not against public policy.

Where Nevada Law regards a wife's allowance as final, unless the decree or approved agreement reserves the right of modification, suit may be brought in Maine upon the agreement for past due installments.

Coe v. *Coe*, 71.

A separate support order in favor of a wife does not of itself bar a husband from a divorce.

The issues involved in the support order (that the husband, being of sufficient ability, wilfully and without reasonable cause, refused and neglected to provide suitable maintenance for his wife) are *res adjudicata*.

The issue involved in the support order (that the wife was living apart from her husband for just and reasonable cause) is not *res adjudicata* since such fact is not a statutory prerequisite to the support order and *a fortiori* not necessarily determined.

Uncondoned misconduct of a libelant which would justify a divorce to a libelee bars a divorce to libelant.

Living apart for just and reasonable cause may not be for such a cause as would justify a divorce.

Grossness, wantonness and cruelty are not necessary ingredients of a separate support order (R. S., 1944, Chap. 153, Sec. 43 (Sec. 55) as amended by P. L., 1949, Chap. 239, Sec. 137).

Russell v. *Russell*, 113.

DUMPS

See Municipal Corporations, *Wilde* v. *Madison*, 83.

EXCEPTIONS

It is elementary that exceptions must be allowed or their truth otherwise established before they will be heard by the Law Court. R. S., 1944, Chap. 94, Sec. 14. Rules of Court 40.

An exception does not lie to the failure of the presiding justice to grant a motion for a directed verdict at the close of the State's case, when the respondent does not then rest his case; the further introduction of evidence in defense results in a waiver of the exception.

State v. *Johnson*, 30.

See Probate Court, *Jensen Applt.*, 1.
See Workmen's Compensation, *Girouard's Case*, 62.
See *Dubie* v. *Branz*, 170, 389.

ESCAPE

See Indictments, *Smith Petr.* v. *State*, 313.

EASEMENTS

Where one conveys to another a tract of land surrounded by the grantor's own land, or inaccessible except through the grantor's own land, he is considered to have granted by implication a right of way to and from it. The test is necessity and whether the party claiming can at reasonable cost on his own estate and without trespass, create a substitute.

No right of way of necessity exists across the remaining land of the grantor, where the land to which such right of way is claimed borders on the sea. It must be necessity and not mere convenience.

No right of way can be implied, if there is free access to the land over public navigable water, although an easement of necessity is sometimes recognized where the expense to be incurred in creating or using another way is excessive.

Bodies of water are navigable when they are used or capable of being used, in their ordinary condition as highways. This is a question of fact.

Ponds containing more than ten acres are known as great ponds and they are public ponds which with the soil under them are held by the state in trust for the public.

The location of ways arising from necessity may be changed by the concurrence of the parties and such location or change need not be in writing nor formally agreed to, but may be inferred from the acts or acquiescence of the parties.

Flood v. *Earle*, 24.

See Municipal Corporations, *Kennebunk et al.* v. *Maine Turnpike Authority*, 35.

EQUITY

Equity appeals are heard anew on the record.

A variance requires a real difference between allegation and proof. The test to be applied is the tendency of the evidence substantially to prove the allegation not the literal identity of facts alleged and facts proven.

Tuttle v. *Howland*, 246.

R. S., 1944, Chap. 95, Sec. 31 is mandatory and jurisdictional. In the absence of either a report of the evidence or an abstract thereof approved by the justice hearing the case an equity appeal must be dismissed.

Semo v. *Goudreau et al.*, 251.

ESTOPPEL

EVIDENCE

INSURANCE

One contracting to defend actions seeking recovery for negligence in the operation of a motor vehicle, and to pay all recoveries therefor within stated limits, owes the person insured both good faith and the exercise of proper care in the preparation and conduct of the defense of cases litigated.

An insurer is liable to his insured beyond the stated amount of his limited liability for bad faith or for negligence in the preparation or defense of any action he has contracted to defend.

An insurer may be liable to his insured for failure to accept an offer of compromise of an action he is defending pursuant to his insurance contract.

The present case requires no decision whether this court will adopt the "bad faith rule" or the "rule of negligence" in determining whether an insurer is liable to his insured for failure to accept an offer of compromise within the insurance coverage if there is a recovery in excess thereof.

The failure of an insurer to interview all available witnesses and visit the *locus* of an accident in the course of preparing the defense of an action does not constitute negligence therein when the defense is conducted on the issue of damages.

The reliance of an insurer on the opinion of a qualified expert on the question of damages does not constitute negligence.

An insurance policy for limited coverage does not obligate the insurer to pay the full amount thereof to relieve his insured from the hazard of a recovery in excess thereof.

Wilson v. *Aetna Casualty and Surety Co.*, 370.

See *Associated Fish Prod.* v. *Hussey*, 388.

INDICTMENTS

When indictment employs language which makes the offense charged clear and unambiguous, it will not be declared defective because of a failure to meet all the technical refinements of criminal pleadings. Under this rule, the omission to allege in an indictment for breaking and entering and larceny that the owner of property named in the indictment is a corporation, if it is, does not render it defective.

The failure of counsel to specify a ground for an objection does not require the overruling of an exception to the admission of the testimony to which it relates, if that ground is apparent to the trial court.

State v. *Hume*, 5.

If a writ of error lies to reverse a sentence imposed because it is in excess of that authorized by law, *a fortiori* of it lies when the record does not set forth the commission of any crime by the respondent for which sentence may be imposed.

Any escape by a prisoner from lawful custody was an escape at common law, and such are now common law crimes in this state punishable under R. S., 1944, Chap. 136, Sec. 2 except those escapes expressly provided for by statute.

An indictment for escape which alleges a lawful detention by virtue of commitment to jail, but which fails to allege by what authority the commitment is made is defective.

The allegation that plaintiff in error was "committed (to jail) for want of bail for his personal appearance," at a named term of court "to answer to a felony" does not mean and is not equivalent to allegations that he was "detained for a criminal offense" or that he was "in custody for a felony."

Penal statutes are to be construed strictly.

Smith Petr. v. *State*, 313.

An indictment charging that a defendant "feloniously did make an assault and . . . then and there feloniously and unlawfully did attempt to carnally know and abuse" . . . sufficiently charges an assault with intent to commit rape in violation of R. S., 1944, Chap. 117, Sec. 12.

The phrase "with intent to commit *rape*" as used in R. S., 1944, Chap. 117, Sec. 12 means an intent to commit those acts punishable under Sec. 10, including unlawfully and carnally knowing and abusing a female child under 14 years of age.

An *attempt* to do an act necessarily includes an *intent* to do the act. Words which are the equivalent of, or more than the equivalent of the allegation of the required specific intent are sufficient.

Moody v. *Lovell*, 328.

See Trial Justices, *State* v. *McNally*, 254.

JOINT TENANCY

See Divorce, *Poulson* v. *Poulson*, 15.
See Joint Accounts, *Bosworth Applts.*, 92.

JOINT ACCOUNTS

A bank account made payable to a decedent and her daughter or the survivor in 1944 is payable to daughter as survivor under R. S., 1944, Chap. 55 even though it was originally opened in 1920 in decedent's individual name and decedent retained the bank book after 1944.

Bosworth, Applts., 92.

JUDGMENT

See Indictments, *State* v. *Hume*, 5.
See Probate Courts, *Jensen Applt.*, 1.

JUVENILES

The excepting from the juvenile jurisdiction of juvenile courts of crimes "the punishment for which may be for *any term of years*" means those serious offenses such as rape, robbery, and burglary where the courts may sentence for "any term of years."

Juvenile courts are courts of special and limited jurisdiction and authority.

A juvenile delinquent is a child under the age limit who violates the criminal law or who is disobedient or incorrigible, or unmanageable, or immoral, or growing up or likely to grow up in idleness and crime.

All felonies are considered infamous.

Manslaughter is not a crime punishable by "any term of years."

The juvenile court can hold a child guilty of juvenile delinquency for the grand jury upon a determination that it should be dealt with

as a criminal for the protection of the community and the best interests of the child.

The original jurisdiction of the common law courts over the offense of manslaughter when committed by juveniles has been taken away by legislative enactment.

The juvenile has the right to be treated as a delinquent until there is a judicial determination under Section 6 of R. S., 1944, Chap. 133, as amended, that he be held for the grand jury and such determination being jurisdictional cannot be waived.

The record of a juvenile court must show by express declaration or necessary implication the judicial determinations requisite under Section 6 of R. S., 1944, Chap. 133 as amended.

Wade v. *Warden*, 120.

See *State* v. *White*, 381.

JEOPARDY

On a writ of error the court is limited to consideration of the record.

On habeas corpus the petitioner is not entitled of right to consideration of the issue of double jeopardy.

The finding of "probable cause" on a complaint and warrant charging grand larceny does not include a finding of "not guilty of petit larceny." Jurisdiction taken only for the purpose of determining if there was, "probable cause" and, if so, to "bind over" the accused to the trial court does not place defendant on trial or in jeopardy for petit larceny before the magistrate.

Kaye v. *State*, 103.

LIFE ESTATE

See Landlord and Tenant, *Weeks* v. *Standish Hdwre. and Garage Co.*, 307.

LANDLORD AND TENANT

To an invitee a landlord has the duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils.

Temple v. *Congress Square Garage Co.*, 274.

A residuary devisee of real estate, although not claiming under the life tenant, is a successor in title to the real estate. After the death of the life tenant he has a right to disaffirm an unenforceable contract for the sale of the property of which he is now the sole owner entered into by the life tenant with the power of disposal.

If the purchaser in possession continues to hold possession of the property which was the subject matter of a contract after disaffirmance, the law will imply an obligation on his part to pay for subsequent use and occupation.

In the absence of special circumstances the purchaser in possession under a contract unenforceable because not in compliance with the Statute of Frauds is not liable for use and occupation.

Weeks v. *Standish Hdwre. and Garage Co.*, 307.

LARCENY

See Jeopardy, *Kaye* v. *State*, 103.

MUNICIPAL CORPORATIONS

Where the only right to the use by a quasi municipal corporation of the waters of a brook is predicated upon a charter provision authorizing such use, an alleged damage to the quality of the water by an upper riparian owner can be sustained only upon a showing that the principal corporation had made a legal taking of the waters of the brook.

A Municipal Corporation cannot by virtue of the ownership of riparian lands abstract water from a brook on which they are located for public distribution since such abstraction for sale to others is not a reasonable use.

Unless a lower riparian proprietor establishes its right to use the waters of a brook for public sale, injury to the quality of the water resulting from a proper use of its land by an upper riparian proprietor is *damnum absque injuria;* that is damage without invasion of a legal right.

The doctrine that a charter authorizing the use of the water of a great pond as a source of water supply operates as a grant of the water and use thereof does not apply to brooks and streams.

Neither the state nor any agency thereof can take private property for use without payment of just compensation.

Kennebunk et al. v. *Maine Turnpike Authority*, 35.

Where a statute authorizes or requires a municipal corporation to do some governmental act or carry out some duty, the corporation is not liable for the negligent acts of its officers in its performance, unless the liability is created by statute.

The furnishing and maintenance of a town dump is a governmental function.

Wilde v. *Madison*, 83.

A City is the creation of and subject to the control of the Legislature. The powers are derived from the charter, special legislation directed to the particular city, the state Constitution, and statutes of general application.

The charter of a city is the organic law of the corporation and an ordinance must conform, be subordinate to, and not exceed the charter.

An ordinance violative of or not in compliance with a city charter is void.

No action by the city through the city council or the people can alter or change the charter which was enacted not by the people of the city but by the people of the state.

Where the power and authority to fix and approve salaries is found in the city charter and not otherwise such is part of the organic law of the city and cannot be altered by local law.

Where a proposed ordinance if adopted, would be void it is not a proper matter for submission to the voters.

Farris ex rel. v. *Colley et al.*, 95.

The liability of a town for damages caused by a defect in a highway arises solely by virtue of statute.

NEGLIGENCE

When damage is caused by the negligence of two persons, acting independently, either is liable therefor.

One acting in an emergency is not chargeable with the same degree of care applicable to normal conditions.

Whether one is acting in an emergency is a question of fact.

The emergency principle is not applicable to one whose negligence has contributed to the creation of the emergency.

A violation of the law of the road constitutes *prima facie* negligence which unexplained is conclusive. (R. S., 1944, Chap. 19, Sec. 106, 102.)

Robinson et al. v. *LeSage*, 300.

It does not necessarily follow that because uncertainty in a declaration may be attacked by a special demurrer, that in all cases of alleged uncertainty, a special demurrer will lie, when a motion for specifications should and could have been filed in the Superior Court before trial.

In negligence actions, the plaintiff must inform the defendant of the facts upon which he relies to establish liability for the alleged injuries, and must set up a situation sufficient in law to establish a duty of its defendant toward the plaintiff, and that the acts complained of were a violation of that duty. In this instant case, the question whether plaintiff's intestates were guest passengers or passengers for hire was a matter of proof rather than pleading.

"Ordinary care" varies with the attendant and surrounding circumstances.

Nadeau v. *Fogg*, 10.

The driver of an automobile faced with a sudden emergency and possible impending collision caused by the negligence of the defendant is not necessarily guilty of contributory negligence because he turns so far to the right in attempting to avoid such collision that his wheels slip off the shoulder of the road, concealed by drifting snow, and overturns his vehicle. The determination whether such action is that of an ordinarily prudent man under like circumstances is a question of fact which should be left to the jury.

While the standard of care required is that which would be exercised by the ordinarily prudent person, it is only that degree of care which such person would use under the same circumstances.

St. Johnsbury Trucking v. *Rollins*, 217.

See Evidence, *Berry* v. *Adams*, 291; *Torrey* v. *Congress Square Hotel Co.*, 234.

See Landlord and Tenant, *Temple* v. *Congress Square Garage Co.*, 274.

See Municipal Corporations, *Morneault* v. *Hampden*, 212.

See New Trial, *Fotter* v. *Butler*, 266.

See Pleadings, *Reynolds et al.* v. *Hinman Co.*, 343.

See *O'Brien* v. *Marston*, 394.

PLEADING

When the defect in a declaration is a matter of form and not of substance it must be specially set forth.

A declaration which fails to set forth in what particular or particulars a defendant or its servants or agents were negligent is demurrable.

The doctrine of *res ipsa loquitur* is a rule of evidence and not a substantive rule of law.

Under the law of this state it is the duty of a plaintiff in an action of negligence to inform the defendant of the facts upon which he relies to establish liability.

By direct averment a pleader must at least state facts from which the law will raise a duty, and show an omission of the duty with injury in consequence thereof.

The rule of absolute liability whereby one acting entirely without fault is liable for damages resulting from his innocent acts has never been adopted in this state and the only logical rule for this court to adopt is the rule that fault is a requisite for liability.

Reynolds et al. v. *Hinman Co.*, 343.

See Equity, *Tuttle* v. *Howland et al.*, 246.
See Indictments, *Smith Petr.* v. *State*, 313.
See Negligence, *Nadeau* v. *Fogg*, 10.
See Trial Justices, *State* v. *McNally*, 254.

PONDS AND BROOKS

See Municipal Corporations, *Kennebunk et al.* v. *Maine Turnpike Authority*, 35.

PROBABLE CAUSE

See Jeopardy, *Kaye* v. *State*, 103.

PROBATE COURT

Where an appeal from the Probate Court was submitted to Supreme Court of Probate at the June, 1949 term and dismissed in vacation on August 12, 1949 without Bill of Exceptions being filed within 30 days period as provided by statute and without further extension of time, the court is without jurisdiction to re-open or further extend the time for filing exceptions, notwithstanding the fact that the clerk's office did not notify petitioner's counsel of the August 12th judgment until September 13th and the further fact that the clerk's office, within the week prior to September 13, had informed petitioner that judgment had not been rendered.

A judgment in vacation becomes final upon resting without attack for the thirty-day period or such further extended period.

The right to take exceptions is wholly statutory and does not spring from any inherent power of the courts.

Jensen, Applt., 1.

A Rule of Court has the force of law if not repugnant to law.

A Rule of Court cannot change a statute.

The provision of Rule 31 of the Probate Court Rules requiring wills be "proved and allowed in open court" and the preservation of testimony "by an affidavit taken before the Judge or Register" and "in no case shall evidence be taken out to prove said will before the return day" does not preclude the introduction into evidence of an affidavit taken before the return day where there are no objections to the will, since the statutes provide "when it clearly appears . . . that there is no objection thereto, (the judge) may decree the probate of any will upon the testimony of one or more of the 3 subscribing witnesses required by law, . . . and the affidavit of such witness or

STATUTES CONSTRUED

REVISED STATUTES

PUBLIC LAWS

PRIVATE AND SPECIAL LAWS

CONSTITUTION OF MAINE

SEPARATE SUPPORT

SURVIVORSHIP

TRIAL JUSTICES

A demurrer reaches only matters apparent on the face of the pleading demurred to.

A statutory provision respecting the drafting of all criminal warrants by the recorder is directory rather than mandatory.

State v. *McNally*, 254.

TAXATION

The requirement of R. S., 1944, Chap. 81, Sec. 35 that inhabitants "make and bring in" to the assessors a true and perfect list of polls and estates real and personal is fulfilled by sending a true and perfect list by registered mail. *Inhabitants of Winslow* v. *County Commissioners of Kennebec* overruled.

Perry et al. v. *Lincolnville*, 362.

TROVER

Any distinct act of dominion over property in denial of owner's right, or inconsistent with it, amounts to conversion.

Legal right of possession or the right of special property in the article bailed or pledged cannot be acquired from a person who obtained possession of the article attempted to be pledged by fraud.

Fraud vitiates all contracts into which it enters, verbal or written.

Dubie v. *Branz*, 170.

The sale of mortgaged personal property constitutes a conversion of the mortgagee's interest.

After the expiration of the statutory time for recording a chattel mortgage, the holder thereof, has no rights in the property mortgaged as against a purchaser, attaching creditor, or subsequent mortgagee.

One who aids or assists another in the conversion of property is a party to the conversion.

Mere advice, even when motivated by the selfish desire of personal benefit, does not constitute such aid or assistance as will make the advisor liable for the conversion advised.

Lewiston Trust Co. v. *Deveno*, 224.

TRESPASS

See Adverse Possession, *Shannon* v. *Baker*, 58.
See Easements, *Flood* v. *Earle*, 24.

VETERANS

See *Carpenter* v. *Coulombe*, 400.

WILLS

See Attorneys at Law, *Cassidy et al.* v. *Murray et al.*, 207.
See Probate Courts, *Knapp Applt.*, 189.

WORDS AND PHRASES

WRIT OF ERROR

WAIVER

WORKMEN'S COMPENSATION

If the answer to a petition for compensation raises issues of fact there are only three methods whereby the Commission may determine such facts—(1) upon the testimony of witnesses (2) by agreement upon affidavits presenting the claims of both parties or (3) upon an agreed statement of facts.

The jurisdiction of the Industrial Accident Commission is purely statutory and cannot be enlarged by waiver consent or express stipulation.

R. S., 1944, Chap. 26, Sec. 41 provides for the only review by the courts.

Pro forma decrees can be reviewed by the Law Court as in the case of equity appeals, i.e., by appeal or exceptions.

R. S., 1944, Chap. 95, Sec. 31 relating to equity appeals makes mandatory and jurisdictional the filing of either a report of the evidence or an abstract thereof approved by the justice hearing the case.

Either party before the Industrial Accident Commission may as a matter of right demand that the proceedings be reported even though there is no statutory requirement therefor.

Failure to demand that proceeding be reported constitutes a waiver.

R. S., 1944, Chap. 95, Sec. 26 relating to exceptions to equity decrees requires only the filing with the Law Court of such parts of the case as are necessary to a clear understanding of the issues.

Girouard's Case, 62.