MAINE REPORTS

146

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

NOVEMBER 1, 1950 to AUGUST 1, 1951*

(* see Table of Cases—footnote)

MILTON A. NIXON
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Reporter of Decisions

MILTON A. NIXON

TABLE OF CASES REPORTED

* The rescript of *Dubie* v. *Branz*, 145 Me. 170, dated May 4, 1950 was published in lieu of the opinion. Herewith is published the full text of the opinion by Mr. Justice Nulty.

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CASES
IN THE
SUPREME JUDICIAL COURT
OF THE
STATE OF MAINE

BENJAMIN H. COFFIN
vs.
WINFRED S. DODGE

Sagadahoc. Opinion, November 13, 1950.

Deceit. Assumpsit.

The Elements in deceit are (1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity and (4) made with the intention that it shall be acted upon and (5) acted upon with damage. In addition to these elements it must also be proved that the plaintiff (6) relied upon the representations (7) was induced to act upon them and (8) did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity.

Whether a false representation is material is a question of law.

The misrepresentation must be of a past or present fact and not of a future happening or expression of opinion.

Deceit cannot be substituted for an action of assumpsit.

ON EXCEPTIONS.

Action of tort for deceit heard by a Justice without the intervention of a jury. Judgment for the plaintiff with damages assessed at $200. Defendant brings exceptions. Exceptions sustained. Case fully appears below.

Harold J. Rubin,
Edward W. Bridgham, for plaintiff.

Benjamin L. Berman,
David L. Berman, for defendant.

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

FELLOWS, J. This is an action of tort for deceit brought in the Superior Court for Sagadahoc County and heard by a justice without the intervention of a jury. The justice

found for the plaintiff and assessed damages in the sum of $200. The case comes to the Law Court on defendant's exceptions.

The facts, briefly, are that prior to May 25, 1949 the plaintiff Benjamin H. Coffin of Brunswick, Maine, placed an order for a Chevrolet truck with one Joseph Goodwin who was an automobile dealer in Brunswick, and on May 25, 1949, while awaiting delivery of the truck from Goodwin, the defendant Winfred S. Dodge of Bowdoinham, Maine, came to the plaintiff Coffin and, according to the plaintiff's testimony, induced the plaintiff to give an order for a Chevrolet truck to the defendant. The defendant Dodge was an automobile dealer and a competitor of Goodwin. The plaintiff says that the defendant Dodge falsely represented to him (the plaintiff) that Goodwin would not be able to deliver a Chevrolet truck for several weeks. The plaintiff stated that he (defendant) said he had "talked with the head Chevrolet man for this whole district" and could deliver a Chevrolet truck "right off." As the plaintiff Coffin was in the lobster business and needed a truck as soon as possible, the plaintiff Coffin paid to the defendant Dodge the sum of $200 for a deposit, and signed an order to the defendant for a Chevrolet truck to be delivered to him (the plaintiff) on or before June 20, 1949. Goodwin, however, delivered a truck to the plaintiff on May 31, 1949 and the plaintiff accepted it.

The plaintiff paid Goodwin for the truck the sum of $1,277.15, having received from Goodwin a discount of $200. The plaintiff demanded of the defendant Dodge a return of his $200 deposit given to Dodge on May 25, 1949, which was refused. This action of deceit was then brought by the plaintiff Coffin against the defendant Dodge.

The declaration alleged, in substance, a misrepresentation on the part of the defendant Dodge in that Dodge stated to the plaintiff that a motor truck could not be delivered by

Goodwin until July 15th, while he (the defendant) could deliver one on or before June 20th.

The defendant claims, by his bill of exceptions, that the plaintiff in this action for deceit is bound by the allegations in his declaration and cannot now say he relied on other representations not alleged; that neither the allegations nor the proof were sufficient to maintain this action; that no damage was proved; and that if the plaintiff has a remedy it is by rescission of the contract with defendant, and an action against defendant for money had and received. The plaintiff claims, on the other hand, that all the elements to sustain the action for deceit were by him alleged in his declaration, and were also proved at the trial.

Most legal rights which have been violated have their own forms of action for the remedies. The proper method, to correct a wrong or to collect a claim, should be followed in order to effect a recovery. Remedies and the forms of action which have been approved by the court for a long period are adhered to in order to avoid confusion and uncertainty. The form and the method of procedure in an action of deceit, for example, have been long established in this state, and closely followed for generations. Every essential element must be alleged and must be proved by affirmative evidence. "For the action of deceit was not intended to be made easy to prove. Its purpose was to restrain law suits in commercial and trading transactions so that every time a party, through reliance upon opinion, or trade talk, or without taking pains to inquire for himself, got the bad end of a bargain he should not be permitted to fly to the courts for redress." *Crossman* v. *Bacon & Robinson,* 119 Me. 105; *Flanders* v. *Cobb,* 88 Me. 488.

In the case of *Crossman* v. *Bacon & Robinson,* 119 Me. 105, 109, the elements in deceit are stated to be "(1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without

knowledge of its truth or falsity and (4) made with the intention that it shall be acted upon and (5) acted upon with damage. In addition to these elements it must also be proved that the plaintiff (6) relied upon the representations (7) was induced to act upon them and (8) did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity. Every one of these elements must be proved affirmatively to sustain an action of deceit."

Whether a false representation is material is a question of law. *Caswell* v. *Hunton,* 87 Me. 277. The fraud must be a misrepresentation of a past or present fact and not on a future happening or an expression of opinion. *Carter* v. *Orne,* 112 Me. 365; *Stewart* v. *Winter,* 133 Me. 136; *Shine* v. *Dodge,* 130 Me. 440. Proof of other false and fraudulent representations cannot sustain an action for deceit unless alleged and relied upon. *Carter* v. *Orne,* 112 Me. 365; *Holbrook* v. *Connor,* 60 Me. 578, 581. A false statement, that had no influence on the decision of the party complaining, furnishes no ground for relief. *Mitchell* v. *Mitchell,* 136 Me. 406, 416. The person who claims to have been defrauded must have no reasonable opportunity to verify the truth or falsity of the representation. Where the party has an opportunity to learn the facts he has no right to rely on representations, the truth of which he has equal means of ascertaining or by the exercise of reasonable diligence could have ascertained. One who has opportunity for ascertaining the truth cannot rely on the statement of one who is not a fiduciary. *Clark* v. *Morrill,* 128 Me. 79; *Thompson* v. *Insurance Co.,* 75 Me. 55, 61. Although there are limitations on the foregoing general rules, see *Banking Company* v. *Cunningham,* 103 Me. 455; *Harlow* v. *Perry,* 113 Me. 239, and *Bixler* v. *Wright,* 116 Me. 133, see also 61 A. L. R. 492, 497 (b), the facts of this case do not bring it within such limitations.

Taking the record in the case at bar, assuming the plaintiff's story true, and applying the rules as stated in the cases previously cited herein, we find the following: The declaration alleged as misrepresentations "that the motor truck which the said plaintiff had ordered from the said Joseph Goodwin could not be delivered to the said plaintiff by the said Joseph Goodwin until the 15th day of July, A. D., 1949 * * * the defendant representing to the plaintiff that he could deliver a motor vehicle to the plaintiff on or before the 20th day of June, A. D., 1949, which was sooner than delivery could be made by the said Joseph Goodwin * * * and relying upon the false, fraudulent and deceitful representations made to him by the defendant that the said Joseph Goodwin was not able to deliver such a motor vehicle to him prior to the 15th day of July, A. D., 1949."

The plaintiff testified in answer to the direct question as to why he gave defendant the order: "A. Because he said he could do it right off. I needed the truck." He further testified: "A. He says: Do you want a truck? I says: Yes, I have already ordered one from Joe Goodwin, an Armour yellow one. He says: He can't get that for six or eight weeks, but, he says, I talked with the head Chevrolet man for this whole district this afternoon. He says: If you want to pay a two-hundred-dollar deposit, I will have the truck right off. So I placed the order with him." "Q. In your talk with Mr. Dodge down at your place in Gurnet, whether or not when he talked with you there was any statement made by him as to his being in Joe Goodwin's?" "A. When I says I ordered from Joe Goodwin, he says: I just come from there and, he says, he can't get you a truck for six or eight weeks." "Q. Whether or not Mr. Dodge made any statement as to whether or not your truck was or was not at Joe Goodwin's garage?" "A. Never mentioned it."

There is no "clear and convincing proof" that the plaintiff relied upon anything other than that the defendant could get a truck "right off" or "right away." The proof

that defendant knew his statement to be false was only that he had been at Goodwin's. There is no satisfactory proof that Goodwin could or could not deliver a truck prior to July 15th, except that he did deliver a truck on May 31st. The allegations of misrepresentation differ from the proof offered. The claim that Goodwin could not get a truck for six or eight weeks looks to the future and can be considered either a matter of opinion, "trade talk," or of a future event. The plaintiff also failed to establish that by the exercise of reasonable care he could not have ascertained the falsity of the alleged misrepresentation. The plaintiff lived in the same town with Goodwin and could have easily ascertained the true facts from Goodwin or Goodwin's garage. The plaintiff could have learned the facts before signing the order to the defendant on May 25, 1949 if he had used any diligence, or if he desired to. The plaintiff himself testified that the defendant suggested that the plaintiff call Goodwin on the telephone and "cancel the order." The only excuse the plaintiff offered for not telephoning to Goodwin was that he thought that Goodwin's garage was "closed at that time of day." Then, too, the talk between the plaintiff and defendant related to an order for a three-quarter ton truck, while the truck ordered at Goodwin's garage was a half-ton truck, and the half-ton truck was later delivered by Goodwin and paid for by the plaintiff on May 31, 1949.

A reading of the declaration and the evidence in this case clearly pictures that this controversy is the result of the work of a shrewd salesman who induced a willing and anxious buyer to give an order, because the salesman promised a quicker delivery than a competitor. The buyer may have been intentionally misled, but the buyer made no effort to verify the misleading statement of the seller when he could easily have done so. There was no ground for an action of deceit. The plaintiff had orally asked Goodwin to get him a truck and no deposit with Goodwin was made.

The plaintiff was waiting for word from Goodwin. The defendant Dodge promised a delivery "right away" if an order was signed with him and deposit made. The plaintiff complied, and probably had no other thought than prompt delivery of a necessary truck. An action of deceit does not lie to recover the $200 deposit. Deceit cannot be substituted for assumpsit. *Crossman* v. *Bacon & Robinson,* 119 Me. 105; *Flanders* v. *Cobb,* 88 Me. 488. The plaintiff's form of remedy after rescission, which rescission he may have made, is an action for money had and received in assumpsit. *Mayo* v. *Purington,* 113 Me. 452; *Prest* v. *Farmington,* 117 Me. 348.

The justice of the Superior Court, in finding as he did for the plaintiff in this action, was clearly wrong. His finding was without evidence to support material elements necessary to maintain the action. *Mitchell* v. *Mitchell,* 136 Me. 406, 416, 417; *Ayer* v. *Harris,* 125 Me. 249; *Viele* v. *Curtis,* 116 Me. 328; *Shapiro* v. *Sampson,* 116 Me. 514.

Exceptions sustained.

ALVA W. MCDOUGAL, APLT.

vs.

JOHN W. HUNT

York. Opinion, November 15, 1950.

Exceptions. Assumpsit. Taxation. Damages.

Where a bill of exceptions does not set forth the error of law upon which the presiding justice based his decision, its sufficiency may be questioned for failure to particularize. R. S. 1944, Chap. 94, Sec. 14.

If taxes assessed to a former owner under R. S. 1944, Chap. 81, Secs. 23 and 100 and paid by him can be recovered from the true owner, it is only on the theory of unjust enrichment.

Actual or compensatory damages are not to be presumed.

Where recovery is limited to actual damages the facts in evidence must be such as to permit determination with reasonable, as distinguished from mathematical certainty.

ON EXCEPTIONS.

Action of assumpsit to recover a proportional share of a total tax paid by plaintiff upon three lots of land one of which belonged to the defendant. Judgment for defendant and plaintiff brings exceptions. Exceptions overruled. Case fully appears below.

Gendron, Fenderson and McDougal, for plaintiff.

Willard and Willard,
Ward T. Hanscom, for defendant.

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

MERRILL, J. On exceptions. The plaintiff, being the owner of a parcel of land in Sanford designated as lots 5, 6 and 7 on a plan of Hanson Pines recorded in York County Registry of Deeds, some time after April 1, 1940, and prior to April 1, 1941, sold lot No. 5 to the defendant. Lots 5, 6

and 7 were contiguous and together formed a single parcel of land at the corner of Main Street and Mountain Avenue. The defendant did not record his deed and neither party notified the tax assessors of the change in ownership. Prior to the conveyance the assessors had been assessing lots 5, 6 and 7 to the plaintiff *in solido,* and as a unit, without assigning a specific value to the separate lots. The assessors after the transfer continued to assess lots 5, 6 and 7 to the plaintiff as before. The plaintiff paid the taxes on all three lots for the years 1941 to 1947 inclusive when he first discovered that lot No. 5 was still being assessed to him as aforesaid, and that he had paid the taxes thereon. The tax bills rendered to the plaintiff and which he had paid did not in any way indicate that lot No. 5 was still being assessed to him. The plaintiff demanded that the defendant reimburse him for what he claimed was the proportional amount of taxes paid attributable to lot No. 5. Other than a statement as to the proportion that the area of lot No. 5 bore to the total area of lots 5, 6 and 7, and that the terrain of the three lots was similar, there is nothing in the record from which it might be determined what proportion the value of lot No. 5 bore to the total value of the three lots assessed to the plaintiff.

This action of assumpsit was then brought to recover what the plaintiff claimed was the proportional share of the total tax paid on the three lots which should have been borne by lot No. 5. There were two special counts setting forth the claim, basing the proportional share on relative area of the lots, together with an omnibus count which contained a claim for money paid by the plaintiff to the use of the defendant. The action was commenced in the Sanford Municipal Court which decided for the defendant. The plaintiff appealed to the January Term of the Superior Court for the County of York, where it was heard by the presiding justice with right of exceptions to matters of law reserved. The justice found for the defendant. The bill of

exceptions states "Plaintiff claims that this finding is based upon an error of law and that he is aggrieved thereby." It is upon this bill of exceptions that the case is now before this court.

Nowhere in the bill of exceptions does it appear what the error of law is upon which the plaintiff claims the justice based his decision. The sufficiency of the bill of exceptions might well be questioned for failure to particularize. See *Gerrish, Executor* v. *Chambers et al.,* 135 Me. 70, 79; *Dodge* v. *Bardsley et al.,* 132 Me. 230; *Edwards* v. *Estate of Williams,* 139 Me. 210; *In Re Hooper Estate,* 136 Me. 451; *Wallace* v. *Gilley and Tr.,* 136 Me. 523; *Bronson, Appellant,* 136 Me. 401. In the latter case we said:

> "It is now well settled that this Court under R. S., Chap. 91, Sec. 24 (now R. S., 1944, Chap. 94, Sec. 14) has jurisdiction over exceptions in civil and criminal proceedings only when they present in clear and specific phrasing the issues of law to be considered."

If the bill of exceptions be deemed sufficient it can, however, amount to no more than an allegation that the record as a matter of law required that the justice find for the plaintiff.

The case is presented to us upon the theory of unjust enrichment and that the defendant should reimburse the plaintiff to the extent that he has been benefited by the discharge of the tax lien on his lot. Although the taxes were legally assessed against the plaintiff, see R. S., 1944, Chap. 81, Sec. 23 and R. S., 1944, Chap. 81, Sec. 100, and although the plaintiff was personally liable to pay the taxes so assessed, and although the taxes so assessed constituted a lien on the plaintiff's lots, together with that of the defendant, which could be discharged only by the payment of the full amount of the tax assessed, the defendant was not personally liable to the town for the tax or any part thereof, it being assessed to the plaintiff.

It is the position of the defendant that the finding of the presiding justice is sustainable on either of two grounds, first: that in no event could he be liable to the plaintiff for any proportion of the taxes so assessed upon his land in common with that of the plaintiff and paid by the plaintiff; and, second: that even if he might be liable for the benefit conferred, the amount of that benefit could not have been determined by the justice upon the facts before him. It does not appear from the record upon which ground the presiding justice may have rendered his decision in favor of the defendant.

Without in any way intimating any opinion as to whether or not under any circumstances taxes assessed to a former owner under the provisions of R. S., 1944, Chap. 81, Sec. 23 and R. S., 1944, Chap. 81, Sec. 100, and paid by him can be recovered by him from the true owner, if they can be recovered under any circumstances, it is only upon the theory of unjust enrichment. In such case the burden is upon the plaintiff to prove the extent to which the defendant has been unjustly enriched by him. Unlike actions brought to recover for an invasion of the plaintiff's right and where nominal damages are recoverable if the invasion of the plaintiff's right be established, 15 Am. Jur. 795, Sec. 356, in actions brought to recover for unjust enrichment for benefits conferred by act of the plaintiff and retained by the defendant, the plaintiff can only recover for such benefits as he proves are actually conferred upon and retained by the defendant.

Damages of the nature claimed in this action, if recoverable, are not given nor do they arise from the invasion of a legal right of the plaintiff by the defendant, but they are compensatory only as a return for unjust enrichment of the defendant conferred upon him by the plaintiff, which unjust enrichment is retained by him. See Restatement, Restitution, Chap. 1, Sec. 1. Actual or compensatory damages are not to be presumed but must be proved. The re-

covery is limited to such damages as are established by the evidence. 15 Am. Jur. 795, Sec. 356.

When recovery may be had *only for actual damage sustained* the record must contain evidence from which damage in a definite amount may be determined with reasonable certainty. While the determination thereof may be the result of the exercise of judgment applied to facts in evidence, those facts must be such as to allow the amount of damages to be determined therefrom with reasonable, as distinguished from mathematical, certainty by the exercise of sound judgment. The determination of the amount must not be left to mere guess or conjecture. As said in 25 C. J. S. 491:

> "However, reasonable certainty is sufficient; absolute certainty is not required; it is sufficient if a reasonable basis for compensation is afforded, although the result be only approximate; what is required is that evidence of such certainty as the nature of the particular case permits be produced."

Applying these rules to the present case, the relative areas of lots of land situate as these lots were situated, even though there was no substantial difference in the terrain of the several lots, do not afford a basis for the determination of the proportion that the value of any one of them bore to the total value of all of them. It is common knowledge that many factors other than square footage of area enter into the determination of land values. While the relative value of lot 5 might have easily been susceptible of proof, no evidence of its value or the value of lots 6 and 7, or the value of lots 5, 6 and 7 was even attempted. On the record before him the assignment of any definite value to lot 5 or a determination of the proportion that the value of lot 5 bore to the values of lots 5, 6 and 7, or the relation that the value of lot 5 bore to the value of lots 6 and 7 would have been at best a pure guess by the presiding justice and based upon mere conjecture.

In this case a single tax was assessed upon a single parcel of land. This parcel of land constituted a corner lot bordering upon two streets. The portion of this parcel of land conveyed to the defendant was situated only upon one street and was the lot furthest from the corner. The presiding justice might well have found for the defendant upon the ground that the plaintiff had failed to maintain the burden of proof which was upon him to establish the amount of the benefit conferred upon the defendant by the plaintiff's payment of the tax and that upon the record before him he was unable to determine the amount of such benefit. He might well have found that the plaintiff did not establish the value of the benefit conferred upon the defendant by the production of evidence of such certainty as the nature of the case permitted. This being true, he would be justified, without violating any principle of law, in finding for the defendant. The plaintiff in this case having failed to establish that the presiding justice violated any principle of law in his decision the exceptions must be overruled.

Exceptions overruled.

GUY A. MELANSON

vs.

REED BROS., INC.

Androscoggin. Opinion, November 18, 1950.

Master and Servant. Hidden Danger. Assumption of Risk.

Before there is a duty upon a master to warn of a hidden danger, the danger must have been known to the master or by the exercise of due care should have been known to him, and it must be a danger which is unknown to the servant and which would not be known to him if in the exercise of due care.

The duty to warn is a non-delegable duty resting upon the master and if he delegates that duty to another such other person stands in the place of the master and his failure to perform is the failure of the master.

Where a servant should have known of a danger he assumes the risk and there is no duty to warn.

Assumption of the risk is not necessarily contributory negligence. One may be in the exercise of the highest degree of care and yet not be able to recover if he is injured by a danger of which he either knew or ought to have known.

Foresight not hindsight is the test to be applied in determining how a reasonably prudent person will act in a given situation and an employer is not to be held responsible because he failed to foresee and give warning of remote, improbable and exceptional occurrences or of special dangers which could not have arisen without negligence on the part of the plaintiff's fellow servants.

ON EXCEPTIONS.

Action of negligence heard by a referee under a rule of court with right of exceptions as to questions of law reserved. Referee reported in favor of the plaintiff. Defendant excepted to acceptance of referee's report. Exceptions sustained. Case fully appears below.

John A. Platz, for plaintiff.

Hutchinson, Pierce, Atwood & Scribner, for defendant.

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

MERRILL, J. On exceptions to the acceptance of a Referee's Report. The case was heard by a referee under rule of court with right of exceptions as to questions of law reserved. The referee reported in favor of the plaintiff. Written objections were made to acceptance of the referee's report. The objections were overruled, the report accepted, and exceptions filed and allowed. It is upon these exceptions that the case is now before this court.

The facts of this case are simple. The plaintiff was the servant of the defendant. The defendant was engaged in the growing and marketing of potatoes upon an extensive scale. At the time of the plaintiff's employment the defendant was engaged in digging its crop from several large fields by means of potato diggers drawn and operated by tractors. The referee found that the plaintiff and one Walker were employed to load potatoes from the field into a truck, counting the number of barrels, keep the field spaced for the pickers and help about the tractor and digger if it should break down. He further found that they informed the defendant of their unfamiliarity with the machinery being used. The plaintiff and Walker went to work in a field where one Wallace Higgins, together with a man by the name of George Glew, were operating the digger and tractor, Higgins being the operator of the digger and Glew being the operator of the tractor. The tractor furnished the power not only for drawing the digger over the ground but in addition, by means of a power takeoff, operated the mechanism of the digger. This power takeoff was a square shaft about six inches in diameter extending from the tractor to the digger. It was located two and one-half to three feet above the ground. Ordinarily when in operation this power takeoff was covered with a guard. When in operation the power takeoff revolved within the guard. At the time of the accident the guard had been removed for the

purpose of greasing the power takeoff. The plaintiff and Walker had been at work about nine days. After lunch on the ninth day, Mr. Higgins, the digger operator in their field, called them to where the digger and tractor were standing and set Walker to work greasing the digger. Higgins asked the plaintiff to get him a wrench which lay upon the ground in front of the plow of the digger, and between the digger and tractor. At that time the engine of the tractor was in operation. The power takeoff was not in operation, being disengaged. The tractor operator, Glew, had the physical control of the clutch which engaged and disengaged the power takeoff. It was his duty to start and stop the power takeoff at the direction of Higgins. In stooping to pick up the wrench, the plaintiff placed his hand upon the idle power takeoff. While his hand was there the power takeoff commenced to revolve. It caught the glove on the plaintiff's left hand and tore off his left thumb.

In his report the referee states:

> "The Referee finds that Wallace Higgins, whose duty it was, as operator of the digger, to warn the plaintiff of the hidden danger incident to contact with the power takeoff and which danger was unknown to the plaintiff, failed to do so."

It is upon this breach of duty that the referee grounds liability on the part of the defendant. By appropriate objection and exception the defendant has challenged the above finding of the referee, which finding is determinative of the plaintiff's right to recover. Unless there was a duty upon the part of the defendant to warn the plaintiff of the danger of contact with the power takeoff, which contact was the cause of the plaintiff's injury, the report of the referee cannot be sustained.

If there be any credible evidence from which the referee could find that the defendant owed the plaintiff the duty to warn him of the danger of coming in contact with the power takeoff when he attempted to pick up the wrench the ob-

jection and exception to the finding must be overruled. *Staples* v. *Littlefield,* 132 Me. 91; *Edwards* v. *Hall,* 141 Me. 239.

One of the many duties that a master owes to his servant is that of warning the servant of *hidden* dangers that he may encounter in the course of his employment. It is to be noted that the duty is to warn of *hidden* as distinguished from *obvious* dangers. However, the duty to warn even of hidden dangers is not universal in its application. Before there is a duty upon the master to warn of a hidden danger the danger must be known to the master, or in the absence of actual knowledge thereof, it must be a danger, the existence of which he, by the exercise of due care on his part, should have known. Furthermore, it must be a danger which is unknown to the servant and which would not be known and appreciated by him if in the exercise of due care. In *Wormell* v. *Railroad Co.,* 79 Me. 397, 405, a leading case in this jurisdiction, we said:

> "Moreover, the law implies that where there are special risks is an employment of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and on failure of such notice, if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew or ought to have known of such risks. It is unquestionably the duty of the master to communicate a danger of which he has knowledge and the servant has not. But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. *Lovejoy* v. *Boston & Lowell Railroad,* 125 Mass. 82; *Ladd* v. *New Bedford R. R. Co. supra; Priestley* v. *Fowler, supra.* It is his duty to use ordinary care to avoid injuries to himself. He

> is under as great obligation to provide for his own safety, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part, as the master is to provide it for him."

In *Hume* v. *Power Company,* 106 Me. 78, 82 we said:

> "And, moreover, the law implies that the discharge of this duty requires the master to notify his servant of any and all special risks and dangers of the employment, and of all dangerous conditions attendant upon the place of the exercise of the employment, of which the master has knowledge, or by the exercise of reasonable care would have knowledge, and which are unknown to the servant and would not be known and appreciated by him if in the exercise of reasonable care on his part.
>
> This duty thus imposed upon the master is personal. The servant has the right to look to him for the discharge of it. If, instead of discharging it himself, the master employs some other person to do it for him, then such other person stands in the place of the master, and becomes a substitute for him—a vice-principal—in respect to the discharge of that duty, and the master then becomes liable for the acts and the negligence of such other person in the premises to the same extent as if he had performed those acts and was guilty of the negligence personally."

To multiply authorities upon these fundamental principles of the law of master and servant would serve no useful purpose. From the foregoing principles of the law it is seen that the duty to warn is a personal, that is, a non-delegable duty resting upon the master. If he delegates that duty to another, with respect to that duty such other person is a vice-principal, that is, he stands in the place of the master and his failure to perform the duty is at law deemed the failure of the master.

As a necessary corollary of the foregoing rules it is a self evident truth that the duty to warn resting upon the

vice-principal, as the alter ego of the master, is only co-extensive with that resting upon the master. Unless the master under the same circumstances, with the same knowledge or means of knowledge as that of the vice-principal, coupled with his own knowledge and means of knowledge as to the hidden danger, would be under the duty to warn of the particular hidden danger to be encountered by the servant, no duty rests upon the vice-principal to warn the servant thereof.

While the referee in the above finding set forth herein has found that Wallace Higgins when he directed the plaintiff to pick up the wrench owed the plaintiff the specific duty to warn him of the danger of coming in contact with the power takeoff, such finding as a basis of liability could only be justified upon the theory that Wallace Higgins was a vice-principal and that he failed to discharge the duty resting upon the defendant to warn the plaintiff of the danger.

The defendant has by written objections and exceptions raised the questions of whether or not there is any evidence from which it could be found that Wallace Higgins was a vice-principal, or whether the picking up of the wrench was within the scope of the plaintiff's employment, or whether Higgins was authorized to direct the plaintiff to pick up the wrench. Important as the decision of these questions might be in certain aspects of the case, in view of the ground upon which we base our decision, none of them need be discussed or decided.

Unless the defendant if personally present and giving the order would under all of the existing circumstances be under the duty to warn the plaintiff of the danger of coming in contact with the power takeoff, Higgins, even if a vice-principal, would not be under the duty to give such warning.

Was there any credible evidence in this record that when Wallace Higgins directed the plaintiff to perform the simple act of picking up a wrench which lay between the digger and tractor that he, (assuming him to have been a vice-principal, a question upon which we neither express nor intimate an opinion) either knew or ought to have known that in so doing the plaintiff would be exposed to danger from coming in contact with the power takeoff, and that that danger was one of which the plaintiff neither knew nor ought to have known? Unless there be credible evidence from which these factors can be found there was no duty upon Higgins as vice-principal, the alter ego of the master, to give the plaintiff warning thereof, and a contrary finding would constitute error in law and require that the defendant's exceptions be sustained.

In determining whether or not there is any credible evidence in a record from which a certain conclusion may be drawn, a court is not precluded from bringing to bear and applying to the problem that sound common sense which is derived from living in a world populated by human beings, and the observation and knowledge of their actions and reactions in and to situations encountered in the ordinary conduct of human affairs. "Judges are not necessarily ignorant in court of what everybody else, and they themselves out of court, are familiar with; and there is no reason why they should pretend to be more ignorant than the rest of mankind." *Affiliated Enterprises* v. *Waller*, 5 Atl. (2nd), (Del.) 257, 261. This principle is as applicable to justices of the Law Court as it is to justices at *nisi prius*. It is also applicable to referees. It not only may, but should be applied in determining what conclusions should be drawn from existing facts.

While in this case the referee has found that the plaintiff was actually ignorant of the danger of coming in contact with the power takeoff, he evidently must have overlooked the fact that if he ought to have known of such danger

there was no duty to warn him thereof. If he should have known it he assumed the risk. If he assumed the risk there was no duty to warn. It must be remembered that assumption of risk is not necessarily contributory negligence. One may be in the exercise of the highest degree of care and yet not be able to recover if he is injured by a danger of which he either knew or ought to have known. It may be as the referee found that it was not negligence on the part of the plaintiff to have placed his hand on the idle takeoff which he did not know would move (a question upon which we need neither express nor intimate an opinion), but it by no means follows that it was such a danger that warning thereof should have been given.

> "The duty which the law imposes upon an employer who engages employees to do work of a dangerous character or in a dangerous place, to warn and instruct employees concerning such dangers, does not compel the employer to guard against injuries which a reasonable and prudent man would not expect to happen, or to warn his employees of dangers not reasonably to be anticipated. His responsibility for injuries asserted to have been caused by a breach of duty in this regard is determined by whether the calamity is one that should have been foreseen by a reasonably prudent person—that is, whether the peril is such as should reasonably have been anticipated. The employer is not to be held responsible because he failed to foresee and give warning of remote, improbable, and exceptional occurrences. Not only must the danger of an employment, in order to create a duty of warning and instruction, be one which is unknown to the employee, but it also must be one which is known to the employer or might be known to him by the exercise of reasonable vigilance." 35 Am. Jur. 581, Sec. 149.

To hold, on this record, that Wallace Higgins should have foreseen, that in picking up the wrench the plaintiff would place his hand on the then idle and harmless power takeoff,

and that he should have further foreseen that while the plaintiff was so engaged the machine would be started by Glew, a fellow servant of the plaintiff and that Higgins should have given the plaintiff a warning of the danger of coming in contact with the power takeoff, would entirely disregard how the ordinarily prudent person, that is the person of ordinary prudence, or the reasonably careful person, that is the person who exercises reasonable care, acts under such circumstances. Foresight not hindsight is the test to be applied in determining how the reasonably prudent person will act in a given situation. As stated in the excerpt from American Jurisprudence, *supra*, the responsibility of the master for a breach of the duty to warn of danger "is determined by whether the calamity is one that should have been foreseen by a reasonably prudent person—that is, whether the peril is such as should reasonably have been anticipated. The employer is not to be held responsible because he failed to foresee and give warning of remote, improbable and exceptional occurrences."

There was no danger to the plaintiff in coming in contact with the power takeoff while idle. It was idle when he was directed to pick up the wrench and when he placed his hand upon it. There is no evidence that Glew engaged the clutch at the direction of Higgins. Nor was Higgins bound to anticipate that it would be set in motion without his direction to the operator of the tractor, Glew, a fellow servant of the plaintiff. As said in Labatt on Master and Servant, Vol. 1, Page 527:

> "Nor is he guilty of negligence in failing to warn a servant of a special danger which could not have arisen without negligence on the part of the plaintiff's fellow servants."

Applying the foregoing standards and tests to the facts of this case, common sense and common knowledge of everyday human affairs require that we hold there was no credible evidence in the record from which the referee

could have found that it was the duty of Wallace Higgins, when he gave the direction to the plaintiff to pick up the wrench, to warn him of the danger of coming in contact with the power takeoff. Absent such duty the plaintiff is not entitled to recover, there is no need to either discuss or rule upon the other exceptions. Exceptions to the overruling of the fourth objection being sustained the entry should be:

Exceptions sustained.

MAURICE W. ROSS

vs.

ANTONIO MANCINI

Cumberland. Opinion, November 8, 1950.

Contracts.

To make a binding contract the offer must be so definite in its terms or require such definite terms in its acceptance that the promises and performances to be rendered by each party are reasonably certain.

ON MOTION.

Action of contract tried before a jury who found for plaintiff. Defendant's motion for a new trial sustained and new trial granted.

John M. Curley, for plaintiff

Raymond S. Oakes, for defendant.

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

THAXTER, J. This action of contract was tried before a jury who found for the plaintiff. The plaintiff declared on an oral contract. There was a plea of the general issue with a brief statement setting up the statute of frauds. The statute of frauds as a defense was later abandoned and the presiding justice charged the jury without exception by the defendant that they were not to concern themselves with it. The only issues according to the court were whether an oral contract was made as claimed by the plaintiff and whether the defendant was guilty of a breach of it. The jury found for the plaintiff and assessed damages in the sum of $1,340; and the case is before this court on the defendant's general motion for a new trial.

The declaration sets forth that the defendant on May 16, 1947 agreed to sell to the plaintiff and the plaintiff agreed to buy of the defendant a dump truck for the sum of $2,000.

Nothing appears to have been said as to when or how payment would be made but the plaintiff claims that the defendant in consideration of the plaintiff's purchase of the truck promised to engage the plaintiff in gainful employment with his truck in preference to any other person until the plaintiff fulfilled obligations assumed by him in financing the purchase price. It is alleged that the plaintiff did purchase said truck and the defendant did engage the plaintiff in gainful employment until February 2, 1948 when the defendant without justifiable cause refused to continue the plaintiff's employment and employed another in his stead so that the plaintiff was unable to fulfill his obligation to pay for the truck and by reason thereof suffered loss.

As expressed in Restatement, Contracts, Sec. 32:

> "An offer must be so definite in its terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain."

Then follows this comment:

> "Inasmuch as the law of contracts deals only with duties defined by the expressions of the parties, the rule stated in the Section is one of necessity as well as of law. The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. A promise by A to give B employment is not wholly illusory, but if neither the character of the employment nor the compensation therefor is stated, the promise is so indefinite that the law cannot enforce it, even if consideration is given for it."

See to the same general effect: Williston, Contracts, Sec. 37; 12 Am. Jur., Contracts, Sec. 64.

In the case before us there was no time set during which the employment was to continue and there is no evidence at

all that it was to continue as alleged in the declaration until the plaintiff was able to pay for the balance due on the truck out of its earnings. The actual purchase was made May 19, 1947. The plaintiff paid $700 down and financed the balance, which with charges amounted to $1,581.60 from a finance company. Payments were to be made at the rate of $105.44 a month. February 2, 1948 the defendant ended the employment of the plaintiff and subsequently the finance company repossessed the truck which was sold for $200. The difference between this resale price and the balance owed the finance company is almost exactly the amount of the verdict.

It is true that the defendant did tell the plaintiff that he would have enough from the earnings of the truck to meet his payments on it but there was no assurance of any definite sum of money. For nine months the amounts that the defendant paid the plaintiff were substantial, approximately $4,500. The most probable reason for the default to the finance company was that the plaintiff did not give due consideration to his living expenses and outside obligations. We cannot see where the defendant was in any way responsible for such default. His conversation with the plaintiff as to what the truck would earn was of the vaguest kind. It was never intended to be anything more than an expression of hope or expectation. The defendant never contemplated an agreement of continuing employment until the truck was paid for. The terms of this alleged contract are too vague and indefinite to be enforcible. They answer the description of Judge Holmes of a somewhat similar claimed agreement. "On the face of it, it does not import a legally binding promise, but rather a hopeful encouragement sounding only in prophecy. We cannot discover an actionable contract." *Hall* v. *First National Bank,* 173 Mass. 16, 19. Neither is the contract in the instant case an actionable one.

Motion sustained.
New trial granted.

JOHN PICKEN
vs.
GEORGE DEWEY RICHARDSON ET AL.

Lincoln. Opinion, December 12, 1950

Exceptions. Abandonment.

Findings of fact by a Justice sitting without a jury so long as they find support in evidence are final.

A good legal fee simple title cannot be lost by abandonment. Once title vests it stays vested until it passes by grant, descent, adverse possession, or some operation of law such as escheat or forfeiture.

A mere general exception to a judgment rendered by a Justice at *nisi prius* does not comply with the statute.

ON EXCEPTIONS.

A Writ of Entry was heard by the Court without a jury and judgment was rendered for the defendants. A Bill of Exceptions set forth certain alleged errors of law and by agreement of the parties the case was submitted to the law court for findings and decision upon certain agreed stipulations made a part of the record. Exceptions overruled. Judgment affirmed. Case fully appears below.

Harvey R. Pease, for plaintiff.

Alan L. Bird,
Samuel W. Collins, Jr., for defendant Richardson.
Philip G. Willard, for defendant Engewald.

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

NULTY, J. This case comes before this court on exceptions by the plaintiff from the Superior Court of Lincoln County. There, the cause, which was a writ of entry, was heard by the court without a jury and judgment was for the defendants. By agreement of the parties the case was

submitted to the court for findings and decision upon nine certain agreed stipulations made a part of the record. From the agreed stipulations substantially the following facts appear:

The predecessors in title of the defendants owned a good record title in fee simple in and to the property in dispute and the present defendants, by deed or inheritance, have acquired the title then owned by their predecessors unless lost by them by the effect of tax title, abandonment or adverse possession.

The issue of whether or not the defendants' title was destroyed and accrued to the plaintiff was left open. The predecessor in claim of title to the now plaintiff acquired a tax deed on the first Monday of February, 1928, from the tax collector of the town of Westport of the premises in dispute and it is agreed that said tax deed was invalid and insufficient to convey a legal title to the property. The question of whether said town of Westport ever entered into possession of the property in dispute is left open but it is agreed that if it did so it was under such color of title as was contained in said tax deed.

It was also agreed that the plaintiff contends that he was entitled to offer evidence that during the period after the first Monday of February, 1928, the defendants, and more particularly their predecessors in title, abandoned the property in dispute and all their title thereto by non-user, non-entry, non-payment of taxes, and all other acts claimed by the plaintiff to be indicative of a legal abandonment of title. To the offer of proof the defendants objected upon the ground that there can be no legal abandonment of title in fee simple other than by formal grant, valid and legal tax process, or adverse possession continued for a period sufficient to create a title in fee simple in another and that, therefore, all evidence so offered by the plaintiff would be immaterial and inadmissible. The court ruled in support

of defendants' objection and excluded the testimony and allowed the plaintiff his exception which will be more fully commented upon later in this opinion.

It was further stipulated that both plaintiff and defendants would be permitted to adduce evidence as to whether or not after the first Monday of February, 1928, the plaintiff and his predecessors in title did in fact acquire title in the property in dispute by virtue of adverse possession continued for twenty years or more.

It was further agreed that the rulings of the court as to the admissibility of the questions set forth in a certain deposition of Harry C. Taft, a predecessor in title of the defendants, filed in this case, together with the exceptions taken by the plaintiff and allowed by the court are fully set forth in the stipulation.

It was further stipulated that on the first Monday of February, 1928, the title in the disputed property in fee simple was held and owned by Harry C. Taft and Clayton H. Taft, brothers, as tenants in common and undivided; that Clayton H. Taft died in 1947, intestate, leaving no widow and as his sole heir a daughter, Arlene B. Engewald, the present co-defendant, and that by deed dated October 17, 1949, and duly recorded in Lincoln County Registry of Deeds Harry C. Taft conveyed his one-half interest in common and undivided to George Dewey Richardson, co-defendant in this case.

It was further agreed that a deed from the inhabitants of the town of Westport to the plaintiff, John Picken, was offered and admitted without objection and is a part of the agreed stipulation.

It was further stipulated that the books of inventory and valuation of the polls and estates maintained in the office of the tax assessors for the town of Westport for the year 1928, carries the following statement written in ink and in longhand: "Land bounded on (n) by Clyde Street, norther-

ly across the common to north line of Echo Home, easterly to said north line to low water mark as shore runs to point begun at, being the easterly portion of Echo Home. as per plan"; that in the column of said page headed "Valuation of Land Dollars" there appears opposite the foregoing description in ink and longhand the figures "300"; and the same figures appear in the column under the heading "total Value of Real Estate Dollars" opposite said description; there appears in the left hand margin on said page opposite said description the words in ink and longhand "Taft, Alice M." through which three parallel pencil lines have been drawn by person or persons unknown; that under said caption "Taft, Alice M." there appears in pencil longhand, written by person or persons unknown, the words "sold to Town"; that the books and records kept by the Assessors of the town of Westport subsequent to 1928 failed to disclose that said property was ever taxed to anyone thereafter.

It was further agreed that a deed from Harry C. Taft to the defendant, George D. Richardson and being the same deed referred to in the deposition of Harry C. Taft is admitted without objection and is a part of the stipulation.

With respect to findings of fact by a justice sitting without a jury our court said in *Graffam* v. *Casco Bank & Trust* Co., 137 Me. 148, 151, 16 A. (2nd) 106:

> "It has long been definitely established as law in this state that 'findings of fact by a Justice sitting without a jury so long as they find support in evidence are final.' *Ayer* v. *Railway Co.*, 131 Me. 381, 163 A. 270, 271, and cases therein cited."

In the instant case there was ample credible evidence to support the findings of fact by the sitting justice and his decision, judgment for the defendants, so far as the facts are concerned is conclusive unless the exceptions set forth in the bill of exceptions, which are six in number, are errors of law which have prejudiced the plaintiff.

Exception No. 1 deals with the third stipulation which relates to the offer of the plaintiff to introduce evidence of legal abandonment of title by the predecessors in title of the defendants. Upon objection by the defendants the court ruled that no testimony relating to a claim of abandonment could be offered and allowed the plaintiff an exception. This exclusion of the offered testimony raises a question of law which, simply stated, is as follows: Can the holder of good record title in fee simple abandon that title? It is stipulated that the predecessors in title of the defendants had good title unless it had been lost by the effect of legal tax title, abandonment or adverse possession, and the court found by its decision no tax title, no adverse possession, and, having excluded evidence of abandonment, the ruling of the court, if correct, would seem to finally decide the question.

An examination of the authorities, both in text books and the reported decisions, reveals by the great weight of authority that a good legal fee simple title cannot be lost by abandonment.

Thompson on Real Property, Permanent Edition, Vol. 5, Sec. 2567, Page 313, contains in part the following:

> "x x x No legal title to corporeal real property can be lost or destroyed by any act of abandonment on the part of the owner. Thus one is not divested of title by reason of the fact that for many years he was unaware of his interest in the land and practically abandoned it when his title was a matter of record. x x x, hence a vested fee simple title to real estate cannot be abandoned; x x x Once title vests it stays vested until it passes by grant, descent, adverse possession, or some operation of law such as escheat or forfeiture. x x x"

To the same effect see 1 *Corpus Juris Secundum,* Page 13, Sec. 5. In 1 *American Jurisprudence,* Abandonment, Sec. 6, Page 5 (1936), the following statement is made:

> "As to real property, the general rule is that where the state has passed a perfect legal title, the doctrine of abandonment is not applicable thereto, and that the title vested in the grantee cannot be affected or transferred by his act in departing from the land and leaving it unoccupied, or otherwise ceasing to exercise dominion over it. If the title is perfect and complete, the mode by which the particular individual acquired it is not material as regards the matter of abandonment by him. A title acquired by prescription can no more be lost by abandonment than a title acquired by deed or descent from the true owner, though, of course, if a person in the adverse possession of land relinquishes it before the expiration of the statutory period, the continuity of his possession is thereby broken and the statute consequently ceases to run."

Tiedeman on Real Property, 4th Edition, Sec. 516, Page 735, under the title Abandonment in part states the following:

> "But no legal title of a corporeal hereditament may be lost or destroyed by any act of abandonment, x x x. A legal title, properly vested, can only be divested when the circumstances of the case are sufficient to raise an estoppel, or where the possession is acquired by one in consequence of an abandonment, and held by him under claim of title for the period of limitation. The title, although not lost by abandonment, would be barred by estoppel or by the Statute of Limitations."

Further examination of the decided cases, particularly including those of Pennsylvania, New Jersey, and many others, discloses that a perfect legal title cannot be lost by abandonment except through adverse possession taken by another and held for the period of the Statute of Limitations. See *Kreamer* v. *Voneida,* 213 Pa. 74, 62 A. 518 (1905). *Byrne* v. *Byrne et al,* 123 N. J. Eq. 6, 195 A. 848 (1938) affirmed 1 A. (2nd) 464. The Massachusetts court in *Dyer* v. *Siano,* 298 Mass. 537, 11 N. E. (2nd) 451 (1937), was to the same effect and the opinion discloses that an ex-

haustive research was made by the court in which reported cases, not only from the Massachusetts courts but from many other courts, including our own courts, were examined and cited.

Our court in *School District No. 4,* in Winthrop, v. *Benson et als,* 31 Me. 381, 384 and 385, had occasion to examine the effect of an alleged abandonment of certain premises which had been used by the plaintiffs for school purposes for a period of more than twenty years openly, notoriously, adversely and exclusively. Our court said in part:

> "If the plaintiffs have held the premises by a continued disseizin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same, is barred by limitation. x x x A legal title is equally valid when once acquired, whether it be by a disseizin or by deed, it vests the fee simple although the modes of proof when adduced to establish it may differ. x x x An open, notorious, exclusive and adverse possession for twenty years, would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed. x x x But the title, obtained by a disseizin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. x x x A parol conveyance of lands creates nothing more than an estate or lease at will. x x x"

In *Phinney* v. *Gardner et als.,* 121 Me. 44, 46 and 47, 115 A. 523, title to a lot of land was in issue. Plaintiff claimed he had acquired title by adverse possession and abandonment by the defendants. On the question of abandonment our court held that the doctrine of abandonment was not applicable to this case and said:

> "There is no opportunity for the application of the doctrine of abandonment in the case at bar. 'The characteristic element of abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person and becomes the subject of appropriation by the first taker.' 1 *R. C. L.*, Page 2. The term is used in connection with personal property, inchoate and equitable rights, and incorporeal hereditaments, but 'at common law a perfect legal title to a corporeal hereditament cannot, it would seem, be lost by abandonment.' 1 *C. J.*, Page 10. Its very essence is inconsistent with the attributes of real estate."

It thus appears that the common law rule which has been followed by our court is that a perfect legal title cannot be lost by abandonment. This being so, the ruling of the court in excluding the offered evidence was correct, as under our law it was not material to the issue and inadmissible.

Exceptions No. 2, 3, 4 and 5 relate to the fifth stipulation in the record and concern the admissibility of certain questions and answers contained in the deposition of Harry C. Taft which was duly admitted and became a part of the record. The questions and answers to Exceptions No. 2 and 3 were admitted by the court for the limited purpose of showing no interruption in adverse possession of the plaintiff. We fail to see any reason why the plaintiff was prejudiced by the admission of the questions and answers or the ruling of the court thereon. Exception No. 4, which involves a question and answer contained in said deposition and called for a conclusion of law was properly excluded. Exception No. 5 is governed by what we have said with respect to Exceptions No. 2 and 3.

Exception No. 6 sets forth the entire findings and decision of the court and the plaintiff attempts to except thereto. He takes nothing by this exception because it does not conform to our practice with respect to exceptions. It does not present in clear and specific phrasing the issues of

law to be considered. The presentation of a mere general exception to a judgment rendered by a justice at *nisi prius* does not comply with the statute. See *Gerrish, Executor* v. *Chambers, et al.*, 135 Me. 79, 189 A. 187. The mandate will be:

Exceptions overruled.
Judgment affirmed.

BENJAMIN A. GLOVSKY, APPELLANT
from decree of
STATE LIQUOR COMMISSION
Knox. Opinion, December 5, 1950.

Liquor Licenses. Approval. Appeal.

Finding of the State Liquor Commission under R. S., 1944, Chap. 57, Sec. 40, as amended by P. L., 1949, Chap. 419, that municipal officers did not act arbitrarily or without justifiable cause in refusing to approve a hotel liquor license cannot be termed a "refusal" of the commission to issue a license within the meaning of the appeal statute, R. S., 1944, Chap. 57, (Sec. 60-A) as amended by P. L., 1949, Chap. 419 so that no appeal to the Superior Court lies from such finding.

There is no inherent or constitutional right to engage in liquor traffic, and whether one shall be permitted to exercise the privilege and under what conditions and restrictions, is a matter for the people to determine, acting by and through the Legislature.

ON APPEAL AND EXCEPTIONS.

An application for a hotel liquor license was submitted to the municipal officers of the City of Rockland for approval. They refused to approve for certain stated reasons. An appeal was taken to the State Liquor Commission and after appropriate proceedings was denied. From the decision of the Liquor Commission an appeal was presented to the Superior Court which was dismissed for lack of jurisdiction. To this ruling exception was noted and appeal taken to the Law Court. Appeal dismissed. Exceptions overruled. Case fully appears below.

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

Jerome C. Burrows, for appellee,
City of Rockland Maine.

Henry Heselton, for appellee,
State of Maine Liquor Commission.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (FELLOWS, J., and MERRILL, J., concur separately)

NULTY, J. This case purports to be before the Law Court on appeal with a bill of exceptions based on a decree of the justice presiding at a term of the Superior Court for Knox County which decree involves the construction of portions of the P. L. of 1949, Chap. 419, amending R. S. (1944), Chap. 57, new Sec. 60-A. The decree of the Superior Court dismissed the appeal (or petition for appeal) from the decision of the Maine State Liquor Commission on the ground that the Superior Court lacked jurisdiction.

It appears that Benjamin A. Glovsky of Rockland, "doing business as Windsor House," applied on January 27, 1950 for a hotel liquor license. The application was submitted to the municipa officers of the City of Rockland for their approval. On March 15, 1950, the municipal officers refused to approve the application, giving their reasons therefor. From this decision of the municipal officers an appeal was taken to the State Liquor Commission under the second paragraph of Sec. 40 of Chap. 57, R. S. (1944). The Commission, after notice and hearing, on April 11, 1950, denied this appeal from the municipal officers of Rockland, stating that "the municipal officers had justifiable cause to reach the decision which they did reach and that they did not act arbitrarily."

Within ten days from this decision of the State Liquor Commission, Benjamin A. Glovsky presented an appeal to the Superior Court under Chap. 419, Sec. 2 of the Laws of 1949, amending R. S. (1944), Chap. 57, new Sec. 60-A. This appeal to the Superior Court was dismissed by the Superior Court for lack of jurisdiction, and an appeal was taken to the Law Court.

The applicable statutes are as follows:

"Licenses for the sale of liquor to be consumed on the premises where sold may be issued to x x x bona fide hotels x x x on payment of the fees herein provided; subject, however, to the condition that the application therefor be approved by the municipal officers of the town or city in which such intended licensee, x x x is operating the same, x x x."

"Any applicant aggrieved by the refusal to approve an application as hereinbefore provided x x x may appeal to the commission, who shall hold a public hearing thereon in the town or city for which such license is requested and if it finds the refusal arbitrary or without justifiable cause, it may issue such license x x x notwithstanding the lack of such approval."

Revised Statutes (1944), Chapter 57, Section 40 as amended by Public Laws 1949, Chapter 419.

"If any person is aggrieved by the decision of the commission in revoking or suspending any license issued by the commission or by refusal of the commission to issue any license applied for, he may within 10 days thereafter appeal to any justice of the Superior Court, by presenting him a petition therefor x x x. Appeal to the Law Court x x x may be taken as in equity cases."

Revised Statutes (1944), Chapter 57, new Section 60-A as amended by Public Laws of 1949, Chapter 419.

The Commission is authorized

"To adopt rules, requirements, and regulations, not inconsistent with this chapter or other laws of the state, the observance of which shall be conditions precedent to the granting of any license to sell liquor, including malt liquor. These rules, requirements, and regulations may include the character of any applicant, the location of place of business and the manner in which it has been operated."

> "To refuse to issue licenses to persons, corporations, associations, or partnerships who have been convicted, or whose officers have been convicted, of a breach of any state or federal law relating to the manufacture, sale, possession, or transportation of liquor within 5 years next prior to the filing of his or its application."
>
> Revised Statutes (1944), Chapter 57, Section 6, Par. VII and IX as amended.

An application for a hotel license must be approved in the first instance by the municipal officers of a town or city before license may be issued. If, however, a refusal to approve by the municipal officers is arbitrary or without justifiable cause, the State Liquor Commission on appeal from the municipal officers may issue without the approval. It is when refusal is arbitrary or there is no justifiable cause, that the commission has authority to act against the decision of the municipal officers. Here, the municipal officers refused to approve, and on appeal from the municipal officers the commission found that the action of the municipal officers was not arbitrary and not without justifiable cause.

Prior to 1949 there was no appeal from the decision of the commission, but the new statute passed as Chap. 419 of the P. L. of 1949, and now known as R. S. (1944), Chap. 57, new Sec. 60-A, gives an aggrieved applicant a right to appeal "x x x from a refusal of the commission to issue any license applied for, x x x." Formerly, the only appeal was to the commission from the finding of the municipal officers, under R. S. (1944), Chap. 57, Sec. 40. This new Sec. 60-A, however, provides for an appeal from the decree of the commission (1) where a license issued by the commission is revoked or suspended and (2) where the commission refuses to issue "any license applied for."

There is no inherent or constitutional right to engage in the liquor traffic, and whether one shall be permitted to exercise the privilege and under what conditions and restrictions, is a matter for the people to determine, acting

by and through the legislature. *Opinion of the Justices,* 132 Me. 512, 517, 174 A. 853; *State* v. *Frederickson,* 101 Me. 37, 63 A. 535; *State* v. *Gurney,* 37 Me. 156, 161.

Under Chap. 57 of the R. S. (1944) the right to grant liquor licenses is given to the State Liquor Commission. The town or city has no authority to grant a license. The municipal officers can only approve or disapprove of an application to the commission for a license. If the municipal officers approve, the commission may then issue, unless the applicant has been convicted of a liquor offense within five years or some other statutory or reasonable regulation, such as character or location, prevents. If the municipal officers refuse to approve and the commission, on appeal, decides that they acted arbitrarily or had no justifiable cause to refuse, the commission may then issue or may for cause refuse to issue.

The question before this court raised by the attempted appeal to which petitioner asserts he is entitled under P. L. of 1949, Chap. 419, new Sec. 60-A amending R. S. (1944), Chap. 57, is whether or not petitioner can invoke the amended provisions hereinbefore quoted and found in said Chap. 419 of the P. L. of 1949. In other words, was it the legislative intent under the existing facts as stated in this case to grant an appeal from the decision of the commission to the Superior Court. It is not necessary to again quote the statute. In our opinion, inasmuch as the municipal officers of the City of Rockland refused to approve the application for a hotel liquor license and petitioner had prosecuted his appeal to the commission, the decision of the State Liquor Commission denying the appeal ends the matter. No further proceedings by appeal or otherwise could be taken by the applicant because the Legislature did not grant an appeal under such circumstances as set forth herein. There was before the State Liquor Commission not the question of refusing to issue a license but solely the question of whether or not the decision and findings of the

municipal officers were arbitrary and without justifiable cause. The decision of the State Liquor Commission upheld the decision and findings of the municipal officers and it would be unlawful and illegal for the State Liquor Commission to make a further decree and refuse to grant the license because under the statute there are only two ways in which a hotel liquor license may be granted (1) if the municipal officers approve, then the commission may issue a license, (2) if the municipal officers disapprove, the commission may, on appeal, after hearing, if they find that the municipal officers' refusal was arbitrary and without justifiable cause, issue a license. The State Liquor Commission can only issue a license in the two ways above set forth. In the instant case, as above stated, the commission did not find that the refusal of the municipal officers to approve the application for a license was either arbitrary or without justifiable cause, and, not having done so, was without authority to issue the license. The action of the State Liquor Commission could not, under these circumstances, be termed a refusal.

The action, therefore, of the Superior Court in dismissing the appeal was correct. It is not necessary to consider the exceptions as they are based on the dismissal of the appeal by the Superior Court and under our holding would be dismissed.

It, therefore, follows that the mandate should be:

Appeal dismissed.
Exceptions overruled.

FELLOWS, J. Even though the result reached in the opinion be correct, insofar as it states that because the commission is precluded from granting a license it would be "unlawful and illegal" for it to make a decree refusing one, we must disagree therewith. Approval by the municipal officers, or in the alternative a finding by the commission on

appeal to it that refusal of such appeal is "arbitrary or without justifiable cause," is a condition precedent to *granting of the license,* not to *action on the application.* Because an application cannot be granted, it by no means follows that it cannot be refused. If refused, no matter how imperative the cause therefor, an appeal lies from the refusal. This is true whether the refusal is express or by necessary implication. The *right of appeal* does not at all depend upon whether the appeal may be sustained.

In the instant case, however, even if a right of appeal exists, the appeal could not be sustained. To sustain either the appeal or exceptions would avail the petitioner nothing. He was not aggrieved by the ruling below. We concur in the result.

NEAL DOW AND FIRST PORTLAND NATIONAL BANK, TRUSTEES UNDER THE WILL OF FRED N. DOW

vs.

KATHERINE DOW BAILEY ET ALS.

Cumberland. December 15, 1950

Wills. Construction. Intent. Beneficiaries. Vested and Contingent Estates.

The intention of a testator, when ascertainable from the will, should control the construction of it and all other rules of construction are subordinate and designed to aid in determining the intention of the testator.

The intention of the testator should be determined by a consideration of the whole instrument, the nature and extent of the estate, and the relationship and needs of the beneficiaries.

A beneficiary in a will, without express declaration that the estate provided for him is limited to the term of his life, may take nothing except a life interest.

A testator may designate the heirs of a beneficiary as alternative or substitutionary beneficiaries by providing that a particular gift be paid to a named beneficiary, or his heirs.

All estates created by wills should be considered as vested rather than contingent whenever the testamentary intention is not defeated thereby and in cases of doubt, what might be considered a condition precedent to the vesting of an estate should be holden to have only the effect of postponing the right of possession.

The action of the testator, in the instant case, in giving the income of property to a donee, pending delivery of possession thereof, affords the most satisfactory evidence of an intention to make a gift of the corpus and defer the delivery of possession.

ON REPORT.

A Bill in Equity whereby complainants, as trustees, under a will seek to have the will construed. Answers filed by or on behalf of all named defendants, and unascertained persons, joined in praying for a construction of the will. After

hearing before a single justice the case was reported to the Law Court for final decision by agreement of all parties. Decree accordingly.

Drummond and Drummond, for complainants, Neal Dow and First Portland National Bank, trustees.

Philip G. Willard, for defendants, Kate W. Dow, Neal Dow and First Portland National Bank, Exrs.

Francis P. Freeman, for defendants Neal Dow, Indiv., and Katherine Dow Bailey.

Kenneth Baird, for defendants, Kenneth Baird, guardian for Dana Dow, Kendall Dow and Neal Dow, Jr. Marion Lee Bailey and William Dow Bailey.

Verrill, Dana Walker, Philbrick and Whitehouse, for Marian Dow Eaton and Annette H. Shedley.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, AND WILLIAMSON, JJ. THAXTER, J., did not sit. FELLOWS, J., dissenting.

MURCHIE, C. J. In this Bill in Equity, the complainants, as trustees under the will of Fred N. Dow, late of Portland, referred to hereafter as the "Trustees" and the "Testator," respectively, seek to have said will, referred to hereafter as the "Will," construed. Their process names all the living descendants of the testator, the executor of the estate of his only deceased descendant, and the widow of that descendant, as parties defendant. A guardian *ad litem* represents all the defendants who are minors and all persons unascertained or not yet in being who may become entitled, at any time hereafter, to any part of the property held by the trustees. Answers filed by or on behalf of all the named defendants, and the unascertained persons, join in praying for a construction of the will. All the answers, except that filed on behalf of the minors and unascertained persons, admit the material factual allegations of the bill, which are denied, as a matter of course, in the answer of the guardian

ad litem. Evidence, taken out before a single justice of this court at a hearing on the bill, answers and replications, carries proof of all such allegations. The case was reported to the law court, for final decision, by agreement of all parties, including the guardian *ad litem.*

The issue presented relates to the provisions of Paragraph ELEVENTH of the will and particularly to "Subparagraph (b)" and "Subparagraph (c)" thereof, so referred to hereafter, reading as follows:

> "(b) To pay over to my said son, William H. Dow, or his heirs, in such manner, form and installments, and at such times as may be consistent with, and not obstructive of, the general purposes of this Will, the sum of One hundred thousand dollars, ($100,000.)
>
> (c) Interest, at the rate of four per cent (4%) per annum, is to be allowed and paid to my said son, or his heirs, by way of income from said Fund, on any portion thereof at any time remaining unpaid. Such interest is to run from the twentieth (20th.) day of the first calendar month next succeeding the sixtieth (60th.) day following the qualification of said trustees, and is to be paid in equal monthly installments, on the twentieth (20th.) secular day of each and every month thereafter, until said Fund has been paid over in full as herein provided."

William H. Dow was one of the executors and trustees named in the will. He survived the testator, qualified as one of his executors and trustees, and received the interest payable under the provisions of subparagraph (c) from a date not disclosed, when such payment was commenced, until December 31, 1947. He died January 31, 1948. No part of the principal of the fund established by subparagraph (b) was paid to him in his lifetime, nor has anything been paid under either subparagraph (b) or subparagraph (c) since his death, although it is apparent that he was entitled, prior thereto, to the interest payable under the latter from December 31, 1947 to January 20, 1948.

The testator died November 27, 1934. The will was dated July 15, 1933. A codicil to it, which has no bearing on its construction, was executed September 23, 1933. The codicil changed provisions of the will relative to (1) a parcel of real estate made available to Marian Dow Eaton, a daughter of the testator, and her daughter, Annette H. Shedley, dur ing their lives, as a home, and (2) the effective date of a memorial established for the father of the testator, described in the will as a man "more widely known than any other who was born and spent his life in Portland."

The will was drafted by the testator when, to quote his own language from it, he was mindful that his life was "rapidly drawing toward its close" and when his only children, a son and daughter heretofore named, who were his most obvious natural beneficiaries, were 68 and 64 years old, respectively, as is disclosed in an inheritance tax computation to which reference will be made hereafter. The testator had, at the time, three grandchildren, two of whom were the issue of the son and one of the daughter. The proportional division of the income of the trust established by Paragraph ELEVENTH of the will, after the fund provided by subparagraph (b) was paid out, declared in subparagraph (d) of Paragraph ELEVENTH, and the division of the estate on final distribution, declared in subparagraph (e) thereof, assuming the existence of living issue of either the son or the daughter at that time, was expressly declared to be controlled by the fact that the son had two children and the daughter one. Failing such living issue when the time for division came, it was to be among designated charities.

Many rules for the construction of wills, declared in decided cases, have been given recognition in this court, but all of them, applicable to particular facts and circumstances, have been held, as was said in *Giddings et al.* v. *Gillingham et al.*, 108 Me. 512, 81 A. 951, to be designed:

> "to aid rather than to hinder in the correct determination of the one controlling factor, the intent of the testator."

Such intention, as was said very recently in *Merrill Trust Co.* v. *Perkins et als.*, 142 Me. 363, 53 A. (2nd) 260, "takes precedence over all else." The manner in which the intention is to be ascertained is well stated in *Bryant et al.* v. *Plummer et al.*, 111 Me. 511, 90 A. 171, as follows:

> "It is an elementary, fundamental, and prevailing rule which must govern in the construction of a will, that the entire document should be carefully examined, parts compared with other parts, provisions considered with reference to other provisions, and, from the whole instrument, from all that it discloses, relative to the nature and extent of the estate of the testator, the size of his bounties, the relationship, needs, conditions, and environment of his beneficiaries, as well as from the precise language used in the parts over which doubts have arisen, ascertain if possible the intention of the testator when he used that language. This rule is of such long standing and wide adoption that citation of authorities would seem unnecessary."

This indicates clearly that the issue raised in the present case must be resolved by considering the will as an entirety and determining the intention of the testator therefrom. The first ten paragraphs, exclusive of Paragraph THIRD, disposed of what proved to be approximately 14.5% of the disposable estate of the testator. Paragraph THIRD created a trust fund of $100,000 for Marian Dow Eaton and Annette H. Shedley aforesaid, the income therefrom, not exceeding 4%, to be paid to said Marian Dow Eaton during her lifetime and thereafter to said Annette H. Shedley during hers, with power to invade the principal, within stated limitations, "in the sole judgment" of the trustees. This fund represented an additional approximate 16% of such disposable estate. The disposition of all the rest, residue

and remainder thereof, representing approximately 69.5% of the whole, was under Paragraph ELEVENTH, another 16% (of the whole) under subparagraph (b) and the balance, or 53.5%, under subparagraph (e). The income, pending final distribution, was to be distributed under subparagraph (d). Paragraphs TWELFTH to SIXTEENTH, inclusive, were devoted to conferring powers on the executors and trustees; enjoining them to take ample time for the disposal of real estate; directing them to use a designated property as an estate office, and to continue to employ a grandson, Neal Dow, son of William H. Dow, therein, so long as he continued "competent and trustworthy." The final, SEVENTEENTH, paragraph named the executors and trustees and expressed the desire of the testator, which has become effective, as the process shows, that said Neal Dow be appointed trustee, to succeed William H. Dow, or to act in his stead, in the event of the death of said William H. Dow during the term of the trust, or of his failure to act as trustee.

The will is unusual, if not unique. Immediately following its declaration of its publication, and of the revocation of all former wills, it directed the executors to turn the management of the estate of the testator over to the trustees, after paying funeral charges and expenses of administration, and providing for the perpetual care of a cemetery lot. It directed the trustees to assume the indebtedness of the testator, and pay the same, in due time, and to set aside the trust fund of $100,000 for Marian Dow Eaton and Annette H. Shedley, in accordance with Paragraph THIRD, "as soon after their qualification as is practicable." The provisions in connection therewith are in marked contrast to those of subparagraph (b). The $100,000 provided for Marian Dow Eaton and Annette H. Shedley was to be set aside "as soon * * * as * practicable." The income therefrom, not exceeding 4%, and, under appropriate circumstances, increments of the principal, were to go to them,

during their lives. The $100,000 provided for "William H. Dow, or his heirs," in subparagraph (b), was to be paid in installments, at a time or times presumably relatively remote, but each installment, when paid, was to become the absolute property of the beneficiary. Pending payment, interest at 4% was to be paid thereon.

The provisions of Paragraphs FOURTEENTH and FIFTEENTH of the will make it apparent that the testator contemplated that the trust representing approximately 53.5% of what proved to be his disposable estate, called hereafter the "Residuary Trust," was to endure for a substantial period of time. Paragraph FOURTEENTH charged the executors and trustees to bear in mind the advantages of taking time for the disposal of real estate, and Paragraph FIFTEENTH expressed the testator's "wish and desire" that his undoubtedly substantial indebtedness should be paid by them, as far as possible, from the income of the Residuary Trust, although recognizing that some part of the *corpus* of it might be required therefor. The provisions of subparagraphs (d) and (e) of Paragraph ELEVENTH relate to the Residuary Trust. They have no bearing on either the $100,000 provided for Marian Dow Eaton and Annette H. Shedley, and the issue of the latter, in Paragraph THIRD, to be *set aside,* by the trustees of the testator "as soon after their qualification as is practicable," or the identical amount provided for "William H. Dow, or his heirs," in subparagraph (b), to be *paid over* "in such manner, form and installments, and at such times" as might not be obstructive of the general purposes of the will, or the interest payable thereon, under the provisions of subparagraph (c). By these provisions the daughter, Marian Dow Eaton, and her issue, in the one case, and the son, William H. Dow, or his heirs, in the other, were to have the benefit of $100,000 each, before the amount of the Residuary Trust was determinable.

The inheritance tax paid to the state was computed by the Inheritance Tax Commissioner, referred to hereafter as

the "Commissioner," February 24, 1936 and paid February 26, 1936, while William H. Dow was acting as one of the executors (or trustees) under the will. The computation of the commissioner construed subparagraph (b) as giving William H. Dow a life interest in the fund, with the remainder to his two children, Neal Dow and Katherine Dow Bailey, who were his heirs presumptive when the will was drawn and executed and his heirs-at-law at the time of his death. That construction is, of course, not binding on the executors of the estate of William H. Dow who, with his widow, now claim that a vested interest passed to William H. Dow, whereby all installments of either principal or interest, when paid, must be paid to said executors, their successors or assigns, or on Marian Dow Eaton, Annette H. Shedley and the guardian *ad litem,* who join in asserting that subparagraph (b) gave a contingent right, and nothing more, to William H. Dow, for the period of his lifetime. Concerning the rights carried by the will upon the death of William H. Dow, these parties take views that are in sharp conflict. We shall deal with their separate claims before taking up that of the executors of the will of William H. Dow, and his widow.

The claim of Neal Dow and Katherine Dow Bailey is grounded in the assertion that the testator, in using the words "or his heirs," in subparagraphs (b) and (c), indicated his intention to designate them as alternative or substitutionary legatees, to receive, in place of William H. Dow, any part of the principal and interest, payable under said subparagraphs, not paid to William H. Dow in his lifetime. The case of *Buck* v. *Paine et al.*, 75 Me. 582, while not cited in support of their claim, illustrates the theory underlying it. In that case, where property was left to trustees for a term of three years, for the benefit of two named grandchildren, and it was expressly stated that if either of them should die during that period, "his or her legal heirs" should be substituted for the deceased grandchild "in every

respect," the court recognized that the will passed a fee to each grandchild, but asserted that the death of one of them, during the three-year period, terminated and defeated the fee which had passed to him. These claimants do not rely on an interest in fee vested in William H. Dow and terminated or defeated by his death before the fund was paid over, but on the claim that he took a life estate and nothing more. They cite such cases as *Bradbury* v. *Jackson et al.*, 97 Me. 449, 54 A. 1068, and *Barry et al.* v. *Austin*, 118 Me. 51, 105 A. 806, to sustain their claim. That one named as a beneficiary in a will without express declaration that the estate intended for him is limited to the term of his life may take nothing thereunder except a life interest, or such an interest coupled with a power, limited or unlimited, to invade the principal, cannot be doubted, but no case has been cited to us, nor are we aware of any, where such a result has been declared on no other ground than that a testator, after naming a beneficiary, added the words "or his heirs." We do not believe that such a testamentary intention can be read into the use of those words in this case.

The claim of Marian Dow Eaton, Annette H. Shedley and the guardian *ad litem* is based in part, also, on the words "or his heirs." Special emphasis is laid by these claimants, however, on the fact that under the will, the trustees were, and are, to pay over the fund in question in such manner and at such time or times as may be consistent with the general purposes of the will. They assert that the provisions of the will to that effect, following the designation of alternative or substitutionary legatees, indicated the intention of the testator that nothing greater than a contingent right should pass under either subparagraph (b) or subparagraph (c) until the time for payment arrived. They assert, also, that this is indicated by the fact that neither subparagraph (b) nor subparagraph (c) carries any words of present gift. For authority on the controlling force of the omission of such words, they cite *Giddings* v. *Gillingham, supra,* and quote from it as follows:

> "The 'disposition' is not made by the testator at the time of his death, but is to be made by his legal representatives after the decease of his wife. Nowhere in the will is there a gift or bequest to these legatees independent of the direction to his executors or trustees to pay them at a future time. The gift, therefore, implied from the direction to pay, speaks as of the time of payment and not as of the date of the testator's death. The courts have always held that the fact that there are no words of present gift has great weight in indicating that the testator intended that the title should not vest until the period of distribution should arrive, and that the bequest should be contingent until that time."
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> * * * * * *
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> "One of the subordinate rules is that when the only gift is found in the direction to pay or distribute at a future time, the gift is future and not immediate, contingent but not vested. Its reason is plain. The direction has no reference to the present and can be executed only in the future, and if in the meantime the donee shall die the direction cannot be exercised at all."

In view of the fact that our own court, in deciding *Moulton* v. *Chapman et al.*, 108 Me. 417, 81 A. 1007, six days after using the quoted language, said of the principle to which it relates, and for which authorities were cited from Massachusetts and New York:

> "But, it is said by one of the courts most frequently applying the rule, that it will hesitate to apply it where the gift is to legatees by name",

and that, thereafter, in deciding *Bryant* v. *Plummer, supra,* it asserted that the reasons which led the court to decide *Giddings* v. *Gillingham, supra,* as it did:

> "were based upon the general scope and purpose of the will, as well as upon the particular language of the will, thus adhering to the broader and safer rule that the intention of the testator must govern when that intention is ascertainable",

it seems unnecessary to refer to the Massachusetts and New York cases so cited. It is pertinent, however, to note that the Massachusetts cases (four in number) are all cited in either or both of two relatively recent Massachusetts decisions which indicate that the principle in question is closely confined. See *Tyler* v. *City Bank Farmers Trust Co. et al.*, 314 Mass. 528, 50 N. E. (2nd) 778; and *Barker et al.* v. *Monks et al.*, 315 Mass. 620, 53 N. E. (2nd) 696. We do not believe that the testamentary intention on which these claimants rely can be read into the will because of the omission of words of present gift in subparagraph (b).

The real issue of the case is whether William H. Dow took a vested interest under said subparagraph (b). The claim of the executors of the will of William H. Dow, and his widow, is that he did. That claim has the support of a very substantial bulk of authority in the decisions of this court. Many of them have recognized it as a well-established principle of testamentary construction that all estates created by wills should be considered as vested rather than contingent whenever the testamentary intention which should be controlling would not be defeated thereby. *Kimball* v. *Crocker et al.*, 53 Me. 263; *Woodman* v. *Woodman et al.*, 89 Me. 128, 35 A. 1037; *Hersey* v. *Purington et al.*, 96 Me. 166, 51 A. 865; *Storrs* v. *Burgess et al.*, 101 Me. 26, 62 A. 730; *Moulton* v. *Chapman, supra; Giddings* v. *Gillingham, supra; Danforth* v. *Reed et al.*, 109 Me. 93, 82 A. 699; *Blaine et al.* v. *Dow et al.*, 111 Me. 480, 89 A. 1126; *Bryant* v. *Plummer, supra; Strout* v. *Strout et al.*, 117 Me. 357, 104 A. 577; *Carver et al.* v. *Wright et al.*, 119 Me. 185, 109 A. 896; *Belding et al.* v. *Coward et al.*, 125 Me. 305, 133 A. 689; *Abbott et al.* v. *Danforth et al.*, 135 Me. 172, 192 A. 544.

In *Kimball* v. *Crocker, supra,* the first of these cases, Chief Justice Appleton indicated that his decision was giving effect to what was said, in *Duffield* v. *Duffield,* 1 Dow & Clark, 311, which he cited and quoted, to have "long been

an established rule for the guidance of the Courts of Westminster." As there stated:

> "all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

In *Blaine* v. *Dow, supra,* it was said that the presumption that a testator intended to create vested estates, rather than contingent ones, was so strong that all such estates should be:

> "regarded as vesting, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event."

In *Morse et al.* v. *Ballou et al.,* 109 Me. 264, 83 A. 799, as in *Belding* v. *Coward, supra,* it was recognized that the presumption of vesting has special force when a devise or bequest to a child is under consideration. See also the cases cited therein: *Wengerd's Estate,* 143 Pa. St. 615, 22 A. 869; and *Atchinson* v. *Francis,* 182 La. 37, 165 N. W. 587.

The single point upon which all parties to the case are in agreement is that the controlling consideration, as stated heretofore, on the authority of *Giddings* v. *Gillingham, Merrill Trust Co.* v. *Perkins,* and *Bryant v. Plummer,* all *supra,* is to be found in the intention of the testator, as expressed in the will. Whether we apply the test as declared in *Kimball* v. *Crocker, supra,* quoting from *Duffield* v. *Duffield, supra,* that all estates shall be holden vested except those where conditions precedent are so clearly expressed that courts cannot hold them otherwise:

> "without deciding in direct opposition to the terms of the will",

or the more recent statement in *Belding* v. *Coward, supra,* that all estates should be held vested:

> "unless the testator has by very clear words manifested an intention that they should be contingent upon a future event",

the result is the same. Nothing can be found in the will to justify assertion that it would be "in direct opposition" to the terms of the will to find that William H. Dow took a vested estate, or that a contrary intention has been manifested by "very clear words." In this connection it is pertinent to note that this court, in *Woodman* v. *Woodman, supra,* adopted the definition between vested and contingent remainders given in Washburn on Real Property, Vol. 2, Chap. 4, Sec. 1, viz:

> " 'The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect' ",

and has reaffirmed that acceptance on more than one occasion since. *Giddings* v. *Gillingham; Bryant* v. *Plummer; Belding* v. *Coward,* all *supra.* The situation presented here is not identical with that dealt with in any of those cases where the control depended upon the death of a particular person or the lapse of a definite period of time. That presented in *Bryant* v. *Plummer, supra,* is, however, comparable to the present one in many respects. No remainder was involved in it. The issue was whether one of two legatees

who were to take property into possession at the expiration of ten years took a vested interest therein at the death of the testator. It was held that he did. That legatee died within two years of the death of his testator, but at the termination of the trust, more than eight years later, the share that would have passed to him at that time, had he been living, was declared to be the property of his estate.

Reading the will as an entirety in the light of the well-established principle relative to the vesting of estates created by will, we conclude that the testator intended William H. Dow to inherit the fund to be paid out pursuant to the provisions of subparagraph (b). Considering the care with which it was drafted, and the provisions it contained protective of the testator's over-all plan for the disposal of his property, it does not admit of doubt that he was aware both that an approximate million dollars was involved and that his son and daughter were the natural objects of his bounty. He was acutely conscious, also, of what he believed his father had represented in his lifetime. The real question is the extent of the bounty he intended for his son, William H. Dow.

The will bequeathed the distinctly personal belongings of the testator to his son and daughter, excepting particular things he desired should be left in his home when it became a memorial to his father. It next provided a home for his daughter, for life, and for her daughter, thereafter, for hers, to which reference has been made heretofore, as also to the trust fund for those beneficiaries. Thereafter he devoted what proved to be a little less than $13,000, according to the computation of the commissioner, to an annuity for his secretary, and $1,700 to bequests to four other employees, conditioned upon their being in his employ at the time of his death. As the fact developed, one was not. The only other appropriation of money carried by the will, except what is contained in Paragraph ELEVENTH, is the provision for the memorial to his father, which the

commissioner found to involve something slightly in excess of $65,000. The balance of the estate was disposed of by Paragraph ELEVENTH, in language appropriate for disposing of the residue of an estate, but the disposition of $100,000 of the principal to which it applied was to be taken therefrom before the Residuary Trust was set up. From that Residuary Trust, William H. Dow, in his lifetime, his children, after his death, and the issue of those children, ultimately, were to take twice the share, of income and principal, left to the daughter, her child, and the issue of the latter. The fact that William H. Dow had two children and his sister one seemed to the testator to represent ample reason for making a larger provision for William H. Dow than for his sister. Whatever he was intended to take under the will, as principal, other than the personal belongings left to him and his sister in Paragraph FIRST, he must take under subparagraph (b). The $100,000 it controls is the identical amount provided for his sister in Paragraph THIRD. That was an undoubted life estate, and the method of its establishment as such demonstrates conclusively that the testator knew full well what language was appropriate for the purpose. Reference to subparagraph (e) of Paragraph ELEVENTH discloses that he knew equally well how to create a contingent estate. He made provision therein that his estate should be divided share and share alike among named charities when the Residuary Trust terminated "failing * living issue" of the children of his son and daughter. There is nothing in the will which would justify belief that the testator intended to make any provision for his daughter, other than the providing of a home, larger than a corresponding one for his son who, because of a larger family, was to take twice the share of the daughter in the Residuary Trust.

A final consideration, which counsel for the executors of the will of William H. Dow, and his widow, urge on the authority of *Hersey* v. *Purington, supra,* is that the com-

bined effect of subparagraphs (b) and (c) is to give to the beneficiary under the former the full benefit of the fund to which it relates almost immediately on the qualification of the trustees. As was said in that case, on the authority of Redfield on Wills:

> "Judge Redfield states it as the result of all the cases that where the income of the estate is given to the donee, in the meantime, it affords the most satisfactory evidence that the testator intended to give the *corpus* of the estate, but only deferred the time of coming into possession."

The will is construed as disclosing the intention of the testator to give William H. Dow, if living, the $100,000 to be paid out by the trustees under subparagraph (b), when available for payment in accordance with the terms of the will, and to give that principal sum, in the same manner, to the heirs of said William H. Dow, if he was not living at the death of the testator. That this identical result might have been accomplished without the use of the words "or his heirs," by the operation of R. S., 1944, Chap. 155, Sec. 10, constitutes no sufficient reason, as has already been indicated, for holding that the use of them carries any controlling effect.

The trustees should be directed to pay to the executors of the estate of William H. Dow all interest payable under subparagraph (c), and the full principal amount payable under subparagraph (b), as the latter becomes payable, under the provisions of the will.

Each answer filed in the case carries an appropriate prayer for costs, including the reasonable fees and expenses of counsel. The questions raised, as was said in *Giddings* v. *Gillingham, supra,* "might well give rise to doubts." Proper allowances for costs, including reasonable fees and expenses of counsel, should therefore be awarded the parties and allowed in the probate accounting. The case is remanded for the entry of a decree to be entered in accordance with this opinion.

Decree accordingly.

FELLOWS, J. (Dissenting) I regret that I cannot agree with the construction placed upon the terms of this will in the opinion by the Chief Justice. It is, therefore, proper that I briefly state my reasons.

I am unable to overlook the testator's use of the word "or" in paragraph eleven, subparagraphs (b) and (c) of the will, and I cannot avoid giving effect to what I am convinced the testator intended when he said "pay over."

This will is a lawyer's own will to which he clearly gave long and careful thought. The testator, Fred N. Dow, says "to *pay over* to my said son, William H. Dow *or his heirs* * * * * at such times as may be consistent with * * * * the general purposes of this will the sum of one hundred thousand dollars." After thus directing in (b) that the trustees *pay over* the $100,000 the testator directs in (c) to pay to William H. Dow *"or his heirs"* interest at the rate of 4% on any portion at any time remaining unpaid.

The "general purposes of the will" were evidently to preserve the real estate and to use at first the income to clear debts existing at the time of the testator's death. No part of the $100,000 was paid. Did the testator intend this sum to be so vested that it was alienable, or did he intend, by the word "or," for this sum of $100,000 to go to William H. Dow, or to the heirs at law of William H. Dow determined as of the date of payment? If the use of the words "or his heirs" carries no controlling effect, as the opinion states, why were they used in this carefully drawn will?

I cannot believe, upon consideration of the whole will, that it was the intention of this cautious and technical testator that his use of the word "or" should mean "and" as construed in the opinion. He intended an alternative or substitute gift to those who were heirs at the time of payment. *Union Safe* v. *Wooster,* 125 Me. 22; *Wyman* v. *Kenney* (Vt.), 10 Atl. (2nd) 191 and cases, including the *Wooster* case, there cited; *Delaware County Trust* v. *Hanby,*

19 Del. Chan. 228, 165 A. 568. See also Vol. 3 "Property,' American Law Institute Restatement of the Law, Section 252, where this rule is adopted.

Another reason is, that the testator made no other disposition except for the trustees *to pay* at some future time. Our court has stated that such provision has great weight. "When the only gift is found in the direction to pay or distribute at a future time, the gift is future and not immediate, contingent but not vested. Its reason is plain. The direction has no reference to the present and can be executed only in the future, and if in the meantime the donee shall die, the direction cannot be exercised at all." *Giddings* v. *Gillingham,* 108 Me. 512, 518; *Storrs* v. *Burgess,* 101 Me. 26; *Moulton* v. *Chapman,* 108 Me. 417.

I agree that any of the 4% interest unpaid, up to the time of the death of William H. Dow, may be considered as vested in William H. Dow. The unpaid principal was not so vested.

CARL G. SMITH, PRO SE

vs.

J. WALLACE LOVELL, WARDEN
MAINE STATE PRISON

Knox. Opinion, December 26, 1950

Sentence. Time. Escape. Courts. Words and Phrases.

Time served for one crime, on a sentence which has been vacated upon a writ of error, cannot be credited upon an independent sentence imposed on the conviction of another crime on a separate indictment where the latter sentence remains in full force and was to commence upon the expiration of the former.

The practice in this state of imposing cumulative or consecutive sentences upon separate convictions, the subsequent to take effect upon the expiration of the former, is recognized with respect to misdemeanors and felonies whether the several convictions are upon separate counts in the same indictment or under separate indictments.

Failure to attack proceedings at *nisi prius* by demurrer, motion in arrest of judgment or exceptions and obtain a stay of sentence and release on bail pending final determination of the cause under R. S., 1944, Chap. 135, Sec. 29 results in a waiver.

Where a stay of sentence has been obtained and there is a failure to recognize, the commitment is to await final decision, rather than in execution of sentence.

Where the first of two cumulative sentences (the subsequent to take effect upon the expiration of the former) is vacated upon writ of error, its expiration takes effect upon being vacated and the subsequent sentence commences.

Sentences pronounced by a court having jurisdiction of the cause and the parties are *voidable only* and as such remain in effect until vacated by a court of competent jurisdiction.

The crime of escape or prison breach, whether misdemeanor or felony, is within the original jurisdiction of the Superior Court and prosecutions therefor may be commenced by indictment.

The words *void* and *voidable* are often used interchangeably and the interpretation of a specific use will depend upon the issue to which it is applied.

ON REPORT.

Petition for a writ of mandamus against the Warden of Maine State Prison alleging that petitioner is entitled to make application for parole under R. S., 1944, Chap. 136, Secs. 14 and 15. On petition, after notice, a Justice of the Supreme Judicial Court issued the alternative writ to which respondent made return. Petitioner demurred and respondent joined. By agreement of the parties the case was reported to the Law Court with the stipulation: "If the demurrer is sustained, case to be remanded to a Justice of the Supreme Judicial Court for issuance of the peremptory writ as prayed for, otherwise, if demurrer denied process to be dismissed." Demurrer overruled. Peremptory writ of mandamus denied. Alternative writ quashed. Petition dismissed. Case fully appears below.

Carl George Smith, pro se, for petitioner.

Ralph W. Farris, Attorney General,
for the State of Maine, and

John S. S. Fessenden, Deputy Attorney General,
for the State of Maine, for respondent.

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

MERRILL, J. On report. This cause arises on a petition for a writ of mandamus. The petitioner is confined in the Maine State Prison in execution of sentence. The respondent is the warden of said prison. The petitioner alleges that he is eligible to parole under the provisions of R. S., Chap. 136, Sec. 14; that it is the duty of the respondent as warden of the prison to furnish him a "blank application for parole" to enable him to make application therefor under the provisions of R. S., Chap. 136, Sec. 15; that the warden though requested therefor refused and refuses to furnish the pe-

titioner such blank application for parole in violation of the petitioner's rights under said Sec. 15. The petitioner seeks a writ of mandamus to enforce his alleged right to receive said "blank application" to enable him to apply for the parole to which he claims he is eligible.

On the petition, after notice, a Justice of the Supreme Judicial Court issued the alternative writ. The respondent made return thereto, to which the petitioner demurred. After joinder by the respondent, the Justice of the Supreme Judicial Court, the parties consenting thereto, reserved the questions of law arising thereon and reported the case to the Law Court with the following stipulation: "If the demurrer is sustained, case to be remanded to a Justice of the Supreme Judicial Court for the issuance of the peremptory writ as prayed for, otherwise, if demurrer denied process to be dismissed."

Without recital of the pleadings, *in extenso,* the determinative issue in the case is whether or not the petitioner is "eligible to parole" under R. S., Chap. 136, Sec. 14. If he is, it is the legal duty of the respondent under R. S., Chap. 136, Sec. 15 to furnish him the "blank application for parole" provided for therein to enable him to make application therefor.

From the petition and the return the following facts appear. The prisoner is in execution of a sentence to the State Prison of not less than one and one-half years and not more than three years. This sentence was imposed on May 10, 1949. By its terms "This sentence is to begin at the expiration of the sentence in case No. 8742." Previously and on the same day in case No. 8742 the petitioner had been sentenced to imprisonment in the State Prison for a term of "not less than three and one-half years, and not more than seven years." Warrants for commitment issued upon both sentences on said May 10, 1949, and the petitioner was then committed to the State Prison where he has ever since been confined.

On September 9, 1950 this court sustained exceptions to the denial of a writ of error attacking the conviction and sentence in case No. 8742, see *Smith, Petr.* v. *State of Maine,* 145 Me. 313, 75 Atl. (2nd) 538. Certificate thereof was filed in the clerk's office in Knox County (the county where the proceedings in error were pending) on September 9, 1950. On October 2, 1950 the Justice of the Superior Court before whom the writ of error was pending signed and filed in said office the following order pursuant to the mandate from the Law Court:

> "The conviction for escape from the Cumberland County jail is reversed and the sentence vacated. Ordered: The prisoner, to wit, Carl G. Smith unless held upon some process in no way dependent upon said conviction or sentence, is hereby discharged."

This order was "Certified to Maine State Prison October 2, 1950."

The petitioner claims that as the conviction in case No. 8742 has been reversed and the sentence therein vacated on writ of error, the sentence in execution of which he is now in custody commenced on the date it was imposed and the warrant of commitment issued, notwithstanding the fact that it "was to begin at the expiration of the sentence in case No. 8742." If this contention of the petitioner be correct the minimum term of his present imprisonment, with the deduction provided by law, had expired when he requested the blank application for parole and the petitioner then was and now is eligible to parole. R. S., Chap. 136, Sec. 14.

The respondent on the other hand claims that "the expiration of the sentence in case No. 8742" did not occur until the conviction in case No. 8742 was reversed and the sentence therein vacated. If this contention of the respondent be sustained the petitioner is not eligible for parole.

In this state it has ever been the practice to impose cumulative or consecutive sentences upon separate convictions, the subsequent sentence to take effect upon the expiration of the former. This practice was recognized in *Breton Petr.* 93 Me. 39, at least with respect to misdemeanors, and in *Smith* v. *State,* 142 Me. 1, 45 Atl. (2nd) 438, with respect to felonies. This is correct practice whether the several convictions are upon separate counts in the same indictment, or under separate indictments.

The leading case upon the subject is *Kite* v. *Commonwealth,* 11 Met. 581, 585. In an able opinion by Chief Justice Shaw the Massachusetts court said:

> "The court are all of opinion that it is no error in judgment, in a criminal case, to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then, by its terms, the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference, that the previous judgment is reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect."

This opinion has been cited and quoted by so many courts that a review of the many decisions would serve no useful purpose. It is to be noted, however, that the Supreme Court of the United States in the case of *Blitz* v. *United States,* 153 U. S. 308, which will be discussed later, gave it

its unqualified approval, including that portion dealing with the vacating of the prior sentence on writ of error.

In a later Massachusetts case, *Dolan's* Case, 101 Mass. 219, 223, the court said:

> "But the validity of such additional sentences is never affected by the contingencies which render the duration of previous terms uncertain. *Kite* v. *Commonwealth,* 11 Met. 581. The time fixed for the execution of the second sentence is not the end of the limited period from the date of the order of commitment in the first case, but the end of the imprisonment under the first sentence, however that may be legally terminated."

This opinion like the former one in *Kite* v. *Commonwealth* was cited with approval by the Supreme Court of the United States in the *Blitz* case, *supra.*

Another leading case, and one exactly in point in the instant case is *Brown* v. *Commonwealth,* 4 Rawle (Pa.) 259. This case was decided and reported several years prior to *Kite* v. *Commonwealth* and has been often cited. In this case the prisoner on the same day was sentenced for larceny to five years' imprisonment, and also to one year's imprisonment for breach of prison, the latter sentence "to commence and take effect immediately after the expiration of the sentence passed on him for the larceny of the goods of Hiram Jones." The first sentence was reversed on error, and after the elapse of a year from the date of sentence the prisoner sought his discharge from the second sentence on the ground that it had expired by its own limitation, the preceding one having been a nullity. The court rendered the following opinion:

> "The preceding sentence, though erroneous, was not void. On the contrary, it was in full force, till it was reversed, and would protect the officer from an action of trespass for false imprisonment. Having been thus in force, it expired, for all legal

> purposes, at the time of its reversal, and the period of the subsequent one which was dependent on it, began to run. The confinement which the prisoner has undergone, therefore is referable to the prior sentence, and not to the succeeding one, which taking effect from the termination of the former is yet in force."

These general principles of law announced in these decisions are set forth in 15 Am. Jur. Page 125, Sec. 468:

> "The fact that an intermediate sentence is held to be void does not entitle the prisoner on the expiration of the term imposed for the preceding sentence to be discharged, but his imprisonment under the last sentence should begin immediately, and commencement of the term of a sentence of imprisonment to take effect immediately after the expiration of a prior sentence is, if such prior sentence is reversed, the date of such reversal."

The petitioner in his brief cites as *contra* to the foregoing principles and cases, *Ex parte Roberts,* 9 Nev. 44, 16 Am. Rep. 1; *Gregory* v. *Queen,* 15 Q. B. 974 and also *Blitz* v. *United States, supra.* An analysis of these cases, however, shows that they are not in point. In *Blitz* v. *United States* the defendant had been convicted on each of three counts of an indictment. At *nisi prius* and prior to sentence, he moved in arrest of judgment on all three counts. The motion was sustained as to the second count and overruled as to the first and third. Thereupon he was sentenced to imprisonment for one year and a day on the first count and upon the third count to imprisonment for a like period to begin upon the expiration of the sentence upon the first count. He then brought the case forward by a writ of error to both counts alleging as error the overruling of the motion in arrest directed to the first and third counts. The Supreme Court of the United States found error in the first count and arrested judgment thereon and as to the third count stated:

> "But as there has been a trial upon the third count, the sentence, in respect to that count, should stand, and the term of imprisonment under it be held to commence from the 28th day of November, 1893, the date fixed by the judgment below for imprisonment to begin under the sentence on the first count."

It is to be noted that in this case there was a simultaneous attack upon the validity of both sentences which was instituted at *nisi prius* and during the term at which they were pronounced. The case was brought forward by a single writ of error directed to both sentences, the appropriate procedure for review of the alleged erroneous rulings with respect to said sentences below. Both sentences were before the court for review in a single case. The same thing is true in *Gregory* v. *Queen, supra.* In such situation the court revised the sentence directly attacked at *nisi prius* and brought forward on error.

In those cases where the sentences upon separate counts in a single indictment were simultaneously under attack by a single writ of error, the sentence which was sustained was made to conform to what should have been imposed in the first place. Such, however, is not the situation here presented, and we need not nor do we intimate an opinion as to what our decision would be under such a situation as obtained in those cases.

The petitioner in the instant case, at *nisi prius* did not attack the proceedings or the sentence in either of the cases there being prosecuted against him. In the case where the sentence was later vacated by writ of error the petitioner, the then defendant at *nisi prius,* if he so chose, could have made a motion to quash the indictment, which motion if made should and we assume would have been sustained. He could have demurred. He could have made a motion in arrest of judgment and, finally, he could have taken exceptions to the sentence imposed. Had he adopted any one of the latter three methods he could have obtained a re-

view by this court of unfavorable action by the court below, which would have resulted in his favor and the vacation of the sentence imposed. Pending his exceptions he could have obtained a stay of sentence and have been released on bail until final determination of the cause. R. S., Chap. 135, Sec. 29. He could likewise have attacked the second sentence by exceptions and have obtained a stay thereof until final determination and have been released on bail until that time. Of course, if he had obtained a stay of sentence and failed to recognize, his commitment would have been to await final decision, rather than in execution of sentence. R. S., Chap. 135, Sec. 29.

The petitioner did none of these things. By his inaction he waived all of these provisions of the law which were available to him and which were designed and intended as a protection of his rights. Some time later, while in execution of the first sentence, he attacked the validity of that sentence by writ of error. In that attack he was successful. That sentence was terminated. By its very terms the second sentence, that now in question, then took effect.

He now complains that he suffered imprisonment under the first sentence unjustifiably, and that the imprisonment which he suffered under that sentence should be credited upon the present valid and subsisting sentence which by its very terms was not to take effect and did not take effect until the other sentence was terminated.

As will be later shown, the first sentence was not *void* but *voidable* until it was vacated. No attack having been made upon the second sentence, the second sentence stood and still stands as pronounced, effective upon the expiration of the first sentence. The first sentence expired not by lapse of time but by being vacated upon the writ of error. When so vacated its expiration then took effect and the present sentence, according to its terms, then commenced.

If the plaintiff suffered imprisonment under the erroneous sentence it is because he did not avail himself of the provisions of law which existed for his benefit.

It may be noted in passing that those who have violated the criminal law, no matter how clear their guilt, are only too willing to avail themselves of any legal technicalities which will enable them to escape well deserved punishment. These same persons, even as does the petitioner, are loud in their denunciation of the law and its "dry legal logic" and "lack of natural justice" when by failure to avail themselves of its provisions they lose a benefit which they might have otherwise obtained.

The case of *Ex parte Roberts*, 9 Nev. 44, is entirely different from the instant case. In that case the petitioner had been sentenced to imprisonment in the State Prison for the term of one year,

> "such term of imprisonment to commence upon the expiration of any term or terms of imprisonment which you may now be undergoing in said State prison."

At the time the foregoing sentence was pronounced upon him, the petitioner was incarcerated in the State Prison having been sentenced thereto to a term of ten years. At the time the sentence for one year was imposed, an appeal from the sentence of ten years was then pending. In *State* v. *Roberts*, 8 Nev. 239, the ten year sentence was declared by the Supreme Court of Nevada to be *null* and *void* on the ground that it was imposed at a term of court not authorized by law to be held. The court said:

> "It is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law: the proceedings in this case were therefore *coram non judice* and void."

Roberts, more than a year after the imposition of the sentence for one year, sought release by habeas corpus upon

two grounds, first, that the sentence was void for uncertainty, because the former conviction being void could not create any term (of imprisonment), that there never was a commencement of such term and necessarily there could not be any expiration of it, and that since the term in question was to commence upon such impossible expiration never could commence. As a second ground for discharge he urged that if the sentence for one year took effect it took effect immediately upon its rendition and that the term of one year therefrom being now expired he was also entitled to his discharge. In this case, *Ex parte Roberts,* 9 Nev. 44, the court said:

> "The decision of this court did not make that judgment (the one upon which the prior sentence was imposed) void; it was void *ab initio,* and the sentence and imprisonment under it were, in legal contemplation, nullities. Either the judgment of the 11th of March commenced to run upon its rendition or it is void for uncertainty, and in neither case is the warden of the State prison entitled to custody of the prisoner."

The petitioner in this case urges that the conviction which we reversed and the sentence which we vacated were *void,* as distinguished from *voidable,* and that his present term of imprisonment, on the authority of *Ex parte Roberts,* commenced to run from the time it was imposed and when he was committed to the State Prison.

Sentences may be either erroneous and hence voidable or they may be absolutely null and void *ab initio.* Sentences pronounced by a court having jurisdiction of the cause and the parties are *voidable only* and not *void.* If voidable as distinguished from null and void, they remain in full force and effect until vacated by a court of competent jurisdiction. See *Wallace* v. *White,* 115 Me. 513, 519.

In the petitioner's former case, the one where the conviction was reversed and sentence vacated, on error, the

court had jurisdiction over the person of the defendant and over the offense with which he was defectively charged. Having been indicted, it was within the jurisdiction of, and was the province of the court to determine whether or not the indictment sufficiently charged a crime and, if so, what crime, and to impose the appropriate sentence therefor. If the court erroneously determined that the indictment charged the crime set forth in the statute under which it imposed sentence and imposed sentence appropriate for that crime, the sentence was not *void* but *voidable.*

By R. S., Chap. 132, Sec. 5, it is provided:

> "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."

The petitioner urges that in the previous case the Municipal Court had original exclusive jurisdiction because the offense which he committed was in fact only a misdemeanor and not a felony; that because he was sentenced upon an indictment returned to the Superior Court in a case over which the Municipal Court had original exclusive jurisdiction, his conviction and sentence were *coram non judice, null and void,* as distinguished from *voidable.* The petitioner's major premise, the one upon which he grounds this argument, is at fault. Municipal Courts do not have exclusive original jurisdiction over such escapes as are misdemeanors only and not felonies. In such offenses the Superior Court has concurrent original jurisdiction, and prosecutions therefor may be commenced by indictments returned to the Superior Court. The crime of escape or prison breach, whether felony or misdemeanor, is within the original jurisdiction of the Superior Court and prosecution therefor may be commenced by indictment. In fact, under the statute above quoted, the Superior Court has jurisdiction of all offenses except those of which exclusive

original jurisdiction is conferred upon Municipal Courts or trial justices. No such exclusive original jurisdiction has been conferred upon Municipal Courts or trial justices over any offense constituting a criminal escape. Therefore, the petitioner's claim that his prior sentence was *coram non judice* is without foundation and cannot be sustained.

Nor can it be successfully urged that because the indictment in the former case defectively set forth the commission of an offense that the sentence imposed therein was *void* as distinguished from *voidable.* It was not *coram non judice.* As said by Chief Justice Marshall in *Ex parte Watkins,* 3 Peters 193, a judgment

> "is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the District of Columbia is a court of record having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force, unless reversed regularly by a superior court capable of reversing it."

As said in *Ex parte Parks,* 93 U. S. 20:

> "Whether an act charged in an indictment is or is not a crime by the law which the court administers, is a question to be met at every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgments, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy

> after final judgment, unless a writ of error lies to some superior court."

The general principle that an erroneous judgment rendered by a court having jurisdiction over the person and the subject matter is voidable and not void is stated in 31 Am. Jur. 66, Sec. 401 as follows:

> "Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith. This is true even if there is a fundamental error of law appearing upon the face of the record. Such a judgment is, under proper circumstances, voidable, but until avoided is regarded as valid."

In the former case *Smith, Petr.* v. *State,* 145 Me. 313, 75 Atl. (2nd) 538, the question of whether the sentence involved was *void* or *voidable* was not in issue. The only issue in that case with respect to the sentence was whether the sentence was, as Chief Justice Emery said in *Galeo* v. *State,* 107 Me. 474, "authorized by law." Although we referred to the sentence in the opinion in *Smith, Petr.* v. *State, supra,* 75 Atl. (2nd) 538, as *void,* we used the word in the sense of *voidable* as distinguished from absolutely *null and void.* While exactness in the use of English especially in opinions is highly desirable and of great importance, nevertheless in the interpretation of words used in opinions, they should be interpreted with reference to the subject matter under consideration and the issue then before the court. The words *void* and *voidable* are often used interchangeably and the interpretation of a specific use of the word *void* will depend upon the issue to which it is applied. As said in *Elerick* v. *Reed,* 240 Pac. 1045, 1047, 113 Okla. 195, 44 A. L. R. 714:

> "The words 'void' and 'voidable' are often loosely used, and much confusion has resulted therefrom.

> 'Void' is so frequently employed in the sense of 'voidable' as to have lost its primary significance; and, when it is found in a statute, judicial opinion, or contract, it is generally necessary to resort to the subject-matter or context to determine precisely the meaning given to the word."

The case of *United States* v. *Winona St. P. R. Co.*, 67 Fed. 948 is an interesting one, especially in its decision with respect to the use of the word void by the same court in its own former opinion. In that case at Page 954, the United States Circuit Court of Appeals for the Eighth Circuit said:

> "Moreover, it is a common practice of legislatures and courts to use the words 'void' and 'voidable' interchangeably where the distinction between them is not material to the question or case under consideration; and it was in this way that the word 'void' was used in Burr v. Greely. The question now before us was neither argued, considered, nor decided in that case, and we enter upon its consideration in this case for the first time."

The court then proceeded to hold that a judgment by a special tribunal vested with judicial power referred to in the former opinion as *void* was *voidable only.*

As in the federal case above cited, the question now before us as to whether or not the sentence under consideration in *Smith, Petr.* v. *State,* 75 Atl. (2nd) 538, was *void* or *voidable* was neither argued, considered, nor decided in that case. Nor was it material to the issue then before this court. We enter upon its consideration in this case for the first time. We hold that it was *voidable* and *not void* and that it was in the sense of *voidable* that the word *void* was used by us with reference to the sentence under consideration in our opinion in *Smith, Petr.* v. *State,* 75 Atl. (2nd) 538.

It is therefore seen that the case of *Ex parte Roberts,* 9 Nev. 44, is not in point. In that case the prior sentence was truly *void* instead of *voidable* only. The situation there

present is not now before us. Nor are we called upon to determine the legal questions there decided. Whether or not we would arrive at the same decision as did the Nevada court on the same facts is a question upon which we neither express nor intimate an opinion.

The other cases cited by the petitioner in his brief have been carefully examined and none of them are applicable to the question here in issue. In not a single one of the following cases cited by the petitioner, *People* v. *Wilson,* 391 Ill. 463, 63 N. E. (2nd) 488; *Owen* v. *Com.* 214 Ky. 394, 283 S. W. 400; *In re: Silva,* 38 Cal. App. 98, 175 Pac. 481; *State* v. *Fairchild,* 136 Wash. 132, 238 Pac. 922; *Jackson* v. *Commonwealth,* 187 Ky. 760, 220 S. W. 1045; *State* v. *Mehlhorn,* 195 Wash. 690, 82 Pac. (2nd) 158; *People ex rel Barrett* v. *Hunt,* 12 N. Y. Supp. (2nd) 127 and *In re: Cowan,* 284 Mich. 343, 279 N. W. 854, was the question of successive or cumulative sentences involved. In each of these cases the question at issue was whether or not in resentencing on the original conviction, after an erroneous sentence had been vacated, credit was to be given on the new sentence for the time served for the same crime under the former erroneous sentence. Not one of these cases involved the issue presented in this case. The issue in this case is whether time served for one crime, on a sentence which has been vacated as erroneous, can be credited upon an independent sentence imposed on conviction of another crime on a separate indictment, because the latter sentence which remains unmodified and in full force and effect was to commence upon the expiration of the former. A discussion of these cases, many of which turn upon express statutory provisions with relation to resentencing, would be profitless at this time as the questions involved therein are not here in issue.

The petitioner's sentence which was vacated on the writ of error terminated on October 2, 1950, the date when the order vacating the same was made in the proceedings in

error, not upon the date of the filing of the certificate of decision from this court. The case in error came to this court upon a bill of exceptions to the decision by the single justice denying error. The effect of sustaining the exceptions was to vacate the decision of the single justice, and left the case in his hands for final disposition. He disposed of the case by his order dated and filed October 2, 1950. By that order, and that order alone, the sentence imposed in that case was terminated, and upon its termination the sentence now under consideration commenced.

The petitioner was not eligible for parole either at the time he made demand upon the warden for the blank application for parole, at the time he petitioned for mandamus, nor is he eligible thereto at the present time. The petitioner's demurrer is overruled. According to the stipulation the process is therefore dismissed.

Demurrer overruled.

Peremptory writ of mandamus denied.

Alternative writ quashed.

Petition dismissed.

EX REL BURLEY ADAIR

vs.

KEEPER OF JAIL OF COUNTY OF YORK

York. Opinion, December 27, 1950.

PER CURIAM.

On exceptions to denial of a writ of habeas corpus. In addition to the bill of exceptions there is printed therewith in the record now before this court the petition for the issue of the writ of habeas corpus, the order of a Justice of the Superior Court that the writ of habeas corpus issue, the officer's return thereon, a petition for release, the docket entries in the case, a transcript of the evidence containing a complete record of the proceedings before the Justice of the Superior Court hearing the writ and his order denying the writ and allowing exceptions thereto. No part of the aforesaid printed record is by reference or otherwise made a part of the bill of exceptions presented in the record.

The court in considering the exceptions cannot travel outside of the bill itself. Without that part of the printed record accompanying the bill of exceptions, including the transcript of the evidence, it is impossible for this court to pass upon the issues intended to be raised by the bill of exceptions. Upon examination of those parts of the record presented to us which are not made a part of the bill of exceptions, and especially the docket entries, it is apparent that the failure to incorporate the same in the bill of exceptions by reference was inadvertent error.

"When errors in pleading or procedure render it impossible to pass upon the issues intended to be raised by a bill of exceptions, and the ends of justice require such action, this court has authority under R. S., Chap. 91, Sec. 14, to order a remand for the correction of such errors." *Powers* v. *Rosenbloom,* 143 Me. 408, 59 Atl. (2nd) 844. *Moores* v. *Inhabitants of the Town of Springfield,* 143 Me. 415, 62

Atl. (2nd) 210. This is such a case and it is remanded to any Justice of the Superior Court for correction of the bill of exceptions by incorporation therein of the pleadings and evidence and the other aforesaid essential material, in term time or vacation, and the re-entry of the case at the February Term 1951 of the Law Court.

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

CLAYTON R. BRAGDON

vs.

MORRIS SHAPIRO, D.B.A.

ARMY & NAVY STORE

Aroostook. Opinion, January 5, 1951.

New Trial. Contracts. Quantum Meruit. Words and Phrases.

On motion for a new trial the evidence with all proper inferences drawn therefrom is to be taken in the light most favorable to the jury's findings and the verdict stands unless manifestly wrong.

Where the terms of an employment agreement set forth no standard sufficiently certain to guide the fact finder in determining what the bonus or extra compensation should be, the agreement is too indefinite to permit recovery thereon.

A jury may properly render a verdict under a *quantum meruit* count for the value of services rendered upon an agreement intended by both parties to provide a salary plus a bonus even though the terms of the agreement are too indefinite to permit recovery of a bonus or extra compensation as such.

A jury may properly be instructed in substance that the promise of an indefinite payment in addition to a definite wage, though unenforceable as made, may be significant as rebutting any understanding that the definite wage was intended to liquidate the value of services rendered.

There is no error where the presiding justice, in directing the jury that it could not find upon the *quantum merit* count "except that you believe the story or contention of the defendant," used the word "contention" to mean story or version of the agreement presented by the defendant and not the defendant's theory of the case.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

Action for money due for services while employed in defendant's store for thirty-nine weeks from January 1, 1947

until September 1947. In the first count, plaintiff seeks to recover $1950 upon a contract for a salary of $100 per week. The second count is upon a *quantum meruit* for the value of services rendered in excess of $50 per week. Verdict for the plaintiff in the sum of $1,369.65 which was apparently rendered upon the *quantum meruit* count. Defendant moved for a new trial and took exceptions to a portion of the judge's charge. Motion overruled and exceptions overruled. Case fully appears below.

Donald N. Sweeney, for plaintiff.

Scott Brown,
Ralph K. Wood,
Roland B. Atchison, for defendant.

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

WILLIAMSON, J. This is an action by the plaintiff to recover a balance due for services rendered while plaintiff was employed in defendant's store for a 39-week period from January 1 to September 27, 1947. In the first count the plaintiff seeks to recover the sum of $1,950 upon a contract for a salary of $100 a week. The second count is on a *quantum meruit.* From the jury verdict of $1,369.55, it is apparent that the jury rendered its verdict under the *quantum meruit* count for the value of plaintiff's services in excess of $50 a week received from the defendant. The case is before us on a motion for a new trial and on exceptions to a portion of the judge's charge.

In considering the motion we will apply the familiar rules that the evidence with all proper inferences drawn therefrom is to be taken in the light most favorable to the jury's findings and that the verdict stands unless manifestly wrong. *Morneault* v. *Inh. of Town of Hampden,* 145 Me. 212, 74 A. (2nd) 455; and *Lessard* v. *Samuel Sherman Corporation,* 145 Me. 296, 75 A. (2nd) 425.

Plaintiff was employed by defendant from 1934 until April 1943. In 1937 he was transferred from defendant's store in Houlton to become manager of the store then opened by defendant in Presque Isle. Through 1942 plaintiff's compensation was paid by a weekly wage in increasing amounts and by a bonus at each Christmas time or shortly after the new year in varying amounts. Defendant stated, "it was really a Christmas present in the first place, then it worked into a bonus." From January 1st until April 1943, compensation was paid by a weekly salary and a bonus on termination of employment.

In 1942 and 1943 the weekly salary with the bonus made a total compensation of $100 on a weekly basis. We are not here concerned, nor was the jury, with deductions for income or social security taxes withheld by the employer.

In July 1946 the plaintiff was again employed under an agreement stated by plaintiff as follows:

> "A. Well, I was to go back managing the store as I had done before when I was working for him full time, pay to be the same as in the past, and we decided on fifty dollars—to draw fifty dollars per week and the balance to be paid at the end of the year.
>
> Q. Now, you went to work in July, 1946 in the new store under that arrangement?
>
> A. Yes."

The defendant, while denying any agreement beyond a $50 weekly salary, said, speaking as of July 1946: "Well, they (meaning plaintiff and other full-time employees) knew I always used them all right in the past and they figured I would probably use them likewise."

At Christmas time in 1946 plaintiff again received a bonus which with the weekly payments of $50 made his

compensation $100 a week. In 1947 he continued to receive $50 a week. He voluntarily ended his employment on September 27th.

Shortly before leaving his position the plaintiff drew and cashed a bonus check, to use plaintiff's words, "for the balance of pay, which amounted to one hundred dollars a week." On informing defendant, plaintiff stated the following conversation between them:

> "I told him what I had done and he said you shouldn't have done that because the balance of pay didn't come until the end of the year. I says: 'If that is the way you feel about it, I can wait until the first of the year.' "

The plaintiff then returned the amount so drawn and after the first of the year requested payment by the defendant who informed him in effect that to collect the balance he should have remained in defendant's employ until the end of the year.

Such are in brief the facts from which we are to determine whether the jury was entitled to find for the plaintiff with damages measured by the fair and reasonable value of his services for the 39 weeks of employment in 1947 less the weekly payments of $50 received from defendant.

It was the function of the jury to pass upon the credibility of the witnesses, and in our view the jury was entitled to make the findings of fact which we have stated briefly and not in complete detail.

Plaintiff, as we have said, urged that he had a firm contract from July 1946 for a weekly salary of $100, basing his claim on the ground that his pay was "to be the same as in the past." In this conclusion the jury did not agree and understandably so. "In the past," if we take 1942 and 1943, his "pay" had been a weekly salary plus a bonus making his "pay" $100 a week. Prior to 1942 both weekly sal-

ary and the bonus had been in varying amounts, and "in the past" the bonus was paid at each year end and at the termination of employment in 1943.

The plaintiff erroneously concluded that the element of a bonus, uncertain in amount, was not included in the 1946 agreement. The agreement was that plaintiff should receive $50 a week salary plus extra compensation or bonus at the end of each year without, however, forfeiture of the bonus by leaving defendant's employ during the year. We may point out that the agreement of July 1946 continued without change through 1947, and further that at no time was the sum of $100 a week specifically mentioned by either party in July 1946 or thereafter, or at least until the employment was ended.

The defendant contends in his argument that the agreement provided for a weekly salary of $50 plus a bonus at the year end, if business warranted, and in such an amount as defendant might determine.

The defendant fairly sets forth the agreement between the parties except that the bonus did not depend upon plaintiff remaining in the employ of defendant until the end of the year. Such was not the case in 1943 and the agreement of 1946 was for pay as in the past. In this respect the arrangement differed from the more usual bonus wherein the employee normally forfeits his bonus if he leaves his position voluntarily.

The agreement was substantially for a share of the profits, determined roughly to be sure before the year end. The defendant said that the payments over the years to 1943 "always varied according to the business we done, naturally." He estimated his profits "mainly on what money I took in . . . . The more we took in, the more I thought we would make." His actual profit was ascertained later upon taking stock. Defendant succinctly stated the situation in saying:

> "They (meaning the plaintiff and other full-time employees) always had that bonus, and according to what business we were going to do, it was up to them."

Defendant cannot well say that the bonus was a gift or gratuity. A bonus in some amount, if business warranted; that is, if there were profits, was a part of the compensation or reward for which plaintiff performed his services.

The plaintiff could not recover upon the contract alleged by him, for the jury properly found that such a contract did not exist. No more could the plaintiff recover upon the agreement which the jury could properly find existed in fact. Such an agreement is not an enforceable contract. Its terms are too indefinite and meaningless to permit recovery of a bonus or extra compensation as such. No standard is set forth sufficiently certain to guide the fact-finder in determination of what the bonus should be. Too much is left to the judgment of the employer.

> "An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain."

Restatement of the Law, Contracts, Sec. 32; *Ross* v. *Mancini,* 146 Me. 26, 76 A. (2nd) 540, 12 Am. Jur. 554, 35 Am. Jur. 501, 17 C. J. S. 364. See also *Corthell* v. *Summit Thread Co.,* 132 Me. 94, 167 A. 79, 92 A. L. R. 1391 and note for full discussion of the principles involved.

There is no taint of illegality about the agreement and the only reason why the plaintiff may not recover thereon rests in its lack of definiteness. There has been a full performance of its terms by the plaintiff. He does not seek damages for failure to give employment, but the fair value of his services satisfactorily rendered under an agreement intended by both parties to provide a weekly salary plus a bonus.

Plaintiff is not barred, however, from relief. It is not necessary that he lose the fair value of his services by reason of an illusory contract for a bonus.

The present case is analogous to that of *Von Reitzenstein* v. *Tomlinson,* 249 N. Y. 60, 162 N. E. 584, in which the plaintiff was entitled to a per diem stipend plus an appropriate percentage of the benefits, if any, resulting from his services. Justice Cardozo, then Chief Judge of the New York Court of Appeals, stated the applicable principles as follows:

> "The defendant's promise to pay 'an appropriate percentage' in excess of the per diem stipend is too indefinite and meaningless to be enforceable as a promise for the payment of anything more than the reasonable value. Varney v. Ditmars, 217 N. Y. 223, 111 N. E. 822, Ann. Cas. 1916B, 758. It is, however, significant as rebutting an agreement that value was liquidated by the liquidation of the daily wage. As to what the work was worth, the door is still wide open. Whatever it was worth in excess of payments made, the plaintiff should receive. *Varney* v. *Ditmars, supra;* - - - - The case is to be disposed of as founded on a common count for service rendered at request."

Professor Williston, in discussing offers and agreements indefinite as to price, says:

> "But the promise of an indefinite payment in addition to a definite price, though unenforceable as made, may be 'significant as rebutting an agreement that the value was liquidated by the liquidation of the daily wage,' and thus preserve the right to recover to the extent the reasonable value exceeds the specified sum."

I Williston On Contracts, Revised Edition, Sec. 41, citing the *Von Reitzenstein* case, *supra.* See also I Williston, Sec. 49 and cases cited.

In the instant case, the agreement carried more than rebuttal value. It effectively disposed of any understanding that the weekly wage was intended to liquidate the value of the services rendered. In substance, the jury was so directed by the presiding justice and properly so.

The bonus payments in 1942 and in 1943—and again in 1946—were 100 per cent of the salary. $50 a week became with the bonus $100 a week. It would be difficult indeed to convince a businessman on such a record that $50 a week was intended to pay for the value of the services rendered, and that year after year the employer paid from the kindness of his heart $100 for services valued by him at $50.

The jury could properly find as they did that the plaintiff was entitled to the fair value of his services for the 39-week period of 1947 and that such value was not measured by the payment of $50 a week. The motion for a new trial was a so-called "general motion" on the usual grounds including excessive damages. Neither in brief nor in argument did defendant suggest that the damages were excessive and that ground of the motion may be considered as waived.

We return to consideration of the exception to an instruction in the charge which reads:

> ". . . . On the other hand if you find that the defendant's contention is correct and you find for the defendant, then I have reference to the second count in the plaintiff's writ, and that is what counsel has stated to you is known and we call it quantum meruit; that is, meaning what the matter or the thing is reasonably worth.
>
> Now, if you find for the plaintiff, and in connection with his contention, then as I have stated to you you will find in the amount stated and interest if you find there was a demand. If you believe the defendant's contention; that is, that his contention is correct, then, in finding for the defendant, you

> may find for the defendant or you may find for the plaintiff upon the defendant's contention in the sum which you feel is fair and reasonable for the services rendered in excess of the amount of fifty dollars already paid—some bonus was to be paid—to the plaintiff either at the end of the year or at the termination of the plaintiff's services and you find that the services of the plaintiff were terminated without breach on the part of the plaintiff, then you may find that the plaintiff is entitled to recover what is reasonably fair for the services in excess of the fifty dollars a week which the defendant states was due to the plaintiff and was paid to him. You will not find upon the second count, upon quantum meruit, except that you believe the story or the contention of the defendant."

Taken as a whole, the instruction directed the jury if "the story or the contention" of the defendant was believed, to ascertain the reasonable value of the plaintiff's services and to render a verdict based thereon with credit for the payments made. If the value of the services exceeded the credits, the verdict would be for the plaintiff; otherwise for the defendant.

The defendant in his argument placed undue stress upon the word "contention." The word in the sense used by the presiding justice meant the story or version of the agreement presented by the defendant, and not the defendant's theory of the case. The court was directing the jury's attention to the legal results which would follow dependent upon the facts found by the jury. Taken in this light, the instruction fairly and understandably set forth the situation which the jury could properly find existed, and on such facts the verdict was properly rendered.

It was unnecessary that the charge set forth in detail the evidence on either side or the legal reasons which called for a decision on the *quantum meruit* count. Had the instruction gone into more detail, both of fact and of law, the plain-

tiff would have been entitled to an instruction which would have led to the same result. The defendant takes nothing from the exception to the instruction.

The entry will be:

Motion overruled and exceptions overruled.

FREDERICK THOMAS GERRISH

vs.

J. WALLACE LOVELL, WARDEN

MAINE STATE PRISON

Kennebec. Opinion, January 9, 1951.

Habeas Corpus. Courts.

The Supreme Judicial Court sitting as a Law Court has no jurisdiction over an application for a writ of habeas corpus since R. S., 1944, Chap. 113, Sec. 6 means the Supreme Judicial Court sitting *nisi prius*.

PER CURIAM.

This is an application, referred to therein as a petition, for a writ of habeas corpus. It was presented to the Supreme Judicial Court of the State of Maine, sitting as a Law Court (hereinafter referred to as the Law Court), on the first day of the December 1950 session thereof begun and held at Augusta, Maine, on the second Tuesday of December, 1950. It was forwarded by mail in a letter addressed—

"To Maine Supreme Judicial Court
Att. Hon. Judge Harold H. Murchie
Augusta Maine".

> The letter of transmittal stated that it was forwarded "to this Hon Court, in session, for hearing and disposition of the case,".

The application recited that duplicates thereof were being "forwarded and supplied" to the following named justices of the Maine Supreme Judicial Court — "Honorable, William B. Nulty, Raymond Fellows, Edward F. Merrill, Robert B. Williamson, Sidney St. Felix Thaxter." Each of these named justices received such duplicate applications.

With respect to applications for writs of habeas corpus, R. S., Chap. 113, Sec. 6 is as follows:

> "Sec. 6. *Application, how to be made.* Application for such writ by any person shall be made to the supreme judicial or superior court in the county where the restraint exists, if in session; if not, to a justice of either of said courts; and when issued by the court, it shall be returnable thereto; but if the court is adjourned without day or for more than 7 days, it may be returned before a justice of either of said courts, and be heard and determined by him."

This section of the statute is mandatory, and it is only to the courts therein specified or the justices thereof that applications for writs of habeas corpus may be made, and then only as therein provided.

The history of this statute illuminates its interpretation. By R. S., 1857, Chap. 99, Sec. 6 it was provided in part:

> "An application for such writ by any person shall be made to the supreme judicial court in the county where the restraint exists, if in session; if not, to a justice thereof;".

This same provision was continued in R. S., 1871, Chap. 99, Sec. 6.

By the act establishing a Superior Court for the County of Cumberland, P. L., 1868, Chap. 151, Sec. 5, concurrent original jurisdiction was conferred upon that court of proceedings in habeas corpus within said county. By the act establishing the Kennebec County Superior Court, P. L., 1878, Chap. 10, Sec. 5, concurrent original jurisdiction of proceedings in habeas corpus within that county was conferred upon that court.

In the revision of 1883, there then being two Superior Courts having concurrent original jurisdiction with the Supreme Judicial Court of proceedings in habeas corpus within their respective counties, and the Supreme Judicial Court having jurisdiction over such proceedings in all counties, it was provided therein, R. S., 1883, Chap. 99, Sec. 6:

> "Application for such writ by any person shall be made to the supreme judicial or superior court in the county where the restraint exists, if in session; if not, to a justice thereof;".

This provision was continued in R. S., 1903, Chap. 101, Sec. 6 and in R. S., 1916, Chap. 104, Sec. 6. In the Revision of 1930, Chap. 113, Sec. 6, the Superior Court of statewide jurisdiction having been established, the section took its present form, the last phrase above quoted, "if not, to a justice thereof," being changed to read, "if not, to a justice of either of said courts."

Prior to the establishment of the Superior Court, with statewide jurisdiction, in 1930, the statutes conferring jurisdiction upon the Supreme Judicial Court in matters of habeas corpus, and Sec. 6 which provided that applications should "be made to the supreme judicial or superior court in the county where the restraint exists, if in session," referred to the Supreme Judicial Court acting in its capacity as a court of original jurisdiction in session at *nisi prius*, as distinguished from the Law Court. As said in the very

recent case of *Carroll* v. *Carroll,* 144 Me. 171, 66 Atl. (2nd) 809:

> "The Supreme Judicial Court sitting as a Law Court is of limited jurisdiction. As such, it is a statutory court and can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. Appeal of Edwards, Appellant, 141 Me. 219, 4 A. 2d 825; Cole v. Cole, 112 Me. 315, 92 A. 174; Public Utilities Commission v. Gallop, 143 Me. 290, 62 A. 2d 166."

A writ of habeas corpus for the purpose of testing the legality of a restraint is an original writ. If the court receives and acts upon an application therefor, if it issues or denies such writ, or if it determines the legality of the restraint in a hearing upon the writ and either discharges or refuses to discharge the person brought before it on such writ, such action on its part is the exercise of original jurisdiction. No statute in force at the time of the establishment of the Superior Court with statewide jurisdiction, by consolidation of the then existing Superior Courts and the conferring of additional powers upon the Superior Court, conferred such original jurisdiction upon the Law Court over proceedings in habeas corpus. The Law Court had no power or authority to issue original writs of habeas corpus and determine thereon the legality of the restraint of a person produced before it on such a writ issued by it. Such original jurisdiction was in the Supreme Judicial Court at *nisi prius* as distinguished from such court acting in its capacity as the Law Court.

The act establishing the new Superior Court with statewide jurisdiction did away with the necessity and occasion for the holding of regular sessions of the Supreme Judicial Court at *nisi prius,* and granted exclusive jurisdiction to the Superior Court over many of the matters which were theretofore within the jurisdiction of the Supreme Judicial

Court at *nisi prius*. Nevertheless, there remains in the Supreme Judicial Court jurisdiction and power to hold *nisi prius* sessions when occasion requires in matters over which that court now has original jurisdiction. Such sessions are occasionally held and when held the Supreme Judicial Court is in session.

The change in the court system and the establishment of the Superior Court of statewide jurisdiction did not confer upon the Law Court original jurisdiction over proceedings in habeas corpus. Nor has such jurisdiction been conferred upon the Law Court by any statute. Original jurisdiction over such proceedings still remains in the Supreme Judicial Court at *nisi prius*. R. S., Chap. 95, Sec. 1. Applications for habeas corpus made to the Supreme Judicial Court can only be made to that court when in session at *nisi prius*. R. S., Chap. 113, Sec. 6 when it uses the phrase "supreme judicial court x x x x if in session" means the Supreme Judicial Court sitting at *nisi prius* as distinguished from the Law Court. The Law Court has no jurisdiction over the application for a writ of habeas corpus presented to it by this applicant.

Nor would it avail the applicant anything if, contrary to his expressed intent, we were to treat one or all of the duplicate applications as applications made directly to one or all of the justices individually. No relief could be granted. The applicant did not comply with the provisions of R. S., Chap. 113, Sec. 8. He did not produce to the court or justices or anyone of them a copy of the precept by which he is restrained, attested by the officer holding him. Nor does he even set up the claim that the warden of the prison in whose custody he is "refuses or unreasonably delays to deliver to the applicant an attested copy of the precept by which he restrains him, on demand therefor," and that because thereof non-production of said copy may be dispensed with under the provisions of Sec. 10 of said chapter. It is not to be implied from the foregoing reference

to the applicant's failure to comply with the provisions of Sec. 8 that we consider that his application is otherwise sufficient or would entitle him to a writ. The question or questions involved therein are not before us for decision, and we neither express nor do we intimate an opinion thereon.

As the court sitting as a Law Court is without jurisdiction to act in the premises, the application should be dismissed, as distinguished from denied.

Application dismissed.

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

ZINA M. WITHAM

vs.

CLEMENT N. QUIGG

Kennebec. Opinion, January 8, 1951.

New Trial.

On disputed questions of fact the Law Court is limited to the question whether the verdict is so plainly contrary to the evidence that manifestly the jury was influenced by prejudice, bias, passion, or mistake.

ON MOTION FOR A NEW TRIAL.

Action on the case for trespass involving the construction of language used in a deed granting the defendant a right of way across the plaintiff's land. The jury returned a general verdict for the plaintiff and two special verdicts and found the width of the right of way. The defendant moved for a new trial. Motion overruled. Case fully appears below.

Locke, Campbell, Reid and Hebert,
James L. Reid,
Robert O'Connor, for plaintiff.

Sanborn and Sanborn,
Richard L. Sanborn, for defendant.

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

NULTY, J. This case is before the Law Court on motion for a new trial filed by the defendant after jury verdict for the plaintiff in Superior Court for Kennebec County. The

writ alleges trespass by the defendant on land of the plaintiff fronting on Bangor Street in Augusta, Maine, and this alleged trespass depends upon the construction of the language in a deed from plaintiff to defendant dated November 29, 1933, which deed conveyed certain property located in the rear of plaintiff's property and granted defendant a right of way across plaintiff's land in the following language:

> "A right of way is hereby conveyed to the said Clement N. Quigg, his heirs and assigns forever, on the northerly side of lot of said grantor which is clearly defined on the face of the earth and now in use."

An examination of the record discloses the following facts which may have some bearing in the interpretation of the language describing the disputed right of way.

Sometime in 1930 plaintiff acquired certain property on the east side of Bangor Street in Augusta, Maine. Plaintiff used this property in the operation of a filling station and in the rear of the said property plaintiff had constructed a three-car wooden garage. The northerly side of plaintiff's property was subject to a certain right of way granted to one Hayden in order to enable the occupants of the Hayden property to use a certain small garage located in the rear of the Hayden property and adjoining the plaintiff's property on the north.

On October 17, 1932, the plaintiff, in writing, leased to the defendant said three-car garage and the record indicates that the plaintiff knew that the defendant was to conduct a general garage business on the property so leased. This lease remained in effect until November 29, 1933, when the plaintiff deeded to the defendant the rear lot together with the buildings thereon and granted defendant the right of way hereinbefore set forth. The record shows

that defendant conducted on the premises the same type of of a small general garage business by himself and that he used the northerly side of plaintiff's lot as a means of ingress and egress. Defendant claimed that he used all of the plaintiff's land lying between the northerly side of the filling station building and the Hayden line for the purposes of ingress and egress. The distance between the northerly side of the plaintiff's filling station building and his northerly line is stipulated to be 26.6 feet of which about four feet was used by a flight of stairs which led from the ground to the second floor of plaintiff's filling station building in which there was an apartment where the plaintiff formerly lived and subsequently where some of plaintiff's tenants lived. The space actually left, taking out the flight of stairs, therefore, would be 22.6 feet which defendant claimed he used during the period that he had the property under lease and after he purchased it and received the deed hereinbefore mentioned. The plaintiff denies this and states that he at all times had his car parked alongside the flight of stairs and that many times cars were parked two deep and that the defendant actually used about ten, twelve or fifteen feet of the plaintiff's premises on the northerly side of the lot near the Hayden line. The record shows that the average car is about six feet wide and that if there were two cars parked alongside or double breasted there would be left for the defendant to use approximately ten feet which was the clearly defined right of way then in use (meaning as of the date of the deed). The record shows that there were no marks to indicate the width of the right of way and that neither the plaintiff or defendant ever discussed the width of that right of way other than the fact that it would be along the northerly side of the plaintiff's property, except there was some conversation with respect to the width of the so-called Hayden right of way which appears to be understood by both plaintiff and defendant to be eight feet in width.

There was also some conversation at the time of the making of the deed between plaintiff and defendant with respect to the plaintiff's reserving an eight foot right of way on the westerly side of the lot plaintiff sold defendant, but apparently the record does not show that the width of the right of way granted the defendant by the plaintiff on the northerly side of plaintiff's lot was ever discussed other than that plaintiff and defendant were to swap rights of way. The record discloses that the plaintiff and defendant carried on their respective businesses from 1932 until 1949 without any question of use of the right of way to the street and in the meantime defendant had constructed a brick garage in the rear of the property purchased from the plaintiff and plaintiff had built additions onto his filling station building extending it towards the rear of plaintiff's lot. There is evidence to show that plaintiff put his extension on his filling station building at an angle to more or less accommodate both the defendant and himself, at least he so testified. The record shows that defendant's business increased and that during the early years when he was doing a small general garage business not too many trucks were serviced but in later years he began to work on large trailer trucks or so-called van trucks and the record discloses that there was considerable difficulty turning these trucks so that they would not hit plaintiff's building and do damage thereto. The record clearly shows that a certain amount of friction developed along in 1949 and it became necessary for both plaintiff and defendant to ascertain just what the language in the deed dated November 29, 1933, did mean with reference to the width of the right of way. There is no question from the record but what defendant used a much larger portion of the 26.6 foot strip during the years from 1932 to 1949 than what the plaintiff claimed he granted defendant but plaintiff states that defendant's use was by sufferance and toleration and for accommodation. The plaintiff in order to bring the matter

to a head, after some discussion with the defendant, erected a so-called fence extending from the north side of his filling station building out into the disputed strip and the defendant promptly knocked the fence down whereupon plaintiff commenced the instant action on the case of trespass. The case was ably tried by both parties and it must be assumed that the instructions of the court were correct because no exceptions were taken to the charge of the presiding justice. The jury was instructed to bring in both general and two special verdicts and the special verdicts were framed in such a way that the jury could determine from the evidence what was the width of the right of way granted by the plaintiff to the defendant in two sections, the one, the section from the street to a point opposite the stairway which protruded four feet from plaintiff's filling station building, the second, the width from that point to the rear of plaintiff's property. The jury brought in a general verdict for the plaintiff and two special verdicts and found that the width of the right of way from the street to the point opposite the stairway was ten feet and from that point to the rear of plaintiff's land the right of way was twelve feet. The defendant, believing that the jury's findings were in error, now brings the matter forward to this court on motion. It should also be noted that the jury took a view of the premises prior to the trial.

In cases like the one at bar, after a jury has rendered its verdict, the Law Court is not a tribunal of the first instance having authority to hear and decide disputes upon questions of fact. Our power is limited to decisions of the question whether the verdict is so plainly contrary to the evidence that manifestly the jury was influenced by prejudice, bias, passion or mistake; otherwise their findings of fact are binding upon this court. See *Leavitt* v. *Seaney,* 113 Me. 119, 93 A. 46.

This court has many times stated the principles of law applicable to a case of this nature and it hardly seems nec-

essary to reiterate the rule so well known and so consistently applied in our State. See *Lessard* v. *Samuel Sherman Corp.*, 145 Me. 296, 75 A. (2nd) 425 and cases cited. See also *Chenery* v. *Russell*, 132 Me. 130, 133, 134, 167 A. 857.

In the instant case the burden of proving to the satisfaction of the court that the verdict was manifestly wrong is upon the one seeking to set it aside. See *Dube* v. *Sherman*, 135 Me. 144, 190 A. 809; *Perry* v. *Butler*, 142 Me. 154, 48 A. (2nd) 631; *Jannell* v. *Myers*, 124 Me. 229, 127 A. 156. In the instant case it is plain from the result and from a careful examination of the record that the jury adopted the views of the plaintiff with respect to the width of the right of way in controversy and there was ample credible evidence which would support their decision. The credit of the testimony of the witnesses of the plaintiff was for the jury and not for the court to decide. See *Jenness* v. *Park*, 145 Me. 402, 76 A. (2nd) 321 and cases cited.

In view of the above principles this court, sitting as a court of law, is without right to disturb the verdict of a jury which has heard the evidence on questions of fact such as existed in this case and where there appears to be no bias, prejudice or other errors of law or fact which would permit this court to take action. It therefore follows that the motion for a new trial must be overruled.

Motion overruled.

STATE OF MAINE

vs.

JAMES McCLAY, JR.

Kennebec. Opinion, January 23, 1951.

Intoxicating Liquor. Sentence. Pleading. Second Offense. Witnesses. Instructions.

The statute, R. S., 1944, Chap. 19, Sec. 121, relating to enhanced punishment for conviction of second or subsequent offense provides an enhanced punishment where for the *first offense* the court may impose a lesser punishment than it must impose for a second offense, even though the court *may impose* as severe a punishment for the first as for the second offense.

Under statutes providing for enhanced punishment for a second offense the prior conviction must be sufficiently alleged and proved beyond a *reasonable* doubt. Art. 1, Sec. 6, Constitution of Maine.

R. S., 1944, Chap. 100, Sec. 128 as amended by P. L., 1947, Chap. 265, Sec. 1, relates only to the qualification as witnesses of persons who have been convicted of crimes, and to the admission in evidence of their prior conviction of certain crimes (i.e. felony, any larceny, or any other crime involving moral turpitude) for the purpose of affecting their credibility. It neither forbids nor limits the introduction of evidence for *other purposes* properly involved in the case, nor does it, even *by implication* modify the rules of criminal pleading.

It is the duty of the court to give the jury adequate instructions as to the purpose and effect of allegations and evidence relating to a former conviction and carefully limit the purpose and effect thereof as will protect the respondent's legal rights.

After a conviction of operating a motor vehicle while under the influence of intoxicating liquor upon a plea of not guilty and an appeal to the Superior Court, a motion to quash the complaint comes too late, unless leave has been granted in the Superior Court to withdraw the plea of not guilty, or to move to quash without withdrawing the plea; such leave is discretionary.

ON REPORT.

Respondent upon a plea of not guilty, was convicted of operating a motor vehicle while under the influence of intoxicating liquor. The warrant contained an allegation of a previous conviction of the same offense. After conviction and sentence respondent appealed to the Superior Court and there moved that the warrant and complaint be quashed for the reason that the allegation of a previous conviction was prejudicial and in contravention of R. S., 1944, Chap. 100, Sec. 128 as amended by P. L., 1947, Chap. 265, Sec. 1. The case was reported to the Law Court by the presiding justice. Case remitted to the Superior Court. Case to stand for trial below on respondent's plea of not guilty.

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

Dubord & Dubord,
James E. Glover, for respondent.

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

MERRILL, J. On report. The respondent in this case was arrested and, upon a plea of not guilty, convicted in the Municipal Court of Waterville, in the County of Kennebec, on a complaint and warrant which alleged that on the twenty-ninth day of April, A.D. 1950, at Vassalboro, in the County of Kennebec and State of Maine, he

> "did operate and drive a certain motor vehicle, to wit, a automobile on a certain public highway, to wit, Route #201, while under the influence of intoxicating liquors, against the peace of the State and contrary to Statute in such case made and provided. And your Complainant, on his oath aforesaid, further complains that the said James Mc-

> Clay, Jr. was convicted for the crime of operating a motor vehicle while under the influence of intoxicating liquors in the Municipal Court of Augusta on the 10th day of September, 1946, against the peace of the State and contrary to the Statute in such case made and provided."

The respondent was sentenced to "pay a fine of three hundred dollars and costs of prosecution and in addition thereto that he be imprisoned 3 months in the county jail. Jail sentence suspended on payment of fine and costs." From this sentence the respondent appealed to the Superior Court at the term thereof to be held at Augusta, in said county, on the first Tuesday of June next. In the Superior Court at the June Term, 1950, the respondent moved that said complaint be quashed for the following reasons:

> "that said complaint is invalid in that the complaint contains an allegation that the respondent had been previously convicted of the crime of operating a motor vehicle while under the influence of intoxicating liquor; said allegation being prejudicial to the Respondent, and in contravention of Section 128, Chapter 100, Revised Statutes of 1944, as amended by Section 1, Chapter 265, Public Laws of 1947."

The case was reported to this court by the justice presiding to determine the question of the validity of the complaint with the stipulation:

> "If the complaint be adjudged bad, a *nolle prosequi* shall be entered; otherwise, the case to stand for trial below on Respondent's plea of not guilty."

The respondent was charged with the violation of that portion of R. S., Chap. 19, Sec. 121 which reads as follows:

> "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of

> intoxicating liquor or drugs, upon conviction shall be punished by a fine of not less than $100, nor more than $1,000, or by imprisonment for not less than 30 days, nor more than 11 months, or by both such fine and imprisonment. Any person convicted of a 2nd or subsequent offense shall be punished by imprisonment for not less than 3, nor more than 11 months, and in addition thereto, the court may impose a fine as above provided."

This statute provides an enhanced punishment for conviction of a second or subsequent offense of the same character. This statute means that a person who has been convicted of violating this statute, if again convicted for a second or subsequent violation of the same statute, is subjected to the enhanced or increased punishment provided for in such case.

Counsel for the respondent urges that there is no enhancement of punishment because the court in imposing sentence for a first offense can impose any punishment that it could impose for the second or subsequent offense. While it is true that under this statute the court *may impose* as severe punishment for the first offense as it can for the second or subsequent offense, nevertheless, for a *first offense* the court *may impose a lesser punishment* than it *must impose* for a second or subsequent offense under the mandatory terms of the statute respecting punishment for the second or subsequent offense. Under this section of the statute for a first offense the court could impose a sentence of a fine only, or it could impose a sentence of not less than 30 days and less than 3 months. For a second offense the provision that a sentence of not less than 3 months be imposed is made mandatory. All discretion as to imposing a fine only or a sentence for less than 3 months is taken away. This constitutes an enhancement or increase in the punishment for a second offense.

It has been generally held that in order to subject an accused to the enhanced punishment for a second or sub-

sequent offense it is necessary to allege in the indictment or complaint the fact of a prior conviction or convictions. A detailed review of the authorities would serve no useful purpose. They may be found collected in the very exhaustive notes in 58 A. L. R. 20 at 64 et seq. and 68 A.L.R. 345, 366 et seq.

The Constitution of this state, Art. I, Sec. 6, provides that in all criminal prosecutions, the accused shall have a right "To demand the nature and cause of the accusation, and have a copy thereof;". The purpose of this constitutional guaranty in the bill of rights is to afford "to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprise him of the criminal act charged;". See *State* v. *Lashus,* 79 Me. 541; *Carl G. Smith, Petr.* v. *State of Maine,* 75 Atl. (2nd) 538.

As said by Chief Justice Shaw in *Tuttle* v. *Commonwealth,* 2 Gray (Mass.) 505, Page 506:

> "When the statute imposes a higher penalty upon a second and a third conviction, respectively, it makes the prior conviction of a similar offence a part of the description and character of the offence intended to be punished; and therefore the fact of such prior conviction must be charged, as well as proved. It is essential to an indictment, that the facts constituting the offence intended to be punished should be averred. This is required by a rule of the common law, and by our own Declaration of Rights, art. 12."

In a later case, *Commonwealth* v. *Harrington,* 130 Mass. 35, an enhanced sentence was provided by statute for a conviction for drunkenness in the case of those who had been convicted of a like offense twice during the last preceding twelve months. *The statute further provided "it shall not be necessary in complaints under the act to allege*

such previous convictions." On a complaint for drunkenness which did not allege two previous convictions of a like offense within the last preceding twelve months, the respondent was sentenced to the enhanced penalty, the evidence of previous convictions being produced when the motion for sentence was made. The court held:

> "It is provided by art. 12 of the Declaration of Rights that no subject shall be held to answer for any crimes or offence until the same is fully and plainly, substantially and formally, described to him. When a statute imposes a higher penalty on a third conviction, it makes the former convictions a part of the description and character of the offence intended to be punished. Tuttle v. Commonwealth, 2 Gray, 505. Commonwealth v. Holley, 3 Gray, 458. Garvey v. Commonwealth, 8 Gray, 382. It follows that the offence which is punishable with the higher penalty is not fully and substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it. That clause of the statute, therefore, which provides that it shall not be necessary, in complaints under it, to allege such previous convictions, is inoperative and void, as being contrary to the provisions of the Declaration of Rights."

That portion of Sec. 6 of Art. I of our Constitution above quoted, while couched in different language from that of Art. 12 of the Declaration of Rights in the Massachusetts Constitution, guarantees and requires that an indictment or complaint for crime must fully and substantially describe to him any crime or offense with which he is charged. Such a description of an offense is included in the phrase "the nature and cause of the accusation."

Under the statutes providing enhanced punishment for second offenses for infraction of the so-called liquor laws, this court held that if the prior conviction was defectively

charged the respondent could only be convicted of the first offense. Not only must the prior conviction be sufficiently alleged, but before the respondent could be convicted of a second or subsequent offense, the prior conviction must be proved beyond a reasonable doubt. We said in *State* v. *Beaudoin,* 131 Me. 31, 33:

> "Counsel for respondent argues that it was error to call the attention of the jury to the allegation of a prior conviction and to require a finding as to that fact. The brief states, 'It is of no concern to the jury how many times the respondent has previously been convicted of a like offense.'
>
> But the respondent had entered a plea of not guilty. It was incumbent on the State to prove every material allegation in the indictment in order to justify the jury in bringing in a verdict of guilty. Respondent was not only charged with illegal transportation of liquor, he was charged with having been previously convicted of a similar offense and therefore liable to additional punishment. Two issues were raised, namely, the immediate infraction of law and the fact of a prior conviction. *State* v. *Gordon,* 35 Mont. 458; 90 Pac. 173; *People* v. *Ross,* 60 Cal. App. 163; 212 Pac. 627; *State* v. *Zink,* 102 W. Va. 619; 135 S. E. 905.
>
> Before he could be subjected to an enhanced punishment for a second violation of law, his guilt on the principal charge must be proved, and also the fact of former conviction. *Singer* v. *United States,* 278 Fed. 415; *Thompson* v. *State,* 66 Fla. 206; 63 So. 423; *McKiney* v. *Com.* 202 Ky. 757; 261 S. W., 276.
>
> In *State* v. *Livermore,* 59 Mont. 362; 196 Pac. 977, it was held that there must be proof of a former conviction on a charge of second or subsequent offense and the proof must be beyond a reasonable doubt. To the same effect are *People* v. *Price,* 6 N. Y. Crim. Rep. 141; 2 N. Y. Supp. 414; *State* v. *Barnhardt,* 194 N. C. 622; 140 S. E. 435; *Byler* v. *State* (1927 Ohio App.) 157 N. E. 421; *Thurpin* v. *Com.* 147 Va. 709; 137 S. E. 528.

> It is not sufficient to merely introduce the record of the conviction of a person bearing the same name as defendant. The identity of the person named in the record and the prisoner must be shown."

For other Maine cases involving allegations of prior convictions in complaints and indictments, and the necessity and effect thereof, see the following cases: *State* v. *Robinson,* 39 Me. 150; *State* v. *Regan,* 63 Me. 127; *State* v. *Hines,* 68 Me. 202; *State* v. *Woods,* 68 Me. 409; *State v. Wentworth,* 65 Me. 234; *State* v. *Gorham,* 65 Me. 270; *State* v. *Dolan and Hurley,* 69 Me. 573; *State* v. *Lashus,* 79 Me. 504; *State* v. *Wyman,* 80 Me. 117; *State* v. *Dorr,* 82 Me. 341; *State* v. *Simpson,* 91 Me. 77; *State* v. *Bartley,* 92 Me. 422; and *State* v. *Hatch,* 94 Me. 58.

It is true that in none of these cases was there objection made to the sufficiency of the complaint and warrant or indictment because of the *inclusion* of an allegation of a prior conviction. These cases involved the power of the court to impose the enhanced punishment on a second offender in cases where the allegation was either defectively made, or, if sufficiently made, proof of the allegation was defective. However, the effect of those cases, which hold that if the prior conviction was defectively alleged the respondent could only be convicted of a first offense, is to require that the allegation be included in the complaint and warrant or the indictment, to justify conviction of a second or subsequent offense, see *State* v. *Dorr, supra, State* v. *Lashus, supra, State* v. *Bartley, supra.*

It is urged by counsel for the respondent that these cases which involved infractions of the so-called prohibitory law with respect to the sale and handling of intoxicating liquors are not in point, because they arose when R. S., Chap. 57, Sec. 72, or previous acts of similar import, were in force, which section has since been repealed by P. L., 1947, Chap.

78. Sec. 72 of Chap. 57 of the Revised Statutes was as follows:

> "Every judge, recorder, and clerk of a municipal court and every trial justice and county attorney, having knowledge of a previous conviction of any person accused of violating any of the provisions of this chapter, in preparing complaints, warrants, or indictments, shall allege such previous conviction therein; and after such indictment is entered in court, no county attorney shall dismiss or fail to prosecute it except by special order of court. If any judge, recorder, or clerk of a municipal court, or any trial justice or county attorney neglects or refuses to allege such previous conviction, or if any county attorney fails so to prosecute, he forfeits $100 in each case, to be recovered in an action of debt, to be brought by the attorney-general in behalf of the state."

For a history of this section of the statute prior to the Revision of 1944, see R. S., 1930, Chap. 137, Sec. 21; R. S., 1916, Chap. 127, Sec. 41; R. S., 1903, Chap. 29, Sec. 61; R. S., 1883, Chap. 27, Sec. 52; R. S., 1871, Chap. 27, Sec. 45; P. L., 1877, Chap. 215, Sec. 4; P. L., 1867, Chap. 130, Sec. 7.

This section, R. S., 1944, Chap. 57, Sec. 72, and its predecessors are not the source of the rule of criminal pleading which requires that prior convictions be alleged in order that enhanced penalties may or must be imposed upon second or subsequent offenders under statutes providing therefor. That rule has its source in the common law. It is preserved by Art. I, Sec. 6 of our Constitution, *supra,* as a sacred right of, and a protection to, those accused of crime.

The purpose of this statute was not to establish a new rule of criminal pleading but, by the imposition of this mandatory duty on enforcement officers to make sure that the existing rules of criminal pleading were complied with, and

thus permit the imposition of the statutory punishment on second and subsequent offenders. To anyone familiar with the history of the prohibitory law in this state and the problems and methods of its enforcement, this purpose is apparent. The statute was passed in recognition of the fact that to authorize the imposition of the enhanced penalty for a subsequent offense the prior conviction must be alleged in the complaint or indictment as the case might be. It was the intent and purpose of the statute to prevent the prosecution of known second and subsequent offenders under complaints or indictments which would not allow courts to impose the enhanced penalty provided for such offenders.

The allegation of previous conviction in the complaint is in no way in contravention of R. S., 1944, Chap. 100, Sec. 128, as amended by P. L., 1947, Chap. 265, Sec. 1, as alleged in the motion to quash.

R. S., Chap. 100, Sec. 128, before it was amended in 1947 read:

> "No person is incompetent to testify in any court or legal proceeding in consequence of having been convicted of an offense; but such conviction may be shown to affect his credibility."

By P. L., 1947, Chap. 265, Sec. 1, the foregoing section of the statute was amended to read as follows:

> "No person is incompetent to testify in any court or legal proceeding in consequence of having been convicted of an offense; but conviction *of a felony, any larceny or any other crime involving moral turpitude* may be shown to affect his credibility."

This statute has no application to the present case. Section 128 of Chap. 100 of the Revised Statutes of 1944, as amended by P. L., 1947, Chap. 265, Sec. 1 relates only to the qualification as witnesses of persons who have been con-

victed of crime, and to the admission of evidence of their prior conviction of certain crimes for the purpose of affecting their credibility as witnesses. The amendment of 1947 limited the number and class of crimes, the conviction of which could be used for the purpose of impeachment. As such it established a rule of evidence restricting the use of prior convictions for a single purpose, that of impeaching a witness. It neither purported to forbid, nor did it in any way limit the introduction of evidence of a prior conviction for *other purposes* when such evidence would be admissible on *other* issues properly involved in the case. Nor did it, *even by implication,* modify the rules of criminal pleading. If an allegation of a prior conviction was necessary in a complaint and warrant or indictment prior to the amendment of 1947, to authorize the court to impose the enhanced punishment provided for a second or subsequent offense, such allegation is equally necessary for the same purpose since the amendment. If prior to the amendment the allegation of prior conviction must be proved as laid, and that beyond a reasonable doubt, in order that the respondent could be convicted of a second or subsequent offense, such proof is equally necessary therefor since the adoption of the amendment. The allegation of prior conviction can only be sustained by the introduction of evidence, and evidence thereof is admissible for that purpose.

Where the power and authority of the court to impose an enhanced penalty is *wholly* dependent on the existence of facts set forth in the statute, which facts are entirely separate from, and unconnected with, the commission of the immediate infraction, such additional facts must be alleged in the complaint or indictment and proved beyond a reasonable doubt to authorize the imposition of the enhanced penalty. The existence of such facts is an issue to be determined by the jury. Typical of this class of cases are those arising under statutes providing for enhanced

punishment for those previously convicted of a similar offense.

The foregoing rule is not in conflict with the cases of *Rell* v. *State of Maine,* 136 Me. 322 and *State of Maine* v. *McKrackern,* 141 Me. 194. The statute applicable to those cases which permits discretionary severity in the punishment of assaults which are of a "high and aggravated nature," now R. S., Chap. 117, Sec. 21, sets forth no specific facts entirely separate from and unconnected with the commission of the immediate infraction as a prerequisite for imposing the enhanced penalty. This is sufficient to distinguish those cases from the instant case, and to show that those cases are not in conflict with the foregoing rule as set forth in this opinion. We do not, by calling attention to this distinction, mean to hold, or even intimate, that there are not other distinctions between those cases and this one. Nor would we even intimate that the mere absence of a statutory provision requiring the existence of specific facts entirely separate from and unconnected with the commission of the immediate infraction as a prerequisite to imposition of the enhanced penalty *necessarily* excuses additional allegation and proof of the statutory requirements which authorize the imposition of such penalty. The necessity of allegation and proof of facts or conditions authorizing a statutory enhanced penalty will in each case depend upon the provisions of the particular statute under consideration.

It may be true as counsel for the respondent urges that it is prejudicial to the respondent to have the fact of his previous conviction alleged in the complaint and warrant. It may likewise be true that it is prejudicial to the respondent to have evidence of his prior conviction of a similar offense introduced in his trial for a subsequent offense of similar nature. On the other hand, it is of the utmost importance to the respondent who is charged with a second offense that he have the right to challenge the fact of his

prior conviction, have his day in court, and have his former conviction established only by a verdict of the jury upon proof establishing the same beyond a reasonable doubt. If prejudice there be, it is a necessary result of setting forth in the manner required by law the offense with which the respondent is now charged. Proper instructions by the court as to the purpose and effect of the allegation and evidence of former conviction will protect the respondent's legal rights. It is the duty of the court to give the jury adequate instructions with respect thereto, carefully limiting the purpose and effect of both the allegation of prior conviction and the proof thereof within legitimate bounds. If the court omits to give such instructions, the rights of the respondent to the same can be preserved by a request therefor, which, if refused, would constitute reversible error.

To avoid such incidental prejudice on the part of the jury as may result from allegation and proof of prior conviction, we cannot disregard the provisions of Art. I, Sec. 6 of the Constitution. To avoid such incidental prejudice we must not adopt a rule of criminal pleading which would expose the individual to punishment for an offense with which he is not charged. The maintenance of fundamental constitutional safeguards far outweighs such incidental prejudice as may result from compliance with the rule requiring both allegation and proof of prior conviction in the case of one charged as a second or subsequent offender.

A question of procedure should be here noted. On appeal, in the usual course, the plea entered below stands, and trial is anew. After a plea of not guilty in the court below and an appeal to the Superior Court, a motion to quash comes too late, unless *before the motion to quash is filed* there has been leave granted in the Superior Court "to withdraw the plea, or to move to quash without withdrawal of the plea." *State* v. *Haapanen*, 129 Me. 28. The granting of such leave by the Justice of the Superior Court is within his discretionary powers. In this case the justice would have been

fully warranted in denying either leave to withdraw the plea of not guilty or a motion for the right to move to quash without the withdrawal of the plea. See *State* v. *Haapanen, supra, State* v. *Thomas,* 90 Me. 223. However, as the Justice presiding in the Superior Court saw fit to report this case, we have decided the same upon its merits rather than upon the technical rules relating to the time within which, and the conditions under which, motions to quash may be filed in cases appealed from Municipal Courts.

The allegation of prior conviction does not render the complaint in this case bad. In accordance with the stipulation in the report the case must be remitted to the Superior Court to stand for trial below on respondent's plea of not guilty.

Case remitted to the Superior Court.

Case to stand for trial below on respondent's plea of not guilty.

CLAUD H. HULTZEN ET AL.

vs.

GERTRUDE WITHAM

BEATRICE C. STAPLES

vs.

GERTRUDE WITHAM

Cumberland. Opinion, January 25, 1951.

Directed Verdict. Easements. Co-owners. Repairs and Improvements.

A verdict should be directed for one party whenever one returned for the other party would not be sustainable and in testing the propriety of a directed verdict for one party, all pertinent evidence must be viewed in the light most favorable to the other.

Owners in common of an easement such as a right of way may make all reasonable repairs which do not affect his co-owners injuriously but cannot alter the grade or surface of such way as will make it appreciably less convenient and useful to a co-owner having equal rights therein.

Such owner cannot make repairs and improvements to a way designed solely to benefit his own property, although repairs are not rendered improper because of incidental benefit to such property.

As against strangers, the right of every owner of an easement to repel invasion is absolute. As between co-owners the rights to repair and improve, or object thereto, are relative.

Whether repairs made by one co-owner impeded or injured another co-owner in any use for which a way was or could have been made susceptible is a question for the jury to determine.

ON EXCEPTIONS:

Action by co-owners in common of an easement against another co-owner for the alleged obstruction of a right of

way by the erection of a sea wall. The defendant admitted the erection of the sea wall asserting that it constituted necessary and lawful repairs and improved the right of way for the benefit of all persons interested therein. To the direction of verdicts for the plaintiffs, defendant excepted. Exceptions sustained. Case fully appears below.

Harry C. Libby,
Philip F. Thorne, for plaintiffs.

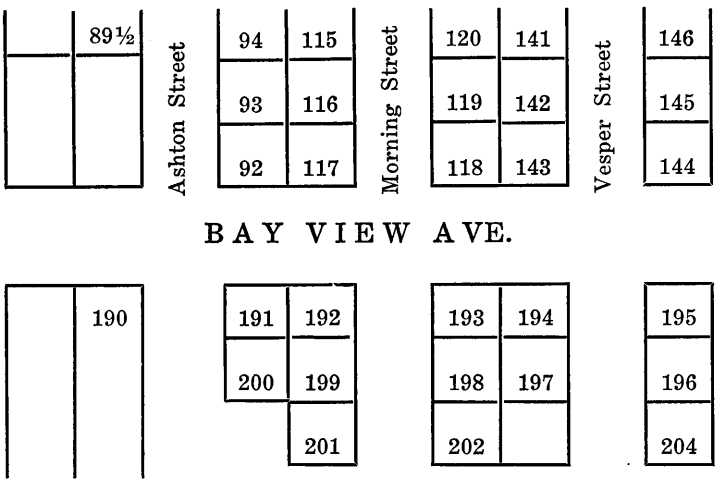
Frank P. Preti, for defendant.

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

MURCHIE, C. J. Bills of Exceptions of identical import, filed by the defendant, in each of these cases, challenge the propriety of the direction of verdicts for the plaintiffs, for nominal damages, on one of two counts, in each declaration, alleging that the defendant obstructed a right of way forty feet wide, identified as Morning Street Extension, by the construction of a sea wall across the full width thereof. On a second count, in each declaration, alleging the obstruction of another right of way, identified as Ashton Street Extension, by piling stones therein, motions of the plaintiffs to discontinue were granted prior to the direction of the verdicts.

The two rights of way are parts of strips of land delineated as streets, giving access to the shore or beach, on a "Plan of Lots at Higgins Beach," in the Town of Scarborough, recorded in the Registry of Deeds for Cumberland County on June 10, 1913, referred to hereafter as the "Plan." The plaintiffs assert their claims as owners of lots sold by reference to the Plan. A copy of a portion of it, introduced in evidence as Plaintiffs' Exhibit No. 1, is repro-

duced below, in its essential parts. It is stipulated that Bay View Avenue, shown thereon, runs approximately east and west.



All the strips of land delineated as streets on the Exhibit, and Bay View Avenue, are now public highways except the parts of Morning Street and Ashton Street which lie southerly of said Avenue. Such parts of Morning Street and Ashton Street are the rights of way referred to in the declarations, and in the evidence, as extensions. The beach lies southerly of Lots Nos. 201, 202, 203 and 204. The lot involved in the Hultzen case is not shown above, but is identified as Lot No. 109 on the Plan. The evidence makes it plain that it lies a short distance northerly of Lot No. 115 and fronts on Morning Street. The lot involved in the Staples case is Lot No. 194. The defendant is the owner of all the lots fronting on Morning Street Extension and on the easterly side of Ashton Street Extension.

The parties have stipulated that they have equal rights of way in both extensions, in common with other owners and subject to common usage. For an accurate determination

of their rights, reference should be had to cases involving the sales of lots according to recorded plans. See *Sutherland* v. *Jackson,* 32 Me. 80; *Warren* v. *Blake,* 54 Me. 276, 89 Am. Dec. 748; *Young* v. *Braman,* 105 Me. 494, 75 A. 120; *Webber* v. *Wright,* 124 Me. 190, 126 A. 737. For present purposes we assume the rights to be as the parties have stipulated.

That one injured in his "comfort, property, or the enjoyment of his estate by a common and public or a private nuisance" may recover his damages against the person responsible therefor is the express mandate of R. S., 1944, Chap. 128, Sec. 16. Section 7 of that chapter, defining certain nuisances, includes among them "the obstructing or encumbering by fences, buildings, or otherwise, of highways, private ways, streets, alleys," etc. The defendant admits that she constructed a sea wall across the full width of Morning Street Extension, at or about the point which marks the line between the southerly limit of Lots Nos. 201 and 202 and the beach. She asserts that it constitutes neither an obstruction nor a nuisance, relying on the fact, in support of which she presented a considerable volume of testimony, that the extension, as a private way, was unsuitable for any use prior to the construction of the sea wall, and that in the construction of it she provided steps for the use of pedestrians. She admits that the extension is not now available for vehicular use in passing to and from the beach. She raised the grade of it three feet, or to the approximate level of Bay View Avenue, after the wall was built, so that a single step is required to pass over it to the shore, although several are required on the beach side. The evidence presented on her behalf tends to prove that vehicular traffic upon Morning Street Extension, if ever possible, had ceased to be so some time prior to the building of the sea wall. Whatever the fact may have been when the Plan was made and recorded, the sea wall eliminated the possibility of the passage of vehicles to the beach over

Morning Street Extension, if it had not been eliminated theretofore. The steps provided for the passage of pedestrians are inadequate to permit the passage of a vehicle of any kind.

A ruling of law that the question of fact concerning the usability of a right of way, that is not a public highway, for any particular use or uses, is not in issue in a case seeking the recovery of damages for an alleged obstruction of it, is implicit in the direction of the verdicts. There was a very definite conflict of evidence on that factual issue, applicable to a period of twenty years or more, which, if material, could only be resolved by a jury. *Jewell et al.* v. *Gagne,* 82 Me. 430, 19 A. 917. It is well established, however, that a verdict for one party should be directed whenever one returned for the other could not be sustained. *Jewell et al.* v. *Gagne, supra; Moore* v. *McKenney,* 83 Me. 80, 21 A. 749, 23 Am. St. Rep. 753; *Inhabitants of Woodstock* v. *Inhabitants of Canton,* 91 Me. 62, 39 A. 281; *Inhabitants of Wellington* v. *Inhabitants of Corinna,* 104 Me. 252, 71 A. 889. The ruling was proper if the factual issue is not material. If it is material, it is well established that all the evidence pertinent to it must be viewed in the light most favorable to the defendant, as the party against whom the verdicts were directed. Such is always the rule in testing the propriety of directed verdicts. *Heath* v. *Jaquith,* 68 Me. 433; *Lewiston Trust Co.* v. *Deveno et al.,* 145 Me. 224, 74 A. (2nd) 457.

There has been no occasion heretofore in this jurisdiction to resolve the issue which, restated in its simplest terms, is whether a strip of land laid out, and intended for use, as a right of way, is encumbered or obstructed, as a matter of law, by the erection of a barrier across it, by a co-owner of the right of way, whether or not such erection interferes with any use for which the way was, or might be made, susceptible.

These cases involve a *private* way as distinguished from a *public* way. Neither involves the respective rights of owners of dominant and servient tenements. On the record, neither of the plaintiffs, nor the defendant, have, or ever have had, any title to the fee in Morning Street Extension. *Sutherland* v. *Jackson, Warren* v. *Blake,* and *Young* v. *Braman,* all *supra.* The only rights of either or any of them in that extension are those of co-owners in common in an easement of passage over the same as owners of lots delineated on the Plan. Nor in the present cases are we presented with problems arising from a physical intrusion upon or physical obstruction of an easement by an absolute stranger to the title.

The defendant by her pleadings seeks to justify the building of the sea wall across Morning Street Extension at the sea-ward end thereof, the filling in of the extension behind said sea wall, and the raising of the grade thereof to the approximate level of Bay View Avenue, and her lots of land on both sides thereof, as necessary and lawful repairs of a right of way. In her brief statement she says that:

> "she, the said defendant, by reason of then existing conditions and attending circumstances was obliged to make necessary and lawful repairs, not only to preserve said way for all who had a right therein, but to make it convenient and passable without which repairs said way had become greatly deteriorated and would have become impassable and of no use or value to the said defendant in her occupation and use of the lots of land owned by her to which said right of way was appurtenant. Said defendant further says that by her actions she has materially improved said way as to make it more useful and beneficial to said plaintiff and all others having an interest therein."

As above noted, these actions are brought by co-owners of an easement against another co-owner. They involve the right of one co-owner, as against another, to make re-

pairs and improvements. The right of one co-owner in an easement to make repairs, as against the owner of the fee over which the easement passes, is not here in issue. Neither is the right of the owner of the fee to make changes or repairs within the limits of the way, as against the owner of the easement, in question. We are here concerned *only* with the rights of and between co-owners of the easement.

The general rules with respect to the right of one co-owner in an easement to repair and improve the same are well stated in 17 Am. Jur. 1005, Sec. 110:

> "Where there are several owners in common of an easement such as a private way, each owner may make reasonable repairs which do not injuriously affect his co-owners, but he cannot make any alteration of the course of the easement or any change in its grade or surface which makes it less convenient and useful to any appreciable extent to anyone who has an equal right therein."

This general rule was recognized in *Rotch* v. *Livingston et al.*, 91 Me. 461, 475, 40 A. 426, 432. It was there said that:

> "Each owner can * * * use the entire width of the way and can fit it all for use at his reasonable discretion so long as he does not unreasonably impede any other co-owner in his use. This principle is recognized in the cases cited by the plaintiffs. Killion v. Kelley, 120 Mass. 47; Kelley v. Saltmarsh, 146 Mass. 585; Nute v. Boston Cooperative Building Co., 149 Mass. 465; Vinton v. Greene, 158 Mass. 426. In all these cases the proposed change was forbidden upon the sole ground of the *manifest detriment* to the objecting party in his own use of the way. *We find no case where the court interfered with the proposed change or use unless it was made to appear that the objecting party would be seriously inconvenienced in his own use of the way.*" (Emphasis ours.)

The quotation *supra* from 17 Am. Jur. 1005, Sec. 110, is an almost verbatim quotation from *Killion et al.* v. *Kelley*, 120 Mass. 47, cited in *Rotch* v. *Livingston, supra.*

Whether or not the repairs made by one co-owner *unreasonably impede* another in his use of the way or *seriously inconvenience* him, in his own use of the way, depends upon the use to which the way is, or may be made susceptible. It is not a nuisance under R. S., Chap. 128, Sec. 7, for one co-owner of an easement of passage to make repairs or improvements in a private way which do not obstruct or interfere with any existing use thereof, or any potential use to which the way is susceptible or may be made susceptible. "The reasonableness of the improvements or repairs made by the owner of an easement of way is largely a question of fact." 17 Am. Jur. 1006, Sec. 111; *Guillet* v. *Livernois*, 297 Mass. 337, 8 N. E. (2nd) 921, 112 A. L. R. 1300.

As between co-owners in an easement of passage, in determining whether or not a way is, or may be made, susceptible for a particular use asserted by another co-owner, a jury should deal with actualities and not mere theories. Jurors may consider the practicability of subjecting a way to any proposed use, taking into consideration all existing factual questions. Among such questions, in these cases, are the actual location, the nature of the terrain, the soil, the exposure to, and action of, the sea, and whether or not if a usable way for vehicular traffic were constructed for passage to and from the beach, its reasonable permanence and stability could be assured. They may also consider the effect thereof on other uses to which the way might be subjected by abutting owners and others.

There was evidence in these cases from which the jury, if the issue had been submitted to it, could have found that Morning Street Extension, prior to the building of the sea wall, and the grading of the way between that sea wall and Bay View Avenue, had never been susceptible to, nor used,

nor usable for, vehicular traffic to and from Higgins Beach. There was evidence from which it could have found that without the work done thereon by the defendant the way never had been, and never would have been, of any practicable use as a way, other than as a mere footpath through shifting and changing sands, due to inundation and washing by the sea by recurrent and seasonal high tides. There was evidence from which it could have found that the way could not reasonably have been placed and maintained in a condition that would have made it susceptible to use by vehicular traffic to and from Higgins Beach. There was evidence from which the jury would have been justified in finding that without a sea wall across it the way would have continued to be washed and gullied from time to time by the sea, and have become of less and less use for any purpose whatever; and that even if it were put in a condition susceptible for use by vehicular traffic to and from Higgins Beach it could not be permanently maintained in that condition without constant repairs and renewals. There was no evidence that any co-owner had ever attempted to make any repairs or improvements to Morning Street Extension to make it available for vehicular traffic to and from Higgins Beach. These were all questions of fact for the jury, which the jurors were entitled to consider in determining whether or not the defendant had obstructed or interfered with any reasonable use to which the way was or could be made susceptible by the plaintiffs.

It must be remembered that in these cases we are dealing only with the respective rights of co-owners of an easement. Their respective rights as between themselves are relative, not absolute. That which might constitute an invasion or obstruction of an easement by an absolute stranger to the title, that is, by one without scintilla of legal right, in the easement, or in the fee, may well be within the right of a co-owner of the easement to make and maintain. *As against the stranger,* the right of every owner of the

easement to repel invasion thereof is absolute. *As between co-owners,* the rights to repair and improve, and the right to object to repairs and improvements, are only relative. Neither co-owner can interfere with the reasonable use of the way by any other for a purpose to which the same is or may be made susceptible.

In any given case, the determination of whether there has been such interference is a question of fact for the jury. In these cases it was likewise a question of fact for the jury whether the construction of the sea wall by the defendant was a reasonable method of insuring the continued use of Morning Street Extension as a way for the benefit of her own property on each and both sides thereof, to which it was appurtenant, as well as for others entitled to use the same. In determining that question, it must be remembered that the defendant had no right to make repairs or improvements within the limits of the right of way solely for the protection of her lots abutting thereon, as distinguished from improvements and repairs for the purpose of improving the way as such. In these cases the defendant's only right in the way is a right of passage over the same in common with others. Her right to make repairs and improvements is incidental to that use alone. Protective construction *designed solely for the benefit of her lots must be made within the boundaries thereof.* Cases involving the right of an abutting owner, who also owns the fee over which a common way passes, to make repairs or improvements within the limits of the way for the protection of his abutting land, not inconsistent with the rights of the common owners of the way, are clearly distinguishable. Here too the rights of the parties are relative, not absolute. Of course, repairs and improvements properly made to facilitate the use of the way, as such, are not precluded because they may incidentally protect the abutting lands. The true purpose for which repairs or improvements are made, and their suitability therefor, are questions of fact for a jury.

It was a question of fact for the jury in these cases whether or not the work done by the defendant impeded or injured the plaintiffs or either of them in any use of the way to which it was or could have been made susceptible. If not, the defendant could not be held to have obstructed or encumbered the private way in which she was a co-owner with the plaintiffs, nor could it be said that the plaintiffs, or any of them, were injured in his "comfort, property, or the enjoyment of his estate" by either a common and public or a private nuisance. The plaintiffs would not be entitled to maintain their actions either under the statute or at common law.

By directing verdicts for the plaintiffs, essential questions of fact were taken from the jury, and were either decided in favor of the plaintiffs or considered immaterial by the presiding justice. This was error. The exceptions must be sustained.

Exceptions sustained in both cases.

STATE OF MAINE

vs.

RAYMOND C. HUME

Kennebec. Opinion, January 26, 1951.

Criminal Law. Continuance. Mistrial. Evidence. Bill of Particulars. Examination of Witnesses.

Granting of continuances or mistrials is discretionary and the chief tests as to what is a proper exercise of judicial discretion is whether it is in furtherance of justice and the right of exception arises only where there is a clear abuse of discretion.

The order in which testimony is introduced is within the discretion of the presiding justice.

Testimony of a deputy sheriff relating to a "break" other than that for which the respondent was being tried may be admissible as one event in a chain of circumstances and for the purpose of confirming testimony expected to be given by an accomplice and is not prejudicial where it is presented with the understanding that the guilt or innocence of the respondent in such other "break" is not in issue and the rights of the respondent are fully protected by the charge of the presiding justice, to which no exceptions were taken.

The accused in a criminal case at common law is not entitled as a matter of right to a bill of particulars. The ordering of a bill of particulars rests in the sound discretion of the court and a statement of expected testimony or names of witnesses need not be given.

The effect of a bill of particulars should not be "too narrow" but to reasonably restrict the proofs to matters set forth.

On redirect examination a witness may be interrogated to clarify or explain matters brought out on cross examination by the opposite party even though it happens to bring out adverse information.

Relevant evidence to support a charge may be received within the court's discretion although it may tend to show respondent committed another offense not charged or "that the acts charged are part of a common scheme."

A conviction may be sustained in a criminal case on the uncorroborated testimony of an accomplice unless statutes or the constitution provide otherwise.

ON APPEAL AND EXCEPTIONS.

On indictment for breaking, entering and larceny in the nighttime, R. S., 1944, Chap. 119, Sec. 3. Before trial respondent filed a motion for continuance on stated grounds which motion was denied. Respondent excepted. During the course of the trial respondent moved for a mistrial for stated reasons. This motion was denied and respondent excepted. Respondent also excepted during the course of the trial to certain rulings of the presiding justice relative to the admissibility of testimony. Respondent also moved for a new trial and from a denial thereof appealed. Exceptions overruled. Appeal dismissed. Judgment for the State.

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

William H. Niehoff, for respondent.

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

FELLOWS, J. This is an indictment for breaking, entering and larceny against Raymond C. Hume, alias Raymond Humes, alias Polack Humes. The respondent was found guilty by a Kennebec County jury and the case is now before the Law Court on exceptions and appeal.

The indictment was returned by the Grand Jury at the June Term, 1948, for violation of R. S., (1944), Chap. 119, Sec. 3 in breaking and entering in the nighttime the office at the Maine Central Railroad station at Winthrop and committing larceny therein. The respondent entered a plea of not guilty.

At the February Term, 1949, the respondent was found guilty by verdict of the jury. Exceptions taken to the admission of certain improper testimony were sustained by the Law Court in *State* v. *Hume,* 145 Me. 5, 70 Atl. (2nd) 543, and the respondent was again tried at the February Term, 1950. The pending appeal and exceptions relate to this second trial.

Before the trial the respondent filed a motion for continuance on the ground that prejudicial statements had been published in local newspapers two weeks previously, which he claimed constituted an invasion of his right to a fair and impartial trial. This motion was denied by the presiding justice to which denial the respondent excepted.

On the morning of the second day of the trial, and during the trial, the respondent filed a motion for a mistrial on the ground that a certain article published on that day, appearing in local newspapers, was prejudicial to the rights of the respondent. Exceptions were taken to the denial of this motion.

During the course of the trial several exceptions were filed to the rulings of the presiding justice relative to the admissibility of certain testimony.

This case is here on exceptions to the refusal to grant a continuance, to the refusal to order a mistrial, and on exceptions to the admission of certain testimony, and also on appeal from the denial of a motion, made to the justice presiding, for a new trial.

FIRST AND SECOND EXCEPTIONS

The first two exceptions are directed to the refusal to grant continuance and the refusal to order a mistrial.

The article in the Kennebec Journal published February 16, 1950, quoted in the motion for continuance, was as follows:

"HUME TO STAND TRIAL AGAIN AT CURRENT SESSION

Raymond C. Hume, Augusta, will stand trial for a two and a half year old charge during the present term of Superior Court, according to a statement made Wednesday by County Attorney James L. Reid. The 53 year old local restaurant proprietor was found guilty in February of last year by a Superior Court jury of a charge of breaking, entering and larceny into the Winthrop railroad depot in 1947. The County Attorney in a prepared statement stated he was asking for a new trial on the conclusion that 'the question of the innocence or guilt of Hume is for the jury to determine.' Hume had been granted a new trial by the Law Court after filing exceptions.

Hume was sentenced to serve 6 to 12 years in State Prison by Justice Arthur E. Sewall.

His attorney William C. Niehoff of Waterville, filed exceptions to certain legal aspects of the trial. Referred to the Law Court, the exceptions were upheld by Maine's Chief Justice Harold H. Murchie.

He was then granted a new trial. He had been released under $20,000 bail pending the outcome of the filed exceptions which, when filed by the Law Court, could have resulted in a dismissal of the charge.

Reid's full statement is as follows: 'After reviewing the opinion of the Law Court and reviewing the evidence, and after consultation with the presiding justice (Justice Donald W. Webber), I have concluded that the question of the innocence or guilt of Raymond C. Hume is for the jury to determine and therefore I shall ask for a trial.

'The decision of the Law Court hinged on a statutory amendment relating to the admissibility of certain evidence and does not appear to me to have significantly changed the jury aspect of the case.'

> The retrial was granted by the Law Court on the grounds that the court (Justice Sewall) erroneously admitted certain evidence with respect to the credibility of certain trial witnesses."

The article as published on February 16, 1950 in the Waterville Morning Sentinel was, in substance, the same as in the foregoing article from the Kennebec Journal. The second article published during the trial on March 2, 1950 in both of the above named newspapers, for which mistrial was asked, rehearsed the fact that the case had been previously tried and the new trial granted, and in addition made a summary of the evidence introduced by the state during the first day of the trial.

There was no claim made that any of the newspaper articles contained any statement other than the truth, and the greater portions were matters of public knowledge and court record. They were not "inflammatory" and not intended to prejudice. The statement by the County Attorney and other statements therein, might or might not influence the decision of some juror if he read the accounts, depending of course on the mental capacity of the juror, his power of analysis, and his sense of fairness. It does not appear, however, that any one of the jurors ever saw any one of the newspaper articles published before or during the trial.

In ruling upon the motion for mistrial the presiding justice stated to counsel that the press reports were in accordance with the records and "within the domain of public knowledge." The presiding justice also said that "opportunity was afforded to counsel for the state and the respondent to further examine as to the impact of any prior readings of press reports pertaining to the case, or any other conversation or outside influence upon the mind of the jury. In each case the court is satisfied that the jury has retained an open mind in spite of prior publicity as to the course of this particular litigation. This court feels that at the most

the newspaper report now in question can only refresh the recollection of the jury as to what was already part of the public knowledge at the time of the original trial and sentence."

There is not the slightest indication in the record that any member of the panel was prejudiced by any newspaper account. In fact, as previously stated, it does not appear that any juror read, or had knowledge of, any newspaper article relating to this case. The fact that some newspaper account might prejudice some one who could be, or was, a juror, is not sufficient to show that a juror who was drawn was so prejudiced.

Continuances and mistrials are within the discretion of the presiding justice. *Cunningham* v. *Long,* 125 Me. 494, 497; *Collins* v. *Dunbar,* 131 Me. 337; *Bank* v. *Shaw,* 79 Me. 376; *Graffam* v. *Cobb,* 98 Me. 200; *Rumsey* v. *Bragg,* 35 Me. 116. In the absence of anything tending to show that this discretion was not properly exercised, the ruling is not subject to valid exceptions. *Fitch* v. *Sidelinger,* 96 Me. 70, 71. "The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion." *Charlesworth* v. *Express Co.,* 117 Me. 219, 221, see also *State* v. *Bobb,* 138 Me. 242; *Bourisk* v. *Mohican Co.,* 133 Me. 207.

In the light of the rules stated in the foregoing cases, and after careful examination of the record, we fail to see any abuse of discretion on the part of the presiding justice in refusing to grant a continuance or to order a mistrial. In fact no second trial can be had in any case if truthful newspaper accounts of a former trial can be seriously taken as ground for continuance or mistrial, without some evidence of probable prejudice resulting. There must be "palpable error" or "apparent injustice" to make a discretionary ruling reviewable. *Fournier* v. *Tea Co.,* 128 Me. 393. The right of

exception arises only where there is clear abuse of discretion and the burden to prove such abuse rests on him who alleges it. *Lebel* v. *Cyr*, 140 Me. 98, 102.

THIRD EXCEPTION

The third exception was taken to the admission of certain testimony given by one Lawrence Minot, a deputy sheriff, who stated that on the morning of November 8, 1947 he was notified of a "break" at Belgrade depot and that he went there and found a "window jimmied" and "money box gone." This evidence was objected to on the ground that evidence was not admissible of any break in any place outside of the town of Winthrop. The court admitted this evidence, however, as one event in a chain of circumstances which the County Attorney said he should prove, "with the understanding that the guilt or innocence of this respondent as to any break in Belgrade is not an issue here." The evidence was not offered to show that the respondent broke into the Belgrade depot. In fact, there was no mention, by deputy Minot, of any particular person breaking into it. He stated there was a break at Belgrade, and the state contended that this was but a chronological link in a one night's chain of events.

The state endeavored to show a criminal enterprise from the time the respondent started with one Thomas and one Hendley from Waterville. To prove this, the state used (1) the testimony of Thomas, an alleged accomplice, (2) a series of facts and circumstances by other witnesses tending to corroborate the testimony of the accomplice, and (3) admissions by conduct and statements of the respondent. It was admitted that Hendley was an incompetent witness due to mental condition. The respondent did not testify, as was his right and privilege. It further appeared that the respondent had been, at a previous term, placed on trial for committing the Belgrade break, and had been found not guilty by the jury.

The evidence introduced by the state was to the effect that the respondent Hume (or Humes) on November 7, 1947 needed money, and called on Thomas at Thomas' store in Waterville about 6 P. M. The respondent proposed that they make "a break", and Thomas agreed, provided it was at some place outside of Kennebec County. Hendley was working in the woods, and Thomas and the respondent, Hume, went to get him. The three started for Wiscasset in Lincoln County. About 10 P. M. a fire warden at Wiscasset ordered them to move from the place where they had stopped the car, and this fact discouraged a proposed break in Wiscasset, so they returned and parked the car for a time in a gravel pit in Belgrade. Thomas testified that he (Thomas) broke into the station at Belgrade and obtained $35.00 or $40.00 which was considered a too small amount, and the three men went to the Winthrop station. It is apparent from the record that the state refrained from asking questions of the witness, Thomas, tending to implicate the respondent in any Belgrade break, but the attorney for the respondent did ask Thomas on cross examination (after being warned by the court) several questions that tended to show that the respondent was in the town of Belgrade and with Thomas at the gravel pit.

The trio arrived at Winthrop station about 3 o'clock in the morning of November 8, 1947. Hendley stood guard outside the railroad station, while the respondent and Thomas broke into the station. The railroad money box was thrown into a stream on the way home, and found by the officers on being directed there by Thomas some time after.

This third exception, to the testimony of deputy sheriff Minot that there was a break in the station at Belgrade was not evidence that this respondent made the break. In fact, there was no evidence introduced by the state to prove this respondent guilty of breaking into the Belgrade station. On the contrary, the evidence regarding the Belgrade break

that crept into this case, despite all effort on the part of the court and state's attorney to prevent, showed Thomas, and only Thomas as the guilty person at Belgrade. The evidence was presented to show that the sheriff's department learned of this break first. It was also for the purpose of confirming testimony expected to be given by the accomplice Thomas. The logical order of presentation may not have been followed, but the rights of this respondent were fully protected in the charge, to which no exceptions were taken. The order in which testimony is introduced is within the discretion of the presiding justice. *State* v. *Trocchio,* 121 Me. 368, 378.

If it had been error to admit this testimony of deputy Minot, or to admit it out of the usual order at the beginning of the trial, it was harmless. It was not evidence that the respondent was involved. The whole record shows that any evidence in the case that tended in any way to implicate the respondent with complicity in the Belgrade break was first brought out by the attorney for respondent himself, in cross examination of the state's witnesses. The attorney for respondent, in fact, asked the accomplice Thomas several times if "Hume was with you (Thomas) all the time after you left Waterville."

FOURTH EXCEPTION

The accomplice witness, Russell Thomas, in relating the events of the night testified that they first went to Wiscasset. This was objected to on the ground that this fact was not specified in a bill of particulars filed by the state, and that the attorney for the state should be confined to evidence as to only what occurred in the town of Winthrop. The presiding justice admitted the testimony because the bill of particulars stated that they travelled to Winthrop, although it did not state the exact route, and furthermore, that the bill had been on file in the clerk's office long enough

for the respondent to have asked for further particulars had he desired.

The record shows that the bill of particulars was ordered filed, on motion by attorney for the respondent, and was filed on or before February 5, 1949. A letter was also written by the County Attorney to the respondent's attorney on February 4, 1949 enclosing a copy of the bill of particulars, and stating to the respondent's attorney that if he required any further particulars to make the request, and the County Attorney further stated in his letter, "you have the burden of letting me know what you want so I won't have to guess." This letter of the County Attorney was not answered.

We see no merit in this exception. The accused, in a criminal case at common law, is not entitled as a matter of right to a bill of particulars. The reason is that in criminal cases there is directness and particularity in the averments of the indictment, and there is no need, generally, for a statement of the matters to be given in evidence to be furnished to the respondent. The court may, however, in its discretion require a bill of particulars to be filed. *Commonwealth* v. *Snelling,* 15 Pick. (Mass.), 321; *Commonwealth* v. *Wood,* 4 Gray (Mass.), 11; *Commonwealth* v. *Davis,* 11 Pick. (Mass.), 432, *27 Am. Jur.* "Indictments," 671, Sec. 111, *42 C. J. S.,* 1093, Sec. 156 citing *State* v. *Haapanen,* 129 Me. 28.

The ordering of a bill of particulars to be furnished in a civil or a criminal matter rests within the sound discretion of the court having regard to the nature and circumstances of the case. See for civil cases, Rules of Court, *129 Me. 506, 507,* and in criminal cases, *Commonwealth* v. *Giles,* 1 Gray (Mass.), 466; *Commonwealth* v. *Hayes,* 311 Mass. 21.

The effect of a bill of particulars is to reasonably restrict the proofs to matters set forth in it. The construction placed on a bill of particulars, however, should not be "too narrow." It should be "fairly construed." A bill of par-

ticulars in a civil or criminal case may be amended by the party filing the bill of particulars, within the discretion of the court in the furtherance of justice. *Commonwealth* v. *Mannos,* 311 Mass. 94; *Commonwealth* v. *Hayes,* 311 Mass. 21; *Fox* v. *Conway Ins. Co.,* 53 Me. 107; *Baxter* v. *Macgown,* 132 Me. 83; *Bean* v. *Fuel Co.,* 124 Me. 102. Any insufficient bill of particulars may also be ordered amended or made more precise and definite on motion. A statement of the excepted testimony to be introduced or names of witnesses, need not be given therein. The bill of particulars is not a set of interrogatories, nor is it employed to compel the state to disclose all its material evidence for conviction. *Commonwealth* v. *Giacomazza,* 311 Mass. 456, *42 C. J. S.* "Indictments," 1092, Section 156, *27 Am. Jur.* "Indictments," 671, Sections 111-114, *31 Corpus Juris* "Indictments," 750.

FIFTH EXCEPTION

This exception is to the admissibility of certain testimony which the respondent claims tended to show that he was guilty of an offense other than as alleged in the indictment. The accomplice witness Thomas on redirect examination was allowed to testify as follows:

Q. "Mr. Niehoff asked you whether or not at all times Mr. Humes was with you? Is that so?"

A. "Yes."

Q. "Did he go to the depot with you?"

A. "Yes."

Attorney Niehoff, for respondent, objected that this testimony was not relevant to the Winthrop break and that the respondent had been acquitted of the break at Belgrade.

We find no abuse of the discretionary power of the court. It is well settled that on redirect examination a witness may be interrogated to clarify or explain matters brought out on cross examination by the opposite party, even though it

may happen to bring out adverse information. *William* v. *Gilman,* 71 Me. 21; *Pelkey* v. *Hodgdon,* 102 Me. 426; *State* v. *Sprague,* 135 Me. 470. The determination of relevancy and materiality rests largely in the discretion of the presiding justice. *McCully* v. *Bessey,* 142 Me. 209, *49 Atl. (2nd)* 230; *Torrey* v. *Congress Square,* 145 Me. 234, *75 Atl. (2nd)* 451. Even a repetition is not exceptionable. *Caven* v. *Granite Company,* 99 Me. 278. By leave of court and in it discretion, cumulative evidence is also admissible in rebuttal. *Pillsbury* v. *Kesslen Shoe Co.,* 134 Me. 504. Relevant evidence to support a charge may be received within the court's discretion although it may tend to show that the respondent committed another offense not charged or "that the acts charged are part of a common scheme." *22 C. J. S.,* 1109, Sec. 688 and cases cited; *Commonwealth* v. *Corcoran,* 252 Mass. 465, 478; *State* v. *O'Toole,* 118 Me. 314; *State* v. *Smith,* 140 Me. 255.

All evidence from whatever source in a conspiracy charge is admissible to prove concerted action and unlawful purpose, "precisely the same as similar evidence would be admissible to prove a combination or concerted action or unlawful purpose upon any other charge, either civil or criminal." *State* v. *Trocchio,* 121 Me. 368, 376.

The fact that the respondent had been found not guilty of making a break at Belgrade does not necessarily make testimony inadmissible, in another charge, that he was in Belgrade at or about the time of the break in Belgrade. The testimony introduced by the respondent himself, to show an alibi, places him in a gravel pit in Belgrade in the early morning. Thomas was admittedly the only guilty person at Belgrade, and the evidence introduced in this case does not tend to show guilt at Belgrade on the part of this respondent. There is no conspiracy charged in the indictment, but evidence may be admitted, in judicial discretion, to show "a combination or concerted action or unlawful purpose" in any other charge. *State* v. *Trocchio,* 121 Me. 368,

376; See also *State* v. *Smith,* 140 Me. 255. The jury knew that the respondent had been declared not guilty of a break at Belgrade and knew that the evidence in the case at bar was directed to the Winthrop break. "Evidence of collateral facts may be received in civil and criminal cases for the purpose of confirming witnesses." *State* v. *Witham,* 72 Me. 531, 538. The legal rights of the respondent were fully protected during the trial and also in a very clear and careful charge to which no exceptions were taken.

SIXTH EXCEPTION

One Raymond Hall, who was on the fire patrol the night of November 7, 1947 near Wiscasset, testified that he saw a car parked at about 11 P. M. This testimony was introduced for the purpose of confirming the testimony of the accomplice who said that he and respondent were parked in Wiscasset. There were in the car several occupants. Hall ordered them to move on. This testimony was objected to because the respondent was not identified as one of the occupants of the car, and the car was not identified.

The admission of this testimony rested within the discretion of the presiding justice and we see no abuse of discretion. It was a matter for the jury's consideration with relation to other facts which may or may not have been proved. *McCully* v. *Bessey,* 142 Me. 209, *49 Atl. (2nd)* 230; *Torrey* v. *Congress Square,* 145 Me. 234, *75 Atl. (2)* 451; *State* v. *O'Toole,* 118 Me. 314; *State* v. *Smith,* 140 Me. 255; *State* v. *Sprague,* 135 Me. 470; *State v. Merry,* 136 Me. 243; *State* v. *Trocchio,* 121 Me. 368, 376.

SEVENTH EXCEPTION

Harry Pinkham, sheriff of Kennebec County, testified that he received word from deputy sheriff Lawrence Minot of an automobile, licensed as number 40-146, having been at the gravel pit at the town of Belgrade in the early hours of No-

vember 8, 1947. This car was registered in the name of Florence Whittier of Augusta. The sheriff called on Florence Whittier and found the respondent Hume at her home with her. In answer to questions by the sheriff, respondent Hume stated to the sheriff that he had the car and "the car was with me all night at Togus Pond." "I have not been in Belgrade for five years." Later in the day, Hume told the sheriff that "I lied to you this morning * * * I was down to Newcastle. I had another fellow with me and two girls * * * a fire warden came by who said you cannot park here." Sometime later the respondent told the sheriff: "If the car was there I was there, but I was not there." When still later the respondent, confronted at the sheriff's office with two boys who had seen the car at the gravel pit in Belgrade, the respondent was very angry, and said he was being "persecuted." The attorney for respondent asked to have this testimony stricken from the record because it referred to Belgrade. The County Attorney stated it was not for the purpose of showing anything in regard to the break at Belgrade (as in fact it did not) but to show respondent's conflicting stories. Exceptions were taken to the refusal to strike.

This evidence would appear to be relevant, or at least it appeared so to the presiding justice, and we see no reason to disagree with his decision. As in previous exceptions, it related to matters within the court's discretion and there was no abuse.

EIGHTH EXCEPTION

Harry Pinkham, the sheriff, on redirect was asked this question: Q. "You were asked where the word 'Polack' came from. Now tell the whole story." The sheriff then testified, subject to objection, that when he heard that Hendley, "Monk" and "Polack" made the break at Winthrop he (the sheriff) did not know who "Polack" was. He talked with Hendley and showed him twelve photographs of indi-

viduals who had been photographed in jail, and Hendley picked out the photograph of the respondent.

This evidence related to the identification of a photograph of the respondent which was in the sheriff's possession. We fail to see wherein the respondent was prejudiced or aggrieved. *Simoneau* v. *Livermore,* 131 Me. 165.

APPEAL

A careful examination of each and all of the respondent's exceptions fails to disclose any exceptionable error, which brings us to a consideration of his appeal from the denial by the presiding justice of motion for a new trial. Revised Statutes (1944), Chap. 135, Sec. 30.

The evidence produced by the state to prove the guilt of the respondent for the Winthrop break came from Russell Thomas who testified that the crime was committed by the respondent, Joe Hendley, and himself. The state produced facts and circumstances which tended to show that the story of the accomplice Thomas was true. There were also claimed admissions, by respondent, in statements and by conduct. The respondent did not testify, but introduced the testimony of several witnesses who testified that the respondent on the night in question was first at an Augusta restaurant in company with another man and two women; that afterwards he was with Florence Whittier until about midnight, and still later, and until two o'clock in the morning, he was drinking beer with Yvette Breton Derouche at Augusta, and while parked with Yvette Derouche in a gravel pit near Belgrade.

Except where the statutes or constitution provide otherwise, the rule is that a conviction may be sustained in a criminal case on the uncorroborated evidence of an accomplice, but such testimony is always received with caution. The testimony of the witness is for the jury, and, if his testimony convinces beyond a reasonable doubt, they are

authorized to find guilt. *State* v. *Morey,* 126 Me. 323; *Sinclair* v. *Jackson,* 47 Me. 102.

In this case, "Monk" Thomas, by his own admissions, had a long criminal record, and the principal question the jury had to determine was whether Thomas was truthful in stating that the respondent was with him on the night of November 7 and 8, 1947, or whether the respondent was with two girls and another man. The story told by Thomas, if believed, would authorize the jury to find the respondent guilty as charged, and guilty beyond all reasonable doubt. The state did not rely wholly upon the testimony of Thomas, the accomplice, but introduced other testimony to support Thomas. If the supporting evidence is believed, inferences can be drawn that corroborate Thomas in many particulars. On the other hand, if the testimony produced by the respondent can be taken as true, the respondent has a perfect alibi.

The presiding justice in his charge gave full instructions concerning the caution to be exercised in viewing the testimony of an accomplice. The evidence presented jury questions and the jury was amply justified in the verdict.

We are compelled to say, as did Justice Pattangall in *State* v. *Morey,* 126 Me. 323, 329, "that a study of the whole case forces the conclusion that no innocent man was wronged." We can also say that the respondent had a fair trial and we find no errors.

Exceptions overruled.

Appeal dismissed.

Judgment for the State.

ELIZABETH M. RICHARDSON

vs.

GEORGE DEWEY RICHARDSON

Lincoln. Opinion, February 6, 1951.

Exceptions. Boundaries. Highways.

Findings of fact by a justice sitting without a jury so long as they find support in evidence are final.

When land conveyed is bounded on a highway, it extends to the center of the highway; when it is bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the center of such way.

ON EXCEPTIONS.

Writ of Entry heard by the court without a jury and judgment for the plaintiff for a specific part of the premises, although less than plaintiff demanded. R. S., 1944, Chap. 158, Sec. 10. Plaintiff excepted to the finding that his title extended easterly to the westerly bound of a certain street.

Exceptions overruled. Case fully appears below.

Harvey R. Pease, for plaintiff.

Alan L. Bird,
Samuel W. Collins, Jr., for defendant.

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

NULTY, J. Exceptions by the plaintiff from the Superior Court of Lincoln County.

The cause of action was a writ of entry and by agreement was heard by the court without a jury and judgment was for the plaintiff for a specific part of the premises, although less than the plaintiff demanded. See Sec. 10 of Chap. 158 of the R. S. (1944).

Plaintiff demanded property in Westport, Maine, which according to the deed to the plaintiff duly admitted in evidence contained the following description:

> "A certain piece or parcel of land, situated in Westport, in the County of Lincoln and State of Maine, and being lot numbered thirty-eight (38) on a plan of 'Echo Home,' Westport, Maine, made by S. C. Taft, C. E. dated May 23, A. D. 1890 and recorded in said Lincoln County Registry of Deeds. Said parcel of land is bounded and described as follows: Easterly on Bay Street, as shown on said Plan; Northerly on Lot #37, on said Plan; Westerly on Lot #43 on said Plan; and Southerly on Lot #39, on said Plan, containing 4950 Square feet of land, more or less."

Plaintiff also demanded in her declaration, in addition to said Lot #38, the portion of Bay Street (a street laid out on said plan) which adjoins said Lot #38 on the east, and also such land as lies easterly of said street between said street and low water mark of equal width with said Lot #38. The sitting justice found that plaintiff had acquired title to said Lot #38 in fee simple and that the description of said Lot #38 was clear, plain and unambiguous and was described by number referring to the recorded plan. He also found that the bounds were clearly stated, including the east bound thereof, and that the square footage was stated and conformed exactly with the square footage shown on the plan to be within the confines of said Lot #38. As to the claim of said plaintiff to the fee in said street (Bay Street) and to the land between said Bay Street and low water mark based on the assumed legal presumption that the original grantor by his deed of said Lot #38 intended that all land between said Lot #38 and low water mark, including said street, was included in the conveyance, the sitting justice found that Bay Street was never laid out, built, used or accepted. It existed only upon the plan and the sitting justice found that except for the right of passage which plaintiff had along Bay Street as delineated on the plan she

took no fee to the land designated as Bay Street or to the land along the shore between said Bay Street and low water mark. Based on the foregoing facts the sitting justice gave judgment for the plaintiff as to said Lot #38 and excluded any portion of said Bay Street and the land easterly thereof between Bay Street and low water mark.

It is almost unnecessary to again state the law with respect to findings of fact by a justice sitting without a jury because it has been definitely established as law in this State that "findings of fact by a justice sitting without a jury so long as they find support in evidence are final." See *Ayer* v. *Railway Co.*, 131 Me. 381, 163 A. 270, 271; and cases therein cited. Also *Graffam* v. *Casco Bank & Trust Co.*, 137 Me. 148, 151, 16 A. (2nd) 106; *Picken* v. *George Dewey Richardson et al.*, 146 Me. 29, 77 A. (2nd) 191. There was ample credible evidence to support the findings of fact by the sitting justice and his decision so far as the facts are concerned is conclusive unless the exception, seasonably taken by the plaintiff, raises an error of law which has prejudiced the plaintiff.

According to the bill of exceptions the plaintiff excepts to the finding of the sitting justice that plaintiff's title extended easterly only to the westerly bound of Bay Street. This raises a question of law which, however, has been considered on more than one occasion by our court. Simply stated, the question of law raised in this case is whether or not land bounded on a proposed street or private way, existing only by designation on a plan, carries to the grantee by the conveyance the fee or any part of the fee in said street or in other land not specifically included in the description. Our court in the early case of *Bangor House Proprietary* v. *Brown*, 33 Me. 309 at 314 (1851) said:

> "As the law has been established in this State, when land conveyed is bounded on a highway, it extends to the centre of the highway; where it is

bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the centre of such way.

"The occasion of such difference in effect may be ascertained. The owner of land, who has caused it to be surveyed and designated as containing lots and streets, may not be able to dispose of the lots as he anticipated, and he may appropriate the land to other uses; or he may change the arrangement of his lots and streets to promote his own interest, or the public convenience in case the streets should become highways. He does not by the conveyance of a lot bounded on such a way hold out any intimation to the purchaser, that he is entitled to the use of a highway to be kept in repair, not at his own, but at the public expense, for the common use of all. While he does by an implied covenant assure to him the use of such designated way in the condition in which it may be found, or made at his own expense. By a repurchase of that title, the former owner would be entitled to close up such way, as he would also by obtaining a release of the right of way.

"There is no indication in such cases of an intention on the part of the grantor to dispose of any more of his estate than is included by the description, with a right of way for its convenient use.

"When a lot conveyed is bounded on a highway expected to be permanent, the intention to have it extend to the centre of it is inferred, (among other reasons noticed by this Court in former cases,) from the consideration that the vendor does not convey or assure to the vendee a right of way, the law affording him in common with others a more permanent and safe public way, to be kept in repair at the public expense. The vendor not being burdened by an implied covenant, that the vendee shall have a right of way, has no occasion to retain the fee of the highway for that purpose. Hence arises one motive inducing him to convey all the rights, which he can convey to land covered by the highway."

The rule announced above with respect to the title to the fee in private ways or streets has remained unchanged in this State to the present time and seems decisive of this case. See *Ames* v. *Hilton,* 70 Me. 36 (1879); *Winslow* v. *Reed,* 89 Me. 67, 35 A. 1017 (1896); *Coleman* v. *Lord,* 96 Me. 192, 194, 52 A. 645 (1902) and cases cited. See also *Young* v. *Braman,* 105 Me. 494, 497, 75 A. 120 (1909).

In 1930 in *Stuart et al.* v. *Fox et al.,* 129 Me. 407, 415, 152 A. 413, we considered the title to a lot of land arising out of the abandonment of a railroad right of way, the plaintiffs' claim being that the deed under which they claimed title conveyed the fee to the center of the railroad property and that on the abandonment of the railroad right of way they became possessed of the abandoned land free from the encumbrance of the railroad right of way on the theory that a railroad right of way was a highway and the same rule which applied in the case of land bounded on a highway should apply to land adjoining a railroad right of way. In the exhaustive opinion the authorities were extensively reviewed, not only those relating to railroad rights of way but of those relating to land bounded on highways and on private ways and non-navigable water ways and also lands on tidewater to the extent necessary to determine the reason and meaning of the presumption that the title extends to the center of the way in the case of highways and to the thread of the stream in the case of non-navigable streams and to flats between high and low water mark under the Colonial Ordinance of Massachusetts 1641-47 and we reached the conclusion that there was reason for extending the presumption to highways, non-navigable water ways and tidewater flats but that to extend it to private ways would result in an arbitrary rule of construction not based on a real intent and one that does not follow the ordinary rules of construction.

Applying the rules of law set forth above to the instant case causes us to conclude that the presumption herein re-

ferred to should not be extended to private ways or streets. It, therefore, follows that the ruling of the sitting justice with respect to the extent of plaintiff's title was correct and the plaintiff's exceptions are of no avail.

Exceptions overruled.

RITA NADEAU BERTICELLI, ADMRX.

vs.

ARMAND HUARD, LAUREAT HUARD, THERESA GAGNON AND FERDINAND PATENAUDE

Androscoggin. Opinion, February 8, 1951.

Poor Debtors. Bonds. Surrender.

It has been the practice for the debtor to deliver to the jailer, when he surrenders himself into custody, either an attested copy of the execution and return thereon, or of the bond, and he would not be obliged to receive him without one or the other, but there is no statute requiring these prerequisites. (See R. S., 1944, Chap. 113, sec. 25).

The condition of a bond that the respondent within six months deliver himself into the custody of the keeper of the jail to which he is liable to be committed under an execution is not complied with where the respondent within the six month period appeared at the sheriff's office for the purpose of surrender but was refused by the sheriff because neither the principal nor sureties had with them a copy of the bond or execution upon which it is based.

ON EXCEPTIONS.

Action of debt for the balance claimed to be due on a poor debtor's bond. It was heard by the court with right to except on questions of law reserved. The sole question is whether the condition of the bond had been complied with. The judge found for the plaintiff. Exceptions overruled. Case fully appears below.

Clifford and Clifford,
William H. Clifford, for plaintiff.

Adam B. Sichol,
Isaacson & Isaacson,
Philip M. Isaacson, for defendant.

Armand Huard, pro se.
Laureat Huard, pro se.

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

THAXTER, J. This is an action of debt for the balance claimed to be due on a poor debtor's bond. It was heard by the court with right to except on questions of law reserved. The facts are not in dispute. The judge found for the plaintiff.

The sole question at issue as raised by the exceptions is whether the principal on the bond, Armand Huard, did comply with that condition of the bond which provided that the bond should become void if the respondent did within six months from the time of executing the bond deliver himself into the custody of the keeper of the jail to which he is liable to be committed under said execution held against him.

The principal and sureties on the bond claimed that his acts constituted such a surrender as was a compliance with this condition of the bond; the plaintiff claims that this condition of the bond had not been complied with.

It is admitted that on the evening of March 31, 1950, while the bond had thirty days still to run, the defendant, Armand Huard, together with his bondsmen, appeared at the sheriff's office in Auburn for the purpose of surrendering himself under the provisions of the bond. Neither the principal on the bond nor any of the sureties had with them either a copy of the bond or of the execution on which the bond was based; and for this reason the deputy sheriff, Henry Michaud, who was in charge of the office of the sheriff, refused to accept the proffered surrender of Armand Huard, the principal. In so doing, the sitting justice found that the deputy was entirely within his rights.

In *Jones* v. *Emerson*, 71 Me. 405, it was argued that in spite of the fact that the statute does not require any precept or copy of the reason for the commitment to be filed with the

jailer, yet "it is the universal practice, otherwise what justification would the jailer have on *habeas corpus*? How could he escape the penalty imposed in R. S., 1871, c. 99, sec. 25, or prevent his prisoner being discharged on that writ? The *habeas corpus* statute seems to take it for granted that the jailer or other officer shall be able to furnish the written evidence of his authority for depriving a citizen of his liberty. *Com.* v. *Waite,* 2 Pick. 445." The penalty referred to in the statute reads as follows, R. S., 1871, Chap. 99, Sec. 25:

> "If any officer refuses or neglects, for four hours, to deliver a true and attested copy of the warrant or process, by which he detains any prisoner, to any person who demands it and tenders the fees therefor, he shall forfeit to such prisoner two hundred dollars."

And the penalty is just the same today, R. S., 1944, Chap. 113, Sec. 25.

In *Hussey* v. *Danforth,* 77 Me. 17, the rule is laid down in the following language:

> "It has been the practice for the debtor to deliver to the jailer, when he surrenders himself into custody, either an attested copy of the execution and return thereon, or of the bond, and he would not be obliged to receive him without one or the other, but there is no statute requiring these as prerequisites, ..."

Putnam v. *Fulton,* 131 Me. 232, clearly points out that in order to comply with the third condition of the bond the debtor must surrender himself or be surrendered "in such manner and under such circumstances as compelled acceptance . . . ." And further in summing up the cases the court says:

> "From these cases it appears that a jailer may receive one who offers to place himself in custody without being presented with an attested copy of the execution and return thereon or of the bond, but that he is not obliged to do so."

The defendant relies on the case of *Noyes* v. *Perkins*, 129 Me. 385. The language used in that case must be read in the light of the facts found by the court. In the case at bar the jailer definitely refused to accept the surrender of the debtor. In the *Noyes* case there is no such definite refusal to accept his surrender, and from that fact the court found that there was an implied acceptance of custody.

There is a clear distinction between the two cases and, if we would not overrule the cases which have already established the policy fixed in this jurisdiction, the exceptions must be overruled.

Exceptions overruled.

MILTON S. BUBAR

vs.

HOWARD F. SINCLAIR

Somerset. Opinion, February 12, 1951.

Record. Error. Courts.

Every court of record has an inherent power, as well as a duty to strike off entries (or to amend entries) made through error or mistake, even if at some previous term, so long as the record of the case remains incomplete.

The power of the court ceases and the parties are out of court when a *valid* and *final* judgment disposing of the pending action has been entered on the record.

ON EXCEPTIONS.

Petitioner on a motion to correct an alleged error in the record alleges (the allegation being accepted as true) that a motion for a new trial directed to the Law Court was presented to the presiding justice for the sole purpose of having the justice endorse thereon an extension of time for filing the transcript of evidence; that the extension was verbally granted but the presiding justice made an erroneous notation denying the motion for a new trial.

At the hearing on the motion to correct, petitioner excepted to the rulings that the Superior Court has no inherent authority to correct its own errors and that the presiding justice at the next term after the alleged error was made cannot order a change or correction, even if the evidence proves an error to have been made. Exceptions sustained. Case fully appears below.

George M. Davis, for plaintiff.

William F. Jude, for defendant.

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

FELLOWS, J. This is a petition, or motion, to correct an alleged error in a Superior Court record. The petition was denied, and exceptions taken to certain rulings. The exceptions are sustained.

The original action of trover for alleged conversion of pulpwood was tried in the Superior Court for Somerset County at the January term, 1950. A verdict was rendered by the jury in favor of the plaintiff. The defendant then filed a general motion for new trial intended for the Law Court, as he claims, and as the bill of exceptions states. The motion was handed to the presiding justice for the purpose of obtaining an extension of time for filing the transcript of evidence, as provided by Rule of Court. Rule 17, 129 Me. 509. The justice verbally granted an extension until the first of March, and then erroneously made, as the defendant claims, on the motion for new trial, the memorandum "Jan t 50, Motion Denied. Time for filing bill of exceptions extended to March 1st, 1950." This notation was signed by the justice presiding. The transcript of evidence was filed February 19, 1950. After filing the evidence and after learning of the docket entry, which was made by the Clerk of Courts from the notation, the defendant at the following term, in May 1950, filed this petition with the justice, who was then presiding, asking for a correction of the error made at the preceding January term. This pending petition (or motion) asks that a new and corrected entry be made as follows: "Motion for new trial filed. Time for filing transcript extended to March 1, 1950." This petition was denied and these pending exceptions taken. There was evidently no extended hearing on this petition for a correction, because the only evidence in the record is the petition itself, with an affidavit of the defendant's attorney certifying to the truth of the facts.

The bill of exceptions, now under consideration and allowed by the presiding justice as true, states that the defendant made a motion for new trial which was *intended*

for the Supreme Judicial Court sitting as a Law Court; that the motion for new trial was presented to the presiding justice "for the sole purpose of having the justice endorse thereon an extension of time for filing the transcript of evidence as provided by rules of court." . . . "Whereupon, the justice verbally granted an extension of time until the first day of March A. D. 1950" and then erroneously made the notation "Jan t 50, Motion Denied. Time for filing bill of exceptions extended to March 1st, 1950."

The justice presiding at the May term certifies to the truth of the statements and contentions in the pending bill of exceptions, R. S., (1944), Chap. 94, Sec. 14; *Bradford* v. *Davis,* 143 Me. 124, 56 Atl. (2nd) 68; *Field* v. *Gellerson,* 80 Me. 270, and for the purposes of this decision the Law Court is bound by the facts as so certified.

The motion for new trial filed at the January term was intended as a motion to the Law Court. It was presented to the presiding justice for one purpose only, viz.: to extend and fix the time for filing the evidence under the rule. He orally extended the time for filing the evidence to March first. It was not intended that the presiding justice should act upon the motion for new trial. The presiding justice erroneously acted on the motion for new trial, and wrote on the motion itself that it was denied and that exceptions were to be filed by March first.

The denial of motion for new trial by the presiding justice (when the motion is intended for him) is not exceptionable. See opinion in *Carroll* v. *Carroll,* 144 Me. 171, 66 Atl. (2nd) 809, in reference to the practice and to the form of motion for new trial, and the case of *Bodwell-Leighton Co.* v. *Coffin & Wimple,* 144 Me. 367, 69 Atl. (2nd) 567, holding that exceptions do not lie to denial of motion for new trial by presiding justice. See also R. S., (1944), Chap. 100, Sec. 60.

Five exceptions were taken at the hearing on this motion (or Petition) to correct the alleged error, but only the first

two exceptions need to be considered. The first ruling to which exception was taken was to the effect that the Superior Court has no inherent authority to correct its own errors, and the second, that the presiding justice at the next term after the alleged error was made cannot order a change or correction, even if the evidence proves an error to have been made.

Whether an erroneous record was actually made is of course a question of fact and this fact was apparently not determined in this case. The ruling was that the court had no authority to correct its own errors, or to correct its errors at a succeeding term, even if an error had been in fact made.

Judicial records that reflect the actions of a court must show what actually and truly occurred in that court. In the words of Lord Coke "records are memorials or remembrances, in rolls of parchment, of the proceedings and acts of a court of justice." The judgments of the court can only be evidenced by its records. The record as finally made should be correct. Judges and clerks, being human, necessarily make an occasional error through a mistake or a misunderstanding. Every court of record, therefore, has an inherent power, as well as a duty, to strike off entries (or to amend entries) made through error or mistake, even if made at some previous term, so long as the record of the case remains incomplete. When a *valid* and *final* judgment disposing of the pending action has been entered on the record, however, and the parties are out of court, the power of the court ceases. *Davis* v. *Cass,* 127 Me. 167, 142 A. 477; *Myers* v. *Levenseller,* 117 Me. 80, 102 A. 776; *Sawyer* v. *Bank,* 126 Me. 314, 138 A. 470. "It was certainly within the power of the court to vacate the judgment if satisfied that it had been entered erroneously," when no service and no appearance. *Hersey* v. *Weeman,* 120 Me. 256, 262; or improper judgment entered after the death of a party, *West v. Jordan,* 62 Me. 484. See also *Woodcock* v. *Parker,* 35 Me.

138; *Lothrop* v. *Page,* 26 Me. 119; *Lewis* v. *Ross,* 37 Me. 230; *Priest* v. *Axon,* 93 Me. 34.

After notice to the parties and hearing thereon, the Superior Court must determine the fact of whether or not the record when made was erroneous. If an error was in fact made, so that the record does not reflect the truth, the record should be amended accordingly. *Westbrook Trust Co.* v. *Swett,* 138 Me. 36; *Sawyer* v. *Bank,* 126 Me. 314.

Exceptions sustained.

THERESA CANTILLON

vs.

THOMAS B. WALKER, ET AL.
EXECUTORS OF ESTATE OF JANE E. OWEN

York. Opinion, February 19, 1951.

Directed Verdict. Wills.

A verdict is properly directed when a contrary verdict could not be sustained and in testing its validity the evidence and inferences therefrom are to be taken in the light most favorable to the excepting party.

The cardinal rule for the interpretation of wills is that they shall be construed so as to give effect to the intention of the testator.

In the instant case, the intention of the testatrix that the plaintiff, a personal maid, receive a bequest unless she left the position she then occupied through fault on her part does not require that plaintiff continue in service as a domestic servant where position of personal maid ceased to exist.

ON EXCEPTIONS.

Action of debt to recover a pecuniary legacy from the executors of the will of Jane E. Owen. To the direction of a verdict for the plaintiff the defendants excepted. Exceptions overruled.

William P. Donahue, for plaintiff.

Waterhouse, Spencer and Carroll,
Edwin G. Walker, for defendants.

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

WILLIAMSON, J. This is an action of debt by the plaintiff to recover a pecuniary legacy from the executors of the will of Jane E. Owen. The case is before us on exceptions

to the direction of a verdict for the plaintiff. The issue is whether the plaintiff left the employ of the testatrix through no fault of her own within the meaning of the will.

In testing the propriety of directing the verdict, we will apply the familiar rules that a verdict is properly directed when a contrary verdict could not be sustained and that the evidence and inferences therefrom are to be taken in the light most favorable to the excepting party. *Hultzen* v. *Witham,* 146 Me. 118, 78 A. (2nd) 342; *Woodstock* v. *Canton,* 91 Me. 62, 39 A. 281; *Heath* v. *Jaquith,* 68 Me. 433; *Lewiston Trust Co.* v. *Deveno,* 145 Me. 224, 74 A. (2nd) 457; *Wellington* v. *Corinna,* 104 Me. 252, 71 A. 889.

The bequest to the plaintiff reads as follows:

> "THIRD: I give and bequeath . . . to Kate Cantillon and Annie Goodwin, each the sum of One Thousand Dollars, if they are in my employ at the time of my decease; to Theresa Cantillon the sum of Five Thousand Dollars if she is in my employ at the time of my decease and also in the event that she shall have left my employ through no fault of her own."

What did the testatrix mean and intend by the phrase "also in the event that she shall have left my employ through no fault of her own"? We will apply the rule set forth in *Palmer* v. *Estate of Palmer,* 106 Me. 25 at 28, 75 A. 130 at 131, as follows:

> "The cardinal rule for the interpretation of wills is that they shall be construed so as to give effect to the intention of the testator. The intention, however, must be gathered from the language which the testator used. It may be sought, as the saying is, within the four corners of the will. If the language of the will is of doubtful meaning, it may be interpreted in the light of conditions existing at the time the will was made, and which may be supposed to have been in the mind of the testator. But the language used must be interpreted in ac-

> cordance with the settled canons of interpretation, even if it may result in a seeming otherthrow of the testator's intent. These rules are so well settled that the citation of authorities in support of them is unnecessary."

See also *Dow* v. *Bailey,* 146 Me. 45, 77 A. (2nd) 567, and cases cited; *Bragdon* v. *Smith, Ex'r.,* 136 Me. 474, 477, 12 A. (2nd) 665.

Admittedly the plaintiff was not in the employ of the testatrix at her decease. Whether we say that she left the employment or service of the testatrix is not of importance. Plaintiff claims and takes nothing under the provision "if she is in my employ at the time of my decease." Our concern is only with the provision applicable if plaintiff has "left my employ through no fault of her own."

In searching for the intent of the testatrix, we will take the factual situation existing at the time the will was executed. We accept as facts throughout this opinion only facts which a jury would necessarily have found from the evidence in the record.

Plaintiff and her two sisters entered the employ of the testatrix in 1930, receiving weekly wages. The sisters performed the usual duties of cook and housemaid. The plaintiff, however, was Mrs. Owen's personal maid, and to use the words of Mrs. Mowry, whom we later mention, "was sort of a companion to Mrs. Owen," for a number of years at least prior to November 1944.

In November 1944 the testatrix made and executed her last will and testament disposing of a large estate. Apart from a bequest of "my jewelry, clothing, wearing apparel and articles of personal effects" to the plaintiff and of "my books" to a library association, there were legacies of $23,000 to educational institutions, a hospital association, and a religious society, of $7,000 to named individuals, and the legacies set forth above to the plaintiff and her sisters.

The balance of the estate, including lapsed legacies, was given to trustees, who were also the named executors, for the maintenance of a free public library in Biddeford.

The bequest of jewelry and other personal effects has been received by the plaintiff at a value of $4,826.50. From the executors' account it appears the balance of the estate, apart from plaintiff's claim here in suit, had a value of $387,280.14.

Mrs. Owen was taken sick with her last illness in December 1944, was placed under guardianship March 30, 1945, and died March 16, 1948, without at any time recovering her ability to manage her own affairs. From December 1944 until his appointment as guardian the defendant, Thomas B. Walker, managed the affairs of Mrs. Owen under a power of attorney.

Mrs. Owen remained in her home until her death. Mr. Walker took charge of the household, including control of the servants, obtained doctors and nurses to give the constant care required, and paid the bills from the estate of his ward.

Shortly after the start of her final illness, Mrs. Owen's condition became and remained such that the plaintiff could no longer perform the duties of a personal maid or companion, nor could Mrs. Owen give the personal directions required for such service. The care of Mrs. Owen was in fact wholly in the hands of the doctors and nurses.

Plaintiff did not leave her position as personal maid through fault on her part. The position simply ceased to exist. Mrs. Owen's illness in this respect completely ended the relationship of personal maid or "sort of a companion" as would have death had it then occurred.

With the change brought about by Mrs. Owen's illness, plaintiff continued to work in the household, assisting her

sisters in duties unconnected with the services of a personal maid.

Difficulties developed between the plaintiff and her sisters on the one hand, and the doctors and nurses on the other in which the guardian became involved. To relieve the situation the guardian installed the wife of a nephew of the testatrix as a part-time resident housekeeper. At length on August 7, 1947 the plaintiff was informed by the guardian, that "she must take her orders from Mrs. Mowry (the housekeeper) or quit." On the following day the plaintiff and her sisters left the household without notice to anyone.

The defendants argue that, in leaving the household without notice, the plaintiff left the employ or service of the testatrix through her own fault, and thus did not satisfy the condition attached to the legacy. More accurately the argument is that a jury would be warranted in so finding and accordingly the verdict should not have been directed.

The construction we place upon the will leads to a different conclusion. What did the testatrix mean by the word "employ"? To what employment was the forfeiture condition attached? In our view it was the employment of the plaintiff as a personal maid or "sort of a companion" to use the descriptive phrase of Mrs. Mowry.

No question arises about the validity of the condition attached to the bequest. It differs in terms but not in nature from the often found provision that the beneficiary shall be in the employ of the testator at his decease. 3 *Page, Law of Wills, 3rd Edition,* Sec. 1035, 57 *Am. Jur.* 929-930; *White* v. *Mass. Institute of Technology,* 171 Mass. 84, 50 N. E. 512; *Anderson* v. *Stone,* 281 Mass. 458, 183 N. E. 841, 69 *C. J.* 671.

The difficulty lies in the construction to be placed upon the particular language used by the testatrix. The rule has

been well stated in *La Rocque* v. *Martin,* 344 Ill. 522, 176 N. E. 734 at 735, cited in *Page, supra,* Sec. 1299, as follows:

> "Whether there has been a performance or breach of a condition precedent or a condition subsequent depends upon a construction of the condition, and a reasonable construction is to be given to such condition in favor of the beneficiary and against a forfeiture, and such construction is dependent upon the circumstances of each particular case."

The plaintiff fulfilled the duties of a personal maid faithfully and loyally so far as appears from the record until by reason of Mrs. Owen's illness the duties could no longer be performed. The position of personal maid ceased to exist, as we have seen, obviously through no fault of the plaintiff.

Thereafter the plaintiff was employed by the guardian in a different capacity; namely, that of a domestic servant as were the sisters. Mrs. Owen, under guardianship, could make no contract of employment with the plaintiff. *R. S., Chap. 145, Sec. 29.* Mrs. Owen, in fact, could exercise no control over the plaintiff. The guardian assumed the relation of master with respect to the plaintiff.

Mrs. Owen made the bequests to her personal maid, not to a domestic servant. It was service as personal maid, not as domestic servant, which Mrs. Owen contemplated in the forfeiture clause. The intention of the testatrix was that, unless the plaintiff left the position she then occupied; i. e., personal maid, through fault on her part, the plaintiff would receive the bequest. It was not the intention of the testatrix that, in case the position of personal maid should cease to exist, the plaintiff must continue in service as a domestic servant with duties less important and substantially different in character.

In reaching this conclusion, we place no narrow meaning upon the word "employ". The word as used by the testatrix fairly meant "service". Had the plaintiff and her sisters

remained at work in the household until Mrs. Owen's death, clearly they would have been in Mrs. Owen's service, and hence in her "employ" under the will. It would be a harsh rule, indeed, which would deprive a servant of a bequest upon the ground that appointment of a guardian ended employment although the service to the testator continued to his death.

We must construe, however, the second and only operative condition of the bequest. Plaintiff recovers in the event "she shall have left my employ (meaning 'service') through no fault of her own."

When the will was executed, the testatrix had in mind that in the ordinary course the plaintiff would continue in her service. Mrs. Owen was a widow without children. For years the plaintiff had enjoyed the intimate and personal relationship of a personal maid and "sort of a companion" with the testatrix. The gift in the will of jewelry and other personal effects—the only gift of this nature—indicates the high regard in which the testatrix held the plaintiff. There are significant differences both in amount and conditions between the bequests to the sisters and the bequests to the plaintiff.

If the guardian had removed his ward to a nursing home, as he considered doing at one time, surely the plaintiff could then have left the employ or service, whether we say of the ward or guardian, without forfeiture of the legacy. Or let us suppose the guardian had discharged the plaintiff when it became apparent that the services of a personal maid could no longer be performed. Here again the plaintiff would be entitled to her legacy. If we add to the last supposition that the guardian thereafter employed the plaintiff as a domestic servant in the household maintained by him for his ward, no one would say that the forfeiture provision attached to the new employment.

The facts in the instant case present substantially the situation last described. It was a fact, readily understood and acted upon by both the plaintiff and the guardian, that her duties as personal maid were at an end. Plaintiff did not voluntarily leave the position, nor did the guardian in terms discharge her. Nevertheless from the time her duties as personal maid ended, she became with the agreement, not of Mrs. Owen, but of the guardian, a domestic servant with duties far different, as we have seen, from the duties in which she was engaged under the direction of Mrs. Owen.

The executors in defending the claim have failed to note that the forfeiture for fault was directed to the plaintiff's service as a personal maid. Whether the plaintiff was at fault in the manner in which she left the employ of the guardian in August 1947 is not the issue in the case.

Plaintiff did not forfeit her legacy. The verdict was properly directed for the plaintiff.

Exceptions overruled.

THERESA CANTILLON, ALIAS, APPELLANT
IN ESTATE OF JANE E. OWEN

vs.

THOMAS B. WALKER ET AL., EXECUTORS UNDER WILL OF JANE E. OWEN

York. Opinion, February 19, 1951.

Probate Court. Appeal. Executors Account. Disputed Legacy.

The legatee of a specific or general legacy has a claim against the estate in preference to those entitled to the residue and, where the claim is disputed, an interest in preventing the distribution of the entire balance of the estate from which his claim, if valid, should be paid.

Where a decree of the Probate Court allowing an account of the executors with the estate deprives a legatee of the protection to which she is entitled, such legatee is "aggrieved" within the meaning of R. S., 1944, Chap. 140, Sec. 32, even though the allowance of the account is unauthorized and ineffective.

A legatee is entitled to be protected by the requirement that the executors retain in the estate assets sufficient to meet her claim.

The allowance of an account neither deprives a legatee of rights against nor protects the executors or the surety on the bond with respect to the claimed legacy.

The distribution of the balance of the estate was not before the Probate Court in considering the first and final account and the executors were not entitled to a credit for the transfer of the balance of the estate.

ON EXCEPTIONS.

The appellant is a claimant of a disputed legacy. The case arises on exceptions to the dismissal in the Supreme Court of Probate of an appeal from a decree of the Probate Court allowing the first and final account of the executors. The account showed (1) the payment of expenses, debts, and legacies (*but not the legacy of the appellant*), and (2) the

transfer of all remaining assets of the estate to the executors in their capacities as trustees of the residue, with no balance remaining in the hands of the executors. The issue is whether appellant is a "person aggrieved" under R. S., 1944, Chap 140, Sec. 32. Exceptions sustained. Case fully appears below.

William P. Donahue, for appellant.

Waterhouse, Spencer and Carroll, for appellee.

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

WILLIAMSON, J. Under the will of Jane E. Owen, the appellant, Theresa Cantillon, was bequeathed the sum of $5,000 "if she is in my employ at the time of my decease and also in the event that she shall have left my employ through no fault of her own." From the allowance by the Probate Court of the first and final account of the executors in May 1949, the appellant appealed and here presents exceptions to the dismissal of the appeal in the Supreme Court of Probate upon the granting of a motion to dismiss made by the executors.

The issue is whether the appellant is a "person aggrieved" by the decree of the Probate Court, and hence entitled to appeal under *R. S., Chap. 140, Sec. 32.* The necessity that the appellant establish her right to appeal and the meaning of "aggrieved" in the statute are set forth in *Lucy M. French, Appellant,* 134 Me. 140, 183 A. 130, and cases cited.

The final account shows: (1) the payment of expenses, debts, and legacies (but not the legacy of the appellant); (2) the transfer of all remaining assets of the estate valued at $387,280.14 to the executors in their capacities as trustees of the residue of the estate; and (3) no balance remaining in the hands of the executors. The objection of the

appellant relates to the transfer of the balance of the estate to the trustees.

The appellant left the employ of the testatrix before her decease. Did she leave "my employ through no fault of her own"? Here lies the real dispute between the appellant and the executors. In not paying the legacy, and in seeking and obtaining the allowance of the account, the executors have shown that in their opinion the appellant did not meet the condition stated in the will. From the appeal it is equally clear that the appellant is of the view that she is entitled to payment. This question, however, is not the issue in the present appeal.

The executors correctly urge that by the decree of the Probate Court the appellant in no way has been deprived of action against them or the surety on their bond for the purpose of establishing her claim and securing its payment. The fact remains, however, that the Probate Court has stamped with its approval the transfer of the residue of the estate, leaving no assets whatsoever in the hands of the executors. The estate, if the allowance of the account is given effect, is insolvent against the claim of the appellant if valid.

The item of transfer of assets in the value of $387,280.14 was improperly included in the account. The Probate Court was not settling an account between the executors and the residuary legatees, but an account of the executors with the estate. The distribution of the balance of the estate was not before the court. The executors were not entitled to a credit for payment of the balance of the estate. In an analogous situation our court has said: "The conclusion is inevitable, that the decree appealed from, assumed to adjudicate and determine matters clearly outside the jurisdiction of the Probate Court, and hence must be annulled." *Hanscom* v. *Marston,* 82 Me. 288 at 297, 19 A. 460 at 461.

In the *Hanscom* case Justice, later Chief Justice, Emery discussed at length the nature of an executor's account. Changes in the jurisdiction of the Probate Court subsequent to the decision do not affect the force of the statement quoted. See *Stilphen, Appellant,* 100 Me. 146, 60 A. 888.

If the complaint here was that by allowance of expenses of administration or of debts, the estate thereby was or became insolvent, the appellant would have the right to appeal. See *Swan et als., Appellants,* 115 Me. 501, 99 A. 449, and *Lucy M. French, Appellant, supra,* involving creditors.

The legatee of a specific or general legacy has a claim against the estate in preference to those entitled to the residue. *Holt* v. *Libby,* 80 Me. 329, 14 A. 201; *Hanscom* v. *Marston, supra.* Surely the legatee whose claim is disputed by the executors has an interest in preventing the distribution of the entire balance of the estate from which his claim, if valid, should be paid.

That the allowance of the account neither deprives the appellant of rights against, nor protects, the executors and the surety on the bond does not answer the problem raised. The right to appeal does not depend upon the financial responsibility of the executors and the surety on their bond to meet the claim of appellant. In this instance the responsibility is unquestioned. Executors are, however, often appointed without bond, and executors and bondsmen do not always meet their obligations.

The appellant will best be protected by requiring that the executors retain in the estate assets sufficient to cover her claim. Appellant is "aggrieved" within the meaning of the statute by a decree of the Probate Court allowing an account which, although it is unauthorized and ineffective, nevertheless in terms deprives the appellant of the protection to which she is entitled.

The case is not before us on its merits but upon a motion to dismiss. With the sustaining of the exceptions the case will come forward for hearing of the appeal in the Supreme Court of Probate.

If no facts beyond the present record appear, the error complained of may be corrected by striking from the account the credit of $387,280.14 arising from the transfer of assets to the trustees, with a corresponding change in the balance remaining in the hands of the executors.

With these changes, the account allowed by the Probate Court will disclose sufficient assets in the possession of the executors with which to meet the claim of the appellant if and when found to be valid.

Exceptions sustained.

STATE OF MAINE

vs.

WALTER R. NEWCOMB

Androscoggin. Opinion, February 20, 1951.

Criminal Law. Indecent Liberties. Evidence. Charge. New Trial.

A motion for a new trial is sustainable when a jury has not been instructed on a point essential for its consideration, or has been instructed erroneously on such a point, notwithstanding the failure to challenge the same by exceptions.

The failure of a witness to state particular facts in identical words on every reference thereto creates no inconsistency in the testimony of such witness.

The testimony of a single witness may be adequate to prove the guilt of a respondent beyond a reasonable doubt.

A jury may be instructed on corroboration, or the lack of it, when that issue has been argued by counsel, the groundwork therefor appearing in evidence, although neither the particular word nor any form of it was used in the testimony.

ON APPEAL AND EXCEPTIONS.

On indictment for indecent liberties under R. S., 1944, Chap. 121, Sec. 6, respondent was convicted on the uncorroborated testimony of an eleven year old child. Respondent seeks to set aside the conviction by appeal from the denial of his motion for a new tral, and by exceptions to three portions of the charge to the jury. Exceptions overruled. Appeal dismissed. Judgment for the State.

Edward J. Beauchamp,
Irving Isaacson, for State of Maine.

Berman & Berman,
Harold L. Redding, for respondent.

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

MURCHIE, C. J. This case presents an appeal by a respondent, convicted of taking "indecent liberties" with a female child eleven years of age (see R. S., 1944, Chap. 121, Sec. 6), from the denial of his motion for a new trial, and his exceptions to three portions of the charge to the jury that found him guilty of the offense charged.

THE APPEAL

Counsel for the respondent argues that the appeal should be sustained on the ground that the charge as a whole, and not merely the particular portions thereof challenged by the exceptions, was prejudicial to the rights of his client. Authority for sustaining an appeal for an error in a charge to which no exception was taken, or for lack of instruction on a question essential for the consideration of a jury, despite the lack of a request for an instruction to supply the omission, is found in *State* v. *Wright,* 128 Me. 404, 148 A. 141, and *State* v. *Peterson,* 145 Me. 279, 75 A. (2nd) 368, both of which are cited. The present case is not comparable to either. It is not contended in this case that the charge did not cover every essential question. The excerpts of the charge, as quoted in the Bill of Exceptions, comprise an approximate half of the whole, and include every word therein which might even be claimed to offer any semblance of foundation for the assertion of prejudice.

Counsel relies, in this connection, as in his argument on the Second Exception, *infra,* on the language used by this court in *State* v. *Brown,* 142 Me. 16, 45 A. (2nd) 442, declaring that in the class of cases in which the present one falls:

> "a heavy responsibility rests upon a judge to see to it that the members of a jury are in a temperate frame of mind and that they consider the evidence* impartially and without bias toward a respondent."

A careful reading of the charge discloses that this responsibility was met fully. Between those portions challenged by the Second and Third Exceptions, quoted *infra,* the jury was instructed that the case then being placed in its hands was:

> "important to the State and it is important to this respondent. If this man has not committed this crime, he should be acquitted. If you believe from the evidence, you as reasonable men and women, that the crime was committed, then it is your duty under your oath to bring in a verdict of guilty. It is essentially a question of fact. You should not allow any sentiment, feeling or sympathy to at all affect you, and I mean sentiment, feeling or sympathy for this little girl or for this respondent, to affect your finding in this or any other case."

This is adequate to satisfy that responsibility and the necessity for caution which Sir Matthew Hale had in mind in his declaration that some accusations are:

> "easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."

See 1 Hale's Pleas of the Crown, 635, as quoted in 52 C. J. 1087, Par. 118. Footnotes in Corpus Juris cite many cases in which the evidence adduced was declared either sufficient or insufficient in appellate proceedings, but although the text is cited, there is no reference to a precedent supporting the claim of the respondent, that the uncorroborated testimony of a single witness is insufficient to justify a conviction. In last analysis, all authorities are agreed that the factual issue of the guilt or innocence of a party accused of any crime must always be resolved by a jury.

Whether the testimony of the eleven year old child who was the only witness presented by the State, except in rebuttal, was adequate to prove the facts necessary to establish the guilt of the respondent beyond a reasonable doubt,

was for the jury to determine. Proof beyond a reasonable doubt was requisite. *State* v. *Lambert,* 97 Me. 51, 53 A. 879; *State* v. *Mulkerrin,* 112 Me. 544; 92 A. 785; *State* v. *Howard,* 117 Me. 69, 102 A. 743; *State* v. *Dodge,* 124 Me. 243, 127 A. 899; *State* v. *Pond,* 125 Me. 453, 134 A. 572; *State* v. *Wright, supra.* The jury was so instructed. In discussing that requirement reference was made in the charge to the fact that the jurors, or some of them, had been instructed in an earlier case that such was the burden of the State. Thereafter the justice said:

> "I discussed reasonable doubt with you at some length and wound up by saying that the State must establish the truth of the facts charged to a reasonable certainty. That is what it means in the final analysis. That is the burden which the law places on the State in this and all other criminal cases, to satisfy you to a reasonable certainty that the offense alleged in the indictment has been committed."

A final claim in support of the appeal is that the child was not consistent in her testimony. The ground for this assertion is that the essential facts were stated more fully in one recital of them than in another. On this point the authorities cited are *State* v. *Terrio,* 98 Me. 17, 56 A. 217, and *State* v. *Morton,* 142 Me. 254, 49 A. (2nd) 907. Again it must be said that the present case is not comparable to either. True it is that all the principal facts proved in a criminal case must be both consistent with each other and inconsistent with the innocence of the person accused, but the issue of consistency does not depend upon exact repetition. It was for the jury to decide what the facts were, resolving all questions of credibility in reaching its decision. *State* v. *Lambert, State* v. *Howard, State* v. *Dodge,* all *supra.* The jurors heard the testimony. The child and the respondent told stories squarely in conflict with each other. The jury elected to believe that told by the child and reject that told by the respondent. It found, as a fact, that the offense,

as charged in the indictment, had been committed. On the record it cannot be said that its decision was not supported by evidence entirely credible.

THE EXCEPTIONS

The Bill of Exceptions quotes three excerpts from the charge which it identifies as the portions challenged by four exceptions stated in general terms, at the close thereof. We take them up in reverse order because the argument on the First Exception is based in part on some of the language in the charge quoted in the Second.

In the first instance we note that two of the exceptions taken, relating to:

> "the expression where the Court said in substance that the jury may condone wrong,"

and:

> "that part * * * where the Court discussed personal wrong or wrongs to the family,"

must be considered to have been consolidated in the Third Exception, although nothing which appears in the quoted excerpt, or elsewhere in the charge, suggests that a jury has any power or authority in the field of condonation. The language of the charge challenged by the Third Exception is:

> "A jury should be just as cold blooded in deciding cases as is possible for human beings to be, because as I said to you yesterday, outside of this Court Room, in those matters which involve you personally, wrongs committed to you personally or to your family, you may forgive and forget to your heart's content. As I said to you, sometimes it is a virtue to be applauded and commended, but you are not playing that role in this Court Room. You may not exercise that privilege which is sometimes given to the individual in those matters which concern and involve him personally."

For the claim that this language, or any part of it, operated to prejudice the rights of the respondent, no authority is cited. Read without reference to the context in which it appears, it carries no statement designed to prejudice the rights of the respondent. Read in that context, noting that it was preceded immediately by the admonitions heretofore quoted, that the jurors should consider the evidence "as reasonable men and women" and should not be influenced by any "sentiment, feeling or sympathy" for either the girl or the respondent, its propriety cannot be doubted.

The language of the charge challenged by the Second Exception reads:

> "The State relies, as I understand it, on the testimony of this little girl. The State says to you that there is no corroborative evidence available, and for that reason it could not furnish it to you. They bring in this little girl, a girl of eleven, going on twelve I believe, to tell you what happened. The question is whether you believe what she says. The whole case depends on that. It will stand or fall on her testimony. Is she telling the truth? That is your inquiry, and it is your responsibility to determine that. If she is not telling the truth, why? I think that is a proper question for you to ask yourselves. If somebody is not telling the truth, the test is why is not that person telling the truth, for what reason. That is a source of inquiry or should be a source of inquiry in this case. Why should she, out of whole cloth, make up a story such as she gave on the witness stand. Is she deliberately committing perjury? Is this a figment of her imagination? Is she testifying about a situation that never occurred, that never existed? Is she telling you about facts that never happened? It is not the quantity of testimony, Mr. Foreman and members of the jury, that counts in any case; it is the quality of the testimony. You can readily imagine a case where a dozen witnesses might come into Court and be reluctant to admit what they knew. You might conclude * they are not telling

> the truth. That is where you play your greatest role. You might on the other hand have one person who tells you a story; apparently willing to tell you what that person knew about the case. It is easy to imagine a case where one witness might prevail against many witnesses. It is the quality you are interested in. You should consider it carefully; it is an important case. The rules of evidence are the same as in any other case."

The argument on this Second Exception is that it overemphasized the evidence of the child and the weight to be given to it. The declaration of this court, in *State* v. *Brown*, *supra*:

> "that the summation of the evidence * * * was onesided in that attention was called unduly to the testimony favorable to the state and but little comment * made on that of the respondent,"

quoted and relied on, is not pertinent. In this case there was no summation of testimony. The State's principal witness told a story denied on every essential point by the respondent. The forthright instruction was given that the case depended entirely on whether or not the jury believed the evidence of that witness. Most, if not all, of the tests which might be applied in determining the issue of her veracity were recited.

The First Exception cannot be disposed of by reference to the language of the charge quoted in connection with it in the Bill of Exceptions, without more. That language reads:

> "Much has been said about corroboration, As a matter of law, there is no need of corroboration. That is not a legal defect in the State's case; the evidence of this little girl, if believed, is sufficient, even though she is not corroborated in the least. If corroboration is available in any given case, civil or criminal, the other litigant may well comment and criticize, and it might be a source of inquiry on the part of the jury to ask why, if cor-

> roboration was available and was not produced, why it was not produced. Is there any corroboration available in this case? If there is, why was it not produced? If there is not any corroborative evidence, then of course it could not be produced."

In arguing that this was prejudicial, counsel for the respondent asserts that it was erroneous "in practically every respect," which, by implication at least, challenges the instruction that "there is no need of corroboration," to which we shall allude later. Before doing so, however, we note that he relies especially on the sentence "Much has been said about corroboration," the words "legal defect" and one sentence of the excerpt of the charge quoted in connection with the Second Exception. That sentence is:

> "The State says to you that there is no corroborative evidence available, and for that reason it could not furnish it to you."

The claim is that the statements that much had been said about corroboration and that the State had said no corroborative evidence was available constituted error because the record is barren of any reference to corroboration and instructions to a jury must always "be based upon the evidence" in the case in which they are given. If the assertion is intended to declare that neither the word "corroboration" nor the word "corroborative" appears in the record, it is correct, but counsel for the respondent in cross-examining the little girl laid the foundation for arguing to the jury that her testimony was not credible because she never told anyone that the respondent had done what her testimony asserts he did do for some days thereafter, or until she was apprehended as a truant by a school truant officer and questioned at the police station. In another connection counsel cites *State* v. *King*, 123 Me. 256, 122 A. 578 which carries an extended discussion of the admissibility of evidence that a child had complained to a parent or officer of acts similar to those which the jury found the respondent had committed

as corroborative of the testimony of the child. Whether or not the fact that this child told something to an officer or officers at the police station several days after the event was admissible to corroborate her testimony need not be considered. The State did not offer to prove it. Regardless of that, it is impossible to believe that counsel for the respondent, having laid the foundation for doing so, did not capitalize to the full, in his argument to the jury, not only on the complete lack of corroborative evidence, but on the admission of the child that she never told anyone that the respondent did what her testimony declares he did for a considerable time thereafter. It seems obvious that the charge dealt with the question of corroboration to clarify the issue presented to the jury in the light of the arguments made relative thereto. The instruction quoted was entirely proper in that regard, and we cannot believe, as counsel urges, that the words "legal defect" in the context in which they were used tended either to confuse the jury or advise it, as counsel for the respondent argues, that the lack of corroboration "had no bearing upon the case."

This leaves the issue, never presented squarely heretofore in this jurisdiction, whether a conviction for the crime charged against this respondent, or for any crime in the class in which it falls, is sustainable if based solely on the uncorroborated evidence of a single witness. The instruction that there was no necessity for corroboration is in accordance with what is said to be the general rule at common law for crimes generally, 16 C. J. 760, Par. 1561; 23 C. J. S. 136, Par. 903, and particularly for "offenses against the chastity of women." Wharton's Criminal Evidence, Sec. 1398. An annotation in 60 A. L. R., commencing at Page 1124, collects a great number of cases, which disclose that where rape is charged, the common law rule prevails, in the absence of statute. Massachusetts, Connecticut and Minnesota have applied it to cases similar to the present one. *Commonwealth* v. *Bemis,* 242 Mass. 582, 136 N. E. 597;

State v. *Lattin,* 29 Conn. 389; *State* v. *Zimnaruk,* 128 Conn. 124, 20 A. (2nd) 613; *State* v. *Dziob,* 133 Conn. 167, 48 A. (2nd) 377; *State* v. *Trocke,* 127 Minn. 485, 149 N. W. 944; *State* v. *Wassing,* 141 Minn. 106, 169 N. W. 485. The Massachusetts Court, in *Commonwealth* v. *Bemis, supra,* declared squarely that:

> "The testimony of the single witness if believed was sufficient to sustain the charge"

of assault with intent to ravish. The Minnesota Court, in *State* v. *Trocke, supra,* made a comment that seems well designed to apply to the present one, i. e.:

> "The testimony is not elevating, and we shall not rehearse it. The prosecutrix testified to the commission of the act charged in the indictment, at the time therein charged, and to the commission of * similar acts * *. Her testimony was contradicted by defendant, but, if believed by the jury, was sufficient to sustain the verdict."

It was said, in that case, thereafter, following the citation of authorities to support the principle declared, that the testimony of the prosecutrix was:

> "corroborated to some extent by the conduct of the defendant."

In this case there is corroboration for that part of the story told by the little girl concerning the manner in which the respondent locked the door of the small shed in which she says the events occurred, which simultaneously contradicts a part of the evidence of the respondent. The corroboration was supplied by a police officer who inspected the premises. His evidence that the door could be locked by a stick he found in the shed corroborates the statement of the little girl that the respondent locked the door on the inside "with a stick." It contradicts, squarely, the respondent's statement that there was "nothing there," meaning in the shed, to lock the door.

Judgment for the State.
Exceptions overruled.
Appeal dismissed.

OPINION

OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

* * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER PASSED MARCH 6, 1951, ANSWERED MARCH 13, 1951

SENATE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

IN SENATE

March 6, 1951

To the Honorable Justices of the Supreme Judicial Court:

WHEREAS, it appears to the Senate of the Ninety-Fifth Legislature that the following are important questions of law and the occasion a solemn one; and

WHEREAS, there is pending before said Ninety-Fifth Legislature a resolve entitled, "Resolve, Appropriating Moneys for the Leasing, Operation and Maintenance of a State Office Building in the City of Augusta" (a copy of which resolve marked Legislative Document No. 547 is herewith enclosed and made a part hereof) which would appropriate revenues for the purposes of leasing, operating and maintaining an office building to be constructed by the Maine State Office Building Authority under the provisions of chapter 76 of the private and special laws of 1941; and

WHEREAS, under the terms of chapter 76 of the private and special laws of 1941, as amended by chapter 94 of the private and special laws of 1943, chapter 51 of the private and special laws of 1945 and chapter 128 of the private and special laws of 1947, there is created a so-called body corporate and politic to be known as the Maine State Office Build-

ing Authority with power to issue notes, bonds, or other evidences of indebtedness and to secure the payment of the same by a mortgage of the proposed building contemplated by said laws together with land owned by said Authority and also to pledge revenue derived therefrom, also to assign any leasehold contract it may have with the State of Maine to secure payment thereof; and

WHEREAS, it appears that the contemplated project is not a self-liquidating one except as the Ninety-Fifth Legislature and successive Legislatures thereafter appropriate revenues for the use and occupation of said contemplated building or buildings; and

WHEREAS, it is important that the Legislature be informed as to the constitutional validity of an appropriation as provided in the aforementioned resolve now pending before it;

NOW, THEREFORE, BE IT

ORDERED: That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

Question 1.

Would action taken by the Building Authority pursuant to the provisions of section 9 of chapter 76 of the private and special laws of 1941, pledge the faith and credit of the State of Maine contrary to the provisions of the Constitution?

Question 2.

Do the provisions of law recited herein together with the contemplated action proposed to be taken thereunder constitute a pledging of the faith and credit of the State of Maine contrary to the provisions of the Constitution?

Question 3.

Would the passage of the resolve now pending before the Ninety-Fifth Legislature (Legislative Document No. 547) and the execution of a lease pursuant to the provisions of section 12 of chapter 76 of the private and special laws of 1941, constitute the creation by the Legislature of a debt or liability on behalf of the State within the purview of the limitations prescribed in Section 14 of Article IX of the Constitution as amended?

Question 4.

Would the execution of a lease within the provisions of section 12 of chapter 76 of the private and special laws of 1941, become a contract which would result in the pledging of the faith and credit of the State of Maine contrary to the provisions of the Constitution?

Question 5.

Would the passage of the resolve (Legislative Document No. 547) by the Ninety-Fifth Legislature obligate succeeding Legislatures to the appropriation of revenues in furtherance of such contemplated action in such manner as to constitute a violation of the Constitution?

In Senate Chamber, March 6, 1951
Read and Passed
/s/ Chester T. Winslow
Secretary

NINETY-FIFTH LEGISLATURE

Legislative Document No. 547
S. P. 248 In Senate, February 9, 1951.

Referred to Committee on Appropriations and Financial Affairs. Sent down for concurrence and ordered printed.

CHESTER T. WINSLOW, Secretary.

Presented by Senator Leavitt of Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-ONE

RESOLVE, Appropriating Moneys for the Leasing, Operation and Maintenance of a State Office Building in the City of Augusta.

State office building; appropriation for. Resolved: That there be, and hereby is, appropriated from the current revenues of the general fund the sum of $275,000 for the fiscal year ending June 30, 1953 for the purposes of leasing, operating and maintaining an office building to be constructed by the Maine State Office Building Authority under the provisions of chapter 76 of the private and special laws of 1941.

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine.

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, the undersigned Justices of the Supreme Judicial Court, having considered the questions submitted to them by the foregoing Senate Order, and having examined the pending resolve, as well as the 1941 legislation to which it relates, respectfully state:

The first four questions can be considered together. Each involves the constitutional provisions that: "The credit of the state shall not be directly or indirectly loaned in any case," and "The legislature shall not create any debt or debts, liability or liabilities, on behalf of the state, which shall singly or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed $2,000,000." Constitution of Maine, Article IX, Section 14, as amended. The exceptions to this provision are inapplicable to the questions and need not be considered.

The foregoing provisions were written into the Constitution by the sixth Article of the Amendments thereto in

1847. Prior thereto there was no limitation on the power of the Legislature to create debts in behalf of the state. In 1867 the Justices of this Court said of the particular provisions that:

> "The general design was to provide a perpetual check against rashness or improvidence. 'The credit of the State shall not be directly or indirectly loaned in any case.' This indicates the great purpose of the amendment. But as there may be occasions for indebtedness for State purpose, authority is given to create a debt to the amount of three hundred thousand dollars. Indebtedness on the part of the State is limited to this amount. The object of the amendment cannot be misunderstood. Its binding force cannot be denied. It is the calm and deliberate expression of the popular will, embodied in the solemn form of a constitutional restriction upon legislative action." Opinion of the Justices, 53 Maine, 587.

A limitation of somewhat similar nature is imposed by the Constitution on our cities and towns. See Articles XXII and XXXIV of the Amendments to the Constitution. The provisions of Article XXII were considered by the court in *Reynolds* v. *City of Waterville,* 92 Me. 292. Decision therein was that the constitutional limitation on municipal indebtedness could not be evaded by making a purchase in the guise of a lease. The questions propounded must be considered in the light of that authority and the Opinion of the Justices, 99 Me. 515, that the limitations of Article XXII of the Amendments were as binding on the Legislature as on the municipalities to which they directly relate.

The Maine State Office Building Authority, as a body corporate and politic, was created by Chapter 76 of the Private and Special Laws of 1941, as "an agency of the State of Maine," to acquire land and erect an office building or an addition to the State House. The State is to execute a deed

to the Building Authority of the necessary land in the rear of the State House, if the Commission selects such land. If not so selected the right of eminent domain is given as to other land necessary.

Section 9 of the Act provides that the Building Authority may issue notes, bonds or other evidences of indebtedness for terms of not more than 30 years secured by mortgage of the proposed building and land, including also the right to assign as security "any lease-hold contract it may have with the state of Maine." There is no limitation on the amount of notes, bonds or other evidences of indebtedness which may be issued by the Building Authority.

Section 12 provides that upon completion of the construction the Building Authority shall execute a lease to the State of Maine "of the entire property for a rental so computed as shall provide for the payment of interest upon the bonds and notes or other evidences of indebtedness hereinbefore provided for and for their ultimate retirement." The Act makes the execution of the lease mandatory. Upon retirement the entire property is to be conveyed to the State. The so-called lease is not in legal effect a lease, it is a contract of purchase. The so-called rental is not true rent, to wit, payment for the use of property. The total amount of so-called rental is the purchase price the State is to pay for the property. When paid in full it will liquidate the entire indebtedness of the Building Authority. Being a contract of purchase, obligating the State to pay the purchase price, unless the entire amount thereof is to be paid pursuant to an appropriation *presently made* from funds or revenues *currently available* therefor, such contract of purchase would in the constitutional sense be a liability created by the Legislature on behalf of the State. It would constitute a liability which would have to be included with the existing debts and liabilities of the State in determining whether or not they exceed the $2,000,000 limit set

forth in Section 14 of Article IX of the Constitution. If such contract price in and of itself, or together with the existing debts and liabilities of the State, should exceed the constitutional debt limit, the so-called lease would be void.

A contract which obligates the State to pay money over a period of years for the purchase of property, creates a liability. It makes no difference whether you call the payments the State is obligated to make rental or installments on the purchase price, the legal effect is the same. If you vitiate the provision for the so-called lease and payment of rental the Building Authority cannot function. The ultimate source of all funds for the liquidation of the indebtedness of the Building Authority is the State of Maine. Under the so-called lease, the State obligates itself to furnish them. This creates a liability. If the aggregate amount of it either by itself or together with existing obligations exceeds the debt limit of the State, it is beyond the power of the Legislature to impose it.

Under the Act in question, the Building Authority is a mere agency of the State. It is expressly declared to be such by the Act itself. Without such declaration it would be. Its duties and functions determine its character. Its liabilities, which must be ultimately discharged by the State, are liabilities of the State within the spirit, purpose, and true meaning of Section 14 of Article IX of the Constitution. To hold otherwise would render the limitations imposed thereby meaningless.

Assuming, as we must, that the debt limit of $2,000,000 fixed by Section 14 of Article IX of the Constitution, will be exceeded if the State becomes obligated to make the payments provided for in the lease contemplated in the Act, Questions 1, 2, 3 and 4 must be answered in the affirmative.

We answer Question 5 in the negative. One Legislature cannot obligate succeeding Legislatures to make appropri-

ations. One Legislature may, within constitutional limitations, impose a contractual obligation upon the State which it is the duty of the State to discharge; but one Legislature cannot impose a legal obligation to appropriate money upon succeeding Legislatures.

Dated at Portland, Maine, this 13th day of March, 1951.

Respectfully submitted:

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
ROBERT B. WILLIAMSON

MEMORANDUM

Mr. Justice Nulty was out of the State when the foregoing questions were submitted. Despite his entire willingness to return for the purpose of answering them, it is the unanimous view of his Associates that such action on his part is entirely unnecessary. He has all the material before him, has considered the questions and authorizes the statement that he concurs in the answers.

HAROLD H. MURCHIE

EX PARTE HERMAN J. MULLEN

PETITIONER FOR A WRIT OF ERROR

Kennebec. Opinion, March 7, 1951.

Writ of Error. Probation.

It is well established that a fugitive from justice is not entitled to institute, or prosecute, appeal or error proceedings, but that principle does not bar one who is at liberty on probation from doing so although he is absent from the State, if his absence does not violate the terms of his probation.

One sentenced for crime, on conviction under a plea of *nolo contendere*, or otherwise, is entitled to attack the process involved by writ of error.

Writs of error are determined on the record of the process placed in issue, and nothing more.

The presence of a petitioner for a writ of error before the court or justice named in his application, pending the issuance of the writ, or thereafter, is not requisite under R. S. 1944, Chap. 116, Sec. 12.

ON REPORT.

On application for writ of error filed before a single justice of the Supreme Judicial Court. The case was reported *ex parte* without notice to any officer of the State. The question presented is whether petitioner, while on probation after conviction and sentence for a crime not punishable by imprisonment for life and while without the borders of the State with the sanction of the probation officer, may avail himself of process under R. S. 1944, Chap. 116, Sec. 12. Case remanded.

Jerome G. Daviau, for petitioner.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ. WILLIAMSON J., did not participate.

MURCHIE, C. J. This case presents the very narrow issue whether one who has been convicted of a crime not punishable by imprisonment for life, on a plea of *nolo contendere,* has had the sentence imposed on him therefor

suspended, and been placed in the custody and control of a probation officer, is entitled to a writ of error to have the process involved reviewed, if he left the State during the probation term, with the approval of his probation officer, and is not within its borders when his application for the writ is filed.

It is well established that a fugitive from justice is not entitled to institute, or prosecute, appeal or error proceedings. *State* v. *Scott,* 70 Kan. 692, 79 Pac. 126, 3 Ann. Cas. 511; *Wilson* v. *Comm.,* 10 Bush (Ky.) 526, 19 Am. Rep. 76; *Tyler* v. *State,* 3 Okla. Crim. Rep. 179, 104 Pac. 919, 26 L. R. A. N. S. 921, 2 Am. Jur. 988, Par. 235. This principle is no bar to the petitioner, whose absence from the State is not in violation of the terms of his probation.

The fact that the petitioner is under parole does not debar him from the remedy he seeks. R. S., 1944, Chap. 136, Sec. 30 provides expressly that probation does not take from any respondent either his right of appeal:

> "or any right to have his case reviewed or retried under the provisions of law."

Neither is he to be denied the remedy because of his virtual admission of his guilt of the offense charged against him by a plea of *nolo contendere.* Despite a rule to the contrary, generally recognized, according to 2 Am. Jur. 987, Par. 230, one convicted of a crime in this State after a plea of guilty may have the process involved reviewed under a writ of error. *Galeo* v. *State,* 107 Me. 474, 78 A. 867; *Welch* v. *State,* 120 Me. 294, 113 A. 737; *Nissenbaum* v. *State,* 135 Me. 393, 197 A. 915.

This case comes to this court on report, in accordance with established precedent. *Galeo* v. *State, supra; Rell* v. *State,* 136 Me. 322, 9 A. (2nd) 129. Petitioner names the State as an adverse party, but the report is based on the application alone, without service on, or notice to, the State.

According to the terms of the report the case is to be remanded for issuance of the writ, and further proceedings thereon, if the petitioner is entitled thereto. At the present stage the proceeding is *ex parte.*

The petitioner is proceeding under R. S. 1944, Chap. 116, Sec. 12, which declares that writs of error, applicable to judgments in all criminal cases not involving offenses punishable by imprisonment for life (which cases are governed by the preceding section), "shall issue of course." The statute prescribes that applications for the writ:

> "shall be made to the supreme judicial court or to the superior court in the county where the restraint exists, if in session,"

otherwise:

> "to a justice of either of said courts."

Additional provisions authorize the court, or the justice, to stay, or delay, execution of sentence and make orders relative to custody and bail, neither of which is applicable when a petitioner is on probation, and direct that when a writ is issued in vacation it may be returnable before a single justice:

> "and be heard and determined by him, or returnable to said court."

The judgment which the petitioner seeks to have reviewed was entered in Kennebec County. His application for the writ is addressed to a justice of this court residing therein, and was presented to him when no court was in session there. It alleges errors of law in the process sought to be reviewed. Writs of error, so based, are determined on the record of the process challenged, and nothing more. *Welch* v. *State* and *Nissenbaum* v. *State,* both *supra.* The presence of a petitioner before the court or justice to whom his application is addressed, pending issuance of the writ, or thereafter, is not requisite.

In *Smith* v. *State,* 33 Me. 48, 54 Am. Dec. 607; *Galeo* v. *State* and *Rell* v. *State,* both *supra,* the errors alleged involved the sentences imposed for the crimes charged. It was said in the last cited case to be the "right" of the then plaintiff in error to challenge his sentence. In this case the errors alleged relate to the indictment rather than to the sentence. The particular grounds for relief are not material to the present issue. One under the restraint of probation, as well as one confined under a sentence, has the right to test the sufficiency of the process under which he is restrained.

Case remanded.

HENRY DINGLEY ET AL.

vs.

PETER DOSTIE

Cumberland. Opinion, March 15, 1951.

Exceptions. Automobiles. Bailment.

It is only when a justice finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence that there is error of law.

Ordinarily in the absence of facts to the contrary an owner of an automobile has the duty to take delivery at the garage or shop where it was deposited within a reasonable time after notice that repairs have been completed.

ON EXCEPTIONS.

Action of assumpsit on an account annexed and general money counts to recover for storage of an automobile. The case was heard by a justice of the Superior Court without the aid of a jury and under reservations of the right to except as to matters of law. The case is before the Law Court on exceptions to a finding for the plaintiff. Exceptions sustained. Case fully appears below.

Agger & Goffin,
By Jacob Agger, for plaintiffs.

Ralph W. Farris, Jr., for defendant.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (THAXTER, J., did not sit)

WILLIAMSON, J. This is an action of assumpsit on an account annexed and the general money counts to recover for storage of an automobile from October 13, 1948 to the date of the writ in April 1949. The case is before us on exceptions to a finding for the plaintiffs by the justice of the Superior Court by whom the case was decided without the aid of a jury and under reservation of the right to ex-

cept as to matters of law. No objection is raised to the assessment of damages at $80.67. At trial the plaintiffs removed a charge for labor from the case, leaving only the claim for storage for consideration.

The controlling issue in the case is raised by the exception which reads:

> "The Court made no specific finding as to the facts in ordering judgment for the plaintiff. The defendant is aggrieved by such finding, claiming there is no evidence to support the findings of such facts as must necessarily have formed the basis of the judgment; and claiming further, that legitimate inferences to be drawn from the evidence cannot support the judgment."

The exception raises a question of law under the rule that "only when (the justice) finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law." *Sanfacon* v. *Gagnon et als.*, 132 Me. 111, 167 A. 695; *Northwestern Investment Co.* v. *Palmer et als.*, 113 Me. 395, 94 A. 481.

The plaintiffs under the name of Packard-Portland (by which name we will sometimes refer to them) are automobile dealers in Portland and for our purpose more particularly sell and repair Crosley cars. Mr. Edward F. Poole was the general manager of Packard-Portland throughout the period of the transactions here involved. In May 1947 the defendant, residing in Augusta, purchased a new Crosley sedan from Packard-Portland carrying a new-car warranty in which it is stated that Packard-Portland is an "Authorized Crosley Dealer" and which is signed "PACKARD-PORTLAND" over the words "Dealer's Signature."

The defendant became dissatisfied with the operation of the car. At length under date of March 2, 1948, Crosley Motors, Inc. (the manufacturer) wrote defendant, acknowl-

edging receipt of a letter from him dated February 18th, and further saying:

> "We are again contacting the Packard-Portland Company, requesting that they investigate your service problems and handle this matter with you. We suggest that you contact their service department affording them the opportunity to thoroughly inspect your car, they will then advise this office of their findings and recommendations for the handling of your service."

The letter bore the notation "CC: Packard-Portland."

On March 9, 1948 Packard-Portland wrote the defendant at Augusta as follows:

> "We are in receipt of a letter from Crosley Motors dated March 2, 1948, in which it states that you were advised to contact our service department at your earliest possible convenience.
>
> If you will please bring your car in to us, we will repair it at no expense to you."

The importance of the letter of March 9th will later appear.

Within a few days and in any event before March 17th, the defendant's Crosley car was towed from Augusta to Portland and left at the plaintiff's garage. No information was then given to Packard-Portland about the nature of the trouble with the car.

On March 17th Mr. Poole wrote the defendant requesting that defendant tell him what was wrong with the automobile. In the course of a telephone call from defendant in reply to the letter, the manager learned that the trouble was in the engine. He explained to defendant the necessity of an authorization from the manufacturer to make the repairs. The explanation in the record, which the court could properly believe was the substance of the conversation, was as follows:

> "In order to do any work when it is out of the written warranty the customer will pay for it and we will do the work and try to get credit from the factory to return to the customer, or we can get authorization to strip the motor, from the customer, and send a claim to Crosley and wait their recommendation of what to do, whether they will stand behind it or not."

The defendant told the manager to "go ahead on that basis." Packard-Portland proceeded to "strip" or "tear down" the motor, and notified Crosley on a "regular claim form."

On August 18th Packard-Portland by a letter signed by the manager wrote the defendant as follows:

> "Very sorry I have not answered you sooner but have been waiting for a reply from Crosley Motors. Your car is much beyond the guarantee period, taking into consideration the length of time it has been here—it is still so previous to that.
>
> We can fix your car for you but it will be at your expense. The only thing we can do to help will be to give you some consideration on our labor. As far as parts, they will have to be at the regular price.
>
> Please advise by return letter if you want me to start repairs on your automobile."

Letters on September 21st and October 12th signed by the manager from Packard-Portland to the defendant complete the correspondence. On September 21st Packard-Portland wrote the defendant requesting advice by return letter whether or not defendant wanted Packard-Portland to start repairing the car and saying further, "If you decide not to, we would appreciate it very much your taking your car as it is taking up our working space." The letter of October 12th read as follows:

> "We are still waiting for your authorization to repair your Crosley Sedan. If you have decided

> not to have your automobile repaired, please notify us at once.
>
> We will have to start charging you storage at the rate of $1.50 per twenty-four hour period."

The case does not turn upon defendant's contention that failure of plaintiffs to restore the car to its condition on delivery to Packard-Portland in March prevents recovery. The court may well have concluded that the car was in a condition reasonably to be expected after the motor had been "torn down."

The relationship of bailor and bailee was created by the delivery of the Crosley car to Packard-Portland shortly after March 9th. The question is whether upon the termination of the bailment it was the duty of the plaintiffs to deliver the car to defendant in Portland or Augusta. The decision hinges upon the effect to be given the letter of March 9th with the statement, "If you will please bring your car in to us, we will repair it at no expense to you."

We neither consider nor determine whether the March 9th letter plus delivery of the car to the plaintiffs constituted a valid contract with offer, acceptance and consideration on the part of the defendant, or whether, if a valid contract was made, it was later altered by agreement or rescinded. See *Bigelow* v. *Bigelow,* 95 Me. 17, 49 A. 49. The present action relates only to a charge for storage.

The correspondence, the plaintiffs urge, provided an ample basis for the court to find that the car was brought to Portland in order that the plaintiffs might ascertain the type of repairs required and take up with the manufacturer whether the manufacturer would consider itself liable for the repairs.

In our view, however, the only conclusion to be drawn from the evidence is that in reliance upon the "repair without expense" letter, the defendant delivered his car to

Packard-Portland. The letter of March 9th was part of a triangular correspondence between Crosley Motors, Inc.—the manufacturer, Packard-Portland—the authorized dealer, and defendant—the purchaser. It was a letter from an "Authorized Crosley Dealer" from whom the defendant had purchased the car. The car was towed to Packard-Portland shortly after receipt of the March 9th letter. It would be unreasonable to believe that it was taken to Portland in reliance upon the letter from Crosley Motors, Inc. of March 2nd.

In the record there is an attack by Packard-Portland upon the letter of March 9th. It was claimed, and the court could find, that the manager's secretary, authorized by him to write and sign a letter to the defendant to bring his car in for inspection, exceeded her actual authority in using the word "repair," and not the word "inspect." In argument, however, plaintiffs lay no stress on this claimed lack of authority and say:

> "(Defendant) had also by then received (the letter of March 9th) and had been told by the manager that 'we would repair it or inspect it.'" The quoted words are from testimony of the manager as follows:
>
> "I told Mr. Dostie to bring his car to our service department and we would repair it or inspect it. I don't remember the exact words—at no charge. My letter followed the Crosley letter."

The manager was referring to the very letter which he in later testimony said was not authorized. Surely the defendant had no reason to suspect an error by Packard-Portland. He could rely, and he did rely, upon the letter.

The effect of the warranty and the conditions under which repairs would be undertaken and by whom paid were explained to the defendant by the manager of Packard-Portland *after* and not *before* defendant had incurred the

expense of delivery of the car. Whether the defendant would have the repairs made at his expense was a question to be considered only after word from Crosley Motors, Inc. Nothing was said in the telephone conversation between the plaintiffs' manager and the defendant about where delivery of the car should be made if the bailment ended without the repairs having been made.

The case is readily distinguishable from the ordinary situation in which an owner leaves his car at a garage for repairs. As the court said in *Daigle* v. *Pelletier,* 139 Me. 382 at 386, 31 A. (2nd) 345:

> "If the contract does not, by its express or implied terms, fix the place of return the car must be delivered in the garage or shop where it was deposited or at some other appropriate place where it is kept for redelivery on demand and the bailee is under no obligation to make delivery of it elsewhere."

In the instant case the car was placed by defendant in possession of Packard-Portland for repairs to be made without expense to the owner. Whether Crosley Motors, Inc. or Packard-Portland bore the expense would not, of course, concern the owner. We may agree that, if the repairs had been made, it would have been the duty of the defendant to have taken delivery of the car at the garage within a reasonable time after notice that the repairs had been completed.

Upon word that Crosley Motors, Inc. would not pay for the repairs, and in absence of authority to make the repairs at the expense of defendant, Packard-Portland could have prevented the necessity of storage by delivery of the car to defendant in Augusta. In our view the owner was under no obligation, insofar as the terms of the bailment were concerned, to accept delivery of the car at the plaintiff's garage until the repairs were made. It follows that plain-

tiffs were not entitled to charge for the storage. The exceptions must be sustained.

In view of our decision reached upon the vital issue, it is unnecessary that we consider the remaining exceptions relating to the exclusion of evidence.

The entry will be:

Exceptions sustained.

CELANIRE GREGOIRE

vs.

ARTHUR J. LESIEUR

York. March 15, 1951.

PER CURIAM.

In the Superior Court this case was "marked 'law,' " to use the words of R. S., 1944, Chap. 91, Sec. 14, and explain its presence on the docket of the Law Court, on the basis of a Bill of Exceptions, filed within thirty days after a judgment rendered in vacation by the justice who presided at the term thereof when the referees to whom it was referred filed their report, but never allowed by that justice. It alleges errors in his action in overruling objections to the report of the referees and accepting it, but was never presented to him for allowance. Another justice purported to allow the exceptions, as true, pursuant to R. S., 1944, Chap. 100, Sec. 39, after "due notice," as his certificate recites, to the defendant, as the adverse party.

In this State, in the first instance, a justice whose rulings are challenged by a bill of exceptions is as much a party to it as the litigants themselves. There are three parties to a bill of exceptions. *Shepard* v. *Hull,* 42 Me. 577; *Charles Cushman Co.* v. *Mackesy,* 135 Me. 294, 195 A. 365. The status of the justice whose rulings are challenged, or of some other authority acting in his stead, pursuant to statute, as noted *infra,* is such that a bill of exceptions not allowed by him, or such other authority, is not in order for consideration by the Law Court. *Manheim* v. *Carr,* 62 Me. 473. The extent of the authority of a justice over a bill of exceptions he is authorized to allow, in a variety of ways, is apparent by reference to *Field* v. *Gellerson,* 80 Me. 270, 14 A. 70; *Dunn* v. *Auburn Electric Motor Co.,* 92 Me. 165, 42 A. 389; and *Atwood* v. *New England Tel. & Tel. Co.,* 106

Me. 539, 76 A. 949. The fundamental reason for the principle is, as stated in the last cited case, because the justice who ruled should determine in the first instance what a bill of exceptions challenging his ruling should contain or omit.

The statutes protect parties seeking to prosecute exceptions to judicial rulings from the loss of their right when the justice making the rulings is unavailable, acts arbitrarily, or fails to act. R. S., 1944, Chap. 95, Sec. 51 authorizes any justice to allow a bill of exceptions involving the rulings of another, on motion, and "after notice and hearing," when that other is not available. R. S., 1944, Chap. 94, Sec. 14, and Rule 40 of the Rules of Court, adopted pursuant thereto, 129 Me. 503, 518, authorizes relief in the Law Court when a party is confronted with arbitrary action, or a failure to act.

To these statutes what is now R. S., 1944, Chap. 100, Sec. 39 was added by P. L., 1915, Chap. 305, when justices were given authority to render judgments in vacation. The 1915 law provided for the filing of exceptions to vacation judgments within such time as the justice entering them might order. This was changed by P. L., 1929, Chap. 234 to provide that bills of exceptions to such judgments should be filed within thirty days after the rendition of judgment "unless the time is further extended by any justice." The authority so conferred on "any justice" is limited to time extensions. It carries no power for allowing bills of exceptions.

The Bill of Exceptions which accounts for the entry of this case on the docket of the Law Court not having been allowed by the justice who made the rulings it alleges erroneous, or by any other authority having power to act in his stead, is not in order for consideration in the Law Court. Neither is it available for remand for the correction of errors under R. S., 1944, Chap. 91, Sec. 14. One of the limitations of that statute was declared in *Carroll* v. *Carroll*,

144 Me. 171, 66 A. (2nd) 809. Another is that no bill of exceptions can be remanded for the correction of errors by this court unless it came here allowed in some proper manner.

Case dismissed

Lausier & Donahue, for plaintiff.

Simon Spill, for defendant.

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

EVERETT W. BARTLETT

vs.

RICHARD A. CHISHOLM AND

PHOEBE R. CHISHOLM

Cumberland. Opinion, March 14, 1951.

Brokers. Pleading. Amendments.

Under R. S. 1944, Chap. 75, Sec. 7 one cannot recover a real estate commission in the absence of an allegation that he was a duly licensed real estate broker at the time the alleged cause of action arose.

The allegation required by statute must appear of record to perfect jurisdiction.

Neither the parties nor the court can waive the provisions of the statute which defines and limits the plaintiffs right to bring and maintain his action.

ON EXCEPTIONS.

On exceptions by defendant to the acceptance of a referee's report in an action to recover a real estate broker's commission. The case was tried without objection being raised to any defect or insufficiency in the pleadings. Exceptions sustained. Case fully appears below.

James A. Connellan, for plaintiff.

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

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

WILLIAMSON, J. On exceptions by defendant, Richard A. Chisholm, to the acceptance of a referee's report. Plaintiff's action to recover a real estate broker's commission was referred under rule of court with the right to except as to matters of law. The referee found for the plaintiff. The

first objection sharply raises a jurisdictional question. The objection reads:

> "1st. The Referee erred in ruling that the declaration could be regarded as having been amended, and further in ruling that the Plaintiff's action was not barred because there was no allegation in Plaintiff's pleadings that at the time of the transaction involved he was a duly licensed and qualified real estate broker under the Laws of Maine."

The issue is whether the referee could properly find for the plaintiff in the absence of an allegation in the declaration that the plaintiff was a duly licensed real estate broker at the time the alleged cause of action arose under the provisions of *R. S., Chap. 75, Sec. 7,* relating to the Maine Real Estate Commission, which reads so far as we are here concerned as follows:

> "No person, partnership, or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for any services performed as a real estate broker or real estate salesman without alleging and proving that such person, partnership, or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

There is no dispute about the facts on the point at issue. The bill of exceptions seen and agreed to by the plaintiff reads as follows:

> "Plaintiff's writ and declaration failed to allege that Plaintiff was a duly licensed and qualified real estate broker under the Laws of Maine. The case was tried without any objection being raised to such defect or such insufficiency. The Referee found and ruled that since amendments could have been allowed, he will regard the writ and declaration as though they had been properly amended."

The position of the referee appears from his report:

> "The action is brought in assumpsit on an account annexed and the general money counts, and issue is joined on a plea of the general issue without brief statement. The case was tried without objection being raised as to any defects in or the sufficiency of the writ and declaration. If objection had been made, any apparent defects in pleading were amendable. *Jones* v. *Briggs,* 125 Me. 265; *Mansfield* v. *Goodhue,* 53 A. (2nd) 264. Amendments could have been allowed as provided in R. S., Chap. 100, Sec. 95. See *Benson* v. *Newfield,* 136 Me. 23, 33."

On direct examination the plaintiff testified:

> "Q. And are you a licensed real estate broker?
>
> A. Yes."

On cross examination the critical fact of a license at the time the alleged cause of action arose in March 1949 was brought out from the plaintiff as follows:

> "Q. How long have you been a real estate broker?
>
> A. Well, now, of that I am not absolutely positive but I think it is four years I have had a broker's license and either one or two years as a salesman of real estate."

The argument of the defendant that "there was no understanding that plaintiff was a licensed broker" or in other words that the case was not tried on the theory that the plaintiff had the required license is without merit. Proof of the fact was made without objection and the fact served no useful purpose except to establish a statutory requirement. It is the allegation, not the proof, which is defective.

This is the third case to come before us in which a real estate broker has failed to make the allegation required by statute. *Gerstian* v. *Tibbetts,* 142 Me. 215, 49 A. (2nd) 227, arose upon exceptions to a nonsuit granted upon the

merits. The court overruled the exceptions both on the merits and for lack of the allegation. The court said, page 220:

> "If the fact that the plaintiff had a license is considered proved, it is not alleged. The very jurisdiction of the Court depends upon *both* allegation and proof."

In *Mansfield* v. *Goodhue,* 142 Me. 380, 53 A. (2nd) 264, upon the sustaining of a demurrer, the defect in the allegation was cured by amendment. A second demurrer by the defendant on the ground that the defect was not amendable was overruled. Our court in sustaining the decision said on page 382:

> "Assuming that such allegation does involve the right of the court to consider the case, yet there is no reason why the failure to allege such fact may not be cured by amendment. It may be true that a court without jurisdiction has no authority to allow an amendment. Yet if a court has jurisdiction of the subject matter, it may in such a case as this allow an amendment to perfect the jurisdiction on the record."

The *Gerstian* and *Mansfield* cases stand for the principle that the allegation required by statute must appear of record. There has been no curative amendment in the case at bar. The pleadings are fatally defective, and hence the exceptions must be sustained.

It is urged that the pleadings are to be regarded as though properly amended. No objection was raised to the defect in or sufficiency of the pleadings at the trial before the referee. An amendment could have been, and no doubt would have been allowed, had the procedures required by *R. S., Chap. 100, Sec. 95,* relating to amendments in referred cases, been followed. See *Ford* v. *Whitehead,* 137 Me. 125, 15 A. (2nd) 857, decided shortly before the statute was first enacted in 1941.

Our attention is directed to *Jones* v. *Briggs,* 125 Me. 265, 132 A. 817, and *Benson* v. *Newfield,* 136 Me. 23 at 33, 1 A. (2nd) 227, which illustrate the cure of mere defects in pleadings by verdict and the treatment of pleadings on an "as if amended" basis when variance appears between allegation and proof. See also *Clapp* v. *Cumberland County Power and Light Co.,* 121 Me. 356 at 359, 117 A. 307; *Cyr* v. *Landry,* 114 Me. 188 at 196, 95 A. 883; *Wyman* v. *Shoe Finding Co.,* 106 Me. 263, 76 A. 483.

Such cases, however, do not touch upon the situation when jurisdiction is at stake. The court did not consider the "as if amended" rule applicable in the *Gerstian* case, *supra,* although no objection to the pleadings appears to have been raised by counsel at any stage of the case. In the *Jones* case, *supra,* the court said on page 266:

> "An action at law is not to be dismissed for mere defects in pleading that are amendable or may be cured by verdict if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action."

In our view the allegation required by the statute must be made of record in fact. The statute does not read that on proof of the license in a case fairly tried and without surprise the allegation may be considered as if in fact made upon the record. Such a construction would fail to give effect to the meaning and the intent of the statute.

We may regret that the decision of the referee cannot be considered on the merits, but must be set aside for lack of a few appropriate words in the pleadings. The law here applicable, however, is found in the Act of Legislature which defined and limited the plaintiff's right to bring and maintain his action. Neither the parties nor the court can waive its provisions. It is not necessary that we pass upon the remaining objections.

The entry will be:

Exceptions sustained.

CHARLES F. BAXTER, ET AL.

vs.

WATERVILLE SEWERAGE DISTRICT, ET AL.

Kennebec. Opinion, March 19, 1951.

Constitutional Law. Sewer Districts. Taxation.

Impairment of Contracts. Police Power. Municipal Corporations.

All acts of the Legislature are presumed to be constitutional.

In testing the question of constitutionality of an act of the Legislature every reasonable doubt is resolved in favor of the proposition that the act is within and under the terms and meaning of the constitution.

Fundamental doctrines of the constitution must be adhered to as if the constitution were made yesterday by those who had full knowledge of present demands and necessities.

Within the limitations set forth in *Kelley et al.* v. *Brunswick School District et al.*, 134 Me. 414; 187 A. 703 the Legislature may create distinct and separate bodies politic and incorporate the identical inhabitants and territory.

The fact that commissioners of a sewer district are appointed by the Mayor with the approval of the City Council rather than election by the people in the district does not affect the constitutionality of an act creating a sewer district. *Opinion of the Justices*, 144 Me. 417; 66 A. (2nd) 376.

The fact that finances needed to improve and maintain the sewer system should come from rates to be paid by users rather than general taxation does not affect the constitutionality of an act creating sewer district.

The act creating a sewer district violates no constitutional guarantee against the impairment of vested rights or contract, (Art. I, Sec. 11, Constitution of Maine; Art. I, Sec. 10, Constitution of United States), even though existing legislation provided that abutters upon a public drain may by permit and payment therefor enter and connect therewith and such permit shall run with the land without subsequent charge or payment, since abutters had in fact no absolute contract but merely a permit or license and exercised their rights with the realization that the Legislature could change the law. A con-

trary rule would enable individuals by their contracts, or contractual relations to deprive the State of its sovereign power to enact laws for the public health and welfare.

Sewer district act providing that the district shall take title to all public drains and sewers and shall be responsible in the maintenance and extension is not objectionable as unlawfully transferring legal duties and responsibilities.

A Municipal Corporation has no element of sovereignty but is a mere local agency of the State.

ON REPORT.

Bill in Equity brought by fourteen residents and taxable inhabitants of the City of Waterville against the Waterville Sewerage District, a quasi-municipal corporation, and its five commissioners, to enjoin them from carrying out the provisions of Chap. 211 of the Private and Special Laws of 1949. Bill dismissed. Case fully appears below.

William H. Niehoff,
Roland J. Poulin, for plaintiff.

Thomas N. Weeks,
F. Harold Dubord, for defendant.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. THAXTER, J. did not sit.

FELLOWS, J. This Bill in Equity is brought by fourteen residents and taxable inhabitants of the City of Waterville and of the Waterville Sewerage District under R. S., 1944, Chap. 95, Sec. 4, against the Waterville Sewerage District, a quasi-municipal corporation, and its five commissioners, to enjoin them from carrying out the provisions of Chapter 211 of the Private and Special Laws of 1949. The case comes to the Law Court on report of the evidence, in accordance with the provisions of R. S., 1944, Chap. 91, Sec. 14.

The bill seeks to have declared unconstitutional this act of the Legislature which created the Waterville Sewerage

District, as a quasi-municipal corporation, and to prevent the district and its commissioners from incurring any indebtedness, from issuing notes or bonds, and from charging the plaintiffs for the use of the public sewers and drains of the city of Waterville. The defendants deny the allegations of the plaintiffs' bill and contend that the legislative act is constitutional and that the district and its commissioners are legally empowered to act.

The Chapter 211 of the Private and Special Laws of 1949 was passed by the Legislature to remedy, if possible, a condition in the city of Waterville that is described by physicians, sanitary engineers, and health officers as a serious threat to the public health because of an antiquated, insufficient, obnoxious and highly dangerous city sewerage system. The Messalonskee stream, which runs through the city and was sufficient for sewage disposal when the population was small, is now a hazardous peril, and more sewer entrances into it are forbidden. The act provides for the taking over, by the district, of all the public sewers and for their necessary extension, improvement and operation, and for the disposal of sewage. The act was duly adopted by the voters of the city of Waterville at a special election and five commissioners were appointed by the Mayor with the approval of the City Council, as provided therein. The schedule of the fees that are to be charged to those who use this service has been filed with, and approved by, the Public Utilities Commission of the State.

The plaintiffs claim that Chapter 211 of the Private and Special Laws of 1949 is unconstitutional because (1) the act violates the constitutional provision restricting the debt limit of the city of Waterville to five per cent of the valuation; (2) that the boundaries of the district created by the act are geographically the same as the boundaries of the city; (3) that the act transfers a function of the city to another municipal or quasi-municipal corporation with gov-

ernmental functions of a similar nature, which absolves the city from a legal duty; (4) that the commissioners of the district are appointed by the Mayor of the city with approval of a majority of the City Council; (5) that the financing of extension and maintenance should be by general taxation and not by rates charged users, as provided in the act; and (6) that the charges for use are in violation of the obligations of a contract and deprives the plaintiffs of vested rights in public sewers.

In passing upon the constitutionality of any act of the Legislature the court assumes that the Legislature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional and this is "a presumption of great strength." *State* v. *Pooler,* 105 Me. 224, 228; *Laughlin* v. *City of Portland,* 111 Me. 486; *Village Corporation* v. *Libby,* 126 Me. 537, 549. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. *Warren* v. *Norwood,* 138 Me. 180. Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court. *Kelley* v. *School District,* 134 Me. 414; *Hamilton* v. *District,* 120 Me. 15, 20.

It is not, and it should not be, a question of testing the constitution to discover whether or not its words have sufficient elasticity of meaning to cover the act under consideration, and to stop within the limits of the breaking point. It is rather the resolving of every reasonable doubt in favor of the proposition that the act is within and under the terms and meaning of the constitution, without exerting strain on the words used to express the fundamental law. New social and economic conditions raise problems that were not dreamed of by the men who drafted and adopted

the constitution, but the fundamental doctrines must be adhered to, as if the constitution were made yesterday by those who had full knowledge of present demands and necessities. The court does not intend to yield to the "theory of expediency" as was stated by Justice Murchie in *Warren* v. *Norwood,* 138 Me. 180, 195.

The people of the State of Maine in creating, by the State constitution, the legislative department of government, conferred upon it the whole of their sovereign power of legislation, except in so far as they delegated some of this power to the Congress of the United States, and except in so far as they imposed restrictions on themselves, by their own constitution, and fixed limits upon the legislative authority. The government of the United States is one of enumerated powers and the national constitution specifies them. The people of this State retain all powers not enumerated. The Legislature of Maine may enact any law of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, by the Constitution of the United States or the Constitution of this State. The Federal and State Constitutions are limitations upon the legislative power of the State Legislature and are not grants of power. At any legislative session, therefore, unless restricted by one of these constitutions, the legislators may amend or repeal any law of their predecessors. *Constitution of Maine,* Article IV, Part III, Section I; *Laughlin* v. *Portland* 111 Me. 486.

On May 4, 1949 while this bill to create the Waterville Sewerage District was pending in the Legislature, the justices of this court were asked, by the Maine Senate, as provided by the constitution, to give their individual opinions in regard to its constitutionality. The justices stated unanimously that "the constitutionality of a legislative enactment depends not only upon whether the same violates some limitation on legislative power imposed by the constitution, but

also whether or not its application to existing rights would violate the constitutional guaranties of those possessing the same. Within the limitations set forth in *Kelley et al.* v. *Brunswick School District et al.*, 134 Me. 414, 187 A. 703, the Legislature may create distinct and separate bodies politic and corporate with identical inhabitants and territory. The identity of inhabitancy and territory existing between the proposed Sewer District and the city of Waterville does not affect the constitutionality of the proposed act; nor is the purpose of the act such that in and of itself it would prevent the creating of the proposed body politic and corporate." *Opinions of the Justices*, 144 Me. 417, 66 Atl. (2nd) 376.

The evidence presented in this case, and now before us, does not indicate that the creation of the Waterville Sewerage District is a "scheme" or "subterfuge" to circumvent the constitutional 5% debt limit of the city. *Reynolds* v. *Waterville*, 92 Me. 292. The present financial condition of the city of Waterville does not so indicate. It also satisfactorily appears that the district, with powers separate and distinct from the city, will be able to give better service.

The argument advanced by the plaintiffs, that the act establishing the Waterville Sewerage District transfers a function of the city to another municipal corporation with governmental functions of like nature, is not tenable. The answer is in the act itself. The district takes over the sewer system and will manage and control. The city of Waterville will have no duties or responsibilities in regard to it. The district is a separate corporation, although geographically the same territory, and established by the Legislature which had complete authority to so establish. The units are for distinct and different purposes. *Kelley* v. *School District*, 134 Me. 414; *Hamilton* v. *Pier District*, 120 Me. 15. The provision of the act that the commissioners

of the sewerage district be appointed by the Mayor of the city of Waterville with the approval of the City Council, rather than election by the people in the district, does not affect the constitutionality. *Opinions of the Justices,* 144 Me. 417, 66 Atl. (2nd) 376.

The plaintiffs contend that the finances needed to improve and maintain the sewer system and its service should come from general taxation of all property rather than rates to be paid by users, but this too is a legislative direction which the law-making body had authority to order. The control of rates is a governmental function. The rates are charges made for services rendered, and charges which the consumer by accepting service impliedly agrees to pay. The Legislature in the exercise of police power is unrestricted by the provisions of contracts or agreements between individuals or corporations, or between individuals and municipal corporations. See *Guilford Water Company,* 118 Me. 367; Re *Searsport Water Co.,* 118 Me. 382.

The constitution provides that "the Legislature shall pass no * * * law impairing the obligation of contracts." Constitution of Maine, Article I, Section 11; Constitution of the United States, Article 1, Section 10. The R. S., 1944, Chap. 84, Sec. 143 provides that abutters upon the line of a public drain may enter and connect "on written application to the municipal officers distinctly describing the land to which it applies and paying therefor what they determine. They shall then give the applicants permits so to enter which shall be available to the owner of the land so described, his heirs and assigns, and shall run with the land without any subsequent charge or payment," and Sec. 148 of Chap. 84 of R. S., 1944, provides that the public drain shall be kept in repair by the municipality. An ordinance of the city of Waterville passed in May 1889 provides also for a license or permit for an individual to make a private drain or to connect with a public sewer.

The plaintiffs contend that they have a contract with the city of Waterville and that this act creating the Waterville Sewerage District violates contractual rights, citing *Blood* v. *Bangor,* 66 Me. 154 and *Hamlin* v. *Biddeford,* 95 Me. 308, which cases hold that under existing statutes the city is liable for failure to repair a sewer. They had no inflexible and absolute contract. They had in fact a permit or license only. The statutes and the ordinance state that it is a "permit." It could not be a contract such as the plaintiffs claim because the city of Waterville had no power to make a contract to deprive the State of its police power. The person who connected with the public sewer entered with the realization that the Legislature could change the law. Then, too, the rights and franchises of a city are rights that can be changed by the Legislature. "Where the public health, safety or morals are concerned the power of the State to control under its police powers is supreme and cannot be bargained or granted away by the Legislature. The exercise of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts." Re *Searsport Water Co.,* 118 Me. 382 at 387; In re *Guilford Water Co.,* 118 Me. 367; Re *Island Falls Water Co.,* 118 Me. 397; *State* v. *Pulsifer,* 129 Me. 423. The Constitution of the United States does not interfere with the police power of the State. *State* v. *Robb,* 100 Me. 180. The police power extends to the "lives, limbs, health, comfort and quiet of all persons." *Railroad Co.* v. *Commissioners,* 79 Me. 386, 393; *State* v. *Mayo,* 106 Me. 62. This rule is not only reasonable, but necessary, as a contrary rule would enable individuals by their contracts, or contractual relations, to deprive the State of its sovereign power to enact laws for the public health and public welfare.

The plaintiffs say that the law which creates the Sewerage District transfers a governmental function from the city of Waterville to another municipal corporation and thus unlawfully transfers legal duty and responsibility.

This result is neither caused by the action of the city nor by the action of the Sewerage District. It is the authorized and constitutional act of the Legislature that, by the terms of the law passed by it, has provided that the district shall take the title to all public drains and sewers in the city of Waterville and shall be responsible in the maintenance and extension of the present public system. "A municipal corporation has no element of sovereignty. It is a mere local agency of the state." *Frankfort* v. *Lumber Co.*, 128 Me. 1, 4; *Augusta* v. *Water District*, 101 Me. 148.

We have examined with care Chapter 211 of the Private and Special Laws of 1949 establishing the Waterville Sewerage District and providing the terms, methods and conditions for this quasi-municipal corporation to take over the present public sewer system of the city of Waterville and, in the interests of the public health, to maintain, operate, enlarge and improve the same. We have considered the evidence introduced into the record, with the aid of the instructive briefs presented by counsel for the plaintiffs and counsel for the defendants. We fail to find any evidence of fact, or any proposition of law, to overcome the presumption of constitutionality. The Legislature had the authority, and whether the act was proper and expedient was a matter for legislative determination.

Bill dismissed.

LUCY L. KNOWLTON

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

Piscataquis. Opinion, March 19, 1951.

Exceptions.

Insurance. Accidental Means. Exceptions and Exclusions.

If the finding of a referee is based upon absence of proof of a fact, the finding is final unless the evidence establishes as a matter of law the existence of such fact.

It is well settled that if a fall produces injuries which in turn cause death, and such fall is caused by disease, the death results at least indirectly from the disease which causes the fall.

Finding of a referee that "death . . . did not result directly or indirectly or wholly or partially or otherwise from any bodily or mental disease or infirmity" constitutes legal error where all the evidence shows that seizures of the decedent were caused by alcoholism and the falls which he suffered were caused by such seizures, and there is no evidence from which it could be found that the insured's death was caused in any other way than as a result of falls caused by seizures.

One of the purposes of the "*Exceptions* and *Exclusions*" clause of an insurance policy is to deny the additional benefit for death indirectly caused by disease even if a death so caused would be within the "*Benefit*" clause.

ON EXCEPTIONS.

Action on two life insurance policies for the recovery of an additional benefit for death caused by bodily injuries. The regular benefit had been paid and accepted without prejudice to the present rights of action, if any. The referees found for the plaintiff. The case is before the Law Court on exceptions to the ruling of the justice of the Superior Court refusing to accept, setting aside and rejecting the referees' report.

Exceptions overruled. Case fully appears below.

Francis A. Finnegan,
Abraham M. Rudman, for plaintiff.

James E. Mitchell, for defendant.

SITTING: MURCHIE, C. J., MERRILL, NULTY, JJ. MANSER, CHAPMAN A. R. J. (THAXTER, FELLOWS AND WILLIAMSON JJ. did not sit.)

MERRILL, J. On exceptions to the ruling of a justice of the Superior Court refusing to accept, setting aside and rejecting a referees' report. The action, on two life insurance policies, is for the recovery of the additional benefit provided for in each policy in a sum of $2,500 for death caused by certain bodily injuries. The regular death benefit provided for in each of the policies had been paid and accepted without prejudice to the present rights of action, if any.

The plaintiff, Lucy L. Knowlton, was the beneficiary of both policies and was the widow of the insured, David L. Knowlton. The writ was dated February 4, 1949, returnable to the March 1949 Term of the Superior Court in the County of Piscataquis. At the return term the action was referred to referees with right of exceptions reserved to both parties as to questions of law. The referees filed a report in which they found for the plaintiff and that she was entitled to the additional benefits for which action was brought.

Each policy in a paragraph entitled "BENEFIT" provided for the payment of the additional benefit if "the Insured's death was caused directly, independently and exclusively of all other causes, by a bodily injury sustained solely by external, violent, and accidental means." Each policy under a subsequent clause entitled "EXCEPTIONS AND EXCLUSIONS" provided that the additional benefit

should not be payable "if death results, directly or indirectly, or wholly or partially, or otherwise, from (1) any bodily or mental disease or infirmity,".

The referees accompanied their report with special findings, one of which was, "The death of David L. Knowlton did not result directly or indirectly or wholly or partially or otherwise from any bodily or mental disease or infirmity."

By written objections sufficient under Rule XXI the defendant challenged, among others, this finding of the referees as erroneous in law. The justice of the Superior Court by whom the objections were heard refused to accept, and set aside and rejected the referees' report. To this action by the presiding justice the plaintiff alleged exceptions. It is upon these exceptions that the case is before this court.

If the above special finding by the referees was erroneous as a matter of law, the ruling of the presiding justice was correct and the plaintiff's exceptions thereto must be overruled.

We said in *Benson* v. *Town of Newfield,* 136 Me. 23, 27:

> "Facts found in reference under Rule of Court are final when supported by any evidence. *Brunswick Coal & Lumber Co.* v. *Grows,* 134 Me. 293; 186 A. 705; *Staples* v. *Littlefield,* 132 Me. 91; 167 A. 171; *Hawkins* v. *Maine and New Hampshire Theaters Co.,* 132 Me. 1; 164 A. 628; *Kliman* v. *Dubuc,* 134 Me. 112; 182 A. 160; *The United Company and Fay & Scott* v. *Grinnell Canning Co.,* 134 Me. 118; 182 A. 415; *Richardson* v. *Lalumiere,* 134 Me. 224; 184 A. 392. From proven facts proper inferences may be drawn as a basis for determination of legal issues."

If the finding of the referee is based upon absence of proof of a fact, when the burden of proof with respect to such fact rests upon the party against whom such finding

is made, the finding of the referee is final unless the evidence establishes the existence of such fact as a matter of law.

We have in two cases indicated that the legal effect of the action of a single justice in finding that certain facts exist, or in finding that the existence of certain facts has not been proved is the same. In *Levesque* v. *Pelletier,* 144 Me. 245, 68 Atl. (2nd) 9, 11, we said:

> "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."

This language was quoted with approval in *Tarbell* v. *Cook et al.,* 145 Me. 339, 75 Atl. (2nd) 800 at 801.

While the burden on the appellant in an equity appeal is only to show that the finding of the sitting justice was clearly wrong, no distinction is made as to the weight of his finding whether it be of facts found by him to have been proved or it be that there is a failure of proof of certain facts. This same general principle is applicable to the findings of referees. The same degree of finality is to be accorded to their findings whether such findings be that facts have been proved or that there be a lack of proof of facts.

The findings necessarily made by a referee (1) of facts proved or (2) that there was a lack of proof of facts are not to be set aside by the court unless such findings constitute error in law. With respect to the facts found proved, such finding will not be erroneous in law when supported by any evidence. With respect to a finding that there was a lack of proof of a fact, such finding will be final unless such finding of lack of proof constitutes an error in law. Such finding of lack of proof of a fact will not constitute an error in law if there is any evidence negativing the existence of such fact, or any evidence of facts from which a proper in-

ference may be drawn against the existence of such fact, nor unless the existence of such fact is the only proper inference which the referees could have drawn from all of the other facts necessarily found by them.

The insured, David L. Knowlton, was admitted to Bangor State Hospital on Friday, July 16, 1948, at about 4:15 p.m., suffering from acute chronic alcoholism, which is a disease. At the time of his admission he was somewhat intoxicated and tremulous. The deceased had commenced drinking heavily in the fall of 1945 and the winter of 1946. From sometime in May, 1946 until sometime in June of that year he was in a private hospital for treatment for alcoholism. In the fall of 1946 he started drinking heavily again and, except for a period of some three months when he was working as a fireman in a planing mill, he continued so to do until committed to Bangor State Hospital where he was deprived of all liquor. For the three months next preceding this commitment he had been drinking, on an average, about a fifth of spirituous or hard liquor, so-called, each day. In fact, his widow, the beneficiary, testified that she had purchased this quantity of whiskey for him, and did so in order to save his spending money for taxi fares in going to get the liquor himself.

On Sunday afternoon, following Knowlton's commitment on Friday, at about 4 p.m., an attendant in the hospital named Thompson was in a room just off the corridor of the hospital. He heard a noise, went into the corridor and saw Knowlton on the floor near the drinking fountain. The noise was caused by Knowlton's fall to the floor. The floor of this corridor was of hard wood with a waxed surface and as Thompson stated, "pretty much highly polished." He went to Knowlton and found him in a convulsive state which was consistent with a convulsion caused by alcoholism. No witness testified that he saw Knowlton fall. Previously, on the same Sunday morning, the same attendant

had left Knowlton sitting on the side of his bed eating his breakfast. A few minutes later he was called to Knowlton's room and found him on the floor beside the bed in a convulsive condition, consistent with a convulsion caused by alcoholism. At about 1:15 in the afternoon Knowlton had a seizure in the corridor near the drinking fountain. There is no evidence that he fell from that seizure, but Dr. O'Brien, who was called to the scene, testified that when he arrived, he found him on the floor, and that at that time he had a convulsion consistent with being caused by, and which he diagnosed as having been caused by alcoholism. The record is barren of any evidence of any other cause of these convulsions than the alcoholism, the disease from which Knowlton was suffering. After Knowlton was found in a convulsive condition on the floor at 4 p.m., he was removed to his bed in a semi-comatose condition. He subsequently became unconscious and died. An autopsy was performed and it was found that Knowlton had a fracture of the skull some six inches long and that he had suffered hemorrhages of the brain.

There was evidence in the record which would justify a finding by the referees that the death, as distinguished from the fall, was caused by the injuries which were caused by the fall or falls, and that alcoholism was not a cause of the death itself, as distinguished from the fall or falls which caused the injuries which in turn resulted in death. Such a finding was necessary to bring the death within the coverage of the clause in the policy entitled "BENEFIT". See *Bouchard* v. *Prudential Ins. Co.*, 135 Me. 238. In that case the disease itself was one of the contributing causes to the death, as distinguished from the accident. The question of whether the accident as distinguished from the death was caused by disease was not involved in that case, nor so far as we can find involved or decided in any other case decided by this court.

A finding, however, that the death, as distinguished from the fall which caused death, was not caused by disease is not determinative of the liability of the defendant under these policies.

It is well settled that if a fall produces injuries which in turn cause death, and such fall is caused by disease, the death results at least indirectly from the disease which causes the fall. In such case, the beneficiary cannot recover the additional benefit provided for in the policy, if the policy contains, as here, a provision that the additional benefit will not be payable "if death results, directly or indirectly, or wholly or partially, or otherwise, from (1) any bodily or mental disease or infirmity,". *Manufacturers' Accident Indemnity Co.* v. *Dorgan,* 58 Fed. 945. Multiplication of authorities upon this point would serve no useful purpose. This is but an application of the maxim, *causa causantis causa est causati,* the cause of the thing causing is the cause of the effect.

Although there is a conflict in the decisions as to whether in such a case as this the death is within the coverage of the "BENEFIT" clause of these policies, we need express no opinion thereon because we hold that if the fall, which causes the injuries which result in death, is caused by disease, the death is indirectly caused by disease within the exclusion of the above clause entitled "EXCEPTIONS AND EXCLUSIONS." One of the purposes of the "EXCEPTIONS AND EXCLUSIONS" clause is to deny the additional benefit for death indirectly caused by disease in such cases, even if a death so caused would be within the coverage of the "BENEFIT" clause. See *Bohaker* v. *Travelers Insurance Company,* 215 Mass. 32. There is also a conflict in the decisions as to whether under the clause entitled "EXCEPTIONS AND EXCLUSIONS" the burden is upon the plaintiff to show that the death was not so indirectly caused by disease or is upon the insurer to show that it was so

caused. On account of the reasons upon which we base our opinion, it is immaterial where this burden of proof lies and we need express no opinion thereon.

There is no evidence in this record which would justify a finding that the seizures which the plaintiff had on any one of the three occasions that he had the same, were caused by any other cause than the disease of alcoholism from which he was suffering. On the other hand, all of the evidence in the case shows that said seizures were caused by the alcoholism, and that the falls which he suffered were caused by said seizures. There is no evidence in the case from which it could be found that the insured's death was caused in any other way than as the result of a fall or falls caused by such seizure or seizures. The only conclusion that can be drawn from the evidence in this case is that the death was caused by a fall or falls which in turn was or were caused by disease, to wit, alcoholism. Measured by the rules hereinbefore set forth with respect to findings by referees, whether the burden of proof was upon the plaintiff to negative disease as a cause of the fall of the insured, or whether it was upon the defendant to show that the fall was caused by disease, the finding of the referees "The death of David L. Knowlton did not result directly or indirectly or wholly or partially or otherwise from any bodily or mental disease or infirmity" constituted legal error. This legal error by the referees in and of itself justified the action of the presiding justice when he refused to accept, and set aside and rejected the referees' report. This being true, we need not consider any of the other objections to the acceptance of the referees' report, nor any of the grounds of exceptions to the action of the presiding justice. *Kennebunk, Kennebunkport & W. W. D.* v. *Maine Turnpike Authority,* 145 Me. 35, 71 Atl. (2nd) 520 at 531.

Exceptions overruled.

BESSIE M. HEATH ET AL.,

APPLTS. FROM DECREE OF JUDGE OF PROBATE
IN RE ALLOWANCE OF LAST WILL OF ORA E. REED

BESSIE M. HEATH ET AL.,

APPLTS. FROM DECREE OF JUDGE OF PROBATE
IN RE DISALLOWANCE OR DENIAL OF MOTIONS
IN ESTATE OF ORA E. REED

Cumberland. Opinion, April 9, 1951.

Wills. Exceptions. Burden of Proof. Witnesses.

The validity of a decree of the Supreme Court of Probate can be challenged before the Law Court only by exceptions.

The sufficiency of bills of exceptions to the finding and decrees of the Supreme Court of Probate is determined by the same rules of law as apply in civil cases.

Bills of exceptions must on their face show in what respect the ruling is in violation of law, what the issue was, and how the excepting party was aggrieved.

The burden of proving as a fact that the testatrix at the time of the execution of the will was of sound mind is upon the proponents of the will.

When the mental condition of a person is in issue non expert witnesses who were acquainted with the testatrix and who had business and social contacts with her may be asked whether they observed anything singular or unusual respecting her mental condition and questions of similar import.

ON EXCEPTIONS.

On petition for probate of a will alleging that testatrix last dwelt in Portland in the County of Cumberland. The Judge of Probate for Cumberland County denied motions by the contestants to dismiss the petition on the alleged ground that testatrix died a resident of Richmond in the County of Sagadahoc. R. S., 1944, Chap. 140, Sec. 9. Con-

testants appealed. After hearing upon the petition, where the question of jurisdiction was again raised, the will was allowed. An appeal was taken to the Supreme Court of Probate where both appeals were heard together. The Supreme Court of Probate entered a decree dismissing both appeals and allowing the will. To the decree as well as to rulings of the Justice of the Supreme Court of Probate admitting and excluding certain testimony and evidence exceptions were alleged and allowed. Exceptions overruled. Case fully appears below.

Hutchinson, Pierce, Atwood & Scribner,

John W. Quarrington,

John J. Keegan, for proponents.

Franklin R. Chesley,

Edward S. Titcomb,

James H. Titcomb, for contestants.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (THAXTER, J., did not sit)

MERRILL, J. On exceptions. Ora E. Reed, the testatrix, died on the eleventh day of October, A. D. 1948 in a nursing home in Richmond, in the County of Sagadahoc and State of Maine. A document dated April 12, 1940, purporting to be her last will and testament, was offered for probate in the Probate Court for the County of Cumberland, State of Maine, by the executors named therein, who are here the appellees. The petition for probate of the will alleged that the testatrix last dwelt in Portland, in said County of Cumberland. The Judge of Probate for Cumberland County denied motions by the contestants, which motions sought the dismissal of the petition for probate of the will on the ground that the testatrix died a resident of Richmond, in the County of Sagadahoc, and that because of the pro-

visions of R. S., Chap. 140, Sec. 9, the Probate Court for Cumberland County was without jurisdiction in the premises. From this decision an appeal was taken to the Supreme Court of Probate. After hearing upon the petition, in which the contestants again raised the question of jurisdiction, the Judge of Probate held that the testatrix died a resident of Cumberland County and allowed the document presented as her last will and testament. From this decision of the Judge of Probate an appeal was taken to the Supreme Court of Probate. The aforesaid appeals were heard together in the Supreme Court of Probate and decree was entered holding that the testatrix died a resident of and domiciled in Portland, in the County of Cumberland and State of Maine, allowing the document presented as her last will and testament and dismissing both appeals. To the decree of the Justice of the Supreme Court of Probate, as well as to certain rulings of his admitting and excluding testimony and evidence, exceptions were alleged and allowed. It is on these exceptions that the case is now before this court.

The bill of exceptions for convenience is divided into three numbered parts. Part numbered 1 is an exception to so much of the decree of the Justice of the Supreme Court of Probate as overruled the motion of the contestants to dismiss the petition, and his finding that the decedent was domiciled in and a resident of the city of Portland at the time of her decease. Part numbered 2 consists of a group of separate exceptions therein lettered A to H, both letters inclusive, the several exceptions being to rulings of the presiding justice admitting or excluding testimony and evidence objected to by the contestants. Part numbered 3 is an exception to the decree of the Supreme Court of Probate allowing the will, and especially to so much thereof as held that the testatrix was of sound mind on April 12, 1940, the date of the execution thereof. For convenience we will first consider the exceptions contained in parts 1 and 3 of the bill

of exceptions. These exceptions are to the decree and findings of the Supreme Court of Probate.

By and in the Reasons of Appeal, the issues before the Supreme Court of Probate were (1) the jurisdiction of the Probate Court for the County of Cumberland over the proceedings, (2) the execution of the will, (3) the competency of the testatrix to make a will and (4) whether its making and execution were procured through fraud, deceit and undue influence.

The validity of a decree of the Supreme Court of Probate can be challenged before this court only by exceptions. *Cotting* v. *Tilton,* 118 Me. 91; *Tuck* v. *Bean,* 130 Me. 277; *Bronson, Aplt.,* 136 Me. 401; and *Edwards, Aplt.,* 141 Me. 219. Exceptions reach only errors in law. *Clapp* v. *Balch,* 3 Me. 216; *Laroche* v. *Despeaux,* 90 Me. 178. We said in *Cotting* v. *Tilton,* 118 Me. 91, 94:

> "The findings of the Justice in the Supreme Court of Probate in matters of fact are conclusive, if there is any evidence to support them. And when the law invests him with the power to exercise his discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions."

See also *Mitchell et Alii, Re: Will,* 133 Me. 81; *McKenzie* v. *Farnham,* 123 Me. 152; *Packard, Aplt.,* 120 Me. 556; *Palmer's Appeal,* 110 Me. 441.

The sufficiency of bills of exceptions to the findings and decrees of the Supreme Court of Probate is determined by the same rules of law which determine the sufficiency of bills of exceptions in other civil cases, and especially by those applicable to bills of exceptions from the findings and decisions of a single justice in cases tried without the intervention of a jury.

As said in *Bronson, Aplt.* 136 Me. 401 with respect to exceptions to a decree of the Supreme Court of Probate:

> "It is now well settled that this Court under R. S., Chap. 91, Sec. 24 (now R. S., Chap. 94, Sec. 14), has jurisdiction over exceptions in civil and criminal proceedings only when they present *in clear and specific phrasing the issues of law to be considered.* The presentation of a mere general exception to a judgment rendered by a justice at *nisi prius* is not sufficient under the statute. *Gerrish, Exr.* v. *Chambers et al.,* 135 Me. 70; 189 A. 187. *An exception to a judgment rendered in the Supreme Court of Probate is within the rule."* (Emphasis ours.)

Exceptions to the findings of a single justice on the ground that they are erroneous in law, to be within the foregoing statutory rule must on their face show in what respect the ruling is in violation of law. In the Bronson case, which held that the bill of exceptions was insufficient, it was alleged that "said rulings were erroneous and prejudicial to her and she excepts thereto and prays that her exceptions be allowed."

The bill itself must state the grounds of exceptions in a summary manner. The bill must be able to stand alone. See *Bradford* v. *Davis,* 143 Me. 124, 56 Atl. (2nd) 68. The bill of exceptions must show what the issue was and *how the excepting party was aggrieved. Jones* v. *Jones,* 101 Me. 447.

If the ground of exception to the finding of a single justice is that it was erroneous in law because there was no evidence to support it, or because his finding was made without any evidence, such ground must clearly appear in the bill of exceptions. A general exception on the ground that the finding was erroneous in law is not sufficient. As said in *Wallace* v. *Gilley et al.,* 136 Me. 523:

> "The exception, however, is not properly presented. It is directed generally and indiscrimi-

> nately to the judgment below. It is not stated whether the error alleged is based upon the erroneous application of established rules of law, or upon findings of fact unsupported by evidence, or on other exceptionable grounds. It is now settled that the presentation of a mere general exception to a judgment rendered by a justice at nisi prius does not comply with the law."

If it is claimed that the error in law is because the finding of fact is without any evidence to support it, the bill of exceptions should contain such allegation or its equivalent. The bill of exceptions in the present case, so far as it relates to the finding by the Justice of the Supreme Court of Probate that the testatrix died a resident of Cumberland County, and to his decision that the document presented was her last will and testament based upon his finding that she was possessed of testamentary capacity, nowhere alleges that such findings or either of them, were made without evidence to support them. Nor does the bill of exceptions contain language equivalent to such allegations. On the other hand, the bill of exceptions itself with respect to those subjects clearly shows that there was evidence with respect to each of them to be weighed and passed upon by the presiding justice and from which he could draw conclusions which supported his findings with respect thereto.

The effect of the statements contained in the bill of exceptions respecting these issues amounts to no more than that the presiding justice erred in making his choice between two conclusions, either of which he could have made from the facts set forth in the bill of exceptions. The exceptions to so much of the decree as relates to the jurisdiction of the court and to the sustaining of the will are insufficient. Neither of them either by direct allegation or by necessary inference alleges any error of law on the part of the presiding justice. They must be overruled as insufficient.

Realizing, however, the importance of this case to the

parties, involving as it does an estate of approximately one-half million dollars, we have carefully examined the case upon its merits so far as these issues are concerned. The reading of the entire record presented to us, consisting of 1,332 pages, together with a volume of exhibits consisting of 75 pages, and the briefs of the parties containing 187 pages, and an examination of the cases cited was no small task. In approaching this task we were bound by the rule, too well established to require further mention, that if there is any evidence to support the findings and decree of the Supreme Court of Probate, exceptions will not lie. Even had the bill of exceptions been sufficient, because of the foregoing rule we would not have been obliged nor would it have been within our province to study the voluminous report of the evidence in this case for the purpose of ascertaining on which side the evidence preponderates or what testimony we regard as most entitled to credence, or which of alternative possible inferences we would have drawn therefrom. Our duty under such circumstances would be confined to the determination of whether the conclusions reached by the Justice of the Supreme Court of Probate were erroneous as a matter of law. Questions of fact once settled by the Justice of the Supreme Court of Probate, if his findings are supported by any evidence, are finally decided. Such justice and he alone is the sole judge of the credibility of witnesses and the value of their testimony. It is only when his findings are made without any evidence to support them that we can disturb them on exceptions as erroneous in law.

From a careful and thorough study of the record and the briefs we are convinced that no injustice is being done by overruling on technical grounds those exceptions, contained in parts 1 and 3 of the bill of exceptions, which respectively relate to the questions of jurisdiction and to the allowance of the will. The decree of the Supreme Court of Probate, affirming as it does the jurisdiction of the Probate Court of

Cumberland County and allowing the will of the decedent, is not only supported by credible evidence, but it is inconceivable to this court that the Supreme Court of Probate could have arrived at any other decision upon the record before it. The evidence clearly demonstrated that the testatrix changed her domicile from Richmond to Portland sometime in 1920 or 1921, and retained her domicile in Portland to the time of her death. The evidence clearly demonstrated that the will was duly executed with all of the required formalities prescribed by our Statute of Wills. The evidence further demonstrated, even beyond a reasonable doubt, that at the time the testatrix executed the same she was a person of sound mind and of sufficient age as required by R. S., Chap. 155, Sec. 1. There was no evidence that even remotely suggested that the execution of the will was obtained by fraud, deceit or undue influence.

A discussion or analysis of the voluminous testimony upon these issues would serve no useful purpose. The decree of the Supreme Court of Probate was amply supported by credible evidence. It was not erroneous in law and the exceptions to it set forth in parts 1 and 3 of the bill of exceptions, even if sufficiently stated, would have to be overruled.

With respect to the group of exceptions contained in that part of the bill of exceptions numbered 2, we will discuss later the exceptions contained therein in the portion thereof lettered G. As to all of the other exceptions contained in part 2 of the bill of exceptions, we will say as did Chief Justice Dunn in *Eastman, Appellants,* 135 Me. 233, they are "Exceptions to rulings excluding evidence, and admitting evidence, detail whereof would promote no serviceable end (and they) are not sustainable. Clearly no ruling did prejudice to any legal right. *Neal* v. *Rendall,* 100 Me. 574; 62 A. 706; *Ross* v. *Reynolds,* 112 Me. 223; 91 A. 952." They must be overruled.

Our only reason for discussion of the exceptions con-

tained in part 2 and lettered G is for the purpose of reaffirming at this time an established rule of evidence, which reaffirmation we believe may be serviceable in the future. One of the issues before the Supreme Court of Probate was the mental capacity of the testatrix. On that issue the burden of proving as a fact that the testatrix at the time of the execution of the will by her was of sound mind was upon the proponents of the will. The proponents were permitted to ask numerous non-expert witnesses, who were acquainted with the testatrix and who had business and social contacts with her, questions of the following tenor:

"Q. In such times as you did see her there, did you observe any facts about her conversation that indicated anything singular or unusual respecting her mental condition?

A. No, sir.

Q. Did you ever hear her say anything or do anything that indicated to you that her mind was affected or weakened?

A. No, sir."

These questions, propounded to numerous witnesses, were admitted and answered over the objection of the contestants and exceptions in each instance were taken and allowed and the exceptions properly preserved and allowed in the bill of exceptions in part 2 G thereof. If this testimony was improperly admitted it would be prejudicial.

The objection to these questions was based upon the rule that a non-expert witness (other than a family or other skillful and reputable physician with adequate opportunity for observing and judging his mental qualities, or an attesting witness to the will) is not allowed to give a *direct* opinion as to the mental condition of a testator, when that condition is in issue. These questions, however, were clearly admissible under the rule laid down by this court in *Robinson* v. *Adams,* 62 Me. 369. In that case Narcissa

Stone and William G. Barrows, who were not witnesses to the will then in question, were offered as witnesses. With respect to their testimony we said:

> "The exceptions to the answers of Narcissa Stone and Wm. G. Barrows are based on the assumption that they were expressions of opinions by non-experts. These answers were given in connection with details of certain facts introduced by the appellees, in refutation of the allegation of unsoundness of mind made by the appellant. They were both mere negations; statements that they did not observe certain facts touching the mental condition of the testatrix; i. e., one said she did not observe any failure of mind, and the other, who was a witness to a former will, that he observed nothing peculiar. *State* v. *Pike,* 49 N. H., 408.
>
> The only objection in the argument is, that these were expressions of opinion on the question of testamentary capacity.
>
> The question, whether opinions of witnesses not experts are, in all cases where insanity or delusions are in question, to be excluded, has recently been much discussed, particularly in a learned opinion by Mr. Justice Doe of the Supreme Court of New Hampshire.
>
> If the case required it, we might, perhaps, review some of the former decisions of this court. But, certainly nothing less than a *distinct expression of the opinion* (emphasis ours) of the witness, *given as such opinion directly* (emphasis ours), comes within our rule. Mere negations, such as stated by these witnesses, *do not give to the jury an affirmative opinion* (emphasis ours). They, at most, state negatively that nothing was observed by them. This is not an opinion of the witness, but had relation to a fact, as to the condition of the person."

The foregoing case of *Robinson* v. *Adams* was quoted in *Fayette* v. *Chesterville,* 77 Me. 28. See also *Plummer* v. *Life Insurance Co.,* 132 Me. 220, 226.

Maine is not peculiar and alone in admitting such testimony. The same rule prevails in Massachusetts. See *Gorham* v. *Moor,* 197 Mass. 522; *Jenkins* v. *Weston,* 200 Mass. 488; *Leary* v. *Webber Co.,* 210 Mass. 68; *Commonwealth* v. *Borasky,* 214 Mass. 313; *Raymond* v. *Flint,* 225 Mass. 521; *Old Colony Trust Co.* v. *Di Cola,* 233 Mass. 119; *Neill* v. *Brackett,* 241 Mass. 534. In fact the specific questions here objected to are those the admissibility of which was sustained in *Gorham* v. *Moor, supra.* When the mental condition of a person is in issue these questions and questions of similar import are admissible. They were admissible in this case, and there was no error upon the part of the presiding justice in permitting them to be asked and answered.

There being no prejudicial legal error in any ruling challenged by the bill of exceptions, the exceptions must be overruled.

Exceptions overruled in both cases.

OPINION

OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER PASSED APRIL 12, 1951 ANSWERED APRIL 20, 1951

SENATE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE
IN SENATE

April 12, 1951

To the Honorable Justices of the Supreme Judicial Court:

Whereas, it appears to the Senate of the Ninety-Fifth Legislature that the questions of law hereinafter pro-

pounded are important and that it is upon a solemn occasion, the following statement of facts and questions of law are herewith submitted:

STATEMENT

There are pending before the Ninety-Fifth Legislature several tax bills any one of which, if enacted, would institute a program of taxation designed to provide revenue for the state government on a large scale. If any one of these bills is enacted it is also contemplated that the revenue produced will be such that state government could and should withdraw from taxation of real and personal property (the state levy upon valuation). For this purpose, the pending legislation makes provision for the repeal of the state tax levy so-called. Whether the new tax, if enacted, be a sales or income tax or both or combination of both, it is contemplated that the field of taxation wherein a levy upon valuation is imposed will be left to municipalities for the production of revenues to support and maintain municipal functions of government.

It is common knowledge that there are large areas of the state in which there are no organized municipal governments in which areas, commonly called the unorganized territory, it is necessary for the state to directly support and maintain governmental functions ordinarily the responsibility of local governments. One of the direct state responsibilities in the unorganized territories, there being no municipal government to provide therefor, is to provide for the support and maintenance of public schools. Attached hereto and made a part hereof is a copy of Legislative Document No. 562 entitled "An Act to Create the Maine School District," which, if enacted, purports to make provision for the support and maintenance of schools in the unorganized territory.

NOW, THEREFORE, BE IT ORDERED:

That the Justices of the Supreme Judicial Court are re-

quested to give to the Senate, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

Question 1.

If Legislative Document No. 562 were duly enacted, assuming the administrative district purporting to be created thereby were created by direct terms, would the same be constitutional?

Question 2.

In view of the obvious purposes of Legislative Document No. 562, is it constitutional, if enacted, to assess a tax upon property in an unorganized township in the unorganized territory in which township there are no inhabitants?

A. Would such assessment in such territory be constitutional with respect to property in an unorganized township in which there are one or more inhabitants, but none of school age?

B. Are unorganized townships within the unorganized territory a basic factor in the assessment of taxes?

Question 3.

Is it essential to the constitutionality of Legislative Document No. 562, if enacted into law, that it be submitted by referendum to the legal voters resident within such unorganized territory for acceptance or rejection?

Question 4.

If the answer to Question 3 is in the affirmative, may existing facilities provided by the election laws be utilized for such referendum or will additional legislation be required?

In Senate Chamber, April 12, 1951

Read and Passed

(Signed) Chester T. Winslow,
Secretary

NINETY-FIFTH LEGISLATURE

Legislative Document No. 562

H. P. 1034 House of Representatives, February 9, 1951

Referred to the Committee on Taxation. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Sinclair of Pittsfield.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-ONE

AN ACT to Create the Maine School District.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 37, §§ 155-A - 155-E, additional. Chapter 37 of the revised statutes is hereby amended by adding thereto 5 new sections to be numbered 155-A to 155-E, inclusive, to read as follows:

'Maine School District

Sec. 155-A. Maine school district. The administrative district known as the Maine school district shall include all of the unorganized territory of the state, and any areas which may subsequently become a part of the unorganized territory.

Sec. 155-B. Assessment of tax. An annual tax of not over 7½ mills on the dollar shall be assessed upon all the property in the Maine school district, including rights in public reserved lots, 1½ mills to be expended under the direction of the state tax assessor for the purpose of property

appraisal within the district, and not over 6 mills to be used for schooling of children residing in said district. Such tax shall be paid on or before the 1st day of October, annually. The valuation as determined by the board of equalization, and set forth in the statement filed by it as provided by section 65 of chapter 14, shall be the basis for the computation and apportionment of the tax assessed. The state tax assessor shall determine, in accordance with the provisions of section 74-A of chapter 14, the amount of such taxes due from the owners of lands in each unorganized township and lot or parcel of land not included in any township and rights in public reserved lots, and such amounts shall be included in the statements referred to in section 77 of chapter 14. The tax assessed shall be valid, and all remedies herein provided shall be in full force if said property is described with reasonable accuracy whether the ownership thereof is correctly stated or not.

Sec. 155-C. Determination of tax; certification to state tax assessor. The commissioner of education shall before March 15, annually, make an estimate of the cost of schooling children residing in the Maine school district for the school year beginning the following July 1. Such amount shall not exceed an amount equivalent to a tax of 6 mills on the last state valuation of property in the unorganized territory, as determined by the board of equalization and set forth in the statement filed by it under the provisions of section 65 of chapter 14. The commissioner of education shall certify such amount to the state tax assessor not later than March 15, annually, following the making of such estimate.

Sec. 155-D. Assessment and collection of tax. The state tax assessor shall, not later than April 1 of the same year, make an assessment of the total amount certified together with 1½ mills on the dollar of valuation for property appraisal and shall determine the amount of tax due in ac-

cordance with the provisions of section 74-A of chapter 14 and include such amounts in the statement referred to in section 77 of chapter 14. The state tax assessor shall collect such taxes and deposit the receipts with the treasurer of state daily, and so much of the taxes so collected as were assessed for school purposes and so much as were assessed for appraisal purposes shall be credited on the books of the state to appropriate accounts. Payment and collection of such school district taxes shall be in accordance with the provisions of sections 77-A to 77-C, inclusive, of chapter 14.

Sec. 155-E. Expenditure of funds by the commissioner of education. The commissioner of education is hereby authorized to expend so much of the funds of the Maine school district as were assessed for school purposes for the cost of schooling of children residing within the Maine school district, in accordance with the provisions of this chapter. Any unexpended balance in such account shall be carried forward in the books of the state and shall not lapse.'

Sec. 2. R. S., c. 14, § 93, amended. The 1st paragraph of section 93 of chapter 14 of the revised statutes is hereby amended to read as follows:

'Each owner or person in charge or control of personal property such as would not be exempt from taxation if it were located in a city or town of this state, and not otherwise subject to taxation under existing laws of the state of Maine, which on the 1st day of April in each year is situated whether permanently or temporarily, within an unorganized township, shall, on or before the 1st day of May in each year, return to the state tax assessor a complete list of such property upon blanks furnished by said assessor; and such property shall be assessed by said state tax assessor for a just proportion of all **school district** and county taxes; but none of the property described in this section shall be included in the state valuation as made for unorganized townships.'

Sec. 3. R. S., c. 37, § 145, amended. Section 145 of chapter 37 of the revised statutes is hereby amended to read as follows:

'**Sec. 145. State to cooperate with U. S. government for schooling of children on government reservation.** Special arrangements may be made to provide elementary school privileges in cooperation with the United States government for a child or children residing with a parent or legal guardian at any light station, fog warning station, lifesaving station or other place within a United States government reservation, **from such appropriation as the legislature may provide for the purpose, and** under such rules and regulations as may be made by the commissioner and approved by the governor and council.'

Sec. 4. R. S., c. 37, § 146, amended. Section 146 of chapter 37 of the revised statutes, as amended by section 7 of chapter 350 of the public laws of 1945, is hereby further amended to read as follows:

'**Sec. 146. Appropriation for schools in unorganized territory; how used.** Such amounts as are necessary to **provide schooling for children residing in the unorganized territory** shall be paid out of **the** funds **of the Maine School District account.** The commissioner is authorized to use **such funds** for any purpose in connection with the schooling of children in the unorganized territory of the state, including: teachers' salaries, board and traveling expenses; fuel and janitor service; tuition, board and transportation of elementary school pupils; secondary school tuition; textbooks, school apparatus and supplies; erection, equipment, repair and maintenance of schoolhouses and requisite buildings, all of which schoolhouses shall conform to the minimum requirements for school buildings as provided by section 21; lots for school buildings or leases thereof; services and expenses of agents and attendance officers, and clerical assistance; and any other expenses he may deem necessary.'

Sec. 5. R. S., c. 37, § 148, repealed. Section 148 of chapter 37 of the revised statutes, as amended by section 30 of chapter 41 and by section 8 of chapter 350, both of the public laws of 1945, is hereby repealed.

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine:

The undersigned Justices of the Supreme Judicial Court, in giving you their opinion upon the important questions of law propounded to them by the Senate Order passed April 12, 1951, as Section 3 of Article VI of the Constitution requires them to do, feel compelled to recognize, as their predecessors did on July 1, 1903, that the particular inquiries involve an issue of such inclusive scope that something more than a categorical answer is required. See *Opinion of the Justices,* 97 Me. 595, at 597. On that occasion the two questions asked were whether a proposed enactment, if it became a law, would violate the provisions of (1) Section 8 of Article IX of the Constitution, or (2) any of the provisions thereof. The justices restated the more inclusive issue thus raised, as follows:

> "In levying a State tax, is the Legislature prohibited by the Constitution from fixing a higher rate of taxation upon lands outside of incorporated cities, towns and plantations than the rate * * * within such municipalities?"

They answered it affirmatively, relying on said Section 8, and advised that the proposed legislation was "contrary to the Constitution."

Reference to the "Statement" carried in the Preamble of the Senate Order, discloses that the Legislature contemplates the abandonment of the system of property taxation which has been the principal source of the State's revenues, or one of them, and substituting one which cannot be expected to produce any substantial yield in the unorganized

territory of the State. We cannot doubt that Question No. 1 involves a more fundamental and underlying one, which might be stated as follows:

> "Has the Legislature any option, if it desires that the property in the unorganized territory of the State shall continue to contribute to the cost of government, or to the maintenance of schools, except to continue to tax all the property within the State, not exempt from taxation, at a uniform rate, according to its just value?"

Statements of Justices of this Court, not only in Opinions such as this but in decided cases, require a negative answer to that question. Two such statements were made in giving consideration to taxes imposed on the property in unorganized territory to provide a proportionate part of funds for the operation of schools elsewhere. In the first of them, *Opinion of the Justices,* 68 Me. 582, the constitutional validity of P. L., 1872, Chap. 43, imposing a mill tax for the support of schools, was declared. It was said of that legislation, that:

> "All the property in the state is assessed * according to its valuation. All contribute thereto in proportion to their means."

In the second, *Sawyer* v. *Gilmore,* 109 Me. 169, a new school fund was established, through a similar tax, and a different system for the distribution of its yield was provided. In declaring the validity of that law Mr. Justice Cornish said that:

> "The Legislature has the right * * * to impose an equal rate of taxation upon all the property in the State * * * for the purpose of distributing the proceeds * * * for common school purposes."

Each of the statements quoted above was grounded in the requirement of Section 8 of Article IX of the Constitution that all taxes upon real and personal property, until and unless the Legislature should provide especially for the tax-

ation of intangible personal property as therein authorized: "Shall be apportioned and assessed equally, according to the just value thereof."

Subject to the right to levy taxes for municipal and county purposes and to exceptions of the nature of those considered in *Hamilton* v. *Portland Pier Site District,* 120 Me. 15, and *Inhabitants of Sandy River Plantation* v. *Lewis* and *Maxcy,* 109 Me. 472 (Maine Forestry District Tax) permitting the assessment of special local taxes for special local purposes based upon local benefits, any and all taxes assessed upon real and personal property by the State must be assessed on all of the property in the State on an equal basis while that provision of the Constitution remains unchanged.

We answer Question No. 1 by saying that the proposed legislation would not be constitutional if enacted. This being true, on the fundamental ground stated, no good purpose would be served by considering the additional questions.

Dated at Portland, Maine, this twentieth day of April, 1951.

Respectfully submitted:

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY
ROBERT B. WILLIAMSON

OPINION
OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

QUESTIONS
PROPOUNDED BY THE HOUSE OF REPRESENTATIVES IN AN ORDER PASSED APRIL 19, 1951
ANSWERED APRIL 21, 1951
HOUSE OF REPRESENTATIVES ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In House of Representatives

Whereas, there is now pending before the House of Representatives of the 95th Legislature of the State of Maine,

Bill, "An Act to Facilitate Extension of the Maine Turnpike" (House Paper 686) (Legislative Document 416), a printed copy of which is hereto attached and made a part hereof; (Exhibit "A")

Whereby it is proposed to add a new subsection VIII to Sec. 107 (Limitation on Use of General Highway Funds) of Chap. 20 (State Highway Department) of the Revised Statutes of 1944, which proposed new subsection VIII provides for the payment by the Treasurer of the State to the Maine Turnpike Authority created by Chap. 69 of the Private and Special Laws of 1941, a portion of the state tax on gasoline for the purposes more fully stated therein, and

Whereby in the last sentence of the proposed new subsection VIII it is provided that "Upon the issuance of Turnpike revenue bonds or Turnpike revenue

refunding bonds by the Authority under the provisions of Chap. 69 of the Private and Special Laws of 1941, as amended and supplemented, the provisions of this subsection shall be deemed to constitute a material part of the contract between the authority and the holders of such bonds," and

Whereas, an amendment is proposed to said Bill, a copy of which proposed amendment is hereto attached and made a part hereof; (Exhibit "B") and

Whereas, grave doubt has arisen as to the constitutionality of such Bill, with or without the proposed amendment, with relation to

1. The pledging of the credit of the State, directly or indirectly, and
2. The diversion of State Highway funds, and

Whereas, to the House of Representatives of the 95th Legislature it appears that the questions of law herein raised are important and that the occasion is a solemn one; NOW, THEREFORE, BE IT ORDERED, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House of Representatives, according to the provisions of the Constitution in this behalf, their opinion on the following questions, to wit:

Question 1. Is the Maine Turnpike Authority a "State Department" within the meaning of Article LXII of the Constitution?

Question 2. Would Bill, "An Act to Facilitate Extension of the Maine Turnpike" (House Paper 686) (Legislative Document 416) if enacted by the Legislature, in its present form, pledge the credit of the State directly or indirectly, contrary to the Constitution?

Question 3. Would Bill, "An Act to Facilitate Extension of the Maine Turnpike" (House Paper 686) (Legislative Document 416) if enacted by the Legislature, in its present form, divert State Highway Funds contrary to the Constitution?

Question 4. Would Bill, "An Act to Facilitate Extension of the Maine Turnpike" (House Paper 686) (Legislative Document 416) if amended as proposed (Exhibit "B") and if enacted, pledge the credit of the State directly or indirectly, contrary to the Constitution?

Question 5. Would Bill, "An Act to Facilitate Extension of the Maine Turnpike" (House Paper 686) (Legislative Document 416) if amended as proposed (Exhibit "B") and if enacted, divert State Highway Funds contrary to the Constitution?

Exhibit "A"

NINETY-FIFTH LEGISLATURE

Legislative Document No. 416

H. P. 686 House of Representatives, February 2, 1951.

Referred to Committee on Highways. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk.

Presented by Mr. Sinclair of Pittsfield.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-ONE

AN ACT to Facilitate Extension of the Maine Turnpike.

Preamble. Whereas, by chapter 69 of the private and special laws of 1941, approved April 17, 1941 (herein some-

times called the "act"), the Maine Turnpike Authority (herein sometimes called the "authority") was duly created as a body corporate and politic and was authorized and empowered to construct, maintain and operate in integral operating units a turnpike from a point at or near Kittery in York county to a point at or near Fort Kent in Aroostook county, and to issue turnpike revenue bonds payable solely from revenues to pay the cost of such construction; and

Whereas, it is declared by the act that the accomplishment by the authority of the authorized purpose stated in the act is for the benefit of the people of the state of Maine and for the improvement of their commerce and prosperity in which accomplishment the authority will be performing essential governmental functions, and when all bonds issued by the authority for paying the cost of the turnpike and the interest thereon shall have been paid or a sufficient amount for the payment of all such bonds and the interest to maturity thereon shall have been set aside in trust for the benefit of the bondholders and shall continue to be held for that purpose, the authority shall be dissolved and the turnpike, its connecting tunnels and bridges, overpasses and underpasses, its leases, rights, easements, franchises, land and property shall become the property of the state of Maine and all revenue therefrom shall become payable to the treasurer of state as a part of the highway funds of the state and the turnpike, its connecting tunnels, bridges, overpasses and underpasses shall be maintained and operated by the state highway commission, and all funds of the authority not required for the payment of the bonds and all machinery, equipment and other property belonging to the authority appertaining to the maintenance and operation of the turnpike shall be vested in the state highway commission; and

Whereas, the first integral operating unit of the turnpike, extending from a point in the town of Kittery at or near

the approach to the interstate toll bridge over the Piscataqua river to a point in the city of Portland in Cumberland County connecting with Congress street in the Stroudwater section, with an approach connecting with U. S. Route No. 1 at or near Cash Corner in South Portland, has been constructed by the authority and such construction was financed by an issue of turnpike revenue bonds of the authority in the aggregate principal amount of $20,600,000. all of which are now outstanding and unpaid; and

Whereas, the construction of an additional unit of the turnpike, extending from the present northern terminus of the first unit at Portland into or through the heart of the state will greatly improve the commerce and prosperity and the health and living conditions of all the people in the state; and

Whereas, the construction of such additional unit will relieve traffic congestion on existing highways which is rapidly becoming a menace to the safety of the inhabitants of the state, and will relieve the highway funds of the state of enormous expenditures for widening and constructing extra lanes on existing highways; and

Whereas, the construction and operation of such additional units will substantially add to the funds available by the state of Maine for construction of public highways and will attract many motorists to Maine who will, in turn, buy more gasoline and further increase revenues of the state for use on other public highways; and

Whereas, the provisions of this supplemental act are necessary to effect the financing of such additional unit; now, therefore,

Be it enacted by the People of the State of Maine, as follows:

R. S., c. 20, § 107, sub-§ VIII, additional. Section 107 of chapter 20 of the revised statutes is hereby amended by

adding thereto a new subsection, to be numbered VIII, to read as follows:

'**VIII.** For returning and paying to the Maine Turnpike Authority, created by chapter 69 of the private and special laws of 1941, an amount equal to the amount of the tax on that number of gallons of internal combustion engine fuels which are consumed on each integral operating unit of the turnpike theretofore constructed by the authority under the provisions of said chapter 69, the amount to be paid to the authority to be calculated on the basis of 1 gallon of fuel for each 15 miles of motor vehicle travel over each such unit. On or before the 15th day of each month, the executive director of the authority shall certify to the treasurer of state the number of miles of motor vehicle travel over each such unit in the preceding calendar month, and within 15 days after the receipt of each such certificate, the treasurer of state shall pay to the secretary and treasurer of the authority, or to such trustee or cotrustee of funds of the authority as shall be designated by the authority, the amount payable to the authority according to such certificate and calculated as above set forth; provided, however, that there shall be deducted from the amount payable for the last month of each calendar year a pro rata part of the amount expended during such calendar year under the provisions of subsection IV. The amount so paid to the authority on account of each such unit shall be deemed to be revenues of such unit the same as tolls and other revenues collected by the authority. Until bonds are issued by the authority for paying the cost of an additional integral operating unit of the turnpike, all moneys received by the turnpike authority under the provisions of this subsection shall be deposited in a special fund and may be used by the authority only for the purpose of conducting traffic and engineering studies preparatory, and deemed by the authority necessary, in order to extend or construct an ad-

ditional operating unit of the turnpike. Upon the issuance of any turnpike revenue bonds or turnpike revenue refunding bonds by the authority under the provisions of chapter 69 of the private and special laws of 1941, as amended and supplemented, the provisions of this subsection shall be deemed to constitute a material part of the contract between the authority and the holders of such bonds.'

Exhibit "B"

Committee Amendment "A" to H. P. 686, L. D. 416
Bill "An Act to Facilitate Extension of the Maine Turnpike"

Amend said Bill by striking out everything after the words "subsection IV." and inserting in place thereof the following:

Until bonds are issued by the authority for paying the cost of an additional integral operating unit of the turnpike, all monies received by the turnpike authority under the provision of this subsection shall be deposited in a special fund and may be used by the authority only for the purpose of conducting traffic and engineering studies preparatory, and deemed by the authority necessary, in order to extend or construct an additional operating unit of the turnpike. Upon the issuance of any turnpike revenue bonds or turnpike revenue refunding bonds by the authority under the provisions of Chapter 69 of the Private and Special Laws of 1941, as amended and supplemented, the amount so paid to the authority on account of each such unit shall be deemed to be revenue of such unit the same as tolls and other revenues collected by the authority.

ANSWER OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

The undersigned, Justices of the Supreme Judicial Court,

having considered the questions submitted to them by the Order of the House of Representatives passed April 19, 1951, respectfully answer as follows:

The Maine Turnpike Authority is not a "State Department" within the meaning of Article LXII of the Amendments to the Constitution. Our answer to Question 1, therefore is "No."

The Maine Turnpike Authority not being a state department within the meaning of said provision of the Constitution, the payment to it of any part of the revenues referred to in said provision of the Constitution, as provided for in House Paper No. 686, Legislative Document No. 416, being an act entitled "An Act to Facilitate Extension of the Maine Turnpike," either in its present form or if amended as proposed by Exhibit "B" would constitute a diversion thereof contrary to said provision of the Constitution. Our answer to Questions 3 and 5 is "Yes."

In view of the answers to Questions 1, 3 and 5 it seems unnecessary to answer Questions 2 and 4.

Dated at Portland, Maine, this twenty-first day of April, 1951.

Respectfully submitted:

HAROLD H. MURCHIE

SIDNEY ST. F. THAXTER

RAYMOND FELLOWS

EDWARD F. MERRILL

WILLIAM B. NULTY

ROBERT B. WILLIAMSON

OWEN E. JONES, SR.

AND

ELINOR B. JONES

vs.

HOWARD T. DEARBORN

Knox. Opinion, April 24, 1951.

Equity. Injunction. Title.

Equity will not take jurisdiction to compel the removal of an alleged nuisance which is already existing, and restrain its continuance by injunction, until the alleged infringement and the existence of the nuisance resulting therefrom have first been established in an action at law, except in cases of sufficient reason where the necessity is imperious or irreparable injury is threatened, or to avoid a multiplicity of suits, or where the remedy at law is inadequate.

ON APPEAL.

This is an equity action to enjoin an alleged unlawful use of land, obstruction of a right of way, and for damages. The title to the land is in dispute. The sitting justice granted the injunction and assessed damages at $1.00. Defendant appealed. Appeal sustained. Injunction dissolved. Bill dismissed without prejudice to the right of the plaintiffs to proceed at law. Case fully appears below.

Stanley L. Bird, for plaintiffs.

Frank F. Harding, for defendant.

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

THAXTER, J. This is an action in equity to enjoin the defendant from an alleged unlawful use of the plaintiffs' land, for obstruction of a right of way across it, and for damages for such unlawful use and obstruction. The defendant ad-

mitted by his answer and agreed statement that he had obstructed the right of way which was conveyed to his predecessors in title by deed and that he intended to continue such obstruction. The plaintiffs acquired their title to the servient tenement by warranty deed from Erland N. Records on August 30, 1949, who in turn by various conveyances acquired title from Isaac Jameson, who in 1892 was the owner of a large tract of land in the area which included both the dominant tenement, now owned by the defendant, and the servient tenement, now owned by the plaintiffs. The sitting justice sustained the bill in equity, granted the injunction asked for, and assessed damages at $1.00. The defendant appealed and a temporary injunction was granted pending appeal. The case is now before us on this appeal.

As said by Chief Justice Wiswell in *Sterling* v. *Littlefield,* 97 Me. 479, 481:

> "This court, from the time of its earliest decision upon the subject until the present time, has always adhered to the general rule, that, while, in a proper case, equity will interfere to prevent a threatened and prospective nuisance, it will not take jurisdiction to compel the removal of an alleged nuisance which is already existing, and restrain its continuance, by injunction, until the alleged infringement of the complainant's rights and the existence of the nuisance resulting therefrom, have first been established in an action at law. To this rule there are undoubtedly various exceptions which have been recognized by the court. The aid of the equity court and its intervention by injunction may be invoked in the case of an existing nuisance, notwithstanding that the right has not been first determined, when the necessity is imperious, or where immediate and irreparable injury is threatened unless relief be given in equity, or where, on account of the necessity of a multiplicity of suits at law, or even for some other sufficient reason, the remedy at law would be inadequate."

The facts of this case do not bring it within any of the exceptions therein set forth.

Appeal sustained.

Injunction dissolved.

Bill dismissed without prejudice to the right of the plaintiffs to proceed at law.

KENNETH A. HUNTER

vs.

FRANK H. TOTMAN

FRANK H. TOTMAN

vs.

KENNETH A. HUNTER

Aroostook. Opinion, April 24, 1951.

Evidence. Shop Book Rule. Expert Witnesses. Offer to Compromise.

R. S., 1944, Chap. 100, Sec. 133, a statute that affects the "shop book rule," is applicable only to entries that fairly may be considered an "account."

Whether a witness called as an "expert" possesses necessary qualifications is a preliminary question for the court and the decision is conclusive unless it clearly appears that the evidence was not justified or that it was based upon some error in the law.

The admissibility of a letter or other evidence containing an offer to compromise or settle a pending claim depends upon intention. An offer to compromise a claim, or to purchase one's peace, cannot be shown to prove liability. If he intends an admission of liability, coupled with an endeavor to settle such liability then it is admissible to prove such liability. The court must in its discretion determine the preliminary question of intent.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

This is an action of assumpsit to recover an alleged balance due on the sale and delivery of potatoes and a cross action by defendant to recover a claimed overpayment. The jury returned verdicts for the plaintiff. The cases are before the Law Court on motion for a new trial, exceptions to the denial of a motion for directed verdict, exceptions to the admission of a record or notebook, and a letter which was in the nature of a compromise. Exceptions sustained. Motion for new trial in each case sustained. New trials granted. Case fully appears below.

Roberts & Bernstein, for plaintiff.

James P. Archibald, for defendant.

SITTING: MURCHIE, C. J., FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (THAXTER, J., did not sit.)

FELLOWS, J. These two cases were tried together before a jury in the Superior Court for Aroostook County, and are before the Law Court on exceptions and motions for new trials.

The first case of Kenneth A. Hunter v. Frank H. Totman was an action of assumpsit to recover for alleged balance due on sale and delivery of potatoes, by Hunter to Totman, which potatoes were claimed to be in the plaintiff Hunter's storehouse in January 1948. The first action was for the sum of $57,376, being equivalent to 14,344 barrels of potatoes at $4, less a credit of $54,236 paid by Totman, leaving a claimed balance of $3,140. The jury verdict, in favor of Hunter as plaintiff, was for $3,140. This first case now comes to the Law Court on defendant Totman's motion for new trial, on exceptions to denial of defendant's motion for a directed verdict, on defendant's exceptions to the admission of a record or notebook, exceptions to admission of certain expert testimony, and exceptions to admission of a

letter, which letter Totman claimed was in the nature of compromise.

The second case, or cross action, of Frank H. Totman v. Kenneth A. Hunter, tried with the first case, was an action of assumpsit to recover claimed overpayment in the sum of $4,520, as the difference between the $54,236 that Totman paid to Hunter, for potatoes claimed by Hunter to be in Hunter's warehouse, and 12,429 barrels that Totman says were actually there. The verdict in this second case was for Hunter as defendant. This second case, tried with the first case, is before the Law Court on plaintiff Totman's general motion for new trial, and on the same exceptions to admissibility of notebook, the expert testimony and the letter.

The facts appear to be that, during the season of 1947, Kenneth A. Hunter of Mars Hill, Maine, produced potatoes and stored some of them in his potato house. In January 1948 Frank H. Totman of Houlton, Maine, met Hunter at Mars Hill and discussed these potatoes. The parties disagree as to the exact conversation, but the sale in January 1948 by Hunter to Totman evidently involved 14,344 barrels of "field run" potatoes at $4 per barrel, and Hunter testified that at the time there were 14,344 barrels in his house, and the declaration in his writ bases his claim on that amount.

The potatoes in the potato house were shipped out of the potato house by Totman, and Totman claimed that the amount of potatoes purchased by him, and for which he had made payments to Hunter totaling $54,236, had not been put into the house. Totman's payment to Hunter apparently represents 13,559 barrels at $4.

There was a dispute as to the meaning of a "barrel of field run potatoes," but whether it has the meaning as testified to by various witnesses, of "as they come from the

field," or a "twelve peck barrel," or "a barrel of eleven pecks," presents jury questions as to the intention of the parties at the time of contract. It is not material here for this decision, because of the methods of proof. Also, if it means a twelve-peck barrel, Totman says he accounted for 12,429 barrels. If it is an eleven peck barrel, Totman says he accounted for only 13,559 barrels. Totman claimed a shortage in either event.

The quantity of potatoes in the potato house at the time of the sale in January 1948 is the main issue, and to prove the amount Hunter offered a record or notebook which was practically his entire case. This book was admitted, and exception taken.

FIRST EXCEPTION

This record book was kept by Pauline Hunter, the wife of Kenneth A. Hunter. It contains no items of charges against Totman, or of credits. It is a memorandum book containing a transcript of picking records and trucking records. The book is not a book of accounts concerning Totman. There was a "truck count" and a "pickers' count" kept by the Hunters for their own purposes, such as amounts of payment due from them to pickers, etc. The original records of "tickets" were made by the potato pickers and by the truck drivers. Mrs. Hunter had no personal knowledge of her entries. The pickers' cards, made out by several different potato pickers of the number of barrels picked up, were placed on barrels in the field and collected by her son David Hunter. David was then 12 or 13 years of age and "followed the trucks." Mrs. Hunter entered totals in many instances and did not itemize each slip or ticket. There were two truck drivers, Vincent Lunn and Johnny Smith. Proof was not made of the book entries by the individuals who had knowledge, or who made the slips. One truck driver only was presented as a witness. David Hunter did

not testify. It does not appear that the other witnesses could not be easily obtained.

The only evidence presented by Hunter (to apply to either, and both, of these two cases that were on trial together) to show the amount of potatoes in the potato house at the time of sale, was this record or notebook. Mrs. Hunter testified, and on her testimony the "notebook" (as she called it) was admitted under Revised Statutes (1944), Chapter 100, Section 133. Mrs. Hunter said: "A. The pickers were supplied with picking tickets. Each picker had his own number, and attached a ticket with his number to each full barrel he picked. The truck drivers took the ticket off the full barrel and put it in a small box for that purpose, and at the end of the day's operation the truck boxes were brought to me. I counted the pickers' tickets and recorded them in a notebook." The presiding justice then admitted the book subject to Totman's exception. Mrs. Hunter later said: "A. At the end of each day each truck driver—and we had two—turned in to me a list or record showing the number of barrels which he had hauled to the potato house, so I kept a truck record on one page." On cross examination Mrs. Hunter testified that her son David Hunter (then between 12 and 13) "did not follow the trucks into the potato house, but that he was the person who gathered the pickers' 'tickets.' " The information to Mrs. Hunter, she says, came from three persons, Lunn, Smith, and her son David, who in their turn, received some of their information from others, or from "tickets" made by others.

The statute (passed by the Legislature in 1933 as Chapter 59 of the Public Laws of 1933) now Revised Statutes 1944, Chapter 100, Section 133, is as follows:

> "An entry in an account kept in a book or by a card system or by any other system of keeping accounts shall not be inadmissible in any civil proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay

> or self-serving, if the court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid. The court in its discretion, before admitting such entry in evidence, may, to such extent as it deems practicable or desirable but to no greater extent than the law required before June 30, 1933, require the party offering the same to produce and offer in evidence the original entry, writing, document, or account, from which the entry offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the entry offered or the original or any other entry, writing, document, or account from which the entry offered or the facts therein stated were transcribed or taken, or who has personal knowledge of the facts stated in the entry offered."

The law, "before June 30, 1933," as referred to in the above statute, is stated in *Mansfield* v. *Gushee,* 120 Me. 333, which case holds that in order to render account books admissible, where the entries were made on information given to the bookkeeper by third parties, it must be shown (1) the informant is dead or insane, or (2) the informant is beyond the jurisdiction, or (3) the informant is unable to attend court. See *Mansfield* v. *Gushee,* 120 Me. 333, at 347.

The question now before the court is whether, under Revised Statutes (1944), Chapter 100, Section 133, a notebook or inventory of the number of barrels of potatoes in a field, or the number delivered to a potato house, kept by a person who had no personal knowledge, from slips or "tickets," not being an account and not showing a charge or a credit, is admissible in evidence, without proof by the person or persons who had the actual knowledge. In other words, does the statute refer to an *account* kept to show a transaction, between the parties to the suit with debits and credits, or does it mean any inventory, count, statement, or

measure kept by one of the parties for his own convenience and use "in the regular course of business?"

In the construction of a statute the fundamental rule is the legislative intent. *Smith* v. *Chase,* 71 Me. 164; *Pierce* v. *Bangor,* 105 Me. 413; *State* v. *Koliche,* 143 Me. 281, 61 Atl. *(2nd)* 115, but a statute in derogation of the common law is strictly construed and is not extended by implication. *Henderson* v. *Berce,* 142 Me. 242, *50 Atl. (2nd)* 45; *Haggett* v. *Hurley,* 91 Me. 542, *40 Atl. (2nd)* 561, *41 L. R. A.* 362.

At the common law under the "shop book rule," a book of accounts showing debits and credits between the parties to the suit, was admissible as bearing upon the question of proof of delivery of goods sold or the performance of services rendered as charged in the shopkeeper's books, which, supported by the oath of the party presenting the books, or someone in his behalf, was admissible, if the person making the entries was dead, insane, unable to be present, or beyond the jurisdiction. Otherwise, the delivery or performance, must be proved by one cognizant of the facts. *Mansfield* v. *Gushee,* 120 Me. 333, 346, 347. By the above statute of 1933, the legislature intended to render a rule of proof less difficult, but does the rule extend to books or entries other than "accounts"? R. S. (1944), Chap. 100, Sec. 133.

The precise question presented by the exception in this case has not been previously decided in Maine. The above statute passed in 1933 was mentioned and incidentally discussed by the court in *Richardson* v. *Lalumiere,* 134 Me. 224 (decided in 1936) where the court stated that entries which were not a charge of goods delivered or services rendered are merely memoranda for a party's own convenience and not admissible in evidence, and cited *Waldron* v. *Priest,* 96 Me. 36, *51 Atl.* 235. The Lalumiere case also quoted *22 C. J.* 871 that "loose memoranda, or entries in diaries or memoranda books used for recording any matter of which

the owner may wish to make note, while admissible for the purpose of refreshing the memory of a witness, have generally been excluded as independent evidence." The above case of Waldron v. Priest, which holds a lawyer's docket inadmissible, cited for authority the case of *Lapham* v. *Kelley,* 35 Vt. 195, wherein the Vermont court decided that entries in a passbook of payments made, in the form of charges against the other party, were not admissible as *independent* evidence because no such book was kept in the regular course of business to show the sale of goods or the performance of services regularly charged on books of account, and the passbook could be used only to refresh the recollection of the witness.

Entries of deceased person, as private memoranda to prove weather conditions, are not admissible. *Arnold* v. *Hussey,* 111 Me. 224, but with regard to *ancient* facts, they may be. See *Old Town* v. *Shapleigh,* 33 Me. 278.

Our court has decided that where the entries in a book of accounts do not itemize the transactions recorded, and comprise the details of several transactions, the book is not admissible as independent evidence. *Putnam* v. *Grant,* 101 Me. 240. Statements of the plaintiff himself or of third persons, such as invoices, bills of lading or protests, are not admissible. *Paine* v. *Ins. Co.,* 69 Me. 568.

In an action brought in Massachusetts to recover the value of fruit jars, the plaintiff offered an account or inventory, made up in part from information obtained from slips turned into the office by the glass jar makers. The Massachusetts Court held it inadmissible under a similar statute. The court says:

> "While this statute is a rule of evidence, it applies only to 'an entry in an account kept in a book or by a card system or by any other system of keeping accounts.' This statute, undoubtedly, was passed to change the law as laid down in Kent v. Garvin,

> 1 Gray, 148 and similar cases that followed, and simply to relieve against the hardships sometimes experienced in making proof in accordance with the law there laid down. This language confines the operation of the statute to an entry in an account, using the word 'account' in the sense of a series of charges for merchandise or other matter ordinarily the subject of a book account. The statute did not enlarge the kind of evidence which could be proved by books of account which heretofore was admissible when supported by the evidence of all parties to the entries in the book account. The reason why the entries in Kent v. Garvin were held incompetent was because they had been transferred to the book by a clerk, from entries or memoranda kept by another person, who was not called as a witness to support his entries and deliveries of the articles so charged. The statute authorizes the court to admit as evidence such entries if it is found that they were made in good faith, and in the regular course of business, and before the beginning of the proceeding. It is to be observed that the statute applies to 'an entry in an account * * * * book.' "
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> *Kaplan* v. *Gross,* 223 Mass. 152, 154; *Rhoades* v. *N. Y. Central* R. R., 227 Mass. 138.

The plaintiff Hunter relies in his brief on the case of *Bank* v. *Hollingsworth & Whitney,* 106 Me. 326, and similar cases, involving the records of an agreed scaler who obtained information from his assistants. The courts have never considered that the shop book rule applied to scalers under these circumstances. Scalers are usually skilled experts who must not only count and measure, but exercise judgment in estimation, and have for generations been recognized as acting in a quasi judicial capacity when agreed upon. *Hutchins* v. *Merrill,* 109 Me. 313; *M. D. & I. Co.* v. *Allen,* 102 Me. 257.

This statute of 1933 (now Revised Statutes, 1944, Chapter 100, Section 133) is, in the opinion of the court, a stat-

ute that affects the "shop book rule," and is applicable only to entries that may fairly be considered an "account." The statute does not apply to entries in a book, or entries in a card or other system, which are simply memoranda made for the convenience or purposes of the one who made them. Entries that cannot fairly be considered as an "account" are not admissible in evidence, except as has been previously permitted under certain circumstances, to refresh recollection or as statements against interest, without supporting proof from those who had personal knowledge of the facts. The first exception must be sustained.

SECOND EXCEPTION

A witness was permitted to state as an expert that a smaller amount of potatoes would be removed from a potato house in the Spring than were placed in storage in the Fall.

Whether a witness called as an expert possesses the necessary qualifications is a preliminary question for the court. The decision is conclusive unless it clearly appears that the evidence was not justified, or that it was based upon some error in law. *Marston* v. *Dingley,* 88 Me. 546; *Conley* v. *Gas Co.,* 99 Me. 57. We see no exceptionable error here, although, under the circumstances of this case, the necessity for an expert on potatoes before an Aroostook County jury does not seem to us to be fully "justified." *Pulsifer* v. *Berry,* 87 Me. 405. In any event, the testimony admitted was harmless.

THIRD EXCEPTION

The admission in evidence of a letter written by Totman to Hunter was excepted to, as being in the nature of an offer to compromise.

The admissibility of a letter or other evidence which contains an offer to settle a pending claim depends on intention.

If a person intends his offer to be a compromise settlement it is inadmissible. An offer to compromise a claim, or to purchase one's peace, cannot be shown to prove liability. If he intends an admission of liability, coupled with an endeavor to settle such liability, then it is admissible as evidence to prove such liability. It is the duty of the court to determine the preliminary question of fact as to what was the intention in making the alleged offer of settlement. To the proper exercise of his discretion no exception lies. *Finn* v. *Telephone Company,* 101 Me. 279.

The letter in question here was not an offer to compromise. It was an offer to pay $15,836 (and the checks were enclosed) "which is the balance due on the basis of 13,559 barrels field run at $4.00 per barrel." The letter further called attention to the fact that "this figure compared with your original advice to me of 14,344 barrels indicated a wind shrinkage of 785 barrels * * * this is a prohibitive shrinkage and if your records are correct, then there is something wrong somewhere * * *. I feel there is a possibility of error." The decision of the presiding justice to admit the letter was within his discretion. The letter was for the purpose of ascertaining the claims really existing, and what was justly due from one party to the other, that they might be fairly adjusted. *Cole* v. *Cole,* 33 Me. 542. See also *Beaudette* v. *Gagne,* 87 Me. 534; *Shaw* v. *Railroad Co.,* 108 Me. 568.

MOTIONS

Frank H. Totman as defendant in the first case, and as plaintiff in the second, filed motions for new trials. Kenneth A. Hunter as the seller of the potatoes, based his claims in each suit on the notebook kept by his wife. The book, under the circumstances here and without supporting testimony from witnesses with personal knowledge, was not admissible.

The jury found for Hunter in both cases. In the case where Hunter was plaintiff, the verdict is the exact amount appearing by the Hunter inventory or memoranda in the inadmissible notebook. Both verdicts are, under the circumstances, clearly wrong.

Exceptions sustained.

Motion for new trial in each case sustained.

New trials granted.

ALEXANDER A. LAFLEUR, ATTORNEY GENERAL
ON RELATION OF CARL E. ANDERSON, ET AL.

vs.

HELEN C. FROST, ET AL.

AND

JOSEPH R. McLAUGHLIN, ET AL.

vs.

EDWARD T. COLLEY, ET AL.

Cumberland. Opinion, April 27, 1951.

Municipal Corporations. Initiative and Referendum. Declaratory Judgments. Mandamus. Constitutional Law.

A proper case for a declaratory judgment (R. S., 1944, Chap. 95, Sec. 38 et seq.) is not presented where no controversy between the parties is shown by reason of which the parties are entitled to a declaratory judgment. There is no authority for the giving of such a judgment which, if given, would be but an advisory opinion.

The requirements of R. S., 1944, Chap. 95, Sec. 48 that a municipality be made a party in proceedings involving the validity of a municipal ordinance are not complied with by making the members of the city

council parties, since members of the city council are not the municipality.

It is necessary that the party who attacks the validity of a city ordinance be aggrieved thereby.

Mandamus will not be granted where it will avail nothing.

Mandamus will not lie to compel the submission of an ordinance which, if ratified, would be invalid.

Where an unconstitutional and invalid portion of a statute or ordinance is separable from and independent of a part which is valid the former may be rejected and the latter may stand.

The provision of a city ordinance providing initiative and referendum whereby ten original petitioners constitute a committee representing all the signers to the petition with the power in a majority of the committee to withdraw the petition and to stop proceedings at any time is invalid and unconstitutional.

The provision of a city ordinance providing initiative and referendum whereby the ballot shall contain two brief explanatory statements of a proposed ordinance, one prepared by the city council and one by the sponsoring committee, is invalid and unconstitutional.

The initiative and referendum established in a city under the constitution can be changed only by the City Council on ratification by the electors or by the legislature by uniform legislation. Maine Constitution, Amendment XXXI, Secs. 21 and 22.

Charter provisions for the initiative and referendum (Private and Special Laws, 1923, Chap. 109 as amended) are superseded by the initiative and referendum established in a city under the constitution. Both may be superseded by uniform legislation under the constitution.

ON REPORT.

This cause originates in Equity by ten citizens and taxable inhabitants of the City of Portland seeking to prevent by injunction, and other relief, the submission to the people of an initiative and referendum ordinance enacted pursuant to provision of the Constitution of Maine, Amendment XXXI. After hearing the request for injunction was denied and the ordinance was ratified by vote of a majority of the electors voting thereon. Relators, being qualified

voters, then instituted mandamus proceeding to compel the submission of another initiative and referendum ordinance to the voters under the initiative and referendum provisions of the City Charter. Private and Special Laws, 1923, Chap. 109. Both causes were presented to the Law Court on report. In the equity case, bill dismissed. In the mandamus proceedings, the alternative writ quashed and peremptory writ denied. Case fully appears below.

Wilfred A. Hay,
Theodore R. Brownlee,
John E. Hanscomb, for petitioners (plaintiffs)

Barnett I. Shur,
Robert W. Donovan, for defendant (respondents)

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

WILLIAMSON, J. The mandamus case of LaFleur, Attorney General, ex rel. Anderson et als., and the equity case of McLaughlin et als. v. Colley et als. are companion cases presented on report with arguments in writing with the issues in each case relating to the exercise of the initiative and referendum in the City of Portland. The relators in the mandamus case are qualified voters, and the plaintiffs in equity are ten citizens and taxable inhabitants, all of the City of Portland. The members of the City Council are the respondents in the mandamus case and with the City Clerk, the defendants in equity.

The vital and controlling issue is whether the initiative and referendum established by the City Council on November 6, 1950 and ratified by the electors on December 4, 1950 under the provisions of Amendment XXXI, Sections 21 and 22, of the Constitution of Maine, is valid.

In the mandamus case, the relators seek to compel the submission of an initiative and referendum ordinance

(which we will call "the proposed ordinance") to the voters under the initiative and referendum provisions of the City Charter.

In the equity case the plaintiffs seek to have the ordinance established by the City Council and ratified by the electors (which we will call the "city ordinance") declared invalid and null and void.

Unless otherwise indicated, references to the Charter will will be to Article III, entitled "Initiative and Referendum," found in P. & S. L., 1923, Chap. 109 as amended; and reference to the Constitution will be to Section 21 of Amendment XXXI.

It must be borne in mind that both the "proposed" and the "city" ordinances in terms establish the initiative and referendum, and further that the Charter has contained provisions for the initiative and referendum since enacted by the Legislature and approved by the voters of Portland at a referendum in 1923.

The action which resulted in the cases being before us took place from October 1950 to January 1951.

October 23 — The "proposed ordinance" was duly initiated by the filing of a petition in accordance and compliance with the Charter.

November 6 — Acting under authority granted by the Constitution, the City Council established the initiative and referendum by adoption of the "city ordinance" to be submitted to the electors for ratification at an election to be held on December 4th.

November 21 — Plaintiffs in equity filed their bill seeking (1) a finding and decree that the "city ordi-

nance" is invalid, and, if ratified, would be null and void; (2) an injunction to prevent its submission to the voters and action by the city clerk in connection with the election; and (3) general relief.

November 22 — After hearing, injunction was denied.

December 4 — The "city ordinance" was ratified by vote of a majority of the electors voting thereon.

December 6 — The petition initiating the "proposed ordinance" signed by more than 500 qualified voters was duly presented by the City Clerk to the City Council at its first regular meeting after the closing of the petition upon the expiration of the thirty-day period for signatures by qualified voters. Full and complete compliance with the preliminary requirements of the Charter relative to preparation, signature, and presentation of a petition initiating an ordinance is not questioned. Apart from considerations to be noted later, under the terms of the Charter, it became the duty of the City Council to "immediately take the necessary steps to submit to the voters of the city the question proposed in said petition," provided the Council did not pass the ordinance, and further within ten days of the presentation of the petition to set a time for submission at a

special or general election within a limited period in the future. The "proposed ordinance" has n e i t h e r been passed nor been submitted to the voters by the City Council.

January 3, 1951 — The "city ordinance" ratified by the voters on December 4th in terms became effective.

January 4, 1951 — Mandamus proceedings commenced by relators—amended on January 9th with the alternative writ then issuing.

The case in equity is before us on bill, with bill of particulars, answer, replication, and stipulation of facts. When filed, the bill sought to enjoin the submission of the "city ordinance" to the vote of the people on the ground it was invalid and would be, if ratified, null and void. Injunction was denied. The vote was taken, and the "city ordinance," before then a proposal, was thereby ratified, becoming effective thirty days later.

The primary purpose for which the bill was brought ended with the failure to prevent the submission of the "city ordinance" to the voters. The plaintiffs urge that the bill *now presents* a proper case for a declaratory judgment under the Uniform Declaratory Judgments Act, *(R. S., Chap. 95, Sec. 38 et seq.)* and that the right to such a judgment must be determined as of the date when the bill was filed.

In our view, however, we must look at the situation as it existed when presented to us. Plaintiffs no longer seek preventive but remedial relief. Our court has said, "Individual taxpayers of a municipal corporation have not ordinarily the right to sue for remedial relief, where the wrong, for which they seek redress, is one which affects the entire community and not specifically those bringing the action." *Bay-*

ley et als. v. *Inh. of Town of Wells et al.*, 133 Me. 141, 174 A. 459. See also *Eaton et als.* v. *Thayer et als.*, 124 Me. 311, 128 A. 475, and *Tuscan* v. *Smith et als.*, 130 Me. 36, 153 A. 289. The relief now sought is that the "city ordinance" duly enacted and in terms effective be declared invalid and null and void. No relief against the members of the City Council or the City Clerk would be appropriate for their official duties have been fully performed.

Wherein is there a controversy between the plaintiffs, who differ not at all from any other ten taxable inhabitants of Portland, and the City Council, and the City Clerk with respect to the "city ordinance"? The City Clerk, who has performed the duties required by him in connection with the election, has no further official interest in the matter. What action, if any, is proposed by the plaintiffs in equity which calls for a decision against the members of the City Council? To say that the plaintiffs are entitled to have a declaratory judgment is to say that any ten taxable inhabitants of the city may at any time obtain a declaratory judgment upon the validity of any ordinance of the city whether or not the plaintiffs are affected particularly by the ordinance under attack.

The plaintiffs do not show there is a controversy between the parties by reason of which they are entitled to a judgment. A judgment would be not a declaratory judgment in the proper sense, but an advisory opinion given without warrant of authority on our part. "It is essential that a controversy exist; for otherwise the petition would seek only an advisory opinion of the Court." *Maine Broadcasting Co., Inc.* v. *Banking Co. et al.*, 142 Me. 220, 49 A. (2nd) 224. Apart from declaratory judgment, it is necessary that the party who attacks the constitutionality of an ordinance be aggrieved thereby. See *Chapman* v. *City of Portland,* 131 Me. 242, 160 A. 913; *McQuillin, "Municipal Corporations,"* 3rd Edition, Sec. 20.16.

There are other reasons as well why the equity case does not call for a declaratory judgment. The validity of an ordinance is involved, and it is alleged to be unconstitutional.

The record does not show that the municipality, the City of Portland, a body politic and corporate, is a party or that the attorney general has been served with a copy of the proceeding. *Sec. 48 of Uniform Declaratory Judgments Act, supra.* The members of the City Council are not the municipality. The attorney general is the petitioner for mandamus, but has not, so far as it appears, interested himself in the equity case.

The bill in equity must be dismissed.

In the mandamus case we have before us the amended petition, alternative writ, return thereto, traverse of petitioners, and stipulation of facts.

The relators by the mandamus proceedings seek to have the "proposed ordinance" initiated under the Charter, submitted to the voters in accordance with the Charter. As we have seen, the "city ordinance" has been established and ratified under the Constitution and is presently in terms effective. If the "city ordinance" is valid and, if thereby, the initiative and referendum are established for the City of Portland, it would be a useless procedure to compel the submission to the voters of the "proposed ordinance." "Mandamus will not be granted when it will avail nothing." *Burkett, Attorney General* v. *Youngs et al.*, 135 Me. 459 at 467, 199 A. 619. The relators gain nothing from the fact that their "proposed ordinance" was initiated *before* the "city ordinance" was passed by the city government; or from the fact that, apart from other considerations, the City Council failed to act within the times prescribed by the Charter before the "city ordinance" became effective.

When the case was presented on report, in terms the "city

ordinance" was in force and effect. It is with this fact in mind that we approach the question of issuance of the peremptory writ.

The "city ordinance" was adopted under the Constitution. The source of the right to establish the initiative and referendum by ordinance approved by the electors lies in the *Constitution,* and *not* in the *Charter.*

Sections 21 and 22 of Amendment XXXI of the Constitution read:

> "Section 21. The city council of any city may establish the initiative and referendum for the electors of such city in regard to its municipal affairs, provided that the ordinance establishing and providing the method of exercising such initiative and referendum shall not take effect until ratified by vote of a majority of the electors of said city, voting thereon at a municipal election. Provided, however, that the legislature may at any time provide a uniform method for the exercise of the initiative and referendum in municipal affairs.
>
> "Section 22. Until the legislature shall enact further regulations not inconsistent with the constitution for applying the people's veto and direct initiative, the election officers and other officials shall be governed by the provisions of this constitution and of the general law, supplemented by such reasonable action as may be necessary to render the preceding sections self executing."

The Legislature has not provided a uniform method applicable to cities generally, and accordingly we are not here concerned with the last provision of Section 21.

The "city ordinance" reads at the outset as follows:

> "BE IT ORDAINED BY THE CITY COUNCIL OF PORTLAND, MAINE, IN CITY COUNCIL ASSEMBLED: THAT, there be and hereby is established initiative and referendum in the City of Portland dealing with legislative matters on municipal affairs."

Provision is then made for the method of exercising the initiative and referendum, and for the submission of the ordinance for approval or rejection at an election on a given date.

In brief there was full compliance with the constitutional provisions for the establishment and ratification of the initiative and referendum in Portland. The invalidity, if such exists, must be within the terms of the "city ordinance" and is not to be found in the manner in which it was enacted and ratified.

The "city ordinance" differs from the initiative and referendum provisions of the Charter in certain respects. Its terms are not so broad as the initiative and referendum under the Charter. For example: the "city ordinance" reads:

> "(1) The submission to the vote of the people of *any proposed ordinance dealing with legislative matters on municipal affairs,* or of *any such ordinance enacted by the City Council* and which has not yet gone into effect, may be accomplished—."

The words underscored read in the Charter as follows:

> "of any proposed ordinance, order or resolve, or of any ordinance, order, or resolve enacted by the city council—."

In other words *"ordinance, order or resolve"* under the Charter has been narrowed to *"ordinance dealing with legislative matters on municipal affairs."* Under the "city ordinance," neither the "city ordinance" nor ordinances "dealing with appropriations, tax levy, or with wages or hours of city employees" are subject to the initiative or referendum. There is no such limitation upon the scope of the initiative and referendum under the Charter. The differences mentioned between Charter and "city ordinance" serve to illustrate the point urged by the relators that the Charter has been altered, amended or repealed by the "city

ordinance." Clearly, the initiative and referendum under the "city ordinance" is not the same initiative and referendum set forth in the Charter.

It does not follow, however, that by establishing the initiative and referendum under the authority of the Constitution, the City Council and voters of Portland have changed the Charter. Neither the City Council nor the voters of Portland can change the Charter. The Charter was granted by the people of the state acting through the Legislature.

The Charter remains unchanged, but its operation in the field of the initiative and referendum has been made ineffective by the act of the City Council and the voters under the authority of the Constitution. It needs no citation of authority to establish the principle that the Constitution of Maine is the supreme law of the state (limited, of course, by the Federal Constitution). A power granted or reserved by the Constitution may not be limited by the Legislature. The City Council and the voters in establishing and ratifying the "city ordinance" looked directly to the Constitution. No uniform state law prohibited action. They were governed not by any provision of their Charter but by the broad right under the Constitution to have the initiative and referendum if they so chose. Let us suppose the Legislature granted a charter expressly stating there should not be initiative and referendum in a city. Could it be said that the Constitution could thus be rendered a nullity? What difference then if the Legislature by charter provides a form of initiative and referendum which is not acceptable to a city? May not a city under the Constitution establish its own brand of initiative and referendum marked "constitutional" and not "legislative"?

The City Council in argument attack, and the relators defend, each with vigor, the constitutionality of the initiative and referendum provisions of the Charter. In our view of the case, we need not, nor do we, discuss the question

whether the Legislature could under the Constitution grant the initiative and referendum found in the Charter. Our decision does not hinge upon the answer to such an issue. Sufficient it is to say that, once the city establishes the initiative and referendum under the Constitution, it no longer has force and vitality.

In passing we may note that Oberholtzer in "The Referendum, Initiative and Recall in America" (1911) page 420, says, "The initiative and the referendum found a foothold in the East in 1908 when Maine adopted them in a modified form." We were the sixth state to adopt the policy on a state-wide basis. *1 Bulletins For The Constitutional Convention (Mass.),* (1917-18), 188.

Commencing with 1911, Legislatures have often included provisions for the initiative and referendum in municipal affairs. For example: *Waterville, P. & S., Laws of 1911, Chap. 219.* There is ample evidence that Legislatures from 1911 to 1949 have considered that the Constitutional amendment of 1908 did not prohibit the establishment of the initiative and referendum in cities by charter.

It may be said that the result is the same whether we say the Charter is altered, amended or repealed, or the Charter in this respect has been superseded. The underlying theory, however, on which the initiative and referendum is established under the Constitution, is far different from a change of the Charter. In the one case, it is the effect of an act entirely apart from the Charter, which causes the disappearance of the initiative and referendum under the Charter. In the latter case a change can result only from exercise of a power to change found in the Charter; that is, in the Act of the Legislature creating and establishing the municipal corporation; and no such power exists under the Charter of Portland.

The situation is not unlike that which exists in the distribution of the functions of the Federal and State govern-

ments. Given a field of activity in which the Federal government may exercise power, it may remain proper for the State to occupy the field until the Federal government exercises the power. At that point, the State must retire. No action by the State produces the result. No amendment of its law is necessary. A superior power has undertaken to act, and the lesser power must give way. For example: in interstate commerce, see *Penn. R. R. Co.* v. *Public Service Comm.*, 250 U. S. 566, 63 L. Ed. 1142, 40 U. S. Sup. Ct. 36, 11 *Am. Jur.* 25. So here, the City Council had and exercised the right, wholly apart from the Charter, to establish the initiative and referendum effective upon ratification by the voters.

That the Legislature by specific authority of the Constitution may provide a uniform system of initiative and referendum in cities which would supersede the "city ordinance" does not alter the nature of the "home rule" in initiative and referendum under the Constitution.

We may say (1) without any constitutional provision the Legislature has full authority to create initiative and referendum in cities by charter, (2) with the constitutional provision "home rule" in initiative and referendum is granted to the cities which upon its exercise will supersede the charter, and (3) under the constitutional provision the "home rule" in initiative and referendum may be superseded by a uniform method through legislation.

That the "city ordinance" differs from the initiative and referendum under the Charter is not material. Portland has not changed its Charter. It has established the initiative and referendum under the Constitution.

We come then to a test of whether the "city ordinance" did establish the initiative and referendum under the Constitution. Does the undoubted fact that it is less broad in scope than the initiative and referendum under the Charter

destroy its validity? Does the "city ordinance" establish the initiative and referendum within the meaning of the words in the Constitution or, if there are terms inconsistent with the initiative and referendum, may they be declared null and void, leaving an effective initiative and referendum in operation?

As we have seen, the "city ordinance" or what we may call the "constitutional initiative and referendum" is less broad in scope than the "charter initiative and referendum." The "city ordinance" provides the initiative and referendum in regard not to all of the municipal affairs but to certain of the municipal affairs. The constitutional language reads, "in regard to its (the city's) municipal affairs."

Must a city in exercising "home rule" establish an initiative and referendum covering all of its municipal affairs? We think not. The Constitution does not place limitations upon the minimum but upon the maximum scope of the initiative and referendum. The limitation is that the initiative and referendum must not be established in matters which are not municipal affairs.

The court in the Bangor case of *Burkett, Attorney General* v. *Youngs et al.,* 135 Me. 459, 199 A. 619, held that mandamus did not lie to compel a referendum upon an appropriation resolve. The court said on page 464: "The Bangor City Council established the initiative and referendum. The ordinance was ratified at a popular election on December 7, 1931. It appears to have been retained in 1935. This right of initiative and referendum was necessarily restricted to 'municipal affairs.' "; and on page 466: "The referendum, as applied to municipal affairs, affects only those ordinances and resolves that are municipal legislation."

If the city chooses to limit the operation of the initiative

and referendum to a selected segment of municipal affairs by inclusion or exclusion, we see no objection to such course. The right to "home rule" should be broadly construed.

It becomes unnecessary to discuss at length the limitations in the "city ordinance." Sufficient it is to say that it does not appear that any matters *not municipal* are by its terms subject to the initiative and referendum.

The "city ordinance" duly established and ratified provides then a limited initiative and referendum in regard to municipal affairs. Is any invalidity disclosed in the machinery adopted which would require a determination that it is not a valid system under the Constitution?

At the outset we find no defect in the provision that the ordinance becomes effective thirty days after ratification by the voters. The Constitution says only that it "shall not take effect until ratified" by the voters. It does not say that the ordinance must immediately become effective. The thirty-day period is not an unreasonable length of time in which to place a new ordinance in effect. In our opinion this provision of the "city ordinance" is valid.

There is nothing unusual in the machinery provided for the exercise of the initiative and referendum under the city ordinance with the exception of the committee which we will later discuss.

The pattern follows closely that found in the initiative and referendum in general. We find the first move in the petition signed by a certain number of voters and filed with the City Clerk. There follows a period of thirty days within which the petition is open for signature by voters. The City Clerk then closes the petition and presents it to the city government with verification of the number of valid signatures.

The next move is on the part of the City Council. Under the Charter initiative and referendum, if the valid sig-

natures amount to five hundred or more, the City Council is required to call an election. Under the "city ordinance," if the valid signatures amount to at least 5% of the registered voters as determined at the time of the last-preceding municipal election, the City Council shall call a public hearing within thirty days, and at its first regular meeting thereafter call an election. In each instance the time for the election is to be set by act of the Council within ten days after the call for election is required.

We find nothing unreasonable in the provision requiring 5% of the voters determined as stated, or for a public hearing with the consequent delay in time between presentation and the fixing of a date for the election. Some number of petitioners is always required to start the operation of the initiative and referendum. Whether the number be 500 (as under the Charter) or 1500 (estimated number under the "city ordinance") is a matter of detail. The number, either absolutely or in percentage cannot be said to be so great that it unreasonably prevents the fair exercise of the initiative and referendum. Nor does the provision of a public hearing do more than require that the *City Council* give opportunity for the arguments pro and con on the proposed question. The City Council by action approving the initiated ordinance, for example, may end the necessity of a vote of the people. The public hearing cannot harm, and it may help the petitioners.

There need be no hard and fast rules about the time between petitions and calling of an election. If the thirty-day delay (or longer depending upon the time of council meeting) be considered unreasonable, what time would be proper? Unless provisions of this nature destroy the initiative and referendum, they should and must be left to determination of the City in establishing the initiative and referendum under the Constitution.

Nor is there sound objection to the provision in the "city

ordinance" permitting repeal or amendment of an ordinance adopted under the initiative and referendum by the City Council after five years from its effective date without submission to the voters. It is not questioned that an ordinance adopted under the initiative and referendum may be so repealed or amended by the City Council if the ordinance expressly so provides. To lift the requirement of a vote of the people after five years is no more than a change in detail. If the people desire such a limitation on the initiative and referendum, who may properly object thereto?

There remain three provisions in the "city ordinance" which call for more particular discussion.

First. In Section 1, we find the "city ordinance" itself is not subject to the operation of the initiative and referendum therein established. There is no objection to this provision. The *initiative and referendum* under the *Constitution* does not originate with action by the people but by the City Council. The right to establish the initiative and referendum under the Constitution includes the right to alter, amend, or repeal the ordinance by the City Council upon ratification by the voters.

Second. The "city ordinance" established a committee in the following language:

> "Section 1. The original ten petitioners shall be considered to be a committee representing all the signers to the petition. A majority of this committee shall have full power and authority to withdraw the petition or to stop further proceedings at any time when, in their sole and exclusive judgment, such action is deemed to be advisable. The decision to withdraw or to stop further proceedings shall be in writing, addressed and delivered to the city clerk, and shall be signed by at least six members of the committee."

In signing the petition each voter appoints the original ten petitioners as a committee representing all signers with

the authority quoted above. (Section 2 of the "city ordinance")

No similar provision whereby the power to stop the operation of the initiative and referendum is given to a committee of the petitioners has been called to our attention. In principle it is entirely without the intent of the initiative and referendum. If the people; that is, the voters, are to have the power to legislate in municipal affairs, why we may ask should such power be limited to the judgment of the original ten petitioners, or any petitioners, once the petition has been signed by the appropriate number of qualified voters?

Under the "city ordinance" ten petitioners—the first who cause the petition to be prepared and who sign it—are given the power through a majority to kill at any stage that which 1500—the estimated 5% of the voters—have sought to have submitted to a vote.

A system which compels the voter to leave his great rights to legislate, either directly through the initiative or by the people's veto in a referendum, to the mercy of six out of ten individuals may provide a neat and orderly method for the conduct of business, but it cannot be called the initiative and referendum.

There is no justification for saying the first-ten signers are the most interested citizens or that the citizen, who later signs or indeed who does not sign at all, has not exactly the same interest in the proposal as the original ten. Must the 1490 or more signers (let alone the remainder of the voters) rely upon the judgment of six whom they did not select, whom they may or may not know, and in whom they may or may not have confidence?

It may well be that conditions may arise under which no one wishes the measure submitted to a vote. The election expense in such event will be wasted for the outcome is cer-

tain. What manner of provision for withdrawal of the proposal may be reasonably made, we need not determine. It is sufficient for our purposes that the initiative and referendum does not contemplate that the citizen be required to accept the judgment of six of the original ten petitioners, as his agents, in the exercise of the right of initiative and referendum.

The pressures in the exercise of the initiative and referendum must come upon the City Council and upon the voters, and not upon a group of ten whose sole function is to start the petition. Once this act is accomplished, they become neither more nor less than voters who have signed, and they have neither greater nor less right or authority than other signers.

With this provision, the "city ordinance" is not an initiative and referendum established in regard to municipal affairs under the Constitution.

Third. The same error appears in the provision for form of the ballot which reads:

> "Section 6. *Form of Ballot.* The ballots used when voting upon such proposed ordinance shall set forth the title thereof in full, together with two brief explanatory statements of not more than 200 words each, one prepared by the City Council and the other prepared by the sponsoring committee. These statements shall be descriptive of the intent and content of the proposed ordinance. The ballot shall also contain the words: 'For the Ordinance' and 'Against the Ordinance.' "

With the fall of the sponsoring committee, the provisions for the brief explanatory statements must fail. To strike out the committee statement, leaving the City Council statement, would be destructive of the intent that the proponents and opponents have like opportunity for a last word on the ballot. We do not say that a provision for an explanatory statement by City Council alone would be invalid. It is not

necessary that we pass upon such an issue for it is not here presented. We do say, however, that to delete the statement of one group would be destructive of the purpose and intent of the provision of the "city ordinance," and hence Section 6, insofar and only insofar as it relates to the explanatory statements, is invalid.

The question now becomes whether the provisions which we have found to be invalid may be separated from the remainder of the ordinance to the end that the "city ordinance" without the committee of ten, or the sponsoring committee, may stand.

The rule has been stated in *Hamilton* v. *Portland Pier Site District et als.*, 120 Me. 15 at 24, 112 A. 836: "Where an unconstitutional and invalid portion of a statute is separable from and independent of a part which is valid the former may be rejected and the latter may stand."

The great and underlying purpose of the City Council and the voters was to establish the initiative and referendum. This purpose should not be defeated lightly from the inclusion of an invalid provision relating to the machinery for its exercise. See *Baxter et als.* v. *Waterville Sewerage District,* 146 Me. 211, 79 A. (2nd) 585.

To say that the City Council would have refused to establish the initiative and referendum without the committee of ten, or that the voters would have refused to ratify the "city ordinance," had not such provision been made, would be in our view to give undue weight to a minor matter of machinery in the operation of the initiative and referendum. The invalid provisions, which, as we have pointed out, destroy the initiative and referendum within the fair meaning of the Constitution, may be readily deleted. The "city ordinance" will then contain adequate and complete terms for the establishment and operation of the initiative and referendum. *State* v. *Robb,* 100 Me. 180 at 194, 60 A.

874. No extension of initiative and referendum in fields not intended will thereby be made. Only a plan to limit the exercise of the initiative and referendum by a method not within its spirit will be removed.

We have then presently effective in Portland a "city ordinance" creating and making effective the initiative and referendum under the authority of the Constitution.

The "proposed ordinance," if submitted to and adopted by the voters, would be a nullity. By action under the Charter —and it is under the Charter initiative and referendum that the petitioners are proceeding—the "city ordinance" cannot be altered or amended. The Charter—the Act of Legislature—gives way, as we have seen, to the Constitution. Portland has adopted the initiative and referendum under the Constitution, and only under the Constitution may the "city ordinance" be changed either by City Council on ratification by the voters or by the Legislature by uniform legislation.

Mandamus will not lie to compel the submission of an ordinance which if ratified would be invalid. *Farris* v. *Colley,* 145 Me. 95, 73 A. (2nd) 37. The peremptory writ will not issue to compel a useless act.

We place our decision upon the grounds given. It may be stated, however, that it is apparent that the "proposed ordinance" is an attempt to establish the initiative and referendum under the Constitution, not by following the path made clear in the Constitution, but by initiation of the "proposed ordinance" under the Charter initiative and referendum.

The "proposed ordinance" commences:

> "BE IT ORDAINED BY THE PEOPLE OF THE CITY OF PORTLAND, MAINE.
>
> THAT there be and hereby is established initiative and referendum in the City of Portland in regard

> to its municipal affairs as provided by Article 31, Sections 21 and 22 of the Constitution of the State of Maine."

The "proposed ordinance" is blocked, not only by the "city ordinance," but by the Charter. Assuming the Charter initiative and referendum to be valid, the proposal, if adopted, would in effect amend the Charter. Thus the "proposed ordinance" would not be valid if adopted.

Under the circumstances we are of the view that no costs should be taxed in either case.

The entries will be:

> In the equity case, *bill dismissed.*
> In the mandamus proceedings, *the alternative writ quashed and the peremptory writ denied.*

RULES OF COURT

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.

RULES OF COURT

STATE OF MAINE

KENNEBEC, SS.

SUPREME JUDICIAL COURT AND SUPERIOR COURT

May 8, 1951.

All of the Justices of the Supreme Judicial Court and the Superior Court concurring, Rule 18 of the Revised Rules of the Supreme Judicial Court and the Superior Court of the State of Maine, as found in 129 Maine 510, is amended, effective July 1, 1951, by adding an additional paragraph, so that the Rule as amended will read as follows:

> "Exceptions to the admission or exclusion of evidence must be noted at the time the ruling is made, or all objections thereto will be regarded as waived.
>
> Exceptions to any opinion, direction or omission of the presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived.
>
> Requested instructions shall be submitted in writing.
>
> In all cases where no provision is otherwise made by statute or rule of court respecting the time within which bills of exception shall be presented for allowance or filed, bills of exceptions to any judgment, final ruling, order or decree of a justice of the supreme judicial court or of the superior court, to which exceptions lie, shall be presented to the justice rendering or making the same for allowance by him, and shall be filed within 30 days after the rendition of judgment or the entry of such final ruling, order or decree, unless prior to the expiration of such 30 days the time for pres-

entation and filing of the same is further extended by said justice. If the justice of the supreme judicial court or the superior court disallows or fails to sign and return the exceptions, or alters any statement therein, and either party is aggrieved, the truth of the exceptions presented may be established in the manner prescribed in section 14 of Chapter 94 of the Revised Statutes of 1944 and Rule 40 of the Rules of the Supreme Judicial and Superior Courts."

By the Courts

HAROLD H. MURCHIE

Chief Justice.

OPINION

OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

* * * *

QUESTIONS PROPOUNDED BY THE HOUSE IN AN ORDER PASSED MAY 10, 1951, ANSWERED MAY 10, 1951

HOUSE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

IN HOUSE OF REPRESENTATIVES

May 9, 1951

Whereas, there is now pending before the House of Representatives a bill, "An Act Creating the Maine School Building Authority" House Paper No. 1274, Legislative Document No. 824, a printed copy of which Document is hereto attached and made a part hereof and marked Exhibit A; and

Whereas, an Amendment identified as Committee Amendment "A" has been reported by the Committee on Judiciary to the House of Representatives, a copy of which proposed amendment is hereto attached and made a part hereof and marked Exhibit B; and

Whereas, an Amendment identified as House Amendment "A" to said Bill has been proposed, a copy of which proposed amendment is hereto attached and made a part hereof and marked Exhibit C; and

Whereas, there is now pending before the House of Representatives "Resolve, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness" House Paper No. 1082, Legislative Document No. 695, a printed copy of which Document is hereto attached and made a part hereof and marked Exhibit D; and

Whereas, an Amendment identified as Committee Amendment "A" has been reported by the Committee on Judiciary to the House of Representatives, a copy of which proposed Amendment is hereto attached and made a part hereof and marked Exhibit E; and

Whereas, grave doubt has arisen as to the constitutionality of said bill with relation to:

1. The pledging of the credit of the State, directly or indirectly;
2. Limitation of municipal indebtedness; and
3. Diversion of state school funds; and

Whereas, to the House of Representatives of the 95th Legislature it appears that the questions herein raised are important and that the occasion is a solemn one,

Now, therefore, be it

ORDERED, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House of Representatives according to the provisions of the Constitution in this behalf their opinion on the following questions, to wit:

Question 1

Would Bill, "An Act Creating the Maine School Building Authority," if enacted with or without amendments as proposed, pledge the credit of the State, directly or indirectly, contrary to the Constitution?

Question 2

If the "Resolve, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness," with or without the proposed amendment, were adopted by the people, would the provisions of Legislative Document No. 824, if enacted with or without amendments as proposed, violate any of the constitutional provisions relative to limitation of municipal indebtedness?

Question 3

If the Resolve were not adopted by the people, would the provisions of Legislative Document No. 824, if enacted with or without amendments as proposed, violate any of the provisions of the Constitution relative to limitation on municipal indebtedness?

NINETY-FIFTH LEGISLATURE

EXHIBIT A

Legislative Document No. 824

H. P. 1274 House of Representatives, February 21, 1951

Referred to the Committee on Judiciary. Sent up for concurrence and 1250 copies ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Low of Rockland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-ONE

AN ACT Creating the Maine School Building Authority.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 37, §§ 212-228, additional. Chapter 37 of the revised statutes is hereby amended by adding thereto 17 new sections, to be numbered 212 to 228, inclusive, to read as follows:

'Maine School Building Authority

Sec. 212. Short title. Sections 212 to 228, inclusive, shall be known and may be cited as the "Maine School Building Authority Act."

Sec. 213. Purpose. A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to aid in the provision of public school buildings in the state, the "Maine School Building Authority," herein created, is hereby authorized and

empowered to construct, acquire, alter or improve public school buildings and to issue revenue bonds of the Authority, payable from rentals to finance such buildings and when paid for by said rentals to convey them to the lessee towns.

Sec. 214. Credit of state not pledged. Revenue bonds issued under the provisions of sections 212 to 228, inclusive, shall not be deemed to constitute a debt of the state of Maine nor a pledge of the credit of the state, but such bonds shall be payable solely from the funds herein provided therefor, and a statement to that effect shall be recited on the face of the bonds.

Sec. 215. Organization of authority. There is hereby created and established a body corporate and politic to be known as the "Maine School Building Authority." The Authority is hereby constituted a public instrumentality of the state, and the exercise by the Authority of the powers conferred by the provisions of sections 212 to 228, inclusive, shall be deemed and held to be the performance of essential governmental functions. The Maine School Building Authority shall consist of 7 members, including the governor, the commissioner of education, the senate chairman of the committee on education, and 1 member of the state board of education to be appointed by the governor, to serve during their incumbency in said offices, and 3 members at large appointed by the governor for terms of 3, 4 and 5 years respectively, to hold offices as follows: 1 until the completion of the 3rd full fiscal year following his appointment; 1 until the completion of the 4th such full fiscal year and 1 until the completion of the 5th such full fiscal year. All other original appointments of such members shall be for a period of 5 years, and said Authority shall constitute a body corporate and politic. A vacancy in the office of an appointive member, other than by expiration, shall be filled in like manner as an original appointment, but only for the remainder of the term of the retiring member. Appointive members may

be removed by the governor and council for cause. The state commissioner of education shall be chairman of the Authority. The Authority shall elect one of its members as vice chairman, and shall also elect a secretary and treasurer who need not be a member of the Authority to serve at the pleasure of the Authority. The secretary and treasurer shall be bonded as the Authority shall direct. Five members of the Authority shall constitute a quorum and the affirmative vote of 4 members shall be necessary for any action taken by the Authority. No vacancy in the membership of the Authority shall impair the right of the quorum to exercise all rights and perform all the duties of the Authority.

All members of the Authority shall be reimbursed for their actual expenses necessarily incurred in the performance of their duties and the appointive members shall receive, in addition, $10 per day for services actually rendered.

Sec. 216. Definitions. As used in sections 212 to 228, inclusive, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

"Authority" shall mean the Maine School Building Authority created by sections 212 to 228, inclusive.

"Project" or the words "school project" shall mean a public school building or buildings or any extension or enlargement of the same, including land, furniture and equipment for use as a public school or public schools, together with all property, rights, easements and interests which may be acquired by the Authority for the construction or the operation of such project.

"Cost" as applied to a project shall embrace the cost of construction or acquisition, the cost of the acquisition of all land, rights-of-way, property, rights, easements and interests acquired by the Authority for such construction or

acquisition, the cost of demolition or removing any buildings or structures on lands so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of all furnishings and equipment, financing charges, insurance, interest prior to and during construction and, if deemed advisable by the Authority, for 1 year after completion of construction, cost of architectural and legal expenses, plans, specifications, estimates of cost, administrative expense and such other expense as may be necessary or incident to the construction or acquisition of the project, the financing of such construction or acquisition and the placing of the project in operation. Any obligation or expense hereafter incurred in connection with the construction or acquisition of a project may be regarded as a part of the cost of such project.

"School building" shall mean, but shall not be limited to, any structure used or useful for schools and playgrounds, including facilities for physical education.

"Town" or "towns" as used herein includes cities and plantations.

Sec. 217. General grant of powers. The Authority is hereby authorized and empowered:

I. To adopt by-laws for the regulation of its affairs and the conduct of its business;

II. To adopt an official seal and alter the same at pleasure;

III. To maintain an office at such place or places within the state as it may designate;

IV. To sue and be sued in its own name, plead and be implead; provided, however, that any and all actions at law or in equity against the Authority shall be brought only in the county in which the principal office of the Authority shall be located;

V. To construct or acquire, extend, enlarge, repair or improve school projects at such locations within the state as may be determined by the Authority, when the superintending school committee on any town or the community school committee of a community school district has certified the need therefor to the municipal officers of such town or the trustees of such community school district together with their recommendation for the procurement of new, additional or different public school buildings, and such recommendation has been approved by such municipal officers, town or towns, and by the state board of education. This Authority may acquire the properties of a town, a school district or community school district, subject to the liabilities thereof and under conditions consistent with the provisions of sections 212 to 228, inclusive, and may issue revenue bonds in replacement of the outstanding liabilities.

VI. To issue revenue bonds of the Authority for any of its corporate purposes, payable solely from the rentals and revenues pledged for their payment, and to refund its bonds, all as provided in sections 212 to 228, inclusive; and to secure any issue of such bonds by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the state;

VII. To make temporary loans to finance individual projects until such time as the Authority may deem it advantageous to issue revenue bonds on said projects.

VIII. To fix, alter, charge and collect rentals and other charges for use of school projects financed under the provisions of sections 212 to 228, inclusive, at reasonable rates to be determined by it for the purpose of providing for the payment of the expenses of the Authority, the improvement, repair and maintenance of such projects, the payment of the principal of and the interest on its

revenue bonds, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such bonds;

IX. To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under the provisions of sections 212 to 228, inclusive.

X. To acquire in the name of the Authority, by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain, such lands or rights therein as it may deem necessary for carrying out the provisions of sections 212 to 228, inclusive.

XI. To make and enter into all contracts, leases and agreements necessary or incidental to the performance of its duties and the execution of its powers under the provisions of sections 212 to 228, inclusive;

XII. To utilize the services of agencies and departments of the state whenever feasible, and to employ such other persons and agents as may be necessary in its judgment, and to fix compensations;

XIII. To accept from any authorized agency of the federal government loans or grants for the planning, construction or acquisition of any project and to enter into agreements with such agency respecting any such loans or grants, and to receive and accept aid and contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purpose for which such loans, grants or contributions may be made; and

XIV. To do all acts and things necessary or convenient to carry out the powers expressly granted in sections 212 to 228, inclusive.

Sec. 218. Contracts between Authority and towns. The Authority may authorize any town or towns or community school district, subject to the supervision and approval of the Authority, to design and construct any project and to acquire necessary land, furnishings and equipment therefor. Any town or community school district is hereby authorized to convey to the Authority property, rights, easements and any other interests, which may be necessary or convenient for the construction and operation of any project and upon such terms as may be agreed upon between the Authority and town or community school district. Any town or community school district may contract with the Authority for the lease or use of any project financed under the provisions of sections 212 to 228, inclusive, for such period and for such consideration and on such terms and conditions as such town or community school district and the Authority shall determine to be in the public interest, and all rentals or other charges provided by any such contract to be paid for the lease or use of such project shall be deemed to be current operating expenses of the town or the community school district, but shall be excluded in the computation for state school subsidy. If a town or community school district shall be delinquent in its payments to the Authority, the state department of education shall make payment to the Authority in lieu of such town or community school district from any amounts properly payable to such town or community school district by such department, not exceeding the amount then presently due to the Authority from such town or community school district. When the amount of rental paid by any town lessee of such school buildings shall equal the cost with interest paid out by the Authority, from its sale of bonds, the lessee shall be given full title to such building or buildings by said Authority.

Sec. 219. Revenue bonds. The Authority is hereby authorized to provide by resolution, at 1 time or from time to time, for the issuance of revenue bonds of the Authority for

the purpose of paying all or any part of the cost of any project or projects and for any purpose authorized in sections 212 to 228, inclusive. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment. The bonds of each issue shall be dated, and shall bear interest at such rate or rates, not exceeding 5% per year shall mature at such time or times not exceeding 40 years from their date or dates, as may be determined by the Authority, and may be made redeemable before maturity, at the option of the Authority, at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of the bonds. The Authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the state. The bonds shall be signed by the chairman of the Authority or shall bear his facsimile signature, and the official seal of the Authority shall be impressed thereon and attested by the secretary and treasurer of the Authority, and any coupons attached thereto shall bear the facsimile signature of the chairman of the Authority. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. All bonds issued under the provisions of sections 212 to 228, inclusive, shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the state. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both

principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The Authority may sell such bonds in such manner, either at public or at private sale, and for such price, as it may determine to be for the best interest of the Authority, but no such sale shall be made at a price so low as to require the payment of interest on the money received therefor at more than 5% per year, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values; excluding, however, from such computation the amount of any premium to be paid on redemption of any bonds prior to maturity.

The proceeds of the bonds shall be used solely for the payment of the cost of the projects and shall be disbursed in such manner and under such restrictions, if any, as the Authority may provide in the resolution authorizing the issuance of such bonds or in any trust agreement securing the same.

Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts, notes or temporary bonds, with or without coupons, which may be exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost. Bonds may be issued under the provisions of sections 212 to 228, inclusive, without obtaining the consent of any departmental division, commission, board, bureau or agency of the state, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by sections 212 to 228, inclusive.

Sec. 220. **Trust funds.** Notwithstanding the provisions of any other law, all moneys received pursuant to the authority of sections 212 to 228, inclusive, whether as proceeds

from the sale of bonds or as revenues, shall be deemed to be trust funds to be held and applied solely as provided in sections 212 to 228, inclusive. The resolution authorizing the bonds of any issue or any trust agreement securing such bonds shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as sections 212 to 228, inclusive, and such resolution or trust agreement may provide.

Sec. 221. Remedies. Any holder of bonds issued under the provisions of sections 212 to 228, inclusive, or any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given may be restricted by such trust agreement, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the state or granted hereunder or under such trust agreement or the resolution authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by sections 212 to 228, inclusive, or by such trust agreement or resolution to be performed by the Authority or by any officer thereof.

Sec. 222. Revenue refunding bonds. The Authority is hereby authorized to provide by resolution for the issuance of revenue refunding bonds of the Authority for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of sections 212 to 228, inclusive, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds; and, if deemed advisable by the Authority, for the additional purpose of constructing enlargements, extensions or improvements of the project or projects in connection with which the bonds to be refunded shall have been issued or constructing or acquiring

any additional project or projects. The issuance of such bonds, the maturities and other details thereof, the rights of the holders thereof and the rights, duties and obligations of the Authority in respect of the same shall be governed by the provisions of sections 212 to 228, inclusive, in so far as the same may be applicable.

Sec. 223. **Transfer to towns.** When the bonds issued under the provisions of sections 212 to 228, inclusive, in connection with any project and the interest thereon shall have been paid or a sufficient amount for the payment of such bonds and the interest thereon to the maturity thereof shall have been set aside in trust for the benefit of the bondholders, such project shall be conveyed by the Authority to the lessee town or community school district.

Sec. 224. **Preliminary expenses.** The state board of education is hereby authorized in its discretion and with the approval of the Authority to expend out of any funds available for the purpose, such moneys as may be necessary for any preliminary expenses of the Authority, including architectural and other services, and all such expenses incurred by the board prior to the issuance of revenue bonds under the provisions of sections 212 to 228, inclusive, shall be paid by the board and charged to the appropriate project or projects and the board shall keep proper records of accounts showing each amount so charged. Upon the issuance of revenue bonds for any project or projects, the funds so expended by the board in connection with such project or projects shall be reimbursed to the board from the proceeds of such bonds.

Sec. 225. **Bonds eligible for investment.** Revenue bonds and revenue refunding bonds issued under the provisions of sections 212 to 228, inclusive, are hereby made securities in which all public officers and public bodies of the state and its political subdivisions, all insurance companies, trust companies and their commercial departments, banking associ-

ations, investment companies, savings banks, executors, trustees and other fiduciaries, and all other persons who are now or may hereafter be authorized to invest in bonds or other obligations of a similar nature, may properly and legally invest funds, including pension and retirement funds or capital under their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any state or municipal officer or any agency or political subdivision of the state for any purpose for which the deposit of bonds may be authorized by law.

Sec. 226. Additional method. Sections 212 to 225, inclusive, shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby, and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing; provided, however, that the issuance of revenue bonds or revenue refunding bonds under the provisions of sections 212 to 228, inclusive, need not comply with the requirements of any other law applicable to the issuance of bonds.

Sec. 227. Liberally construed. The provisions of sections 212 to 228, inclusive, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes thereof.

Sec. 228. Exemption from taxation. As the exercise of the powers granted by sections 212 to 228, inclusive, will be in all respects for the benefit of the people of the state and for the improvement of their educational facilities, and as projects constructed under the provisions of said sections constitute public property, the Authority shall not be required to pay any taxes or assessments upon any bonds issued under the provisions of sections 212 to 228, inclusive, their transfer and the income therefrom including any profit

made on the sale thereof shall at all times be free from taxation within the state.'

Sec. 2. Appropriation. In order to provide for the necessary expenditures in the administration of the Authority created by section 1 of this act, for the fiscal years ending June 30, 1952 and June 30, 1953, there are hereby appropriated the sums of $15,000 for such use in each of said fiscal years, or so much thereof as shall severably be found necessary, out of any moneys in the general fund not otherwise appropriated.

EXHIBIT B

Committee Amendment "A" to H. P. 1274, L. D. 824, Bill "An Act Creating the Maine School Building Authority."

Amend said Bill by adding at the end of that part designated "Sec. 218." thereof the following underlined paragraph:

'No contract or agreement between a town or towns or community school district and the Authority shall be valid unless first approved by the inhabitants of the town or towns involved either individually or as members of a community school district.'

Further amend said Bill by adding, after the underlined word "Authority" in the 3rd line of that part designated "Sec. 219." thereof, the following underlined words and figures: 'but not to exceed $15,000,000 outstanding'

Further amend said Bill by inserting, before the underlined words "any project" in the 6th line of that part designated "Sec. 228." thereof, the following underlined words: 'any of its property or'

Reported by a Majority of the Committee on Judiciary.

EXHIBIT C

House Amendment "A" to H. P. 1082, L. D. 695, "Resolve, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness."

Amend said Resolve by striking out the 2nd paragraph thereof and inserting in place thereof the following paragraph:

'**Constitution, Art. IX, Section 15, amended.** Section 15 of Article IX of the constitution, as amended, is hereby further amended by adding at the end thereof a new sentence, to read as follows:'

Filed by Mr. Low of Rockland.

EXHIBIT D

NINETY-FIFTH LEGISLATURE

Legislative Document No. 695

H. P. 1082 House of Representatives, February 14, 1951

Referred to the Committee on Judiciary. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Senter of Brunswick.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-ONE

RESOLVE, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness.

Constitutional amendment. Resolved: Two-thirds of each branch of the legislature concurring, that the following amendment to the constitution of this state be proposed:

Constitution, Art. XXII, amended. Article XXII of the constitution, as amended by article XXXIV, is hereby further amended by adding at the end thereof a new sentence, to read as follows:

'Long term rental agreements under contracts with the Maine School Building Authority shall not be considered debts or liabilities within the provisions of this article.'

Form of question and date when amendment shall be voted upon. Resolved: That the aldermen of cities, the selectmen of towns and the assessors of the several plantations of this state are hereby empowered and directed to notify the inhabitants of their respective cities, towns and plantations to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of senators and representatives at the next general or special state-wide election, to give in their votes upon the amendment proposed in the foregoing resolution, and the question shall be: "Shall the constitution be amended as proposed by a resolution of the legislature to exempt rental agreements with the Maine School Building Authority from the limitations of municipal indebtedness?"

And the inhabitants of said cities, towns and plantations shall vote by ballot on said question, those in favor of the amendment voting "Yes" upon their ballots and those opposed to the amendment voting "No" upon their ballots, and the ballots shall be received, sorted, counted and declared in open ward, town and plantation meetings and returns made to the office of the secretary of state in the same manner as votes for governor and members of the legislature, and the governor and council shall count the same, and if it shall appear that a majority of the inhabitants voting on the question are in favor of the amendment, the governor shall forthwith make known the fact by his proclamation, and the amendment shall thereupon, as of the date of said proclamation, become a part of the constitution.

Secretary of state shall prepare ballots. Resolved: That the secretary of state shall prepare and furnish to the several cities, towns and plantations ballots and blank returns in conformity with the foregoing resolve, accompanied by a copy thereof.

EXHIBIT E

Committee Amendment "A" to H. P. 1082, L. D. 695, Resolve, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness.

Amend said resolve by inserting after the underlined word "agreements" in the fourth line thereof, the underlined words and figures 'not exceeding 40 years.'

Further amend said resolve by striking out in the fifth line thereof the underlined word "considered."

Reported by a Majority of the Committee on Judiciary.

ANSWERS OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

The undersigned Justices of the Supreme Judicial Court, in accordance with the provisions of the Constitution, respectfully answer herein the questions propounded by the House of Representatives in an order dated May 9, 1951 passed May 10, 1951 relative to House Paper No. 1274, Legislative Document No. 824 entitled "An Act Creating the Maine School Building Authority," with proposed amendment identified as Committee Amendment "A" together with "Resolve, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness," House Paper No. 1082, Legislative Document No. 695, and proposed amendments identified as Committee Amendment "A" and House Amendment "A."

Question 1

The Bill "An Act Creating the Maine School Building Authority" if enacted with or without amendment, as proposed, would not pledge the credit of the State contrary to the Constitution.

Question 2

If the "Resolve, Proposing an Amendment to the Constitution to Exempt Rental Agreements with the Maine School Building Authority from the Limitations of Municipal Indebtedness," with or without amendment, as proposed, be adopted by the people, the provisions of Legislative Document No. 824, if enacted, with or without amendment, as proposed, will not violate the constitutional provisions relative to limitation of municipal indebtedness.

Question 3

If the resolve be not adopted by the people, the provisions of Legislative Document No. 824, if enacted, with or without amendment, as proposed, will not violate the provisions of the Constitution relative to limitation on municipal indebtedness. Any action taken under the act, however, would violate the provisions of the Constitution if the municipal indebtedness in any particular instance or instances is thereby increased beyond constitutional debt limits. The declaration in Section 218, of the proposed act, that "all rentals or other charges provided by any such contract to be paid for the lease or use of such project shall be deemed to be current operating expenses of the town or the community school district" neither controls nor determines the nature of the liability created by the lease. So long as Section 15 of Article IX of the Constitution (as now codified) remains unchanged, the liabilities of municipalities must be determined in accordance with the principles declared in *Reynolds* v. *City of Waterville,* 92 Me. 292; and in *Opinions of the Justices,* 99 Me. 515, and 146 Me. 183, 79 Atl. (2nd) 753.

Dated at Augusta, Maine, this tenth day of May, 1951.

Respectfully submitted:

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY
ROBERT B. WILLIAMSON

OPINION
OF THE JUSTICES OF THE SUPREME JUDICIAL COURT
GIVEN UNDER THE PROVISIONS OF SECTION 3
OF ARTICLE VI OF THE CONSTITUTION

* * * * * *

QUESTION PROPOUNDED BY THE HOUSE IN AN ORDER
PASSED MAY 3, 1951, ANSWERED MAY 8, 1951

HOUSE ORDER PROPOUNDING QUESTION

STATE OF MAINE

In House, April 24, 1951

Whereas, under Section 14 of Article IV, part third, of the Constitution of Maine, it is provided:

"Corporations shall be formed under general laws, and shall not be created by special acts of the legislature, except for municipal purposes, and in cases where the objects of the corporation can not otherwise be attained; and, however formed, they shall forever be subject to the general laws of the State."

Whereas, Section 8 of Chapter 49 of Revised Statutes of Maine, 1944 provides:

"Three or more persons may associate themselves together by written articles of agreement, for the purpose of forming a corporation * * * to carry on any lawful business anywhere, including corporations for manufacturing, mechanical, mining or quarrying business; * * * and excepting corporations for banking, insurance, the ownership, maintenance, or operation of a cemetery or cemeteries, the construction and operation of railroads or aiding the construction thereof, and the business of savings

banks, trust companies, loan and building associations, or corporations intended to derive profit from the loan of money except as a reasonable incident to the transaction of other corporate business or where necessary to prevent corporation funds from being unproductive," etc.

Whereas, Section 3 of Chapter 55 of the Revised Statutes of Maine, 1944 provides:

"No person, co-partnership, association or corporation shall do a banking business unless duly authorized under the laws of this state or of the United States, except as provided by Section 4. The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, co-partnership, association, or corporation, or a corporation intended to derive profit from the loan of money except as a reasonable incident to the transaction of other corporate business or when necessary to prevent corporate funds from being unproductive, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass-book, a note, a receipt, or other writing" etc.

Whereas, Chapter 55 of the Revised Statutes of Maine, 1944, provides in Sections 19, 86, 142 and 181 thereof for the incorporating of trust companies, savings banks, loan and building associations and industrial banks.

Whereas, there is now pending before the 95th Legislature of this State a special act entitled Bill, "An Act to Incorporate the Guardian Finance Co.", Legislative Document No. 383, a copy of which is hereto attached and made a part hereof.

Whereas, it is important that the Legislature be informed as to the Constitutional validity of the said special act entitled Bill, "An Act to Incorporate the Guardian Finance Co.", Legislative Document No. 383, now pending.

Whereas, it appears to the House of Representatives of the said 95th Legislature that the following is an important question of law, and the occasion a solemn one;

Now, therefore, be it

Ordered, That the Justices of the Supreme Judicial Court are hereby requested to give to the House of Representatives, according to the provisions of the Constitution on this behalf, their opinion on the following question, to wit:

QUESTION

Is it competent for the Legislature to create by special act of the Legislature a private corporation whose principal object shall be to engage in business intended to derive profit out of the loan of money, credit, goods, or choses in action, in an amount or value in excess of three hundred ($300.00) dollars, whether secured or unsecured?

Presented by:

Hayes — Dover-Foxcroft.

NINETY-FIFTH LEGISLATURE

Legislative Document No. 383

H. P. 641 In House, February 1, 1951.

Referred to the Committee on Judiciary. Sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Spear of South Portland.

STATE OF MAINE
IN THE YEAR OF OUR LORD NINETEEN HUNDRED FIFTY-ONE

AN ACT to Incorporate the Guardian Finance Co.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. Corporators; corporate name; powers and privileges. Maurice A. Branz, of Cape Elizabeth, Brewster A. Branz and Anna D. Branz, both of Portland, S. Arthur Paul of Falmouth and Wilfred A. Hay of Windham, all in the county of Cumberland and state of Maine, or such of them as may vote to accept this chapter, with their associates, successors and assigns, are hereby made a body corporate to be known as the "Guardian Finance Co.," and as such shall have the power to enact suitable by-laws and regulations, and elect such officers as it deems desirable to effect its corporate purposes and be possessed of all the powers, privileges and immunities and subject to all the duties and obligations conferred on corporations by the general corporation law of this state.

Sec. 2. Principal office. The principal office and place of business in Maine is to be located in the city of Portland, county of Cumberland, or as fixed by the directors.

Sec. 3. Purposes. The purpose for which this corporation is formed and the nature of the business to be conducted by it are as follows: To engage in the business of making loans or to advance money upon contracts, promissory notes, secured or unsecured, upon such terms and conditions as are lawful and may be agreed upon; to purchase contracts or notes incorporated in or secured by conditional sales contracts or chattel mortgages or personal property; to borrow money and secure payment thereof by pledging its assets or any part thereof; and to do any and all things necessary or incidental to the foregoing; to take over the loan and finance business of Maurice A. Branz, presently conducted by him under the firm name and style of Guardian Finance Co. and to assume all outstanding obligations of the said Maurice A. Branz incurred by him in the conducting of the said business.

Sec. 4. Capital stock. The corporation may determine the capital stock of the said corporation and the division of same into shares, either of par or non-par, common or preferred, and the amount of dividend to be paid or declared thereon; with the right to change the capital stock by majority vote of the holders of stock issued and outstanding, and having voting power, the fees therefor to be paid as prescribed by the laws of Maine.

Sec. 5. Subject to supervision of bank commissioner. The corporation may be subject to inspection and examination of its books and records by the bank commissioner or his deputies at all times.

Sec. 6. First meeting, how called. Any 3 of the incorporators named in this act may call the 1st meeting of the corporation by mailing a written notice signed by 3 incorporators, postage paid, to each of the other incorporators 5 days at least before the day of the meeting, naming the time, place and purpose of such meeting; and at such meeting the necessary officers may be chosen, by-laws adopted and any

other corporate business transacted; provided that without such notice, all such incorporators may meet voluntarily at any time and effect their organization by electing officers, adopting by-laws and transacting other lawful business.

ANSWER OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

The undersigned Justices of the Supreme Judicial Court, having considered the question propounded to them by the Order of the House of Representatives dated April 24, 1951, and passed May 3, 1951, respectfully advise that they are of opinion that it is "competent for the Legislature to create by special act of the Legislature a private corporation whose principal object shall be to engage in business intended to derive profit out of the loan of money," subject to such limitations relative to the amount of individual loans, or otherwise, as the Legislature may prescribe, if the objects of the corporation cannot be attained under any existing general laws.

The only limitation upon the power of the Legislature to create corporations by special act is that found in Sections 13 and 14 of Part Third of Article IV of the Constitution adopted in 1875, by Article XIV of the Amendments thereto. These read as follows:

> "Section 13. The legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation.
>
> "Section 14. Corporations shall be formed under general laws, and shall not be created by special acts of the legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained; and, however formed, they shall forever be subject to the general laws of the state."

The purpose intended to be served by these additions to the Constitution is evidenced by the following statement contained in the Inaugural Address of Governor Selden Connor delivered before the Fifty-fifth Legislature when it convened in 1876, as found in the Acts and Resolves of 1876, page 145 at 165:

> "Section thirteen presents a discretionary field of action which your own honor will impel you to occupy to the fullest extent.
>
> "The title of 'Special and Private Laws,' which includes so large a portion of the laws of former Legislatures, is an obnoxious one, conveying suggestions of privilege, favoritism and monopoly; though happily these evils have not in fact, stained the character of our legislation, they should not be suffered to have, even in the form of our laws, any grounds of suspicion that can be removed. Other weighty objections to special laws for private benefit are, that they are obtained at the public expense, and in their passage distract the attention of legislators from matters of public interest. The opportunity is now afforded, and the duty enjoined upon you, by the amendment, to restrict the necessity for such laws to the narrowest possible limits. An analysis and classification of the private and special laws upon the statute books, will inform you of the objects for which it is desirable to provide by general laws, if practicable.
>
> "Many objects have been hitherto specially legislated upon although they were amply provided for by general laws. I have distinguished authority for the statement that sixty or more of the corporations created by a special act for each, by the last Legislature, could have been created and organized under general laws. The reason why the general laws have not been resorted to to a greater extent, is not, so far as I am informed, to be found in any insufficiency or defect of those laws, but in the greater ease and simplicity of the method of application to the Legislature and in the fancied higher

> sanction of an authority proceeding directly from it. Section fourteen, relating to corporations, is compressive and peremptory. It relates to all corporations, except only those for municipal purposes. It clearly prohibits their creation by special acts if the objects desired can be secured under existing general laws."

Since the adoption of these sections, the successive Legislatures of this State, as evidenced by their action, have consistently interpreted Section 14 as permitting the creation of corporations by special charter whenever the objects thereof could not be attained *under existing general laws.*

Established principles of constitutional construction require that the views of the framers be given great consideration, *Opinion of the Justices,* 68 Me. 582 at 585, and that whenever a constitutional provision may be considered ambiguous its:

> "interpretation must be held to be settled by the contemporaneous construction, and the long course of practice in accordance therewith,"

State v. *Longley,* 119 Me. 535 at 540.

It cannot be doubted that the framers of Art. IV, Part Third, Sec. 14 intended that it should be construed as Governor Connor construed it, as authorizing the Legislature to determine the field or fields in which corporations should be "formed under general laws," and that in the absence of an existing general law under which the objects of the corporation can be attained the Legislature may create such corporation by special act. Neither can it be doubted that it has been construed in conformity with that view for more than three-quarters of a century. In this construction we heartily concur for no other meaning can be fairly given to the language used in the amendment.

It being manifest that your inquiry relates particularly to the proposed incorporation of Guardian Finance Co., and

that its objects, as declared in Legislative Document No. 383, cannot be attained by organization under any existing general law, we supplement the foregoing by saying that said corporation may be chartered by special act.

Dated at Augusta, Maine, this eighth day of May, 1951.

Respectfully submitted:

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY
ROBERT B. WILLIAMSON

CLYDE MOORES

vs.

INHABITANTS OF TOWN OF SPRINGFIELD

Penobscot. Opinion, June 11, 1951.

Evidence. Admissions.

An admission made at a trial of a case, which is reduced to writing, or incorporated into the record, and is not declared to be limited to the purpose of the particular trial, is provable at any subsequent one.

The court has discretionary authority to relieve a party from any admission made improvidently or by mistake at an earlier trial.

ON EXCEPTIONS.

Action to recover on certain town orders. At a previous trial counsel stipulated that the orders in question were duly executed. In the instant proceeding the court relieved the defendant of the admission and upon the evidence found for the defendant upon the ground that none of the orders were signed by all the selectmen, or a majority of them. The plaintiff brings the case to the Law Court on exceptions to the acceptance of the referee's report. Exceptions overruled. Case fully appears below.

Atherton and Atherton,
Wendell Atherton, for plaintiff.

E. Donald Finnegan,
Francis A. Finnegan, for defendant.

SITTING: MURCHIE, C. J., THAXTER, MERRILL, NULTY, WILLIAMSON, JJ. (FELLOWS, J., did not sit.)

MURCHIE, C. J. The plaintiff brings this case to this court, for the second time, on exceptions to the acceptance of a referee's report giving judgment against him. On the

first occasion, his exceptions were sustained. *Moores* v. *Inhabitants of Town of Springfield,* 144 Me. 54, 64 A. (2nd) 569. This time they must be overruled.

At the first trial the defendants permitted the Orders of the defendant Town on which the action is based to be introduced in evidence by admission of their due execution, despite an earlier demand for proof thereof, alleging the signatures thereon not genuine. The plaintiff, in turn, resting his case on the Orders and the admission, admitted the allegations carried in the defendants' brief statement, that the defendant Town, at the times the Orders were issued, had indebtedness outstanding in excess of its constitutional debt limit.

The admission of the plaintiff being declared insufficient to preclude his recovery on the Orders, *Moores* v. *Inhabitants of Town of Springfield, supra,* the plaintiff, at the second trial, rested his case again on the Orders and the defendants' admission in connection therewith. The defendants, thereupon, submitted evidence that each and every Order had been signed by a single selectman, affixing the names of all the selectmen in office at the time of issue. The referee found for the defendants on the ground that none of the Orders were signed by all the selectmen, or a majority of them, and declared, expressly, that if he had discretionary authority to relieve the defendants of their admission at the first trial, he would do so.

This is conclusive of the case, on the very authorities relied on by the plaintiff. Those authorities establish as a general principle that a formal admission made at one trial of a case is provable at a second one. *Holley* v. *Young,* 68 Me. 215; *Wetherell* v. *Bird,* 7 Car. & P. 6, 173 Eng. Reprint 3; *Currie* v. *Cleveland,* 108 Me. 103, 79 A. 19; *Prestwood* v. *Watson,* 111 Ala. 604, 20 So. 600; *Perry* v. *Simpson Waterproof Mfg. Co.,* 40 Conn. 313; *Moynahan* v. *Perkins,* 36 Colo. 481, 85 Pac. 1132, 10 Ann. Cas. 1061; *Central*

Branch Union Pacific Railroad Co. v. *Shoup,* 28 Kan. 394, 42 Am. Rep. 163, 1 Greenleaf on Evidence, Sec. 186, Wigmore on Evidence, 2nd. Ed., Vol. 5, Sec. 2593; and the Annotation in A. L. R. (following the report of *LeBarron* v. *City of Harvard,* 129 Neb. 460, 262 N. W. 26, 100 A. L. R. 767). They do not support the plaintiff's claim that such an admission has controlling force.

The pertinent law, in this jurisdiction, was declared in *Holley* v. *Young, supra.* The opinion in that case closes by declaring an exception, or qualification, to the general principle aforesaid. After citing *Wetherell* v. *Bird, supra,* and 1 Greenleaf on Evidence, Section 186, Mr. Justice Walton, referring to Professor Greenleaf's later declaration, in Section 206, that courts are vested with discretionary authority to relieve parties from admissions made improvidently, or by mistake, concluded:

> "With such a discretionary power lodged in the court, we think no evil results will follow if we adopt the rule that an admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding judge, in the exercise of his discretion, thinks proper to relieve the party from it."

This was quoted with approval in *Currie* v. *Cleveland, Moynahan* v. *Perkins* and *Central Branch Union Pacific Railroad Co.* v. *Shoup,* all *supra,* and recognized in *LeBarron* v. *City of Harvard, supra.* It is part of the foundation for the statement in the Annotation thereto, 100 A. L. R. 775, 776, that the general rule makes a stipulation, or admission, formally made at one trial of a case, available at a subsequent one "unless the court permits its withdrawal upon proper application."

There could be doubt, in the present case, whether the admission made at the first trial was not limited to the purposes thereof by necessary implication, although no express

statement to that effect was made at the time, and this would preclude the application of the general rule. Assuming otherwise, there can be no doubt that the circumstances under which the admission was made justified the referee in exercising discretionary authority to relieve the defendants from its improvidence. The Orders sued on were not duly executed. They should not bind the defendant Town. The plaintiff should not be permitted to recover on them.

Exceptions overruled.

STATE OF MAINE

vs.

STANLEY W. BEANE

Androscoggin. Opinion, June 11, 1951.

Criminal Law. Intoxicating Liquor. Instructions.

When instructions given in a charge ascribe unwarranted force to some particular part of the evidence or might be construed by a jury as requiring a conviction despite reasonable doubt on any essential question of fact, it is improper to refuse a special requested instruction denying such force and declaring the true rule that factual questions should be resolved on all the testimony.

ON EXCEPTIONS.

On respondent's exceptions, following a conviction, before a jury, of driving a motor vehicle while under the influence of intoxicating liquor. At the close of the charge to the jury respondent requested certain special instructions on the ground that the blood test evidence was overemphasized in the charge to such an extent that the jury might interpret it as requiring a conviction despite the possibility of a reasonable doubt on the basis of "all the testimony." **Exceptions sustained. Case fully appears below.**

Irving Isaacson, for State of Maine.

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

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

MURCHIE, C. J. When the transcript of testimony in a case carries evidence clearly indicating that the verdict rendered was the only one which could have been returned, if the true issue had been comprehended by the jury, it seems unfortunate to disturb it. Notwithstanding this is such a case, we feel constrained to sustain respondent's Exception X, which challenges the propriety of the refusal of the court below to give certain requested instructions (quoted *infra*) to the jury. We do so to safeguard against the possibility, remote as it appears, that he did not have, in every respect, "a fair and impartial trial." The requirement that every respondent in a criminal case shall have such a trial is fundamental. *State* v. *Merrick,* 19 Me. 398; *State* v. *King,* 123 Me. 256, 122 A. 578; or *State* v. *Brown,* 142 Me. 16, 45 A. (2nd) 442.

In the second of these cases, an exception to the admission of improper testimony was sustained, as this court said, "with reluctance, considering the evidence." It is with great reluctance that we take the action we do. A reading of the evidence supporting the charge that the defendant operated a motor vehicle upon a public highway while under the influence of intoxicating liquor, within the meaning of R. S., 1944, Chap. 19, Sec. 121, produces grave uncertainty if there could have been any reasonable doubt of his guilt, without reference to the testimony to which the requested instructions relate. That concerned a test, made at defendant's request, to determine the alcoholic content of his blood. The instructions given the jury gave unwarranted force to that testimony, which, under the statute, provided *prima facie* evidence of the defendant's guilt.

The statute provides that:

> "Evidence that there was * * * 7/100%, or less, by weight of alcohol in * blood, is prima facie evidence that the defendant was not under the influence of intoxicating liquor* * *. Evidence that there was * * * from 7/100% to 15/100% * * * is relevant evidence * * * not to be given prima facie effect * * *. Evidence that there was * * * 15/100%, or more, * * * is prima facie evidence that the defendant was under the influence of intoxicating liquor * * *."

The defendant's blood, when tested, showed an alcoholic content of 21/100% by weight. The testimony of the pathologist, to that effect, supplemented, and confirmed, evidence of defendant's guilt, given by three police officers who testified on the basis of his appearance and actions and the manner in which he was driving an automobile along the public highway. The defense offered was brief, and in some respects unusual. The defendant did not deny the consumption of alcoholic beverages prior to his arrest, but deposed that he had consumed no more than two bottles of beer, drunk one and three hours, respectively, earlier. He did not deny that his appearance and actions were, substantially, as the officers described them, but ascribed them to a war disability and a highly nervous state resulting therefrom. He explained the course of the automobile as it traveled along the highway by asserting that there was a defect in the steering equipment, which caused the vehicle to "shimmy," as he said, when driven at some speeds.

It is obvious that the evidence of the pathologist made a *prima facie* case against the defendant, under the statute, and that it tended strongly to support what the officers had said and to contradict what he had said, as well as the testimony of a witness presented by him, who was at the police station when he was admitted to bail. This was that the defendant appeared then, as often before, red of face, with eyes "kind of bad."

Despite the apparent strength of the State's case, and the obvious weakness of that of the respondent, the factual issue as to whether he was, at the pertinent time, "at all under the influence of intoxicating liquor," to use the words of the statute, was for jury determination, under our system of jurisprudence. It is unnecessary to cite precedents for a principle of law so fully established, or for the companion one that a jury should perform its allotted function under proper instructions from the court.

The particular issue, in this case, arises in connection with special instructions requested on behalf of the defendant, and refused. Reference to the charge shows that the jury was instructed, thoroughly and appropriately, that the burden of the State was to prove guilt beyond a reasonable doubt, and that the respondent was entitled to the protection of a presumption of innocence. Thereafter, however, the court dealt specifically with the evidence of the pathologist, in two paragraphs, as follows:

> "There is a law in this state which I want to read to you, which has to do with this offence. 'Evidence that there was, at the time, 15/100%, or more, by weight of alcohol in his blood, is prima facie evidence that the defendant was under the influence of intoxicating liquor within the meaning of this section.' Dr. Beliveau has testified, as I understand his testimony, and again I say it is your recollection that controls and not mine, that his test showed 21/100% by weight of alcohol in the blood of this respondent, which, as I figure it, is at least 6/100% more than the 15/100% which the law says shall be prima facie evidence that the respondent in this case was under the influence of intoxicating liquor. Prima facie does not mean conclusive evidence but it means that stands unless successfully contradicted. That is what I take prima facie to mean. It means on the face of it the respondent is considered under the influence of intoxicating liquor.

> **Much has** been said about Dr. Beliveau's testimony as to the test he took, and again you have got to weigh his testimony. Does it sound true? Do you believe the doctor, or is he mistaken or prevaricating about the situation? The doctor is admittedly an eminent pathologist who, as I remember his testimony, has made hundreds of these tests, and who said that the test which he performed in this case was the accepted and recognized test taken from a sample of this respondent's blood. May I say it can only be done at the respondent's request and analyzed. Much has been said in argument about the doctor's failure to observe this respondent. He has had eight hundred cases. His job when called in is to take blood and test that blood and report his findings. He told you what he found and that this was the alcoholic content in the respondent's blood and he said further—Question by Mr. Isaacson: 'Will you explain to the Court and jury what is the significance of that figure .21? My question was what is the significance of that alcoholic content in the blood?' Answer: 'It means that the individual from whom the specimen was obtained was under the influence of liquor at that time.' This is a scientific test, a recognized test. Is it reliable? Do you believe it. As I say, it is for you to say whether it is or is not."

Exceptions were taken to several parts of the charge, including the second of the quoted paragraphs, but it seems unnecessary to consider anything more than the exception which challenges the refusal to give the following instructions:

> "1. The respondent does not claim that the officers lied; he does claim that they are mistaken. The latter claim is far different than the former. To find the respondent not guilty does not require you to find that the officers lied.
>
> 2. If upon all the testimony, including the test, you are satisfied that a reasonable doubt exists as to the respondent's guilt, then you should find the respondent not guilty.

> 3. The blood test is not conclusive. You should consider all the testimony and if there is a reasonable doubt, then the respondent should be found not guilty."

There can be no doubt about the propriety of the refusal to give the first of them. It is well established that a court, after instructing a jury, is not bound to repeat, at request, anything which was "substantially and properly covered" in the charge given, *State* v. *Cox,* 138 Me. 151, 23 A. (2nd) 634. See also *State* v. *Pike,* 65 Me. 111, and *State* v. *McKrackern,* 141 Me. 194, 41 A. (2nd) 817. He is under no obligation to adopt language suggested by counsel. *State* v. *Knight,* 43 Me. 11; *State* v. *Williams,* 76 Me. 480. The instructions given advised the jurors they were to pass upon the capacity of the officers to observe what they said they did, as well as their credibility. The word "mistaken," which is the control word of the request, was actually used in the charge.

Under ordinary circumstances the charge given the jury in this case might be considered as having covered "substantially and properly" what we must assume was sought in the second and third requests — consideration of "all the testimony." The jurors were advised that *prima facie* evidence was not "conclusive," to use the controlling word of the third request. Much emphasis was laid upon "reasonable doubt," which is the principal subject matter of both. In the brief presented on behalf of the State, however, the issue is squarely raised that the two instructions, if given, would have completely negatived "the provisions of the blood test statute." This suggests that counsel for the State construed the instructions given, particularly those carried in the quoted paragraphs, as they were construed by counsel for the respondent, and it cannot be doubted that there is a possibility that the jury might have interpreted what was said as requiring that evidence showing the presence of 21/100% of alcohol, by weight, in the blood of the

respondent be given more than *prima facie* effect. The words, referring to 21/100%:

> "which, as I figure it, is at least 6/100% more than the 15/100% which the law says shall be prima facie evidence",

taken with the later declarations that the test was scientific, and recognized, and that the questions to be resolved were "Is it reliable?" and "Do you believe it," might be interpreted as requiring a conviction if the jurors did think it reliable and did believe it, despite the possibility of reasonable doubt on the basis of "all the testimony." As was said in the early case of *State* v. *Merrick, supra,* the instructions, so construed:

> "required a conviction, although every one of the jury might entertain reasonable doubts of * guilt."

It might well be doubted, on the record, if the defendant could have been prejudiced by the refusal of the instructions requested, or by those given in the charge, but to overrule the exception to the refusal of the second and third requested instructions on that ground would be either to usurp the function of the jury, in determining the fact, or to give the statutory provision an effect more controlling than the statute warrants.

Exceptions sustained.

BOYCE'S CASE

(JAMES A. BOYCE *vs.* MAINE PUBLIC SERVICE CO. AND LIBERTY MUTUAL INSURANCE CO.)

Piscataquis. Opinion, June 11, 1951.

Workmen's Compensation. Employer. Arise Out of Employment. Course of Employment.

The Industrial Accident Commission is the trier of facts and its findings for or against the claimant are final if there is any evidence on which to base them.

It is the general rule that when one employer lends a servant to another for a particular employment, and the servant is under the exclusive direction and control of that other in the particular employment, he must be dealt with as the servant of the one to whom he is loaned.

To "arise out of employment" the injury must have been due to a risk of employment. To "occur in the course of employment" the injury must have been received while the employee was carrying on the work which he was called upon to perform, or doing some act incidental thereto.

ON APPEAL.

On appeal by defendant from a decree of the Superior Court affirming a decision of the Industrial Accident Commission. The defendant claimed that the petitioner was not employed by it at the time of receiving injuries, and that in any event the accident did not arise out of and in the course of his employment. Appeal dismissed. Decree affirmed. Case fully appears below.

Robinson, Richardson and Leddy, for appellant.

James E. Mitchell, for appellee.

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

FELLOWS, J. This case is in the Law Court on appeal from a decree of the Superior Court for Piscataquis County affirming a decision of the Industrial Accident Commission awarding compensation to James A. Boyce as an employee of the Maine Public Service Co.

The petitioner Boyce asked for an award against the Maine Public Service Co. for serious personal injuries by accident arising out of and in the course of his employment, when he fell through a skylight of a camp building at Mooseluk Lake while shoveling snow from the roof on February 15, 1950. The defendant Company claimed that the plaintiff (petitioner) was not employed by it at the time of receiving the injuries, and that in any event the accident did not arise out of and in the course of his employment.

The record fairly shows that James A. Boyce went to work for the Great Northern Paper Company at Mooseluk Lake in the summer of 1948 where the Paper Company was constructing a dam. Boyce did some cooking, worked on a road, and worked on the dam. The dam was completed in the early part of 1949. During the winter of 1948-1949 Boyce looked after the property for the Paper Company.

The activities of the Great Northern Paper Company ceased in the fall of 1949, and Boyce expected to be "laid off" and received word that he was going to be, and that the Maine Public Service Co. "would take it over." Then Boyce received word from an official of the Paper Company to take orders from Mr. McGowan of the Service Company.

Mooseluk Lake is so inaccessible that an airplane, or a possible twenty mile walk, is necessary to get in and out. The Service Company had arranged with the Paper Company for the use of some of the water. In order to avoid the requirement of the Service Company for a physical examination of employees, it was more convenient for the Service Company to keep Boyce to tend the dam, and to leave

him where he was with his supplies and on the pay rolls of the Paper Company, rather than to take him out for examination.

Boyce stayed at the Mooseluk Dam at the request of the defendant Service Company. He was indirectly paid by the Service Company, because the Service Company paid his wages to the Paper Company. He attended to raising and lowering the gates of the dam when and as ordered by the defendant Service Company to govern the water supply in the Aroostook river, from which the Service Company obtained some of its power. He would not have been there had it not been for the request of the Service Company. The Paper Company had no work there for him, and gave him no orders to do any work there. The Great Northern Paper Company exercised no control over his work during that winter. Boyce acquiesced in the new employment and accepted the orders and directions of the defendant Service Company.

Boyce lived in an "office camp" which had been built and previously used by the Great Northern Paper Company, and he kept in another building formerly used as a "cook camp and sleeping camp," his tools, axes, saws, salt, kerosene and other materials used by him to keep the dam equipment free of ice to permit use. At the time of his injuries he was attempting to shovel the snow from the roof of the camp where his working utensils were stored. During the previous winter, while this camp was occupied and in use by the Paper Company, he had kept the snow from the roof, acting under instructions from the Paper Company. During the winter of 1949-1950 he received no such instructions from anyone. Boyce chose to keep the salt, kerosene and tools in a camp other than where he ate and slept, and without being instructed he shoveled to protect his materials from a possible falling roof as well as to protect himself.

The Industrial Accident Commission found, and it appears clear to the court that on the evidence it could so find, that the plaintiff petitioner Boyce, in the general employ of the Great Northern Paper Company, was loaned to the defendant Service Company, and submitted to the exclusive direction and control of his special employer, the Service Company. The Commission also found that the work of Boyce, at the time of injury, was entirely for the benefit of the Maine Public Service Company, as the dam would have been entirely closed and no person employed, except for the arrangement between the companies for use of water by the Service Company. The Commission further and also found, that Boyce at the time of his injury was performing an act in furtherance of his special employer's business and that it was incidental to his employment with the Service Company.

The appellant argues that for Boyce to keep a camp roof shoveled to protect his tools, salt and oil, when he had adequate space in the camp where he lived, "is so ridiculous as to defy belief." This contention of the Maine Public Service Company, and its insurance carrier the Liberty Mutual Insurance Co., is well answered by these words of the Commission in its findings:

> "In arriving at a decision of this matter we have considered the time, place and circumstances under which the accident occurred. We believe the injury followed as a natural incident of the employee's work, which he was employed to do. We believe there was a causal connection between the employment and the injury. It arose in the course of the employment because it came about while the workman was doing the duty he was employed to perform. It arose out of the employment because it is apparent to us, upon consideration of all the circumstances, that there was a causal connection between the conditions under which Mr. Boyce was working and the injury which he received.

This employee was engaged to tend a dam. This was in a remote place. He was the only employee. He had tended the dam previously for another employer. He was the type of man who was conscientious in his work. He was in the habit of looking after the property at the dam. He lived in an office building, and kept the materials which he claimed were necessary to perform his work properly at the dam, in another building. He had never been instructed one way or the other, about keeping the snow shoveled off the roofs of the buildings at the dam, by the Maine Public Service Company. The winter before he had been instructed by the owner of the dam and the buildings to keep the cook camp shoveled off, which he did. This was the work he was doing when injured. To protect the tools and materials needed to keep the gates of the dam free of ice, is the reason Boyce advances for shoveling off the roof where they were kept. He had another reason, which seems legitimate, and that was to save himself from injury, so that the roof would not fall in on him, while he was in the cook camp. Mr. McGowan, the employer's agent, who gave Boyce all of his orders, admitted that every man had different ways of doing his work. We do not believe, in a situation of this kind, that an employee must be expressly directed as to the time, manner and extent of doing each particular task. It is our opinion that an employee, situated as Mr. Boyce was, at the dam, would reasonably be expected to use his own discretion, as to how he would perform his duties. This particularly so, in the absence of any orders, contrawise. Boyce had not been forbidden to put his tools and other materials in the cook camp. He had not been forbidden to shovel off the cook camp. It was his responsibility to keep the dam and its gates free of ice. He was not instructed as to what tools or materials to use, or not to use, in doing his work. The fact that Boyce chose to live in the office building, we believe, does not change the situation, but is another instance of an employee using his discretion on the job."

The Workmen's Compensation Act arose out of conditions produced by modern industrial development and is based on the philosophy that industrial accidents are inevitable incidents of industry, and that the burden should be borne by industry rather than by the injured employee. *Bartley* v. *Couture,* 143 Me. 69, *55 Atl. (2nd)* 438. Under the Act, the theory of common law negligence, as the basis of liability, is discarded and a right to compensation is given for injuries incident to the employment. The compensation law substitutes in place of an action which requires proof of the employer's negligence with common law defenses, the right to compensation based on the fact of employment. This obviates uncertainties, delay, expense and possible hardship. It transfers the expense and uncertainty from the worker to the industry, and tends to improve relations between employers and employees by avoiding troublesome litigation. See *Foster* v. *Hotel Company,* 128 Me. 50. A liberal construction rule is imposed by the Legislature. Revised Statutes (1944), Chapter 26, Section 30. The Industrial Accident Commission is the trier of the facts and its findings for or against the claimant are final if there is any evidence on which to base it. When there is competent and probative evidence the decision of the commission, if guided by legal principles, is not subject to review. *Albert's Case,* 142 Me. 33; *Mailman's Case,* 118 Me. 172. The court must accept the findings of fact, if there is competent evidence, but it is not necessarily bound by the reasoning of the commission. *Shaw's Case,* 126 Me. 572. A finding based on speculation or conjecture will not be sustained. Conclusions must be natural and rational. *Syde's Case,* 127 Me. 214.

Whether a servant of one employer has been loaned to another is determined by the circumstances surrounding both the general employment and the special employment. Who controls and directs him and his activities in the new and particular service? Does he continue to be under the control of his general employer, or does he become, for the

time being, subject to the exclusive control and direction of the person to whom he has been loaned? Does the employee himself, know and consent, and does he submit to the direction and control of the new master? The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another. It is the general rule that when one lends a servant to another for a particular employment, and the servant is under exclusive direction and control of that other in the particular employment, he must be dealt with as the servant of the one to whom he is loaned. *Torsey's Case,* 130 Me. 65; *Gagnon's Case,* 128 Me. 155, 158; *Wyman* v. *Berry,* 106 Me. 43; *Pease* v. *Gardner,* 113 Me. 264. *Wilbur* v. *Construction Co.,* 109 Me. 521; *Beaulieu* v. *Tremblay,* 130 Me. 51; *Frenyea* v. *Steel Co.,* 132 Me. 271. Consent or acquiescence of the employee to the change of employment may be inferred from the servant's acceptance of or obedience to orders given by the special employer. *Torsey's Case,* 130 Me. 65. The fact that a loaned servant remains on the payroll of his general employer is not decisive of the question of employment. It is a circumstance to be considered. *Chisholm's Case,* 238 Mass. 412.

The Workmen's Compensation Act provides for compensation where the employee receives a personal injury by accident arising out of and in the course of his employment. Revised Statutes (1944), Chapter 26, Section 8. The law is clear, but the application is often difficult. To arise out of the employment the injury must have been due to a risk of the employment. To occur in the course of the employment the injury must have been received while the employee was carrying on the work which he was called upon to perform, or doing some act incidental thereto. The accident may occur in the course of the employment although it may not arise out of it. The compensation depends on the fact that the accident not only takes place in the course of the employment, but also that it arises out of the employment.

John D. Wheeler's Case, 131 Me. 91. There must be some causal connection between the conditions under which the employee worked and the injury which he received. If the injury is sustained by reason of some cause that has no relation to the employment it does not arise out of it. *Gouch's Case,* 128 Me. 86; *Mailman's Case,* 118 Me. 172; *Saucier's Case,* 122 Me. 325. The accident to be compensable must occur within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties, or engaged in doing something incidental thereto. He should not be in a place forbidden by the employer. *Fournier's Case,* 120 Me. 236, or in a clearly unsafe place, when the employer has provided a safe one, *Healey's Case,* 124 Me. 145. See also *Dulac* v. *Insurance Co.,* 120 Me. 31, where employee used freight elevator, instead of exit, unknown to employer; *Gray's Case,* 123 Me. 86, where employee injured in a fight; *Washburn's Case,* 123 Me. 402, where employee injured in "horse play;" *Hawkins* v. *Portland Gaslight Co.,* 141 Me. 288, where employee went outside plant and was shot by a crazed soldier; which cases hold that the accident must be due to a risk to which the employee was exposed because of his employment, or because of work incidental thereto. If the accident occurs while the employee is doing what he might reasonably do and at a place where he might reasonably be, it is compensable. See *Westman's Case,* 118 Me. 133, where cook of towboat went from boat at dock to a store for supplies and on return was drowned, and it was held that the injury was traceable to nature of work; *Farwell's Case,* 127 Me. 249, where waitress went to find night watchman and was injured; *Hinckley's Case,* 136 Me. 403, where fireman on steam shovel joined operator at shovel en route to new location, and *Bennett's Case,* 140 Me. 49, where in a production rush the employee vaulted rail instead of walking the ramp. "An injury arises out of the employment if it arises out of the nature, conditions, obligations,

or incidents of the employment; in other words, out of the employment looked at in any of its aspects." *Caswell's Case,* 305 Mass. 500, 502.

In this case where the employee who attended the dam was injured while shoveling snow from the roof of the building, where his tools and materials were kept, there was evidence on which the commission could properly find within the meaning of the Workmen's Compensation Act that he was in the employ of the Maine Public Service Co., and was injured in an accident arising out of and in the course of his employment.

This being an appeal by the employer and the original decision being affirmed, the Law Court orders the allowance of $250 to be paid to the petitioner employee by the defendant Maine Public Service Co. for expenses incurred in the proceedings of this appeal, in accordance with Revised Statutes (1944), Chapter 26, Section 41.

Appeal dismissed.

Decree affirmed.

Allowance of $250 ordered to petitioner for expenses of appeal.

THE DORCOURT COMPANY

vs.

GREAT NORTHERN PAPER COMPANY

Kennebec. Opinion, June 12, 1951.

Mandamus. Exceptions.

Procedure relative to mandamus is statutory and although there is no express provision for the allowance of exceptions where the peremptory writ is denied the legislature manifestly intended that in such case exceptions in matters of law may be prosecuted. The case must be sent to the Law Court in such shape that its decision will be a final disposition since there is no provision for sending the case back to the justice who heard it for rehearing. (R. S., 1944, Chap. 116, Secs. 17-20.)

A writ of mandamus will not issue before a default in the performance of a duty to compel the performance of such duty unless at the time of the issuance of the writ it is absolutely certain that there will be occasion for the performance of the duty.

ON EXCEPTIONS.

Mandamus proceedings to compel the Great Northern Paper Company to maintain, repair and improve Stratton Brook Dam. The alternative writ was ordered to issue. Issue was joined on the return. On motion New England Trust Company, Trustee, as party plaintiff was stricken. The peremptory writ was denied and exceptions thereto certified to the Chief Justice. Exceptions overruled. Case fully appears below.

McLean, Southard and Hunt, for plaintiff.

Louis C. Stearns,
Louis C. Stearns III,

Thomas Allen,
Scott W. Scully, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, JJ. (WILLIAMSON, J., did not sit.)

MERRILL, J. On exceptions to the denial of a peremptory writ of mandamus by a single justice of this court. The proceeding was initiated against Great Northern Paper Company by a petition of New England Trust Company, Trustee, and The Dorcourt Company. The first or alternative writ of mandamus was ordered to issue. The petition and alternative writ were then amended, on motion, by striking out New England Trust Company, Trustee, as a party plaintiff thereto. Issue was joined on the return to the alternative writ. The peremptory writ was denied, and exceptions to the denial of the writ certified to the Chief Justice.

The Dorcourt Company is seeking to compel the Great Northern Paper Company "to maintain, repair and improve Stratton Brook Dam so that said Dam will be at the effective height at which it was maintained on April 22, 1936, and so that it will be sufficient to raise a head of water to facilitate the driving of logs, pulp wood and other lumber down Stratton Brook," which brook discharges into Dead River, one of the branches of the Kennebec.

By Private and Special Laws 1907, Chap. 234, the Legislature granted to one Albion L. Savage, his associates, successors and assigns, a charter authorizing them to erect dams, including those theretofore erected by him, and to make other improvements in Stratton Brook for the purpose of facilitating the driving of logs, pulp wood and other lumber down said brook, and raising a head of water therefor. Said charter also authorized the charging of tolls, and granted the right of eminent domain. It further provided that when the tolls collected equalled the cost of the improvements, together with six per cent interest, they should be reduced to a sum sufficient to keep the works in repair. There was no provision in the charter which in express terms imposed any duty or duties upon the holder thereof. This charter was duly accepted by Savage. By quit-claim

deed, Savage purported to convey to Great Northern Paper Company his interest and rights under said charter as of September 6, 1911. Great Northern Paper Company built a dam at the outlet of Stratton Brook Pond, on which dam it made its last repairs sometime during the nineteen twenties. At the time of the institution of these proceedings the dam had been destroyed by fire. The Great Northern Paper Company had never charged tolls for the use of the facilities. The Dorcourt Company demanded that the respondent rebuild the dam, which the respondent refused to do.

The Dorcourt Company is the owner of standing timber on the watershed of Stratton Brook, but it is neither engaged in the business of cutting and removing the timber from the soil and delivering the same to purchasers, nor does the record show that it either had or has any present intent so to do. As stated in its brief "Petitioner (The Dorcourt Company) is in the business of selling stumpage. It does not cut the logs nor drive them to market." Nor does the record disclose that if the prayers of the petitioner were complied with, and Great Northern Paper Company rebuilt Stratton Brook Dam, that a single cord of pulp wood or a single stick of long lumber would be driven down Stratton Brook.

The position of the petitioner as established by the facts in the record is not that the respondent is failing to maintain facilities to drive lumber which the petitioner has ready to be driven down Stratton Brook, or even lumber which definitely will be made ready by it, or purchasers from it, to be driven down Stratton Brook. The basis of the petitioner's complaint, on the facts in the record, is that the failure of the respondent to continually maintain the Stratton Brook Dam so that a potential purchaser of lumber from it could, if it desired, drive lumber down Stratton Brook interferes with the marketability of the petitioner's standing timber.

The procedure relative to mandamus in this State is statutory. It is found in R. S., Chap. 116, Secs. 17 to 20, both inclusive. Although the statute does not in express terms provide for the allowance and certification of exceptions if the peremptory writ be denied, this court in *Lawrence* v. *Richards,* 111 Me. 95, held that it was the manifest intent of the legislature that the petitioner be entitled to prosecute exceptions in matters of law if the peremptory writ were refused.

It is further to be noted that there is no provision in the law for sending a mandamus case back to the justice who heard the case for a rehearing. It must be sent to the Law Court, if at all, in such shape that the decision of the Law Court will be the final disposition of the case. See *Hamlin* v. *Higgins,* 102 Me. 510 at 520; *Libby* v. *Water Company,* 125 Me. 144, 146. Such being the situation, if exceptions to the refusal of the peremptory writ are to be of any advantage to the petitioner, the case must come to the Law Court on such a record that if the exceptions be sustained, the peremptory writ may then be ordered to issue. As a peremptory writ of mandamus is issued only in the exercise of sound legal discretion by the court, the record accompanying the exceptions to the denial of the peremptory writ must disclose a state of facts which requires the issue of the peremptory writ as a matter of law. Unless such state of facts be disclosed by the record, any erroneous ruling by the single justice in denying the peremptory writ cannot be legally prejudicial to the petitioner and the exceptions must be overruled.

The writ of mandamus is not an ordinary writ to be sued out as a matter of course. As said in *Edwards Mfg. Co.* v. *Farrington,* 102 Me. 140, 142:

> "It is an extraordinary writ to be issued only when it is made to appear clearly to the court that the writ is necessary to secure some substantial

> right, and also that it will be effective to secure that right. As said in 19 Am. & Eng. Ency. 757, 758, the writ should not be issued 'where, if issued, it would prove unavailing, fruitless, and nugatory.' 'A mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus.' See *Rex* v. *Justices,* 2 B & A 391; 22 E. C. L. 108; *Mitchell* v. *Boardman,* 79 Maine 469; *Tennant* v. *Crocker,* Mayor, 85 Mich. 328; *State* v. *Board of Health,* 49 N. J. L. 349."

The following statements from American Jurisprudence and Spelling on Extraordinary Relief are particularly applicable to the situation here presented.

> "The office of mandamus is to compel the performance of a specific and positive duty imposed by law, and the writ will not be granted unless it appears that there has been a plain breach or dereliction of duty on the part of the respondent." See 34 Am. Jur. Page 867, Sec. 78.

> "Mandamus is used to compel the performance of a present existing duty as to which there has been an actual default, and it is not granted to take effect prospectively. The writ, that is, will not ordinarily be awarded to compel the performance of an act unless the act is one which is actually due from the respondent at the time of the application. Until the time arrives when the duty should be performed, there is no default of duty; and mere threats not to perform the duty will not, as a rule, take the place of default. So, it has been stated that mandamus will not be issued in anticipation of supposed omission of duty, however strong the presumption may be that the person whom it is sought to coerce by the writ will refuse to perform his duty when the proper time arrives. This, however, is a general rule merely and does not prevent the use of mandamus to control the performance of prospective duties where the exigencies of the case demand it." 34 Am. Jur. Page 868, Sec. 79.

As said in Spelling on Extraordinary Relief, Vol. II, Sec. 1385:

> "A relator is not entitled to the writ unless he can show a legal duty then due at the hands of the respondent; and until the time arrives when the duty should be performed, no threats or predetermination not to perform it can take the place of such default. The law does not contemplate such a degree of diligence as the performance of a duty not yet due. The general rule is that the writ will not be granted in anticipation of a supposed omission of duty, however strong the presumption may be that the person sought to be coerced by the writ will refuse performance at the proper time. An important reason for refusing the writ in such cases is, that until the duty is due, no practical question can be presented to the court, but simply a supposed case."

The purpose for which the Savage charter was granted, and on which charter the petitioner bases its entire claim, was that of "facilitating the driving of logs, pulp wood and other lumber" down Stratton Brook. The duty to maintain facilities imposed by the charter, if any there be, is to maintain them for facilitating the driving of such logs, pulp wood and other lumber and such only as is to be actually driven down said brook. The only persons, if any, in whose favor that duty is imposed by the charter are those who have logs, pulpwood and other lumber *to be driven* down Stratton Brook. As said in *Sterns Lumber Company* v. *Penobscot Bay Electric Company*, 121 Me. 287, which involved a dam company charter:

> "The sole purpose of this charter was to benefit the log owner and to assist him in getting his logs out of the stream in the spring season."

Although, as shown by the above quotations from American Jurisprudence, under certain conditions it may be proper to issue a writ of mandamus to compel the performance of a duty prior to the time when its performance will

be due, a writ of mandamus will not issue before a default in the performance of a duty to compel the performance of such duty *unless at the time of the issue of the writ it is absolutely certain that there will be occasion for the performance of the duty.*

In the instant case, as above shown, the petitioner itself has no intent of driving any lumber down Stratton Brook. If it sells its stumpage there is no surety that the purchaser will drive the stumpage so purchased, when converted into logs or pulpwood, down Stratton Brook. The issue of a writ of mandamus compelling the Great Northern Paper Company to rebuild Stratton Brook Dam at this time and at a cost which the evidence discloses may approximate $19,000, might be a wholly futile thing. There being no *present duty* owed by the Great Northern Paper Company to the plaintiff to rebuild Stratton Brook Dam and maintain the same for driving purposes, the action of the single justice in denying the peremptory writ was correct. Had he ordered the writ to issue, on the present record it would have been the duty of this court to sustain exceptions thereto and order the writ quashed. The foregoing considerations being sufficient for the disposal of the case we need not consider other issues presented.

Exceptions overruled.

STATE OF MAINE

vs.

ROBERT LEVESQUE

Androscoggin. Opinion, June 18, 1951.

Criminal Law. Arson. Corpus Delicti. Evidence. Confessions and Admissions.

All elements of the crime of arson must be proved beyond a reasonable doubt.

Corpus delicti in the crime of arson is made up of two elements, (1) the burning, and (2) one criminally responsible for the result.

It is necessary to establish by some proof independent of extra judicial statements or confessions that some portion of the building was burned or ignited in the slightest degree in order to sustain the burden of proof that a respondent is guilty beyond a reasonable doubt.

ON APPEAL AND EXCEPTIONS.

On indictment for arson respondent was tried and found guilty. During the trial respondent excepted to certain rulings of the court relating to the admission of evidence. At the conclusion of the evidence respondent excepted to the overruling of his motion for a directed verdict. Exceptions were duly allowed. After verdict and before sentence respondent moved that the verdict be set aside and a new trial granted. The motion was denied and respondent appealed. Only the appeal is considered. Appeal sustained. Verdict set aside. New trial granted. Case fully appears below.

Edward Beauchamp,
Irving Isaacson, for State of Maine.

Irving Friedman, for respondent.

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

NULTY, J. At the 1947 January Term of the Superior Court for Androscoggin County the respondent was indicted for arson. The indictment contained six counts but before trial it was stipulated between the State and counsel for respondent, with the respondent's permission, that respondent was to be tried only on the first count. At the 1948 November Term the respondent was tried and found guilty. During the trial respondent excepted to certain rulings of the court relating to the admission of certain evidence which exceptions were allowed. At the conclusion of the evidence, the respondent, through his counsel, moved for a directed verdict which motion was denied and exceptions allowed. After verdict and before sentence respondent moved the presiding justice that the verdict of guilty be set aside and a new trial granted. This motion was denied and respondent now brings his appeal from that ruling before the Law Court together with his bill of exceptions. For the purpose of the decision in this case we only deem it necessary to consider the appeal.

The printed case brought forward with the appeal shows that on October 6, 1946, the respondent was living with his parents at 10 Maple Street in Lewiston, Maine, in a second floor apartment of a brick dwelling house belonging to Joseph and Exilia Longtin which building or dwelling house is the one described and referred to in Count 1 of the indictment on which the respondent was tried and found guilty of the crime of arson.

The evidence for the State discloses that a captain of the Lewiston Fire Department, in response to a telephone call made at 9:34 P. M. on October 6, 1946, went with three fire trucks to 10 Maple Street and found some rubbish burning in the front part of the cellar of the brick building at that address; that there was some flame in the rubbish; that the fire was small and was extinguished with a booster tank and that the apparatus of the Fire Department was back at the

Fire Station at 9:45 P. M. and at that time the records of the Fire Department show that the fire was of undetermined origin. The Captain further testified that he was quite sure the foundation of the building was of brick; that the rubbish was not piled but strewn around and scattered and that so far as he could remember the rubbish consisted of general rubbish, mostly paper, and that he could not swear that any partitions were burned. Another witness for the State who lived in an apartment on the first floor at 10 Maple Street and who was at that address on the date in question testified that shortly before 10 P. M. on October 6, 1946, he and his wife smelled smoke and discovered it came from the cellar. They went upstairs to the apartment of the respondent's parents and the wife of the witness telephoned the Fire Department. Thereafterwards the witness and the respondent's brother went down into the cellar and he recognized the respondent standing about three to four feet away from the rubbish that was ablaze; that some old paper and rubbish were burning and that the brother carried the respondent upstairs to the first floor in his arms. Witness further testified that after the fire was put out by the Fire Department he went downstairs and looked around and found "just old scrap paper, that is all." He also testified that the cellar was divided by wooden partitions that ran from the floor to the ceiling; that he did not discover that any of the boards making up the partitions were burned. Another witness, a member of the Lewiston Police Force, testified that he arrived at the scene a few seconds after the Fire Department; that he went down cellar, saw a little smoke, that a fire was being put out by a booster line; that the cellar was divided into eight compartments; that outside the compartments there was space to walk through; that he did not remember what part of the cellar the fire was in except that it was more towards the front of the building; that he made no investigation of the area burned in the cellar. Two other witnesses for the State, Police Of-

ficers of the City of Lewiston, testified that on October 6, 1946, at about 9:45 P. M., in response to a call concerning a disturbance, they drove to St. Mary's Rectory and saw the respondent sitting on the steps of the Rectory; that he was intoxicated; that he staggered; that his speech was incoherent; that he smelled strongly of beer and that he stated that he had just started a fire in the cellar of his house at 10 Maple Street; that respondent was taken in the police car to the station and booked for intoxication and that during the ride to the Police Station respondent seemed to have what the officers termed a "crying jag" and mumbled to himself. The next day, October 7, 1946, the respondent was interviewed by a Captain of the Lewiston Police Department in the presence of another police officer and at that time the respondent was advised of his rights and he stated that he had set the fire at 10 Maple Street; that he went to the cellar where he picked up a piece of cardboard and lit it with a match and placed the burning cardboard against a wooden partition and stayed there until the wood started to burn. The witness further testified that after he got the story from the respondent he transcribed it into the form of a statement and he identified the statement that he had made up following his conversation with the respondent; that he made it up the same morning he interviewed the respondent and that he read the statement to the respondent and that after certain corrections were made the statement was signed by the respondent. The statement, in the nature of a confession, as corrected was offered and duly admitted in evidence by the court without objection and read to the jury. Another witness for the State, an officer of the Lewiston Police Department, testified that he was present at all times when the respondent was interviewed by the captain.

In the view we take of the case it seems unnecessary to further detail or outline the other evidence. The question presented for determination is whether, upon all the evi-

dence, the jury was warranted in finding beyond a reasonable doubt that the respondent was guilty of the crime of arson as charged in the first count of the indictment. Our court said in *State of Maine* v. *Caliendo,* 136 Me. 169, 174, 4 A. (2nd) 837, with respect to the crime of arson:

> "Arson is and always has been regarded as one of the most serious offenses known to the criminal law. It is a crime which is rarely committed in the open and in the presence of witnesses, is usually most difficult to prove, and often can only be established by circumstantial evidence. The State is bound to prove all the elements of the crime beyond a reasonable doubt. If it relies solely on circumstantial evidence to establish the guilt of the accused, as in all other felonies, it must prove each and every circumstance upon which a conviction must rest beyond a reasonable doubt, and the evidence must be sufficient to exclude beyond a reasonable doubt every other reasonable hypothesis except that of the respondent's guilt. *State* v. *Richards,* 85 Me., 252, 255, 27 A., 122; *State* v. *Terrio,* 98 Me. 17, 56 A., 217; *State* v. *Cloutier,* 134 Me., 269, 186 A. 604."

It should be noted from the above quotation that it is the law of our State that all the elements of the crime of arson must be proved beyond a reasonable doubt. Our court, in *State of Maine* v. *Caliendo, supra,* said referring to that particular case:

> "In this case, the corpus delicti of the arson is clearly established."

and further said:

> "- - - - - It is not necessary, to constitute arson, that any of the building should be consumed. If any part, however small, be ignited, the offense is committed. *State* v. *Taylor,* 45 Me. 322. - - - - - - - - -"

> "- - - - - - - mere suspicion, however strong, will not supply the place of evidence and warrant a conviction."

The authoritative textbook writers and many courts have defined the term "corpus delicti" and in the case of arson have stated that it is made up of two elements, the one, the burning, the other, that some one is criminally responsible for the result. The following language appears in 7 Ruling Case Law, 774:

> "The corpus delicti in arson is not merely the burning of a house, but that it was burned by the wilful act of some person criminally responsible for his acts, and not by natural and accidental causes, - - - - -."
>
> "2. Necessity for Proof of Corpus Delicti.—Proof of a charge, in criminal causes, involves the proof of two distinct propositions: first, that the act itself was done, and secondly, that it was done by the person charged, and by none other—in other words, proof of the corpus delicti and of the identity of the prisoner. Hence before there can be a lawful conviction of a crime, the corpus delicti—that is, that the crime charged has been committed by some one—must be proved." See *Bines* v. *State*, 118 Ga. 320, 45 S. E. 376, 68 L.R.A. 33. "Unless such a fact exists, there is nothing to investigate. Until it is proved, inquiry has no point upon which it can concentrate; indeed, there is nothing to inquire about. Accordingly a defendant is not required in any case to answer the charge against him, in the absence of evidence upon the part of the prosecution sufficient to establish the corpus delicti; and if the prosecution fails to establish the corpus delicti the verdict will be set aside and a new trial ordered. The first statement of the necessity of proving the corpus delicti and the insistance of its requirement appears to be that of Lord Hale (2 Hale P. C. 290) where he says: 'I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account of how he came by them, unless there were due proof made that a felony was committed of these goods.'" See note 68

L.R.A. 33 and 45 where many cases are collected and annotated.

Our court has many times defined the words "reasonable doubt" and in *State* v. *Rounds,* 76 Me. 123, 125, approved the following language used in *State* v. *Reed,* 62 Me. 129, 144, as being a correct definition of reasonable doubt:

> "It is a doubt which a reasonable man of sound judgment, without bias, prejudice or interest, after calmly, conscientiously and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner."

In *State* v. *Brown,* 103 S. C. 437, 88 S. E. 21, L. R. A. 1916 D. 1295, which was an arson case, the court said:

> "So, in a case of arson the corpus delicti consists of two elements, the burned house and the criminal act of another in causing the burning. If there is no evidence of either, the defendant is entitled to an acquittal, and he is entitled to an acquittal as a matter of law."

In the same case the court, in speaking of certain statements made by the accused showing enmity, which statements would have a tendency to prove motive, said:

> "Until there is some evidence of the corpus delicti, even confessions made out of court are not admissible." Citing 7 Am. & Eng. Enc. Law, p. 863, note.

> "Before a defendant can be required to go into his defense it is necessary that there shall be some proof of the corpus delicti. If there is no evidence to prove the corpus delicti, the defendant is entitled to a verdict of not guilty."

In addition to the testimony of the State's witnesses, introduced, it is assumed, to establish the *corpus delicti,* the State, as we have before stated, introduced, without objection, the extra judicial statement of the respondent in the nature of a confession made to the police officers to bolster up the evidence of the State's witnesses.

The weight of authority in this country, at least, appears to be from the decided cases that the *corpus delicti* cannot be established by the extra judicial confession of the respondent unsupported by other evidence. *State* v. *Brown, supra; Bines* v. *The State, supra.* In 1 *Greenleaf on Evidence,* Sec. 217, the author states:

> "In the United States, the prisoner's confession *when the corpus delicti is not otherwise proved* has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases; and it appears countenanced by approved writers on this branch of the law."

In *Priest* v. *State,* 10 Neb. 393, 399 (1880), the court said in speaking of confessions and *corpus delicti:*

> "- - - - - Nor is there sufficient evidence of the *corpus delicti.* That a crime has actually been committed must necessarily be the foundation of every criminal prosecution, and this must be proved by other testimony than a confession, the confession being allowed for the purpose of connecting the accused with the offense."

> "A party cannot be convicted of a felony upon a mere suspicion. The law wisely requires the testimony to exclude all reasonable doubt, and while to a great extent the weight of testimony and degree of credibility to be given to the witnesses must be left to the jury, the court, where the verdict is unsupported by evidence, or is clearly wrong, will set it aside and grant a new trial."

In the case of *State of Maine* v. *Peterson,* 145 Me. 279, 75 A. (2nd) 368, 371, we said with respect to the admission of a similar extra judicial statement or confession where other admissions by the respondent had been made as in the instant case:

> "- - - - -, its" (the statement) "probative value, when weighed - - - - - 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."

Applying the principles which we have herein enunciated to the instant case, we feel that the State has not sustained the burden of establishing the respondent's guilt beyond a reasonable doubt. There is no definite or even circumstantial proof that any portion of the building was burned in the slightest degree or even ignited which is necessary to establish the *corpus delicti.* The only significance in the State's evidence is the placing of the respondent near the burning pile of paper or rubbish. That creates some suspicion, but as we have heretofore pointed out in this opinion, mere suspicion without due proof of the *corpus delicti* or the crime charged will not take the place of evidence. On the record here presented the State has not overcome the presumption of innocence which clothed the respondent. The mandate will be

Appeal sustained.

Verdict set aside.

New trial granted.

STATE OF MAINE

vs.

LYNDON LAWRENCE

Penobscot. Opinion, June 21, 1951.

Constitutional Law. Double Jeopardy. Intoxicating Liquor.

The offenses of "being found intoxicated in any street, highway, etc.," (R. S., 1944, Chap. 57, Sec. 95 as amended) and operating or attempting to operate a motor vehicle when intoxicated or at all under the influence of intoxicating liquor (R. S., 1944, Chap. 19, Sec. 121 as amended) are different offenses, and a defendant is not "twice put in jeopardy" by prosecutions for each offense. (Constitution of Maine, Art. I, Sec. 8.)

The test whether a prosecution is for "the same offense" is not to be found in the fact that the acts of a defendant are the same in both cases or that the charges arose from the same transactions.

ON REPORT.

Defendant pleaded guilty before the Bangor Municipal Court to two charges (1) being found intoxicated, etc. (R. S., 1944, Chap. 57, Sec. 95 as amended) and (2) operating a motor vehicle while under the influence, etc. (R. S., 1944, Chap. 19, Sec. 121, as amended). Upon conviction defendant appealed from both charges. At the Superior Court defendant filed a special plea of former conviction and double jeopardy to the second charge. State demurred. Respondent joined. The case is reported to the Law Court to decide questions of law raised by complaint, plea of former conviction, demurrer and joinder. No rights to plead over were reserved. Demurrer sustained. Plea overruled. Case remitted to Superior Court for sentence. Case fully appears below.

John T. Quinn,
Oscar Fellows, for State of Maine.

Harry Stern, for respondent.

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

WILLIAMSON, J. The case is reported to us to decide questions of law raised by the complaint, plea of former conviction, demurrer and joinder. The complaint charges operation of a motor vehicle while under the influence of intoxicating liquor. The conviction was for the offense of being found intoxicated in a public place.

For our purposes the State has admitted by its demurrer that both charges arose from the same acts of the defendant and in the same transaction. *State* v. *Jellison,* 104 Me. 281, 71 Atl. 716. We reach the merits of the case without consideration of objections to the sufficiency of the plea in form and substance urged in argument by the State. Whether in a reported case technical objections are waived or whether, if not waived, the objections here made are sound, we do not determine. In any event by our treatment of the plea as sufficient, the defendant cannot be prejudiced.

The statutes relating to the offenses read in part as follows:

> "Whoever is found intoxicated in any street, highway, or other public place — ." *R. S., Ch. 57, Sec. 95,* as amended; and
>
> "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs, —." *R. S., Ch. 19, Sec. 121,* as amended.

"No person, for the same offence, shall be twice put in jeopardy of life or limb." *Constitution of Maine, Art. I, Sec. 8.* The key words in the case at bar are "for the same offence." Are the offenses the same both in fact and in law, or different? The answer is not found in the fact that the

acts of the defendant were the same in both cases or that the charges arose from the same transaction.

Chief Justice Emery, in the *Jellison* case, *supra,* at page 283 stated the applicable rule in the following words:

> "The acts and the offense they constitute are different matters. The same acts may constitute more than one offense and also different offenses, subjecting the actor to as many punishments as the offenses his acts constitute."

At page 284:

> "The offense of assault and battery and the offense of unlawful assembly or riot are different offenses. Neither includes the other. A person may commit either without committing the other. Nevertheless the same acts may sometimes constitute both offenses, but when they do, the offenses are still different though the acts are the same, and the perpetrator of the acts may be punished twice, once for each offense."

It should be noted that, if one offense is included within the other, it does not necessarily follow that they are the same. The test is conclusive only when it establishes a difference. *State* v. *Inness,* 53 Me. 536. The principle has been stated by Mr. Justice Sutherland in *Blockburger* v. *United States,* 284, U. S. 299 at 304, as follows:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

The defendant is charged with the violation of two distinct statutes enacted for different and unrelated purposes. The one statute is designed to prevent the evil of drunkenness in public; and the other, a menace of great and growing concern to the lives and safety of the public. There

can be no doubt that the Legislature intended to create separate and distinct offenses. *State* v. *Fogg,* 107 Me. 177 at 180, 77 Atl. 714.

The elements of the intoxication charge are:

(1) the condition of intoxication; and

(2) the finding of the defendant in such condition "in a street, highway, or other public place." *State* v. *McLoon,* 78 Me. 420, 6 Atl. 601; *State* v. *Carville,* 14 Atl. 942 (a *per curiam* decision not found in the Maine Reports reported in 1888 by Leslie C. Cornish, Esq., later Chief Justice). The defendant must be arrested in the commission of the offense. See *State* v. *Boynton,* 143 Me. 313, 62 Atl. (2nd) 182.

In the driving charge the elements are:

(1) operation or the attempt to operate a motor vehicle; and

(2) when the defendant is intoxicated, or at all under the influence of intoxicating liquor.

The element of being "found" in the intoxication charge does not appear in the driving charge. Without this element there is no violation of the intoxication statute. In the driving charge there is no requirement that the defendant be found in a particular place or in a particular condition. Indeed, whether the offense occurred in a private or public place is of no consequence.

Another difference between the offenses lies in the required proof of the condition of the defendant. In the one case he must be intoxicated; and in the other, under the influence of intoxicating liquor. The difference lies in the degree of the influence and is well understood. *State* v. *Mann,* 143 Me. 305, 61 Atl. (2nd) 786.

Our decision, however, does not rest upon the difference between the conditions. The result would be the same if the defendant were here charged with operation of a motor vehicle when intoxicated. There would yet be lacking the element of being "found."

Evidence to prove either charge would not warrant conviction of the other. The intoxication statute alone requires proof of being "found," and, of course, the operation of a motor vehicle is present only in the driving charge. The test plainly discloses that the offenses are different, and hence the defendant is not "twice put in jeopardy" for the same offense.

The case of *State* v. *Shannon,* 136 Me. 127, 3 Atl. (2nd) 899, 120 *A. L. R.* 1166, heavily relied upon by the defendant, is not controlling. The issue there was the nature of the crime of perjury. It was held that the giving of false testimony at one trial constituted one perjury and accordingly acquittal of perjury barred a later prosecution for the like offense. The State attempted without success to divide one perjury into two perjuries. If the case at bar involved two driving charges arising from the same transaction, the *Shannon* case would be in point.

The governing principles and their application in a variety of circumstances may be found in *State* v. *Inness, supra; State* v. *Littlefield,* 70 Me. 452; *State* v. *Jellison, supra; State* v. *Beaudette,* 122 Me. 44, 118 Atl. 719; *State* v. *Shannon, supra;* and *Smith, Petitioner for Writ of Error,* 142 Me. 1, 45 Atl. (2nd) 438. See also 15 *Am. Jur.* "Criminal Law," Sec. 380-392, 22 *C. J. S.* "Criminal Law," Sec. 278-285 and Sec. 295 (b); and annotations in 92 *A. S. R.* 89 at 104 et seq., and 172 *A. L. R.* 1053 at 1054 and 1065. We are aware that our views are not in accord with the cases of *State* v. *McLaughlin* (1926), 121 Kan. 693, 249 P. 612, and *Dowdy* v. *State* (1929), 158 Tenn. 364, 13 S. W. (2nd) 794.

The demurrer must be sustained and the plea overruled. With the disposition of the dilatory plea, the only question is what judgment should be entered.

In the Municipal Court, where the complaint originated, the defendant pleaded guilty and then appealed to the Superior Court. The guilty plea remains unchanged. No right to plead over and stand trial on disallowance of the special plea was stipulated in the report. In the *Shannon* case, *supra,* such a right was reserved. See also *State* v. *McClay,* 146 Me. 104, 78 Atl. (2nd) 347; *State* v. *Inness, supra,* and *State* v. *Jellison, supra.*

In the absence of such a stipulation, the guilt of the defendant is established. There remains the matter of sentence.

The entry will be:

Demurrer sustained.

Plea overruled.

Case remitted to the Superior Court for sentence.

SHERMAN I. GOULD, ADMR. C. T. A.
OF THE ESTATE OF WILLIAM E. STEARNS, APPELLANT

vs.

ERNEST H. JOHNSON
STATE TAX ASSESSOR

Oxford. Opinion, June 18, 1951.

Inheritance Tax.

Joint Bank Accounts. U. S. Savings Bonds.

The order in which names appear on joint bank accounts is not *prima facie* evidence of ownership.

The fact that a woman assists her husband in his business does not make any part of the earnings of a jointly conducted business hers.

The burden is on the moving party to show that the State Tax Assessor was in error in making an assessment.

U. S. Government bonds, series G, payable on death to another are taxable under inheritance or succession laws (1944, Chap. 142, Sec. 2, Par. I, subd. C.)

ON EXCEPTIONS.

Petition in equity under R. S., 1944, Chap. 142, Sec. 30, as amended, for the abatement of an inheritance tax levied against the estate of William E. Stearns. Upon dismissal by the Probate Court an appeal was taken to the Supreme Court of Probate. That court also dismissed the appeal and exceptions were taken and allowed. Exceptions overruled.

Sherman I. Gould,
Robert K. Miles, for appellant.

Ralph Farris,
Boyd Bailey, for appellee.

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

THAXTER, J. This is a petition in equity brought under the provisions of R. S., 1944, Chap. 142, Sec. 30 as amended, for the abatement of an inheritance tax against the estate of William E. Stearns late of Hiram in the County of Oxford, deceased. It was brought by Sherman I. Gould as administrator c.t.a. of Mr. Stearns' estate. This petition was dismissed by the Probate Court for the County of Oxford and an appeal was taken to the Supreme Court of Probate of that county. That court dismissed the appeal except as to a small item of $17.01, and with such exception the determination of the state tax assessor was upheld. To such ruling exceptions were taken by the petitioner and allowed. These are now before us.

William E. Stearns and his wife, Nora J. Stearns, were engaged together in the business of buying and selling cattle, farms, and farm materials. They kept no books. The business was successful. They died within a few months of each other, William on April 10, 1945, and Nora on July 31, 1945. There is property in the estate of each about which there is no controversy. This controversy arises over the inclusion by the state tax assessor as assets of the estate of William E. Stearns of three bank accounts amounting in the aggregate to $30,258.46, and of certain United States Government Bonds, Series G, totalling $10,500. The bank accounts were joint accounts payable as follows:

1.	Portland Savings Bank "Nora J. Stearns or William E. Stearns payable to either or the survivor"	$2,878.06
2.	Maine Savings Bank "Mrs. Nora J. Stearns or William E. Stearns, pay either or survivor"	$1,286.66
3.	Kezar Falls National Bank, Savings Department	$26,093.74

> "Nora J. or W. E. Stearns, Subject to the order of either. The balance at death of either to belong to the survivor"

There is no evidence other than the fact that the husband and wife were in business together showing the source of the funds of said bank accounts or showing whose funds were used in the purchase of the United States Government Bonds. The bonds stood in the name of William E. Stearns, payable on death to Nora J. Stearns.

There were seven exceptions to the findings of the Supreme Court of Probate. Exceptions 1 and 2 relate to the bonds, exceptions 3, 4, 5, 6 and 7 to the bank accounts. The order of names on the bank books is not *prima facie* evidence of ownership. Nor does the fact that a woman assists her husband in his business make any part of the earnings of a jointly conducted business hers. *Holmes* v. *Vigue,* 133 Me. 50.

The presumption in the instant case is that the funds represented by these bank books belonged to the husband, William E. Stearns. That presumption is strengthened by the provisions of Section 3 of the agreed statement which reads as follows: "3. That Nora J. Stearns and William E. Stearns were associated together in the business of trading —cattle, farms, farm machinery and materials, etc. That the only source of wealth of either party brought to the attention of the assessor prior to the assessment date was said joint enterprise."

The burden was on the appellant to show that the State Tax Assessor was in error in making the assessment. There is no evidence in the record which sustains that burden. What we here say indicates that exceptions 3-7 inclusive should be overruled.

Exceptions 1 and 2 rest on a different basis. We shall disregard the claims of the State that these exceptions are

not properly before us and consider the merits of the questions raised by them.

The case of *Harvey* v. *Rackliffe*, 141 Me. 169, involved the title to the proceeds of a United States War Bond registered in the name of William A. Griffin, payable on death to Etta E. Covel. The question was whether the estate of Griffin or the representative of the estate of Etta E. Covel was entitled to the proceeds of the bond. This court recognized the right of the administratrix of the estate of the beneficiary to the proceeds, holding that the federal law and regulations enacted in pursuance thereof providing for such recognition were controlling and took precedence over the state rule to the contrary. The specific policy involved in the instant case is set forth in the following language from Treasury Department Circular No. 654, Second Revision, Fiscal Service Bureau of the Public Debt, dated January 1, 1944: "The bonds shall be subject to estate, inheritance, gift, or other excise taxes, whether Federal or State, but shall be exempt from all taxation now or hereafter imposed on the principal or interest thereof by any state, or any of the possessions of the United States, or by any local taxing authority." *Harvey* v. *Rackliffe* was decided on the theory that there was a contract with the United States for the benefit of a third person and that the failure to recognize such contract by the state might seriously interfere with the ability of the federal government to borrow money. We said, page 181: "Above all else the capacity of the government to borrow at all depends on the inviolability of its obligation, on its ability to carry it out strictly in accordance with its terms. If the state may treat the bonds here involved, or the proceeds of their sale, as the property of some person other than the one whom the contract has designated, the government has thereby been prevented from carrying out the agreement into which it has entered." The appellant argues that the same reasoning applies to the right of the state to levy a succession tax on the proceeds of

a sale as assets in the hands of the administrator of Mr. Stearns' estate. Such is distinctly not the law. The federal law not only does not prohibit such taxation, it permits it. Though it undoubtedly could be argued that the right of the state to tax in this manner might to some extent affect the value of such bonds, it is not the policy of the federal government to prohibit such state taxation.

The question has been decided by some state courts adverse to the contention of the appellant here. *Gregg* v. *Commissioner,* 315 Mass. 704; *Estate of A. T. Myers,* 359 Pa. 577, 60 A. (2nd) 50; *Mitchell* v. *Carson,* 186 Tenn. 228, 209 S. W. (2nd) 20. No case has been cited to us by the appellant the other way. *Harvey* v. *Rackliffe* left undecided the question of the right of the state to levy an inheritance or succession tax on such a bond or on the proceeds thereof.

As a matter of fact the point in issue has been specifically decided by our own court in a case significantly not mentioned by the appellant. *Hallett* v. *Bailey,* 143 Me. 1, 54 A. (2nd) 533. It was there held that such property as is involved here, though it passed to the beneficiary was taxable under the provisions of R. S., 1944, Chap. 142, Sec. 2, Par. I, Subd. C.

The judgment of the Supreme Court of Probate must be affirmed.

Exceptions overruled.

RUBY M. WEEKS

vs.

ERNEST H. JOHNSON

STATE TAX ASSESSOR

Cumberland. Opinion, June 18, 1951.

Inheritance Taxes.

U. S. Savings Bonds. Joint Names. Payable on Death.

The rights of a beneficiary of U. S. Savings bonds arise solely from contract and not from grant or gift since they can be transferred *inter vivos* only on complying with Federal Statutes and regulations.

U. S. Savings bonds whether payable to decedent or another; or whether payable to decedent, payable on death to another are subject to inheritance taxes as assets of decedent's estate even though shortly after purchase and before death they were delivered as a gift.

ON REPORT.

On petition for abatement of inheritance tax.

The case was reported to the Law Court by the Probate Court for Cumberland County in accordance with R. S., 1944, Chap. 142, Sec. 30, and a stipulation. Case remanded to the Probate Court for Denial of Abatement and Dismissal of Petition. Case fully appears below.

Robert K. Miles,
Adelbert L. Miles, for petitioner.

Alexander A. LaFleur,
Boyd L. Bailey, for respondent.

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

THAXTER, J. The issue in this case is the same as we had before us in the case just decided of *Gould* v. *Johnson, State Tax Assessor.*

In the instant case an inheritance tax of $457.98 was assessed by Ernest H. Johnson, State Tax Assessor, on certain United States Savings Bonds, series E, as assets of the estate of James N. O. Boe, late of Portland, who died September 1, 1948. All the bonds were bought by James N. O. Boe with his own money. They were issued between February 1942 and June 1945. $1,000 face amount of these bonds were issued in the joint names of James N. O. Boe or Miss Ruby M. Weeks. $5,275 face amount were issued in the names of James N. O. Boe, P.O.D. Miss Ruby Weeks.

For purposes of assessment of inheritance tax all of these bonds, whether payable to James N. O. Boe or Ruby Weeks as joint owners, or payable in beneficiary form to James N. O. Boe, P.O.D. Ruby Weeks, are the same. They are issued only in registered form; and can be transferred *inter vivos* only on complying with the federal statutes and regulations. Regulation A 315.45 and 315.46. The agreed statement alleges that the decedent shortly after the E bonds were purchased by him delivered them to Miss Ruby Weeks, stating in effect that he was giving them to her; and she accepted said bonds and retained them in her custody. Such attempted transfer of title was, however, ineffectual because of noncompliance with United States Treasury Regulations; and the status of the bonds was just the same as if no such attempted transfer had been made.

Under the doctrine of *Harvey* v. *Rackliffe,* 141 Me. 169, there was here a contract between the United States and the deceased, James N. O. Boe, by which the United States agreed to pay the bonds on the death of James N. O. Boe to the petitioner, Ruby M. Weeks. The rights of Miss Weeks arise solely from contract and not from grant or gift. The question is whether these bonds were subject to an inheri-

tance tax by the State of Maine as assets of the estate of James N. O. Boe. This question has already been answered by the case of *Hallett* v. *Bailey,* 143 Me. 1, 54 A. (2nd) 533, and *Gould* v. *Johnson, State Tax Assessor,* recently decided. The instant case is reported to the Law Court by the Probate Court for Cumberland County in accordance with 1944 R. S., Chap. 142, Sec. 30, and in accordance with the stipulation in such report the entry will be

Case remanded to the Probate Court for Denial of Abatement and Dismissal of Petition.

GEORGE WOLF

AND

GEORGE WOLF CASH AND CARRY, INC.

vs.

W. S. JORDAN CO.

Cumberland. Opinion, June 21, 1951.

Equity. Appeal. Decree.

In an equity appeal the Law Court may affirm, reverse, or modify the decree of the court below or remand for further proceedings. (R. S., 1944, Chap. 95, Sec. 21.)

An equity appeal is heard anew on the record, but the findings 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 clearly wrong.

When a cause of action is capable of being heard and determined in equity on the jurisdictional ground of equitable relief sought, and it appears from the evidence or the lack of sufficient proof, that relief in equity should not be granted, the bill should be dismissed without prejudice.

There is a presumption against fraud.

A final decree in equity of a bill "dismissed" may be *res judicata* and "dismissal" is distinguished from "dismissed without prejudice."

ON APPEAL.

Bill in equity before a justice of the Supreme Judicial Court. After hearing the presiding justice entered a decree "dismissed without costs." Plaintiff appealed. Case remanded for addition to decree of words "and without prejudice." Case fully appears below.

Redman, White & Willey,
John E. Willey, for plaintiff.

Wilfred A. Hay, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, WILLIAMSON, JJ. (NULTY, J., did not sit.)

FELLOWS, J. This equity case heard in the Supreme Judicial Court in Cumberland County, is before the Law Court on plaintiff's appeal from a decision by the sitting justice dismissing the bill.

The bill alleges, in substance, that George Wolf and George Wolf Cash and Carry, Inc. were carrying on the wholesale grocery business in Portland. On April 1, 1948 Wolf was the owner of all the capital stock in the corporation, and employed by the Wolf corporation as manager. As a wholesale dealer Wolf had gained the good will and patronage of many retail grocers, and had established friendly business relations with manufacturers and processors of food products. On April 1, 1948 the plaintiff Wolf corporation had on hand $30,000 worth of merchandise at wholesale cost. That the defendant W. S. Jordan Co. was in the same kind of business, and that with intent to defraud the plaintiffs by removing them as competitors, and to fraudulently obtain lists of their customers and their direct buying facilities of nationally advertised food products, the defendant offered to purchase, and did purchase, for the inventory value of $30,000 the entire stock with the added consideration that the defendant would hire George Wolf as manager of the defendant's wholesale business. That George Wolf would deliver, and did deliver, to the defendant a list of Wolf corporation's customers, and permit the defendant to write to each customer that the defendant had taken over the Wolf business, and to urge their future purchases from the defendant Jordan Co. That the plaintiffs did all in their power to acquire for the defendant proper contacts with their manufacturers and processors. That the defendant agreed to employ Wolf as manager of its business and to give steady employment at an initial salary of $100 per week with a later increase. That the defendant Jordan Co. did not intend to give steady employment to plaintiff Wolf, but acted fraudulently, and "as a trick," to induce the plaintiff to discontinue the com-

petitive business, and to thus obtain the lists of customers and manufacturers. That Wolf entered the employ of defendant at a salary of $100 per week on April 1, 1948 and faithfully performed his duties, and that he increased the business and profits of defendant. That the defendant never intended to give steady employment to the plaintiff George Wolf, and about six months after sale of the stock of merchandise of plaintiff Wolf corporation, and after employment of plaintiff Wolf, the plaintiff Wolf was discharged contrary to agreement, without just cause, and to his great damage. That the defendant W. S. Jordan Co. has profited greatly through its fraudulent conduct.

The prayers for relief made in the bill were (1) that defendant be ordered to produce list of names of customers furnished by plaintiff, and to notify them of wrongful discharge, (2) that defendant return list of names of manufacturers given and to also notify them of Wolf's wrongful discharge, (3) that the court determine the sums of money due to plaintiffs as damages.

The defendant Jordan Co. in its answer denied all allegations of fraud, and stated that the contract to hire was for indefinite term and could be terminated by either party; that George Wolf was discharged because incompetent, and that the plaintiffs have an adequate remedy at law.

After full hearing, the findings of the sitting justice were that the proof of the charges of fraud was not "full, convincing or adequate," and that the complainants have attempted to seek relief in equity when they have a plain, adequate and complete remedy at law. The sitting justice said: "The bill in equity alleges fraud, deception and trickery on the part of defendant corporation and while it prays for certain mandatory relief by way of injunction, the real relief in the opinion of the court is directed to a money recovery, although the allegations of the bill set forth fraud

in ample language." Final decree was entered "dismissed without costs" from which the plaintiffs claimed appeal.

In an equity appeal the Law Court may affirm, reverse or modify the decree of the court below or remand for further proceedings. R. S. (1944), Chap. 95, Sec. 21. An equity appeal is heard anew on the record, but the findings 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 clearly wrong. *Tarbell* v. *Cook,* 145 Me. 339, 75 Atl. (2nd) 800; *Levesque* v. *Pelletier,* 144 Me. 245, 68 Atl. (2nd) 9; *Sears, Roebuck & Co.* v. *Portland,* 144 Me. 250, 68 Atl. (2nd) 12.

In equity, jurisdictional facts should not only be alleged, but the facts must be proved. It requires more than conjecture or strained and unnatural inferences. The proof must be convincing. *Adams* v. *Ketchum,* 129 Me. 212, 151 A. 146; *Gatchell* v. *Gatchell,* 127 Me. 328. It is the general rule that when a cause of action is capable of being heard and determined at law, but is entertained in equity on the jurisdictional grounds of equitable relief sought, and it appears from the evidence, or from lack of sufficient proof, that relief in equity should not be granted, the bill should be dismissed *without prejudice. York* v. *McCausland,* 130 Me. 245, 253, 154 A. 780; *Gamage* v. *Harris,* 79 Me. 531, 11 A. 422. See also *American Oil Co.* v. *Carlisle,* 144 Me. 1, 63 Atl. (2nd) 676.

Fraud is never presumed. In the absence of proof to the contrary, the presumption is that fraud does not exist. *Frost* v. *Walls,* 93 Me. 405; *Grant* v. *Ward,* 64 Me. 239. In the case of a fiduciary relationship between the parties, however, the law may imply a condition of superiority held by one of the parties, and may presume undue influence. *Robie, Appellant,* 141 Me. 369; *Small* v. *Nelson,* 137 Me. 178.

The court has the authority to use the extraordinary power of injunction when it is properly applied for, when justice urgently demands it, and when there is no legal remedy or the remedy at law is inadequate. The writ of injunction is, and always has been, granted in Maine with great caution and only when necessary on clear and certain rights. *Levesque* v. *Pelletier,* 144 Me. 245, 68 Atl. (2nd) 9.

When matters in controversy have once been inquired into and settled by a court of competent jurisdiction in law or equity, they cannot be again drawn in question in another suit between the same parties or their privies. *Fuller* v. *Eastman,* 81 Me. 284, 286; *Edwards* v. *Seal,* 125 Me. 38. A final decree in equity of "bill dismissed" may settle all the matters litigated in the proceedings below, and may include what might have been litigated. The matters are *res judicata* and the decree is a bar to any further action. Dismissal is distinguished from dismissed without prejudice. *Edwards* v. *Seal,* 125 Me. 38, 41, 17 Am. Jur. "Dismissal," 93, Sec. 71; Whitehouse Equity (1st Ed.), 382, Sec. 355 (Note), 27 C. J. S., 254, Sec. 73. The two leading and essential elements of the doctrine of *res judicata* are identity of parties and identity of the issues necessarily involved. *Morrison* v. *Clark,* 89 Me. 103; *Lander* v. *Arno,* 65 Me. 26.

The evidence introduced by the plaintiffs in this case, if fully believed, may have been sufficient to prove fraud and thus give the court authority to proceed in equity. The justice who heard the evidence, however, found that the proof was not adequate. The finding has the force of a jury verdict, in that it may not be disturbed unless clearly wrong. "When the testimony is conflicting, the judge has an opportunity to form an opinion of the credibility of witnesses, not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record. A witness may appear badly upon the stand and well in the record." *Young* v. *Witham,*

75 Me. 536; *Wilson* v. *Littlefield,* 119 Me. 143. When relief cannot be granted for lack of proof, and there may be remedy at law, the bill should be dismissed without prejudice. *York* v. *McCausland,* 130 Me. 245, 253.

We have examined the record with care, and we cannot say that the findings of the sitting justice are "clearly wrong." The bill was entertained below on condition that jurisdictional facts be proved to give authority for the court to exercise equitable relief. There was no "fiduciary relationship." This was a business transaction between business men, and however the record of the facts may appear to this court, we are bound by the findings unless they appear to be clearly wrong. In this case the findings of the court below indicate that although complainants did not offer sufficient proof to sustain the allegations of fraud to give equitable relief, the complainants may have an action at law for possible breach of contract. It is evident that the court below did not intend by its decree to bar a future action under the doctrine of *res judicata.* The decree of "dismissed without costs" may do so. It is therefore our opinion that the decree below should be modified by adding to the decree the words "and without prejudice" that the bill may be "dismissed without costs and without prejudice." *Gamage* v. *Harris,* 79 Me. 531.

Case remanded for addition to decree of words "and without prejudice."

RULES OF COURT

STATE OF MAINE

Supreme Judicial Court. June Law Term, 1951.

All of the Justices of the Supreme Judicial Court concurring, Rule 5 of the Rules Applicable only to Proceedings in

the Supreme Judicial Court, 129 Me. 523 at 524, is hereby amended by deleting the closing paragraph stating the effective date thereof, and adding the following paragraphs:

> Except as hereinafter provided, all exhibits in the case shall be reproduced in the copies of the case for the Law Court either by printing or photostatic process, and the original exhibits shall not be filed in the Law Court in *specie* as a part of the copy of the case. Such exhibits as in the opinion of the justice presiding cannot be reproduced by printing or photostatic process, and then only upon a certificate to that effect and specific order by him, may be transmitted by the clerk of the court below to the clerk of the Law Court as forming a part of the record of the case. Whenever physical examination of exhibits printed or reproduced as a part of the copy of the case is necesssary to afford a fair understanding of the same or their effect, the clerk of the court below, upon order of the justice before whom the case was heard, may transmit to the clerk of the Law Court such exhibit or exhibits as said justice may specify in his order. Nothing herein contained shall prevent the withdrawal of original exhibits and the substitution of copies thereof in the court below when the same is done by agreement of the parties and with the consent of the justice presiding. For the purposes of this rule such substituted copies shall be deemed the exhibits admitted in the case.
>
> This rule shall take effect and apply to all cases heard below after August 1, 1951.

HAROLD H. MURCHIE,

Chief Justice

STATE

vs.

JOHN SULLIVAN

Aroostook. Opinion, July 13, 1951.

Operating While Under the Influence. Attempt. Directed Verdict.

The commission of the crime of operating while under the influence of liquor, or drugs, also includes of necessity, that a person charged with an attempt to operate intended to operate, and unless the acts done were done with the intent to operate no offense is committed.

When the evidence is so weak or defective that a verdict based upon it cannot be sustained, the trial court, on motion should direct a verdict for the respondent.

When criminal intent is in issue and a conclusion consistent with innocence is reasonable, the respondent is entitled to the benefit of a reasonable doubt.

ON EXCEPTIONS.

On complaint before a jury for attempting to operate a motor vehicle while under the influence of intoxicating liquor contrary to R. S., 1944, Chap. 19, Sec. 121. At the close of the testimony respondent moved for a directed verdict which was denied. The case comes to the Law Court on exceptions to the denial. Exceptions sustained.

James P. Archibald, for State of Maine.

Donald Sweeney, for respondent.

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

FELLOWS, J. This case comes to the Law Court from the Superior Court for Aroostook County, on exceptions by the respondent to the denial of his motion for a directed verdict.

The complaint against the respondent, John Sullivan, brought in the Caribou Municipal Court, alleged that the respondent while under the influence of intoxicating liquor attempted to operate a motor vehicle "by then and there starting the motor of said automobile, and releasing the brakes." The respondent pleaded not guilty in the Municipal Court, examination was waived, a finding of guilt made, and appeal to Superior Court taken. The respondent was tried before a jury at the September term, 1950, of the Superior Court. At the close of the testimony the respondent moved for a directed verdict which was denied and exceptions taken.

The evidence clearly showed that the respondent's automobile, with the hood up, was parked on the Washburn Road in Caribou, and a mechanic, one Freeman Dixon, was standing on the bumper and working on the engine. The mechanic requested that the respondent get in the car and start the motor for him in order that the mechanic might test the fuel pump. The mechanic fed the gas by hand to keep the engine running, after the engine was started. The respondent's car was parked on a grade with the mechanic's pickup truck parked a foot, or a foot and a half, below and to the rear of the respondent's vehicle. While the mechanic was at work on the respondent's car and controlling the supply of gas with his hand, the respondent was sitting in the driver's seat. No power was applied from the motor to the wheels. The respondent's car rolled back down the grade a foot, or a foot and a half, until the rear bumper of respondent's car came against the front bumper of the pickup truck. At that instant two police officers were slowly passing, and they stopped at the noise of the slight collision. The officers then questioned the respondent, and decided that there were indications that the respondent had been drinking. One officer stated that the respondent had been "locked up once before." They then arrested the respondent for attempting to operate a motor vehicle while under

the influence of intoxicating liquor. No evidence was offered by the respondent to rebut the State's claim that he was under the influence. The respondent did not testify. The officers stated in testimony that the engine of the respondent's car was "roaring" as they slowly approached the scene, and it would be "fair to say" that if the car had been in gear there would probably have been a greater crash than was heard by them. The mechanic testified that he told the respondent to shut off the motor at about the time when the officers were passing, and that the car then rolled back. The fact is no doubt fully stated in the State's brief in this manner: "as respondent was shutting down his car, it rolled back and came to rest with a considerable crash against the pick up." The mechanic did not know who drove the respondent's car to the place where it was parked, and when he got there to make repairs on the fuel pump, there was no one in the car and the hood was then up. The mechanic saw the respondent and several members of the respondent's family in the vicinity of the car when the mechanic arrived.

Section 121 of Chapter 19 of the Revised Statutes (1944), provides as follows: "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs, upon conviction, shall be punished. . . ." The purpose of this statute is to protect persons and property from loss or injury, by the movement of a motor vehicle operated by a person while intoxicated or at all under the influence of liquor or drugs. *State* v. *Cormier,* 141 Me. 307; *State* v. *Mann,* 143 Me. 305.

The legislature, by the terms of this statute, has distinguished between the operation of a car, and the attempt to operate. The commission of the crime of operating while under the influence of liquor or drugs, also includes of necessity, that the person charged with an attempt to operate

intended to operate. *Carson,* Petitioner for Writ of Error, 141 Me. 132; *State* v. *Jones,* 125 Me. 42.

According to popular acceptance, the meaning of the term "to operate a motor vehicle" is the same as to "drive" it. It usually means that a person must so manipulate the machinery that the power of the motor is applied to the wheels to move the automobile forward or backward. The starting of the motor, however, may under existing circumstances be sufficient, if there is the intention to move the car. "The 'operation' intended to be curtailed by the statute is not either complete or extended." Murchie, J. in *State* v. *Roberts,* 139 Me. 273, 275, and cases there cited. See also 61 C. J. S. "Motor Vehicles," 720, Section 628; 5 Am. Jur. "Automobiles," 917, Section 771. Operation might be inferred from the fact that an automobile moved ahead a short distance with the engine running and with the respondent in the driver's seat, and the forward movement could not be accounted for by vibration or a slight depression in front of the automobile. *State* v. *Jalbert,* 142 Me. 407.

Where an attempt to operate is charged, there must be an *intent* to commit the offense of operating. Unless the acts done were done with the intent to operate the motor vehicle while under the influence of liquor, no offense is committed. *State* v. *Jones,* 125 Me. 42, where the alleged act was to "insert and turn the key of said automobile and put his foot upon the self starter." "To constitute an attempt there must be something more than mere intention or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made." *State* v. *Doran,* 99 Me. 329, 332.

The rule governing the direction of verdicts in a criminal case is that when the evidence is so defective or weak that a verdict based upon it cannot be sustained, the trial court, on motion, should direct a verdict for the respondent. A re-

fusal to so direct is valid ground for exception if all the evidence is in. *State* v. *Martin,* 134 Me. 448; *State* v. *Shortwell,* 126 Me. 484; *State* v. *Roy,* 128 Me. 415.

In this case at bar a verdict for the accused should have been directed. The record of the evidence brings it within the foregoing rule. A verdict of guilty on the facts here could not and cannot be sustained. An attempt to commit the crime of operating a motor vehicle while under the influence of intoxicating liquor is the charge. The evidence of intent is wholly lacking. In fact the proof introduced by the State shows that there was no such intent. This record shows the necessity for the rule regarding a directed verdict in order to protect the constitutional rights of the individual, and to prevent a jury through some bias or prejudice from convicting without evidence, and, despite instructions to the contrary, to take the fact that the respondent did not testify as proof of the offense charged. The respondent did not take the stand and did not present evidence to rebut the question that he was under the influence of intoxicating liquor. That he did not take the stand at this trial, together with incidental statements, such as that of one officer that the respondent had previously given trouble, were sufficient for the jury to "guess him into jail." Failure of proof is not a technicality. Proof of the material elements that constitute the crime is vital in order to uphold constitutional law and procedure. *State* v. *Martin,* 134 Me. 448.

The proof introduced here, only shows that the respondent's car was parked on the grade, with the hood up, and with a mechanic standing on the bumper to make tests or repairs on the engine. The motor was started by the respondent, who got into the driver's seat at the request of the mechanic. The mechanic was feeding the gas by hand to determine if the fuel pump was in working order, and no power was transmitted from the motor to the wheels or intended to be so transmitted. The respondent shut off the

motor at the direction of the mechanic. Then, as the State says in its brief, "as respondent was shutting down his car, it rolled back and came to rest with a considerable crash against the pick up." The evidence was not sufficient to enable a jury to legally find the respondent guilty of the offense charged, beyond a reasonable doubt. In the case of *State* v. *Jalbert,* 142 Me. 407 cited by the State, the movement of the car could be inferred as due to the operation of the car by the respondent, because there was no other way to account for it. Here the backward motion of inches can be accounted for under the evidence, as due to vibration and down grade. The movement was also indirectly proved by the testimony of the State's witnesses as due to vibration and grade. The inference that must be drawn from the testimony in this case is directly opposite to the inference that could be drawn in the *Jalbert* case.

When a criminal intent is at issue and a conclusion consistent with innocence is reasonable, the respondent is entitled to the benefit. *State* v. *Wagner,* 141 Me. 403, 44 Atl. (2nd) 821. "Guesswork is not the moral certainty of guilt that the law requires. Conjecture, surmise, and suspicion do not constitute proof beyond a reasonable doubt." *State* v. *Morton,* 142 Me. 254, 258; *State* v. *Roy,* 128 Me. 415; *State* v. *Baron,* 135 Me. 187.

Exceptions sustained.

PHILIP GENDRON

vs.

ROBERT K. BURNHAM

KEEPER OF CUMBERLAND COUNTY JAIL

Cumberland. Opinion, July 16, 1951.

Witnesses. Self Incrimination. Grand Juries. Contempt. Evidence. Exceptions. Habeas Corpus.

Art. I, Sec. 6 of the Constitution of Maine and the Fifth Amendment to the Constitution of the United States preserve the right of a witness against self incrimination and are so similar in nature and identical in purpose that precedent in respect to one may well serve as precedent for the other.

A witness should be *fully informed of his legal rights* when called upon or admitted to testify as a witness in a matter in which his guilt is involved.

A witness is protected not only from direct disclosures of guilt but from being compelled to disclose the circumstances of his offense, the sources from which or means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his connection without using his answers as direct admissions against him.

The grand jury is a constituent part of the court and contempts in its presence are contempts in the presence of the court and as such are direct rather than constructive contempts.

The grand jury has the power to invoke the aid of the court in dealing with witnesses who refuse to answer questions propounded to them, and in such cases may make oral or written presentations to the court. If by written presentment it should be upon the original oath of the grand jurors signed by the foreman and not merely the personal oath of the foreman.

Where a contempt is committed in the court's presence but not in actual view of the judge all that is necessary is that the contemnor be brought before the court, informed of the charge against him, given an opportunity to defend and his guilt be established beyond a reasonable doubt.

A mere affidavit or presentment by the grand jury in writing does not make a *prima facie* case and proof thereof must be established.

A witness may assert his privilege against self incrimination in justification of his refusal to answer before the grand jury or if his refusal to answer before the grand jury is made in good faith he may assert the basis therefor for the first time when brought before the court.

Failure to claim the privilege at the proper time may constitute a waiver.

Refusal by a witness to answer a question before a grand jury because of an honest but mistaken belief on his part that the answer would be self incriminating does not constitute contempt.

Whether a question is such that the answer thereto would be self incriminatory is a question for the court and to constitute contempt the refusal must be made after the court has ruled upon the question of privilege and directed that an answer be made.

Sentences for contempt by a witness who refuses to answer questions before a grand jury cannot be tested by exceptions since the power to punish may be summarily exercised.

Habeas Corpus is the only method of testing the lawfulness of the interrogatory or commitment.

ON REPORT.

Petitioner was subpoenaed before the grand jury of Cumberland County where he refused to answer certain questions propounded to him on the ground that the answers thereto would tend to incriminate him. The grand jury reported his refusal to the court by an affidavit of the foreman and prayed that he be ordered to show cause why he should not be adjudged in contempt. Petitioner filed an answer and in support thereof testified that his refusal was based upon a belief that the answers would tend to incriminate him. The court found petitioner in contempt and sentenced him. Habeas Corpus proceedings were commenced and after hearing by agreement the cause was certified to the Chief Justice of the Supreme Judicial Court for immediate

decision by the Law Court. Writ sustained. Prisoner ordered discharged. Case fully appears below.

Wilfred A. Hay,

Gendron, Fenderson and McDougal,

Armand Gendron, for petitioner.

Alexander A. LaFleur, Attorney General,

William H. Niehoff, Assistant Attorney General,

Daniel C. McDonald, County Attorney, for respondent.

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

MERRILL, J. On report. Writ of habeas corpus certified to Chief Justice for immediate decision by the justices upon findings of fact by a Justice of the Superior Court and by agreement of the parties in accord with the procedure employed in *Welch* v. *Sheriff,* 95 Me. 451 and *Wade* v. *Warden,* 145 Me. 120, 73 Atl. (2nd) 128.

The prisoner, in obedience to a subpoena, appeared and was sworn as a witness before the grand jury in session at the May Term of the Superior Court for the County of Cumberland on the 18th day of May, 1951. The record discloses twenty-five questions which were asked him while before the grand jury. Of these questions he answered eight and declined to answer seventeen. Of the seventeen questions which he declined to answer, to nine of them he specifically asserted his privilege against self incrimination as the basis therefor. The grand jury thereafterwards reported the questions and answers to the court by an affidavit signed and sworn to by their foreman, in which affidavit the grand jury prayed that the prisoner should be ordered to appear before the Superior Court to show cause why he should not be adjudged in contempt of court for refusing to make answer to said questions. To this complaint the prisoner,

the then respondent, filed an answer in writing, under oath, in which, after setting forth his own recollection of the questions and answers, he stated:

"2. That the respondent at all times has been, and is now, ready and willing to answer such questions as will not tend to incriminate him, that in so doing he has at all times, and is now, ready and willing to accept the judgment of this Honorable Court as to what questions he should answer and as to what questions he may properly and rightfully claim his privilege against self-incrimination;

3. That in every instance in which, in his examination before and by the Grand Jury, the respondent has declined to answer a question, he has declined in the honest belief that the answer might tend to incriminate him; that in all such instances he felt, in his personal judgment, that the answer would be substantially dangerous to him from the standpoint of self-incrimination; that in so exercising his judgment he acted in good faith and to the best of his ability; that the danger of self-incrimination in answering such questions as he declined to answer, he, the respondent, felt was proximate and real and not imaginary, fanciful or remote;

4. That the respondent has at all times had, and now has, every desire to cooperate with this Honorable Court and with the Grand Jury, and to answer any and all questions which this Honorable Court or the Grand Jury may propound to him, subject only to his constitutional right to decline to answer on the ground of self-incrimination, and, further, that in the exercise of this right he has at all times, and is now, ready and willing to abide by the decision of this Honorable Court as to whether or not, in any case or as to any question or questions, he may have the right to decline to answer on the ground that the answer or answers may tend to incriminate him."

At the hearing before the single justice on the contempt charge, the prisoner took the position that it was an adversary proceeding and that the State must make out its case. Whereupon, the following proceedings were had:

> "THE COURT: I have here an affidavit signed by the foreman of the grand jury, setting out questions and answers given by this respondent, sworn to by Mr. Murphy. On the strength of that I will rule the State has made out a prima facie case, at least. You may give your defense and I will be glad to hear it.
>
> MR. GENDRON: We will except to that, if the Court please, and will offer an answer in writing under oath.
>
> THE COURT: Do you wish to put on any evidence?
>
> MR. GENDRON: If the Court will take our answer and consider the facts in the answer as proven — in such case —
>
> THE COURT: I will not accept it."

Thereafterwards, the prisoner, the then respondent was duly sworn, examined, and cross-examined. With respect to each and every question which he had declined to answer he testified under oath that he had declined to answer on the ground that he might incriminate himself, although he admitted that he may not have announced to the grand jury the ground of his declination except as to nine questions as shown in the affidavit. The prisoner further stated with respect to all questions which he refused to answer that when he was before the grand jury he believed in good faith that answers to the questions might tend to incriminate him.

In the hearing before the justice in the contempt proceeding, the position of the prisoner was stated as follows by his counsel:

> "MR. GENDRON: Very well, Your Honor. So as to make sure that our position is clear, if the Court please, on the record, we want to make an offer of

proof in this connection. We want to offer to prove with respect to the question of incrimination, in connection with the question which this witness refused or declined to answer before the grand jury, that the answer to that question would tend to incriminate the witness, would tend to give the State evidence implicating him in a criminal activity; our position being, of course, that this witness before the grand jury—and I assume that is the position of the Court—has the privilege of refusing to answer questions if the answer to any question, or the question concerning which he claims his privilege might incriminate him.

THE COURT: Do you think it is for him to decide?

MR. GENDRON: I think, if the Court please, before the grand jury there is no other person to decide that question. The witness must decide the question before the grand jury for himself.

THE COURT: That decision is binding and final?

MR. GENDRON: It is not binding and final, if the Court please. I think the next step, if the grand jury believes that the refusal to testify is unreasonable, the next step is for the grand jury to bring the witness before the Court to decide upon the subject matter as laid before the Court by the grand jury and explanations given by the witness, whether or not there is a real danger that the testimony might incriminate the witness. I think it is—I think then at that point if the Judge —

THE COURT: Is this an argument of —

MR. GENDRON: No. You have asked us to state our position. I think it is quite fundamental, if the Court please. I think then if the Court decides that the witness should answer the questions, the Court directs the witness to answer the questions. If the witness states before the Court, before going back to the grand jury, he will not answer in any event the Court can perhaps punish

right on the spot because there is a second contempt there, but if the witness simply goes back before the grand jury and if he answers the questions when he returns before the grand jury he is not, as we respectfully submit, not guilty of contempt. If he refuses to answer the question after being directed by the Court to answer, he is guilty of contempt. It is our position and I think we have made it clear in our answer. The answer has been presented and received by the Court?

THE COURT: And read by the Court."

After a lengthy examination and cross-examination of the prisoner, the contempt hearing was closed as follows:

"MR. NIEHOFF (Assistant Attorney General): I want to ask some more questions.

Q. I ask you now, Mr. Gendron, did you have any other business dealings with Louis Pooler than selling him merchandise?

A. I decline to answer on the ground it might incriminate me.

MR. NIEHOFF: I now take the position this man has waived his privilege to claiming self-incrimination because he has stated—he is a witness—and his counsel has stated for the record that he is associated with these fellows in conspiracy and now he is offering himself as a witness and has now opened the door and cannot claim self-incrimination, and I ask he be instructed to answer the question.

MR. GENDRON: The prosecutor knows very well it is not for the attorney to waive or claim the privilege of the witness. I think it is well established law. Furthermore this is not a grand jury investigation. This is a hearing in contempt. We have an issue here —

THE COURT: I think, Brother Niehoff, we will stop here. He admits being asked the questions and giving the answers which appear in this affidavit. In my opinion, it is sufficient to hold him in contempt, and I do that.

MR. GENDRON: We take exceptions.

THE COURT: All right. I sentence him, as I did some others, to six months in jail."

A mittimus was issued and the prisoner was committed to the Cumberland County jail on the 25th day of May, 1951, in execution of the foregoing sentence.

On the 9th day of June, 1951, the present writ of habeas corpus was issued and the respondent herein sought to justify his imprisonment of the prisoner under the mittimus or warrant of commitment issued in the contempt proceeding. Hearing was had on the writ of habeas corpus before the Superior Court. The presiding justice, in addition to the facts hereinbefore stated, made the following specific findings of fact:

"No writ of attachment, rule to show cause, citation, order of notice, or other process was issued by the Court upon the Affidavit of the foreman of the Grand Jury, Petitioner's Exhibit 1 (Cf. copy of docket entries in evidence herein as Petitioner's Exhibit 4), and no process of any kind was served on Respondent in the Contempt proceeding, the Petitioner herein, prior to commitment. Petitioner was present at the Contempt hearing and testified therein as set forth in Petitioner's Exhibit 3.

Petitioner, at no time, either before, during or after the Contempt hearing, was ordered or directed by the Presiding Justice to answer any question which he had declined to answer before the Grand Jury.

In the course of the proceedings of May 25 (Cf. page 1 of transcript in evidence here as Petitioner's Exhibit 3), the affidavit of the foreman of the Grand Jury was held, over defense objection, to constitute 'a prima facie case, at least' (of contempt), and, upon conclusion of the hearing, Petitioner herein was held in contempt for failure to

answer questions before the Grand Jury (Cf. Petitioner's Exhibit 1 herein).

After Petitioner's commitment for alleged contempt, there was found, presented and returned to Court, by the same Grand Jury before which he appeared as a witness under subpoena, two indictments against the Petitioner, one for Conspiracy to promote a lottery and one for possession of lottery tickets, both now standing continued without plea of guilty or not guilty to the September Term, 1951, of this Court."

This case is of novel impression in this State. We are here concerned with an essential power of the court, the power to punish for contempt. We are also here concerned with one of the fundamental liberties vouchsafed to the individual by the Constitution of this State, the privilege against self incrimination. The problem here presented is to reconcile the maintenance of the authority of the court to require the answer to questions propounded to a witness on the one hand, and the preservation of the right of the witness against self incrimination on the other hand.

The Constitution of this State in Art. I, Sec. 6 guarantees to the accused in all criminal prosecutions that "He shall not be compelled to furnish or give evidence against himself, x x x." By a similar provision in the Fifth Amendment of the Constitution of the United States it is provided that no person "shall be compelled in any Criminal Case to be a witness against himself, x x x." These provisions of the respective Constitutions have crystallized into absolute guaranties that common law privilege which is and always has been one of the cherished rights of the English and American peoples. These two constitutional provisions are so similar in nature and identical in purpose that precedent with respect to the construction of the one may well serve as precedent for the construction of the other. As said by this court in *State* v. *Gilman*, 51 Me. 206, 225:

> "Great care should undoubtedly be taken to protect the rights of the accused. His secret should not be extorted from him by the exercise of any inquisitorial power. He should be *fully informed of his legal rights,* when called upon or admitted to testify as a witness in a matter in which his guilt is involved. No officious party should be permitted to extract confessions from him, by operating upon his hopes or his fears." (Emphasis ours.)

Not only is the privilege against self incrimination available against direct disclosure of guilt on the part of the witness, but as said by the Supreme Court of the United States in *Counselman* v. *Hitchcock,* 142 U. S. 547, 585:

> "It is a reasonable construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him.' *Emery's Case,* 107 Mass. 172, 182."

In the instant case the prisoner was a witness before the grand jury in obedience to subpoena. He was not a volunteer. He was before the grand jury by compulsion of law. Although it is the duty of the individual, when summoned before the grand jury, to give true answers to inquiries concerning facts within his knowledge, yet his duty to answer is always measured by his constitutional right to assert his privilege against self incrimination. The privilege against self incrimination is not a privilege against being subjected to inquiry. It is a privilege against the necessity of making disclosure of incriminating facts as heretofore defined. In cases where the privilege is validly asserted the right to require answer must yield thereto. As said by the Supreme Court of the United States in *United States* v. *White,* 322 U. S. 694, 698, quoted with approval in *Hoffman, Petitioner*

v. *United States* of America (May 28, 1951, 95 L. Ed. 729, 735):

> "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."

The practice of calling suspects before the grand jury and there examining them secretly and unaccompanied by counsel with respect to crimes of which they are suspect is not to be encouraged. It has not been the customary procedure in this jurisdiction. Under such practice it is all too easy to violate the constitutional rights of the individual. The mere fact that an accused was before the grand jury and there interrogated is not necessarily fatal to an indictment returned against him. It is unnecessary for the purposes of this opinion to lay down rules as to what will or will not vitiate an indictment found against a person called before the grand jury as a witness, nor with respect to the limitations upon the use against him of his answers before the grand jury. Suffice it to say it is a practice also fraught with danger to successful prosecution of one indicted as a result thereof. We are not here concerned with the validity of the indictments returned against the prisoner. We are here dealing with the validity of his imprisonment for his alleged contempt in refusing to answer questions propounded to him when before the grand jury. That question must be resolved in the light of the foregoing general principles.

We said in *Cushman Co. et al.* v. *Mackesy et al.*, 135 Me. 490 at 494:

> "The power of courts to punish for contempt has existed from earliest times. It was useless to establish courts unless they had authority to punish acts which might interrupt the orderly course of judicial procedure; and it was likewise futile

> to confer jurisdiction to issue orders or injunctions without the power to enforce obedience to such decrees.
>
> Contempts are of two kinds. There are those which occur in the presence of the court, which tend to bring the court into disrepute and interfere with the orderly conduct of judicial proceedings; and there are those, of which the court does not have first-hand information, for example those arising out of the failure to obey some order which the court has lawfully made. The procedure for punishment in the two cases is different. In the first the court may forthwith on its own initiative punish the offender; in the second the matter must be brought to the court's attention by some formal pleading and sentence may be imposed only after a hearing."

The *unjustifiable refusal* by a witness before the grand jury to answer a proper question propounded to him constitutes a contempt and may be punished as such.

The first question to be determined in this case is whether such contempts are classified and dealt with as having occurred in the presence of the court. The answer to this depends upon the nature of grand juries. As said by the Massachusetts Court in *Commonwealth* v. *McNary,* 140 N. E. 255, 256:

> "The grand jury is a constituent part of the court. Presentment by grand jury in cases to which it is applicable is a part of the law of the land, and preserved by the Twelfth Article of the Bill of Rights of the Constitution. The grand jury is a branch or appendage of the court. It is organized and empowered to dischage its appropriate functions by virtue of being impaneled and sworn in open court as prescribed by law. It sits and deliberates under the authority of the court. It may at any time apply to the court for instructions and invoke its power for aid and protection in the performance of its duties. These attributes are essential in order to enable it to discharge its obligations and

> do its work efficiently and without molestation in the protection of the public against crime and of the individual against oppression. Heard v. Pierce, 8 Cush. 338, 54 Am. Dec. 757; Commonwealth v. Bannon, 97 Mass. 214; Commonwealth v. Sanborn, 116 Mass. 61.
>
> It is an inevitable consequence of these principles that the court has the power and is charged with the duty of punishing for contempt any one whose conduct interferes with or has a tendency to obstruct the grand jury. Such conduct is as much contempt, and punishable as such, as that which interferes with or has a tendency to obstruct the administration of justice in the courts in another form or manner. It may be as necessary to put forth the power of the court to protect itself against contempts committed against this instrumentality of justice as against others. It is a contempt of the court of which the grand jury is a part to obstruct its normal and legal functions."

Our grand jury system is but a continuation of that which existed prior to the separation and we accept the foregoing statement by the Massachusetts Court as a correct exposition of the law as it exists in this State. Therefore, the grand jury being a constituent part of the court, contempts in the presence of the grand jury are contempts in the presence of the court of which it is a part and are to be dealt with as such and as direct rather than constructive contempts.

Although the grand jury has no power in and of itself to punish for contempt, see 12 Am. Jur. 426, Sec. 53, and cases therein cited, it does have power to invoke the aid of the court in dealing with witnesses who refuse to answer questions propounded to them. For the purpose of invoking the aid of the court the jury may detain the witness and take him before the court. As said in *Heard* v. *Pierce,* 8 Cushing (Mass.) 338 at 344:

> "in the language of lord Coke, 'it is against the office of the justices and the authority given them

> by law' that they should go to the jury or the witness; and it was therefore necessary, and the jury consequently had the implied power, to detain the witness and take him to the court. In truth, without the power to take refractory witnesses, or witnesses who honestly interpose unfounded objections to giving evidence, before the court, for its direction and aid, the grand jury would be wholly unable to perform the duties imposed upon them by law."

As said in Thompson and Merriam on Juries, Sec. 647, Page 699:

> "Witnesses before the grand jury are subject to the lawful authority and control of the court, in the same manner as are the witnesses before the trial jury. 'In contemplation of law,' said PARSONS, J., 'a grand jury are supposed to be personally present in court.' In view of the fact that the proceedings of the grand jury are conducted apart from the court, it is plain that when a witness, who has been duly summoned before this body, refuses to be sworn or to answer questions, or is otherwise contumacious, the grand jury may require their officer to take him into custody, and conduct him before the court to obtain the advice and decision of the court under the circumstances, as well as its compulsory power to enforce obedience. Such a witness may be fined by the court, or imprisoned for contempt."

The Massachusetts Court in *Heard* v. *Pierce, supra,* further stated on Page 345:

> "It may be proper to suggest as a matter of form that it may be suitable, whenever the grand jury have occasion to take a witness to the court, that the jury themselves should go into court with the officer and the witness, that the questions may be stated, or the decision of the court made, in the presence both of the jury and the witness."

We heartily approve this suggested procedure that the grand jury itself cause its officer to detain the witness until

he can be taken before the court, and that the proceedings thereafterwards be had in court in the presence of the witness and the grand jury. When before the court, the grand jury can then orally present to the court what has taken place, and the court can properly deal with the problem. This procedure has long been used in this State and was that followed in *this Court* when sitting at *nisi prius*.

However, cases may arise where the witness escapes from, or is allowed to depart from the presence of the grand jury, and for these or other reasons cannot be immediately taken into custody by the grand jury and brought before the court. In such cases the grand jury may make oral or written presentation to the court of the facts and request process from the court to bring the witness before the court, there to be dealt with. Even in such cases the better practice would be, the witness having been brought before the court, to have the proceedings before the court in the presence of the grand jury as well as of the witness, and the proceedings had upon the oral presentation by the grand jury to the court. If, however, the witness is to be tried upon a written presentment by the grand jury to the court, the presentment should be upon the oath of the grand jurors, to wit, their original oath, and signed by the foreman in the same manner as any other formal presentment by the grand jury to the court.

In the instant case, while the complaint to the court purports to be that of the grand jurors, it is not made upon their oath or oaths, and it is supported not by the original oath of the grand jurors but by the personal oath of the foreman of the grand jury administered by a Notary Public. Such method of presentment by the grand jury is irregular in this jurisdiction. While it is unnecessary for us to decide whether the same would be fatal if the contemnor was actually being presented and tried upon the presentment itself, as would be the case if tried upon an indictment

returned, *State* v. *McAllister,* 26 Me. 374, better practice would indicate that all presentations of persons by the grand jury to the court should be upon their original oath or oaths, it being immaterial whether the same be "upon their oath" or "upon their oaths." *State* v. *Lang,* 63 Me. 215, 219. The original oath administered to grand jurors requires that they will "true presentment make of all matters and things" given them in charge. R. S., Chap. 135, Sec. 2. This oath once administered to the grand jurors prior to entering upon the duties or their office is sufficient. All presentments made upon their oath will be considered sworn presentments, and this applies to presentments for contempt. When presentment is made upon their oath as grand jurors, no further oath or verification of the presentment is necessary, in the absence of a specific statute requiring the same.

The alleged contempt in this case was in contemplation of law committed in the presence of the court. As such, no written complaint to the court was required. When a contempt is committed in the physical presence and actual view of the court, the court may summarily punish therefor. If the contempt is committed in the presence of the court or any of its constituent parts, but not in the actual view of the judge, all that is necessary for the prosecution of such contempt is that the contemnor be brought before the court, informed of the charge against him, given opportunity to defend against it and the facts constituting the alleged contempt be established beyond a reasonable doubt. As said in *In Re Caruba,* 51 Atl. (2nd) (N. J.) 446 at 459:

> "*Direct contempts are those usually referred to as contempts in the face of the court (in facie curiae).* But this does not mean that such contempts must be committed while the judge is presiding in open session in the courtroom.' There is no doubt in my mind but that the Chancellor might have called Merrill and Jenkinson in the court room and inquired, 'Did you write this letter?' And upon an affirmative answer being given, could

> have said, 'Take him away, Sheriff', or 'Take him away, Sergeant'. (Five Knights' Cases, How. St. Tr. 111, 148). He could have committed them instanter. Oswald, 136. 'The law enables the court or a judge to send an offender to prison for contempt of court with a rapidity which may be described as "oriental" '. Oswald, 8. The Chancellor did not choose to act in this summary manner but followed the modern practice of issuing an order to show cause. But he nevertheless had the power."

In the instant case, the respondent was personally before the court, the proceedings continued at his request to enable him to defend, he was represented by counsel, the *facts* alleged to constitute the contempt were there made known to him and admitted by him. This was sufficient to confer jurisdiction upon the court to deal with the alleged contempt. That the affidavit was irregular, that no process was issued to bring the prisoner before the court, and that no rule was issued requiring him to show cause why he should not be held in contempt are immaterial. The irregularity of the affidavit, therefore, becomes of no importance. However, in contempts of the class where written complaint supported by affidavit *is necessary*, if such proceeding originate in the grand jury as such, and the complaint is made by the grand jury itself, it should be by presentment on their oath as grand jurors.

In the contempt case the presiding justice after the prisoner, the then respondent, was brought before him, ruled that the affidavit made out a *prima facie* case. This ruling was erroneous. Even a proper presentment by the grand jury in writing, unless its truth be admitted, must be established by proof. An affidavit is not such proof. This is an added reason why the proper practice in dealing with a witness in open court for alleged contempt in refusing to answer questions before the grand jury should take place in the presence of the grand jury. In such case the

facts may be reported to the court by the grand jury in the presence of the witness, and all proceedings had in the presence not only of the court but also of the grand jury and the witness. In this way the witness is given ample opportunity to hear the charge, and either deny the same or admit the facts and seek to justify. If he denies the charge in whole or in part, evidence should be taken out and the facts ascertained, the burden being upon the prosecution to establish the facts alleged to constitute the contempt beyond a reasonable doubt. The erroneous ruling by the court that the affidavit was sufficient to make out a *prima facie* case was cured by the prisoner. By offering himself as a witness and admitting being asked the questions and making the answers set forth in the affidavit, he himself supplied any lack of required proof. That lack of proof on the part of the plaintiff in a civil case, or on the part of the State in a criminal case may be supplied by the defendant when motion for nonsuit or directed verdict would otherwise have to be sustained is too elementary a proposition to need citation of authority therefor. The same rule applies in prosecutions for contempt.

If the facts be proven or admitted, the witness may attempt justification thereof. If, as here, the witness has refused to answer questions before the grand jury, he has a right to assert his privilege against self incrimination in justification of such refusal. If the answers would be self incriminatory, he cannot be compelled to answer the questions. This privilege against self incrimination may be asserted by the witness before the court as well as before the grand jury.

It is true that the privilege against self incrimination is a personal one. To be available to a witness it must be claimed and, being but a privilege, it may be waived. *State* v. *Wentworth,* 65 Me. 234. Failure to claim the privilege at the proper time may constitute a waiver.

The prosecution claims in this case that the prisoner when a witness before the grand jury waived his privilege against self incrimination as to all questions which he refused to answer without specifically asserting the privilege. This contention cannot be sustained. If the prisoner when before the grand jury in good faith refused to answer questions because he honestly believed that answers thereto would be self incriminatory without then stating the ground therefor, he had a right to assert his privilege when before the court in contempt proceedings. There is no evidence in the record presented to this court which would justify a conclusion that the prisoner in refusing to answer the questions or any of them was a refractory witness or one who was wilfully seeking to obstruct the functioning of the grand jury. The only proper conclusion that can be reached upon the record is that the prisoner believed in good faith that his answers to the questions propounded would be self incriminatory and that he refused to answer them on that ground. Such being the fact, he had the right to assert his privilege in the contempt proceedings even though he had not specifically asserted the same before the grand jury.

Refusal by a witness to answer a question before the grand jury because of an honest but mistaken belief on his part that the answer would be self incriminating does not constitute contempt. Nor does the fact that a witness did not state to the grand jury the ground for his refusal so made in and of itself make such refusal to answer a contempt. The grand jury is not the judge of the applicability of the privilege to questions directed to a witness. Whether the question is such that the answer thereto could be self incriminatory is a question for the court and until the witness has been taken before the court that question cannot be determined. The witness has the right to state his ground for refusing to answer when he was before the grand jury before and to the court. In other words, if his refusal before the grand jury was made in good faith, and

based upon his constitutional privilege, he can assert that privilege for the first time when he is brought before the court as for contempt. If the court rules against the privilege he cannot then be punished for contempt unless and until he has been given an opportunity to return before the grand jury and answer such question or questions as the court has ruled are not privileged and has directed him to answer. As before stated herein, it is the *unjustifiable refusal* to answer a question before the grand jury that constitutes contempt. The contumacious, intentional and wilfully obstructive refusal to answer questions before a grand jury by a refractory witness or one who is wilfully seeking to obstruct the functioning of the grand jury is unjustifiable and constitutes contempt. On the other hand, refusal to answer a question in order that the witness may in good faith interpose even an unfounded objection to making answer thereto, and obtain a ruling of court thereon is not unjustifiable, and is wholly within the rights of the witness. In such case to be unjustifiable and constitute contempt the refusal to answer must be made after the court has ruled upon the question of privilege and directed that answer be made.

If when before the court, upon being directed to answer the questions, the witness refuses to answer the same, he may then and there be punished for contempt.

If the witness returns before the grand jury and answers the questions pursuant to the direction of the court, the matter is closed. If, on the other hand, he persists in his refusal after returning before the grand jury, the grand jury may forthwith return the witness to the court and the court may summarily punish him for his contempt.

In this jurisdiction sentences for contempt by a witness who refuses to answer questions cannot be tested by exceptions. The power to punish for contempts of this nature is a plenary one and may be summarily exercised. Whether

the interrogatory be lawful or otherwise, or whether the commitment be justifiable or not, can be determined only on a writ of habeas corpus. If otherwise, the plenary common law power of the court or that conferred by statutes creating a summary process to elicit the truth by a disclosure of facts within the knowledge of the person inquired of, might, by the ingenuity of counsel, be wholly evaded. See *Bradley* v. *Veazie,* 47 Me. 85.

In the contempt proceeding against the prisoner the court ruled that as he admitted being asked the questions and giving the answers which appeared in the affidavit, that that was sufficient to hold him for contempt, and then proceeded to sentence him to six months in jail therefor. This ruling by the court was erroneous. There being no evidence in the record which would justify a finding that the refusal to answer the questions before the grand jury was contumacious or obstructive, the witness was entitled to have specific rulings as to whether or not he should answer each question which he had refused to answer. He was further entitled to an opportunity to answer such questions as the court ruled did not call for self incriminatory disclosures and which the court directed him to answer. This opportunity was not afforded him. The court made no ruling on the several questions as to whether or not the witness should answer the same, nor did it direct him to answer any of them or give him opportunity therefor. There was no contempt, and the sentence for contempt was not justified. As this ground is decisive in favor of the prisoner's right to a discharge upon the writ of habeas corpus, it is unnecessary for us to determine to which of the questions the prisoner was justified in asserting the privilege against self incrimination. An examination of the questions and the background against which they were asked and a consideration of the nature of the inquiry before the grand jury makes it apparent that nearly all, if not all, of the questions which the prisoner refused to answer could have been self

incriminatory, within the rule set forth in *Counselman* v. *Hitchcock, supra,* and that in all probability most of the answers, if truly given, would have been of that nature.

Although this prisoner is discharged because proper procedure safeguarding his constitutional rights was not followed, no injustice is being done. In accordance with the terms and purpose of the report and certification the prisoner should be enlarged.

Writ sustained.

Prisoner ordered discharged.

ELEANOR R. HUTCHINS

vs.

FRANKLIN J. MOSHER

LAWRENCE F. HUTCHINS

vs.

FRANKLIN J. MOSHER

York. Opinion, July 17, 1951.

Negligence. Rules of Road.

Plaintiff's violation of rules of the road which contribute as a proximate cause to an accident will bar recovery. (R. S., 1944, Chap. 19, Sec. 107.)

ON MOTION FOR NEW TRIAL.

Action of negligence to recover for personal injuries and damages to an automobile. After verdicts for plaintiffs defendant filed a motion for a new trial in each case. Motions sustained in each case. Case fully appears below.

Varney, Levy and Winton, for plaintiff.

Robinson, Richardson and Leddy, for defendant.

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

THAXTER, J. These actions resulted from an automobile collision and were tried together, the first brought by Eleanor R. Hutchins to recover for personal injuries, the second by her husband, Lawrence F. Hutchins, to recover for damages to his automobile which she was driving. The defendant, an automobile dealer residing in Oakland, Maine, was driving from Boston home easterly via Portland on November 29, 1949. His wife was with him. They were on the Maine-New Hampshire Interstate Bridge leaving Portsmouth and approaching Kittery; and were proceeding about

thirty-five miles an hour easterly in the right-hand lane of a three lane road.

The plaintiff was going to Portsmouth to pick up their child who was about to be dismissed from school. She was proceeding on Bridge Street which intersects the approach to the bridge in Kittery, and in accordance with rules of the road she stopped before she entered the highway. But she stopped on the left-hand side of Bridge Street at a point where her view was obstructed of cars coming east. It was obstructed for two reasons. She placed herself much closer to such cars than she would have if she had observed the rule of the road and had kept to the right of the center line of Bridge Street before she made her left turn. R. S., 1944, Chap. 19, Sec. 107. Not only did she place herself much nearer to cars approaching on her left but she placed herself in a pocket where also the bridge rail obscured from her view cars approaching from her left. Bridge Street, where she was, was at least two or three feet lower than the highway at the intersection. From her stopped position she went into low gear and drove out on the main highway directly in front of the Mosher car, so close that the defendant Mosher did not have time to get his foot on his brake before the collision. She came onto the highway bridge approach, turned sharply to her left on the main highway, and the cars collided nearly head on while she was travelling on the left side of the road.

Mosher saw her car waiting at the left side of the intersection before she entered the main highway. It was raining but his view was not obscured, and he supposed that she was waiting to give him the right of way which she was bound to do. The plaintiff, Mrs. Hutchins, made more mistakes in a short space of time than often falls to the lot of an automobile driver. The defendant, Mosher, appears to have been driving in a reasonable and prudent manner. The plaintiff, Mrs. Hutchins, was negligent and that negligence caused this accident.

She entered the main highway from Bridge Street from the left side of Bridge Street; she entered it directly in the path of an oncoming car which she did not see and to which she did not give the right of way as was her duty; and she turned to the left and drove on the wrong side of the highway at least for some distance and that was where the collision took place.

Each of these violations of the rule of the road contributed as a proximate cause to this accident. They establish the plaintiff's negligence sufficiently to bar her recovery; and there is not a shred of evidence of the defendant's negligence. The plaintiff's negligence is best shown by her remark when she went over to Mr. Mosher's window of his car and said right after the collision: "Oh, my God. Am I to blame? I didn't see you."

The defendant after the verdict filed a motion for a new trial in each case. Those motions must be granted.

Motion sustained in each case.

EDWARD A. INGERSON

vs.

STATE OF MAINE

Cumberland. Opinion, July 17, 1951.

Writ of Error. Prior Conviction.

Facts outside the record are not to be considered on writ of error proceedings.

Such incidental prejudice as might result from an allegation of a prior conviction is outweighed by the constitutional requirements of allegation and proof.

ON EXCEPTIONS.

Upon conviction following arraignment, plea of guilty and sentence upon an indictment charging the crime of rape pursuant to R. S., 1944, Chap. 117, Sec. 10 and a prior conviction pursuant to R. S., 1944, Chap. 136, Sec. 3, plaintiff brings a writ of error. To a ruling of the Superior Court dismissing the writ, the case is brought to the Law Court on exceptions. Exceptions overruled. Case fully appears below.

Aldrich and Aldrich, for plaintiff in error.

John S. S. Fessenden,

James L. Reid, for State of Maine.

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

NULTY, J. This writ of error comes to the Law Court on exceptions by the plaintiff in error to the ruling of a Justice of the Superior Court in the County of Cumberland dismissing his writ of error.

The plaintiff in error was indicted at the June Term, 1949, in the Superior Court for Kennebec County. The indictment charged the crime of rape pursuant to R. S., 1944,

Chap. 117, Sec. 10, and further alleged and charged, pursuant to the provisions of R. S., 1944, Chap. 136, Sec. 3, that the plaintiff in error had been previously convicted and sentenced for the crime of attempted rape in 1939 to the Vermont State Prison and sentenced to serve a term of not less than one year nor more than four years therein. The docket entries accompanying the writ of error show that the plaintiff in error was represented by counsel and, upon arraignment, pleaded guilty and was thereupon sentenced to twenty years at hard labor at the Maine State Prison which sentence he is now serving. The writ of error specifies the following errors:

> 1. That the record of the indictment shows that illegal evidence was presented to the Grand Jury by the State of Maine which was inflammatory and prejudicial to the Defendant and which might legally have affected the Grand Jury in finding its indictment and without which the Grand Jury might not have found said indictment. Wherefore said indictment was a nullity and void and any sentence imposed thereunder is illegal.
>
> 2. That the charge as set forth in the indictment is inflammatory and is prejudicial to the constitutional rights of the Defendant.
>
> 3. Said indictment as found does not make out or legally describe an offense against the peace of the State of Maine or contrary to any statute of the State of Maine, for which the Court could legally impose sentence.
>
> 4. Said sentence is illegal because it is not possible from the indictment to tell with what crime the defendant is charged and sentenced and for what crime he has been placed in jeopardy.

Our court in the case of *Nissenbaum* v. *State of Maine,* 135 Me. 393, 197 A. 915; and in *Jenness* v. *State of Maine,* 144 Me. 40, 64 A. (2nd) 184, 186, in speaking of writs of error, held that it is the record only that controls, that facts outside of the record are not to be considered and that the

writ of error can be brought only to obtain a correction of error on that record. The first error raises the question of prejudice and the plaintiff in error claims that the record of the indictment shows that illegal evidence was presented to the Grand Jury which was inflammatory and prejudicial to the plaintiff in error and that, therefore, the indictment became a nullity and void and that any sentence thereunder was illegal. Since this proceeding was instituted our court has had occasion to consider the matter of prejudice in the case of *State* v. *McClay*, 146 Me. 104, 78 A. (2nd) 347. In that case we held that such incidental prejudice as there may be by reason of the statement of prior conviction is outweighed by the security of fundamental constitutional safeguards in requiring both allegation and proof of a prior conviction. That case is decisive not only of the first error claimed by the plaintiff in error but also the second error wherein the plaintiff in error claimed that the charge as set forth in the indictment is inflammatory and prejudicial to the constitutional rights of the plaintiff in error. See also *Jenness* v. *State, supra.* The third error claimed by the plaintiff in error that the indictment found by the Grand Jury does not legally describe an offense against the peace of the State of Maine or contrary to any statute of the State of Maine is of no avail to the plaintiff in error for the reason that in our opinion the indictment describes not only the offense charged correctly but also alleges with all necessary certainty the prior conviction so that there would be no danger to the plaintiff in error from any hazard of double jeopardy. See *State* v. *Jalbert*, 139 Me. 333, 338, 30 A. (2nd) 799, and *State* v. *Dunning*, 83 Me. 178, 22 A. 109, wherein the court states in substance that it will consult sound sense to the disregard of captious objections in looking for the meaning of the allegations in the indictment. In regard to the fourth error that the sentence is illegal because it is not possible from the indictment to tell with what crime the plaintiff in error was charged and sentenced and

for what crime he has been placed in jeopardy, it would appear to this court after a careful examination of the record that the indictment strictly follows the statute and that the addition of the allegation of previous conviction was properly set out, in fact, the legislature has seen fit to require that it be fully set out and proved beyond a reasonable doubt and we held in *State* v. *Jenness, supra,* that it is not only constitutional but is indicative of the intention of the legislature and these facts, coupled by the plea of guilty of the plaintiff in error leave no alternative because by his plea of guilty he placed himself in such a position that he cannot now attack the judgment of the court.

Further comment is unnecessary for it is our opinion that no new questions are raised in the pending writ of error which have not heretofore been answered by our court in the following cases: *Jenness* v. *State, supra; State* v. *McClay, supra,* and cases cited therein.

The court below, in a carefully worded decision which considered the errors referred to herein correctly decided them when it dismissed the writ of error. That decision must stand. The mandate will be

Exceptions overruled.

LAFAYETTE S. BRAY

vs.

ELLA SPENCER

Kennebec. Opinion, July 19, 1951.

Real Actions. Trespass. Res adjudicata. Estoppel.

In a suit at law, or in equity, a judgment by a court of competent jurisdiction in a prior action between the same parties is generally conclusive, under the doctrine of *res adjudicata*, as to issues tried or that might have been tried. If for a different cause of action it is conclusive by estoppel as to matters actually litigated.

A judgment in an action of trespass *quare clausum* is not a bar by way of estoppel to a real action. This is true, even if the defendant in the trespass suit pleads soil and freehold.

The burden of proving that the same issue was actually determined in a prior action is upon the one so asserting.

ON EXCEPTIONS.

This was real action. The plea was the general issue with disclaimer as to part of the land. The defendant offered no evidence other than exhibits relating to a prior action of trespass *quare clausum* wherein the present defendant as moving had prevailed. The proffered exhibits were excluded and exceptions taken. After judgment for the plaintiff defendant brought exceptions. Exceptions overruled. Case fully appears below.

Perkins, Weeks and Hutchins, for plaintiff.

Stanley L. Bird, for defendant.

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

FELLOWS, J. This was a real action heard in the Superior Court for Kennebec County by the presiding justice without a jury. The plea was the general issue with dis-

claimer to part of the land described. The court in finding for the plaintiff, established the disputed boundary on the "Settler's Lot line" as determined by the court surveyor, and assessed damages in the sum of $126.00. The case now comes to the Law Court on defendant's exceptions to the exclusion of certain evidence offered by her, consisting of the record of a prior action of trespass, between the parties and heard by a referee, wherein the defendant (plaintiff in the trespass action) recovered judgment for $1.00 and costs.

In this pending real action the principal question involved was the location of a disputed boundary line. The plaintiff, Lafayette S. Bray of Fairfield, Maine, has record title to a tract of land of about 50 acres in Benton, Maine, and the defendant, Ella Spencer of Benton, is the owner of a lot which adjoins the Bray lot. The two lots are divided by the "Settler's Lot line," so called. The Settler's line is admitted to be the easterly bound of the Spencer lot and the westerly bound of the Bray lot. The location of this line upon the face of the earth was the main question presented. A court surveyor was appointed who made a survey, plans and a report. The presiding justice in giving judgment for the plaintiff found the line to be as indicated on the plan made by the court surveyor, which was introduced in evidence. Damage for wood removed from the Bray lot by the defendant was assessed at $126.00.

The defendant offered no evidence other than five exhibits, which consisted of certified copies of the writ, pleadings of general issue, report of referee, acceptance of report, and docket entries, all of which exhibits related to a prior action of trespass *quare clausum* brought in 1949 in the Kennebec Superior Court, wherein Ella Spencer (now defendant) was plaintiff and Lafayette Bray (now plaintiff) was defendant. These five proffered exhibits were excluded and exceptions taken.

The question now before the Law Court is whether the record evidence of a prior action of trespass is admissible in a later real action between the same parties. The defendant contends that such evidence is admissible and that it estops the plaintiff from successfully prosecuting his present real action.

The action of trespass *quare clausum* is essentially a possessory action. Possession alone is sufficient to maintain the action against one who cannot show a better right or title. *Moore* v. *Moore,* 21 Me. 350. See *Thurston* v. *McMillan,* 108 Me. 67 for proof required. Possession, without title, supports trespass *quare clausum fregit* against one who has no right to be upon the property. The gist of the action is the disturbance of the plaintiff's actual or constructive possession, and if this fact does not appear, it cannot be maintained. *Savage* v. *Holyoke,* 59 Me. 345. Trespass *quare clausum* is an appropriate form of action for wrongfully interfering with a person's possession of realty although the interference was by the landlord. *Moshier* v. *Reding,* 3 Fairfield, (12 Me.) 478; *Bryant* v. *Sparrow,* 62 Me. 546; *Harlow* v. *Pulsifer,* 122 Me. 472. A landlord, out of possession, cannot maintain trespass if the tenant is in possession, unless there is an injury to the freehold. *Perry* v. *Bailey,* 94 Me. 50; *Lawry* v. *Lawry,* 88 Me. 482.

The general issue in trespass *quare clausum* is "not guilty" and this plea puts in issue the question of whether the plaintiff's rightful possession has been disturbed by the defendant. Real actions, however, bring into issue the title itself. *Hall* v. *Decker,* 48 Me. 255; *Linscott* v. *Fuller,* 57 Me. 406; *Kimball* v. *Hilton,* 92 Me. 214; *Powers* v. *Hambleton,* 106 Me. 217.

In any suit at law, or in equity, a judgment by a court of competent jurisdiction in a prior action between the same parties is generally conclusive, under the doctrine of *res adjudicata,* as to issues tried or that might have been tried.

If for a different cause of action it is conclusive by estoppel as to matters actually litigated. *Van Buren Light & Power Co.* v. *Van Buren,* 118 Me. 458; *Harlow* v. *Pulsifer,* 122 Me. 472; *Edwards* v. *Seal,* 125 Me. 38. "Was the same vital point put directly in issue and determined?" *Howard* v. *Kimball,* 65 Me. 308, 330. The recovery of a judgment for personal injuries bars an action for property damage due to the same accident. *Pillsbury* v. *Kesslen Shoe Company,* 136 Me. 235. When issues are different *res adjudicata* cannot be upheld. *Sweeney* v. *Shaw,* 134 Me. 475. Verdicts for defendant in trespass and trover suits do not bar maintenance in favor of the plaintiff in a real action, where the cases were tried together. *Hardison* v. *Jordan,* 142 Me. 279. Where the parties are the same but the cause of action, or issue, is different, the prior judgment is only conclusive upon such issues as actually tried, and the burden is on the party setting up an estoppel by judgment to show that the same issue was involved and determined, on its merits, in the prior proceeding. *Russell* v. *Russell,* 145 Me. 113, 72 Atl. (2nd) 640; *Susi* v. *Davis,* 133 Me. 354; *Damren* v. *The American Light and Power Co.,* 95 Me. 278, 30 Am. Jur. "Judgments," 914, Sections 172, 180.

A judgment in an action of trespass *quare clausum* is not a bar by way of estoppel to a real action. This is true, even if the defendant in the trespass suit pleads soil and freehold. The right of possession, at the time of the alleged trespass to the particular locus, is the only question necessarily determined by a judgment in the trespass action. For the former judgment to be a bar it must appear that the question now in issue was in issue then and was decided. A judgment in trespass "does not settle the title." *Kimball* v. *Hilton,* 92 Me. 214; *Susi* v. *Davis,* 133 Me. 354; *Young* v. *Pritchard,* 75 Me. 513.

The case at bar is a real action wherein Lafayette S. Bray is plaintiff and Ella Spencer defendant. They own adjoin-

ing lots. The dispute is the exact location of the boundary line between the two parties. The defendant offered the entire court record of a prior trespass action, between the parties, wherein Ella Spencer, as then plaintiff, recovered judgment for $1.00 against Lafayette S. Bray. This record evidence was excluded, and exceptions taken. In the trespass action the record shows the pleadings to have been the general issue only. The question of title was not raised. The question of location of the line now in dispute was not determined. The court surveyor, on cross examination in this real action, did say that a plan offered by the defendant had been used in the trespass action, and that there was "a discussion about the ownership of this triangle," and "I think" Mr. Bray claimed to own as far as the "line represented." There was no evidence outside of this uncertain testimony, and the court record of the trespass case, which was offered and excluded, to show what was before the court in the prior case. There was no evidence, in the offered record, that the referee in the trespass action passed on the question of the line. All that the trespass action determined was that the plaintiff was then in possession of property described in her writ and declaration, and that the defendant was guilty of a trespass on some part of the property.

To raise an estoppel, it is not sufficient to show that the matter in controversy may possibly have been determined in the prior litigation. The party claiming an estoppel must make it appear affirmatively by legal evidence that it was *actually* determined. *Young* v. *Pritchard,* 75 Me. 513; *Smith* v. *Brunswick,* 80 Me. 189. This the defendant, Ella Spencer, did not do. In fact the record offered and excluded shows the contrary. The exclusion was proper. *Kimball* v. *Hilton,* 92 Me. 214.

Exceptions overruled.

ROWER J. MORIN, D/B/A ROWER J. MORIN & SON

vs.

H. W. MAXIM CO., INC. ET AL.

Androscoggin. Opinion, July 19, 1951.

Liens. Time. Additional Work.

The filing of a lien certificate after the expiration of sixty days from the time the last materials or labor are furnished or performed, and the commencement of process after the expiration of ninety days from that date are not seasonable.

A lien law should be construed favorably to those entitled to its protection.

Work done by one entitled to the protection of the lien statute after the time for enforcing a filed lien has elapsed cannot be considered as labor, within its provisions, to remedy an unfortunate neglect to comply therewith.

The test to be applied in lien cases is whether a lien has been honestly earned and a lien claimant has brought himself within the statute.

A lien claimant cannot bring himself within the statute by additional work, performed at his own solicitation, even though he had contracted to do such work, after he has filed a lien certificate and the time for enforcement thereof has expired.

ON APPEAL.

This is a bill in equity to preserve and enforce a lien pursuant to R. S., 1944, Chap. 164, Sec. 38. The question presented is whether a lien certificate was seasonably filed pursuant to R. S., 1944, Chap. 164, Sec. 36. The presiding justice found for the complainant. Defendant appealed. Appeal sustained. Decree reversed. New decree in accordance with this opinion. Case fully appears below.

Clifford and Clifford, for claimant.

W. A. Trafton, Jr., for defendant.

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

MURCHIE, C. J. Decision on this bill in equity, dated July 7, 1950, brought by the complainant, pursuant to the provisions of R. S., 1944, Chap. 164, Sec. 38, to preserve and enforce a lien for labor and materials used in the repair of a building owned by one of four named defendants, must be controlled by determination whether the certificate required to be filed by R. S., 1944, Chap. 164, Sec. 36, as identified in the process, was seasonably filed. Neither the filing of a lien certificate, after the expiration of sixty days from the time the last materials or labor were furnished or performed, nor the commencement of process after the expiration of ninety days from that date, is seasonable. *Baker* v. *Fessenden*, 71 Me. 292; *Cole* v. *Clark*, 85 Me. 336, 27 A. 186, 21 L. R. A. 714; *Darrington* v. *Moore*, 88 Me. 569, 34 A. 419; *Woodruff* v. *Hovey*, 91 Me. 116, 39 A. 469; *Hartley* v. *Richardson*, 91 Me. 424, 40 A. 336; *Marshall* v. *Mathieu*, 143 Me. 167, 57 A. (2nd) 400.

In this case two lien certificates were filed, one on April 3, 1950, stating that the last labor and materials were furnished on February 3, 1950. No process was instituted to preserve and enforce it. A second one was filed on June 22, 1950 (dated June 19, 1950), stating that the last of said materials and labor were furnished and performed on June 14, 1950. This is the one the present process was brought to enforce. It is not denied that the complainant did some work on the premises on May 8, 9 and 10, and possibly on May 12, which was incidental to the work completed on or before February 3, or that he painted some sash, storm sash and screens on June 8, 9, 12, 13 and 14. The time for commencing any kind of process to enforce the lien filed on February 3 aforesaid had expired before the first of these dates. The justice who heard the case below found that the painting of the sash, storm sash and screens, in June, was a

part of the work the complainant had contracted to do. This covered, among other things, the painting of "sashes, doors, trim, storm sash and screens," with an express recital that "New screens and storm sash (were) to have two coats." The justice must have found as a fact that June 14 was the date on which the last labor and/or materials were furnished. A decree was entered adjudging complainant to be entitled to the lien claimed and an appeal was duly taken.

The named defendants, in addition to the owner of the premises, are a general contractor, who undertook to make extensive repairs thereto, and who employed the complainant to do the particular work to which the lien relates, and two mortgagees, with whose knowledge and consent the repairs were undertaken. Stipulations entered in the case render it unnecessary to consider the propriety of the prices charged for labor and materials, or whether the work done was performed on, and become part of, the building sought to be reached by the lien. The sole issue is the date on which, under all the circumstances of the case, the complainant must be held to have ceased "to labor or furnish materials," to use the controlling statutory words.

The cause was consolidated in the Trial Court with several other processes involving lien claims upon the premises involved. That consolidation is meaningless to the issue, but is noted because the justice below recorded in his findings that the "defendant, Cook, mortgagee, is the only defendant contesting the validity of the lien," and that he "has instituted foreclosure proceedings." He recorded, also, that the "practical effect" of a successful contest on the part of the appellant would be to give him the benefit of $5,743.80 of labor and materials (the figure named being that of the lien awarded), "which were actually put into the building." In this connection we note that while this court has recognized heretofore that the lien law should be construed favorably to those entitled to its protection, *Shaw* v. *Young*, 87

Me. 271, 32 A. 897; *Hartley* v. *Richardson, supra, Andrew* v. *Bishop,* 132 Me. 447, 172 A. 752, it has also recognized, in *Cole* v. *Clark, supra,* that labor performed cannot be considered as labor entitling one to the benefit of the lien law:

> "simply because it would * remedy * * unfortunate neglect to comply with the statute".

It was said expressly in *Shaw* v. *Young, supra,* and affirmed in *Andrew* v. *Bishop, supra,* in asserting the rule of liberal construction, that the tests were whether the lien had been "honestly earned" and whether the lien claimant was "within the statute." The issue in this case involves the latter question only.

The evidence taken out before a Special Master in Chancery (which is the only evidence heard in the cause) discloses that the complainant, on August 26, 1949, wrote the general contractor, offering, at a fixed price, to do all the painting and decorating in connection with the alterations contemplated on the property in question. The offer was accepted September 6, 1949. Work had already commenced under it at that time, and continued through February 3, 1950. On April 3, 1950, as heretofore noted, a lien certificate was filed pursuant to R. S., 1944, Chap. 164, Sec. 36, asserting a claim for the full contract price for "labor done and materials furnished * * * between second day of September, 1949, and February 3rd, 1950," and declaring that the last items thereof were furnished and performed on the latter date. The work done on May 8, 9 and 10 was nothing more than "touch-up work," and has no bearing on the issue, although it is apparent that it was done after the lapse of more than ninety days from the completion of the contract work, according to the lien certificate then on file.

The record is entirely silent concerning what happened between April 3, 1950, when the first lien certificate was filed, and June 2, 1950, when the complainant wrote the general contractor a letter, the substance of which will be

stated hereafter. It conclusively appears, however, that at some time during the interval, which must have been after the lapse of ninety days from February 3, 1950, the complainant learned in some manner that the lien thus recorded was no longer available for enforcement.

On June 2, 1950, the complainant wrote the general contractor a letter, recalling the contract, wherein, as he stated, he had agreed "among other things" to put two coats of paint "on the new screens and storm sash," and declaring that he had been "waiting" to finish his work under the "written contract," and that the general contractor had been "slow in furnishing" the screens. The letter referred to the fact that the general contractor was "apparantly in financial difficulty" and requested the contractor to furnish "all new storm windows and the new screens so that I may complete my job and file my lien."

The testimony given by the complainant, before the Special Master in Chancery, and the exhibits presented in connection therewith, present an absolute contradiction of the statement that complainant was "waiting to finish up" his work, if that statement was read, as it would be normally, as declaring that his "waiting" dated back to February 3, 1950. He stated under oath, more than once, that when he filed the lien certificate on that date, he thought his work under his contract was completed, or finished. The certificate was prepared and filed for him by an attorney. He went to another after the time had expired for preserving and enforcing his lien under it, pursuant to R. S., 1944, Chap. 164, Sec. 38 (or R. S., 1944, Chap. 164, Sec. 45), and, perhaps, after he had solicited the opportunity to paint new screens and sash, by his letter of June 2, 1950, although there is no direct statement to that effect, in order that he might have a new basis for filing and preserving a lien claim, seasonably. The justice below found expressly, as a purported fact, that his action was legitimate and, consider-

ing the fact that the screens were supplied in accordance with his request, was effective to that end. His decision was based entirely on the report of the Special Master in Chancery whose pertinent factual findings, as recorded in his report, were that the lien certificate filed on June 22, 1950 was filed "within sixty days from the last date of performance of labor or furnishing of materials" and that the process was filed within ninety days thereof.

The standing of factual decisions in equity cases could hardly be expressed more clearly or forcibly than by quoting the statement of Mr. Justice Strout, in *Hartley* v. *Richardson, supra:*

> " 'The decision of a single justice upon matters of fact in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous.' 'The burden to show the error falls upon the appellant.' 'He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.' *Young* v. *Witham,* 75 Maine, 536; *Paul* v. *Frye,* 80 Maine, 26."

The burden referred to therein would necessarily be held to have been carried by the present appellant if the principles stated in the foregoing quotation were applicable here. The issue which must control the present case, however, is not one of fact but of law. Despite the use of factual language, the justice below was making a ruling of law in his declaration that the complainant's purpose in seeking to secure screens to paint to preserve his lien was legitimate and effective. The complainant places his reliance on three decisions of this court, cited *infra,* one of which served as the foundation for the action of the justice below who stated in his findings that the "rule" therein laid down "has application." That case is *Delano Mill Co.* v. *Warren,* 123 Me. 408, 123 A. 417. Therein, one who became a lien claimant for materials representing an aggregate charge exceeding $10,000 had furnished all except one small item on or prior

to October 28, 1922, and had billed the defendants on that day for his full contract price. Thereafter, and within the lien period, the defendant had notified the supplier that an additional door was required. This was supplied on December 28, 1922, and called for no increase in the account. The lien certificate, filed February 20, 1923, alleging that the last of the materials had been furnished on the later date, was held to have been filed seasonably.

Earlier cases cited in complainant's brief are *Farnham* v. *Richardson,* 91 Me. 559, 40 A. 553, and *Van Wart* v. *Rees,* 112 Me. 404, 92 A. 328.

In the first of these the lien claimant furnished materials which he believed represented all he had contracted to furnish on or before September 19, 1895, but thereafter, within the lien period, he delivered an additional door in exchange for one which defendant's employees declared did not fit the frame prepared for it. The later delivery was on October 1, 1895, and the lien certificate filed on November 6, 1895 alleged that the last of the materials was furnished on said October 1. The lien period then fixed by statute being forty days (R. S., 1883, Chap. 91, Sec. 32, as amended by P. L., 1895, Chap. 34), the filing was seasonable if October 1st was the control day, but not if September 19 was the correct date. It was held to have been filed seasonably.

In the other cited case, *Van Wart* v. *Rees,* the man who became a lien claimant supplied materials for a single job during two periods, one expiring on December 5, 1911 and the other beginning on February 14, 1912. On said December 5 the carpenter employed by the defendant, when the materials were ordered, left his work, and nothing was done on the job until February 14th, 1912, when a new carpenter was secured. The lien certificate was filed seasonably by reference to the February 14th date, but not otherwise. The filing was declared seasonable.

The cases on which complainant relies are clearly distinguishable from his own. In two of them the late delivery of a small item of materials, and in the third the interruption of the supply of materials, was at the instance of, or on the responsibility of, the property owner, or one acting on his behalf. Taking them in chronological order, the court declared, in *Farnham* v. *Richardson, supra,* not only that the exchange of the doors was "made at the request of the defendant * and for his convenience," but that it could not be claimed that the charge made for it:

> "was an afterthought, made for the purpose of extending the time within which the claimant could file his lien claim for the materials furnished previously".

In *Van Wart* v. *Rees, supra,* the interruption of work was caused by the defendant's carpenter, and there was express statement in the opinion that there was nothing in the circumstances attending it to "impugn the good faith" of the material-man. Finally, in *Delano Mill Co.* v. *Warren, supra,* the court declared specifically that it was not contended "that the delivery of the door was held back by the plaintiff to keep alive its lien."

The outstandingly unique feature of the complainant's case is found in the filing of two lien certificates alleging different dates for the completion of the work. Whether or not he understood that the general contractor was in financial difficulties when the first lien certificate was filed, as he did when his letter of June 2 was written, it is apparent that he filed it to protect his rights under a contract he believed he had performed fully. So, apparently, the general contractor viewed it. The evidence discloses that a representative of the latter discovered in May that the work done prior to February 3 required some touching up, and it was his notice to that effect that accounts for the work in that line done in May. No complaint was made by him that

all the work contemplated by the contract had not been performed. Instead, he testified with reference to the screens that he had no money to buy more and that the complainant had "painted only what was there in the old building."

The facts present a patent attempt on the part of one entitled to the protection of the lien law, who had permitted his rights thereunder to lapse by his own fault, to have those rights restored by a palpable fiction, in which the owner of the premises, or his general contractor, joined after it was apparent that the owner was to lose the property. To permit the complainant to hold his lien under such circumstances would do violence to well established law.

Appeal sustained.

Decree reversed.

New decree in accordance with this opinion.

FIRST NATIONAL BANK OF PITTSFIELD

vs.

HAROLD L. MORONG ET AL.

AND

NEWPORT TRUST COMPANY

Penobscot. Opinion, July 24, 1951.

Bills and Notes. Fraud. Bankruptcy. Consideration.

The express mandate of R. S., 1944, Chap. 100, Sec. 74 permits a creditor holding a claim against a bankrupt and some other or others, who has an action pending against all of them, to discontinue against the bankrupt in order to obtain a speedy judgment against his solvent debtors.

An antecedent or pre-existing debt constitutes value for the execution of a promissory note.

The one raising the issue of fraud has the burden of establishing it by clear and convincing proof.

ON MOTION FOR NEW TRIAL.

This is an action on a promissory note signed by all defendants and one Morong, to take care of an overdraft of Morong's at the plaintiff bank. The case was discontinued as to Morong after he was adjudicated bankrupt. Defendants then moved for a dismissal of the case on the ground that the dismissal as to Morong was prejudicial to them. This motion was denied. Defendants pleaded the general issue with a brief statement alleging no consideration for their indorsements and that their signatures were obtained through fraud. After a verdict for defendants plaintiffs

moved for a new trial. Motion sustained. Verdict set aside. New trial ordered.

H. R. Coolidge,

Lloyd R. Stitham, for plaintiff.

Edward Stern,

Michael Pilot,

W. F. Jude, for defendants.

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

MURCHIE, C. J. The issue here presented, on plaintiff's general motion for a new trial, must be considered in the light of the relationship of the six defendants to one Harold L. Morong, who was named as one of seven in the original process. It was discontinued as to him, on plaintiff's motion, after he had been adjudicated a bankrupt. At the trial, the defendants moved for its dismissal on the ground that such discontinuance was prejudicial of their rights. The denial of their motion raises no issue here, no exceptions having been taken, but the fact is noted because the motion was made before the jury and may have influenced its verdict. The plaintiff's action is authorized expressly by R. S., 1944, Chap. 100, Sec. 74, which was R. S., 1871, Chap. 82, Sec. 47, when *West* v. *Furbish,* 67 Me. 17, was decided. As was stated in that case, it permits a creditor holding a claim against a bankrupt and some other, or others, to obtain "a speedy judgment against his solvent debtors."

Plaintiff seeks recovery on a promissory note signed by Morong and the defendants at the office of his attorney, on February 7, 1949. It calls for the payment of $3,700 in one month. It was executed to take care of an overdraft of Morong's at the plaintiff bank, and was applied to that

purpose on February 16, 1949. It was contemplated that within the month prior to its maturity the defendants, and Morong, would make some definite arrangements for the future. All the defendants referred to the note in their testimony as a "temporary" one. The overdraft had been discussed by Morong, his attorney and the defendants at a meeting convened by him on February 2, 1949. The meeting was attended, at his request, by representatives of the plaintiff. The statements of one of them thereat, according to the defendants, justify the plea entered in the action, and the verdict.

The plea was the general issue, with a brief statement alleging that there was no consideration for the note (binding upon the defendants), and that their "indorsements (of it) were induced and procured by and through the fraud of the * plaintiff." The question of consideration, unless it was intended merely to assert that what there was originated in fraud, is easily disposed of. The overdraft the note paid was an existing debt of Morong's. R. S., 1944, Chap. 174, Sec. 25, provides expressly than an "antecedent or preexisting debt constitutes value," for the execution of a promissory note. Its force was recognized in *Merrill Trust Co.* v. *Brown,* 122 Me. 101, 119 A. 109; *Jordan* v. *Goodside,* 123 Me. 330, 122 A. 859; and *Flynn* v. *Currie,* 130 Me. 461, 157 A. 310.

The issue is fraud. The defendants having raised it, it is clear that they had the burden of establishing it, *Judkins* v. *Chase,* 123 Me. 433, 123 A. 516, by "clear and convincing proof." *Strout* v. *Lewis,* 104 Me. 65, 71 A. 137; *Portland Morris Plan Bank* v. *Winckler,* 127 Me. 306, 143 A. 173. It must be recognized that a jury has determined the fact in their favor, and must be considered to have done so under proper instructions, no exceptions to the charge having been presented. *Frye* v. *Kenney,* 136 Me. 112, 3 A. (2nd) 433. It is undoubted that the plaintiff, seeking a new trial

on general motion, has a heavy burden, that is well stated in *Jannell* v. *Myers,* 124 Me. 229, 127 A. 156, and *McCully* v. *Bessey,* 142 Me. 209, 49 A. (2nd) 230. Factual decisions by a jury will not be disturbed unless so clearly wrong that it is apparent that they are traceable to "prejudice, bias, passion, or a mistake of law or fact."

It might be doubted if the evidence presented would support a factual finding of fraud, without reference to the requirement of "clear and convincing proof" already noted. The finding of fraud, implicit in the verdict, is supported by nothing other than the assertion of five of the defendants, the sixth being unable to be present in court, according to a stipulation duly entered, that one of the representatives of the plaintiff stated, at the meeting of February 2nd aforesaid, that the plaintiff had a mortgage on the building in which Morong was doing business and would foreclose it and put him out of business if his overdraft was not paid, whereas, in fact, the plaintiff held nothing but chattel mortgages on his equipment. Morong was operating a moving picture theatre in the building where the meeting was held. The defendants do not claim that plaintiff's representative said anything in clear and forthright language about a real estate mortgage. Rather they assert it was implied in an inclusive gesture made by that representative in declaring that the plaintiff had a mortgage "on this place." The meeting was assembled by Morong to persuade the defendants to pay his overdraft, in some manner. Collectively, the five who testified held claims against him aggregating more than $13,000. All of them knew about the overdraft and that he owed the plaintiff something like $3,500 on the theatre equipment. All of them wanted Morong to continue in business, in the hope that he could pay all his indebtedness, including his obligations to them. Some of them, in the presence of plaintiff's representatives, discussed the organization of a corporation to take over the theatre property and the plaintiff's claims against Morong.

The representatives of the plaintiff entered the meeting of February 2nd after the defendants had assembled and had had an opportunity to discuss Morong's affairs with him and with his attorney, who was acting, as one of them testified, for "the whole of us, I guess." One of those representatives was requested at the outset, by Morong, to tell the defendants he "hadn't done anything wrong." That representative "would hardly say that," but stated the fact of the overdraft and the necessity for its payment, and offered time for liquidation of Morong's indebtedness to the plaintiff in small payments, declaring expressly that the alternative to payment of the overdraft was that the plaintiff would take the place over and the defendants would not "get a cent." The note was not presented at the meeting. It is written on one of the plaintiff's printed forms and was signed at the office of Morong's attorney. No representative of the plaintiff was present at the time.

The verdict is difficult to understand except on the assumption that the jury decided, in the exercise of its proper function of determining what witnesses were telling the truth, *Jannell* v. *Myers* and *McCully* v. *Bessey,* both *supra,* that the plaintiff's representative had given false testimony in reporting his own statements at the creditors' meeting of February 2nd, and been less than frank in evading questions as to how the printed form note signed by the defendants reached the office of Morong's attorney. Counsel for the defendants laid considerable emphasis on the latter point in their brief, and undoubtedly argued to the jury that such lack of frankness was additional evidence that that representative "had deliberately made false statements to these Defendants, knowing them to be false."

There was a clean-cut conflict of testimony on what the plaintiff's representative told the defendants at the February 2nd meeting. That representative asserted that he told them that the plaintiff had a "chattel mortgage" on the

"theatre equipment." Each and all of the defendants assert that he did not use either the word "chattel," or the word "equipment," but implied that the plaintiff had a mortgage on the theatre building by referring to "this place," when making his statement and gesturing with his arm inclusively. The plaintiff held four chattel mortgages on different items of the equipment of the theatre. Some of them covered subsequent indebtedness and were written in language appropriate to give the plaintiff such rights as Morong had in theatre equipment not owned by him, and in the lease under which he occupied the building where he operated the theatre. It is undoubted that the plaintiff was in a position, as its representative asserted to the defendants, to take the place over and put Morong out of business. This was the action the defendants sought to forestall, and did forestall by executing the note.

The defendants had full opportunity at the meeting of February 2nd to ask the representatives of the plaintiff to explain in full detail what claim or claims it had against Morong's property. They did not do so. The record provides some indication that they had an opportunity to secure all pertinent information from Morong and his attorney before the representatives of the plaintiff entered that meeting. Whatever the fact in that regard, they had five full days, thereafter, to make such investigation as they wished concerning his property and his obligations before they signed the note.

Most, if not all, of the defendants had been lending money to Morong, or cashing his checks, for a considerable period prior to the meeting. It cannot be doubted, accepting their testimony at its face value, that they executed the note to make it possible for Morong to continue in business in the hope that by doing so he might be enabled to pay all his indebtedness, to the plaintiff and to them, or that they intended, when they did so, to make permanent, as distin-

guished from temporary, arrangements within thirty days thereafter. Plaintiff's representatives at the meeting of February 2nd, as at the time the note was delivered to take care of Morong's overdraft, had every right to believe that the defendants were acting with knowledge of Morong's exact circumstances.

The particular basis for the prejudice, bias, or mistake of law or fact, which induced the verdict is not traceable, but it is entirely apparent that the testimony of the defendants would not establish fraud on the part of the plaintiff by that degree of "clear and convincing proof" which decided cases make requisite. See the cases cited *supra.*

Motion sustained

Verdict set aside.

New trial ordered.

HARRY B. BEAL

vs.

UNIVERSAL C. I. T. CREDIT CORPORATION

Aroostook. Opinion, July 27, 1951.

Chattel Mortgages. Conditional Sales.

After Acquired Property.

A chattel mortgage can be given only of chattels actually in existence and actually belonging, or potentially belonging, to the mortgagor and unless a case comes within certain recognized exceptions, statutory or otherwise, a mortgagor can not mortgage property that he does not own.

At common law there must be some provision in the mortgage and some new act sufficient to pass title to after-acquired property.

ON EXCEPTIONS.

This is an action of assumpsit to recover a sum of money paid by the plaintiff to the defendant for a certain conditional sales contract alleged not to be a first lien as represented. The case comes to the Law Court on plaintiffs exceptions to a finding for the defendant. Exceptions overruled. Case fully appears below.

David Solman,

Hutchinson, Pierce,

Atwood & Scribner, for plaintiff.

Donald N. Sweeney, for defendant.

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

FELLOWS, J. This is an action of assumpsit to recover the sum of $1,438.67 paid by the plaintiff to the defendant for a certain conditional sales contract securing a Ford

truck which contract was alleged in the declaration not to be a first lien as represented. The case was heard by the justice presiding in the Superior Court for Aroostook County on an agreed statement. It now comes to the Law Court on plaintiff's exceptions to the court's finding for the defendant.

This is a brief summary of the agreed facts: On December 4, 1948 one Lloyd K. Maxwell gave to the Caribou Motor Company a conditional sales contract on a Ford truck he was purchasing of Caribou Motor Company, and he then took delivery of the truck from the Caribou Motor Company. This conditional sales agreement provided that title was to remain in the Motor Company (or Universal C. I. T. Credit Corporation if assigned to it) until the truck was fully paid for. Several days previously, however, on November 29, 1948, Lloyd K. Maxwell had given to the Aroostook Trust Company a chattel mortgage in the sum of $2,153.25 (with full covenants of title as "the true and lawful owner," and with the usual warranties against claims of others, and the right to take possession for non-payment) secured in part by this Ford truck that he contemplated buying, together with other personal property. The agreed statement of facts says that Maxwell represented to the Trust Company that the proceeds of his loan from the Trust Company would be used to purchase the truck, but the chattel mortgage does not indicate that the truck was to be after acquired.

The conditional sales contract of December 4, 1948, given by Maxwell, was assigned by Caribou Motor Company to the defendant Universal C. I. T. Credit Corporation, but was not recorded. The chattel mortgage of November 29, 1948, given by Maxwell to the Trust Company five days before the sales agreement, and before he had any title, claim, or possession to the truck, was recorded by the Trust Company on December 10, 1948.

On May 9, 1949 the defendant C. I. T. Credit Corporation represented to the plaintiff, Harry B. Beal, that it had a sales agreement which it said was a first lien on the truck, and the plaintiff purchased of defendant the conditional sales contract for $1,438.67.

On June 18, 1949 the Aroostook Trust Company, without knowledge of the sales contract, took possession of the truck, claiming under its chattel mortgage. On July 7, 1949, after taking possession, the Aroostook Trust Company assigned its chattel mortgage to Harry B. Beal the plaintiff.

The Caribou Motor Company had no knowledge that there was a mortgage from Maxwell to the Trust Company describing its truck and dated November 29, 1948, because the truck was then owned by Caribou Motor Company, and in its possession. The chattel mortgage was given by Maxwell to the Trust Company before his purchase under the sales contract, and the first knowledge of the Trust Company that there was a sales contract was when it took possession of the truck on June 18, 1949.

In giving judgment to the defendant the decision of the justice presiding was "that the conditional Sales Contract signed by Lloyd K. Maxwell on Dec. 4, 1948 to the Caribou Motor Company, and assigned by the Caribou Motor Company to the Defendant, it not having recorded said Constitutional Sales Contract, and assigned by the Defendant to the Plaintiff, constitutes a first lien on said truck, all assignments having been made for a valuable consideration and that it takes precedence over the mortgage given by Lloyd K. Maxwell to the Aroostook Trust Company." To this decision the plaintiff took exceptions.

The situation appears to be that a chattel mortgage on a truck was given by one who had neither title nor possession, and the mortgage does not state that it was intended that the loan would be used to purchase the truck. The truck

was not purchased by the proceeds of the loan, but was purchased several days later under a conditional sales contract. The chattel mortgage is recorded but the sales agreement is not. The question presented, according to the briefs, is whether the unrecorded conditional sales contract takes precedence over a recorded chattel mortgage when the mortgagor had neither title, possession, nor right to possession. There is another question, and that question is whether the chattel mortgage, obtained by the bank as mortgagee, gave any valid rights in and to this truck, without regard to the sales agreement.

Under the common law a man could bargain with his own personal property as he desired, and could deliver possession and reserve title in himself until fully paid for, without notice to the world through any public recording of the agreement. *Tibbetts* v. *Towle,* 12 Me. 341. The statute now provides that no agreement, that personal property bargained and delivered to another shall remain the property of the seller until paid for, is valid except as between the parties unless it is recorded in the town or city where the purchaser resided. Revised Statutes (1944), Chapter 106, Section 8. This statute is interpreted as meaning that an unrecorded conditional sales contract is not valid against the lawful claims of third persons. As between the original parties it must be definite, in writing, and signed by the person to be bound thereby. As to third persons it must be recorded. *Gould* v. *Huff,* 130 Me. 226. It follows that if a sales agreement is good between the parties, and no other person has a valid claim, such as a true owner, an attaching creditor, a mortgagee holding valid legal mortgage, a trustee in bankruptcy, and the like, it is good against everyone.

A chattel mortgage can be given only of chattels actually in existence and actually belonging, or potentially belonging, to the mortgagor. This rule is subject to some exceptions, statutory and otherwise, but unless a case comes with-

in one of the well established exceptions, a mortgagor cannot mortgage property that he does not own. At common law there must be a provision in the mortgage and some new act sufficient for the purpose in order to pass after acquired property, like delivery to the mortgagee or by a confirmatory writing properly recorded. *Griffith* v. *Douglass,* 73 Me. 532. A chattel mortgage on a stock of goods in a store may provide in the mortgage that replacements are subject to the lien. *Dexter* v. *Curtis,* 91 Me. 505; *Sawyer* v. *Long,* 86 Me. 541. "Including all cars, engines and furniture that have been or may be purchased." *Morrill* v. *Noyes,* 56 Me. 458. In the case of *Burrill* v. *Whitcomb,* 100 Me. 286, relied on by the plaintiff, the chattel mortgage was of property consisting of stock in trade contained in a store of the mortgagors together with all stock in trade which might, from time to time, be added. The tea, for which suit was brought, was not owned by the mortgagors at the time of the execution of the mortgage but was later purchased as a part of their stock for the purpose of carrying on their business. It was held that the mortgagee was entitled to take possession of the tea as after acquired stock in trade in accordance with the express terms of the mortgage.

Sections 7, 8, 9 of Chapter 164 of the Revised Statutes (1944) provide that a person may mortgage crops growing or to be grown, and also that a chattel mortgage shall constitute a valid lien on any property described in the mortgage to be purchased with the proceeds of a loan, and for a lien on substitutions for or replacements of property described, when acquired by the mortgagee.

A mortgage is a sale to the extent of carrying title, not an agreement to sell. A mortgage conveys title to the vendee which may be defeated by payment by the vendor. A conditional sales agreement retains title in the vendor which may be defeated by payment by the vendee. *DeLaval Separator Co.* v. *Jones,* 117 Me. 95; *Campbell* v. *Atherton,* 92

Me. 66. The terms of the chattel mortgage must be sufficient to meet all the terms of the contract and the rights of third parties definitely known from inspection of the record. *Williams* v. *Noyes & Nutter Manufacturing Co.*, 112 Me. 408; *Morrill* v. *Noyes*, 56 Me. 458, 466. Third persons are chargeable with notice of no more than they can ascertain from the record, or from being put upon their inquiry by the record. *Thurlough* v. *Dresser*, 98 Me. 161; *Partridge* v. *Swazey*, 46 Me. 414; *Griffith* v. *Douglass*, 73 Me. 532; *Cadwallader* v. *Shaw*, 127 Me. 172.

In the case at bar there was no complete agreement in the mortgage. The mortgage makes no mention of any property to be acquired. The mortgage falsely states that the mortgagor is the owner of the truck. He was not the owner and the truck was not in his possession. No mention is made in the mortgage that it was intended that the proceeds of the loan was to be used to purchase the truck described. The agreed statement says there was an oral understanding between the parties that the loan was to be used to purchase the truck, but the mortgage does not so state. The record of the mortgage in the case at bar would give no legal notice to anyone that the mortgagor intended to purchase the truck then belonging to the Motor Company and at that time in the Motor Company's possession. The chattel mortgage transferred title to any personal property described therein that was then owned by Maxwell as mortgagor, but it transferred no title and gave no valid claim to the Ford truck mentioned therein, because the truck was not owned by Maxwell and there was no legal provision in the mortgage relative to acquisition thereafter.

The court below, giving judgment to the defendant, was correct.

Exceptions overruled.

MARIE PAULE D'AOUST, APPLT.

FROM DECREE OF JUDGE OF PROBATE

IN PROCEEDINGS OF MICHELE A. D'AOUST

York. Opinion, July 27, 1951.

Custody.

The findings of a Justice of the Supreme Court of Probate whether a mother is a suitable person to care for a child and whether the best interests and welfare of the child will be promoted by her having custody will not be disturbed unless found without evidence or contrary to the only conclusion which may be drawn from the evidence.

ON EXCEPTIONS.

On petition before the Probate Court by a father pursuant to R. S., 1944, Chap. 153, Sec. 19, as amended, for custody of a minor child. After a decree awarding custody to the father an appeal was taken to the Supreme Court of Probate where, after hearing, the decree was reversed. The case is before the Law Court on exceptions. Exceptions overruled. Case fully appears below.

Gendron, Penderson & McDougal, for appellant.

Lausier & Donahue, for appellee.

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

WILLIAMSON, J. On exceptions. The care and custody of a minor child of parents living apart was given to the father by decree of the Judge of Probate upon the petition of the father under R. S. Chap. 153, Sec. 19, as amended. On appeal to the Supreme Court of Probate the decree was reversed and custody awarded to the mother.

The governing principles are familiar and well estab-

lished. "The paramount consideration for the court . . . . is the present and future welfare and well-being of the child." *Grover* v. *Grover,* 143 Me. 34. "This Court can not review the findings of a single justice on questions of fact. He is the exclusive judge of the credibility of witnesses and the weight of the evidence; and only when he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law." *Bond* v. *Bond,* 127 Me. 117 at 129. See also *Merchant* v. *Bussell,* 139 Me. 118; *Stanley* v. *Penley,* 142 Me. 78; *Mitchell* v. *Mitchell,* 136 Me. 406; *Sweet* v. *Sweet,* 119 Me. 81.

It will serve no useful purpose to set forth the evidence in detail. A full and complete hearing was held in January 1951, and findings of fact were filed by the presiding justice.

The child, Michele, will be eight years of age in September next. She has been living with her father at the home of his mother and step-father in Biddeford. The father has been unemployed since leaving the service and has no income. The care and support of the child have fallen upon the grandmother and her husband. There is no suggestion that the child has not received proper care.

The question was whether it would be better for the child to remain in Biddeford or be in the custody of her mother, who is employed and lives in Boston. Obviously in reaching a decision the character of the mother and her ability to provide for the child were of the highest importance. Was she a proper and suitable person to be charged with the great responsibility sought by her?

By the first three exceptions the father urges there was no credible evidence to support findings that (1) condonation of his wife followed an affair some years in the past; (2) the mother "has and is conducting herself properly;" and (3) the "best interests and welfare of the child will be promoted" by the decree awarding custody to the mother.

With respect to the first exception, the presiding justice found that the husband with full knowledge of the facts had forgiven his wife. Whether there was condonation in the strict sense was not material. It was for the presiding justice, not for the father, to determine whether the mother was a suitable person to care for the child, and to give such weight to her past actions as he, and not the father, deemed proper. On this ground alone, the exception is without merit.

The three exceptions in terms raise only the question of credibility which is not, as we have indicated, an issue before us. Surely the evidence is not inherently improbable, which, if so, would present an issue of whether there was any evidence. The record discloses ample evidence to warrant the decree.

There was no error in the provision of the decree reading, "with the right on the part of the father to visit said child in Boston when convenient for the mother and the child."

In determining the best interests of a child, the court often grants a right of visitation. Necessarily the details of such right will vary with the circumstances. The right forms an integral part of the plan decreed for the care and custody of the child. It must be honored faithfully by both mother and father. The State, in placing its protecting cloak about this child, expects and will demand that the mother and father use common sense and reason in their every relationship in so far as the child is concerned. A decree of custody is never final.

The entry will be

Exceptions overruled.

BERNSTEIN *vs.* CARMICHAEL

MAERY PRO AMI *vs.* CARMICHAEL

Cumberland. Opinion, July 30, 1951

Directed Verdict. Negligence.

Evidence must be viewed in the light most favorable to the plaintiff in considering the propriety of a directed verdict for the defendant.

Proof of a violation of a law of the road constitutes *prima facie* evidence of negligence.

A plaintiff has the burden of proving that the defendant was negligent and that his negligence contributed in some manner to the damage for which recovery is sought.

A scintilla of evidence will not support a verdict.

ON EXCEPTIONS.

Actions of negligence to recover for injuries suffered by a minor child and expenses incident thereto. The case is before the Law Court on exceptions to the direction of verdicts for the defendant. Exceptions overruled. Case fully appears below.

Charles A. Pomeroy,

Wilfred A. Hay, for plaintiffs.

Robinson, Richardson & Leddy, for defendant.

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

MURCHIE, C. J. These two actions, tried together in the Superior Court, are brought forward for review on exceptions to the direction of verdicts for the defendant. The issue thus raised must be resolved, as the plaintiffs assert, by viewing all the evidence in the record in the light most favorable to them, *Lewiston Trust Co.* v. *Deveno,* 145 Me. 224, 74 A. (2nd) 457, and cases cited therein, with full rec-

ognition that a jury, when a case is submitted to it, is entitled to draw all inferences that are reasonable and proper from such evidence. That they are limited to such inferences is undoubted. See the cases cited *infra.*

The plaintiffs are a minor, suing by his next friend, to recover for injuries alleged to have been sustained when he was struck by a motor vehicle operated by the defendant, as he was crossing a public highway, and his mother, seeking reimbursement for medical and hospital expenses occasioned thereby.

The minor was six years old when injured. That his injuries were serious cannot be doubted. He was found unconscious under the running-board of an automobile parked at the curb, which the defendant had passed, stopping within a few feet thereof, just before he was found. It is probable that the child would have no recollection of the circumstances. Whether or not he would, he did not testify, nor was any witness presented who saw him crossing, or attempting to cross, the road, or when he was struck.

The highway on which the plaintiff was traveling crosses Deering Oaks, a public park in Portland, where the minor and many other children were playing, in broad daylight, just prior to his injury. He had been taken there by his grandfather and grandmother, in an automobile they had parked against the curb on the opposite side of the road, which was thirty feet wide and had cars parked on both sides at the time, spaced quite close together. A space about eighteen or twenty feet wide, according to the testimony of the grandfather, was left to accommodate travel. A stipulation made in the case is that the "prima facie legal speed limit" in the Park is twenty miles per hour (for motor vehicles).

The claim of the plaintiffs is grounded on evidence indicating that defendant's car passed the spot where the minor

was found injured, just prior to his being found, an estimate of the grandfather that the speed thereof, when first seen approaching the parked cars, was between thirty and thirty-five miles per hour, and defendant's statement, after the child was found, that she was awfully sorry but she did not see him. The grandfather testified that the defendant was traveling in the center of the road, slightly to the left of the center line, that a hat the child was wearing was found, and that the defendant's car stopped, at the left thereof, the car being about thirty-five feet beyond the hat. He made two different statements about the location of the hat, with reference to his own car, but the one more favorable to the plaintiffs would not indicate that the defendant's car travelled more than forty-seven feet, after the child was struck, if he was struck where the hat was found, and there is no evidence to that fact.

Both grandparents testified to hearing two thumps and a squeaking, or screeching, of brakes. The grandmother described it as "an awful screeching." There is no suggestion in the case, however, that the tires of defendant's car left any skid marks on the road. The only possible grounds on which the defendant could have been found guilty of negligence are violation of a speed law and failure to see the child when she should have seen him. The second ground is meaningless in the absence of evidence that he was in the highway, where he could have been seen, as she approached, and there is no such evidence.

The grandparents testified that the child was playing in the grass, alongside their own automobile, until a matter of seconds before whatever happened did happen. This can hardly be true in view of the fact that he was found under the running-board of a vehicle parked on the side of the street opposite their car immediately after the defendant passed. The inference seems unavoidable that he had crossed the highway, and was returning. He had been play-

ing about twenty minutes with a home-made bow and arrow, shooting the arrow on a line roughly parallel with the road, in the grass alongside the grandparents' car, while they watched him. When they took their eyes off him, and what he did while they were not observing, are unknown. Whether he shot an arrow across the road, intentionally or by mistake, ran across to retrieve it, and was attempting to return, cannot be known. When the hat fell off his head, and why, are matters for surmise, or speculation. Again there is a strong inference that it may have fallen off as he was crossing the road, headed away from his grandparents. It is almost certain it could not have been knocked off by his being struck by defendant's car.

The plaintiffs rely on the well-established principle that the violation of a law of the road, in the operation of a motor vehicle, constitutes *prima facie* evidence of negligence, and the testimony of the grandfather that when he first saw the defendant's car approaching, it was traveling at a speed of from thirty to thirty-five miles per hour. The principle is well stated in *Nadeau* v. *Perkins,* 135 Me. 215, 193 A. 877, where earlier authorities to the same effect are stated. Reliance on it involves the assumption that a jury would be justified in finding that the defendant was proceeding at a speed in excess of the speed limit while passing through the lane between the two lines of cars parked at opposite curbs of the highway. The testimony shows that the car of the grandparents was the one nearest to the point where the defendant entered the park, on the side of the highway on which it was parked, and that the distance from it to the point of entry was about two hundred yards. The grandfather did not state where the defendant's car was when he saw it, which might have been two hundred yards away. He did not claim that he had watched its progress, or that it had not slowed down when it reached his car. It cannot be said that there is more than a scintilla of evidence that the defendant was exceeding the speed limit

when that point was reached. That a scintilla of evidence will not support a verdict was long since declared in this court, in decisions still of authoritative force. *Beaulieu* v. *Portland Company,* 48 Me. 291; *Connor* v. *Giles,* 76 Me. 132; *Nason* v. *West,* 78 Me. 253, 3 A. 911.

In *Beaulieu* v. *Portland Company, supra,* this court quoted the then recent English case of *Cornman* v. *E. C. Railway Co.,* Am. Law Register, 1860, Page 176, wherein it was said:

> " 'It is not enough to say there was *some* evidence. A scintilla of evidence, or a mere surmise that there may have been negligence * * * would not justify * * * leaving the case to the jury. There must be evidence on which the jury might reasonably and properly conclude that there was negligence.' "

To the same effect is the statement in *Connor* v. *Giles, supra,* that.

> "The old rule, that a case must go to the jury if there is a scintilla of evidence, has been almost everywhere exploded. * * * The better and improved rule is, not to see whether there is any evidence, a scintilla, or crumb, dust of the scales, but whether there is any upon which a jury can, in any justifiable view, find for the party producing it, upon whom the burden of proof is imposed."

Again, in *Nason* v. *West, supra,* the court said that while negligence may be proved by:

> "facts from which it may reasonably be inferred that the defendants' negligence caused the injury complained of, * * * a mere scintilla of evidence is not sufficient."

The last statement emphasizes the additional principle of law, established equally with that on which the plaintiffs rely, that the burden resting on one seeking to recover for alleged negligence is to prove not only some act of negligence, but that the act proved contributed in some manner

to the damage for which recovery is sought. *Adams* v. *Richardson,* 134 Me. 109, 182 A. 11. As was said in *Mahan* v. *Hines,* 120 Me. 371, 115 A. 132:

> "When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict."

In this case it might have been proper for a jury, if the issue had been submitted to it, to draw an inference that the motor vehicle driven by the defendant struck the minor plaintiff within the limits of the highway. There is nothing in the record, however, which could support an inference that the minor should have been seen by the defendant at a time when she would have been able to stop her car before striking him, if she had been traveling at a proper speed. There is nothing in the record to support a finding that he was struck by any part of her car, if he was struck by it at all. If so, the logical inference is that he was struck by the right hand side thereof, and, perhaps, that his striking was occasioned by his running against it from a place of concealment between parked cars.

It was argued on behalf of the plaintiffs that one driving an automobile along a highway traversing a public park where children are playing, on plots of grass bordering it, as they were at the pertinent time, should proceed so slowly that he can stop within a few feet "if a child drops into his path from a tree." No authority was cited for the assertion, nor do we believe any could be found. Automobiles should be driven at all times with a degree of care commensurate with attending circumstances, but one driving along such a highway as that here involved is under no duty to anticipate children dropping from trees, or running into his path from between motor vehicles parked along the curbs.

In closing, it should be noted that the grandmother testified not only that the defendant stated after the accident

that she was sorry but did not see the child, which might support an inference that he was struck by her car, but that a sister of the defendant, who was riding with her, stated that she did. If the plaintiffs had believed that the sister saw the child at a time, or in a place, which would support the claim that the defendant was negligent in not seeing him, it seems apparent that they would have called her as a witness and used her testimony. As the parties "upon whom the burden of proof" was imposed, to use the closing words of the quotation from *Connor* v. *Giles, supra,* they elected to rest their cases on evidence which failed entirely to place the minor anywhere except on the grass northerly of the highway, prior to the accident, and under the running-board of an automobile parked on the southerly side thereof, after he was hit. Under such circumstances, the decision in the Trial Court, that verdicts in their favor could not be supported on the evidence presented, was not only proper but inevitable.

Exceptions overruled.

FENTON SHAW

vs.

THE HOME INSURANCE CO.

Aroostook, ss.

PER CURIAM.

This is an action to recover on a policy of fire insurance. The defendant insured the one and one-half story frame building and additions structurally attached, with combustible roof covering, including foundations and all landlord's fixtures thereto while therein or thereon as a part of the building, while used for dwelling purposes only $3,000;

Also

On frame building, including additions structurally attached with non-combustible roof covering and landlord's fixtures thereto and known as Potato House #1 and attached to dwelling #1 by ell $7,000.

Between the time the contracts of insurance were issued and the fire, the plaintiff altered the ell and the barn. The barn became a potato house. The ell was used as a milk separator room, and it was used to store utensils, and wood, and for a shed. It was also used as a garage for plaintiff's automobile and the roof was raised and the west wall was extended. These changes cost at least $3,000; and the plaintiff also used the ell for the storage of spare parts, a drill, a press, and a welding machine.

The plaintiff did not notify the defendant of such remodeling before the fire; but there was no requirement that **required him so to do.** The damages on the ell, if there is to be any recovery at all, are not claimed to be excessive. The question is whether or not there can be any recovery as a matter of law for fire damage to the ell.

The sole question is whether the ell was covered. Was it a question for the jury whether the ell was under the policy structurally attached to the house and used for dwelling house purposes only? That is a permissible interpretation of the contract of insurance and was for the jury to determine.

A standard policy of insurance such as this is prepared by the insurers and should be interpreted most strongly against the defendant. *Barnes* v. *Dirigo Mutual Fire Insurance Co.*, 122 Me. 486; it is a question of fact for the jury. *Giberson* v. *York County Mutual Fire Insurance Co.*, 127 Me. 182. A literal construction of a fire insurance policy is not favored by the courts. *Bragdon* v. *Shapiro*, 146 Me. 83. The words "structurally attached . . . and used for dwelling purposes only" are words of description and not words of prohibition on the use of the building.

The verdict is not against the evidence or weight of evidence.

Motion denied.

George V. Blanchard, for plaintiff.

George B. Barnes, for defendant.

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

EMMA DUBIE*

vs.

MAURICE A. BRANZ D/B/A
THE GUARDIAN FINANCE COMPANY

Cumberland. Opinion, May 4, 1950.

Exceptions. Conversion. Fraud. Rule 21.

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

Any 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 appears below.

Saul Sheriff, for plaintiff.

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

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

NULTY, J. This case is before this court on exceptions to acceptance of report of referees. The action is trover, plea, general issue with brief statement alleging title and

* The Rescript of this case was published by inadvertence at 145 Me. 170. Herewith is published the full text of the court's opinion by Mr. Justice Nulty.

right of possession of the property in question and claiming that said property, which was a diamond ring, was pledged as collateral security for a loan made by the defendant in good faith and that the indebtedness for which said ring was collateral security had not been paid and that said defendant would relinquish possession of said ring upon payment of said indebtedness. The action was referred to referees under Rule of the Superior Court with right of exceptions as to matters of law reserved. The referees reported in favor of the plaintiff. Defendant filed seven objections in writing to the acceptance of the report. The referees' report was accepted and defendant filed exceptions which were allowed by the presiding justice. The written objections filed by the defendant are made a part of the bill of exceptions by reference and defendant is, therefore, properly before this court to be heard on such matters as are put in issue by the written objections filed by him in so far as said objections comply with *Rule 21.* 129 Me. 511, 157 A. 859, *Staples* v. *Littlefield,* 132 Me. 91, 93, 167 A. 171. The report of the referees is specific in its terms and contains the statements of fact upon which the report is based and also contains statements of the legal principles which the referees applied in determining liability and assessing damages.

After the case was docketed in this court an error was discovered in the pleadings and the case was remanded to the Superior Court for correction, 72 A. (2nd) 450, said case to be re-entered in this court in accordance with the opinion.

Rule 21 of the Supreme Judicial and Superior Courts provides:

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

The written objections to the report were as follows:

> 1. There is no evidence in the record to support the conclusion which the Referees reached that immediately after pledging the ring with the defendant Albert F. Allen left for parts unknown and continued search has not disclosed his whereabouts.
>
> 2. There is no evidence to support the conclusion that Albert F. Allen neither advanced or intended to advance any money to the plaintiff to buy oil leases for her or for any other purpose, and that his procurement of her ring from her and its sub-pledge was clearly a fraud.
>
> 3. There is no evidence to support the conclusion that Albert F. Allen was guilty of conversion of the plaintiff's ring.
>
> 4. That the Referees' conclusion that the defendant became liable to the plaintiff for his possession of her ring is contrary to the law.
>
> 5. That the Referees' findings of fact above described are manifestly against the evidence.
>
> 6. That the Referees' findings of fact above described are manifestly against the weight of evidence.
>
> 7. That the Referees' conclusions of law above described are against the law.

Objections 5, 6 and 7 are manifestly insufficient and were properly overruled by the presiding justice. They are not specific, but general, and they cannot be considered. *Throumoulos* v. *First National Bank of Biddeford,* 132 Me. 232, 169 A. 307 and cases cited.

Objection 4 is also too general and the exception based thereon cannot be considered. This 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. *Throumoulos* v. *First National*

Bank of Biddeford, supra, Moores v. *The Inhabitants of the Town of Springfield,* 64 A. (2nd) 569, 573.

Objections 1, 2 and 3 filed by the defendant assert that there was no evidence before the referees to support the particular findings and conclusions of the referees set forth in the above objections. These three objections raise questions of law which under the rule of reference were properly reserved. It is, however, unnecessary to make more than passing mention that this court has many times held that findings of fact by the referees will not be disturbed provided there is any evidence to support the findings. *Staples* v. *Littlefield, supra; Morneault* v. *Boston & Maine R. R. Co.,* 68 A. (2nd) 260. 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.

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 Carrabassett 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. We agree with said ruling, and, such being the case, 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, under the referees' findings, which were correct on the facts, a legal bailee or a pledgee of property for a special purpose and his attempted sub-pledge to the defendant, although the defendant acted in good faith and with reasonable care, as found by the referees, was a nullity and said defendant never acquired any special property or even the legal right of possession from said Allen. It is needless to say that the right of possession of 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 as found by the referees. 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 MEMORIAM

Memorial Exercises before the Law Court at Portland, June 14, 1951, conducted by the Cumberland County Bar Association in commemoration of

HONORABLE GUY HAYDEN STURGIS

The Fifty-second Justice of the Supreme Judicial Court, and its Eighteenth Chief Justice

Born March 3, 1877. Died January 18, 1951.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ., MANSER, CHAPMAN, A.R. JJ.

TRIBUTE BY GOVERNOR FREDERICK G. PAYNE TO THE LATE CHIEF JUSTICE GUY H. STURGIS

There will be those who will speak of the "Chief" from the lawyer's standpoint. It is my wish to speak of him first as my friend and then as a figure in our State Government.

As a man he was all that anyone could ever ask to find in his fellow man—courteous, endlessly patient, charitable in his judgments, helpful, just, yet genial and gracious, of strong affections, considerate and kind. He was popular, but not because he ever worked for popularity as an end in itself. It came to him as a result of his own character and conduct.

There is a familiar quotation about "little nameless unremembered acts of kindness and of love"; but many of Judge Sturgis' acts of kindness will be remembered all through life by the friends for whom he did them.

As a judge he displayed not only those qualities of character which have been mentioned, but a lofty conception of the judicial function, a determination to master the law on each subject that came before him in order that absolute justice might be done, vigilance in preserving the rights of contestants, and at the same time consideration of their feelings.

A young lawyer once told me, "No one was ever needlessly humiliated in his court. He might show me where I was wrong, but he did it in such a way that it could not be resented. He went out of his way to have me understand why I was wrong." He was always a friend to the young lawyer and youth in general.

He had the qualities of mind to master legal technicalities while never once losing sight of the great principles of jurisprudence. His knowledge and sound reasoning was used to maintain a just balance in the relations of men with one another, never permitting the principles of right and justice to be sacrificed either to legal technicalities or the political fads of the moment.

His desire for justice was always clear-headed and practical. He was a realist not a crusader. He was a staunch and firm citizen. His faith in the foundation of our government was strong and he devoted his natural abilities and acquired learning to strengthen that foundation in every way possible.

There is no greater responsibility than that borne by the men and women who make our laws and those who administer them. Our country has been passing through very

great social changes, and those changes have brought a flood of litigations with them. In the resulting turmoil, Judge Sturgis always kept a straight course, neither turning aside to unpractical enthusiasms nor blocking the path of real progress. He had given his oath, as we all do when we take office, to support the Constitution, and he kept that oath. He not only supported the Constitution; he did so wholeheartedly because he believed in it and in the institutions which have developed under it.

His devotion to God and Country was such that it has inspired many to try to follow in his footsteps.

The counsel and advice given to me on many occasions by Judge Sturgis will always be remembered by me. He was my friend, of which I am very proud, and always shall be.

He was a man who so conducted himself and his court that no man could say that equal justice was not received before him.

Judge Sturgis will always be remembered as a man's man, a friend, a loyal American.

FREDERICK G. PAYNE

JACOB H. BERMAN

PRESIDENT CUMBERLAND BAR ASSN.

May it please the Court:

It is an honor, and a privilege, for me to present a tribute to the memory of our late Chief Justice Guy H. Sturgis of the Supreme Judicial Court of the State of Maine. As president of the Cumberland Bar Association, I am honored to speak for the membership that knew and respected an eminent lawyer and judge. As a dear friend of Guy H. Sturgis for almost half a century, it is my personal privilege to pay formal homage to a fine man.

Intimate associations over the years lead a friend to become aware of the true worth of his friend and neighbor. The keenness and excitement of mental combat develop one lawyer's respect for another. The losses and the victories caused by a judge's rulings and decisions bring a lawyer to admire and even love a judge.

When I began the practice of law in Portland, more than four decades ago, Guy Sturgis was already a successful attorney. His talents had become widely known not only in this community but throughout the State of Maine. Since that distant time, when I first hung out my shingle, Guy Sturgis and I saw each other almost daily. Frequency and closeness of contact nurtured mutual respect and affection, and I came to have the greatest admiration for Guy Sturgis as a lawyer and human being.

As many of you know, we were often adversaries in those early days—on different sides of the fence politically, and, as lawyers, representing opposing clients. Many were our arguments, and vigorous and heated. Yet both of us always knew in our hearts that our differences of opinion were

without anger or acrimony, and we recognized that underneath it all lay a bond of mutual respect which united our lives professionally and which no amount of contention could sever. I shall never forget the lesson that I learned in combat with him—that Guy Sturgis was an antagonist worthy of any man's steel.

When Guy Sturgis assumed the high office of judge, he modestly informed us that he intended to study hard and that he would always seek to learn. Throughout his career on the Bench he never forgot these promises. His natural talents, combined with diligent study and research, and tempered by practical wisdom, made of Chief Justice Sturgis one of Maine's great judges and Chief Justices.

Often, eulogies take the form of sonorous, but empty, phrases. If my tribute to Chief Justice Sturgis will have any claim to merit, it will lie in the fact that every word I speak comes from my heart. Others might rise higher in flights of oratory; none will be more sincere in the expression of loss than I.

Two of the best known eulogies in the English language are Lincoln's immortal Gettysburg address and Marc Anthony's oration at the bier of Caesar. Lincoln, with the modesty which characterized all his acts, was guilty of the greatest understatement of all time when he said—"the world will little note nor long remember what we say here." Shakespeare has Marc Anthony launch forth on a false premise—"the evil that men do lives after them; the good is oft interred with their bones." To be sure, this was a clever strategem, to arouse the populace against Caesar's murderers. But artifice does not establish truth. Surely, all of us know that the good in our departed friends and loved ones is what remains engraved upon our hearts; their faults and foibles are as nothing, written upon the sands of the shore and washed away by the waters of time.

I call attention to these classic utterances only to show that the tribute lives on with the memory of the departed; the eulogy becomes part of the picture which history preserves. It behooves us, therefore, to take care lest we give an untrue impression of the man we mourn.

Let us not, then, depict Guy Sturgis as

> "some tall cliff that rears its awful form
> sheer from the depths and midway leaves
> the storm, though round its base the
> lowering clouds are spread, eternal sunshine
> rests upon its head."

Guy Sturgis would have been the last person to wish to be remembered as a composite of all the virtues—a God-like, perfect lawyer and judge for over twenty-five years.

He was not perfect. Guy Sturgis was a very human person, with the usual frailties of human beings. Indeed, it was this humanity, this understanding of men's weaknesses, that made him a great lawyer and a great judge. He had the faculty of searching the souls of men and women brought before him, and this God-given perception enabled him to temper justice with mercy. His fairness was a by-word.

It is an American custom to call lawyers, who possess the serenity, the integrity and the sound judgment required by judicial office, "judge," even though these lawyers have never served on the Bench. People who did not know that Guy Sturgis was a judge, nevertheless called him "judge." He had the judicial mien, the judicial temperament, the judicial mind. As judge, he would have brought honor to any court in this country.

His forthrightness in all things endeared him to all who dealt with him, and won for him friends who were many and staunch. It has been said that a man who has had no enemies has had no friends. Like so many adages, this

is often untrue. It would be hard to believe that Guy Sturgis had any real enemies, but his true and devoted friends were legion.

To be a successful attorney, a justice and Chief Justice of the highest court of a state are time and energy consuming careers. As the years advance, the demands and pressures increase. Yet, however much occupied with the law and with dispensing justice, Guy Sturgis was never too busy to take an active part in the affairs of his municipality, his state and his country. Guy Sturgis loved Portland; he loved Maine; he loved America. Even when circumstances made it impossible for him to accept civic appointments, his sound advice and moral support for any worthy project were always available; his backing added incalculable strength to any cause.

It was his interest in the world and worldly affairs, in his family, his friends, his work and the many other activities which made up his well-rounded life, that preserved his youth and kept him going past the Scriptural limitation of "three score years and ten." He did not retire until he was seventy-one years of age and even when he retired, he retained his status as an active justice—the first active retired Chief Justice in the history of Maine.

If this memorial sounds a strong personal note, it is because few men knew Guy Sturgis as did I, and none felt more deeply than I the loss of his companionship.

I stand at the grave of my friend and grieve. Why do I grieve? Not because he has gone on; he now has gone beyond this vale of tears and grief; I grieve for myself because I have lost a friend; I have lost an associate; I grieve for myself.

But in mourning this truly fine person I am far from alone. The passing of Chief Justice Guy H. Sturgis is a

grievous loss to the profession of law and to the judiciary of Maine.

May these words of mine serve in some small way to express the respect and admiration which Guy Sturgis earned as a lawyer and a judge—and the depth of the feeling of the members of the Bar that we have been deprived of a noble counselor, a profoundly wise man.

HONORABLE CARROLL S. CHAPLIN

May it please the Court:

I have been accorded the honor of representing the Bar of Cumberland County at this Memorial Service and I am grateful for the opportunity of paying tribute to the memory of one who was my intimate friend and for whom I had a sincere affection.

I first became acquainted with Judge Sturgis in the fall of 1904, when I was a law student in the office of Nathan and Henry B. Cleaves and Stephen C. Perry. He was then associated with that firm as counsel in the famous Chandler Will case.

After my admission to the Bar in October, 1908, I frequently sought his advice and in August, 1911, we became associated in the practice of law, which relation continued for twelve years, until his appointment as an Associate Justice of this Court. We served together in the Board of Aldermen of the City of Portland and this political experience led him to seek and obtain membership on the Republican State Committee, where he distinguished himself as an organizer and displayed a high quality of leadership.

In January, 1917, after a strenuous contest for the office of Attorney General, he emerged the victor and for four years devoted himself to the duties of that office, establishing a reputation as an able lawyer and a forceful advocate.

Upon his retirement from the law department of the State, he resumed his office practice and while it could be observed that further combat in the political arena was a luring temptation, his desire to become distinguished in his profession restrained him from seeking further elective of-

fice. He resisted all suggestions in that behalf and waited patiently for that which he most desired, appointment to the Supreme Judicial Court, to which he was named by Governor Baxter on August 14, 1923, and this was the genesis of a long and brilliant career on the bench. After serving seventeen years as an Associate Justice, he was appointed Chief Justice by Governor Barrows on August 8, 1940 and became the eighteenth incumbent of that office, the lot of but few men in the history of this State, and an attainment of which he was justly proud. Having served in that capacity for nearly nine years, he retired on an active status on February 28, 1949.

His judicial career touched the services of seventeen different justices of this court now retired or deceased; Justices Cornish, Hanson, Philbrook, Dunn, Morrill, Wilson, Deasey, Barnes, Bassett, Pattangall, Farrington, Hudson, Manser, Worster, Chapman, Murray and Tompkins, a notable company.

For twenty-six years Judge Sturgis rendered to this State a distinguished service. More than two hundred and fifty published opinions furnish ample proof of that service. These opinions are of uniform excellence, legally sound, clearly and simply expressed and possess a distinctive literary quality. They represent hours of prodigious labor, painstaking and exhaustive research and the selection of appropriate language and apt phrase wherewith to give expression to the conclusions reached, which conclusions will stand as enduring beacons for the guidance of generations of lawyers yet unborn.

The members of this Bar will long remember the kindly assistance and helpful advice which Judge Sturgis gave them in the past. No matter how busy he might be with his own problems, he always cheerfully put them aside when interrupted by someone who sought his help and advice.

I shall never forget the scene which I invariably beheld when I entered his chamber yonder. There he sat, literally buried in an avalanche of books and papers, searching for precedents, revising the draft of an opinion, re-revising it and revising it again. Many here present will recall that picture and regret that it is now but a memory.

Judge Sturgis possessed all of the attributes of an ideal jurist. He was dignified, both in manner and in stature. He was courageous and fearless. He could be stern and caustic when occasion required and if he seemed to wear a cloak of austerity, one needed only to look beneath to find the kind and friendly soul that he really was.

He sought only to do justice and "his grasp on the bow was decision and arrow and hand and eye were one." He adhered to the philosophy of Emerson, that "it is easy in the world to live after the world's opinion, it is easy in solitude to live after our own; but the great man is he who, in the midst of the crowd, keeps with perfect sweetness the independence of solitude."

In the Memorial Services held for Chief Justice Dunn, Chief Justice Sturgis closed his response for the court in words which, in retrospect, may now be said of him.

> "I am confident that, could he speak, he would say to us today that these last years of his life were happy days, filled to overflowing with the contentment that comes to a man who is privileged to live and work in a calling to which he is devoted, to be the recipient of the highest judicial honor within the gift of his State, to have the respect in unstinted measure of all people and to have made a record upon the pages of judicial history in which he might well take pardonable pride."

Judge Sturgis retired just prior to his seventy-second birthday and hopefully looked forward to years of rest and recreation, to be interrupted only when he chose to perform some judicial function. But the years of incessant labor

had taken their toll of strength and when the lethal messenger appeared and beckoned, he found no coward soul, but one who answered:

"I was ever a fighter—so—one fight more,
The best and the last!"

On January 18, 1951, he yielded the fight and passed on and the manner of his passing may be likened unto that of Mr. Valiant - For - Truth, in The Pilgrim's Progress.

"After this, it was noised about that Mr. Valiant - For - Truth was taken with a Summons by the same Post as the other, and had this for a Token that the Summons was true, That his pitcher was broken at the fountain. When he understood it, he called for his Friends, and told them of it. Then said he, I am going to my Father's; and Tho' with great Difficulty I am got hither, yet now I do not repent me of all the Trouble I have been at to arrive where I am. My Marks and Scars I carry with me, My Sword I give to him that shall succeed me in my Pilgrimage, and my Courage and Skill to him that can get it."

CARROLL S. CHAPLIN

HONORABLE JOHN D. CLIFFORD, JR.

May it please the Court:

Thirty-one years ago, many members of the Androscoggin Bar were assembled in the courthouse at our County seat in Auburn. It was the day set for the beginning of the trial of Edgar M. Ward for murder.

The attorneys were all present, their brief cases open on the counsel table; the Judge was on the bench; the prisoner was arraigned; the talesmen were assembled; and, after due inquiry by counsel, the jury was impaneled, and the trial was ready to proceed.

The attorney for the defense was one of the great lawyers of his time, the Honorable Frank A. Morey, the veteran of a thousand legal battles, and one who had been highly successful as a trial lawyer.

In charge of the prosecution was the Attorney General of Maine, the Honorable Guy Hayden Sturgis, a relatively young man, whose record as an able advocate had already been made in this State. The public interest was intense, for the sensational aspects of the case had been widely publicized.

For the State it was a most difficult case to prepare and present, because it was based upon circumstantial evidence, and there appeared to be lacking some important details of proof essential to establish the guilt of the accused. The Attorney General, well appreciating these defects, offered to recommend the acceptance of a plea of guilty of the lesser charge of manslaughter. The defendant, confident of acquittal, summarily rejected this offer.

I can recall, as if it were only yesterday, the consummate skill displayed by Attorney General Sturgis. Fully prepared, with a complete mastery of the facts, he marshaled his witnesses and presented his evidence with rare judgment and ability.

Colorful, courteous and alert, he forged and welded each link in the chain of evidence, and foreclosed any other reasonable conclusion than that of guilt. Relentlessly and adroitly he cross-examined the defense witnesses, and completely shattered the efforts of the defendant to explain away his actions on the night his victim died.

The summation of the Attorney General was logical, fair, and persuasive. Opposing counsel, confronted with insurmountable odds, fought a valiant, but losing battle. Ward was found guilty of murder.

The *splendid* conduct of this trial by Attorney General Sturgis was *but* one more achievement in a career already studded with brilliant triumphs in the field of law.

That was the first time I had the pleasure of meeting Justice Sturgis. I met him often after that; tried cases before him after his elevation to the Supreme Bench; and, as United States Attorney, conferred with him occasionally when confronted with problems I deemed difficult and obscure. His judgment was always sound. He received me, as he received all other lawyers, with consideration and patience.

Every incident that we recall in the life of Justice Sturgis, every courteous act and kindness, every step in his remarkable career, awakens pleasant memories. The Cumberland Bar honors itself in this public expression of esteem, affection, and respect for him.

It is a privilege for me to bring from all the members of the Bar of Androscoggin a tribute to his memory, and their sincere sympathy for the loved ones he left behind. Today, we stand upon the common ground of consecration, and join with you in this memorial, dedicated to one so worthy to receive it.

In honoring the memory of Chief Justice Sturgis, it is my privilege also speaking in behalf of the United States Dis-

trict Court for the District of Maine, to refer to that spirit of cooperation, comity and high regard which has always prevailed between the Courts of Maine and our Federal Court. Justice Sturgis promoted this friendly relationship during his long and notable service as a Justice of this Court.

Just as the artist lives in his work after he is gone, Justice Sturgis lives in his influence upon the jurisprudence of Maine and in the integral part he played in its making.

Upon the three walls of this imposing courtroom hang the portraits of five illustrious men, all Portland lawyers, each of whom rendered outstanding service as a Justice of the Supreme Judicial Court of this State. They typify the essential characteristics which have distinguished the Maine Judiciary from its beginning.

On the side wall, in the center, is the painting of our first Chief Justice Prentiss Mellen, appointed in 1820, the year Maine became a sovereign State, and in whose memory the Maine Bar erected a monument in Portland's Western Cemetery; on his right, Justice Thomas Hawes Haskell, who, like Justice Sturgis, was born in the old historic town of New Gloucester; to Justice Mellen's left the eminent Justice Sewall Cushing Strout; and on the panel of the front wall Justice George Emerson Bird, fondly remembered by the older members of the bar.

On the rear wall is the portrait of one whose career bore marked resemblance to that of the Justice whose memory we honor today. Chief Justice Scott Wilson and Chief Justice Guy H. Sturgis were each prominent in Portland's City government, each rendered conspicuous service as Attorney General of Maine, each, shortly after terminating that service was appointed an Associate Justice of our Supreme Judicial Court, and each was later named Chief Justice.

I know that I voice the sentiments of all here present, and those of the Bench and Bar of Maine, in the hope that

we may see placed in that panel, now vacant, on the front wall, the portrait of our late departed friend who has left for posterity such a *splendid* record of work, most faithfully performed.

If those men could speak to us today, they would urge us to remain steadfast and maintain the ideals and principles which have made America great; to be vigilant in preserving to our people the rights guaranteed them by the Constitution of our State and Nation; to stand firm against intolerance and, in times of internal conflict and dangers from abroad, to approach with calmness and courage, free from partisanship, the solution of the problems of the day; that our Nation, united and strong, may long endure. These were the principles by which Chief Justice Sturgis lived.

In the years that lie ahead, when fame and interest will have somewhat dimmed, it can be truly said of Chief Justice Guy H. Sturgis that his reputation for honesty, loyalty, and high character will be always preserved, and that his sterling excellence as a man, a lawyer, and an upright Judge, will never fade.

JOHN D. CLIFFORD, JR.

ADDRESS OF EDWARD W. ATWOOD,
PRESIDENT OF MAINE STATE BAR ASSOCIATION
AT MEMORIAL SERVICES FOR THE
HONORABLE GUY H. STURGIS,
LATE CHIEF JUSTICE
OF THE SUPREME JUDICIAL COURT OF MAINE

May it please the Court:

We are gathered in this room to do honor to Guy H. Sturgis who here did honor to his profession, to this bar and to the bench which he graced, first as an associate justice and later as chief justice. This courtroom is a most appropriate place for these services, for it is here, on the very bench before us, that most of us remember him. Without his presence this chamber will never seem quite the same to our generation.

After twenty-three years of practice, having attained his rank among the leaders of the bar, Judge Sturgis accepted an appointment to the Supreme Judicial Court of Maine in the year 1923. That recognition of his fitness to hold high judicial office was by the Honorable Percival P. Baxter, then Governor of Maine, who, together with Governor Lewis O. Barrows who elevated him to the Chief Justiceship, have joined with us here today to honor him. My own acquaintance with him began shortly before his elevation to the bench. I was then a fledgling at the bar and as such was an object of one of his major interests, which he carried with him throughout his judicial career, the welfare and advancement of the younger members of the bar.

He was a questioning judge, alert and active of mind. His conduct on the bench during the trial of a cause before

him at *nisi prius* or during arguments at law terms was firm, dignified, courteous and scholarly. There were indications that he missed the strife of advocacy, for at times he would put counsel on their metal by engaging them in colloquy on close points, but never unfairly, and almost without exception the counsel so engaged were those experienced practitioners whom he considered full worthy of his steel. In this regard he was most considerate of the younger members of the bar and not only consciously avoided so far as he could any word or act which would make their tasks more difficult but to the contrary used every proper means to graciously assist and guide them in the presentation of their causes. Throughout he evidenced a genuine respect for his office which enabled him with dignity to repress effectively any improper practices by those appearing in his court.

The bar association of this state, for which I speak today, numbers among its members companions of his youth, associates of his mature life, admirers of his professional and judicial attainments and many, many friends who respected and loved him for himself as a good and true man; a man of action who made his mission in life the doing of justice and who, in performing that mission, exemplified Disraeli's philosophy that "justice is truth in action."

BY HON. ROSCOE H. HUPPER

If the Court please:

It was indeed a great privilege to me to be permitted to attend here to take part in this Memorial Service for our distinguished friend. I come here not as a member of any Bar but as a representative of Hebron Academy, that wonderful institution perched on the Oxford Hills ever since 1804, with which Judge Sturgis was connected for many years in the capacity of a Trustee, ultimately becoming President of the Trustees, which office he held until about two years ago when he relinquished it on account of what he deemed to be receding health. Nevertheless, he continued on as a Trustee up to the very date of his death on January 18th last.

At the annual meeting of the Trustees held at the Academy on June 8th, a resolution of sorrow and respect was duly passed, including a direction to myself, which I deemed a very great honor, to appear here as the President of the Trustees succeeding Judge Sturgis, to say just a word in his honor in this Memorial Service.

Not being a member of the Maine Bar, which I deem to be most unfortunate, and not having had great contact with Judge Sturgis except an irregular and occasional meeting of the Trustees, I nevertheless got myself and was able to pass on to the various others my own estimate of his great capabilities as a lawyer. When two lawyers get together on matters not definitely concerning the law, they get a great deal out of their mutual contact, and in that way I met Judge Sturgis and became greatly blessed. He was a man who spoke always from the heart and straight from the shoulder with every attitude and performance of his. He was a dynamic personality, a man of decision, a well-read lawyer; as well-read lawyer, I think, as I ever came into

contact with, and that feeling that I had of Judge Sturgis' legal capabilities and performances, I think, was accentuated by his great skill of expression. He was always forceful, clear, direct, blunt if you please, but nobody ever had the least doubt, according to my experience and information, what Judge Sturgis meant when he spoke; and that is a very great considerable attribute.

Hebron Academy fell into hard days in 1943, so hard that hard decisions became necessary on the part of the Trustees. It became impossible, practically speaking, to continue the school at that time, and a break at that time after the school had been established and running well and efficiently ever since 1804 was something to be mourned. Judge Sturgis, as President of the Trustees, did not falter one moment. The facts were there; the student body had been cut down by war conditions; it was impossible to continue without a deficit which would have been suicidal. Judge Sturgis stated his views so clearly, so promptly and effectively that not a single other Trustee could have a moment's doubt that the decision had been directed by Judge Sturgis. He carried through a proposition that that Academy must suspend, with incalculable benefits, may I say.

You summarize most men in their achievements in just a few words, and, generally speaking, the fewer the better in simple words. We have heard here from many of our friends his high qualities as a Judge and a lawyer in language that will adorn the Maine Reports; skilfully worded eulogies of our great friend. But if you will permit me, I will give a summation of Judge Sturgis taken from Holy Writ: and there is no better place to find it about any man, and he deserved it if ever any man did, as David did, of whom it is said at the very end of the Seventy-eighth Psalm, "he fed them according to the integrity of his heart; and guided them by the skilfulness of his hands."

HONORABLE DONALD W. WEBBER

May it please the Court:

As I rose to address the jury in my first case in Caribou, Maine in September, 1948, my knees trembled and the papers shook violently in my hand. But at that moment there flashed through my mind the reassuring words which had been spoken to me only a few weeks before during my briefing by our beloved late Chief Justice. I recalled that he had said to me, "Don, I am going to switch things around and send you to Caribou for your first term. Caribou is a good place to start. I had my first term there and I know. You will be frightened," he said; "you have tried a lot of cases but you will be scared to death. Everyone is. I was. I remember when I got up to charge my first jury, I had tried a lot of cases — I had been Attorney General — but for a moment I didn't know whether my legs would hold me, and the papers shook so I could hardly read. But that all passed and it will with you." Comforting words, those, to come to the mind of a frightened youngster on the court in a moment of self doubt and tension. Words spoken by a man who, as he presided over the deliberations of the Law Court, had always seemed the very epitome of self confidence and poise. Somehow the thought that in this same rustic courtroom, amid similar circumstances, he, whom I so much admired and respected, had been forced to wrestle with the same inner turmoil which beset me, gave me courage and made me feel less alone. I addressed the jury—calm descended upon me—I sat down and courteous members of the bar offered no exceptions. Guy Sturgis and I had successfully completed my first jury charge. I have opened my brief remarks with this anecdote because I am speaking for the Superior Court and I strongly suspect that each member of that Court who served under him was likewise fortified by the wisdom and advice of the "Chief." I

know that I went to that briefing conference with almost an inferiority complex—tortured by self doubt, and wondering why I had ever forsaken the comparative comfort of the practice of law. Somehow the "Chief" seemed to sense all that was in my heart. He devoted nearly an entire afternoon out of his busy life to saying just the right things. I went away home ready to tackle the job, ready to work and ready to make honest mistakes and be corrected above. He gave me an injection of intestinal fortitude which I now believe had some qualities of permanence. No man could owe another man a greater personal debt.

Two men had a great impact upon my life, my father and Hon. Guy H. Sturgis. They lived their lives in the same era and upon a somewhat similar pattern, and they passed together over the horizon on the same day. They attended Edward Little High School at the same time where, both being small, agile, smart and full of mischief, they did little to bring joy into the lives of their teachers. It would have been hard to obtain a vote of confidence that one of these imps of Satan would some day be Chief Justice of our Maine Court and the other a reasonably successful attorney. They attended Bowdoin at the same time and to provide necessary funds they bell-hopped at Poland Spring Hotel and roomed together. They never tired of reminding each other of certain joint conspiracies and nefarious undertakings to break and enter Hiram Ricker's refrigerator in the nighttime with resultant loss of chicken and other edible merchandise. It may seem sadly out of place to introduce humor into a Memorial Exercise but no one who knew and loved the late "Chief" as I did can think of him apart from his unfailing wit and humor. It is not surprising that the impish qualities of youth gave way to a somewhat conservative maturity mixed with a delightful sense of humor. Both of these men loved boys and young men. The "Chief" was never too busy to help a young lawyer when that young man was willing to work once he saw the direction his thinking

must take. Some mistook the apparent austerity with which he presided in the Law Court for coldness and deemed him unapproachable. Never were they more mistaken. Perhaps I was more fortunate than some, for as I rose to address the Law Court on my first argument, one of the Associate Justices apparently asked Judge Sturgis in a whisper who I was. In a stage whisper which reverberated off the four walls, he replied, "Why, don't you know him? That's Georgie Webber's boy." Somehow there was a flood of warmth in the courtroom at that moment, at least as far as I was concerned.

The Chief knew the problems of the Superior Court and he was prepared to help us but he also expected us to help ourselves. On one of my first terms a problem arose in the mechanics of running the court. I scanned the Statutes and found them silent. I called the "Chief" and he advised me in very plain English that I must run my court—that he did not know the answer any more than I did, and if I used common sense, I would no doubt be as right as anyone could be. I issued my orders and everyone accepted them as though they could not possibly be fallible. How wise he was and how well he knew people!

No Chief Justice ever took more seriously the administrative functions which devolved upon him as head of the Court. Unwilling to shirk in the slightest degree his duties as an interpreter of the law and a writer of opinions, he imposed upon himself additional hours of labor in order to administer the functions of the Court in the meticulous manner which he deemed essential. Which of us has not had instruction at his hand in the gentle art of preparing an expense account in form and substance acceptable to the State of Maine? And which of us is not well aware that if all public servants dealt with the public dollar as conscientiously as he did, there would be less talk of unbalanced budgets and deficit spending.

The Hon. Guy H. Sturgis brought to his task of leadership over both the Superior and Supreme Judicial Courts the simplicity and reliance on fundamental truths growing out of a boyhood spent in a small New England community, the democracy of a public school education, the awareness of the better things of life and a knowledge of the art of living fostered in him by a small liberal arts college, a keen analytical legal mind in the best tradition of a great law school, and lastly a personality, a wit, a sense of fairness and justice which could not be created by environment but with which he was fortunately blessed by his Maker.

In dealing with the day to day problems of the Superior Court, each of its justices must be able to find quickly and to apply intelligently and promptly the law as set forth in the written opinions of our Law Court. As a pleasant mental exercise and as a preparation for these remarks, I scanned many of the opinions written by Mr. Justice Sturgis. He made his first appearance as an opinion writer in the case of *Utterstrom* v. *Kidder,* 124 Me. 10, in which he reviewed and reaffirmed the rights of minors in contract cases. It is significant that in his first opinion he indicated the style of legal writing which he would consistently employ — plain, concise and logical with a clearcut reduction of the issues — unencumbered with the flights of rhetoric or grammatical embroidery.

In *State* v. *Buckley,* 125 Me. 301, he set forth a clear exposition of that problem which has harassed law school students and jurists alike, the difference between burden of proof and burden of evidence or explanation.

Of necessity, his agile mind ranged the whole legal field, with results always reasonable, always practical, and always readily understandable by the lone man at *nisi prius* with five minutes at his disposal before he must rule.

With Volume 126 of the Maine Reports he had become a prolific opinion writer and remained so until his retirement.

All but one of the present members of the Superior Court served under him as Chief Justice. In order that I might speak more truly for the Superior Court, I requested all those who served under him as Chief Justice to send me a brief comment of their own. Because of illness, one of our number was unable to participate, but from the others I have these comments.

Mr. Justice Clarke says of his old friend,

> "It was years ago and while Judge Sturgis was actively interested in and about our Great and General Court that I was first privileged to meet him and to form an acquaintance that as the years passed resolved itself into an enduring friendship. His stalwart appearance, outstanding ability and forceful handling of the subject under consideration coupled with his kindly and charitable attitude toward those who did not always agree with him was indeed an inspiration.
>
> The warmth of his greeting whenever I had opportunity to drop into chambers, augmented by his thoughtful suggestion and timely advice, dealt in a manner that put one at ease, served to dignify an already close friendship to a level of a fatherly approach.
>
> Thus down the years my late Chief whom I so deeply admired seemed none less than a father to me."

And this word of appreciation from Mr. Justice Sullivan,

> "My recollection of Chief Justice Sturgis will ever be twofold. He was my exalted friend. He was the jurist. His friendship was warm, loyal and rugged. It was lusty. It was a gift you enjoyed heartily and, in delicacy, cherished, but which must remain for us, its beneficiaries, a personal boon.

As Chief Justice Guy H. Sturgis merits and possesses a station with any known to me through more than thirty years of observation. That is not euphemy. He was an indefatigable worker and an inexorable perfectionist. Jurisprudence was his obsession. By native ability he was gifted with superior faculties. He loved his vocation passionately. Quite animated and almost brusque of disposition he nevertheless tempered his natural ardor in his decisions and achieved a uniformly substantial addition to our reported law. What was more to his eternal credit as a judge he was detachedly just. His own true words are more eloquent in that regard than I can ever hope to be. In one of our last colloquies, he said "I have been criticized, as have all human beings, at some time or another for many asserted faults but no one ever said that Guy Sturgis was not fair." There could be no greater encomium for any judge."

Mr. Justice Sewall has this to say of his one time fellow member of the bar, and later and for many years his Chief:

"I have known Justice Sturgis for the greater part of my active life as an attorney and after he went on the bench, I had the pleasure of trying several cases before him. He was always most fair and I think some of the charges that he gave were as good as I have ever heard. Then when the time came that I myself went on the bench, I always found Justice Sturgis ready to counsel and aid in every way possible. Many times I have sought his counsel and advice regarding matters and he would ever put aside his other work and give me all the time necessary to straighten out my problems.

Whenever possible I would call on Judge Sturgis in his office and many chats we have had which have been of great interest and benefit to me.

He gave years of service to the bench, years which I know he enjoyed himself, and years which added dignity and luster to the Court.

Our senior Justice, the Hon. Albert Beliveau, adds this word:

> "I knew the late Chief Justice Sturgis from the time he was appointed to the Bench, and by reputation long before that. It so happened that when he was on the Circuit, that he held court in Oxford quite frequently, and in those days I had occasion to try before him very often. His knowledge of the law and his striking appearance made him an ideal presiding justice. He was exacting but always fair, and exceedingly accommodating and helpful whenever possible. From that I gained experience which, I believe, has been of untold value to me ever since. From 1935 until his retirement, our contacts were more intimate and more frequent. His treatment, his consideration, his thoughtfulness and his valuable help and advice made my work much easier and more pleasant. While the favors I asked of him were few, they were always granted. For that help, I have been and always will be grateful. His retirement, in my opinion, was a serious loss to the Bench and Bar as well as to the State. His death was a blow to his friends who had hoped that he might live many more years and enjoy to the utmost that rest and peace which he had so well earned and which he so richly deserved. I have and shall miss him."

Now, in conclusion, we, the several Justices of the Superior Court, take our final leave of our friend and leader. We know not what form immortality may take, but in his case, at least, there will be immortality upon this earth and among men, not only among us mortal few who, day by day, will be reminded of him and his wisdom and good counsel, but as long as the printed page shall endure and be renewed, and men who follow us shall read his words and think well and wisely because he thought well and wisely. So shall that brave spirit long endure.

DONALD W. WEBBER

RESOLUTIONS OF THE CUMBERLAND BAR ASSOCIATION

"Let no noble man pass without due honor."

We gather today for this period of meditation to honor the memory of a brother who endeared himself to all the people of his native State, and who won the affection of every member of this bar. With this conferees, he planted the seeds of justice, and cultivated the holy ground. Wherefore by their fruits, ye shall know them.

RESOLVED: That Chief Justice Guy H. Sturgis crowned his career by mounting guard over the rights of every individual, whatever his national origin or his religious beliefs. We shall remember him, as a lovable companion, an eminent lawgiver, an apostle of liberty, and a Christian gentleman. He fulfilled his appointed mission *summa cum laude.* In the deep wells of our hearts we share the grief of his bereaved family.

We note with gratification the presence of those who come to do reverence to his memory,—his beloved associates on the Bench, Justices of our Superior Court, brethren from all parts of Maine, and old neighbors from the little town in Cumberland County where Guy Sturgis first saw the light of day. When we take counsel of his allegiance to high principles, when we dwell upon the good life he gave us to live by, a life with malice toward none and with charity toward all, we can join in the triumphant cry of Paul to the Corinthians, "O death, where is thy sting? O grave, where is thy victory?"

RESOLVED: That we hold high the banner of truth that he gave us in trust. His sterling character is engraved upon our memories. We take pride and find consolation in the knowledge that today's memorials will form a permanent biography of his life. They are not just lip service; they are the heart throbs of friends.

Monuments of stone will crumble to dust one day, but the book containing this litany of praise will be read as long as the English language shall live. When the 146th Maine Report is placed in the law libraries of the 48 States, the name and fame of Justice Guy H. Sturgis will grow greater, and will spread from North to South and from East to West as the years roll by. We give and bequeath these golden memorials to future generations of citizens for their exaltation and profit, and we especially give and bequeath them, as a rich heritage, to future members of this bar who are yet unborn.

RESOLVED: That in the Good Friday of our sorrow, the precious memory of our beloved brother is the promise that Easter lies just beyond the horizon. It is our fondest hope that the tender words spoken here will bring him sweet dreams. The doctrine of his life, with its emphasis upon Christian ethics, gives birth to spiritual reflection. Ever, throughout the voyage of life, our captain steered a straight course, and when his ship came in it touched the shining shore.

We only know that he has gone to his reward. We cannot push ajar the gates and see within, but we can believe. We believe that the door to one of the many mansions was opened for him. We believe that he heard the Voice, told of in the fourteenth chapter of Matthew, a Voice that said, "It is I; be not afraid."

In our daily petition to the Throne of Mercy, we shall offer up the common prayer: May the good Lord bless and keep him, till we meet again.

Requiescat in pace.

JAMES H. McCANN
SILAS JACOBSON
HARRY C. LIBBY

CHIEF JUSTICE HAROLD H. MURCHIE RESPONDED FOR THE SUPREME JUDICIAL COURT

Members of the Bar — and of the Memorial Committee:

Your Memorials and Resolutions, eulogistic though they were, constitute no greater encomium upon GUY HAYDEN STURGIS, as a man and as a jurist, than his record richly merits. Friendly, agreeable and companionable, in private life, he held the scales of justice, in public life, evenly, impartially and fearlessly, during all the years of his service on the Bench. Living cleanly, and with serious purpose, from childhood, his accomplishments must inspire others to emulate his example.

His judicial career, as the fifty-second Justice appointed to this Court, and its eighteenth Chief Justice, placed him among those who had rendered outstanding service to the State of Maine, when he resigned the latter office, a little less than two and a half years ago. He would have been considered exceptional, as a jurist, if he had retired to well-earned rest, at that time. Instead, moved, without doubt, by a sense of duty, he accepted appointment as an Active Retired Justice, and continued to serve the State. Duty was ever uppermost in his mind.

You have dealt, as you should, with his judicial career, his public service before his appointment to the Bench, and his life and character. Your emphasis on the latter, apparent in all that you have said, demonstrates that with you, as with us, it is the personal loss suffered in his passing, rather than the public one, which demands attention, and expression, at this time. Great as the public loss was, the knowledge that it was inevitable, and approaching with increasing speed, as time passed, served as something in the nature of preparation for the shock which came with the definite, final news. For the personal loss, there could be no preparation. The truism, "While there's life, there's

hope," ruled his family, and his friends, to the very end. Among the latter, we of the Bench are proud to class ourselves.

It would be futile for one not possessed, as I am not, of the heart of a poet, or the power of expression of an orator, to attempt to improve on the portrayal of life, character and attainments of GUY HAYDEN STURGIS, carried in your addresses and resolutions. I hope, however, that it is not inappropriate for me to make a few references to his personality, and his judicial career, as they appeared to those associated with him in the work to which he devoted the major part of his adult life. There, more effectively than anywhere else, perhaps, the superlative nature of his personal qualities and his great judicial capacity were displayed to the full.

The association which comes in hearing and analyzing arguments concerning the rights of litigants, and conferring with reference thereto, in the earnest endeavor to award exact justice to each, as far as humanly possible, and on principles that will prove enduring, is one which produces true friendships, for those endowed with personal qualities attractive to others. Such was our association with CHIEF JUSTICE STURGIS, for varying periods of time. Such were the qualities with which he was blessed, in generous measure. Individually, we appreciated his friendship, and will cherish the memory of it. Collectively, we value his counsel, and realize that it will be sorely missed. Unanimously, we concur most heartily in all the sentiments you have expressed, and join in the homage these exercises represent.

In the field of his judicial work you have depicted GUY HAYDEN STURGIS, with great accuracy, as he appeared to the Bar, and to the public, in the open court room. There he conducted *nisi prius* terms, with and without a jury, for

six years and a quarter, and handled equity and referred cases for more than twenty-seven years, sitting on, or presiding over, the Law Court, for more than twenty-five of them. What he did in the open court room, without more, is ample to justify your appraisal of him as a jurist. There, he demonstrated, adequately, his possession of the three attributes of an ideal judge, as declared by Rufus Choate, an approximate century ago—learning, integrity, and public confidence therein. The point we wish to make is that confirmation of all you saw was found in his work, and the manner in which he conducted it, where it was not your privilege to observe him.

Much judicial work, in an appellate court, is done at the conference table, where those charged with the final decision of litigated cases meet many problems incident thereto, not apparent to the Bar and to the public. There, day after day, and term after term, the foundations are laid for making, and justifying, decisions, on the basis of precedent, when it is available, or logic, when it is not. There, discussions are conducted, about principles of law and procedure, and about the power and authority vested in the Court, and the limitations thereon, which are never published, or publicized. There, more preeminently even than in the open court room, GUY HAYDEN STURGIS displayed his great range of knowledge in law. I should add, also, that his every action there supported all you have said with reference thereto, and more.

The published opinions of this Court include more than two hundred and fifty written by GUY HAYDEN STURGIS, as Justice and Chief Justice. They establish, fully, the juristic competence you have extolled. They fall far short, nevertheless, of demonstrating the full extent of his contribution to the jurisprudence of our State. Any attempt to ascertain that requires consideration of all the cases in which he participated as a member of the Law

Court, viewed in the light of knowledge which could only be possessed by those participating with him. Reference to his own opinions discloses the meticulous care with which he gave attention to every pertinent principle of law and question of fact, when charged with the responsibility of speaking for the Court. That is fully known, to the Bar, and to the public. What we, of the Bench, know, and we, alone, is that he was equally painstaking when dealing with an opinion to be published in the name of another. He never attempted to dictate a choice of words, but was always insistent that no semblance of any material aspect of law or fact should be overlooked. His concurrence in an opinion carried complete assurance that every issue which should be mentioned had been covered, accurately and adequately.

During the more than twenty-five years of the service of GUY HAYDEN STURGIS on the Law Court, he concurred, with five exceptions, in every opinion deciding a case on which he sat. When he could not concur, he noted his non-concurrence, or dissent, or that while he deemed the result proper, he could not subscribe to everything said in reaching it, without more. He never wrote a separate opinion, defining an individual position. When one considers the great number of cases decided in his time, and the ratio of five thereto, it does not seem too much to say, from a practical viewpoint, that all the law declared or affirmed in this Court, over a quarter of a century, must have been in strict accordance with his personal concept of the demands of right and justice.

As was to be expected of one of his capacity, GUY HAYDEN STURGIS, as a jurist, formed his judgments, slowly and carefully, after full consideration of all the law and facts involved. He adhered, firmly, to every judgment so made, but was not influenced in doing so by either stubbornness or pride of opinion . It was ever possible to convince

him that his position was erroneous, if it was contrary to established precedent, or convincing logic. Under such circumstances, he yielded, always, with exceeding grace.

Confining himself, still, to the facilities for observation available only to the Bench, I must refer, before closing, to the field of administrative work, enforced on the Chief Justice of this Court by that provision of our statute law which says that he is the "head of the judicial department of the state." The duties incident thereto are time-consuming. They must be performed promptly. They interrupt the even flow of Law Court work. They can be annoying. They were handled, at all times, by CHIEF JUSTICE STURGIS, with thoroughness, efficiency and despatch, despite the complication of failing health, which plagued him for many months in the final years of his responsibility therefor.

In supplementing the observations of the Bar, and the public, of GUY HAYDEN STURGIS, as a jurist, I have not intended to minimize in any way the undoubted fact that his fame, as such, must ever rest in the written judgments which bear his name. Nothing said here can increase it, or diminish it. It is not your purpose, or ours, to do either. You realize, as we do, that all who read those judgments must be convinced of his great stature, as a jurist, and that all who knew him, as a man, must have discerned his great personal worth. The purpose you, and we, serve, in conducting these exercises, is to record, for posterity, the fact that the eminence of his judicial standing and the superlative nature of his personal qualities were realized in his own time.

That that time has ended, we all lament. We must be grateful, however, that it extended, as it did, beyond the scriptural "three score years and ten." We must be even more so, that we were privileged to live with him, to work

with him, to know him. Our loss, that of the Bench, the Bar, and the public, great as it was, cannot be compared with that of his family, which has had a second shock, more recently, in the death of his oldest son. We grieve for its members. Words we know, cannot alleviate their sorrow, but we hope it may be proper for us to urge them to consider, as trifling consolation, the pride they must feel in the public and private life of their family head, and in the general recognition of the outstanding place he occupied in the life of his time. Would that I might express, adequately, the measure of our sympathy. I cannot. I can but assure them that it surpasses expression.

It is a sad duty to pronounce the closing words of farewell, in services such as these, conducted to commemorate a true and valued friend. Such, GUY HAYDEN STURGIS was, to me, to each of us, and to all of you. Rich recollections of him will be fresh in the minds of all of us, while personal memory lasts. The span of years that will represent, even for the youngest among us, is nothing by reference to futurity. It is for the generations to come that we have spoken today of the fullness and excellence of his public and private life, that a record thereof may be preserved as an example for youth. For that purpose, it is ordered that your Memorials and Resolutions be spread upon the records of the Court, and that a copy of the Resolutions be sent to the family.

In further respect to the memory of CHIEF JUSTICE STURGIS, as he will ever be known, hereafter, the Court will adjourn for the day.

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AMENDMENTS

See Brokers, *Bartlett* v. *Chisholm et al.*, 206.

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See Equity, *Wolf et al.* v. *Jordan Co.*, 374.
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See Sentence, *State* v. *McClay*, 104.

ARSON

See Criminal Law, *State* v. *Levesque*, 351.

ASSUMPSIT

On motion for a new trial the evidence with all proper inferences drawn therefrom is to be taken in the light most favorable to the jury's findings and the verdict stands unless manifestly wrong.

Where the terms of an employment agreement set forth no standard sufficiently certain to guide the fact finder in determining what the bonus or extra compensation should be, the agreement is too indefinite to permit recovery thereon.

A jury may properly render a verdict under a *quantum meruit* count for the value of services rendered upon an agreement intended by both parties to provide a salary plus a bonus even though the terms of the agreement are too indefinite to permit recovery of a bonus or extra compensation as such.

A jury may properly be instructed in substance that the promise of an indefinite payment in addition to a definite wage, though unenforceable as made, may be significant as rebutting any understanding that the definite wage was intended to liquidate the value of services rendered.

There is no error where the presiding justice, in directing the jury that it could not find upon the *quantum meruit* count "except that you believe the story or contention of the defendant," used the word "contention" to mean story or version of the agreement presented by the defendant and not the defendant's theory of the case.

Bragdon v. *Shapiro*, 83.

See Deceit, *Coffin* v. *Dodge*, 3.
See Taxation, *McDougal* v. *Hunt*, 10.

ATTEMPT

See Intoxicating Liquor, *State* v. *Sullivan*, 381.

BAILMENTS

It is only when a justice finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence that there is error of law.

Ordinarily in the absence of facts to the contrary an owner of an automobile has the duty to take delivery at the garage or shop where it was deposited within a reasonable time after notice that repairs have been completed.

Dingley et al. v. *Dostie*, 195.

BANKRUPTCY

See Bills and Notes, *First Nat'l Bank* v. *Morong et al.*, 430.

BILLS AND NOTES

The express mandate of R. S., 1944, Chap. 100, Sec. 74 permits a creditor holding a claim against a bankrupt and some other or others, who has an action pending against all of them, to discontinue against the bankrupt in order to obtain a speedy judgment against his solvent debtors.

An antecedent or pre-existing debt constitutes value for the execution of a promissory note.

The one raising the issue of fraud has the burden of establishing it by clear and convincing proof.

First National Bank v. *Morong et al.*, 430.

BILL OF PARTICULARS

See Evidence, *State* v. *Hume*, 129.

BONDS

See Poor Debtors, *Berticelli, Admrx.* v. *Huard et al.*, 151.

BONUS

See Assumpsit, *Bragdon* v. *Shapiro*, 83.

BOUNDARIES

Findings of fact by a justice sitting without a jury so long as they find support in evidence are final.

When land conveyed is bounded on a highway, it extends to the center of the highway; when it is bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the center of such way.

Richardson v. *Richardson*, 145.

BROKERS

Under R. S., 1944, Chap. 75, Sec. 7, one cannot recover a real estate commission in the absence of an allegation that he was a duly licensed real estate broker at the time the alleged cause of action arose.

The allegation required by statute must appear of record to perfect jurisdiction.

Neither the parties nor the court can waive the provisions of the statute which defines and limits the plaintiff's right to bring and maintain his action.

Bartlett v. *Chisholm et al.*, 206.

BURDEN OF PROOF

See Wills, *Heath et al., Applts.*, 229.

CHATTEL MORTGAGES

A chattel mortgage can be given only of chattels actually in existence and actually belonging, or potentially belonging, to the mortgagor and unless a case comes within certain recognized exceptions, statutory or otherwise, a mortgagor can not mortgage property that he does not own.

At common law there must be some provision in the mortgage and some new act sufficient to pass title to after-acquired property.
Beal v. *Universal C. I. T.*, 437.

CONDITIONAL SALES

See Chattel Mortgages, *Beal* v. *Universal C. I. T.*, 437.

CONSTITUTION CONSTRUED

Constitution of Maine, Art. I, Sec. 6
State v. *McClay*, 104
Constitution of Maine, Art. I, Sec. 6
Gendron v. *Burnham*, 387
Constitution of Maine, Art. I, Sec. 8
State v. *Lawrence*, 360
Constitution of Maine, Art. I, Sec. 11
Baxter v. *Waterville Sewerage Dist.*, 211
Constitution of Maine, Art. IV, Part III, Sec. 1
Baxter v. *Waterville Sewerage Dist.*, 211
Constitution of Maine, Art. IV, Sec. 14
Opinion of Justices, 316
Constitution of Maine, Art. IX, Sec. 8
Opinion of Justices, 239
Constitution of Maine, Art. IX, Sec. 14
Opinion of Justices, 183
Constitution of Maine, Art. IX, Sec. 15
Opinion of Justices, 295
Constitution of Maine, Amend., Art. XIV
Opinion of Justices, 316
Constitution of Maine, Amend., Art. XXXI
LaFleur v. *Frost et al.*, 270
Constitution of Maine, Amend., Art. LXII
Opinion of Justices, 249

CONSTITUTIONAL LAW

Art. I, Sec. 6 of the Constitution of Maine and the Fifth Amendment to the Constitution of the United States preserve the right of a witness against self incrimination and are so similar in nature and identical in purpose that precedent in respect to one may well serve as precedent for the other.

A witness should be *fully informed of his legal rights* when called upon or admitted to testify as a witness in a matter in which his guilt is involved.

A witness is protected not only from direct disclosures of guilt but from being compelled to disclose the circumstances of his offense, the

DAMAGES

DECEIT

The Elements in deceit are (1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity and (4) made with the intention that it shall be acted upon and (5) acted upon with damage. In addition to these elements it must also be proved that the plaintiff (6) relied upon the representations (7) was induced to act upon them and (8) did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity.

Whether a false representation is material is a question of law.

The misrepresentation must be of a past or present fact and not of a future happening or expression of opinion.

Deceit cannot be substituted for an action of assumpsit.

Coffin v. *Dodge*, 3.

DECLARATORY JUDGMENTS

DILATORY PLEAS

DIRECTED VERDICT

EASEMENTS

EQUITY

In an equity appeal the Law Court may affirm, reverse, or modify the decree of the court below or remand for further proceedings. (R. S., 1944, Chap. 95, Sec. 21.)

An equity appeal is heard anew on the record, but the findings 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 clearly wrong.

When a cause of action is capable of being heard and determined in equity on the jurisdictional ground of equitable relief sought, and it appears from the evidence or the lack of sufficient proof, that relief in equity should not be granted, the bill should be dismissed without prejudice.

There is a presumption against fraud.

A final decree in equity of a bill "dismissed" may be *res judicata* and "dismissal" is distinguished from "dismissed without prejudice."

Wolf et al. v. *Jordan Co.*, 374.

ERROR

See Record, *Bubar* v. *Sinclair*, 155.

ESCAPE

See Sentence, *Smith* v. *Lovell*, 63.

ESTOPPEL

See Res Adjudicata, *Bray* v. *Spencer*, 416.

EVIDENCE

R. S., 1944, Chap. 100, Sec. 133, a statute that affects the "shop book rule," is applicable only to entries that fairly may be considered an "account."

Whether a witness called as an "expert" possesses necessary qualifications is a preliminary question for the court and the decision is conclusive unless is clearly appears that the evidence was not justified or that it was based upon some error in the law.

The admissibility of a letter or other evidence containing an offer to compromise or settle a pending claim depends upon intention. An offer to compromise a claim, or to purchase one's peace, cannot be shown to prove liability. If he intends an admission of liability, coupled with an endeavor to settle such liability then it is admissible to prove such liability. The court must in its discretion determine the preliminary question of intent.

Hunter v. *Totman*, 259.

Granting of continuances or mistrials is discretionary and the chief tests as to what is a proper exercise of judicial discretion is whether it is in furtherance of justice and the right of exception arises only where there is a clear abuse of discretion.

The order in which testimony is introduced is within the discretion of the presiding justice.

Testimony of a deputy sheriff relating to a "break" other than that for which the respondent was being tried may be admissible as one event in a chain of circumstances and for the purpose of confirming testimony expected to be given by an accomplice and is not prejudicial where it is presented with the understanding that the guilt or innocence of the respondent in such other "break" is not in issue and the rights of the respondent are fully protected by the charge of the presiding justice, to which no exceptions were taken.

The accused in a criminal case at common law is not entitled as a matter of right to a bill of particulars. The ordering of a bill of particulars rests in the sound discretion of the court and a statement of expected testimony or names of witnesses need not be given.

The effect of a bill of particulars should not be "too narrow" but to reasonably restrict the proofs to matters set forth.

On redirect examination a witness may be interrogated to clarify or explain matters brought out on cross examination by the opposite party even though it happens to bring out adverse information.

Relevant evidence to support a charge may be received within the court's discretion although it may tend to show respondent committed another offense not charged or "that the acts charged are part of a common scheme."

A conviction may be sustained in a criminal case on the uncorroborated testimony of an accomplice unless statutes or the constitution provide otherwise.

State v. *Hume*, 129.

See Admissions, *Moores* v. *Springfield*, 325.
See New Trial, *State* v. *Newcomb*, 173.
See Sentence, *State* v. *McClay*, 104.

EXCEPTIONS

See Bailments, *Dingley et al.* v. *Dostie*, 195.
See Intoxicating Liquor, *State* v. *Beane*, 328.
See Mandamus, *Dorcourt Co.* v. *Great Northern Paper Co.*, 344.
See New Trial, *State* v. *Newcomb*, 173.
See Taxation, *McDougal* v. *Hunt*, 10.
See Writ of Entry, *Picken* v. *Richardson*, 29.
See *Gregoire* v. *Lesieur*, 203.

EXECUTORS AND ADMINISTRATORS

The legatee of a specific or general legacy has a claim against the estate in preference to those entitled to the residue and, where the claim is disputed, an interest in preventing the distribution of the entire balance of the estate from which his claim, if valid, should be paid.

Where a decree of the Probate Court allowing an account of the executors with the estate deprives a legatee of the protection to which she is entitled, such legatee is "aggrieved" within the meaning of R. S., 1944, Chap. 140, Sec. 32, even though the allowance of the account is unauthorized and ineffective.

A legatee is entitled to be protected by the requirement that the executors retain in the estate assets sufficient to meet her claim.

The allowance of an account neither deprives a legatee of rights against nor protects the executors or the surety on the bond with respect to the claimed legacy.

The distribution of the balance of the estate was not before the Probate Court in considering the first and final account and the executors were not entitled to a credit for the transfer of the balance of the estate.

Cantillon, alias Applt. v. *Walker et al.*, 168.

FRAUD

See Bills and Notes, *First Nat'l Bank* v. *Morong et al.*, 430.
See Equity, *Wolf et al.* v. *Jordan Co.*, 374.

GRAND JURY

See Constitutional Law, *Gendron* v. *Burnham*, 387.

HABEAS CORPUS

See Consitutional Law, *Gendron* v. *Burnham*, 387.
See Courts, *Gerrish* v. *Lovell*, 92.

HIGHWAYS

INDICTMENTS

Facts outside the record are not to be considered on writ of error proceedings.

Such incidental prejudice as might result from an allegation of a prior conviction is outweighed by the constitutional requirements of allegation and proof.

Ingerson v. *State,* 412.

INHERITANCE TAXES

INITIATIVE AND REFERENDUM

INJUNCTION

INSURANCE

If the finding of a referee is based upon absence of proof of a fact, the finding is final unless the evidence establishes as a matter of law the existence of such fact.

It is well settled that if a fall produces injuries which in turn cause death, and such fall is caused by disease, the death results at least indirectly from the disease which causes the fall.

Finding of a referee that "death . . . did not result directly or indirectly or wholly or partially or otherwise from any bodily or mental disease or infirmity" constitutes legal error where all the evidence shows that seizures of the decedent were caused by alcoholism and the falls which he suffered were caused by such seizures, and there is no evidence from which it could be found that the insured's death was caused in any other way than as a result of falls caused by seizures.

One of the purposes of the "*Exceptions* and *Exclusions*" clause of an insurance policy is to deny the additional benefit for death indirectly caused by disease even if a death so caused would be within the "*Benefit*" clause.

Knowlton v. *John Hancock Life Ins. Co.,* 220.

INTOXICATING LIQUOR

The commission of the crime of operating while under the influence of liquor, or drugs, also includes of necessity, that a person charged with an attempt to operate intended to operate, and unless the acts done were done with the intent to operate no offense is committed.

MUNICIPAL CORPORATIONS

A proper case for a declaratory judgment (R. S., 1944, Chap. 95, Sec. 38 et seq.) is not presented where no controversy between the parties is shown by reason of which the parties are entitled to a declaratory judgment. There is no authority for the giving of such a judgment which, if given, would be but an advisory opinion.

The requirements of R. S., 1944, Chap. 95, Sec. 48 that a municipality be made a party in proceedings involving the validity of a municipal ordinance are not complied with by making the members of the city council parties, since members of the city council are not the municipality.

It is necessary that the party who attacks the validity of a city ordinance be aggrieved thereby.

Mandamus will not be granted where it will avail nothing.

Mandamus will not lie to compel the submission of an ordinance which, if ratified, would be invalid.

Where an unconstitutional and invalid portion of a statute or ordinance is separable from and independent of a part which is valid the former may be rejected and the latter may stand.

The provision of a city ordinance providing initiative and referendum whereby ten original petitioners constitute a committee representing all the signers to the petition with the power in a majority of the committee to withdraw the petition and to stop proceedings at any time is invalid and unconstitutional.

The provision of a city ordinance providing initiative and referendum whereby the ballot shall contain two brief explanatory statements of a proposed ordinance, one prepared by the city council and one by the sponsoring committee, is invalid and unconstitutional.

The initiative and referendum established in a city under the constitution can be changed only by the City Council on ratification by the electors or by the legislature by uniform legislation. Maine Constitution, Amendment XXXI, Secs. 21 and 22.

Charter provisions for the initiative and referendum (Private and Special Laws, 1923, Chap. 109 as amended) are superseded by the initiative and referendum established in a city under the constitution. Both may be superseded by uniform legislation under the constitution.

LaFleur v. *Frost et al.*, 270.

All acts of the Legislature are presumed to be constitutional.

In testing the question of constitutionality of an act of the Legislature every reasonable doubt is resolved in favor of the proposition that the act is within and under the terms and meaning of the constitution.

Fundamental doctrines of the constitution must be adhered to as if the constitution were made yesterday by those who had full knowledge of present demands and necessities.

Within the limitations set forth in *Kelley et al.* v. *Brunswick School District et al.*, 134 Me. 414; 187 A. 703 the Legislature may create distinct and separate bodies politic and incorporate the identical inhabitants and territory.

The fact that commissioners of a sewer district are appointed by the Mayor with the approval of the City Council rather than election by the people in the district does not affect the constitutionality of an act creating a sewer district. *Opinion of the Justices*, 144 Me. 417; 66 A. (2nd) 376.

The fact that finances needed to improve and maintain the sewer system should come from rates to be paid by users rather than general taxation does not affect the constitutionality of an act creating sewer district.

The act creating a sewer district violates no constitutional guarantee against the impairment of vested rights or contract, (Art. I, Sec. 11, Constitution of Maine; Art. I, Sec. 10, Constitution of United States), even though existing legislation provided that abutters upon a public drain may by permit and payment therefor enter and connect therewith and such permit shall run with the land without subsequent charge or payment, since abutters had in fact no absolute contract but merely a permit or license and exercised their rights with the realization that the Legislature could change the law. A contrary rule would enable individuals by their contracts, or contractual relations to deprive the State of its sovereign power to enact laws for the public health and welfare.

Sewer district act providing that the district shall take title to all public drains and sewers and shall be responsible in the maintenance and extension is not objectionable as unlawfully transferring legal duties and responsibilities.

A Municipal Corporation has no element of sovereignty but is a mere local agency of the State.

Baxter v. *Waterville Sewerage District*, 211.

See Liquor, *Glovsky*, v. *State Liquor Commission*, 38.

NEGLIGENCE

Evidence must be viewed in the light most favorable to the plaintiff in considering the property of a directed verdict for the defendant.

Proof of a violation of law of the road constitutes *prima facie* evidence of negligence.

A plaintiff has the burden of proving that the defendant was negligent and that his negligence contributed in some manner to the damage for which recovery is sought.

A scintilla of evidence will not support a verdict.

Bernstein v. *Carmichael*, 446.

Plaintiff's violation of rules of the road which contribute as a proximate cause to an accident will bar recovery. (R. S., 1944, Chap. 19, Sec. 107.)

Hutchins v. *Mosher*, 409.

See Agency, *Melanson* v. *Reed Bros.*, 16.

NEW TRIAL

A motion for a new trial is sustainable when a jury has not been instructed on a point essential for its consideration, or has been instructed erroneously on such a point, notwithstanding the failure to challenge the same by exceptions.

The failure of a witness to state particular facts in identical words on every reference thereto creates no inconsistency in the testimony of such witness.

The testimony of a single witness may be adequate to prove the guilt of a respondent beyond a reasonable doubt.

A jury may be instructed on corroboration, or the lack of it, when that issue has been argued by counsel, the groundwork therefor

NUISANCES

PAROLE

PLEADING

POLICE POWER

POOR DEBTORS

PROBATE COURTS

SECOND OFFENSE

See Sentence, *State* v. *McClay*, 104.

SELF INCRIMINATION

See Constitutional Law, *Gendron* v. *Burnham*, 387.

SENTENCE

Time served for one crime, on a sentence which has been vacated upon a writ of error, cannot be credited upon an independent sentence imposed on the conviction of another crime on a separate indictment where the latter sentence remains in full force and was to commence upon the expiration of the former.

The practice in this state of imposing cumulative or consecutive sentences upon separate convictions, the subsequent to take effect upon the expiration of the former, is recognized with respect to misdemeanors and felonies whether the several convictions are upon separate counts in the same indictment or under separate indictments.

Failure to attack proceedings at *nisi prius* by demurrer, motion in arrest of judgment or exceptions and obtain a stay of sentence and release on bail pending final determination of the cause under R. S., 1944, Chap. 135, Sec. 29 results in a waiver.

Where a stay of sentence has been obtained and there is a failure to recognize, the commitment is to await final decision, rather than in execution of sentence.

Where the first of two cumulative sentences (the subsequent to take effect upon the expiration of the former) is vacated upon writ of error, its expiration takes effect upon being vacated and the subsequent sentence commences.

Sentences pronounced by a court having jurisdiction of the cause and the parties are *voidable only* and as such remain in effect until vacated by a court of competent jurisdiction.

The crime of escape or prison breach, whether misdemeanor or felony, is within the original jurisdiction of the Superior Court and prosecutions therefor may be commenced by indictment.

The words *void* and *voidable* are often used interchangeably and the interpretation of a specific use will depend upon the issue to which it is applied.

Smith v. *Lovell*, 63.

The statute, R. S., 1944, Chap. 19, Sec. 121, relating to enhanced punishment for conviction of second or subsequent offense provides an enhanced punishment where for the *first offense* the court may impose a lesser punishment than it must impose for a second offense, even though the court *may impose* as severe a punishment for the first as for the second offense.

Under statutes providing for enhanced punishment for a second offense the prior conviction must be sufficiently alleged and proved beyond a *reasonable* doubt. Art. I, Sec. 6, Constitution of Maine.

R. S., 1944, Chap. 100, Sec. 128 as amended by P. L., 1947, Chap. 265, Sec. 1, relates only to the qualification as witnesses of persons who have been convicted of crimes, and to the admission in evidence of their prior conviction of certain crimes (i.e., felony, any larceny, or any other crime involving moral turpitude) for the purpose of

STATUTES CONSTRUED

REVISED STATUTES

PUBLIC LAWS

PRIVATE AND SPECIAL LAWS

SURVIVORSHIP

TAXATION

TENANTS IN COMMON

TITLE

TRESPASS

WAIVER

WILLS

WITNESSES

WORDS AND PHRASES

WORKMEN'S COMPENSATION

The Industrial Accident Commission is the trier of facts and its findings for or against the claimant are final if there is any evidence on which to base them.

It is the general rule that when one employer lends a servant to another for a particular employment, and the servant is under the exclusive direction and control of that other in the particular employment, he must be dealt with as the servant of the one to whom he is loaned.

To "arise out of employment" the injury must have been due to a risk of employment. To "occur in the course of employment" the injury must have been received while the employee was carrying on the work which he was called upon to perform, or doing some act incidental thereto.

Boyce's Case, 335.

WRIT OF ENTRY

Findings of fact by a Justice sitting without a jury so long as they find support in evidence are final.

A good legal fee simple title cannot be lost by abandonment. Once title vests it stays vested until it passes by grant, descent, adverse possession, or some operation of law such as escheat or forfeiture.

A mere general exception to a judgment rendered by a Justice at *nisi prius* does not comply with the statute.

Picken v. *Richardson*, 29.

WRIT OF ERROR

It is well established that a fugitive from justice is not entitled to institute, or prosecute, appeal or error proceedings, but that principle does not bar one who is at liberty on probation from doing so although he is absent from the State, if his absence does not violate the terms of his probation.

One sentenced for crime, on conviction under a plea of *nolo contendere*, or otherwise, is entitled to attack the process involved by writ of error.

Writs of error are determined on the record of the process placed in issue, and nothing more.

The presence of a petitioner for a writ of error before the court or justice named in his application, pending the issuance of the writ, or thereafter, is not requisite under R. S., 1944, Chap. 116, Sec. 12.

Ex Parte Mullen, 191.

See Indictments, *Ingerson* v. *State*, 412.