MAINE REPORTS

147

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

AUGUST 1, 1951 to MAY 1. 1952

RULES EDITION

Revised Rules of the Supreme Judicial
and Superior Courts.
Rules Applicable Only to Proceedings in the
Supreme Judicial Court.

Equity Rules.

[EFFECTIVE AUGUST 1, 1952]

Index to Rules follows Table of Cases

MILTON A. NIXON
REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
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AUGUSTA, MAINE

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OF THE

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DURING THE TIME OF THESE REPORTS

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Reporter of Decisions

MILTON A. NIXON

TABLE OF CASES REPORTED

A

B

C

K

L

M

N

O

P

INDEX

TO

REVISED RULES OF THE SUPREME JUDICIAL AND SUPERIOR COURTS

RULES APPLICABLE ONLY TO PROCEEDINGS IN SUPREME JUDICIAL COURT

EQUITY RULES

FORMS

EQUITY FEE BILL

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

BROOKS BROWN

vs.

GUY GANNETT PUBLISHING CO.

Kennebec. Opinion, August 3, 1951.

PER CURIAM.

ON EXCEPTIONS. This was an action for libel of the plaintiff by the publication of an article in "Portland Sunday Telegram and Sunday Press Herald," a newspaper owned and published by the defendant company.

The declaration contained two counts. In the first count it was alleged that the defendant:

> "with intent to bring the plaintiff into hatred, contempt and ridicule, to deprive him of the benefits of public confidence and social intercourse, and to injure him in his business, did maliciously, wilfully, recklessly and falsely write, compose, print, publish, circulate, and sell in said newspaper the following false, scandalous and defamatory article of and concerning the plaintiff, entitled 'Back Door Politics,' said article being in the words following, to wit:". (Here followed the alleged libelous article set out with innuendoes.)

Said count further alleged:

> "And the plaintiff avers that by the writing, printing, publishing, circulating and selling the above false, malicious, defamatory and scandalous article as aforesaid, the defendant has greatly injured the plaintiff in his good name and reputation, has deprived him of public confidence, and exposed him

to public hatred, contempt and ridicule, and plaintiff has suffered great pain and distress of body and mind, has been shunned by many of his former acquaintances, has been injured in his business and ability to sell insurance, and has otherwise been greatly injured and prejudiced;".

In a second count, which also contained the above allegations of intent and publication, after setting forth the alleged libelous article with innuendoes and alleging that the conduct charged therein amounted to a criminal offense as a violation of Sec. 36 of Chap. 4 of the Revised Statutes of Maine of 1944, the plaintiff continued:

"and the plaintiff further says that by the writing, printing and circulation of said false, malicious, and defamatory article as aforesaid, the defendant has greatly injured and prejudiced the plaintiff in his own good name, character and reputation, and the plaintiff has been rendered liable to criminal prosecution for the above described crime, has suffered great pain and distress in body and mind, and has been held up to public scorn and ridicule, has been shunned by many of his former associates and acquaintances, has been embarrassed by whisperings and conversations in low tones wherever he went and has been ostracized from the society of many of his former associates and otherwise has been greatly injured and prejudiced;".

To this declaration the defendant filed a general demurrer. To the overruling of this demurrer the defendant alleged exceptions which were allowed, and it is upon these exceptions that the case is now before this court.

By its demurrer the defendant has admitted the truth of each and every one of the foregoing allegations.

In the very recent case of *Briola* v. *Bass Pub. Co. et al.*, 138 Me. 344 at 346, this court said:

"It is too well settled to require extended citation of authority that there is a distinction in the requirements necessary to maintain an action of libel and in those essential in an action of slander. A charge which is published in writing is regarded

> as carrying more weight than one which is made verbally. It is accordingly not necessary in a case of libel that the charge import a crime, nor is it essential that special damage be alleged. The question is, do the printed words, if believed, 'naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefit of public confidence and social intercourse?' *Tillson* v. *Robbins*, 68 Me., 295, 301, 28 Am. Rep., 50."

It is not necessary in order for printed words to be libelous that they naturally tend to expose the plaintiff to public hatred *and* contempt *and* ridicule, *and* deprive him of the benefit of public confidence and social intercourse. *It is sufficient if they naturally tend to bring about any one of the foregoing consequences.* The governing principle of law is stated in the alternative or disjunctive, *not* in the conjunctive.

In the plaintiff's declaration in this case he has alleged not only the falsity of the article but also that it was published "with intent to bring the plaintiff into hatred, contempt and ridicule, to deprive him of the benefits of public confidence and social intercourse, and to injure him in his business." By its demurrer the defendant has admitted not only the falsity of the alleged libelous matter, but that it published the same with the specific intent set forth in the foregoing language. The declaration in the first count further alleges that by the publishing and circulating of the false printed matter the defendant has greatly injured the plaintiff in his good name and reputation, has deprived him of public confidence, and exposed him to public hatred, contempt and ridicule, and that the plaintiff has been shunned by many of his former acquaintances and has been injured in his business and ability to sell insurance. All of these allegations, which are allegations of fact, have been admitted by the demurrer. In the second count it is to be noted that in addition to many of the foregoing allegations the count alleges that by and because of the said libel the plaintiff "has been shunned by many of his former associ-

ates and acquaintances, has been embarrassed by whisperings and conversations in low tones wherever he went and has been ostracized from the society of many of his former associates." All of these allegations are allegations of fact and are admitted by the demurrer. The complete article of which the plaintiff complains, omitting innuendoes, is as follows:

"BACK DOOR POLITICS

A political deal cooked up last Spring is just coming to the fore — and it smells.

As best we can determine, a few five-and-ten-cent operators coaxed Brooks Brown, sr., out of the Augusta legislative race on the pretext of having a job lined up for his son, Brooks, jr., head of the Maine Council of Young Republican Clubs.

The elder Brown wanted to try for a House seat, but the pseudo-politicians had a ticket of their own and, realizing they couldn't beat a Brown at the polls, took another course.

They promised that if Brown would withdraw, they'd see that the son would become an assistant attorney general assigned to the Liquor Commission, the deal would have mean the bum's rush for Henry Heselon, whose only apparent error is doing a good job.

Soon after the September election, the five and dime operators attempted to carry out their promise. It seems that their only error was a failure to consult, at the time of the promise, with those in a position to fulfill the deal.

In other words, they hit a snag, but they're going to come out whole — thanks to Uncle Sam. Young Brown is being called into service which removes him as an eligible for the liquor commission assignment.

Our only point in bringing this deal into the open is to reveal that some of the boys play their politics seriously — they even talk for officials without authority.

We could call a few names but think it would add little to the overall picture."

If this article, if believed, naturally tends to expose the plaintiff to public contempt or even ridicule, or to deprive him of the benefit of public confidence and social intercourse, the demurrer must be overruled. Although it was argued by the defendant before this court that the foregoing article was complimentary to the plaintiff, such is not our opinion. To say the least, the article is capable of exposing the plaintiff to public ridicule, as the defendant by its demurrer has admitted it intended to do and actually succeeded in doing.

The plaintiff in his innuendo in the second count claims that the language used charges him with a violation of Sec. 36 of Chap. 4 of the Revised Statutes of this State relating to bribery. It is unnecessary for us to determine this question. If the words are otherwise libelous, as we hold they are, the innuendo may be regarded as surplusage. *Briola* v. *Bass Pub. Co. et al., supra.*

Exceptions overruled.

Goodspeed & Goodspeed, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

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

BOSCHO, INC.

vs.

LILLIAN M. KNOWLES

York. Opinion, August 4, 1951.

Conditional Sales. Recording. Conflict of Laws.

A mistake by a town clerk in recording a conditional sales contract cannot affect the vendor's rights under the contract unless the recording statute is applicable.

The Maine recording statute does not apply to a conditional sales contract between a Massachusetts seller and a Maine buyer made in Massachusetts where the property was there situated and delivered to the buyer, even though it was contemplated that the property would be removed to and used in Maine. R. S., 1944, Chap. 106, Sec. 8.

ON EXCEPTIONS.

Action by a vendor against a town clerk to recover damages resulting from the negligent failure to properly record a conditional sales contract. The case is before the Law Court on exceptions to the refusal to direct a verdict for the defendant and to the direction of a verdict for the plaintiff. Exceptions to the refusal to direct a verdict for defendant sustained. Exceptions to the direction of a verdict for plaintiff on issue of liability sustained. Case fully appears below.

Gendron, Fenderson & McDougal, for plaintiff.
F. Roger Miller, for defendant.

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

WILLIAMSON, J. This is an action by a vendor against a town clerk to recover damages resulting from the negligent failure to indicate the signature of the buyer on the record of a conditional sale contract. The case is before us on ex-

ceptions to the refusal to direct a verdict for the defendant and to the direction of a verdict for the plaintiff on the issue of liability. No objection is raised to the basis or amount of damages assessed by the jury, in the event liability is established.

The argument of the plaintiff in substance is that (1) the validity of the contract, except as between the original parties, depended upon recording under the provisions of R. S., Chap. 106, Sec. 8; (2) the record made by the town clerk was insufficient and void; (3) the reserved title of the seller was lost upon a sale of the machinery covered by the contract by the buyer to a third party; and (4) the town clerk is liable to the seller for the mistake in recording.

It is apparent that, unless the recording statute was applicable to the conditional sale contract in question, a mistake in recording could not have affected the seller's rights under the contract. In other words, the plaintiff must show that our statute required the recording of the contract to establish its validity against a third party. Not until the case is brought within the statute does it become necessary to consider either the sufficiency of the record or the liability of the town clerk for error.

Both parties assumed at the trial and before us that the statute was applicable. With this assumption we are unable to agree.

The controlling facts about which there is no dispute may be briefly stated. In Medford, Massachusetts at its home office on July 21, 1948, the plaintiff, a Massachusetts corporation, sold and delivered certain machinery to the buyer, a resident of South Berwick, Maine, under a conditional sale contract. The contract was prepared in duplicate by the seller at its home office, upon a printed form with necessary details typewritten. In form it was an order from the buyer, dated at South Berwick, directed to the seller at Med-

ford, to ship the machinery "delivered F.O.B. Medford via our truck to William Lambert . . . to be used in the . . . building situated at . . . in South Berwick, Maine." Among the agreements were provisions for (1) the retention of title by the seller until payment of the stated balance of the purchase price in monthly payments, (2) repossession and sale on default, and (3) re-delivery "to the seller, F.O.B. original shipping point" in event of rejection of the property by the buyer. In the absence of a stated place for payment, the instalments were payable to the seller in Medford. The order was "subject to approval by seller at home office," and it was there signed by the buyer and approved and accepted by the seller. To this point every act—the preparation and execution of the contract and the delivery of the machinery — took place in Massachusetts.

The machinery was removed to South Berwick, as was contemplated by the parties. Some months later it was sold to a third party by the buyer. The original contract with a copy thereof was sent by the seller to the town clerk to be recorded, and was received by her on July 22, 1948. The copy was placed in the record book and forms the record of the original. The error of which the seller complains may be illustrated as follows:

Original Contract:	Buyer	William Lambert	(typewritten)
	By	WILLIAM LAMBERT	(signature)
Record of Town Clerk:	Buyer	William Lambert (carbon copy of original)	(typewritten)
	By	.....	

The words "Buyer" and "By" in both original and copy are printed.

There are other differences between the original contract and the copy to which no objection is made. The copy does not show that (1) the original was signed by the seller's manager, (2) the signatures of the parties were witnessed, and (3) the acknowledgments of the buyer and the seller's manager were taken before a Massachusetts notary public. In brief, the copy in the record is a carbon copy of the original prepared on a typewriter upon a printed form, and does not include words appearing on the original written in hand or stamped thereon to indicate the expiration of the notary's commission.

Does our recording statute apply to a conditional sale contract between a Massachusetts seller and a Maine buyer, made in Massachusetts where the property was then situated and delivered to the buyer, when it was contemplated the property would be removed to and used in Maine?

Our recording statute, R. S., Chap. 106, Sec. 8, reads in part as follows:

> "No agreement, that personal property bargained and delivered to another shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby; and when so made and signed, . . . it shall not be valid, except as between the original parties thereto, unless it is recorded in the office of the clerk of the city, town or plantation organized for any purpose, in which the purchaser resides at the time of the purchase. . . ."

In our view the statute applies to conditional sales in Maine, and does not reach the conditional sale here in question. The fact that the property was brought to Maine, as it was contemplated by the parties, does not bring the contract within the statute.

For our purposes, although it will be seen it is not essential for decision, we will assume that the retention of title by the seller was effective under Massachusetts law. At

common law, the conditional sale would have been valid against all persons. It is our statute, and not the common law, which denies validity, except as between the original parties, unless the agreement is recorded. *Tibbetts* v. *Towle,* 12 Me. 341; *Morris* v. *Lynde,* 73 Me. 88; *Beal* v. *Universal C. I. T. Credit Corporation,* 146 Me. 437. The law of Massachusetts has not been called to our attention, and we may properly consider it to be like our common law. *Franklin Motor Car Co.* v. *Hamilton,* 113 Me. 63; *Strout* v. *Burgess,* 144 Me. 263, 68 A. (2nd) 241, at 250.

The Restatement of the Law, Conflict of Laws, reads: "Sec. 272. Whether a conditional sale is effective to enable the vendor to retain title is determined by the law of the state where the chattel is at the time of the sale." "Sec. 276. If, after a valid conditional sale, a chattel is taken into another state with the consent of the vendor, any dealings with the chattel in the second state may create new interests in the chattel if the law of that state so provides." "Sec. 278. If after a valid conditional sale a chattel is taken into another state with the consent of the vendor, whether the interest of the vendor is divested by a sale to a purchaser for value in the second state is determined by the law of the latter state."

The recording of conditional sale agreements, in a limited form, was first required by P. L., 1870, Chap. 143; and in R. S., 1871, Chap. 111, Sec. 5, we find the words, "No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when it is so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property,". The statute was broadened to substantially its present form in P. L., 1895, Chap. 32.

The view that the recording statute does not apply to a situation such as the present case was first expressed by our

court in 1871 in *Drew* v. *Smith,* 59 Me. 393, in an action by a conditional vendor against an attaching creditor of the vendee. The agreement, in form a Holmes note, was made in Vermont between a Vermont seller and a Maine buyer. The property was delivered in Vermont and the note was there payable. It is clear from the terms of the note and other facts in the reported case that the parties understood the property would be removed to and used in Maine. The court held the validity of the agreement was determined by Vermont law. The court said, at page 394, "By our statute, as it now stands, R. S., 1871, Chap. 111, Sec. 5, such a contract is invalid between the parties, as well as others, unless recorded. This statute was passed subsequent to the date of the contract, and does not in terms apply to it; nor can it by well-settled principles affect contracts made in other states, the validity, force and effect of such depending upon the laws of the place where made."

The last clause of the quotation was not necessary for decision of the case. It is entitled to great weight, however, as a considered statement of the meaning and intent of the statute made but a short time after its enactment.

In *Emerson Co.* v. *Proctor,* 97 Me. 360, decided in 1903, the proposal of a Maryland seller was accepted by the buyer in Maine. It was held a Maine contract and, not being recorded in accordance with our laws, the seller did not show title against a purchaser from an assignee of the buyer. The opinion shows that the goods were in fact shipped to Maine consigned to the seller, and here delivered to the buyer.

The application of the recording statute was not discussed, but was necessarily in question in *Franklin Motor Car Co.* v. *Hamilton,* 113 Me. 63, on facts strikingly like the present case. From the opinion and an examination of the record it appears that an automobile was sold and delivered in Massachusetts by a Massachusetts seller to a Maine buyer

under a conditional sale contract made and executed in Massachusetts and not recorded in Maine. The automobile was removed to Maine with the consent of the seller. From an examination of the original contract in the case, we find that the buyer "agrees not to change the location of the place where the property is to be stored and cared for at 302 Elm Street, Biddefore, Maine without the consent of the (seller)." Notes evidencing the balance of the purchase price were payable at a Boston bank.

The conditional vendor prevailed in replevin against an attaching creditor of the vendee. The court said, on page 64, "But the contract in question is admittedly a Massachusetts contract, made in Massachusetts, and to be construed in accordance with the laws of that State." In the absence of evidence of the Massachusetts law, our court held under common law there was no right to redeem, and refused to apply our statutory right of redemption. Had our recording statute been applicable, the court necessarily would have determined that the contract, not having been recorded in Maine, was not valid against an attaching creditor of the vendee. *Maine Acceptance Corp.* v. *Sheehan,* 129 Me. 485; *Tardiff* v. *M-A-C Plan of NE,* 144 Me. 208, 67 A. (2nd) 337.

Gross v. *Jordan,* 83 Me. 380, does not involve the applicability of the then recording statute, but illustrates the law governing a conditional sale. The contract between a Massachusetts seller and a Maine buyer was made in Massachusetts and the goods were there delivered. It is apparent that the property was removed to and used in Maine with the consent of the vendor. No restriction, however, upon the location of the property appears in the agreement. The court held the contract was to be interpreted according to the laws of Massachusetts, and on proof thereof a Massachusetts statute permitting redemption was held applicable.

We are aware that the weight of authority is against the

view we have expressed. In 3 *Jones, Chattel Mortgages and Conditional Sales,* 6th Ed., Sec. 1160, we find:

> "*Influence of recording statutes — Where removal of chattels to second state contemplated.* Where it is agreed in a contract of conditional sale, or understood by the parties, that the chattels are to be taken to a state other than that in which the contract is made, such a feature of the agreement is strong evidence that the parties contracted with reference to the laws of the second state, and a majority of the courts consider that questions relating to recording requirements, if any, are to be settled according to the laws of that state. This is true whether it be a fact that actual delivery was made in the latter jurisdiction, or the removal occurred after the delivery had been completed in the first state. Though removal of the chattels to another state than that of the loci contractus may not have been agreed to or contemplated at the time the sale was made and the delivery took place, if the seller thereafter consent that they may be taken to another jurisdiction where they acquire a new situs, it is but logical that such consent should be accorded the same effect as an original understanding in that behalf, and that the local recording laws should be enforced as to creditors of, or purchasers from, the conditional vendee."

The problem, however, is one of statutory construction, and the cases decided by our court show distinctly that our recording statute is not to be extended to cover a conditional sale under the conditions here described. Without question the legislature may require the recording of such agreements to protect the interest of the vendor. Under the Uniform Conditional Sales Act, for example, there is provision for filing "in ..... in which the goods are first kept for use by the buyer after the sale;" and there are also provisions for refiling upon removal from the state. 3 *Jones, supra,* Sec. 1435.

Discussion of the principles may be found in 2 *Beale, The Conflict of Laws* (1935), Sec. 272.1 et seq.; 3 *Jones, supra,*

Sec. 1147 et seq., 1160; 2 *Williston on Sales,* Revised Ed. (1948), Sec. 339. See also 55 C. J. 1208-09, 1264-65; 11 Am. Jur. 362 et seq.; 47 Am. Jur. 129; Annotations in 25 A. L. R. 1153, 57 A. L. R. 535; 87 A. L. R. 1308, 148 A. L. R. 375, Note in 41 Harvard L. R. 779.

Whether the contract was valid or invalid under Massachusetts law is immaterial. In either event the recording in Maine was a useless act, and no loss could come to the seller from a mistake in the town records. The seller's rights under the conditional sale, whatever they may have been, were not impaired by the act of the town clerk.

In this view of the case it becomes unnecessary to consider either the sufficiency of the record or the liability of the town clerk to the seller arising from the error charged.

The entry will be

Exceptions to refusal to direct a verdict for defendant sustained.

Exceptions to direction of verdict for plaintiff on issue of liability sustained.

GEORGE SEMO

vs.

ARCHIE GOUDREAU ET AL.

York. Opinion, August 22, 1951.

Equity. Pleading. Fraud. Mistake. Enforcement.

A final decree in equity must be based upon and confined to the allegations of the complaint and a decree not so predicated is a nullity.

An original bill of complaint for reformation of a deed on the sole ground of mutual mistake cannot support a finding of fraud.

A petition for execution or any supplemental proceeding to enforce a decree may be resisted if the decree is based upon a ground of relief not stated in the bill since the lack of authority to issue the decree appears on the face of the record.

Upon exceptions to, or an appeal from a decree in supplemental proceedings in aid of or to enforce a final decree, the Law Court has no authority to remand the case for further proceedings in the original case, and such collateral proceedings do not reopen the original case for either amendment of the bill, decree, or reconsideration of the case on the merits.

ON EXCEPTIONS.

On petition for execution to enforce a final decree. Defendant excepted to the ruling of the presiding justice granting issuance of the execution. Exceptions sustained. Case remanded to the court below for decree dismissing the petition for execution. Case fully appears below.

Lausier and Donahue, for plaintiff.

Frank Coffin,

Frank Powers, for defendant.

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

NULTY, J. This action, which was originally commenced by a bill in equity seeking the reformation of a deed given by the plaintiff to the defendants on the grounds of a mutual mistake by the parties, is before us for a second time—this time on exceptions to the ruling of the justice below granting the issuance of an execution upon a petition for execution which petition in turn alleges that it is based upon the final decree sustaining the plaintiff's bill and ordering, besides other relief, the defendants to forthwith pay to the plaintiff the sum of five hundred dollars with costs.

This litigation, up to the present time, has pursued rather an unsatisfactory course, due, apparently, to the fact that numerous errors of procedure were made in the original proceedings, some of which were referred to in our former opinion. See *Semo* v. *Goudreau et al.*, 145 Me. 251, 75 A. (2nd) 376. We held in that case, which purported to be an equity appeal, that the failure to furnish this court with the evidence before the court below or an abstract thereof, approved by the justice hearing the same, was a fatal defect and was both mandatory and jurisdictional under the provisions of Revised Statutes (1944), Chap. 95, Sec. 31. This necessitated the dismissal of the appeal, although the appeal in that case attempted to raise some of the same questions that appear in this proceeding which is brought forward to this court on exceptions. An examination of the docket entries set forth in the record discloses that in addition to the fatal defect before mentioned the attempted equity appeal was not seasonably filed under our statutes. We now have before us a petition for execution based upon a finding in the final decree which final decree is sharply attacked by an answer of the defendants who vigorously assert that the final decree contains findings that vary from and fail to follow the allegations of the bill of complaint. The particular finding that the defendants attacked in the final decree of the court sustaining the bill and ordering the reformation

of the deed to the land in question contains the following language:

> "that said defendants, contrary to equity and good conscience, are guilty of fraud and have no legal or equitable claim to the land and building - - - - -."

Hearing was had on the petition for execution and answer before the same justice who presided at the first hearing and the petition for execution was granted and exceptions allowed. No attempt, so far as the record shows, was made to amend the original bill of complaint which sought relief by way of reformation of a deed solely on the ground of mutual mistake of both parties.

The defendants contend that a final decree under our law must follow and be based upon and confined to the allegations of the complaint and that any decree not based on such allegations is a nullity and that if the decree is a nullity it can be attacked by collateral proceedings such as those of the instant case.

Under the law of Maine fraud, if found in any proceeding, should be, according to our court in *Parlin* v. *Small*, 68 Me. 289, 291:

> "- - - - - based upon testimony that is clear and strong, satisfactory and convincing."

In *Chadwick* v. *Starrett*, 27 Me. 138, 145, we said:

> "Fraud is not to be presumed, but must be distinctly and particularly set forth, and be supported by corresponding proof."

In *Stevens* v. *Moore*, 73 Me. 559, 563, we said:

> "It must now be considered as well settled that a general charge in a case where fraud is relied upon is insufficient. Here the evidence to be introduced, or the minute facts which are important only as they bear upon others which are relied upon, need not be recited; but those which constitute the fraud and enough to show that a fraud was committed or attempted must be alleged. Story's Eq. Plead. Sec. 251."

An examination of the authorities discloses that this court early considered some of the questions raised by the present proceeding and in *Scudder* v. *Young et al.*, 25 Me. 153, 155, which was a case in which the equity court was asked to grant relief where the allegation was fraud and fraud had not been proven, we said:

> "- - - The Court can grant relief only *secundum allegata et probata.*"

In the instant case the pleadings place in issue mutual mistake and there is no definite allegation of fraud.

In *Stover* v. *Poole,* 67 Me. 217, 222, we said:

> "- - - Hence in any suit, whatever may be the pleadings, the judgment must depend upon the effect of the plaintiff's allegations and be in accordance with them."

In *Merrill* v. *Washburn,* 83 Me. 189, 191, 192, 22 A. 118, we said:

> "Good pleading is as essential upon the equity side, as upon the law side, of the court. Full, clear, direct and orderly statements are required by the chancery rules, and by the very nature of equity procedure. Equity decrees must be based upon the allegations in the bill. Prayers for relief must be unavailing, unless preceded by allegations showing a complete case, authorizing the exercise of equity jurisdiction. The most ample evidence is useless without sufficient statements in the pleadings. Evidence without allegations is as futile as allegations without evidence. *Grosholz* v. *Newman,* 21 Wall, 481."
>
> "Bills in equity seeking relief on the ground of fraud, accident or mistake, must directly charge the grounds relied upon. The statement should be so full and explicit as to show the court a clear picture of the particulars of the fraud, — the manner in which the party was misled, or imposed upon, — the character and causes of the accident, or mistake, and how it occurred. Without such a statement in the bill, the court can not grant relief,

> or even hear evidence in the matter. *United States* v. *Atherton,* 102 U. S., 372, *Scudder* v. *Young,* 25 Maine, 153; *Stover* v. *Poole,* 67 Maine, 217; *Stevens* v. *Moore,* 73 Maine, 559."

In *Emery* v. *Bradley,* 88 Me. 357, 360, 34 A. 167, we said:

> "The question of law presented by the exception is evidently this: whether the plaintiff's bill contains allegations sufficient to support that clause of the final decree excepted to. It is an elementary principle that no final decree can be extended beyond the allegations in the bill. Decrees in equity must be secundum allegata, as well as secundum probata."

See also *Buswell* v. *Wentworth et al.,* 134 Me. 383, 391, 186 A. 803; *Portland Terminal Co.* v. *Boston & Maine Railroad,* 127 Me. 428, 431, 439, 144 A. 390. In *Hagar* v. *Whitmore,* 82 Me. 248, 256, 19 A. 444, we said, speaking of the claim of the complainant that there should be a decree against the defendants on a ground not alleged in the bill:

> "These questions were nowhere raised in any of the pleadings, and the respondents objected to much of the evidence concerning them, and insisted at the argument that they could not properly be determined in this suit. While in equity procedure all (except dilatory) pleadings are construed liberally in furtherance of the cause, yet propositions of fact, relied upon as grounds for equitable relief, must be alleged with some degree of distinctness in the bill. Claims and defenses in equity based on facts, must be stated in bill, answer, or plea. It is not enough that they appear in the evidence, and are noticed in the argument. The maxim *probata secundum allegata* applies in equity as well as at law. If the evidence first discloses fresh grounds for relief, or defense, the party desiring to avail himself of them, should state them in some amendment or supplemental pleading, which upon proper terms he can always obtain leave to file. The decree must follow the allegations. If a party, after the evidence is taken, submits his cause upon his original allegations, he

> should be content with an adjudication confined to those allegations. In this cause the complainant submitted no amendments but only his original bill as first drawn. We think he cannot require us to go beyond it."

It is unnecessary, in view of the above citations, to quote cases from other jurisdictions or from the authoritative textbook writers, all of which in the main support the doctrine laid down by our court as indicated by the above citations. Applying the authorities herein cited to the present proceedings, it is apparent that the decree on the original bill in equity rests upon a ground which is not alleged in the bill of complaint. The only ground for relief set forth in the bill was mutual mistake. The only ground for relief stated in the decree was fraud. The difference between mistake and fraud requires no further comment. The principle here involved goes to the very power and authority of the court to issue a decree.

A decree which is not founded upon a cause for relief stated in the bill is unenforcible. Any supplemental proceeding to enforce the decree may be successfully resisted if the decree is based on a ground of relief not stated in the bill. This is but giving effect to the well established general principle that a decree which is based upon a cause not set forth in the bill is subject to collateral attack. The reason why such decree may be attacked collaterally is that the lack of authority to issue the decree appears on the face of the record. The original decree in this case being unenforcible, it was an error in law to order an execution to issue in aid thereof. The defendant's exceptions to such order, properly taken and allowed, must be sustained.

It is to be remembered that this case is now before us only upon exceptions to a decree rendered in supplemental proceedings in aid of the enforcement of the original decree. Although the original decree is subject to collateral attack in such proceedings, and its enforcement may be resisted on

the ground that it is not supported by the bill, such collateral attack must not be confused with a direct attack on the decree. Such collateral attack does not have the effect of either exceptions to, or an appeal from the original decree. It does not reopen the original case for either amendment of the bill, decree, or reconsideration of the case on the merits.

Upon exceptions to, or an appeal from a decree in supplemental proceedings in aid of or to enforce a final decree, this court has no authority to remand the case to the court below for further proceedings in the original case. Except as final decrees may be attacked by exceptions or appeal, within the times, and in the manner provided by statute, they become finally operative from the time they are signed, filed and entered. Furthermore, as we said in *Parsons* v. *Stevens,* 107 Me. 65, 71, 78 A. 347:

> "In Whitehouse Eq. Pr., section 526, it is laid down that in this State 'after a final decree has been signed, filed and entered errors involving the merits of the case cannot be corrected by rehearing on motion or petition, the only remedy being by bill of review or the statutory petition for review.' "

For a full discussion of the power of the court over final decrees and the methods of correcting the same see *Parsons* v. *Stevens, supra; Thompson* v. *Goulding,* 5 Allen 81; *Gerrish* v. *Black,* 109 Mass. 474; Whitehouse Equity Practice, Sec. 526 and Secs. 254 et seq., and Daniell's Ch. Pl. & Prac. 5th Am. Ed. Sec. 1576 et seq.

The defendants failed in their direct attack on the original decree. See *Semo* v. *Goudreau et al., supra.* It is to be noted, however, that in that case the appeal was not dismissed upon the merits, but because of failure to present the record to the Law Court in accord with a statutory provision which is jurisdictional. The dismissal of that appeal does not have the effect of an affirmance by this court of the

decree below. Therefore, decisions such as *Southard* v. *Russell,* 16 How. (U. S.) 547; *Jewett* v. *Dringer,* 31 N. J. Equity 586; *Pinkney* v. *Jay,* 12 Gill. & J. (Md.) 69 and *Ryerson* v. *Eldred,* 18 Mich. 490, to the effect that *after a decree has been affirmed by an appellate court* a bill of review will not lie in the court below to correct errors apparent on the fact of the record, are not decisive of the rights of the parties to a review of the original case.

Inasmuch as the plaintiff can never obtain any relief against the defendants under the present decree, it is unlikely that the defendants will move for review. Unless and until the plaintiff, acting within the rules set forth in the foregoing authorities, obtains a new decree sustained by allegation and proof, he will be entitled to no relief. We cannot remand the case to the court below for such proceedings. A bill of review is a new and independent proceeding which must be instituted by the party seeking the review. The exceptions must be sustained and the case remanded to the court below for a decree dismissing the petition for execution.

The mandate will be

Exceptions sustained.

Case remanded to court below for decree dismissing petition for execution.

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
GOVERNOR FREDERICK G. PAYNE
IN A LETTER DATED AUGUST 17, 1951,
ANSWERED AUGUST 23, 1951

LETTER PROPOUNDING QUESTIONS

State of Maine

OFFICE OF THE GOVERNOR

Augusta

August 17, 1951

To the Honorable Justices of the Supreme Judicial Court:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, section 3, and being advised and believing that the questions of law are important, and that it is upon a solemn occasion,

I, Frederick G. Payne, Governor of Maine, respectfully submit the following statement of facts and questions and ask the opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT

WHEREAS, by Article III, section 1, Constitution of the State of Maine, the powers of this government shall be di-

vided into *three distinct departments,* the *legislative, executive,* and *judicial,* and

WHEREAS, by Article III, section 2, Constitution of the State of Maine, no person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, (except in the cases herein expressly directed or permitted), and

WHEREAS, by Article IV, Part Third, section 1, the Legislature shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States, and

WHEREAS, by Article I, section 13, of the Constitution of the State of Maine, the laws shall not be suspended but by the legislature or its authority, and

WHEREAS, by Article V, Part First, section 12, the Governor of the State of Maine shall take care that the laws be faithfully executed, and

WHEREAS, the Legislature of the State of Maine, by virtue of authority vested in it by Article IV, Part Third, section 1, of the Constitution of Maine, has enacted, pursuant to its police powers, chronologically, certain Acts which are herewith listed in substance:

(1) Chapter 77 of the Revised Statutes of Maine, 1944, created a State Racing Commission, and has reference to harness horse racing.

(2) Chapter 289, Public Laws of Maine, 1949, amending Chapter 77 of the Revised Statutes of Maine, 1944, by adding Chapter 77-A, created a Running Horse Racing Commission, and has reference to running horse meets.

(3) Neither of these chapters, 77 or 77-A, confined race meets to either nighttime or the daytime.

(4) Chapter 77 of the Revised Statutes, 1944, permits pari-mutuel betting subject to certain provisions not here pertinent.

(5) Chapter 388 of the Public Laws of Maine, 1949, permits night harness races or meets on prescribed conditions.

(6) Chapter 404 of the Public Laws of Maine, 1951, amended section 9 of Chapter 77-A of the Revised Statutes, 1944, which chapter and section pertain to flat racing, to read as follows:

"Racing shall be permitted in the daytime only from May 15th to November 30th of each year."

and

WHEREAS, the effective date of the last Act above mentioned is August 20, 1951, and

WHEREAS, before the effective date of the Act (August 20, 1951), a Bill in Equity was filed, a copy of which is hereto attached as Exhibit A (exhibit omitted herefrom) seeking an injunction against the enforcement of said Act, directed against the Attorney General of the State of Maine, a Constitutional and executive officer of the State of Maine, the County Attorney of Cumberland County, a statutory officer of the State of Maine, and the Maine Running Horse Race Commission, an administrative tribunal created by the Legislature, and

WHEREAS, by Article IV, Part Third, section 17, there exists a veto power in the people of the State of Maine, by which veto power the people may, if an Act is objectionable to them, erase such Act from the "Books" through referendum proceedings, and

WHEREAS, the Plaintiffs in the above mentioned Bill in Equity, failing to avail themselves of the veto power above mentioned, and before the effective date of said Act, presented to the Superior Court, in vacation, a Bill in Equity requesting that a temporary injunction issue restraining

the enforcement of said statute, enacted by the Legislature pursuant to its police powers, and

WHEREAS, the above mentioned temporary injunction, a copy of which is hereto attached as Exhibit "B", (exhibit omitted herefrom) was granted, July 23, 1951, without notice to the defendants and without a hearing, *ex parte,* and

WHEREAS, the Supreme Judicial Court is of Constitutional creation by virtue of Article VI, section I, Constitution of the State of Maine, and

WHEREAS, Superior Courts are courts of legislative creation, and

WHEREAS, the issuing of such injunction by a single justice presiding in a statutory court after *ex parte* proceedings and without notice, restraining the Attorney General, a Constitutional officer of the Executive branch of the government, from proceeding to enforce an Act enacted by the Legislature, pursuant to its police powers, before the effective date of that Act, appears to be an intervention by the court in the legislative power to legislate, amounting to a substitution of the judgment of the court for that of the Legislature, and appears to be a violation of Article I, section 13; Article III, sections 1 and 2; Article IV, Part Third, section 1; and Article V, Part First, section 12, of the Constitution of the State of Maine,

NOW, THEREFORE, I, Frederick G. Payne, Governor of Maine, respectfully request an answer to the following questions:

(1) May a statutory court, before an Act duly passed by the Legislature has become effective, issue an injunction, restraining the enforcement of that law?

(2) Is the act of issuing an injunction before an Act of the Legislature, enacted pursuant to its police pow-

ers, becomes effective, such an intervention of a legislative function and a substitution of the judgment of the Judiciary for that of the Legislature, as to be a violation of Article III, sections 1 and 2, and Article IV, Part Third, section 1, of the Constitution of the State of Maine?

(3) May the Attorney General, a Constitutional officer of the Executive branch of the government, vested with Constitutional, statutory, and common law powers, be divested of his authority to initiate legal proceedings relative to an Act of the Legislature, enacted by the Legislature pursuant to its police powers, by a temporary injunction restraining him from so proceeding, when that injunction is issued by a single justice presiding in a statutory court after *ex parte* proceedings and without notice, when the issue involved is that of the constitutionality of a legislative enactment?

(4) Is the power to determine that a statute is unconstitutional vested in a single justice, or should a single justice assume a statute is constitutional unless the contrary has been established by the Law Court?

(5) Does a statutory court, superior or otherwise, have authority to adjudicate Constitutional questions?

(6) Is the power to determine a statute unconstitutional vested only in that Constitutional Court, the Supreme Judicial Court?

Respectfully submitted,

FREDERICK G. PAYNE

Governor of Maine

ANSWER OF THE JUSTICES

To the Honorable Frederick G. Payne,
Governor of Maine:

Answering the questions submitted to the Justices of the Supreme Judicial Court in your letter of August 17, 1951, the undersigned respectfully reply:

Question No. 1

A statutory court upon which the legislature has conferred full equity powers has equal authority with a constitutional court possessing the same powers. In this state the Supreme Judicial and Superior Court have concurrent original jurisdiction in equity, and the powers of the justices of each court are the same.

As we interpret the first question it is directed only to the time element and not to the further question as to whether a court may under any circumstances issue an injunction restraining enforcement of a law. Ordinarily an injunction against the enforcement of a law should not issue and would not be issued prior to the effective date of the law. We are not prepared to state however that under no circumstances can such an injunction issue before the law becomes finally effective. It may be well to say that a temporary injunction restraining the enforcement of a law is not necessarily an immunity bath for violators of the law during the existence of the injunction if the validity of the law is ultimately sustained.

Question No. 2

If the situation be such that an injunction may properly be issued prior to the effective date of the act, its issuance

would not violate Article III, Sections 1 and 2, or Article IV, Part Third, Section 1, of the Constitution of the State of Maine.

Question No. 3

The authority of a single justice in equity to issue preliminary injunctions is granted by R. S., 1944, Chapter 95, Sec. 34. The fact that the issue involved is the constitutionality of a statute does not limit the *power* of the court, but the gravity of the situation as well as due and proper respect for the Legislative branch of the Government would dictate that instead of issuing a preliminary injunction *ex parte* on bond, it should only be issued after hearing unless there be imminent danger of immediate and irreparable damage, before a hearing may be had. Even in such case a temporary restraining order pending hearing on the application for temporary injunction would better comport with equity practice in this jurisdiction. See *Deering* v. *York and Cumberland Railroad Co.*, 31 Me. 172.

Questions Nos. 4, 5 and 6

It is the duty of every Court to protect and uphold the State and Federal Constitutions. A single justice of the Supreme Judicial Court, or of the Superior or any other statutory court, has the *power* to pass upon the constitutionality of a Statute if the question be in issue. It has been the long established custom in this state, however, that a court at *nisi prius*, or a judge of any court having jurisdiction of the subject matter in litigation, will accept the presumption that any law passed by the Legislature is Constitutional unless it has been finally determined otherwise by the Supreme Judicial Court sitting as a Law Court.

Departure from this custom is justified only in extraordinary circumstances.

Dated at Augusta, Maine this 23rd day of August, 1951.

Respectfully submitted:

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY
ROBERT B. WILLIAMSON

HENRY H. STRATER

vs.

MARGARET C. STRATER

York. Opinion, August 24, 1951.

Divorce. Agreements. Property Settlements. Decree.

Findings of fact by a sitting justice will be conclusive unless clearly wrong and the burden is upon the appellant to prove it.

An agreement with respect to "all finances" incorporated in a divorce decree purporting to settle "alimony and all property adjustments" supersedes property rights created by statute (R. S., 1944, Chap. 156, Sec. 62) where such was the intention of the parties, and equity will act to remove a cloud on the title to real estate caused thereby.

ON APPEAL.

This is an appeal by the defendant from a decree of a sitting justice of the Superior Court in Equity directing the defendant to release by appropriate deed or conveyance all her right, title and interest in and to real estate. Appeal dismissed. Decree below affirmed. Case fully appears below.

Varney & Fuller, for plaintiff.

Philip G. Willard, for defendant.

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

NULTY, J. This case comes before us on appeal by the defendant from a decree of the sitting justice of the Superior Court in Equity for York County. It appears from the record that the defendant, for cruel and abusive treatment because of the fault of the plaintiff, was granted a divorce at the January Term 1942 in the County of York. The record further shows that after long and protracted negotiations, participated in by themselves and their attorneys, the parties entered into an agreement with respect to the contents of the divorce decree concerning their prop-

erty affairs. This agreement contained the following language:

> "It is hereby stipulated and agreed, by and between the parties, that the following may be incorporated in the Court's decree relative to all finances."

Although the stipulation was in no way binding upon the court, the court adopted it by including in the decree of divorce the following provision:

> "It is further ordered and decreed that *alimony and all property adjustments between the parties* shall be in accordance with stipulations filed with the Clerk of Courts, which hereby are made and become part of this decree; ----------." (italics ours)

By this order the rights of the parties were settled in accordance with the terms of the stipulation. They were settled, however, by the order which adopted the stipulation, not by the stipulation itself. The agreement did not even purport to settle the property affairs of the parties, but contemplated action by the court for that purpose, and gave the consent of the parties that such action by the court might be in accordance with its terms. Some time later the plaintiff became aware that the defendant maintained and claimed that she had certain rights by descent in and to the real estate owned by the plaintiff at the time of the divorce and soon found that he would not be able to convey the real estate because the defendant would not sign the deeds and, in addition, notified prospective purchasers through her attorney of her alleged claims to said real estate. Being unable to dispose of his real estate, the plaintiff instituted the instant bill in equity seeking to have the equity court order the defendant to sign a quit-claim deed releasing any claim or interest to the real estate which the plaintiff owned at the date of the decree of divorce. Answer was filed by the defendant which in substance denied that the memorandum of agreement or stipulation subsequently

incorporated into the divorce decree provided a complete settlement of the property rights to the exclusion of the defendant's statutory rights provided for in Section 9, Chapter 73, Revised Statutes 1930, now Section 62, Chapter 153, Revised Statutes 1944. In short, the defendant denies that the decree of the court incorporating the memorandum of agreement was intended as a full and final settlement of the property affairs of the parties in so far as the real estate of the plaintiff was concerned.

The matter came on for hearing on bill, answer and proof, both oral and documentary. The sitting justice, after hearing, made certain findings and a decree was entered directing the defendant to release by appropriate deed or conveyance all her right, title and interest in and to any real estate owned by the plaintiff with one exception not pertinent to the decision of this case as of the date of said divorce decree.

We have repeatedly held, and citation of authority is almost unnecessary, that under the law of our State an equity appeal is heard anew on the record and that findings of fact by the sitting justice will be conclusive unless clearly wrong and the burden is on the appellant to prove it. *Tarbell* v. *Cook,* 145 Me. 339, 75 A. (2nd) 800. There is credible evidence in the record from which the sitting justice could find that the plaintiff and defendant intended and hoped that the agreement between them exhausted property relations between them and this finding is fortified by the decree of the court below when it ordered that "all property adjustments shall be in accordance with stipulations filed with the Clerk of Courts." In fact, it appears that the decree of divorce was predicated upon the stipulations between the plaintiff and the defendant. The terms of these stipulations became the terms of the decree of divorce so that thereafter the obligations of the parties as defined in the stipulations would be imposed upon them by the decree of divorce.

The defendant now, however, claims by her answer that because the decree and its provisions made no provision as a matter of law for obviating the provisions of what was then R. S., 1930, Chapter 73, Section 9, the pertinent part of which reads as follows:

> "- - -When a divorce is decreed to the wife for the fault of the husband for any other cause (than impotence), she shall be entitled to one-third in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead; - - - - -. The court may also decree to her reasonable alimony out of his estate, having regard to his ability; and to effect the purposes aforesaid, may order so much of his real estate, or the rents and profits thereof, as is necessary, to be assigned and set out to her for life; or instead of alimony, may decree a specific sum to be paid by him to her; - - - -."

the defendant became possessed of a one-third interest in common and undivided of the plaintiff's real estate because of the words in the statute above set forth "shall descend to her as if he were dead." The defendant also takes the position that her rights in the plaintiff's real estate were transferred to the defendant by operation of the statute without the necessity of any decree and that the decree of divorce could not effectively modify or take away such statutory rights except by specifically ordering the defendant to release the interest which descended to her by the operation of the statute herein quoted.

An examination of the agreement (called in the decree "stipulations") discloses that certain parcels of the real estate of the plaintiff were considered and one parcel the plaintiff agreed to convey to a trustee for the defendant in the form of a limited life estate together with a limited right of way for foot passage only over another parcel which was to be used by the defendant. These facts simply strengthen the claim of the plaintiff that *all property ad-*

justments between the parties shall be in accordance with stipulations (see divorce decree, *supra*) (italics ours). The divorce decree — standing alone — may have created in the defendant a record legal title to the real estate—see *White* v. *Warren,* 214 Mass. 204, 206—but under the facts and circumstances appearing here it does not seem to this court that it was the intention of the parties and the court as shown by the decree of divorce that the defendant should acquire any interest in the real estate of the plaintiff. A decree settling the property affairs of the parties to a divorce is not invalid because the court has adopted their stipulations as to its contents. Even agreements for such purposes are valid if fairly and properly made. *Coe* v. *Coe,* 145 Me. 71, 71 A. (2nd) 514. In the instant case the sitting justice found, and in his finding we concur, that although "there obtained superficial thinking and inexhaustive action in the preparation and rendition of the decree" the meaning of the court was clear. Such being the case and there being ample credible evidence to support the findings of the sitting justice, there are legal consequences flowing from the decree which in equity and good conscience must be clarified and corrected by this defendant to clear the record title of the real estate of the plaintiff. In other words, the claim of the defendant with respect to the real estate of the plaintiff creates at least a cloud on the record title of the plaintiff which must be clarified and corrected, as we have said above. The divorce decree gave the defendant certain benefits in lieu of alimony with, in our opinion, the intention of the plaintiff and the defendant and the court that such benefits should be exhaustive of all property adjustments between the plaintiff and defendant. The defendant has accepted and enjoyed the benefits of the decree. We said in *Gerry* v. *Stimson,* 60 Me. 186, 189:

> "It is well settled that courts of equity will order to be cancelled, or set aside, or delivered up, deeds or other legal instruments, fraudulent, fictitious, and void, which are a cloud upon the title to real

> estate. But the same reason, which justifies the court to compel the cancellation of a deed, or a release of supposed rights acquired under it, will authorize the prevention of such fictitious and fraudulent titles coming into existence. It is better to prevent the creation of a fictitious or fraudulent title, than to compel its cancellation or its release after it had been created."

The decree of the sitting justice below ordering the defendant to give full effect to the divorce decree issued by the York County Superior Court at the January Term A. D. 1942 by releasing by appropriate deed or conveyance all her right, title and interest in any real estate owned by the plaintiff with the one exception heretofore referred to as of the date of said divorce decree was correct and must stand.

Appeal dismissed.

Decree below affirmed.

JOSEPH O. BOLDUC

vs.

HENRY THERRIEN

York. Opinion, August 27, 1951.

Deceit. Directed Verdict.

It is error to direct a verdict for a defendant where there is evidence which if believed and viewed in the light most favorable to the plaintiff under proper instructions of the applicable rules of law would justify a verdict for the plaintiff.

ON EXCEPTIONS.

This is an action of tort for deceit brought to recover damages arising out of alleged misrepresentations in the purchase and sale of real estate. The plaintiff excepted to the direction of a verdict for the defendant. Exceptions sustained. Case fully appears below.

Simon Spill, for plaintiff.

Francis J. LaFountain, for defendant.

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

NULTY, J. This is an action of tort for deceit brought by plaintiff against the defendant to recover damages arising out of alleged misrepresentations in the purchase and sale of real estate. The defendant filed a plea of general issue. It comes before us on exceptions by the plaintiff to the granting of a motion for a directed verdict for the defendant at the January 1951 Term of the York County Superior Court. The bill of exceptions contained two exceptions but the only exception now pressed is the claim of the plaintiff that the court erred in directing a verdict for the defendant.

The declaration, omitting certain parts thereof, alleges that the defendant

> "did falsely and fraudulently represent to said plaintiff, a layman inexperienced in house construction and known to the defendant to be such, that said dwelling house was well built, that the cellar was dry, that the roof and foundation were built in best workmanship manner and best material, and that weather proof paper was used wherever necessary in said house; that the plaintiff relying upon said statements and representations of the defendant made to him, and believing each of them to be true, not knowing or having any reason to believe that they were in fact false and not true, was thereby induced to purchase the said house at said price as stated aforesaid; and the plaintiff further alleges that the said defendant, a building contractor, having built said house, knew or ought to have known that the statements made by him were not true as represented by him to said plaintiff in that the roof is without proper support, that said building does not have weather proof paper, that said foundation was not built in good workmanship manner and with best material, that the cement blocks and mortar are cracking, that the window casings and door casings were improperly installed, that the wood posts are sagging, and said house was not well built, all of such defects causing damage to the rest of the building, namely, floors, doors and other parts of the house being drawn out of line, said cellar was wet and otherwise defective, all of said defects were not apparent or subject to examination and due to faulty workmanship and insufficient and improper material, - - - -."

The facts, briefly, are that the plaintiff was interested in purchasing a house for himself and his grandchildren with whom he had been living. The defendant was a building contractor of considerable experience who in the course of his business was selling houses which he had built. The house in question was built by the defendant under his di-

rect personal supervision and finished in April, 1948. The plaintiff met the defendant on May 19, 1948, and together they examined the house in question. The plaintiff became interested in the house but the price was too high and after further negotiations the defendant agreed to sell the house to the plaintiff for $8,000, and plaintiff made a down payment of $2,000. A few days later a deed from the defendant to the plaintiff was made, executed and delivered to the plaintiff.

The alleged misrepresentations which are the basis of this action arise out of conversations between the plaintiff and defendant at the time the premises in question were examined. The plaintiff informed the defendant that he knew nothing about house construction and that he would have to rely entirely upon the defendant for information. In the course of the examination of the house the plaintiff learned from the defendant that it was a one story house with an unfinished attic which the plaintiff did not see, being informed by the defendant that it was not necessary for him to see it as it was unfinished with no floor, and, upon further inquiry by the plaintiff with respect to the trap door leading to the open attic, the defendant said in substance—you are buying just a one story house and you do not need to worry about the roof. You have no business there. You can't put anything there; there is no floor or nothing. It developed at the time of the examination that there was considerable water in the cellar which the defendant explained by saying that it had been raining pretty hard for a couple of months. The plaintiff was told and he saw that there was an electric pump installed in the cellar for the purpose of pumping out the water. He also received the information that the foundation was cement blocks with the statement by the defendant in substance that he (the defendant) built all his houses with cement blocks and that they were satisfactory. The plaintiff stated to the defendant that he expected to have something good and the

defendant stated that this house has paper under the shingles and the roof is new and I built it and when I say I built something it is built. Defendant further stated that the house was insulated all around, including good nice paper under the clapboards. The evidence on the part of the plaintiff discloses that the plaintiff informed the defendant that he was trusting the defendant because of his lack of knowledge and the defendant replied to the effect that when he (the defendant) said something he said it and that it (the house) is built and it is right. After the deed was delivered plaintiff went into possession of the premises, the water disappeared and everything, according to the record, seemed to be in order, but late in the Fall of 1948 water again began to appear in the cellar and the plaintiff noticed wet spots on the ceiling of his bedroom. Plaintiff also noticed that the floors had begun to sag and that the doors would not close and windows would not shut properly. Plaintiff complained to the defendant but defendant informed him that when a house is sold and paid for he (the defendant) was all done. Shortly thereafter plaintiff called a mason who made an examination of the cellar and reported that he could improve it by installing a drain around the inside of the cellar which he subsequently did. Then the plaintiff called a carpenter or contractor when he found the ceiling in his bedroom was wet and the record discloses that the carpenter not only made an examination of the roof by removing a number of shingles but that he also made an examination of the unfinished attic in the presence of the plaintiff. The record shows that on one side of the roof there was no insulation, either felt or paper, under the shingles—at least under the shingles that were removed by the carpenter. Plaintiff also called another contractor who made an examination of the premises and in addition to testifying with respect to the faulty construction of the cellar and foundation he testified with respect to the construction of the roof. His testimony in substance was to

the effect that he found upon examination that the only support which the roof had were the rafters bearing from the outside walls on both sides of the house; that there were no collar beams which are customarily placed on each rafter about six feet or thereabouts above the wall plate crossing over from one rafter on one side of the roof to its mate on the other side of the roof; that there was a total absence of a ridge pole prop which is usually placed, according to the witness, about every third rafter to strengthen the roof. There was also further evidence of the faulty construction of the cellar floor, walls and foundation which appeared to be cracked in many places so that water easily oozed through into the cellar.

The essential elements of an action for deceit have been so often and so recently stated by this court that it is unnecessary to reiterate them. See *Shine* v. *Dodge,* 130 Me. 440, 443; also *Coffin* v. *Dodge,* 146 Me. 3, 76 A. (2nd) 541, 543. The question of whether a false representation is material is a question of law. *Caswell* v. *Hunton,* 87 Me. 277, 32 A. 899. Deceit imports a false and fraudulent representation, which must not only influence the buyer's judgment in making the purchase but also must relate to a fact which directly affects the value of the property sold. See *Shine* v. *Dodge, supra.* We said in *Shine* v. *Dodge, supra,* Page 444:

> "The line between what is a statement of fact and of opinion is often shadowy. - - - - - But the precise form of the language is not always the controlling factor. The relationship of the parties or the opportunity afforded for investigation and the reliance, which one is thereby justified in placing on the statement of the other, may transform into an averment of fact that which under ordinary circumstances would be merely an expression of opinion. - - - - - - - - - In construing what is in this respect the true meaning of the language used, it is often necessary to consider the subject matter and the surrounding circumstances, and

> it may be proper to leave the determination of this issue to the jury under proper instructions of the court." (See cases cited)

In our opinion there are certain representations in the declaration which are material although some may be expressions of opinion but it should be remembered that the defendant had been informed of the lack of knowledge of the plaintiff with respect to house construction and the defendant also knew or had been told by the plaintiff that he (the said plaintiff) was relying solely upon the defendant for information concerning the house under consideration. The plaintiff and his witnesses by their testimony pictured a set of facts some of which were material and a great many of the representations testified to by the plaintiff and his witnesses are hardly uncontradicted by the defendant other than to claim that they were trade talk or mere expressions of opinion. It certainly cannot be said that the defendant's representations of the presence of the insulation on the house and roof was a matter of opinion. Neither can the faulty construction of the roof and foundation as testified to by plaintiff's witnesses under the circumstances existing in this case be termed trade talk. There was evidence by the plaintiff and his witnesses which if believed and viewed in the light most favorable to the plaintiff under proper instructions of the applicable rules of law was for the jury. The applicable principles of law relating to the propriety of granting directed verdicts have been many times announced by our court, but it will do no harm to repeat them. We said in *Kimball* v. *Cummings*, 144 Me. 331, 68 A. (2nd) 625, 627, quoting from *Barrett* v. *Greenall*, 139 Me. 75, 80, 27 A. (2nd) 599, 601:

> "The principle of law which controls the action of this court, when exceptions are presented to test the propriety of a nonsuit or a directed verdict for the defendant in the trial court, is to determine only whether upon the evidence under proper rules of law 'the jury could properly have found for the

plaintiff', Johnson et al v. New York, New Haven and Hartford Railroad et al, 111 Me. 263, 88 A. 988, 989; and in determining that issue, the evidence must be considered in that light which is most favorable to the plaintiff, Shackford v. New England Telephone & Telegraph Co., 112 Me. 204, 91 A. 931. The issue here is not whether the evidence adduced is sufficient to establish the controverted facts, but whether or not it has a tendency to establish those facts, and if this is so, although 'it may not be strong in its support, and the Judge may well apprehend, that the jury will find it insufficient', the court has no 'right to weigh it, and determine its insufficiency as matter of law.' Sawyer v. Nichols, 40 Me 212. It is the province of the jury, and not of the justice presiding in the trial court, to judge of the testimony of the witnesses appearing in the cause and to weigh their evidence. Sweetser v. Lowell et al., 33 Me. 446; Blackington v. Sumner et al., 69 Me. 136. The credit to which the testimony of a witness is entitled is entirely a question of fact for decision by the jury. Parsons v. Huff, 41 Me. 410."

Applying the principles of law set forth in the above cited cases to the instant case it is the opinion of this court that it was reversible error to direct a verdict for the defendant. The mandate will be

Exceptions sustained.

ABBIE I. SARD
vs.
REBEKAH W. SARD ET AL., EX'RS.
(LAW DOCKET NO. 1317)

ABIGAIL SARD TRAFFORD
vs.
REBEKAH W. SARD ET ALS., EX'RS.
(LAW DOCKET NO. 1318)

REBEKAH W. SARD, APLT.
FROM DECREE OF JUDGE OF PROBATE
IN RE RETENTION OF ASSETS FOR THE BENEFIT OF
ABBIE I. SARD
(LAW DOCKET NO. 1319)

REBEKAH W. SARD, APLT.
FROM DECREE OF JUDGE OF PROBATE
IN RE PRIVATE CLAIM OF RUSSELL E. SARD, JR.
(LAW DOCKET NO. 1320)

REBEKAH W. SARD, APLT.
FROM DECREE OF JUDGE OF PROBATE
IN RE PETITIONS OF ABBIE I. SARD AND
RUSSELL E. SARD, JR.
(LAW DOCKET NO. 1321)

Waldo. Opinion, August 28, 1951.

Exceptions. Divorce. Agreements. Wills.

Executors and Administrators. Priorities. Executions. Burden of Proof.

Findings of fact by a single justice are conclusive if there is any evidence to support them.

If a justice finds without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions.

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 as apply in other civil cases.

A claim for payments to be made pursuant to an agreement incorporated in a divorce decree which by its terms binds the heirs, executors, administrators, assigns and legal representatives is a claim for ultimate payment of which sufficient assets should be ordered retained by the executors under R. S., 1944, Chap. 152, Sec. 18.

In an action at law brought by a former wife against the executor of her former husband's estate to recover installments due her under a separation agreement, the burden of proving payment is upon the defendant.

An exception that the court had no authority to postpone execution or payment, if erroneous, is not prejudicial.

A daughter recovering damages in an action at law against her deceased father's estate for breach of contract to provide for her by Will is in the same position as that of a legatee, rather than that of a creditor with respect to priority of payment.

A former wife by virtue of rights and installments due and to become due under a separation agreement and divorce decree is a creditor of her former husband's estate and her claim takes priority over claims of children for damages resulting from a failure to leave bequests under such agreement and divorce decree.

ON EXCEPTIONS.

These are separate actions at law and before the Probate Court by a former wife and her two children against the deceased husband's and father's estate and executors thereof. The former wife commenced two actions and each of the two children commenced one action all of which resulted in five matters before the Law Court. (1) A legal action by the former wife to recover unpaid installments due under an agreement and divorce decree resulted in exceptions to an award of $3700 (No. 1317 on the Law Docket). (2) A petition by the former wife before the Probate Court for retention of assets to pay future installments under said agreement and decree resulted in an order and amended order for retention and exceptions thereto (Nos. 1321 and 1319 on the Law Docket). (3) A legal action by the daugh-

ter for damages because of the failure of her father to provide for her as promised in the agreement and divorce decree resulted in exceptions to an award in her favor (No. 1318 on the Law Docket). (4) A claim by a son before the Probate Court against his father's estate for failure to provide for him as promised in the agreement and divorce decree resulted in a decree in his favor and exceptions thereto (No. 1320 on the Law Docket).

Exceptions in each case overruled. Cases fully appear below.

Hutchinson, Pierce,

Atwood & Scribner, for Abbie I. Sard.

Linnell, Brown, Perkins, Thompson & Hinckley,

for Rebekah W. Sard.

Alan L. Bird,

Berman & Berman, Lewiston, for Russell E. Sard.

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

MERRILL, J. On exceptions. These five cases involve the rights of Abbie I. Sard and her two children, Russell E. Sard, Jr., and Abigail Sard Trafford, against the estate of Russell E. Sard, divorced husband of Abbie and father of Abigail and Russell, Jr. Their respective rights are dependent upon and are governed by the terms of a separation agreement entered into in the State of New York between Abbie I. Sard and the decedent prior to their divorce. This agreement was found by the Nevada Court, which subsequently entered the decree of divorce, to constitute a fair and equitable agreement and settlement of the property rights of the respective parties. It was specifically "approved," "adopted and made a part of" the decree of divorce. By its terms said agreement was to bind the heirs,

executors, administrators, assigns and legal representatives of both the parties. Among other things the husband agreed to pay his wife "The sum of Six Thousand dollars ($6,000) per annum, payable in equal monthly installments" during the natural life of the wife or until her remarriage. It was further mutually agreed that the husband and wife would each execute a will providing "a bequest, in the sum of not less than Fifty Thousand dollars ($50,000) to each of said children."

The separation agreement was executed in New York on the 25th day of July, 1930. The divorce decree above referred to was dated November 10, 1930. Subsequent to the entry of the divorce decree, in acknowledgment of the performance of certain provisions contained in the agreement with respect to a possible divorce decree the husband signed a statement that the decree of divorce complied with the terms of the agreement. The husband later (July 23, 1935) remarried and died testate, a resident of Waldo County in this State, leaving as widow, Rebekah Wilmer Sard. The two children, who were both of age at the time of his death, survived him. By his will he nominated his widow, Rebekah, and his son as executors and, the will being allowed, they were confirmed as such. Under the will no provision was made for assuring the continuation of the payments to his former wife. Although there was a provision in the will for his children, it is claimed by both of them that the same does not conform to, nor satisfy the terms of the separation agreement and divorce decree.

The *former wife* brought an action at law in the Superior Court to recover installments due her under the agreement and decree which were unpaid at the date of her husband's death and that had accrued to and including March 1, 1950. This action was heard by the justice presiding, without the intervention of a jury, and he found for the plaintiff in the sum of three thousand seven hundred dollars ($3,700) plus interest from the date of the writ.

This case is identified in the record before this court as No. 6331 on the Waldo Docket and is *No. 1317 on the Law Docket.* This case is now before this court on the defendants' exceptions.

The *former wife* also petitioned the Judge of Probate under R. S., Chap. 152, Sec. 18 that he order the executors to retain in their hands sufficient assets to pay her the amounts that would thereafterwards become due her under said agreement and decree.

From an order and amended order for retention of assets, made in the Probate Court, appeals were taken to the Supreme Court of Probate by Rebekah Wilmer Sarl, widow and co-executrix. The two cases were heard together and in order to clarify the decree below the Supreme Court of Probate entered an order and decree as follows:

> "It is ordered and decreed that the executors of said estate and/or their successors shall, after payment of any and all taxes due from said estate, whether State or Federal, all obligations legally due common creditors including specifically the petitioner, all expenses of administration and such compensation as may be allowed by the Probate Court below to attorneys, retain and set aside and invest, subject to the investment rules applicable to trustees, the residuum of said estate up to but not exceeding the sum of $150,000, the income from which, after deduction of such expenses of administering such fund as the Probate Court below may from time to time alow, shall be used to make regular monthly payments of $500 each to petitioner, any necessary balance of such payments not provided by such net income to be paid by them out of the principal fund.
>
> Propositions of law, novel in this jurisdiction, having been here presented which justify litigation of this matter thus far, costs are hereby awarded the appellant to be paid out of said estate."

These two cases are identified in the record before this Court as Nos. 6362 and 6362-B on the Waldo Docket and are

Nos. 1321 and 1319 respectively upon the Law Docket. These two cases are now before this court on exceptions to the decree of the Supreme Court of Probate by the appellant, Rebekah Wilmer Sard, as widow and co-executrix of the estate.

The son and daughter both claimed that the father, although he made provision for them in his will, failed to make the provision for each of them provided for in the separation agreement and under the provisions of the divorce decree incorporating the agreement therein.

The *daughter,* as beneficiary of said contract, brought an action at law against the estate to recover the damages sustained by her because of the failure of her father to make the provision for her in his will as promised in the contract as incorporated in said divorce decree. This case was heard by a Justice of the Superior Court without intervention of a jury. He found for the plaintiff in the sum of $50,000 but without interest. He further found that although she was entitled to damages for the breach of the contract to make provision for her by will, her relationship to the estate with respect to priority of payment of said damages was the same as that of a legatee, rather than as that of a creditor. *Lang* v. *Chase,* 130 Me. 267, 276. He further found that the mother, so far as payments already due and to become due to her under the separation agreement and divorce decree, was a creditor of the estate; and that payment to her would take priority over the payment of damages to the son and daughter for failure to make the required provisions for them by will. Because the retention order in favor of the mother would prevent immediate payment to the daughter, he made the further order with respect to the judgment in favor of the daughter "Execution to issue on *scire facias* against the goods of the testator, when shown to have come to the hands of the defendant executors or their successors."

To this judgment by the Justice of the Superior Court in favor of the daughter the executors filed exceptions. It is upon these exceptions that this case is now before this court. This case is identified on the record before this court as No. 6333 on the Waldo Docket and *No. 1318 on the Law Docket.*

The *son,* Russell E. Sard, Jr., being one of the co-executors of the will, instead of bringing suit against the estate to recover his damages for the failure by his father to make the required provision for him in the will, filed his private claim therefor against the estate in the Probate Court. From a decree in his favor appeal was taken to the Supreme Court of Probate. In that court the justice thereof allowed the claim in the amount of $50,000 with costs but without interest, with the provision that payment "be *withheld* until goods of the testator not subject to retention order, shall have come into the hands of the executors or their successors, this claim to have exact parity with the judgment awarded Mrs. Trafford in Docket #6333." To this decree of the Justice of the Supreme Court of Probate, Rebekah Wilmer Sard, widow and co-executrix, took exceptions. It is upon these exceptions that this case is before this court. This case may be identified as No. 6362-A on the Waldo County Docket and *No. 1320 on the Law Docket.*

Each of the five cases is before this court on exceptions to the ruling of a single justice. In the two actions at law, brought respectively by the mother and daughter against the estate, the exceptions are to the finding of a Justice of the Superior Court hearing the cases without the intervention of a jury. That such findings may be challenged only by exceptions, and that exceptions reach only errors in law, is too well settled in this jurisdiction to need the citation of authorities therefor. The same is true with respect to the other cases which are here on exceptions to decrees of the Supreme Court of Probate. In both classes of cases the

findings of fact by the justice presiding are conclusive if there be any evidence to support them. When the law invests the justice with the power to exercise discretion, that exercise is not reviewable on exceptions. If the justice finds without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions.

The general rules of law governing the sufficiency of bills of exceptions, and the questions which are open under bills of exceptions are the same with respect to both classes of cases. As we said in the recent case of *Heath et al. Applts.*, 146 Me. 229, 232:

> "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 indiscriminately 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."

Measured by the foregoing rules the bill of exceptions from the decree ordering retention of $150,000 in the cases Waldo County Docket No. 6362 and No. 6362-B, *Law Docket Nos. 1319 and 1321* is fatally defective. It contains the full text of the rulings and decree of the Justice of the Supreme Court of Probate and then, without specifying in what respect such rulings are erroneous, merely states:

"To the foregoing rulings, and findings, the appellant, being aggrieved, seasonably excepted and

presents this her Bill of Exceptions and prays that the same may be allowed."

This bill of exceptions does not differ in any material respect from that in *Dodge* v. *Bardsley,* 132 Me. 230, of which we said:

> "The purpose of a bill of exceptions is to present in clear and specific phrasing the issues of law to be considered by this court. Each ruling objected to should be clearly and separately set forth. The very purpose of the bill is to withdraw from the mass of rulings those which it is claimed are erroneous and exceptions are only presented in a "summary manner' in accordance with the statute when they are 'stated separately, pointedly, concisely.' *McKown* v. *Powers,* 86 Me., 291, 295, 29 A., 1079, 1081.
>
> The method adopted by counsel here attempts to bring before this Court indiscriminately all the rulings of the presiding Justice, and subverts the very purpose of the statute. The objections to this course have been repeatedly pointed out."

In *Wallace* v. *Gilley and Tr.,* 136 Me. 523, the plaintiff brought a bill of exceptions:

> "To the allowance of the defendant's motion the court's ruling and judgment the plaintiff excepts and prays that his exceptions may be allowed."

Again we said:

> "The exception, however, is not properly presented. It is directed generally and indiscriminately 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."

To multiply authorities upon these basic principles of law long established in this jurisdiction would serve no useful purpose.

The exceptions to the decree of the Justice of the Supreme Court of Probate ordering the retention of assets by the executors must be and hereby are overruled.

In passing we would say, however, that the claim of Abbie I. Sard for payments not yet accrued is a claim for the ultimate payment of which sufficient assets should be ordered retained by the executors under the provisions of Sec. 18 of Chap. 152 of the Revised Statutes. Nor, were the question open, do we think that the amount ordered retained is so excessive that it indicates an abuse of discretion or that the decree should be disturbed on that account. Mrs. Sard in October, 1950, was 59 years and 6 months of age with a life expectancy of approximately 15 years. She is entitled to an annuity of $6,000 per year. Although her life expectancy is approximately 15 years, she may not live 6 months and she may live to be 100 years of age. The amount to be ordered retained must be sufficient to meet all of the payments which she may be entitled to receive in any event, and no matter to what age she may live. The amount ordered retained is well justified by the reasoning applied in cases under a similar statute. See matter of *Heckscher*, 76 N. E. (2nd), 273, 297 N. Y. 668, affirming 72 N. Y. S. (2nd) 263, 272 App. Div. 880, and matter of *Reid*, 300 N. Y. S. 1083, affirmed 254 App. Div. 850, 6 N. Y. S. (2nd) 360. In this connection it is further to be remembered that at the death of the annuitant the unexpended balance of the retained assets, if any, will be distributed to those entitled thereto in due course of the completion of the administration of the estate. Such distribution will be made in strict accord with their respective priorities as to payment.

In the action at law brought by the *former wife* to recover installments due her under the contract, the bill of exceptions sufficiently raises but a single issue of law, to wit, who has the burden of proof with respect to payments under the contract and decree. The court ruled that the

burden of proving the same was upon the defendant. This ruling is challenged by the exceptions. More than one hundred years ago this court held that payment was an affirmative defense and that the plaintiff in a suit for breach of contract need not offer evidence negativing payment. *Witherell* v. *Swan,* 32 Me. 247, 250. For further cases showing that the burden of proof with respect to payment is upon the defendant see *Crooker* v. *Crooker,* 49 Me. 416; *Essex Fertilizer Company* v. *Danforth,* 111 Me. 212; *Fairbanks* v. *Barker,* 115 Me. 11; *Church* v. *Church,* 122 Me. 459 and *Hibbard* v. *Collins,* 127 Me. 383. These cases are in accord with the rule declared in Greenleaf on Evidence, 10th Ed. Vol. I, Sec. 516, Wigmore Code of Evidence, 3rd Ed. Rule 238, Page 506, Art. 18, Page 513, and I Jones on Evidence, 4th Ed. Sec. 179, Page 321.

The law applicable to the particular facts of this case is well stated in 40 Am. Jur. Sec. 278, Page 894, as follows:

> "Where, under the terms of a written obligation, a specific sum of money becomes due and payable at a certain time, the production of such obligation establishes prima facie that the amount therein stipulated to be paid is due, and it is not incumbent on the person holding such obligation in the first instance to show either that demand has been made or that there has been a failure to comply therewith."

In 70 C. J. S. Page 298 it is stated:

> "The general rule is that, where an indebtedness or obligation to pay has been established, the burden of proving payment is on the party who alleges it, x x x x x x x. The most frequent applications of this rule are found in actions on obligations for the payment of money, in which it is held that the fact of payment is a special or affirmative defense, and that proof of nonpayment is not necessary to establish a cause of action, even though a formal allegation of nonpayment is included in the bill, petition or complaint."

This special application of the general rule is supported by the cases cited in the footnote to the text of C. J. S. and especially by those in the footnotes found on the same subject in 48 C. J. 682, being notes 23 and 24. The presiding justice correctly applied the foregoing rules with respect to the burden of proof of payment to this case. The exceptions to this ruling that the burden of proof of payment was on the defendant must be and hereby are overruled.

The substantive rights of the *daughter,* Abigail Sard Trafford, and of the *son,* Russell E. Sard, Jr., founded upon the provision in the separation agreement that their father would execute a will providing "a bequest, in the sum of not less than Fifty thousand dollars ($50,000) to each of said children" and their claim that the father's will did not comply with the terms of said agreement are identical. The daughter sought to enforce her rights by an action at law. The son sought to enforce his rights by filing his private claim as executor in the Probate Court. As heretofore stated, the Justice of the Superior Court who heard the action at law, and who in his capacity as Justice of the Supreme Court of Probate heard the appeal from the allowance of the private claim of the son, awarded each of them the sum of $50,000 with payment thereof postponed as hereinbefore set forth. The bill of exceptions by the defendants in the suit at law contains the following allegations:

> "The defendant contends that the provisions made for the plaintiff in the Will were a substantial compliance with the contract and that it was error to rule to the contrary.
>
> Further, that plaintiff has no standing in this Court to bring suit in her own name, and the Court's ruling to the contrary was error.
>
> Further, there was no evidence to support the amount of damages as found.
>
> Further, the Court has no authority to postpone execution or to order that payment of the amount found to be due be postponed.

> To the foregoing rulings and findings the defendant, being aggrieved, seasonably excepted and presents this Bill of Exceptions and prays that the same may be allowed."

The second of the foregoing grounds of exception, "that plaintiff has no standing in this Court to bring suit in her own name," was not urged or mentioned by the appellant in her brief. Oral argument was waived. We have the right to and do consider this exception waived. *State* v. *Sutkus*, 134 Me. 100, 104, and cases cited. The third ground that there was no evidence to support the amount of damages as found is without merit. The contract was to make a provision in the sum of $50,000 and, if broken, the damages were $50,000. The fourth ground of exception, that the court had no authority to postpone execution or to order that payment of the amount found to be due be postponed, if erroneous, is not prejudicial to the appellant. This leaves but one ground of exception for consideration, which is the claim "that the provisions made for the plaintiff in the Will were a substantial compliance with the contract and that it was error to rule to the contrary." The grounds alleged for the exceptions to the decree in favor of the son on his private claim are the same as those to the judgment in favor of the daughter and the exceptions should be disposed of in the same manner by this court.

The seventh paragraph of the separation agreement entered into between the father of these claimants and their mother, his then wife, as set forth in the bill of exceptions was as follows:

> "SEVENTH: The husband and the wife each agree to execute a last will and testament wherein and whereby each of them will provide a bequest, in the sum of not less than Fifty thousand dollars ($50,000), to each of said children, with such limitations as to the payment of said principal sum as each of said parties may elect, but in any event such testamentary bequest shall provide that the

income on such bequest shall, during the minority of the beneficiary, be payable to said child for his or her maintenance and support."

The provisions of the will which it is claimed constitute a substantial compliance with the terms of the separation agreement are set forth in the bill of exceptions as follows:

"Upon the death of my said wife, but subject to the condition set forth below in this paragraph, I direct my Trustees to transfer, assign and pay over, and I give and bequeath, out of the principal of this trust fund, to my daughter, ABIGAIL S. TRAFFORD, and to my son, RUSSELL E. SARD, JR., to each of them, the sum of One Hundred Thousand Dollars, provided, in each case, that my said daughter or my said son, as the case may be, shall have survived me; it being my intent hereby to create, subject to the condition set forth below in this paragraph, in each of my said daughter and my said son who shall survive me a vested right to the payment of said sum, with only the time of payment thereof postponed until the death of my said wife. The foregoing provisions of this paragraph in favor of my said daughter and son are intended by me to be in performance of, and not in addition to, my agreement set forth in Article SEVENTH of a certain Agreement between myself and my former wife, Abbie I. Sard, dated the 25th day of July, 1930, and are, in each case, made conditional upon my said former wife and my said children executing and delivering to my executors within one year after my death the releases described in Article FIFTH of this my Last Will and Testament. If, however, either of my said children should die before me, leaving issue me surviving, I give and bequeath to such issue me surviving, in equal share *per stirpes* and not *per capita,* the same vested right to the future payment of One hundred Thousand Dollars which such child would have acquired under the foregoing provisions had he or she survived me and had my said former wife and my said children executed and delivered the releases as aforesaid.

> The balance of this trust fund, or all of it in the absence of the releases mentioned in the next preceding paragraph hereof, I direct my Trustees upon the death of my said wife, Rebekah Wilmer Sard, to transfer, assign and pay over, and I give, devise and bequeath the same, in equal shares to such of my daughter, ABIGAIL S. TRAFFORD, and my son, RUSSELL E. SARD, JR., as shall survive my said wife and the respective issue surviving my said wife, taken collectively, of each of them who shall have predeceased my said wife leaving issue so surviving; the respective issue of each of said two children who shall have predeceased my said wife to take, in equal shares *per stirpes* and not *per capita,* that share which such child would have taken had he or she survived my said wife.
>
> B. If my said wife, Rebekah Wilmer Sard, should not survive me, I give, devise and bequeath my said residuary estate in equal shares to such of my daughter, ABIGAIL S. TRAFFORD, and my son, RUSSELL E. SARD, JR., as shall survive me and the respective issue surviving me, taken collectively, of each of them who shall have predeceased me leaving issue so surviving; the respective issue of each of said two children who shall have predeceased me to take, in equal shares *per stirpes* and not *per capita,* that share which such child would have taken had he or she survived me."

The releases referred to as described in Article Fifth of the will were (1) a release by the former wife, Abbie I. Sard, of the estate "from any obligation which it may be under to her by virtue of" the separation agreement and (2) releases by Abigail S. Trafford and Russell E. Sard, Jr., daughter and son, of "my estate from any obligation imposed upon me or my estate in and by article Seventh of said Agreement."

The claim that the foregoing provisions of the will, conditioned as they are upon the execution of the releases described therein, and with no provision for payment to the

son and daughter of either income or principal until after the death of the testator's widow, constitute a substantial performance of the agreement is so devoid of merit that it needs no extended consideration by this court. The Justice of the Superior Court in commenting upon the terms of the separation agreement as entered into by their father and mother well said:

> "It is inconceivable that their language was designed to open the door to the imposition of unreasonable restrictions and conditions under the guise of 'limitations.' The testator married again and as so often happens, he sought to favor his second wife and prefer her interests over those of his children. By his will, the contractual $50000 bequests were to be paid only at the end of a life estate in favor of his second wife, and then only upon the giving of releases by his first wife and children which would substantially negative the contractual rights which they owned. That our Court would not consider such a bequest as conforming to the contractual obligation seems evident from a study of the cases. (See Bank v. Tracy, 115 Me. 433)."

This appraisal of the attitude of this court with respect to this question by the court below was correct. The provisions of the will of the father for the children do not substantially or even approximately comply with the terms of the separation agreement. The exceptions to the decision of the Justice of the Superior Court in the action at law brought by the daughter and to the decree of the Supreme Court of Probate in the appeal case involving the private claim of the son must be and hereby are overruled.

The entries in the several cases will be as follows:

Law Docket No. 1317 — Exceptions overruled.
Law Docket No. 1318 — Exceptions overruled.
Law Docket No. 1319 — Exceptions overruled.
Law Docket No. 1320 — Exceptions overruled.
Law Docket No. 1321 — Exceptions overruled.

HARRIET L. WHITE

vs.

G. BYRON MARCH

Kennebec. Opinion, August 31, 1951.

Negligence. Motor Vehicles. Non-resident. Process. Venue.

When an alien or non-resident is personally present in any place in this State, temporarily or transiently, and is there served with process, our courts have complete jurisdiction over his person.

The non-resident motor vehicle statute (R. S., 1944, Chap. 19, Sec. 59) is not limited to actions brought by a resident plaintiff.

A transitory action may be brought by a non-resident plaintiff where jurisdiction over a non-resident defendant can be obtained in accordance with the principles of the common law or by substituted service pursuant to R. S., 1944, Chap. 19, Sec. 59.

The non-resident motor vehicle statute does not restrict the venue of the action to the county where the accident happened or to any other particular county within the State, although the natural place to bring the action is the county where service of process would normally be made.

The non-resident motor vehicle statute must be followed strictly.

ON EXCEPTIONS.

This is an action by a non-resident plaintiff against a non-resident defendant to recover damages resulting from an automobile collision occurring within the State of Maine. Jurisdiction of the defendant was claimed by virtue of substituted service of process made upon the Secretary of State pursuant to R. S., 1944, Chap. 19, Sec. 59. The presiding justice granted a motion to dismiss the action for want of jurisdiction. Plaintiff excepted. Exceptions overruled. The statute was not strictly followed.

Case fully appears below.

Alan L. Bird,

Samuel W. Collins, Jr., for plaintiff.

Berman, Berman & Wernick, for defendant.

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

THAXTER, J. This action to recover damages to property and for personal injuries grew out of a collision of two automobiles on Route 1 in the State of Maine on the road between Stockton Springs and Bucksport, in this state. The plaintiff was a resident of Bridgeport in the State of Connecticut, the defendant was a resident of St. John, Newfoundland. Personal service was not made within the State of Maine on the defendant but jurisdiction of him was claimed to have been obtained by substituted service made on the Secretary of State as agent of the defendant in accordance with the provisions of R. S., 1944, Chap. 19, Sec. 59. The defendant filed a motion to dismiss the action on the ground of want of jurisdiction. The sitting justice granted the motion and to such ruling the plaintiff excepted. The case is before us on such exception.

There are two questions raised by defendant's motion to dismiss, which the sitting justice granted. Firstly: Was the purpose of the legislature, as expressed in the statute, to provide for obtaining jurisdiction over a non-resident defendant in a suit brought by a non-resident plaintiff in the courts of this state? Or was such right to be restricted as claimed by the defendant to a plaintiff who was a resident of this state? Secondly: Were the provisions of R. S., 1944, Chap. 19, Sec. 59, fully complied with? The provisions of Sec. 59 read as follows:

> "**Sec. 59. Non-resident operating motor vehicle in this state to appoint secretary of state as attorney for service of process; how service is to be made. R. S. c. 29, Sec. 130.** The acceptance by a person who is a resident of any other state or country of the rights and privileges conferred by this chapter as evidenced by the operation, by himself or agent, of a motor vehicle thereunder, or the operation by such a person, by himself or his agent, of a motor vehicle on a public way in this

state otherwise than under the provisions of said chapter, shall be deemed equivalent to an appointment by him of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which such person or his agent may be involved, while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy thereof with a fee of $2 in the hands of the secretary of state, or in his office, and such service shall be sufficient service upon such non-resident; provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt, and the plaintiff's affidavit of compliance herewith, are appended to the writ and are filed with the clerk of courts in which the action is pending, or that such notice and copy are served upon the defendant, if found within the state, by an officer duly qualified to serve legal process, or, if found without the state, by any duly constituted public officer qualified to serve like process in the state or jurisdiction where the defendant is found, and the officer's return showing such service to have been made is filed in the case on or before the return day of the process or within such further time as the court may allow. The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action."

By its terms the statute in question is not limited to actions brought by a resident plaintiff. That is admitted by counsel for the defendant. The legislature could easily have inserted such provision in the statute if it had wished.

It is settled law in this jurisdiction that when an alien or non-resident is personally present in any place in this state,

however temporarily or transiently, and is there served with process, our courts have complete jurisdiction over his person. *Alley* v. *Caspari,* 80 Me. 234, 237. As was clearly said by Chief Justice Peters in *Rice* v. *Brown,* 81 Me. 56, 61, "Any non-resident of the state may sue any other non-resident in any county where the defendant is personally served with process." Such is the rule in Massachusetts. *Peabody* v. *Hamilton,* 106 Mass. 217.

It has been the policy of our legislature to extend the jurisdiction of our courts by providing in some cases for substituted service against non-resident defendants. Thus provision is made for giving jurisdiction over non-resident corporations before they are permitted to do business within our state, and over non-resident motorists who are involved in an accident while driving on our highways. The constitutionality of such a provision as is here involved, R. S., 1944, Chap. 19, Sec. 59, is unquestioned. *Pawloski* v. *Hess,* 253 Mass. 478, affirmed 274 U. S. 352, 71 L. Ed. 1091. See 32 Mich. L. Rev. 325; 37 Mich. L. Rev. 58. Such policy is but a recognition that the law must keep abreast of the demands of modern science in so far as they apply to travel by automobile. There is thus provided by the exercise of the police power an efficacious remedy to promote the public safety and preserve the public health on behalf of those injured in their persons or property by the negligent use of our highways by others. *Pawloski* v. *Hess,* 250 Mass. 22. *Kane* v. *New Jersey,* 242 U. S. 160, 61 L. Ed. 222. This jurisdiction over a non-resident defendant is claimed by some courts on the theory that by using our highways to travel by automobile, the non-resident motorist thereby consents to the appointment of the Secretary of State as his agent to accept service of process in actions growing out of the operation of his automobile within the state. But it is not true consent and the law should meet this issue head on rather than to rest jurisdiction on a fiction. Judge Holmes has pointed out in his work on the Common Law, page 1,

that "The life of the law has not been logic; it has been experience." And Judge Hand clearly shows that jurisdiction over a foreign corporation is not obtained by reliance on the fiction that such corporation has in fact consented to be served here. He says in *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148, 151 (S.D. N. Y. 1915):

> "When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent."

Counsel for the defendant calls our attention to the fact that in interpreting a statute we seek the intent of the legislature often in disregard of the letter of the enactment. *State* v. *Day*, 132 Me. 38. But it is a very different thing to explain an ambiguous statute by searching for legislative purposes in contravention to a statute's expressed terms, than it is to create a doubt of what a statute means by ascribing to the legislature an intent which the legislature has failed to express or has expressed by the use of quite contrary language. That is the story here. By its language this statute does not restrict the right of a non-resident plaintiff to sue in our courts. A transitory action may be brought by a non-resident plaintiff where jurisdiction over a non-resident defendant can be obtained in accordance with the principles of the common law or by substituted service in accordance with the provisions of R. S., 1944, Chap. 19, Sec. 59. Such has been the ruling of various courts

where the question has been specifically raised. Why should this court restrict the right of the non-resident plaintiff to sue by inserting in Sec. 59, *supra,* something which is not there? Why should he not be permitted to bring suit by substituted service under this statute when he is plainly embraced within its terms? To bar him would be to give to the statute a meaning contrary to legislative intent. It would be to bar our doors to litigants when legislative policy has been to open them as widely as possible. To use the words of the New Hampshire court, it would be to put a construction on a statute "provincial in character." It would be to construe the statute both contrary to its letter and spirit. *Garon* v. *Poirier,* 86 N. H. 174, 164 A. 765. That the plaintiff in this case has the right to bring suit in this state is in accord with authorities with which we agree. *Beach* v. *Perdue Co.* (Del. Super. Ct. 1932) 163 A. 265; *Fine* v. *Wencke,* 117 Conn. 683, 169 A. 58; *Herzoff* v. *Hommel,* 120 Neb. 475; *Garon* v. *Poirier, supra; Sobeck* v. *Koellmer* (App. Div. 1933) 265 N. Y. S. 778; *Malak* v. *Upton,* 3 N. Y. S. (2nd) 248; *State ex rel. Rush* v. *Circuit Court,* 209 Wis. 246; See *Martin* v. *Fischback Trucking Co.* (C. C. A. 1950) 183 F. (2nd) 53, 39 Harv. L. Rev. 563, 32 Mich. L. Rev. 347 et seq., 37 Mich. L. Rev. 58, 74.

We cite the following language from one of these authorities which is in accord with the doctrine expressed in all the others: *State ex rel. Rush, Petitioner* v. *Circuit Court for Dane County,* 209 Wis. 246, 248:

> "Even assuming that the consent upon which the constitutionality of such laws is based is a fiction and that the real basis for sustaining them is the necessity of securing safety on the highways, the extension of the benefits of the act to non-residents violates no constitutional prohibition. The state has nearly as great an interest in promoting the safety of non-residents using our highways by securing for them convenient redress in case of injury as it has in its own residents. The

> necessity which justifies such an act with respect to residents is broad enough to justify the inclusion of non-residents."

We have given this discussion as this plaintiff may again seek to use the statute here in question to obtain jurisdiction of this defendant. If he does so we will say that the venue of this action was properly laid in the County of Kennebec. The statute does not restrict the venue of the action to the county where the accident happens or to any other particular county within the state. In the absence of any specific designation of venue, the normal place to bring the action was the County of Kennebec where service of process would normally be made. A statute as important as this does not fail because no provision is made as to venue.

We have seen that the statute here in question providing for substituted service on a non-resident motorist using our highways is a valid exercise of the police power of the state; that by its terms it is unrestricted in scope and applies in a suit brought by a non-resident plaintiff as well as in a suit brought by a resident. To give the court in Maine personal jurisdiction over the defendant, the statute in question however must be strictly followed. *Felstead* v. *Eastern Shore Express, Inc.* (Del. Super. Ct. 1932) 160 A. 910. See the language of the court in *Shushereba* v. *Ames,* 255 N. Y. 490. To construe this statute strictly imposes no hardship on a plaintiff, and it does insure the defendant protection. The statute here involved provides that the service of process shall be sufficient service upon the non-resident defendant, "provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt, and the plaintiff's affidavit of compliance herewith, are appended to the writ and are filed with the clerk of courts in which the action is pending." This provision of the statute clearly was not complied with. We agree with counsel for the defendant that because of such defective service and because

of that alone no jurisdiction was ever obtained over the defendant. The case was properly dismissed; but the plaintiff is of course free to institute another action when he has shown compliance with the statutory provisions relating to service.

Exception overruled.

GUY E. FLAGG

vs.

AGNES T. DAVIS ET AL.

Androscoggin. Opinion, September 17, 1951.

Equity. Appeal. Specific Performance. Contracts.

Under Maine law an equity appeal is heard anew on the record.

In determining whether there is credible evidence to support the findings of a sitting justice, it is well to bear in mind that "credible" under the common law means competent.

Where a complainant does not support his bill by full, clear, and convincing evidence a decree granting specific performance is error.

ON APPEAL.

This is a bill in equity with a prayer for specific performance of an alleged contract to convey real estate. The case was heard on bill, answer, replication and proofs. From a decree sustaining the bill and ordering specific performance, defendants appeal. Appeal sustained. Remanded to the court below for entry of a decree dismissing the bill for specific performance. Case fully appears below.

John A. Platz, for plaintiff.

Berman & Berman, for defendant.

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

NULTY, J. This proceeding comes before us on defendants' appeal from a final decree of the Supreme Judicial Court in Equity for the County of Androscoggin sustaining the bill in equity and ordering specific performance by the defendants. The litigation was developed by a bill in equity which prayed for specific performance for what is alleged to be a contract to convey real estate. The written docu-

ment, specific performance of which is sought by the plaintiff from the defendants, reads as follows (omitting a portion of the description of the real estate):

> "Memorandum of agreement by and between Agnes T. Davis, Benj. L. Davis, Melvin J. Davis, Elizabeth J. Davis, Mildred T. Finn, F. Wallace Finn, Ethel L. Davis, Emma D. Harris, Agnes I. Davis and Charles H. Harris, of Webster, County of Androscoggin, State of Maine and Guy E. Flagg of Auburn, Maine, same County and State, and, or his assigns.
>
> "The above named heirs of Lee W. Davis agree to sell to Guy E. Flagg or his assigns all of the land located in Lewiston on Pleasant Street and Mitchell Road —.
>
> "Upon tender to him of a Warranty Deed of said premises free and clear of all incumbrances, the said Guy E. Flagg agrees to pay said Lee W. Davis heirs, the sum of Six Thousand ($6000.00) on or before October 1, 1949.
>
> "Dated at Lewiston this 3rd day of September 1949.
>
> SIGNED
>
> Agnes T. Davis Exec
> Benjamin L. Davis
> Melvin J. Davis
> Agnes I. Davis
> Elizabeth J. Davis
> Mildred T. Finn
> F. Wallace Finn
> Ethel L. Davis
> Emma D. Harris
> Charles H. Harris
> Guy E. Flagg."
>
> We extend this
> option for 10 days
> Melvin J. Davis

It came before the court below on bill, answer, replication and proofs, the answer being a complete denial of the alle-

gations of the bill. From the factual findings of the court below and from the decree thereon it appears that the real estate in question was owned by the defendants and embraced forty-four (44) acres of land, more or less, in Lewiston, Androscoggin County, Maine. The sitting justice found from the testimony and the written contract that the plaintiff offered to pay the defendants $6,000.00 for the land upon tender of a deed to the plaintiff or his assigns on or before October 1, 1949, which contract the sitting justice finds by mutual agreement was extended for ten days by an endorsement made by the active agent of the defendants on the original contract set forth herein, and that defendants never, at any time, tendered to the plaintiff or his representative a fully executed warranty deed of the premises which the written contract required, although prior to the expiration of the extended period of time called for by the written contract, defendants informed Frank W. Linnell, an attorney who the plaintiff claimed to the defendants was to act as the conduit through whom the transaction was to be completed, that they were not going to tender a deed, and, in the words of the witness, "- - - he was not going through with it." The sitting justice also found as a fact that the plaintiff expected to find a customer who would provide the funds to carry out the transaction and that the plaintiff did not have funds of his own to fulfill the contract terms. It is conclusively shown that the defendants knew and understood that by the terms of the written contract they were obliged to offer plaintiff a deed complying with the terms of the written contract. After the verbal repudiation to Linnell by the defendants' active agent and prior to the expiration of the final date for the tender of the deed the defendants undertook negotiations with third parties for the sale of the real estate described in the written contract dated September 3, 1949, as extended. After the expiration of the final date indicated for the tender of the deed, Linnell at the request of the plaintiff, called the active agent for the

defendants and notified him that the purchase price called for by the written contract was available and that the plaintiff was ready to complete the transaction. The agent for the defendants informed Linnell that the property had been sold, but later the same day again offered the property to the plaintiff for an increased price. It was developed in testimony and found by the sitting justice that a third party, through the activities of the plaintiff subsequent to the time limitation of the contract, had agreed to buy the property and had deposited the full purchase price, which was in excess of the contract price, with Linnell who, as before stated, was to act as conduit. The defendants, through their attorney, refused to give a deed and shortly thereafterwards the bill in equity for specific performance was instituted.

Under our law an equity appeal is heard anew on the record. See *Cassidy* v. *Murray,* 144 Me. 326, 74 A. (2nd) 230; *Sears, Roebuck & Co.* v. *City of Portland,* 144 Me. 250, 68 A. (2nd) 12, 16. We said in *Cassidy* v. *Murray, supra,* in speaking of equity appeals:

> "(2) Revised Statutes (1944) Chap. 95, Sec. 21, in part directs with respect to equity appeals and the duty of the Law Court therein: 'and shall on such appeal, affirm, reverse, or modify the decree of the court below, or remand the cause for further proceedings, as it deems proper.' Our court has held that findings of fact by the justice below will be conclusive unless clearly wrong and the burden is on the appellant to prove it. Young v. Witham, 75 Me. 536, Paul v. Frye, 80 Me. 26, 12 A.
>
> 544. Our court also said in Leighton v. Leighton, 91 Me. 593, 603, 40 A. 671, 675, speaking of findings of fact: 'Such is the general rule, but it does not necessarily require proof beyond a reasonable doubt. And sometimes circumstances and conditions are to be considered which prevent the rule applying so literally as it otherwise would.'

> "In Sears, Roebuck & Co. v. City of Portland, supra, we said (speaking of finding of fact) : 'This rule does not mean that the findings of fact of the Justice below will not be reversed on appeal unless such findings constitute error in law. They may be disregarded on an appeal when clearly wrong.' "

There was a very lengthy hearing in this matter as shown by the transcript of the record, which approximates two hundred eighty typewritten pages. Sitting as an appellate court, we are very conscious of the principle which requires no further citation of authorities that the decision of any fact by the court below should not be overruled by the appellate court unless the appellate court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error, one of the main reasons for support of that principle being that one who sees and hears the witnesses is in a more favorable position to better judge of their credibility than others who merely review the printed testimony, but it, however, sometimes happens that a hurried examination of a long and complicated case by the court below may not be so satisfactory as a deliberate reexamination of the case on appeal with the aid of a printed record. See *Leighton* v. *Leighton, supra.*

In examining conflicting testimony in order to determine whether or not there is credible evidence to support the findings of a sitting justice, it is well to bear in mind that the word "credible" under common law means competent. See *Clark et al., Aplts.*, 114 Me. 105, 106, 95 A. 517. *Black's Law Dictionary,* Third Edition, Page 475, defines a credible witness as "one who is competent to give evidence" and "one who is worthy of belief" and defines credibility as "Worthiness of belief; that quality in a witness which renders his evidence worthy of belief." *Bouvier's Law Dictionary* (unabridged), Rawle's Third Revision, Vol. I, Page 725, defines a credible witness as "One who, being competent to give evidence, is worthy of belief. *Amory* v. *Fellowes,* 5 Mass.

229; - - -." We said in *Weliska's Case,* 125 Me. 147, 149, 131 A. 860, speaking of credibility of testimony:

> "The credibility of testimony, its capacity for being believed, is one of the things to be settled before weighing it. If the testimony has not this quality there is no occasion for weighing it. - - - - - For probatory purpose it was as light as nothingness, - - -."

With these principles in mind, we have very carefully examined the record, which is voluminous and at times conflicting, and in many places there appears to be gross inaccuracies of what ordinarily would or should be credible testimony as to the facts in the instant case, and when we intimate that they are inaccuracies we put it mildly, and they were not all confined to one of the parties to the litigation. We, therefore, feel that the evidence is not full, clear and convincing in that from the record it is impossible for us to determine just where the truth lies, or, to put it another way, we are unable to determine from the record which part or parts of the evidence adduced can be said to be credible and, therefore, convincing and worthy of belief.

The sitting justice finds that the original contract dated September 3, 1949, was extended by "mutual agreement." It is true that the active agent of the defendants signed the alleged extension as it appears on the original contract, but when the evidence is carefully examined the reasons given by the plaintiff and defendants are in sharp conflict. The plaintiff, in stating his version of the facts relating to the alleged extension states, among other reasons, that the defendants asked for time to secure signatures on the deed which had been drafted at his request. It should be noted that the deed did not contain the name of any grantee and was ordered and furnished by the plaintiff. The active agent of the defendants testifies that the plaintiff asked for further time in order to get the money to pay the purchase

price. As a matter of fact the entire record, when carefully examined and considered, is convincing that the plaintiff at no time during the contract term or the alleged extension thereof ever had the money with which to pay the agreed purchase price provided in the contract if the deed was tendered to him by the defendants, and the evidence is equally convincing, when carefully examined, that it was only after the contract and the alleged extension thereof had expired was the plaintiff in a position to pay said purchase price.

There is another conflict in testimony which is extremely difficult to reconcile with any of the existing facts. A careful reading of the evidence discloses that the defendants, through their active agent, attempted to repudiate the contract which fact may have had some bearing in the decision of the sitting justice below. The record shows that the plaintiff apparently had no knowledge of this so-called repudiation but it is clear that when the plaintiff was confronted with testimony that he met the active agent of the defendants on October 10, 1949, which was one day before the alleged extension expired, he then tries to place himself in a hospital and also testifies that he had an entirely different car when he and the defendants' active agent met on that day in front of the Lewiston Post Office. The evidence concerning that meeting is not credible evidence from any point of view and the credibility of that evidence is not necessarily confined to the plaintiff's side of the story. In other words, the entire evidence, taken as a whole, fails to support the plaintiff's allegations for it is not full, clear and convincing and worthy of belief. In our opinion the plaintiff has failed to sustain the burden of proof because the testimony of the plaintiff, under the circumstances and conditions that appear to exist according to the record, is not credible. We, therefore, as an appellate court, feel that any further analysis of the evidence would be of no particular

value and, as we said in *Sears, Roebuck & Co.* v. *City of Portland, supra,* speaking of findings of fact:

> "They may be disregarded on an appeal when clearly wrong."

We also said in *Fall* v. *Fall,* 107 Me. 539, 81 A. 865, which was an action relating to the enforcement of a constructive trust in a parcel of land:

> "We are of the opinion that complainant does not support his bill of complaint by full, clear and convincing evidence. The conscience of the court is not satisfied that the allegations are sustained. - - -"

It is the opinion of this court that on the record the allegations of the bill are not sustained and it follows, therefore, that the decree of the court below granting specific performance was error and the mandate will be

Appeal sustained. Remanded to the court below for entry of a decree dismissing the bill for specific performance.

OSCAR A. CADORETTE ET AL., IN EQUITY

vs.

MICHEL CADORETTE, INDIVIDUALLY AND AS EXECUTOR U/W OF DELIMA BERGERON, ET AL.

York. Opinion, September 13, 1951.

Equity. Fraud.

Where on the facts a defendant fails to overcome the presumption of fraud, a decree invalidating a deed and mortgage will not be disturbed on appeal.

ON APPEAL.

This is an appeal from a final decree in equity holding a deed and mortgage void. The case was heard on bill, answer, replication and proof. Appeal dismissed. Decree below affirmed except for modification thereof with respect to rent income from September 9, 1950. Final decree to be entered by the sitting justice in accordance herewith. Costs of this appeal to be added to bill of costs below.

Franklin R. Chesley (deceased),
Lloyd P. LaFountaine, for plaintiff.

Joseph E. Harvey, for defendant.

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

WILLIAMSON, J. This is an appeal from a final decree in equity holding a deed and mortgage, "held (in an interlocutory decree) to have been illegally and fraudulently obtained, which made them both void, as a matter of law," are "an absolute nullity."

The plaintiffs are three sons and the only daughter of Delima Bergeron, deceased. The defendants are the eldest

and remaining son and his wife. The son is named both individually and as executor of his mother's will.

The case was heard at length on bill, answer, replication and proof. After the interlocutory decree was entered, an accounting was taken of the net rents and profits for which the defendants were responsible to the plaintiffs. The final decree calls for certain action by the defendants including payment of the rent income to the date of the decree. No objection is raised to the decree in so far as it is designed to make effective the main holding. No separate findings of fact were filed. See *Tebbetts* v. *Tebbetts,* 124 Me. 262.

The principles of law under which an equity appeal is heard are well established. "An equity appeal is heard anew on the record," and "It is also the law that findings of fact by a sitting justice will be conclusive unless clearly wrong and the burden is upon the appellant to prove it." *Tarbell* v. *Cook,* 145 Me. 339, 75 A. (2nd) 800. See *Cassidy et al.* v. *Murray,* 145 Me. 207, 74 A. (2nd) 230, and cases cited. "In an appeal from the decision of a sitting justice, the appellant has the burden of showing the decree to be clearly wrong, especially when the credibility of witnesses is an issue. In this case the credibility of the witnesses was an important issue. The sitting justice had the advantage of observation of the persons testifying, and their testimony weighed by him must have aided in forming his judgment." *Snow* v. *Gould,* 119 Me. 318, at 321. See also *Young* v. *Witham,* 75 Me. 536, and *Fortin et al.* v. *Wilensky,* 142 Me. 372. We examine the record, therefore, to ascertain if there is evidence sufficient to justify the ultimate finding by the sitting justice.

It will be unnecessary to set forth the evidence in detail. There was ample credible evidence to disclose the following situation.

Mrs. Delima Bergeron, mother of the parties (except the defendant son's wife), died on January 18, 1948 at the age of eighty-four years and nine months. She was left a widow on the death of her second husband in January 1942. For several years, and since before 1942, she owned a home and income producing properties in Biddeford which form the subject matter of the controversy. In addition to the real estate, Mrs. Bergeron had substantial deposits in savings accounts. In no way was the mother dependent upon her children for financial aid. The family was united. The children were on friendly terms with each other and with their mother until her death.

In October 1942 Mrs. Bergeron had a shock, and for a year required the services of a nurse. It was necessary that one of the family take charge of the home. At the outset her eldest son and his wife moved to the mother's home. The wife gave up her employment at her husband's store. In February 1943 by arrangement within the family the son and his wife closed their home and thereafter lived with and cared for the mother. Before this, and after her shock, the mother conferred with a lawyer about disposition of her property. No will or deeds, however, were executed by her at this period.

To an increasing degree the eldest son Michel acted as his mother's business agent, collecting the rents and attending to her properties and banking. From 1942 they had a safe deposit box jointly. In 1944 his mother executed a power of attorney running to him, and he then took over the collection of rents from a brother. Michel became the trusted son and his mother relied heavily upon him.

In March 1946 Mrs. Bergeron made her will, leaving her property in so far as the children were concerned as follows: 74 Pike Street to her sons Oscar and Arthur; 80 Pike Street to her son Alfred and her daughter Rose; 109 and

113 Alfred Street to Michel and his wife Florida, together with all furniture and furnishings in the home at 109 Alfred Street and all fixtures in the store at 113 Alfred Street. The residue of the estate was left to Michel who was named executor without bond. The will was not prepared by the lawyer whom she had previously consulted. It does not appear that the will was read by any of the children. It was then—and indeed had been since the mother's illness in 1942—the general understanding between the mother and the children that the property would be left as set forth in the will, and that each of the children except Michel would receive a $1,000 savings account. The value of the property left to the defendants, Michel and Florida, was much in excess of the value of the interests in the Pike Street houses devised to the other children, plus the savings accounts.

In October 1947 Mrs. Bergeron had a second shock. Within a few days her condition was such that there was administered the sacrament of extreme unction. For the remainder of her life she was bedridden, was partially paralyzed, and required the care of a practical nurse. She was also under the care of a physician, who did not testify in the case. There is no suggestion in the record that he was not available. The immediate cause of death was a cerebral hemorrhage.

On December 15, 1947 Michel upon an order signed by his mother closed a savings account of $2,210 in the joint names of his mother and his brothers Alfred and Arthur, and opened two joint accounts of $1,000 each, one in the names of his mother and Alfred, and the other in the names of his mother and Arthur. An existing joint account of $1,096 in the names of his mother and Rose was not disturbed. The three savings accounts were later received by the children from Michel as executor.

Rose told of an incident at the home on December 15. Florida in Michel's presence said in substance that her mother had no more money, that it was necessary to sell the Pike Street houses, and that the houses had been valued for them at about $18,000. We quote a portion of the testimony of Rose:

> "Well, she said that they were going to buy the houses for $9,000 and of course I was close to mother and she would give me $5,000 alone and she would give Oscar one, Fred one, and Arthur two, and she says, 'You will have more than the three together.' 'So,' she says, 'we will go in the room and tell mother that you are going to accept at $5,000.' And we all got up and went to my mother's room, and Michel went first, and he began to crank the bed so she could stand up a little, and he said, 'Rose is going to take the $5,000.' She says, 'What did you say?' And we were coming in, and Florida said, 'Well, tell her; tell her you are going to take the $5,000.' And she saw me and she said, 'Rose, they say I don't have any more money; I don't know what they did with my money,' and she started crying, and I did, too. You think I would ask for $5,000? No, siree. So she brought me in the kitchen and she said, 'Don't cry; you didn't think I would give you as much as that.'"

The incident was denied in its entirety by the defendants.

We come now to the transaction found to be fraudulent. On December 22, 1947 a lawyer came to the home at the request of Michel. The lawyer had not seen Mrs. Bergeron since preparing her will in March 1946. He conferred with Mrs. Bergeron, and the next day returned with the deed and mortgage. The attorney stated in substance that the instruments were prepared to carry out Mrs. Bergeron's directions, that his advice was neither sought by nor given to her, and that he did not know of or inquire about the value of the property conveyed.

By the deed dated December 23, 1947 Mrs. Bergeron conveyed to Michel and his wife Florida the properties on Alfred and Pike Streets, that is, her home and all the income producing properties. Michel and Florida on the same day and as part of the same transaction gave a mortgage upon the same properties to Mrs. Bergeron, conditioned upon support and maintenance for life, with nursing and medical care and a suitable burial. The mortgage and deed were recorded on December 26, 1947. Twenty-three days later — twenty-six days from the delivery of the deed and mortgage — the mother died.

The will was presented for probate in February 1948 by the lawyer who drafted both the will, and the deed and mortgage as well. The plaintiffs attended the Probate Court hearing. No mention was made by the attorney that the property devised to them had been conveyed by their mother.

Not a word was said by Michel or Florida to the brothers and sister about the conference with the attorney or about the deed and mortgage. Not until after the allowance of the will did they learn of the conveyance by their mother of all of her real estate. Under the will, if the deed is effective, the plaintiffs receive nothing.

It is plain from the record that there was a relationship of confidence, dependence and trust between mother and son, shared by his wife. It is equally plain that the son and wife gained substantial benefits from the transaction and the mother nothing. The Alfred Street property was worth about $23,000 and the Pike Street houses a like amount. The home and the real property were worth thousands of dollars more than the value of the promises secured by the mortgage.

Or if we consider the transaction in connection with the expected division of the mother's estate, we find the de-

fendants gained the Pike Street houses at no cost to themselves. Their promise under the mortgage did no more than relieve their mother and her estate of like expenses. Whatever the defendants paid out would increase in like amount the residue left to Michel by will, and in fact this was the result. Michel says he expended some $2,400, and his final account as executor shows he received $4,616.64 from the estate. There was no necessity whatsoever for the mother to dispose of any, let alone all, of her real property. The inventory of her estate shows $4,809.68 in bank accounts in her name, apart from accounts available to her totalling over $3,000 jointly with Alfred, Arthur and Rose.

If Michel and Florida were but innocent recipients of a mother's gift — for their promise under the mortgage held no value for the mother, aged and dying — we may ask why did they not fully and freely disclose the entire transaction to the brothers and sister? Why did they not tell the fact, so interesting to the brothers and sister, that the mother no longer lived in her own home, or derived income from her houses, but relied upon the promise of defendants for support and burial?

The governing principle was stated by Justice, later Chief Justice Sturgis, as follows:

> "The term 'Fiduciary or confidential relation' embraces both technical fiduciary relations and those informal relations which exist whenever one person trusts in and relies on another. And the rule is that whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them by which the superior party obtains a possible benefit equity presumes the existence of undue influence and the invalidity of the transaction, and casts upon that party the burden of proof of showing affirmatively by clear evidence that he or she

> acted with entire fairness and the other party acted independently, with full knowledge and of his own volition free from undue influence." *Gerrish, Executor* v. *Chambers et al,* 135 Me. 70, at 74.

See also *Eldridge* v. *May,* 129 Me. 112.

"The presumption of fraud which the law casts upon transactions of this kind is not overcome by the evidence." *Gerrish* case, *supra.* The decree below was fully warranted.

By the terms of the final decree the defendants were required to account for the rent income to September 9, 1950. It will be necessary to modify the decree to provide for payment of rent income subsequent thereto.

The entry will be

Appeal dismissed.
Decree below affirmed except for modification thereof with respect to rent income from September 9, 1950.

Final decree to be entered by the sitting justice in accordance herewith.

Costs of this appeal to be added to bill of costs below.

JOHN PUCILLO, JR., PRO AMI

vs.

WILLIAM A. CUMMINGS

JOHN PUCILLO

vs.

WILLIAM A. CUMMINGS

Sagadahoc. Opinion, September 13, 1951.

PER CURIAM.

These cases are before this court on the defendants' exceptions to the refusal of the presiding justice to grant a nonsuit. From the earliest days in this state this court has consistently held that no exceptions lie to the refusal to grant a motion for a nonsuit. The presiding justice should have refused to allow the bill of exceptions. The exceptions must be dismissed as improvidently allowed.

Exceptions dismissed.

Harold J. Rubin, for plaintiff.

John W. Quarrington,
Charles A. Bartlett, for defendant.

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

FRED W. MORRIS ET AL. PET'RS.

vs.

HAROLD I. GOSS

SECRETARY OF STATE

Cumberland. Opinion, October 5, 1951.

Taxation. Constitutional Law. Emergency.

It is a well established rule that questions of constitutional law should not be passed upon unless strictly necessary to a decision of the cause.

The emergency preamble of a statute must express the facts constituting the emergency. Whether such fact or facts as has been expressed can constitute an emergency is a question of law. The question whether the facts exist or do constitute the emergency are legislative matters not subject to court review.

The expression that "the *essential* needs of State Government require that additional revenue be raised by this legislature" is a sufficient expression of fact as constituting an emergency under the Constitution of Maine.

"Essential" means indispensable, absolutely requisite, and indispensably necessary.

The requirement that facts constituting the emergency be expressed is fulfilled by the expression of ultimate facts.

The essential needs of State Government are those needs indispensably necessary to public peace, health, and safety.

A tax measure may be immediately necessary even though the funds to be raised thereby will not be required nor become available within the ninety-day period during which non-emergency bills may be suspended by invoking a referendum.

The emergency may consist in the necessity of final enactment or the immediate availability of revenue.

ON EXCEPTIONS.

Mandamus proceeding to compel the Secretary of State to receive petitions invoking the referendum on the Sales and

Use Tax Act. Upon issuance of the alternative writ and a return petitioners demurred. The demurrer was overruled and peremptory writ denied. Petitioners excepted and the cause was certified to the Chief Justice in accordance with R. S., 1944, Chap. 116, Sec. 18. Exceptions overruled.

Jacob H. Berman,
Edward J. Berman,
Sidney W. Wernick,
Berman, Berman and Wernick, for petitioners.

Alexander A. LaFleur, Attorney General,
Boyd L. Bailey,
Powers McLean,
Asst. Attys. Gen'l., for respondent.

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

MERRILL, J. On exceptions. This is a mandamus proceeding by which the petitioners seek to compel the Secretary of State to receive petitions invoking the referendum provided for in the Constitution of this State on a bill enacted by the Legislature as an emergency measure and entitled "An Act Imposing a Sales and Use Tax." The petitioners for the writ were citizens, taxpayers and electors of the State of Maine whose names appeared on the voting lists of the various cities and towns in which they resided as qualified to vote for Governor of the State of Maine. The petitioners instituted the petition for mandamus in their own names upon the refusal by the Attorney General of the State of Maine, after being duly requested so to do, to permit the use of his name, title or office to proceed by mandamus against the Secretary of State regarding the controversy set forth in the petition.

The 95th Legislature of the State of Maine enacted "An Act Imposing a Sales and Use Tax," the same being designated as Chapter 250 of the Public Laws of 1951. This act will be hereinafter referred to as Chapter 250. This act purported to be enacted as an emergency measure to take

effect when approved and it was approved by the Governor on the 3rd day of May, 1951. On the 19th day of May, 1951, the Legislature enacted "An Act for the Assessment of a State Tax for the Year Nineteen Hundred and Fifty-one and for the Year Nineteen Hundred and Fifty-two," designated as Chapter 213 of the Private and Special Laws of 1951. This act will be hereinafter referred to as Chapter 213. This act also purported to be enacted as an emergency act to take effect when approved. It was approved by the Governor May 21, 1951.

Chapter 213 materially amended certain provisions of Chapter 250.

In the petitions for a referendum the petitioners set forth a copy of Chapter 250 as originally enacted, ignoring the amendments thereto which had been made by Chapter 213.

Chapter 250 contained the following emergency preamble:

> "**Emergency preamble.** Whereas, the essential needs of state government require that additional revenue be raised by this legislature; and
>
> Whereas, the revenue to be collected under the provisions of this act may not be sufficient to provide for said needs during the next fiscal biennium unless the tax is imposed on retail sales made on and after the date of beginning of the next fiscal year, namely, July 1, 1951; and
>
> Whereas, it is necessary to proceed immediately to create and organize an efficient administrative agency for the collection of said tax on and after July 1, 1951; and
>
> Whereas, in the judgment of the legislature, these facts create an emergency within the meaning of the constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,".

Chapter 250 also contained the following emergency clause:

> **"Emergency clause.** In view of the emergency cited in the preamble, this act shall take effect when approved."

The basic controversy between the parties is whether Chapter 250 is subject to the referendum provisions of the Constitution. The respondent, Secretary of State, alleges that the bill was duly and legally enacted in compliance with the terms of the Constitution as an emergency measure, that it thereby took effect when approved by the governor and that therefore it is not subject to referendum.

He also claims that the petitions invoking the referendum are invalid as not complying with that portion of Section 20 of Part Third, Article IV of the Constitution which provides, "The petitions shall set forth the full text of the measure requested or proposed." This claim is based upon the fact that the measure set forth in the petition is Chapter 250 as originally enacted and without the amendments thereto enacted by Chapter 213.

He further claims that the questions involved in the case are now moot because the constitutional ninety-day period for filing referendum petitions has elapsed, and that the tender of valid petitions in a sufficient number cannot be the equivalent to filing the same. He further claims that the question is moot because even if the Secretary of State is compelled to receive the petitions under the mandamus, other time limits, for action thereon, expressed in the Constitution cannot be complied with.

The petitioners, on the other hand, claim that Chapter 250 was not constitutionally enacted to take effect as an emergency measure, and that not being so enacted it was subject to referendum. As to the claim that the petitions are invalid, the petitioners allege that the Constitution, Article IV, Part Third, Section 17, contemplates a refer-

endum not only upon the whole but upon a part or parts of an enacted bill and that therefore, the petitions comply with constitutional requirement. They also take issue with the respondent on the other issues raised by him.

The Justice of the Superior Court ordered the first or alternative writ to issue. The Secretary of State filed a return. To this return the petitioners demurred. The justice sustained the contentions of the respondent that the bill was constitutionally enacted as an emergency measure and that the referendum petitions were invalid, overruled the demurrer and denied the peremptory writ. To the ruling of the presiding justice the petitioners alleged exceptions which were allowed and certified to the Chief Justice in accordance with the provisions of Sec. 18 of Chap. 116 of the Revised Statutes. It is upon these exceptions that the cause is now before the justices.

If Chapter 250 was constitutionally enacted as an emergency measure it was not subject to referendum and that fact would be decisive of this case. As we sustain the ruling of the justice below on this ground it will be unnecessary to consider the other grounds of objection by the respondent to the issue of the peremptory writ.

We are not unmindful of the well established rule that questions of constitutional law should not be passed upon unless strictly necessary to a decision of the cause under consideration. *Payne* v. *Graham,* 118 Me. 251. This rule should not be departed from except for strong reason and under extraordinary circumstances. The rule is particularly applicable to cases involving the validity of action by the Legislature, a coordinate branch of government. One of the basic reasons for the rule is that the court should refrain from the exercise of its undoubted authority to declare legislative action to be in violation of the Constitution except in those cases where such declaration is absolutely required of it, thereby exhibiting the respect which one co-

ordinate branch of the government should render to another. Furthermore, except in extraordinary cases the court will rely upon the presumption of the constitutionality of legislative action and not even examine the question unless a determination thereof is strictly necessary to a decision disposing of the cause before it for determination.

We believe, however, that we should depart from the rule in this case. It is a cause of great public moment. More than thirty thousand (30,000) citizens have sought to nullify legislative action on the ground that it was taken in violation of constitutional provisions. It is the first time in the history of this State that such a controversy has arisen between the people, as such, and the Legislature. We believe it to be in the public interest that we decide this cause not upon a technicality or technicalities, but squarely upon the constitutionality of the exercise of legislative power by the Legislature. Surely it is no disrespect to that branch of government to examine its action and to hold (as we do hold) that it has acted with strict fidelity, not only within its constitutional authority, but in the discharge of its duty as an independent branch of government.

Section 16, Part Third of Article IV of the Constitution is as follows:

> "No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency, (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preser-

> vation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate."

Counsel for the respondent strenuously contend that the court has *no authority* to review a legislative determination that an act is immediately necessary for the preservation of the public peace, health or safety. On the other hand, counsel for the petitioners as vigorously contend to the contrary.

The briefs submitted are of unusual excellence. They are exhaustive and contain the authorities relied upon as sustaining the respective views of the parties. They also contain clear analyses of opposing authorities and seek to apply or to distinguish the same from the case at bar. It would be of little profit in this opinion, however, to either cite these authorities *in extenso* or to discuss them in detail. They may be found in the notes in 7 A. L. R. 522, 110 A. L. R. 1435 and the citations supplemental thereto in the A. L. R. Blue Book and latest supplement thereto.

The respondent's position is perhaps best stated in *State ex rel Schorr* v. *Kennedy,* 132 Ohio State, 510, 9 N. E. (2nd) 278, 110 A. L. R. 1428 where it is stated:

> "A fundamental principle should not be surrendered to meet the exigencies of a passing case. If every member of the court concurring in this decision were of the opinion that the act presently before us is not on its face an emergency measure, that would not alter the situation in the slightest under the rule of adoption. In other words, since the people in their Constitution have made the General Assembly the exclusive arbiter of whether a proposed act is in truth an emergency measure upon a dual affirmative vote of at least two-thirds

> of the elected members, no court has the power or authority to interfere with the judgment so exercised. If the General Assembly abuses its prerogative, the people are not lacking for methods of correction.
>
> The contrary rule would permit a court to step from its bench to the legislative halls and arbitrarily or capriciously override the judgment of the department of government to which the enactment of legislation has been expressly confided by the people."

The position of the petitioners is well stated when in referring to the foregoing case and the dissenting opinion therein by Mr. Justice Day they say:

> "In no way does the court purport to answer the contention of Justice Day in his dissent that the explicit requirement of a statement of reasons, was: 'unquestionably intended as a check upon the Legislature to prevent the evil of legislative encroachment, upon the right of referendum reserved to the people. This check should not be released by the courts.
>
> Where the Constitution requires a statement of reasons for the declaration of an emergency, such requirement, by implication, imposes a limitation upon the power of the Legislature. Where the declaration is not warranted by the reasons assigned, the enactment does not take immediate effect.'"

Although in *Payne* v. *Graham,* 118 Me. 251, we recognized the conflicting views and decisions and deferred passing upon the question of our own authority in the premises, in that case, however, we did announce a general principle which we now hold decisive of the present issue. In that opinion we stated:

> "Obviously the test is the extent to which legislative power is limited by the Constitution. Constitutional limitations are subjects of judicial interpre-

> tation and effectuation. Questions of public policy, such as the justice, expediency, necessity or urgency (immediate necessity) of laws are for final legislative determination. But the control by the Legislature of even these questions may be qualified by express constitutional limitation."

In that same opinion we further said referring to Section 16, Part Third of Article IV of the Constitution above quoted:

> "We think it clear that the above quoted language of the Maine Constitution creates a limitation upon legislative power and that without conforming to it no act can be made an emergency act and as such be given immediate effect."

In *Payne* v. *Graham* we held that the requirement of an expression in the preamble of the facts constituting the emergency was essential and that it was a limitation on the unrestrained power of the Legislature to enact emergency measures.

That case further stands for the legal principle that whether or not the Legislature has made an allegation of a fact or facts is a question of law and, as such, may be reviewed by the court. In *Payne* v. *Graham* we further stated, as above set forth, "Constitutional limitations are subjects of judicial interpretation and effectuation."

It is to be remembered that we are now interpreting our own Constitution. In so doing, we are not bound by any of the interpretations which other courts may have made of their own Constitutions. Nor do we follow such interpretations except to the extent that the reasoning upon which they rest is convincing to us when applied to our Constitution.

We said in *Farris* v. *Goss*, 143 Me. 227, 230:

> "Article XXXI of the Constitution of this state became effective as an amendment on January 1,

> 1909, almost forty years ago. It made a fundamental change in the existing form of government in so far as legislative power was involved. Formerly that power was vested in the House of Representatives and the Senate. By the amendment the people reserved to themselves x x x x x power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the Legislature. (This general statement, of course, must be modified by excepting therefrom emergency measures enacted as such in the manner prescribed by the Constitution.) x x x x x The significance of this change must not be overlooked, particularly by this court whose duty it is to so construe legislative action that the power of the people to enact their laws shall be given the scope which their action in adopting this amendment intended them to have."

It is not only with a realization of our said duty as declared in *Farris* v. *Goss* but in the discharge of our paramount duty to support the Constitution of this State that we decide the fundamental question as to the extent of our authority to review legislative action in the adoption of emergency legislation. We believe the rule which we adopt herein will guarantee to the people to its full extent the exercise of such legislative power as they have reserved to themselves; and with respect to the power to enact emergency legislation conferred upon the Legislature give full effect to the constitutional limitations thereon, in accord with principles announced in *Payne* v. *Graham*.

In examining the sufficiency of an emergency preamble the question of whether or not the Legislature has *expressed* (to wit, made an allegation of) *a fact or facts* is a question of law. Whether or not such fact or facts *can constitute an emergency* within the meaning of the Constitution is likewise a question of law. These questions of law may be reviewed by this court. On the other hand, whether or not a fact expressed as existing, does exist, is a question of fact

and not of law. It is likewise a question of fact whether or not an expressed fact which can constitute an emergency, does constitute an emergency. These questions of fact are within the exclusive province of the Legislature for its determination. A determination of these questions by the Legislature being a determination of fact and not of law, and being a determination within its exclusive province, is not subject to review by this court.

The foregoing principles of law relative to spheres of legislative and judicial authority are analogous to those applied by this court in the interpretation of Section 21 of Article I of the Constitution. That article is as follows:

> "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."

In the case of *Moseley* v. *Water Co.* 94 Me. 83, 89 we said:

> "It must be remembered that the question, whether the necessity exists for the granting of this right to take private property for a public use, is a legislative and not a judicial one. The use being public, the determination of the legislature that the necessity exists which requires private property to be taken, is conclusive. Whether a particular use for which land is taken, under the exercise of the right of eminent domain is public or not, is a judicial question; but as to whether the necessity exists for taking lands for a public use by the exercise of the right of eminent domain is a legislative question."

Under this and similar cases the principle is well established that no declaration by the Legislature that the use for which the power of eminent domain is granted is a public one is conclusive. The question of whether or not the use is a public use within the contemplation of the Constitution is one of law and is a proper subject for determination

by the courts. On the other hand, it is equally well settled that whether the public exigencies require that land be taken for a public use is a question of fact, and its determination is exclusively within the province of the Legislature.

We will now examine the emergency preamble used in Chapter 250 and determine whether it expresses a fact or facts as constituting an emergency, and if so, whether the fact or facts so expressed as constituting an emergency can constitute an emergency within the meaning of that term as used in the Constitution. As heretofore intimated, we answer both of these questions in the affirmative. The contention of the petitioners to the contrary cannot be sustained. Nor can we sustain their position that the only emergency, if any there be, was created by the act itself.

The particular fact expressed in the preamble which we hold sufficient for that purpose is that "the essential needs of state government require that additional revenue be raised by this legislature;". This allegation must be interpreted as meaning, and we hold that it does mean, that the revenues for which provision was then made by existing law were insufficient to carry out the *essential* needs of the government of the State of Maine.

One of the meanings of *essential* as defined in Webster's New International Dictionary, Second Edition, Unabridged, 1948, is *indispensable,* which word in turn is there defined as *"impossible to be dispensed with or done without; absolutely necessary or requisite."* In the Standard Dictionary it is defined not only as *indispensable* but as *necessary* and as *"absolutely requisite."* One of the meanings assigned to the word essential is *"indispensably necessary."* See *Pittsburg Iron & Steel Foundries Co.* v. *Seaman-Sleeth Co.* D. C. Pa., 236 F. 756, 757.

It is a well recognized principle of constitutional law that every reasonable presumption will be made in favor of the

constitutionality of an act enacted by the Legislature. We said in *Browne et al.* v. *Connor et al.*, 138 Me. 63, 66:

> "At the same time we must, if possible, interpret the language which the legislature has used in such manner as to sustain the enactment rather than to defeat it. The presumption is that the legislature has not disregarded constitutional prohibitions. *State* v. *Rogers*, 95 Me., 94, 49 A., 564, 85 Am. St. Rep., 395; *Ulmer* v. *Lime Rock Railroad Co.*, 98 Me., 579, 57 A., 1001, 66 L.R.A., 387; *State* v. *Pooler*, 105 Me., 224, 74 A., 119, 24 L.R.A., N.S., 408, 134 Am. St. Rep., 543; *Laughlin* v. *City of Portland*, 111 Me., 486, 90 A., 318, 51 L.R.A., N.S., 1143."

In accord with that rule of construction we interpret the word *essential* as used in the preamble of Chapter 250 as meaning *indispensable, absolutely requisite* and *indispensably necessary.*

The statement contained therein "the essential needs of state government require that additional revenue be raised by this legislature" is a statement of a then existing fact, to wit, that the needs of the state government, which needs are *indispensably necessary,* cannot be met unless additional revenue be raised by the 95th Legislature. It is urged by the petitioners that this is but the statement of a conclusion and not a statement of fact. It is urged by the petitioners that this statement fails to set forth the essential needs of the State government which require revenue in addition to that then provided by existing law. This objection cannot be sustained. The only logical alternative to the use of this broad general statement, which we hold to be a statement of fact and not a conclusion, would be to set forth in the emergency preamble of an act to raise revenue the entire budget of the State of Maine which was to be met either in whole or in part by the tax imposed, together with a recital of the then existing revenues available to meet the same. The Constitution of this State does not require any such un-

reasonable interpretation of the phrase "facts constituting the emergency."

It is true that *Payne* v. *Graham, supra,* is authority for the proposition that the provision of the Constitution requiring that "the facts constituting the emergency shall be expressed in the preamble of the act" is not satisfied by the recital of a mere conclusion instead of facts. However, that constitutional requirement is satisfied by the expression in the preamble of an ultimate fact or facts which constitute an emergency without a recital of all of the separate facts evidencing the existence of such ultimate fact.

If the existing revenue of the State is insufficient to meet the essential needs of the State, that in and of itself is an ultimate fact, and such fact is expressed with sufficient definiteness when it is stated as it was here stated in the first clause of the preamble to Chapter 250. This first clause in the emergency preamble expresses a fact, and if the fact so expressed can constitute an emergency within the meaning of the Constitution of this State, which emergency requires the proposed legislation as immediately necessary for the preservation of the public peace, health or safety, and the emergency preamble, as here, so declares, the emergency preamble is sufficient, and we do not need to consider the sufficiency of the facts expressed in the other clauses of the preamble.

A consideration of the fundamental nature of the power of taxation and its relationship to government, the necessity of its exercise to assure the preservation of the public peace, health and safety, together with a consideration of the duty of the Legislature to provide with certainty for the essential needs of government by the imposition of the taxes necessary therefor is determinative of this case.

Taxation is a sovereign right. As such it is an attribute of sovereignty. It is essential to the existence of govern-

ment. *Camden* v. *Village Corporation,* 77 Me. 530, 536. This right is so vital and so essential to the existence of government that the suspension or surrender of the power of taxation by the Legislature is expressly prohibited by the Constitution of this State. Const. Art. IX, Sec. 9.

The Supreme Court of the United States well said in *Leigh* v. *Green,* 193 U. S. 79, 87:

> "The right to levy and collect taxes has always been recognized as one of the supreme powers of the State, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen."

As said by the same court in *Lane County* v. *Oregon,* 7 Wallace (U. S.) 71, 76:

> "Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government."

The exercise of the power to tax necessarily involves two steps, both of which are within the sole province of the Legislature: first, a determination of the nature of the tax to be imposed; and, second, the effective imposition of the tax in such a manner as to insure its collection and availability to the State for the purposes for which it is raised. The preservation of the public peace, health and safety is indispensably necessary in and by any government worthy of the name. The *essential needs* of the State government are those things which are *indispensably necessary to enable the State to preserve the public peace, health or safety.* Sufficient revenue therefor is absolutely indispensable to the preservation of the public peace, health and safety.

In this State, and under our Constitution, to provide for the flow of revenue into the state treasury sufficient for the

essential needs of the State is solely a legislative function. At each regular session of the Legislature it is the *duty* of the Legislature to make certain that it has made adequate provision to meet the essential needs of the State for the ensuing biennium. It can do this only by levying a tax or taxes sufficient in amount for such needs of the State during the ensuing biennium. Once its biennial session is adjourned *sine die* the Legislature has no power of reconvention. It can only be again called into session by and at the will of the Chief Executive. It is, therefore, not only within the province, but it is also the duty of the Legislature to make certain before adjournment *sine die* that the revenue measure or measures which it enacts and which are required to provide for the essential needs of the State are finally enacted into effective law before such adjournment.

It is provided by Section 16 of Part Third, Article IV of the Constitution that "An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety;". With respect to tax measures, *immediate necessity of the measure* does not require that the funds to be received under the tax measure or measures enacted must be required as available for use within the ninety-day period during which non-emergency bills may be suspended by the invoking of a referendum. The *real emergency* is the necessity that the act or acts providing revenue sufficient for the essential needs of the State for the ensuing biennium become law before the adjournment of the Legislature *sine die*. Either the necessity of finality of enactment of the bill into law, or the immediate availability of the revenue to be produced thereby, or both of them together may constitute an emergency under the foregoing provision of the Constitution, viz.: make the measure immediately necessary for the preservation of the public peace, health or safety. *A tax measure may be immediately necessary even though the funds to be raised thereby will not be required nor become available within the*

ninety-day period during which non-emergency bills may be suspended by invoking a referendum.

Again it must be remembered that it is not the form of tax which determines whether or not such tax can be an emergency measure, but it is whether or not it is necessary that such measure take effect before final adjournment of the Legislature because the proceeds thereof will be required for the essential needs of the State, to wit, for the preservation of the public peace, health or safety. If no tax to provide for the essential needs of the State could be enacted as an emergency measure, each and every tax measure enacted for such purpose *could* be suspended by invoking a referendum thereon. *The unrestrained possibility of such action could destroy the power of taxation.*

The great jurist Chief Justice Marshall, in the famous case of *McCulloch* v. *Maryland,* 4 Wheat. U. S. 316, 431, said, "the power to tax involves the power to destroy." While this statement in its literal sense may be subject to some doubt because of constitutional limitation of the power of taxation, history has shown that *lack of the power to tax destroys the efficiency of government. The power to tax is essential to government.* The flow of revenue into the treasury of the State is indispensably necessary to enable the State to function. One has but to read the history of this country under the Confederation and during the period subsequent to the Revolution prior to the adoption of the Federal Constitution and the acquisition of the power of taxation by the Congress, to see how true this statement is.

It is absolutely essential to the preservation of government itself that a Legislature which has no power of reconvention and which meets at stated intervals have the power to effectively enact revenue measures sufficient for the essential needs of the State until its reconvention. The unrestrained power to block such legislative action, if lodged in the hands of ten per centum of the number of qualified elec-

tors of a State who voted for governor in the last gubernatorial election would confer upon a small minority of the people the power to produce absolute chaos. If such power exists as to one form of tax measure it applies equally to all other forms of taxation. The successive invoking of referenda on all enacted tax measures, either by a single organized group, or by different groups to which the several tax bills were distasteful, could paralyze government.

From a breakdown or paralysis of government chaos is the inevitable result. This is no fanciful fear which we express. In these days of world unrest and the widespread breakdown of economic and governmental structures we are too prone to think and say it cannot happen here. The price of liberty is eternal vigilance. It is within the power, and is the duty as well as the function of this court to safeguard and protect within the borders of this State the fundamental principles of government vouchsafed to us by the State and Federal Constitutions. We should be ever alert to exercise our constitutional authority not only to uphold and maintain the Constitution against direct attack, but also to repel so far as lies within our power the first step toward an invasion of its guaranties.

This court has always accepted the challenge of this duty. It is in that spirit that we here decide the underlying issue of this case. The Constitution is designed not only to protect us from the invasion of our rights by others but even to protect us from ourselves. True it is that all rights of government are derived from the people. Among other things constitutions are adopted to safeguard the rights of the citizens from invasion not only by individuals but by government itself. Another purpose of a constitution is to insure the orderly conduct of government, and a proper discharge of the essential functions thereof.

Only in a constitutional manner may the people exercise the law making power reserved to themselves. Even the

people must not be allowed to interfere with the exercise by the Legislature of the law making power which has been conferred upon that branch of government by the Constitution. This court has never hesitated to exercise its power and authority to protect the individual from an unconstitutional invasion of his rights by the legislative branch of government. By the same token it is now our duty to prevent the people from interfering in an unconstitutional manner with the constitutional exercise by the Legislature of the powers conferred upon it by the Constitution. It is in the exercise of this latter duty that we decide the issue of this case and uphold the action of the Legislature.

If Chapter 250 providing for a sales and use tax could not be enacted as an emergency bill, neither could Chapter 213 providing for the levy of the customary State Tax be so enacted. In fact, if Chapter 250 could not be enacted as an emergency measure no tax required for the essential needs of the State could be so enacted. We are glad to announce that no interpretation of our Constitution which makes such result even remotely possible is required of us.

The present controversy is brought into sharp focus only because by Chapter 250 the State enters into a new and controversial field of taxation. The exercise by the Legislature of its fundamental power to enact a tax measure as emergency legislation, however, does not in any way nor to the slightest degree depend upon whether or not the tax measure enacted is in the customary or in a new and untried field of taxation. In truth the very fact that the issue is controversial, may be the controlling factor that requires a tax bill to be enacted as an emergency measure. It is the fundamental power and authority of the Legislature to preserve government which is here at stake, not merely whether or not we shall have a sales and use tax. It is for the Legislature to decide, within constitutional limitations, what form or forms of taxation are or may be necessary for the essen-

tial needs of the State. Except possibly as limited by the provision in the Constitution for initiated legislation, this question is exclusively within the legislative province.

If a referendum could be invoked upon a tax measure duly enacted as an emergency measure, the State would be without the funds to be produced thereby not only during the time of the suspension, but, if the act were rejected by the people, until a reconvention of the Legislature. Such reconvention could only come about on a special call by the Executive or the elapse of the constitutional time between the regular sessions thereof. However, tax measures like other measures enacted by the Legislature as emergency legislation may be ultimately repealed by the people either by the exercise of their elective franchise and the election of a Legislature responsive to their will, or by invoking the provisions for initiated legislation contained in the Constitution. It is far better that the people pay an unpopular and distasteful tax until such time as they can bring about its repeal, than it is to lodge in the hands of a small minority the absolute power to paralyze State government by the exercise of the unrestrained power of referendum applied to tax measures.

The present controversy is not merely whether or not we have a sales and use tax in the State of Maine, but it involves the important principle of whether our Constitution permits a small minority of citizens who are dissatisfied with the form of taxation enacted by the Legislature to absolutely paralyze State government.

We said in a recent *Opinion of the Justices,* 146 Me. 319, 323:

> "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:— 'in-

> terpretation must be held to be settled by the contemporaneous construction, and the long course or practice in accordance therewith,' *State* v. *Longley,* 119 Me. 535 at 540."

The exercise by the Legislature of its fundamental power to enact a tax measure as emergency legislation is not at all novel in the legislative history of this State. The adoption of the constitutional amendment providing for the initiative and referendum was proclaimed by Governor Cobb October 30, 1908. The 74th Legislature, it being the first Legislature to meet thereafterwards, enacted the State Tax Act for the year 1909 as an emergency measure. See Private and Special Laws of 1909, Chapter 411. Since that time every Legislature to and including the 95th Legislature with the sole exception of the 75th Legislature, has enacted a State Tax Act as an emergency measure. To and including the 88th Legislature the State Tax for the first year of the biennium only was enacted as an emergency measure. However, since that time commencing with the 89th Legislature, to and including the 95th Legislature, the State Tax for both years of the biennium has been levied under a single bill. In every instance such bill has been enacted as an emergency measure. The fact that these successive Legislatures during the entire existence of the constitutional provisions authorizing referenda and providing for the enactment of emergency legislation have enacted tax bills as emergency measures, though not conclusive as to the power of the Legislature so to do, demonstrates beyond question that this court by this decision is not sanctioning the embarkation by the Legislature upon any new or uncharted legislative sea. Such action on the part of these successive Legislatures affords strong evidence of a contemporary and continuing interpretation of the Constitution as conferring the power to enact tax acts as emergency measures. Such action serves to reinforce the interpretation of the Constitution which we reach independently thereof.

We hold that a tax measure to provide funds necessary for the essential needs of the State government can be an emergency measure, and if it be constitutionally enacted as such, it will take effect immediately upon its approval by the governor, or its final passage over the veto of the governor. In either case it will not be subject to a referendum.

The Legislature, in the emergency preamble here in question, declared the existence of a fact which we hold could, and which it alleged did constitute an emergency, and that the measure, because of such emergency, was immediately necessary for the preservation of the public peace, health and safety. These determinations by the Legislature being determinations of fact and not of law, and being determinations within its exclusive province, are not subject to review by this court.

Our decision that an emergency together with the facts constituting such emergency are sufficiently expressed in the preamble of Chapter 250, the same having been enacted as an emergency act, is decisive of the case. The act is not subject to constitutional referendum, and the Secretary of State should not receive the petitions invoking the same. Chapter 250 took effect when approved by the governor. This determination by us fully disposes of the case. Our decision being on this ground, it renders all other contentions of the petitioners and the respondent not heretofore noted and specifically disposed of in this opinion immaterial to a decision of the cause. The failure on our part to decide or discuss them, however, is no intimation of our views thereon. The exceptions must be overruled.

Exceptions overruled.

WILLIAM BERGER, PLAINTIFF IN ERROR

vs.

STATE OF MAINE

Knox. Opinion, October 8, 1951.

Criminal Law. Conspiracy. Gambling. Indictments.

An indictment charging a conspiracy to do an "illegal act injurious to public morals . . . to wit . . . to gamble and bet on horse races" is not sufficient to explain the intended act or to negative the fact that respondents may have lawfully agreed to engage in legal pari-mutuel betting.

When the act to be accomplished by a conspiracy is itself criminal or unlawful it is not necessary to set out in the indictment the means by which it is to be accomplished; but when the act is not in itself criminal or unlawful, the unlawful means must be set out.

ON REPORT.

This is a writ of error pursuant to R. S., 1944, Chap. 116, Sec. 12. Plaintiff had previously entered a plea of guilty to an indictment charging conspiracy and was sentenced thereon. The writ of error was reported to the Law Court under R. S., 1944, Chap. 91, Sec. 14. Writ sustained. Conviction reversed. Sentence vacated.

Christopher S. Roberts, for plaintiff in error.

Alexander LaFleur,
William H. Niehoff,
Daniel McDonald, for the State.

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

FELLOWS, J. This is a writ of error that comes to the Law Court from Knox County on report. The evidence con-

sists of the Superior Court record of the original case in Cumberland County.

This record shows that at the May term of the Superior Court for Cumberland County, 1951, William Berger, this plaintiff in error, was indicted with four others, for a conspiracy. The indictment alleged "felonously did combine, conspire, and agree together, with fraudulent intent wrongfully and wickedly to do a certain illegal act injurious to the public morals, to wit: did then and there conspire and agree together with said intent, wrongfully and wickedly to engage in gambling by then and there agreeing, with said intent, to gamble and bet on horse races."

The respondents, including this plaintiff in error, entered a plea of guilty to this indictment, and each was sentenced to not less than one and not more than two years in the State Prison at Thomaston in Knox County. After notice on this writ of error by a Justice of the Supreme Judicial Court, a hearing was held thereon in Knox County. R. S., (1944), Chap. 116, Sec. 12. The case, by agreement of counsel and by order of court, was reported to the Law Court for determination, under the provisions of R. S., (1944), Chap. 91, Sec. 14.

A writ of error is based on the record facts alone, and lies for defects evident upon the face of the record. It is a writ of right. *Nissenbaum* v. *State,* 135 Me. 393; *Smith, Petitioner,* 142 Me. 1. Even after a plea of guilty the person convicted may have the record reviewed under a writ of error. *Ex parte* Mullen, 146 Me. 191, 79 Atl. (2nd) 173.

A defendant has a constitutional right to know the nature and the cause of the accusation from and by the record itself. The facts must be stated with certainty. The description of the criminal offense charged in the indictment must be full and complete. Every fact or circumstance which is necessary for a *prima facie* case must be stated.

The indictment must charge a crime either under the statute or at common law. An indictment should charge a statutory offense in the words of the statute or in equivalent language. If no crime is charged, no lawful sentence can be imposed. *Smith* v. *Smith,* 145 Me. 313, 75 Atl. (2nd) 538.

The principal assignment of error in this case is that no crime was alleged in the indictment because the indictment "sets forth no conspiracy as defined in Revised Statutes (1944), Chapter 117, Section 25."

Section 3 of Chapter 126 of the Revised Statutes (1944), provides that "whoever gambles, or bets on any person gambling, shall be punished, etc.," and Section 25 of Chapter 117 of the Revised Statutes (1944), relied on by the State, is as follows:

> "If two or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or property of another; or for one or more of them to sell intoxicating liquor in this state in violation of law to one or more of the others; or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice; or to commit a crime punishable by imprisonment in the state prison, they are guilty of a conspiracy, and every such offender, and every person convicted of conspiracy at common law, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 10 years."

The indictment under consideration alleges that this plaintiff in error, with four others, "did combine, conspire and agree together to do a certain illegal act injurious to the public morals," * * * "to wit" * * * "to gamble and bet on horse races." What is or is not injurious to the public morals involves many considerations, and occasionally varies with time and changing conditions. It may depend on the opinion of a majority of good citizens. *State* v. *Jenness,*

143 Me. 380. "The common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries." *State* v. *Pooler et al.*, 141 Me. 274, 280. At common law, bets were legal under some conditions. 27 Corpus Juris, 1046. The State of Maine recognized this, and early passed a statute against "gaming." Statutes 1821, Chapter 18. Horse racing was decided to be a "game" within its terms. *Ellis* v. *Beale,* 18 Me. 337. However, the State now authorizes, permits, and approves of betting on horse races under regulation and license. Revised Statutes (1944), Chapter 77 and 77-A; Public Laws of 1949, Chapter 289 as amended by Public Laws of 1951, Chapter 404.

The pending indictment does not charge a conspiracy to commit a well defined and well recognized criminal offense. It charges that this plaintiff in error, with others, conspired to "do an illegal act injurious to the public morals" to wit: to engage in gambling, "to gamble and bet on horse races." The words in the indictment are not sufficient to explain the intended act or to negative the fact that the respondents may have lawfully agreed to engage in legal pari-mutuel betting. The manner in which the illegal purpose (if it was illegal) was to be accomplished is not set forth, the purpose itself should appear to have been plainly illegal, and forbidden by law, or the indictment cannot be sustained. The State charged in this indictment that the respondents "wrongfully and wickedly" conspired "to bet on horse races." The indictment does not allege that they illegally conspired. A transaction may even be considered dishonest and immoral according to social standards and still not be unlawful under the criminal law. *State* v. *Hewett,* 31 Me. 396, 399.

Conspiracy has been defined by our court as "a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish

some purpose not in itself criminal or unlawful, by criminal or unlawful means. When the act to be accomplished is itself criminal or unlawful, it is not necessary to set out in the indictment the means by which it is to be accomplished; but, when the act is not in itself criminal or unlawful, the unlawful means by which it is to be accomplished must be distinctly set out." *State* v. *Mayberry,* 48 Me. 218, 235; *State* v. *Trocchio,* 121 Me. 368, 375; *State* v. *Vermette,* 130 Me. 387. It is not sufficient to say "against the peace of the State and contrary to the form of the statute." *State* v. *Schwarzschild,* 83 Me. 261, 265.

From all that appears by this indictment, now under consideration, there was no illegal purpose. No illegal purpose is alleged. If the purpose was to engage in the legal betting on horse races, and there were unlawful means by which it was to be accomplished, the means are not set out. That the act of betting is in itself wrongful or wicked may depend on the individual idea of public morals. The State, through its legislature, has decided that pari-mutuel betting on horse races is neither wrong nor wicked.

As was said by Justice Merrill in *Smith* v. *State,* "as the indictment does not sufficiently set forth the commission of any offense either under the statutes of this State or at common law, the sentence imposed is entirely without legal justification and is void." *Smith* v. *State,* 145 Me. 313, 75 Atl. (2nd) 538, 545. The writ of error should be sustained, the conviction reversed, and the sentence vacated.

Case remanded.

ERNEST C. ARNOLD, ET AL.

vs.

RAYMOND BOULAY

Kennebec. Opinion, October 9, 1951.

Easements. Plans of Lots. Streets. Dedication.

Whenever the owner of land conveys lots by reference to a map or plan he becomes bound not to use those portions devoted to the common advantage otherwise than in the manner indicated by the plan and rights thus acquired by a grantee may be by implied covenant as appurtenant, although they are not of such a nature as to give rise to public rights by dedication.

ON EXCEPTIONS.

Action to recover damages for obstruction of an easement. The case is before the Law Court on exceptions to the acceptance of a referee's report awarding judgment for defendant.

Exceptions sustained.

Willis A. Trafton, Jr., for plaintiff.

Gerard B. Giguere, for defendant.

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

WILLIAMSON, J. This is an action in a plea of the case to recover damages for obstruction of an easement. The referee, by whom the case was heard with reservation of the right to except as to questions of law, found for the defendant. The case is before us on exceptions to the acceptance of the referee's report.

Plaintiffs are the owners of a part of lot #102 and other numbered lots shown upon a plan of "Monmouth Highlands," a summer cottage development on the northwesterly shore of Tacoma Lake. The easterly line of the lots upon the plan is approximately eighty feet from the high water mark of the lake. The area between the easterly or shore front line of the lots and the high water mark is designated on the plan as "Lake Shore Road." Four "avenues" are shown between tiers of lots running from the rear of the tract to "Lake Shore Road."

The obstruction of which the plaintiffs complain is a cottage or camp erected by the defendant upon a lot with a frontage of ninety feet upon the lake and a depth of forty feet, lying entirely within "Lake Shore Road."

In the first count, the plaintiffs, as owners of a part of lot #102, allege that they are entitled to the uninterrupted use and enjoyment of all parts of the area shown as "Lake Shore Road," (1) as an open area for travel to and from lot #102 to other points on the plan and to Tacoma Lake, and (2) for recreation and as a park and as an open "unbuilt-upon" area between their lot and Tacoma Lake. Similar allegations are made in the second count with respect to the other lots owned by the plaintiffs.

In January 1908 the Commonwealth Lumber Company, owner of the tract, caused it to be divided into lots and the plan referred to to be prepared and recorded in the Registry of Deeds. The Company by warranty deed, dated in February and recorded in April 1908, sold to one Lothrop lot #102, "according to plan of land, Entitled "Monmouth Highlands" . . . Which plan is recorded in Kennebec County, Registry of Deeds, for furthur refernce, and is Bounded . . . on the East by Lake Shore Road." Lothrop in turn in October 1910 conveyed to Commonwealth Lumber Company a small parcel from the easterly end of lot #102, placing the easterly bound of the remainder of the lot some distance

westerly from "Lake Shore Road." The deed reads, in part: "Said premises are hereby conveyed upon the express condition that the same shall be dedicated and used as a part of Lake Shore Road as laid down on the above named plan and for no other purpose, and that no buildings or other structures shall ever be erected on the same. And also upon the condition that the owners of the remainder of said lot numbered 102, their heirs and assigns, shall have the right to pass and repass at all times, on foot or in teams, over the premises hereby conveyed to and from said Lake Shore Road, as now delineated on said plan."

Title to the remainder of lot #102, which it may be noted is not bounded by "Lake Shore Road" as shown on the plan, was acquired in 1947 by plaintiffs through and under Lothrop. Other lots, including lots touching "Lake Shore Road," were purchased by the plaintiffs in 1948. No question of plaintiffs' title to lots claimed by them arises.

The lot upon which the defendant has erected a cottage or camp was conveyed by the Commonwealth Lumber Company to one Bosworth by warranty deed in August 1908, and was purchased by defendant in 1950. The parties agree "that defendant now possesses whatever right, title and interest were acquired by said Bosworth by said deed."

From the referee's report, we quote the following: "It appears from the evidence that neither the so-called avenues nor the Shore Road have been wrought or improved. The town has not accepted them as town ways, nor has it made any repairs. It is not claimed that the general public has made use of them. The use appears to be only by lot owners and their invitees."

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"The Referee rules that there was never a dedication under the legal rules pertinent to the term; that the streets, roads or so-called Avenues were never wrought; that they

were not used by the public; and to a limited extent only by lot owners."

The errors asserted by the plaintiffs in their written objections are: (1) failure to apply the rule that an easement is implied when land is sold described with reference to a recorded plan upon which streets and ways are shown; (2) failure to rule that the plaintiffs are entitled to an easement across that portion of "Lake Shore Road" on which defendant has erected a building; and (3) the ruling "that there was never a dedication under the legal rules pertinent to the term."

The referee placed his decision upon a finding there was no dedication of "Lake Shore Road" to public uses. Apparently he was of the view that at least a portion of "Lake Shore Road" was available to lot owners for travel, for he stated with reference to the defendant's lot, "It does appear, however, that there is still at least 40 feet left for travel to pass the lot."

For what purpose did the Commonwealth Lumber Company in creating the development set aside an eighty foot strip along the shore, known as "Lake Shore Road"? What was its intent when it sold lots with reference to the plan?

A right of way, or easement for travel, to and from the lots, eighty feet in width was clearly not required. The referee has so indicated in commenting upon the forty foot strip between numbered shore lots and defendant's lot. It is apparent from the nature of the property and the plan that the purpose was to provide an area along the lake shore of the width indicated for the benefit and use of the lot owners and their invitees, free from buildings and other obstructions, and with right of access to and use of the lake shore at all points.

The right to use of the shore, and to have the area open for the purposes customarily made of such property, neces-

sarily would be of great value to the lot owners. In planning the development, the owner must have weighed an expected increase in value of the lots in general from an open strip along the shore against loss from inability to sell lots bounded by the lake, and concluded that on balance it was more advantageous to set aside "Lake Shore Road" for the purposes indicated.

If such was not the intent of the owner, then we must say it proposed to retain the right to sell the entire frontage on the shore for cottage lots, leaving, at best, only a space sufficient for travel in front of the lots nearest the lake. Surely the Company at that time did not intend to lull Lothrop and other purchasers with a false promise of an open shore front available to all.

The Commonwealth Lumber Company changed its position by the sale of a lot in "Lake Shore Road" to Bosworth in August 1908. The referee speaks of the undisputed evidence "That the company practically simultaneously conveyed to the defendant's predecessor, the lot now claimed to be an unlawful infringement." The Bosworth deed, however, could not alter rights acquired under the Lothrop deed given and recorded prior thereto. Nor did the deed from Lothrop to the Company in 1910 change the rights in "Lake Shore Road" with respect to the remainder of lot #102 since acquired by the plaintiffs.

It is not necessary in our view of the case to determine whether there was an "incipient dedication" to the public. Clearly lot #102 was sold with reference to the plan. On such facts, by purchase with reference to a plan, the plaintiffs' predecessors, and hence the plaintiffs acquired, with reference to that part of lot #102 owned by them an easement by implication based upon estoppel in "Lake Shore Road." *Young* v. *Braman,* 105 Me. 494; *Sutherland* v. *Jackson,* 32 Me. 80; *Bartlett* v. *Bangor,* 67 Me. 460; *Harris* v. *South Portland,* 118 Me. 356. Such an easement is not

based upon a dedication to the public. It is a private right in no way dependent upon a prospective public use.

In *Lennig* v. *Ocean City Association,* 41 N. J. Eq. (14 Stew.) 606, 7 A. 491, 56 A. R. 16, the principle was stated in the following words:

> "Whenever the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, parks, squares, or in other modes of a general nature calculated to give additional value to the lots delineated thereon, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated. This principle has been asserted most frequently for the purpose of supporting dedications to uses strictly public; but it is by no means necessary that such a use should be created. . . . From this doctrine it, of course, follows that such distinct and independent private rights in other lands of the grantor than those granted may be acquired, by implied covenant, as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication. The object of the principle is, not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated."

See also *Bacon* v. *Onset Bay Grove Ass'n,* 241 Mass. 417; 136 N. E. 813 (sea shore); *Carroll* v. *Hinchley,* 316 Mass. 724, 56 N. E. (2nd) 608 (lake); *Douglass* v. *Belknap Springs Land Co.,* 76 N. H. 254, 81 A. 1086, 37 L. R. A., N. S. 953 (lake shore avenue following marginal line of lake); *Lake Garda Co.* v. *D'Arche,* Conn. 66 A. (2nd) 120 (lake); Annotation 7 A. L. R. (2nd) 607; 19 C. J. 928 — Easements, Sec. 127; 28 C. J. S. 701 — Easements, Sec. 39; 17 Am. Jur. 958 — Easements, Sec. 47.

There is no suggestion that the private rights of the plaintiffs have been lost by adverse possession as in *Harris* v. *South Portland, supra.*

With respect to that part of lot #102 owned by the plaintiffs, there exists by implication an easement in "Lake Shore Road" to the full extent thereof for the purposes intended by the Commonwealth Lumber Company as set forth above. They are entitled to enjoy "Lake Shore Road," as the owners of part of lot #102, free from the obstruction placed therein by the defendant.

In light of the error with respect to the first count relating to part of lot #102, the exceptions must be sustained. Accordingly it is not necessary that we pass upon the claim of the plaintiffs in the second count relating to other lots. A discussion of what rights the plaintiffs, as owners of other lots, may have in "Lake Shore Road" involves issues which we neither consider nor determine.

The entry will be

Exceptions sustained.

STATE OF MAINE

vs.

CYRIL D. CLUKEY

Piscataquis. Opinion, October 10, 1951.

Criminal Law. Assault with Intent to Rape. Indictments.

An indictment charging "assault" with intent to "ravish and carnally know and abuse" sufficiently charges the crime of assault with intent to rape under R. S., 1944, Chap. 117, Sec. 12.

ON EXCEPTIONS.

An indictment charging assault with intent to rape under R. S., 1944, Chap. 117, Sec. 12. Respondent excepted to the denial of a motion for directed verdict. Exceptions overruled. Judgment for the State.

Louis Villani, for State.

Bartolo M. Siciliano, for defendant.

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

NULTY, J. This case comes before us from the Superior Court of Piscataquis County on exceptions by the respondent to the denial of his motion for a directed verdict and to the admission of certain exhibits and testimony offered by the State.

The respondent was indicted by the Grand Jury of Piscataquis County at the September Term, 1950, of the Superior Court of the crime of assault with intent to commit rape as defined under Chap. 117, Sec. 12, R. S., Me. 1944. The indictment, omitting the formal parts, charges that the respondent

> "on the twenty-second day of April, A. D. 1950 at Guilford in the County of Piscataquis and State of Maine, feloniously did assault one Althea A. Bearce, a female under the age of Fourteen years, to wit, of the age of twelve years, with intent her, the said Althea A. Bearce, violently, by force and against her will, feloniously and unlawfully to ravish and carnally know and abuse,"

One of the issues raised by the bill of exceptions is whether the indictment sufficiently charges an assault with an intent to commit a rape on a female child under the age of fourteen years in violation of R. S., 1944, Chap. 117, Sec. 12, or charges an assault and battery. To decide this issue we must examine R. S., 1944, Chap. 117, Sec. 10 and Sec. 12, relating to the crime of rape. R. S., 1944, Chap. 117, Sec. 12, is as follows:

> "Sec. 12. Assault with intent to commit rape; penalty. R. S. c. 129, Sec. 23. Whoever assaults a female of 14 years of age or more, with intent to commit a rape, shall be punished by a fine of not more than $500, or by imprisonment for not more than 10 years. If such assault is made on a female under 14 years, such imprisonment shall be for not less than 1 year, nor more than 20 years."

R. S., 1944, Chap. 117, Sec. 10, is as follows:

> "Sec. 10. Rape, definition; penalty. R. S. c. 129, Sec. 16. Whoever ravishes, and carnally knows, any female 14 or more years of age, by force and against her will, or unlawfully and carnally knows and abuses a female child under 14 years of age, shall be punished by imprisonment for any term of years."

To the indictment the respondent entered a plea of not guilty and after trial the jury returned a verdict of guilty.

In *Moody* v. *Lovell*, 145 Me. 328, 75 A. (2nd) 795 (1950), this court had occasion to consider the essential requisites of an indictment charging assault with intent to commit

rape on a female under the age of fourteen years. We held in that case that the word "rape" as used in Sec. 12 of R. S., 1944, Chap. 117, *supra,* means the offense for which punishment is provided in Sec. 10, *supra,* of the same chapter which defines rape. It includes not only the ravishment of a female of fourteen or more years of age by force or against her will but also the unlawful carnal knowledge and abuse of a female child under the age of fourteen years. We further held that the phrase "with intent to commit a rape" as used in R. S., 1944, Chap. 117, Sec. 12, means an intent to commit those acts punishable under Sec. 10, including unlawfully and carnally knowing and abusing a female under fourteen years of age. We further held that an assault with intent to commit a rape upon a female child under fourteen years of age requires the specific intent to unlawfully and carnally know and abuse such female child. We further held that the statutory crime of assault with intent to commit a rape requires proof of a specific intent and that the indictment under the long established rules of criminal pleading requires that the assault be made with the required specific intent. The crime forbidden by Sec. 10 is "unlawfully and carnally knowing and abusing" and the indictment for assault with intent to commit a rape must set forth that the assault was made with such intent. The indictment here in question does use the words "with the intent" and in our opinion complies with the rules laid down by this court in *State* v. *Lynch,* 88 Me. 195, 33 A. 978, quoted in *Moody* v. *Lovell, supra,* with respect to the use of the words of the statute setting forth the elements of a statutory crime which requires a specific intent. This rule was also approved in the recent case of *Smith, Petitioner* v. *State,* 145 Me. 313, 75 A. (2nd) 538. We, therefore, hold that the words used in this indictment sufficiently charge the respondent with assaulting a female child under the age of fourteen years, to wit, the age of twelve years, with assault

with intent to commit a rape and sufficiently charge a violation of R. S., 1944, Chap. 117, Sec. 12.

The record discloses that on the night of April 22, 1950, at Guilford, Maine, one Althea A. Bearce and a girl friend went to the moving pictures. They left the theatre about 8:30 P. M. and walked together to the corner of Hudson Avenue and Oak Street where they stopped in front of the Guilford Trust Company for a few minutes and held a conversation. They then separated and the girl friend walked on Hudson Avenue in the direction of her home and said Althea A. Bearce walked on Oak Street toward her home. While walking she was accosted by the respondent whom she did not know and who took her by the arm and walked with her for a short distance. There was evidence that said Althea A. Bearce stated to the respondent that he had walked with her far enough. The respondent did not leave and continued to walk with said Althea A. Bearce for a further distance according to the evidence to a point in front of the Godsoe house where he asked her for a kiss and she refused. Said Althea A. Bearce then testified that the respondent threw her down and that she screamed and that he then put his hand over her mouth and that he put his hand under her dress and tore her underwear; that during the struggle a button was torn from her coat and found the next morning on the Godsoe lawn; that the respondent immediately left and said Althea A. Bearce got up from the ground and went to her home. There was also evidence that the respondent and said Althea A. Bearce were seen in the vicinity of the Godsoe house by a witness who testified that he passed them on Oak Street and saw them again on the lawn of the Godsoe house and subsequently heard a scream and turned and saw said Althea A. Bearce running down the sidewalk. There was other testimony which to a certain extent was corroborative of the above facts.

Our court has many times considered the rule governing the direction of verdicts in a criminal case. We said in *State* v. *Sullivan,* 146 Me. 381, 82 A. (2nd) 629 (1950):

> "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 refusal to so direct is valid ground for exception if all the evidence is in."

See *State* v. *Martin,* 134 Me. 448, 187 A. 710; *State* v. *Shortwell,* 126 Me. 484, 139 A. 677; *State* v. *Roy,* 128 Me. 415, 148 A. 144.

With the above rule in mind, we have carefully examined the record with a view of determining whether or not the evidence was so defective or so weak that a verdict based upon it could not be sustained and have come to the conclusion that the jury was waranted in finding the respondent guilty beyond a reasonable doubt. The evidence as reported presents a typical case which under our law is for the consideration of the jury. They saw and heard the witnesses for the State (the respondent introduced no evidence) and it was within their province to determine not only what weight should be given to the testimony but also what part or parts of it should be believed in reaching their conclusion. See *State* v. *Bragg,* 141 Me. 157, 40 A. (2nd) 1; *State* v. *Cox,* 138 Me. 151, 163, 23 A. (2nd) 634; *State* v. *Merry,* 136 Me. 243, 8 A. (2nd) 143; *State* v. *Manchester,* 142 Me. 163, 166, 48 A. (2nd) 626; *State* v. *McKrackern,* 141 Me. 194, 41 A. (2nd) 817; *State* v. *Hudon,* 142 Me. 337, 350, 52 A. (2nd) 520.

What we have stated above disposes of the case unless the respondent has been prejudiced by the introduction and admission of three exhibits of wearing apparel consisting of a coat worn by said Althea A. Bearce at the time of the

incident, a button which purported to have been torn from the coat at the time and subsequently found on the Godsoe lawn the next morning by a witness for the State and certain underwear alleged to have been worn by said Althea A. Bearce at the time, which underwear the State claimed, through its witnesses, was torn by the respondent at the time of the incident. Respondent claimed that the exhibits were not properly identified, had not been at all times in proper custody, and that there was no evidence to show the exhibits were in the same condition as they were on the night of the alleged asault. There is testimony in the record, however, which clearly shows that the exhibits were substantially in the same condition as at the time of the incident except that the underwear had been washed. There was also ample testimony relating to the custody and control of the exhibits. The objections raised by the respondent to the introduction of the exhibits if they have any merit, go solely to the weight to be given to the exhibits. They were properly admitted. Certain other exceptions to the evidence were taken but were not properly incorporated and brought forward in the bill of exceptions and therefore are not properly before us and cannot be considered. See *State* v. *Townsend,* 145 Me. 384, 71 A. (2nd) 517.

There appears to be no merit in any of the exceptions and the mandate will be

Exceptions overruled.
Judgment for the State.

LIONEL J. BOLDUC ET AL.

vs.

GRANITE STATE FIRE INS. CO.

Androscoggin. Opinion dated October 11, 1951.

Courts. Vacation.

PER CURIAM.

Plaintiffs' exceptions to the rejection of a referee's report awarding them a recovery must be sustained on the exception which challenges the authority of the Justice of the Superior Court who ruled on the motion for the acceptance thereof, and the objections thereto, "subsequent to the vacation" following the term at which such motion and objections were presented to him for action. That the exception was waived is immaterial.

The statute authorizing decisions in vacation on matters heard during term time confers no authority beyond that period which intervenes between the adjournment of one term and the opening of another. *Robinson, Appellant,* 116 Me. 125, 100 A. 373; *Moreland* v. *Vomilas,* 127 Me. 493, 144 A. 652.

The case must be remanded to the Superior Court for further appropriate action therein.

Exceptions sustained.

Frank W. Linnell, for plaintiff.

David V. Berman, for defendant.

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

STATE OF MAINE

vs.

EARL ROWELL

Oxford. Opinion, November 3, 1951.

Criminal Law. Pleading. Night Hunting.

A warrant charging night hunting that respondent ". . . did hunt . . . wild animals . . . after one-half hour after sunset of the twenty-second day of November and one-half before sunrise of the twenty-third day of November . . ." is fatally defective under a statute making it an offense to "hunt wild animals from ½ hour after sunset until ½ hour before sunrise of the following morning . . ." (R. S., 1944, Chap. 33, Sec. 67.)

ON EXCEPTIONS.

Respondent was tried and convicted of night hunting. The case is before the Law Court on exceptions to the refusal of the presiding justice to direct a verdict of not guilty. Although there was no objection to the sufficiency of the complaint, the entry will be Case remanded to Superior Court with complaint there to be quashed. Case fully appears below.

Shelton C. Noyes, for State of Maine.

Frank W. Linnell, for respondent.

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

WILLIAMSON, J. On exceptions. In the Superior Court the respondent was found guilty of hunting at night. The case is before us on exceptions to the refusal of the presid-

ing justice to direct a verdict of not guilty. The only issue raised by the exceptions is whether the evidence warranted the guilty verdict. No objection to the sufficiency of the complaint has been made at any stage of the case.

On our examination of the record, however, we are forced to the conclusion that the complaint is fatally defective in that it does not allege a criminal offense. The court, therefore, lacked jurisdiction to try and sentence the respondent. The case will be remanded with instructions to quash the complaint.

The complaint upon which the respondent was convicted reads in part:

> "that—Earl Rowell of Sumner in said County, of Oxford on the *twenty-third day of November* in the year of our Lord one thousand nine hundred and fifty, at said Sumner in said County of Oxford *did hunt* and pursue *wild animals,* other than skunks and raccoons, *after one-half hour after sunset of the twenty-second day of November and one-half before sunrise of the said twenty-third day of November,* against the peace of said State, and contrary to the form of the statute in such case made and provided."

The statute creating the offense which the State sought to charge reads in part:

> "It shall be unlawful to hunt wild animals *from ½ hour after sunset until ½ hour before sunrise of the following morning,* except skunks and raccoons, as provided in Section 97. For the purposes of this section, the time shall be that which is recognized as legal in the State of Maine."
>
> *R. S., Chap. 33, Sec. 67* found in Tenth Biennial Revision of the Inland Fish and Game Laws compiled in 1949.

We have emphasized the controlling words in the complaint and statute.

There are certain fundamental rules to be kept in mind in reaching a conclusion upon the sufficiency of the complaint.

> "It is a well established principle, that if all the facts alleged in an indictment may be true, and yet constitute no offence, the indictment is insufficient. A verdict does nothing more than to verify the facts charged, and if these do not show the party guilty, he cannot be considered as having violated the law." *State* v. *Godfrey,* 24 Maine 232 at 233.

> "A defendant has a constitutional right to know the nature and the cause of the accusation from and by the record itself. The facts must be stated with certainty. The description of the criminal offense charged in the indictment must be full and complete. Every fact or circumstance which is necessary for a prima facie case must be stated. The indictment must charge a crime either under the statute or at common law. An indictment should charge a statutory offense in the words of the statute or in equivalent language. If no crime is charged, no lawful sentence can be imposed. *Smith* v. *State,* 145 Maine 313, 75 Atl. 2d., 538."

Berger v. *State of Maine,* 147 Me. 111, 112-13. See also *State* v. *Beckwith,* 135 Me. 423, 198 A. 739 and *State* v. *Bellmore,* 144 Me. 231, 67 A. (2nd) 531.

Turning to the necessity of the allegation of the time of the offense and of the hour when material we quote from *State* v. *Dodge,* 81 Me. 391 at 395, 17 A. 313:

> " 'Neither a complaint nor an indictment for a criminal offense is sufficient in law, unless it states the day, as well as the month and year on which the supposed offense was committed.' *State* v. *Beaton,* 79 Maine, 314.
>
> An act, prohibited by statute on certain particular days only, must be charged as having been committed on one of those particular days; for the time laid is a material element in the offense, and,

> unless laid on a day within the statute, no offense would be charged. In the case at bar, both time and place are material elements to constitute the statute offense. *State* v. *Turnbull,* 78 Maine, 392."

We are not concerned with a formal allegation of time which need not be proved as laid. See *State* v. *Harvey,* 126 Me. 509, 140 A. 188. It is obvious that the time of day in the case at bar forms an essential part of the offense. Hunting on November twenty-third is not the offense. No one would suggest that a complaint to such effect without more would sufficiently charge hunting at night. The offense here is hunting within certain hours of the day. Accordingly no statutory offense is set forth unless the hunting is alleged to have taken place within such hours.

Does the complaint allege the period of time within which the respondent is charged with hunting to be within the hours in which hunting is prohibited by statute? The starting point of the period in the complaint is "after ½ hour after sunset" of November twenty-second. The difficulty arises from the failure to end the period at least one-half hour before sunrise on the following morning. The complaint reads "and one-half before sunrise" of November twenty-third. Certainly we cannot say that the complaint charges that the hunting occurred *before one-half hour before sunrise* or within the period running, to use the words of the statute, "until ½ hour before sunrise." We can say no more than that the period of day within which the act of hunting allegedly occurred ended on November twenty-third *sometime before sunrise.*

A charge of hunting before sunrise on a given date is not a charge of violation of the night hunting statute. It is entirely consistent with the allegations that the hunting of which the State complains took place within one-half hour before sunrise. The respondent may have committed all the acts alleged in the complaint and yet have not violated the law. The respondent was not charged with a crime.

Under the circumstances we express no opinion upon the merits of the exceptions.

The entry will be

Case remanded to Superior Court with complaint there to be quashed.

J. W. STEPHENS, LIMITED

vs.

MAINE LUMBER PRODUCTS CORPORATION AND CASCO BANK & TRUST COMPANY AND LIBERTY NATIONAL BANK IN ELLSWORTH, TRUSTEES

Cumberland. Opinion, November 3, 1951.

PER CURIAM.

On exceptions. This case is before the court on exceptions to the acceptance of a referee's report in favor of the plaintiff. The case was heard by a referee under a rule of court with right of exceptions reserved as to matters of law. By agreement of the parties the case was set by the referee for a hearing on February 28, 1951. On that date, at the request of defendant's counsel, it was continued to the 7th of March. On that date, again at the request of defendant's counsel, the case was continued finally to March 14th at 2 p.m. On the 7th of March, by agreement and without objection of counsel for the defense, the plaintiff

filed an affidavit of claim in accordance with the Revised Statutes, Chapter 100, Section 132. On the 14th of March counsel for the defense again appeared before the referee and asked for a continuance. The cause was then continued by the referee to March 19th at 2 p.m. on condition that if the defendant were not then present with witnesses and ready to proceed with the case, the referee would proceed *ex parte.*

On March 19th counsel for the defense appeared before the referee at either a few minutes before or just after 3 p.m. He then stated that no witnesses for the defense were present, and again requested a continuance to enable him to produce witnesses for the defense. He also asked for a continuance on the ground that the defendant, through associate counsel, was filing a counter claim in the Federal Court, and urged that this was a matter justifying a continuance. The referee took the matter under consideration, and, there having been no intimation that the defendant either could or would offer witnesses in its behalf if the motion were denied, on the next day notified counsel for both parties that he had denied the motion for continuance and the testimony was closed.

The defendant on the next day moved to reopen the case to enable it to introduce the testimony of such witnesses as it then had available. The referee refused this motion, decided the case *ex parte,* and reported to the court in favor of the plaintiff. The defendant objected to the acceptance of the report on the ground that it was an abuse of discretion on the part of the referee to find for the plaintiff and to deny the defendant the right to reopen the case and introduce testimony in its behalf. The presiding justice overruled the objections and accepted the referee's report. The defendant took exceptions to this action of the presiding justice on the same grounds set forth in the objections to the referee's report.

We need not consider the effect upon the proceedings of the filing of the counter claim in the Federal Court. The matter was not argued orally, nor is it mentioned in the defendant's brief. Under the doctrine recently announced in the case of *Sard* v. *Sard et al.*, 147 Me. 46, 59, it may be considered waived. See also *State* v. *Sutkus*, 134 Me. 100, 104 and cases cited.

Under the circumstances of this case as disclosed in the record the referee was fully justified in deciding the case *ex parte* and in refusing to reopen the case. There comes a time in every cause when it must be disposed of. This cause was disposed of in accordance with the agreement of the parties and the condition imposed in the granting of the last continuance. At the appointed time on March 19th, there being no witnesses for the defense present, the referee could have then refused a continuance and then and there decided the case *ex parte*. He was entirely within his rights in announcing his decision to that effect on the day following. Upon the facts disclosed in the record it was not an abuse of discretion on the part of the referee to refuse to reopen the case.

Exceptions overruled.

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

Philip F. Chapman, Jr.,
Milton A. Nixon, for defendant.

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

PUBLIC UTILITIES COMMISSION

vs.

JOHNSON MOTOR TRANSPORT

Kennebec. Opinion, November 7, 1951.

Public Utilities. Exceptions. Contract Carrier. Common Carrier.

If the findings of the Public Utilities Commission are supported by substantial evidence they are final.

A common carrier is one who holds himself out as engaged in the public service of carrying goods for hire, to the limit of capacity, and to take "anybody's freight."

With a contract carrier there is an individual contract made with the carrier for the transportation of certain goods to a certain destination for a certain price.

What constitutes a common carrier and what constitutes a contract carrier are questions of law; but whether one is acting as a contract or common carrier are questions of fact.

ON EXCEPTIONS.

Proceeding instituted by Public Utilities Commission under R. S., 1944, Chap. 40, Secs. 59 and 25 by order to show cause why respondent should not cease and desist from certain acts. Respondent excepted to the order of the Commission. Exceptions overruled. Case fully appears below.

Frank M. Libby, for Public Utilities Commission.

Wilfred A. Hay,
John E. Hanscomb, for defendant.

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

FELLOWS, J. This case comes to the Law Court on exceptions to certain rulings of the Public Utilities Commission.

The proceedings were instituted by the Public Utilities Commission on its own motion under the provisions of Chapter 40, Section 59 of Revised Statutes (1944), in accordance with Chapter 44, Section 25 of the Revised Statutes (1944), which Section 25 reads in part as follows:

> "The commission also shall have authority to issue an order to any holder of a certificate or permit requiring such holder to cease and desist from any violations of the provisions of sections 17 to 30, inclusive, or of any rules or regulations of the commission promulgated pursuant to the authority thereof; * * * * *."

On October 24, 1950, the Commission, in writing, alleged that it had information tending to show that Johnson Motor Transport, of Portland, Maine was operating motor vehicles upon the public highways in the business of transporting freight for hire as a common carrier over regular routes, particularly from Portland and South Portland and other places, to Augusta, Bangor, Calais, Eastport and other points, without having obtained from the Commission a certificate declaring that public necessity and convenience required and permitted such operation and as a result such operation was contrary to the provisions of Section 18 of Chapter 44, Revised Statutes of Maine (1944).

The Commission notified Johnson Motor Transport to appear and show cause why the Commission should not issue an order to cease and desist from engaging in the business as a common carrier over regular routes between points within this state. Notice of the proceeding was also given by registered mail to Border Express, Inc., Cole's Express, Fox & Ginn, Inc., all of Bangor, Maine, and to Congdon Transportation and Maine Truck Owner's Association, both of Portland, Maine.

Hearings were held on the Show Cause Order in the State House in Augusta, Maine, and a large amount of evidence in the form of oral testimony and documentary exhibits was introduced by the Commission, by the Respondent, and by the Intervenors.

It seems to be recognized by all parties that Johnson Motor Transport is a corporation organized under the laws of Maine. It is recognized that the Motor Transport, or its predecessors in title, have been in the transportation business since 1930. It is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission on May 23, 1946. This I. C. C. certificate authorizes the respondent to engage in transportation in the interstate or foreign commerce as a common carrier by motor vehicle over "regular routes" which are described in the certificate as follows:

> "From Portland over Maine Highway 3 to Augusta, Maine, thence over U. S. Highway 201 to Fairfield, Maine; thence over Maine Highway 11 to Newport, Maine, and thence over U. S. Highway 2 to Bangor;
>
> "From Portland over U. S. Highway 1 to Brunswick, Maine, thence over U. S. Highway 201 to Fairfield, Maine, and thence over the above-specified route to Bangor;
>
> "From Portland over U. S. Highway 1 to Bangor;"

The I. C. C. certificate also authorized the operation as such motor vehicle common carrier over the following described "irregular routes:"

> "Between points and places in that part of Maine, on and south of Maine Highway 16, on the one hand, and on the other, points and places in Massachusetts within twenty-five miles of Boston, including Boston."

Johnson Motor Transport is also the holder of Contract Carrier Permit No. 190 granted to it by the Maine Public

Utilities Commission, as a matter of right under the so-called "grandfather clause" of Chapter 259 of the Public Laws of 1933 (now R. S., Chapter 44, Sections 17-31) on November 9, 1933, and renewed on February 23, 1950. The authorization granted by this Maine contract carrier permit is to operate a motor vehicle or motor vehicles as a contract carrier "within the general area and/or for the general purposes within which and for which John R. Johnson has been regularly engaged in transporting freight or merchandise for hire over the highways of this state from March 1, 1932 to June 30, 1933, the effective date of Chapter 259, Public Laws of 1933."

At the hearing, before the Public Utilities Commission, Johnson Motor Transport took these three exceptions:

I. The Commission erred in allowing Fox & Ginn, Inc., Moore's Motor Express, Inc., Fogg's Transportation Co., Congdon Transportation, B & E Motor Express, Roy Bros. Transportation Co., Inc., Sanborn's Motor Express, Dugas Express Co., Border Express, Inc., Cole's Express, Maine Central Railroad Co. and Bangor and Aroostook Railroad Co. to intervene as parties to the proceedings, to present evidence and to cross examine at will the respondent's witnesses.

II. The Commission erred in taking judicial notice of the operating rights granted by the Commission to the above named intervenors in so far as they relate to the matter in hearing.

III. Respondent excepts to three findings of fact by the Commission and to its judgment, order and decree thereon on the ground that said findings of fact are without substantial evidence to support them, and that said findings of fact and the judgment, order and decree of the Commission are unwarranted in

law which third exception is hereinafter set forth in detail.

The findings of fact, to which exceptions are taken, are as follows:

1. "From all the evidence it can hardly be disputed that Johnson Motor Transport's operation over Routes 1, 2, and 3 between Portland and Bangor in handling both interstate and intrastate freight is in accordance with the I. C. C. authority heretofore granted to the company, namely, as a common carrier over regular routes, of interstate commerce."

2. "From all the facts presented, we conclude that Johnson Motor Transport, in the operation under discussion, up to this point between Portland and Bangor and intermediate points and return is acting as a common carrier over regular routes of intrastate shipments within the State of Maine."

3. "There is nothing in the operation Bangor to Calais and return that can lead one to a different conclusion than that the operation is one of common carriage. Neither do we find anything to indicate that the carriage is over irregular routes, in spite of the fact that Johnson Motor Transport's authority from the Interstate Commerce Commission is to carry on an irregular route operation. Here is an instance where the presumption that the operation follows the authority (I. C. C.) seems to be contradicted by the facts. We are therefore, brought to the conclusion that in the operation from Bangor-Brewer to Calais and return, Johnson Motor Transport has been engaged in hauling merchandise as a common carrier over regular routes between points in the State of Maine."

The order, judgment and decree, to which exceptions are taken, is in part as follows:

> "That Johnson Motor Transport, holder of Contract Carrier Permit #190 issued by this Commission, cease and desist immediately from any further operation as a common carrier of merchandise for hire over regular routes between points within this state, viz.: between Portland to Bangor (Brewer) and intermediate points."
>
> "* * * * * Also between Portland to Bangor (Brewer) to Calais and intermediate points over U. S. #1 and return over the same route."

The above first and second exceptions relating to (1) the authority of the Public Utilities Commission to allow interested third parties to intervene and to present evidence, and (2) the authority of the Commission to take judicial notice of its own records as to rights of intervenors, were expressly waived by Johnson Motor Transport in its brief and at oral argument. (Relative to these two abandoned exceptions, see *Public Utilities Commission* v. *Gallop,* 143 Me. 290; *Damariscotta Water Co.* v. *Itself,* 134 Me. 349). The third exception taken to findings of fact on the ground that there is no substantial evidence to support, and, therefore, that the decree of the Commission is unwarranted, is the only exception to be considered.

The Law Court is not an appellate court from the Public Utilities Commission to retry questions of fact. Facts found by the Commission are not open in this court, unless the Commission shall find facts to exist without any substantial evidence to support them. If a factual finding, as a basis for an order by the Commission, is supported by any substantial evidence, the finding is final. *Public Utilities Commission* v. *City of Lewiston Water Commissioners,* 123 Me. 389, 123 Atl. 177; *Hamilton* v. *Caribou Power Company,* 121 Me. 422; *Casco Castle Co., Petr.,* 141 Me. 222; *Re Samoset Company,* 125 Me. 141. See also for law and procedure, *Public Utilities Commission* v. *Gallop,* 143 Me. 290, 62 Atl. (2nd) 166. "Substantial evidence" is such evi-

dence as taken alone would justify the inference of the fact. *Gilman* v. *Telephone Co.*, 129 Me. 243, 248.

The Commission has statutory authority to suspend a certificate or permit issued by it, and to issue a "cease and desist" order, for violation of certain statutes or legal regulations. R. S. (1944), Chap. 44, Sec. 25. To operate as a common carrier over regular routes the persons or corporations must have a certificate from the Commission of public convenience and necessity. R. S. (1944), Chap. 44, Sec. 18.

Johnson Motor Transport holds a Contract Carrier Permit issued to it by the Public Utilities Commission. It holds no certificate from the Commission of public convenience and necessity as a common carrier within the state.

The real and practically the only question presented in this case, therefore, is whether Johnson Motor Transport operates as a common carrier of intrastate freight between points in this state. The Motor Transport says it does not and that it operates only as authorized by its Contract Carrier permit. It offered evidence which might be considered substantial evidence as tending to show the fact to be as claimed. On the other hand, the evidence submitted by the intervenors and by officials who investigated for the Commission is substantial, and tends to show the fact to be to the contrary.

John R. Johnson, President of Johnson Motor Transport, testified that as to freight carried "we pick it up in Boston and we pick it up somewhere else along the route we are allowed to operate;" that the merchandise picked up in Portland destined for Bangor, or other points, "goes along" in the same trucks starting from Boston, "we pick it up with the understanding that we deliver it at the first opportunity, we take anybody's freight that we feel we can handle." Johnson said there was no difference in the billing between interstate and intrastate freight, and no freight was refused

where it could be handled. Evidence was offered as to the volume of interstate and intrastate business of Johnson Motor Transport, and as to the manner of conducting the business. From the evidence the Commission could well find that the usual charges were "the common carrier rates." There was substantial evidence also that Motor Transport solicited intrastate and interstate business generally and not individual contracts for the intrastate. There was substantial evidence that while engaged in its interstate common carrier business it was also at the same time and by the same trucks engaged in intrastate business; that usually one truck per day, except Saturday and Sunday, left Portland for the east; that freight was accumulated for both interstate and intrastate shipments, and that there were regular routes with only slight or occasional deviations. A study of the waybills, driver's "logs," circulars, and other documentary evidence, shows the manner of handling freight, routes, destinations, and schedules over the whole state between Portland and Calais. From this documentary evidence it could be found that prompt and regular service was maintained over well recognized or regular routes, and that contracts of carriage were contracts such as is usual with common carriers.

The definition of a common carrier at common law seems to be clearly recognized by all the parties in this proceeding. A common carrier is one who holds himself out as engaged in the public service of carrying goods for hire, to the limit of capacity, and to "take anybody's freight." The statute does not define. A common carrier is an insurer of the goods in his custody and is liable unless he can show that the loss or damage is due to an act of God, the act of a public enemy, the fault of the shipper or the inherent nature of the goods. *Warren* v. *Portland Terminal Co.*, 121 Me. 157, 116 A. 411; *Rogers* v. *Steamboat Company*, 86 Me. 261, 272; *New England Express Co.* v. *Maine Central Railroad*, 57 Me. 188; 9 Am. Jur. "Carriers," 430, Section 4; *Morse* v.

Railway Co., 97 Me. 77, 13 C. J. S. "Carriers," 131, Section 71; *Tarbox* v. *Eastern Steamboat Co.*, 50 Me. 339.

With the contract carrier (sometimes called the private carrier), upon the other hand, there is an individual contract made with the carrier for the carriage of certain goods to a certain destination for a certain price. The contract carrier may refuse to take the goods and refuse to contract for carriage. The business of the private contract carrier grew up with the motor vehicle. At first, an individual owning one or more trucks was accustomed to haul merchandise from place to place for hire over the highways. No regulations were needed because trucks were few. As more and more engaged in transportation by motor truck, however, it became necessary to make rules of law to protect the public, as well as to protect the ever increasing number of competing contract and common carriers from themselves. Under a so-called "grandfather clause" the regulatory statutes permitted the first of the private contract carriers to receive a certificate to enable them to continue their accustomed business over their accustomed routes. R. S. (1944), Chap. 44, Sec. 21 - III; *State* v. *King*, 135 Me. 5.

The contract with a private carrier may be in writing, it may be oral, or it may be implied from all the circumstances. It may be for one carriage of freight or a series. Each act of transportation, however, is a separate and individual act. It is not for public convenience and necessity but is a private transaction. The contract carrier does not hold himself out to accept all freight of all who offer. He makes an individual contract and is only liable for negligence under the contract he has made. *Public Utilities Commission* v. *Utterstrom*, 136 Me. 263; 9 Am. Jur., 435, Section 10 "Carriers"; 13 *Corpus Juris Secundum*, 31, Section 4 "Carriers"; *Haddah* v. *Griffin*, 247 Mass. 369. Even a common carrier may become a private contract carrier by special

engagement to carry what is not its duty to carry. *Buckley* v. *B. & A. R. R.*, 113 Me. 164, 93 A. 65, L. R. A. 1916-A, 617. All persons transporting freight for hire and not common carriers are included as contract carriers. R. S. (1944), Chap. 44, Sec. 21.

The principal defense offered by the respondent Motor Transport is to the effect that at no time did it acknowledge that it was a common carrier or "hold itself out as a common carrier." There is substantial evidence, however, from which the Commission could find that it accepted anybody's freight, that it had rarely, if ever, refused freight; that the rate charged was the common carrier rate or "sometimes higher"; that intrastate freight was carried in the same manner, under the same conditions, in the same trucks, and at the same time as the interstate. In short, there was substantial evidence from which the Commission could find that there was nothing in the service or nature of the service offered or rendered that differed from that of a common carrier.

What constitutes a common carrier, and what constitutes a contract carrier, are questions of law, but whether the carrier is acting as a common carrier or as a contract carrier is a question of fact. The fact is to be determined, in proceedings of this kind, by the Commission. The question is often a question of difficulty. Has the carrier held himself out as a common carrier, not necessarily by what has been said by the carrier or his agents, but by his acts? Every carrier might be able to avoid the insurer liability as a common carrier by simply insisting that he was a contract carrier, if his words were conclusive and his acts immaterial. The natural inclination of the contract carrier is, of course, to do the largest possible amount of business with the smallest danger of liability. Liability as an insurer is greater than the liability for negligence. Proof of carrier negligence is often difficult or impossible. To re-

fuse an occasional shipment by one claiming to be a contract carrier does not make him a contract carrier. It is evidence only of the fact. It is sometimes easy and convenient to raise a "smoke screen." It is the general and well recognized rule that a carrier cannot be a common carrier of intrastate freight and at the same time be a contract carrier. One part of a truck devoted to the public use as an interstate common carrier may be inconsistent with the other part devoted to intrastate contract carrier service. The regulation required under the statute might become the impossible.

The Public Utilities Commission carefully considered both the interstate and the intrastate business, the circumstances indicating a common carrier business, and the manner of conducting the claimed contract service, in its determination of the facts.

The claims and contentions of a party to litigation are often drowned in a sea of circumstances where only the truth is able to rise and swim.

From the substantial evidence in this proceeding the Commission was justified in finding, as it did, that Johnson Motor Transport in its intrastate business was operating over regular routes as a common carrier. The "cease and desist" order of the Commission, under the facts found, was proper.

Exceptions overruled.

KENNEBUNK, KENNEBUNKPORT

AND WELLS WATER DISTRICT

vs.

MAINE TURNPIKE AUTHORITY

York. Opinion, November 9, 1951.

Referees. Amendments. Riparian Rights. Prescription.

It is within the discretionary power of the court to strike off a reference following the final rejection of the referees' report although any action taken by the court below inconsistent with the continued existence of the reference will discharge the rule as a matter of law.

Any amendment to a declaration which could have been allowed by the court prior to the reference may be allowed by the court subsequent to the discharge of the rule. (Rule IV, Rules of Court.)

The fact that a plaintiff claims to recover for the same items and cause of action but upon different principles and rules of law than those which would have been applicable to the original declaration does not violate the condition laid down in Rule IV.

An amended declaration must set forth a good cause of action.

A prescriptive right cannot be acquired against one whose right is not invaded.

The right of non-riparian use by an upper riparian proprietor may exist by prescription as against a lower riparian proprietor, although such prescriptive right does not exist as against riparian users above the upper riparian proprietor.

The use of water for public distribution in this State is not a riparian use.

Although a use of its land by an upper riparian proprietor may be a reasonable one, the manner of its use may be so negligently conducted that it becomes unreasonable as against the rights of a lower riparian proprietor.

ON REPORT.

The Law Court had previously overruled plaintiff's exceptions to the rejection of a referees' report. Plaintiff, after return of the cause to the Superior Court, offered certain amendments to the declaration. Defendant challenged the authority of the court to strike the rule of reference or allow the amendments. The cause was then reported to the Law Court with certain stipulations of the parties. Amendments allowed. Cause remanded for further proceedings.

Waterhouse, Spencer & Carroll,
Hutchinson, Pierce, Atwood & Scribner, for plaintiff.

Varney, Levy & Winton,
Charles W. Smith,
Franklin F. Stearns, Jr., for defendant.

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

MERRILL, J. On report. This case has previously been before this court. *Kennebunk, Kennebunkport and Wells Water District* v. *Maine Turnpike Authority,* 145 Me. 35, 71 Atl. (2nd) 520. It is an action on the case instituted by Kennebunk, Kennebunkport and Wells Water District, hereinafter called the District, against Maine Turnpike Authority, hereinafter called the Authority. The District is a body politic and corporate created by the Legislature of this State for the purpose of supplying water to towns and individuals within its territorial limits. P. & S. L., 1921, Chap. 159. The Authority is a body politic and corporate created in like manner for the purpose of constructing and operating a turnpike from a point at or near Kittery to a point at or near Fort Kent. P. & S. L., 1941, Chap. 69.

The District in this action seeks to recover damages for injury to its water supply, Branch Brook, which injury and

damages it alleges were caused by the Authority by the construction of its turnpike across Branch Brook and its watershed. The injury claimed was the creation of a turbid condition of the water.

In our former opinion we sustained the rejection of a referees' report in favor of the plaintiff. We did this on the ground that the plaintiff neither alleged in its declaration nor established by proof any facts from which it could be found that it had, as against the defendant, the legal right, that is, the proprietary right, to use Branch Brook as a source of public water supply. The legal principles governing our determination of the case were thoroughly discussed and declared in our former opinion. No reexamination thereof is required at this time.

To avoid the impact of our former decision, the plaintiff, after the return of the case to the Superior Court, offered certain amendments to the declaration. These amendments may be summarized as follows: (1) direct allegations that the plaintiff was successor in title to the property and franchises of a private water company, to wit, York County Water Company, created under the name of Mousam Water Company by Chapter 254, Private and Special Laws of Maine, 1891, to which were given further rights and its name changed to York County Water Company by legislative action; that said York County Water Company was the owner of riparian lands, now owned by the plaintiff, which include both banks and the bed of Branch Brook; that the dam, pumping plant, sedimentation plant and water intake of the plaintiff were all located thereon; and that under its charter said private water company was authorized to take water for public distribution from Branch Brook; (2) that both its predecessor in title and itself had acquired a proprietary right to use the waters of Branch Brook as a source of supply for public distribution

by long continued use which had ripened into title by prescription; (3) that the use of the waters of Branch Brook as a source of supply for public distribution was, as against the defendant, a reasonable exercise by the plaintiff of its rights not only as a riparian proprietor, but also of its proprietary rights acquired by prescription.

After making its motion to amend the declaration, the plaintiff then moved to strike off the rule of reference. The defendant challenged the authority of the court to grant either of these motions. Under the terms of the report, if the amendments are allowable save for some purely procedural reason and the declaration as amended would support a finding for the plaintiff which would include as an element of damages the injury to the waters of Branch Brook as a source of public water supply to the plaintiff District, and it is not required that the order of reference be stricken off before amendments be allowed, or the motion that the reference be stricken off may be granted, the amendments are to be allowed as prayed for and the action remanded to the Superior Court for further proceedings in accordance with the opinion of the Law Court.

It is further stipulated in the report that the plaintiff has "brought no condemnation proceedings against and received no conveyances from the predecessors in title of the Defendant as to that parcel of real estate acquired by the Defendant on both sides of Branch Brook upstream from the Plaintiff's land on which its pumping station is located."

The rejection of the referees' report by the justice below became final and conclusive when this court by its mandate overruled the exceptions thereto. In such situation it is clearly within the discretionary power of the court below to strike off the reference. While better practice would dictate that in such situation a formal entry of the striking off of the reference should be made upon the docket,

any action taken by the court below inconsistent with the continued existence of the reference will *ipso facto* and as a matter of law discharge the rule.

If the rule be discharged either by operation of law or by order of the presiding justice, the situation of the case is then the same as though it had never been submitted to referees. Any amendment to the declaration which could have been allowed by the court prior to the reference may be allowed by the court subsequent to the discharge of the rule. Therefore, the fact that this case was formerly before referees has no bearing upon the authority of the court below to allow the proposed amendments.

Rule IV of the Revised Rules of the Supreme Judicial and Superior Courts is as follows:

> "Amendments in matters of substance may be made, in the discretion of the court, on payment of costs, or such other terms as the court shall impose; but if applied for after joinder of an issue of fact or law, the court will in its discretion refuse the application or grant it upon special terms; and when either party amends the other party shall be entitled also to amend, if his case requires it. No new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action."

Within the meaning of this rule of court, the proposed amendments are not only consistent with the original declaration but they are for the same cause of action.

The fact that a plaintiff claims to recover for the same items and cause of action but to do so upon different principles and rules of law than those which could have been applicable to the declaration as unamended does not violate the conditions laid down in Rule IV. See *Brewer* v. *East Machias,* 27 Me. 489. "A declaration so defective, that it would exhibit no sufficient cause of action, may be cured by

an amendment without introducing any new cause of action. This is often the very purpose of the law authorizing amendments. The intended cause of action, when defectively set forth, may be as clearly perceived and distinguished from another cause of action, as it would be, if the declaration had been perfect." *Pullen* v. *Hutchinson,* 25 Me. 249, 252. See also *Frost* v. *Company,* 126 Me. 409 at 412. In the latter case it was said: "The very purpose of an amendment is to cure defects. If without the amendment the action could be maintained, no amendment is necessary."

There is, however, one further requirement relating to the allowance of amendments. The declaration as amended must set forth a good cause of action. *Gilbert and Beckler* v. *Dodge,* 130 Me. 417; *Garmong* v. *Henderson,* 112 Me. 383. In other words, the declaration if amended as proposed must not be demurrable. The offered amendments, however, are not challenged on this ground.

The issue now before this court, however, is narrowed by the following stipulation in the report. If the Law Court should decide (2) that the declaration if amended as prayed for "would not be sufficient to support a finding for the plaintiff which would include as an element of damages the injury to the waters of Branch Brook as a source of public water supply to the plaintiff District x x x x x judgment is to be ordered for the defendant."

In our prior decision we held that the plaintiff's proprietary right to use the waters of Branch Brook stemming from its ownership of riparian lands was restricted to riparian purposes. We further held that the use of the waters of a brook by a riparian proprietor as a source of water supply for public distribution was not a riparian use. We further held that a charter authorizing the use of the waters of a brook as a source of water for public distribution by either a public water district or a private water company

is not a grant to such district or company of any proprietary right and ownership in or to the use of the waters mentioned therein for such purpose. Such charter but marks out and defines the sources of water supply which the corporation within the terms of its charter may use. We further held in our former opinion that if, as here, the use of the waters be a non-riparian use, the right to exercise the same must be acquired by purchase or grant from or by the exercise of eminent domain against *those whose rights it is sought to restrict* by the exercise of such use. We further held that unless so acquired the non-riparian use will not be a reasonable use against an upper riparian proprietor and its exercise will not be a factor entering into the determination of whether or not the use of his land by an upper riparian proprietor is a reasonable one as against the lower proprietor. The upper proprietor may make any use of his land not forbidden by law that he could make if such use by the lower proprietor was not being exercised.

A prescriptive right cannot be acquired against one whose right is not invaded and who cannot bring an action for the invasion thereof. While a riparian proprietor may make reasonable diversion or abstraction of the water for a riparian use, he can make neither for a non-riparian use. Diversion without return, or abstraction of the water for a non-riparian use, as against a lower riparian owner, is an invasion of his riparian rights. If such diversion or abstraction be continued for the period and under the conditions requisite for prescription it will, as against such lower proprietor, ripen into a prescriptive right. An action lies by a riparian proprietor for the wrongful invasion of his riparian rights even though there be no actual damages. *Blanchard* v. *Baker,* 8 Me. 253. This decision rendered in 1832, has never been questioned by this court.

On the other hand, it is perfectly clear that the abstraction of water for a non-riparian use by a lower riparian proprietor does not invade any right of the upper riparian proprietor. His interest in the water after it passes his land ceases. As no right of the upper proprietor is invaded by such use, no right of action therefor exists in his favor. The fact that a riparian proprietor acquires a prescriptive right against a lower riparian proprietor to make a non-riparian use of water gives him no right by prescription against the upper riparian proprietor. Their relative respective rights remain the same as before.

A prescriptive right is no greater right than could have been acquired by a grant from those against whom the right is acquired by prescription. In the present situation none of the owners of riparian land situated below the lands of the plaintiff had, as riparian proprietors, any proprietary right to use the waters of Branch Brook as a source of supply for public distribution. Not having such right they could neither individually, nor collectively, convey such right to the plaintiff. An appropriate deed of such right from a lower riparian proprietor, however, would estop him and his successors in title from objecting to such use of the water by the upper proprietor who was his grantee in such deed. In like manner, proper deeds from all of the lower riparian proprietors could estop them and their successors in title from preventing their grantee from making a non-riparian use of the water which they had purported to convey by such deeds.

The rule that a non-riparian use by a lower riparian proprietor is not a factor in determining whether the use of its land by an upper proprietor is a reasonable use, applies whether such lower riparian proprietor making such non-riparian use be a grantee from or has as against other still lower riparian proprietors obtained the right so to do by

prescription. In other words, one using the waters of a stream as a source of public supply cannot *as against upper riparian proprietors* obtain from lower riparian proprietors, either by grant or prescription, rights which the lower proprietors do not themselves possess.

Although the plaintiff in this case may have acquired the right to use the waters of Branch Brook as a source of supply for public distribution as against all lower riparian proprietors, it has not, either by prescription, purchase, grant, or by the exercise of eminent domain acquired such right from or against the defendant, an upper riparian proprietor. Therefore, the exercise of such use by the lower proprietor "will not be a factor entering into the determination of whether or not the use of his land by an upper riparian proprietor (here the defendant) is a reasonable use thereof. The upper proprietor (here the defendant) may make any use of his land not forbidden by law that he could make if such use by the lower proprietor was not being exercised." See our former opinion in this case as reported in 145 Me. 35, 52, 71 Atl. (2nd) 520 at 530.

We hold as a matter of law that, as against the use of the water of Branch Brook by the District as a source of public water supply, the use by the Authority of its own land for the purpose of constructing the turnpike was a reasonable one. In constructing the turnpike, the Authority had a legal right to do all things incidental thereto. It could remove growth from the soil, establish grades, make cuts and fills and bridge the brook. Within the confines of its own land it could divert the brook, provided it returned it to its original channel. It could even erect spoil piles of the extra earth and material removed and for which it had no use. These things were incidental to the prosecution of a lawful use of its own land. These things did not *per se,* either individually or collectively constitute an unreasonable use

by the defendant of its own land with respect to the use of the waters of Branch Brook by the plaintiff as a source of public water supply.

To allow a water company or a water district to restrict the lawful use that upper riparian proprietors might otherwise make of their lands by a prescriptive use of the waters against lower proprietors would confer upon such districts or companies the right to appropriate the watershed of a stream by prescription against those who could not bring an action to prevent it. If control of the watershed of a stream for the purpose of protecting its water supply be desired by a water company or water district, it should be acquired by purchase, or if such power be, as here, conferred upon it, by the exercise of the right of eminent domain. It cannot, as against upper proprietors, be acquired by a prescriptive use of the water for such purpose. In the instant case the District had obtained no rights in or against the defendant's land by grant, eminent domain, prescription or otherwise.

The case *Stockport Waterworks Company* v. *Potter et als.*, 3 H. & C. 300, 159 Eng. Repr. 545, which overruled the prior decision in the same case reported in 7 H. & N. 160, 158 Eng. Repr. 433, held that a prescriptive right to use water from a stream for public distribution was insufficient to justify recovery of damages against an upper riparian proprietor for pollution of the stream. In this case Pollock, B., speaking for the majority of the court, said:

> "But a third and conclusive answer, as it seems to us, was given to such an easement.
> The defendants' land is far higher up on the stream than the conduit or tunnel at Nab Pool Weir by which the plaintiffs abstract the water.
> No amount of water abstracted by the plaintiffs or those under whom they claim could possibly be felt by the defendants. If the water was abstracted

> unlawfully or in excessive quantities, or not returned into the river the proprietors below might have cause to complain, but the defendants could not, because they could not be affected by it. They had neither the will nor the power to interfere with the plaintiffs' use nor to take legal proceedings against them.
>
> No grant could therefore be presumed by the defendants because no user ever existed adverse to their full enjoyment of the water. And *Sampson* v. *Hoddinott* (1 C. B. N. S. 590, 611) was cited as an express authority for this proposition."

The case of *Pennsylvania R. Co.* v. *Sagamore Coal Co.*, 281 Pa. 233, 126 Atl. 386, 39 A. L. R. 882 is especially relied upon by the plaintiff. This case was a bill in equity to enjoin as a public nuisance the discharge of acid mine waters into a creek by the defendant, an upper riparian proprietor. There were several plaintiffs. The railroad company was itself using water for a public use. Other plaintiffs were using it as a source of public water supply. The State became a party by intervention. The court held that the defendant was polluting water used by the public. The court said:

> "In the view we take of it, the controversy compacts itself within closer bounds than it had in the minds of counsel, and, although its public importance is very great, it is controlled by one fact and a single equitable principle — the fact that the stream has been polluted, and the principle that this creates an enjoinable nuisance if the public uses the water."

The court then held that the pollution by an upper riparian proprietor of a source of public water supply or water which was used for a public use was a public nuisance and, as such, could be enjoined for the protection of the public. They held that the determining factor was the public use of the stream, saying "It is the use of the water

by many people that makes it 'public use,' in applying the nuisance doctrine — not the fact of how the water is taken from the stream for their use, whether in the mains of a water company or by them in buckets." This case, however, does not even discuss the question of damages or whether they were recoverable by the ones distributing the water for public use.

In the case *Baltimore* v. *Warren Manufacturing Co.*, 59 Maryland 96, cited by the plaintiff, an injunction was granted to the city to restrain the defendant, an upper riparian proprietor, from defiling the stream on which the city was *a lower riparian proprietor* and from which stream the city took water for public distribution. The court held that pollution of a stream by an upper riparian proprietor for the prescriptive period would ripen into a prescriptive right *against the lower proprietor.* The case stands for the doctrine that *a riparian proprietor* to protect the invasion of his private rights *as a riparian proprietor* by unlawful pollution of the stream by an upper riparian proprietor is entitled to redress by action at law and, in case the nuisance be continued, to relief by injunction. *City of Aberdeen* v. *Lytle Logging & Mercantile Co.*, 108 Pac. (Wash.) 945, was likewise an injunction case and the question of the plaintiff's right to use the water for public distribution was not an issue.

By the terms of the report in this case damage to the plaintiff's right to use the water for riparian purposes is excluded from our consideration nor do we pass upon that question. The use of the water for public distribution in this State is a non-riparian use, and a use of the water by the plaintiff which cannot be a factor in determining as between the plaintiff and the defendant whether or not the use by the defendant of its upper riparian land is a reasonable use. Whether or not the acts of the defendant could have

been restrained as a common law or statutory public nuisance by action instituted in behalf of the public, or as a private nuisance for invasion of the plaintiff's rights as a riparian proprietor to make riparian use of the water is not before us and, under the terms of the report, need not be decided by us. By the terms of the report it is only if "The declaration as amended would support a finding for the plaintiff which would include as an element of damages the injury to the waters of Branch Brook as a source of public water supply to the plaintiff District," that the amendments are to be allowed and the action remanded to the Superior Court for further proceedings in accord with the opinion of the Law Court.

The fact that the use of its lands by the defendant for the purpose of constructing a turnpike was a reasonable use as against the plaintiff's use of the waters of Branch Brook as a source of supply for public distribution is not necessarily determinative of the issue now before us. In our former opinion, as reported in 145 Me. 35, 43, 71 Atl. (2nd) 520, 525, we recognized the principle that although a use of its land by an upper proprietor may in and of itself be a reasonable one, the manner of its use may be so negligently conducted that it becomes unreasonable as against the rights of the lower riparian proprietor. This is but another example applying the doctrine *sic utere tuo ut alienum non laedas,* so use your own that you will not injure the property of another.

In this case although the plaintiff had not acquired the right to use the waters of Branch Brook as a source of public water supply so that it could prevent the defendant from constructing the turnpike on its land, the plaintiff's use of the waters for such purpose was not illegal, nor was it, as against the defendant, unlawful in the sense that it invaded any rights of the defendant.

The defendant, according to the allegations in the declaration, had knowledge of the use the plaintiff was making of the waters. The declaration alleged that the defendant in prosecuting the work of constructing the turnpike unnecessarily, negligently, recklessly, carelessly, wantonly and unlawfully so conducted the same in certain respects that it thereby caused the turbidity of the water of which the plaintiff complains. Certainly the defendant had no right to intentionally or wilfully interfere with the use which the plaintiff was making of the waters of Branch Brook. On the other hand, all damages necessarily caused to the waters of Branch Brook as a source of public water supply by the prosecuting of the defendant's work of constructing the turnpike would be *damnum absque injuria*. There is, however, a mean between these two extremes for which the defendant might become liable in damages for injuring the waters of Branch Brook as a source of public water supply. To define as an abstract proposition just where this liability would be incurred is extremely difficult and involves so many variable factors that we will not attempt to do so at this time. It must be borne in mind that at this time we are but passing upon the sufficiency of the declaration. We have no facts or evidence before us as we did at the time we rendered our former decision. Nor can we presume that the record, if again taken out, will not contain facts in addition to those which were contained in the record when it was before us the first time. We must presume that the evidence will establish every allegation in the amended declaration. The declaration contains averments which, if true and established by evidence, would justify a recovery for damages actually suffered by the plaintiff, down to and including the date this action was commenced, because of the injury to the waters of Branch Brook as a source of public water supply. This being true, under the terms of the report the amendments are to be allowed as prayed for and

the action is hereby remanded to the Superior Court for further proceedings in accordance with this opinion.

So ordered.

DENNIS COLLINS, PETITIONER
FOR WRIT OF HABEAS CORPUS

vs.

ALLAN L. ROBBINS, WARDEN
MAINE STATE PRISON

Knox. Opinion, November 21, 1951.

Criminal Law. Juveniles. Courts. Manslaughter.

The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked, and subsequent happenings and events, though they are of such character as would have prevented jurisdiction from attaching in the first instance, will not operate to oust the jurisdiction already attached.

Under our law the crime of murder includes manslaughter.

Upon an indictment of a juvenile for murder, a crime within the jurisdiction of the Superior Court, a plea of guilty of manslaughter and sentence thereon is valid notwithstanding statute providing "municipal courts . . . shall have exclusive original jurisdiction over all offenses, except for a crime, the punishment for which may be imprisonment for life or for any term of years . . ." (R. S., 1944, Chap. 133, Sec. 2, as amended by Chap. 334, P. L., 1947.)

ON REPORT.

Habeas Corpus before the Law Court pursuant to R. S., 1944, Chap. 91, Sec. 14. Petitioner, a juvenile, stands committed upon a plea of guilty of manslaughter to an indict-

ment for murder. Writ discharged. Petitioner remanded to the custody of the Warden of Maine State Prison in execution of sentence.

Christopher S. Roberts, for petitioner.

Frank F. Harding,
Curtis M. Payson, for State of Maine.

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

NULTY, J. Habeas corpus proceedings from Knox County Supreme Judicial Court in vacation and brought forward to this court on report upon facts agreed, R. S., 1944, Chap. 91, Sec. 14, and certified for immediate decision by agreement of Counsel. *Wade* v. *Warden of State Prison,* 145 Me. 120, 73 A. (2nd) 128. The facts disclosed by the record are:

Dennis Collins, a minor, brought a petition for a writ of habeas corpus against Allan L. Robbins, Warden of the Maine State Prison, in usual form on July 24, 1951, and, on said petition the writ of habeas corpus was ordered to issue forthwith. On the same day the Warden produced the body of Dennis Collins before the court and made the usual return, attaching thereto a certified copy of the *mittimus* under which said Dennis Collins was detained. A brief hearing was had in which Dennis Collins testified that at the time of his indictment for the murder of his father he was thirteen years old and that the date of his birth was February 23, 1937.

The record as reported includes the petition for the writ, the writ, the return of the writ by the Warden of the State Prison, with a certified copy of the mittimus, the record of the original case in Knox County Superior Court and the facts taken out at the hearing. It also includes a stipulation that said Dennis Collins was arraigned in the Rockland

Municipal Court on October 30, 1950, on the charge of murder and that he was bound over to the grand jury of the Superior Court, November Term, Knox County, 1950.

The Knox County records of the Superior Court for the November Term, 1950, disclose that the grand jury indicted Dennis Collins for murder and that counsel was appointed by the court to represent said Dennis Collins. Upon arraignment said Dennis Collins pleaded guilty to the crime of manslaughter which plea the court accepted and sentenced him to be confined to hard labor in the State Prison at Thomaston for the term of not less than five years and not more than ten years and a mittimus for his commitment was duly issued and said Dennis Collins was duly committed under said mittimus.

The petition for the writ of habeas corpus alleges in the usual form that the petitioner, Dennis Collins, is now unlawfully imprisoned in the Maine State Prison at Thomaston, and the petitioner, Dennis Collins, now contends that the Superior Court for the County of Knox, when it accepted his plea of manslaughter to the indictment charging murder, was without jurisdiction to impose sentence because judges of municipal courts within their respective jurisdictions have exclusive original jurisdiction of all offenses, except for a crime, the punishment for which may be imprisonment for life or any term of years committed by children under the age of 17 years. Thus, the petitioner's claim involves the construction of the second paragraph of R. S., 1944, Chap. 133, Sec. 2, as amended by Chap. 334 of the Public Laws of 1947, the pertinent part as amended reading as follows:

> "Judges of municipal courts within their respective jurisdictions shall have exclusive original jurisdiction over all offenses, except for a crime, the punishment for which may be imprisonment for life or for any term of years, committed by children under the age of 17 years, and when so exer-

> cising said jurisdiction shall be known as juvenile courts. Any adjudication or judgment under the provisions of sections 4 to 7, inclusive, shall be that the child was guilty of juvenile delinquency, and no such adjudication or judgment shall be deemed to constitute a conviction for crime."

No question is raised by the petitioner as to the jurisdiction of the Superior Court of Knox County over the crime of murder for which he was charged in the indictment found by the grand jury at the November 1950 Term. This court recently declared in *Wade* v. *Warden of State Prison, supra,* that murder was an offense clearly excepted from the jurisdiction of the juvenile courts and set forth at length in that exhaustive opinion the interpretation of Revised Statutes and Public Laws last cited with respect to the respective jurisdictions of the Superior and Municipal Courts over a juvenile charged with the crime of manslaughter. In other words, the petitioner's claim now is that he could not be legally sentenced after his accepted plea of manslaughter to an indictment charging him with murder because the Superior Court of Knox County by its action in accepting his plea of manslaughter was without jurisdiction to further act and dispose of the case, the exclusive original jurisdiction over the offense being by law vested in the judges of the Municipal Courts.

The petitioner, Dennis Collins, was charged with murder. He was first taken before the Rockland Municipal Court, arraigned and bound over to the grand jury for the November 1950 Term of Knox County Superior Court. At that time the Superior Court of Knox County had exclusive original jurisdiction of this particular crime of murder, it being excepted in the act granting jurisdiction to the judges of the municipal courts over offenses committed by children under the age of seventeen years. See R. S., 1944, Chap. 133, Sec. 2, as amended, *supra.* We, therefore, hold that the Superior Court of Knox County had exclusive original ju-

risdiction of the crime of murder. Therefore, at the time of the arraignment of the petitioner, Dennis Collins, for the crime of murder on the indictment found by the grand jury of said Knox County the jurisdiction of the Superior Court with respect to the crime charged was the same as if the so-called juvenile court laws referred to and cited herein had not been enacted. In other words, the jurisdiction of said Superior Court was in no way changed. See *State* v. *Rand and Henry,* 1934, 132 Me. 246, 250, 169 A. 898.

The question now before us seems to be, was the Superior Court for Knox County without jurisdiction to impose sentence when it accepted the petitioner's plea of guilty of manslaughter to the indictment charging murder?

It has long been accepted as a well known principle of law that

> "the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked, and if the jurisdiction once attaches to the person and subject matter of the litigation, the subsequent happening of events, though they are of such a character as would have prevented jurisdiction from attaching in the first instance, will not operate to oust the jurisdiction already attached. This is the statement of the rule that subsequent events will never defeat jurisdiction already acquired." 12 Encyclopedia of Pleading and Practice, Page 171.

The Supreme Court of Missouri, in *State* v. *Wear,* 1898, 145 Missouri, 162, 205, 46 S. W. 1099, said, in speaking of jurisdiction:

> "The pendency of a cause in a court where jurisdiction exists, and has been acquired in a lawful manner is a test of the continuance of such jurisdiction, and of its valid exercise until final disposition is made of the cause, no matter how flagrant may be the errors which attend the exercise of such jurisdiction, nor how numerous and obvious

> may be the errors with which the record abounds, because the jurisdiction to decide right, being once conceded, such concession necessarily embraces the power to decide wrong, and a wrong decision though voidable, and though it may be avoided, yet until avoided is equally as binding as a right one; it cannot be attacked collaterally; the only way its binding force can be escaped or avoided is by appeal or writ of error."

The Court of Appeals of Kentucky, in *Stewart, Pros. Atty., et al.* v. *Sampson, Judge et al.*, 1941, 285 Ky. 447, 148 S. W. (2nd) 278, 280, 281, said in speaking of jurisdiction:

> "The term (jurisdiction) applies to both the litigant in the cause and to its subject matter, by which is meant that a court, before it may exercise judicial power to determine a cause pending before it, must have authority to deal with and determine the questions relating to the subject matter of the litigation, and also must in some way have the litigant whose interest is involved in the subject matter properly brought into court, and which is usually designated as 'jurisdiction of the person.' Therefore (employing the usual terms with reference thereto), a court may not proceed to determine a matter before it unless it has 'jurisdiction of the person' as well as 'jurisdiction of the subject matter.' "
>
> "To begin with, it should be borne in mind that the term 'jurisdiction', as applied to judicial tribunals, emanates exclusively from the constitution and legally enacted statutes of the sovereignty of the forum. 14 Am. Jur. 368, § 169."
> "Technical jurisdiction, therefore, is the power and authority on the part of the court to hear and judicially determine and dispose of the cause pending before it, and which power and authority must be conferred in the manner hereinbefore stated."

The Supreme Court of Florida in *Tidwell* v. *Circuit Court of DeSoto County, et al.*, 1942, 151 Fla. 333, 9 So. (2nd) 630, said in speaking of jurisdiction where the claim was

made in connection with the charge of a felony which by operation of a statute was reduced to a misdemeanor, the petitioner claiming that the circuit court had no jurisdiction because of the reduced grade of crime, said the following:

> "The gravity of the offense was fixed at the time of its commission and the voluntary act on the part of the defendant in making restoration to the person whose property was stolen has no influence upon the nature of the crime or the jurisdiction of the court in which the matter should be tried, but only serves to diminish the character of the punishment if the defendant is eventually convicted."

To the same effect see *Harmon* v. *State,* 1913, 8 Alabama Appellate Court Reports, 311, 62 So. 438, and *Koppel* v. *Heinrichs,* 1847, 1 Barb. (N. Y.) 449.

In 16 Corpus Juris, Criminal Law, Par. 247, Page 182, in speaking of a conviction of an offense below jurisdiction or within jurisdiction of the lower court, we find the following statement:

> "Where the court has jurisdiction of the crime for which accused is indicted, it is not lost if on the evidence he is convicted of a crime of an inferior grade of which it would not have jurisdiction originally, - - - -." See cases cited in note.

To the same effect, see 22 Corpus Juris Secundum, Criminal Law, Par. 169, Page 264.

In *Carson, Petitioner,* 1944, 141 Me. 132, 39 A. (2nd) 756, we had occasion to consider whether the accused in an indictment charging a substantive offense could be legally convicted and sentenced for an attempt to commit the crime charged and if so whether the attempt to commit the crime is a lesser crime included in the greater one. We decided in that case that the accused could and that an attempt to commit a particular crime is not only necessarily included in but is also substantially charged by an indictment alleging

the crime itself has been committed, and that R. S., 1944, Chap. 132, § 10, aptly provides for such a situation if, according to the wording of the statute, the residue of the charged crime is substantially charged in the indictment under which the prosecution is conducted. See also *State* v. *Ham et als.*, 1866, 54 Me. 194, and *State* v. *Leavitt*, 1894, 87 Me. 72, 32 A. 787. In *State* v. *Waters*, 1854, 39 Me. 54, 65, cited in *Carson, Petitioner, supra,* we declared:

> "The jury may acquit the defendant of part and find him guilty of the residue. 1 Chit. C. L. 637. Where the accusation includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime and convict him on the less atrocious. 2 Hale, 203. This rule applies in all cases where the minor offense is necessarily an elemental part of the greater, and when proof of the greater necessarily establishes the minor."

In the instant case the petitioner was charged with murder. Under our law the crime of murder includes manslaughter. *State* v. *Conley*, 1854, 39 Me. 78, 87. In fact, it has been held from the earliest days that upon an indictment for murder a conviction may be had for manslaughter. 1 Hale, 449; 2 Hale, 302. There are a great many instances where defendants have been found guilty of the lesser offense embraced or included in the larger charge and these have been sustained by the authorities. See *State* v. *Webster*, 1859, 39 N. H. 96, 99, where the court said:

> "The evidence failing to substantiate the greater offense, the jury, under the instructions of the court, returned a verdict for an assault and battery. - - - - - - - - - It is a verdict for a lesser offense embraced in a larger one, and as such is sustained by the authorities; - - -."

The New Hampshire Court goes on to say, Page 100, in speaking of higher offenses which involved the construction of a New Hampshire statute relating to the jurisdiction of justices of the peace under the statute:

> "It does not apply to higher offenses, (enumerating them). An indictment may be found in all such cases without any preliminary examination before a magistrate; and if upon the trial the evidence fails to sustain the indictment to the full extent, the court are not thereby ousted of their jurisdiction. The grand jury find the matter as it appears before them, and present to the court an indictment for an offense, which requires no preliminary proceedings before a justice of the peace, and of which the court have jurisdiction in the first instance; and having that jurisdiction it is not in any way affected by the result of the trial."

The cases cited and commented upon up to this point indicate that the accused has been found guilty of the lesser or included offense by the jury but it is a well settled principle of law requiring no citation of authorities that the accused may plead guilty or confess to an inferior or lesser crime provided the court having jurisdiction is willing for good cause shown to accept the plea and there is no reason why an indictment charging murder which necessarily includes the lesser offense of manslaughter and contains everything essential to establish the guilt of the petitioner, would not have the legal effect, if the petitioner were permitted to plead guilty to manslaughter, of acquitting the petitioner of the charge of murder. See *Carson, petitioner, supra.*

The petitioner through his counsel strongly urges that this court adopt the holding of the Louisiana Court in *State* v. *Dabon,* 1927, 162 La. 1075, 111 So. 461, which held that the conviction of manslaughter of a juvenile charged with murder and who had not previously been before the juvenile court could not be sustained and amounted only to a verdict of not guilty of murder, and that the child was still subject to proceedings before the juvenile court based upon manslaughter as juvenile delinquency. The contrary result was reached by the Tennessee Court in *Howland* v. *State,* 1924, 151 Tenn. 47, 268 S. W. 115, which holds that if a

juvenile is properly indicted for murder, that crime not being within the jurisdiction of the juvenile court, the jurisdiction of the criminal court having properly attached, it attached for all purposes and the conviction of the juvenile of manslaughter was correct.

As a result of our examination of the authorities and cases cited herein we are of the opinion that the Tennessee Rule is the correct rule and we, therefore, hold and declare that the jurisdiction of the Superior Court of Knox County was in no way changed when it accepted from the petitioner, a juvenile under the age of seventeen years, a plea of guilty of manslaughter to an indictment charging murder and we further hold and declare that jurisdiction as we have defined it in this opinion cannot be lost or ousted under such circumstances as are described herein, and once having attached it continues until the final disposition of the cause.

We said in *Wallace* v. *White,* 1916, 115 Me. 513, 519, 521, 99 A. 452:

> "If a court has jurisdiction of the person and cause, the fact that the sentence is excessive or otherwise erroneous is not ground for discharge on habeas corpus. A writ of habeas corpus cannot reach errors or irregularities which render proceedings voidable merely, but only such defects in substance as render the judgment or process absolutely void."

> "It is the judgment of the court which authorizes detention. - - - - The judgment is the real thing, - - - -. The important question on habeas corpus is, is the prisoner in the custody where the judgment commanded him to be put, - - - -."

See also *Cote* v. *Cummings,* 1927, 126 Me. 330, 332, 138 A. 547.

We hold that the commitment of the petitioner was properly made under a valid judgment. It necessarily follows that the mandate will be

Writ discharged. Petitioner remanded to the custody of the Warden of Maine State Prison in execution of sentence.

PLINY CROCKETT, APLT.
FROM DECREE OF JUDGE OF PROBATE IN ESTATE OF SUMNER O. HALEY

York. Opinion, November 27, 1951

Wills. Probate Appeals. Burden of Proof. Exceptions.

R. S., 1944, Chap. 140, Sec. 33 requiring service of probate appeal to be made upon "all parties who appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court" does not require service upon "thirteen different heirs at law" whose names do not appear upon the docket.

An appeal bond is not defective because dated November 24th and refers to an appeal as having been claimed on November 20th when in fact both the appeal and bond were presented to the court on November 29th and there can be no doubt as to the identity of the appeal to which the bond refers. (R. S., 1944, Chap. 144, Sec. 33.)

The findings of the Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them.

The burden rests upon the proponents of a will to prove testamentary capacity.

The burden is upon the contestants to prove undue influence.

The mere inducing of a testator to make a will is not undue influence.

ON EXCEPTIONS.

To the disallowance of a will an appeal was taken to the Supreme Court of Probate. Contestants excepted to the action of the Supreme Court of Probate (1) refusing to dismiss the appeal on the asserted grounds of improper service and defective appeal bond, and (2) allowing the will. Exceptions overruled. Case fully appears below.

Titcomb & Siddall, for appellant.

Arthur A. Green, for legatees.

Lausier & Donahue, for sole heir-at-law.

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

MERRILL, J. On exceptions. Sumner O. Haley, a resident of York County, died June 8, 1950, leaving an instrument purporting to be his last will and testament. By this will he disposed of an estate amounting to some $96,000. His sole heir was a first cousin, Winn Broughton, otherwise known as Winn E. Broughton. By the will he left him a token bequest of $100. He also left the sum of $500 to Flora D. Palmer, who had been his housekeeper for some forty-eight years. He divided the residue into six equal shares, one of which he gave either to the child or the children of each of six named deceased first cousins. Of these second cousins nine were residents of the Conways in New Hampshire. On June 27, 1950, Pliny Crockett, a beneficiary and the executor named in the will, presented the same for allowance to the Probate Court for York County.

The docket of the Probate Court shows that on July 14, 1950 "Winn Broughton" appeared by William P. Donahue. Said docket also shows that on November 2, 1950 Arthur A. Green of North Conway, New Hampshire, appeared "for thirteen different heirs at law." In passing it may be noted that Winn Broughton was the sole heir at law of the deceased; that the probate docket does not disclose the names of those for whom Arthur A. Green appeared; and that William P. Donahue, by whom Broughton appeared before the Judge of Probate is an attorney at law residing in this State. On November 14th the Judge of Probate *disallowed* the will.

Within the time allowed by law, to wit, on *November 29,* 1950, Pliny Crockett, in his individual capacity and as the executor named in the will, filed his appeal and reasons of appeal in the Probate Court. The "appeal and reasons of appeal" were dated *November 20,* 1950. The appeal and reasons of appeal bear an endorsement dated November 29, 1950 signed by the Judge of Probate ordering them filed. On the same date, *November 29,* 1950, Crockett filed an appeal bond. This bond was dated *November 24,* 1950 and refers to the appeal to which it is applicable as claimed *November 20,* 1950. This appeal bond bears an endorsement dated November 29th, "examined and approved," signed by the Judge of Probate. There is no evidence in the case which indicates any action with respect to the time of taking and claiming the appeal except as aforesaid. Within the time prescribed by R. S., Chap. 140, Sec. 33, the appellant caused a copy of the reasons of appeal, attested by the Register, to be served upon William P. Donahue, the resident attorney by whom Winn Broughton appeared before the Judge of Probate. Within the time prescribed by said statute for service of the reasons of appeal, Arthur A. Green accepted service for those for whom he had appeared in the Probate Court.

In the Supreme Court of Probate the contestant, Broughton, moved to dismiss the appeal on the grounds that service was not made as required by Sec. 33, *supra,* and that the bond did not comply with statutory requirements. To the denial of this motion he took exceptions. He also took exceptions to rulings on the admissibility of evidence made by the Justice of the Supreme Court of Probate during the trial. He also took exceptions to the final decree of said justice allowing the will, on the grounds that there was no evidence from which it could be found that the will was executed according to law, or that Sumner O. Haley at the time of the executing of the same was of sound mind, and that all of the evidence in the case required a finding as a matter of law that the execution of the will was obtained by undue influence. It is upon these exceptions, they having been presented and allowed, that the case is now before this court.

The exceptions to the denial of the motion to dismiss the appeal must be overruled. The statute, R. S., Chap. 140, Sec. 33, requires that service of the reasons of appeal be made upon "all the parties who appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court." Service is not required to be made on any other persons than those specified in the statute. Nor are any other persons than those specified in the statute entitled to have service made upon them.

The purpose of limiting the persons upon whom service of reasons of appeal must be made to those who "appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court," is to give the appellant definite record information of those upon whom the reasons of appeal must be served. The only person who appeared before the Judge of Probate "on the case" and whose appearance had been

entered on the docket within the meaning of Sec. 33, *supra,* was Winn Broughton. The appearance of Arthur A. Green for thirteen unnamed heirs did not sufficiently identify the persons for whom he entered an appearance so that the appellant had notice of their identity to enable him to make service upon them. They neither entered nor caused to be entered their appearance upon the docket of the Probate Court within the meaning of Sec. 33, *supra.* The appellant was not required to make service of the "reasons of appeal" upon them or either of them. This being true, the question of the sufficiency of the acceptance of service for them by their attorney becomes immaterial.

The other suggested ground for dismissing the appeal is that the bond is defective as an appeal bond. The claimed defect is that the bond is dated November 24, 1950 and refers to the appeal as having been claimed on November 20, when in fact the appeal was not claimed or taken until November 29, the date "the appeal and reasons of appeal" were filed in the Probate Court.

The filing of the bond required by Sec. 33 of Chap. 140 of the Revised Statutes is an essential jurisdictional requirement, without which a probate appeal cannot be perfected. *Bartlett, Appellant,* 82 Me. 210. In the instant case although in strictness the appeal was not claimed until November 29, the date when the "appeal and reasons of appeal" were filed in the Probate Court, these papers were dated November 20. Although the bond was dated November 24, it was not presented to the Probate Court until November 29, and then simultaneously with the aforesaid appeal and reasons of appeal. The fact that the bond refers to the appeal as having been claimed on the date of the papers, November 20, instead of on November 29, the date it was filed in court, does not vitiate the bond. There can be no doubt as to the identity of the appeal to which this bond refers. It sufficiently identifies the proceeding in which it is filed, and to

which it relates. The fact that the bond bears a date prior to the date of filing the appeal is also immaterial. It was made and dated subsequent to the making of the appeal papers, and it took effect not from the date which it bears upon its face but from the date on which it was delivered, to wit, filed in the Probate Court and approved by the judge thereof. This bond could be enforced with respect to *this* appeal. It was and is a sufficient bond under the statute.

The right of appeal in probate matters is conditional. It can be presented only upon complying with the requisites of the statute relating to such appeal. *Bartlett, Appellant, supra.* Among these prerequisites are the filing of an appeal bond and service of the reasons of appeal as required by Sec. 33, *supra. Bartlett, Appellant, supra, Nichols* v. *Leavitt,* 118 Me. 464. In this case because the bond filed meets the statutory requirements, and because the reasons of appeal were served within the time and upon the persons prescribed by statute, the exceptions to the refusal to grant the motion to dismiss the appeal must be overruled.

With respect to the exceptions taken to rulings of the Justice of the Supreme Court of Probate upon the admissibility of evidence, we will say as we did in *Heath et al., Applts.,* 146 Me. 229, 236, (there quoting 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."

This brings us to an examination of the exceptions to the decree of the Justice of the Supreme Court of Probate allowing the will. In the very recent case of *Heath et al., Applts., supra,* we held that the validity of the decree of the Supreme Court of Probate can be challenged before this court only by exceptions; and that the findings of the jus-

tice of said court in matters of fact are conclusive if there is any evidence to support them. In that decision we reviewed the authorities supporting these rules and to do so again would be superfluous.

The Justice of the Supreme Court of Probate made the following findings:

> "The evidence, offered by the contesting parties, consisting in part of the testimony of the three attesting witnesses, conclusively proves that said decedent on the First day of August 1949 was possessed of testimentary capacity and legally qualified and competent to make and execute his Last Will and Testament, that the same was legally executed, and that there was no undue influence exercised upon him; that the Executor named in said instrument has sufficient business experience to qualify him for said office; that said instrument offered for probate is the duly executed Last Will and Testament of the said Sumner O. Haley and is entitled to probate as such."

Unless the foregoing findings of fact or some of them were made by the presiding justice without any evidence to support them, such findings do not constitute error in law and the exceptions thereto must be overruled.

On the question of testamentary capacity it is well settled in this State that "The burden rests upon the proponents to affirmatively prove it. In probating a will the sanity of the testator must be proved and is not to be presumed. These principles are too well established in this State to require citation. But the word sanity is used in its legal and not its medical sense." *Chandler Will Case*, 102 Me. 72, 87. In that same case on Page 89 we stated: "Our court have also said in *Randall & Randall, Appellants*, 99 Maine 398, 'If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, con-

dition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient.' " Measured by this test there was evidence from which the court could have found that the testator in this case possessed the required testamentary capacity. A review of the testimony would serve no useful purpose.

In the same case, *Chandler Will Case, supra,* at Page 117 we said: "The burden of proof rests upon the contestants to sustain the allegation of undue influence by a preponderance of the evidence." See *Mitchell et alii, Re Will of Emma J. Loomis,* 133 Me. 81. Unless the evidence of undue influence in this case was so overwhelming that a finding by the Justice of the Supreme Court of Probate that the contestant had not maintained the aforesaid burden of proof was legal error, the exception to the decree on this ground must be overruled.

From the earliest days in this State it has been recognized that undue influence exerted upon the testator will vitiate a will. *Small et al.* v. *Small,* 4 Me. 220. In *Barnes* v. *Barnes,* 66 Me. 286, 297 we said:

> "The influence must amount either to deception or else to force and coercion, in either case destroying free agency."

The case of *O'Brien, Applt.,* 100 Me. 156, especially on Pages 158 and 159, and *Rogers, Applt.,* 123 Me. 459, 461, contain excellent and full discussions of what is meant by undue influence. In the latter case we said:

> "By undue influence in this class of cases is meant influence, in connection with the execution of the will and *operating at the time the will is made,* (emphasis ours) amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was

> constrained to do that which was not his actual will but against it.
>
> Undue influence often closely resembles and is near akin to actual fraud. But strictly speaking it is not synonomous with fraud. In the making of a will, undue influence is exerted, where the mind of the nominal maker of the document, in yielding to the dominancy and supervision of another's designing mind, does what otherwise the ostensible actor would not have done."

As said in the comparatively recent decision *In Re Will of Ruth Cox,* 139 Me. 261 at 272:

> "The true test is the effect on the testator's volition. It must be sufficient to overcome free agency, so that what is done is not according to the wish and judgment of the testator."

If the instrument as finally executed expresses the will, wish and desires of the testator, the will is not void because of undue influence. This is illustrated by the decision of *Struth et al.* v. *Decker et al.,* 100 Maryland, 368, 59 Atl. Rep. 727, 730, where the court said in language particularly applicable to the case now before us:

> "There was a mass of testimony tending to show that, but for the zeal of Mrs. Frackman, the mother-in-law of Charles G. Struth, and his subservience to her urgency, no will would have been made; but it would serve no useful purpose to detail the testimony upon this point, because the *influence which is exerted merely to induce the making of a will, while leaving the testator free from influence as to the provisions of the will, is not undue influence in the legal sense.*" (Emphasis ours.)

Although in the instant case there was evidence that pressure was brought to bear upon the decedent to induce him to make a will, there was evidence from which it could well be found that once the decedent was induced to make

the will, the will which he did make and which is the subject matter of this controversy, expressed his own will, wishes and desires.

The will was drawn by a member of the Bar who was recommended by and sent to the testator by the appellant, Pliny Crockett. This person, Fred W. Small, an attorney of thirty-five years' experience and practice, and a resident of Gorham, Maine, testified that he first saw the testator at the Buxton-Hollis Hospital on the Saturday before the will was executed on the following Monday, August 1, 1949. Mr. Small testified:

> "I talked with him in regard to making his will and what he wanted to do about his relatives, had quite an extensive conversation with him on the 30th, and he told me about his various relatives, and at first he didn't know how he was going to be able to make a will because he had some timberland that people had told him was worth a great deal more than he had any idea and he didn't know just how he was going to be able to make provisions in his will, and I told him he didn't have to make special money bequests, he could make division in fractional shares if he wanted to, and that seemed to appeal to him as being what he wanted to do, and I went over mostly on the 30th his relations. He did most of the talking and I had to listen because he was quite a talker and he gave me quite a history of the family and who his relatives were, and some of them he talked quite extensively about. x x x x x x x x x
>
> He talked quite a lot about Winn Broughton. He seemed to think a lot of him, but he said that Winn was well off and he didn't need the money and he wanted to give him one hundred dollars. x x x x x He apparently had seen him (Broughton) previously and in the years past because he thought a great deal of Winn Broughton, said he had some patents that he had realized money from and he had been a successful man and his other relatives needed the money more than he did and he wanted

to give Winn a hundred dollars, and he talked about the other provisions of the will. x x x x x x x Well, he wanted to give his housekeeper five hundred dollars. Those were the only two pecuniary bequests he wanted to make; and then his other relatives had been — they were not, apparently, very well off, from what he said, and that his sister had left some money in trust and some of the relatives were to receive an annuity payment. I think the relatives, some of the relatives on his father's side — were to receive certain payments from an annuity which his sister had left, and that he had an understanding with his sister that he was to take care of the Conway cousins and that she had provided for the others; and he said he wanted to divide it among the second cousins according to the way the will reads. I wouldn't know off-hand just who they were, without referring to it. x x x x x x x

He said his housekeeper had worked, I believe he said she had worked for him for forty-eight years the 6th day of April previous to that time, and he had paid her. He didn't say how much he had paid her, and on several occasions I referred to the housekeeper, asked if that was all he wanted to give, and he was definite that five hundred dollars was what he wanted to give her. x x x x x

I went back home. I went there with the intentions of getting the data to draw the will and then going back to my office and preparing it, but I didn't get through with him that day, or that afternoon. x x x x x

I returned the next Monday, that is the first day of August, and at that time I brought my typewriter with me to type the will there at the hospital. x x x x x

Well, the Saturday he talked about his relatives and things which were really not material as far as I was concerned, but he was an old man and he wanted to talk and I couldn't break into his conversation and he didn't get down to making the final provisions that day, and I had to go back."

Mr. Small testified that the decedent knew the names of his six deceased cousins but was not in all cases sure of the names of their children; and that he gave him directions to draw the will making the division into sixths and disposing of those sixths in the manner set forth in the will. There was no one present in the room with Mr. Small and the decedent when the provisions of the will were being discussed.

If this testimony was entitled to credence and was believed by the Justice of the Supreme Court of Probate he was well justified in finding that the will was not produced by undue influence, and that notwithstanding the fact that more or less pressure had been exerted upon the testator to induce him to make a will, the will which he finally did make expressed his own true wishes and desires. We can say of the testimony of Mr. Small as did the Maryland Court of the attorney who drew the will involved in the case of *Struth* v. *Decker, supra:*

> "but we must remember that he is under the double obligation of an officer of the court, as an attorney, and as a witness sworn in the case and effect must be given to his testimony accordingly unless it is discredited according to the rules of evidence."

The evidence in the record did not discredit nor did it require the Justice of the Supreme Court of Probate to disregard the foregoing testimony of Mr. Small; nor did it compel a finding by the justice that it was other than in strict accordance with the truth. Winn Broughton, the contestant, did not sustain the burden resting upon him to establish undue influence in this case. The decree by the Justice of the Supreme Court of Probate sustaining the will is not erroneous in law. The entry must be exceptions overruled.

Exceptions overruled.

LAWRENCE E. BARTLETT

vs.

BURTON L. NEWTON

Oxford. Opinion, November 27, 1951.

Law Court. On Report. Facts.

PER CURIAM.

This case was reported to this court, for the rendition of such judgment as the law and the evidence require, upon so much of the latter as is legally admissible. The issue presented is purely one of fact. It should be resolved by a trier of facts, passing upon the credibility of witnesses giving testimony sharply conflicting, after having the benefit of observing them on the stand. *Associated Fish Products Co.* v. *Hussey,* 145 Me. 388, 71 A. (2nd) 519. The report must be discharged, and the case remanded to be tried at *nisi prius.*

The primary issue is whether the plaintiff had a trade with the defendant, as he claims, whereby labor performed for Newton & Tebbets, Inc., a corporation of which the defendant was president, was to be applied to a note for $581.40 given the defendant. The note was signed also by Roger W. Wheeler, a partner in Wheeler Brothers, the employer of the plaintiff, engaged at the time in procuring cordwood for Newton & Tebbets, Inc. The note recites that the principal sum, with interest, was "to be collected from Wheeler Brothers account at Newton & Tebbets mill." No payment was made on the note, unless by plaintiff's labor in yarding 100 cords of wood for Newton & Tebbets, Inc. under an account designated the "Wild River Account." That account dealt with 27.89 cords of wood in excess of the 100 cords yarded by the plaintiff.

A lesser issue, assuming that plaintiff's story is rejected by the trier of facts, will be the coverage of a chattel mortgage given by the plaintiff to secure the note. When it was executed plaintiff was the owner, subject to a conditional sale agreement, of an Allis-Chalmers Diesel Tractor equipped with Carco Hydrodozer and Winch. The mortgage identifies the tractor with its serial and engine numbers as shown in the conditional sale agreement, reciting that it is subject thereto. The evidence indicates that the blade of the hydrodozer was not attached to the tractor when the mortgage was given, or when it was foreclosed. It was in use on it from time to time while the mortgage was in force.

The action is trover. Plaintiff seeks to recover for the tractor and its equipment, all of which was taken by the defendant in foreclosure proceedings. He claims that the debt was paid prior to foreclosure by his labor on the 100 cords of wood aforesaid, deposing that the agreed price therefor was $6 per cord. It is undoubted that the plaintiff and Roger W. Wheeler had some negotiations with the defendant, prior to the making of the loan, and another loan involving something in excess of $400, made to Roger W. Wheeler, or Wheeler Brothers, and that the proceeds of the two loans were applied to claims against the tractor and a truck mortgaged to secure the Wheeler loan. Defendant's evidence indicates that the negotiations produced nothing more than his agreement, for Newton & Tebbets, Inc., that a larger price would be paid for cordwood delivered under the Wild River Account than that being paid Wheeler Brothers earlier.

Defendant, in his testimony, purported to give a full accounting for all wood handled under the Wild River Account. His figures indicate credits to Wheeler Brothers aggregating $4,706.69 and charges totalling $4,584.91, after an adjustment of $65 on stumpage items amounting to

$873.16. Included in the latter are items representing $153.16 applicable to an "original advance." There is nothing in the record to show what stumpage applied to wood delivered under the Wild River Account, or that the "original advance," whatever it was, had any connection with it.

Plaintiff testified that he yarded the 100 cords of wood aforesaid for the defendant, or his corporation, was not paid therefor by Wheeler Brothers, and did not look to Wheeler Brothers for payment. Defendant, in purporting to give a full accounting of the Wild River Account, may recognize, by implication at least, that if a proper accounting would show a balance due Wheeler Brothers, that balance should be applied on plaintiff's note. If so, and such accounting showed a balance sufficient to satisfy the secured note, the plaintiff would be entitled to recover in the present action. A trier of facts should determine whether there was any agreement between the parties, the terms thereof, if any, and the accounting carrying it into effect.

Report discharged.

William E. McCarthy, for plaintiff.

Gerry Brooks, for defendant.

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

DONALD D. SUSI

vs.

MERTIE E. SIMONDS

Somerset. Opinion, December 17, 1951.

Contracts. Special Damages.

An action on the case may lie concurrently with assumpsit for breach of an express or implied contract.

In order to recover special damages for breach of contract it must affirmatively appear that the circumstances giving rise to the special damages were in contemplation of both parties at the time of making the contract.

Special damages consisting in part of loss of profits which plaintiff purchaser contemplated making of the property are not warranted where the contemplated use was never communicated to defendant.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

This is an action for breach of an option to convey a parcel of real estate. The jury returned a verdict in favor of the plaintiff but refused to find certain special damages. Plaintiff moved for a new trial and filed exceptions. Motion overruled. Exceptions overruled. Case fully appears below.

Bartolo M. Siciliano, for plaintiff.

Lloyd H. Stitham,

Merrill & Merrill, for defendant.

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

THAXTER, J. This is an action brought for the breach of an option to convey a parcel of real estate to the plaintiff. The option reads as follows:

"Madison, Me.

July 3, 1948

On receipt of $100.00 (one hundred dollars) paid by Donald D. Susi of Pittsfield, Maine, I, Mertie Simonds agree to hold my south Main Street property the home of which is now occupied by Fred Sinclair, for a period of ninety (90) days from this date and which property I agree to sell to said Donald D. Susi for the sum total of $6000.00 (six thousand dollars) less the $100.00 already paid and give said Susi a warranty deed at time of full payment.

Mertie E. Simonds

(On reverse side of said Exhibit appears the following:)
Said S"

The action was not, however, brought in assumpsit but in tort because the plaintiff claimed to recover certain special damages which he has set forth in his writ which he seems to think could be more readily recovered if the action were brought in tort instead of assumpsit. By such procedure the action was only complicated, not simplified. An action on the case may lie concurrently with assumpsit for breach of an express or implied contract. *Inhabitants of Milford* v. *Bangor Railway & Electric Co.*, 104 Me. 233.

In order, however, for the plaintiff to recover the special damages which he here claims to have suffered beyond what would naturally flow from the breach claimed of such contract, it must affirmatively appear that the special circumstances under which the contract was actually made which gave rise to such damages were communicated by the plaintiff to the defendant and were thus in the contemplation of both parties at the time of making the contract. *Hadley* v.

Baxendale, 9 Exchequer Rep. 341; *Griffin* v. *Colver, et als.,* 16 N. Y. 489.

These special damages consist in part at least of loss of profits in the use which the purchaser contemplated making of the property which he did not obtain. But, as the trial judge very pertinently pointed out, it would be impossible for the purchaser to communicate such information to the seller when the purchaser admitted that he had not fully decided himself just what use he would make of the property.

We have the record in this case which is three hundred pages long, and from a careful reading of it have not found a shred of any evidence of knowledge by the defendant which would form the basis for the assessment of any of the damages under the rule set forth in *Hadley* v. *Baxendale, supra.* The plaintiff may say that he was prevented by the trial judge from introducing such evidence. This brings us to a consideration of the exceptions which are nine in number. It is not necessary to discuss these in detail. To do so might dignify them as having some possible merit which they do not have. If the evidence excluded had been admitted, the result could not possibly have been changed.

The judge who presided at the trial of this case had infinite patience. Yet he continually admonished counsel for the plaintiff against wasting time.

The jury found that the plaintiff was entitled to the $100 back which he had paid for the option. That was all he was entitled to have, not the amount of special damages claimed in the writ.

Motion overruled.

Exceptions overruled.

CHARLOTTE B. WEBBER

vs.

PHYLLIS L. BRUNK

(FORMERLY PHYLLIS L. WEBBER)

Penobscot. Opinion, December 17, 1951.

Equity. Mortgages. Burden of Proof.

An equity action to compel the discharge of a mortgage must be supported by clear and convincing proof.

ON REPORT.

This is an action under R. S., 1944, Chap. 163, Sec. 16 reported to the Law Court under R. S., 1944, Chap. 95, Sec. 24. Bill dismissed. Case fully appears below.

Oscar Walker, for plaintiff.

Michael Pilot,

Gerard P. Collins, for defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. FELLOWS, J. does not concur.

THAXTER, J. This controversy comes before us from the Supreme Judicial Court of Penobscot County, having been reported under and by virtue of Sec. 24, Chap. 95, R. S., 1944.

The record includes the bill in equity, the answer, the replication and the evidence, both oral and documentary, and we have heretofore held that a case or cause so reported was what the Legislature intended for a method of submitting questions involving both law and fact in the most comprehensive manner to the decision of the court. See *Mather* v. *Cunningham*, 107 Me. 242, 78 A. 102, and *Cheney* v. *Richards*, 130 Me. 288, 290, 155 A. 642.

The bill, answer and proof disclose that at the November, 1947, Term of the Superior Court for Penobscot County a divorce was decreed to Phyllis L. Brunk (formerly Phyllis L. Webber), the defendant in the instant case, from Hartson C. Webber. By the terms of the decree of divorce custody of two minor children was given to the defendant and said Hartson C. Webber was ordered to pay $35.00 a week for their support. The date of the divorce decree was November 21, 1947, and on that date said Hartson C. Webber gave to the defendant a second mortgage on certain real estate in Dexter, Maine, the conditions of said mortgage providing (1) that if said Hartson C. Webber shall comply with the order of the Superior Court for Penobscot County and pay to said defendant the sum of $35.00 per week for the support of his minor children, or provided alternatively (2) that if the said Hartson C. Webber, in substitution for said second mortgage, deposited with said defendant or with such other person as may be approved by said defendant, or by the legal guardian of said minor children, the sum of $1500.00 in cash or other security in form and amount approved by the defendant or by the legal guardian, then in that event, the mortgage deed would be void. In other words, said Hartson C. Webber could fulfill the terms of the mortgage in two ways, one by making the payments ordered under the divorce decree for the support of his minor children or he could deposit cash or other security with the defendant or legal guardian of the minor children in the amount of $1500.00 and thus fulfill the terms and conditions of the mortgage in which case said Hartson C. Webber or those claiming under him would be entitled to a discharge of said second mortgage.

On July 15, 1950, said Hartson C. Webber transferred his equity in the mortgaged premises to his sister, Charlotte B. Webber, the plaintiff in this action. From the evidence it appears that said Hartson C. Webber was in default in his weekly payments for the support of his minor children and

on August 16, 1950, he was arrested on an execution and committed to the Penobscot County jail where he remained until October 20, 1950. On that date there was a hearing in the Superior Court involving the release of said Hartson C. Webber and with respect to the original decree of divorce and according to the decree of the Superior Court it appears that as of the date of hearing the arrearages amounted to approximately $1,000.00. The decree recites that by agreement of counsel this sum was compromised for $500.00. The decree also ordered the alteration and amendment to the original decree of divorce reducing the weekly payments from $35.00 a week to $20.00 a week and that by agreement of counsel payments at the rate of $20.00 a week for a future period of fifty weeks be made and paid forthwith. The decree also provided that payments were to continue at the rate of $20.00 a week subsequent to the fifty week period and until further order of court and, lastly, the decree provided that when the foregoing payment of $1500.00 had been made the said Hartson C. Webber shall be released from the custody of Penobscot County jail. It should also be noted that counsel had agreed to all provisions above recited. The evidence shows that the sum of $1500.00 was paid by the plaintiff and that a receipt was given which receipt reads as follows:

> "Received of Oscar Walker, Attorney for Hartson C. Webber, per Charlotte B. Webber, fifteen hundred dollars ($1500.00) in compliance with Court Order.
>
> Re: Hartson C. Webber vs. Phyllis L. Brunk (formerly Phyllis L. Webber.
>
> Hearing held before Justice G. C. Gray, this 20th day of October 1950.
>
> Gerard P. Collins
>
> Attorney for Phyllis L. Brunk"

There is nothing in the decree of the Superior Court nor in the receipt which makes any reference to said second mortgage or that the payment was made in substitution of the mortgage. The plaintiff in this case, in her bill in equity which is brought under the provisions of Sec. 16, Chap. 163, R. S., 1944, seeks a decree compelling the defendant to discharge the second mortgage, claiming that the payment of $1500.00 made by the plaintiff was made in substitution of the mortgage and in accordance with its terms heretofore set forth and referred to. The defendant by oral evidence and by documentary evidence, particularly the receipt set forth above, denies that payment of said second mortgage was ever mentioned in the negotiations which led up to the payment of $1500.00 ordered by the Superior Court.

This is the factual situation that now confronts us from the record. The burden of proof, as in all cases, is on the plaintiff to support her bill of complaint by full, clear and convincing evidence. That burden we hold has not been sustained. We said in *Fall* v. *Fall et al.*, 107 Me. 539, 81 A. 865, and also in *Flagg* v. *Davis*, 147 Me. 71, 83 A. (2nd) 319, in speaking of bills in equity and the necessity of sustaining the allegations therein by convincing evidence:

> "we are of the opinion that complainant does not support his bill of complaint by full, clear, and convincing evidence. The conscience of the court is not satisfied that its allegations are sustained - - - -."

That language applies, in our opinion, to the record in this case. It follows that the mandate will be

Bill dismissed.

Fellows, J., does not concur.

HAROLD MacQUINN

vs.

MRS. A. MANSFIELD PATTERSON

Hancock. Opinion dated December 24, 1951.

Exceptions. Agency. Apparent Authority. Unjust Enrichment.

The principles governing exceptions to the acceptance of referees' reports are well established. The report is prima facie correct. The excepting party is confined to the objections. Findings are conclusive if supported by evidence of probative value. The existence of such evidence is a question of law.

The existence and extent of apparent authority and a reliance thereon are questions of fact to be determined by the finder of facts.

Except where there is reliance upon the appearance of agency, a principal is not bound by knowledge of an agent concerning matters as to which he has only apparent authority.

One should not be allowed to recover by way restitution for his own mistakes upon the theory of unjust enrichment.

ON EXCEPTIONS.

This is an action of assumpsit upon an account annexed. The issue is liability for gravel fill on the defendant's premises. The plaintiff filed exceptions to the acceptance of the referee's report. Exceptions overruled. Case fully appears below.

Ralph C. Masterman, for plaintiff.

H. L. Crabtree, Sr., for defendant.

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

WILLIAMSON, J. This action in assumpsit upon an account annexed is before us on exceptions by the plaintiff to

the acceptance of a referee's report. The exceptions are overruled.

The issue is whether the defendant is liable to the plaintiff for making a gravel fill on defendant's premises. Findings by the referee in favor of plaintiff on all other items in the account are not questioned. There is no dispute about the reasonableness of plaintiff's charges of $550 for gravel and $128 for use of a bulldozer, or a total of $678 for the fill. The issue is liability and not damage.

The principles governing our consideration of exceptions to a referee's report are well established. The report is prima facie correct. The excepting party is confined to the objections set out below. The findings of the referee are conclusive if supported by any evidence of probative value. Whether there is any such evidence is a question of law. When facts are undisputed, and but one possible deduction can be drawn, the question is one of law. *Rule of Court* 42, 129 Me. 519; *Staples* v. *Littlefield,* 132 Me. 91, 167 A. 171; *Hawkins* v. *Theatre Co.,* 132 Me. 1, 164 A. 628; *Flood* v. *Earle,* 145 Me. 24, 71 A. (2nd) 55; *Morneault* v. *Boston & M.R.R.,* 144 Me. 300, 68 A. (2nd) 260; *Paulsen* v. *Paulsen,* 144 Me. 155, 66 A. (2nd) 420; *Knowlton* v. *John Hancock Mutual Life Ins. Co.,* 146 Me. 220, 79 A. (2nd) 581.

In the fall of 1947 defendant's summer home at Bar Harbor was destroyed by fire. At a meeting upon the premises the parties discussed and agreed upon certain work to be undertaken by the plaintiff. The agreement was later set forth in the letters below:

"Mr. Harold MacQuinn

Dear Sir:

Will you please be very careful of the old furnace in my cellar. Edgar is going to have the man who put it in for me look it over—I think the inside may be used.

Will you use the oldest bricks and rubble in spreading the space for terrace on the northeast corner of house lot. I think the outside chimney bricks could, some of them, be used for wall or steps and drainage ducts.

Will you kindly write me what you are going to do for me. I meant to ask you to do this last Sunday it seems more business like and I can show it to my architect. Edgar knows just what I want to save, please consult him if you are in any doubt.

There is a shrub to the north of the house—I think that could be saved and moved in the spring, there is so little—that everything is precious.

Yours very truly,

A. M. Patterson

November 19, 1947"

Upon the back of the above letter is a plan of defendant's lot showing the location of a terrace.

"December 1, 1947

Mrs. A. M. Patterson

139 East 66th Street

New York, New York

Dear Mrs. Patterson:

Thank you for your letter of November 19th.

We have salvaged all the scrap metal at your summer home, but have not disturbed the furnace. Our plans are to take down the foundation wall to the ground level, clean up the debris now in the basement and cement the top of the existing foundation wall.

We plan to use all the rubble which is suitable for the sub-grade of your terrace, leaving the lot

in a neat workable condition. We will consult Mr. Thomas about anything in question.

Very truly yours,

Harold MacQuinn

by J"

Mr. Edgar Thomas, referred to as "Edgar" in the defendant's letter, and as "Mr. Thomas" in the plaintiff's letter, was the defendant's gardener.

To understand fully the situation it is necessary to consider certain facts not appearing in the letters. The referee found, to quote from the report, that at the conference it was agreed "the rubble was to be pushed toward a spot which she (the defendant) indicated she might use as a terrace," and again that "there is some evidence in the case that the (defendant) was planning to rebuild on the lot where the house was burned, but she gave this up after she found out what the costs of rebuilding would be." The defendant, in substance, said that at the conference she told the plaintiff she hoped to rebuild and that she did not inform him of the change in her intention.

Mr. Thomas, the gardener, was on the premises when the fill was made between the 6th and 10th of April, 1948. He neither notified the defendant, nor made any objection to the plaintiff. The plaintiff did not consult him. The defendant had no knowledge of the gravel fill until after the work was completed.

The referee also found, to quote from the report:

"There was some evidence introduced concerning the authority which the defendant had delegated to her caretaker, Edgar. That authority is clearly set forth in the defendant's letter to the plaintiff under date of November 19, 1947, wherein she states that "he knew what was to be saved. If there was any doubt the plaintiff was to consult him"."

"The burden is on the plaintiff. If there was any room for doubt before, the correspondence seems to remove it and we do not find in any of the evidence or the correspondence anything that would legally warrant the plaintiff in believing he was authorized to use the gravel in question."

In reaching the conclusion the referee necessarily found (1) that the express contract did not call for the gravel fill, and (2) that the defendant was not bound under the principles of agency, express or apparent.

The positions of the parties are clearly stated in the following extracts from their testimony:

Mr. MacQuinn:

"You have no contract with Mrs. Patterson other than this letter of December 1 which would permit you to haul gravel on the lot.

A. I consider the conversation that Mrs. Patterson and I had a part of the contract. Mrs. Patterson has stated in a letter that Mr. Thomas would be on the job which was her agent and Edgar knew what she wanted. Edgar saw the fill hauled in and no one said anything. Presumed it was all right. Her agent was on the premises all the time this work was going on and as she said in her letter he knew what she wanted. He should have been told it would be up to him to stop the work as her agent.

Q. You didn't know what authority he had from her?

A. Only what she states in the letter.

Q. Did you ask Mr. Thomas about the advisability of hauling in fill?

A. I did not.

Q. How often was Thomas on the lot?

A. He was on the job every day we worked there.

Q. And you have no other authority for hauling gravel except as stated in that letter?

A. Only from the conversation that Mrs. Patterson and I had in regards to the condition of the lot and cleaning the lot up.

Q. Your conversation had no mention of gravel?

A. Well, I didn't see how we could leave the lot in a workmanlike manner without hauling gravel in."

Mrs. Patterson:

Q. "What did you understand in Mr. MacQuinn's letter of December 1, when he spoke of leaving the lot in a neat workmanlike manner?

A. I understood he was going to use the bulldozer to push the chimneys down and with the bulldozer he would push what rubble which was the remains of the house and I asked him to push it in a certain direction. That was all. Nothing further.

Q. There was no mention of having gravel hauled in?

A. Never.

Q. Did Mr. Thomas have any authority from you to assent to whatever Mr. MacQuinn was doing?

A. No. Never."

The plaintiff argues: (1) that the agreement included the gravel fill, and (2) if not, that the plaintiff is entitled to recover upon an implied contract arising through the agency of defendant's gardener.

Upon the first point plaintiff says defendant gave the impression she intended to rebuild and the plaintiff, to quote

from the brief, "assumed rightfully that he should put the place in shape according to the usual practice and custom in such cases."

Granted the defendant gave an impression of an intent to rebuild, plaintiff's argument rests upon a "usual practice and custom" that "leaving the lot in a neat workmanlike condition" (to quote from plaintiff's letter) called for a gravel fill. There is no evidence in the record of a custom or usage, either locally or generally, of the nature suggested by the plaintiff. Surely no such custom or usage is so generally known that judicial notice may be taken thereof.

We have considered plaintiff's first point, although there is considerable doubt whether it is raised by the objections. The express agreement did not include the gravel fill.

Upon the second point the plaintiff says in substance that the gardener's knowledge of the making of the fill must be imputed to the defendant, with liability resulting under an implied contract. Without doubt if the defendant had knowingly and without objection permitted the plaintiff to make the gravel fill, she would have been liable to pay therefor. See *Wadleigh* v. *Pulp & Paper Company,* 116 Me. 107, 100 A. 150; 58 Am. Jur. 514; 1 Williston on Contracts, Rev. Ed. Sec. 91A. Here the question is whether the defendant is bound by the knowledge of the gardener.

As we have shown, the defendant did not know of the fill until after it was completed. No basis for liability can be found either in actual knowledge or failure to object on her part.

In our view of the case it is not material whether the conclusion of the referee was based upon lack of express or apparent authority in the gardener. The result in either event must necessarily have been the same.

The express authority of the gardener is contained in the following sentences in the letters:

"Edgar knows just what I want to save, please

consult him if you are in any doubt." (from defendant's letter)

"We will consult Mr. Thomas about anything in question." (from plaintiff's letter)

The referee concluded the authority was limited by the defendant's letter. Precisely how the authority was then limited is not stated in the report. The plaintiff, on the other hand, says the limitation on authority is stated in the plaintiff's letter. Obviously if the plaintiff's letter is taken alone without defendant's letter, the extent of the agency is enlarged.

There is, however, a clear overriding limitation on the exercise of the authority, whether we take the limitations in the defendant's or the plaintiff's letter. It is through consultation that the gardener exercises his authority with respect to the plaintiff. The inference is clear that the gardener only in giving advice in such consultation could act for his principal, the defendant, in so far as the plaintiff was concerned.

The decisive fact is that the plaintiff did not consult with the gardener. His own testimony was to this effect. There was evidence of probative value to use the test of a referee's findings that the plaintiff did not rely in any degree upon the express authority of the gardener.

If we apply the principles of apparent authority we must reach the same conclusion.

The existence and extent of apparent authority and the reliance thereon, are facts to be determined here by the referee. Illustrations of apparent authority as a fact to be found by a jury are found in *Frye* v. *DeNemours & Company,* 129 Me. 289, 151 A. 537; *Heath* v. *Stoddard,* 91 Me. 499, 40 A. 547; *Feingold* v. *Supovitz,* 117 Me. 371, 104 A. 697. See also 2 Am. Jur. 82 et seq; 2 C. J. S. 1205 et seq and 1217; 2 C. J. 574 et seq.; 1 Williston on Contracts, Rev.

Ed. Sec. 277; Restatement, Agency, Sec. 8. The rule has been well stated in Restatement Agency, Sec. 273 as follows:

> "Except where there is reliance upon the appearance of agency, a principal is not bound by knowledge of an agent concerning matters as to which he has only apparent authority."

Whatever the apparent authority, if any, of the gardener may have been, the plaintiff cannot escape the finding that the plaintiff did not rely upon the agency. The situation is analogous with that presented in the discussion of express authority.

Express authority existed at best only upon consultation, and there was no consultation. If there was apparent authority, there was clearly no reliance thereon. In either event, the referee was entitled to believe that the agency of the gardener was not a factor in the delivery and spreading of the gravel for the fill. In other words, the referee could have found, and necessarily in reaching his ultimate conclusion did find, that the plaintiff in making the fill relied upon his interpretation of the agreement with the defendant. By mistake he made the fill without noting that the defendant had not authorized him to undertake the work.

It will be unnecessary to review in detail the nine objections to the acceptance of the report. In seven of the nine objections the plaintiff charges error by the referee in failing to take into consideration certain principles of law and certain facts relating to the agency of the gardener. As we have pointed out, whatever the scope of the agency, and whether express or apparent, there was neither exercise of express authority nor reliance upon apparent authority.

In the third objection it is said that the referee disregarded a certain fact showing the defendant's intention to

rebuild. The objection does not accurately state the stipulation from which it is taken but in any event, the report shows the fact of the defendant's intention was considered by the referee. The first point in the plaintiff's argument apparently relates to this objection.

There remains the ninth objection reading "The referee failed to take into consideration that the defendant was unjustly enriched by his decree."

We do not understand the plaintiff seeks—nor should he —to recover by way of restitution for a mistake by plaintiff in making the fill. The point of the plaintiff in the objection is that in light of defendant's silence from receipt of plaintiff's letter to receipt of his bill after the work was completed, and in light of allowing "him in the presence of her agent to fix the lot in a good and proper manner," the defendant will be unjustly enriched unless required to pay for the fill.

The claim is based, it will be at once noted, upon the agency of the gardener. The plaintiff seeks to recover upon a contract made with the defendant, or her agent. As we have elsewhere pointed out, it is our view that the referee was amply justified in finding no such contract, express or implied, existed.

The plaintiff takes nothing from the objections. The report was properly accepted in the Superior Court.

The entry will be

Exceptions overruled.

ANTON JOHNSON ET AL.

vs.

FREDERICK G. KREUZER

York. Opinion, December 27, 1951.

Contracts. Charge. Excessive Damages.

In an action of assumpsit the jury have the right to determine the existence of the contract, if any, and its extent and limitations.

Where there are no exceptions to the charge of the presiding justice it must be presumed to be correct.

It is the duty of the court, in the case of excessive or inadequate damages, to set aside the verdict if the jury disregards the evidence, or act from passion or prejudice.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit alleging an agreement, performance on the part of the plaintiff, and a breach by the defendant. The plea is the general issue. After verdict for the plaintiff the defendant moved for a new trial on the ground that the verdict is against the law and the evidence, and damages are excessive. Motion sustained, unless within 30 days from the filing of mandate, the plaintiff remit all of verdict in excess of $5,000.

Crowley & Nason,

Hilary F. Mahaney, for plaintiff.

Joseph E. Harvey,

William H. Stone, for defendant.

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

FELLOWS, J. This case is before the Law Court from Superior Court of York County on motion of defendant for a new trial.

The action is assumpsit. The declaration sets forth in one count an oral agreement, to the effect that the defendant Frederick G. Kreuzer promised the plaintiffs Anton Johnson and his wife Helen Johnson that if they would come to live with him as farmhand and housekeeper, he would provide for them a home for life. The first count alleges the agreement, performance on the part of the plaintiffs, and a breach by defendant. There is an account annexed for work and labor from 1940 to 1950, 542 weeks at $20.00 per week. The omnibus money counts are also attached to the writ. The plea is the general issue. The jury verdict was in the amount of $8,905.00. No exceptions were taken. The motion by defendant is the general motion for a new trial on the usual grounds that the verdict is against the law and evidence, and that the damages are excessive.

The evidence is in part conflicting but the principal facts seem to be these: Anton Johnson and his wife Helen Johnson lived on a farm in Portsmouth, New Hampshire. About 1932 they became acquainted with the defendant Frederick G. Kreuzer and he was a very frequent visitor, and he apparently became an intimate friend. About 1934 the defendant Kreuzer was divorced, and the plaintiffs then adopted Kreuzer's six months old son, and the Kreuzer child's name was changed to Anton Johnson, Jr. This child has lived with the Johnsons continuously since that time, and was seventeen at the time of trial.

In 1938 the defendant Kreuzer bought a farm in Kennebunk, Maine and for a year Mr. Kreuzer had an elderly couple living there with him. In 1939 Mr. Kreuzer urged Mr. and Mrs. Johnson to sell their farm in Portsmouth and to come to Kennebunk with him. The plaintiffs say that

Mr. Kreuzer told them that they were farming on a small scale, but if they would come to his Kennebunk farm they could farm together on a larger scale; that it would be easier for them, and that he would give them a home so long as either or both of them lived. The defendant denied any such agreement; he says that the Johnsons were talking of selling their Portsmouth farm because they did not like it; that he did not and could not promise a home for their life, because he did not know that he "would be able to make a go of it," and that at the time when the plaintiffs say the agreement was made he (Kreuzer) did not own the Kennebunk farm and had only an agreement to buy.

In March 1940 the plaintiffs, Mr. and Mrs. Johnson, informed the defendant, Mr. Kreuzer, that they had sold their Portsmouth home and were getting ready to move to his Kennebunk farm. The plaintiffs say Kreuzer was pleased and told them they would have no more worries. Mrs. Johnson was then 47 years of age and Mr. Johnson was 55. The Johnsons moved to Kennebunk. Mrs. Johnson did the cooking, the housework, assisted on the farm, and in addition Mrs. Johnson took boarders. The relations between the plaintiffs and the defendant were most agreeable, and apparently one "very happy family." Mr. Kreuzer lived with the Johnsons on the farm when not engaged at his work elsewhere. Mr. Johnson cared for the farm, the cattle, the haying, and did anything required of him by the needs of the farm, and the produce went towards the common Kreuzer-Johnson table. To show the good relations between the parties a will was once made by Kreuzer, leaving his property to the Johnsons.

When the Johnsons first came to the farm there was little milk production and some of the property was subject to a mortgage to Mr. Kreuzer's uncle, and later subject to an attachment which Johnson paid. Johnson brought five cows with him when he came, and the milk checks were in-

creased. During the ten years after the Johnsons came, Mr. Kreuzer was employed a large portion of his time elsewhere. Kreuzer's earnings from the outside employment and the earnings of his smoke house business at the farm were retained by him, except such as he used for some farm repairs, equipment and improvements. A large part of the proceeds of the milk checks went toward a mortgage held by the Federal Land Bank, the maintenance of the Kreuzer-Johnson household, the food for the common table, and grain for livestock. There were never any misunderstandings or trouble between the parties for about ten years. The Johnsons, with their adopted Kreuzer son, and Mr. Kreuzer, lived happily together, and each contributed to the betterment of the farm and the welfare of all the Johnsons and Kreuzer. Mr. Kreuzer borrowed $828.08 of Mrs. Johnson to pay a judgment against him, and gave her a note secured by mortgage of his livestock, after which Kreuzer said that he considered that the cattle belonged to the Johnsons, and permitted Mr. Johnson to exchange, to sell and to purchase as his own. Exchanges and purchases of machinery were also done by Johnson. Mrs. Johnson testified that all the personal property was "turned over" to them by Mr. Kreuzer during the period from 1940 to 1950. There are, of course, many contradictions in the testimony and many claims of money items that the Johnsons "must have received" which are denied. A jury could well find that no cash profit was taken by the Johnsons over the years. There are discrepancies in testimony as to the amounts received by Kreuzer from his outside employments, how much he put into the farm, who owned certain cattle purchased and exchanged for, who purchased and owned certain machinery, and many other understandings and misunderstandings which presented factual questions.

In 1949 Mr. Kreuzer married again, and from the time of this marriage there was trouble between the parties. In July or August 1949 a sign was put up announcing that the

farm was for sale, and Mrs. Kreuzer informed the Johnsons that they must move. Mr. Kreuzer did not tell the Johnsons to vacate, but in November 1950 Mr. Kreuzer, without notice or warning, moved out of the house the hot kitchen stove then being used by Mrs. Johnson to get the next meal. The Johnsons without a stove in November were forced to move to another farm which they rented. The stove was returned to the Kreuzer farm after the compulsory eviction.

If the testimony of the plaintiffs is true, and the jury by the verdict has said that it is, there was an oral contract to the effect that if the plaintiffs would come to operate the defendant's farm, they (the plaintiffs) would have a home there so long as they lived. There was evidence that the plaintiffs came and that they did operate for a period of ten years in a manner to satisfy the defendant, until the time when his new wife arrived. The evidence was that they were to have, and for ten years they did have, a home. There was evidence of a breach of the claimed contract on the part of the defendant after ten years. The evidence is ample, if believed, for the jury to find a verdict for the plaintiffs. The jury had the right to determine the existence of the contract, if any, and its "extent and limitations." *Herbert* v. *Ford,* 33 Me. 90; *Thurston* v. *Nutter,* 125 Me. 411; *Bryant* v. *Fogg,* 125 Me. 420; *Levine* v. *Reynolds,* 143 Me. 15. The verdict, in so far as it bears out the contentions of the plaintiffs that there was a contract and a breach, is consistent with the circumstances and probabilities. *Jenness* v. *Park,* 145 Me. 402, 76 Atl. (2nd) 321.

There are no exceptions to the charge of the presiding justice. The charge is not before us. The charge must, therefore, be presumed to have been legally correct and to properly state the issue. *Barlow* v. *Lowery,* 143 Me. 214, 219. It was legally satisfactory to the parties at the time, otherwise, exceptions would have been taken to the charge

as given, or exceptions taken to the refusal to give requested instructions.

The amount of the jury verdict was $8905.00, and it is apparent that this amount is so excessive, under any view of the evidence, that the court is forced to the conclusion that the jury was affected by bias, sympathy, prejudice or some other improper influence. The jury must have been swayed by a sympathy for the defendant Kreuzer's son who was adopted as a baby, and cared for by the plaintiffs for his more than seventeen years. The jury was doubtless prejudiced by the sudden and perhaps needless removal by the defendant of the hot kitchen stove in November while being used by the plaintiff Mrs. Johnson. The jury must have been improperly affected in its judgment by statements concerning the disagreeable attitude of the new wife of defendant towards the plaintiffs. It is also probable that without any claim and without any evidence of future damages because of life expectancy, the jury assessment contains such damages because of sympathy.

It is the duty of the court, in the case of excessive or inadequate damages, to set aside the verdict if the jury disregards the evidence, or acts from passion or prejudice. *Leavitt* v. *Dow,* 105 Me. 50; *Libby* v. *Towle,* 90 Me. 262; *Conroy* v. *Reid,* 132 Me. 162, 166.

The manner in which the case was tried indicates that future damages were not to be considered by the jury. They were not claimed, and there was no evidence of life expectancy. The parties were permitted to testify without objection as to what was "fair and reasonable compensation" for the work done. The questions that should have been answered by the jury, according to the record, were (1) Was there a contract? (2) If there was a contract, and if the defendant prevented full performance, what was fair and reasonable compensation under all the circumstances for work and labor performed?

For about ten years the two plaintiffs with their adopted son had the home they contracted for. The farm cost the defendant Kreuzer $4200.00 in 1938. The plaintiffs conducted the farm with its stock and equipment more or less as their own. The jury award was more than twice its cost, and more than the plaintiffs could ever have profited had the defendant deeded the farm to them. The jury award was approximately $890.00 net for each of the ten years. Under the most favorable view of the evidence, the court feels that damages should not exceed $5,000.00.

In the light of the many benefits admittedly received by the plaintiffs from the defendant and from the defendant's farm, it is apparent that the jury, because of sympathy and prejudice, did not give proper consideration to the testimony.

Motion sustained, unless within 30 days from filing of mandate, the plaintiffs remit all of verdict in excess of $5,000.00.

WILFRED D. THIBEAULT

vs.

BEATRICE THIBEAULT

Sagadahoc. Opinion, January 2, 1952.

Equity. Husband and Wife. U. S. Savings Bonds.

Equity may determine rights under R. S., 1944, Chap. 153, Sec. 40 as between husband and wife as co-owners of United States War Savings bonds where wife had redeemed bonds after bill in equity has been served upon her.

ON APPEAL.

This is a bill in equity by a husband against his wife under R. S., 1944, Chap. 153, Sec. 40 to recover certain property. The cause was heard on bill, answer, replication and proof. A decree in favor of the plaintiff was entered by the presiding justice and defendant appealed. Appeal dismissed. Decree below affirmed. Case fully appears below.

Edward W. Bridgham,

Harold J. Rubin, for plaintiff.

John P. Carey, for defendant.

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

WILLIAMSON, J. On appeal. This is a bill in equity brought by a husband against his wife under R. S., Chap. 153, Sec. 40, to recover certain property "which in equity and good conscience belongs to (him)." The property in dispute includes (1) real estate, of which the title for convenience in financing was taken in the name of the wife's

sister who later conveyed the property to the wife, (2) a bank account of about $750.00, and (3) United States War Savings Bonds with a maturity value of $1,450.00 purchased by the husband from his own earnings without any contribution thereto by the wife and registered in the names of the husband and wife as co-owners. The bonds were redeemed by the wife for about $1,136.25 after the bill in equity was served upon her.

The cause was heard on bill, answer, replication, and proof. The presiding justice found the wife possessed of $800.00, which in equity and good conscience belonged to her husband, and entered a decree accordingly.

The wife urges that under applicable Federal law and regulations her husband had no interest in the proceeds of the bonds. In brief she says that the co-owner who cashes war savings bonds, takes all. In reaching this conclusion the wife relies upon *Harvey* v. *Rackliffe,* 141 Me. 169, 41 A. (2nd) 455, 161 A. L. R. 296, and *Paulsen* v. *Paulsen,* 144 Me. 155, 66 A. (2nd) 420.

We are not, however, compelled to reach such an inequitable conclusion. In the *Harvey* case bonds purchased by X with his own money were registered in the name of X payable on death to Y. It was held that on the death of X, Y became the owner and the estate of Y was entitled to the proceeds in preference to the estate of X.

We are not here concerned with the question of ownership arising upon the death of a co-owner.

In the *Paulsen* case bonds were issued in the names of the mother and a minor daughter as co-owners. The father of the child cashed the bonds as he could do under Federal law. In an action by the mother against the father to recover the proceeds it was held that the minor was a necessary party to the suit and that in her absence "her right to the proceeds of the bonds could not be litigated." The clear inference

from the opinion is that had the minor, who was one of the two registered co-owners of the bonds, been a party, the rights between the mother and the minor child could have been determined. In other words, the mother's interest in the bonds was not destroyed by the fact that the child through the father cashed the bonds.

It will serve no useful purpose to rehearse the facts. In our view there was evidence sufficient to justify the ultimate finding by the sitting justice. See *Cadorette* v. *Cadorette,* 147 Me. 79, 83 A. (2nd) 315, and *Flagg* v. *Davis,* 147 Me. 71, 83 A. (2nd) 319.

The court was justified in finding that the husband and wife each had a one-half interest in the bonds in question. The exact value of the one-half interest in the bonds is not satisfactorily shown. The difference between $800.00 and the approximate redemption value of the bonds could have been attributable to other factors within the consideration of the presiding justice.

The entry will be

Appeal dismissed.

Decree below affirmed.

JOSEPH A. BENNETT

vs.

LOWELL B. LUFKIN

Penobscot. Opinion, January 17, 1952.

Negligence. Rule of Road. Intersection.

A violation of a rule of the road is prima facie evidence of negligence on the part of the person disobeying it. See Rule, R. S., 1944, Chap. 19, Sec. 104 as amended.

Where a plaintiff in the exercise of due care believed that a defendant was about to stop his car before reaching an intersection and in reliance upon such belief attempted to overtake and pass *before* the intersection such conduct does not amount to contributory negligence notwithstanding a rule of the road that it is unlawful to overtake or pass at an intersection.

ON MOTION FOR A NEW TRIAL.

Action to recover damages to his automobile resulting from a collision. The jury returned a verdict for plaintiff. Defendant moved for a new trial. Motion overruled.

Myer W. Epstein, for plaintiff.

Michael Pilot,

Gerard Collins, for defendant.

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

WILLIAMSON, J. In this automobile accident case the plaintiff recovered a jury verdict of $152 for damages to his sedan sustained in a collision with a milk truck driven by the defendant. The case is before us on defendant's general motion to set aside the verdict and to grant a new trial. The only issue is whether the jury was manifestly wrong in

finding the plaintiff was free from contributory negligence. Neither negligence of defendant nor the amount of damages is questioned.

We must view the evidence in the light most favorable to the plaintiff. The defendant has the burden of convincing us that the jury verdict was manifestly wrong. *Raymond* v. *Eldred,* 127 Me. 11, 140 A. 608; *Coombs* v. *Mackley,* 127 Me. 335, 143 A. 261; *Searles* v. *Ross,* 134 Me. 77, 181 A. 820; *Bragdon* v. *Shapiro,* 146 Me. 83, 77 A. (2nd) 598; *Witham* v. *Quigg,* 146 Me. 98, 77 A. (2nd) 595. No exceptions were taken to the charge and indeed the charge is not included in the record before us. It must be assumed that the issue was stated to the jury with proper instructions. *Frye, Lounsbury* v. *Kenney,* 136 Me. 112, 3 A. (2nd) 433; *Michaud* v. *Taylor,* 139 Me. 124, 27 A. (2nd) 820; *Eaton* v. *Marcelle,* 139 Me. 256, 29 A. (2nd) 162; *Atherton* v. *Crandlemire* et al, 140 Me. 28, 33 A. (2nd) 303; *Kennebec Towage Co.* v. *State of Maine,* 142 Me. 327, 52 A. (2nd) 166.

The record consists of the testimony, in part conflicting, of the plaintiff and the defendant. Under the rule stated the jury were justified in accepting the plaintiff's version of the accident and in finding the facts here summarized.

The collision occurred at the intersection of Mt. Hope Avenue and Pearl Street in Bangor in the daytime of June 10, 1950. The plaintiff was proceeding in his sedan along the Avenue behind the defendant's truck. Just before the defendant reached the intersection the plaintiff blew his horn and started to pass the truck on the left. The defendant, without signal or warning, turned left to enter Pearl Street.

The plaintiff described what took place as follows:

> "As I was approaching Pearl Street, why the car made an indication although there was no hand signal; the indication of the car was toward the right hand side of the road as if to stop off and

> deliver milk. It was proceeding at a very slow rate. I blew my horn and started to pass him, and as I proceeded on just as soon as I came abreast of him he started to swerve in towards me. At that time there was nothing I could do but attempt to get by the best I could. He struck the rear fender of my car."

The plaintiff estimated that the defendant's truck was thirty to forty feet from Pearl Street and the plaintiff's car was a like distance behind the truck when the defendant turned to the right about fifteen feet making, to use the words of the plaintiff, "a gradual swerving off as if he were to park on the right." There was no other traffic on the Avenue.

The defendant contends the plaintiff must be barred from recovery for violation of the statutory rule of the road, reading, in so far as we are interested, as follows:

> "The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of ways unless permitted to do so by a traffic or police officer." *R. S., Chap. 19, Sec. 104, as amended.*

From the record it is clear that the plaintiff in terms violated the statute. The collision occurred while the plaintiff was passing the truck at the intersection.

The rule has long been established that "violation of the law of the road is prima facie evidence of negligence on the part of the person disobeying it." *Dansky* v. *Kotimaki,* 125 Me. 72, at 74, 130 A. 871, at 873, citing 13 R. C. L. 287. Recent statements of the rule are found in *Hutchins* v. *Mosher,* 146 Me. 409, 82 A. (2nd) 411, and *Bernstein* v. *Carmichael,* 146 Me. 446, 82 A. (2nd) 786.

Field v. *Webber,* 132 Me. 236, 169 A. 732, and *Rawson* v. *Stiman,* 133 Me. 250, 176 A. 870, were actions by the overtaking vehicle, or car behind, against the vehicle ahead turn-

ing left at an intersection. In the *Field* case the governing factor was the failure of the plaintiff to give an audible signal in passing. Whether the overtaking prohibition of the statute applied was not determined. In the *Rawson* case it was considered self-evident by the court that the plaintiff's disregard of the statute was a proximate cause of the accident, and the plaintiff was held negligent as a matter of law.

Did the presumption of negligence on the part of the plaintiff remain uncontrolled and unexplained? If so, the plaintiff cannot recover. Could the triers of fact reasonably have reached the conclusion, in face of the adverse presumption, that the plaintiff was in the exercise of due care? If so, the verdict stands.

The jury must have found that the plaintiff, in the exercise of due care, (1) believed that the defendant would stop the truck on the Avenue before the intersection, and (2) in reliance on this belief, attempted to overtake and pass the truck *before* the intersection. From an examination of the record we cannot say the jury manifestly erred in reaching such a conclusion.

Under the statute it is negligence—prima facie negligence—to overtake or pass at an intersection. The driver of the overtaking car cannot base his due care upon the expectation that the car ahead will not turn, for example, to the left. The negligence of the driver of the car ahead does not erase the contributing negligence of the overtaking driver. The explanation of the plaintiff's course lies in the situation existing before either car entered the intersection. The defendant, by indicating he was stopping before the intersection, thereby made it clear to the plaintiff that he would not turn left into Pearl Street. The Avenue was, from the point of view of the plaintiff, clear of traffic, and he could pass with safety.

If the defendant had given a clear signal by hand, for example, that he was about to stop on the Avenue, surely it

would not have been negligence on the part of the plaintiff to have passed the truck. The violation of the statute—prima facie negligence at best—would have been sufficiently explained. Or suppose the defendant had given a signal to the plaintiff to pass by waving his hand, the defendant could not have contended there was negligence in passing at an intersection.

The present case differs from the illustrations only in degree. It is a closer question, to be sure, whether the plaintiff was the "reasonably prudent man." The decision, however, rests upon application of the same principles.

In our view there was sufficient evidence to overcome the presumption of negligence arising from violation of the statute. The jury cannot be said to have been manifestly in error in finding the plaintiff was in the exercise of due care.

The entry will be

Motion overruled.

STATE OF MAINE

vs.

WILLIAM HOFFSES, APPELLANT

Waldo. Opinion, January 21, 1952.

Motor Vehicles. Intoxicating Liquor. Corpus delicti.

The underlying reason for the *corpus delicti* doctrine rests in the desire to safeguard against the possibility of a conviction for an alleged crime not, in fact, committed.

Extra judicial confessions are competent evidence to corroborate other proof of *corpus delicti.*

Conclusive proof that (1) a motor vehicle overturned while being operated upon the highway, (2) that the vehicle had been in respondent's control a half-hour earlier some miles away, (3) that respondent was at the place where overturning occurred immediately thereafter, (4) that he had suffered a recent injury, (5) that he assumed responsibility for notifying police of the event, (6) that earlier on the day in question respondent had been seen drinking in a beer parlor, and (7) had been warned not to drive the truck because he had been drinking too much, is sufficient evidence of the *corpus delicti* to justify the testimony of two police officers as to respondent's admissions that he was driving the car when it overturned even though respondent was never seen to drive the truck.

Evidence which will qualify an extra-judicial confession for admission in corroboration need not establish the *corpus delicti* beyond a reasonable doubt, but is sufficient if, when considered therewith, it so satisfies the jury "that the offense was committed and that the defendant committed it."

ON EXCEPTIONS.

Respondent was convicted of operating a motor vehicle while under the influence (R. S., 1944, Chap. 19, Sec. 121). The case is before the Law Court on exceptions to rulings of the court permitting the testimony of two police officers

as to respondent's admission that he was driving. Exceptions overruled.

Hillard H. Buzzell, for plaintiff.

Alan Crossman, for defendant.

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

MURCHIE, C. J. The respondent herein, convicted of operating a motor vehicle upon a highway while under the influence of intoxicating liquor, within the purview of R. S., 1944, Chap. 19, Sec. 121, brings his case to this court on exceptions to the denial of a motion for a directed verdict and to evidence rulings permitting two police officers to testify to his admission that he was driving it when it overturned in the highway during the late evening of November 9, 1950. The exception challenging the refusal of the motion for a directed verdict must be held to have been waived by a motion for a new trial, filed after verdict, although the docket entries do not disclose that any action was taken thereon. *State* v. *Simpson,* 113 Me. 27, 92 A. 898; *State* v. *Bobb,* 138 Me. 242, 25 A. (2nd) 229. It may be noted, however, that the respondent loses nothing by the waiver. The sole ground of error alleged in it presents the identical issue raised by his challenge of the evidence rulings. His exceptions must be overruled.

The turning over was seen by one Sam Cassida, looking out the window of his house, nearby. Cassida went to the scene, promptly, after trying, unsuccessfully, to find a flashlight. When he reached the scene, the respondent was standing in front of the truck and within a few feet of it. He had a fresh head injury, which Cassida described as a bump, scratch or laceration. No other person was in sight. He asked Cassida to notify the police. Cassida did so, and dressed the injury, but saw nothing to indicate that the respondent was "under the influence of intoxicating liquor."

Neither did three other witnesses, who testified to seeing the truck as it was driven along the highway, shortly before the overturning. There was ample evidence, however, to support the factual finding of the jury on that point.

The evidence discloses that one of the police officers aforesaid saw the respondent drinking in a beer parlor, early in the evening of the day in question, and saw him leave it and proceed toward the truck, which was then parked nearby, with a lady. That officer recognized the truck as one often driven by the respondent, warned him that he had been drinking too much to drive it, and asked him to turn over the key to it. This the respondent refused to do, but undertook to report to the police before driving it. He did not report. He was not seen to enter the truck, or to drive it from where it was parked to the scene of the overturning, but it was found there within an approximate half-hour of the warning. The distance involved is not given definitely in the record, but the three witnesses who saw the truck in operation on the highway testified that it passed them on the road and that they followed it, in the car in which they were traveling, for about two and a half miles.

The testimony challenged by the exceptions includes that of the police officer who warned the respondent not to operate the truck, and was the first to reach the scene where it overturned. He testified that the respondent admitted that he was alone in the truck, and was driving it, when it turned over. A second officer asserted that the respondent said he knew he took the curve on which the over-turning occurred too hard, that he had been drinking too much, and that he should not have been driving.

The respondent's claim is that the *corpus delicti* was not proved, except by his admissions to the officers and that his statements, as extra-judicial confessions, were not competent evidence to establish it. He relies particularly on the recent decision of this court in *State* v. *Levesque,* 146

Me. 351, 81 A. (2nd) 665. Therein it was declared that the extra-judicial confession of a respondent that he had set fire to rubbish in the cellar of a building, placed it against a wooden partition and watched it until the wood started to burn would not establish the *corpus delicti* of the crime of arson, against the evidence of the firemen who extinguished the fire that no wood had in fact been ignited. The case discloses that exceptions were reserved against a ruling admitting evidence of the confession of the respondent, but the case was decided on an appeal from the denial of a motion for a new trial.

The situation presented in the *Levesque* case is in no way comparable to the present one. There it was adequately proved that there had been a fire in the cellar of the building involved in the arson charge, but there was no proof, outside the confession, of a burning that would constitute arson. In this case it is proved conclusively that a motor vehicle turned over while being operated on a highway, that the vehicle had been in the control of the respondent a half-hour earlier, some miles away, and that the respondent was not only at the place where the over-turning occurred immediately thereafter, but was (apparently) alone, and had suffered a recent injury. It was proved also that he assumed the responsibility for notifying the police of the event.

Comparison of the situations presented in *State* v. *Levesque, supra,* and in the instant case serves, admirably, to illustrate both the reason underlying the *corpus delicti* doctrine and the proper use of extra-judicial confessions within its limitations. The authorities make it clear that the underlying reason for the doctrine rests in the desire to safeguard against the possibility of a conviction for an alleged crime not, in fact, committed. This is made clear in the Note following the report of *Bines* v. *State,* 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33, in L.R.A. Both the case and the Note are cited in *State* v. *Levesque, supra.* See, also,

the Annotation and the Notes following the reports of *State* v. *Morgan,* 157 La. 962, 103 So. 278, 40 A. L. R. 458, *Comm.* v. *Killion,* 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911, and *Nolan* v. *State,* 60 Tex. Crim. 5, 129 S. W. 1108, Ann. Cas. 1912 B 1248, at pages 460, 913 and 1249, respectively, in A. L. R. and Ann. Cas. The cases, notes and annotation, and many cases identified therein, establish adequately the principle, generally recognized, that extra-judicial confessions are competent evidence to corroborate other proof of the *corpus delicti.*

That the present case is one in which the admissions of the respondent constitute extra-judicial confessions provable against him within the field defined in said cases, notes and annotation, does not admit of doubt. Reference to three of the four cases cited from other jurisdictions, where verdicts were set aside on the ground that the *corpus delicti* was not proved except by a confession, demonstrates more than ample grounds for distinguishing them therefrom.

Bines v. *State, supra,* may be said to have been controlled by a provision of the Georgia Code declaring that:

> "a confession alone, uncorroborated by other evidence, will not justify a conviction",

but there was no evidence whatsoever in that case, outside the confession, that the respondent was at, or near, the scene of the alleged crime at the time. *Morgan* v. *State* and *Nolan* v. *State,* both *supra,* were prosecutions for sex crimes, and in each case the alleged victim testified that the crime charged had not been committed. In the latter, there was evidence that such victim, an unmarried female, had borne a child, and it was therefore established as a fact that some male had had intercourse with her, but the crime charged was incest and the court declared, quite properly, that the birth was not:

> "evidence of incestuous intercourse".

Cayford's Case, 7 Me. 57, decided as far back as 1830, as was declared in *Ham's Case,* 11 Me. 391, that:

> "a deliberate and voluntary confession, understandingly made, is the best evidence",

and competent testimony to prove an essential element of a crime. Cayford was prosecuted for lewd and lascivious cohabitation under a statute, Laws of 1821, Chap. X, defining the offense as involving a man and a woman "either or both of whom" were married. Cayford's confession was that he was married. There was no other evidence of that fact. The same fact was in issue in Ham's prosecution, which was for adultery, but his confession was held insufficient to justify conviction, because of its remoteness in time.

Neither of these early cases discussed the *corpus delicti* doctrine or the use of extra-judicial confessions to prove, or corroborate, the commission of a crime. Both fit admirably, however, into the rule of corroboration, as declared in Wharton's Criminal Evidence, Sec. 641. It is said there to be "generally accepted" that the evidence which will qualify an extra-judicial confession for admission in corroboration need not establish the *corpus delicti* beyond a reasonable doubt, but is sufficient if, when considered therewith, it so satisfies the jury "that the offense was committed and that the defendant committed it." Continuing, Wharton says:

> "It has been said that the corroboration of an extrajudicial confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real, and not imaginary; and again, that it is sufficient if the independent evidence establishes the corpus delicti to a probability."

It is amply proved in this case that the respondent, while under the influence of intoxicating liquor within the meaning of the statute, had in his possession the key to a motor vehicle which, a few miles distant and an approximate half-hour later, turned over in the highway while being oper-

ated thereon, and that he was standing alone near it, somewhat injured, within minutes thereafter. His statements admitting that he was the operator of it at the time of the overturning were competent evidence to prove that essential fact.

Exceptions overruled.

RUSSELL R. GREENE, ADMR.

vs.

FRANK S. WILLEY, JR.

Cumberland. Opinion, January 21, 1952.

Negligence. Death Statute. Children.

Where an automobile driver sees a child in a place of danger, or sees a child of tender years near or in the street in front of him, he must have his car under proper control and be able to stop if necessity demands it.

Under R. S., 1944, Chap. 152, Sec. 9, 10, there is a presumption that the deceased was in the exercise of due care and defendant must plead contributory negligence specially.

The statute does not change the substantive law and cases must be decided on all the evidence presented.

A directed verdict against plaintiff should be ordered when contributory negligence appears from substantive and incontroverted evidence.

ON EXCEPTIONS.

Action under R. S., 1944, Chap. 152, Secs. 9 and 10 to recover for damages for death. At the close of testimony the

court directed a verdict for defendant. Plaintiff excepted. Exceptions overruled. Case fully appears below.

Bernstein & Bernstein, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

FELLOWS, J. This is an action brought to recover damages for death, in accordance with the provisions of Revised Statutes (1944), Chapter 152, Sections 9 and 10. The plaintiff's intestate, Beverly Ann Greene, met her death on July 15, 1950 as a result of an accident involving the motor vehicle of the defendant, Frank S. Willey, Jr. The deceased was at the time nearly twelve years of age (born August 29, 1938). The case was heard in the Cumberland County Superior Court. At the close of the testimony, on motion of the defendant, the court directed the jury to return a verdict for the defendant. The case is now before the Law Court on plaintiff's exceptions.

The record shows that on July 15, 1950 the defendant, in his tractor truck, was proceeding westerly on Lincoln Street in Saco, Maine. The truck was a vehicle "about 20 or 25 feet long" designed to haul a trailer, but at this time "no trailer truck" was attached. The tractor had dual wheels in the rear. The truck was proceeding slowly, although there is disputed testimony relative to the speed, and as to exactly where the truck was with relation to the center of the road at the time of the accident. And although it is difficult to understand from the testimony wherein the defendant was negligent under all the circumstances, there was some testimony from which the jury might have found that the defendant was not proceeding with "all care and caution." The plaintiff is entitled on his exceptions, where a verdict has been directed against him, to have the testimony treated in the most favorable aspect to his case of

which it might be reasonably susceptible. The jury has the right to determine controverted facts and to draw any reasonable and legal inferences.

Beverly Greene was playing with three or four other young people in her yard or driveway on the left or southerly side of Lincoln Street. There were also some children in the yard on the opposite side of the street. There was a sidewalk between the Greene yard and the highway. There was no traffic on the highway and no children in the street as the defendant proceeded in his truck. Beverly, her sister Dorothy, Richard Grant and Jerry Twomey were playing a game which they called "Relievo." Beverly and Richard were opposing Dorothy and Jerry. The object was for one "team" to "capture" the members of the other team and place them in a circle marked on the ground. The object of the other team was to avoid being caught, and if or when one were caught, the other could "release" him or her by running through the circle. At the time of, or immediately before the accident, Beverly had been captured and was in the circle, and Richard was trying to run through the circle in order to release her. The circle was located in the yard of Beverly Greene's home, and as Dorothy Greene testified, seven or eight steps from the black-top road.

After some running about the Greene yard on the part of Richard Grant, he ran through the circle and said "Relievo," and thus released Beverly Greene who was being guarded in the circle by her sister Dorothy Greene. Beverly made her escape by running across the sidewalk into the street, at the same instant of time that the defendant approached in his truck. The evidence is overwhelming that as she ran out of the circle her head was turned to see if anyone was in pursuit of her, and with her head turned, ran to the side of the truck and was struck by the left rear wheel of the truck and was instantly killed.

The plaintiff's witness, Richard Camden, who was ten years old, and sitting on the steps of a house across the

street watching the game, said that Beverly ran into the street, "Dorothy started to chase her but she stopped and Beverly stopped to look at her to see if she was chasing her." She was then struck. Dorothy Greene, the fifteen year old sister of the deceased, says that the two boys ran down the sidewalk, but her sister Beverly ran into the street; that she (Dorothy) started to run after her sister but she saw the truck and stopped running. She said her sister Beverly ran into the street, "she stopped to look at me" at the moment she was hit. Richard Grant, called by defendant, sixteen years old, testified that he ran through the circle, said "relievo," and "I kept running down the street when I glanced up I see the truck coming. When I turned around Beverly had fallen to the ground." Richard says he turned "in front of the hydrant" which was but a few feet from the circle. Jerry Twomey, fourteen years old, who was one of the children playing and who lived next door to the Greene home, testified as follows: "We had just chased Beverly and caught her. Dorothy brought her back. Dicky started running up and down and I started chasing him. He had gone down the street. Dorothy was guarding the circle. Just after I got to the hydrant he ran through the circle and relieved her and then she hit the truck. Q. What did Beverly do? A. she ran out. She slowed down but she didn't really stop. She slowed down and then they met. Q. Who met? A. The truck and Beverly. Q. What part of the truck? A. The left hind wheel." Twomey also said "she kept going until the truck and she collided. She looked sideways. I guess she was trying to see if Dorothy was close to her to get away."

Richard Ruck who was riding with the defendant in the truck, at about six o'clock in the afternoon, says: "There were kids on both sides of the street. He pulled over to about the center of the road. I see this girl running so I looked. She was running toward the truck, running with her back to the truck. The front of the truck was by her at

that time. She ran into the rear wheel. I looked out and see it when it hit. It just knocked her down." Ruck further stated "somebody was chasing this girl and ran her right into the truck."

It is very apparent that the deceased was never in front of the truck. She ran towards it and was struck by a rear left wheel that extended a little beyond the side of the truck. There is no testimony that indicates otherwise. At the identical fractional second that she stopped running (if she did stop running) the front end of the truck was beyond her and she was hit by the rear wheel.

The evidence, and all the evidence, must be taken in its most favorable aspect to the plaintiff's contentions. The jury has the right to determine controverted facts and the inferences to be drawn. There is conflicting testimony here as to whether the defendant's horn was sounded, whether sounding was necessary, what was the actual speed, if speed was important. There was some testimony from which a jury might have inferred a speed in excess of statutory permission in that built up section. The violation of a traffic statute, if there was violation, may be evidence of negligence. *Bernstein* v. *Carmichael,* 146 Me. 446; *Field* v. *Webber,* 132 Me. 236, 243; *Neal* v. *Rendall,* 98 Me. 69.

Where an automobile driver sees a child in a place of danger, or sees a child of tender years near or in the street in front of him, he must have his car under proper control, and to stop if necessity demands. Otherwise, he may be held negligent. *Hamlin* v. *Bragg,* 128 Me. 358, where a child of five years was seen by the driver on a plank platform across the ditch from the sidewalk, he gave no warning of his approach and the child started across the street. The Hamlin child did not suddenly dart out, because the driver saw the child standing on the platform, but because of speed, or other cause, he was not able to avoid striking the child when the child started to cross the street. This court held

that a jury might well find that the driver was negligent, and under such circumstances it was a jury question as to the contributory negligence of a child of five years. See *Meserve* v. *Libby,* 115 Me. 282, where a child of six years stopped in front of an automobile and the automobile stopped, but the driver assumed the child would permit him to pass and started up, injuring the child. See also *Ross* v. *Russell,* 142 Me. 101 where a child of eight passed through a line of cars halted by traffic officer. She stopped as defendant came along close to the waiting line, and she tried to get back to a point of safety and was struck. Held question for jury.

In all of the foregoing cases the child was where the driver should see and assume that the child might cross in front of him. The driver of an automobile is not obliged to stop when children are playing in their dooryards with a sidewalk between them and the road. Otherwise, no automobile would ever reach its destination. It is difficult for the Court to understand, on this record, wherein this driver was negligent, but the question of the negligence of the driver, in the case at bar, must be held a jury question. There is more than "a scintilla of evidence." *Bernstein* v. *Carmichael,* 146 Me. 446, 450. There are some inferences that might possibly be drawn indicating negligence on the part of the driver, in view of the conflicting testimony as to speed, warning, control, and exact location of the truck on the highway.

The heedless, and most unfortunate action of this twelve year old girl, however, presents another and a legal question. There is no testimony dispute as to her actions. There is no controversy as to what portion of the truck she hit, or that hit her. There is no real controversy as to what she was doing and why she thoughtlessly ran into the street and into the rear left-hand side of this truck. The natural sympathy of the court is always with the members of a family in such dreadful misfortune, but too often the victim of

highway accidents negligently contributes to his own disaster. The victim's actions, or failure to see and act, may be the proximate or only cause of injury, or it may be a concurring and contributory cause.

In this case, brought under the Death Statutes (Revised Statutes (1944), Chapter 152, Sections 9, 10), there is a presumption that the deceased was in the exercise of due care, and the defendant must plead contributory negligence specially. In order that one person may recover damages of another, it is always necessary that it appear (1) that that other was negligent, and (2) that he who seeks damages for injuries due to another's negligence was free from any negligence contributing thereto. How, when, and where, are used to ask most of the questions in a negligence case, and in their correct answer lies liability or non-liability. This statutory presumption of due care on the part of the deceased is a presumption of fact, but what the true fact is, may clearly and positively appear either in the plaintiff's case or in the defendant's. It is a presumption of fact that may be overcome by credible evidence to the contrary.

This statute does not undertake to change the substantive law, and cases must be decided upon all the evidence presented. The statute enacts a presumption of care on the part of the deceased, and it also casts the burden of overcoming the presumption upon the defendant. Contributory negligence is usually a question for the jury, but when it appears in a case, from substantial and uncontroverted testimony, that the plaintiff was negligent, and that his negligence contributed to his injuries, the judge should order the verdict that this evidence demands. *Field* v. *Webber,* 132 Me. 236, 242; *Levesque* v. *Dumont,* 117 Me. 262, same case 116 Me. 25.

The record in this case shows that the statutory presumption of due care on the part of the deceased was entirely overcome. The evidence from many witnesses, both for the

plaintiff and for the defendant, is clear, uncontradicted and conclusive that the plaintiff's intestate either ran directly into the side of a defendant's truck, or darted across the sidewalk into the street and stopped so close to the truck that she was hit by the rear left wheel. At no time did she look where she was going. She never looked toward the truck or any other point in the street. She ran and was looking backward toward a probable pursuer among her play fellows, when the truck was then only a few feet away and directly in her path. She was never in front of the truck, and in all probability never within the vision of the driver from the time when she eagerly rushed from the circle into the street, to traverse a few running steps to the side of the moving vehicle. This girl was not a little child of five or six years. She was approximately twelve (11 years, 11 months), in the fifth grade of school, and according to testimony "very intelligent," She had the "capacity" to exercise care for herself. *Grant* v. *Bangor Railway and Electric Co.*, 109 Me. 133, 138; *Colomb* v. *Street Railway*, 100 Me. 418; *Levesque* v. *Dumont*, 116 Me. 25.

As once said by this court: "To him who reviews the sad accident, on the neutrality of the printed transcript, seeking only the verity of that record, there seems, in justice, no escape from the conclusion that plaintiff's intestate's negligence was proved to have been a moving or contributory cause of (her) death. The evidence, on this phase, did not, in fact, disclose a jury question; it presented a question of law." *Field* v. *Webber*, 132 Me. 236, 245.

In fact, where the impact was with the body of the truck, the inference is that the child was never in a place where the truck driver had a chance to see her. The act of the child may be the sole proximate cause of the accident. *Wiles et al.* v. *Connor Coal & Wood Co.*, 143 Me. 250, 260; *Levesque* v. *Dumont et al.*, 116 Me. 25; *Milligan* v. *Weare*, 139 Me. 199.

Where a boy eight years old saw an automobile approaching and attempted to run across the street in front of it. He either ran against the automobile or was struck by it. The court by Chief Justice Savage say: "We think the plaintiff was guilty of contributory negligence. Whether he was hit by one mud guard as he claims, or ran against the other, he was trying to run across in front of an approaching car, which could have been only a few feet away, when he started the second time. It was a childish impulse, no doubt, to follow his playfellow. But the danger was so obvious and so immediate, that even a child of his years should have known better. Children even of his age are held to the exercise of some care. They cannot be absolutely careless, and then hold others responsible to them for the results to which their carelessness contributed." *Moran* v. *Smith,* 114 Me. 55, 57.

The plaintiff cites the case of *Hutchins* v. *Emery,* 134 Me. 205, where the plaintiff was on the sidewalk where she had a right to be and was struck by an automobile forced upon the walk by action of defendant's automobile,—held a question of fact for the jury as to whether defendant's act was the proximate cause of injury. In *Guillory* v. *Horecky,* 168 So. 481 (La.), cited by the plaintiff, the evidence showed that children were walking and playing tag on the side of the road and the driver saw them for a block away, an eleven year old girl was killed,—held a question of fact as to proximate cause, because "no plea of contributory negligence was filed." *Duff* v. *Husted,* 111 Atl. 186 (Conn.), relied on by plaintiff, raised the question of whether contributory negligence was attributable to a boy of six years playing on the road,—held question for jury. In *Brown* v. *Wade,* 145 So. 790 (La.), a child of three years and ten months seen by defendant to be coming to corner of street, and defendant assumed the child would not attempt to cross,—judgment for plaintiff affirmed. The child of that age was "incapable of being contributorily negligent." In *Ottenheimer* v. *Molo-*

han, 126 Atl. 97 (Md.), "there was nothing to prevent the defendant from seeing the *** small children playing at the roadside *** he might have turned aside when he realized the actual peril." In *Gettemy* v. *Grennan Bakeries,* 21 Atl. (2nd) 465 (Pa.) the court held, in the case of a six year old child walking and playing with others on the road from school, and seen by driver for 600 feet, that the driver of an automobile is not held negligent if a child suddenly darts into view and gets hit, but where small children are playing in the road in full view, the driver must watch for the unexpected.

The court in Massachusetts, where a boy nearly twelve years old (as Beverly Greene in this case) in an effort to escape the police, ran from the yard and across the sidewalk into the street, and was struck by the rear wheel of defendant's truck then passing,—held that a verdict for defendant was rightly ordered, because the conclusion was necessary that "as matter of law, the intestate was negligent and such negligence was a contributory cause of his injury." *Jackman* v. *O'Hara,* 280 Mass. 496, 498.

Children must have a place to play. We have no law that prohibits a child from playing near, or even in the street. The automobile driver must use care and be able to stop when children of tender years are in his range of vision, and in or near the highway. Very young children may be expected to do the unexpected. The driver of an automobile is not liable, however, even if he is negligent, if the accident is unavoidable, or if the person injured is of sufficient age to have the capacity to use care, and negligently contributes to his injury, and he is not liable if the accident is entirely due to the act of the child.

We are obliged to hold, in this case, that the direction of a verdict for the defendant was correct.

Exceptions overruled.

CAROLINE G. WYMAN, APLT.

FROM DECREE OF JUDGE OF PROBATE

ESTATE OF CHARLES HINDS GOODWIN

Androscoggin. January 24, 1952.

Adoption. Inheritance. Collateral Kindred.

Adoption is a judicial act creating between two persons certain relations, purely civil, of paternity and affiliation.

Adoptees rights of inheritance must originate by virtue of a statute.

Under Maine Law the right of inheritance applicable to local adoptions does not arise until the death of a decedent.

It is generally held that the status acquired by adoption in one state will be recognized in another but the fact that an adopted child can inherit under the law of the state of his adoption will not enable a child adopted in one state to inherit property in another, under the laws of which an adopted child, even if adopted in the state, cannot inherit.

The right of an adopted child to inherit as an heir of the relatives or descendants of the adoptive parents depends upon statutory or constitutional provisions, and such right is not conferred unless the language of the statutes is clear.

R. S., 1944, Chap. 145, Sec. 38 providing ". . . the adoption of a child made in any other state, . . . shall have the same force and effect in this state as to inheritance and all other rights and duties as it had in the state where made" means that if the foreign law of adoption gave the adopted child capacity to inherit from his adoptive parents the state of Maine would give a like right of inheritance but this cannot be construed to confer rights upon a foreign adoptive sister to inherit from her adoptive brother where such rights would be denied a local adoptee.

ON EXCEPTIONS.

Decedent died intestate leaving a widow, no children, a sister by adoption, and four cousins. Upon petition for distribution the Probate Court ruled that the estate should be

distributed one-half to the widow, and one-eighth to each of four cousins. Upon appeal by the adoptive sister the Supreme Court of Probate sustained the ruling. On exceptions to the Law Court, exceptions overruled. Case remanded.

Clifford & Clifford, for appellant.

George R. Grua, for appellee.

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

NULTY, J. On exceptions from the Superior Court of Androscoggin County sitting as the Supreme Court of Probate.

From the bill of exceptions and the agreed statement of facts it appears that Caroline G. Wyman, the appellant, was legally adopted by the natural father and mother of Charles Hinds Goodwin, deceased, in the Commonwealth of Massachusetts in 1887; that at the time of said adoption the adoptive parents were legal residents of and domiciled in said Massachusetts; that after said adoption the deceased (Charles Hinds Goodwin) was born to the foster parents (of Caroline G. Wyman) and at the time of their death the said foster parents were residents of and domiciled in the town of Livermore Falls in the State of Maine. The said deceased (Charles Hinds Goodwin) died intestate on October 12, 1948, in said Livermore Falls leaving a widow, no children, the said Caroline G. Wyman (sister by adoption), and four cousins. It also appears from the record that in the orderly administration of the Estate of Charles Hinds Goodwin a petition for distribution was filed in the Probate Court for Androscoggin County and on said petition for distribution the Probate Court ruled that the Estate should be distributed one-half to the widow and one-eighth to each of the four cousins. From this decision the said Caroline G.

Wyman (adoptive sister) duly appealed to the Superior Court for Androscoggin County, sitting as the Supreme Court of Probate, which ruled that the distribution ordered by the Judge of Probate was correct. From this ruling exceptions were taken and brought forward to this court.

The real question and the only question for the determination of this court is whether or not the said appellant is entitled to inherit under the laws of descent or distribution one-half of the estate of said Charles Hinds Goodwin as an heir at law of her brother by adoption. This question involves and turns upon the proper construction of the language of Sec. 38, Chap. 145, R. S., 1944, hereinafter set forth relating to the legal effect of adoption. Adoption has been defined as "a judicial act creating between two persons certain relations, purely civil, of paternity and affiliation." *Black's Law Dictionary, Third Edition; Bouvier's Law Dictionary, Rawle's Third Edition. Restatement of the Law of Conflict of Laws,* Sec. 142, under Adoption, contains the following comment:

> "a. Adoption is the relation of parent and child created by law between persons who are not in fact parent and child."

Under Sec. 143, Comment a, we find the following:

> "The status of adoption is not created by the common law of England or of the states of the United States, nor does that law give it any legal effect. Unless there is in the state a statute providing for adoption, no effect will be given in England or a state of the United States to the status of adoption as such."

From the last quotation it will be seen that at common law the appellant would have no claim of inheritance in the estate of her adoptive brother, Charles Hinds Goodwin, deceased. Therefore, if she is entitled to rights of inheritance they must originate by virtue of a statute authorizing the

same. See *Gatchell and Jefferey* v. *Curtis and Given*, 134 Me. 302, 186 A. 669, wherein we said:

> "But the important point to remember is that adoption is unknown to the common law; it exists solely by virtue of statute. We must accordingly look to the various legislative acts to determine the rights of the parties affected by the decree of adoption."

Sec. 38, Chap. 145, R. S., 1944, reads as follows:

> "**Sec. 38. Legal effect of adoption of child; descent of property. R. S. c. 80, § 38.** By such decree the natural parents are divested of all legal rights in respect to such child, and he is freed from all legal obligations of obedience and maintenance in respect to them; and he is, for the custody of the person and right of obedience and maintenance, to all intents and purposes, the child of his adopters, with right of inheritance when not otherwise expressly provided in the decree of adoption, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters, nor property from their lineal or collateral kindred by right of representation; but he shall not by reason of adoption lose his right to inherit from his natural parents or kindred; *and the adoption of a child made in any other state, according to the laws of that state, shall have the same force and effect in this state, as to inheritance and all other rights and duties as it had in the state where made, in case the person adopting thereafter dies domiciled in this state.* If the person adopted dies intestate, his property acquired by himself or by devise, bequest, gift, or otherwise before or after such adoption from his adopting parents or from the kindred of said adopting parents shall be distributed according to the provisions of chapter 156, the same as if born to said adopting parents in lawful wedlock; and property received by devise, bequest, gift, or otherwise from his natural parents or kindred shall be distributed

> according to the provisions of said chapter 156 as if no act of adoption had taken place." (underscoring ours)

It will be noted that this statute makes reference to two classes of adoptions. One may be termed the domestic or local adoption made under the laws of the State of Maine. The other, an adoption made outside the State of Maine. Our court has on several occasions interpreted certain phases of local adoptions made under the laws of the State of Maine. See *Warren* v. *Prescott,* 84 Me. 483, 24 A. 948, which settled the proposition that by adoption the adopters could make themselves an heir but they cannot thus make one for their kindred. See also *Gatchell et al.* v. *Curtis et al., supra,* which case historically reviews the statutes and amendments of this state with respect to local adoptions. See also the case of Latham, Appellant, 124 Me. 120, 126 A. 626, which holds that a decree of local adoption entered in accordance with power conferred by statute fixes the status of the child; it does not settle for all time the child's right to inherit property. That remains as in the case of all persons subject to legislative regulation, until it becomes vested by the death of him whose estate may be subject to administration. Our court said in *Gatchell et al.* v. *Curtis et al.,* supra, quoting from Latham, Appellant, *supra:*

> "The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of the decedent."

So far as we are aware there has been no construction of that part of our adoption statute, *supra,* which reads as follows:

> *"And the adoption of a child made in any other state, according to the laws of that state, shall have the same force and effect in this state as to inheritance and all other rights and duties as it had in the state where made in case the person adopting thereafter dies domiciled in this state."*

This section of the statute apparently was passed by the Legislature in an attempt to clarify the matter of foreign adoption before mentioned. That is, adoptions legally made outside of the State of Maine and in accordance with the law of the particular state or territory where the adoption took place. The instant case is such a situation, but it should be borne in mind that we are now speaking *not of the rights of descent or inheritance* from the adopters but are concerned solely with the question of whether or not an adoptive sister, the appellant in this case, can under our laws of descent or inheritance legally succeed to any interest in the property of the appellant's adoptive brother who was a natural child of the adopters.

We have heretofore pointed out the relationship of parent and child created by adoption and Restatement of the Law of Conflict of Laws, Sec. 143, states:

> "The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter estate to the status of adoption when created by its own law."

There is, however, considerable difference between the status of adoption, that is, the relationship of parent and child, and the right or capacity of the adopted child to inherit because under our decisions the right of inheritance applicable to local adoptions does not arise until the death of a decedent while the status of adoption becomes effective at the date of the decree of adoption. See *Appeal of Latham, supra.* In 73 A. L. R. 964 under the Annotation entitled Conflict of Laws As to Adoption as Affecting Descent and Distribution of Decedent's Estate, and in 154 A. L. R. 1179 under the same title, and in the Annotation in 18 A. L. R. (2nd) 960 under the title What Law, in Point of Time, Governs as to Inheritance from or through Adoptive Parent will be found many cases wherein the views of various courts of last resort of the United States are set

forth and commented upon. Some courts take the view that the law creating the status of adoption is controlling. Others take the view that the law of the place where the property is situated or the law of decedent's domicile controls extent or fact of right of inheritance when in conflict with law creating the status. It does not seem to us that anything would be gained by citing these authorities or considering them in detail, but it seems to be the general rule that usually the status acquired by adoption in one state will be recognized in another and the right of the child to inherit will be given effect as to property located in the latter state and that right to inherit in a state other than that of his adoption will be determined by the law of the state creating the adoption, but it is only the adoption status with its incidental rights, if any, as to inheritance that will follow him to and be recognized in the state where the property is located or situated entitling him to inherit it if and to the extent that the law of the latter state allows a child there adopted to inherit; but the question whether an adopted child (irrespective of where he is adopted) can inherit and the extent of such right of inheritance, will be determined, not by the law of the state where the adoption took place, but by the law of the state where the property is located, or by the law of the domicile of the decedent, as the case may be, so that the fact that an adopted child can inherit under the law of the state of his adoption will not enable a child adopted in one state to inherit property in another state, under the laws of which an adopted child, even if adopted in the state, cannot inherit or can inherit only to a limited extent.

1 Am. Jur. Sec. 63, Page 662, states:

> "The right of an adopted child to inherit as an heir of the relatives or descendants of the adoptive parents depends entirely upon statutory or constitutional provisions. And while these statutes, though similar, have not received a uniform construction, yet it is the general view that there is

not conferred upon the child a right to inherit from the lineal or collateral kindred of the adoptive parent unless the language of the statutes is clearly to that effect.

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"Adoption statutes, as well as matters of procedure leading up to adoption, should be liberally construed to carry out the beneficent purposes of the adoption institution and to protect the adopted child in the rights and privileges coming to it as a result of the adoption. But it does not follow that an adoption statute should be liberally construed to divert from its natural course the descent of property left by those who are not parties to the adoption proceedings. Consanguinity is so fundamental in statutes of descents and distributions that it may only be ignored by construction when courts are forced so to do either by the terms of express statute or by inexorable implication. To prescribe a course of descent which will take property of deceased persons out of the current of their blood, the legislature must use explicit and unmistakable language."

An examination of the statute in question, namely, Sec. 38, discloses that domestic or local adopted children do not take from lineal or collateral kindred of the adoptive parents by right of representation, in fact, adopted children are specifically denied that right. It therefore follows that if the Legislature had intended to make any exception to a foreign adoption, it should have added explicit words to that effect. It appears to this court that the Legislature by the adoption act simply intended to say that if the foreign law of adoption gave the adopted child capacity to inherit from its adoptive parents the State of Maine would give a like right of inheritance from the adoptive parents provided such adoptive parents died domiciled in Maine. In other words, it is our opinion that that language referring to the person adopting dying domiciled in this state has no bearing on the question before us which is as we have stated before, whether or not the appellant, the adoptive sister of the de-

cedent, is entitled to inherit from her adoptive brother. As we said above, if the adoption of the appellant had taken place under the laws of the State of Maine, she clearly would not have been entitled to receive anything from her adoptive brother's estate.

It is a well known fact that distribution of personal property in this state is governed by the rules of descent in force in this state at the date of death of the decedent (See Appeal of Latham, *supra*) and we are unable to gather any legislative intent from the language used in said Section 38 which in any way would permit a foreign adoptee to take a greater share in a decedent's estate than a domestic or local adoption and we have before pointed out that the appellant, had she been legally adopted under the laws of Maine, would have been specifically excluded from taking any property from her adoptive brother. Thus we cannot believe that the appellant in this case is entitled to share in the estate of her adoptive brother. If the Legislature had intended such a course of descent which would take property of deceased persons out of the current of their blood, the Legislature should have used explicit and unmistakable language.

It should be noted that while this opinion deals with Section 38, Chap. 145, R. S., 1944, said section was amended by Chap. 81 of the Public Laws of Maine, 1951, effective August 20, 1951, and this opinion is not to be construed as in any manner reflecting the ideas of this court as to the legal effect of said amendments nor do we express or intimate any opinion thereon.

The mandate will be

Exceptions overruled.
Case remanded.

LIONEL J. BOLDUC, ET AL.

vs.

GRANITE STATE FIRE INSURANCE COMPANY

Insurance. Courts. Referees. Vacation.

Androscoggin. Opinion, January 29, 1952.

An insurer who has contracted to cover legal liability for damage to property during its "loading, unloading, skidding, lowering and hoisting" is not holden for loss caused by the use of dynamite to sever the property intended to be hoisted, since "hoisting" does not connote severing or detaching, or the use of dynamite, and was not foreseeable under the risk accepted. Defendant had no notice that its use was essential or was contemplated as part of a hoisting operation in the particular trade.

ON EXCEPTIONS.

Action to recover upon an insurance contract for damages resulting from the use of dynamite in a hoisting operation. Referees reported a decision in favor of plaintiffs. Defendant filed written objections. Presiding justice held plaintiffs' motion for acceptance in abeyance during the term, the succeeding vacation, and the following term, and rejected the report in the following vacation. The court's authority to rule was rejected by the Law Court at 147 Me. 129, 83 A. (2nd) 567. Subsequently another justice rejected the report for the same reasons as the previous justice and the case comes forward on identical exceptions previously allowed, (except for the one which controlled the previous decision) with the approval of the justice whose ruling is now challenged. Exceptions overruled.

Case fully appears below.

Frank W. Linnell, for plaintiff.

Berman & Berman, for defendant.

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

MURCHIE, C. J. This case presents the single, very narrow, issue whether an insurer, who has contracted to cover

the legal liability of its assured for damage to property during its "loading, unloading, skidding, lowering and hoisting," is holden for a loss caused by the use of dynamite to sever property, intended to be hoisted to make its moving possible, from a foundation to which it was attached so firmly that severance by a hoisting device, pry bars and jack-hammers proved impossible.

The case was heard by a referee, to whom it was referred by the parties, with the right to exceptions on questions of law reserved. No question of fact is involved. The referee's decision, for the plaintiffs, reflects his ruling of law on the issue stated. He grounded it on the facts that a lifting device was under strain on the property at the time of the damage, and that the plaintiffs had advised the defendant fully concerning their undertaking to move the property from one location to another. There was reliance also on a letter written to the owner of the property by an agent of the defendant confirming a telephone conversation in which it was stated that plaintiffs' insurance, as enlarged by an endorsement on their policy, covered "all rigging operations" of the assured, and "any hoisting or lowering, skidding, unloading or loading operations," wherever the property might be. There was reference, also, to "loading, unloading, skidding, lowering or hoisting operations."

The referee, in final analysis, grounded his decision on the intent of the parties to cover whatever the plaintiffs might do in "hoisting" the property. Counsel for the plaintiffs argues also that the word "hoisting" is ambiguous, and should be construed to include "dismantling," obviously contemplated by the parties. He argues, further, on the basis of evidence in the Record, that the word "hoist" has a special and well recognized meaning in the heavy machinery moving trade, which considers a "hoisting operation" to start when a lifting agent is employed and force exerted on it, and includes the use of pry bars, jack-hammers and dynamite, as supplemental to such lifting

agent. The case discloses that prior to the use of the dynamite which caused the damage, the plaintiffs had employed a chain-hoist, pry bars and jack-hammers, to no avail, as far as severing the property from its foundation was concerned. Severance and damage came simultaneously with the last of several small blasts of dynamite.

The history of the case discloses that after the referee made his report, the defendant filed written objections to its acceptance, and plaintiffs' motion therefor was held in abeyance by the justice presiding at the term of its filing, not only until after the adjournment thereof but throughout the vacation following and until after a new term had been convened and adjourned by another justice. The report was rejected, in vacation following the succeeding term, by the justice holding the term when the motion for its acceptance was filed, on the grounds that " 'hoisting' does not, in English, connote severing or detaching," and that it was not "foreseeable under the risk accepted by the insurance carrier that it was indemnifying the assured for damage caused by severance with dynamite."

Exceptions originally alleged included one challenging the authority of the justice to rule on the motion at the time he did, and that one was sustained, reluctantly in view of the fact that counsel for both parties desired the case considered on its merits, but necessarily because plaintiffs' attempted waiver of it could not confer an authority in excess of that vested by statute. *Bolduc* v. *Granite State Fire Insurance Co.*, 147 Me. 129, 83 A. (2nd) 567.

Subsequently, another justice rejected the report on the same grounds, and the case comes forward on the identical exceptions originally alleged, except for the one which controlled it in the decision aforesaid. The procedure is unusual in presenting exceptions to a ruling of one justice originally allowed by another with the qualifications stated, but their prosecution at this time is with the approval of

the justice whose ruling is now challenged, and that would seem to constitute the equivalent of the allowance of them.

The grounds alleged for the rejection of the report being adequate, there is no occasion to consider the exceptions in detail. The record discloses no single word in any part of the correspondence or conversations between the parties, or spoken or written by any one having an interest in the property plaintiffs had undertaken to transport, to give notice to the defendant that the use of dynamite was essential to severing the property from a foundation for transporting it, that such a use was contemplated, or was considered a part of a hoisting operation in the particular trade in which the plaintiffs were engaged. The report of the referee was properly rejected.

Exceptions overruled.

CHARLES UNOBSKEY ET AL.

vs.

CONTINENTAL INSURANCE COMPANY

Washington. Opinion, January 31, 1952

Insurance. Extended Coverage. Windstorm.

The doctrine that a policy of insurance must be liberally construed in favor of the insured is applicable only where there is an ambiguity in the terms of the policy.

In an action to recover for damages to store merchandise under an insurance policy providing for extended coverage for the perils of "windstorm" it must appear at least to a satisfactory probability that the damage was due to wind. No recovery can be had where

the court can only speculate on whether the dominant cause of damages was wind or surface waters.

ON REPORT.

Action against Continental Insurance Company before the Law Court on report of evidence from Superior Court. Judgment for defendant. Case fully appears below.

Blaisdell & Blaisdell, for plaintiff.

Berman, Berman & Wernick, for defendant.

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

FELLOWS, J. This case brought by Charles Unobskey and Arthur H. Unobskey both of Calais, doing business as Unobskey Brothers, against the Continental Insurance Company, comes to the Law Court from the Superior Court of Washington County for final decision on a report of the evidence. By agreement, the decision in this case is to govern twenty companion cases named by the presiding justice of the Superior Court in his order for this report to the Law Court, and now on the Washington County Superior Court docket. These companion cases were brought by these plaintiffs against twenty other insurance companies, on the same or similar policies of insurance with the same endorsements, and governed by the same facts. All twenty-one writs are dated August 14, 1950.

The principal circumstances are these: The plaintiffs Arthur H. Unobskey and Charles Unobskey purchased, through a Calais insurance agency, fire insurance under the Maine Standard Policy, which policy was in force at the time of their losses hereinafter mentioned. Attached to the policy, and made a part of it, was an extended coverage endorsement which covered other perils including "windstorm."

On March 9, 1950 there occurred a very severe storm with high wind and heavy rain, and during the storm an outside door leading into plaintiff's retail store was torn open and the store basement flooded with water in a few minutes. The flooding of the basement resulted in damage of more than twenty thousand dollars. It is disputed as to whether the door was forced open by force of the wind or by force of accumulated water.

The portions of the endorsements on the policy which are in question are as follows: "The coverage of this policy is extended to include direct loss by *Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, and Smoke.*"

> "*Provisions Applicable Only to Windstorm and Hail:* This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow, whether driven by wind or not.
>
> This Company shall not be liable for loss to the interior of the building or the insured property therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail."

The store of the plaintiffs was on the main street of Calais. In the rear of the store was a large vacant lot used by abutting owners for parking cars as well as for other purposes. This parking lot was lower than the land and streets about it. The land area here was, therefore, a sort

of bowl sloping upward from this parking lot to the adjoining land and adjacent streets. That this lot was lower than the surrounding territory, and that it was recognized that a large quantity of water was likely to accumulate during rainy weather, is demonstrated by the fact that there were many manholes and catch basins in the lot and in its near vicinity to carry off the accumulations.

In the early morning hours of March 9, 1950, a heavy wind and rainstorm occurred. There was a high wind for several hours with a heavy downpour of rain. Somewhere between 4:15 A.M. and 4:30 A.M. the outside door in the rear of plaintiffs' store was torn open, and a "river" of water went through the doorway down a flight of basement stairs, broke in an inside door leading into the basement, and in a few minutes completely flooded the large basement of the plaintiffs and damaged their stock.

The plaintiffs contend that they are entitled to recover under the extended coverage endorsement of their policy, because they say that this damage was caused by "windstorm." They claim that the "rain" entered the property of the plaintiffs through an opening in the "wall" of plaintiffs' premises, which opening was caused by the direct force of wind. In other words, that the accumulated rain water entered the basement through an opening caused by the windstorm, and caused the damage complained of; that the storm was the cause and the defendant is liable for all damage that followed.

The defendant, on the other hand, contends that the damage to plaintiffs' merchandise was not caused by windstorm, but was caused by pressure of water which had accumulated against the rear wall and door of the plaintiffs' store, not only from the rain but from the thawing of large quantities of snow, and that the pressure of water against the rear door was the cause of the breaking in of the door and the consequent damage. The defendant also claims that the

policy did not cover damage from accumulated surface water, in any event.

A brief summary of the testimony of the witnesses in the order of presentation is as follows: The testimony of Arthur Unobskey shows that he was awakened at about 4 A.M. by a terrific wind and rain storm, and he immediately called his manager, Holland, to look the store over. At 4:15 A.M. Holland reported everything in proper order and condition. At 4:30 A.M. Holland reported that the basement door had broken in and the basement was being flooded. Mr. Unobskey went to the store and found that damage to the door was a broken latch or hasp that had torn out, and permitted the door to open and the outside water to pour into the basement, breaking the inside basement door.

Edgar C. Camick, in charge of U. S. Weather Bureau in Eastport eighteen miles away, who recorded the weather conditions that morning from 1 to 5 A.M. said that the wind reached the maximum velocity of 44 miles, and for one minute at 3:17 A.M. reached 49 miles; that at 44 miles per hour it would be considered "gale force." Frank C. Holden, mechanical engineer, who qualified as an expert on strains and stresses through wind and water pressure, stated that a wind velocity of seventy miles per hour or 300 pounds pressure would be necessary to cause failure of this latched door, and that a depth of water of 28½ inches would produce a force of 300 pounds.

Morris Holland, uncle of the plaintiffs and store manager, lived in apartment over the store, and at 4 A.M. received a call from one of the plaintiffs, went down around and looked store over. Everything in good order, until a few minutes after, or about 4:30 A.M. when he heard terrific crash and found water rushing into the basement through the broken outside door and broken inside door. The basement was very quickly filled. "The wind was

steady and pretty hard and I had to hang to building to get in." He described outside door and sill, the sill being seven inches higher than first step. The water was then up to the sill. Frank Frost, manager of a Calais bank, lives 500 yards from Unobskey store. He heard a crashing sound before daylight. It was one of the worst windstorms he had ever seen. The wind tore off shingles. Roy L. Waite, manager of St. Croix Electric Company said that the storm caused no serious damage to power lines but caused considerable trouble through disrupting circuits, and tree branches falling and breaking wires. The snow disappeared during the night and streets were very wet. It was an unusual storm.

Byrne O'Neil, Street Commissioner, had a duty to clear catch basins, and went around at 4 A.M. in Unobskey parking space. Rear door of store was then all right. Depth of water (on slightly higher ground) at 25 feet distant from Unobskey store then about 8 inches in parking place. One and one-half hours later he saw the Unobskey door open. Some limbs of trees blown down. His own storm door blown off. Water everywhere in large quantities—running down street and between houses and over the parking lot. Parking lot was only place for water to go as it came down the streets and the land above. Weather warm, rainy, wind blowing, snow melting. Between 9 and 11 catch basins were within 300 feet of each other and 300 feet from the store. Two catch basins on the lot itself. The catch basins and sewers could not take care of the large amounts of water. Arthur Kallenberg, manager of State Theatre adjoining Unobskey store, visited his theatre about 7:30 A.M. Not much water in theatre. Some water came through walls into theatre but sump pump cleared it. Lewis E. Kenison, civil engineer, testified that all the terrain sloped upward from Unobskey lot. He was awakened at 5 A.M. Extraordinary downpour of rain and exceptionally strong wind. There had been six to nine inches of snow on the ground which

had melted during the storm. Great quantities of water ran in streets.

Philip Hollingdale, the manager of adjoining A. & P. store, said that at 7 A.M. there was water in his store and 8 to 10 inches in the cellar. There was mud also. The water and mud came in under the back door from the parking lot. Ruth Goode and Ella M. Lowther who lived in nearby houses on higher ground than the parking lot, testified to high wind and much rain, and that torrents of water were running down the streets toward the parking lot.

Harry P. Tracy, the Chief of Fire Department, called out at about 5 A.M. with complaints of flooded cellars. A call came from Mr. Unobskey requesting a pumper. Water running in neighboring streets 18 inches deep in places. "Flood conditions" in the highways. Pumped out Unobskey basement into Main Street with "500 gallon pumper." On back wall of Unobskey store there was a "silt line" or water line plainly marked and "quite noticeable." The line was also on Unobskey back door which had been forced open. The line was up to the windows. The same line was on the theatre wall also. Tracy arrived at about 6 A.M. There was much water in parking space but "we got around all right in our boots." John F. Marquis, insurance adjuster, went with John A. Strossman, branch insurance manager, to Unobskey store on March 23rd. They had photographs made, and testified to the silt line they observed. The water mark, or silt mark, on the door which was broken in was 28½ inches above the top of cement sill. The sill was 4 inches above the ground.

It is the well recognized rule that in the interpretation of a policy of insurance it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity. *Barnes* v. *Insurance Co.*, 122 Me. 486, 491; *McGlinchey* v. *Fidelity and Casualty Co.*, 80 Me. 251. This doctrine, however, is not applicable unless there

is ambiguity in the terms of the policy. The terms of the policy are to be taken and understood in ordinary sense. *Lunt et al.* v. *Fidelity and Casualty Co.*, 139 Me. 218, 223.

The terms of a policy cannot be enlarged or diminished by judicial construction. The function of the court is not to make a new contract, but to ascertain the meaning and intention of that actually made. *Johnson* v. *Insurance Co.*, 131 Me. 288. A contract of insurance like every other contract must receive a reasonable construction. *Wheeler* v. *Phoenix Indemnity Co.*, 144 Me. 105, 65 Atl. (2nd) 10.

The questions presented for determination appear to be (1) Was this storm of March 9, 1950 a "windstorm" within the meaning of the policy? (2) Was the breaking in of the door caused by wind? (3) Was this a "direct loss by windstorm?"

When the policy and the endorsements on the policy, in this case, are carefully examined, it very clearly appears that the plaintiffs were insured against "fire," and that the "policy is extended to include direct loss by windstorm." It is not extended to rainstorm, or to snowstorm. It is windstorm. It is also specifically stated that the defendant company "shall not be liable *** for tidal wave, high water or overflow whether driven by wind or not." The company insured against nothing except "rain, snow, sand or dust" and then only when "the property insured shall first sustain an actual damage to roof or walls by the direct force of wind *** and then shall be liable for loss to the interior of the building, or the insured property therein, as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind."

The evidence presented by this record satisfies the court that this storm of March 9, 1950 was a "windstorm" and within the meaning of the provisions of the policy. The wind was unusual, and at times of "gale force."

When we consider the breaking of the outside door, we are confronted, however, with a most troublesome question. Was the cause high wind or was it high water? The evidence before us on this is to the effect (1) a strong wind at about, or just before the time of the breaking away of the bolt or latch; (2) the noise of a crash; (3) so much water which must have been against the door that when the door opened the inside door was "smashed" by force of the rushing water, and the entire basement flooded in a very short time; (4) that the inside door was broken by force of water alone, no wind was inside the building; (5) "within half or three-quarters of an hour the cellar was full up to the beams;" (6) the testimony regarding the silt line, or silt deposit, on the walls, windows, and broken door, 28½ inches above the sill; (7) the testimony of Holden, plaintiffs' witness, which indicates that from his examination and experiments the wind might not have blown the door open unless it reached a velocity of 70 miles an hour, and that the water might have forced it; (8) the lack of evidence showing that the wind was blowing in gusts, or was blowing towards the door, at, or about the time, the bolt was torn out; (9) some testimony indicating that the wind was lessening in force at the time the door was broken open, and that the depth of water was increasing.

It is probable that all available evidence has been discovered and offered, but from the evidence which was presented, the court can only guess why the door opened when it did open, and can only speculate on whether the dominant cause was wind or water. It may have been due to either cause, and it may have been jointly or equally due to both causes. The proof is lacking from which even a satisfactory probability can be determined.

It is of course true, that if this windstorm had not occurred, and if there had been no heavy rain, and if the sewers had been sufficient, there could have been no damage done to the stock in the basement. The policy did not insure

against all eventualities. There must be proof in the first instance, under the terms of the contract, that the building suffered actual damage in roof or walls by direct force of wind, and not some other force not expected or provided for. This proof is not in the record. See *Gelber* v. *Paramount Fire Ins. Co.* (Mo.), 219 S. W. (2nd) 871.

Conjecture, choice of possibilities, or quantitative probability is not proof. "There must be something more to lead a reasoning mind to one conclusion rather than to the other." *McTaggart* v. *Railroad Co.,* 100 Me. 223, 230; *Mosher* v. *Smithfield,* 84 Me. 334; *Edwards* v. *Express Co.,* 128 Me. 470. There is nothing for consideration when a decision can only be based on conjecture. *Sulphur Railroad, Terminal Co.* v. *Gas Light Co.,* 135 Me. 408; *Tibbetts* v. *Central Maine Power Co.,* 142 Me. 190.

If we should assume (which the submitted proof does not warrant) that the door was broken by combined force of wind and water and that the wind was the dominant cause, then there could be a recovery for the damage to the door. The contract of insurance contemplated, in addition to this damage, only the damage caused by rain that directly entered the building through the broken door. It did not cover the damage caused by running surface water from rainstorm and melting snow, that overflowed the catch basins and the parking area. See *Parish* v. *County Fire Ins. Co.,* 126 A. L. R. 703 (Anno.), 134 Neb. 563, 279 N. W. 170.

Judgment for Defendant.

WALDO S. O'DONNELL, PETITIONER

RE: CONTRACT CARRIER SERVICE

Kennebec. Opinion, January 31, 1952.

Public Utilities. Exceptions.

Where there is substantial evidence to support the factual findings of the Public Utilities Commission the findings are final.

The exercise of discretion by the Public Utilities Commission, in the absence of an abuse thereof, is not reviewable on exceptions.

ON EXCEPTIONS.

On exceptions certified from the Public Utilities Commission under R. S., 1944, Chap. 40, Sec. 66. Exceptions overruled. Case fully appears below.

Wilfred A. Hay, for petitioner.

Hutchinson, Pierce, Atwood & Scribner,

Sumner Clark, for Maine Central R. R. Co.

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

NULTY, J. On Exceptions certified from Public Utilities Commission under Section 66, Chapter 40, R. S., 1944.

The petitioner, Waldo S. O'Donnell, is engaged in the business of transporting freight and merchandise for hire in contract carriage by motor vehicle. He holds a permit issued by the Public Utilities Commission authorizing the transportation of coal, asphalt or tar mix, rock, sand and gravel from certain designated places in Maine to other places specified in the said permit. He seeks further authority to transport bulk cement from points in Maine to road, bridge and mixing plant and construction jobs at points in Maine.

Due notice was given by the Commission and a public hearing on the petition was held at which the Maine Central Railroad Company appeared as a protestant. After hearing, the Commission denied the petition, the finding, order and decree being as follows:

> "We find from the evidence presented that the petition of Waldo S. O'Donnell should be denied.
>
> It is therefore, Ordered, Adjudged and Decreed
>
> That the petition of Waldo S. O'Donnell for authority to transport bulk cement as hereinbefore set forth be, and the same hereby is, denied."

The Bill of Exceptions contains the three following exceptions which were allowed:

> "To the aforesaid finding, and to the order and decree of the Public Utilities Commission based thereon, the petitioner excepts, on the ground that the aforesaid finding, order and decree thereon are erroneous in law in these respects, namely: *that there was no substantial evidence to support said finding, order and decree; that the said finding, order and decree are contrary to the evidence and the applicable law; and that said finding, order and decree are an arbitrary exercise by the Public Utilities Commission of the discretionary power vested in it by Section 21, paragraph III of Chapter 44 of the Revised Statutes relating to the issuance of permits to contract carriers.*" (Underlining ours)

This court has very recently, on two occasions, pointed out to the profession its duties and powers in cases coming before it on exceptions to rulings of the Public Utilities Commission. See *Public Utilities Commission* v. *Gallup* (1949), 143 Me. 290, 62 A. (2nd) 166, and *Public Utilities Commission* v. *Johnson Motor Transport,* 147 Me. 138, 84 A. (2nd) 142. It should not be necessary to repeat them at length except for the fact that they still appear to be somewhat misunderstood in certain particulars.

We said in *Hamilton* v. *Power Co.* (1922), 121 Me. 422, 423, 117 A. 582, 583, and many times since in other cases with respect to the Public Utilities Commission and the power of review of its findings by this court:

> "Acting within its powers, its orders and decrees are final except as a review thereof by the regularly constituted courts is authorized under the Act creating the Commission.
>
> "Such and the only power of review is found in R. S., Chap. 55, Sec. 55, as amended by Chapter 28, Public Laws 1917," (now R. S. Chap. 40, Sec. 66) "and relates only to questions of law. 'Questions of Law may be raised by alleging exceptions to the rulings of the Commission on an agreed statement of facts, or on facts found by the Commission.'
>
> "The facts on which the rulings of the Commission are based must be either agreed to by the parties or be found by the Commission. Facts thus determined upon are not open to question in this court, unless the Commission should find facts to exist without any substantial evidence to support them, when such finding would be open to exceptions as being unwarranted in law."

We also said *In Re Samoset Company* (1926), 125 Me. 141, 143, 131 A. 692, 693, with respect to the rules of procedure governing bills of exceptions:

> "This court desires to further add, that the form of a bill of exceptions in such cases should, so far as possible, conform to the practice in the courts of law, Sec. 59, Chap. 55, R. S.," (now Sec. 70, Chap. 40, R. S. 1944) "*Hamilton* v. *Water Co.*, 121 Me. 422; 117 A. 582, and should be a summary statement of the contentions of the excepting party and, without referring to other documents or the evidence, except in cases where it is claimed that facts were found without any evidence, should show wherein the excepting party was aggrieved by the alleged ruling."
>
> * * * * * * * * * *
>
> "This court has no power, as it is requested to do in brief of counsel, to review the entire pro-

> ceedings before the Commission. It is expressly precluded from reviewing the findings of fact, unless they are made without any evidence to support them. It cannot review the judgment of the Commission as to public policy or the discretion vested in it under this statute. *Maine Motor Coaches, Inc.* v. *Public Utilities Commission,* 125 Me. 63, 130 Atl. 866; *Hamilton* v. *Water Co.* supra."

We said in *Public Utilities Commission* v. *Gallup, supra,* at Page 293:

> "The power of this court to review proceedings of the Public Utilities Commission on exceptions is conferred upon it by R. S. Chap. 40, Sec. 66."

This section provides that questions of law may be raised, viz., by alleging exceptions to the ruling of the Commission (1) "on an agreed statement of facts," (2) "or on facts found by the Commission,". In discussing this question in *Public Utilities Commission* v. *Gallup, supra,* we said at Page 295:

> "before an exception can be taken of which this court will have cognizance, there must either be an agreed statement of facts, or facts found by the Commission, and a ruling upon the one or the other as the case may be. The ruling thus referred to, therefore, must be the final ruling which disposes of the case. In other words, the exceptions which are to come before this court are to the ruling, to wit, the order or decree of the Commission upon the facts in the case. It is this ruling which we must find erroneous in law before we can sustain exceptions thereto."
>
> * * * * * * * * * *
>
> "It is to such erroneous rulings (orders or decrees) made upon either agreed statements of facts or facts found by the Commission and, *to such rulings only,* that the statutory right of exception is given."

We said in *Gilman* v. *Telephone Co.*, 129 Me. 243, 248, 151 A. 440:

> "Questions of fact pertaining to a case are for consideration and decision by the Public Utilities Commission.
>
> "If a factual finding, basic of an order of the Commission, is supported by any substantial evidence, that is, by such evidence as, taken alone, would justify the inference of the fact, the finding is final. *Hamilton* v. *Caribou, etc., Company,* 121 Me. 422, 424. Here, as with a jury verdict, a mere difference of opinion between court and commission, in the deductions from the proof, or inferences to be drawn from the testimony, will not authorize the disturbance of a finding.
>
> "On the other hand, whether, on the record, any factual finding, underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions. *Hamilton* v. *Caribou, etc., Company,* supra."

With the principles heretofore enunciated, we come now to the three exceptions. The first two exceptions are similar and will be considered together. In substance they assert the claim that there was no substantial evidence to support the finding, order and decree and that the finding, order and decree are contrary to the evidence and the applicable law. These two exceptions really mean that the Commission found facts to exist without any substantial evidence to support them and, in accordance with our decisions, particularly *Hamilton* v. the *Power Company, supra,* this finding would be open to exceptions as being unwarranted in law. These two exceptions have no merit. They are controlled by the decision in *Gilman* v. *Telephone Co., supra,* and the cases cited herein and many others. It does not seem necessary for this court to analyze and minutely review the evidence upon which the findings by the Commission were based because in our opinion, after a careful examination of the record and the findings of fact by the Com-

mission, we are satisfied that there was substantial evidence to amply support the factual findings of the Commission and under our decisions cited herein the findings are final and cannot be disturbed.

Having disposed of the first two exceptions, we come now to the third which is:

> "that said finding, order and decree are an arbitrary exercise by the Public Utilities Commission of the discretionary power vested in it by Section 21, paragraph III of Chapter 44 of the Revised Statutes relating to the issuance of permits to contract carriers."

The applicable part of said Par. III provides:

> "No application for a permit shall be granted by the Commission until after a hearing, nor shall any permit be granted if the Commission shall be of opinion that the proposed operation of any such contract carrier will be contrary to the declaration of policy of Sections 17 to 30, inclusive, - - - -."

It is apparent from this last quoted statute that the Legislature has given the Public Utilities Commission the function of utilizing its discretion in matters coming before it such as operating motor trucks for hire on the highways of our State. That function, by the language of the statute, is a discretionary grant of power and is imposed upon the Commission and not upon the court. It is a clear legislative delegation of discretion and unless that discretion is abused by the Commission this court has no power to intervene and it is not reviewable on exceptions. See *Maine Motor Coaches, Inc.* v. *Public Utilities Commission, supra; Hamilton* v. *Water Co., supra.* The same law is applicable to the action of a single justice and we recently held in *Sard* v. *Sard,* 147 Me. 46, 53, 83 A. (2nd) 286:

> "When the law invests the justice with the power to exercise discretion, that exercise is not reviewable on exceptions."

The same rule enunciated in the *Sard* case is applicable to the Commission with respect to its power to exercise discretion and the reviewability of the same on exceptions. An exception, based upon the discretionary power of the Commission, has no merit unless the ruling so made raises a question of law or shows a clear abuse of discretion. An examination of the record convinces us that the opposite is true in this case.

Exceptions overruled.

Murchie, C. J., did not sit.

EVERETT W. BARTLETT

vs.

RICHARD A. CHISHOLM ET AL.

Cumberland. Opinion, January 31, 1952.

Exceptions. Amendments. Brokers.

PER CURIAM.

This case comes before us for the second time, this time on exceptions by the defendant to the allowance of a motion to amend the writ and declaration filed by the plaintiff after the decision of this court in the same entitled action reported in 146 Me. 206; 79 A. (2nd) 167. In the original writ and declaration, plaintiff failed to allege that he was a duly licensed and qualified real estate broker under the laws of Maine and this court held that under and by virtue of R. S., Chap. 75, Sec. 7, relating to the Maine Real Estate Commission, the plaintiff cannot recover in an action seeking payment of 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; and that said allegation required by statute must appear of record to perfect jurisdiction.

Upon the filing of plaintiff's motion to amend the defendants' raised two objections, claiming that the court had no jurisdiction to allow the amendment and that if it did it was an abuse of discretion not to impose terms. The court allowed plaintiff to amend and imposed no terms and defendants' exceptions were filed and allowed and without further hearing or proceedings on the merits the exceptions were certified and have been brought forward to this court.

The exceptions must be dismissed as prematurely brought forward but inasmuch as they raise questions, the answers to which may be helpful if further appellate proceedings are contemplated by either party, we will, under the circumstances, consider them.

We said in *Mansfield* v. *Goodhue,* 142 Me. 380 (1947), 53 A. (2nd) 264, in speaking of an amendment seemingly necessary for failure of the plaintiff to allege that he was a duly licensed broker at the time the cause of action arose:

> "Yet if a court has jurisdiction of the subject matter, it may in such a case as this allow an amendment to perfect the jurisdiction on the record. *Merrill* v. *Curtis,* 57 Me. 152. See *Perry* v. *Plunkett,* 74 Me. 328, 331, 1 Enc. Pl. & Pr. 511; 49 C. J. 505; 41 Am. Jur. 498."

So far as the exception of the defendants relates to abuse of discretion, we see no merit in it.

The matter of expediency of amendment, in fact the whole matter of the imposition of terms or no terms, is in the discretion of the court and the real test is, does the proposed amendment further justice. To this exercise of the court's discretionary power exceptions do not lie. See *Clapp* v. *Balch,* 3 Me. 219; *Harvey* v. *Cutts,* 51 Me. 604;

Cameron v. *Tyler,* 71 Me. 27; *Flint* v. *Comly,* 95 Me. 251, 49 A. 1044. We said in *Bolster* v. *China,* 67 Me. 551, 553:

> "There is no limit upon the judge's discretion as to terms. - - - - - The object of the rule is simply to call the judge's attention to the question, what, if any, terms shall be imposed, as liable to be affected by the character of the proposed amendment, and the progress the case has made. The exercise of his discretion will not be examined, on exceptions, by this Court. - - - - - -"

See also *Hayford* v. *Everett,* 68 Me. 505, 508.

We said in *Hashey* v. *Bangor Roofing & Sheet Metal Co.,* 142 Me. 405, 406, 50 A. (2nd) 916, which was an action involving amendments to the declaration which were allowed over the objections of the defendant and exceptions taken and certified:

> "The exceptions must be dismissed as prematurely brought forward. The mandate of the statute is clear that allegations of error as to the disposal of pleadings of a dilatory nature are not determinable in this court until after the close of the trials to which they relate. R. S. 1944, Chap. 94, Sec. 19; *Day v. Chandler et al.,* 65 Me., 366; *Cameron* v. *Tyler,* 71 Me., 27; *Smith* v. *Hunt,* 91 Me., 572, 40 A., 698; *Copeland v. Hewett et al.,* 93 Me., 554, 45 A., 824; *Gilbert* v. *Dodge,* 130 Me., 417, 156 A., 891; *Augusta Trust Co.* v. *Glidden et al.,* 133 Me., 241, 175 A., 912. It has been indicated heretofore that the test determining whether a ruling on a pleading may be brought to this court immediately or should await the close of the trial, i. e. whether the pleading is dilatory in nature, hinges on the issue whether it is 'adverse to the proceeding.' *Hurley* v. *Inhabitants of South Thomaston,* 101 Me., 538, 64 A., 1050; *Augusta Trust Co.* v. *Glidden et al,* (133 Me., 241, 175 A., 912)."

The mandate will be

Exceptions dismissed
from the law docket

James A. Connellan, for plaintiff.

Berman, Berman & Wernick, for defendant.

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

JEANETTE ROBITAILLE

DONALD ROBITAILLE

vs.

MAINE CENTRAL RAILROAD CO.

(TWO CASES)

Kennebec. Opinion, February 6, 1952

Negligence. Trespassers. Invitees. Private and Public Ways.

To the trespasser or licensee the duty is to refrain from wanton, wilful or reckless acts of negligence. To the implied invitee the duty is to make the premises reasonably safe or to give suitable warning of a dangerous condition, or in brief, to use due care.

A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway, is subject to liability for bodily harm caused to them while using such part as a highway, by his failure to exercise reasonable care to maintain it for a reasonably safe condition or travel.

Jerome G. Daviau, for plaintiffs.

Perkins, Weeks & Hutchins, for defendant.

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

WILLIAMSON, J. These tort actions are before us on exceptions to the direction of verdicts for the defendant.

At about 11 o'clock on the night of October 8, 1949 the plaintiff, Mrs. Robitaille, with two companions, was driving her husband's automobile southeasterly along Chaplin Street in Waterville on her way to the Hotel James, located on the west side of the street. At a point near the Hotel she turned right from the street and took a short cut across land of the railroad to the parking area in the rear of the Hotel, skirting the east end of a freight loading platform.

Fifteen minutes later, on leaving the Hotel, Mrs. Robitaille, in attempting to return to Chaplin Street, drove at least forty feet to the adjoining land of the railroad and then in a general northerly direction forty-six feet up a ramp and over the edge of the freight loading platform onto the track four feet below. There were no signs, barriers or lights to indicate the ramp, platform or track.

Mrs. Robitaille sues for personal injuries and her husband, who was not in the car at the time of the accident, for damage to his car. Mrs. Robitaille alleges (1) that she was an implied invitee, (2) negligence on the part of the defendant and (3) her own due care. Her husband makes like claims, except that he says negligence on the part of his wife would not bar recovery in his action.

The first question, and as we shall see the decisive question, is whether the evidence would have warranted a finding by the jury that Mrs. Robitaille was induced, and thus impliedly invited, by the railroad to enter its premises. In considering the exceptions we will take the evidence and inferences therefrom in the light most favorable to the excepting party. Among the cases in which the rule recently has been stated and applied are: *Bolduc* v. *Therrien,* 147 Me. 39, 83 A. (2nd) 126; *Hultzen* v. *Witham,* 146 Me. 118, 78 A. (2nd) 342; *Bernstein* v. *Carmichael,* 146 Me. 446, 82 A. (2nd) 786; *Cantillon* v. *Walker,* 146 Me. 160, 78 A (2nd) 782.

The duty owed by the railroad to Mrs. Robitaille was determined by her status. Unless there was a violation of a duty owed to her there could be no recovery.

To the trespasser or licensee the duty was to refrain from wanton, wilful or reckless acts of negligence. To the implied invitee the duty was to make the premises reasonably safe or to give suitable warning of dangerous conditions or, in brief, to use due care. *Dixon* v. *Swift,* 98 Me. 207, 56 A.

761; *Parker* v. *Portland Publishing Co.*, 69 Me. 173, 31 A. R. 262; *Campbell* v. *Portland Sugar Co.*, 62 Me. 552, 16 A. R. 503; *Stanwood* v. *Clancey*, 106 Me. 72, 75 A. 293, 26 L. R. A. NS 1213; *Kidder* v. *Sadler*, 117 Me. 194, 103 A. 159; *Foley, Malloy* v. *Farnham Co.*, 135 Me. 29, 188 A. 708; *Collins* v. *Maine Central Railroad Co.*, 136 Me. 149, 4 A. (2nd) 100; *Willey* v. *Maine Central Railroad Co.*, 137 Me. 223, 18 A. (2nd) 316; *Sweeny* v. *Old Colony and Newport Railroad Co.*, 92 Mass. (10 Allen) 368; 38 Am. Jur. 754, 758, 765, 771; 65 C. J. S. 438, 491, 521.

It is apparent, and indeed there is no contention otherwise, that the railroad violated no duty to a trespasser or licensee simply in maintaining a track and raised platform on its own premises. Unless, therefore, a jury could have found that Mrs. Robitaille was an invitee, it will be unnecessary to consider the other allegations by the plaintiffs.

There is no claim that Mrs. Robitaille was expressly invited by the railroad or was impliedly invited for the mutual benefit of the railroad and herself. Mrs. Robitaille was a patron of the hotel. She had no business with the railroad.

Plaintiffs' argument comes to this: Mrs. Robitaille was induced to enter the premises of the railroad in the belief that she was present where, as a member of the public, she had a right to be.

The principle is stated in *Plummer* v. *Dill*, 156 Mass. 426, 31 N. E. 128, 32 A. S. R. 463 as follows:

> "There is a class of cases, to which Sweeny v. Railroad Co. (supra), and Holmes v. Drew, 151 Mass. 578, 25 N.E. Rep. 22, belong, which stand on a ground peculiar to themselves. They are where the defendant, by his conduct, has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement or implied invitation in these cases is not to come to a place of business fitted up by the

> defendant for traffic to which those only are invited who will come to do business with the occupant, nor is it to come by permission or favor or license; but it is to come as one of the public, and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability of such a case should be coextensive with the inducement or implied invitation."

For the *Sweeny* case, we may substitute *Collins* v. *M. C. R. R. Co., supra,* and for the *Holmes* case, *Leighton* v. *Dean,* 117 Me. 40, 102 A. 565, L. R. A. 1918B 922.

There was evidence that for many years the public had passed between Chaplin Street on the east and Main Street on the west, by which the railroad land was bounded, (1) over the premises of the railroad and in particular over the ramp and platform, and (2) over the premises south of the railroad land and in particular along the north line of the hotel and other lots in the area with which we are concerned.

It will serve no useful purpose to consider the evidence on this point in detail. Fairly considered, it discloses no more than a use without objection. A finding that the use was of right, and not by license or permission of the owners or occupiers of the land, would have no reasonable basis in the evidence.

A jury could also have found the surface of the premises west of Chaplin Street, including the ramp, platform, and the parking area, was substantially like that of a graveled highway. The inference was not, however, permissible therefrom that the railroad induced or allured the driver of the car upon its land.

Mrs. Robitaille, in substance, testified that at no time did she observe the track, platform, or ramp, or indeed know of their existence. For a short distance at least she traveled from Chaplin Street upon the way designed by the railroad

for use of business visitors in reaching the ramp and platform. From the photographs it is apparent that this way formed no part of Chaplin Street. Mrs. Robitaille knew, or must be charged with knowledge, that on turning from Chaplin Street to approach the parking area in the rear of the hotel she was leaving the public street.

There was nothing from that moment until the accident to lead her to believe that she was again upon a public street or way. At best, in explanation of her accident, Mrs. Robitaille could have believed she was upon the hotel parking lot when she drove over the edge of the platform.

> "The test is whether an intelligent and prudent person would understand there was an invitation to use private land as a public way." *Leighton* v. *Dean,* supra.

The rule of inducement or allurement was well stated in *Beckwith* v. *Somerset Theatres, Inc.,* 139 Me. 65 at 69, 27 A. (2nd) 596 at 598 in these words:

> "If a person so surfaces and maintains his land abutting on a public highway as to indicate to the traveling public that such land is included in and is a part of such highway, with no sufficient warning to the contrary, he impliedly invites or allures travelers lawfully on the highway to drive over that land as if it were a part of such highway, provided such travelers did not know that the land was private property. In such circumstances, the travelers would not be trespassers on the land, but invitees, to whom the land owner owes the duty of keeping it in a reasonably safe condition for such travel."

The present cases do not fall within the principle governing the *Beckwith* case. Mrs. Robitaille entered the railroad land not from an abutting highway but from an abutting parking lot. She cannot successfully urge that she thought, or had reason to think, that she was entering Chaplin Street

or any other public way when she drove upon the railroad's land.

The railroad did not create the appearance of a public way. This is not the case of a street railroad crossing as in *Collins* v. *M. C. R. R. Co., supra,* or the continuation of a public street as in *Williamson* v. *Southern Ry. Co.,* 42 Ga. App. 9, 155 S. E. 113, a case cited in plaintiffs' brief.

In Restatement on Torts, Negligence, Sec. 367, we find the rule in these words:

> "A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway, is subject to liability for bodily harm caused to them while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel."

See also annotations 14 A. L. R. 1397, 159 A. L. R. 136 at 142, 174 A. L. R. 471 and 476.

The jury could not have found Mrs. Robitaille was an invitee on the railroad's premises. It follows that she was a trespasser or licensee and that the railroad violated no duty owed to her or her husband. There is no necessity, therefore, for considering the other issues presented by the plaintiffs.

The entry in each case will be

Exceptions overruled.

JAMES M. ACHESON ET AL.

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, February 20, 1952.

Sales Tax. Exemptions. Statutes.

Section 10, subsection VII-A of chapter 250 of P. L., 1951 which exempts coal, oil, wood and other fuels (except gas and electricity) "used for cooking or heating for domestic purposes" includes all such fuel used for such purposes in a hotel and the exemption is not limited to rooms actually occupied by guests, nor to such rooms only as are occupied by guests who remain for four consecutive months or longer.

The fundamental rule of statutory construction is to ascertain and carry out the legislative intent.

"Domestic purposes" has a much broader significance than "household or family" and in the legislation in question are used in contra-distinction to purposes as "trade, manufacturing, industrial, and commercial."

ON REPORT.

On abatement the State Tax Assessor declined to abate taxes under the Sales and Use Tax Law. Appeal was filed with the Superior Court. The case comes to the Law Court on report with agreed statement from the Superior Court. Appeal sustained. Judgment for appellants. Tax abated. Case remanded to Superior Court for decree in accordance with this opinion. Case fully appears below.

Sanford L. Fogg, for appellant.

Boyd L. Bailey, Assistant Attorney General,
Miles P. Frye, Assistant Attorney General, for appellee.

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

FELLOWS, J. This is an appeal by James M. Acheson and Mary L. Acheson doing business as Capital City Hotel Co. (Augusta House) from the decision of Ernest H. Johnson, State Tax Assessor declining to abate taxes under the Sales and Use Tax Law. The case comes to the Law Court from the Superior Court for Kennebec County on report with agreed statement of facts.

The agreed facts are: James M. Acheson and Mary L. Acheson, doing business as Capital City Hotel Co., on July 1, 1951, and ever since, have operated the Augusta House, a year-round hotel open to the public, in Augusta, Maine. Neither of the appellants makes his home in the hotel. During the month of July, 1951, they purchased from Purinton Bros. Co., fuel dealers in Augusta, 16.82 tons of coal, for use in the hotel, at a price of $15.15 a ton, the total bill for the same being in the amount of $254.82. The Achesons furnished Purinton Bros. Co. a certificate stating that the coal was to be used for cooking or heating for domestic purposes and that its purchase was exempt from the sales and use tax. Such exemption certificates are authorized by the State Tax Assessor for use in certain cases and when taken in good faith relieve the seller from the duty of collecting a sales tax. The Achesons paid for the coal so purchased but neither they nor any one else has paid to Purinton Bros. Co. or to the State of Maine, any sales or use tax, or any part thereof, on the purchase of coal.

The coal was delivered to the Augusta House and was there used to heat the entire hotel building, including the lobby, dining room, halls, cocktail lounge, kitchen, lavatories, banquet rooms, bedrooms, suites and service rooms. A very small percentage of the coal was used for cooking in the hotel, most of the cooking there being done by electricity, with the exception of steam pressure cookers and coffee mak-

ers run by steam from the boilers. The heating and cooking is done for employees, as well as guests of the hotel whether there for one meal, one day, or longer. Some guests live in the hotel the year round, while others are there for but one meal or longer.

Pursuant to claimed authority granted by Section 20 of the Sales and Use Tax Law, Ernest H. Johnson, in his capacity of State Tax Assessor, on July 27, 1951 made the following ruling:

> "Fuel consumed in heating those portions of any hotel which are customarily occupied for a period of four (4) months or longer by individuals will be considered as used for domestic purposes. Fuel consumed in heating other portions of hotels, including rooms normally occupied by persons remaining for less than four (4) months at a time, will not be considered as used for domestic purposes. That portion of the fuel, other than gas and electricity, purchased by a hotel and used for domestic purposes, as noted above, would not be subject to the sales tax."

Pursuant to said ruling of July 27, 1951, the State Tax Assessor has determined that 15% of the amount of the coal used in July, 1951, was exempt from the sales or use tax, as having been used for, or intended for, heating for domestic purposes, and that the remaining 85% was subject to use tax at the rate of 2%, in a total amount of $4.33. On August 28, 1951, the State Tax Assessor assessed a use tax against the appellants in the sum of $4.33, served them with notice thereof and made demand upon them for payment.

The above percentages were arrived at from figures furnished to the State Tax Assessor by the Augusta House, based on the calendar year 1950 which was used as the base period. The correctness of the percentages arrived at by applying the State Tax Assessor's ruling to the figures is not in dispute. But the appellants contend that the ruling

itself, and the tax assessed pursuant thereto, is erroneous, unreasonable and not consistent with Section 10, subsection VII-A of Chapter 250, P. L., 1951, in that coal, oil, wood and other fuels (except gas and electricity) used for cooking or heating for domestic purposes within the meaning of said subsection VII-A, includes all such fuel used for such purposes in a hotel and that the exemption is not limited to rooms actually occupied by guests, nor to such rooms only as are occupied by guests who remain for four consecutive months or longer but that it includes fuel used to heat other portions of the hotel maintained for the comfort and convenience of the guests, as well as used for cooking in the hotel.

The State Tax Assessor contends, on the other hand, that the term "domestic purposes," as used in said subsection VII-A, is to be construed narrowly and limits the application of said subsection to fuel used to heat the "domus," or living quarters of employees, or such space as is specifically billed to guests making their home in the hotel for four consecutive months or longer.

On August 29, 1951, the said James M. Acheson and Mary L. Acheson, pursuant to Section 29 of said Chapter 250, P. L., 1951, filed a petition with the State Tax Assessor for a reconsideration of his assessment of August 28, 1951, requesting that said tax, assessed as aforesaid, be abated. Said petition did not request oral hearing.

On August 29, 1951, the State Tax Assessor considered said petition for consideration and abatement of tax and rendered his decision thereon, refusing to abate said tax, and on that same day he notified petitioners of his decision on said petition.

On August 30, 1951, the said James M. Acheson and Mary L. Acheson, pursuant to Section 30 of said Sales and Use Tax Law, appealed to the Kennebec Superior Court, October

Term, 1951, said appeal having been served on the State Tax Assessor and entered in court on that same day, to wit, August 30, 1951.

The sole issue on said appeal is whether the exemption contained in Section 10, subsection VII-A of Chapter 250, P. L., 1951 is limited, as it applies to hotels, to that portion of the fuel used for heating the living quarters of guests who occupy such quarters for four consecutive months or longer, as the State Tax Assessor has ruled, or whether said exemption applies also to fuel used for heating the rooms of all guests, irrespective of the length of their stay in the hotel, as well as other portions of the hotel maintained for the comfort and convenience of its guests and to fuel used for cooking in the hotel for guests and employees, all as contended for by appellants.

By agreement of counsel, the Legislative Record of 1951 was incorporated into the agreed statement by reference.

Section 3, Chapter 250, P. L., 1951, relating to the sales tax, provides in part:

> "A tax is hereby imposed at the rate of 2% on the value of all tangible personal property, sold at retail in this state . . . measured by the sale price. . . ."

Section 4, Chapter 250, P. L., 1951, relating to the use tax, provides in part:

> "A tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property, purchased at retail sale . . . at the rate of 2% of the sale price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller . . . showing that the seller has collected the sales or use tax. . . ."

The appellants paid no sales tax under Section 3. They, therefore, owe a use tax under Section 4, unless the sale is

exempt. But appellants claim that the sale is exempt, under Section 10, VII-A:

> "Exemptions. No tax on sales, storage or use shall be collected upon or in connection with:
> VII-A. Coal, oil and wood. Coal, oil, wood and all other fuels, except gas and electricity, used for cooking or heating for domestic purposes."

Thus, if the heating of rooms used in a hotel by or for its guests, including sleeping rooms, kitchen, public dining rooms, lobby, cocktail bar, etc., is the use of fuel "for domestic purposes," the assessment is in error. If the fuel used for cooking in the hotel kitchen, whether for transient or non-transient guests, is for "domestic purposes," the assessment is in error. But if the space in question is not "domestic" and if cooking meals for the general public, including permanent residents in the hotel, is likewise not "domestic," the assessment is correct.

The fundamental rule of statutory construction is to ascertain and carry out the legislative intent. The language of the statute is "the vehicle best calculated to express the intention" but the court will "look at the object in view." *Lipman et al.* v. *Thomas,* 143 Me. 270, 273. "Some flexibility is essential in the proper interpretation of statutes." *In re Frank R. McLay,* 133 Me. 175, 177. When words used in a statute have more than one recognized meaning, the sense in which they are used by the legislature may be ascertained by a consideration of the subject matter and the object to be accomplished. "It is the spirit of the law which controls." *State* v. *Howard,* 72 Me. 459; *Tarr* v. *Davis et als.,* 133 Me. 243, 248. *Beck* v. *Corinna Trust Co.,* 139 Me. 350. Intent is sought from the language used, without supplying language or doing violence to it. Dictionary definitions are not controlling. *Donnell* v. *Joy,* 85 Me. 118; *Lyon* v. *Lyon,* 88 Me. 395, 399; *State* v. *Standard Oil Co.,* 131 Me. 63, 64. The legislature determines

what property is taxed and what is free from tax. *Greaves* v. *Houlton Water Co.*, 143 Me. 207. Whether the taxation, or exemption, is wise or unwise, is not for the court but for the legislature. *Whiting* v. *Lubec,* 121 Me. 121, 115 Atl. 896. The purpose of the legislature, if discernible from the statute, will prevail irrespective of any rule for strict construction against exemptions. *Inhabitants of Holden* v. *James,* 136 Me. 115. When a tax statute is susceptible of more than one interpretation the court will incline to the interpretation most favorable to the citizen. *Millett* v. *Mullen,* 95 Me. 400, 415; *Unemployment Commission* v. *Androscoggin et al.,* 137 Me. 154, 160. Words which have acquired a meaning through judicial definition are construed in accordance therewith. *Auburn Trust Co.* v. *Buck and Wellman,* 137 Me. 172; *Hathorn* v. *Robinson,* 96 Me. 33; *Haggett* v. *Hurley,* 91 Me. 542, 547.

The real question presented by this case involves the meaning of the words "domestic purposes" as used in this statute. The legislature has said that there is no tax on sales, storage, or use in connection with "coal, oil, wood, and all other fuels except gas and electricity, used for cooking or heating for domestic purposes." The legislature did not say "used in a home" as it might easily have said had that been its intention. It said "used" * * * "for domestic purposes." It is plain that the intent of the legislature was to exempt fuels if those fuels were used for "domestic purposes."

In its original meaning "domestic" related to home life, to household or family, but at the present time it has a much broader significance which must be determined in reference to the matter in which it appears. *Thurston* v. *Carter,* 112 Me. 361, 364. It is often used to distinguish from that which is foreign, or outside the state. It is used to distinguish from manufacturing purposes, commercial purposes, trade purposes or industrial purposes. *Paper*

Company v. *Town of Lisbon,* 127 Me. 161; *Kimball* v. *Water Company,* 107 Me. 467.

The purpose of the legislature to make an exemption of fuel used "for domestic purposes" is plain from the words themselves. "Domestic purposes" is also plain when considered in the light of prior decisions of this court, as well as in the light of the purposes of the whole tax law, indicated by other exemptions listed in Public Laws, 1951, Chapter 250, Section 10, such as food products (with certain exceptions), medicines, school meals, sales to hospitals and houses of religious worship *excepting where used in commercial enterprises.* There is no indication that the legislature intended or expected the construction contended for by the State Assessor. The legislature is presumed to know that the Court of Maine had defined "domestic" in at least two decisions many years before, and that the word "domestic" used by the legislature in this law, would probably be again so defined. The legislature could easily have said "in the home" instead of "for domestic purposes" if it intended such a construction. See *Kimball* v. *Water Company* (1911), 107 Me. 467, 469, 78 Atl., 865, and *Pejepscot Paper Co.* v. *Town of Lisbon* (1928), 127 Me. 161, 164, 142 Atl. 194.

If we consider the argument and rulings of the State Tax Assessor, he himself recognizes that a hotel may be "home." The Assessor has applied "home" to some rooms in a hotel but not to others. In his concept no place is "domestic" if the public is free to enter for a temporary stay. The Assessor says that the halls, the lobby, the dining room, etc., are public places and not used for "domestic purposes." The Assessor ruled, in this case, under this claimed statutory authority to make rules and regulations to carry this tax statute into effect (Public Laws 1951, Chapter 250, Section 20), that fuel consumed in heating the sleeping rooms of any hotel *customarily occupied by one individual for four*

months or longer is exempt. If occupied for less than four months the fuel consumed in heating would not be considered as used for domestic purposes, and would be subject to the tax. Pursuant to this ruling, the Assessor determined that 15% of the total amount of coal used in the hotel was exempt as "domestic purposes" and 85% was subject to the use tax. No objection is specifically made by the appellants to the four months ruling, or to the 85-15 percentage, although objection might well be raised. We must necessarily pass upon the validity of the ruling. It is probable that percentages may be necessary to apply to some buildings devoted to several different purposes, and proper regulations might be adopted by the Assessor, and returns made by owners or occupiers to show the use and divisions of use, which would not require expensive and actual surveys throughout the state. The legislature however, made no time limit as a criterion, and a state administrative officer has no more right to legislate than has the courts. *Anheuser-Busch, Inc. et al.* v. *Walton et al.*, 135 Me. 57.

Briefly stated, the position of the State Assessor seems to be that no fuel to heat any room in a hotel is exempt from use tax, unless that room is a usual hotel bedroom which must have been occupied by the individual for at least four months. If it is occupied for only three months and twenty-nine days it is not a "home," and is not entitled to heat free from the use tax. The position of the appellants is that a hotel is a "home," whether temporary or permanent, and fuel used therein is "for domestic purposes."

In the case of *Kimball* v. *Water Co.*, decided in 1911 and reported in 107 Me. 467, 78 Atl. 865, it was held by this court that where the charter empowered the Water Company to supply water for "domestic purposes," that the use of water to run an elevator in a hotel comes within the term "domestic purpose." The opinion by Justice Cornish states: "For what purpose is this used if not domestic? It certain-

ly is neither a trade nor an industrial purpose. The power is not employed in manufacturing or in producing any article for sale upon the market. 'Domestic' is used as the direct antithesis of commercial or industrial. The word itself, in its derivation from 'domus' a house, suggests its inherent purport. It is defined as 'belonging to the home or household, concerning or relating to the home or family,' Standard Dic.: or as Webster has it 'of pertaining to one's house or home, or one's household or family.' As water is furnished by a public service corporation to private consumers it may be used in various ways, but the purpose, whatever the method, comes within these definitions of domestic. Thus it may be used for drinking, cooking, bathing, washing, toilet, heating or sprinkling. It is not the manner of the use but its purpose which is the determining test. Is it to be used for the necessity, cleanliness, health, comfort or convenience of the house and its appurtenances or of the household? If so it is a domestic purpose. And it can make no difference whether it be a private home or a hotel, which in this sense is but a larger household, a temporary home for a greater number of people. An elevator in a private house is a convenience, in a hotel is almost, if not quite, a necessity. It promotes the personal comfort of the proprietor, his family, servants and guests. It is a domestic labor saving device and the use of water in propelling such elevator would certainly seem to be embraced in the term domestic."

"The test is an intended use which in its nature is domestic. What is the character of the purpose, not what is the character of the place of user." *Paper Company* v. *Town of Lisbon,* 127 Me. 161, 164.

It is our opinion in this case, therefore, in deciding the claims of the parties as stated in the agreed facts, that the exemption contained in Section 10, subsection VII-A of Chapter 250, Public Laws of 1951 is not limited to that por-

tion of the fuel used for heating the living quarters of guests who occupy such quarters for four consecutive months. There are no time limits. The Assessor had no authority to make time limits. The exemption applies to all fuel used for heating the rooms of all guests as well as the other portions of the hotel maintained for the use, comfort or convenience of its guests and employees.

A hotel may be a permanent home or it may be temporary. It is "a home away from home" as some hotel advertisements state. The guests are not restricted to their sleeping rooms any more than would be the invited guests in a private dwelling. The guest in this larger or "hotel home" has the right to use, and pays to use, the hall, the lobby, the dining room, and other rooms maintained for the use or comfort of guests. So too, the rooms in the hotel used and occupied by hotel servants are in "domestic" use.

The legislative intent was to include in the exemption all coal, oil, wood, and other fuels (except gas and electricity) used in a hotel for cooking or heating for "domestic purposes" and "domestic purposes" are those purposes "which in their nature are domestic." The words "domestic purposes" are used in contradistinction of such purposes as trade, manufacturing, industrial, and commercial.

Appeal sustained.

Judgment for appellants. Tax abated.

Case remanded to Superior Court for decree in accordance with this opinion.

HERMAN J. MULLEN

vs.

LEWISTON EVENING JOURNAL

Libel. Demurrer.

PER CURIAM.

The decision of this court in *Brown* v. *Guy Gannett Publishing Co.*, 147 Me. 3, 82 A. (2nd) 797, is entirely controlling of the instant case. Decision there was that a defendant, demurring to a declaration alleging that published statements were false and were published with intent to injure the plaintiff, admitted the truth of such allegations. The issue in that case was raised by defendant's exceptions to the overruling of a demurrer. We are now called upon to consider a ruling sustaining one, challenged by plaintiff's exceptions. The issue is identical, although raised in different manner.

The asserted ground for the ruling is that, in libel, "words cannot be regarded, upon demurrer to the declaration, as actionable, unless they can be interpreted as such, with * * reasonable certainty." Reliance is placed on the decision in *Wing* v. *Wing*, 66 Me. 62, 22 Am. Rep. 548. The alleged libel in that case was that the plaintiff "stole" windows from a house, and it was said that the word relied on, as used, could not be said to impute the crime of larceny. It was said, also, that where there was uncertainty as to the meaning of expressions, one resorting to an action of libel because of their use is required to make the intended meaning clear by "proper colloquium and averment."

The article now alleged to be libelous, published in a daily newspaper by the defendant, under a Waterville date line and the caption "Case Against Hallowell Man Charged with Fraud Continued," recites, in a first paragraph, that the plaintiff had entered a plea of not guilty in the Waterville Municipal Court, in a "case" charging him with "cheating

by false pretenses as the operator of a widespread 'stamp plan' of retail sales promotion," which case had been continued "to tomorrow." Seven additional short paragraphs recited his arrest, named an individual as the complainant against him, and a community bureau as the "signer" of his warrant, and recorded certain details of his "stamp plan," purporting to quote the official conducting his prosecution, in most instances.

The declaration alleges that the plaintiff had spent much time and money in developing his plan, on which he was dependent for his livelihood; that the publication of the article was made by the defendant "in reckless disregard" of the truth or falsity of the statements carried in it, "with complete lack of good faith" and "with intent to injure the plaintiff's character and reputation"; and that the injury intended had been accomplished.

Reference to the declaration discloses no allegation that the statements of the first paragraph of the published article were false, but the defendant has not plead the truth thereof, or of its supplemental statements. Its demurrer admits the falsity of many of the latter. What is more vital, perhaps, it has admitted the allegations of lack of good faith and malicious intent. Despite such admissions, it is urged in argument on its behalf that as a newspaper publisher, defendant was entitled to the privilege of publishing news concerning all prosecutions for alleged criminal offenses.

It is possible, if not probable, assuming the truth of the factual statements of the first paragraph of the alleged libel, and that all the statements in it were published in good faith, and without malice, that the plaintiff would have no remedy therefor, assuming him to be entirely free from guilt. Such, however, is not the case presented by declaration and demurrer.

Newspapers are not entitled, in commenting upon court proceedings, to publish false statements with complete lack of good faith, and with motives of personal malice, and on the record, the principle declared in *Brown* v. *Guy Gannett Publishing Co., supra,* requires that plaintiff's exceptions be sustained and defendant's demurrer overruled.

In the Trial Court the prayer of the defendant that it have leave to answer over if its demurrer was overruled was granted. The present decision carries no implication that the published article is not entitled to full protection, within the privilege recognized for a newspaper publisher on an issue properly framed. That issue can not be resolved until and unless it is raised by appropriate pleadings.

Exceptions sustained.

Jerome G. Daviau, for plaintiff.

Clifford & Clifford, for defendant.

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

AURELIE BUSQUE

vs.

NAPOLEON M. MARCOU
EXECUTOR OF WILL OF
JOSEPH BUSQUE, ALFRED BUSQUE, GASPARD BUSQUE
AND LAURA GOSSELIN

Kennebec. Opinion, March 6, 1952.

Contracts. Statute of Frauds. Wills. Marriage.

A will executed by a testator prior to marriage upon an oral agreement to do so in consideration of marriage is not a memorandum within the meaning of R. S., 1944, Chap. 106, Sec. 1, as amended by P. L., 1947, Chap. 185, where the will neither intimates nor refers to the existence of such oral agreement.

A memorandum must show within itself or by reference to some other paper all the material conditions of the contract.

Marriage alone is not a part performance upon which equitable relief can be based notwithstanding the Statute of Frauds.

Mere execution of a will in pursuance of an oral agreement is not a full performance on the part of a promisor within the doctrine that a contract fully executed cannot be abrogated because of the Statute of Frauds, since a will is ambulatory and may be revoked at any time prior to death.

ON REPORT.

This is a Bill in Equity by a widow against the executors and beneficiaries of her deceased husband's estate. The case is before the Law Court on Report upon the original bill with exhibits attached, demurrer, plea and replications. Plea sustained. Bill dismissed. Case fully appears below.

James L. Boyle,
Patricia Boyle Koons, for plaintiff.

Dubord & Dubord, for defendant.

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

MERRILL, J. On report. The issues in this case may be stated briefly as follows: Aurelie Busque, the plaintiff, is the widow of Joseph Busque. Prior to their marriage, Joseph agreed with Aurelie that if she would marry him he would "execute a last will and testament nominating her as his executor and providing that on his decease his will would bequeath and devise to her all the estate he owned at the time of his decease." On the 21st day of June, 1943, Joseph made a will substantially complying with his agreement referring therein to Aurelie as his wife-to-be. Aurelie married him the next day. On April 17, 1946, Joseph, by a will of that date revoking all former wills, after a few small bequests, including one of articles of personalty to the defendant, Gaspard Busque, bequeathed and devised to Aurelie one undivided half of the residue of his estate, and to a brother and sister, the defendants Alfred Busque and Laura Gosselin, the remainder thereof in different fractions.

The widow, Aurelie, brought a bill in equity against the executor and beneficiaries of the will claiming that the new will was a fraud upon her, and that the executor, heirs, devisees and legatees claiming any interest in real and personal property under the will of April 17th (the second will) held the same in trust for her. The defendants filed an answer with demurrer and plea inserted therein. The plaintiff filed replications to the demurrer and to the plea.

The case came on for hearing before a Justice of the Supreme Judicial Court, sitting in equity, upon bill, demurrer, plea, answer and replications thereto. By agreement of the parties it was referred by the justice to this court on "the original bill with attached exhibits, the demurrer and plea filed by the defendants and the replications to the demurrer and to the plea filed by the plaintiff, with the stipu-

lations that if the demurrer is overruled and the plea is overruled, the bill may be sustained and decree entered below in accordance with the prayers contained in the bill, otherwise such order to issue by the Law Court as the pleadings in the case may require."

The plea alleged:

> "That neither the contract which is set forth in the Plaintiff's Bill and which she thereby seeks to enforce, nor any memorandum or note thereof was ever reduced to writing or signed by the party to be charged therewith or any person thereunto lawfully authorized within the meaning of Paragraphs III and VII of Section 1, Chapter 106, Revised Statutes 1944, State of Maine, for the prevention of frauds and perjuries."

To this plea the plaintiff filed the following replication:

> "The plaintiff, in answer to defendants' plea in bar, that no memorandum or note was ever reduced to writing or signed by the party to be charged therewith, admits that there was no note or memorandum thereon given by Joseph Busque to the said Aurelie Busque, other than the will executed in favor of Aurelie Busque by Joseph Busque dated June 21, 1943, which appears as 'Exhibit A' as part of the original bill and thereto the plaintiff replies that (a) said will appearing as described in the bill followed by the marriage of the parties and by plaintiff otherwise complying with her promise as alleged made a completed transaction not within the Statute of Frauds, and (b) that the Statute of Frauds does not and never was intended to apply in a case based on facts as described in plaintiff's bill, and (c) that in pleading the Statute of Frauds in such a case based on marriage, the pleading of such statute and the invocation thereof in such a case in equity as described in plaintiff's bill would allow said statute to shield a fraud."

R. S., c. 106, § 1, as amended by P. L., 1947, c. 185, reads in part as follows:

"No action shall be maintained in any of the following cases: * * *

III. To charge any person upon an agreement made in consideration of marriage; * * *

VII. Upon any agreement to give, bequeath or devise by will to another, any property, real, personal, or mixed; * * *

unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise."

These same provisions of the statute were in effect at the time of the making of the alleged contract and the marriage.

The contract which is the foundation of the plaintiff's claim was an oral one. It was not only a contract to give, bequeath and devise property to another but it was also an agreement made in consideration of marriage. Either of these factors is sufficient to require as a condition to enforcibility by action that the contract or agreement or some memorandum or note thereof be in writing and signed by the party to be charged therewith in accord with the foregoing provisions of the statute of frauds.

The plaintiff claims, however, that *the will* executed by the testator prior to the marriage and subsequent to the agreement constitutes a sufficient note or memorandum to satisfy the requirement of the statute of frauds and to remove the bar of paragraphs III and VII thereof. This will does not have such effect. It neither refers to nor does it even intimate the existence of the agreement to make or execute the will. There is nothing in the will from which either the existence of the agreement to execute the will or the terms of such an agreement can be inferred. Without passing upon the question of whether a will may be so drawn as to constitute a note or memorandum of a contract

as required by paragraph III and VII of the statute of frauds, the will here under consideration is neither a note or memorandum of the agreement sufficient to satisfy the requirements of the statute. This is true whether one is considering either paragraph III or paragraph VII *supra.*

This court has not been called upon to determine under what circumstances, if any, a will executed in pursuance of a contract to make a will in consideration of marriage will satisfy the foregoing requirements of the statute of frauds and constitute a memorandum or note of the contract.

General principles as to the requirements of a sufficient memorandum under the statute of frauds have been enunciated by this court and are conclusive against giving such effect to the particular will here in question. We held in *O'Donnell* v. *Leeman,* 43 Me. 158 that the memorandum must show within itself or by reference to some other paper all the material conditions of the contract. We further held in *Jenness* v. *Mount Hope Iron Company,* 53 Me. 20 that the memorandum must establish the contract plainly in all its terms or it will not be sufficient; and that it can receive no aid from parol evidence. To the same effect is *Williams* v. *Robinson,* 73 Me. 186, especially at 195, and *Kingsley* v. *Siebrecht,* 92 Me. 23 at 27.

These same principles are recognized and enunciated in 49 Am. Jur. Page 636, § 322, where it is said:

> "A memorandum sufficient to satisfy the requirement of the statute of frauds must be complete in itself as to the parties charged with liability thereunder and the essential terms of the contract. The memorandum cannot rest partly in writing and partly in parol; that is to say, a deficiency in the memorandum cannot be supplied by parol evidence."

The application of the foregoing principles to the will here in question, which is a simple devise and bequest of

property to the plaintiff making no reference to any agreement between the parties with respect to the execution of the will or that the same is made in pursuance of any agreement whatever clearly demonstrates that this will is not a sufficient note or memorandum to satisfy the requirements of the statute of frauds, with respect to the contract here under consideration. *Brought v. Howard,* 30 Ariz. 522, 249 Pac. 76, 48 A. L. R. 1347, is a case directly in point.

Other cases hold that a will which fails to refer to or show a connection with the agreement or bargain in question is an insufficient memorandum under the statute of frauds. *Baker* v. *Bouchard,* 10 Pac. (2nd) (Cal.) 468, 122 Cal. App. 708; *Holsz* v. *Stephen,* 362 Ill. 527, 200 N. E. 601, 106 A. L. R. 737; *Gibson et al.* v. *Crawford,* 56 S. W. (2nd) (Ky.) 985, 247 Ky. 228; *Southern* v. *Kittredge,* 85 N. H. 307, 158 Atl. 132; *Hathaway* v. *Jones,* 194 N. E. 37, 48 Ohio App. 447; *White* v. *McKnight,* 146 S. C. 59, 143 S. E. 552, 59 A. L. R. 1297; *Upson* v. *Fitzgerald,* 103 S. W. (2nd) (Tex.) 147, 149; *Canada* v. *Ihmsen,* 240 Pac. 927, 33 Wyo. 439; 43 A. L. R. 1010. To multiply authorities would serve no useful purpose. As was well said by the Arizona court in *Brought* v. *Howard, supra:*

> "A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest. It must therefore be held that there is no written memorandum of the agreement here in suit."

It must be remembered that in this case the defendants have invoked not only one but two separate and distinct provisions of the statute of frauds, to wit, paragraphs III and VII *supra.* Each and both of these provisions of the statute are applicable to the contract here in question.

While it is true that equity will under some circumstances grant relief to one who has fully or partially performed a

contract which is unenforcible because it does not comply with the requirements of the statute of frauds, it does so only upon certain well recognized and established equitable principles. Relief because of the partial or full performance of the contract is usually granted in equity on the ground that the party who has so performed, has been induced by the other party to irretrievably change his position and that to refuse relief according to the terms of the contract would otherwise amount to a fraud upon his rights.

In the case of a verbal contract made in consideration of marriage, however, the marriage alone, even though it is an irretrievable change of position, is not a part performance upon which equitable relief can be based. This rule which is firmly established, is based upon the express language of the statute. The marriage adds nothing to the very circumstance described by the statutory provision which makes the writing essential. Unlike the other paragraphs of Section 1 of the statute of frauds, in paragraph III it is the consideration of the contract which brings it within the statute, not the nature of the promise made. To say that in the case of an oral contract made in consideration of marriage the bar of the statute is removed, even in equity, by the marriage itself would destroy the statute and make it meaningless.

A very full annotation on this subject is found in 48 A. L. R. 1356 and contains decisions from twenty states and from the English courts sustaining this view. In accord with the overwhelming weight of authority, which is sustained by sound reasoning and irrefutable logic, we hold that marriage alone pursuant to an oral contract in consideration thereof is insufficient either at law or in equity to remove the bar to the enforcement of such contract which is imposed by Section 1, Paragraph III of the statute of frauds. Nor did the execution of the first will by Joseph constitute such a partial performance of the contract as

would in equity remove the bar of the statute of frauds. Part performance to operate as a bar to the application of the statute of frauds must be part performance on the part of one seeking to charge the other party under the contract, not part performance on the part of the one whom it is sought to charge. As said in the English case of *Caton* v. *Caton,* 1865, L. R. 1 Ch. Eng. 137, affirmed in 1867, L. R. 2 H. L. 127, 6 Eng. Rul. Cas. 256:

> "The preparing and executing of the will cause no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged."

The plaintiff claims, however, that this case is that of a wholly executed contract. She says that subsequent to entering into the oral contract, the decedent fully performed his part of the contract by executing a will in accord with the terms thereof and that she performed her part of the contract by entering into the marriage. She further claims that the statute of frauds has no application to contracts which have been fully executed by both parties.

Although it is true that an oral executory contract which fails to comply with the requirements of the statute of frauds is unenforcible, it is equally true that when the contract has been fully executed it cannot be abrogated for that reason. The position of the plaintiff that the making of the first will by Joseph pursuant to his oral contract so to do, which contract was entered into in consideration of marriage, constituted full performance on his part is not tenable. Mere execution of a will is not full performance on the part of the promisor in such a contract. A will is ambulatory in its nature and may be revoked at any time prior to death. Full performance of the contract on the part of the promisor requires not only the making of the will but also that the will be allowed to remain in force until his death. Whether this condition be the subject of an ex-

press promise contained in the oral contract or be implied from the oral promise to make a will in favor of the promisee is immaterial and can make no difference in the result. In either event the promise, be it express or implied, forms a part of the contract and it is made in consideration of marriage, and it cannot be enforced unless the contract or some memorandum thereof is in writing and signed by the promisor. The cases of *Brought* v. *Howard, supra, Zellner* v. *Wassman,* 184 Cal. 80, 193 Pac. 84, *Hughes* v. *Hughes,* 49 Cal. App. 206, 193 Pac. 144, *Luders* v. *Security Trust and Savings Bank et al.,* 9 Pac. (2nd) (Cal. App.) 271, and *Caton* v. *Caton, supra,* are all cases in which it was held that the fact that a will was executed in accordance with an oral contract made in consideration of marriage did not prevent subsequent revocation thereof by the testator. This same principle was also recognized in *O'Brien* v. *O'Brien,* 197 Cal. 577, 241 Pac. 861. As said in *Caton* v. *Caton, supra:*

> "As a will is necessarily, until the last moment of life, revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a contract of a negative nature,—a contract not to vary what has been so prepared and executed. I do not see how there can be part performance of such a contract."

In *Zellner* v. *Wassman,* 184 Cal. 80, 193 Pac. 84, 87, the Supreme Court of California said:

> "Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (Schultze v. Noble, 77 Cal. 79, 19 Pac. 182; Colon v. Tossetti, 14 Cal. App., 693, 113 Pac. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing $5,000 to the plaintiff. The mere execu-

tion of a will was not a performance of the contract."

Somewhat analogous to the foregoing cases is the case of *Anglemire* v. *Policemen's Benev. Assn. of Chicago,* 301 Ill. App. 277, 22 N. E. (2nd) 713. In that case the deceased prior to marriage orally promised the plaintiff that if she would marry him he would surrender a benefit certificate in the defendant association and procure a new one in her favor. After the marriage he did procure a new certificate naming her as beneficiary and delivered the same to her. Later, in accord with the terms of the by-laws of the association, he procured a new certificate with other beneficiaries. The court below held, "that the above agreement between appellee and the insured upon the subsequent marriage and change of beneficiary became an executed contract; that he was estopped from later changing the same;". The appellate court *reversed this decision on the ground that the contract was within the statute of frauds.*

The cases cited by the plaintiff as holding that the execution of a will in accord with an oral promise so to do in consideration of marriage constitutes full performance by the promisor, to wit, *Adams* v. *Swift,* 169 App. Div. N. Y. 802, 155 N. Y. Supp. 873, and *Brown* v. *Webster et al.,* 90 Neb. 591, 134 N. W. 185, fail to take into consideration the real nature of a contract to dispose of property by will and that there is an inherent promise contained in such contracts that the will will remain and be in force until death of the promisor. It is further to be noted that the New York case is a case decided by the Supreme Court of New York and not by the Court of Appeals. Another case which has been cited elsewhere as holding that the execution of the will was a part performance of the contract such as would take the contract out of the statute of frauds, *Lowe* v. *Bryant,* 30 Ga. 528, 76 Am. Dec. 673, although not specifically mentioned therein, would seem to have been overruled by *Hammond* v. *Hammond,* 135 Ga. 768, 70 S. E. 588.

We hold that enforcement of the contract in question is barred by the statute of frauds; that this defense was sufficiently set up by plea; that the replication to the plea does not set forth sufficient facts to destroy the efficacy of the plea. The plea must be sustained. It is unnecessary for us to consider the sufficiency of the bill or the sustainability of the demurrer. By the terms of the report if the plea is sustained, the Law Court is to issue such order as the pleadings in the case may require. The plea being sustained and the facts set forth therein being an absolute bar to the maintenance of the bill, it is ordered that the bill be dismissed.

Plea sustained
Bill dismissed.

GRACE ARLENE BURTON, COMPLT.
vs.
CLIFFORD THOMPSON

Hancock. Opinion, March 15, 1952.

Law Court.

On Report. Bastardy. Blood Tests. Death.

The Law Court cannot be required and has no jurisdiction to decide, prematurely, interlocutory questions which subsequent proceedings in the case may show to be wholly immaterial, unless the parties stipulate that the decision may, in one alternative at least, supersede further proceedings.

"Child" under the blood grouping tests statutes means "living person."

ON REPORT.

This is a bastardy action. Respondent filed a motion for blood tests. Complainant objected on the ground that, the child having died, there was no child at the time the motion was filed. The case was reported to the Law Court upon the

question of law raised by the motion. Report discharged. Case dismissed for the Law Docket. Case fully appears below.

Blaisdell & Blaisdell, for plaintiff.

Herbert T. Silsby II, for defendant.

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

WILLIAMSON, J. On report with agreed statement of facts. In this bastardy action the respondent moved that the court order the complainant, her child, and the respondent, to submit to blood grouping tests to determine whether or not paternity of the respondent could be excluded, as provided in R. S., Chap. 153, Sec. 34.

The complainant's child was born alive on December 15, 1950 but lived only twelve hours. At the April 1951 term of the Superior Court when the bastardy action was entered, the respondent filed the motion to which we have referred. The complainant seasonably objected to the allowance of the motion on the ground that "as a matter of law the motion filed must be denied by the court as the complainant now has no child." Counsel agreed that the case should be "submitted to the Law Court for ruling and opinion as to any and all questions of law involved; to be remanded for disposition of the motion by the court or any justice thereof in vacation in accordance with the opinion of the Law Court and for further proceedings in the case in the usual course." The case was then reported by the presiding justice to the "Supreme Judicial Court as a Court of Law with full authority to decide any and all questions involved, as matters of law."

The case is not in order for decision on report. It falls within the rule stated by the court in *Casualty Company* v. *Granite Company,* 102 Me. 148, at page 152, 66 A. 314, as follows:

> "The Law Court cannot be required and indeed has no jurisdiction to decide, prematurely, interlocutory questions which the subsequent proceedings in the case may show to be wholly immaterial, unless, as already stated, the parties stipulate that the decision may, in one alternative at least, supersede further proceedings."

It is apparent that final disposition of the case at bar does not turn upon the allowance or denial of the motion. See also *Mather* v. *Cunningham,* 107 Me. 242, 78 A. 102; *Libby* v. *Water Co.,* 125 Me. 144, 131 A. 862; *Cheney* v. *Richards,* 130 Me. 288, 155 A. 642; *Rogers* v. *Brown,* 134 Me. 88, 181 A. 667; and *Associated Fish Products Co.* v. *Hussey,* 145 Me. 388, 71 A. (2nd) 519.

Although no decision is appropriate under the rule stated, we do not hesitate to point out that "child" under the blood grouping test statute means a living person. Could a dead child be ordered to submit to the tests? We think not.

The entry will be

Report discharged.

Case dismissed from the law docket.

FRANCIS H. SLEEPER, APPLT.

FROM DECREE OF THE JUDGE OF PROBATE IN RE COMMITMENT OF RALPH S. SMALL TO AUGUSTA STATE HOSPITAL

Cumberland. Opinion, March 19, 1952.

Constitutional Law. 14th Amend. Insanity. Commitment. Notice. Hearing. Statutes.

Statute authorizing the commitment of one alleged to be insane for observation and treatment for a preliminary period not exceeding thirty-five days without hearing, without notice, without any provision being made in the act allowing him within said period to institute any proceedings to test the necessity of his commitment is unconstitutional.

It is not that which actually is done under statutory authority but that which may be done that determines constitutionality.

At common law an insane person who was a menace to his own safety or that of others could be confined in a suitable place by any interested person, and that without legal process. But a private person can act only in an emergency, and then only at his peril.

In proceedings for temporary commitment for observation and treatment (not ancillary to final commitment proceedings) there must be not only adequate notice to the alleged incompetent, but also an opportunity for him to be heard before the order of commitment is issued, unless there are circumstances, such as the condition of the alleged incompetent, which render notice and hearing impracticable, if not impossible.

Final commitment can only be determined after notice and opportunity to be heard.

The confinement of one who is mentally ill in a mental hospital is a deprivation of his liberty within the meaning of the 14th Amendment to the Constitution of the United States unless accomplished and continued with his voluntary consent.

Where a repealing statute provides that certain sections of existing law "are hereby repealed and the following enacted in place there-

of" and it is the manifest intent of the legislature to repeal the old sections only if the new sections take their place, an adjudication that the new sections are unconstitutional leaves the old sections in full force and effect.

ON REPORT.

On petition to the Judge of Probate for Cumberland County under Chap. 374 of P. L., 1951 for the indefinite commitment of Ralph S. Small. The Judge of Probate dismissed the petition on the ground that Sections 104 to 107 inclusive of Chapter 374 of P. L., 1951, were unconstitutional. Petitioner appealed to Supreme Court of Probate where the case was reported to the Law Court upon certain testimony and an agreed statement. Appeal dismissed. Decree of the Probate Court affirmed. Case to be remanded to the Probate Court for decree dismissing petition. Case fully appears below.

Alexander A. LaFleur, Attorney General,
Herbert H. Sawyer, Asst. Atty. Gen., for State of Maine.

Arthur A. Peabody, guardian *ad litem.*

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

MERRILL, J. On report from the Supreme Court of Probate for the County of Cumberland. One Ralph S. Small, alleged to be a person mentally ill, was committed to the Augusta State Hospital for observation and treatment under the provisions of Sections 104 and 105 of the Revised Statutes as enacted by Section 5 of Chapter 374 of the Public Laws of 1951. Within the time limited therefor by Section 105, the Superintendent of the Augusta State Hospital, Dr. Francis H. Sleeper, petitioned the Judge of the Probate Court in the County of Cumberland, from which county said Small had been admitted to the hospital, for Small's indefinite commitment to said hospital under the provisions of

Sections 106 and 107 of Chapter 23 of the Revised Statutes, as enacted by P. L., 1951, Chap. 374, Sec. 5. The Judge of Probate, to whom said petition was addressed, dismissed the petition on the ground that said Sections 104 to 107, inclusive, are unconstitutional "in that they authorize proceedings which are in violation of the due process clause of both the Constitution of the United States and of this State and that the Probate Court is without jurisdiction in the premises." From this decree of the Judge of Probate, Dr. Sleeper duly appealed to the Supreme Court of Probate for the County of Cumberland. Arthur Peabody, Esq., was duly appointed *guardian ad litem* for Ralph S. Small and appeared for him in the Supreme Court of Probate and also in this court. The case was reported by the Justice of the Supreme Court of Probate to the Law Court for hearing and decision upon an agreed statement of facts and certain testimony taken out in the Supreme Court of Probate.

Although the immediate question is whether new Sections 106 and 107 of Chapter 23 of the Revised Statutes as enacted as a part of P. L., 1951, Chap. 374, Sec. 5, are constitutional, the answer to this question in turn depends upon the constitutionality of new Sections 104 and 105. It is in new Sections 104 and 105 that the basic changes from the former provisions of the law relative to the involuntary commitment of the insane or mentally ill are to be found. Under the prior law, proceedings for the commitment of the insane to a public hospital could be instituted by a written complaint to the municipal officers of the town in which the person alleged to be insane was. Upon receipt of the complaint, it became the duty of the municipal officers to inquire into the condition of the one alleged to be insane and cause a true copy of the complaint to be given to him, together with notice of the time and place of the hearing and that he had a right and would be given an opportunity to be heard, all to be done at least 24 hours prior to the time set for hearing. It was required that the fact of the insanity of the person

in question be established at said hearing by the evidence of two reputable physicians, given under oath, together with their written certificate to that effect, based upon due inquiry and a personal examination of the person alleged to be insane. Upon being satisfied that such person was insane and that his comfort and safety or the safety of others interested would thereby be promoted, the municipal officers were to send him forthwith to one of the hospitals named in the act, directing the superintendent to receive and detain him until he be restored or discharged by law or by the superintendent or the department. R. S. (1944), Chap. 23, Secs. 105 and 107.

Section 106 of the original act, R. S., 1944, Chapter 23, provided that pending the issue of a certificate of commitment by the municipal officers, the superintendent of the hospital might receive into the hospital a person so alleged on complaint to be insane, provided he was accompanied by a copy of the complaint and physicians' certificate, which certificate must set forth that in the judgment of the physicians "the condition of said person is such that immediate restraint and detention is necessary for his comfort and safety or the safety of others." Said Section 106 further provided that unless within fifteen days thereafter the superintendent should be furnished with the certificate of commitment from the municipal officers the detention of such person should cease.

From these provisions of the statute it is seen that there was in every organized community in the state a board empowered to commit, that in all cases the person alleged to be insane was to be served with notice of the proceedings and given an opportunity to be heard on the question of his insanity and the necessity of his commitment to the mental hospital. Section 106 provided for the cases where immediate restraint was necessary pending determination by the municipal officers of the truth of the complaint. The emer-

gency commitment process was strictly ancillary to the main commitment proceeding which in no case could be determined without notice and an opportunity to be heard. The danger of abuse of the emergency process was minimized by the provision that unless a certificate of commitment was received by the superintendent within fifteen days the detention should cease.

This procedure was radically changed by the act of 1951. By new Section 104 enacted as a part of P. L., 1951, Sec. 5, it was provided that a petition for immediate admission and acceptance of an alleged mentally ill person into his institution for the purpose of observation and treatment could be addressed, not to a committing board, but to the superintendent of the public hospital to which admission was desired. Said petition was to be immediately presented to a city or town clerk, member of the city council or member of the board of selectmen in the town where the mentally ill person resided or was found. Such official was to immediately inquire into the facts set forth in the petition and if he was satisfied that the person required confinement and treatment in one of the state or federal hospitals, he was to so state on the petition and join in the same by affixing his signature thereto. The petition must be accompanied by a certificate signed by a physician stating therein that he had examined the person alleged to be mentally ill, together with his reason for his opinion that the person was mentally ill and required confinement and treatment in a hospital maintained for the mentally ill. Such examination must have been made within five days previous to the signing of the certificate. After signing the petition as aforesaid and the filing of the certificate by the physician, it was mandatory that the municipal official forthwith order the alleged mentally ill person to be taken to such state or federal hospital as he might properly designate, accompanied by a copy of the petition and the physician's certificate. Other provisions of the section are immaterial to the question here under discussion.

By new Section 105 which is enacted as a part of P. L., 1951, Chap. 374, Sec. 5, the following provisions are made:

> "Admission of patients; preliminary observation. The superintendent or head of the hospital to which the mentally ill person is sent, or his duly appointed substitute, shall receive and detain such person for observation and treatment for a period of not more than 35 days, provided that such person is accompanied by the petition and physician's certificate duly executed as set forth in section 104. Prior to the expiration of 25 days of the observation period the superintendent, head of the hospital, or his duly appointed substitute, or any justice of the peace or any notary public may certify, in a petition addressed to the probate court situated in the county from which said mentally ill person was admitted, that the alleged mentally ill person requires further care and treatment for an indefinite period."

New Sections 104 and 105 apply indiscriminately to all persons alleged to be mentally ill whether or not they actually require immediate hospitalization for their own safety or the safety of others, and whether or not they have sufficient mentality to appreciate the meaning of the notice of the proceedings if the same were served upon them. The new act makes no requirement for a certificate that the safety of the one alleged to be mentally ill or that of others requires his immediate commitment to the hospital. The new act makes no provision whatever for any hearing *ex parte* or otherwise before commitment for observation and treatment for the preliminary period of not more than thirty-five days. Under this act a person may be committed for observation and treatment for the preliminary period of not exceeding thirty-five days without hearing, without notice, without any opportunity to be heard and *without any provision being made in the act allowing him within said period to institute any proceedings to test the necessity of his commitment for observation and treatment.* The entire pro-

ceeding so far as he is concerned is *in invitum* and without opportunity to contest in advance or attack its validity thereafterwards during said period.

This court is fully aware that there are occasions which require the immediate taking into protective custody of one who is mentally ill because of the immediate danger that he will cause injury to himself or others. We are also fully aware that the best interests of the patient may in some cases demand immediate treatment pending the completion of proceedings for his ultimate commitment to a hospital for the mentally ill. R. S., 1944, Sections 105, 106 and 107 not only took care of all of these situations but also respected the constitutional rights of the one alleged to be insane. It is not that which actually is done under statutory authority but that which may be done under the statute that determines its constitutionality. As we said in *Bennett* v. *Davis*, 90 Me. 102, 105:

> "It is not what has been done, or ordinarily would be done under a statute, but what might be done under it that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement."

Under this statute as drawn (P. L., 1951, Chap. 374, Sec. 5), in the attempt to provide a single standardized procedure for both non-emergency and emergency commitments, it would be possible either by fraud or mistake to commit a perfectly sane person who is not in need of commitment, care or treatment, to a mental hospital and there hold him without any previous notice whatever and without his being afforded under the act any opportunity to be heard either in advance of or subsequent to his commitment and within said period of thirty-five days on the question of the necessity therefor.

We are not unmindful that courts have gone a great distance in sustaining the legality of commitments to mental

institutions especially where the act itself under which the commitment is made gives the party committed an unqualified right to obtain at any time a review of the present necessity of his detention and commitment. *In re Crosswell's Petition,* 28 R. I. 137, 66 Atl. 55; *Ex Parte Dagley,* 35 Okla. 180, 128 Pac. 699; *Payne* v. *Arkebauer,* 190 Ark. 614, 80 S. W. (2nd) 76.

Without in any way intimating our opinion of the soundness of the reasoning upon which such authorities are grounded, we would call attention to the fact that this act does not meet the test prescribed by those authorities. Notwithstanding the fact that new Section 124 enacted as a part of P. L., 1951, Chap. 374, Sec. 5, provides for inquiry into cases of unreasonable detention, it does not, as claimed by counsel for the appellant, in any way affect the present situation. In the first place, it is extremely doubtful whether or not it refers to or authorizes a petition in his own behalf to be instituted by the person committed to the hospital. Even if it does, a question upon which we need not intimate any opinion at this time, the section certainly does not apply to a person ordered into the hospital for preliminary observation and treatment. By its very terms it applies only to persons "*adjudged mentally ill and committed.*" Under this statute there is no adjudication of mental illness prior to or during the preliminary period for observation and treatment. Counsel for the appellant argues that new Sections 104 and 105 apply to and can be used only in the emergency cases of those persons whose mental condition is such that their safety or the safety of others demands their immediate commitment for observation, care and treatment. As a reason for this construction the appellant urges that because new Sections 108 and 109 grant original jurisdiction to Judges of Probate to commit those mentally ill on hearing and after notice, and because Sections 104 and 105 do not require notice or hearing, and because commitments without notice and hearing can only be made in emergency

cases, it is the legislative intent that Sections 104 and 105 refer to and may be employed in emergency cases only.

The fallacy of this argument is shown by an examination of the law existing prior to the enactment of Chapter 374 of the Public Laws of 1951 and especially of those sections of the prior law which it purports to repeal. As we have heretofore shown, the original law authorized the municipal officers on petition to them, and after notice and hearing to commit in all cases emergent or otherwise. It also provided for temporary commitment in emergency cases pending such hearing. Along with these provisions for commitment by the municipal officers, the original law also conferred concurrent jurisdiction on Judges of Probate in the same manner that such jurisdiction is conferred on them by new Sections 108 and 109, enacted as a part of P. L., 1951, Chap. 374, Sec. 5. See R. S., 1944, Chap. 23, Secs. 111, 112.

New Sections 108 and 109 as enacted in P. L., 1951, Chap. 374, Sec. 5, are to all practical purposes re-enactments of Sections 111 and 112 in the old act. Sections 111 and 112 provided an alternate procedure applicable to all cases emergent or otherwise. Sections 105 and 107 in the original act applied to all cases to which Sections 111 and 112 applied. Section 106 of the original act furnished a method for the immediate commitment of those who needed immediate emergency confinement and with respect to whom proceedings under Section 105 were pending. New Sections 104 and 105 by their terms apply to any and all cases whether they be emergent or otherwise. The fact that new Sections 108 and 109 are but a re-enactment of old Sections 111 and 112 indicates that even as old Sections 111 and 112 did not limit the applicability of old Sections 105 and 107 to emergency cases, new Sections 108 and 109 do not limit the applicability of new Sections 104 and 105 and 106 to emergency cases. We hold that the application of new Sections 104 and 105 is not confined to emergency cases, but

that they in fact as well as in terms apply to all cases emergent and otherwise.

At common law an insane person who was a menace to his own safety or that of others could be confined in a suitable place by any interested person and that without legal process. *Porter* v. *Ritch et al.*, 70 Conn. 235; Bac. Abr., "Trespass" D, *573; 44 C. J. S. 160, Sec. 63 b; 32 C. J. 678, Sec. 342; 28 Am. Jur. 675, Sec. 31. This right to make such confinement without legal process was dependent upon the fact of actual insanity of such a nature that the person confined was actually a menace either to his own safety or that of others. *Porter* v. *Ritch, supra.* As said in that case:

> "An insane person whose going at large is dangerous to others, or to himself, and who is restrained, cannot maintain that he has been deprived of any right, or that he has suffered any injury. In most of the cases cited, the act placing a restriction upon the liberty of another was by a private person, and the act was held to be justified. But a private person can act only in an emergency, and then only at his peril: the peril of being unable to prove the existence of the emergency which is his justification. Restrictive conditions of this kind upon personal liberty, or upon the use of property, are sometimes absolutely necessary to the safety of all. A wise administration of government does not leave it to private persons to decide when these restrictions shall be exercised. Private persons may not be willing to take the hazard. And so statutes are passed which directly name or authorize a municipal board to appoint some one to judge of the emergency and direct the performance of those acts which any individual might do at his peril without any statute. Such an one is the agent of the law and incurs no personal liability."

The Connecticut statute which was under consideration in the case of *Porter* v. *Ritch* authorized the Judge of Probate before whom commitment proceedings were pending and of which notice had been given, to make a temporary

order for an emergency commitment pending the determination of the main issue. The constitutionality of the provision was sustained.

R. S., 1944, Chap. 23, Sec. 106, as before shown, provided for emergency temporary commitments pending final decision on the petition. The making of such statutory provisions was a proper exercise of the police power by the state. As before noted, such action was but ancillary to a pending proceeding which was to be heard in due course after notice and opportunity to be heard. It could be taken only in those cases where two physicians certified to the municipal officers that immediate restraint and detention was necessary for the comfort and safety of the person alleged to be insane or for the safety of others. Immediate detention without notice and an opportunity to be heard can only be justified when the immediacy of such action is required for the safety of either the person restrained or for the safety of others. As said in 28 Am. Jur. 676, Sec. 32:

> "The broad rule generally prevails that a valid proceeding to commit a person to an insane asylum or hospital requires, not only adequate notice to the alleged incompetent, but also an opportunity for him to be heard before the order of commitment is issued, unless there are circumstances, such as the condition of the alleged incompetent, which render notice and hearing impracticable, if not impossible."

We hold that this general rule applies to temporary commitments for observation and treatment which are not ancillary to a proceeding for final commitment, which proceeding for final commitment is only to be determined after notice to the person who is alleged to be mentally ill and affording him an opportunity to be heard.

New Sections 104 and 105 of R. S., Chap. 23, as enacted as a part of P. L., 1951, Chap. 374, Sec. 5, are not ancillary to a proceeding for final commitment to the hospital. The

proceeding for commitment for observation and treatment provided for in these sections is a preliminary proceeding, and the order of commitment is made to determine whether or not a petition for final commitment will be made.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides among other things that no person shall be deprived by any state "of life, liberty, or property, without due process of law;". The confinement of one who is mentally ill in a mental hospital is a deprivation of his liberty unless accomplished and continued with his voluntary consent.

New Sections 104 and 105 authorize *ex parte* involuntary commitment of a person alleged to be mentally ill to a hospital for observation and treatment for a period of thirty-five days. This may be done without affording him opportunity to be heard, without even an allegation, to say nothing of proof, that his mental condition is such that he is an immediate menace either to himself or to others, and with no opportunity afforded him by the statute to test during the continuance of his confinement either the validity or present necessity thereof. As tersely stated by Walton J. of another *ex parte* commitment in *Portland* v. *City of Bangor,* 65 Me. 120, 121, while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove that the *ex parte* commitment authorized by new Sections 104 and 105 is not such process. We therefore hold these sections enacted in P. L., 1951, Chap. 374, Sec. 5 unconstitutional and void.

In habeas corpus proceedings to obtain the release of an insane person the court not only inquires into the legality of the restraint but the necessity therefor, and if the person is found to be actually insane and a menace either to himself or to the safety of others, he is not entitled to discharge on habeas corpus. In *Re Oakes,* 1845, 8 Law Rep. 122; *Denny* v. *Tyler,* 3 Allen, 225; *Dowdell, Petitioner,* 169

Mass. 387. In other words, the welfare of the insane person and the safety of the public determines the result in habeas corpus rather than the strict legality of his restraint. This is similar to the law applied in cases of writs of habeas corpus to obtain the custody of children. It is the welfare of the child, not the strict legal right of the petitioner upon which ultimate judgment is founded. We call attention to this fact because it explains the result in some instances where habeas corpus proceedings were instituted to obtain the release of persons alleged to be illegally restrained and who were not released although it was found that the original commitment was illegal. However, the common law right to institute habeas corpus proceedings to test the validity of restraints is not the equivalent of requiring a legal order imposing restraint prior to commitment; nor does the fact that one may test the validity of his restraint by habeas corpus make an otherwise illegal restraint a legal one.

Having held new Sections 104 and 105 to be in violation of the due process clause of the constitution, we must next determine the effect of such unconstitutionality upon the rest of Section 5 of Chapter 374 of the Public Laws of 1951, which contains the new Sections 104 to 129, both inclusive, of Chapter 23 of the Revised Statutes.

Section 5 of said Chapter 374 provides: "Sections 104 to 143, inclusive, of chapter 23 of the revised statutes, as amended, *are hereby repealed and the following enacted in place thereof:*" (Emphasis ours.) It was the manifest and expressed purpose of the legislature by this section of Chapter 374 to repeal all of the sections specified and to substitute the new sections numbered 104 to 129, both inclusive, in place thereof. We believe that it was the manifest intent of the legislature to repeal the old sections only if the new sections took their place. Section 106 of Chapter 23 of the Revised Statutes of 1944, providing for emergency commitments was one of the essential features and provisions of the then existing statute.

Provision for placing a person who is mentally ill to the degree that he is dangerous to himself or others in immediate proper restraint is essential. Such timely restraint is essential not only to the immediate welfare of the person who is mentally ill and perhaps to his ultimate recovery but also to the safety of society. A comprehensive law providing for the commitment of the mentally ill to hospitals which fails to make provision for emergency commitment of the dangerous is woefully inadequate both from the legal, administrative and medical viewpoint. The only provision in the new act under which immediate restraint could be imposed upon the dangerous are new Sections 104 and 105. These sections we have hereinbefore declared unconstitutional because they are universal in their application, applying alike to all classes and degrees of mental illness and without distinction between persons who are dangerous and those who are not.

The authorities are not at all uniform on whether a *repealing clause,* which repeals numerous provisions of a statute, found in an act which enacts substitute provisions for those repealed, may be divisible and held effective in part and void in part, when one or more provisions of the substitute act are held to be unconstitutional. Upon this question we need not and do not express an opinion. We believe that the unconstitutionality of Sections 104 and 105 as enacted in Section 5 of Chapter 374 of the Public Laws of 1951 removes provisions of the act which are so basic and leaves the act so ineffective that without them the legislature would not have enacted any part of Section 5 of Chapter 374. It is our opinion that Section 5 is indivisible, that the unconstitutionality of Sections 104 and 105 is of such importance that neither the repealing act nor any of the substitute sections would have been enacted by the legislature had it realized the invalidity of new Sections 104 and 105. This being true, Section 5 of the Public Laws of 1951, Chapter 374, never became law and R. S., 1944, Chap. 23,

Secs. 104 to 143, both sections inclusive, have been and now are in full force and effect. This being true, the Judge of Probate had no jurisdiction to receive the petition of the appellant which he rejected.

It may be well to call attention at this time to the fact that Sections 132 and 133 and 134, of Chapter 23 of the Revised Statutes, which we now hold to be in effect and which were not re-enacted in Chapter 374 of the Public Laws of 1951, provide a procedure whereby the superintendents of the two state hospitals may validate any commitments which may have been made since the enactment of P. L., 1951, Chap. 374, and as to the legality of which they are in doubt.

Appeal dismissed.

Decree of the Probate Court affirmed. Case to be remanded to the Probate Court for decree dismissing petition.

GEORGE A. ELLIOT, JR.
vs.
MAURICE N. SHERMAN

MARION CLAPP COLLIN
vs.
MAURICE N. SHERMAN

York. Opinion, March 20, 1952.

Trespass, Treble Damages. Pleading. Amendments. Law Court. Exceptions. Excessive Damages.

It is not necessary to expressly claim treble damages in a declaration; it is sufficient to set forth facts to show plaintiff is entitled thereto.

If judgment be rendered for a sum larger than the amount of the *ad damnum* it is for that reason reversible unless plaintiff enter a *remittitur* of the excess.

An amendment of a declaration after verdict by increasing the damages claimed to correspond to a verdict will not as a general rule be permitted without setting aside the verdict and granting a new trial to enable the defendant to make his defense to the enlarged demand unless the amendment is for the correction of a circumstantial error or a matter of form.

Where the failure to set the *ad damnum* clause in an amount sufficient to equal the treble damages is but a formal matter an amendment after verdict may be allowed by the trial court.

The Law Court is without statutory power to allow amendments to original process.

Error in ordering judgment in excess of *ad damnum* is an error of law to be challenged by exceptions, not motion.

ON MOTION FOR NEW TRIAL AND EXCEPTIONS.

Action under R. S., 1944, Chap. 11, Sec. 11 to recover treble damages for trespass. In the Elliot case the declaration alleged damage of $10,000; in the Collin case $6,000,

with an *ad damnum* accordingly. The jury found actual damage of $5,000 in each case. The presiding justice ordered judgments of treble the verdict, or $15,000 each. The cases are before the Law Court on general motions for new trial attacking the verdicts, the action of the court in trebling the verdicts, and exceptions to the denial of directed verdicts. If plaintiff remits all damage in excess of $10,000 (in the Elliot case) within 30 days after the receipt in the case is received, exceptions overruled. Otherwise exceptions sustained. Motion sustained, new trial granted. If plaintiff remits all damages in excess of $6,000 (in the Collin case) within 30 days after the rescript in this case is received, exceptions overruled, motion overruled. Otherwise exceptions sustained; motion sustained and new trial granted.

Waterhouse, Spencer & Carroll, for plaintiff.

Titcomb & Siddall,
Walter Tapley, Jr., for defendant.

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

MERRILL, J. On motions and exceptions by the defendant. The plaintiff in each of these cases was the owner and occupant of a valuable summer estate and home in Kennebunkport, in the County of York. These estates of the plaintiffs were located between a summer hotel known as Old Fort Inn and the sea. The two estates were contiguous and certain trees and growths thereon afforded each of the plaintiffs privacy with respect to the other plaintiff and privacy from observation from the inn, as well as beautified the estates. The defendant was connected with the management of Old Fort Inn. The trees growing upon the plaintiffs' estates obscured the view of the sea from Old Fort Inn. It is claimed that the defendant, who was active

in the management of Old Fort Inn, directed employees of Old Fort Inn to cut out trees and growth, and limbs growing on trees situate on the plaintiffs' estates and thereby open up a vista to the sea across and through the plaintiffs' estates for the benefit of Old Fort Inn. While it is not denied that employees of the corporation owning Old Fort Inn did make the cuttings upon the plaintiffs' estates, it is the position of the defendant that the plaintiffs have failed to show that such work was done at his direction or that he was responsible therefor. This question was left to the jury for their determination and by their verdicts they have found this issue against the defendant.

The actions were brought to recover treble damages under the provisions of R. S. Chap. 111, Sec. 11. Under appropriate instructions from the court, the jury found specially that the trespasses were committed wilfully and knowingly, that the trees were ornamental trees and that the lands on which the trespasses were committed were improved lands. They also specially found the amount of *actual damage* suffered in each case to be $5,000. After receipt of verdicts, each in the sum of $5,000, the justice presiding ordered a judgment to be entered in each case for three times the amount of the verdict, viz., for $15,000.

In the Elliot case the declaration set forth that the actual damage to the plaintiff's property caused by the trespass was $10,000 and in the Collin case that such damage was $6,000. Neither declaration expressly claimed treble damages. Each declaration, however, set forth sufficient facts to entitle and authorize the plaintiff to recover treble damages. In each writ the *"ad damnum"* was set in exactly the same amount as the *actual damage* alleged in the declaration. The verdicts in each case were *less than,* and within the sum set forth in the declaration as the *actual damage* to the plaintiff's estate caused by the defendant's trespass thereon. In each case *trebling the amount of actual damage* produced a sum *in excess* of the *ad damnum* in the writ.

After the presiding justice had ordered judgments to be entered in each case in three times the amount of the verdict rendered by the jury, defendant filed general motions attacking the verdicts on the usual grounds and also attacking the action of the court in trebling the verdicts and ordering judgment in each case in excess of the *ad damnum* in the writ. Defendant also filed exceptions to the denial of his motions for directed verdicts and to the action of the court in ordering judgments in treble the amount of the verdicts found by the jury.

The exceptions to the refusal of the presiding justice to direct verdicts for the defendant and the motions to set the verdicts aside, so far as the motions are based upon allegations that they are against the evidence and the manifest weight of the evidence are without merit. A discussion of the testimony would serve no useful purpose. Suffice it to say, there was credible evidence from which the jury could find that the trespasses were committed at the direction of the defendant, that his action in this respect was willful, and knowingly taken in total disregard of the plaintiffs' property rights, that the trees cut were ornamental trees and cut upon lands which fell within the description of those described in Section 11 *supra*. The attitude of the defendant is well shown by the uncontradicted testimony of a witness who testified that the defendant stated, prior to the cutting of the trees on the Collin property and upon being told that they would make trouble: "To hell with them. Let them sue me. All they can get is the cost of the trees."

Except for the fact that compliance with the order that judgment be entered for three times the amount of the actual damage would result in a judgment in each case in excess of the *ad damnum* (of which later), the procedure followed in these cases is in accord with precedent. It is not necessary to expressly claim treble damages in the declaration. It is sufficient to set forth facts showing that

the plaintiff is entitled thereto. *Black* v. *Mace,* 66 Me. 49. In cases where multiple damages are claimed it is immaterial whether the court, acting within its authority, multiplies the verdict for actual damages returned by the jury, or instructs the jury to determine the actual damage and return a verdict for the multiple damages. The principle is the same whether the multiple damages be double or treble damages. *Black* v. *Mace, supra, Quimby* v. *Carter,* 20 Me. 218.

This brings us to the consideration of the effect of the order that judgment be entered in three times the amount of the actual damage found by the jury when compliance therewith would result in the entry of a judgment in excess of the *ad damnum* in the writ.

The precise question here presented, so far as we can learn, has not been before this or any other court. This is not the ordinary case where a verdict has been rendered in excess of the actual damage claimed in the declaration, or in excess of the *ad damnum.* In each of these cases the verdict was for an amount smaller than the actual damage claimed and set forth in the declaration, and smaller than the *ad damnum* in the writ.

When these plaintiffs made the *ad damnum* in their respective writs in the same amount as the actual damage alleged in the declaration, it became inevitable that if actual damages were found by the jury in excess of one-third of the amount claimed, a judgment for treble damages in accord with the provisions of the statute would exceed the *ad damnum* in the writ. Faced with this situation, and the amount of each verdict exceeding one-third of the *ad damnum* in the respective writs, the court nevertheless ordered judgments for treble damages, which judgments would exceed in amount the *ad damnum* in each of the writs. This action by the court is challenged both by motions and exceptions.

As early as 1830 this court in *McLellan* v. *Crofton,* 6 Me. 307, 325 declared:

> "It is a principle of law established by several decided cases, that if judgment be rendered for a sum larger than the amount of the *ad damnum,* it is, for that reason reversible on a writ of error; and it must be reversed, unless the plaintiff will enter a remittitur of the excess. If this be done, the court will affirm the judgment for the residue. *Hutchinson* v. *Crossen,* 10 Mass. 251; *Grosvenor* v. *Danforth,* 16 Mass. 74."

This general principle so early recognized has never been questioned by this court unless possibly by a dictum in *Morse* v. *Sleeper,* 58 Me. 329, 332, which intimates that if the error was amendable the statute of jeofails will save a *judgment* from reversal on error. The Maine cases which discuss the effect of a verdict in excess of the *ad damnum* and the power of the court to allow amendments to the *ad damnum* both before and after verdict, to wit, *McLellan* v. *Crofton, supra, Converse* v. *Damariscotta Bank,* 15 Me. 431, *Merrill* v. *Curtis,* 57 Me. 152, *Morse* v. *Sleeper,* 58 Me. 329, *Hare* v. *Dean,* 90 Me. 308, and *Starbird* v. *Eaton,* 42 Me. 569, throw very little light upon the specific problem here involved.

In a note found in Ann. Cases, 1913 B. 709, the general rule as to the power of the court to allow an amendment increasing the *ad damnum* after verdict is well stated as follows:

> "While a trial court has a broad discretion in allowing amendments, even after a verdict, in furtherance of justice, the general rule is that a party is bound by the allegations of his pleadings, and therefore an amendment of a declaration or complaint after verdict, by increasing the amount of the damages claimed, to correspond with the amount of the verdict, will not, as a rule, be permitted without setting aside the verdict and granting a new trial to enable the defendant to make his defense to the enlarged demand."

This statement in the note is well supported by the authorities therein cited. See also 1 Ency. of Plead. & Prac. Page 589 and notes, also 15 Am. Jur. Page 751, Sec. 309. In the case of *McLellan* v. *Crofton, supra,* we stated:

> "The 16th section of our revised statutes, ch. 59 (1820, Chap. 59, now the statute of jeofails R. S., 1944, c. 100, § 11), has respect only to circumstantial errors or mistakes; and it would seem that, inasmuch as a judgment is liable to reversal, if rendered for a larger sum than the *ad damnum* alleged, the total omission, or the smallness of an *ad damnum,* cannot properly be considered as merely a circumstantial error or mistake; at least after rendition of judgment. Perhaps until judgment is rendered, it may be so considered. We are not aware of any decisions opposing this idea."

Pursuant to the intimation in that case the court after verdict and before judgment allowed the insertion of an *ad damnum,* which had been wholly omitted, without setting the verdict aside.

The New Jersey Court of Errors and Appeals declares what seems to us to be the true rule and one well founded in reason for determining whether or not the amendment of the *ad damnum* of the writ after verdict and before judgment is one of substance or is a matter of form and for the correction of a circumstantial error. In the case of *Sweet* v. *Excelsior Electric Co.,* 59 New Jersey Law, 441, 31 Atl. 721, 722, the court said:

> "If a declaration should allege a cause of action on proof of which a larger sum must be due than is stated in the ad damnum clause, then that clause might be deemed formal, and, after verdict, might be amended to conform with the real claim set forth in the pleading. But where, as in this case, the declaration is for unliquidated damages, and contains no indication of the extent of the plaintiff's claim outside of the ad damnum clause, we must presume that the defendant regulated his

> conduct at the trial with reference to a claim for the damages there stated, and might have modified his course of defense had a claim for a larger sum been in controversy. As was said by Lord Kenyon in Tomlinson v. Blacksmith, 7 Term R. 132: 'It would be going too far to make the amendment required without sending the cause to a new trial, as the defendant might have gone to trial relying that no more than (the stated) damages could be recovered against him.' See, also, Corning v. Corning, 6 N. Y. 97."

The foregoing language is particularly applicable to the situation disclosed by the present cases. These declarations alleged actual damage in excess of the amount of such damage found by the jury and returned in their verdict. These declarations show that the actual damage found by the jury would, because of the statute, be trebled. These declarations show that the plaintiffs claim actual damages which, if found to have been sustained as claimed, will require the entry of a judgment in excess of the *ad damnum*. All the information requisite to defend against the plaintiffs' claims was disclosed in the two declarations. The failure to set the formal *ad damnum* clause in an amount sufficient to equal the treble damages was but a formal matter within the rule stated in *Sweet* v. *Excelsior Electric Co., supra*. In these cases the declarations indicated that the extent of the claim of each plaintiff was in excess of the *ad damnum* clause in the writ. The court below, after verdict, could have allowed motions to increase the *ad damnum* in each of these writs without setting aside the verdicts or granting new trials. Counsel for the plaintiffs, fully realizing the facts, deliberately refrained from making motions to amend the *ad damnum* clauses in the writs. They chose rather to come to this court on the records as they then existed and meet the exceptions and motions of the defendant on the existing records.

This court is a statutory court. It is not a court of original jurisdiction. It possesses only those powers conferred

upon it by statute. It is without power to allow amendments to original process. As we said in *Heim* v. *Coleman*, 125 Me. 478, 479:

> "The Law Court in this state is not a constitutional court, but is one created by statute, and has that jurisdiction only which the statute has conferred upon it and that is a limited jurisdiction. It has no other authority * * * * The court cannot properly extend its statutory powers. *Stenographer Cases*, 100 Maine, 275; *Mather* v. *Cunningham*, 106 Maine, 115.
>
> The Supreme Court, sitting *in banc*, as a court of law, is not a court of original jurisdiction, and cannot grant leave to amend. *Baker* v. *Johnson*, 41 Maine, 15; *Crocker* v. *Craig*, 46 Maine, 327; *Mather* v. *Cunningham*, supra. *State* v. *Dondis*, 111 Maine, 17."

Even if the error in these cases is of such a nature that this court, acting under the authority of R. S., Chap. 91, Sec. 14, could remand these cases to the court below *suo moto* for amendments, justice does not, in our opinion, require the same to be done.

In these cases the error of the court in ordering judgments in an amount in excess of the *ad damnum* in the respective writs was an error of law. As such it was subject to challenge by exceptions, not motion. The motions so far as based upon this cause must be denied. The exceptions, however, are sufficient to reach the legal error. The error, however, does not require the unqualified sustaining of the exceptions and the ordering of a new trial at all events.

From the earliest days in this state, see *McLellan* v. *Crofton*, *supra*, as well as elsewhere, it has been the right of a plaintiff who has recovered a judgment in excess of the *ad damnum* in his writ, when the judgment is attacked on that ground, to remit all of the same in excess of the *ad damnum* and thereby save his judgment to that extent. The plaintiff

possesses this same right when the attack, as here, is on the order for judgment and comes before judgment has been finally entered. In the instant cases, the plaintiffs may avail themselves of this privilege.

By his motions the defendant has attacked the verdicts on the ground that the actual damages found by the jury were excessive and that the judgments for treble damages were likewise excessive. The jury in these cases assessed damages with a heavy hand. It undoubtedly was unduly influenced by the arbitrary, willful and overbearing action of the defendant. The verdicts in these cases were to be for the actual damage suffered and were not to include any element of punitive damages. The actual damages suffered, however, in each of these cases were substantial. If the plaintiffs or either of them avail themselves of the privilege of remittitur hereinafter extended to them, the evidence is amply sufficient to sustain verdicts for actual damages in an amount sufficient, when trebled, to equal the *ad damnum* of the respective writs. This being true, justice will be done in each case by making an entry therein that the motion and exceptions be overruled if the plaintiff within thirty days after receipt of the rescript shall remit all damages in excess of the amount of the *ad damnum* contained in his or her writ; otherwise exceptions and motion to be sustained, and a new trial granted.

The entry in the case George A. Elliot, Jr. v. Maurice N. Sherman, Docket No. 1479 to be as follows:

> *If plaintiff remits all damages in excess of $10,000 within 30 days after the rescript in this case is received, exceptions overruled, motion overruled. Otherwise, exceptions sustained; motion sustained, and new trial granted.*

The entry in the case of Marion Clapp Collin v. Maurice N. Sherman, Docket No. 1482 to be as follows:

If plaintiff remits all damages in excess of $6,000 within 30 days after the rescript in this case is received, exceptions overruled, motion overruled. Otherwise, exceptions sustained; motion sustained, and new trial granted.

THE COCA-COLA BOTTLING PLANTS, INC., APLT.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, March 26, 1952.

Sales Tax. Containers. Exemptions.

The common returnable soft drink bottle, on which a deposit is made on purchase and refunded on return, is a "container" within the meaning of Sec. 2 of the "Sales and Use Tax Law" and the purchase of such bottles from an Ohio Manufacturer by a Maine bottler is not taxable. (P. L., 1951, Chap 250.)

ON REPORT.

On petition for reconsideration of an assessment of a "use" tax, an appeal was taken to the Superior Court. The case was reported to the Law Court on an agreed statement of facts. Appeal to Superior Court sustained. Judgment for appellant without costs. Tax abated. Case remanded to Superior Court for decree in accordance with opinion.

Hutchinson, Pierce, Atwood & Scribner, for plaintiff.

Ernest H. Johnson, State Tax Assessor,
Boyd L. Bailey, Asst. Atty. Gen.,
Miles P. Frye, Asst. Atty. Gen., for defendant.

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

WILLIAMSON, J. The question is whether the common returnable soft drink bottle, on which a deposit is made on purchase and refunded on return, is a "container" within the meaning of Section 2 of the "Sales and Use Tax Law."

The appellant, a bottler in Maine, purchased bottles from an Ohio manufacturer. If the bottles were "containers," the purchase was not "at retail sale" and not taxable. If the bottles were not "containers," the purchase was "at retail sale" and taxable.

The case is an appeal to the Superior Court from the decision of the State Tax Assessor upon a petition by appellant for reconsideration of an assessment of a "use" tax in the amount of $34.78. *Sections 29 and 30.* It is before us on report upon an agreed statement of facts. References to the statutes are to the "Sales and Use Tax Law." P. L., 1951, Chap. 250 (also designated as R. S., Chap. 14A).

The parts of the "Sales and Use Tax Law" with which we are concerned read as follows:

> "**Sec. 2. Definitions.** The following words, terms and phrases when used in this chapter have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> - - - - - - - - - -
>
> "Retail sale" or "sale at retail" means any sale of tangible personal property, in the ordinary course of business, for consumption or use, or for any purpose other than for resale in the form of tangible personal property.
>
> - - - - - - - - - -
>
> "Retail sale" or "sale at retail" do not include the sale of containers, boxes, crates, bags, cores, twines, tapes, bindings, wrap-

> pings, labels and other packing, packaging and shipping materials when sold to persons for use in packing, packaging or shipping tangible personal property produced or sold by them.
>
> - - - - - - - - - -
>
> "**Sec. 4. Use tax.** A tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property, purchased at retail sale on or after July 1, 1951 at the rate of 2% of the sale price. . . . . .
>
> "**Sec. 10. Exemptions.** No tax on sales, storage or use shall be collected upon or in connection with: . . . . . .
>
> "X. **Containers.** Sales of returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling."

The "use" tax under Section 4 is based upon a purchase "at retail sale." To determine the meaning of "retail sale" we turn to the definitions in Section 2. "Retail sale," or "sale at retail," under the first sentence quoted does not include a sale for resale.

If the bottles in question were purchased for resale by the bottler, there would clearly be no tax on the transaction. For the purposes of this case, however, we assume that the appellant neither purchased the bottles for resale nor sold them. The appellant contends that it does not sell bottles and specifically that it does not seek an abatement of the tax under the resale provision. The state admits in argument that the bottles are not sold "in the ordinary sense" to a distributor or consumer.

We are concerned with the first and last sentences, quoted above, of the paragraph in Section 2 defining "retail sale." Under the first sentence standing alone the purchase by the appellant was a "retail sale." It was a sale for "use" of the bottler or in any event "for a purpose other than for resale."

The definition of "retail sale" or "sale at retail" is not found in the first sentence alone. We must consider the entire definition, and for our immediate purpose the last sentence of the paragraph.

We come now to the "container" sentence and to the question vital to the controversy. The state says that "container" under the statute includes a non-returnable or "throw away" bottle but not the returnable bottle. The appellant says whether or not the bottle is returnable is of no consequence. In either event it says the bottle is a "container," and with this view we agree.

We recognize the principles of *"noscitur a sociis"* and *"ejusdem generis."* See *50 Am. Jur. 241 et seq. and 59 C. J. 979 et seq.* There is no place here, however, for the application of the principles.

What is there, we may ask, in this paragraph fairly and reasonably to lead one to believe that non-returnable bottles are "containers" and returnable bottles are something else? The legislature, had it wished to limit "container" to the non-returnable or "throw away" bottle, could readily have so provided.

It is suggested that Section 10-X, exempting returnable containers from tax under certain conditions, indicates significantly that the "container" of Section 2 is of the non-returnable or "throw away" variety and does not include the returnable bottle. Section 10-X operates, it is clear, at the level of the retail sale of the contents of the container or at the level of the sale of the container for refilling. It has no bearing upon a sale, such as the transaction before us, from manufacturer to bottler. In our view the plain and ordinary meaning of "container" in Section 2 is not to be altered in such an indirect manner.

The state further urges that on appellant's theory every sale of returnable bottles will escape taxation contrary to

the intent of the legislature that one sale of tangible personal property, with certain exceptions, should be taxed and that the taxable sale should be at the level of consumption or use. It is undoubtedly true that if the returnable bottle is a statutory "container," there will be neither sales nor use tax upon a sale of the bottles.

Under such a construction, however, will not the cost of the bottles be reflected in the sale price—and in the taxable price, unless an exempted sale—of the bottled goods? In the long run the price of the beverage must include the cost of the bottle. The returnable bottle is taxed as fully as the wrapping paper, twine and bag, once used and then destroyed.

It was well stated in briefs and argument that little help would be derived from decisions and statutes in other states. *Gay, Comptroller* v. *Canada Dry Bottling Co. of Florida, Inc.*, decided by the Supreme Court of Florida in an opinion filed February 8, 1952, alone calls for particular discussion. Under the 1949 Act sales of "materials, containers, labels, sacks or bags used for packaging tangible personal property for shipment or sale" were excluded from tax. The provision follows closely the "container" sentence in our statute. The Florida Court in 1952 held that returnable soft drink bottles were not "containers." The decision was grounded in large measure upon a 1951 amendment to the Act which in terms limited the exclusion from tax to containers, etc., "intended to be used one time only." The court concluded that the legislature intended to clarify and not to change the law and that in 1949 the legislature intended the returnable container to be taxed, although it did not say so in plain words until 1951.

For our purpose it is sufficient to say that we have no such amendment to our statute. We are not, therefore, called upon to decide what weight should be given to an

amendment in determining the legislature's intent at an earlier date.

Our duties are judicial in nature. We must guard against trespassing upon the fields of the legislative and executive branches of government. We are not charged with responsibility for the economic and social effects of taxation. Our task is to ascertain and to give effect to the intention of the legislature.

It seems to us plain and clear that a soft drink bottle is a container, and that the fact it may be attracted to the bottler for repeated use by device of deposit and refund does not alter its character.

If a change in the law is desired it must come from the legislature. It cannot come by rule or regulation of the state tax assessor, or by decree of court. The case was reported to the Law Court "which court shall determine the legal rights of the parties and all questions of law arising in said cause and render final decision in accordance therewith." Neither party seeks costs.

The entry will be

Appeal to Superior Court sustained.
Judgment for appellant without costs.
Tax abated.

Case remanded to Superior Court for decree in accordance with opinion.

MRS. RITA GAMACHE
vs.
THOMAS COSCO

Androscoggin. Opinion, March 28, 1952.

Negligence. Intersection. Last Clear Chance.

R. S., 1944, Chap. 19, Sec. 107.

The failure of a driver to comply with R. S., 1944, Chap. 19, Sec. 107 by not attempting to pass beyond the center of the intersection preparatory to making a left turn results in strong evidence of contributory negligence.

The driver of an automobile at an intersection must watch and time the movements of his own car and that of approaching vehicles so as to insure safe passing. A driver also owes the duty to signal his intention to turn.

The doctrine of "last clear chance" or "discovered peril" applies only after the defendant has discovered, or should have discovered, that plaintiff is in a position of peril and the defendant has the opportunity to avoid the accident after plaintiff's negligence has ceased. Defendant's negligence must be both the *last* negligence and proximate cause of accident.

ON EXCEPTIONS.

This is a negligence action involving an intersection collision of motor vehicles. The presiding justice directed a verdict for defendant. Plaintiff filed exceptions. Exceptions overruled. Case fully appears below.

Edward J. Beauchamp, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

FELLOWS, J. This action of negligence comes to the Law Court from Androscoggin County Superior Court upon the plaintiff's exceptions to a directed verdict for the defendant.

The plaintiff, Mrs. Rita Gamache, testified that on September 1, 1950 she was driving her Chevrolet automobile northerly on Lisbon Street in the city of Lewiston towards the intersection of Lisbon and Chestnut Streets. At the same time the defendant was proceeding southerly on Lisbon Street toward the intersection. It was her intention to turn left, at the intersection, onto Chestnut Street. Chestnut Street runs easterly and westerly. When the plaintiff came to the intersection the traffic light was red. She stopped her car on the right hand lane of Lisbon Street two or three feet back of the curb line of Chestnut Street. There were two lanes on Lisbon Street, one for northerly traffic and one for southerly.

The plaintiff said that it was raining at the time of the accident, and that there was no traffic near the intersection other than the truck of the defendant going southerly and the car of the plaintiff going northerly.

When the red traffic light changed to green the plaintiff started her car. She says she saw the defendant coming, but she thought he was a "long ways off." Where, and at what time, with regard to the collision, the plaintiff saw the defendant's truck, if she actually saw it, she did not say. She made no estimate of distances. She did not testify that she gave any indication of her intentions to turn left, or any warning to the on-coming truck, or to a car that might be following her. She did not attempt to go to, or to pass beyond, the center of the intersection, but sharply turned left, into the southwest quarter of the intersection from the position where she had stopped for the red light, and directly in the path of the on-coming defendant's truck. She does not testify that she made any attempt to time the movement of the defendant's vehicle and that of her own, so as to reasonably insure safe passage for both vehicles. She said "I saw the green light went on and I looked around and there wasn't any other cars in view so I started and then suddenly

saw that truck coming down. *** I saw he was coming pretty fast so naturally I stopped *** and he hit me right in front." She testified there were no cars on her left and no cars on her right. She said the defendant's truck was at all times on its right and proper side of Lisbon Street. The damage to the plaintiff's car was on the left front fender and the left side of the grill. She stated that she did not see the truck at all until after she had started. John A. Perreault, Jr., called by the plaintiff, testified that he was at the corner of Chestnut and Lisbon Streets and that he saw the defendant's truck coming to or through the intersection at a rate of 20 to 25 miles an hour. The plaintiff's car was hit on the left front side at an angle "it had to be an angle because she was turning. Couldn't hit her straight on." On cross examination one question was "Do you know whether the collision stopped the cars?" Perreault answered "Yes it did." Later Perreault said that he thought she was stopped when the collision occurred but "part of that truck was in my way. I can't tell you exactly."

With the witness Perreault, a blackboard chalk was evidently used, and counsel made the oft repeated error of having a witness state, with reference to a temporary drawing on the board, that he "crossed over right here" and "there is no car there," which statements are of no value to a reviewing court, without definite location with regard to place of accident, or some approximate distances from one point to another, appearing in the record. Counsel should have in mind that unless care is taken, when a chalk is used, the printed record will not show facts that might be vital in some cases, although not important in the case at bar. In this case the story of the plaintiff and the important portions of the testimony from Perreault can be understood. This decision must also, and necessarily, be based on the plaintiff's own testimony as to her due care, or lack of it, and the negligence, if any, of the defendant.

Upon the close of the plaintiff's case, the defendant rested his case and moved for a directed verdict which was granted.

The statute requires that when the driver of a vehicle intends to turn to the left at an intersection, the driver "shall approach such intersection in the lane for traffic to the right of and nearest to the center line of the way, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left. For the purpose of this section the center of the intersection shall mean the meeting point of the medial lines of the ways intersecting one another." Revised Statutes (1944), Chapter 19, Section 107.

The burden of proof is upon the plaintiff to prove her own due care, and that no lack of care on her part contributed to her injuries. She admittedly failed to obey the law by not attempting to pass beyond the center of the intersection, as the statute requires of a driver who intends to turn left. This is very strong evidence of contributory negligence. It "creates a presumption of negligence." *Bolduc* v. *Garcelon,* 127 Me. 482; *Dansky* v. *Kotimaki,* 125 Me. 72; *Rouse* v. *Scott,* 132 Me. 22; *Berry* v. *Adams,* 145 Me. 291, 75 Atl. (2nd) 461.

The driver of an automobile at an intersection must watch and time the movements of his own car and that of an approaching vehicle to insure safe passing. A driver also owes the duty to the driver of the other vehicle to signal the intention to turn left. *Kennedy* v. *Flagg,* 145 Me. 399, 75 Atl. (2nd) 850; *Esponette* v. *Wiseman,* 130 Me. 297, 155 Atl. 650; *Erwell* v. *Harmon,* 139 Me. 47; *Verrill* v. *Harrington,* 131 Me. 390, 163 Atl. 266.

The record in this case plainly shows that the plaintiff was guilty of negligence. Had she obeyed the statute, when

she reached the intersection of Lisbon and Chestnut Streets, and passed beyond the center, the defendant's truck would have gone through the intersection, or would have been out of the plaintiff's path. She turned or "cut" left suddenly and without warning before she reached the center. She either did not see the defendant's truck with seeing eye and attentive mind, or she saw and failed to time her own movements with the movements of the defendant. Not only did she fail to observe the law, but there is no evidence that she exercised any of the care to be expected from the ordinarily careful and prudent driver of an automobile.

The plaintiff in her bill of exceptions and in brief of counsel claims that even if she was negligent, the doctrine of the "last clear chance" is applicable to the facts in this case. The claim is based on the plaintiff's testimony that she started on the green light, turned sharply left and "suddenly saw that truck coming **** so naturally I stopped," and she claims it was then possible for the defendant to have passed on either her right or on her left. Her own testimony, however, negatives the possibility that the defendant could have avoided the collision.

The "doctrine of last clear chance" or "the doctrine of discovered peril" only applies *after* the defendant has discovered, or should have discovered, that the plaintiff is in a position of peril. The defendant must also have the time and opportunity to avoid the accident, after the plaintiff's negligence has ceased, or in a case where the plaintiff's negligence is too remote. The negligence of the defendant must be the last negligence, and it must be the proximate cause. It cannot be invoked unless the defendant has a clear chance to avoid, after the plaintiff's negligence has ceased, or ceased to be of any vital importance because remote. It is not only the *last* chance but it must also be a *clear* chance. *Barlow, Pro Ami* v. *Lowery,* 143 Me. 214.

The record does not show that the negligence of the defendant, if in fact it can be construed that he was in any manner negligent, was the proximate cause of this accident. The plaintiff does not testify that the defendant was far enough away from her when she turned into his path and "suddenly" saw him, so that he could have stopped. She argues there was room for him to pass to her left or right because she saw no other cars, except for a car parked at the curb. She testified that she started. She turned sharp left. After she started she saw the defendant "suddenly." She says she stopped "just over the center line of Lisbon St." ** "I must have passed over a little. I don't know. I don't remember, it happened so quickly."

The defendant had no "last clear chance" to avoid the plaintiff. The record does not show that the defendant had any chance whatever. He had neither time, nor opportunity to see that the plaintiff had placed herself, or was about to place herself, "in peril" and to avoid her. She turned quickly to the left into the path of the defendant before reaching the intersection center, and she made no signal to indicate her intention, nor any effort to gauge distances or speeds. She either hit the defendant, or, if she stopped, as she claims, she stopped so suddenly in his immediate path that he had neither time nor opportunity to avoid her. Under any view of the plaintiff's testimony, her negligence was either a "continuing negligence," or, it was negligence so fresh and immediate in time and so near in space, that it was not "remote" as the last clear chance doctrine requires. The fact that it was the plaintiff's left front fender and left side of the front grill that was damaged, forcibly if not conclusively argues against the plaintiff's contention. There was nothing, so far as the evidence shows, to reasonably put the defendant on guard against the sudden appearance of the plaintiff's car in his own proper and legal path, or to warn him of its sudden unlawful and negligent turn to the left. The record indicates that

he was "guilty of neither original nor subsequent negligence." *Fernald* v. *French,* 121 Me. 4, 10.

The verdict directed for the defendant in the Superior Court, by the justice presiding, was correct and proper.

Exceptions overruled.

LUDRICK BURTCHELL
vs.
FRANK S. WILLEY, SR.

Aroostook. Opinion, March 31, 1952.

Courts.
Negligence. Jurisdiction. Pleading. Transitory and Local Actions. Terms. Return Day.

The Superior Court in any county has jurisdiction of transitory actions whether they sound in tort or contract and venue in such actions is a matter of procedure which can only be taken advantage of by dilatory plea or motion seasonably filed.

Local actions must be brought in the county where the statute demands, or there is no jurisdiction.

If a wrong return date is made in an action or there is no return day, the objecting party waives the defect by a general appearance and going to trial without appropriate motion or plea in abatement (Rule 5, Rules of Court). R. S., 1944, Chap. 100, Sec. 11.

ON MOTION FOR NEW TRIAL.

Action of negligence. The jury returned a verdict for plaintiff. Defendant moved for a new trial. Motion overruled. Case fully appears below.

Roberts & Bernstein, for plaintiff.

James P. Archibald, for defendant.

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

FELLOWS, J. After verdict for the plaintiff in the sum of $4,694.50, this case comes to the Law Court from the Superior Court, Aroostook County, on the defendant's motion for a new trial.

The writ in this action was dated June 29, 1950. The writ was served on June 30, 1950 and was made returnable at Houlton "on the second Tuesday of June, 1950." There was no term, provided by law, in June at Houlton. The writ was entered at the September Term 1950, and the defendant entered a general appearance. The defendant filed no plea to abate and made no motion to dismiss. The case was continued and tried at the November Term, 1950. After verdict for the plaintiff, the defendant filed motion for new trial on the usual grounds that the verdict was contrary to the law and evidence, and that the damages were excessive.

The principal facts and contentions are these: On May 5, 1950 at about two-thirty in the morning, on State Highway No. 100 near the town line between the towns of Clinton and Benton, the parties to this suit were operating trailer tractors. The plaintiff, Ludrick Burtchell of Fort Fairfield, was engaged in sending a load of potatoes to market in his vehicle, and his driver was proceeding southerly. The defendant, Frank S. Willey, Sr., was traveling northerly to obtain a load of potatoes. The night was foggy. Both vehicles had the lights on, and the driver of each vehicle was guiding the movement of his vehicle more or less by the painted center line of the highway, which painted center line could be plainly and easily seen.

The plaintiff claims, and Dale Kimball the driver for the plaintiff testified, that he was driving a new 1949 Ford tractor, with a 28-foot trailer. The tractor was 8 feet wide.

The trailer was 4 feet wider than the tractor and loaded with 15 tons of potatoes. The highway was approximately 20 feet wide, "black top" surface, with "2-foot shoulders." The fog was thick and visibility only about 150 feet. He was driving at the rate of 30 to 35 miles per hour. The plaintiff's driver further testified that he was on his right-hand side of the highway and all of his tractor and all of his trailer was on the right side of the painted white center line. He saw the defendant's tractor trailer when it was 150 feet away and it then was "straddling the white line" with the defendant's left wheels about 3 feet on the plaintiff's side of the road. "I started to cut out and he started cutting to the right to miss, but we were too close." ** "I applied my brakes." The defendant's left rear wheels struck the plaintiff's left trailer wheels. The plaintiff's driver after applying the brakes, went 200 feet, when the trailer and tractor tipped over in the "ditch" on their left side and were damaged so that they were practically a complete loss.

The defendant, on the other hand, testified that he was travelling about 35 miles an hour in an International tractor with 30-foot trailer, and that he could see only "one telephone pole at a time," but "I could see the white line in the center of the road" and "I was keeping the front wheel of my tractor just to the right-hand side of it all the way along." The defendant said that he saw the plaintiff's headlights at 200 feet and that he then was "just to the right of the white line." The defendant said, concerning the plaintiff, that "he was following the line just the same as I was." "He was on the other side of it." "It didn't appear to me as though we were going to hit. In fact, the front of his tractor got way by me before we hit." The rear wheels of the tractors hit. The defendant said "the back end is wider than the front." The defendant did not testify that he turned in any manner toward the right, because he did not believe they were going to hit.

The highway police officer investigated within an hour after the collision and made measurements. He told of locations of broken glass and other materials in the road, and of tire marks on the west side of the highway. The officer said that the plaintiff's driver, Kimball, told him that night that the defendant, Willey, was "one foot over" on Kimball's side of the road, but Willey did not claim to the officer that the plaintiff was on Willey's side of the road. Donald Willey, son of the defendant and riding with his father, was asleep and "heard a crash, that is all."

The Superior Court in any county has jurisdiction of transitory actions such as assumpsit, or action for damages. Transitory actions are personal actions brought for the recovery of money, whether they sound in contract or in tort. In contemplation of law transitory actions "have no locality" and the court has *jurisdiction* in any county. The matter of wrong venue in transitory actions (such as bringing the suit in a county where neither party lives) is a question of procedure. The defendant may submit to jurisdiction in a transitory action in any county, if he chooses. If he objects, he must do so by dilatory plea or motion seasonably filed. If he fails so to plead he waives the objection. *Webb* v. *Goddard,* 46 Me. 505; *Power Co.* v. *Railroad Company,* 113 Me. 103. Local actions, however, such as replevin, must be brought in the county where the statute demands, or there is *no jurisdiction,* and the action may be dismissed on motion, or taken advantage of at the trial. The court on its own motion may dismiss where lack of jurisdiction becomes apparent. Where the statute prescribes the county in which a particular kind of action shall be brought, the action is *local. Power Company* v. *Railroad Company,* 113 Me. 103, 104; *Plaisted* v. *Walker,* 77 Me. 459.

If a wrong return date is made in an action, or if there is no return day, advantage of such an error can be taken by motion or plea in abatement. If the party objecting neglects

to make his motion or file his plea within the time fixed by the rule of court, and he enters a general appearance and goes to trial, he has waived the defect. *Pattee* v. *Lowe,* 35 Me. 121. A writ returnable on a day out of term is voidable and is abatable on motion seasonably filed. *Kehail* v. *Tarbox,* 112 Me. 327; Rule of Court 5. Of course, if the time when the defendant is to appear is not clearly and distinctly stated, or if an impossible date, or there is other lack of proper process, his failure to appear may not justify any legal conclusion against him. *Dover-Foxcroft* v. *Lincoln,* 135 Me. 184; *Railroad Company* v. *Weeks,* 52 Me. 456. If, however, the defendant does appear he may waive the irregularity. The court may in its discretion, and in a proper case, permit an amendment. *Barker* v. *Norton,* 17 Me. 416; *Guptill* v. *Horne,* 63 Me. 405; *Lawrence* v. *Chase,* 54 Me. 196; *Bunker, Appellant,* 129 Me. 317; *Dover-Foxcroft* v. *Lincoln,* 135 Me. 184. See also Revised Statutes 1944, Chapter 100, Section 11, providing in substance that no proceeding shall be reversed for want of form or for circumstantial errors or mistakes which are amendable. In regard to plaintiff making a change of return day in the writ or process before, or after, service on the defendant, see *Bray* v. *Libby,* 71 Me. 276; *Harris* v. *Barker,* 87 Me. 270; *Dodge* v. *Hunter,* 85 Me. 121.

In this case at bar, the return day of the writ was "the second Tuesday of June 1950," a day when no term was to be held. The writ was entered at the September term, 1950. The defendant appeared at the September term and entered a general appearance. The defendant filed no plea in abatement, or motion to dismiss. This action for damages is a transitory action. The court had jurisdiction. The case was continued and tried at the November term, 1950. The irregularity was waived, and, by the waiver, became immaterial in this case.

In order to obtain a new trial on a general motion, it is necessary that the moving party show that the verdict is so

manifestly wrong, that it is apparent that there was prejudice, bias, passion or mistake. *Rawley* v. *Palo Sales, Inc., et al.*, 144 Me. 375; *McCully* v. *Bessey*, 142 Me. 209, 212. The general rule is that the verdict must stand when the testimony is conflicting, and there are two arguable theories presented, both sustained by credible evidence. *Jenness* v. *Park*, 145 Me. 402, 76 Atl. (2nd) 321.

When a person is travelling in a motor vehicle upon the highway, and approaching to meet another vehicle, he must seasonably turn to the right of the middle of the travelled part of the way so that the vehicles may pass each other without interference. Revised Statutes 1944, Chapter 19, Section 72. The statute "means that they must turn in season to prevent a collision, and the one who fails to obey this mandate is prima facie guilty of negligence, and must sustain the burden of excusing his presence upon the wrong side of the road." *Bragdon* v. *Kellogg*, 118 Me. 42.

It is not necessarily negligence to drive an automobile in heavy fog. The driver of an automobile passing through fog has the right to proceed at a reasonable speed, consistent with the existing conditions. The questions of due care is one of fact. *Cole* v. *Wilson*, 127 Me. 316; *Peasley* v. *White*, 129 Me. 450.

The plaintiff must sustain the burden of establishing his own due care at the time of the collision. *Baker* v. *McGary Transportation Company*, 140 Me. 190. The evidence must be evidence that would authorize the jury to find that the damage was occasioned solely by the negligence of the defendant. *Spang* v. *Cote*, 144 Me. 338, 343.

Human nature is such, that when the driver of one automobile is in collision with another, or he has had any form of accident, the driver is often inclined to remember what he desires to remember. Accidents happen so quickly that there is neither time nor opportunity for the driver to observe all

locations, incidents and circumstances. It is only after the accident has happened, and while the driver reviews the facts with a disturbed or uncertain mind, that he endeavors to recall the facts, and to convince himself perhaps, that he acted at the time in the manner that he knows he should have acted. As time goes on, he has so satisfied his own mind as to what happened, that he honestly believes that he actually remembers facts that show he was not at fault. Individuals differ so much in powers of observation, discrimination, and memory, that the members of a jury who hear testimony relating to an accident, have the opportunity to watch carefully the appearance, hesitancies, inconsistencies, and other "court room incidents" that may indicate false or erroneous testimony. A printed record of the testimony gives the reader nothing through ear and eye of some vital things that often lead to truth.

Memory and imagination are in close intellectual brotherhood, and it is difficult to tell what are real memory images and what are details filled in by imagination. The unconscious impressions so blend themselves with conscious realities that they often appear to make a harmonious whole. The only check on such mistaken, or fabricated, testimony is the appearance of the witness himself, the credible testimony of other witnesses, and the circumstances surrounding the transaction. The jury which has heard the testimony and seen the witnesses is, therefore, in a better position to decide disputed questions of fact, than is one who only reads a record.

In this case now under consideration, the plaintiff testified that he was at all times on his right side of the white line that marked the center of the travelled part of the way; that he was proceeding at 30 to 35 miles per hour; and that the defendant was "straddling the white line," with his left wheels 2 or 3 feet over the line. The defendant, on the other hand, said that he was also travelling at 30 to 35

miles per hour, and that he was "just to the right" of the white center line. In fact, the defendant did not believe "we were going to hit."

The questions for jury determination were (1) was the plaintiff in the exercise of due care, and if so, (2) was the defendant negligent? Each claims, and, produces evidence intended to show, that he was in the exercise of due care at the time of the collision. There were "two arguable theories." The jury believed that the theory of the plaintiff was the correct theory, and the plaintiff's evidence, which the jury believed, justifies the verdict. The verdict is not "clearly wrong" and it must stand. The court has no right to substitute its judgment for the verdict of the jury in a case where the record shows that either may have been in the right, although one must have been in the wrong.

The amount of damage found due is not questioned by the defendant. He admits in his brief that "the amount of damage could have been found from the evidence."

Motion overruled.

ANTONIO PARADIS ET AL. APPELLANTS FROM DECREE OF JUDGE OF PROBATE IN RE WILL OF NARCISSE PARADIS

Kennebec. Opinion, March 31, 1952.

Wills Capacity. Witnesses. Evidence. Cross Examination.

A person possessed of a sound mind is entitled to dispose of his property by will, on compliance with the formal requirements incident to the execution of valid wills, without more.

The question of the testamentary capacity of one who executes a will in accordance with the formal requirements of the statute is one of fact, to be resolved on all the evidence presented at a hearing on its allowance.

The proponents of a will, or those opposing its allowance, are entitled, if they wish, to have each subscribing witness thereto express an opinion, formed at the time of the execution of it, concerning the soundness of mind of a testator, and to develop any facts tending to show the opportunity, or lack of opportunity, each had for forming a considered opinion thereon.

A subscribing witness to a will is competent to testify on the question of a testator's soundness of mind although suddenly called upon to act as such with no knowledge concerning the capacity of the testator beyond what might be acquired by having him indicate that the instrument he was signing was his will and that he desired it attested.

Although persons asked to sign a will as attesting witnesses ought to inquire into the capacity of an intended testator, and should refuse to attest the will of one they believe lacking in testamentary capacity, an instrument they have attested as a will should not be invalidated as such because of their failure to perform that duty.

It is not necessary to establish the due execution of a will that all of the subscribing witnesses thereto, or any of them, testify to the soundness of mind of the testator.

Evidence concerning the source of acquisition of the property of a testator, or a part thereof, is not admissible testimony to establish the claim that his will makes an unnatural or unreasonable disposition of his property, or that its execution was induced by undue

influence or duress, in the absence of other evidence tending to support either such claim.

The ruling in the instant case excluding evidence concerning the source of acquisition of a part of the property of the testator must be upheld on the limited record presented, which carries no other evidence tending to prove either undue influence or duress.

Neither undue influence nor duress can be proved by reference to a will and its provisions alone, nor can it be established by such reference that a will is unnatural or unreasonable.

One possessed of a small property cannot be said to be making an unnatural or unreasonable distribution of it by a will leaving his entire estate to his wife if she survives him.

The right of a parent to dispose of his property by will as he may wish cannot be restricted by the action of a child in contributing to the maintenance of a family home, during minority or thereafter.

Mere inequality in the treatment of the children of a testator in his will, however great, constitutes no evidence of undue influence.

A party should not be permitted, ordinarily, to call a witness to the stand and proceed to establish his lack of credibility after finding his evidence disappointing.

One calling a witness to the stand is not precluded from proving by other witnesses that the true facts are contrary to the evidence he has given.

One calling a witness to the stand to prove the execution of an instrument he has witnessed is not precluded from proving the lack of credibility of that witness concerning other facts.

Under appropriate circumstances one who has called a witness to the stand may cross-examine him, in the discretion of the court, or prove that he has made statements at other times contradictory of the evidence he has given, when that evidence is a surprise, or carries indication of treachery on the part of the witness.

Statements made by a witness out of court contradictory of the evidence given therein may be proved to neutralize his testimony, but not as substantive evidence to prove the facts declared in his contradictory statements.

The rulings in the instant case denying the appellants the right to prove that a witness, whose evidence they claimed surprised them,

had made statements contradictory thereof at other times, and excluding from the evidence a signed statement carrying such contradictory statements must be sustained on the limited record accompanying the bill of exceptions, which carries no other evidence tending to prove any of the facts to which such contradictory statements relate.

ON EXCEPTIONS.

On exceptions to the decree, findings, and rulings of the presiding justice of the Supreme Court of Probate allowing a last will and testament. Exceptions overruled.

McLean, Southard & Hunt, for plaintiff.

Goodspeed & Goodspeed, for defendant.

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

MURCHIE, C. J. The appellants in this case are Antonio Paradis and Jeanne Theriault, two of four children disinherited by a will leaving all the property of their father to his wife, if she survived him, and to a half-brother of theirs, if she did not. They seek a review of a decree of the Supreme Court of Probate, and the findings therein, made by the justice who heard their appeal from the Probate Court, without the intervention of a jury. Their exceptions allege error in the decree and in rulings on evidence. The justice denied their appeal, allowed the contested instrument as the last will and testament of Narcisse Paradis, and made specific findings that he was of sound mind when it was executed, and was not subjected to duress or undue influence in the making of it.

The testator, who was married twice, died December 24, 1948, survived by a widow, his second wife, and five children, two borne by her and three by the first wife. His will, executed February 28, 1948, recites expressly that he is not

unmindful of the four disinherited children, naming all of them. The wife made a will at the same time, leaving all her property to him, if he survived her, and if not, to her son Joseph. Joseph was the contingent beneficiary under both wills.

The record presented does not contain all the testimony taken out in the Supreme Court of Probate. It presents the testimony of two of the subscribing witnesses to the will, and a stipulation that the third "need not be personally called," to lay the foundation for the first exception, and that of two witnesses called by the appellants. The Bill of Exceptions quotes some evidence in addition, part of which relates to the second exception and part to the third, in connection with which it carries the full testimony of two additional witnesses called by the appellants. We shall take the exceptions up in order.

THE FIRST EXCEPTION

The stipulation aforesaid recites that the witness whose personal appearance was waived by it would testify, if present, that she was a stenographer in the office of the scrivener of the will at the time it was executed, and was one of the witnesses thereto, that the testator was a stranger to her, and said no more in her presence than to answer "Yes" when the will, as drafted, was presented to him, and he was asked if it was his last will and if he desired that it be witnessed. She would testify, also, it declares, that the testator, his wife, and the subscribing witnesses were together in the scrivener's office while all the signatures appearing on the document were affixed thereto, that the testator signed it in the presence of the witnesses, and that they signed it in his presence, and in the presence of the others. The case does not disclose whether the same witnesses subscribed the will of the wife.

The testimony of the scrivener, who was one of the witnesses to the will, relates the circumstances attendant upon

the preparation and execution of it, and his long acquaintance with the testator, and carries his declaration of opinion that the testator was "sane" at the time. That of the third witness to the will (second in order of signing) covers less than three pages in the record. She, also, was a stenographer in the office of the scrivener. Her evidence confirms the recitals of the stipulation, and the testimony of the scrivener, concerning the manner in which the will was executed. She was not asked to give her opinion whether the testator was of sound mind, either by the proponents or the appellants, but admitted, in effect, on cross-examination, that she had declared in the Probate Court, at the first hearing on the will, that she did not hear the testator say enough to permit her to form any opinion as to his mental capacity.

This exception is grounded in the fact that the stipulation, and the evidence of the third witness, particularly as given, according to her admission, in Probate Court, establish conclusively that two of the three subscribing witnesses to the will gave no thought when signing it to whether the testator was "of sound mind," to use the words of our statute of wills, R. S., 1944, Chap. 155, Sec. 1. The exception is a dual one, alleging errors (1) in the refusal of appellants' motion that the will be disallowed, made at the close of proponents' direct case, and (2) in the decision carried in the decree, that the requirements of the statute were satisfied, despite omission of the witnesses to form an opinion that the testator possessed a "sound mind."

The claim of the appellants cannot be said to be entirely without foundation in precedent. In New York one ancient case, at least, may be said to support it. It was so construed, in any event, by Judge Redfield, an eminent writer on the law of wills. The case, *Scribner* v. *Crane,* 2 Paige Ch. 147, 21 Am. Dec. 81, was decided in 1830. It involved an instrument purporting to be the will of a very feeble lady, nearly ninety years of age, who, while lying on her

bed helpless, had placed her mark on a document drawn by her physician, with a hand guided by him. He subscribed it thereafter, as a witness, as did two other persons, who testified, when it was offered for probate, that they had "relied partially, if not entirely, on the declarations" of the physician as to the capacity of the testatrix. The will was disallowed because neither of these two witnesses "had sufficient knowledge on the subject to give legal evidence of the due execution of the will." Judge Redfield included this case in his collection of leading cases on the law of wills, American Cases on Wills, 137, attesting to the distinction of the author of the opinion, Chancellor Walworth, and subscribing to the desirability of a more stringent rule about the proper function of witnesses to wills than that generally recognized. It is his comment, thereafter, however, which bears directly on the present case. This reads as follows:

> "We do not expect to be able to restore the office of the attestation of the subscribing witnesses to a will to its former healthy state. The law, upon all questions, must conform in some degree to existing usage and custom, however unwise we may deem it. And the fact that most men execute their wills in the most informal manner, away from their dwellings, in the offices of attorneys, calling the first persons they can find to witness them, must in a great degree deprive the attestation of all judicial character. Formerly, wills were prepared with great care, by giving formal instructions to solicitors, and designating the persons who were to act as witnesses, some near friends more commonly, and always such as were well acquainted with the testator and his family. The actual execution of one's will under such circumstances, became a very solemn act, somewhat in the nature of a religious rite, like a baptism or burial. It was then very proper to regard the formal attestation by the witnesses as a sort of judicial authentication, much like probate in common form. At that time a witness who attested the execution of a will, and then testified to the incompetency of

> the testator, was regarded much in the light of a perjured person. But now this is every day's occurrence, without exciting any surprise or rebuke. We can not but feel that the old practice was the better one; but we do not well see how it is to be restored, except by statute, and statutes are not so likely to be enacted in order to revive obsolete usages as to inaugurate new ones."

The appellants do not cite *Scribner* v. *Crane, supra,* but they do cite an Annotation in 35 A. L. R., noted hereafter, which identifies it, several decisions of this court, some Massachusetts cases and one from Illinois, and quote excerpts from several of them to sustain their position that witnesses to wills must form opinions about the soundness of mind, or otherwise, of those executing them. *Gerrish* v. *Nason,* 22 Me. 438, 39 Am. Dec. 589; *McKeen* v. *Frost,* 46 Me. 239; *Robinson* v. *Adams,* 62 Me. 369, 16 Am. Rep. 473; *Trinitarian Congregational Church and Society of Castine, Appellant,* 91 Me. 416, 40 A. 325; *Wells, Appellant,* 96 Me. 161, 51 A. 868; *Martin, Appellant,* 133 Me. 422, 179 A. 655; *Chase* v. *Lincoln,* 3 Mass. 236; *Brooks* v. *Barrett,* 7 Pick. 94; *Hastings* v. *Rider,* 99 Mass. 622; *Nunn* v. *Ehlert,* 218 Mass. 471, 106 N. E. 163, L. R. A. 1915 B 87; and *Allison* v. *Allison,* 46 Ill. 61, 92 Am. Dec. 237.

The quoted excerpts have a tendency, without doubt, to confirm the claim of the appellants that the purpose underlying the requirement that wills be executed in the presence of credible witnesses is to have reliable evidence of the execution of them, and provide security against fraud. Many of the cases suggest the desirability of honest and unbiased opinions from such a source, concerning the soundness of the mind of a testator. None, however, except *Allison* v. *Allison, supra,* rejected a will because one or more of the witnesses formed no judgment on that question at the time it was executed, and that decision is explained by the court's declaration therein that the Illinois statute required "before

a will can be admitted to probate, that the subscribing witnesses shall swear they believe the testator to have been of sound mind and memory."

It is not difficult to find statements in judicial opinions which, without reference to their context or the issues under consideration, lend color of support to implied principles of law the cases cannot be considered as having declared. In *Robinson* v. *Adams, supra,* for example, which the appellants cite as declaring that sanity on the part of the testator is one of the things a witness must be qualified to attest at "the time of the act," i.e., the signing, Judge Kent, after quoting Greenleaf on Evidence in its statement that:

> "Witnesses to a will are permitted to testify as to the opinions which they formed of testator's capacity, at the time of executing his will",

declared expressly that such witnesses might express such opinions although they were suddenly called in "and heard only the request to sign and the declaration" that the paper they were asked to sign was a will. This was in 1870. At a later date, 1902, Judge Powers, in *Wells, Appellant, supra,* dealing with a case in which two of the witnesses to a will had expressed no opinion about the soundness of mind of the testatrix, and the third, a nurse who had been in attendance on her throughout the day the will was executed, had testified that she was out of her mind all that day, set aside a jury verdict that the testatrix was not of sound mind, with express declaration that it is not necessary, to establish a will:

> "that any of the subscribing witnesses should testify to the sanity of the testator."

Finally, in 1920, in *Goodridge, Appellant,* 119 Me. 371, 111 A. 425, this court, in dismissing an appeal from the allowance of a will, where the issues were due execution, fraud and undue influence, noted that one of the subscribing wit-

nesses had not recalled the execution of the will until "after his memory was refreshed," and that the others had no recollection whatsoever "of what occurred at the time of their attestation," but had merely identified their signatures. The true function of witnesses to wills is to prove due execution, and that is done by the identification of the signatures of the testator and themselves. *Canada's Appeal,* 47 Conn. 450.

In the Annotation aforesaid, 35 A. L. R. 79, and in the text of American Jurisprudence, 57 Am. Jur. 232, Sec. 302, the rule is asserted to be, "with rare exceptions," that it is the duty of a subscribing witness to a will "to observe and judge of the mental capacity of the testator." Both the Annotation and the text recognize, however, as the latter states expressly in the paragraph following that wherein the quoted words appear, that:

> "the rule that an attesting witness is under a duty to observe the mental capacity of the testator is, in some respects, honored more in the breach than in the observance, since courts which uphold it do not carry it to the extent of invalidating a will for the reason that the attesting witnesses did not perform the duty imposed by the rule."

The proper function of witnesses, asked to attest wills, is well stated in the opinion of Mr. Justice Wilde, in *Hawes* v. *Humphrey,* 9 Pick. 350, 20 Am. Dec. 481. Therein, after asserting that the statutory requirement that wills be witnessed was intended to protect a testator, who might be *in extremis,* or greatly debilitated by age or infirmity, from fraudulent practices, and made them, in some sense, the judges of sanity, he said that:

> "It is their duty to inquire into this matter, and if they think the testator not capable, they should remonstrate and refuse their attestation."

The appellants do not assert that the evidence presented in the Supreme Court of Probate could not support a find-

ing that Narcisse Paradis was of "sound mind." They admit that it could. They declare, expressly, in their Bill of Exceptions, that:

> "While there was conflicting evidence, want of mental capacity is not raised in these exceptions."

It was the right and privilege of the appellants to have each of the subscribing witnesses to the will express an opinion whether the testator was of sound mind at the time of its execution, and to develop facts to show the opportunity, or lack of opportunity, each had for forming a considered opinion on the subject. They elected not to do this, but to rely entirely on the technical question of law they have raised. We have considered it at length, notwithstanding it might have been dismissed rather summarily on the express authority of *Wells, Appellant,* and in accordance with the plain implication of *Goodridge, Appellant,* both *supra,* because we deem it desirable to make it entirely clear that no will should be disallowed in this state on the ground asserted. Our statute gives persons of sound mind the right to dispose of property by will upon complying with stated formal requirements. It may be to the advantage of those seeking to exercise the privilege that they select witnesses who will be able to vouch for their capacity, but capacity is a question of fact to be resolved on the evidence presented. It is not an issue to be decided on such a technical ground as that some particular person or persons, even those selected as witnesses to attest execution, formed no opinion on it. The first exception is overruled.

THE SECOND EXCEPTION

This exception challenges rulings barring the appellants from proving what they had earned during the years 1921 to 1941, during minority and thereafter, what substantial amounts of their earnings they had turned over to their father, to help him in maintaining his home, and what

"understanding," if any, they had with him concerning such contributions, presumably in connection with how he should dispose of any property he might possess at the time of his death by will. They assert that they were prepared to show, also, the comparative earnings of the father, in the years 1921 to 1946, inclusive. It is in evidence that he suffered a shock, at an unstated time, and it may be, although the point is not covered in the testimony of the witnesses whose evidence is before us, that this occurred in 1946, and terminated his earning capacity.

The evidence excluded might have had a tendency, if coupled with information disclosing the size of the estate of the testator, which is not disclosed by the record, to show that he died possessing more property than he would have had if the contributions sought to be proved had not passed into his hands, and the principle that, under appropriate circumstances, the source of the property of a testator may be proved, when the question of undue influence is in issue, has been recognized in many cases. As it is stated in Corpus Juris, 68 C. J. 772, Sec. 460:

> "Evidence tending to show the source of the property is admissible to sustain the reasonableness or unreasonableness of the will, particularly where the testator was under an obligation to the person from whom the property was derived to make a certain disposition of the property."

Reference to the cases cited in support of this textual statement, however, discloses that the circumstances held applicable have always been far different from any which might have been disclosed by responsive answers to the questions to which the rulings challenged relate. These, as set forth in the Bill of Exceptions, were:

"Q When did you start work?

Q How long did you continue to work while living at home?

Q While you were working what part of what you did earn did you turn in to your father?

Q Did you continue to work and turn in money at home after you were 21?

Q Did you have any talk after you became 21 with your father about simply paying board?

Q Roughly how much had you contributed during the time you had been working?"

They were asked of Antonio Paradis when he was giving his testimony, and were excluded on objection, and the Bill of Exceptions states that similar, if not identical, questions were asked of Jeanne Theriault, with the same rulings. The issue as to whether the rulings were proper was raised by exceptions noted and preserved, but the circumstances are not comparable to those presented in the cases cited in Corpus Juris to support the textual statement quoted: *Glover* v. *Hayden,* 4 Cush. 580; *In re Ruffino's Estate,* 116 Cal. 304, 48 Pac. 127; and *Rhea* v. *Madison,* 151 Ky. 262, 151 S. W. 667. Neither is there anything in additional cases cited by the appellants which relates to contributions made by children to a parent for the maintenance of a home, while residing in it with him, particularly when it is noted that some part of the discussion between parent and child in this case, after the latter became of age, was "about simply paying board." We cannot recognize that any child may restrict the right of a parent to dispose of his property by will in such manner as he may wish by contributing to the maintenance of a home, during minority or thereafter.

The claim of the appellants, apparently, is not that the contributions in question restricted the free will of their father, but that the facts that they were made, and that the son who was named as the contingent beneficiary in the will made no corresponding ones, tended to support their claim that the father was subjected to undue influence, exercised by that son or by his mother. The assertion was made in

argument by the appellants that it was admitted that Joseph, the contingent beneficiary, made no contributions prior to the execution of the wills. This may have been said on the authority of the testimony of the scrivener, that the testator told him, when the will was prepared, that Joseph had made no contributions "except as payments on the building might mean that." If it has any additional support in the evidence, it must appear in the testimony of some witness whose evidence is not presented in the limited record carried by the Bill of Exceptions. The reference to "payments on the building" is to the fact that the testator told the scrivener that he and his wife had borrowed money on a mortgage a short time before the will was made, and that Joseph "was paying on the buildings."

In considering this exception, we are hampered by the fact that the record is incomplete. We are unable to say, with no knowledge of what testimony was given by Antonio Paradis and Jeanne Theriault, or by other witnesses, whether the testimony excluded would have any bearing on the issue of undue influence. The scrivener testified that the testator went into some detail in discussing his children, asserting:

> "something to the effect that the children were all pretty well off, or getting along all right",

and noting that one daughter was a nun, saying that he:

> "was kind of proud of that."

In further support of this exception, the appellants cite us to an additional statement in the section of Corpus Juris already cited, that:

> "In passing on the questions of fraud, mistake, and undue influence, it is proper to consider the nature and contents of * * * the will itself. * * * to compare provisions * * * with other evidence to determine whether they are unjust, unequal, or un-

> natural, as such inequality or unnaturalness * * * bears on the question of fraud and undue influence, although it is insufficient in itself to establish such matters, and hence is immaterial and incompetent in the entire absence of other evidence",

and to the Case Note accompanying the report of *Meier* v. *Buchter,* 197 Mo. 68, 94 S. W. 883, 6 L. R. A. N. S. 202, in the last cited report thereof, as well as other authorities, including 57 Am. Jur. 291, Par. 407, an extended annotation in 66 A. L. R. commencing at Page 228, with special reference to Page 250, and several decided cases from other jurisdictions, dealing with distributions of property by will held to be unjust, unnatural, unreasonable, or capricious. It is said in the Case Note aforesaid that:

> "The authorities are all agreed that an unnatural distribution of property by the testator may be considered in connection with other facts going to show undue influence".

The case annotated quotes 29 Am. & Eng. Enc. Law, Second Edition as saying, at Pages 115 and 116, that:

> "Evidence that the provisions of a will are unreasonable, unjust, capricious, and unnatural is not sufficient in itself to establish undue influence * * *; but it is proper to be considered along with other evidence as going to show such undue influence * * *. And for the purpose of setting out more clearly the unnaturalness of the will, it may be shown that relations between the testator and the relatives not provided for were pleasant, or that the latter were dependent for support on the former."

All these authorities recognize that undue influence cannot be proved by reference to the will and its provisions alone. Corpus Juris makes that point directly, asserting that it is "immaterial and incompetent in the entire absence of other evidence." The Case Note declares that it may be considered "with other facts," and the Encyclopedia suggests

the nature of such facts in its reference to relatives not provided for being "dependent for support" on the testator. Regardless of such limitations, the subject matter under discussion in all instances is a will carrying an unnatural or unreasonable distribution, and it cannot be said that any man possessing a small property is providing for such a distribution in making a will leaving his entire estate to his wife. We have no knowledge about the size of the estate here involved, but it is difficult to believe that it could be a large one if, as the excluded evidence was apparently designed to prove, the children of a first wife were making contributions to the maintenance of a home, after a stepmother appeared on the scene and increased the family group by two children borne to the father by her. As the record stands, the possibility that there might be such supporting evidence as dependency, noted in the Encyclopedia, is eliminated by the testimony of the scrivener that the testator asserted to him that the children he was disinheriting were "pretty well off" or "getting along all right."

One thing about the will of Narcisse Paradis is apparent on its face, the inequality of his provisions for his several children. On this point it may be sufficient to refer to the one case cited in Corpus Juris to support its textual statement about unjust and unequal provisions of wills. That case is *Storer* v. *Zimmerman,* 28 Minn. 9, 8 N. W. 827, where it is said:

> "mere inequality, however great, in the distribution of * property among children * * is no evidence of undue influence * * *. If it were evidence from which a jury might find undue influence to avoid the will, the issue practically presented * * * in every case * * * would be, is the will such as the jury, if in the testator's circumstances, would have made? Few wills could stand if such were the test."

The second exception must be overruled. The limited record before us cannot justify the belief that responsive

answers to the questions involved would have brought the case within the principle stated in Corpus Juris concerning proof of the source of testator's title to the property he possessed at the time of death and make the distribution he attempted to provide for by will unjust, unnatural or unreasonable in any way, and the inequality in his treatment of his children is amply explained by his own references to their situation at the time the will was made. To hark back to the quotation from Am. & Eng. Enc. Law, carried in *Meier* v. *Buchter, supra,* there is no evidence in the limited record before us concerning the relations between the testator and the disinherited children when the will was made, and no suggestion of any dependency of any of them upon him for support.

THE THIRD EXCEPTION

This exception, like the others, alleges more than one erroneous ruling, challenging not only those which refused to permit the appellants (1) to cross-examine a witness they had called to the stand, on the ground that she was hostile and adverse, and was giving testimony which was a surprise to them, (2) to prove that she had declared the factual recitals carried in a statement prepared by their counsel and signed by her, identified as Exhibit 2, were true, and (3) to introduce that Exhibit in evidence, but additional rulings so interrelated with those three that they require no separate consideration.

The witness was Mrs. Evelyn Paradis, the wife of the contingent beneficiary. She had testified in opposition to the allowance of the will in the Probate Court, had signed Exhibit 2 when it was presented to her for that purpose by appellants' counsel, and has asserted to them, in the presence of other witnesses, that the factual recitals carried in it were true, after the opening of the case in the Supreme Court of Probate. She had indicated at that time, however,

that she did not wish to testify again, and had stated that she would be out of town when the case was heard, if she knew when it was to be. There can be no doubt the appellants and their counsel knew that her attitude was both hostile and adverse when they called her to the stand, as was made entirely clear by counsel's statement to the court:

> "Sometimes you have to call hostile witnesses, Your Honor. The law recognizes the fact the purpose of a law suit is to get out the truth. If this woman can contribute to the truth and the facts in this case she ought to be permitted to testify. They won't put her on, we know, and the only alternative is for us to put her on although we know she is hostile."

Recitals in the Bill of Exceptions disclose that the procedure appellants sought to follow was to compel this witness, through a cross-examination conducted by reference to Exhibit 2, to affirm the truth of its factual declarations, or impeach her, if she did not make the affirmations, by the testimony of witnesses asserting that they had heard her declare them to be true. It ought not to require the citation of any authority to demonstrate that such a plan of procedure has no support in legal precedent. All the evidence presented in litigated cases must be sworn testimony, and must be so presented as to give the parties to whom it is adverse the opportunity for cross-examination. Facts cannot be proved in court by having a witness, or a multiplicity of witnesses, make oath that some named person said at some time or times that the recitals of a written document were true. Parties may be permitted, it is true, under appropriate circumstances, to cross-examine witnesses they have placed on the stand, *State* v. *Benner*, 64 Me. 267, *State* v. *Crooker*, 123 Me. 310, 122 A. 865, 33 A. L. R. 821, but it has always been recognized in this court that the granting of such a permissive right was vested in the discretion of the justice presiding, and that the exercise of his discretion

was not subject to exception. It is so declared in the cited criminal cases, and has been recognized in the field of civil litigation in other jurisdictions. *Devine* v. *Johnson & Jennings Co.*, 189 Ill. App. 556; *Louisville & Nashville Railroad Co.* v. *Hurt*, 101 Ala. 34, 13 So. 130; *Maloney* v. *Martin*, 81 App. Div. 432, 80 N. Y. Supp. 763; *Bank of the Northern Liberties* v. *Davis*, 6 Watts & Sergeant (Pa.) 285. All of these cases are cited in appellants' brief.

This exception, so far as it challenges the ruling denying the appellants the right to cross-examine Mrs. Evelyn Paradis, might be dismissed on the ground that it was made in the exercise of a discretion that is not subject to exceptions, but reference to the record discloses that counsel was permitted to examine the witness exhaustively in connection with the factual recitals carried in Exhibit 2, and that she answered questions dealing directly with substantially every such recital. On many occasions, it is true, she gave answers which minimized the force of statements carried in absolute terms therein, as where she said, when asked if the testator once declared, in referring to his trip to the office of the scrivener to make the will, "no matter if I say no I'll have to go," that he "had a smile on his face when he said it."

The additional rulings challenged by this exception were made in strict accordance with established precedents in this jurisdiction and in others. The law does not look with favor on permitting a party to call a witness and proceed to demonstrate his lack of credibility when his evidence is disappointing. It was declared in the first volume of the published reports of this court that:

> "the party calling a witness shall not be permitted to attack his character by general evidence",

although it was recognized, even then, that he might disprove facts to which such a witness had testified. *Morrell* v. *Kimball*, 1 Mè. 322. There has been no departure from this general principle in subsequent years, although exceptions

to it have become well established when a party is required to call a witness who has subscribed to a document which must be proved, *Dennett* v. *Dow,* 17 Me. 19, or is surprised by unfavorable testimony given unexpectedly by one he has called to the stand, *Hartford Fire Insurance Co.* v. *Stevens,* 123 Me. 368, 123 A. 38. See also *Gooch* v. *Bryant,* 13 Me. 386; *Brown* v. *Osgood,* 25 Me. 505; *Chamberlain* v. *Sands,* 27 Me. 458; *Shorey* v. *Hussey,* 32 Me. 579; *State* v. *Knight,* 43 Me. 11; *Harmon* v. *Perry,* 133 Me. 186, 175 A. 310. In *Dennett* v. *Dow, supra,* the establishment of the exception applicable to subscribing witnesses was protested in a dissent on the ground that it was unwise as having:

> "a tendency to unsettle the law of evidence by preferring the particular benefit to the general good."

The rule applicable to surprise is well stated in *Hartford Fire Insurance Co.* v. *Stevens, supra,* but a limitation on it is expressed very forcibly in *Bank of the Northern Liberties* v. *Davis, supra.* Therein the court, recognizing that the authority was discretionary and that a party had the right to protect himself from the treachery of a particular witness by proving his case through others, negatived the appellants' claim completely by saying that:

> "In such cases, and others of similar kind, the court before whom the cause is tried, has always, in the exercise of a sound discretion, allowed the party calling him (a treacherous witness) to prove that at different times and in the presence of other persons, he has held different language. This, however, is not substantive evidence of itself, but is permitted to neutralize the evidence given by the witness."

To the same effect see *Akins* v. *State,* (Okla.) 215 Pac. (2nd) 569; *State* v. *Lane,* (Ariz.) 211 Pac. (2nd) 821, and the cases cited in the Note in Ann. Cas. 1914 B, 1121 at 1134, under the caption "Effect of Impeachment."

The rulings which denied the appellants the right to introduce Exhibit 2 in evidence to prove the truth of the fac-

tual recitals carried in it, or to permit other witnesses to testify that Mrs. Paradis had asserted such recitals to be true, at some time or times, were proper. If the appellants had produced any evidence, through other witnesses, competent to prove any of those facts, or tending to do so, and her testimony had been of opposite effect, the evidence they sought to offer would have been proper to minimize the force of her statements, but such is not the situation presented in the record before us. In the partial record accompanying the Bill of Exceptions, including those parts of the testimony quoted in it, there is no evidence whatsoever having any tendency to prove any part of those factual recitals. A careful reading of the testimony given by Mrs. Paradis, and of Exhibit 2, furnishes ample proof that she is not the type of witness whose evidence would carry convincing weight. Such a reading makes it apparent that her own wishes, for a cause we cannot know, induced her to desire that the will be disallowed when the case was heard in the Probate Court, and to favor its allowance at the time of the hearing in the Supreme Court of Probate. No witness whose evidence is colored by personal feelings can furnish credible testimony to support the cause she favors.

The will in question was executed in accordance with the requirements of our statute of wills, by a person of sound mind within the purview thereof, as the appellants admit by their statement that the evidence heard in the Supreme Court of Probate would justify a factual finding to that effect. Their claims that the testator was influenced, in the making of it, by fraud, coercion or undue influence are not supported by any evidence in the partial record accompanying, or forming a part of, their Bill of Exceptions. They could not have been supported effectively by the evidence excluded under the rulings challenged by the second and third exceptions.

Exceptions overruled.

MAINE STATE RACEWAYS ET AL.

vs.

ALEXANDER A. LaFLEUR, ATTORNEY GENERAL, ET AL.

Cumberland. Opinion, April 1, 1952.

Constitutional Law. Gambling. Police Power.

14th Amendment.

There is no inherent or constitutional right to engage in gambling in any form; and whether one shall be permitted to engage in it and under what conditions and restrictions, is a matter for the people to determine, acting by and through the legislature.

The state in the exercise of its police power may prohibit gambling, or authorize it in such limited and regulated forms as may seem appropriate to the legislature.

The Fourteenth Amendment to the Constitution of the United States does not prevent the proper exercise of the police power of the state.

ON APPEAL.

This is a bill in equity seeking a temporary and permanent injunction against the enforcement of P. L., 1951, Chap. 404. The case is before the Law Court on appeal from a decree of a single justice granting the injunction. Appeal sustained. Decree vacated. Case remanded for the issuance of a decree dismissing the bill with costs.

Alexander A. LaFleur, Attorney General,

Philip F. Chapman, Jr., Assistant Attorney General,
for Attorney General and Running Horse Race Commission.

Mayo S. Levenson,
Wilfred A. Hay, for Maine State Raceways Et Al.
Daniel C. McDonald, pro se,
Carl Beyer,
Milton A. Nixon,
Paul K. Stewart,
for Christian Civic League of Maine, Inc.

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

MURCHIE, C. J. The complainants in this Bill in Equity, carried to this court on appeal, are Maine State Raceways, the owner of the equity in a running horse race track in the Town of Scarborough, in the County of Cumberland, Scarboro Holding Company, Inc., the holder of a mortgage thereon, in possession thereof with the consent of the mortgagor, and Scarborough Downs, the lessee and operator of said track at the time the process was commenced, under a license issued on January 5, 1951, pursuant to the provisions of P. L., 1949, Chap. 289, enacted as Chapter 77-A of our Revised Statutes.

The respondents are the Attorney General of the State, Alexander A. LaFleur, the County Attorney of the County of Cumberland aforesaid, Daniel C. McDonald, and Paul A. Dundas, Nathan H. Whitten and Frank H. Totman, the members of the Running Horse Racing Commission established by said Chapter 77-A, referred to hereafter as the "commission." All are named in their official capacities. Chapter 77-A vests the commission with authority to make rules and regulations for running horse races conducted under it, and for the operation of race tracks on which such races are held, within the state. It carries an express declaration that no such meet shall be permitted on Sunday. It imposes the enforcement of its provisions on the Attorney General "with the aid of the county attorneys of the

several counties," upon notification from the Commission of any violations thereof.

The issue presented is of transcendent importance. The process asserts, in effect, that it is not within the police power of the state to grant the privilege of gambling by the sale of pari mutuel pools in the conduct of harness horse racing at night to licensees under a law regulating such racing, and gambling, and deny that privilege to licensees authorized to conduct running horse racing under another law.

The issue is brought to a focus by the action of the single justice to whom the process was presented when filed, and who heard it five months later, in granting injunctions, both temporary and perpetual, restraining the Respondents from performing the functions assigned to them by said Chapter 77-A, as amended by P. L., 1951, Chap. 404. The amendment carried in the latter act prohibited the commission from licensing running horse racing to be conducted at night. Under Chapter 77 of the Revised Statutes, as amended by P. L., 1949, Chap. 388, the members of the State Racing Commission, established to license harness horse racing where pari mutuel betting is permitted, are expressly directed to license such racing at night. The name of that commission was changed to State Harness Racing Commission by P. L., 1951, Chap. 266, Sec. 95.

The temporary injunction was granted on July 20, 1951, a month prior to the effective date of P. L., 1951, Chap. 404. It was granted without a hearing, upon the filing of a bond by the complainants pursuant to the provisions of R. S., 1944, Chap. 95, Sec. 34. The perpetual injunction, the one brought in issue by the appeal, was granted on December 21, 1951, after the cause was heard on the bill, answers and replication. At that time the license held by Scarborough Downs when the process was commenced had expired ac-

cording to its terms and the clear mandate of Chapter 77-A. The temporary injunction had effectively blocked the commission from revoking the license and the other respondents from prosecuting any violations of the amended law conducted in compliance with its terms. The perpetual injunction is meaningless so far as the commission is concerned. It purports, however, to enjoin any prosecution of the complainants, at least for infractions of the law prior to its issue.

It is alleged in the process, with many things not essential to a determination of the cause, that P. L., 1951, Chap. 404 is unconstitutional and void because it contravenes the Fourteenth Amendment of the Constitution of the United States and some unspecified provision of the Constitution and Bill of Rights of this state, and while the decision of the single justice carries no specific findings or rulings, it must be implicit therein that he has declared the law unconstitutional on one of the alleged grounds.

There is no provision in the Constitution of this state, of which our Bill of Rights is a part, which forbids the complete prohibition of gambling of any and all sorts within the state, or restricts the power of the legislature to permit it, in such limited form, and under such regulation or regulations, as it may deem for the welfare of the people, within the broad scope of legislative power vested in it by Section 1 of Article Four of the Constitution, Part Third. We must assume, therefore, that the decision was based on a construction of the Fourteenth Amendment to the Constitution of the United States.

It has been asserted in this court on many occasions that that amendment does not prevent the proper exercise of the police power of the state, notwithstanding its prohibition of the abridgement of "the privileges or immunities of citizens of the United States" and its requirements concerning

"due process of law" and "equal protection." See *Jordan* v. *Gaines*, 136 Me. 291, 8 A. (2nd) 585, and the cases cited therein. The broad scope of the police power of the states has the full recognition, also, of the Supreme Court of the United States. See the *License Cases*, 5 How. 504, 12 Law Ed. 256, and particularly the statement of Justice Grier that:

> "It has been frequently decided by this court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category."

This decision, made in 1847, antedates the writing of the Fourteenth Amendment, but the broad language quoted must be considered as forecasting later decisions that the police power of the states was not curtailed by its adoption. See *Barbier* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 357; *Mugler* v. *Kansas*, 123 U. S. 623, 8 S. Ct. 273; and *Crane* v. *Campbell*, 245 U. S. 304, 38 S. Ct. 98. The two latter dealt with laws regulating the sale of intoxicating liquors, but it has never been denied, so far as we know, that gambling is equally a subject matter for police regulation. In that connection it may be well to quote Justice Grier once more, noting that his comment had to do with the form of gambling known as lotteries. In *Phalen* v. *Virginia*, 8 How. 163, 17 Curtis 539, 12 L. Ed. 1030, he said that:

> "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few per-

> sons and places, but the latter infects the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

No lottery is here involved, but the complainants made it a point to prove factually in this case that gambling by pari mutuel betting on running horse races conducted at night attracted far larger crowds, and produced much heavier betting, than similar races held in the daytime, or harness horse races held at any time of either day or night. In the light of that evidence, there is no occasion for this court to take judicial notice, as it might, considering the gambling probes and prosecutions conducted in the state by both federal and state authorities in recent times, that gambling in connection with horse racing was involving many people and large sums of money.

Gaming, or gambling, the two terms being synonymous as lexicographers and legal texts assert, Webster's Universities Dictionary; 12 R. C. L. 707, Par. 2; 24 Am. Jur. 398, Sec. 2; 38 C. J. S. 51, Sec. 1, has always been the subject matter of regulation by legislation in this state. The first law dealing with it is found in Laws of 1821, Chap. XVIII. Pool selling, probably not known in early days, was expressly prohibited by P. L. 1877, Chap. 176. The provisions of the latter law are now found in R. S. 1944, Chap. 126, Sec. 1, the original terms thereof having been qualified in the 1944 revision of our statutes to safeguard such selling of pari mutuel pools as was authorized by Chapter 77 of the Revised Statutes aforesaid. The qualification written therein for that purpose is adequate to protect equally well corresponding sales conducted in connection with running horse races under Chapter 77-A. It does not extend beyond those two fields.

The allegations of the process assert also that the complainants have made a large investment in the construction

of their race track, relying on the right to operate running races and engage in the sale of pari mutuel pools in connection therewith, and, perhaps, to do so at night, although the evidence makes it clear that they conducted races in the daytime only, as is the mandate of P. L. 1951, Chap. 404, when their plant was first put in operation. Whatever the fact, it is true, as Chief Justice Waite said in *Stone* v. Mississippi, 11 Otto 814, 25 L. Ed. 1079, that:

> "the power of governing is a trust committed by the People to the government, no part of which can be granted away"

by a charter or license to corporations or individuals. Continuing, he said that although the state might create corporations, and vest them with certain rights, they were subject at all times:

> "to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality."

The present appeal might be sustained, and the decree under review vacated, on a variety of grounds. One will be apparent on reference to the provision of Chapter 77-A, Section 6, authorizing the commission to:

> "make rules and regulations for the holding, conducting and operating of all running horse races and for the operation of race tracks on which any such"

races might be held under its provisions, and to the corresponding provision of Chapter 77, which vests similar authority in the commission established to deal with harness horse racing when pari mutuel betting is permitted. There can be no warrant whatsoever for any licensee under either law to believe that the commission issuing his license might not make such rules and regulations without reference to others made by any other, or that the rules and regulations of commissions established in connection with harness horse

racing, on the one hand, and running horse racing, on the other, must be uniform or standardized. Even less is there any foundation for a belief that the legislature which established the commissions, and had full authority to abolish either or both at will, surrendered any part of its authority to make regulations binding upon the commissions themselves, and all licensees operating under them, or either of them.

A second ground for sustaining the appeal, and vacating the decree, is found in another fact equally apparent by reference to the laws in question. This is that neither commission was given jurisdiction over all horse racing of the type dealt with by either within the state. No license whatsoever is required for anyone who wishes to engage in what the Bill of Complaint describes as "the business of running horse racing," or that of "harness horse racing," quoting again. The respective laws deal with such businesses only when the operators of them desire to conduct them "if pari mutuel betting is permitted." Chapter 77-A, Sec. 7; Chapter 77, Sec. 10. In the Bill of Complaint the references are to conducting the respective businesses "for profit," and the closing paragraph thereof makes it apparent that the underlying ground for the action lies in the fact, alleged and proved, that the "business of running horse racing," as such, cannot be conducted profitably. The evidence discloses clearly that the track operated by Scarborough Downs was conducted at a loss at all times, so far as the horse racing exhibited there was concerned. The profit derived from the operation of it came entirely from the sale of pari mutuel pools, which yielded a commission, fixed by the statute at 15% gross, adequate to meet the racing losses and provide a return on the property investment.

A more fundamental ground for sustaining the appeal and vacating the decree, and that upon which such action is taken, lies in the nature of the right complainants seek to

assert in claiming to be entitled, regardless of legislative decisions concerning public welfare, to engage in the sale of pari mutuel pools. Such privilege lies, with the sale of intoxicants, in a field wherein the police power of the state has always been recognized as controlling and inclusive. Sixteen months ago, in *Glovsky, Appellant,* 146 Me. 38, 77 A. (2nd) 195, this court had occasion to say that:

> "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."

The same thing is true, equally, of gambling, in any form.

The legislature has seen fit to legalize gambling, in a limited and regulated manner, under Chapters 77 and 77-A of the Revised Statutes, and under Sections 21 to 27 of Chapter 126, dealing with the game of beano. The enactment of the laws therein carried constituted no surrender of its right to terminate the privileges granted at any time or to modify them in any manner it might see fit. No warrant can be found, in law or precedent, for the claim asserted by the complainants in this process, or for the issue of either the temporary injunction or the perpetual one. Under the circumstances, it is necessary that the cause be remanded for the issue of a decree dismissing the bill, and it seems appropriate that the decree of dismissal impose costs on the complainants.

Appeal sustained.

Decree vacated.

Case remanded for the issue of a decree dismissing the bill with costs.

RALPH C. STOCKMAN BY GUARDIAN

vs.

CITY OF SOUTH PORTLAND

Cumberland. Opinion, April 1, 1952.

Taxation. Veterans. Exemptions. Reports. Guardian and Ward. Evidence. Admission. Assessors. Rules of Court.

It is a well settled principle of law that whoever claims the right to an abatement or exemption from taxation has the burden of proving all facts necessary to bring himself within such exemption.

The effect of vacating the acceptance of a referees' report by the Law Court goes to remanding the case to the Superior Court where in the discretion of the presiding justice, the reference may be stricken off and the case heard by a jury, or there might be a recommittal to the same referees, or with the consent of the parties, a reference to new referees.

Voluntary payment of exempt taxes by a guardian cannot prejudice the rights of his ward even though it is the guardian's duty to resist the collection of taxes not legally assessed.

Evidence in the form of letters written by the assessors to the guardian recognizing the exemption are immaterial to the issue whether facts exist authorizing the exemption under the statute.

The admissions of the tax assessors cannot prejudice the right of the city to collect a tax assessed or their right to retain the proceeds of one assessed and collected since assessors are public officers *not* agents of the city.

Proof of payment of a tax to the collector is not sufficient proof that such has been received by the city.

To limit issues and extent of proof a plaintiff may file a motion for specifications under Superior Court Rule 9.

ON EXCEPTIONS.

This is an action on the case to recover taxes claimed to have been illegally assessed and collected. The cause was

referred to a referee with right of exceptions reserved. The referee found for the plaintiff. The Superior Court overruled defendant's objections to the referee's report, accepted the report, and defendant brings exceptions. Exceptions sustained. Case remanded to Superior Court.

Thompson, Murrell & Rich, for plaintiff.

George W. Weeks, for defendant.

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

MERRILL, J. On exceptions. This is an action on the case to recover for taxes claimed to have been illegally assessed and collected. The action was referred under rule of court with right of exceptions as to matters of law reserved by both parties. The action was to recover taxes assessed upon the plaintiff's real estate for the years 1946, 1947, 1948 and 1949 which had been paid by his guardian. It was claimed by the plaintiff that the property on which these taxes were assessed was exempt from taxation under the provisions of R. S., Chap. 81, Sec. 6, Par. X, and especially that portion of the paragraph which exempts from taxation,

> "the estates, to the value of $3,500 of all male or female veterans who have served in the armed forces of the United States during any federally recognized war period and who were honorably discharged, who shall have reached the age of 62 years, or are receiving a pension or compensation from the United States Veterans' Administration for total disability, * * * * * provided, however, that no exemption shall be allowed hereunder in favor of any person who is not a legal resident of this state;"

The referee found in favor of the plaintiff in the sum of $383.30, being the amount of the taxes assessed and inter-

est. The report of the referee having been offered for acceptance, the defendant filed written objections thereto. The objections, eight in number, were overruled and the report accepted. The case is now before us upon defendant's exceptions to the action of the justice of the Superior Court in overruling the objections to, and accepting the referee's report.

The 4th written objection to the referee's report is as follows:

> "There is no sufficient evidence in the record to prove that an exemption from taxation of the real estate of Plaintiff's ward was warranted in that there is no evidence that the Plaintiff's ward was a legal resident of the State of Maine in the years 1946-1947-1948-1949."

The transcript of evidence, which is made a part of the bill of exceptions, contains no evidence of and is entirely silent as to the residence of the plaintiff.

Unless the plaintiff was entitled to the exemption claimed by him, he cannot recover. It is a well settled principle of law that whoever claims the right to an abatement or exemption from taxation has the burden of proving that he is entitled thereto. As said in *Judson Freight Forwarding Co.* v. *Commonwealth of Massachusetts,* 242 Mass. 47, 136 N. E. 375, 27 A. L. R. 1131 at 1137:

> "The burden of proof is upon the petitioner to make out its right as matter of law to abatement of the tax. *No intendment as to evidence can be made in its favor beyond what is shown in the record.*" (Emphasis ours.)

As said in *Barnes* v. *Jones,* 139 Miss. 675, 103 So. 773, 43 A. L. R. 673, 678:

> "An exemption from taxation will never be presumed, and the burden is on the claimant to establish clearly his right to an exemption. In the case

> of Morris Ice Co. v. Adams, 75 Miss. 410, 22 So. 944, the court said that 'the rule is universal that he who claims exemption must show, affirmatively, an exemption expressly declared and that the claimant is clearly embraced within the terms of the exemption.' "

This same principle is declared in 20 Am. Jur. 148, Sec. 142, where it is stated:

> "The burden rests upon the party who, as the basis of his claim or defense, asserts that he is within an exception or exemption in a contractual stipulation or a statute to prove all the facts necessary to bring himself within such exception or exemption."

The footnote to this section is replete with citations in which this doctrine has been declared by the courts in cases relating to taxation. See also Jones on Evidence, Vol. 1, Sec. 180, Page 328, Note 12; 61 C. J. 411-412, Secs. 429-430 and cases cited.

In this case the burden was upon the plaintiff to prove that he was entitled to the exemption claimed. Unless he was a legal resident of the State of Maine when the several taxes were assessed he was not entitled to the exemption. The burden was upon him to prove that he was a legal resident of the State of Maine at the date as of which each of the taxes in question were assessed. There was no evidence of his residence. He therefore failed to maintain the burden of proof which was upon him to show that he was entitled to the exemption. This defect in proof was sufficiently and specifically challenged by the defendant's 4th objection. This objection to the acceptance of the referee's report should have been sustained. To overrule it constituted legal error. We must sustain the exceptions on this ground.

The effect of sustaining the exceptions to the acceptance of a referee's report because of the erroneous overruling of the defendant's objection thereto is to vacate the ac-

ceptance of the report. However, as we said in *Courtenay* v. *Gagne et al.*, 141 Me. 302, 305:

> "The authority of this Court only goes to remanding the case to the Superior Court, where, in the discretion of the presiding Justice, the reference may be striken off and the case heard by a jury, or there might be a recommittal to the same referees, or with the consent of the parties, a reference to new referees. *Chaput* v. *Lussier*, 131 Me., 145, 159 A., 851."

Although the erroneous action by the justice below in overruling the 4th objection necessitates vacating the acceptance of the referee's report, the exceptions so far as they are based upon the overruling of the other objections are also before this court for decision. As the questions involved therein may again arise, and because a settlement of them now may possibly obviate further litigation, we will proceed to consider the same.

Objection No. 1, that there is no evidence that an assessment of the taxes in question was inadvertent was properly overruled. *If the property was exempt* it is immaterial to the determination of the issues in this case whether the assessment of the taxes thereon was intentional or through inadvertence.

Objection No. 2, that there is no evidence in the record to support the finding of the referee that the assessment of the taxes in question was illegal, should have been sustained. The word illegal as here used means unauthorized by law. If the property was exempt, its assessment was unauthorized by law. We sustain the exception to the overruling of this objection upon the ground that there was no evidence in the record that the plaintiff was a legal resident of the State of Maine, and therefore, no evidence that the property was exempt from taxation. By sustaining the exception on this ground we do not even intimate that the

record contained sufficient evidence of the other facts necessary to the plaintiff's right to the exemption which he claims.

Objections No. 3 and No. 7 being in effect upon the same grounds will be considered together. They are as follows:

> "3. The evidence shows conclusively that the real estate of the Plaintiff's ward was assessed by the Assessors for the years 1946-1947-1948-1949 and that the tax so assessed was voluntarily paid.
> 7. The finding is against the law and the evidence in that the law is that a taxpayer who voluntarily pays real estate taxes duly assessed cannot recover said taxes from the city."

To sustain these exceptions the defendant relies upon the law as stated in *Smith* v. *Readfield,* 27 Me. 145, which was an action brought against a town to recover taxes paid. In that case the court said:

> "When money claimed as rightfully due is paid voluntarily, and with a full knowledge of the facts, it cannot be recovered back, if the party, to whom it has been paid, may conscientiously retain it."

It is claimed by the defendant that the plaintiff's guardian, with full knowledge that the plaintiff's property was exempt from taxation, and after having been informed thereof, and that it would be exempted by the assessors, voluntarily and without protest paid the taxes assessed for the years 1946, 1947, 1948 and 1949. Even if the evidence conclusively shows these facts to be true, such payment by the guardian does not constitute a defense to this action. Although the taxpayer brings this action by his guardian, it is the taxpayer, *the ward,* who is the plaintiff, *not the guardian.* The guardian is not a party to the suit. As said by us in *Raymond* v. *Sawyer,* 37 Me. 406: "In the prosecution and defence of suits, the guardian who appears for his ward, does not become a party to the proceedings;". To the same effect, see *Sanford* v. *Phillips,* 68 Me. 431.

Even if the guardian has paid the several taxes with full knowledge on his part that the plaintiff's property on which they were assessed was exempt from taxation, such action on his part cannot prejudice the rights of his ward. As said in 39 C. J. S. 174, Sec. 99, Par. a:

> "A guardian by his conduct, default, or silence cannot bar the ward of his rights; a ward is not estopped to assert any rights to property by reason of any negligence on the part of his guardian."

As said in 25 Am. Jur. 66, Sec. 101:

> "It is the prevailing view that a guardian may not waive legal rights in behalf of his ward, or surrender or impair rights vested in the ward, or impose any legal burden thereon. Nor, according to the generally accepted view, can the ward or his estate be estopped, or held to have ratified an illegal transaction, by reason of the guardian's act."

While it is the duty of the guardian to pay taxes legally assessed upon his ward's property to save it from forfeiture, it is likewise his duty to resist, in behalf of his ward, the collection of taxes which are not legally assessed. If he has knowledge that property of his ward is exempt from taxation, it is his duty to assert and claim the exemption. If the tax be assessed upon the exempt property it is his duty to take the proper steps to resist the payment thereof. However, the voluntary payment by a guardian of a tax upon the exempt property of his ward is not a voluntary payment thereof by the ward. It does not have the same effect as does a voluntary payment by a taxpayer who is *sui juris*. It cannot prejudice the right of the ward to recover from the city the amount so paid to it by his guardian.

If the City of South Portland has received payment of taxes assessed upon the exempt property of the plaintiff, it has not only received, but until it repays the same, retains money to which it is not entitled. On the record now before

us, the plaintiff, an insane ward under disability, has been guilty of no conduct which should deprive him of the right to recover from the city the money illegally exacted from him by the city and which was improvidently and illegally paid to it by his guardian. The defendant's 3rd and 7th objections were properly overruled, and the exceptions so far as they relate thereto are without merit.

The 5th and 6th objections are based upon the admission of two exhibits numbered 9 and 19. Exhibit No. 9 is a letter from the assessors of the defendant city to the plaintiff's guardian dated October 30, 1945 in which they recognize the fact that the plaintiff is entitled to the statutory exemption. Exhibit No. 19 is an office copy of another letter written by the Assessors to the plaintiff's guardian dated November 2, 1945 in which they state that they

> "wish to advise that Mr. Stockman's property, assessed at a value of $1655. with current taxes of $83.41 is exempt from taxation as of 1946.
> This decision will stand as long as the property remains in the ownership of Ralph C. Stockman, as long as this property does not exceed the assessed valuation of $3500. and as long as this property remains his sole holdings."

Notwithstanding these letters, the assessors of the defendant city assessed this property for taxes in the years 1946, 1947, 1948 and 1949. This is an action to recover from the city the amount which the plaintiff's guardian improvidently paid in discharge of those taxes.

These letters are immaterial to the issues involved in this case. The first issue to be determined is whether or not the property upon which the several taxes paid by the plaintiff were assessed was exempt from taxation. Whether this property was exempt depended upon the existence of each and every one of the necessary facts set forth in the statute granting the exemption. If they did exist the property was

exempt from taxation, and this irrespective of whether or not the assessors recognized the exemption or assessed taxes thereon. The statute did not require the owner to assert his exemption to make the property nontaxable. On the contrary, if the property was exempt, the statute required a specific request therefor to make the property subject to taxation. R. S., Chap. 81, Sec. 6, Par. X. As before stated, the burden is on the plaintiff who asserts an exemption from taxation to establish every fact necessary to its existence.

In an action against a municipality to recover the amount paid to discharge a tax which was assessed on exempt property, the plaintiff cannot prove the existence of all or any one of such facts by admissions made by the assessors. Nor can he do so by showing that the assessors either recognized his right to the exemption claimed or by showing that they agreed to grant the exemption. Assessors are public officers, not agents of the city. It is their duty to assess taxes. They cannot by their admissions of the existence of facts which negative the authority of the city to assess a tax upon persons or property, prejudice the right of the city to collect a tax assessed, or to retain the proceeds of one assessed and collected. Their admissions are not admissible in evidence for such purpose. *Rockland* v. *Farnsworth,* 93 Me. 178.

Exhibits 9 and 19 were not admissible as admissions binding upon the city tending to establish the plaintiff's right to the exemption he now claims or to establish the existence of any of the separate facts which were necessary to entitle him thereto.

Nor were these exhibits admissible to show that the assessors in the fall of 1945 recognized that the plaintiff was then entitled to an exemption, or that they then granted him a contingent continuing exemption for the future. Neither of these facts were in issue. Whatever the action of the

assessors in the fall of 1945, taxes were assessed for the years 1946 to 1949, inclusive. The issue in this case is, was the property upon which these taxes were assessed exempt from taxation at the time the several taxes were assessed. The existence of an exemption, such as is here claimed, depends upon the existence of the facts entitling the property owner thereto. If those facts exist the right to the exemption is absolute. The exemption is granted by the statute, not by act of the assessors. Neither the admissions nor the acts of the assessors in office in 1945 are competent evidence of the existence of the exemption or any of the facts upon which its existence depends. Exhibits 9 and 19 were immaterial to the issues in the case and the 5th and 6th objections to the acceptance of the referee's report based upon their admission should have been sustained.

The 8th objection that the finding of the referee is against the law and the evidence is not sufficiently specific under Rule 21 and was properly overruled.

As this case may be tried again it might be well to note in passing that in an action against a city or town to recover a tax paid upon exempt property, the plaintiff must show that the money paid has been *received by the city.* Proof of payment to the tax collector is not sufficient. We said in *Smith* v. *Readfield,* 27 Me. 145, 148:

> "There is no proof, that any part of the money paid by the plaintiff to the collectors has ever been paid by them to the treasurer of the town. Without proof of payment to him, or to some other legal officer, or agent of the town, authorized to receive it, the plaintiff must fail for want of proof, that the town has received the money."

In this case it may well be, as we more than half suspect, that a new trial is necessitated because of the inadvertent failure on the part of the plaintiff to introduce available evidence essential to the maintenance of his cause of action.

If so the fault is that of the plaintiff, not of the defendant nor of the court.

Even in reference cases the defendant has the right to require the plaintiff to prove every fact essential to the maintenance of his action. If a right to exceptions in matters of law be reserved, by appropriate objections and exceptions, as here, the defendant can take advantage of the plaintiff's failure in this respect. Nor is the defendant required to inform the plaintiff that he is insisting upon this right. The fact that he is insisting on trial, in and of itself is notice to the plaintiff that he must prove every fact essential to his case that has not been admitted by the defendant's pleadings.

If the plaintiff desires to limit the issues or, if not able to limit the issues, to make certain of the extent of proof that will be required of him, he can file a motion in the Superior Court under Rule 9 for specifications of defense. This course was not followed in this case. The case went to trial on the general issue. Every fact essential to the maintenance of the cause of action was in issue. On the record of this case, as it was tried, there is not the slightest indication that counsel for the defendant city led counsel for the plaintiff to believe that proof of any fact essential to the maintenance of his client's cause of action, and which he neglected to prove, was or would be dispensed with. Even when the defendant by seasonable and specific written objections to the acceptance of the referee's report called attention to the lack of proof of plaintiff's legal residence in the State of Maine, plaintiff then failed to seek to have an opportunity to correct the inadvertent omission, if such it was, by making a motion to have the report recommitted by the court to the referee.

Because of the erroneous overruling of the 2nd, 4th, 5th and 6th objections to the referee's report, the exceptions must be sustained and the case remanded to the Superior

Court. That court may, in its discretion, in accord with the rule laid down in *Chaput* v. *Lussier,* 131 Me. 145, 148, reaffirmed in *Courtenay* v. *Gagne et al.,* 141 Me. 302, 305, and *Moores* v. *Inhabitants of Springfield,* 144 Me. 54, 73, strike off the reference, recommit it to the referee who heard it before, or, with the consent of the parties, it may, after this reference is stricken off, refer it anew to another or other referees.

Exceptions sustained.

Case remanded to Superior Court.

HENRY F. TOULOUSE ET AL.
PETITIONERS FOR WRIT OF CERTIORARI

vs.

BOARD OF ZONING ADJUSTMENT,
CITY OF WATERVILLE

Kennebec. Opinion, April 2, 1952.

Certiorari. Zoning. Municipal Corporations Non-Conforming Uses.

Certiorari is a writ issued by a Superior Court to an inferior court of record, or to some other tribunal or officer exercising a judicial function, requiring the certification and return of the record and proceedings, that the record may be revised and corrected in matters of law.

Certiorari does not lie to enable the Superior Court to revise a decision upon matters of fact.

Upon petition for certiorari the question is the issuance of the writ and the court at *nisi* has jurisdiction to decide what will be done (R. S., 1944, Chap. 116, Sec. 14; P. L., 1945, Chap. 24, Sec. 4.)

Zoning is the division of a municipality into districts and the prescription and application of different regulations in each district.

Zoning restrictions are in derogation of the common law and should be strictly construed.

See opinion for discussion of non-conforming use under Section 5 of the Zoning Ordinance of City of Waterville.

This is a petition for certiorari under P. L., 1945, Chap. 24; R. S., 1944, Chap. 80, new Section 88A. The writ was ordered to issue by the Superior Court directed to the Board of Zoning Adjustment as a board of appeal. The case comes to the Law Court on exceptions. Exceptions overruled.

N. C. Marden, for plaintiffs.

Arthur B. Levine, for defendants.

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

FELLOWS, J. This is a petition for the writ of certiorari made under the provisions of the Public Laws of Maine, Chapter 24, Laws of 1945; Revised Statutes (1944), Chapter 80, new Section 88-A. The petition for the writ was fully heard by the presiding justice of the Superior Court in Kennebec County. The petition was granted and the writ ordered to issue directed to the Board of Zoning Adjustment as a board of appeal. The case comes to the Law Court on exceptions to the order of the Superior Court for the writ to issue.

The facts found by the Board of Zoning Adjustment and recognized by the court on granting the petition for the writ of certiorari, are these: The property in question is located on the Oakland Road in Waterville, and was owned in 1949 by a Mrs. Connell. Her husband, with her permission, had previously erected a poultry house on the premises

in 1947 and conducted therein the business of raising chickens until in December 1948, when the building ceased to house poultry, although the premises continued to be used for the poultry business. Mr. Connell, with the consent of Mrs. Connell, sold the poultry house on March 29, 1949, and it was removed from the premises. At that time Mr. and Mrs. Connell separated, and Mrs. Connell instituted divorce proceedings. She obtained her divorce in June 1949 and immediately thereafter, on June 16, 1949, sold the premises to Henry F. Toulouse, the petitioner. On December 19, 1949 these petitioners applied to the Building Inspector for a permit to construct a new poultry house upon the premises and for permission to use the premises for conducting a poultry business. The building to be erected to be slightly smaller than the one previously used. On December 22, 1949 the Inspector of Buildings for the city of Waterville granted the permit asked for by Mr. Toulouse. An appeal from the action of the Building Inspector was taken by one Lacombe and interested parties, to the Board of Zoning Adjustment, which Board on February 13, 1950 sustained the appeal and denied the permit. The pending petition was filed on March 14, 1950 with the Superior Court asking for writ of certiorari to order the Board of Zoning Adjustment to certify its records relating to the application for the permit that "they may be presented to this court to the end that the same, or as much thereof as may be illegal may be quashed or modified in whole or in part." Upon hearing on this petition, asking for the writ of certiorari, the court ordered the writ to issue, and the pending exceptions were taken to the order.

The Zoning Ordinance of the City of Waterville was enacted in 1948, and it is conceded that the zoning map places these premises in a restricted residential zone. The ordinance provides that the Inspector of Buildings, in the first instance, has authority to grant, or to refuse, a permit to construct any type of building in the City of Waterville,

with the right of appeal to the Board of Zoning Adjustment. The statute provides that from the decision of the Board of Zoning Adjustment (after appeal from the inspector of buildings) any person aggrieved may petition the Superior Court, setting forth the claims of illegality in the action of the Board of Zoning Adjustment, and the court "may allow a writ of certiorari directed to the board of appeals." Revised Statutes (1944), Chapter 80, new Section 88-A, Public Laws 1945, Chapter 24, Section 4.

Section 5 of the Zoning Ordinance of the City of Waterville, now in question here, provides as follows:

"NON-CONFORMING USES

Section 5. Any lawful use being made of a building or premises, or part thereof, existing at the time of the adoption of this ordinance, or any amendment thereto, may be continued, although such use does not conform with the provisions hereof. Such building is hereby defined to include a building erected or replaced within one year from the time of loss, destruction or removal of such building, unless the Board of Zoning Adjustment shall find that the delay in restoration or replacement has been due to the unavailability of materials or labor, or both, in which case the Board may grant up to one additional year in which to restore or complete such building. Except as herein provided, if any non-conforming use of buildings or premises is discontinued for a period of one year such use shall be considered abandoned and any future use of said buildings and premises shall be in conformity with the provisions of this ordinance. Such use may be changed, or if in a part of a building or premises designed or intended for such use may be extended throughout such building or premises, provided that application for a permit for such change or extension shall be made to the Board of Zoning Adjustment, and provided further that the Board of Zoning Adjustment shall rule that such change or extended

> use is not substantially more detrimental or injurious to the neighborhood."

In this case, the Inspector of Buildings, in the first instance as provided in the ordinance, granted a permit December 22, 1949 to Henry F. Toulouse to construct a poultry house no larger than that previously (March 29, 1949) on the premises, because the use for poultry business had not been discontinued for a period of one year. On appeal the Board of Zoning Adjustment, February 13, 1950, sustained the appeal and refused the permit on the ground that the above Section 5 should be construed and interpreted to mean that "abandonment of a non-conforming use shall immediately render the premises subject to use only in conformity with the ordinance."

These petitioners, Henry F. Toulouse and Grace L. Toulouse, on March 14, 1950, filed this petition with the Superior Court in accordance with said Public Laws 1945, Chapter 24, Section 4, asking for writ of certiorari, and alleging among other things, that the above conclusion to which the Board of Zoning Adjustment came is against the applicable law; the records thereof are erroneous and illegal because the predecessor in title to the property, now of the petitioners, did not abandon the use of said premises for the housing and rearing of poultry; because the use of the premises for the poultry business has never been abandoned; because under this Zoning Ordinance by its express terms, any use lawful at the time of the adoption of the ordinance might be continued although such use did not conform with the provisions of the Zoning Law; and because by the definition in the Zoning Ordinance the building for which permission to build was sought was replacing a building removed from said premises within one year.

Upon hearing on this petition for certiorari, the presiding justice decided that although the facts might indicate an abandonment by the Connells (because of the sale and re-

moval of the poultry house, their divorce, and subsequent sale of the real estate), that by the express provisions of the Zoning Ordinance itself, there was no legal abandonment, as the petitioners within a year from the sale and "removal" of the poultry house sought, by the requested permit, to replace the poultry house. The presiding justice ordered writ of certiorari to issue and to be served on the Board of Zoning Adjustment. The City of Waterville, by its City Solicitor, filed the pending exceptions to this order.

The statute (Public Laws, 1945, Chapter 24, Section 4) instead of providing for a simple statutory appeal to the Superior Court, provides for a verified petition containing specifications of any alleged illegality in the action of a municipal board of appeals under any zoning law, and in the petition, the petitioner asks for and the court may order writ of certiorari directed to the board of appeals to review the action of the board. After the writ is issued, and a hearing on the writ had, the court may affirm, modify or set aside the decision brought up for review, and if need be to order further proceedings by the board of appeals.

Certiorari is a writ issued by a superior to an inferior court of record, or to some other tribunal or officer exercising a judicial function, requiring the certification and return of the record and proceedings, that the record may be revised and corrected in matters of law. Bouvier's Dictionary. Certiorari differs from a writ of error in that it lies when the proceedings are not according to common law. See *Levant* v. *County Commissioners,* 67 Me. 429, 433. It does not lie to enable the Superior Court to revise a decision upon matters of fact. *Lapan* v. *County Commissioners,* 65 Me. 160; *Hayford* v. *Bangor,* 102 Me. 340. Upon hearing of a petition for writ of certiorari, the question for the court to decide is whether it will issue the writ. If the writ is ordered to issue, the court at *nisi prius* has the jurisdiction to decide what should be done. *Brooks* v. *Clifford,* 144 Me.

370; *Rogers* v. *Brown,* 134 Me. 88; Revised Statutes (1944), Chapter 116, Section 14. These time honored rules regarding certiorari are recognized by the terms of this statute providing for certiorari in zoning cases. See Public Laws 1945, Chapter 24, Section 4.

Zoning is the division of a municipality into districts and the prescription and application of different regulations in each district. 58 Am. Jur. "Zoning," 940, Section 1; Opinion of Justices, 124 Me. 508, 509. The justification for the restrictions imposed by zoning statutes and ordinances is given as "in the interest of health, safety, or the general welfare." Revised Statutes (1944), Chapter 80, Sections 84-87.

Before the adoption of modern zoning laws, the owners of property were restricted in the use of their property only by prohibitions of use recognized by the common law, or statute, as detrimental to the rights of the public. The restrictions of zoning statutes and zoning ordinances authorized by statute, are in derogation to the common law and should be strictly construed. Where exemptions appear in favor of the property owner, the exemptions should be construed in favor of the owner. Ordinances cannot be enlarged by implication. *Houlton* v. *Titcomb,* 102 Me. 272, 284. See *Landry* v. *MacWilliams,* 173 Md. 460, 196 Atl. 293, 114 A. L. R. 984; *Darien* v. *Webb,* 115 Conn. 581, 162 Atl. 690, where there was no one year provision. See also 58 American Jurisprudence "Zoning," 945, Sec. 11, and cases there cited. In regard to statutes in derogation to the common law, see *Lipman* v. *Thomas,* 143 Me. 270, 273.

The defendant says, that in construing the terms of Section 5 of the Waterville Zoning Ordinance (given in full above) that the court should by implication read into this section that upon *abandonment* the right to a non-conforming use is lost, that abandonment can take place within any

space of time, and that the third sentence simply limits the period of discontinuance to one year "so as to prevent the resumption of the use in indefinite times in the future" and "that the provision relating to replacement of buildings was inserted * * * in order not to penalize an owner whose building was destroyed * * * or voluntarily removed with the intention of rebuilding." In other words, the defendant claims that when the Connells sold the poultry house there was abandonment of the non-conforming use, and by abandonment the premises immediately became solely residential.

The petitioners, however, say that the first, second, and third sentences in Section 5 of the ordinance mean something, and that they mean what they say and no more. This ordinance differs from the so-called "Standard Form of Zoning Ordinance" that has been passed upon by authorities in other states. There is no extension of this ordinance by implication. Section 5 states in the first sentence that any lawful use of a building or premises existing at the time of the adoption of the ordinance may be continued. The second sentence says "such building is hereby defined to include a building erected or replaced within one year from the time of loss, destruction or removal of such building." The third sentence "If any non-conforming use of buildings or premises is discontinued for a period of one year, such use shall be considered abandoned." The petitioners contend that under the terms of this ordinance they can only be deprived of the exercise of the use which was lawful, when the zoning ordinance became effective, by discontinuance for one year. The then owner, Mrs. Connell, on or about March 30, 1949, assented to the act of her husband in the sale and removal of the poultry house. She had the right to continue the non-conforming use within a year, and by her sale of the property to the petitioners in June 1949, the petitioners had the right to continue within the year.

The presiding justice, after full hearing on the petition the for writ of certiorari, and in granting the same, sustained the contention of the petitioners. He said in part: "The drafters of the Zoning Ordinance for the City of Waterville and the legislative body of the City of Waterville saw fit to set forth affirmatively that a non-conforming use "is hereby defined to include a building erected or replaced within one year from the time of * * destruction or removal of such building." * * "The petitioners within a year sought by a requested permit to replace the poultry house after the removal of the former poultry house, and the petitioners were within the affirmative and positive and elaborated concession to a non-conforming use set out in Section 5."

The procedure adopted in this case of hearing the whole case on the petition for the writ of certiorari was proper. When, however, "the case is before the court on the writ, all evidence extrinsic to the record is excluded." *Levant* v. *County Commissioners,* 67 Me. 429; *State* v. *Madison,* 63 Me. 546.

The decision of the Superior Court, that the writ of certiorari issue, was correct.

Exceptions overruled.

GUY W. PARKER

vs.

WILLIAM B. KNOX

Androscoggin. Opinion, April 5, 1952.

Negligence.

Factual decisions of a jury cannot be disturbed by a court on review unless manifestly influenced by bias, passion, or prejudice, or reflecting apparent mistake.

Factual findings by a jury must be viewed in the light most favorable to the party for whom the verdict has been rendered.

It is for the jury to pass upon the credibility of witnesses.

A court reviewing the verdict of a jury must recognize its right to accept the story of a witness in so far as it is not modified or contradicted by admitted or undoubted facts.

A verdict should not be sustained on evidence inherently impossible.

Public officers are holden to the exercise of reasonable care under the circumstances confronting them.

The operator of a motor vehicle must keep it within control at all times, and be able to bring it to a stop within a reasonable distance, on proper notice.

ON MOTION FOR NEW TRIAL.

Action of negligence for injuries suffered while operating a motor vehicle. The jury returned a verdict for plaintiff. The case is before the Law Court on defendant's general motion for a new trial. Motion sustained.

Berman & Berman, for plaintiff.

Frank W. Linnell, for defendant.

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

MURCHIE, C. J. Defendant's general motion for a new trial herein raises the single issue whether the verdict returned against him, with its implied findings that he was operating a motor vehicle negligently and that the plaintiff was using due care, when he suffered the damages for which he is seeking recovery, has that sufficient support in evidence essential to sustain it. The motion carries an allegation that the amount of the award carried in the verdict is excessive, but that allegation was not argued, and may properly be considered as waived, although it may be said that a reading of the record shows it had no merit.

The facts disclose that the plaintiff, a man seventy-five years of age, was operating a motor truck, carrying a heavy load of rock from Leeds to Bath, when he drove it off the road and it overturned, injuring him and damaging his truck. The defendant, an officer of Maine State Police, traveling along the highway on which plaintiff was proceeding, had observed the truck of the latter ahead of him just prior to the event and, believing that the load the truck was carrying might be excessive, had increased the speed of his car to overtake and pass the truck, for the purpose of stopping it and weighing the load. The load was not in fact excessive. The defendant trailed the truck a short distance, increased his speed to overtake and pass it, turned to the left of the highway, in the direction in which both vehicles were moving, for that purpose, and proceeded to pass. He signalled the plaintiff to stop, by flashing his lights, and swung his car back to the right hand side of the highway, applying his brakes lightly, to bring his own car gradually, as he said, to a stop. The plaintiff, fearing a collision, as he testified, applied the brakes of the truck with considerable force and turned sharply left, to avoid hitting the defendant's car. He lost control of the truck, for a cause that cannot be known with certainty, although the defendant testified that the plaintiff told him, while in the hospital, that after turning to the left he could not turn back into the road

because of some binding of the front wheels of his truck. In any event, whatever the cause, the plaintiff continued to follow a gradual course from the right side of the road to the left, into and across the ditch on the left hand side, and on to swampy ground, where the overturning occurred, throwing the plaintiff out. The truck righted itself thereafter.

At the point where the accident occurred the traveled portion of the highway was approximately twenty-three feet wide, the surface was dry, and the road was practically straight and level for a considerable distance in both directions. There was no other traffic in sight upon it. The truck left a skid-mark approximately one hundred and fifty feet in length on the highway surface.

The evidence is sharply conflicting. The points of conflict relate to the speed at which the plaintiff's truck was moving, which he places at thirty-five miles per hour, against an estimate of the defendant that was considerably larger, but did not involve unlawful speed; whether or not the defendant sounded a horn, to give notice that he was to pass the truck; and the clearance between the two vehicles at the time of passing and, thereafter, when the defendant swung his vehicle to the right, began to slow its speed, and brought it to a stop. There is a conflict, also, perhaps not material, about the lights defendant flashed to signal the plaintiff to bring his truck to a stop. The plaintiff asserts he saw a "blue" light flashing, over his left front mudguard. The defendant states that his vehicle carried no "blue" light, but that he used his stop lights in his signalling. The most vital point of conflict relates to the distance defendant traveled after passing the truck before swinging from the left side of the road, which he used in passing, to the right, and before slowing the speed of his car thereafter. On these points there is some testimony corroborative of the evidence

given by the defendant, that he kept to the left until he had opened up distances of forty feet or more, before making any swing to the right, and a hundred feet or more, before reducing his speed. Such corroboration came from the only eye-witness to the accident, other than the parties themselves, and there is nothing in the record to justify belief that he had any basis for bias or prejudice.

The principles which must control decision on the motion are well established. Factual decisions of a jury cannot be disturbed by a court on review unless manifestly influenced by bias, passion or prejudice, or reflecting apparent mistake. *Jannell* v. *Myers,* 124 Me. 229, 127 A. 156; *McCully* v. *Bessey,* 142 Me. 209, 49 A. (2nd) 230. In resolving such an issue the testimony given in a case must be viewed in the light most favorable to the party for whom a verdict has been rendered. *Searles* v. *Ross,* 134 Me. 77, 181 A. 820; *Marr* v. *Hicks,* 136 Me. 33, 1 A. (2nd) 171; *McCully* v. *Bessey, supra.* In applying these principles it must be recognized that it is for a jury rather than a court to pass upon the credibility of witnesses. *Esponette* v. *Wiseman,* 130 Me. 297, 155 A. 650; *Shannon* v. *Baker,* 145 Me. 58, 71 A. (2nd) 318, and cases cited therein. All of these principles tend to support the position of the plaintiff, but they do not require the sustaining of a verdict on evidence inherently impossible. *Blumenthal* v. *Boston & Maine Railroad,* 97 Me. 255, 54 A. 747; *McCarthy* v. *Bangor and Aroostook Railroad Co.,* 112 Me. 1, 90 A. 490, 54 L. R. A. N. S. 140; *Alpert* v. *Alpert,* 142 Me. 260, 49 A. (2nd) 911. As the Pennsylvania court states a principle of similar import, "testimony in violation of incontrovertible physical facts and contrary to human experience * * * must be rejected." *Crago* v. *Sickman,* 165 A. 841, and cases cited therein. To the same effect are the declarations of this court in *Esponette* v. *Wiseman, supra,* that a jury has the right to accept the story of a witness:

> "as correct in so far as it was (is) not modified or contradicted by admitted facts",

and that a court is bound by jury findings:

> "but only to that extent."

It is on this principle that plaintiff's case must fail. To establish defendant's negligence, within the principle that the operation of a vehicle in violation of the "law of the road" constitutes negligence, when it becomes a proximate cause of an accident, he asserts that the defendant swung his car to the right immediately after passing the truck, contrary to the provisions of R. S., 1944, Chap. 19, Sec. 103, as amended. The provision thereof, as it stands since the enactment of P. L., 1947, Chap. 86, requires the driver of a vehicle, overtaking another proceeding along the highway in the same direction, to pass it, to:

> "pass at a safe distance to the left thereof, and * not again drive to the right side of the highway until safely clear of such overtaken vehicle."

That this constitutes a part of the "law of the road," and that proof of a violation of its mandate makes a *prima facie* case of negligence, is well established. *Dansky* v. *Kotimaki,* 125 Me. 72, 130 A. 871; *Rouse* v. *Scott,* 132 Me. 22, 164 A. 872; *Robinson* v. *LeSage,* 145 Me. 300, 75 A (2nd) 447. The difficulty arises in the fact that the only evidence given to support the plaintiff's factual picture of the event, carried in his own evidence, is inherently impossible, when tested by the uncontroverted fact that there was no time after the defendant's car passed his truck when the distance which separated the two vehicles was not increasing. His own story is that the defendant's car "slowed right down," immediately the passing was accomplished, as he stated on direct-examination, or "stopped," practically as promptly, as he said on cross-examination. Had either been true, if the defendant had swung to the right as abruptly as the plaintiff asserted, even a sharp swing of the truck to the

left would not have given space for clearance and, with no diminution of the speed of the truck, and plaintiff does not claim any, it would have rammed the rear end of defendant's car, or overtaken and passed it.

The skid-mark made by plaintiff's truck shows the angle of its swing to the left, and that it did not deviate from the course taken when it was made, until it left the road and passed into the ditch. The reason for the failure of the plaintiff to follow the road by turning to the right when the left hand limit of the traveled part was reached can be known only by himself. That he did not have the truck under control is apparent. He testified that he recognized that a police officer was driving the car passing him, and that he saw a light flashing thereon. This must have given him notice that a police officer was signalling him to stop.

Police officers performing official duties, as at all other times, are holden to the exercise of reasonable care, under the circumstances confronting them, in operating vehicles upon our highways, but they are entitled to believe that those they overtake and pass will observe the "law of the road" and maintain control at all times over the vehicles they are operating. The duty of the operator of a motor vehicle to keep the same within control at all times has been frequently stated in this court, and others. See *Esponette* v. *Wiseman, supra,* and cases cited therein. This requirement involves a control that will make it possible for the operator of a vehicle to stop it "within a reasonable distance," as the Michigan court declared in one of the cases so cited, *Bowmaster* v. *DePree Co.*, 233 N. W. 395, and on proper notice, such as the signal of a police officer. Had the plaintiff maintained such control over his truck, the accident here involved would not have happened.

Recognizing that the jury in the exercise of its proper function was entitled to accept the testimony of the plaintiff, that the speedometer of his truck showed he was travel-

ing at a speed of thirty-five miles per hour when the car of the defendant passed him, and reject the evidence of the defendant, that the speed of the truck at the time was nearer fifty miles per hour, it was not justified in believing that the truck was being operated under such adequate control as would permit the stopping of it within a reasonable distance, or on proper notice by one entitled to signal its operator to bring it to a stop. A careful reading of the record makes it apparent that the jury must have been influenced by sympathy for an old man lawfully engaged in hauling rock over the highway, or bias against a police officer for stopping him, unnecessarily, to weigh a load which was not in fact excessive. It was the duty of the officer to stop the truck and weigh the load if he had reason to believe it might be excessive, and there is no evidence that he did not. It was the duty of the plaintiff to stop his truck, and to keep it within control at all times so that he could do so without accident, on proper signal. It is doubtful if the evidence could be held to sustain a finding that the defendant was negligent. It is apparent that it cannot support one that the plaintiff was in the exercise of due care. As was said in *Esponette* v. *Wiseman, supra:*

> "We reach the conclusion regretfully but unavoidably that plaintiff's own negligence contributed to the happening of the event which caused his injury."

Motion sustained.

STATE OF MAINE

vs.

JACK SCHLEAEFER

Hancock. Opinion, April 9, 1952.

Night Hunting. Indictments. Sentence. Appeal.

A warrant or indictment need not specifically negative the fact of hunting skunks and raccoons under a statute making it "unlawful to hunt wild animals from one-half hour after sunset until one-half hour before sunrise the following morning, except skunks and raccoons" where the process specifically charges respondent with hunting deer.

Appeal vacates the sentence.

ON REPORT.

Respondent pleaded guilty before the municipal court to a charge of night hunting and appealed. The case is before the Law Court on stipulation and report from the Superior Court. The question is the sufficiency of the process. Judgment for the state. Case remanded to the Superior Court for sentence.

Edwin R. Smith, County Attorney, for the state.

Herbert T. Silsby,
Kenneth W. Blaisdell, for defendant.

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

THAXTER, J. The respondent was charged in a complaint brought before the Bar Harbor Municipal Court with the offense of hunting wild animals in the night time, to wit, deer. He pleaded guilty; was sentenced to pay a fine of $200 and costs, and to serve thirty days in jail. He appealed to the Superior Court sitting at Ellsworth, and with-

out filing any new pleading, he brings the case on report to this court on an agreed statement of facts, which raises the question whether the complaint sets forth any offense. If it does, judgment shall be entered for the state; if not, a *nolle prosequi* is to be entered.

It would have been in order for the justice of the Superior Court to sentence the respondent on the plea entered in the court below. As long as the question is raised in this manner of the sufficiency of the complaint, we shall consider that question on its merits, particularly in view of the respondent's plea of guilty. The complaint is attacked on several specific grounds.

(A) It is very loosely drawn but it is sufficient. The statute makes it "unlawful to hunt wild animals from ½ hour after sunset until ½ hour before sunrise of the following morning, except skunks and raccoons." The respondent objects that the complaint does not negative the fact of his hunting skunks and raccoons. When it says that he was hunting deer, it does negative that he was hunting skunks or raccoons. We know the difference here in Maine and there could not possibly be any confusion.

(B) It is said that the time alleged is indefinite. Counsel evidently have in mind the recent case of *State* v. *Rowell* 147 Me. 131, 84 A. (2nd) 140, but that case is very different from this. In that case the time of day was an essential part of the offense. It may be here but it is definitely stated.

As the appeal vacated the sentence imposed in the Municipal Court, and as the plea of guilty entered therein still stands, the case must be remanded to the Superior Court for sentence. The entry must be

Judgment for the State.

Case remanded to the Superior Court for sentence.

STATE OF MAINE

vs.

ROBERT LEMAR

Sagadahoc. Opinion, April 9, 1952.

Constitutional Law. 14th Amendment. Sea & Shore Fisheries. Blood Worms.

This state has the right under the 14th Amendment to the Constitution of the United States to control public fishing rights in waters along its shores.

This state owns the beds of all tidal waters (unless it has parted with title) within its jurisdiction as well as the waters themselves so far as they are capable of ownership, and has the full power to regulate and control fishing therein for the benefit of the people.

The legislature may authorize the selectmen of each town within the state to make a regulation forbidding the taking of clams without a permit and to provide that permits shall be granted only to the inhabitants of the town.

State v. *Leavitt*, 105 Me. 76 affirmed.

ON REPORT.

Defendant was charged with unlawfully digging "bloodworms without first having obtained a license from the Municipal Officers of said Town of Woolwich" and found guilty. He appealed. The Superior Court reported the case to the Law Court on an agreed statement of facts. Judgment for the state. Case remanded to the Superior Court for sentence.

Harold J. Rubin, for State.

Nunzi F. Napolitano, for Aplt.

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

THAXTER, J. The respondent was charged in the Bath Municipal Court with a violation of Sec. 77 of Chap. 34 of Revised Statutes of 1944, as amended by Sec. 85, Chap. 332, Public Laws of 1947, which reads as follows:

> "No person, firm or corporation shall, within the limits of the town of Woolwich in the county of Sagadahoc, dig or take any clams, clam-worms, sand-worms or blood-worms, without having first obtained a license from the municipal officers of said town of Woolwich, who are authorized to grant and issue such licenses and fix the fee therefor. No license shall be granted or issued to any person, firm or corporation unless such person, firm, or corporation is a resident of said town of Woolwich. Nothing herein shall prohibit a riparian owner of shores or flats in said town of Woolwich from digging and taking clams therefrom for food for himself and family without license. For the purposes of sections 85 to 87, inclusive, the term 'a resident' shall mean a person, firm or corporation who has resided in this state for a term of at least 6 consecutive months and in the town of Woolwich for at least 3 consecutive months prior to making application for license."

The particular offense with which the respondent is charged is that, being a resident of Dresden in the County of Lincoln, he did at Woolwich, in the County of Sagadahoc, on June 9, 1951, unlawfully and without right "dig" bloodworms without first having obtained a license from the Municipal Officers of said Town of Woolwich." The complaint was brought in the Municipal Court at Bath in said County of Sagadahoc; the respondent, after a plea of not guilty, was found guilty and fined $15.00 and costs; and appealed to the Superior Court to be held on the first Tuesday of June, 1951. All parties agreeing, the case was reported by the Superior Court sitting at Bath to this court on an agreed statement of facts and a stipulation that the only issue was "the question of the constitutionality of Chapter 34, Section 77, Revised Statutes of Maine, as re-

vised by Chapter 332, Section 85, of the Public Laws of 1947, and incorporated in the Second Biennial Revision of the Sea and Shore Fisheries Laws of the Public Laws of 1949, which the respondent contends deprives him of his property without due process of law; abridges his privileges and immunities; denies him the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution, and precludes him from acquiring and possessing property, and of pursuing and obtaining safety and happiness in violation of Article I, Section 1, of the Constitution of the State of Maine."

The facts are not in dispute. The agreed statement reads in part as follows:

> "On the ninth day of June, A. D. 1951, Robert Lemar, of Dresden, Maine, was arrested by a Warden of the Maine Sea and Shore Fisheries Department for unlawfully digging blood-worms from the flats within the limits of the Town of Woolwich, he, the said Robert Lemar, not then having a written permit of the Municipal Officers of said Town of Woolwich and paying the fee therefor, and he not being a riparian owner of shore or flats in said Town.
>
> "It is admitted that said Robert Lemar dug said worms as above set forth; that he was a resident of Dresden at that time; that he had no license from said Town, but that he did have a valid commercial fishing license issued by the Commissioner of Sea and Shore Fisheries of the State of Maine permitting him to dig and sell worms taken from the flats and coastal waters of the State; that said respondent was not a riparian owner of the shore or flats within said Town of Woolwich; also that said respondent is a legal resident of the State of Maine within the terms and provisions of the Sea and Shore Fisheries Laws of said State, to wit: Chapter 34, Revised Statutes of 1944, as revised."

The only issue is the constitutionality under the state and federal constitutions of the statute here involved. That

issue seems to have been settled by the case of *State* v. *Leavitt,* 105 Me. 76, except that that case applies to clams and this to bloodworms. The principles of law involved in each case are exactly the same.

In the *Leavitt* case, the opinion of the court discusses exhaustively the very complex question of the rights of riparian owners in navigable rivers to the shore front where it is bounded by the sea and where the tide ebbs and flows. It is unnecessary to discuss the question as to what extent the rule of law laid down in that case over forty years ago may have been modified by recent decisions of the Supreme Court of the United States. It is sufficient to say that that case still remains the law in this state in so far as it involves the right of this state to control by legislation public fishing rights in the waters along our shores. In other words, this state, unless it has parted with title, owns the bed of all tidal waters within its jurisdiction as well as such waters themselves so far as they are capable of ownership, and has full power to regulate and control fishing therein for the benefit of all the people. *Commonwealth* v. *Hilton,* 174 Mass. 29, 33. The legislature has the right to authorize the selectmen of each town within the state to make a regulation forbidding the taking of clams without a permit and to provide that permits shall be granted only to the inhabitants of the town. *Commonwealth* v. *Hilton, supra.* Such a regulation is not in violation of the Fourteenth Amendment of the Constitution of the United States.

As was said in *State* v. *Leavitt, supra,* at page 85, et seq.:

> "Since it must be assumed that the public interest required some limitation upon the right of clam fishing, it does not seem to us that it is unreasonable or arbitrary for the State having a proprietary interest as well as a governmental power all for the public benefit to give the preference to those whom the law for more than two hundred and fifty years has given a preference, and who

were enjoying a preference when the Fourteenth Amendment was adopted, namely, the inhabitants of the town within which the fisheries are located. The discrimination between them and the inhabitants of other towns seems to us to 'bear a just and proper relation' to the difference in situation, in locality and in the actual enjoyment of prior legal rights or privileges. It is not unreasonable that they to whose doors nature has brought these 'succulent bivalves' . . . shall be entitled to them before those who are less favorably situated whenever there must be restriction. And we do not think that the legislative recognition of this existing superiority in situation and privilege denies to others the equal protection of the law.

"And it may be said further that if the State may, under the circumstances, prefer some, it may so far as the Fourteenth Amendment is concerned, entirely exclude others. A preference violates equality as certainly as exclusion does.

"The reasons suggested by us for holding that this discriminating legislation is not inimical to the equal protection clause of the Fourteenth Amendment apply alike to the inhabitant of the town who takes clams for his own use and to the hotel keeper in the town who takes them for use in his hotel."

As we said earlier, the same rule which applies to clams applies also to bloodworms. The respondent would have us overrule *State* v. *Leavitt, supra,* which has been the law in this state for many years. This we are not prepared to do.

Judgment for the State.

Case remanded to the Superior Court for sentence.

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
GOVERNOR FREDERICK G. PAYNE
IN A LETTER DATED APRIL 3, 1952

ANSWERED APRIL 9, 1952

LETTER PROPOUNDING QUESTIONS

State of Maine

Office of the Governor

Augusta

April 3, 1952

To The Honorable Justices of the Supreme Judicial Court:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions of law are important, and that it is upon a solemn occasion,

I, Frederick G. Payne, Governor of Maine, respectfully submit the following statement of facts and the questions and ask the opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT

WHEREAS, the powers of the government in this State are divided into three distinct departments, the legislative, executive and judicial; and

WHEREAS, by the Maine School Building Authority Act, Chapter 405 of the Public Laws of 1951, the Maine School Building Authority was created in the executive department to aid in providing urgently needed public school buildings in the towns in the State, which buildings many of said towns are unable to or cannot conveniently provide for themselves; and

WHEREAS, the supreme executive power of this State is vested in the Governor and the Governor is charged by the Constitution of Maine with the duty to see that the laws are faithfully executed; and

WHEREAS, the Authority has advised the Governor that it is unable to execute the legislative mandate pursuant to said Act until certain questions of law are resolved by the Justices of the Supreme Judicial Court; and

WHEREAS, the Governor respectfully submits said questions of law and asks the opinion of the Justices of the Supreme Judicial Court thereon pursuant to Section 3 of Article VI of the Constitution of Maine; and

WHEREAS, there is no other judicial procedure available to the Governor or the Authority to resolve said questions of law prior to the issuance of the Authority's revenue bonds pursuant to the provisions of said Act; and

WHEREAS, the Authority is unable to issue its revenue bonds unless prior thereto said questions of law have been resolved; and

WHEREAS, the Authority is authorized by said Act to construct or acquire, extend, enlarge, repair or improve school projects, as defined in said Act, to finance their construction, to charge and collect rentals for their use and to lease them to the respective towns; and

WHEREAS, the Authority is authorized by Section 219 of said Act to issue, at one time or from time to time, its

revenue bonds for the purpose of paying the cost of any school project or projects; and

WHEREAS, the Authority proposes to combine several projects for financing purposes, that is, issue a single series of bonds for paying the cost of several projects; and

WHEREAS, by Sections 218 and 223 of said Act, the Authority must convey the project to the town upon payment of all costs of said project; and

WHEREAS, the Authority plans to keep a separate construction account for each town covering the proceeds of that portion of the bonds in each series which are issued in connection with the project for the town, to have a separate account in the sinking fund for each town covering the rentals received from each project and to convey the project to the town when that portion of the bonds in such series which were issued in connection with the project shall have been paid; and

WHEREAS, the Authority proposes to adopt a standard form of lease agreement to be entered into between the Authority and the several towns, pursuant to the provisions of Section 218 of said Act; and

WHEREAS, neither a delay in the actual completion of the project beyond the estimated completion date nor damage to or destruction of the whole or any portion of the project operates to relieve the town of its obligation to make its rental payments under the lease agreement; and

WHEREAS, the last paragraph of Section 218 of said Act provides that no lease agreement shall be entered into or shall be valid unless approved by the inhabitants of the town; and

WHEREAS, the creation of school districts coterminous with towns, subject to a referendum in each such town, has been authorized by many special acts at recent sessions of

the legislature, which acts empower such districts to construct school buildings; and

WHEREAS, by Section 226 said Act "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";

NOW, THEREFORE, I, Frederick G. Payne, Governor of Maine, respectfully request an answer to the following questions:

(1) Does the Maine School Building Authority Act permit the Authority to combine into a single issue, for financing purposes, the bonds in connection with the projects of several towns?

(2) May a lease agreement entered into between a town and the Authority pursuant to the Maine School Building Authority Act include a provision obligating the town to pay rent for the use of the project during a period of any delay in completing the construction of the project beyond the estimated date for completion or in the event of damage to or destruction of the whole or any portion of the project?

(3) Will the favorable vote of a majority of those voting on a lease agreement constitute approval by the inhabitants of the town under the Maine School Building Authority Act?

(4) Does a town have power to contract with the Authority for the financing and construction of school buildings under the Maine School Building Authority Act, notwithstanding the creation under a special act of a school district coterminous with the

town having power to construct similar school buildings?

Respectfully submitted,

FREDERICK G. PAYNE,

Governor of Maine

ANSWER OF THE JUSTICES

To the Honorable Frederick G. Payne, Governor of Maine.

The undersigned Justices of the Supreme Judicial Court individually acknowledge receipt of your communication of April 3, 1952, requesting our advice concerning certain provisions of the Maine School Building Authority Act, Chapter 405 of the Public Laws 1951, by giving our opinion on the specific questions submitted to us therein.

We feel constrained to say, in reply thereto, that the occasion of the inquiry of your Excellency is not a solemn one within the meaning of Section 3 of Article VI of the Constitution which reads as follows:

> "Section 3. They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives."

The duty imposed on the justices by this provision is not without limitations. The questions of law on which advisory opinions of the justices may be required must be important ones, as specifically stated therein, and such questions must be answered only on "solemn occasions." Many years ago when the question of the exact scope of the constitutional provision was considered by the justices, the majority of those then in office said, 95 Me. 564, 567:

> "The Justices are required to give their opinion in answer to important questions of law upon a

> certain condition: it would be improper * * * for them to give an opinion except upon that condition; it necessarily follows, * * * that the Justices must determine, each undoubtedly for himself, whether or not that condition existed although in cases of doubt it may be the duty of the Justices to resolve that doubt in favor of the prerogative,"

of the officer or body propounding the question. The "condition" referred to therein is that the occasion must be a solemn one. Earlier in the same opinion the justices had said:

> "It is sufficient to say, that such an occasion does not exist unless the body (or officer) making the inquiry has occasion to consider and act upon the questions submitted in the exercise of the legislative or executive powers intrusted to it by the Constitution and laws of the state."

This is the construction placed upon similar provisions of the Massachusetts and New Hampshire constitutions by the justices of their respective courts. 148 Mass. 623, 67 N. H. 600.

In this instance the opinions sought are not designed to aid the governor in the determination of any question touching the exercise of his power or the performance of his duty, but solely for the guidance of those administering the Maine School Building Authority Act. The members of the Authority are not vested with power to seek advisory opinions from the justices. We must say, as did the justices of the New Hampshire court:

> "the case is not one in which the law allows the opinions of the Justices to be given."

The situation is not changed by the fact that the governor is vested with "supreme executive power" or charged with the duty to "take care that the laws be faithfully executed." These constitutional provisions do not make questions for the decision and action thereon by subordinate executive

officers, agencies, boards and instrumentalities of the state questions to be decided or acted upon by the governor, nor do they authorize the governor to require opinions of the justices thereon. To hold otherwise would in effect make the justices the legal advisors of every subordinate executive officer, agency, board or instrumentality of the state on whose behalf the governor might choose to propound questions to the justices, not for his own guidance, as contemplated by the constitution, but solely for the guidance of such subordinate officer or agency.

Respectfully submitted:

HAROLD H. MURCHIE
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
EDWARD F. MERRILL
WILLIAM B. NULTY
ROBERT B. WILLIAMSON

Dated at Portland, Maine, this ninth day of April, 1952.

STATE OF MAINE
vs.
F. H. VAHLSING, INC.

Aroostook. Opinion, April 10, 1952.

Taxation. Constitutional Law. Excise Taxes.

Public or Private Use.

The so-called "Potato Tax," R. S., 1944, Chap. 14, Secs. 206-217 inclusive, and acts amendatory, is not a tax assessed on an *ad valorem* basis but an excise tax on the amount of business done in a particular commodity within the state, and as such may be assessed in addition to a property tax.

Article IX, Sec. 8, of the Constitution of Maine does not control the imposition of license or excise taxes.

There is a presumption in favor of the constitutionality of an act approved by the legislature.

An excise tax must be levied for a public purpose and even though an expressed legislative recognition is not conclusive, where the industry is of sufficient size and importance, and especially where the welfare of agriculture is concerned, a tax levied for its support has almost invariably been held as levied for a public use.

Whether a use is public or private is a question of law for the court.

The promotion of agriculture has been a recognized governmental activity in this state.

The mere fact that the proceeds of a tax are to be expended primarily for the benefit of the industry on which the tax is levied does not of itself render the tax unconstitutional.

ON EXCEPTIONS.

Action by the State of Maine to recover a tax under R. S., 1944, Chap. 14, Secs. 206-217 and acts amendatory. The presiding justice of the Superior Court rendered a *pro forma* judgment for the state. Defendant filed exceptions. Exceptions overruled.

Alexander LaFleur, Attorney General,
Boyd L. Bailey, Assistant Attorney General,
Ernest L. McLean, Special Counsel, for state.

Scott Brown, for defendant.

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

THAXTER, J. This is an action brought by the State of Maine to recover a tax alleged to be due under the provisions of R. S., 1944, Chap. 14, Secs. 206-217, and acts amendatory thereof, for potatoes sold and shipped at Limestone and at Easton, both in the County of Aroostook, during the period beginning December 1, 1947 and ending June 30, 1950. There was a plea of the general issue, together with a brief statement, and the case was heard by the presiding justice of the Superior Court on the writ, pleadings, and agreed statement, who rendered a *pro forma* judgment for the state in the amount of $11,339.23. The case is before the Law Court on an exception to such ruling.

There is no dispute as to the facts. If the so-called potato tax law is a constitutional and valid piece of legislation, the tax is due in the amount claimed for 1,133,923 barrels of potatoes sold and shipped taxed at one cent per barrel.

The tax is attacked on three main grounds: that it imposes an unwarranted burden on interstate commerce; that it is discriminatory, being a specific tax and not being apportioned and assessed equally with other property in the State of Maine according to its just value as required by the Constitution of Maine, Article IX, Sec. 8; that the tax is not levied for a public purpose.

That a tax such as this is not an unwarranted interference with interstate commerce has been settled by a number of important cases and no extended defense of its va-

lidity on this point is really needed. *Sligh* v. *Kirkwood,* 237 U. S. 52, 59 L. Ed. 835; *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459, 63 L. Ed. 1084; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 82 L. Ed. 823; *C. V. Floyd Fruit Co., et al.* v. *Florida Citrus Commission, et al.,* 128 Fla. 565, 112 A. L. R. 562; see Note 112 A. L. R. *supra,* 571; *State* v. *Enking,* 59 Idaho, 321, 82 Pac. (2nd) 649.

The Michigan court in construing a statute similar to our own, except that it applies to apples instead of potatoes, rather summarily answered this question. The court said in the case of *Kull* v. *Michigan State Apple Commission,* 296 Mich. 262, 296 N. W. 250, 252:

> "While not stressed in the body of their brief, in appellees' counterstatement of questions involved the issue is raised that this act contravenes that portion of article I, sec. 8, of the Federal Constitution which vests in Congress the power to regulate interstate commerce. A sufficient answer is that the act now under consideration does not impose a burden on interstate commerce because it neither impedes nor embarrasses interstate commerce in the commodities involved."

The enforcement of our potato tax act does not cast such a burden on interstate commerce as is prohibited by Section VIII, Article I, of the Constitution of the United States giving to congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Our so-called potato tax law was enacted in 1937 and is now grouped with other analogous special taxes in Chap. 14 of Revised Statutes of 1944, the proceeds of which are to be used for certain designated purposes.

Article IX, Sec. 8, of the Constitution of Maine provides as follows:

> "All taxes upon real and personal estate, as-

> sessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property."

Counsel for the defendant claims that this tax was assessed in violation of this provision. The potato tax is not a tax assessed on an *ad valorem* basis on the value of potatoes owned, but like the gasoline tax, the use fuel tax, the cigarette tax, and the oleomargarine tax, on the amount of business done in the particular commodity within the state. It is an excise tax and not a property tax and is clearly imposed as an excise tax. This same attack was leveled unsuccessfully against our gasoline tax. See *Opinion of Justices,* 123 Me. 573, 577. Being an excise tax it may be assessed in addition to a property tax, which must clearly be levied in conformity with Article IX, Sec. 8, of the Constitution of Maine. Such has been the decision of all those state courts which have considered the validity of the tax from this point of view. *Louisiana State Department of Agriculture* v. *Sibille,* 207 La. 877, 22 So. (2nd) 202, (La. Apr. 30, 1945) ; *C. V. Floyd Fruit Co.* v. *Florida Citrus Com. supra; Miller* v. *Michigan State Apple Commission,* 296 N. W. 245, (Mich. Feb. 7, 1941) ; *State* v. *Enking, supra.* As was said by the court in *Louisiana State Department of Agriculture* v. *Sibille, supra,* at page 205 of 22 So. (2nd), in referring to the distinction between property and excise taxes:

> "Under our well established jurisprudence those constitutional provisions apply only to property taxes; they do not control the imposing of license or excise taxes."

We find the following in 51 Am. Jur., page 345:

> "The principle that the imposition of both an excise tax on a privilege, activity, occupation, or

> calling and an ad valorem tax on property used in the exercise, conduct, or performance of such calling, privilege, or activity is not invalid as double taxation is generally recognized. The principle is bottomed on the theory that the subject of ad valorem taxation is property and that of excise taxation is a right or privilege, and that consequently, the requirement frequently made essential to the existence of double taxation in the unconstitutional sense, namely, that both impositions must be against the same taxable subject, is lacking. The rule has received application in many diverse factual situations. Thus, it is well settled that a state may collect an ad valorem tax on property used in a calling and at the same time impose a license tax on the pursuit of that calling."

Sec. 1 of the potato tax law, now Sec. 206 of Chap. 14 of R. S., 1944, reads as follows:

> "The production of potatoes is one of the most important agricultural industries of this state and sections 206 to 217, inclusive, were enacted into law to conserve and promote the prosperity and welfare of this state and of the potato industry of this state by fostering and promoting better methods of production, merchandising, and advertising the said potato industry of this state."

Sec. 207 defines certain terms.

Sec. 208 imposes the tax at the rate of 1¢ a barrel on all potatoes raised in the state, except such as are retained by the grower to be used for home consumption and for seed purposes.

Sec. 209 provides that the tax is due on each lot of potatoes as provided in Sec. 212.

Sec. 210, as amended by Public Laws of 1945, Chapter 30, provides for certain information on certain prescribed forms, and for the issuance of a certificate by the state tax assessor to the shipper, and that "no shipper shall sell or

ship any potatoes as defined in Section 207, until such certificate is furnished as required by this section."

Sec. 211 provides as follows:

> "Each shipper purchasing potatoes and paying, or becoming liable to pay, the tax imposed by section 208 shall charge and collect from the seller a tax at the rate of 1¢ per barrel, to be deducted from the purchase price of all potatoes subject to the tax, so purchased by such shipper."

Sec. 212, as amended by Chap. 30, Public Laws of 1945, provides that every shipper shall keep a record of all purchases, sales and shipments of potatoes and shall, on or before the 15th day of each month, render a report to the state tax assessor stating the quantity of potatoes received, sold, or shipped by him during the preceding calendar month, on certain forms furnished by the state tax assessor, and for such further information as the assessor shall prescribe. It also provides that, on or before the 1st day of the calendar month succeeding the filing of said report, each shipper shall pay to the state tax assessor a tax at the rate of 1¢ per barrel upon all potatoes so reported as purchased, sold or shipped, as determined by the state tax assessor.

Sec. 213, as amended by Public Laws of 1945, Chap. 30, provides for inspection by the state tax assessor, his agent, or the commissioner of agriculture.

Sec. 214 provides for certain penalties.

Sec. 215 provides for the appropriation of moneys received by the treasurer of state as follows:

I. For the collection of the tax and the enforcement of all the provisions of the law.

II. 25% of the money collected for investigation of better methods of production, shipment and merchandising of potatoes, and for the manufacture and merchandising of

potato by-products by the Maine Agricultural Experiment Station under the supervision of the Maine Development Commission.

III. 25% of the sum collected for the general purpose of merchandising and advertising of Maine potatoes for food and for seed purposes under the direction of the Maine Development Commission.

IV. This subsection provides that the funds remaining after paying the expenses of carrying out the provisions of sections 206-217, inclusive, including expenses authorized under the provisions of subsections II and III of this section, "may be expended by the commission to carry out the purposes outlined in said subsections as it may determine."

Sec. 216 provides for changes in membership of the Maine Potato Tax Committee. Four of the five members shall be residents of Aroostook County, and one a resident of central Maine. This committee shall work with the Maine Development Commission in an advisory capacity to assist in enforcing the provisions of the act.

Sec. 217 provides that the taxes imposed by the act shall be in addition to any other taxes legally imposed or collected under other provisions of the law of the state now or hereafter in force.

We must bear in mind that the entire amount received from this tax beyond that required for expenses of collection of the tax, and for administration purposes, is to be used for the purpose of investigating and determining better methods of production, shipment, and merchandising of potatoes and for the manufacture and merchandising of potato by-products by the Maine Agricultural Experiment Station under the supervision of the Maine Development Commission; and for merchandising and advertising Maine potatoes for food and for seed purposes under the direction of the Maine Development Commission. In other words,

these funds are to be used for agricultural research and education in the State of Maine, and for advertising *Maine potatoes,* a distinctive and substantial *Maine product.* True the subject matter of this research is specialized and confined to a single crop. That crop, however, is of such magnitude that there cannot be any doubt that it affords a proper field for specialized research and education. The allocation of a portion of the funds raised by the tax to advertising the product is but a method of assuring to those taking advantage of the research a market for the product.

This law, as we have said before, was enacted first in 1937, Public Laws, Chap. 84, and is now found substantially in its original form in R. S., 1944, Chap. 14, Secs. 206-217. Sec. 1 as originally enacted, now Sec. 206 of the Revised Statutes, expresses in straightforward language the honest purpose of the 88th Legislature in enacting this law. The act needs no interpretation by us. We must bear in mind that the entire amount received from this tax beyond that required for expenses of collection and administration is to be used by the Maine Agricultural Experiment Station under the supervision of the Maine Development Commission to investigate and determine better methods of production, shipment, and merchandising potatoes; and for merchandising and advertising Maine potatoes for food and for seed purposes. In other words, so far as used for advertising, these funds are to be used for advertising the State of Maine by advertising the *Maine potato,* a typical and distinctive product of this state, the raising of which constitutes one of our basic industries.

As we acknowledged in a very recent case, the presumption is in favor of the constitutionality of an act approved by the legislature. In *Morris* v. *Goss,* 147 Me. 89, 94, 83 A. (2nd) 556, 559, we find the following language:

> "Furthermore, except in extraordinary cases the Court will rely upon the presumption of the

> constitutionality of legislative action and not even examine the question unless a determination thereof is strictly necessary to a decision disposing of the cause before it for determination."

This tax has been in force now for over fourteen years in the belief that the collection of it was valid; the Maine Potato Tax Commission has been financed through its revenues; advertising throughout the country of Maine potatoes has been carried on under the supervision of the Maine Development Commission, at a time when Maine potatoes are under severe competition with those from Idaho and elsewhere. Similar legislation has been already passed by the legislature of Idaho and approved as constitutional by the court there. *State* v. *Enking, supra.* In addition it has met with approval in the states of Florida, Louisiana and Michigan. In Florida it applies to citrus fruits, *C. V. Floyd Fruit Co.* v. *Florida Citrus Commission et al., supra;* in Louisiana to sweet potatoes, *Louisiana State Department of Agriculture* v. *Sibille, supra;* in Michigan to apples, *Miller* v. *Michigan State Apple Commission, supra.* Everywhere it has been held that such a tax is an excise tax, and that to be held valid as such it must be levied for a public purpose. The language of the Louisiana court is similar to that of all the others. It says, 22 So. (2nd) 206:

> "The declaration that the act was passed to promote the prosperity and welfare of the State of Louisiana and of its people is an expressed legislative recognition that the tax is imposed for a public benefit. To be sure, that recognition is not conclusive; it could not make the tax one for public purpose if in fact it were for a private purpose."

Where the industry involved has been of sufficient size and importance, and especially where the welfare of agriculture has been concerned, a tax levied for its support such as this, to wit, a tax for the benefit of agriculture as an industry, as distinguished from grants to those engaged there-

in, has almost invariably been held as levied for a public use. It is significant that the meaning of the words "public use" has been liberally interpreted in this state. *Laughlin* v. *City of Portland,* 111 Me. 486. The question in the *Laughlin* case was whether the legislature had the constitutional power to authorize a city to establish a municipal fuel yard. In answering that question in the affirmative, this court said, pages 491-492:

> "The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such today."
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> * * *
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> "On the other hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now."

Admittedly the line of demarcation between a public and a private use is not always easy to draw. Whether a use is public or private is a question of law for the court. This question must be determined by the application of established legal principles to the then existing facts. The statement of this court, when it said, "what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today" is not to be interpreted as a declaration by this court that the meaning of the constitution changes with the ebb and flow of economic events. What we meant by that declaration is that the constitution is made up of living words, and that the change of the nature of economic events may, within the

established principles of constitutional construction, transform a use which was formerly a private use into a public use. The transformation, however, is brought about not by a change in the meaning of the constitution but by a change in the situation which brings the particular use within the established meaning of a public use under the constitution.

The promotion of the agricultural industry has been a recognized governmental activity in this state for many, many years and money raised by taxation for the benefit of agriculture as an industry, as distinguished from direct grants to those engaged therein, has been provided by legislative action. As long ago as 1885 there was established in connection with the State College of Agriculture and Mechanic Arts, the Maine Fertilizer Control and Agricultural Experiment Station originally to protect farmers from frauds in commercial fertilizer and to promote agriculture by scientific investigation and experiment. Public Laws of 1885, Chap. 294. This station was placed under the control and management of a board of managers of five members, of whom one was the professor of agriculture of the State College of Agriculture and Mechanic Arts, another the Secretary of the State Board of Agriculture, and three more appointed by the governor. The purpose of such legislation was avowedly to protect and advance the agricultural interests of this state. Two years later this act was formally repealed and another passed to integrate and coordinate such work with the efforts of the federal government in the same direction. Public Laws of 1887, Chap. 119. We all know that every legislature since then has appropriated money for the furtherance of these original purposes. The Maine Development Commission was established in 1933 and $50,000 was appropriated by the state to it to further its work to advertise and publicize the agricultural, industrial and recreational resources of this state. This legislation is now found in R. S., 1944, Chap. 35.

Is it possible that after the lapse of nearly seventy years, since the enactment of the original legislation, anyone has the temerity to argue to us that this legislation was beyond the power of the legislature to enact, and that all appropriations for these purposes since the passage of the original act were void because the money was not appropriated for a public purpose? And yet they must so argue if they expect us to hold the potato tax law invalid on that ground. The Nebraska court has had this same problem before it and disposed of it by the following language: *Power Oil Co.* v. *Cochran* (Neb. 1941), 295 N. W. 805, 811, et seq.:

> "The constitutionality and validity of the appropriation of the $50,000 for the Nebraska Advertising Commission, we think, must depend on the question of the constitutionality of the act creating the commission. The two must stand or fall together. It is hardly necessary to state that an appropriation of public funds for the sole purpose of making effective an unconstitutional law is void.
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> "The creation by legislative action of a commission to function at public expense to advertise the products of the state and its advantages with the purpose of attracting tourists and industries is something new in this state and, perhaps, in its scope, is more far reaching than legislation of this character in any other state. However, the principle of state advertising is not new, even in this state. The principle and practice of state advertising extends back into antiquity. This fact is pointed out graphically in the opinion in City of Jacksonville v. Oldham, 112 Fla. 502, 150 So. 619. The principle has been recognized in State v. Cornell, 53 Neb. 556, 74 N.W. 59, 39 L.R.A. 513, 68 Am. St. Rep. 629; Board of Directors of Alfalfa Irrigation District v. Collins, 46 Neb. 411, 64 N.W. 1086; State v. Robinson, 35 Neb. 401, 53 N.W. 213, 17 L.R.A. 383; State v. Miller, 104 Neb. 838, 178 N.W. 846. It is true that the cases have reference to expenditures for advertising by counties, but

> counties are only arms of the state. The rules announced are not grounded in any sense in county organization but on the principle that legislative power exists to make expenditures for advertising which is for the public benefit. The courts of certain other states have adopted a similar attitude toward advertising in the interests of the public welfare at public expense. City of Jacksonville v. Oldham, supra; C. V. Floyd Fruit Co. v. Florida Citrus Commission, 128 Fla. 565, 175 So. 248, 112 A.L.R. 562; State v. Enking, 59 Idaho, 321, 82 P. 2d 649; City of San Antonio v. Paul Anderson Co., Tex. Civ. App. 41 S.W. 2d 108; Anderson v. City of San Antonio, 123 Tex. 163, 67 S.W. 2d 1036; Moreland v. City of San Antonio, Tex. Civ. App. 116 S.W. 2d 823; Davis v. City of Taylor, 123 Tex. 39, 67 S.W. 2d 1033; Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728; Lewis v. LaGuardia, 172 Misc. 82, 14 N.Y.S. 2d 463.
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> "In this field, if limited to the public benefit, the legislature has power to act. Whether it enters the field or not is a matter of legislative discretion. Whether or not the legislature exercised a wise discretion is not a matter that can properly be determined by the courts. The legislature, subject only to the initiative and referendum, and constitutional inhibitions, and provided that legislation is for a public purpose, has an unlimited field within which to legislate."

This potato tax was imposed for a public purpose, and because in the opinion of the legislature the public exigencies required it; at least we must so hold where the industry for the benefit of which the tax is levied is as important and as basic as is the potato industry to the State of Maine which imposes the tax. The mere fact that the proceeds of this tax are to be expended primarily for the benefit of the industry on which the tax is levied does not of itself render the law constitutional; for such an argument would justify

almost any tax so long as the particular industry for whose benefit the tax is primarily enacted pays the bill. What justifies the tax is that the money expended for the promotion of the potato industry is not primarily expended for the benefit of those individuals engaged therein but for the benefit of the people as a whole by making available to any and all who may wish to enter into the industry the specialized knowledge and information that will enable them to carry the same on, and prospects of a market for that which they produce. The line of demarcation between the expenditure of public funds for the benefit of the individual in order to get an indirect resultant benefit to the people as a whole, and the expenditure of public funds for the benefit of the people as a whole with incidental benefits accruing to individuals may be extremely delicate and hard to discover. To formulate a general rule to cover all situations is neither possible nor do we attempt to do so.

It is to be presumed, however, that when the legislature levies a tax and appropriates the proceeds thereof for a purpose which it declares to be for the public welfare that it has acted in good faith and within its constitutional powers. Unless it has clearly exceeded its constitutional powers in so doing, its action must be sustained. All rational doubts as to the constitutionality of statutes must be resolved in favor of the constitutionality thereof. Although it is the duty of the court to declare acts which transcend the powers of the legislature void, this judicial duty is one of gravity and delicacy and it is only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute that the inherent power of the court to declare statutes unconstitutional should be exercised.

It is the considered opinion of this court that the primary purpose of the enactment of this act is the promotion of the welfare of the people of the state as a whole; that it is enacted for a public purpose and that the fact that those en-

gaged in raising potatoes may be incidentally benefited thereby does not change the purpose of the act from a public one to a private one. As said by the Supreme Court of the United States in *Loan Ass'n* v. *Topeka,* 20 Wall. 655, 664, 22 L. Ed. 455:

> "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principal is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

Measured by this standard, the excise tax now under consideration is levied for a public purpose and the act imposing the same is constitutional.

The entry must be

Exceptions overruled.

HELEN GOSSELIN
LAWRENCE R. GOSSELIN
vs.
DANIEL R. COLLINS

(Two Cases)

Androscoggin. Opinion, April 11, 1952.

Negligence. Pedestrians.

Whether the operator of a motor vehicle or a pedestrian is in the exercise of due care are questions of fact for the jury, except in cases where the pedestrian enters the path of a motor vehicle so abruptly as to give its operator no opportunity to see him and avoid hitting him.

Where a jury could properly find that the plaintiff, at some point in crossing the street observed the defendant's car approaching at such a distance and at such an apparent speed that he was justified in continuing to cross the street it is proper for the trial court to refuse to direct a verdict for the defendant.

ON EXCEPTIONS.

Actions of negligence by a husband and wife to recover for injuries suffered by the wife when struck by an automobile while crossing the street and for medical expenses. The cases were tried together before a jury which returned verdicts for the plaintiffs. The cases are before the Law Court on exceptions to the refusal of the presiding justice to direct verdicts for the defendant. Exceptions overruled (each case).

Harris M. Isaacson, for plaintiffs.

Frederick P. Armstrong, Jr.,
Robinson, Richardson & Leddy, for defendant.

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

WILLIAMSON, J. These tort actions are before us after jury verdicts for the plaintiffs on exceptions to the refusal of the presiding justice to direct verdicts for the defendant. The cases arise from an automobile accident in which the plaintiff, Helen Gosselin, was severely injured when she was struck by an automobile operated by the defendant while she was crossing Main Street in Lewiston on a cross walk in front of the Empire Theatre. The plaintiff, Lawrence E. Gosselin, husband of Helen, seeks to recover for medical expenses and other damage resulting from his wife's injuries. The cases were tried together and present identical issues apart from damages which the defendant does not here question. For convenience we will treat the cases as one and speak of Mrs. Gosselin as the plaintiff.

Does the evidence with the inferences reasonably drawn therefrom taken most favorably to the plaintiff, warrant findings by the jury (1) that the defendant was negligent, and (2) that the plaintiff was in the exercise of due care?

"The issue is liability. It must be resolved with full recognition of the principle that the facts must be viewed in the light most favorable to the plaintiffs, giving them the benefit of every justifiable inference." *Wiles, et al.* v. *Connor Coal & Wood Co.*, 143 Me. 250, at 252, 60 A. (2nd) 786, at 787.

Is the evidence in support of the plaintiff's position, "substantial, reasonable, coherent, and consistent with circumstances and probabilities"? *McCully* v. *Bessey*, 142 Me. 209, at 212, 49 A. (2nd) 230, at 232.

Illustrative statements of the governing principles applied in pedestrian cases are as follows:

"Whether under any particular circumstances, whatever the speed of a motor vehicle colliding with a pedestrian on a crosswalk may be, the operator of it, or the pedestrian, is

using due care are questions of fact for jury determination, except in cases where the pedestrian enters the path of the vehicle so abruptly as to give its operator no opportunity to see him and avoid hitting him. Typical exceptions are found in such cases as *Milligan* v. *Weare,* 139 Me. 199; 28 A. (2nd) 463; and *Wiles* v. *Connor Coal and Wood Co.,* 143 Me. 250; 60 A. (2nd) 786. The general rule was well stated in *Shaw* v. *Bolton,* 122 Me. 232; 119 A. 801, as follows:

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

This statement, made with reference to a pedestrian struck by an automobile while he was crossing a street, applies with equal force to the operator of a motor vehicle at a crossing for pedestrians." *Lange* v. *Goulet,* 144 Me. 16, at 19, 63 A. (2nd) 859, at 860.

"To paraphrase, (the pedestrian) did his full duty if he waited until it reasonably appeared that a prompt crossing could be safely effected if approaching automobiles were lawfully managed and controlled.

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"A jury might find that the defendant's automobile was down the street such a distance when the deceased left the curb that an ordinarily prudent man would have deemed it safe to attempt the crossing." *Sturtevant* v. *Ouellette,* 126 Me. 558, at 562, 140 A. 368, at 370. See also *Wetzler* v. *Gould,* 119 Me. 276, 110 A. 686; *Ross* v. *Russell,* 142 Me. 101, 48 A. (2nd) 403; *Day* v. *Cunningham;* 125 Me. 328, 133 A. 855; *Haskell* v. *Herbert,* 142 Me. 133, 48 A. (2nd) 637; 2A Blashfield Cyc. of Automobile Law and Practice, 276, 277, Sec. 1411 "Pedestrians—Contributory Negligence."

Main Street, in the area with which we are concerned near the Empire Theatre, is a main artery of travel running in a general easterly and westerly direction with a

slight down-grade to the west. The street has a black surface and is 46 feet in width from curb to curb. White lines marked (1) the cross walk 8 feet in width, (2) the center of the street from each side of the cross walk, dividing the street into east and west-bound traffic lanes, and (3) parking spaces 7½ feet in width on the north or theatre side of the street commencing 18 feet west of the cross walk. In front of the theatre extending to the parking space was a "no parking" zone. The view to the east from the cross walk is clear and unobstructed for a distance of 250 feet to 300 feet. The weather at the time of the accident was clear and the street was dry and fully and completely lighted.

The plaintiff was struck by the front of defendant's car at the right of the center of the hood, and was thrown or pushed by the collision so that she was pinned or wedged beneath a car parked in the first space. The defendant's car was at all times in the west-bound traffic lane. It is apparent, therefore, that the plaintiff had proceeded several feet beyond the center of the street when she was struck. The defendant did not blow his horn.

There is no dispute in the record upon the facts stated above. Whether the defendant brought his car to a stop 35 feet or 85 feet west of the cross walk, a point upon which there is some doubt, is not, in our view, material for purposes of decision.

The evidence of the plaintiff in substance is as follows:

Mr. and Mrs. Gosselin, together with Mr. and Mrs. Blanchard, were on their way to the first moving picture show of the evening. The plaintiff and Mrs. Blanchard left the car in which they were passengers on the south side of Main Street. They stepped into the street on the cross walk, found there was traffic coming from the west and returned to the curb. When the south half of the street was clear of traffic they again started to cross, noting that there were

no cars approaching from the east. About half way across the street the plaintiff glanced again to the east and saw the defendant's car at or near the east end of the bridge, known as the Canal Bridge, 140 feet distant. The plaintiff says that she believed she had ample opportunity to reach the theatre or north side of the street and continued on her course. Just before she was struck she noticed the car was "right on top of me" and she could not move.

Mrs. Blanchard walking behind the plaintiff at some point looked to her right and saw a car coming onto the bridge. When she next saw the car it "was on top of us —me, and I jumped back."

The defendant described his actions in the following words:

> "I was coming down Main Street. Before I got onto the Bridge I noticed people crossing the street on the Bridge so I slowed down there, but they didn't cross so I continued on until I got about 15 feet from the crosswalk. I got about at Island Avenue and I saw some people on the crosswalk so I thought they were waiting for me to go by, so when I got about 15—maybe 10 or 15 feet from the crosswalk there were two girls run out in front of me."

Island Avenue enters Main Street from the north, with its west line about 35 feet east of the cross walk and 100 feet west of the east end of the Canal Bridge. It was at this point that the people whom the defendant first noticed were crossing from the south to the north side of Main Street. They stopped in the middle of the street to permit the defendant to pass.

Estimates of the defendant's speed vary from slow and less than 20 miles per hour by the defendant, to "a fairly rapid clip" by an east-bound motorist passing the defendant at the bridge, and "a terrific rate" by a pedestrian cross-

ing the street a few steps behind the plaintiff and her friend. A police officer said defendant told him, when asked how fast he was going, "I slowed down on the bridge, I don't know."

It will serve no useful purpose to rehearse the many conflicting details in the record. There can be no doubt that the jury was justified in finding the defendant was negligent. He was proceeding on a busy city street in an area with which he was thoroughly familiar and was approaching a cross walk of which he was fully aware. There seems to be no excuse for his failure to see the plaintiff and the others on the cross walk until he was within 35 feet.

The bite of the case lies in the question of contributory negligence. Was it lack of due care on the part of the plaintiff as a matter of law to proceed on a cross walk to the north side of the street in the belief that the defendant's car would be so driven that she would not be placed in danger? What was the situation? When the plaintiff was about half way across the street did she stop and then dart, or dash, or run in front of the defendant's car when it was close upon her? If so, she was negligent. Or did she, observing the defendant's car approaching from the east, as a reasonably prudent person under the circumstances proceed to cross the west-bound traffic lane in the belief that she could safely pass in front of the oncoming automobile?

Accidents take place within seconds. Wide variance in impressions of time, distance, position and speed, to name only a few of the factors calling for observation and judgment, are to be expected. Parties and the witnesses equally honest and intelligent will not agree. The advantage to the fact finder in seeing and hearing witnesses need not be elaborated.

Liability does not rest upon acceptance of the plaintiff's version in every detail. From a careful review of the rec-

ord we are convinced that a jury could find that the plaintiff, at some point in crossing the street, observed the defendant's car approaching at such a distance and at such an apparent speed that she was justified in continuing to cross the street. We cannot say a jury would err (or in these cases did err) in finding for the plaintiffs.

The entry will be in each case

Exceptions overruled.

RALPH E. JENKINS
vs.
ROBERT S. BANKS

Cumberland. Opinion, April 14, 1952.

Negligence. Master and Servant. Independent Contractors.

Where the contractee in an independent contractor-contractee relationship undertakes to provide instrumentalities with which the work is to be carried on, he owes to the contractor and the latter's employees the duty of exercising reasonable care with respect thereto.

Where there is a master-servant relationship, it is the duty of the master to use reasonable care to furnish his servants reasonably safe appliances with which to work and to use reasonable care to inspect such appliance in order to discover and remedy defects.

A servant may rely upon the presumption that his employer has performed his duty, although he is bound to use his senses to see obvious defects.

A contractee undertaking by contract to furnish the contractor with appliances has the duty of initial inspection and reasonable care; and the contractor, although he is bound to use his senses to see obvious defects is not required to examine appliances furnished him but may rely upon the presumption that the contractee has performed his duty with reference to initial inspection.

Where the contractee by his contract agrees to furnish appliances to the contractor for his personal use in personally performing the contract, the contractee is under the same duty with respect to furnishing them as a master to his servant.

ON EXCEPTIONS.

This is an action of negligence to recover for personal injuries suffered as a result of a fall caused by the collapse of a staging upon which plaintiff was at work. The presiding justice directed a verdict for defendant. The case is before the Law Court on exceptions. Exceptions sustained.

Raymond S. Oakes, for plaintiff.

Robinson, Richardson & Leddy,
Robert J. Milliken, for defendant.

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

MERRILL, J. On exceptions. This case is before us on exceptions by the plaintiff to the admission of certain testimony in the course of the trial and to the direction of a verdict for the defendant. The action is brought by the plaintiff, Ralph E. Jenkins, against the defendant, Robert S. Banks, to recover for personal injuries suffered by the plaintiff as the result of a fall caused by the collapse of a staging upon which he was at work.

The defendant was in the roofing business, so-called, and took contracts to cover side walls and roofs with asbestos shingles. The plaintiff was working for him as an applicator of such shingles. At the time he was injured he was engaged with two other men in laying shingles on a building which the defendant had contracted to cover. The plaintiff claims that the relationship existing between the defendant and himself was that of master and servant. The defendant claims that the plaintiff and those working with him were independent contractors.

The negligence charged against the defendant is that he furnished to the plaintiff and those working with him a defective wall bracket with which to construct the staging upon which the plaintiff was at work, and the collapse of which caused the injuries to the plaintiff; and that the defendant either knew or, by the exercise of due care on his part, should have known of the defective condition of the bracket.

The defendant furnished the brackets and planks of which the staging was constructed to the plaintiff and his associates for the prosecution of the particular job on which they were engaged at the time the plaintiff was injured. If the relationship was that of master and servant, the defendant's duties to furnish instrumentalities and with respect to those furnished are those imposed upon him by such relationship.

If the plaintiff was an independent contractor, although the relationship of contractee and independent contractor does not in and of itself cast upon the contractee a duty to furnish appliances, he may assume that duty by his contract. If upon the evidence in this case the jury should find that the relationship between the parties was that of independent contractor and contractee, there is sufficient evidence in the record to justify a finding by the jury that the defendant by the contract undertook to furnish the brackets and planks for the construction of the staging which collapsed.

Where the contractee undertakes to provide any of the instrumentalities with which the work is to be carried on, he owes to the contractor and the latter's employees the duty of exercising reasonable care with respect thereto. 27 Am. Jur. Page 509, Sec. 30. See 44 A. L. R. 891, note.

If the relationship is that of master and servant, it is the duty of the master to use reasonable care to furnish his

servants reasonably safe appliances with which to work and to use reasonable care to inspect such appliances in order to discover and remedy defects. The servant, though he is bound to use his senses to see defects which are obvious, is not required to examine appliances to discover those not obvious; and he may rely on the presumption that his employer has performed his duty with reference to such inspection. *Boober* v. *Bicknell,* 135 Me. 153, 154.

If the relationship is that of contractee and independent contractor, and if as a part of the contract the contractee undertakes to furnish the contractor with appliances with which to do the work he, because of the contract, and as an implied obligation imposed thereby, owes the contractor the duty to furnish reasonably safe appliances and to use reasonable care to inspect such appliances prior to furnishing them to the contractor in order to discover and remedy defects. In other words, the *contractee* has a duty of initial inspection. The *contractor,* though he is bound to use his senses to see defects which are obvious, is not required to examine appliances furnished him by the contractee in accordance with the terms of his contract to discover those defects which are not obvious. He, like a servant, may rely on the presumption that the contractee has performed his duty with reference to such initial inspection.

It is not often that the contractor himself is injured by a defective appliance furnished by the contractee. The question of liability of the contractee for furnishing defective appliances usually arises when an employee of the contractor has been injured thereby. See cases collected in 44 A. L. R. 932 note, 1048 et seq. But where, as in this case, the contractee (assuming for the moment that the plaintiff here was an independent contractor) pursuant to his contract has furnished an appliance for the personal use of the contractor, who is to personally perform labor under the contract, the contractee should be held to the same duty of

care in the *initial selection and inspection* of the appliances as should a master furnishing the same to his servant. Nor do we see any reason why the contractor may not rely upon the performance of this duty by the contractee, in the same way that a servant may so rely on the performance of his duty by his master. There is nothing magic about the relationship of independent contractor and contractee that negatives liability on the part of the latter for a breach of his duty to the former. The duties flowing from the relationship itself may not be the same as those flowing from the relationship of master and servant. When, however, the contractee by his contract agrees to furnish appliances to the contractor for his personal use in personally performing the contract, the contractee should be and is under the same duty with respect to furnishing them as is a master to his servant.

It is clearly established by the evidence that within a very short time, about an hour, after the bracket was first put to its intended use, and without being subjected to an unreasonable or extraordinary load, it pulled apart and as a result thereof, the staging collapsed and the plaintiff was injured thereby.

Although the evidence is conflicting, there was evidence from which it could have been found that the defendant, after personally inspecting, selected this bracket with others for use by the plaintiff and his associates on this particular job. The bracket itself was introduced in evidence as an exhibit. As real evidence it was subject to examination by the jury and its actual condition could be seen and observed by them. No purpose would be served in attempting to describe its condition. Suffice it to say that the condition of the bracket was such that whether or not it was defective was clearly a question of fact for the jury. It was likewise a question of fact for the jury to determine whether or not the defendant by his examination and selection thereof

either knew or should have known of its defective condition at the time he furnished the same to the associates of the plaintiff and the plaintiff for use. If the bracket was defective and the defendant either knew of the defect or, by the exercise of due care on his part in selecting and inspecting the same, should have known of its defect, the furnishing of the bracket to the plaintiff and his associates for use would be negligence. This would be true whether the relationship between the plaintiff and defendant was that of independent contractor and contractee or servant and master. Furthermore, it was likewise a question of fact for the jury whether or not plaintiff, either as a servant or as an independent contractor, did discover or, by the exercise of due care on his part, should have discovered the defective condition of the bracket. In resolving this question it is to be remembered that the plaintiff, though he was bound to use his senses to see defects which were obvious, was not required to examine the bracket furnished him by the defendant in accordance with the terms of his contract to discover defects which were not obvious. He had a right to rely on the presumption that the defendant had performed his duty by making a reasonable initial inspection of the bracket.

There was sufficient evidence in this case if the issues of fact be resolved in favor of the plaintiff to justify a verdict in his favor, whether the relationship between him and the defendant was that of master and servant or that of independent contractor and contractee. This being true, it was error to direct a verdict for the defendant. The exceptions to the direction of the verdict must be sustained. As this will necessitate a new trial, the exceptions to the admission of evidence become immaterial.

The entry will be

Exceptions sustained.

HUDSON PULP AND PAPER CORPORATION
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, April 14, 1952.

Sales Tax. Retail Sale. Paper Manufacturing.

The statutory exclusion from taxation of "tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser" applies to certain lubricating oils and greases used to lubricate machinery and certain wires, wet felts and dry felts, used upon paper machines; and a regulation of the state tax assessor is unauthorized which limits the exclusion so as to apply to that which is being acted upon (the subject matter of manufacture), rather than all those expendibles by which the process of manufacture is carried on. (P. L., 1951, Chap. 250, Sec. 2.)

It is the tax act, not the assessor's regulations, which determine liability.

ON REPORT.

This case arises upon a petition for reconsideration and abatement of an assessment of the state tax assessor. From a ruling declining to abate the tax an appeal was taken to the Superior Court. The case was reported to the Law Court for final determination. (P. L., 1951, Chap. 250, Secs. 29, 30.) Appeal to Superior Court sustained. Judgment for appellant without costs. Tax abated. Case remanded to Superior Court for decree in accordance with opinion.

Locke, Campbell, Reid & Hebert, for plaintiff.

Alexander A. LaFleur, Attorney General,
Boyd Bailey, Assistant Attorney General,
Miles P. Frye, Assistant Attorney General, for defendant.

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

MERRILL, J. On report. This case is an appeal to the Superior Court for the County of Kennebec from a decision of Ernest H. Johnson, state tax assessor, declining to abate taxes. The assessor levied a use tax upon certain lubricating oils and greases used to lubricate machinery, and certain wires, wet felts and dry felts used upon paper machines, all purchased by the appellant for use in its business as a manufacturer of paper. Proper procedure was followed to obtain a reconsideration and abatement of the assessment in question by the assessor, and to bring the case before the Superior Court on appeal. See P. L., 1951, Chap. 250, Secs. 29 and 30. In the Superior Court the case was reported to this court for final determination. By the terms of the report it is agreed that there is only one issue and that is "Is the purchase by the appellant, the taxpayer, of wires, wet felts and dry felts (all paper machine clothing) and lubricants a purchase of 'tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser . . .' within the meaning of the fourth sentence of the definition of 'retail sale' or 'sale at retail,' Section 2, Chapter 250, P. L., 1951?"

By Chapter 250 of the Public Laws of 1951, the legislature enacted Chapter 14-A of the Revised Statutes known as the "Sales and Use Tax Law," hereinafter called the Act.

The lubricating oils and greases used to lubricate the machinery, and the wires and felts used in connection with and on the machinery employed to manufacture paper, were all expendibles. By being used in connection with the paper-making machinery and during the process of making paper, they will be consumed or destroyed within the meaning of those terms as used in Section 2 of the Act. As to the oils and greases it is self evident that their use for the intended purpose destroys them. True it is that the wires and felts

are not completely annihilated by the intended use, but as a result of chemical action and mechanical abrasion both wires and felts are rendered useless after varying but relatively short periods of use; the wires having a life of one to four weeks, the wet felts six to ten days and the dry felts up to five months. After these periods the felts and wires become of no use in the paper-making business.

We hold that these articles of personal property by use for the purposes intended are consumed or destroyed within the meaning of those words as used in the Act. However, the fact that these articles of personal property are either consumed or destroyed is not necessarily determinative of the issue. They must not only be consumed or destroyed but they must also be consumed or destroyed *in the manufacture of tangible personal property* for sale.

So much of Section 2 of the Act as is pertinent to the question at issue is as follows:

> " 'Retail sale' or 'sale at retail' means any sale of tangible personal property in the ordinary course of business, for consumption or use, or for any purpose other than for resale in the form of tangible personal property. * * * * * 'Retail sale' and 'sale at retail' do not include the sale of tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser, but shall include fuel and electricity."

Although the parties agree that the articles of personal property in question are consumed or destroyed, they are not in agreement as to whether or not they are consumed or destroyed *in the manufacture of tangible personal property* within the meaning of the foregoing provision of Section 2 of the Act.

Purporting to act under authority of Section 20 of the Act the assessor promulgated Regulation 3. This regulation, in part, declared and set forth the categories of personal property consumed or destroyed to which the exclusion from the definition of "retail sale" or "sale at retail" in Section 2 of the Act applied. The pertinent part of Regulation 3 is as follows:

> "The exemption applies to substances, as distinguished from machines or tools, affecting the physical nature of tangible personal property in the process of manufacture, but which do not enter into the final product in an identifiable form so as to be considered an ingredient or component part of the finished product. The exemption does not apply to machines, replacement parts, or tools."

By this regulation the assessor sought to divide those things which are consumed or destroyed into two categories or classes, one of which would be taxable and one of which would not be taxable. Those things which were *being acted upon* in the process of manufacture, and by being acted upon were consumed or destroyed and thus lost their identity in the end product were treated as exempt from taxation. Those things which *acted upon* the material which was being processed, even if they were destroyed or consumed, would not be exempt from the tax.

As stated in the assessor's brief: "The distinction is functional and extremely simple—as simple as the distinction between that which acts and that which is acted upon. It is possible for the most practical person—little versed in theory—to proceed rapidly through a manufacturing plant and classify what he sees as in one category or the other instantly."

To the class of non-taxable things so determined, the assessor added one other group, to wit, those things which were totally destroyed by a single use.

Desirable as the result reached by the assessor's classification may be, and despite the fact that it is logical and workable, the said classification set forth in Regulation 3 cannot be sustained. Whether or not the purchase or sale of an article of personal property subjects the purchaser to a sales or use tax, and if so to which one, depends, not upon the regulations of the assessor, but upon the Act itself. Although the assessor is authorized by Section 20 of the Act to promulgate and enforce rules and regulations, by the very terms of that section such rules and regulations must be consistent with the Act. The assessor by regulation can neither make that which is non-taxable under the Act taxable, nor can he render that which is taxable under the Act non-taxable. It is the Act, not the assessor's regulations which determines taxability.

In determining whether or not the purchase of the articles in question subjected the purchaser to either a sales or use tax, the court must give effect to the Act. The "use tax" under Section 4 of the Act is based upon a purchase "at retail sale." For the purposes of the Act "retail sale" and "sale at retail" are defined in that portion of Section 2 of the Act heretofore quoted in this opinion. In interpreting that portion of Section 2 of the Act applicable to the question here presented, the court, if possible, must give effect to every word, phrase, and clause contained therein. It is not to be presumed that the legislature used either words, phrases or clauses without reason or without meaning, or that they are used as mere surplusage.

An examination of the portion of Section 2 now under consideration shows that the assessor's classification is inconsistent with this portion of the Act. The words *"ingredient or component part"* are applicable only to those things which are acted upon in manufacture, to wit, personal property from which the manufactured product is being produced. In other words, they relate to the subject matter of

manufacture. The same is true of the applicability of the words *"loses its identity."* The words *"consumed or destroyed,"* however, are each applicable not only to that which is being acted upon, the subject matter of manufacture, but also to those things which act upon the subject matter, viz., that which is being produced by manufacture. They are applicable to all of those expendibles by which the process of manufacture is carried on.

In the interest of clarity we again quote the clause of the Act here in question:

> " 'Retail sale' and 'sale at retail' do not include the sale of tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser, *but shall include fuel and electricity."* (Emphasis ours.)

If the foregoing sentence closed with the word *purchaser,* it might well be argued that the words *"consumed or destroyed"* being inserted between the words *"ingredient or component part of,"* and the words *"or loses its identity,"* which words and phrases are applicable only to those things which are being acted upon, likewise referred only to those things which were being acted upon. However, the sentence does not stop with the word *"purchaser,"* but continues with the following phrase which we have italicized above, *"but shall include fuel and electricity."*

Fuel and electricity when used in the manufacture of personal property are ordinarily not only consumed or destroyed but they also act upon the subject matter of manufacture and are not themselves acted upon as a subject of the process of manufacture. Furthermore, they do not ordinarily enter into or become an ingredient of the end product. (An apparent exception to the last statement is found in the fact that in the process of smelting iron for

casting, in which process coke is used for fuel, a portion of the carbon of which the coke is composed enters into and becomes an ingredient of the cast iron. This matter will be dealt with in the opinion in a companion case, *Androscoggin Foundry Company* v. *Ernest H. Johnson, State Tax Assessor,* which opinion is filed herewith.)

The foregoing phrase *"but shall include fuel and electricity"* would be meaningless and wholly unnecessary if the interpretation relied upon by the assessor were the correct one. The insertion of this phrase at the end of the sentence to our mind shows conclusively that the words *"consumed or destroyed"* are not used in a limited sense, but they refer to all those things which may be consumed or destroyed in the process of manufacture, whether or not they be those things which act upon the subject matter thereof, or those things which are acted upon therein and thereby. We cannot adopt the assessor's interpretation as set forth in Regulation 3 *supra.* To do so would require us to hold that the phrase *"but shall include fuel and electricity"* is meaningless and that it be treated as mere surplusage.

This question is a novel one. The decisions by courts of other states are not helpful. The language and provisions of their sales and use tax acts is not the same as that employed in our Act. As said by counsel for appellant in their brief and assented to by counsel for the tax assessor, "No tax statute contains the provision here in issue in the same or even substantially the same terms." As further stated by counsel for the tax assessor, "This statute is to be construed as unique. Our inquiry into its meaning will be little helped by the decisions of any other state. The legislature knew that it was a Maine statute, not derived from any one in present use."

Even as the scope of the regulations which may be promulgated by the assessor is limited to such as are consistent

with the Act, so too the function of this court is limited to interpreting the Act *as enacted.* As said by us in the very recent case of *The Coca-Cola Bottling Plants, Inc. Applts.* v. *Ernest H. Johnson, State Tax Assessor,* 147 Me. 327, "Our duties are judicial in nature. We must guard against trespassing upon the fields of the legislative and executive branches of government. We are not charged with responsibility for the economic and social effects of taxation. Our task is to ascertain and to give effect to the intention of the legislature." By the same token we cannot interpret an act of the legislature against its plain intent, as therein expressed, in order to facilitate the administration of the act. If a change in the incidence of the tax is desired either for economic reasons or to simplify the administration of the Act, such change must come from the legislature. It cannot be effected by rule or regulation of the assessor, nor can it be brought about by a decision of this court.

The case was reported to the Law Court with the stipulation "If it is determined that none of said items is taxable, judgment shall be for the appellant. Judgment to be without costs, interest or penalty." None of the items were purchased by the appellant at "retail sale" within the meaning of that phrase as defined in the Act. The appellant is not subject to a use tax with respect to any of the items in question. None of them were taxable within the meaning of the stipulation.

The entry will be

Appeal to Superior Court sustained.

Judgment for appellant without costs. Tax abated.

Case remanded to Superior Court for decree in accordance with opinion.

ANDROSCOGGIN FOUNDRY COMPANY
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, April 14, 1952.

Sales Tax. Retail Sale. Foundries.

The statutory exclusion from taxation of "tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser . . ." applies to moulding sand, refractories, fire clay, steel shot and grit, crucibles, and snagging wheels in a foundry but coke and oil used as a fuel are taxable under Section 2 even though in the use of coke, as a fuel, a portion of the carbon of which it is composed becomes an ingredient of the iron processed.

ON REPORT.

This case arises upon a petition for abatement of an assessment of the state tax assessor. From a ruling declining to abate the tax an appeal was taken to the Superior Court. The case was reported to the Law Court for final determination. (P. L., 1951, Chap. 250, Secs. 29, 30.) Appeal to Superior Court sustained without costs. Case remanded to Superior Court for decree in accordance with opinion.

Locke, Campbell, Reid & Hebert, for plaintiff.

Alexander A. LaFleur, Attorney General,
Boyd Bailey, Assistant Attorney General,
Miles P. Frye, Assistant Attorney General, for defendant.

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

MERRILL, J. On report. This case is an appeal to the Superior Court for the County of Kennebec from a decision of Ernest H. Johnson, state tax assessor, declining to abate taxes. The assessor levied a use tax upon certain coke,

molding sand, refractories, fire clay, steel shot and grit, oil burned to heat core ovens, oil burned to heat enameling ovens, crucibles and snagging wheels, all of which were purchased by the appellant for use in its business of conducting an iron foundry. Proper procedure was followed to obtain a reconsideration and abatement of the assessment in question by the assessor and to bring the case before the Superior Court on appeal. See P. L., 1951, Chap. 250, Secs. 29 and 30.

In the Superior Court this case was reported to this court for final determination. By the terms of the report it is agreed that there is only one issue and that is, "Is the purchase by the appellant, the taxpayer, of coke, molding sand, refractories, fire clay, steel shot and grit, oil burned to heat core ovens, oil burned to heat enameling ovens, crucibles and snagging wheels a purchase of 'tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser . . .' within the meaning of the fourth sentence of the definition of 'retail sale,' or 'sale at retail,' Section 2, Chapter 250, P. L., 1951?"

By Chapter 250 of the Public Laws of 1951 the legislature enacted Chapter 14-A of the Revised Statutes known as the "Sales and Use Tax Law," hereinafter called the Act. In assessing the taxes involved herein, the assessor purported to do so under authority of the Act.

This case is a companion case to *Hudson Pulp and Paper Corporation* v. *Ernest H. Johnson, State Tax Assessor* (147 Me. 444), the two cases having been heard together in this court and the decision in the latter case being filed simultaneously herewith.

All of the before mentioned personal property was purchased by the appellant for use in its business of conduct-

ing a foundry. All of it will be consumed or destroyed within the meaning of those terms as used in Section 2 of the Act as interpreted by this court in the *Hudson Pulp and Paper Corporation* case. No useful purpose would be served by a discussion of the specific use and length of life of *molding sand, refractories, fire clay, steel shot and grit, crucibles and snagging wheels.* All of these articles of tangible personal property are expendibles and have a relatively short use life in the foundry business. As all of these items of property will be consumed or destroyed in the manufacture of personal property for later sale by the purchaser, the purchase of none of these articles is a purchase at "retail sale" within the meaning of the Act as interpreted by us in the *Hudson Pulp and Paper Corporation* case, *supra.* The appellant is not subject to a use tax with respect to any of these items. None of them were taxable within the meaning of the stipulation and the use taxes assessed with respect to their purchase must be abated.

The purchases of coke, oil burned to heat core ovens and oil burned to heat enameling ovens by the ultimate consumer are purchases at "retail sale" within the meaning of Section 2 of the Act. The definition of "retail sale" or "sale at retail" contained in Section 2 of the Act so far as pertinent to the present inquiry is as follows:

> " 'Retail sale' or 'sale at retail' means any sale of tangible personal property in the ordinary course of business, for consumption or use, or for any purpose other than for resale in the form of tangible personal property. * * * * * *'Retail sale'* and *'sale at retail'* do not include the sale of tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser, *but shall include fuel and electricity.*" (Emphasis ours.)

From a consideration of the foregoing definition of "retail sale" and "sale at retail" and the exclusions therefrom, it is seen that purchases of fuel by the ultimate consumer are specifically included within the definition of "retail sale" and "sale at retail" as used in the Act. This is true notwithstanding the fact that the fuel, when used as such, becomes "an ingredient or component part of," or is "consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser."

The oil used as fuel for heating core ovens and for enameling ovens was subject to the tax as assessed and the assessment should stand as laid.

In the *Hudson* case, *supra,* we said concerning the coke, "in the process of smelting iron for casting, in which process coke is used for fuel, a portion of the carbon of which the coke is composed enters into and becomes an ingredient of the cast iron." The agreed statement contains the following stipulation:

> "*Coke.* Coke is 86%, more or less, carbon. The balance of it is ash. Foundries use a special brand of coke which contains a minimum of ash. The first function of coke is to provide heat which changes the metal used, such as scrap iron, from a solid to a liquid. The purpose of making this change is to pour the liquid into a mold where it will take a new shape. The second function of the coke is to add carbon to the iron which makes the iron softer and more machineable. In its second function, adding carbon, the coke becomes an ingredient of the ultimate product, and therefore, exempt. The State now exempts coke to the extent of 50%. The issue between us is whether the coke in its function of melting iron is taxable. Granted the premise that coke is taxable in that function, there is no unfairness in selecting the figure 50%."

Although in the submission of this case it is stated the only question before us is whether or not the coke in its function of melting iron is taxable, Section 2 of the Act makes all coke which is a fuel taxable. The fact that in smelting iron a portion of the fuel becomes an ingredient of the end product does not change this result. Fuel is "any matter used to produce heat or power by burning." Webster's New International Dictionary, Second Edition, Unabridged. Fuel is "combustible matter used to kindle or sustain fire or produce heat, as oil, wood, etc." Standard Dictionary. Coke used in smelting iron is certainly fuel. The fact that in using it as fuel in smelting iron a portion of the carbon of which it is composed becomes an ingredient of the iron in process does not deprive the coke of its character as fuel. Under Section 2 of the Act, its purchase by the ultimate consumer is at "retail sale" and this is true whether the coke, used as fuel, becomes either in whole or in part "an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser." The clause in Section 2, above quoted, specifically included the purchase of fuel by the ultimate consumer in the definition of the words "retail sale" and "sale at retail" as used in the Act. Such inclusion is without limitation. The coke in question being a fuel and having been purchased at "retail sale" is subject to a use tax. It is not exempt from the tax by Section 10, subparagraphs VII and VII-A which contain the exemptions with respect to fuels. The tax assessed upon the coke should be assessed at 2% of its purchase price.

The appeal to the Superior Court must be sustained but, as stipulated, without costs. The tax on the molding sand, refractories, fire clay, steel shot and grit, crucibles and snagging wheels must be abated. The tax on the coke should be assessed on its full purchase price. The tax as assessed on

the oil used for fuel in the core ovens and enameling ovens must be sustained as assessed. The case must be remanded to the Superior Court for a decree in accordance with this opinion.

The entry will be

Appeal to the Superior Court sustained without costs.

Case remanded to Superior Court for decree in accordance with opinion.

MAINE LAKES & COAST CORP.

vs.

JAMES C. JONES

Cumberland. Opinion, April 23, 1952.

Brokers.

Where there is sufficient evidence from which the jury may conclude that a real estate broker is in fact the procuring cause of the purchase of his principal's property, it is error to direct a verdict against the broker in an action to recover his commission.

ON EXCEPTIONS.

This is an action to recover a real estate broker's commission. The case is before the Law Court on plaintiffs exceptions to the direction of a verdict for defendant. Exceptions sustained.

Jacobson & Jacobson, for plaintiff.

Agger & Goffin, for defendant.

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

NULTY, J. This case comes before this court on plaintiff's exceptions to the direction of a verdict for the defendant at the November 1951 Term of the Cumberland County Superior Court. The action is in contract for the recovery of a real estate broker's commission arising out of the sale of certain real estate located at 58 Everett Avenue, South Portland, Maine, owned by the defendant and co-listed with the plaintiff which was the holder of a real estate broker's license.

We said in *Johnson et al.* v. *New York, New Haven & Hartford Railroad, et al.*, 111 Me. 263, 265, 88 A. 988, 989, in speaking of the test of the propriety of the direction of a non-suit or a directed verdict:

> "Upon exceptions to an order of non-suit or of verdict for the defendant, the duty of the court is simply to determine whether, upon the evidence, under the rules of law, the jury could properly have found for the plaintiff. We are not called upon to express our own judgment of the probative force of the testimony. Whatever our own conclusions might have been, if there was evidence which the jury were warranted in believing, and upon the basis of which honest and fair minded men might reasonably have decided in favor of the plaintiffs, then the exceptions must be sustained."

We again said in *Shackford* v. *New England Telephone and Telegraph Company*, 112 Me. 204, 205, 91 A. 931, in speaking of exceptions directing a verdict for the defendant:

> "In considering exceptions of this kind, it is not the province of the court to weigh conflicting evidence and ascertain its comparative value, but only to determine whether the evidence, considered most favorably for the plaintiff, would have warranted a verdict in his favor. Johnson v. N.Y., N.H. & H. R.R., 111 Maine, 263."

Since the above decisions we have many times defined the principles of law relating to the propriety of granting a directed verdict for the defendant and these rules are clearly set forth in the case of *Barrett* v. *Greenall,* 139 Me. 75, 80, 27 A. (2nd) 599. The language used in that decision was also adopted in *Bolduc* v. *Therrien,* 147 Me. 39, 83 A. (2nd) 126, when the same question with respect to the propriety of granting a directed verdict was considered by our court. We said in *Bubar* v. *Bernardo,* 139 Me. 82, 85, 27 A. (2nd) 593:

> "The issues as to the credibility of his testimony and the weight to which it was entitled were questions for a jury rather than for the Court under our system of jurisprudence, *Sweetser,* v. *Lowell* et al, 33 Me. 446; *Sawyer* v. *Nichols* 40 Me., 212; *Parsons* v. *Huff,* 41 Me., 410; *Blackington* v. *Sumner et al,* 69 Me., 136, - - - -."

The evidence made a part of the bill of exceptions tends to prove that the defendant was the owner of the real estate in question and in the latter part of April, 1951, had certain conversations with one Hunt, who was a duly licensed real estate broker living on the same street and who had learned that the defendant was desirous of selling his real estate. Hunt asked the defendant to permit him to attempt to sell said real estate. There was other conversation with respect to the asking price and also concerning the usual 5% real estate broker's commission and Hunt requested permission of the defendant to co-list the real estate with the plaintiff which permission was granted. As a result of the conversations Hunt, on April 25, 1951, co-listed the property of the defendant with the plaintiff which advertised the property in the local papers on April 29th and 30th, 1951. Connected with plaintiff's office was a duly licensed broker by the name of Mrs. Anne Hewlett Mallinckrodt. Mrs. Mallinckrodt, in connection with her business, met one Adelbert R. Sargent, a lieutenant of the Maine State Police who

had been recently transferred to the Portland area and who was interested in either purchasing or renting a house for himself and family. After showing Sargent certain real estate in Portland, Maine, she showed him the real estate of the defendant and Sargent, who was accompanied by his wife, evidenced an interest in the real estate. It appears that again the same day, which Sargent says was May 2, 1951, Sargent asked Mrs. Mallinckrodt to take him and his wife again to the property, which she did. After the second visit Sargent, in the office of the plaintiff and in the presence of Mrs. Mallinckrodt, Mr. Wheelock, the manager of the office, and later, Mr. Abbott P. Smith, president of the plaintiff, discussed the real estate and the selling price and Sargent was encouraged by plaintiff and the others present to make his best offer for the real estate, which he did. This offer, including the identity and occupation of Sargent, was communicated to the defendant by telephone by Mr. Smith in the presence of Sargent, Mrs. Mallinckrodt and Wheelock but defendant refused the offer and Sargent, according to the testimony, would not raise his offer and left the office and afterwards left town and was not contacted by any of the interested parties, at least so far as the evidence discloses, until the following Monday, May 7, 1951, when, Mrs. Mallinckrodt testified, she had a telephone conversation with him and Sargent asked if the property had been sold. He was told that it had not been sold. The testimony further discloses that after May 7, 1951, on one occasion Mrs. Mallinckrodt called Sargent from plaintiff's office with respect to the real estate suggesting that he do something about it but that his reply was made up of excuses which indicated that some relative was going to buy real estate which he could rent. Mrs. Mallinckrodt testified that she distinctly remembered calling Sargent on May 18, 1951, concerning the real estate and that his answer to her query was that he thought he would be transferred back to Bangor, that he could not find any real estate here to buy

within his means and that he had asked for a transfer back to Bangor. It also appears from the evidence that when Sargent came to the Portland area and assumed his new position, connected with his organization and stationed at Scarboro was a civilian employee of the Maine State Police by the name of Einer Olesen who resided in South Portland, Maine, and who acted as a general repair man or mechanic for the Maine State Police at Scarboro Barracks. Olesen testified that he and others of the Maine State Police were informed by Sargent that he was looking for a home to buy or rent. He further stated that he had accompanied Sargent on various inspection trips looking for a home and that he had made a number of trips around the area on his own account because he knew the kind of a home that Sargent desired. He went on to state that he received information that the real estate of the defendant was for sale and that he inspected the outside of the premises and, thinking that it was the type of real estate in which Sargent would be interested, he attempted on May 2, 1951, to get in touch with Sargent by telephone. Being unable to contact Sargent, he on that same evening contacted the defendant by telephone and had a conversation with him with respect to the real estate. He stated that he ascertained the price, which was $10,500, and that there was no real estate broker involved. Arrangements were made by the defendant for Olesen to examine the real estate on the next day, which was Thursday, May 3, 1951. The testimony indicated that Olesen was much interested in the real estate and that he wanted to get information for Sargent, but knowing Sargent was out of town he then informed defendant that he would like to bring a Mrs. Cook around to see the house. It should be noted that Mrs. Cook was Mrs. Arnold Cook, Sargent's sister, who owned a home in which she lived in Scarboro, Maine. However, before he had made arrangements to do that and before he left the defendant he asked the defendant if he would sign papers to let him have

the house. The defendant declined to do that and informed Olesen that he would find out what the necessary procedure was as there was a mortgage on the property. Olesen further testified that he made arrangements for Mrs. Cook to see the house on Thursday evening and the testimony discloses that Olesen and Mrs. Cook examined the real estate on Thursday evening and arrangements were made to meet the defendant the next day, which was May 4, 1951, at which time further arrangements were made for an appointment with the defendant and the testimony discloses that the agreement of sale was signed Friday evening and a deposit of $500 was made. At the time the deposit was made and the agreement signed Mrs. Barbara Cook was unable to be present but the testimony discloses that she instructed her husband to sign the agreement and make the deposit and the agreement is signed by Arnold Cook, husband of Mrs. Barbara Cook, and the defendant and witnessed by Olesen.

It is to be noted that the evidence discloses that the negotiations of the defendant and Olesen, according to the defendant, were for the benefit of Mrs. Cook and they were concluded on Friday evening, May 4, 1951. The evidence further discloses that on May 15, 1951, the defendant conveyed the real estate to Barbara Cook, Sargent's sister, who testified that not only the down payment but the balance of the purchase price was borrowed from Sargent and she also testified that she informed the defendant that she was selling the property to her brother, Sargent. Within an hour after the defendant had conveyed the real estate on May 15, 1951, to Mrs. Cook, Mrs. Cook conveyed it to Sargent and his wife in joint tenancy and it should be noted that the conveyance took place at the office of the same bank and that the defendant was not present.

Under the applicable rules of law referred to herein the duty of our court is to determine whether or not the jury

could have properly found for the plaintiff and in discharging that duty the evidence is to be viewed in a light most favorable to the plaintiff. In other words, would the facts justify a verdict for the plaintiff. In the instant case there are many questions of fact involved and the jury heard the testimony and saw the witnesses and the credibility and the weight of the testimony is solely a matter for the jury under our procedure. One of the important questions of fact is whether or not the plaintiff broker in this case was in fact the procuring cause of the purchase of his principal's property. That is a question of fact and not of law. In short, it is the opinion of this court that there was sufficient evidence in this case, if the issues of fact be resolved in favor of the plaintiff and his witnesses, to justify a verdict in his favor. Under such circumstances it was reversible error to direct a verdict for the defendant. The exceptions to the direction of a verdict must be sustained. The mandate will be

Exceptions sustained.

REVISED RULES

OF THE

SUPREME JUDICIAL

AND

SUPERIOR COURTS

OF THE

STATE OF MAINE

The following rules are hereby adopted, established and recorded as the rules governing procedure in trials and the conduct of business in the Supreme Judicial and Superior Courts of the State of Maine in all matters within their jurisdiction.

1
TIME OF THE ENTRY OF ACTIONS.

All writs and libels shall be filed in the clerk's office forty-eight hours at least, exclusive of Sundays, before the first day of the term, and no civil action shall be entered after the first day of the term, unless by consent of the adverse party and by leave of the court; or unless the court shall allow the same upon proof that the entry was prevented by inevitable accident, or for other sufficient causes; and in all cases the Christian and surname of the parties and of each trustee shall be entered upon the docket. Writs are to be filed as provided above before entry of the action and shall not be taken from the files, except by special leave of court. Any action may be made a mis-entry at any time during the first term, upon proof that the action was settled before the sitting of the court.

2

ENTRY OF THE ATTORNEY'S NAME ON THE CLERK'S DOCKET. CHANGE OF ATTORNEY.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the clerk's docket; and after entry of the action or appeal, before the call of the new docket, the attorney of the defendant or respondent shall cause his name to be entered on the same docket as such attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party in writing. And until such notice of the change of an attorney, all notices given to or by the attorney first appointed, shall be considered in all respects as notice to or from his client, excepting only such cases in which by law the notice is required to be given to the party personally. *Provided, however,* that nothing in this rule contained shall be construed to prevent either party in a suit from appearing for himself, in the manner provided by law; and in such case the party so appearing shall be subject to all and the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

3

AMENDMENTS IN MATTERS OF FORM.

Amendments in matters of form will be allowed, as of course, on motion; but if the defect or want of form be shown as cause of demurrer, the court will impose terms on the party amending.

4

AMENDMENTS IN MATTERS OF SUBSTANCE.

Amendments in matters of substance may be made, in the discretion of the court, on payment of costs, or such other terms as

the court shall impose; but if applied for after joinder of an issue of fact or law, the court will in its discretion refuse the application or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case requires it. No new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

5

PLEAS AND MOTIONS IN ABATEMENT.

Pleas or motions in abatement, or to the jurisdiction, in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if alleging matter of fact not apparent on the face of the record, shall be verified by affidavit.

6

TIME OF FILING PLEAS.

In all cases in order for trial at any term, the pleadings of the defendant, except in cases where the general issue without brief statement is to be pleaded, shall be filed within the first three days of the term, and failure to so file pleadings shall be, in the discretion of the court, cause for continuance.

7

OBTAINING A RULE TO PLEAD.

Either party may obtain a rule on the other to plead, reply, rejoin, etc., within a given time to be prescribed by the court; and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall enlarge the rule.

8

TIME OF FILING AMENDMENTS OR PLEADINGS.

When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special

plea, replication, etc., if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office by the middle of the vacation after the term when the order is made, but, if no such vacation, on or before the first day of the next term; and, in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, etc., as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require; unless the court for good cause shown, shall allow further time for filing such amendment, or other pleadings.

9

SPECIFICATIONS OF DEFENSE.

Parties pleading the general issue may, upon written motion and after notice and hearing thereon, be required to file, in addition thereto, a brief specification of the nature and grounds of their defense; and shall, in all cases, be confined on the trial of the action to the grounds of defense therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial.

10

DENIAL OF SIGNATURES, AND PARTNERSHIPS.

No party shall be permitted at the trial of any cause to call for proof of the signature or execution of any paper declared on or filed in set-off, or mentioned in specifications filed by either party, or of the existence of a partnership alleged in the writ, declaration or specifications of defense, when the names of the members thereof are set forth, unless such party, at least ten days before such trial, shall make and file affidavit that he has reason to believe, and does believe, that such signature or execution is not genuine, or authorized, or that said paper has been

mutilated or altered since it was executed, or that such partnership does not exist. A witness examined in chief only as to the signature to or execution of a paper, shall be cross-examined by the adverse party only as to such signature or execution.

11

SPECIFICATIONS BY PLAINTIFF.

In actions of assumpsit on the common counts, a specification of the matters to be proved in support thereof shall be filed, on motion of the defendant, within such time as the court shall order. And in actions upon an account annexed, one copy of the specifications shall be furnished by the party presenting the same, for the court, and one other copy for the jury.

12

TRUSTEE DISCLOSURES.

In cases commenced by trustee process, when any trustee shall present himself for examination, he or his attorney shall give written notice thereof to the attorney for the plaintiff, or in his absence cause the same to be noted on the docket; and, upon motion, the court may fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the names of the counsel for the plaintiff, and such trustee, with the date of the service of the writ upon him, and the number of the action upon the docket.

13

COSTS UPON CONTINUANCE.

Unless for cause shown, no costs shall be allowed either party for any term at *nisi prius* when a case is continued by agreement of parties entered on the docket. When a case is under an order of reference to a referee or auditor, costs shall be allowed for the terms at which the rule is issued and the report filed, but not for the intervening terms. Costs shall be allowed for only one term in the Law Court.

14

TIME FOR MAKING MOTIONS FOR CONTINUANCE IN CIVIL ACTIONS.

Motions for continuance of any civil action shall be made at the opening of the court on the morning of the second day of the term unless the cause shall come in course to be disposed of in the order of the docket on the first day. But when the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterward as it can be made, according to the course of the court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

15

AFFIDAVIT TO SUPPORT MOTIONS FOR CONTINUANCE IN CIVIL ACTIONS.

No motion for a continuance in a civil action based on the want of material testimony will be sustained, unless supported by an affidavit which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation, and the endeavors and means which have been used to procure his attendance or deposition, to the end that the court may judge whether due diligence has been used for that purpose.

No counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. And no action shall be continued on such motion if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received and considered as evidence on the trial, in like manner as if the witness were present and had testified thereto; and such agree-

ment shall be made in writing at the foot of the affidavit, and signed by the party, or his counsel or attorney, if required. And the same rule shall apply, *mutatis mutandis*, when the motion is based on the want of any material document, paper or other evidence that might be used on the trial.

16

EVIDENCE TO SUPPORT MOTIONS BASED ON FACTS.

No motion based on facts will be heard unless the facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys. The same rule will be applied as to all facts relied on in opposing any motion.

17

MOTIONS FOR NEW TRIALS.

Motions for new trials, whether made to have a verdict set aside as against the law and the evidence, or made for any other cause, must be in writing and must assign the reason therefor.

Motions made to have a verdict set aside as against the law and the evidence, whether addressed to the presiding justice or to the Law Court, must be filed during the term at which the verdict is rendered but in any case never more than thirty days after the rendition of such verdict, excepting only that such a motion addressed to said Law Court after denial of a like motion by the presiding justice must be filed within ten days after decision adverse to the moving party is filed by the presiding justice.

When such a motion is addressed to the presiding justice, it may be heard during the term or during the ensuing vacation at the court's discretion. If the matter is heard during the term, the court's decision thereon, if not rendered during said term, shall be rendered during the ensuing vacation or at the next term following. If the matter is heard during vacation, the court's decision thereon shall be rendered during said vacation. No exceptions lie to the decision of the presiding justice and no appeal except in cases of felony.

When such motion is addressed to the Law Court, the party making it shall cause a report of the whole evidence in the case to be prepared, signed by the presiding justice or authenticated by the certificate of the official court stenographer, and filed within such time as the presiding justice shall by special order direct, and, if no such order is made, it must be done within thirty days after the adjournment of the term at which the verdict was rendered or within thirty days after the filing of the motion, whichever is later; if not so done, the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict.

When a motion for new trial is made for any other cause not shown by the evidence presented at the trial, it shall be addressed to the Law Court, and may be filed with the clerk of the Superior Court at any time before final judgment (except as otherwise provided by statute in criminal cases as to motions based on newly discovered evidence); and the clerk shall give immediate written notice thereof by mail or otherwise to the adverse party or his attorney. The evidence in support of the allegations of the motion and in rebuttal or impeachment may be taken out within such time and in such manner as the court, or any justice thereof in vacation, shall order, and the moving party shall cause a report of the same, together with a report of the whole evidence in the case to be prepared, signed by the justice or authenticated by the certificate of the official court stenographer, and filed within such time as the court, or said justice in vacation, may direct, and the case shall be marked "LAW"; or if not so done, the motion shall be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict. Double or treble costs may be awarded when such motion is by the Law Court deemed frivolous or intended for delay.

18

EXCEPTIONS.

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 exceptions 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 the next secular calendar day after the rendition of such judgment or the entry of such final ruling or decree, unless the time for presentation and filing of the exceptions be enlarged as hereinafter provided. Upon request therefor made prior to such judgment, final ruling, order or decree, the justice shall fix the time within which exceptions must be presented to him for allowance and filed. Upon request therefor first made subsequent to and within thirty days after such judgment, final ruling, order or decree, such justice may in his discretion enlarge and fix the time for the presentation of exceptions to him for allowance and for filing. Prior to the expiration of the time fixed by the justice for the presentation and filing of exceptions as aforesaid, said justice, for cause shown, may further enlarge the time therefor. If exceptions be allowed subsequent to the issue of any peremptory writ or other process under such judgment or decree, the justice shall have authority to issue a *supersedeas* suspending the execution of such writ or other process pending decision by the Law Court on said exceptions. If the justice of the Supreme Judicial Court or Superior Court disallows or fails to sign and return the exceptions so presented, or alters any statement therein, and either party is aggrieved, the truth of the exceptions presented may be established in the manner prescribed by statute or by Rule 40 of the Rules of the Supreme Judicial and Superior Courts.

19

MOTIONS IN ARREST OF JUDGMENT IN CRIMINAL CASES.

Motions in arrest of judgment in criminal cases shall be filed and presented to the court for adjudication during the term at which the accused has been found guilty, whether exceptions be or be not filed and allowed; and if not so presented, the right to file the same shall be considered as waived.

19A

RESTRICTION UPON MARKING CASES "LAW."

No case at law in which a report of the evidence is required for the Law Court shall be marked "Law" until such report has been filed.

20

TIME OF FILING MOTIONS, PRESENTING PETITIONS, ETC.

Motions, petitions, reports of referees, applications for commissioners to take depositions, surveys, or for views by the jury in cases touching the realty, and all like applications, except by leave of court, shall be made and presented at the opening of the court on the morning of the second day of the term; provided, that when the cause or ground of such motion or other application shall first exist or become known to the party after the time in this rule appointed for making the same, it may be made at any subsequent time. But motions or applications such as from their nature require no notice previous to granting the same, may be made at the opening of the court on the morning of each day.

21

OBJECTIONS TO REPORTS.

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.

22

NOTICE PREVIOUS TO MOTIONS.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by the rules of court, no previous notice need be given to the adverse party. But the court, if notice has not been given, will allow time to oppose the motion if the case shall require it. Where, however, for any special cause, such motion may, by the proviso of any rule, be made at a subsequent time, it will not be heard unless seasonable notice thereof shall have been given to the adverse party.

23

DEPOSITIONS TAKEN IN TERM TIME.

Depositions may be taken for the causes and in the manner by law prescribed, in term time, as well as in vacation; provided, they be taken in the town in which the court is holden, and at an hour when the court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time than is above provided, unless the court, upon good cause shown, shall specially order the deposition to be taken.

24

COMMISSIONS TO TAKE DEPOSITIONS.

The court will grant commissions to take the depositions of witnesses and will appoint the commissioners. In vacation a commission may be issued upon application to any justice, in the same manner as may be granted in term time; or either party, upon application to the clerk, may obtain a like commission; but, in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be

directed to any judge of any court of record. In each case the evidence, by the testimony of witnesses shall be taken upon interrogatories to be filed in the clerk's office by the party applying for the commission, and upon such cross-interrogatories as shall be filed by the adverse party. A copy of all the interrogatories shall be annexed to the deposition. No such commission shall issue except upon interrogatories filed as aforesaid by the party applying and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within fourteen days from the service of such notice.

No deposition taken out of the State without such commission shall be admitted in evidence unless the same was taken by some justice of the peace, notary public, or other officer, legally empowered to take depositions or affidavits in the state or county in which the deposition was taken, nor unless the adverse party was present, or was duly and seasonably notified, but unreasonably neglected to attend.

25

FILING DEPOSITIONS.

Depositions shall be opened and filed by the clerk at the term for which they are taken. If the action in which they are to be used shall be continued, such depositions shall remain on file and be subject to objections when offered at the trial as at the term when filed; and if not so left on the files they shall not be used by the party who originally produced them. The party producing a deposition may, if he see fit, withdraw it during the same term in which it is originally filed, in which case it shall not be used by either party.

26

USE OF COPIES OF DEEDS.

In actions touching the realty, office copies of deeds material to the issue, from the registry of deeds, may be read in evidence without proof of their execution where the party offering the

same is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

27

NOTICE TO PRODUCE WRITTEN EVIDENCE.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless previous notice to produce it on trial shall have been given to the adverse party or his attorney, nor shall counsel be allowed to comment upon a refusal to produce such evidence, without first proving such notice.

28

TRIAL LIST AND ORDER OF TRIALS.

All actions, except libels for divorce, shall be considered in order for trial at the return term, unless the court shall otherwise direct, when the party desiring it shall have given written notice thereof to the adverse party. Such notice shall be given by a plaintiff thirty days, and by a defendant ten days, before the sitting of the court. Cases brought up from an inferior court by appeal or by removal shall be in order for trial at the term of entry without such notice. Libels for divorce shall not be in order for hearing in term time or vacation until the second term, unless service was completed at least sixty days before the return term.

In all counties except Cumberland, immediately after the call of the docket, a trial list of all actions to be tried by the jury shall be made, and a time assigned for the trial of each action upon the list, and all other actions shall be tried or otherwise disposed of as ordered by the court.

Civil cases shall be assigned for trial in the County of Cumberland in the following manner:

On the first day of each term, the clerk shall present a trial list made up of such cases as shall have, at least three days exclusive of Sunday, theretofore been submitted to him in writing

by counsel for either party; requests for assignment which do not give the docket number, name of plaintiff and defendant, may be disregarded.

29

TAXATION OF COSTS.

Bills of costs shall be taxed by the clerk upon a bill to be made out by the party entitled to them, if he shall present such bill; otherwise upon inspection of the proceedings and files. No costs shall be taxed without notice to the adverse party to be present, provided he shall have notified the clerk in writing of his desire to be present at the taxation thereof.

30

DAY OF RENDITION OF JUDGMENT.

All judgments on whatever day given shall date and be entered as of the last day of the term unless an earlier day be specially ordered; provided, however, that a divorce decree filed in vacation shall be dated and entered as of the date of filing. No divorce decree or other judgment entered in vacation shall become final until the expiration of the time within which exceptions may be filed in the cause.

31

CUSTODY OF PAPERS BY THE CLERK.

The clerk shall be answerable for all records and papers filed in court, or in his office; and they shall not be lent by him, nor taken from his custody, unless by special order of court; but the parties may at all times have copies. No original writ or process filed in the clerk's office shall be taken from the files for the purpose of service, but attested copies thereof shall be made for that purpose and the expense thereof shall be included in the taxable costs. Depositions may be withdrawn by the party introducing them at the same term at which they are filed; but while remaining on the files they shall be open to the inspection of either party at all reasonable hours.

32

FILING PAPERS AND RECORDING JUDGMENTS.

In order to enable the clerk to make up and complete his records within the time prescribed by law, it shall be the duty of the prevailing party forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case. If the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record, and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent term and after notice to the adverse party, the court shall order it to be recorded. No execution shall issue until the papers are filed as aforesaid. When a judgment shall be recorded upon such petition the clerk shall enter the same, together with the order of court for recording it, among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found. When so recorded, the judgment shall be considered in all respects as of the term in which it was originally awarded. The party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, the costs on the petition and also the costs of the adverse party if he shall attend to answer thereto.

33

WRITS OF VENIRE FACIAS.

Every *venire facias* shall be made returnable into the clerk's office by ten o'clock in the forenoon of the first day of the term, and the jurors shall be required to attend at that time, unless some justice of the court shall designate a different day or hour, and in such case the *venire* shall specify such day and hour. *Venires* issued in term time may be returnable forthwith or upon any day or hour as ordered by the court.

34

CAPIAS UPON INDICTMENTS AND SCIRE FACIAS UPON RECOGNIZANCES.

On indictments found by the grand jury, the clerk shall, ex officio, issue a capias without delay. In vacation, he shall also issue capias against respondents not under bail, when requested by the county attorney. When a respondent has been sentenced to imprisonment but the mittimus has been stayed pending exceptions, or when a prisoner has been admitted to bail awaiting the decision of the Law Court on his exceptions, the clerk upon receipt of the certificate of decision of the Law Court overruling the exceptions shall issue the mittimus forthwith.

When default is made by any party under recognizance in any criminal proceeding, the clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the court shall make a special order to the contrary and when not otherwise provided by statute.

35

EXAMINATION OF WITNESSES, ETC.

The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of court, and counsel shall stand while so examining or cross-examining unless otherwise permitted by the court.

The re-examination of a witness, whether direct or cross, shall be limited to matters brought out in the last examination by the other party, unless by special leave of court.

36

ORDER OF EVIDENCE.

A party having rested his case can not afterwards introduce further evidence except in rebuttal unless by leave of the court.

37

LIMITATION OF TIME FOR ARGUMENT.

In all trials of causes, whether by jury or by the court, after the evidence is closed counsel for the moving party (and in criminal cases the attorney for the State) shall argue and shall be limited to fifty minutes. Opposing counsel shall then argue and be limited to one hour; counsel for the moving party (or in criminal cases counsel for the State) shall be allowed ten minutes for rebuttal argument. The court may, before the commencement of argument, for good cause shown, allow further time, which shall in all cases be fixed and definite.

38

ATTORNEYS NOT TO BE BAIL OR WITNESSES.

No attorney shall give bail or recognize as surety in any criminal matter in which he is employed as counsel or attorney, nor shall he become bail in any civil suit.

No attorney or counsellor shall be permitted to take any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the court.

39

ASSESSMENT OF DAMAGES ON DEFAULT.

When the defendant is defaulted by agreement to be heard in damages by the clerk or an assessor instead of the presiding justice or a jury, the clerk or assessor may, on reasonable notice, hear the parties during the term or in vacation and assess the damages.

When the defendant is called and defaulted for want of appearance in accordance with statute or for want of attendance at the time set by the court for trial or hearing, the court shall, if requested by plaintiff, cause the damages to be assessed by the jury, or, if not so requested, may in its discretion assess the damages in term time or vacation, or appoint the clerk or an

assessor to hear in damages in term time or vacation. Such defaulted defendant, although not entitled to notice of such hearing, shall be heard in damages if he seasonably appears for that purpose.

In either case, the report of damages so found by such clerk or assessor shall be made, if during term time or vacation, to the justice presiding, or otherwise to the next term of court, for acceptance and adoption or rejection by the court.

40

ESTABLISHING TRUTH OF EXCEPTIONS.

A party desiring to establish before the Law Court the truth of exceptions presented to a justice at *nisi prius* and not allowed by him shall within ten days after notice of refusal to allow them file in the court where they were taken his petition supported by affidavit and setting forth in full the bill of exceptions presented and all material facts relating thereto, and give a copy thereof to the opposite party or his attorney of record. A transcript of so much of the official stenographer's notes as relates to the exceptions must be filed with the petition. The affidavit may be made by the party or his attorney of record but must be positive, based upon actual knowledge and not upon information or belief.

Within ten days after being served with a copy of the petition the opposite party may if he desire file in the same court an answer verified by a similar affidavit and setting forth any material facts against the petition.

Upon motion of either party made within ten days after the filing of an answer any justice of the court may appoint a commissioner to take the depositions of such witnesses as may be produced by either party, the depositions to be filed in the court where the exceptions were taken within such time as such justice may order.

The case thus made shall be entered and heard at the next law term upon certified copies as in other cases. If the truth of the exceptions be established they will be heard and judgment rendered thereon as if originally allowed.

41

DISPOSITION OF DORMANT CASES, ETC.

Cases, including libels for divorce, remaining on the docket for a period of two years or more with nothing done shall be dismissed for want of prosecution unless good cause be shown to the contrary. Actions continued for judgment shall not be continued further for judgment after the term of default unless for cause. Motions for renewal of orders of notice must be in writing, stating the reasons why the former order was not complied with.

42

STIPULATIONS IN RULES OF REFERENCE.

In references of cases by rule of court, the decision of the referee upon all questions of law and fact shall be final unless the right to except as to questions of law is specifically reserved and so entered on the docket, but the referee may find the facts and report questions of law for decision by the court.

43

NATURALIZATION.

The stated days of the terms of the court in the several Counties of the State on which final action may be had on petitions for naturalization as provided by Federal law are hereby fixed as the third day of the January, April and September terms, the second day of the March term, the first day of the November term, and the first Tuesday following the third Monday of June in Androscoggin County; the second day of each term in Aroostook County; the third day of the February and October terms and the first day of the May term in Franklin County; the second day of the April term and the first day of the September term in Hancock County; the third day of the February term, the second day of the April and October terms, and the first Wednesday after the third Monday of June in Kennebec County; the second day of the February term and the third day of the

May and November terms in Knox County; the second day of each term in Lincoln County; the third day of the March and November terms, and the first Tuesday after the third Monday of June in Oxford County; the second day of the January and September terms, the first day of the April term and the third day of the November term in Penobscot County; the second day of the March term and the third day of the September term in Piscataquis County; the first day of the January term, the second day of the October term and the first Tuesday after the third Monday of June in Sagadahoc County; the third day of the January and May terms and the second day of the September term in Somerset County; the first day of the January term, the third day of the April term and the second day of the October term in Waldo County; the first day of each term in Washington County; and the second day of the January and May terms and the third day of the October term in York County.

The time for the naturalization hearings to be held as hereinbefore provided shall be 2:30 o'clock in the afternoon except that those held on the third day of the terms shall be at 11:00 o'clock in the forenoon.

44

COURT RECORDS.

Clerks shall, without unreasonable delay, after the rendition of final judgment in civil actions, make extended records of proceedings in court in real actions, including actions for the foreclosure of mortgages, in complaints for flowage, libels for divorce and annulment of marriage, and petitions for partition. In all other civil cases at law, it shall be sufficient to record the names of the parties, date of the writ, petition or complaint, the term of the court at which it was entered, date of service or notice to defendant, verdict of jury, if any, the date of rendition of judgment, its nature and amount, and the number of the case upon the docket at the judgment term.

Upon application of any party in any civil cause, either at law or in equity, the court or a justice thereof in vacation, may upon

or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper.

45

PRACTICE IN TAKING BAIL.

Every bail commissioner upon taking bail shall either endorse upon the warrant or precept upon which the prisoner is held the following facts: Date and place (town or city) of taking bail, court and term at which prisoner is required to appear, offense of which he is accused, amount of bail, names and residences of principal and each surety; or if the bail is taken after arrest and before the issuing of a warrant, shall forthwith deliver to the officer having the prisoner in charge a printed memorandum signed by such bail commissioner of the following form:

State of Maine

..... ss.

Memorandum of Recognizance
Date .....

Offense .....

Amount of Bail $.....

Returnable .....

..... of ..... Principal.

..... of ..... Surety.

..... of ..... Surety.

..... Bail Commissioner.

All recognizances taken by bail commissioners shall be reduced to writing in the usual form and be certified to by the commissioner and returned to the county attorney or to the magistrate or clerk of the court at or before the time at which the principal is required to appear.

46

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

1. The phrase "any action or proceeding" embraces all proceedings of a civil nature including causes in equity, libels for divorce and all petitions to enforce civil rights.

2. The affidavit required by Section 200 must set forth facts showing that the defendant is not in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act" approved October 17, 1940, as amended by Public Laws 732 of the 77th Congress approved October 6, 1942; an affidavit upon information and belief is not sufficient.

3. The affidavit may be made by the plaintiff personally or by his attorney of record; if plaintiff is a corporation, the affidavit may be made by the President, Treasurer, Clerk or a Director, or by the attorney of record.

4. In civil actions the affidavit must be filed at the first term and before judgment is entered; if not so filed, the action will be continued for judgment without costs.

5. In causes of equity, the affidavit should be filed, when motion is made that the bill be taken *pro confesso*. In libels for divorce and in all other proceedings, in which a decree is signed, the affidavit must be filed before the cause is heard.

6. In actions heretofore defaulted and continued for judgment, the affidavit must be filed before judgment, or the action will stand further continued.

7. In actions which have been continued for judgment for want of such affidavit, judgment may be entered at any term upon the affidavit being filed.

47

ADMINISTRATION OF JUSTICE

No county attorney, assistant county attorney, clerk of courts, or deputy clerk of courts, and no judge, recorder, or clerk of a

municipal or police court, or any trial justice, shall be retained or employed, or shall practice as an attorney on the criminal side of any court in the State.

48

SCHEDULE OF FEES.

Attorneys.

Writ of attachment including power of attorney, declaration, attorney's fees and blank	$3.60
Libel, petition or complaint	3.50
Writ of replevin and bond	4.70
Travel: For every ten miles to and from court, observing the rule prescribed in R. S.	.33
Attendance: For each term until the action is disposed of, except as otherwise provided in these rules	3.50

No costs shall be allowed after a defendant is defaulted and the action continued for judgment.

Law Court.

Travel and attendance as at *nisi prius* terms, but for one term only.

If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his writ.

If the defendant prevails, he may tax one attorney's fee for the issue in fact, and one for the issue in law.

Transcripts of cases made by the official stenographers, and printed copies certified by the clerks to the Law Court, may be taxed for in the bill of costs at the rate actually paid to the stenographers for transcripts, not exceeding the rate established by statute, and at the rate actually paid to the printers for the printing, not exceeding, however, three dollars and fifty cents per page for pages averaging two hundred and forty words each (exclusive of initials "Q" and "A" for Question and Answer), together with compensation to the clerks for preparing manuscripts for the printer when necessary, and for correcting proof

and certifying, at the rate of ten cents per printed page, for pages averaging two hundred and forty words each. If a party prints his own case, there may be taxed, also, compensation paid to the clerk for copies for the printer of writs, pleadings and exhibits which are in his official custody, but not of the transcript of the testimony.

Clerk.

For Use of Counties.

Copy of writ, libel or other process, or abstract thereof, together with copy of order of notice thereon, not less than	$1.00
Entry, *nisi prius*	1.00
Exemplifying copies, not less than	1.00
Commission to referee, auditor, surveyor or other officer appointed by the court	1.50
Warrant to make partition	1.00
Process to enforce a lien on personal property	2.00
Each certificate attached to renewed execution	.25
Copy of decree of divorce or certificate of same, not less than	1.00
Computing damages and taxing costs	.25
Writ of execution	.50
Execution for possession	.50
Every writ and seal other than before mentioned	1.00
Subpoena	.10

Miscellaneous.

Service as taxed by the officer, subject to correction.

Surveyors, commissioners and other officers appointed by the court, fees as charged by them subject to correction.

Costs of reference as reported by the referee, and allowed by a justice of the court.

For hearing in damages or in costs, the clerk or assessor appointed by the court shall have such reasonable compensation as a justice of the court may allow, and the same shall be paid by the county.

RULES APPLICABLE
ONLY TO
PROCEEDINGS
IN
SUPREME JUDICIAL COURT

1

ADMISSION TO THE BAR.

Applications for admission to the bar may be heard by single justices of the Supreme Judicial Court at any regular or special session thereof.

2

REGULAR SESSIONS OF THE SUPREME JUDICIAL COURT.

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.

3

SESSIONS OF THE LAW COURT.

Prior to the first day of December of each year, the chief justice shall give notice of the times and places at which the Supreme Judicial Court shall sit as a Law Court during the ensuing year.

4

LIMITATION OF TIME FOR ARGUMENT.

Oral arguments before the Law Court, including arguments in reply, are limited to one hour for each side, unless for cause shown the court shall fix a longer time before the arguments are begun.

5

COPIES FOR THE LAW COURT.

No cause standing for argument on the law docket will be heard unless at least fourteen days before the commencement of the term at which such cause would be in order for hearing the clerk of the Law Court has been furnished with eighteen copies of the case, properly indexed, printed or fairly and legibly written or typewritten on good paper of the size of 8 x 10½ inches, containing the substance of all the material pleadings, facts and documents on which the parties rely.

In cases of facts agreed and stated by the parties, or reported by consent of the parties, it shall be the duty of the plaintiff to furnish the papers or abstracts for the court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued. If the party whose duty it is to furnish the papers neglects so to do, the adverse party may furnish them. If the party whose duty it is neglects to furnish them, as required by this rule, he shall not have any costs for that term, and further he shall be liable to be nonsuited, defaulted, or have judgment entered against him for want of prosecution, or such other judgment as the case may require.

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 necessary 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.

6

BRIEFS FOR THE LAW COURT.

Counsel for each party, at least fourteen days before the commencement of the term at which a case is in order for hearing, shall furnish to the clerk of the Law Court eighteen copies of a brief, properly indexed, and fairly and legibly printed, written or typewritten, on good paper of the size of 8 x 10½ inches, which said brief shall contain in order here stated,

1. A concise abstract or statement of the case, presenting succinctly the questions involved in the manner in which they are raised.

2. A summary of the points of law relied upon, noting under each point the authorities to be cited to sustain it.

3. A brief of the argument exhibiting a clear statement of the points, both of law and fact, to be discussed, with a reference

to the pages of the record and the evidence and authorities relied upon in support of each point.

Either party may at or before the argument of the cause, file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

Upon receipt of such copies, the clerk shall forthwith forward a copy to each attorney of record, and to the reporter of decisions, reserving six copies for distribution among the justices prior to the convening of the Law Term at which such cases are to be argued and six copies for use of the sitting justices at the time of argument. The copies for distribution among the justices prior to the convening of the term shall be forwarded by the clerk to such justices with the records to which they relate ten days before the convening of the term at which the cases are to be argued.

If both parties have neglected to comply with this rule, the case, when it is reached in its order on the docket, will be continued, or the parties will be ordered to argue in writing, or judgment will be immediately entered at the discretion of the court. If one party has complied with the rule, and the other has not, only the party complying will be heard in oral argument, and the other party will be ordered to argue in writing, or the case may be decided without argument by the other party, at the discretion of the court.

EQUITY RULES

1

THE COURT.

The court held by one justice may sit in equity in any county on any day not prohibited by statute.

2

THE CLERK.

The clerks of the court shall act as clerks in chancery and may, as of course, issue such processes and make and enter such

orders as do not require the consideration of the court. They may keep for equity causes a separate docket upon which they shall minute in detail all proceedings in the cause, with the date, and by whom each order is made.

3

RULE DAYS.

Rule days shall be held the first Tuesday of each month at ten o'clock in the forenoon at the court house in each county for the proper dispatch of equity business, when and where all processes shall be returnable, unless otherwise ordered by the court or directed by statute.

4

THE BILL.

Bill shall be drawn succinctly and in paragraphs numbered *seriatim,* and without prolixity or unnecessary repetition. The confederacy clause, the charging part, and the jurisdictional clauses may be omitted.

The prayer for answer may be omitted, unless discovery is sought or answer upon oath is desired. The prayer for relief shall state the specific relief sought and may also ask for general relief. The prayer for process shall contain sufficient information for the proper frame thereof.

Bills shall be addressed:

"To the Supreme Judicial Court or to the Superior Court. In Equity. A. B., of ....., complains against C. D., of ....., and says:

First: ....." etc.

5

VERIFICATION.

Bills for discovery and those praying for injunction must be verified by oath.

6

PROCESS.

Process shall not issue until the bill is filed, unless the bill is inserted in a writ, when no special process shall issue until the writ is filed.

Upon the filing of a bill, subpoena shall issue and be returnable as provided by statute, or as the court may order.

7

SERVICE ON NON-RESIDENTS.

When it shall appear that a defendant is and resides out of the state, the clerk, on application of the plaintiff at any time after filing the bill, shall enter an order for the defendant to appear and answer the bill, if in any of the states of the United States, or the District of Columbia, or in any of the provinces of the Dominion of Canada, within one month; if in any other part of North America including the West India Islands, or in Europe or Egypt, within two months; if in any other part of the world, within three months, after the date of the service of the order upon him, if personally served, or after the last publication of the order, if served by publication only. A copy of the order and an attested copy of the bill (or an abstract thereof approved by a justice) shall be served on such defendant in person within three months from the date of the order by an officer qualified to serve civil processes in the place where served, or in any foreign country by such officer, or by any consul, vice-consul or consular agent of the United States in such foreign country, or by any person specially appointed by the court to serve the order; or the order and an attested copy of the bill (or an abstract thereof approved by a justice) shall be published three times in different weeks, all within thirty days after the date of the order, in some newspaper published in the county where the suit is pending. The return of personal service shall be verified by the affidavit of the person making the service. In case of

service by an officer, his authority shall be certified by the clerk of a court of record, if within the United States or any of its possessions, and if without the United States or its possessions, by such a clerk, or by a United States consul, vice-consul or consular agent.

8

APPEARANCE.

Appearance shall be entered on the docket by the party or his counsel or filed with the clerk.

9

PLEADINGS IN DEFENSE.

Pleadings in defense may omit formal clauses not essential to the merits of the cause.

10

ANSWERS.

Answers shall be concise and direct in statement, and shall fully and particularly answer each paragraph of the bill; and shall be paragraphed and numbered to conform thereto so far as may be. Answers not in compliance with this rule may be stricken from the files and a new answer ordered with costs, or the bill may be taken *pro confesso* for want of an answer.

Answers shall be entitled:

"In the Supreme Judicial Court or in the Superior Court,

In Equity,

A. B. v. C. D.

The answer of C. D., who answers and says:

First: ....." etc.

11

JURY TRIALS.

If the defendant desires any issues of fact submitted to a jury, he shall at the close of his answer make such claim, and

succinctly state such issues. If the plaintiff desires any issues of fact submitted to a jury, he shall make such claim at the end of his replication, and succinctly state the issues.

12

JURATS.

Oaths to bills and answers shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, that he believes his information to be true.

13

DISCOVERY, ETC.

Discovery and answer, when necessary to the entering of a proper decree, may be required; and to enforce the same a writ of attachment may issue by special order of the court, on which the defendant will be bailable on a bond with sufficient sureties given to the plaintiff in such sum as the court may order, which is to be returned with the writ. In case of neglect of the defendant to enter his appearance according to the statute, the bond shall be forfeited, and may be enforced by petition and notice thereon; and on a summary hearing, damages may be assessed and an execution issue therefor; and a new writ of attachment may issue on a special order therefor, on which he will not be bailable.

14

DEMURRERS AND PLEAS.

Defenses by demurrer or plea may be inserted in an answer; and unless the plaintiff sets such defenses for hearing before a single justice in order that proper amendments may be speedily had (and such defenses prevail in the Law Court), no amendment on account thereof shall then be allowed, except upon terms.

15

CERTIFICATIONS.

Demurrers and pleas shall not be filed until certified by counsel to be in good faith and not intended for delay; and if pleas, that they are true in fact.

16

ANSWERS TO CROSS-BILLS.

The answer to a cross-bill shall not be required before answer is made to the original bill.

17

REPLICATIONS.

The replication shall state in substance that the allegations in the bill are true and that those in the answer are not true.

18

SIGNATURE OF COUNSEL.

Counsel shall sign all pleadings as a guaranty of good faith.

19

EXCEPTIONS TO BILLS.

Exceptions to bills may be filed within twenty days after return day, and to answers within ten days after notice that they have been filed, and shall be disposed of by reference to a master, or otherwise, as the court may direct. Costs, double and treble, may be awarded on exceptions and execution issued therefor as the court may order.

20

AMENDMENTS.

Amendments as to parties shall be made under order of court. Other amendments may be made before issue as of course. After issue, amendments may be allowed by the court with or without terms.

21

BILLS OF REVIVOR.

Amendments may serve the purpose of bills of revivor or bills supplemental or bills of that nature, but they shall be served as such bills should be served.

22

SETTING CASES FOR HEARING.

When a demurrer is filed, the court upon motion of either party may set the cause for hearing upon bill and demurrer at any time. When a plea or answer is filed, the court upon motion of the plaintiff may set the cause for hearing upon bill and plea, or bill and answer, at any time. When a replication is filed to a plea or answer the court upon motion of either party may set the cause for hearing upon bill, plea or answer, and evidence, but such hearing shall not be had until after thirty days from the filing of the replication unless by consent or special order of court. If a jury trial has been duly asked for in the answer or replication and is moved for in the motion for a hearing, the court in setting the cause for hearing may in its discretion order a jury trial and frame the issues therefor. The cause shall in such case be in order for trial at the jury term next after such thirty days in the county where the case is pending. Any time fixed for hearing or trial may be extended for good cause shown.

23

OVERRULED DEFENSES.

A defense interposed in one form and overruled shall not afterwards be sustained upon subsequent pleadings in the same case.

24

ORAL EVIDENCE.

At any hearing or trial in equity the evidence of witnesses may be presented by oral testimony or by depositions or both. When oral testimony is given it shall be reduced to writing by

the court stenographer, certified by him and filed with the depositions.

25

DOCUMENTARY EVIDENCE.

Deeds and other instruments in writing or copies of them certified by counsel may be filed with the clerk and notice given twenty days before the hearing or trial, and may then be admitted in evidence without proof of execution if otherwise admissible, unless the execution is denied, or fraud in relation thereto be alleged, and notice given within ten days after notice that they are filed.

Copies of any votes, entries or other records upon the books of any corporation, or of any papers on its files attested by its clerk may be received as evidence, instead of the books and papers unless it shall appear that the opposite party or counsel has been denied access to them at reasonable hours.

26

PRODUCTION OF DOCUMENTS.

When books, papers or written instruments material to the issue are in possession of the opposite party and access thereto is refused, the court upon motion, notice and hearing, may require their production for inspection. Extracts from any books, papers or instruments thus produced, verified by counsel, may be filed as documentary evidence by either party, instead of the originals.

27

ALLEGATIONS NOT TRAVERSED.

All allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true.

28

DECREES.

When a party is entitled to a decree in his favor, he shall draw the same and file it, and give notice.

If corrections are desired they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the justice, who heard the case, for approval. If they are not adopted, notice shall be given of the time and place, when and where the matter will be submitted to such justice for decision, and he shall settle and sign the decree.

When the Law Court has certified its decision upon an appeal or exceptions from a final decree, and a decree has been entered therein by a single justice as in accordance with the certificate and opinion of the Law Court, a party aggrieved by the form of such last named decree may within ten days take exceptions thereto. Such exceptions and the record connected therewith, including a copy of the opinion of the court, shall be transmitted to the chief justice and be argued in writing on both sides within thirty days thereafter and they shall be considered and decided by the justices as soon as may be. If the decision is adverse to the excepting party, treble costs on these exceptions may be allowed to the prevailing party.

29

FORMS OF DECREES.

Drafts of orders and decrees shall be entitled with the name of the county, the date of the hearing, the docket number of the cause, and the names of the parties, and may then proceed substantially as follows: "This cause came on to be heard (or, to be further heard, as the case may be), this day and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz.: (Here insert order or decree)." No part of the pleadings, the master's report or any prior proceeding, need be recited or stated.

30

MASTER.

When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a

hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons signed by the master requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte;* and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte,* or the party obtaining the reference shall lose the benefit of the same at the election of the adverse party.

31

COMPENSATION OF MASTER.

The compensation to be allowed to masters for their services shall be fixed by the court in its discretion in each case, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. Such compensation may, however, be paid by the county. The master shall not retain his report as security for his compensation, but when it is allowed he shall be entitled to an attachment for the amount against the party ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

32

EXCEPTIONS TO MASTER'S REPORT.

When exceptions shall be taken to the report of a master, they shall be filed with the clerk at once and notice thereof be forthwith given to the adverse party, and the exceptions shall then be set for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

33

COSTS.

When a party is entitled to costs, his counsel shall tax each item of the bill in writing, referring to the documents on file or

inclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days, after notice, make his objections to the same in writing and give notice. A reply may be made in writing and the bill filed with the inclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal and submit the papers to a justice of the court for decision. The clerk may regard costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill that he does not find cause to object, or when no objections are made within two days after notice of taxation.

34

RESPONSIBILITIES OF ATTORNEY.

The attorney making the application shall be personally responsible for the payment of fees to commissioners, examiners, stenographers, or magistrates taking testimony; to the clerk for his fees; and for costs imposed as terms of amendment or relief. When it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has, after request, neglected to pay, he shall, unless good cause is shown for such neglect, be suspended from practice in equity cases, until payment is made. When any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner until the further order of court.

35

VERIFICATION OF COPIES.

Copies required by these rules may be verified by signature of counsel, who will be held responsible for the accuracy thereof.

36

NOTICES.

Notices required by these rules shall be served in writing signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases shall be properly directed to him and placed in the

post office and postage paid. Copies are to be preserved and produced, and the original will in all cases be regarded as received when the counsel giving the notice produces a memorandum, made at the time on the copy retained, of its having been delivered or sent by mail on a day certain, unless the reception is positively, and not for a want of recollection denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case none will be good unless given to him. In case of a change of such counsel, notice will be given thereof, and the change noted on the docket.

37

APPLICATIONS ACTED UPON.

When an application for an injunction or for an order or decree under the statute or these rules, is made to one justice of the court and the same has been acted upon by him, it shall not be presented to any other justice.

38

WRITS OF INJUNCTION.

Writs of injunction, preliminary, pending the suit, or perpetual, may be granted according to the principles of equity procedure and as authorized by the statute and may be in the form annexed with such changes as the case may demand.

39

REHEARINGS.

Applications to the discretion of the court for a rehearing may be made on petition, verified as required by Rule 12, setting forth particularly the facts, the name of each witness, and the testimony expected from him. The petitioner can examine only witnesses named, except to rebut the opposing testimony. The petition having been presented to a justice of the court and by him allowed, may be filed and the same proceedings had thereon as on an original bill. If the decree has not been executed, such justice of the court may suspend its execution until the further

order of court by a writ of *supersedeas* or order, on the petitioner's filing a bond, with sufficient sureties, in such sum and approved in such manner, as he may direct, conditioned to perform the original decree in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

40

INTERLOCUTORY HEARINGS.

When the decision of a justice is desired upon any interlocutory matter, the clerk shall forward to him the papers in the cause and enter his decision as soon as received.

41

OTHER PROCEDURE.

All equity proceedings not provided for by statute or these rules shall be according to the usual course of proceedings in equity.

42

DISPOSITION OF DORMANT CASES.

A cause in equity remaining on the docket for a period of two years or more without any action therein being taken shall be dismissed for want of prosecution unless good cause is shown to the contrary.

43

COURT RECORDS.

In equity cases it shall be sufficient, except in cases for dissolution of corporations, cases or proceedings involving title to real estate, and bills for the construction of wills, to record the names of the parties, date of filing bill and issue of subpoena or order of notice and return day thereof, dates of filing answer and replication, if any, date of filing decree that bill be taken *pro confesso,* date of final decree, and number of the case upon the docket; in addition to the foregoing particulars, in proceedings for the

dissolution of corporations, the decree of dissolution shall be recorded in full; in bills for the construction of wills, the decree construing the will in question shall be recorded in full; in bills to quiet title to real estate the proceedings shall be recorded in full; in interlocutory proceedings by receivers, trustees and masters in selling real estate, the petition for authority to sell and the decrees authorizing sales shall be recorded in full, with date of decrees confirming the sales; and in cases in equity to enforce liens on real estate only final decrees authorizing sale of real estate shall be recorded in full, with date of decree confirming sale; provided that the justice signing the final decree in any case may by special order direct that such additional record be made as to him seems proper.

Upon application of any party in any civil cause, either at law or in equity, the court or a justice thereof in vacation, may upon or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper.

FORMS.

WRIT OF ATTACHMENT.

(SEAL)

STATE OF MAINE

To the sheriffs of our counties and their deputies:

We command you to attach the body of A.B., of ....., in our county of ....., so that you have him before our Supreme Judicial Court, at ....., within and for our county of ....., on ....., the ..... of ..... next, at ..... o'clock in the ..... noon, to answer for an alleged contempt in not (here insert the cause), and you may take a *bond with sufficient sureties to C.D., the party injured, in the sum of ....., conditioned that he then and there appear and abide the order of court.

Hereof fail not and make due return of this writ, with your doings thereon, at the time and place aforesaid.

Witness, ..., Justice of our said court, the ..... day of ....., in the year of our Lord nineteen hundred and .....

..... Clerk.

WRIT OF INJUNCTION.

(SEAL)

STATE OF MAINE

....., SS.

To the sheriffs of our counties and their deputies:

We command you to make known to A.B., of ....., in our county of ....., that C.D., of ....., in the

* When the party is not entitled to bail, that part of the writ is to be omitted.

county of ....., has filed his bill in equity before our Supreme Judicial Court, in the county of ....., therein alleging (here insert the allegations in the bill showing the cause for issuing the writ), and that in consideration thereof, he, the said A.B., and his attorneys and agents, are strictly enjoined and commanded by our said court, under the penalty of fine or imprisonment as the court may order therein, absolutely to desist and refrain from (here insert the acts enjoined) and from all attempts, directly or indirectly, to accomplish such object until the further order of our said court.

Hereof fail not and forthwith make due return of this writ, with your doings thereon, to our court, where the bill is pending.

Witness, ..., Justice of our said court, the ..... day of ....., in the year of our Lord nineteen hundred and .....

....., Clerk.

When the injunction is to be perpetual, the writ is to be varied accordingly.

SUBPOENA.

(SEAL)

STATE OF MAINE

....., ss.

To A.B., of .....: GREETING.

We command you to appear before our Supreme Judicial Court, at ....., in the county of ....., on ..... rules, viz., Tuesday, the ..... day of ..... next, then and there to answer to a bill of complaint, there exhibited against you by C.D., of ....., and abide the judgment of said court thereon.

And we further command you to file with the clerk of said court for said county of ....., within ..... days after the day above-named for your appearance, your demurrer, plea or answer to said bill, if any you have.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, ..., Justice of our said court, at ....., the ..... day of ....., in the year of our Lord .....

....., Clerk.

OATH.

....., ss. ..... 19.....

Then personally appeared ..... and made oath that he has read the above ..... and knows the contents thereof, and that the same is true of his own knowledge, except the matters stated to be on information and belief, and that, as to those matters, he believes them to be true.

Before me,

.....

SUMMONS TO SHOW CAUSE.

(SEAL)

STATE OF MAINE

....., ss.

To the sheriffs of our several counties, or either of their deputies:

GREETING.

We command you that you summon ..... (if he may be found in your precinct), to appear before .....,

the Supreme Judicial Court of the State of Maine, to be holden ....., at ....., in the county of ....., on ....., the ..... day of ....., A. D. 19...., at ..... o'clock in the .....noon, then and there to show cause, if any he have, why an injunction ..... should not be granted as prayed for in the bill of complaint ..... of .....

Hereof fail not, and make due return of this writ, with your doings thereon, into our said court.

Witness, ..., Justice of said court, at ..... aforesaid, the ..... day of ....., in the year of our Lord one thousand nine hundred and .....

....., Clerk.

EQUITY FEE BILL.

ATTORNEYS.

Drawing and filing bill or answer, including attorney fee	$5.00
Drawing amendment to bill or answer when such amendment is occasioned by an amendment by the opposing party	2.50
Drawing and filing formal decree dismissing bill	1.00
Drawing and filing other decrees when not requiring material alteration, each	5.00
Drawing each rule	.50
Drawing interrogatories, each set	1.00
Drawing demurrer or plea	2.00
Travel: For each ten miles to and from court in filing bill, answer, replication or decree, and in attending each hearing before a justice or master, observing the rule prescribed in R. S.	.33
Attendance: For attendance at each hearing before a justice or master	3.50
For each jurat attached to bill, answer or necessary paper	.25

LAW COURT.

For travel and attendance, the same fees as for attending a hearing before a justice or master, but for one term only. If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his bill. If the defendant prevails, he may be allowed one attorney's fee in addition to that in his answer.

CLERK.

Entry and filing bill	$1.00
Copies, not less than	1.00
Subpoena	.25
Copies for same, each	.25
Each notice given	.25
Summons to show cause	1.00
Writ of injunction	1.00
With ten cents for each one hundred words of the allegations in the bill incorporated therein.	
Commission to receivers, masters and other officers appointed by the court	1.00
Taxing costs	.25

* * * *

The foregoing rules, including fee bills and forms, shall be recorded in Volume 147 of the Maine Reports, and shall take effect and repeal all former rules on the first day of August in the year 1952.

BY ALL THE JUSTICES OF THE SUPREME JUDICIAL AND SUPERIOR COURTS.

HAROLD H. MURCHIE,
Chief Justice.

Attest:

May 16, 1952.

INDEX

ACTIONS

AD DAMNUM

ADOPTION

Adoption is a judicial act creating between two persons certain relations, purely civil, of paternity and affiliation.

Adoptees rights of inheritance must originate by virtue of a statute.

Under Maine Law the right of inheritance applicable to local adoptions does not arise until the death of a decedent.

It is generally held that the status acquired by adoption in one state will be recognized in another but the fact that an adopted child can inherit under the law of the state of his adoption will not enable a child adopted in one state to inherit property in another, under the laws of which an adopted child, even if adopted in the state, cannot inherit.

The right of an adopted child to inherit as an heir of the relatives or descendants of the adoptive parents depends upon statutory or constitutional provisions, and such right is not conferred unless the language of the statutes is clear.

R. S., 1944, Chap. 145, Sec. 38 providing ". . . the adoption of a child made in any other state, . . . shall have the same force and effect in this state as to inheritance and all other rights and duties as it had in the state where made" means that if the foreign law of adoption gave the adopted child capacity to inherit from his adoptive parents the state of Maine would give a like right of inheritance but this cannot be construed to confer rights upon a foreign adoptive sister to inherit from her adoptive brother where such rights would be denied a local adoptee.

Wyman, Applt., 237.

AGENCY

Where the contractee in an independent contractor-contractee relationship undertakes to provide instrumentalities with which the work is to be carried on, he owes to the contractor and the latter's employees the duty of exercising reasonable care with respect thereto.

Where there is a master-servant relationship, it is the duty of the master to use reasonable care to furnish his servants reasonably safe appliances with which to work and to use reasonable care to inspect such appliance in order to discover and remedy defects.

A servant may rely upon the presumption that his employer has performed his duty, although he is bound to use his senses to see obvious defects.

A contractee undertaking by contract to furnish the contractor with appliances has the duty of initial inspection and reasonable care;

and the contractor, although he is bound to use his senses to see obvious defects is not required to examine appliances furnished him but may rely upon the presumption that the contractee has performed his duty with reference to initial inspection.

Where the contractee by his contract agrees to furnish appliances to the contractor for his personal use in personally performing the contract, the contractee is under the same duty with respect to furnishing them as a master to his servant.

Jenkins v. *Banks*, 438.

The principles governing exceptions to the acceptance of referees' reports are well established. The report is prima facie correct. The excepting party is confined to the objections. Findings are conclusive if supported by evidence of probative value. The existence of such evidence is a question of law.

The existence and extent of apparent authority and a reliance thereon are questions of fact to be determined by the finder of facts.

Except where there is reliance upon the appearance of agency, a principal is not bound by knowledge of an agent concerning matters as to which he has only apparent authority.

One should not be allowed to recover by way restitution for his own mistakes upon the theory of unjust enrichment.

MacQuinn v. *Patterson*, 196.

AMENDMENTS

See Pleading, *Elliot, Jr., Collin* v. *Sherman*, 317.
See Pleading, *Kennebunk et al.* v. *Maine Turnpike*, 149.
See *Bartlett* v. *Chisholm et al.*, 265.

APPARENT AUTHORITY

See Agency, *MacQuinn* v. *Patterson*, 196.

APPEAL

R. S., 1944, Chap. 140, Sec. 33 requiring service of probate appeal to be made upon "all parties who appeared before the judge of probate on the case that have entered or caused to be entered their appearance in the docket of said court" does not require service upon "thirteen different heirs at law" whose names do not appear upon the docket.

An appeal bond is not defective because dated November 24th and refers to an appeal as having been claimed on November 20th when in fact both the appeal and bond were presented to the court on November 29th and there can be no doubt as to the identity of the appeal to which the bond refers. (R. S., 1944, Chap. 144, Sec. 33.)

The findings of the Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them.

The burden rests upon the proponents of a will to prove testamentary capacity.

The burden is upon the contestants to prove undue influence.

The mere inducing of a testator to make a will is not undue influence.

Crockett, Applt., 173.

Under Maine law an equity appeal is heard anew on the record.

In determining whether there is credible evidence to support the findings of a sitting justice, it is well to bear in mind that "credible" under the common law means competent.

ASSAULT

ASSESSORS

BASTARDY

BLOOD TESTS

BONDS

BROKERS

BURDEN OF PROOF

CAPACITY

CERTIORARI

When the act to be accomplished by a conspiracy is itself criminal or unlawful it is not necessary to set out in the indictment the means by which it is to be accomplished; but when the act is not in itself criminal or unlawful, the unlawful means must be set out.

Berger v. *State*, 111.

CONSTITUTION CONSTRUED

Article IV, Part Third, Section 20, *Morris et al. v. Goss*, 89.
Article IV, Part Third, Section 17, *Morris et al.* v. *Goss*, 89.
Article IV, Part Third, Section 16, *Morris et al.* v. *Goss*, 89.
Article IX, Section 8, *State* v. *Vahlsing, Inc.*, 417.

CONSTITUTIONAL LAW

There is no inherent or constitutional right to engage in gambling in any form; and whether one shall be permitted to engage in it and under what conditions and restrictions, is a matter for the people to determine, acting by and through the legislature.

The state in the exercise of its police power may prohibit gambling, or authorize it in such limited and regulated forms as may seem appropriate to the legislature.

The Fourteenth Amendment to the Constitution of the United States does not prevent the proper exercise of the police power of the state.

Maine State Raceways v. *LaFleur*, 367.

This state has the right under the 14th Amendment to the Constitution of the United States to control public fishing rights in waters along its shores.

This state owns the beds of all tidal waters (unless it has parted with title) within its jurisdiction as well as the waters themselves so far as they are capable of ownership, and has the full power to regulate and control fishing therein for the benefit of the people.

The legislature may authorize the selectmen of each town within the state to make a regulation forbidding the taking of clams without a permit and to provide that permits shall be granted only to the inhabitants of the town.

State v. *Leavitt*, 105 Me. 76 affirmed.

State v. *LeMar*, 405.

See Taxation, *Morris et al.* v. *Goss*, 89.
See Insanity, *Sleeper, Applt.*, 302.
See Taxation, *State* v. *Vahlsing, Inc.*, 417.

CONTRACTS

An action on the case may lie concurrently with assumpsit for breach of an express or implied contract.

In order to recover special damages for breach of contract it must affirmatively appear that the circumstances giving rise to the special damages were in contemplation of both parties at the time of making the contract.

Special damages consisting in part of loss of profits which plaintiff purchaser contemplated making of the property are not warranted where the contemplated use was never communicated to defendant.

Susi v. *Simonds*, 189.

In an action of assumpsit the jury have the right to determine the existence of the contract, if any, and its extent and limitations.

EXCISE TAX

EXECUTIONS

EXECUTORS AND ADMINISTRATORS

Findings of fact by a single justice are conclusive if there is any evidence to support them.

If a justice finds without evidence, or if he exercises discretion without authority, his doings may be challenged by exceptions.

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 as apply in other civil cases.

A claim for payments to be made pursuant to an agreement incorporated in a divorce decree which by its terms binds the heirs, executors, administrators, assigns and legal representatives is a claim for ultimate payment of which sufficient assets should be ordered retained by the executors under R. S., 1944, Chap. 152, Sec. 18.

In an action at law brought by a former wife against the executor of her former husband's estate to recover installments due her under a separation agreement, the burden of proving payment is upon the defendant.

An exception that the court had no authority to postpone execution or payment, if erroneous, is not prejudicial.

A daughter recovering damages in an action at law against her deceased father's estate for breach of contract to provide for her by Will is in the same position as that of a legatee, rather than that of a creditor with respect to priority of payment.

A former wife by virtue of rights and installments due and to become due under a separation agreement and divorce decree is a creditor of her former husband's estate and her claim takes priority over claims of children for damages resulting from a failure to leave bequests under such agreement and divorce decree.

Sard v. *Sard et al.*, 46.

FRAUD

GAMBLING

GUARDIAN AND WARD

HABEAS CORPUS

HEARING

HUSBAND AND WIFE

INDEPENDENT CONTRACTORS

INDICTMENTS

A warrant charging night hunting that respondent ". . . did hunt . . . wild animals . . . after one-half hour after sunset of the twenty-second day of November and one-half before sunrise of the twenty-third day of November . . ." is fatally defective under a statute making it an offense to "hunt wild animals from ½ hour after sunset until ½ hour before sunrise of the following morning . . ." (R. S., 1944, Chap. 33, Sec. 67.)

State v. *Rowell*, 131.

A warrant or indictment need not specifically negative the fact of hunting skunks and raccoons under a statute making it "unlawful to hunt wild animals from one-half hour after sunset until one-half hour before sunrise the following morning, except skunks and raccoons" where the process specifically charges respondent with hunting deer.

Appeal vacates the sentence.

State v. *Schleaefer*, 403.

INHERITANCE

INJUNCTION

It is a long established custom that the court at *nisi prius* will, in the absence of extraordinary circumstances, accept the presumption of constitutionality of legislative acts, until the Supreme Judicial Court sitting as a Law Court determines otherwise.

Opinion of Justices, 25.

INSANITY

Statute authorizing the commitment of one alleged to be insane for observation and treatment for a preliminary period not exceeding thirty-five days without hearing, without notice, without any provision being made in the act allowing him within said period to institute any proceedings to test the necessity of his commitment is unconstitutional.

It is not that which actually is done under statutory authority but that which may be done that determines constitutionality.

At common law an insane person who was a menace to his own safety or that of others could be confined in a suitable place by any interested person, and that without legal process. But a private person can act only in an emergency, and then only at his peril.

In proceedings for temporary commitment for observation and treatment (not ancillary to final commitment proceedings) there must be not only adequate notice to the alleged incompetent, but also an opportunity for him to be heard before the order of commitment is issued, unless there are circumstances, such as the condition of the alleged incompetent, which render notice and hearing impracticable, if not impossible.

Final commitment can only be determined after notice and opportunity to be heard.

The confinement of one who is mentally ill in a mental hospital is a deprivation of his liberty within the meaning of the 14th Amendment to the Constitution of the United States unless accomplished and continued with his voluntary consent.

Where a repealing statute provides that certain sections of existing law "are hereby repealed and the following enacted in place thereof" and it is the manifest intent of the legislature to repeal the old sections only if the new sections take their place, an adjudication that the new sections are unconstitutional leaves the old sections in full force and effect.

Sleeper, Applt., 302.

INSURANCE

An insurer who has contracted to cover legal liability for damage to property during its "loading, unloading, skidding, lowering and hoisting" is not holden for loss caused by the use of dynamite to sever the property intended to be hoisted, since "hoisting" does not connote severing or detaching, or the use of dynamite, and was not foreseeable under the risk accepted. Defendant had no notice that its use was essential or was contemplated as part of a hoisting operation in the particular trade.

Bolduc v. *Granite State Fire Ins. Co.*, 246.

The doctrine that a policy of insurance must be liberally construed in favor of the insured is applicable only where there is an ambiguity in the terms of the policy.

In an action to recover for damages to store merchandise under an insurance policy providing for extended coverage for the perils of "windstorm" it must appear at least to a satisfactory probability that the damage was due to wind. No recovery can be had where the court can only speculate on whether the dominant cause of damages was wind or surface waters.

Unobskey v. *Continental Ins. Co.*, 249.

INTOXICATING LIQUOR

The underlying reason for the *corpus delicti* doctrine rests in the desire to safeguard against the possibility of a conviction for an alleged crime not, in fact, committed.

Extra judicial confessions are competent evidence to corroborate other proof of *corpus delicti.*

Conclusive proof that (1) a motor vehicle overturned while being operated upon the highway, (2) that the vehicle had been in respondent's control a half-hour earlier some miles away, (3) that respondent was at the place where overturning occurred immediately thereafter, (4) that he had suffered a recent injury, (5) that he assumed responsibility for notifying police of the event, (6) that earlier on the day in question respondent had been seen drinking in a beer parlor, and (7) had been warned not to drive the truck because he had been drinking too much, is sufficient evidence of the *corpus delicti* to justify the testimony of two police officers as to respondent's admissions that he was driving the car when it overturned even though respondent was never seen to drive the truck.

Evidence which will qualify an extra-judicial confession for admission in corroboration need not establish the *corpus delicti* beyond a reasonable doubt, but is sufficient if, when considered therewith, it so satisfies the jury "that the offense was committed and that the defendant committed it."

State v. *Hoffses*, 221.

INVITEE

See Negligence, *Robitaille* v. *Maine Central R. R. Co.*, 269.

JUDICIAL REVIEW

See Taxation, *Morris et al.* v. *Goss*, 89.

JURISDICTION

The Superior Court in any county has jurisdiction of transitory actions whether they sound in tort or contract and venue in such actions is a matter of procedure which can only be taken advantage of by dilatory plea or motion seasonably filed.

Local actions must be brought in the county where the statute demands, or there is no jurisdiction.

If a wrong return date is made in an action or there is no return day, the objecting party waives the defect by a general appearance and going to trial without appropriate motion or plea in abatement (Rule 5, Rules of Court). R. S., 1944, Chap. 100, Sec. 11.

Burtchell v. *Willey*, 340.

See Juvenile Delinquency, *Collins* v. *Robbins*, 163.
See Non-resident, *White* v. *March*, 63.

JUVENILE DELINQUENCY

The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked, and subsequent happenings and events, though they are of such character as would have prevented jurisdiction from attaching in the first instance, will not operate to oust the jurisdiction already attached.

Under our law the crime of murder includes manslaughter.

Upon an indictment of a juvenile for murder, a crime within the jurisdiction of the Superior Court, a plea of guilty of manslaughter and sentence thereon is valid notwithstanding statute providing "municipal courts . . . shall have exclusive original jurisdiction over all offenses, except for a crime, the punishment for which may be im-

Where a plaintiff in the exercise of due care believed that a defendant was about to stop his car before reaching an intersection and in reliance upon such belief attempted to overtake and pass *before* the intersection such conduct does not amount to contributory negligence notwithstanding a rule of the road that it is unlawful to overtake or pass at an intersection.

Bennett v. *Lufkin*, 216.

The failure of a driver to comply with R. S., 1944, Chap. 19, Sec. 107 by not attempting to pass beyond the center of the intersection preparatory to making a left turn results in strong evidence of contributory negligence.

The driver of an automobile at an intersection must watch and time the movements of his own car and that of approaching vehicles so as to insure safe passing. A driver also owes the duty to signal his intention to turn.

The doctrine of "last clear chance" or "discovered peril" applies only after the defendant has discovered, or should have discovered, that plaintiff is in a position of peril and the defendant has the opportunity to avoid the accident after plaintiff's negligence has ceased. Defendant's negligence must be both the *last* negligence and proximate cause of accident.

Gamache v. *Cosco*, 333.

Where an automobile driver sees a child in a place of danger, or sees a child of tender years near or in the street in front of him, he must have his car under proper control and be able to stop if necessity demands it.

Under R. S., 1944, Chap. 152, Sec. 9, 10, there is a presumption that the deceased was in the exercise of due care and defendant must plead contributory negligence specially.

The statute does not change the substantive law and cases must be decided on all the evidence presented.

A directed verdict against plaintiff should be ordered when contributory negligence appears from substantive and incontroverted evidence.

Greene, Admr. v. *Willey, Jr.*, 227.

Whether the operator of a motor vehicle or a pedestrian is in the exercise of due care are questions of fact for the jury, except in cases where the pedestrian enters the path of a motor vehicle so abruptly as to give its operator no opportunity to see him and avoid hitting him.

Where a jury could properly find that the plaintiff, at some point in crossing the street observed the defendant's car approaching at such a distance and at such an apparent speed that he was justified in continuing to cross the street it is proper for the trial court to refuse to direct a verdict for the defendant.

Gosselin v. *Collins*, 432.

Factual decisions of a jury cannot be disturbed by a court on review unless manifestly influenced by bias, passion, or prejudice, or reflecting apparent mistake.

Factual findings by a jury must be viewed in the light most favorable to the party for whom the verdict has been rendered.

It is for the jury to pass upon the credibility of witnesses.

A court reviewing the verdict of a jury must recognize its right to accept the story of a witness in so far as it is not modified or contradicted by admitted or undoubted facts.

A verdict should not be sustained on evidence inherently impossible.

PLAN OF LOT

See Easements, *Arnold et al.* v. *Boulay*, 116.

PLEADING

It is not necessary to expressly claim treble damages in a declaration; it is sufficient to set forth facts to show plaintiff is entitled thereto.

If judgment be rendered for a sum larger than the amount of the *ad damnum* it is for that reason reversible unless plaintiff enter a *remittitur* of the excess.

An amendment of a declaration after verdict by increasing the damages claimed to correspond to a verdict will not as a general rule be permitted without setting aside the verdict and granting a new trial to enable the defendant to make his defense to the enlarged demand unless the amendment is for the correction of a circumstantial error or a matter of form.

Where the failure to set the *ad damnum* clause in an amount sufficient to equal the treble damages is but a formal matter an amendment after verdict may be allowed by the trial court.

The Law Court is without statutory power to allow amendments to original process.

Error in ordering judgment in excess of *ad damnum* is an error of law to be challenged by exceptions, not motion.

Elliot, Jr., Collin v. *Sherman*, 317.

It is within the discretionary power of the court to strike off a reference following the final rejection of the referees' report although any action taken by the court below inconsistent with the continued existence of the reference will discharge the rule as a matter of law.

Any amendment to a declaration which could have been allowed by the court prior to the reference may be allowed by the court subsequent to the discharge of the rule. (Rule IV, Rules of Court.)

The fact that a plaintiff claims to recover for the same items and cause of action but upon different principles and rules of law than those which would have been applicable to the original declaration does not violate the condition laid down in Rule IV.

An amended declaration must set forth a good cause of action.

A prescriptive right cannot be acquired against one whose right is not invaded.

The right of non-riparian use by an upper riparian proprietor may exist by prescription as against a lower riparian proprietor, although such prescriptive right does not exist as against riparian users above the upper riparian proprietor.

The use of water for public distribution in this State is not a riparian use.

Although a use of its land by an upper riparian proprietor may be a reasonable one, the manner of its use may be so negligently conducted that it becomes unreasonable as against the rights of a lower riparian proprietor.

Kennebunk et al. v. *Maine Turnpike*, 149.

See Indictment, *State* v. *Schleaefer*, 403.
See Jurisdiction, *Burtchell* v. *Willey*, 340.
See *Mullen* v. *Lewiston Evening Journal*, 286.

POLICE POWER

POTATOES

PRESCRIPTION

PRIORITIES

PROBATE COURTS

PROCESS

PROPERTY SETTLEMENTS

PUBLIC UTILITIES

Where there is substantial evidence to support the factual findings of the Public Utilities Commission the findings are final.

The exercise of discretion by the Public Utilities Commission, in the absence of an abuse thereof, is not reviewable on exceptions.

O'Donnell, Petr., 259.

If the findings of the Public Utilities Commission are supported by substantial evidence they are final.

A common carrier is one who holds himself out as engaged in the public service of carrying goods for hire, to the limit of capacity, and to take "anybody's freight."

With a contract carrier there is an individual contract made with the carrier for the transportation of certain goods to a certain destination for a certain price.

What constitutes a common carrier and what constitutes a contract carrier are questions of law; but whether one is acting as a contract or common carrier are questions of fact.

Public Utilities Comm. v. *Johnson Motor Transport*, 138.

PUBLIC WAYS

RAPE

An indictment charging "assault" with intent to "ravish and carnally know and abuse" sufficiently charges the crime of assault with intent to rape under R. S., 1944, Chap. 117, Sec. 12.

State v. *Clukey*, 123.

RECORDING

REFEREES

REPORT

A case reported to the Law Court for judgment as the "law and evidence require" must be remanded so that facts may be resolved by a trier of facts.

Bartlett v. *Newton*, 185.

RIPARIAN RIGHTS

RULES OF COURT

RULES OF ROAD

SALES

SALES TAXES

SAVINGS BONDS

Equity may determine rights under R. S., 1944, Chap. 153, Sec. 40 as between husband and wife as co-owners of United States War Savings bonds where wife had redeemed bonds after bill in equity has been served upon her.

Thibeault v. *Thibeault*, 213.

SEA & SHORE FISHERIES

SENTENCE

SPECIAL DAMAGES

SPECIFIC PERFORMANCE

STATUTES CONSTRUED

A. REVISED STATUTES

B. PUBLIC LAWS

PRIVATE AND SPECIAL LAWS

STATUTE OF FRAUDS

A will executed by a testator prior to marriage upon an oral agreement to do so in consideration of marriage is not a memorandum within the meaning of R. S., 1944, Chap. 106, Sec. 1, as amended by P. L., 1947, Chap. 185, where the will neither intimates nor refers to the existence of such oral agreement.

A memorandum must show within itself or by reference to some other paper all the material conditions of the contract.

Marriage alone is not a part performance upon which equitable relief can be based notwithstanding the Statute of Frauds.

Mere execution of a will in pursuance of an oral agreement is not a full performance on the part of a promisor within the doctrine that a contract fully executed cannot be abrogated because of the Statute of Frauds, since a will is ambulatory and may be revoked at any time prior to death.

Busque v. *Marcou*, 289.

STREETS

See Easements, *Arnold et al.* v. *Boulay*, 116.

TAXATION

Section 10, subsection VII-A of chapter 250 of P. L., 1951 which exempts coal, oil, wood and other fuels (except gas and electricity) "used for cooking or heating for domestic purposes" includes all such fuel used for such purposes in a hotel and the exemption is not limited to rooms actually occupied by guests, nor to such rooms only as are occupied by guests who remain for four consecutive months or longer.

The fundamental rule of statutory construction is to ascertain and carry out the legislative intent.

"Domestic purposes" has a much broader significance than "household or family" and in the legislation in question are used in contradistinction to purposes as "trade, manufacturing, industrial, and commercial."

Acheson et al. v. *Johnson,* 275.

The statutory exclusion from taxation of "tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser . . ." applies to moulding sand, refractories, fire clay, steel shot and grit, crucibles, and snagging wheels in a foundry but coke and oil used as a fuel are taxable under Section 2 even though in the use of coke, as a fuel, a portion of the carbon of which it is composed becomes an ingredient of the iron processed.

Androscoggin Foundry Co. v. *Johnson,* 452.

The common returnable soft drink bottle, on which a deposit is made on purchase and refunded on return, is a "container" within the meaning of Sec. 2 of the "Sales and Use Tax Law" and the purchase of such bottles from an Ohio Manufacturer by a Maine bottler is not taxable. (P. L., 1951, Chap. 250.)

Coca-Cola v. *Johnson,* 327.

The statutory exclusion from taxation of "tangible personal property which becomes an ingredient or component part of, or which is consumed or destroyed or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser" applies to certain lubricating oils and greases used to lubricate machinery and certain wires, wet felts and dry felts, used upon paper machines; and a regulation of the state tax assessor is unauthorized which limits the exclusion so as to apply to that which is being acted upon (the subject matter of manufacture), rather than all those expendibles by which the process of manufacture is carried on. (P. L., 1951, Chap. 250, Sec. 2.)

It is the tax act, not the assessor's regulations, which determine liability.

Hudson Pulp and Paper Corp. v. *Johnson,* 444.

It is a well established rule that questions of constitutional law should not be passed upon unless strictly necessary to a decision of the cause.

The emergency preamble of a statute must express the facts constituting the emergency. Whether such fact or facts as has been expressed can constitute an emergency is a question of law. The question whether the facts exist or do constitute the emergency are legislative matters not subject to court review.

The expression that "the *essential* needs of State Government require that additional revenue be raised by this legislature" is a sufficient expression of fact as constituting an emergency under the Constitution of Maine.

"Essential" means indispensable, absolutely requisite, and indispensably necessary.

The requirement that facts constituting the emergency be expressed is fulfilled by the expression of ultimate facts.

The essential needs of State Government are those needs indispensably necessary to public peace, health, and safety.

TRESPASS

See Negligence, *Robitaille* v. *Maine Central R. R. Co.*, 269.
See Pleading, *Elliot, Jr., Collin* v. *Sherman*, 317.

UNDUE INFLUENCE

UNJUST ENRICHMENT

VACATION

VENUE

VETERANS

WAIVER

WILLS

A person possessed of a sound mind is entitled to dispose of his property by will, on compliance with the formal requirements incident to the execution of valid wills, without more.

The question of the testamentary capacity of one who executes a will in accordance with the formal requirements of the statute is one of fact, to be resolved on all the evidence presented at a hearing on its allowance.

The proponents of a will, or those opposing its allowance, are entitled, if they wish, to have each subscribing witness thereto express an opinion, formed at the time of the execution of it, concerning the soundness of mind of a testator, and to develop any facts tending to show the opportunity, or lack of opportunity, each had for forming a considered opinion thereon.

A subscribing witness to a will is competent to testify on the question of a testator's soundness of mind although suddenly called upon to act as such with no knowledge concerning the capacity of the testator beyond what might be acquired by having him indicate that the instrument he was signing was his will and that he desired it attested.

Although persons asked to sign a will as attesting witnesses ought to inquire into the capacity of an intended testator, and should refuse to attest the will of one they believe lacking in testamentary capacity, an instrument they have attested as a will should not be invalidated as such because of their failure to perform that duty.

It is not necessary to establish the due execution of a will that all of the subscribing witnesses thereto, or any of them, testify to the soundness of mind of the testator.

WITNESSES

WORDS AND PHRASES