MAINE REPORTS

148

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 8, 1952 to MAY 29, 1953

MILTON A. NIXON

REPORTER

AUGUSTA, MAINE

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

---

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

[2] HON. EDWARD F. MERRILL, *Chief Justice*

HON. SIDNEY ST. F. THAXTER

HON. RAYMOND FELLOWS

HON. WILLIAM B. NULTY

HON. ROBERT B. WILLIAMSON

[3] HON. FRANK A. TIRRELL, JR.

1 Died March 7, 1953
2 Qualified as Chief Justice March 18, 1953
3 Qualified as Associate Justice March 18, 1953

HON. LESLIE E. NORWOOD, *Clerk*

HON. HAROLD C. FULLER, *Clerk*

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

[1] HON. ARTHUR CHAPMAN

[2] HON. HARRY MANSER

HON. EDWARD P. MURRAY

1 Active Retired Term Expired August 8, 1952
2 Active Retired Term Expired March 20, 1953

JUSTICES OF THE SUPERIOR COURT

HON. ALBERT BELIVEAU
[1] HON. ARTHUR E. SEWALL
[2] HON. FRANK A. TIRRELL, JR.
HON. PERCY T. CLARKE
HON. DONALD W. WEBBER
HON. FRANCIS W. SULLIVAN
HON. GRANVILLE C. GRAY
[3] HON. HAROLD C. MARDEN
[4] HON. RANDOLPH WEATHERBEE

1 Qualified Active Retired March 3, 1953
2 Qualified Associate Justice Supreme Judicial Court March 18, 1953
3 Qualified March 3, 1953
4 Qualified March 25, 1953

ACTIVE RETIRED JUSTICES
OF THE
SUPERIOR COURT

HON. WILLIAM H. FISHER
HON. ARTHUR E. SEWALL

Attorney General

HON. ALEXANDER A. LAFLEUR

Reporter of Decisions

MILTON A. NIXON

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CASES
IN THE
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STATE OF MAINE

STATE OF MAINE

vs.

EMILE JOSEPH TURMEL

Aroostook. Opinion, May 8, 1952.

Murder. Malice Aforethought. Intent.

Murder is the unlawful killing of a human being with malice aforethought, express or implied.

Where an unlawful killing is proved, the law presumes it to have been done maliciously and the burden is upon the defendant to rebut the inference of malice, which the law raises from the act of killing, by evidence in defence.

ON MOTION FOR NEW TRIAL.

On indictment for murder the jury returned a verdict of guilty. Defendant moved for a new trial which was denied by the presiding justice and an appeal was taken to the Law Court. Appeal dismissed. Motion for new trial denied. Judgment for the State.

Ralph W. Farris,
James P. Archibald, for State.

Nathan H. Solman,
Asa H. Roach,
Robert L. Krechevsky of Conn. Bar, for Defendant.

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

THAXTER, J. The respondent was indicted for the murder committed on September 2, 1949 of Anna Evelyn Dun-

lap at Houlton in the County of Aroostook. On his representation that he would plead not guilty by reason of insanity, he was on September 21, 1949 ordered committed to the Augusta State Hospital for observation. The report from that institution was received at the November term of the Superior Court for Aroostook County at which term he was arraigned, pleaded not guilty and went to trial. Nothing more was heard of the defense of insanity. He was convicted of murder, sentenced to the State Prison for life, filed a motion for a new trial, which was denied by the trial justice, and filed an appeal which is now before us.

The evidence shows that the respondent, twenty-seven years old, a resident of Hartford, Connecticut, was employed as a laborer in the construction of the Houlton High School. On the afternoon of Friday, September 2, 1949, he finished his work on that job and shortly thereafter was seen with Anna Dunlap at the head of the stairs which led to her apartment over the liquor store on Bangor Street in Houlton. Apparently then or shortly thereafter Turmel went into Anna Dunlap's apartment with her and he was not seen in the hallway with her again. Subsequently about eight thirty p. m. Anna Dunlap's voice was heard coming from her apartment using the word "Stop." Three times this was heard and each time it was accompanied by a slap.

Subsequently, on Saturday morning September 3rd, at ten o'clock, her badly mutilated, naked body was found on the bed in the bedroom of her apartment by her sister, Mrs. Phyllis Giberson, and her sister-in-law, Mrs. Mae Dunlap, and her brother, Charles Dunlap. The doors entering the apartment were all locked and it was necessary for Charles Dunlap to break open one of the doors to enter. The bedroom was in great confusion; a leg had been broken off one of the chairs which was in the room; blood was splattered over the walls, and the mattress on the bed; and the bed clothes were soaked with blood. According to the respondent's story, as he told it on the witness stand, he had been

to Anna Dunlap's apartment, had had some drinks with her and another man there; the other man finally went out leaving him and Anna Dunlap together; then for an agreed sum of two dollars which he paid her he had intercourse with her, both of them having previously undressed; afterwards according to his story, he found two men going through his clothes; he accused her of being implicated in rolling him; a fight followed with her during which she kicked him, in the course of which he knocked out one of the men. It is unnecessary to go further into the sordid details of what he said took place; but he coolly dressed himself; combed his hair; and went out on the street leaving her moaning and bleeding on the bed to die. According to Dr. Gagnon who performed the autopsy, death apparently came from suffocation from a hemorrhage into her fractured trachea and larynx. He hitch hiked to Limestone to make a date with another girl living there whose name had been given him by a fellow convict at the Houlton jail whom he met while he was serving time there on an intoxication charge. The respondent tried to cross the international boundary line at St. Leonard but was refused admission to Canada by the immigration officer on duty there. He was subsequently picked up near Van Buren by state trooper, Labree, shortly after noon on September 3rd, and in cooperation with state troopers, Bernard and Carmichael, was placed under arrest and taken back to the county jail at Houlton. Here he was examined in the presence of the county attorney, the sheriff, and other prosecuting officers. He was sober and talked freely and willingly. All his rights were carefully safeguarded and no inducement of any kind was held out to him to talk, nor was he threatened in any way.

The respondent, in addition to having admitted the killing of the deceased, made such admission in such language and in such manner that there can be but little doubt that he was one whose mind was devoid of those ordinary instincts of humanity which restrain and govern most men in their

dealings with their fellows. Anna Dunlap was perhaps not entitled to much; but she was entitled to life. And her deliberate and atrocious killing, and the unparalleled brutality of it as told by the respondent, was an offense against us all. We are unable to find in this gruesome record one palliating feature.

The respondent, after having been fully warned of his rights, told at the jail substantially the same story which he has told on the witness stand, "that he hit her three or four times, or five or six times, with the side of his hand, first, near the Adam's apple or here in the neck, and hit her in the face with his fist and she fell to the floor; he picked her up and put her on the bed; she was bleeding by the nose or eyes or mouth, he didn't seem to know which, and she was moaning when he left the room; he went out in the kitchen, washed his hands and face and combed his hair and left the room by the bedroom door; he went down on the street, taking his gear with him, and went over towards North Street and thumbed a ride north to Caribou; on arrival at Caribou he met a boy that he knew, went to a restaurant with him, and from there he got a ride over to Limestone to see a girl friend."

And later on, he said: "If you want to know who done the job, I done it." He said: "I hit her four or five times."

He was anxious to find out if there was first and second degree murder here in Maine and was told by the officers that we had no such distinction, just murder and manslaughter.

Jasper Lycette, the sheriff of the county, testified as follows:

"Q Now, Sheriff, did he make any statement as to what happened between him and this woman after he had had this fracas with the men?

"A Yes, he said that when he came back she was standing up somewhere near the bed and as I

> recollect he said, 'You dirty so-and-so,' and he said he struck her, he said 'like that with the heel of my hand on the throat and on the back of her neck and then I gave her several hard blows with my closed fist in her face."

Police Chief, Magaw, of Houlton, testified that the respondent said: "this woman was standing somewhere near the bed, I believe, and he said he let her have it right then and knocked her down, then he picked her up and threw her on the bed and hit her again."

Turmel himself took the stand and told the whole gruesome, brutal story of how Anna Dunlap died. His version of what happened at the Houlton jail corresponds with the officers' stories.

"A Well, I wouldn't say they tried to drive anything out of me. I was willing to tell them."

After telling how he hit her, we find the following:

"Q And she was moaning?

A She was moaning when I left the apartment and she was on the bed.

Q How bad was she bleeding?

A Oh, she was bleeding because I saw the blood dripping off her face.

Q Where did it come from?

A I can't recall whether it was coming from her nose or her ears."

Then in cross examination, we find the following:

"Q Did it take the fight out of her when you hit her across the throat?

A Not exactly the fight out of her.

Q What did she do?

A She took hold of my two hands and she was holding me close and in the meantime pain went through me and I broke loose and when

I broke loose I hit her with all my might with my fist.

Q You say you hit her with all your might, just as hard as you could? A. Well, I hit her. I was mad.

Q And those blows you struck knocked her down on the floor by the bed? A. That is right.

Q * * * When you left the room she was lying on the bed, blood coming out of her face and she was moaning, and you didn't care what happened to her?

A Well, I left. I know that.

Q And you went out the back door?

A I know it wasn't a nice thing to do."

We quote this testimony not merely to relate the details of this gruesome murder but to address ourselves to the one narrow issue before us. The respondent claims that the verdict should have been manslaughter not murder. The jury was correctly charged by the trial judge, and should have had in their minds the distinction between these two forms of homicide. This is either one or the other. There is no claim that this act was done in self defense; nor is there any other legal justification put forth for it.

Murder under our law is the unlawful killing of a human being "with malice aforethought, either express or implied." Rev. Stat. 1944, Ch. 117, Sec. 1. Malice aforethought does not necessarily mean that there must be specific intent to kill but our court has laid down the rule in the case of *State* v. *Knight,* 43 Me. 11, 137, as follows: "But in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, qualify or palliate the act, the law presumes it to have been done maliciously; and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice, which the law raises from the act of

killing, by evidence in defence." And Chief Justice Shaw, in *Commonwealth* v. *Webster,* 5 Cush. 295, 322, lays down the ancient rule as taken from East's Pleas of the Crown as follows: "but he who wilfully and deliberately does any act, which apparently endangers another's life and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense." Manslaughter is the unlawful killing of a human being without malice aforethought, express or implied. Rev. Stat. 1944, Ch. 117, Sec. 8. Such killing may take place in various forms. It may be done in the heat of passion or on sudden provocation, or it may even be accidental.

Where, as here, excessive force and brutality is used, it would seem to be very difficult for the respondent to produce any circumstances which would reduce the crime from murder to manslaughter. We have read the record over with the greatest care and there is not a single palliating circumstance therein. The jury was fully justified in their verdict of murder. The jury, to use the language of the court in *Commonwealth* v. *Fox,* 7 Gray, 585, 588, were fully justified in believing that this murder "proceeded from an evil disposition or a mind and heart regardless of social duty and fatally bent on mischief."

On the subject of implied malice and in substantiation of the statement that malice may be presumed from the killing, even when not done with a lethal weapon, there is an instructive note to the case of *Commonwealth* v. *Buzard,* reported in 22 A.L.R. (2d) 846 (Pa. 1950).

Counsel for the respondent argues that there was an abuse of discretion by the trial justice in admitting in evidence a photograph of the dead body of the deceased; that such photograph was too gruesome and could not but have prejudiced the jury against the respondent. Although exceptions to its admission were noted, they were not perfected. Were they now before us they could not be sus-

tained. The photograph was properly taken; it had relevancy in determining the atrociousness of the crime; it was no more gruesome than the testimony related by the respondent on the stand; in any event its admissibility was within the discretion of the trial justice. *State* v. *Turner,* 126 Me. 376; *State* v. *Stuart,* 132 Me. 107, 108.

The rights of the respondent were carefully protected both before and at all times during the trial. The judge was meticulous in seeing that he was given every safeguard which the law allowed him. The verdict could not have been otherwise.

Appeal dismissed.

Motion for new trial denied.

Judgment for the State.

WILLIAM AND GRACE K. BREWSTER
vs.
FRANK M. CHURCHILL

Franklin. May 13, 1952.

Referees. Objections. Exceptions.

Deeds. Boundaries. Description.

The filing of written objections to the report of a referee and the prosecution of exceptions to the overruling thereof and the acceptance of the report is appropriate procedure for enforcing a reserved right to exceptions on questions of law.

A referee's report must be interpreted in the light of the cause of action to which it relates and the reasons assigned as objections to its acceptance must be read in the light of the report.

The identification of a particular ruling of law in a referee's report, in the written objections filed to its acceptance, is sufficient if the language used leaves no doubt of such identification.

The location of a boundary line of property as described in a deed is a question of law.

Deed should be construed most strongly against grantors, and in favor of grantees.

A description used in a deed should be honored in its entirety, and not by reference to disjointed parts of it.

"Easterly" does not always indicate "due east," and when such is used more than once in a deed, it must have been intended that the same course was contemplated each time.

When a plaintiff in trover has secured an award not justified by evidence, under an erroneous ruling of law, and the record makes it apparent that he is entitled to some recovery, damages should be determined in subsequent proceedings.

ON EXCEPTIONS.

This is an action of trespass heard by a referee with the right of exceptions on questions of law reserved. The defendant filed written objections to the referees report and exceptions to its acceptance by a Justice of the Court. The case is before the Law Court on the exceptions. Exceptions sustained.

Berman & Berman,
Benjamin L. Berman, for plaintiff.

Currier C. Holman, for defendant.

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

MURCHIE, C. J. In this action of trespass, a referee, hearing the case with the right of exceptions on questions of law reserved, as authorized by Rule 42 of the Rules of Court, 129 Me. 519, filed a report awarding the plaintiffs a recovery of $1,900, applicable largely to hardwood and softwood timber which the defendant removed from land of the

plaintiffs under a claim of title thereto. Something was included, it is true, for damage caused to young growth and to the realty, in the course of the defendant's operation, but if he was the owner of the growth removed, those items would represent nothing more than an incident to a lawful woods operation. Defendant had title, as the grantee, direct or indirect, of parties to whom the plaintiffs had sold all the lumber of both species on a part of their land, to all he removed northerly of the southerly line described, identically, in the two deeds by which plaintiffs conveyed the same. The issue which must control the case is the location of that southerly line.

The line was described in said deeds as follows:

> "Commencing at a stone wall at the roadside; thence easterly along said stone wall and continuing in an easterly direction to land now or formerly owned by Fred O. Smith."

The referee decided that, after following the course of the wall from the roadside to its easterly end, the line ran "due east" therefrom to the westerly line of the Smith property. That decision was one of law and not of fact. It has been said many times in this Court that:

> "*What* are the boundaries of land conveyed by a deed, is a question of *law*. *Where* the boundaries are, is a question of *fact*. An *existing line* of an adjoining tract may as well be a *monument* as any other object. And the *identity* of a monument found upon the ground with one referred to in the deed, is always a question"

for the jury, i.e. one of fact. *Abbott* v. *Abbott*, 51 Me. 575, *Murray* v. *Munsey*, 120 Me. 148, 113 A. 36; *Perkins* v. *Jacobs*, 124 Me. 347, 129 A. 4. No question of identity is here involved. The issue is the location of the southerly boundary.

The defendant filed written objections to the report as required by Rule 21 of the Rules of Court, 129 Me. 511, to

lay the groundwork for prosecuting exceptions to its acceptance if such action was taken. This was the only procedure available to him to enforce his reserved right. *Camp Maqua Young Women's Christian Association* v. *Inhabitants of Poland,* 130 Me. 485, 157 A. 859; *Lincoln* v. *Hall,* 131 Me. 310, 162 A. 267; *Staples* v. *Littlefield,* 132 Me. 91, 167 A. 171; *Throumoulos* v. *First National Bank of Biddeford,* 132 Me. 232, 169 A. 307. The first of these cases calls attention to the change in practice enforced by the adoption of Rule 42 aforesaid, and the last makes it plain that the principle that allegations of error carried in bills of exceptions must be specific to justify review is applied in referred cases to written objections filed under Rule 21. The controlling force of the objections was emphasized in the recent case of *Kennebunk, Kennebunkport and Wells Water District* v. *Maine Turnpike Authority,* 145 Me. 35, 71 A. 2d. 520, where it was said, speaking of a referee's report and objections, that:

> "The report * * * must be interpreted in the light of the (this) alleged cause of action; and the reasons assigned as objection thereto must likewise be interpreted as applicable to the report."

Before proceeding to a consideration of the issue defendant purports to raise by his Bill of Exceptions, incorporating all material requisite for its determination, including copies of the report and the objections, and carrying assertion that he is aggrieved by all the rulings and findings in the report "for the reasons specifically stated" in the objections, we must resolve that raised by the plaintiffs, in reliance on such cases as *Heath, Appellant,* 146 Me. 229, 79 A. 2d. 810, and *Sard* v. *Sard,* 147 Me. 46, 83 A. 2d. 286, that said Bill is inadequate to present any issue because, as their brief states:

> "Nowhere in the Bill are the issues upon which the defendant claims reversal, set forth. The reasons by which defendant claims error are nowhere

> set out in the Bill. There is no allegation that the Justice below found facts without evidence, or made rulings contrary to law."

The references to the "Bill" and to the "Justice" must be intended to relate to the "objections" and the "Referee." The Justice whose ruling accepting the report is under review found no facts, with or without evidence, and made no rulings, contrary to law or otherwise, except the one challenged, the acceptance of the report. The ruling controlling the case was, as heretofore stated, that the southerly line of the lot of land described in the deeds aforesaid ran "due east" from the easterly end of the wall which controls its course for twenty-eight and a half rods from the roadside identified as the place of beginning.

If it could be said that the decision was grounded in factual findings, the position taken by the plaintiffs would be entirely sound. Such findings, made by referees, will not be reviewed on exceptions unless under an allegation that the findings were made without support of evidence, or credible evidence, *Staples* v. *Littlefield,* supra. This principle would preclude consideration of the amount of the damage award carried in the report of the referee if it was not apparent that that amount was determined by the ruling of law locating the property line rather than by determination of the quantity of growth involved or the measure of the value thereof.

Reference to the objections leaves no doubt that the defendant identifies the stated ruling of the referee as the one of which he complains. The phraseology is confusing, perhaps, in its declaration that the referee ruled that the line went "in an easterly direction," which he claims "was error," whereas the ruling was that it ran "due east," but no more so than the plaintiffs' references to the Bill and the Justice in designating the objections and the referee.

The ruling purports to have been made on the authority of *Foster* v. *Foss*, 77 Me. 279, quoting the declaration therein that unless there is some object to direct a course, the words "northerly and easterly" must "be taken to indicate a direction due north or east."

Before referring to that case, and the language quoted from it, several recitals in the report which seem to be intended to support the construction applied to the deeds should be noted. These are that a line projected easterly along the course of the stone wall would not strike the westerly line of the Smith property, a monument fixing the easterly bound of that described in the deeds, but would intersect that line projected southerly ninety-three feet southerly of the southwesterly corner of said property; that if the line follows a course "due east" from the end of the stone wall, it will strike the westerly line of the Smith property "almost at right angles" and cover "almost the shortest possible distance"; and that the word "continuing," as used in the description, "does not eliminate the possibility of some deviation of course" at the point identified. It is said also that in the sixty-eight days intervening between the execution of the two deeds, the plaintiffs and the grantee in the first of them went upon the property and ran a line from the place of beginning identified in it, along the stone wall and on an approximate due east course to the Smith property, which was spotted and painted in the presence of said grantee, and that the plaintiffs thereafter strung a wire along it. The report declares that this line "became the agreed and recognized line" binding upon the parties to the first deed "and their assigns," but the report makes it clear that the defendant had no knowledge of it until he discovered it in the course of his operation when, as the referee declares, he "made no effort to contact plaintiffs * * * but preferred to 'go by his deed' ".

The decision has no support in any of these recitals. Granting that the plaintiffs and the grantee in the first of

the two deeds were bound by the line on which they agreed, their agreement would not bind the grantee in any deed executed later, or the defendant as the successor in title of a subsequent grantee. Granting, also, that the use of the word "continuing" did not "eliminate the possibility of some deviation of course" at the point designated, we cannot fail to recognize that the plaintiffs, having run and marked a line after the delivery of the first deed, could have made the bounds intended to be established by the second one entirely definite by describing that marked line. Assuming the recital in the report that the grantee in the second deed had a financial interest in the growth conveyed by the first has the status of a factual finding, it is not material to the issue because if such interest gave him knowledge that an agreed line had been marked, his knowledge was not the knowledge of the defendant, and nothing was recorded in the Registry of Deeds to carry constructive notice of the fact.

The additional grounds of support mentioned in the report, that a line run due east from the stone wall to the Smith property would strike the latter "almost at right angles" and reach it in "almost the shortest possible distance," are considerations which under the authorities weigh forcibly against the decision instead of in its favor. The principle is undoubted that instruments of conveyance should be construed most strongly against grantors and in favor of grantees. This principle was applied in *Foster* v. *Foss, supra,* as it had been applied earlier in *Field v. Huston,* 21 Me. 69; *Pike* v. *Munroe,* 36 Me. 309, 58 Am. Dec. 751, and *Chapman* v. *Hamblet,* 100 Me. 454, 62 A. 215. It is of general application. Blackstone, Jones' Edition, Volume I, Book II, Page 1225, Sec. 518, 4; 18 C.J. 263, Sec. 219, Par. 9; 26 C.J.S. 361, Sec. 100, f; 16 Am. Jur. 530, Sec. 165.

Decisions rendered since that carried in *Foster* v. *Foss, supra,* show that the statement therein which the referee interpreted as meaning that "easterly" under the circum-

stances of this case must mean "due east" has been modified or changed if it was ever intended that it should be so interpreted. In *Cilley* v. *Limerock Railroad,* 107 Me. 117, 77 A. 776, it is said that:

> "in the matter of identifying descriptions in deeds, the words 'southerly' and 'westerly' are not always used to indicate a direction that is due south or due west."

That language was quoted with approval in *Brown* v. *McCaffrey,* 143 Me. 221, 60 A. 2d. 792, where a point is emphasized which has great force in the present case, the word "easterly" being used twice in describing a single bound in a deed. It was said in *Brown v. McCaffrey, supra,* that the parties "almost without lifting the pen from the deed" wrote the word "westerly" after using the words "westerly line," and that the "westerly" intended must have been the same in both cases.

An additional principle of general application in the construction of deeds, as announced in Blackstone, Jones' Edition, Volume I, Book II, Page 1225, Sec. 517, 3, recognized in this Court in *Keith* v. *Reynolds,* 3 Me. 393, and affirmed in *Jameson* v. *Balmer,* 20 Me. 425, is that the description in a deed should be honored in its entirety "and not merely * disjointed parts of it." In this connection it should be noted that the construction applied by the referee relates to nothing more than the words:

> "and continuing in an easterly direction to land now or formerly owned by Fred O. Smith."

It has already been emphasized that a particular easterly course, and not a general one, identified, when the word "easterly" was first used, by using the stone wall as a monument, which a plan introduced in evidence shows to be east twenty-six degrees and thirty-five minutes south, was disregarded, and it is equally true that the easterly bound of

the land described in the two deeds was disregarded. That bound is described in the words:

> "thence northerly along said Smith's westerly line to the Bradbury Road."

The deed under which the plaintiffs acquired title to a larger tract, on the very day they executed the first of the two deeds under which they conveyed growth to defendant's predecessors in title, is in evidence as an exhibit. The land described in the deeds they executed as grantors is a part of that larger tract. In their deed of acquisition, as in the deeds by which they conveyed, the Smith property and the Bradbury Road are monuments controlling the location of a part of the bounds of the property conveyed. In their deed of acquisition the westerly line of the Smith property is a monument for its full length, as are the southwesterly corner thereof and its point of intersection with said Bradbury Road. It is apparent by comparing the descriptions used in plaintiffs' deed of acquisition with that used in their deeds as grantors that the land described in the latter is a part of the larger tract acquired under the former, and that their intention must have been to convey all the growth on all the land they owned westerly of the Smith property and southerly of the Bradbury Road lying easterly of the road identified as the place of beginning in their deeds of conveyance and northerly of a southerly line never located on the face of the earth. The description they used was not appropriate to locate that southerly line as running due east over any part of its course.

The record carries the admission of the defendant that he cut a small amount of timber south of the true southerly line of the land described in the deeds under which he claims, which must be said, as a matter of law, to run from the easterly end of the stone wall identified as the place of beginning to the southwesterly corner of the Smith property, the monument controlling its eastern bound, and will

deviate very slightly from the exact course of said wall. This makes it essential that the amount and value of such timber be determined in appropriate subsequent proceedings, to fix the measure of damages the plaintiffs are entitled to recover in this action.

Exceptions sustained.

ONESIME J. BOLDUC

vs.

LINWOOD J. PINKHAM, ET AL.

Kennebec. Opinion, May 13, 1952.

Constitutional Law. Zoning. Exceptions and Variances.

The 14th Amendment to the Constitution of the United States does not prohibit zoning legislation in the States.

Neither the Fifth Amendment to the Constitution of the United States nor the Constitution of Maine prohibit zoning legislation in this State.

The provisions of R. S. 1944, Chap. 80, Sec. 88, as amended, impose no mandatory requirement that zoning ordinances shall establish general rules permitting exceptions and variances, as such.

The failure of the City to file its zoning map in the office of the City Clerk, in accordance with the recital of its zoning ordinance does not render the ordinance invalid against one having knowledge of the lines of the zone established thereby.

ON EXCEPTIONS.

This is a Bill in Equity brought forward for review before the Law Court on plaintiff's exceptions to a ruling sustaining the defendant's demurrer and dismissing the process. Exceptions overruled. Decree below affirmed.

Jerome G. Daviau, for Plaintiff.

Arthur Levine, for Defendant.

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

MURCHIE, C. J. The plaintiff in this Bill in Equity, according to factual allegations carried in his amended process, admitted to be true by defendants' demurrer, *Brown* v. *Guy Gannett Publishing Co.*, 147 Me. 3, 82 A. 2d. 797; *Lea* v. *Robeson,* 12 Gray, 280; Whitehouse Equity Practice, Sec. 213 (Vol. I, Page 393), is, and has been for a long time, engaged in the bakery business in the City of Waterville, and is the owner of a tract of land therein, having a frontage on Grove Street, which he purchased in 1945 for the express purpose of building a bakery thereon. Additional factual allegations, so admitted, are that the erection of a building on said land in the time intervening between his acquisition of it and the enactment of a Zoning Ordinance by said City, the pertinent provisions of which will be noted hereafter, was impossible because of post-war shortages and economic conditions entirely beyond his control, and that enforcement of the ordinance, without recognition that the plaintiff is entitled to an exception or variance from its regulations, will reduce the market value of said land and destroy its marketability.

The defendants are Linwood J. Pinkham, the Building Inspector of the City of Waterville, and said City. The prayers of plaintiff's process are that the defendants, their agents, employees and attorneys, be restrained from enforcing said Zoning Ordinance against the plaintiff and his property aforesaid. The case is brought forward for review on plaintiff's exceptions to a ruling sustaining the defendants' demurrer and dismissing the process.

The grounds on which plaintiff seeks the relief claimed are that the Zoning Ordinance, if enacted within the authorization carried in the enabling legislation under which the City purported to act when adopting it on April 6, 1948,

R. S. 1944, Chap. 80, Secs. 84 to 89 inclusive, is unconstitutional, because it violates the Fifth and the Fourteenth Amendments to the Constitution of the United States and some unspecified provision of the Constitution of this State, and that it is void and of no effect, without reference to the question of constitutionality, because it does not define the lines or limits of the zones intended to be established by its terms with sufficient clarity to permit a property owner to determine whether his land is in or out of any particular zone, and fails to make proper provision for "exceptions and variances."

We deal with the constitutional question first, notwithstanding the principle that such questions should not be resolved unless essential to the decision of a case, *Payne* v. *Graham,* 118 Me. 251, 107 A. 709, 7 A.L.R. 516; *Morris* v. *Goss,* 147 Me. 89, 83 A. 2d. 556, because neither the Fifth Amendment to the Constitution of the United States nor the Constitution of this State contains any provision infringed by the enabling legislation, and the Supreme Court of the United States, in decisions binding upon this Court, *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016; *Zahn* v. *Board of Public Works,* 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074, has declared that the Fourteenth Amendment to the Constitution of the United States does not prohibit zoning legislation in the states. The binding force of decisions of that Court in the construction of the Federal Constitution, on this Court, has always been recognized. *State* v. *Furbish,* 72 Me. 493; *State* v. *Intoxicating Liquors,* 102 Me. 385, 67 A. 312, 120 Am. St. Rep. 504.

The dual grounds asserted for the claim that the Zoning Ordinance, as enacted, does not meet the requirements of the enabling legislation must be determined by reference to its provisions. A copy of it is attached to the amended process as an Exhibit. It purports to divide the City into

Residence, Commercial and Unrestricted zones without defining the lines which divide or outline them otherwise than by reference to a plan incorporated in it by the recital that it is:

> "dated April 1948 and filed in the office of the City Clerk,"

and to establish regulations under which no business other than a few enumerated ones, which do not include the bakery business, shall be carried on in a Residence zone, and that none of several enumerated kinds, which again do not include the bakery business, shall be conducted in a Commercial zone, except so far, in each instance, as shall be permissible as a "non-conforming use," under a provision which recognizes that property devoted to any business at the time of the enactment of the ordinance may be so devoted without interruption until abandoned or discontinued, and that the right to continue it shall not be terminated by the destruction of any building involved if reasonable expedition is used in the replacement or reconstruction of it.

The ordinance designates the Building Inspector as the official charged with its enforcement, and constitutes a Board of Zoning Adjustment to administer it, and hear and determine appeals from the granting or refusal of building permits. It specifies that said Board shall have its office "in the office of the Mayor." It carries no general rules for the guidance of said Board in performing its appeal function, or for permitting "exceptions and variances," except so far as they are authorized under the provisions concerning non-conforming uses. Plaintiff's appeal to said Board was denied on the ground that it had no authority to grant a variance.

The plaintiff's claim that the ordinance was not enacted within the authorization of the enabling legislation because of the omission of any provision for exceptions and variances, as such, is grounded in his asserted right to have a

variance, as a matter of law, because his purchase of the property in question was made prior to the enactment of the ordinance and because of his intention, at the time, to erect a bakery thereon. It is obvious that he can have no greater or other right than his predecessor in title would have had if the property had not been sold to him, or than that of the owners of any and all property abutting his, which lies within the same zone. The fundamental purpose of zoning legislation, to create and maintain residential districts from which businesses and trades of any and every sort would be excluded, ultimately, would be defeated if plaintiff's claim could be asserted successfully. The ordinance gives full protection to uses which were in operation at the time of its enactment. It is not fatal to its validity that no further or other provision for exceptions and variances is contained in it. The mandatory provision of the enabling legislation with reference to exceptions and variances, as originally enacted, P. L. 1943, Chap. 199, Sec. 5, was made directory by the amendment of R. S. 1944, Chap. 80, Sec. 88, where the original section now appears, carried in P. L. 1947, Chap. 109.

Plaintiff's claim that the ordinance is invalid because the lines of the zones are not defined with clarity is asserted on the ground that no map such as is identified by its recital:

> "was filed in the office of the City Clerk at the time of the enactment of the (this) ordinance * * * and * there is not now in fact any such zoning map filed in the City Clerk's office."

The allegation to this effect is supplemented by that heretofore noted, that property owners are unable to determine whether particular parcels are "in or out" of any particular zone. The latter allegation can have no bearing on this case, where the ordinance imposes no regulation upon the use of property for the business in which the plaintiff is engaged, except in a Residence zone, and his application for a build-

ing permit discloses his knowledge that his property is in such a zone. Moreover, his allegation that that application was for a building of specified size and materials:

> "two stories with front elevation adapted to zoning requirements,"

indicates that he must have been aware of the "requirements" within the zone in which his property is located.

The admission of the defendants, carried by their demurrer, that no zoning map was filed, in the place designated for its filing, at the time of the enactment of the ordinance, and that none is on file there at the present time, or when the demurrer was filed, would be troublesome if this Court had not had occasion in the recent case of *Toulouse* v. *Board of Zoning Adjustment,* 147 Me. 387, 87 A. (2nd) 670, to examine a copy of the map which locates the lines of the zones established by the ordinance. Whether the explanation lies in the fact that the Board of Zoning Adjustment, constituted as the board of appeals required to be established by the terms of the enabling legislation, has filed the zoning map which governs its action in its own office, which is in that of the Mayor of the City, as heretofore noted, we cannot say on the present record. Whatever the fact, the plaintiff is not in ignorance, as he alleges, in effect, about the location of his property with reference to the pertinent zone lines.

Exceptions overruled.

Decree below affirmed.

LESTER T. JOLOVITZ,
Assignee of Herman J. Mullen
vs.
REDINGTON & CO., INC.

Kennebec. Opinion, May 13, 1952.

Evidence. Stamp Contracts. Lotteries.

The decision of the presiding Justice, sitting without a jury, is conclusive if there is any legal or credible evidence to justify his decision and a party is not aggrieved by the reception of immaterial or illegal testimony if there is sufficient testimony to authorize or require the Court to render the decision that was made.

By R. S. 1944, Chap. 126, Sec. 18 it was the intention of the legislature to prohibit every pecuniary transaction in which chance has any place "affording a chance to get something for nothing."

The law leaves the parties to an illegal contract where it finds them.

If the contract is divisible, an action may in some cases be maintained for legal items.

If a contract is not advisable and there are both legal and illegal elements, neither can be recovered.

Where the evidence justifies a finding that the contract is illegal or that the plaintiff failed to perform as alleged a judgment for defendant will not be disturbed.

ON EXCEPTIONS.

This is an action of assumpsit upon a "Stamp" contract. The defendant contended that the contract was a lottery and that the plaintiff failed to perform its part of the contract. Judgment was rendered in favor of defendant and plaintiff brings exceptions before the Law Court. Exceptions overruled.

Jerome G. Daviau, for Plaintiff.

H. C. Marden, for Defendant.

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

FELLOWS, J. This action of assumpsit was brought by Lester T. Jolovitz as Assignee for benefit of creditors of Herman J. Mullen for the amount claimed due on a "Stamp" contract entered into by Redington & Co., Inc. The case was heard by the presiding Justice of Kennebec Superior Court without a jury. Judgment was rendered in favor of the defendant without a specific finding of facts. The case is now before the Law Court on plaintiff's exceptions. The exceptions are overruled.

The principal facts that could have been found on the evidence, by the presiding Justice, are that Herman J. Mullen, the assignor of the plaintiff, was engaged in a sales promotion scheme called "Self-Defense Stamp Club" where for a cash consideration paid to Mullen by the participating store, Mullen was to install in the store, during a stated period, all necessary printed materials, and to furnish radio and newspaper advertising to enable the participating store to purchase stamps of Mullen from time to time, and to issue the stamps to customers in order to increase its sales. Prizes were to be awarded to contestants. The defendant, Redington & Co., Inc. was to pay Mullen $75.00 to enable it to participate, which sum was paid. The contract was to be in effect for one year commencing April 26, 1948. During this period the defendant was to give to its customers from books purchased of and supplied by Mullen, one "Self-Defense Stamp" for each five dollars' worth of merchandise purchased. With each stamp so issued, and taken by the customer, the customer was entitled to cast five thousand votes for himself, or any other person of his choice, towards prizes to the winning contestant to be awarded by Mullen, which prizes consisted of Hudson Automobile, five piece Bedroom Suite, Electric Refrigerator, DeLuxe Model Radio, Electric Washer, etc. On the stamps were reproduc-

tions of various military insignia, and the stamps held by the participating store and given out by it, were made up into books in such a manner that the kind of insignia was concealed, until the storekeeper detached the stamp from his book. The number of duplicate stamps varied greatly. The stamps so issued by the participating store were to be purchased by the store from Mullen at the rate of ten cents for each Stamp. In addition to the "5000 vote" voting privilege to each customer with each stamp, and as part of the stamp scheme, customers received a "stamp album" bearing on its pages facsimiles of the stamps issued and given with the $5.00 purchase, and prizes or awards, either in cash or U.S. Defense Stamps or Bonds, were to be given to the customer when a page, or all the pages, of the album were filled. There was evidence that it was very difficult to fill an album, or some pages of the "album," because the chance of ever getting all the stamps described in the "album" was very remote. A few stamps carrying certain insignia rarely, if ever, appeared.

As one witness testified, "if he was lucky enough to fill the pages he got money * * * it was the idea of folks trying to get money." Another witness said: "You would receive a certain amount depending on which page you would fill (with stamps) * * * three on page 1 $1.00 in cash. Four on page 3 would pay $2.00. Five on page 5 would give $3.00. Five on page 6 would give $4.00, and so on up to page 15, which covers 15 stamps and the amount is $30.00 in cash."

On page 2 of one of the "Stamp albums" introduced in evidence, the cash value is given as follows: "WE PAY YOU TO SAVE Self Defense Stamps and Cash in, as follows: The three stamps listed on page 1 pay you $1.00 in Cash. The four stamps listed on page 3 pay you $2.00 in Cash. The five stamps listed on page 5 pay you $3.00 in Cash. The five stamps listed on page 6 pay you $4.00 in Cash. The five stamps listed on page 7 pay you $5.00 in Cash. The six

stamps listed on page 8 pay you $6.00 in Cash. The six stamps listed on page 9 pay you $6.00 in Cash. The eight stamps listed on page 11 pay you $8.00 in Cash. The nine stamps listed on page 13 pay you $9.00 in Cash. The nine stamps listed on page 14 pay you $10.00 in Cash. The nine stamps listed on page 15 pay you $11.00 in Cash. The ten stamps listed on page 16 pay you $12.00 in Cash. The twelve stamps listed on page 17 pay you $20.00 in Cash. The fifteen stamps listed on page 19 pay you $30.00 in Cash."

The plaintiff claimed, and offered evidence to indicate that the plaintiff's assignor, Herman J. Mullen performed all the conditions of the contract with defendant Redington & Co., Inc. but the defendant failed to perform, in that it failed to give out stamps to every customer that made a $5.00 purchase, and failed to purchase "the first 2000 self defense stamps" and other stamps of Mullen, and failed to purchase stamps required by the amount of its sales.

The defendant contended and offered evidence to show that the stamp scheme was a lottery and that filling the "stamp album" involved chance or gaming, and the defendant offered testimony also, from which it might be found by the Justice hearing the case, that the plaintiff's assignor failed to reasonably advertise by radio and newspaper, as required in the contract; that he failed to list the standing of contestants in the participating stores, whereby the interest in the contest was not properly promoted; and failed to furnish all the material promised; and failed to award the prizes won by certain contestants, all as required by the contract.

In answer to the contentions of the defendant, the plaintiff contended, and offered evidence to indicate that the parties did not "consider" this scheme a lottery but a "discount"; that filling the pages of the stamp album was only

a "minor part" of the whole scheme; that there was advertising according to contract, or there was a waiver that the defendant's complaint about tabulation and listing was waived by defendant; that "since the defendant breached the contract first by failing to give stamps" its first breach rendered complete performance on the part of the plaintiff impossible, because Mullen was not receiving the necessary money to obtain prizes, and at the close of the contest the winners of prizes agreed to accept and did accept a cash arrangement instead of the automobile and other prizes promised.

The decision of the presiding Justice, sitting without a jury, is conclusive if there is any legal and credible evidence to justify his decision. *Cote et al, Appellants,* 144 Maine, 297. It is otherwise if the only inference or conclusion that can be drawn from the evidence does not support the decision. *Grover, Petr.* vs. *Grover,* 143 Maine, 34; *Close* vs. *Blackwell,* 124 Maine, 429, or if there is no evidence to support it. *Proctor* vs. *Carey,* 142 Maine, 226.

A lottery, or scheme as defined by Revised Statutes (1944), Chapter 126, Section 18, is as follows:

> "Every lottery, policy, policy lottery, policy shop, scheme, or device of chance, of whatever name or description, whether at fairs or public gatherings, or elsewhere, and whether in the interests of churches, benevolent objects, or otherwise, is prohibited; and whoever is concerned therein, directly or indirectly, by making, writing, printing, advertising, purchasing, receiving, selling, offering for sale, giving away, disposing of, or having in possession with intent to sell or dispose of, any ticket, certificate, share or interest therein, slip, bill, token, or other device purporting or designed to guarantee or assure to any person or to entitle any person to a chance of drawing or obtaining any prize or thing of value to be drawn in any lottery, policy, policy lottery, policy

> shop, scheme, or device of chance of whatever name or description; by printing, publishing, or circulating the same, or any handbill, advertisement, or notice thereof, or by knowingly suffering the same to be published in any newspaper or periodical under his charge, or on any cover or paper attached thereto; or who in any manner aids therein, or is connected therewith, shall be punished by . . . The printing, advertising, issuing, or delivery of any ticket, paper, document, or material representing or purporting to represent the existence of, or an interest in a lottery, policy lottery, game, or hazard shall be prima facie evidence of the existence, location, and drawing of such lottery, policy lottery, game, or hazard, and the issuing or delivery of any such paper, ticket, document, or material shall be prima facie evidence of value received therefor by the person or persons, company or corporation who issues or delivers or knowingly aids or abets in the issuing or delivering of such paper, ticket, document, or material."

The statute is broad and comprehensive and if there is any element of chance it is "gambling." It was the intention of the legislature to prohibit every pecuniary transaction in which chance has any place, "affording a chance to get something for nothing." If the "element of lot or chance is in it, it is enough." *Lang* v. *Merwin,* 99 Maine, 486, 489; *State* vs. *Willis,* 78 Maine, 70; *State* vs. *Baitler,* 131 Maine, 285; *State* vs. *Googin,* 117 Maine, 102. It is true that some stamps issued by merchants are valid transactions and not within the prohibition of the statute, as the stamps act only as the amount of a discount. The credit, or value in other merchandise, may be given when the stampbook or "album" is filled, or partially filled. Such a plan is lawful to encourage business, if it does not contain the chance or "gaming" element. The same is true of so-called "popularity contests." *Dion* vs. *St. John Bap. Soc.,* 82 Maine, 319. See also *Morris* vs. *Telegraph Co.,* 94 Maine, 423; *State* vs. *Liv-*

ingston, 135 Maine, 323; *Berger* vs. *State,* 147 Maine 111, 83 Atl. 2nd., 571; *State* vs. *Pooler, et al,* 141 Maine, 274.

The law leaves the parties to an illegal contract "where it finds them." *Conley* vs. *Murdock,* 106 Maine, 266; *Groton* vs. *Waldoborough,* 11 Maine, 306. "No party can recover for acts or services done in direct contravention of an express statute." *Harding* vs. *Hagar,* 60 Maine, 340. If the contract is a divisible one, and there is a separate price for each of many articles sold, an action may in some cases be maintained for legal items. *Boyd* vs. *Eaton,* 44 Maine, 51. Where the contract is an entirety, and includes both legal and illegal elements, neither can be recovered. *Wirth* vs. *Roche,* 92 Maine, 383. See also *Dyer* vs. *Curtis,* 72 Maine, 181; *Hovey* vs. *Storer,* 63 Maine, 486.

If the contract entered into between the parties contains no element of chance (as claimed in this case by the plaintiff and denied by defendant) and the lottery statute does not apply, the plaintiff must show under his declaration that the contract was performed on his part as alleged. *Rogers* vs. *Brown,* 103 Maine, 478; *Veazie* vs. *City of Bangor,* 51 Maine, 509. The party violating a contract, or failing to complete without legal excuse, has no action to recover pro rata compensation. *Levine* vs. *Reynolds,* 143 Maine, 15, 22.

There was sufficient legal and credible evidence to support, authorize and justify the decision of the sitting Justice in giving judgment for the defendant in the case at bar. He could find and undoubtedly did find that the contract was an illegal one, because the filling of the stamp album and payment for its pages involved chance. On the other hand, he could find that the evidence did not prove that the plaintiff was entitled to recover, if this contract can be construed as legal. The exception to the finding for defendant must be overruled.

Exceptions were also taken by the plaintiff to the admission of certain immaterial testimony regarding failure to

award prizes, as being hearsay; to the admission of a conversation between the parties as to why certain parts of the written contract were struck out, as explaining possible ambiguity; and to testimony relating to the public interest to obtain stamps as bearing on extent of advertising. All of this testimony was neither material nor was it prejudicial. It was not of the slightest importance with regard to the decision made by the Court in this case.

The case was heard by the Court without a jury. The Court rendered a decision for the defendant, and there was ample evidence of unquestioned validity, legality, and credibility to sustain it. It has long been the law in Maine that where a decision is made by the Court, without the intervention of a jury, a party is not aggrieved by the reception of immaterial or illegal testimony if there is sufficient legal testimony to authorize or require the Court to render the decision that was made. *Portland* vs. *Rolfe,* 37 Maine, 400; *Pettengill* vs. *Shoenbar,* 84 Maine, 104. Inadmissible evidence received by the Court, hearing a case without a jury, furnishes no ground for exception unless it appears that his decision was based in whole or in part on such evidence. *Haskell* vs. *Hervey,* 74 Maine, 192. "Factual decisions made by triers of fact will not be disturbed in appellate proceedings, if supported by credible evidence." Murray, J., in *Brown* vs. *McCaffrey, et al,* 143 Maine, 221, 226.

Exceptions overruled.

INHABITANTS OF BOOTHBAY
vs.
INHABITANTS OF BOOTHBAY HARBOR

Lincoln. Opinion, May 16, 1952.

Public Utilities. Municipal Corporations.

Taxation. Exemptions.

It is a condition of R. S. 1944, Chap. 81, Sec. 6, Par. I as amended by P. L. 1945, Chap. 90 that tax exempt property be "appropriated to public uses."

Under the statutes exempt property of a public municipal corporation outside the corporate limits must form a part of the water utility system for either corporate or municipal purposes.

A use otherwise public does not become private by reason of ownership by a town.

The wisdom of placing a town in the business of a public utility outside its own territorial limits is a matter for the legislature not the court.

ON EXCEPTIONS.

This is an action of debt by the Town of Boothbay to recover taxes assessed upon Boothbay Harbor water system property. The case is before the Law Court upon exceptions to the acceptance of a referee's report favorable to plaintiff. Exceptions sustained.

Saul H. Sheriff,
Robert W. Donovan, for Plaintiff.

David E. Moulton,
Alexander A. LaFleur,
Locke, Campbell, Reid & Hebert, for Defendant.

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

WILLIAMSON, J. This is an action in a plea of debt by the town of Boothbay to recover taxes assessed upon certain property in Boothbay forming a part of the water system owned by the defendant town of Boothbay Harbor. The case is before us on exceptions to the acceptance of the report of the referee who found for the plaintiff.

The issue is: Was the property taxable? The regularity and sufficiency of the assessment, commitment and other steps leading to this action are not here questioned. The answer lies in the meaning and application of the statute, which reads in part as follows:

"The following property and polls are exempt from taxation:

> 'I. The property of the United States so far as the taxation of such property is prohibited under the constitution and laws of the United States, and the property of this state, and the property of any public municipal corporation of this state appropriated to public uses, *if located within the corporate limits and confines of such public municipal corporation, and also the pipes, fixtures, hydrants, conduits, gatehouses, pumping stations, reservoirs, and dams, used only for reservoir purposes, of public municipal corporations engaged in supplying water, power, or light, if located outside of the limits of such public municipal corporations, ...*"
>
> *R. S. Ch. 81, Sec. 6, Par. I, as amended by P. L. 1945, Ch. 90.*

The property assessed admittedly is within the classification of "pipes, fixtures — etc." (italicized above), is owned by the town of Boothbay Harbor, a corporation engaged in supplying water, and is located outside of the territorial limits of Boothbay Harbor. Tax exemption depends upon whether the defendant has met the remaining conditions of the statute.

We must now ask: (1) Was Boothbay Harbor a public municipal corporation with respect to the property assessed? (2) Is it a condition of the statute that tax exempt property be "appropriated to public uses"? (3) If so, was the property assessed so appropriated?

The Boothbay Harbor water system has its source of supply in Boothbay. It serves and is designed to serve the communities and inhabitants of Boothbay Harbor, Boothbay and Squirrel Island, a summer colony within the town of Southport, with water for fire protection and for commercial and domestic uses.

We are not here concerned with an incidental disposal of a surplus of water by Boothbay Harbor outside of its limits. The referee well said: "The outside service is substantial and, in the absence of evidence to the contrary, indicates a plant and system fitted and intended to serve the several towns." It appears that approximately 28½% of the gross revenue comes from the service in Boothbay and Squirrel Island.

The authority and power of Boothbay Harbor with respect to the water system are derived from a series of Acts of the Legislature, of which the most important is "An Act authorizing the town of Boothbay Harbor to purchase and succeed to the rights of the Boothbay and Boothbay Harbor Water Company." *P. & S. L. 1895, Ch. 56 as amended.* Prior to 1895 we find that in "An Act to divide the town of Boothbay and incorporate the town of Boothbay Harbor" Boothbay Harbor was authorized to contract "for the supply of water for all domestic, sanitary, municipal and commercial purposes"—and to maintain and operate "such a system of water works in its corporate capacity"—. *P. & S. L. 1889, Ch. 381.*

The Boothbay and Boothbay Harbor Water Company was incorporated in 1891 "for the purpose of conveying to and

supplying the inhabitants of Boothbay and Boothbay Harbor, adjacent islands and neighboring territory, with water for all domestic, sanitary, municipal and commercial purposes"—. *P. & S. L. 1891, Ch. 241.*

In the 1895 law Boothbay Harbor was authorized and empowered to purchase and own stock in the Boothbay and Boothbay Harbor Water Company and also to acquire "and exercise all the rights, property, franchises and privileges of said corporation." The town was given the right of eminent domain. The general control and management of the system was placed in the hands of commissioners elected by the town.

It is in Section 2 of this Act as amended that we find fully set forth the authority and power of the defendant town. The section now reads:

> "Sect. 2. Said town is further authorized and empowered, in case it obtains control of said corporation either directly by purchase, or indirectly through ownership of stock, to take water from Adams pond in the town of Boothbay or from any other ponds or supply within said towns of Boothbay and Boothbay Harbor, sufficient for all domestic, sanitary, municipal and commercial purposes, and to take and convey the same, through the *towns of Boothbay and Boothbay Harbor,* **and to** Squirrel Island. Said town is also authorized and empowered, to sell water to the town of Boothbay and to any company, individual, firm or corporation in the towns of Boothbay and Boothbay Harbor, and Squirrel Island."

When originally enacted the section did not include the clause "or from any other ponds or supply within said towns of Boothbay and Boothbay Harbor" added in 1937, and ended with the underscored words "towns of Boothbay and Boothbay Harbor." In 1903 the section was amended by adding:

> "and Southport, and to Squirrel Island, Mouse Island, and other adjacent islands. Said town is also authorized and empowered, to sell water to the towns of Boothbay and Southport, and to any company, individual, firm or corporation in either of said towns, or either of the adjacent islands."

In 1923 Southport, Mouse Island and other adjacent islands were stricken from the section under a law significantly entitled "An Act to Relieve the Town of Boothbay Harbor from All Liability and Duty to Sell or Furnish Water for Any Purpose to a Portion of the Town of Southport and the Inhabitants Thereof, by Reason of Ch. 203, P. & S. L. of 1903." The section, except as amended in 1937 to enlarge the available sources of supply, has since remained without change. *P. & S. L. 1903, Ch. 203; P. & S. L. 1923, Ch. 7; P. & S. L. 1937, Ch. 52, Sec. 1.*

In 1894 Boothbay Harbor constructed a water system under the authority of the 1889 Act, and shortly after the 1895 Act became effective, it acquired the charter rights of the water company. For over a half century Boothbay Harbor has owned, maintained and operated the water system.

Returning to the questions we will answer the second and third at the outset. In our view only property appropriated to public uses is tax exempt under the statute; and further the property here assessed was so appropriated.

The argument of the defendant is that even if the property was not appropriated to public uses, it would nevertheless be tax free. That is, the defendant's position is that ownership, and ownership alone, by Boothbay Harbor of the given types of property outside of the limits of the town determined the exemption, and "public use" was not a test.

In *City of Bangor v. City of Brewer*, 142 Me. 6, 45 A. 2d 434 (1946) will be found a complete study of the history and of the purpose and effect of Paragraph I, which it is unnecessary here to repeat. It is sufficient to note that the

Legislature added to Paragraph I of the Statute in 1903 the words "and the property of any public municipal corporation of this state, appropriated to public uses," and in 1911 the words italicized. *P. L. 1903, Ch. 46; P. L. 1911, Ch. 120.*

The words "appropriated to public uses" with relation to taxation were well understood in 1903. For example, the property of a private water company was "appropriated and devoted to a public use," and hence could be exempt from tax. *City of Portland v. Portland Water Company,* 67 Me. 135 (1877). A village corporation was held a public municipal corporation and the village hall "exempted by implication from the general provisions of the statute in relation to taxation, as property appropriated to public uses." *Camden v. Camden Village Corp.,* 77 Me. 530, at 534, 1 A. 689 (1885).

In the *Camden case* the use was in the exercise of a function of government, and in the *Portland case* for purposes of a public utility. In either event with reference to taxation, the use was "public." It was with this meaning that the words were carried into the statute in 1903. See *Kennebec Water District v. City of Waterville,* 96 Me. 234, 52 A. 774 (1902) ; *City of Augusta v. Augusta Water District,* 101 Me. 148, 63 A. 663 (1906) ; *Laughlin v. City of Portland,* 111 Me. 486, 90 A. 318 (1914).

The 1911 amendment (the words italicized) created a new test for property outside the corporate limits without, however, destroying the test of "public use." First, there clearly appears an intention to limit and not to enlarge exemptions, or in other words, to subject to tax certain property previously exempt. *Whiting v. Lubec,* 121 Me. 121, 115 A. 896 (1922). Second, the exempt outside property of a public municipal corporation "engaged in supplying water, etc." must form part of a utility system for either corporate or municipal purposes.

The property assessed in fact was appropriated to public uses. It was included within a public utility system. Had it been owned by a privately owned utility, or by a water district, for example, the "public uses" would be unchallenged. No more can it be here said that a use otherwise public became private by reason of ownership by a town.

The decisive question remains: Was Boothbay Harbor a public municipal corporation with respect to the property assessed? The referee in his report said:

> "So far as the defendant Town employs its system for town uses and uses of its own inhabitants, it is functioning as a public municipal corporation. So far as it furnishes water to the customers of both towns and inhabitants thereof outside its own boundaries, it assumes for taxation purposes the role of a private corporation engaged in a commercial enterprise for its own profit."

And again:

> "The case presents the question of taxation where there is a mixed use, that is, a public use and private use by the municipality, of the same property. Is such property taxable? I think it is."

We do not understand the referee concluded that the property was not appropriated to public uses within the meaning we give to the term. He had in mind, we believe, the differences in taxation based on ownership by a public municipal corporation ("public use") and on ownership by a privately owned utility ("private use").

By comparison with other situations we may better understand the nature of the defendant as owner of the property here assessed. Boothbay Harbor obviously is neither a water company, nor a water district. Nor does it own the stock of a public utility corporation, with control and management by representatives of the town, as in *Greaves v. Houlton Water Co.*, 140 Me. 158, 34 A. 2d 693 (1943) (first

Greaves case), and *Greaves v. Houlton Water Co.*, 143 Me. 207, 59 A. 2d 217 (1948) (second Greaves case). It is equally clear that Boothbay Harbor is a public municipal corporation, at least in so far as water service for the town and its inhabitants within its own borders is concerned. *Woodward v. Water District*, 116 Me. 86, 100 A. 317 (1917), and *Laughlin v. City of Portland, supra* at 493. Boothbay Harbor unquestionably could hold tax free in Boothbay the types of property italicized in the quotation from the statute, provided the service was limited to the territory of Boothbay Harbor. In such event the situation would be parallel with that found in *Whiting v. Lubec, supra*, and the property would be tax free. Incidental service outside of Boothbay Harbor would not destroy the exemption.

In our view Boothbay Harbor acted as a public municipal corporation and not as a private corporation in supplying water to Boothbay and Squirrel Island.

If a water company owned the system of course the property would be taxable. If, however, a water district of the conventional type covering, let us say, all or part of Boothbay Harbor with authority to serve Boothbay, Boothbay Harbor and Squirrel Island, was the owner, the property would be tax exempt.

In *City of Augusta v. Augusta Water District, supra*, in 1906 the Court first applied the 1903 amendment to Paragraph I of the statute, *supra*. The water district was held a public municipal corporation, and accordingly its property appropriated to public uses was exempt from tax. The decision had been foreshadowed by *Kennebec Water District v. City of Waterville, supra*, in 1902, in which the Court at page 245 defined the water district in terms of the municipality as follows:

> "The Kennebec Water District is a quasi municipal corporation. By the first section of its char-

> ter it is created not only a body corporate, but also a body politic. Its purposes are purely public. It is invested with the power and charged with the duty of furnishing the territory and the people within its limits a supply of water. Its purposes and its duties in this respect, are as extensive as could be conferred by the legislature upon a municipality. It is an agency, so far as supplying water is concerned, in municipal government. We are of opinion that the Kennebec Water District has, under the grants contained in its charter the right to take the water system of the Maine Water Company, as would a municipality under a like grant."

It is a general and well established rule that apart from clear legislative authority, a municipal corporation cannot extend its services (except incidentally) beyond its borders. As Justice Manser well said:

> "The primary objects to be accomplished by a municipal corporation are to promote the welfare and public interest of its inhabitants and not the promotion of the interests of those residing outside its corporate boundaries."

First Greaves case, supra, at page 162.

There is nothing in our view, however, to prevent the State from providing for a water supply for the area here served by a privately owned utility, a quasi municipal corporation such as a water district, or through the agency of an existing municipal corporation. The private utility would not qualify as a public municipal corporation, and so its property would be taxable. But if the water district is tax free, why should not the town have like exemption?

The Court has considered the 1911 amendment to Paragraph I of the statute (the words italicized), *supra,* in four cases.

Whiting v. Lubec, supra, in 1922, and *City of Bangor v. City of Brewer, supra,* in 1946 do not touch upon our par-

ticular problem. In each case the question was whether the property was within the types exempt by the statute. Admittedly such is the situation before us. In both cases apparently the property of town A. located in town B. was used only in connection with services within A. No question of service outside the owning or taxed municipality arose.

We come to the two cases of *Greaves v. Houlton Water Co., supra.* The town of Houlton owned the entire capital stock of the Houlton Water Co. and managed and controlled the company through directors elected by the town. Poles and transmission lines used for distribution of electricity in the town of Hodgdon were held taxable in the *First Greaves case* in 1943. The Court said at page 165:

> "We, therefore, conclude that, by legislative action and intendment, the corporate entity of the Houlton Water Company has been continued and maintained separate and distinct from the town of Houlton; that the corporation has been endowed with authority to act in a dual capacity, one as a public municipal corporation so far as the town of Houlton and its inhabitants are concerned, and the other as a private enterprise in furnishing electric current to a dozen other towns and their inhabitants for their convenience and for its private gain. The duties, powers, rights and immunities of the municipality of Houlton have not been extended by legislative grant beyond its own boundaries. It has been given no right to assume any municipal function as to outside territory. There is no reason, under the circumstances of this case, why the Houlton Water Company should be exempt from taxation upon its property, used solely in the transmission and distribution of electricity outside the limits of the town of Houlton."

In the *Second Greaves case, supra,* in 1948 the property was held tax exempt on the strength of a 1943 statute that the Houlton Water Company "shall hereafter be determined

for all purposes of taxation a public municipal corporation." Between the *first* and *second Greaves cases* there were apparently no changes in the ownership or in the method of doing business by the Houlton Water Company. The only change was the statute which the Court said was intended to give, and did give, tax exemption to the company.

The underlying theory of the *second Greaves case* is not that Houlton, through the water company, had in some manner been authorized to extend, or had extended, its *municipal* powers into Hodgdon, but that the water company operating under its charter in Hodgdon and elsewhere was given tax exemption by the simple method of definition. That is, tax exemption in Hodgdon and elsewhere outside of Houlton (and indeed the same could be said within Houlton as well) rested directly upon the act of the Legislature and was not in any way derived through the town of Houlton. *City of Portland v. Portland Water Company, supra.*

The basis for decision lies in the opinion in the *first Greaves case.* The Court there stressed the fact that Houlton had neither rights nor obligations to supply the surrounding area and "It (Houlton) has been given no right to assume any municipal function as to outside territory." (Page 165)

The referee in his report says:

> "The private acts put in evidence did not change the business, carried on outside the boundaries of the defendant Town for a profit, into a municipal public function. These acts gave authority to sell water in the towns outside its boundaries but imposed no duty to furnish such a service."

With this view, urged by the plaintiff, we cannot agree. Under the private and special legislation discussed above from 1895, and particularly from 1903 to date, Boothbay Harbor has at all times been authorized and empowered to

own and operate the water system serving an outside area. Whether the defendant town was compelled by statute to construct and operate the present system, or any system, is not the point. The fact is that in the exercise of the legislative grant, Boothbay Harbor has undertaken to serve the outside areas. Surely no one will say that Boothbay Harbor is not now under an obligation and duty as a public utility to render such service. There is no escape for Boothbay Harbor on the ground it is acting beyond the authority given by the Legislature.

The case comes to this:

For many years under authority of the Legislature, Boothbay Harbor has owned and operated a water system with a source of supply in Boothbay serving Boothbay Harbor, Boothbay and Squirrel Island. The property assessed in Boothbay is within the types exempt from tax by statute and is appropriated to public uses in the sense that the property of a private public utility is so appropriated. Within its own limits Boothbay Harbor is obviously a public municipal corporation. The supplying of water for municipal and domestic purposes is a proper function of a public municipal corporation. The Legislature can entrust such service to an agency of its own choosing—the water district here and the municipality there, or of course it may be left to the privately owned utility.

Whether it is wise for the Legislature to place a town in the business of a public utility outside of its own territorial limits is a matter for the Legislature, not for the Court, to determine. It has done so repeatedly in the case of water districts. For example see *City of Augusta v. Augusta Water District,* and *Kennebec Water District v. City of Waterville, supra.* It is suggested that if the property here is tax exempt, there is nothing to prevent a town under statutory authority from owning and operating a utility anywhere in the State with freedom from tax. In view of

the history of development of water and other utilities in our State, we doubt if the problem suggested will arise. In any event it is not necessary that it be answered now. The property was not taxable.

The entry will be

Exceptions sustained.

A. C. PARADIS COMPANY, IN EQ.
vs.
H. W. MAXIM CO., INC.
MARGUERITE D. MAXIM, JOSEPH COOK AND
FIRST FEDERAL SAVINGS & LOAN ASSN.

Androscoggin County. Opinion May 15, 1952.

PER CURIAM. These are several bills in equity to establish liens for labor and materials consolidated into one proceeding. The defendant Joseph Cook, a mortgagee, seeks to bring before us an appeal from the final decree of the Justice who heard the cause.

The appeal, however, was taken not from a final decree but from a written statement signed and filed by the Justice entitled "Findings, Decision and Decree." Therein the Justice sets forth in full detail findings of fact, rulings of law, and his conclusions, but at no point does he make a decree. In brief, the statement provides the basis for a draft of a final decree but is not in itself such a decree. The statement alone has no operative effect upon either the parties or the land. Who does what to carry out its terms? Something more is required and that is a final decree.

A final decree it may also be noted in the consolidated proceedings will affect not only the plaintiff, A. C. Paradis

Company and this defendant, but others as well. See *American Oil Co. v. Carlisle,* 144 Me. 1, at 10, 11, 63 A. 2d 676; *Gilpatrick v. Glidden,* 82 Me. 201, 19 A. 166; *Whitehouse, Equity Jurisdiction Pleading and Practice in Maine,* Sec. 522 (1900 Ed.) ; *Equity Rules 28 and 29,* 129 Me. 533, *R. S. Ch. 95, Sec. 21.*

The entry will be

Case dismissed this docket without prejudice.

Brann & Isaacson, for Plaintiff.

W. A. Trafton, Jr., for Defendant.

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

STATE OF MAINE

BY INFORMATION OF

ALEXANDER A. LAFLEUR, ATTORNEY GENERAL

vs.

ROLAND L. MARCOTTE

LUCIEN A. DRAPEAU

PAUL L. GENEST

DONAT E. BOISVERT

RAYMOND L. POULIN

ROBERT CARON

AIME J. LAUZE

ROBERT W. CARON

Androscoggin. Opinion, June 4, 1952.

Elections. Time. Act of God. Notice.

Regular elections must be held that the people may select those whom they desire to guard and govern and it is the duty of the proper officials to follow the laws with respect thereto that the voting rights of all citizens be protected and preserved.

The precise and stated time of holding elections is not always material if another time is not prohibited.

Practically all courts have upheld elections where adequate notice has been given and where the voters have fully and freely expressed, or had the opportunity to express their will.

Mandatory provisions of law must be strictly complied with.

Directory provisions of law need be complied with, under excusable circumstances, only so far as may be.

Wherever possible from a standpoint of legal justice to validate an election it is the duty of the court to do so.

ON REPORT

This is an information in the nature of a quo warranto challenging the authority of certain officers of the City of Lewiston on the ground that they were not elected on the 3rd Monday of February as required by P. and S. Laws, 1939, Chap. 8, as amended by P. & S. Laws, 1943, Chap. 86. Respondents answered that an election at that time was impossible due to a severe blizzard but that upon proper notice the election was duly held the 4th Monday of February. A general demurrer was filed by plaintiffs and the cause reported to the Law Court. Information dismissed.

Alexander A. LaFleur, Attorney General, for State.

Frank M. Coffin, for Defendant.

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

FELLOWS, J. This is an information in the nature of quo warranto brought by Alexander A. LaFleur, Attorney General of Maine, against Roland L. Marcotte, Lucien A. Drapeau, Paul L. Genest, Donat E. Boisvert, Raymond L. Poulin, Robert Caron, Aimee J. Lauze, Robert W. Caron, who claim to be the duly elected Mayor and Aldermen for the city of Lewiston and acting as such since March 17, 1952. The information alleges that the respondents lack authority to act as such officials of Lewiston because the charter of the city of Lewiston (Chapter 8 of the Private and Special Laws of Maine 1939, amended by Chapter 86 of the Private and Special Laws 1943) provides in Article II, Section 1, that "an election shall be held on the 3rd Monday in February of each year, at which the qualified voters of the city

shall ballot for a mayor and the qualified voters of each ward shall ballot for a member of the board of aldermen," and the information states that in violation of this section no election was held on the 3rd Monday in February, 1952 but that "an alleged election was attempted to be held on the 4th Monday in February 1952 under color of which election the respondents claim to have been elected or to have qualified for a run-off election held on the 1st Monday of March, 1952."

Notice was ordered on the quo warranto information by the Superior Court for Androscoggin County. The respondents appeared, and filed their joint and several pleas, or answers, to the information. The information asks "by what warrant they claim to hold and execute the offices of mayor and aldermen?"

After the filing by the respondents of the answers, or pleas, the Attorney General filed a general demurrer to them. This demurrer, therefore, admits the truth of the facts stated by the respondents. The case is reported to the Law Court for final judgment.

The facts admitted by the demurrer are, that on the 3rd Monday of February, 1952 (February 18, 1952) the date on which the annual election was to be held as provided in Article II, Section 1 of the Charter, the entire area of the city was experiencing the most severe blizzard in a period of sixty years. The snow storm commenced on February 17th and had so increased in severity by 8 A.M. on February 18, when the polls were to be opened, that all of the walks, streets and ways in the city were not passable by pedestrian or vehicle. Access to the polling places was impossible because of the storm. Wardens and ward clerks for most of the polling places were unable to report for duty at any time during the voting period between 8 A.M.

and 7 P.M. The continued efforts of the city clerk during the day to obtain the presence of legal voters in most of the polling places, in order to hold meetings and adjourn the same, met with little success because voters were unable to get to the polling places. The city clerk himself found it impossible to deliver ballots to polling places. All transportation utilities throughout the city were unable to operate. Approximately three feet of snow, with drifts of greater depth, made industry, business, schools, and the opening of State, County, and Town offices impossible for the day. The chief of the fire department declared an emergency to exist because equipment could not be moved for any distance. By reason of this "snowbound" condition that existed during all of February 18, 1952, no votes were cast at any polling place, although the number of registered voters in the city was 21,252. No election was, or could be, held because of the unprecedented storm.

The municipal officers of Lewiston immediately called an election for February 25, 1952 and gave notice. On February 25, 1952 an election was held and 13,100 ballots were cast. As a result of the election held on February 25, 1952 the following respondents were elected to the office of aldermen: Lucien A. Drapeau, Paul L. Genest, Donat E. Boisvert, Raymond L. Poulin, Robert Caron, and Robert W. Caron.

No person having received a majority of the votes cast for mayor, or for alderman of Ward 6, at the election on February 25, 1952, it was necessary that a "run-off election" be held, in accordance with Article II, Section 2 of the Charter of the City of Lewiston, on the "1st Monday of March next thereafter." Accordingly the run-off election was held on March 3, 1952, at which election, in accordance with the Charter provisions, 13,565 citizens voted and the following respondents were elected: Roland L. Marcotte,

Mayor,—Aime J. Lauze, Alderman of Ward 6. On March 17, 1952, each and all of the respondents took their respective offices, having been duly sworn, and are carrying out the duties thereof.

The Law Court is asked, in the certificate of the Superior Court reporting the case, "to determine the sufficiency of the plea of the respondents to the information filed herein." In other words, by reason of the foregoing facts which are stated in their joint and several pleas or answers, and to which demurrer was filed, the respondents claim they hold their respective offices rightfully, and pray judgment.

It is universally recognized, in a democracy such as ours, that the right of suffrage, properly, freely, and fully exercised, is fundamental and vital. Regular elections must be held that the people may select those whom they desire to guard and govern. Rights, such as free speech, freedom in religion, rights in property, and our own personal liberties, depend in a large measure upon the periodic selection of suitable, honest and efficient, state, county, and municipal officials. The legislature well knows these necessities, and the statutes of this State, with reference to towns as well as in the charters of cities, provide how often and when such elections shall be held. It is the duty of the proper officials to follow these laws in order that the voting rights of all citizens be protected and preserved.

Frequent elections fairly and honestly held are the important thing. The precise and stated time of holding is not always material if another time is not prohibited. Directory provisions of the statutes should be followed as near as may be.

Although this case at bar may present some features that have never been considered by any court of last resort, we

have no hesitation in declaring that the election of February 25, 1952, in the city of Lewiston, and the run-off election of March 3rd, 1952, were valid. The respondents were duly elected to their respective offices as Mayor and Aldermen of the city.

Practically all courts have upheld elections where adequate notice has been given and where the voters have fully and freely expressed, or had the opportunity to express, their will. Mandatory provisions of law, such as certain necessary qualifications of voters, must be strictly complied with, but the directory provisions of statutes or of charter, such as the date of the annual election, need be complied with under excusable circumstances, only so far as may be. The decisions which relate to this general proposition of law seem to be founded on the doctrine announced in 2 Kent's Commentaries, 5th Edition, 295, (468) as follows: "The sounder and better doctrine I apprehend to be, that where members of a corporation are directed to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards, when the annual day, has by some means, free from design or fraud, been passed by."

In *Norway Water District* v. *Water Company,* 139 Me. 311, 320, this court upheld an election though the technical procedure was not followed. The court specifically adopted the reasoning of the California Court in *East Bay Mun. Util. Dist.* v. *Hadsell et al.,* 196 Calif. 725, 239 Pac. 38, as follows:

> "It is thus apparent that the election itself is the controlling feature and the ultimate objective of the statute. If the election has been honestly and fairly conducted, and no one has been injured by the manner in which the preliminary steps leading thereto have been taken, no reason exists for declaring it invalid. In the instant case there was

> no evidence offered on the part of the defendants tending to show that they had been prejudicially affected by the procedure which had been adopted and followed leading up to the decision. As heretofore set forth, the findings by the court were to the effect that no error or irregularity or omission in the proceedings affected any of the substantial rights of the defendants; that they had full notice that the proposition for the issuance of the bonds would be submitted to the electors of the district at an election to be held on the said 4th day of November, 1924; and that the vote at such election was a full and fair expression of the will of the electors of the district who were qualified to vote at said election upon said proposition. Those findings, while in some respect possibly subject to appellants' criticism that they are but conclusions of law, nevertheless speak the truth as an ultimate expression by the court of the conditions surrounding the situation. The books are filled to overflowing with statements of the rule, in substance, that, wherever possible from a standpoint of legal justice to validate an election, it is the duty of the court to do so."

Our court also, in *Rounds, Petr.* v. *Smart,* 71 Me. 380, 388, where the validity of return of votes of the city of Calais was challenged for lack of signature of city clerk, say "the rules for conducting an election in the statute are directory and not jurisdictional in their character."

See *Farris, Att. Gen.* v. *Libby,* 141 Me. 362, 368, where Mr. Justice Thaxter in a case holding that the legislature intended that "the old council should remain in office until the new council provided by the amending statute should be qualified to act" states the rule that "wherever possible from a standpoint of legal justice to validate an election it is the duty of the court to do so."

Our court has also stated, in a case where the question of an assessor holding over was considered, that where a

term is fixed the words are directory and the assessor continues to be such after the period and until another is elected. *Bath* v. *Reed,* 78 Me. 276.

In a case where the two branches of a city council were directed to elect an officer at a certain time, and there was no prohibition against electing him at some other time, and the Charter contemplated an annual election, the provision that the election should be held at a particular time is directory. "The time relates only to the regular and orderly change of officers according to the scheme established by the charter." *Russell* v. *Wellington,* 157 Mass. 100, 105, 31 N. E. 630. See also *Rutter* v. *White,* 204 Mass. 59, 90 N. E. 401.

The Court in New Hampshire adopted the views of Chancellor Kent above quoted, and decided that where the annual meeting of a corporation was to be held at the time and place provided by the By-Laws, and the directors were elected before the By-Laws were adopted, that the election was valid. Many English authorities are cited in the New Hampshire opinion to the effect that the time for holding an election is directory only and intended only to prevent surprise. *Hughes* v. *Parker,* 20 N. H. 58. See *Stone* v. *Small,* 54 Vt. 498, where there were fraudulent adjournments and the doctrine announced by Chancellor Kent was approved. See also *State* v. *Carroll* (R. I.), 24 Atl. 835, holding notice to be directory where electors have actual notice.

Many of the authorities relative to time and place of holding an election under constitutional or statutory provisions, and of mandamus to compel the calling of an election after the statutory date is passed, are collected in *Rainwater* v. *State,* 237 Ala. 482, 121 A. L. R. 981, note at page 987.

The text writers notice the recent trend of the courts to hold valid an election held at a later date than is provided

in statute or charter, if the electorate have notice and opportunity to vote, and if there is no constitutional or statutory prohibition and no "fraud or design." *McQuillan Municipal Corporations* (2nd Edition) Chap. 12, Secs. 428-430, 18 *American Jurisprudence,* "Elections," 250 Sec. 112; *Dillon on Municipal Corporations,* 5th Ed. 2664, Section 1496; 62 *Corpus Juris Secundum,* "Municipal Corporations," 907, Sec. 471.

The attorney general relies upon the case of *State ex rel. Lorentz* v. *Pierson,* 86 W. Va. 533, 103 S. E. 671, where the West Virginia Court held that where "an election is held on another day than that fixed by law it will be void." The West Virginia Court, however, ordered, in mandamus proceedings, that a later election be called by the municipal officers. From this West Virginia case the attorney general argues that the municipal officers in the case at bar had no authority to call the election of February 25th and the election is void, although he admits that the court might have compelled the officers to call a later election. It seems somewhat inconsistent that where no election is held due to an excusable mistake, or by an unavoidable circumstance, that the date of a later election may only be fixed by the court in mandamus, although the officials are willing to act. This decision of the West Virginia Court has since been modified, if not completely overruled, in later cases before the same court. See *Gay* v. *Buckhannon* (W. Va.), 123 S. E. 183; *State* v. *Curry,* 98 W. Va. 72, 126 S. E. 489; *Bannister* v. *Glasgow* (W. Va.), 185 S. E. 2; *State* v. *Langford* (W. Va., 1940), 9 S. E. (2nd) 865.

In this case at bar there was no fault, mistake, carelessness, fraud, or design, on any person's part to prevent the regular election duly called for the 3rd Monday in February (February 18, 1952). There was a storm of such unusual proportions and such unexpected violence that it might well

be considered that there was no election due to "an act of God." There was no constitutional or statutory prohibition of an election to be held on a later date.

The election on the 4th Monday of February (February 25, 1952) was duly called by the municipal officers and a large proportion of the registered voters expressed their will. More than 63% of the voters also took part in the "run-off election" on the first Monday of March (March 3, 1952), provided by charter, to select the mayor and one alderman who had not received the necessary majority at the election of February 25th. The words in the Charter of the City of Lewiston providing for an annual municipal election on the 3rd Monday of February of each year must be held, under the circumstances of this case, to be directory.

The election duly held on the 4th Monday of February was valid. The respondents hold their respective offices rightfully and lawfully. Accordingly the entry will be,

Information dismissed.

DWIGHT L. CROCKETT

vs.

FRED L. STAPLES

Androscoggin. Opinion, June 11, 1952.

Negligence. Directed Verdict. Contributory Negligence.

In determining whether a verdict was properly directed against a plaintiff on the ground of contributory negligence, the court must determine whether reasonable persons taking the evidence with its inferences in the light most favorable to the plaintiff could conclude that plaintiff was in the exercise of due care.

R. S., 1944, Chap. 19, Sec. 78 as amended by P. L., 1947, Chap. 98, provides that signs and signals shall be prima facie evidence that said signs and signals were erected in accordance with law; and statutes giving the right of way to the traveler on the favored way and requiring the traveler to stop at a stop sign are applicable to the instant case. (P. L., 1949, Chap. 146; R. S., 1944, Chap. 19, Sec. 79, as amended by P. L., 1949, Chap. 144).

A plaintiff is not bound to anticipate defendant's negligence.

ON EXCEPTIONS.

This is a negligence action. The court directed a verdict for defendant. The case is before the Law Court on exceptions. Exceptions sustained. Case fully appears below.

Marguerite L. O'Roak,
Frank M. Coffin, for Plaintiff.

Desmond & Mahoney, for Defendant.

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

WILLIAMSON, J. Exceptions to the direction of a verdict for the defendant are sustained.

The only issue in this tort action arising from a collision between automobiles operated by the plaintiff and the defendant is whether, as a matter of law, the plaintiff must be charged with contributory negligence. In argument the defendant abandoned, and properly so, any claim that the evidence did not present a jury question on the issue of defendant's negligence.

Under the familiar rule we must determine whether reasonable persons taking the evidence with its inferences in the light most favorable to the plaintiff could conclude that plaintiff was in the exercise of due care. A recent statement of the rule is found in *Bernstein* v. *Carmichael,* 146 Me. 446, 82 A. (2nd) 786.

From an examination of the record, including photographs, we are of the view a jury could find substantially the following situation:

The plaintiff, alone in his car, was proceeding westerly on Route #121, a "black top" highway leading from Mechanic Falls to Welchville. The defendant was proceeding southerly on the East Oxford road, known for this case at least as the "School House road," leading into and ending at the north line of Route #121. There was a stop sign on the dirt road approximately 30 feet north of the intersection.

The area with which we are concerned includes the School House road from a point some distance north of the stop sign at or near a school yard and Route #121 for a distance of at least 300 feet easterly of the intersection. Within this area the plaintiff and the defendant could at all times have observed traffic on the intersecting roads.

The cars collided within the intersection on the south half (or east bound traffic lane) of the pavement of Route

#121. The defendant entered from the left or east side of the dirt road and was in the process of turning easterly on Route #121. The front of defendant's car struck the right side of plaintiff's car. The plaintiff was dazed by the collision and lost control of his car, which "bounced off" and came to a stop 114 feet westerly after breaking a guy wire and striking two houses on the south side of the road. The defendant's car stopped 6 feet north of the south edge of the pavement.

The accident took place at approximately six o'clock, daylight saving time, on the evening of May 24, 1951. The road was damp, but this did not affect the case in any way. Visibility was good. Both the plaintiff and the defendant were thoroughly familiar with the area, the roads, the intersection, and the stop sign.

The plaintiff when at least 300 feet east of the intersection saw "a car coming down the dirt road toward the highway" at or near the schoolhouse yard north of the stop sign. "I should say," said the plaintiff, "the car came out at a slow speed with indication that it might stop." The plaintiff's speed was about 30 miles per hour. When within 50 to 100 feet of the intersection plaintiff blew his horn.

The essential facts are given in the evidence of a State Police Officer of statements by the parties:

(Plaintiff)

> "I was going toward Welchville. I saw the other automobile approaching from the side road and supposed he was going to stop. When I realized he wasn't I was too close to avoid hitting him."

(Defendant)

> "I was coming out onto the Mechanic Falls Road from a side road and looked both ways. I observed

> a vehicle coming from my right but thought I had plenty of time to go across the road, not noticing the vehicle coming from my left until I was practically in the road. Then it was too late."

In short the plaintiff, assuming the defendant would stop before entering Route #121 and permit the plaintiff to pass safely through the intersection, paid no further attention to the defendant until it was too late to avoid the collision. Indeed whether the defendant stopped (as defendant and his wife say) or merely slowed down (as other witnesses say the defendant said) at the sign is not known to the plaintiff.

The plaintiff insists, and the defendant denies, that the plaintiff had the right of way under the through way and stop sign provisions of the statutes. *R. S., Chap. 19, Sec. 78,* as amended by *P. L., 1947, Chap. 98,* and *P. L. 1949, Chap. 146; R. S., Chap. 19, Sec. 79,* as amended by *P. L., 1949, Chap. 144.*

The argument turns upon the meaning of the 1947 amendment to section 78 which reads:

> "Such signs and signals shall be prima facie evidence that said signs and signals were erected in accordance with the provisions of this section."

There is in the record no evidence of the designation of Route #121 as a through way. Under the rule of *Hill* v. *Janson,* 139 Me. 344, 31 A. (2nd) 236 decided in 1943, such evidence was required to alter the usual right of way. The 1947 amendment, however, fits the present situation precisely. For purposes of this case Route #121 was a through way (or at least a "stop intersection"), and the statutes giving the right of way to the traveler on the favored way and requiring the traveler on the other way to stop at a stop sign were applicable.

If the prima facie amendment of 1947 did not accomplish this result, it is difficult indeed to assign to it any value in the trial of cases. An amendment validating stop signs installed as of January 1, 1951 became effective after the accident, and so is not here applicable. *P. L., 1951, Chap. 292.*

The decisive inquiry is whether the plaintiff was necessarily negligent in relying upon the defendant stopping or in any event yielding the right of way to the plaintiff until it was too late to avoid the accident.

The plaintiff was not bound to anticipate defendant's negligence. He "had a right to consider that the defendant would observe the law as to stopping" . . . *Davis* v. *Simpson,* 138 Me. 137, at 145, 23 A. (2nd) 320; *Hutchins* v. *Mosher,* 146 Me. 409, 82 A. (2nd) 411; 2 *Blashfield Cyc. of Automobile Law & Practice,* Sec. 1028-1032 (Perm. Ed.)

Let us say that in the exercise of due care the plaintiff could continue at his then speed on the assumption defendant would stop at the sign. Where was the plaintiff when defendant continued beyond the stop sign? Where was he when he knew or should have known that defendant was about to enter Route #121? Was he so near the intersection that he could not avoid the collision in the exercise of due care? Should he have had his car under such control that he could have stopped before the intersection, or reduced his speed to the point that the defendant could have passed across his path in making a left turn on Route #121?

Putting the case differently, we have *first,* a period within which plaintiff could properly rely upon defendant stopping at the stop sign and yielding the right of way to the plaintiff, and *second,* a period brief indeed within which plaintiff knew, or should have known, the collision must

occur unless he stopped or in some manner altered his course. Where were the plaintiff and the defendant when the first period ended? Did the plaintiff thereafter fail, as a matter of law, to exercise due care under the circumstances?

We conclude that the question of contributory negligence was properly for the jury to answer. It is well understood that we do not thereby say what answer should be made by the finders of fact.

Exceptions sustained.

EDDIE LAMBERT

vs.

NEW ENGLAND FIRE INSURANCE COMPANY

Kennebec. Opinion, June 24, 1952.

Insurance. Exclusions. Chattel Mortgages. Encumbrances.

An instrument providing "1 year after date I promise to pay to the order of Marcoux's Garage, Inc. Fifteen Hundred Dollars at 6% this note to cover 1944 G. M. C. Army Truck Motor 270242700 Serial 168901 value received Eddie Lambert" and dated 4/13/1949, is an equitable mortgage under the circumstances of the instant case, and "encumbrance" within the meaning of the Exclusion provisions of an automobile Fire Policy which provided" This policy does not apply; --- (h) under coverage D, E, F, G, H, 1, and I, while the automobile is subject to any bailment lease, conditional sale, mortgage or *other encumbrance* not specifically declared and described in this policy;". (Italics supplied).

A chattel mortgage is an instrument whereby the owner of personal property transfers the title to such property to another as security

for the payment of money or the performance of some obligation or contract subject to be defeated on payment of the money or the performance of some obligation or contract.

An equitable mortgage includes every contract so convincingly established as to show a clear intention to give a lien on specified chattels of, and in the possession of the lienor, and the contract ought in good conscience and equity, to be enforced according to that intention.

An encumbrance is an embarrassment of an estate or property so that it cannot be disposed of without being subject to it.

Where a plaintiff is indebted to another at the time of delivering to him an instrument in the nature of an equitable mortgage it cannot be said that the instrument was without consideration.

The provision of an exclusion clause providing that the policy does not apply *while* the property is subject to encumbrance applies to valid encumbrances made or placed upon the property subsequent to the date of the policy. (Italics supplied).

The word *"while"* as used in an exclusion clause is an adverbial modifier expressing duration meaning "as long as" and is not limited to the date of the issuance of the policy but refers as well to time thereafter.

ON EXCEPTIONS.

This is an action upon an insurance policy for loss or damage by fire to the plaintiff's truck. The case was tried before the court without a jury with right of exceptions reserved as to matters of law. The court granted a nonsuit and plaintiff brings exceptions to the Law Court. Exceptions overruled.

McLean, Southard & Hunt,
John J. Everett, for Plaintiff.

Berman, Berman & Wernick, for Defendant.

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

NULTY, J. This action comes before us on exceptions by the plaintiff to the order of a non-suit granted by the court at the October 1951 Term of the Kennebec County Superior Court. The action, by agreement, was tried before the court without a jury with right of exceptions reserved as to matters of law.

The claim is for loss or damage by fire to the plaintiff's truck under a policy of insurance issued by the predecessor companies of the defendant under what was termed a combination automobile policy which was a policy representing two insurance companies, which companies, according to the admission of the defendant's attorney, were consolidated into the New England Fire Insurance Company, the defendant in this action.

The plaintiff was the only witness and from his testimony and the documentary exhibits the following facts may be summarized: On April 11, 1949, plaintiff owned a 1944 GMC truck upon which, according to the evidence and to the declarations in the policy, there was no mortgage or other encumbrance. On that day he insured it against fire and other casualties through an authorized agency of the predecessors of the defendant company. Two days later, on April 13, 1949, plaintiff executed and delivered to Marcoux's Garage, Inc. an instrument admitted in evidence which, before lines were drawn through the signature, read as follows:

"1500.00 4/13 1949

1 year after date I promise to pay to the order of Marcoux's Garage, Inc. Fifteen Hundred ..... Dollars at 6% this note to cover 1944 GMC Army Truck Motor 270242700 Serial 168901
Value Received

Eddie Lambert"

On the back of said instrument appears proper notation that it was duly recorded in the Town Clerk's Office, Brooks, Maine, on April 14, 1949, and, likewise on the back thereof is a notation "paid 5/7/51, W. F. Marcoux."

There is no evidence in the record which gives any indication that the defendant or any agent of the defendant was in any manner advised of the existence of said instrument for a considerable time after the loss which occurred on July 12, 1949, when, according to the evidence, the plaintiff, in endeavoring to avoid a collision with another automobile, pulled his truck off the road where it struck a tree, overturned and caught on fire and was practically a total loss. At the time of the fire said instrument was still in the possession of Marcoux's Garage, Inc. and the record shows that the plaintiff was indebted on July 12, 1949, to Marcoux's Garage, Inc. in the sum of $162. The plaintiff promptly notified the agent of the defendant and the next day they visited the scene of the accident and the exhibits duly admitted in evidence show that notice of loss by the plaintiff was sent to the defendant company on the day following the loss. From the record it appears that there was further delay in any adjustment of the loss due to the fact that the Office of the Insurance Commissioner of the State of Maine had indicated to the defendant agent that it was investigating the loss and directed that no adjustment be made until said office gave its consent. Time ran on and finally on January 17, 1951, the attorneys for the plaintiff took the matter up with the insurance agent of the defendant and learned that the Insurance Commissioner's Office was no longer interested in the matter. The exhibits show there was further correspondence not only with the agent of the defendant but directly with the defendant. These negotiations, however, were of no avail and the instant action was instituted.

From the record it is apparent that the court, in granting

the non-suit based its action upon Paragraph (h) of the exclusion provisions of the policy which reads as follows:

> "This policy does not apply; - - - - - (h) under coverages D, E, F, G, H, I, and J while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;" (Under coverages in the policy, F includes fire.)

The plaintiff, while not admitting that said instrument hereinbefore set forth, executed and delivered on April 13, 1949, is an encumbrance, strenuously argues that Paragraph (h) under exclusions clearly applies only to encumbrances in existence at the time of issuance of the policy and that the words "specifically declared and described in this policy" can refer only to encumbrances in existence at the time of the issuance of the policy. In other words, the plaintiff's claim is that future encumbrances are not covered and that the plain meaning of the language in the exclusion clause is not susceptible of the meaning placed upon it by the defendant. The defendant, although setting up several other matters of defense in his brief statement filed in the pleadings, stated at the time of argument that it rested its case solely on exclusion clause (h) hereinbefore set forth.

The evidence discloses that the reason that plaintiff gave the instrument dated July 13, 1949, to Marcoux's Garage, Inc. was because he, plaintiff, was working for a man by the name of Lawler and contemplated terminating his employment. Plaintiff claimed he had information that his employer was going to attach his truck if he tried to terminate his employment and that he felt that if there was a mortgage on the truck it would prevent attachment of it by plaintiff's employer and that his employer would have to see Mr. Marcoux if it were attached. This explanation by plaintiff is the basis for a strenuous argument by the plain-

tiff that said instrument given by plaintiff to Marcoux's Garage, Inc. is not a mortgage or other encumbrance. Plaintiff asserts that said instrument is a note; that it does not convey title and that, therefore, it is not a mortgage. Plaintiff also asserts that it is not a Holmes note or a conditional sale because there never was any title to the truck in Marcoux's Garage, Inc. and that said instrument was without consideration and, as between the parties as a note, was absolutely void. Defendant asserts that said instrument is an equitable mortgage or, in any event, an encumbrance.

It is apparent from the summary of the facts that the main questions to be determined are whether or not said instrument dated April 13, 1949, given by plaintiff to Marcoux's Garage, Inc. was a valid encumbrance on the truck, and, if so, did exclusion clause (h) of the insurance policy suspend the operation of the policy and render the policy inapplicable and prevent the plaintiff from recovering his loss under the policy.

Neither party argues that said instrument is a bailment lease or a conditional sale. Is it, then, either a mortgage or other encumbrance? The word "mortgage" is a broad term and includes both legal and equitable mortgages. According to the text writers a chattel mortgage is defined as an instrument whereby the owner of personal property transfers the title to such property to another as security for the payment of money or the performance of some obligation or contract subject to be defeated on payment of the money or the performance of some obligation or contract. See 10 Am. Jur., Chattel Mortgages, Paragraph 2, Page 715.

We held in *Delaval Separator Company* v. *Jones et al.*, 117 Me. 95, 97, 98, 102 A. 968, that:

> "The mortgage" (chattel) "conveys title to the vendee which may be defeated by payment by the

> vendor: * * * * * * *. A mortgage is a sale, to the extent of carrying title, not an agreement to sell."

In the present case it is apparent from the evidence that there was no sale and that no title passed from the plaintiff to Marcoux's Garage, Inc., so said instrument cannot be called a chattel mortgage within the terms of the above definition or the cited decision. The text writers define an equitable (chattel) mortgage to include every contract so convincingly established as to show a clear intention to give a lien on specified chattels of, and in the possession of the lienor, and the contract ought, in good conscience and equity, to be enforced according to that intention. See 10 Am. Jur. Chattel Mortgages, Paragraph 3, Page 716.

With this definition in mind, we have examined some of the earlier decisions of our court and we find that *Oakes* v. *Moore,* 24 Me. 214, 220, decided in 1844, considered a question somewhat similar to the instant case. The plaintiff had a contract to cut, drive and deliver certain pine lumber from land of the defendants, said contract being made with the agent of the defendants. The contract contained a stipulation with respect to the terms of payment and also the words:

> "said logs to be holden to said Oakes until all is paid, or satisfactory security given."

The defendants claimed that the plaintiff by delivering the logs and losing possession of them—thereby lost or waived his lien. Our court held that the plaintiff did not have a common law lien as that involved possession during its continuance but that there is a kind of lien arising under a special contract and that the words of the stipulation created

> "what may be more properly termed, a mortgage, than a mere lien;"

and that under the terms of his contract plaintiff had the right to regain possession of the logs or their value.

In *Spaulding* v. *Adams,* 32 Me. 211, our court again affirmed the rule that a lien created by contract wherein possession is permitted to the general owner, is not discharged. In *Oliver* v. *Woodman,* 66 Me. 54, our court pointed out that common law liens did not extend to all classes of persons and that certain kinds of liens could only be acquired by special contract citing *Oakes* v. *Moore, supra.* In *Sawyer* v. *Gerrish,* 70 Me. 254, our court again considered an instrument in the form of a promissory note and not unlike said instrument in the instant case but containing words which the court held intended to give the defendant a claim on the foal stating:

> "The condition of the promise has been fulfilled and we think the promise should be."

and that the contract was in the nature of a mortgage and not distinguishable in principle from *Oakes* v. *Moore, supra.*

Applying the law cited above to said instrument in the instant case and construing the language contained therein and in the record in accordance with the applicable rules of law with respect to the construction of contracts, it is our opinion that the plaintiff intended to subject his truck to a claim or charge, in other words, to a special contract lien in the nature of a mortgage which might be termed an equitable mortgage under the definition cited herein but which in any event would be, if valid, an encumbrance.

We defined "encumbrance" in *Campbell* v. *Hamilton Mutual Insurance Company,* 51 Me. 69, 72 to be:

> "whatever is a lien upon an estate."

We likewise defined it (encumbrance) in *Newhall* v. *Union Mutual Fire Insurance Company,* 52 Me. 180, 181, as follows:

> "An incumbrance is an embarrassment of an estate or property, so that it cannot be disposed of without being subject to it."

In any event, said instrument falls within the definition of encumbrance. The next question to determine is whether or not it was a valid, subsisting encumbrance or contract lien. The evidence discloses that the plaintiff, at the time of the making of the instrument, was indebted to Marcoux's Garage, Inc. in the sum of $162. In the face of this fact we cannot hold, as the plaintiff strenuously argues, that said instrument was without consideration and was a *nudum pactum*. We hold that said instrument created a valid, subsisting encumbrance or contract lien in the nature of a mortgage on the truck at least to the extent of $162, the amount admittedly due Marcoux's Garage, Inc. at the time of execution and delivery of said instrument.

We now pass to the question of whether the language in the exclusion clause becomes effective on a valid encumbrance made or placed upon the property subsequent to the date of the policy. The plaintiff insists that the exclusion clause does not in any manner refer to or include subsequent or future encumbrances. The defendant takes the opposite view and both argue their respective authorities. The plaintiff to a certain extent relies upon the Oregon case of *Medford* v. *Pacific National Fire Insurance Co.* 1950, 189 Or. 617, 219 P. (2nd) 142, rehearing denied, 222 P. (2nd) 407, 16 A. L. R. (2nd) 1181, 1197. It is true that the case, involving substantially the same exclusion language as found in the instant case, that is, the policy provided that it did not apply to damage by collision, fire or theft:

> "While the automobile is subject to any - - mortgage - - not specifically declared and described in this policy"

was held by the court not to be applicable where the policy recited that there was an encumbrance upon the insured's

automobile and thereafter the insured paid off this encumbrance but a few days later borrowed some money from the third party giving the automobile as security, the court holding that in view of the phraseology of the policy there was no warranty or agreement against encumbrances created after the execution of the policy and that, therefore, the insurer was not relieved of his liability under a loss. The court said that the later encumbrance obviously could not be described in the policy and that the expression "this policy" was ambiguous and therefore should be construed favorably to the insured. We, however, do not subscribe to the reasoning of the Oregon Court and that reasoning is somewhat questioned in an annotation in 16 A. L. R. (2nd) 736, 752, Par. 8.

The defendant advances the view that the placing of an encumbrance after issuance of the policy is a violation of the provision against encumbrances under the contract of insurance. An examination of the authorities discloses that the language in which provisions against encumbrances are set forth shows very little variation or difference so far as the construction of the language is concerned. The words of exclusion contained in the policy in the instant case are similar to those clauses which are commonly used by insurance companies. The defendant argues that the meaning of the language of the exclusion clause contained in said policy should be construed in accordance with the ordinary meaning of the words contained therein in accordance with the ordinary rules of construction of contracts of this type which is the general rule. Defendant urges that the true construction of the exclusion clause is set forth in the case of *Zancker* v. *Northern Insurance Co.* (1943), 238 Mo. App. 110, 176 S. W. (2nd) 523. In that case the exclusion provision of the policy was

> "This policy does not apply; (b) under any of the coverages *while* the automobile is subject to *any*

> bailment lease, conditional sale, mortgage, or other encumbrance not specifically declared and described in this policy." (Underscoring ours.)

A comparison of this clause with that of the clause in the instant case and hereinbefore cited shows that there is no difference of importance between the two exclusion clauses. The *Zancker* case holds flatly that an encumbrance placed on an automobile after the issuance of the policy and in effect at the time of the damage to the automobile invalidates the policy. The court further goes on to state that the contention of the insured that the exclusion clause applied solely to encumbrances existing at the time of the issuance of the policy but not declared has no application; that it is not ambiguous and is not subject to any construction other than its plain meaning and that the word "while" as used in the policy is an adverbial modifier expressing duration meaning "as long as" and is not limited to the date of the issuance of the policy but referred as well to time thereafter. We might add that the word "any" in its ordinary meaning means "all or every" and we so interpret it. In the course of the *Zancker* opinion the court cited and quoted the case of *Bridgewater* v. *General Exchange Insurance Corporation* (1939), 234 Mo. App. 335, 131 S. W. (2nd) 220, with approval and stated that although the exclusion provision in the *Bridgewater* case is somewhat different in wording, the meaning and effect was the same and the ruling in said *Bridgewater* case was applicable in the *Zancker* case. There is an interesting case of *Globe & Rutgers Fire Insurance Co.* v. *Segler,* (Florida) 44 So. (2nd) 658, 16 A. L. R. (2nd) 731, decided February 21, 1950, wherein the court construed an exclusion clause which it said was unambiguous. The clause construed reads as follows:

> "This policy does not apply - - - (b) under any of the coverages while the automobile is subject to any bailment lease, conditional sale, mortgage or

> other incumbrance not specifically declared and described in this policy."

This exclusion clause is the same as that construed in the *Zancker* case and similar to the clause in the instant case. The facts are slightly different in that the policy was originally issued on an unencumbered automobile which was traded in for another car which subsequently became involved in a collision and the insurance policy was transferred by a change of car endorsement issued by the insurance agent as a result of a telephone conversation between the plaintiff and the agent in which conversation neither the agent inquired specifically about or the plaintiff made any statements as to an encumbrance on the replacement car which there was in fact. The court held that the insured was bound by the terms of the policy accepted and retained by him and that the provision against encumbrances was valid and applicable.

The authorities on the subject of validity and construction of provisions of automobile policies against encumbrances are collected and annotated at length in an annotation in 16 A. L. R. (2nd) 736 and we do not deem it necessary to further analyze the authorities. Inasmuch as we have concluded that the execution of said instrument dated April 13, 1949, by the plaintiff created a valid, subsisting encumbrance in the nature of a contract lien or equitable mortgage and have also concluded that the language of the exclusion clause is unambiguous and should be construed to apply to the instant case, it necessarily follows that the policy of fire insurance on the truck of the plaintiff became inapplicable while the encumbrance so created was in full force and effect. The plaintiff may not have intended the result which seems to us is inevitable under the evidence and the decisions cited herein, but exclusion clauses, when fair and reasonable, as this one appears to be, are a part of the contract between the insured and the insurance com-

pany and are binding. It therefore follows that the exception to the granting of a non-suit must be overruled. The mandate will be

Exceptions overruled.

MAC MOTOR SALES, INC.

vs.

NORMAN L. PATE

York. Opinion, June 27, 1952.

Conditional Sales. Mortgages, Recording Short Form. Constructive Notice.

A chattel mortgage, in this State, is a transfer of title by the mortgagor, the then owner, to the mortgagee to secure the performances of an obligation, the title so transferred to be extinguished by the performance of a condition subsequent.

When a borrower seeks to secure his loan by executing a contract in the form of a conditional sale from the lender to himself which he, the borrower, already owns, the contract constitutes an *equitable* mortgage; and must be recorded in the manner prescribed by statute for recording mortgages of personal property.

R. S., 1944, Chap. 164, Sec. 1 and R. S., 1944, Chap. 106, Sec. 8 apply to mortgages of personal property even though equitable as distinguished from legal mortgages.

The recording statute requires the *mortgage itself* or the *conditional sales agreement itself* to be recorded.

There is no provision in Maine Statutes for the recording of a (short form) memorandum or certificate of either a mortgage or conditional sales agreement and a record of such a certificate does not satisfy the statute.

A record of a (short form) certificate is not a record of a contract and therefore does not afford constructive notice to one who was not one of the original parties thereto.

ON EXCEPTIONS.

This is an action of trover for the conversion of an automobile. The case was heard by a single justice upon agreed statement with right of exceptions as to matters of law reserved. The justice found for plaintiff. The case is before the Law Court upon exceptions. Exceptions sustained.

Charles A. Pomerey,
J. Joseph Tansey, for Plaintiff.

William H. Stone,
Edwin G. Walker, for Defendant.

SITTING: MURCHIE, C. J., THAXTER, FELLOWS, MERRILL, NULTY, WILLIAMSON, JJ. (MURCHIE, C. J., THAXTER, J. concur specially in result.)

MERRILL, J. On exceptions. This action of trover for the alleged conversion of an automobile by the defendant was heard by a Justice of the Superior Court in the County of York on an agreed statement of facts, with right of exceptions reserved as to matters of law. The automobile in question was purchased by William A. Berger on November 15, *1949,* and on the same day he executed a chattel mortgage of the same to Guardian Finance Co. to secure his promissory note for $3,726.60. This chattel mortgage was duly recorded on the next day in the office of the City Clerk of Cape Elizabeth, Maine, the then residence of Berger. Possession of the automobile was retained by Berger. On November 1, *1950,* Berger *borrowed* $2,165 from the plaintiff, Mac Motor Sales, Inc. and *as security therefor,* executed a so-called "Conditional Sales Contract" herein-

after referred to as the "Contract," dated October 30, 1950, describing Mac Motor Sales, Inc. as the seller and himself as the purchaser of the automobile in question, and agreeing therein that the "title to said Chattel shall remain vested in the Seller until all amounts due hereunder are fully paid in cash,". The "Contract" further spelled out in great detail the respective rights and obligations of the parties thereunder. In addition to the "Contract," on the same day Berger executed a "Certificate to be Recorded with Town or City Clerk," hereinafter referred to as the "Certificate." This "Certificate," signed by Berger, was a statement that he had on this 30th day of October, 1950, purchased and acknowledged delivery from Mac Motor Sales, Inc. of Lewiston, therein called the seller, the automobile in question and that "Title to all of the above, together with all equipment and accessories already thereon or hereafter added, remain in Seller or assigns until the balance of $2,165.00 which I, we owe thereon, is paid and which I, we, agree to pay in full within ..... months from day of purchase, according to the tenor of an agreement and promissory note executed contemporaneously herewith." This "Certificate" was recorded in the office of the City Clerk of Portland, Maine, on November 1, 1950, that city then being the residence of Berger. At the time the plaintiff made the loan of $2,165 to Berger, it had no actual knowledge of the existence of the aforesaid Guardian Finance Co. mortgage.

On February 20, 1951, the defendant purchased the automobile in question from Berger and took delivery thereof. The defendant paid for the car with two checks, one payable to Berger in the sum of $929, and the other payable to Guardian Finance Co. in the sum of $1,871. Berger delivered the check for $1,871 to Guardian Finance Co. The check was in excess of the amount due on its mortgage, and Guardian Finance Co. returned to Berger the sum of $72.12. At the time the defendant purchased the car of Berger it

was in Berger's possession and had been ever since its purchase by him. Furthermore, the defendant had no knowledge of Berger's indebtedness to the plaintiff nor of the fact that Berger had given to the plaintiff the "Contract," which had never been recorded, or that he had executed the "Certificate," or that the same was recorded. Prior to the commencement of this suit the plaintiff demanded the automobile of the defendant who refused to deliver the same. It was agreed by the parties that if the court found for the plaintiff judgment should be rendered in the sum of $2,165.

The plaintiff relied upon the "Contract" and "Certificate" and the record of the latter to make out its title and right to possession of the automobile as against the defendant.

The Justice of the Superior Court to whom the case was submitted found for the plaintiff in the sum of $2,165. The case is now before this court on exceptions to this decision by the single justice.

The exceptions in effect challenge rulings of the Justice of the Superior Court (1) that the "Contract" and "Certificate" were sufficient to convey title and a right to possession of the automobile to the plaintiff, and (2) that the recording of the "Certificate" was a sufficient record under the statutes of this State to make the plaintiff's title and right to possession valid as against the defendant, a purchaser for value and without actual notice of the plaintiff's claim.

The "Contract" whether standing alone, or taken together with the "Certificate" though in form sufficient to constitute a conditional sale from the plaintiff to Berger and to create between them the relationship of conditional vendor and conditional vendee was ineffective for that purpose.

A conditional sales agreement within the terms of our statute of frauds, R. S., Chap. 106, Sec. 8, is a transaction

whereby personal property is bargained and delivered to another with an agreement that the same shall remain the property of the seller till paid for. In other words, the property is bargained and delivered and title is to vest in the purchaser or vendee only upon the performance of a condition precedent. As said in *Morris* v. *Lynde,* 73 Me. 88, 89:

> "Except so far as some statute might require it, there was no need either of writing or of record, to enable the plaintiffs to retain the title to their own property, till the event occurred which they had made a condition precedent to their parting with title, namely, till the price was paid. The title could pass to the defendant *in presenti,* or *in futuro,* only by the consent of the plaintiffs; in accordance with their agreement. The plaintiffs agreed that the title should vest in the defendant, when he paid the price. This he has never done. The safe has always remained the plaintiffs' property, as if they had never parted with the possession, and as against Lynde and all persons claiming under him, unless some statute controls the contract, and changes the relations of the parties."

To mulitply authorities on this subject would be superfluous. This common law rule, however, has been changed by R. S., Chap. 106, Sec. 8 which requires that all agreements that personal property bargained and delivered to another shall remain the property of the seller till paid for be in writing and signed by the person to be bound thereby. The statute further provides that *such agreement* "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 the transaction here under consideration title was not in the plaintiff, nor was the automobile in question bargained and delivered by the plaintiff to Berger. The transaction was not a conditional sale.

Nor was the transaction a legal mortgage. A chattel mortgage, in this State, is a transfer of title by the mortgagor, the then owner, to the mortgagee to secure the performance of an obligation, the title so transferred to be extinguished by the performance of a condition subsequent. By statute, redemption of the chattel mortgaged after breach of the condition is now allowed. As said by this court in *Drake & Sons* v. *Nickerson,* 123 Me. 11, 13:

> "compliance with the condition subsequent of a chattel mortgage, by one entitled to make a redemption, though after breach of the condition of the expressly stated terms of the mortgage but within the time which the statute defines, immediately terminates the vital existence of the mortgage and takes the title to the property from the mortgagee instanter. The mortgagor, or he who stands in his stead, is thereupon invested with a right of property as complete and absolute as though the mortgage never had been given."

As we said in *Motor Car Company* v. *Hamilton,* 113 Me. 63, 65:

> "At common law there was no right of redemption by a conditional vendee. The vendee, like a mortgagor of chattels, was remediless at law, unless he performed the condition of his contract. Such a mortgagor could not redeem after breach. *Flanders* v. *Barstow,* 18 Maine, 357; 2 Hilliard on Mortgages, 4th Ed. 559. It is the statute only which gives a mortgagor the right of redemption. So it is the statute only which gives a conditional vendee the right to redeem. The situations are entirely analogous."

The cases from other jurisdictions as to the nature of an instrument in the form of a conditional sales agreement which is executed by the owner of personalty for the purpose of securing the payment of a loan of money are not

particularly helpful. This is due not only to the fact that such instruments are often declared to be chattel mortgages by statute, but also to the fact that in many jurisdictions a chattel mortgage creates only a lien on the property mortgaged as distinguished from conveying legal title thereto as in this jurisdiction. See extensive notes in 17 A. L. R. 1421, 43 A. L. R. 1247, 92 A. L. R. 304, also 138 A. L. R. 664 and 175 A. L. R. 1366. Also see *Peoples Bank of Southampton* v. *Merchants' and Farmers' Bank,* 147 S. E. (Va.) 220; *Automotive Collateral Co.* v. *Beckman,* 278 Pac. (Wash.) 417, 152 Wash. 534.

It is, however, immaterial for the purposes of this case whether the "Contract" be held to constitute a conditional sale, a chattel mortgage, an equitable mortgage, or to be wholly void as not satisfying the requirements of any of them. A conditional sale to be valid between other than the original parties thereto must be recorded in accordance with the provisions of R. S., Chap. 106, Sec. 8. No mortgage of personal property is valid except between the parties thereto unless recorded in accordance with the provisions of R. S., Chap. 164, Sec. 1. This is true even if the mortgage of personal property be an equitable as distinguished from a legal mortgage. *Shaw* v. *Wilshire,* 65 Me. 485; *Putnam* v. *White,* 76 Me. 551. The case to the *contra, Knight* v. *Nichols,* 34 Me. 208 was expressly overruled by *Shaw* v. *Wilshire, supra.*

When a borrower seeks to secure his loan by executing a contract in the form of a conditional sale from the lender to himself of property which he, the borrower, already owns, the contract constitutes an *equitable* mortgage. The same, although in form a conditional sale, partakes more of the nature of a mortgage, and must be recorded in the manner prescribed by statute for recording mortgages of personal property. As we said in *Shaw* v. *Wilshire,* 65 Me.

485, 491, concerning the transaction there under consideration:

> "Unless the conveyance to the plaintiff can take effect as a mortgage in accordance with the design of the parties to it, it cannot be held operative to pass the title at all.
>
> It is only by recognizing its true character as a mortgage or as evidence of a pledge that one of these anomalous instruments can be regarded as valid when it comes in conflict with the rights of those who have paid their money for the property to the general owner in possession."

We stated heretofore herein that it is immaterial for the purposes of this case whether the transaction in question be determined to be a conditional sale, a mortgage of personal property or an equitable mortgage of personal property. Our reason for so stating is as follows: If recording the so-called "Certificate" constituted a record of the mortgage or conditional sales agreement, it was made within the time and in the proper clerk's office to satisfy the requirements of either recording statute.

The real question is, does the record of the "Certificate" constitute a record of *the mortgage* or *the agreement* between the parties? We recently declared in *Tardiff* v. *M-A-C Plan of NE,* 144 Me. 208, 211:

> "It has been declared also in decided cases that the burden of establishing that a personal property mortgage, or a conditional sale agreement, encumbers, or controls, the title of the property involved rests upon the party relying on it. *Horton* v. *Wright,* 113 Me. 439; 94 A. 883, and that nothing less than full compliance with all statutory requirements will satisfy that burden. *Gould* v. *Huff,* 130 Me. 226; 154 A. 574."

Be the document in question a mortgage (legal or equitable) or a conditional sale, it is *the mortgage itself* or *the conditional sales agreement itself* which the statute requires to be recorded. There is no provision in either statute for recording anything else. There is no provision in our statute, as there is in the statutes of some states, see *Wittler-Corbin Machinery Co.* v. *Martin et al.*, 91 Pac. (Wash.) 629, 631, for the recording of a memorandum or certificate of either a mortgage or conditional sales agreement. *One* or the *other* of the two documents executed by the parties in this case constituted *the* mortgage or *the* conditional sales agreement. The mere fact that the certificate for record was signed by the borrower is not conclusive upon this question. Neither is the fact that it is entitled "Certificate to be Recorded" decisive, although this circumstance is not without marked significance. As between the parties themselves, it is perfectly clear that *the agreement, the equitable mortgage,* is contained in, and *is* the instrument entitled "Conditional Sales Contract." The "Contract" contains the full and complete terms of their agreement and expresses their respective rights with respect to the property purported to be sold, many of which are omitted from the "Certificate." This being true, the "Contract" is the document which is required to be recorded under either statute. A record of the "Certificate" did not satisfy the requirements of the statute. Record thereof was not a record of *the* equitable mortgage, and the equitable mortgage was not valid as against the defendant in this case, who was a purchaser. We are not unmindful that a contrary result was reached by the United States Circuit Court of Appeals for the Fifth Circuit in interpreting an Alabama statute in the case of *Cable Company of Alabama* v. *Stewart,* 191 Fed. 699, reversing the decision in the same case in the District Court where it was entitled *In Re Bazemore,* 189 Fed. 236, and that the same has been followed in another district in the case of *In Re Farmers' Supply Company,* 196 Fed. 990.

However, *Hoffman* v. *Cream-O Products,* 180 Fed. (2nd) 649 (U. S. C. A. 2nd Cir.), is *contra* to the *Cable* case.

As once said by the Circuit Court of Appeals for the First Circuit concerning a decision by this court, in *Traveler's Ins. Co.* v. *Thorne,* 180 Fed. 82, we now say of the Cable Company decision, "With the most unfeigned respect to the learned (Federal) court, we are unable to follow its reasoning or to reach its conclusion."

We are here concerned with the construction of a statute of our own State, and the construction of a somewhat similar statute of another State by a Federal Court, although entitled to great respect, is not a binding precedent upon this court. In fact, it is not a binding precedent even upon the court of the State which enacted the statute.

The federal cases seem to proceed on the theory that if enough of the contract is placed on record to give notice of the contract that is sufficient. They recognize the further principle, however, which is well stated in *In Re Ford-Rennie Leather Company,* 2 Fed. (2nd) 750, 756:

> "Failure to record a material part of a conditional sales contract prevented the record of the part from operating as a constructive notice to creditors."

To our mind this is not the real question *here involved* under our statute. The question is not whether enough of the contract has been placed on record to give notice of the equitable mortgage but whether *the* equitable mortgage has been recorded. As heretofore stated in this opinion, we hold that the record of the "Certificate" was not a record of the "Contract" and therefore that it does not afford constructive notice thereof, and is not valid against the defendant who was not one of the "original" parties thereto.

Nor is this decision in conflict with our opinion in the case of *Gould* v. *Huff*, 130 Me. 226. That case did not involve the sufficiency of the record, but whether the *Holmes Note itself* contained a sufficient description of the property sold, so that its record was constructive notice to third parties.

Neither is this decision in conflict with *Tardiff* v. *M-A-C Plan of NE, supra.* In that case the "sole issue" as expressly stated in the bill of exceptions and in the opinion was the correctness of the ruling below "that the recording of an unsigned copy of a conditional sale agreement is not a recording of the agreement." This ruling was sustained. True it is that what was there recorded was an unsigned copy of a short or condensed form of the agreement intended by the parties for record. It is urged by the plaintiff that because we did not specifically hold in the *M-A-C Plan* case that the recording of the short form was unauthorized, we by implication held that its record would satisfy the requirements of the statute. That case was before us on a bill of exceptions, and the question of whether the record of the short form was a compliance with the requirements of the statute was not only not decided by us, it was not even open to us for decision under the bill of exceptions which set forth the *"sole issue"* as aforesaid. The court in considering the exceptions cannot travel outside of the bill itself. *Jones* v. *Jones*, 101 Me. 447. "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." *Dodge* v. *Bardsley et al.*, 132 Me. 230, 231. See also *Bradford* v. *Davis et al.*, 143 Me. 124.

The erroneous ruling that the record of the "Certificate to be Recorded" was sufficient under the statutes of this

State is determinative of the questions presented to us and the exceptions must be sustained.

Exceptions sustained.

MURCHIE, C. J. Judge Thaxter and I realize fully that when the majority of a court construes a statute the construction declared is final and binding until and unless the legislature acts.

We deem it proper, however, to say that we would not construe R. S., 1944, Chap. 106, Sec. 8, as it is construed in this case. It stands now, in its essentials exactly as enacted by P. L., 1895, Chap. 32. At all earlier times it was applicable to notes, and nothing more, and it carried express provision that any agreement (or stipulation) relative to a retention of title, to be effective, must be "made and signed as a part of the note." In 1895 its coverage was extended to include leases, conditional sales and purchases on instalments, and to any other agreement which was, or was called by, "any other name and in whatever form it may be." The requirement that it be "made and signed as a part of" the instrument to be recorded was deleted.

It was decided long since in this court, *Chapin* v. *Cram*, 40 Me. 561, that chattel property might be described in general terms in a mortgage and identified specifically in a schedule which was not recorded. The opinion in that case was written by Judge Tenney, who had earlier declared, in

Sawyer v. *Pennell,* 19 Me. 167, that the holder of a chattel mortgage, to secure the benefit of the recording statute must record everything which was made a part of the mortgage. Intention was the governing factor.

It seems to us that every essential part of an "agreement, that personal property bargained and delivered to another shall remain the property of the seller till paid for" can be expressed in a short and condensed form for purposes of record within the intention of the statute as originally enacted and that nothing which has transpired since shows a legislative intention to the contrary. The majority opinion gives effect to form rather than to substance and ignores, as we see it, the words "in whatever form it may be."

We concur in the result.

EASTERN TRUST AND BANKING COMPANY

vs.

BEAN & CONQUEST, INC.

Penobscot. Opinion, June 28, 1952.

Chattel Mortgages. Liens. Conditional Sales. Priorities.

A mortgagor in possession of mortgaged property has no power without the consent and knowledge of the mortgagee to permit through contract a repairman's lien which has priority over a duly recorded chattel mortgage.

The mortgagor in possession of the mortgaged chattels is not the "owner" within the meaning of the lien statute (R. S., 1944, Chap. 164, Sec. 61).

A mortgagee who permits a mortgagor to be in possession and use of mortgaged chattels does not impliedly authorize the mortgagor, without the knowledge and direction of the mortgagee to encumber the chattels.

ON EXCEPTIONS.

This is a replevin action by a mortgagee against a lien claimant who holds the property under a claimed lien for necessary repairs. The question presented is whether the lien takes precedence over the mortgage. A referee found for the plaintiff. The referee's report was rejected by the court and plaintiff brings exceptions to the Law Court. Exceptions sustained.

F. B. Dodd, for Plaintiff.

Shirley Berger, for Defendant.

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

FELLOWS, J. This is an action of replevin brought in the Superior Court for the County of Penobscot and referred to and heard by a referee on an agreed statement of facts. The referee found for the plaintiff, but on objections to the acceptance being duly filed by defendant, the referee's report was "rejected" by the court. The case is before the Law Court on exceptions by the plaintiff to the order rejecting the report of the referee.

The plaintiff, Eastern Trust & Banking Company, is the holder of a duly recorded chattel mortgage on the trucks replevied. Clyde Pelkey, the mortgagor, in possession of the mortgaged trucks had certain necessary repairs made on the trucks at the garage of the defendant, Bean & Conquest, Inc., without the knowledge or consent of the plaintiff mortgagee. The defendant claims a lien for these necessary repairs, and has complied with statutory requirements for enforcement of its lien if it has a lien. The question presented by this case is whether the defendant has a lien for repairs which takes precedence of the plaintiff's mortgage. Does a mortgagor in possession of the mortgaged property, and without the knowledge and consent of the mortgagee, have the power to permit through contract a repairman's lien that has priority of a duly recorded mortgage? Is a mortgagor in possession of the mortgaged chattels the "owner," within the terms and meaning of the lien statute?

The material portions of the lien statute (R. S., 1944, Chap. 164, Sec. 61) is as follows: "Whoever performs labor by himself or his employees in * * * repairing * * * vehicles * * * by direction or consent of the owner thereof, shall have a lien * * * which takes precedence of all other claims and incumbrances * * *."

In its objections to the acceptance of the referee's finding for the plaintiff, filed in Superior Court, the defendant

claimed the decision of the referee was erroneous in that the referee decided that the mortgagor was not the "owner," and the referee also "held that the mortgagee, who permitted the mortgagor to be in possession and use of the chattels, did not impliedly authorize the mortgagor, without the knowledge or direction of the mortgagee, to encumber the chattels herein described in a mechanic's lien." In other words, the defendant claims (1) that the mortgagor is the "owner" under the statute. The defendant also claims (2) that if the mortgagor is not the "owner," that when the mortgagee permitted the mortgagor to keep possession and to use the trucks, he impliedly gave the mortgagor authority to contract for any necessary repairs.

Whatever may be the statutory or other rule in a few jurisdictions, Maine has always held the mortgagee to be the owner of the property mortgaged. Under early common law the mortgagee was the owner, and the mortgagor had no equity of redemption. At the present time, the mortgagor transfers his title to the mortgagee, but the mortgagor is entitled to redeem. *Donald* v. *G. G. Deering Co.,* 115 Me. 32; *Stewart* v. *Hanson,* 35 Me. 506; *Drummond* v. *Griffin,* 114 Me. 120. The mortgagee of personal chattels has the right to the possession of them, unless it is agreed that they shall remain with the mortgagor. *Libby* v. *Cushman,* 29 Me. 429; *Cate* v. *Merrill,* 116 Me. 432. "A bailee can give no lien upon property bailed, as against the owner." *Small* v. *Robinson,* 69 Me. 425, 428; *Motor Mart* v. *Miller,* 122 Me. 29. The owner must order or consent to the repairs. *Indemnity Company* v. *Spofford,* 126 Me. 392. See also 14 C. J. S. "Chattel Mortgages," 939, Par. 300, 10 Am. Jur., "Chattel Mortgages," 858, Par. 217.

The referee in this case made the following decision, which we believe states the applicable rules correctly:

> "The issue is whether under these facts and in the light of the statute applicable to the case the lien

constitutes a claim prior to that of the plaintiff evidenced by the mortgage. The precise question arose in the case of *Hartford Accident and Indemnity Co.* v. *Forrest G. Spofford,* 126 Maine, 392, except in that case the plaintiff claimed as a conditional sale vendor. The plaintiff was sustained. 'The mortgage conveys title to the vendee which may be defeated by payment by the vendor: the Holmes Note retains title in the vendor which may be defeated by payment by the vendee.' *Delaval Separator Co.* v. *Jones,* 117 Maine, 95-97. 'The chattel mortgage carries the whole legal title of the property mortgaged conditionally.' *Cate* v. *Merrill,* 116 Maine, 432. *Donnell* v. *G. G. Deering Co.,* 115 Maine, 32. A conditional vendee holds no title until all payments are completed. *Hartford Accident & Indemnity Co.* v. *Spofford,* supra. So that it is apparent that a mortgagee and a conditional sales vendor each have the same kind of title that of the former defeated by payment by the mortgagor, the latter defeated by payment of the vendee.

Allen Co. v. *Emerton,* 108 Maine, 221, a lien action where this same question arose on a real estate mortgage the court held—'In this state as between the mortgagor and the mortgagee the mortgagee holds the legal estate in the mortgaged premises with all the incidents of the ownership in fee while the mortgagor retains an equitable right under a condition subsequent contained in the deed.' The parties have agreed that if judgment is for plaintiff there is no damage, if for defendant there is to be no order for return but damages are to be assessed at $228.85.

We hold that the word owner as used in the lien statute includes mortgagee. And we further hold as did the court in the case *Hartford Indemnity Co.* v. *Spofford,* 126 Maine, 332, although it was speaking of a conditional sale contract, the right to possession and use of the chattels by the mortgagor does not carry by implication, authority to

encumber the chattels with a mechanic's lien without the knowledge or direction of the mortgagee.

Judgment for plaintiff."

The report of the referee was correct, and the rejection of the report by the Superior Court was error.

Exceptions sustained.

INHABITANTS OF THE CITY OF LEWISTON

vs.

ERNEST H. JOHNSON

IN HIS CAPACITY OF STATE TAX ASSESSOR

Androscoggin. Opinion, July 12, 1952.

Taxation. Sales and Use Tax Law. Water.

P. L., 1951, Chap. 250, Secs. 3 and 5, requires that the City of Lewiston in assessing water bills to the city water consumers add the 2% sales tax.

ON REPORT.

On petition for declaratory judgment under R. S., 1944, Chap. 95, Secs. 38-50. Case remanded to the Superior Court for entry of a declaratory judgment decree in accordance with this opinion.

Frank M. Coffin, Corporation Counsel, for Plaintiff.

Boyd L. Bailey, Assistant Atty. Gen.,
Miles P. Frye, Assistant Atty. Gen., for Defendant.

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

THAXTER, J. This case on report to this court was brought under the provisions of R. S., 1944, Chap. 95, Secs. 38-50, in which the petitioners seek a declaratory judgment.

The specific amount involved is very small, twelve cents; but the principle involved concerning as it does the interpretation of the so-called sales and use tax law passed by the legislature in 1951 is important. P. L., 1951, Chap. 250. At least it would be important if the contentions of the petitioners were valid. It was properly brought in the Superior Court for Androscoggin County; and is an action at law. In discussing the applicability of this statute to cases at law and in equity in *Maine Broadcasting Co.* v. *Eastern Trust & Banking Co. et al.,* 142 Me. 220, 223, this court said: "The purpose of this statute is not to enlarge the jurisdiction of the courts to which it is applicable but to provide a more adequate and flexible remedy in cases where jurisdiction already exists."

The contention of the City of Lewiston is that it was justified in assessing water bills to city water consumers without adding the 2% sales tax which the defendant, the State Tax Assessor, seeks to collect. The validity of that tax is the only issue in this case, and this court is asked to direct the Superior Court to enter final judgment in accordance with its findings on that question.

The defendant claims that the petitioners are engaged in the sale of tangible personal property on which the sales tax can be collected.

The sale of water from the mains of the City of Lewiston is a sale of personal property within the meaning of the

sales and use tax statute. Such obviously was the intent of the legislature. How else could we construe section 3 of the sales and use tax law which reads in part as follows:

> "A tax is hereby imposed at the rate of 2% on the value of all tangible personal property, sold at retail in this state on and after July 1, 1951, measured by the sale price, except as in this chapter provided. Retailers shall pay such tax at the time and in the manner hereinafter provided, and it shall be in addition to all other taxes.
>
> "The tax imposed upon the sale and distribution of gas, water or electricity by any public utility, the rates for which sale and distribution are established by the public utilities commission, shall be added to the rates so established. No tax shall be imposed on electrical energy sold by a wholly owned subsidiary to its parent company. No tax shall be imposed on water stored for the purpose of generating electricity when the water so stored is sold by a subsidiary to its parent company."

Why was it necessary to exclude water "stored" for the purpose of generating electricity where sold by a subsidiary to its parent company, if water as such was not subject to the tax at all? How could it be made any plainer that the legislature intended to tax the sale and distribution of water than by saying "the tax imposed upon the sale and distribution of water" shall be added to the rates established by the public utilities commission?

Certainly the intent of the legislature is crystal clear so far as they could make it so. Is there any reason why that intent cannot be carried out?

Many cases are cited to us by counsel for the City of Lewiston to the effect that water is not subject to ownership, a person cannot "be seised of water" as the argument says; but seisin, as in the case of land, or possession, as in the case of chattels, is not necessary in order that water may

be subject to taxation under the sales and use tax law. In a sense water may be regarded as the property of all and free to all; but these general phrases must be read in their context and not used in the abstract to defeat the purpose of the legislature in taxing water as personal property is taxed under the sales and use tax law.

And even though the water in Lake Auburn, a great pond, may be in a sense held "in trust for the use of the people of the State," *Opinions of the Justices,* 118 Me. 503, such trusteeship is a qualified one and is subject to the right of the state to provide that such water may be used by a public utility or a municipality for the common benefit of the people in its neighborhood. When such control over the waters is lawfully exercised, as in this instance it was, by confining it within pipes, aqueducts or other instrumentalities, and delivering it to customers of the water company or municipality, it becomes personal property which is subject to taxation under the sales and use tax law.

Answering specifically the questions propounded by the petitioners in their petition for a declaratory judgment, we are of opinion that:

(a) The petitioners are engaged in the sale at retail of tangible personal property within the meaning of sections 2 and 3 of the sales and use tax act;

(b) The petitioners are required to collect the tax as provided in sections 3 and 5 of the sales and use tax act;

(c) The petitioners are required to make reports and payments as provided in sections 12 and 13 of the sales and use tax act.

Case remanded to the Superior Court for the entry of a declaratory judgment decree in accordance with this opinion.

PUBLIC LOAN CORPORATION

vs.

BODWELL-LEIGHTON COMPANY

Cumberland. Opinion, June 14, 1952.

PER CURIAM

On exceptions to decision of a single justice who found for the defendant in a jury waived case. The action was replevin for an automobile by the holder of a duly recorded mortgage against a garage proprietor which sought to justify retention of possession on two liens, viz.: a common law lien for repairs and a statutory lien for storage (R. S., c. 164, § 61). The repairs were performed and the storage undertaken without the knowledge of the plaintiff and at the instance of the mortgagor in possession after default. Neither the bill of exceptions nor the record shows upon what grounds the justice found for the defendant, nor does it appear whether he sustained both liens or but one, or, if but one, which lien he sustained.

The decision of a single justice hearing a jury waived case by agreement of the parties is final and conclusive both as to facts and law unless the right to exceptions be reserved. Such right to exceptions may be reserved only as to matters of law.

The bill of exceptions after reciting that the court found for the defendant states:

> "To all which rulings and findings the said plaintiff is aggrieved and excepts and moves that the judgment be set aside for the following reasons:
>
> 1. Because it is against the law. 2. Because it is against the evidence. 3. Because it is manifestly against the weight of the evidence."

The rules governing the sufficiency of bills of exceptions generally, and those attacking the decision of a single justice in a jury waived case have been so recently and repeatedly declared by us that to repeat them here would serve no useful purpose. See *Sard* v. *Sard et al.*, 147 Me. 46; *Heath et al. Applts.*, 146 Me. 229, 232-4; *Bradford* v. *Davis et al.*, 143 Me. 124; *Bronson, Applt.*, 136 Me. 401; *Wallace* v. *Gilley and Trustee*, 136 Me. 523; *Gerrish, Exr.* v. *Chambers*, 135 Me. 70; *Dodge* v. *Bardsley*, 132 Me. 230; *Jones* v. *Jones*, 101 Me. 447; *McKown* v. *Powers*, 86 Me. 291.

The bill of exceptions does not set forth any erroneous ruling of law upon which the decision was based. Ground numbered (1) is insufficient. It does not present in clear and specific phrasing the issue of law to be considered. *Bronson, Applt. supra.* Those numbered (2) and (3) do not allege errors in law. *Sard* v. *Sard et al. supra.*

Nor can we treat the bill of exceptions as a motion for a new trial on the three grounds stated, which would be sufficient allegations in cases where such motions lie. The decision of a single justice in a jury waived case is subject to attack only by exceptions, not by motion. See *Sears, Roebuck and Co.* v. *Portland et al.*, 144 Me. 250, 256, 257, and the authorities therein cited.

Exceptions overruled.

Basil A. Latty, for Plaintiff.

Jacobsen & Jacobsen, for Defendant.

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

HENRY J. KELLEY, ET AL.
vs.
THE BROTHERHOOD OF RAILROAD TRAINMEN
AND
THE MAINE CENTRAL RAILROAD COMPANY
HENRY J. KELLEY, ET AL.
vs.
JOSEPH V. POIRIER, ET AL.
AND
THE BROTHERHOOD OF RAILROAD TRAINMEN
AND
THE MAINE CENTRAL RAILROAD COMPANY

Kennebec. Opinion July 7, 1952.

Demurrer. Laches. Discretion.

A demurrer is appropriate where on the face of a bill in equity laches appears without any statement of justifiable cause or excuse therefor.

The bringing of a suit is not sufficient to relieve one from laches; there must be a reasonably diligent prosecution.

Laches is negligence or delay that works a disadvantage to another, and whether a claimant is barred thereby involves a question of law.

A decision of a court upon a question of laches is so much a matter of discretion, dependent upon the facts in the case, that it should not be disturbed on appeal unless clearly wrong.

ON APPEAL.

These are bills in equity dismissed upon demurrer by the presiding Justice because of laches appearing upon the face of the Bills. Appeals dismissed in both cases.

Paul L. Woodworth, for Plaintiff.

Saul H. Sheriff, for Brotherhood.

Edward H. Wheeler, E. Spencer Miller, Archibald M. Knowles, for Maine Central Railroad Co.

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

NULTY, J. The two above entitled cases are before us on appeals from final decrees of the Supreme Judicial Court in Equity for Kennebec County wherein demurrers by the defendants in each case were sustained and the bills dismissed with costs.

The plaintiffs in the first case instituted a bill in equity against The Brotherhood of Railroad Trainmen and The Maine Central Railroad Company and filed the same in the Supreme Judicial Court for Kennebec County on February 16, 1946. On the same day a second bill in equity was filed by certain of the plaintiffs named as plaintiffs in the first bill against other various individuals and including the same defendants named in the first bill. The allegations in both bills are essentially the same and from the record it appears that both bills have been regarded throughout their history as cases which will stand or fall on the same pleadings or testimony. The claim of the plaintiffs in each case in so far as it is pertinent to the issue before us is that The Maine Central Railroad Company, a common carrier, maintained, prior to 1926, three operating divisions. In that year one division—the Mountain Division—was discontinued and its facilities were merged with those of another division—the Portland Division. The merged division was then divided into two districts. The plaintiffs were employees in the original Portland Division and continued as employees of the Portland District after the merger. The bills further alleged that The Brotherhood of Railroad Trainmen and The Maine Central Railroad Company entered into an agreement dated April 28, 1926, providing, among other things, for seniority rights and also for certain procedures for the laying off of employees and the retention of seniority rights. By an amendment effective March 1, 1930, Art. 53 of said agreement was amended to read as follows:

> "Article 53—*Trainmen Laid Off.* When reducing forces on a district or division, roster rights shall govern. When forces are increased, trainmen will be returned to the service in the order of their roster rights, provided they are again called to the service within one (1) year. Trainmen desiring to avail themselves of this rule must file their address with the proper official at the time of reduction. . ."

The bills further allege that there was an understanding that said Article 53 in said agreement concerning the laying off of men would not be enforced because of a severe business and economic depression existing in the country in the early 1930's until normal conditions should again prevail; that the plaintiffs were dropped from the roster on March 2, 1933, and were duly notified but that other men working in other divisions or districts under the same conditions were not laid off or dropped from the roster; that the application of said rule of said agreement gave certain trainmen seniority rights which properly, the plaintiffs claim, belonged to them. The bills also aver generally that the plaintiffs did everything in their power to retain their status and did nothing to forfeit their seniority rights and also state that the plaintiffs in the year 1933 had not paid their dues and were not affiliated with said Brotherhood of Railroad Trainmen.

The defendants in each of the two cases filed certain pleadings which included demurrers for various causes. It appears that the plaintiffs failed to prosecute the bills until July 17, 1951, when a hearing was held on the demurrers. It should be noted that by agreement of the parties the two bills were heard at the same time upon the bills and demurrers with the understanding that only if the demurrers should not be sustained would decision be rendered upon the other pleadings. The sitting justice found that the demurrers assigning laches in each case should be sustained and final decrees in each case issued sustaining the demurrers

and dismissing the bills from which decrees the present appeals were taken.

The issue before us is the correctness of the ruling of the sitting justice in sustaining the demurrers on the ground of laches.

We have heretofore considered the effect of a demurrer where on the face of the bill laches appear without any statement of justifiable cause or excuse therefor and we said in *Shattuck* v. *Jenkins, et als.*, 130 Me. 480, 482, 157 A. 543:

> "It is well settled that, where a bill in equity shows such laches on the part of the plaintiff that a court ought not to give relief and no sufficient reasons for the delay are stated, the defendant need not interpose a plea or answer, but may demur on the ground of want of equity apparent on the face of the pleading. *Leathers* v. *Stewart,* 108 Me. 96, 101; *Stewart* v. *Joyce,* 201 Mass. 301; *Snow* v. *Manufacturing Co.,* 153 Mass. 456; *Kerfoot* v. *Billings,* 160 Ill. 563; *Lansdale* v. *Smith,* 106 U. S. 392. . .
>
> "And it is held that reasons for delay which will excuse gross laches in prosecuting a claim or long acquiescence in the assertion of adverse rights must be set forth with sufficient certainty to apprise the court as to how the pleader or his privies remained so long in ignorance, how and when knowledge of the matters alleged first came to their knowledge and the particular means used to effect the concealment alleged, so that from the pleading itself it may be determined whether by the exercise of ordinary diligence the discovery might not have been before made. *Hardt* v. *Heidweiger,* 152 U. S. 547; *Tetrault* v. *Fournier,* 187 Mass. 58; 1 Pom. Eq. Rem. 54; 10 R.C.L. 416."

We have also held that the bringing of suit is not enough to relieve the plaintiffs from the charge of laches. We said in *Stewart* v. *Grant,* 126 Me. 195, 201, 137 A. 63:

"The bringing suit is not sufficient to relieve the plaintiff from the charge of laches. He must prosecute his action with reasonable diligence. *Streicher* v. *Murray,* 92 P. 36; *Tinsley* v. *Rice,* 31 S. E. 176; *Thomas* v. *Van Meter,* 45 N. E. 405. A long and unexplained delay in the prosecution of a suit amounts to laches. *Taylor* v. *Carroll,* 44 L.R.A. 479. A party is as much open to the charge of laches for failure to prosecute a case diligently as for undue delay in its institution. *U. S.* v. *Fletcher,* 242 Fed. 818; *Sullivan* v. *Portland & Kennebec R. R.,* 94 U. S. 811. It has frequently been held that the mere institution of a suit does not of itself relieve from laches. If one fails in the diligent prosecution of his action, the consequences are the same as though no action had been begun. *Johnston* v. *Mining Co.,* 148 U. S. 360."

We also defined laches in *Leathers* v. *Stewart, supra*:

"Laches is negligence or omission seasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to an adverse party, and when it would be inequitable to enforce the right. The circumstances in a given case which are claimed to constitute laches are, of course, questions of fact. But the conclusion whether upon the facts it would be inequitable to enforce the right, and whether the claimant is barred by laches, involves a question of law. In proceedings in equity in which the doctrine of laches has been developed, it is commonly held that the defense of laches may be raised by demurrer, that is, assuming the facts stated in the bill to be true, the bill is not maintainable, *as a matter of law,* because of laches. *Taylor* v. *Slater,* 21 R. I. 104; *Meyer* v. *Saul,* 82 Md. 459; *Coryell* v. *Klehm,* 157 Ill. 462; *Kerfoot* v. *Billings,* 160 Ill. 563; Whitehouse Eq. Practice, Sect. 331.

"Nevertheless, the decision of the court upon the question of laches is so much a matter of discre-

tion, dependent upon the facts in the case, that it should not be disturbed on appeal or exceptions unless clearly shown to be wrong. 12 Ency. of Pleading and Practice, 840.

". . . . . But mere lapse of time is not enough. 'The true doctrine concerning laches,' says the author of Pomeroy's Equitable Jurisprudence, Vol. 5, sect. 21, 'has never been more concisely and accurately stated than in the following language,' used by the Rhode Island court:—'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right.' *Chase* v. *Chase,* 20 R. I. 202."

The plaintiffs allege and the demurrers admit that the cause of action arose on March 2, 1933, when the plaintiffs were advised that they were dropped from the roster under the provisions of Art. 53 of the then existing amended agreement between said Railroad and said Brotherhood. No statement is made in the bills which sets forth any convincing reason why no action was instituted against the defendants from said March 2, 1933, until the date of the first bill which was November 14, 1945, the date of the second bill being February 11, 1946, and the date of filing of both bills being February 16, 1946. This failure of the plaintiffs to act within a period of almost thirteen years, unless explained with sufficient certainty to appraise the court as to why the plaintiffs delayed so long a time before bringing and prosecuting the cause of action (if they had one), is sufficient to place their alleged claims in such a status

that the court will give the matters alleged in said bills careful scrutiny because the law abhors the airing of stale and vexatious claims. In addition to the delay mentioned above it should also be noted that there was a still further delay of over five years before the matter was brought to the attention of the Court for hearing. In other words, the plaintiffs have allowed over eighteen years to elapse before court action was requested. It is very obvious that the delay in commencing the litigation has been detrimental to the defendants. If seniority under said agreement was restored to the plaintiffs, it necessarily would destroy the seniority gained by others during the thirteen year period prior to the filing of the bills. Such an undue delay would certainly be prejudicial to the defendants and it would be inequitable to enforce such rights after so long a delay.

It should be borne in mind that we are not dealing with the statute of limitations, that is, the hard and fast rule which is applicable to actions at law, but we are asked in this case to apply the doctrine of laches in equity and that is largely a matter of judicial discretion depending upon the facts and circumstances of each particular case. Equitable relief may be denied when less than the statutory period of six years has elapsed or it may be granted long after the expiration of that period. The chancellor is not bound by clock-ticks. See *Mace* v. *Ship Pond Land & Lumber Co.*, 112 Me. 420, 424, 92 A. 486. Laches depends upon judicial discretion, and, as we said in *Stewart* v. *Grant, supra,* at Page 201:

> "Perhaps no better definition of laches is possible than to say that it is an undue delay working to the disadvantage of another. When a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."

Tested by the rules stated herein the bills in equity are demurrable for the reason, among others, that they contain

"no statement of a justifiable cause or excuse" for the laches apparent on their face. That omission is not cured by the admissions of the demurrers which are no broader than the allegations of the bills and confess no conclusions of law. *Shattuck* v. *Jenkins, et al., supra,* Page 484. The ruling of the sitting justice was correct. Under the circumstances it would be inequitable to grant the right to amend. The mandate will be

Appeals dismissed in both cases.

ADELARD D. DUPONT, PETR.
vs.
WILFRED F. LABBE, ET AL.

York. Opinion July 7, 1952.

Review. Default. Appearance.

A petition for review is addressed to the discretion of the court and when this discretion is exercised according to the well established rules of practice and procedure it is final and conclusive.

It is not error for a presiding justice to decline to state the law before hearing.

ON EXCEPTIONS.

This is a petition for review based upon R. S. 1944, Chap. 110, Sec. 1, Clause VII. The presiding justice granted the petition and respondent brought exceptions. Exceptions overruled.

Daniel E. Crowley, for plaintiff.

Hilary F. Mahaney, for defendant.

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

WILLIAMSON, J. Exceptions to the granting of a review of an action in which the petitioner was defaulted on his failure to enter an appearance are overruled.

The petition is based upon R. S. Ch. 110, Sec. 1, Clause VII. The applicable law is found in *Donnell* v. *Hodsdon,* 102 Me. 420, at 422, 67 A. 143, at 144, as follows:

> "Under clause VII upon which this petition is based, the petitioner is not entitled to a review unless he proves to the satisfaction of the court at nisi prius three propositions; (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable. If the presiding Justice is satisfied of all these and grants the petition or is not satisfied of some one of them and denies the petition, his decision is final and not subject to review upon exceptions."

Thomaston v. *Starrett,* 128 Me. 328, 147 A. 427; *Jason* v. *Goddard,* 129 Me. 483, 149 A. 622; *Thompson* v. *Chemical Co.,* 134 Me. 61, 181 A. 829; *Richards* v. *Libby,* 140 Me. 38, 33 A. 2d 537.

It is familiar law that a petition for review is addressed to the discretion of the court. *Summit Thread Co.* v. *Corthell,* 132 Me. 336, 171 A. 254, and cases cited *supra.*

In passing upon the decision of the presiding justice we bear in mind the rule stated by Justice, later Chief Justice, Emery in *Goodwin* v. *Prime,* 92 Me. 355, at 362, 42 A. 785, at 787, as follows:

> "The petition, therefore, was addressed to the judicial discretion of the justice of the Supreme Court of Probate who should happen to hear it. The law

> court cannot substitute its discretion for his. When the determination of any questions rests in the judicial discretion of a court, no other court can dictate how that discretion shall be exercised, nor what decree shall be made under it. There are in such cases no established legal principles or rules by which the law court can measure the action of the sitting justice unless indeed he has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument."

The law has also been well stated by Justice, later Chief Justice, Sturgis in *Bourisk* v. *Mohican Co.*, 133 Me. 207, at 210, 175 A. 345, at 346, as follows:

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

See also *American Oil Co.* v. *Carlisle,* 144 Me. 1, 63 A. 2d 676, and *Sard* v. *Sard,* 147 Me. 46, at 53, 83 A. 2d 286.

The first error of law of which the respondents complain is without merit. At the outset of the hearing and before the taking of testimony the respondents requested the presiding justice to rule that under the statute the petitioner must prove substantially what is stated in the quotation above from the *Donnell* case.

The justice declined to specify anything at that time. There was no reason for him then to rule. Error comes

not in failure to state the law before hearing, but in failure to apply the governing principles of law in the course of hearing and decision.

The second objection in the bill of exceptions reads:

> "The Judge heard and ruled only on the accident and mistake and found for the petitioner over the objections of the respondents and the respondents duly excepted thereto."

The record, however, shows that the justice considered the remaining statutory elements in reaching his decision. The record was made a part of the bill of exceptions and accordingly controls the bill in so far as it differs therefrom. *Tower* v. *Haslam,* 84 Me. 86, 24 A. 587; *State of Maine* v. *Mitchell,* 144 Me. 320, 68 A. 2d 387.

In the third objection the respondents claim that from the evidence "that one and only one conclusion could be reached from those facts and that is that the petitioner was properly served and only through the petitioner's own negligence and lack of due diligence was the default recorded against him. and it was an abuse of discretion to find from the facts presented that there was accident, fraud, mistake or misfortune within the meaning of the Statute."

The petitioner in review (or defendant), a real estate agent, sold several houses built by his principal, a Mr. Benoit, including a house sold to the respondents (or plaintiffs). The plaintiffs sued Mr. Benoit, the principal, and the defendant, the real estate agent, in separate actions in deceit in connection with the plaintiffs' purchase of the house. The writs each carried an ad damnum of $3,000, were returnable at the October Term of the same court, and were issued on the same day from the office of the same attorney. The defendant did not enter his appearance or employ an attorney. From Mr. Benoit the defendant learned with reference to the Benoit action shortly after the service of the summons that Mr. Benoit had employed an attorney and

later in October that the action had been continued at the return term to the January term.

The defendant believed responsibility, if any, to the plaintiffs rested upon Mr. Benoit and not upon him. The justice could, and in view of his decision, did find that by mistake the defendant did not protect his interests in court, that the mistake was of the type for which the petition might be granted, and further that the apparent negligence of the defendant arose from the mistaken belief that his case in some manner would travel with the Benoit case. *Shurtleff* v. *Thompson,* 63 Me. 118; *Pickering* v. *Cassidy,* 93 Me. 139, 44 A. 683; *Grant* v. *Spear,* 105 Me. 508, 74 A. 1130; *Taylor* v. *Morgan & Company,* 107 Me. 334, 78 A. 377; *Leviston* v. *Historical Society,* 133 Me. 77, 173 A. 810; *Richards* v. *Libby, supra.*

After a hearing by the justice presiding at the return term, properly held under our practice without notice to the defaulted defendant, damages were assessed in the amount of $3,000. The award, it will be noted, is the precise amount of the ad damnum in an action setting forth charges of deceit with relation to the cellar, heater, and other conditions in a house of which the total cost was $4900.

The justice hearing the petition for review heard direct evidence only on one point, that is upon mistake, but he clearly had in mind and based his decision, the record shows, upon the other elements as well. On the record we hold given a mistake, the justice was acting within his discretion in finding that, to use his words "on the face of the thing it shows an injustice." It is a short step on a straight path from that point to a finding that a further hearing would be just and equitable.

We cannot say that the presiding justice committed a "palpable error" in finding the existence of the three essential elements.

Exceptions overruled.

STATE OF MAINE
vs.
VIRGIL A. TORREY

York. Opinion July 11, 1952.

Public Utilities. Permit. Criminal Law. Lessors.

An owner-lessor in the business of furnishing a truck with a driver to a carrier for use in the interstate operations of the carrier is not required to obtain a permit under R. S. 1944, Chap. 44, Sec. 22, as amended by P. L. 1949, Chap. 263 and R. S. 1944, Chap. 44, Sec. 30, Clause IV.

There is a distinction between the lease of a truck with a driver to a *carrier* to augment its equipment and the lease to a *shipper* of transported goods. In the latter situation the lessor is engaged in transportation for hire and must have a permit.

ON REPORT.

Respondent was indicted for transporting freight and merchandise for hire without a P. U. C. permit. The case is before the Law Court upon agreed facts. Respondent not guilty. Respondent discharged.

Alexander A. LaFleur, Atty. Gen.
Raymond E. Jensen, Spec. Asst. Atty. Gen.

James J. Weinstein, for defendant.

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

WILLIAMSON, J. On report. The respondent was indicted for transporting freight and merchandise for hire by truck in interstate commerce without the permit of the Maine Public Utilities Commission required by statute. The case is before us for final determination upon undisputed facts. For our purposes we treat the record of the evidence as the equivalent of an agreed statement. We expressly do

not pass upon our authority or obligation to find the facts in a criminal case on report.

The decisive issue is: Was Mr. Curtis, owner of the truck driven by the respondent and leased to the Hemingway Brothers Interstate Trucking Company (sometimes called Hemingway), an interstate carrier?

The pertinent provisions of the statutes read:

> "Sec. 22. *Interstate carriers; permit to operate.* In order that there may be proper supervision and control of the use of the highways of this state, every person, firm or corporation transporting freight or merchandise for hire by motor vehicle upon the public highways between points within and points without the state is required to obtain a permit for such operation from the commission. Application for such permits shall be made in the manner and form to be prescribed by the commission in its regulations, and such permits shall issue as a matter of right upon compliance with such regulations and payment of fees, unless the commission shall find that the condition of the highways to be used is such that the operation proposed would be unsafe, or the safety of other users thereof would be endangered thereby."
>
> *R. S. Ch. 44, Sec. 22, as amended by P. L. 1949, Ch. 263.*
>
> "Any driver of any motor vehicle which is being unlawfully used by any person, firm, or corporation in carrying on the business of a common carrier or of a contract carrier or of an interstate carrier without a certificate or permit shall be liable to the penalties provided in this section."
>
> *R. S. Ch. 44, Sec. 30, Clause IV.*

A violation of either section is a misdemeanor.

Strictly the indictment charges that the respondent was an interstate carrier, and hence required a permit for himself. It is apparent, however, from the facts and the argu-

ment that the indictment was obtained to test the necessity of a permit, not in the name of the respondent, but in the name of Mr. Curtis for whom the respondent was driving the truck.

In reaching our decision we do not pass upon the validity of the statute requiring a state permit for an interstate carrier. For our purposes there must be compliance with the statute.

The facts may be briefly stated:

At the time of the alleged offense at Kittery the respondent was driving a truck owned by his employer, Mr. Curtis, and leased to Hemingway under a "motor vehicle rental lease agreement" for a stated sum of $90.00 for a trip from New York City to Portland. The freight and merchandise on the truck were being transported for hire in interstate commerce under bills of lading issued by Hemingway.

The following conditions and provisions in the printed form of the lease are of interest:

> "3. The Lessor agrees that nothing in this lease shall give the Lessee jurisdiction or control over the vehicles other than to designate freight to be handled, to specify routes over which the carrier is permitted to operate by virtue of Interstate Commerce Commission authority, and to indicate destination of freight.
>
> "7. The Lessor agrees that the sum herein agreed upon for the leasing of the equipment herein described, shall constitute full and complete payment of any and all expenses involved in the operation of said equipment.
>
> "8. The Lessor agrees to furnish at his own expense, the driver or drivers required to operate the leased equipment during the term of the lease.

> "14. The Lessor agrees that it will not use the Interstate Commerce Commission plates or any State Utility plates of the Lessee herein except when the Lessor is transporting freight for and solely on behalf of the Lessee."

Mr. Curtis owned two trucks which were used exclusively under trip leases with Hemingway and were marked with its name. The trucks were driven either by Mr. Curtis or by a driver employed by him.

The truck driven by the respondent carried a distinguishing number plate issued by the Maine Public Utilities Commission upon the request of Hemingway in which ownership by Mr. Curtis and lease to Hemingway were noted. A certificate of insurance covering both Mr. Curtis and Hemingway was also on file with the Commission. The records of the Commission did not disclose (1) that the owner-lessor furnished the driver, or (2) that the truck was leased not at all times, but only under trip leases.

The decision does not turn, however, upon the apparent acquiescence of the Commission in the lease of the truck. If Mr. Curtis was an interstate carrier, the Commission could not waive the statutory permit.

There are certain situations which we may well eliminate from discussion.

FIRST—The respondent was not engaged for *himself* in "transporting freight or merchandise for hire" by truck in interstate commerce. The driving of a truck in itself is not an interstate operation within the meaning of Section 22 of the statute. The truck driver is reached through Clause IV of Section 30. Unless the truck is lawfully used by a carrier—here of course an interstate carrier—with the proper certificate or permit, the driver violates the law. In a sense the driver must pay for the sins of his employer or in any

event of the carrier for whom the operation is conducted. Clause IV makes clear the distinction between the carrier and the truck driver. In brief, no one would seriously urge that the respondent for himself required a permit as an interstate carrier. The question is whether or not he was protected by Hemingway's permit.

SECOND—Hemingway was an interstate carrier. The operation in which the respondent acted in the capacity of a truck driver was part of its lawfully permitted business. The carrier was transporting freight and merchandise for hire not in its own truck or in a truck leased without a driver, but in a truck leased with driver furnished by the owner-lessor. In so far as the shipper was concerned he was shipping goods via Hemingway. Whether the truck was owner or leased by the carrier meant no more to the shipper via Hemingway than does the ownership of a freight car to the shipper via rail.

THIRD—There was no element of subterfuge or evasion in the lease arrangement between Mr. Curtis and Hemingway. In *U. S.* v. *Steffke,* 36 Fed. Supp. 257, for example, the defendant owner-lessor in fact continued an interstate operation for its own benefit in the name of the lessee. There is no suggestion here that Mr. Curtis used Hemingway to cover his own operations. His status as a carrier rested upon the open relationship with Hemingway. There was nothing hidden from the Commission or the shipping public. *Interstate Commerce Commission* v. *F & F Truck Leasing Corp.,* 78 Fed. Supp. 13.

The basic issue is not as urged by the state in its brief whether the respondent was the servant and agent of Hemingway or of Mr. Curtis, an independent trucker. The respondent clearly was in the employ of Mr. Curtis. The undoubted fact that Hemingway under the trip lease had certain control over the movement of the truck and thus over

its driver did not destroy the essential relationship between truck owner and truck driver.

In our view Mr. Curtis, the owner-lessor, was not in the business of transporting freight and merchandise for hire in interstate commerce. He was in the business of furnishing a truck with driver to a carrier for use in the interstate operations of the *carrier*. Accordingly, Mr. Curtis required no permit, and so the respondent needing no protection from a permit in the name of Mr. Curtis, is not guilty of the offense charged.

The situation in the case at bar is not unlike that described in the words of the Court in *Interstate Commerce Commission* v. *F & F Truck Leasing Corp., supra* at 19:

> "It is the frequent practice in the motor carrier industry for carriers to augment their over-the-road equipment by leasing vehicles from owner-operators who are also employed to drive the vehicles. Owner-operators who own or control several units of equipment are in fact engaged in the truck rental business. The traffic handled in such leased equipment by an owner-operator becomes an integral part and parcel of the authorized carrier's operations. The published rates of the lessee carrier control the transportation costs to the public, and as to the operations of such leased vehicle the lessee carrier assumes full responsibility for compliance with all applicable statutes and the rules of the Commission governing the duties of the carrier to the shipper and to the public generally (Dixie Ohio Express case, 17 M.C.C. 735, 752)."

The interstate operation we hold was the operation of Hemingway and not of Mr. Curtis.

The cases cited by the state may in our view be distinguished on the facts from the case at bar. In several of the cases the truck was leased not to a *carrier* to augment its

equipment but to the *shipper* of transported goods. Courts in such cases have repeatedly held the lessor is engaged in transportation for hire and must have a suitable permit. *Entremont, et al.* v. *Whitsell, et al.,* (Cal.) 89 Pac. 2d. 392; *Casale, Inc.* v. *United States,* 86 Fed. Supp. 167; *Public Service Commission* v. *Lloyd A. Fry Roofing Co.,* (Ark.) 244 S.W. 2d. 147; *Motor Haulage Co.* v. *United States,* 70 Fed. Supp. 17.

For like reasons a transportation tax was upheld on income from an operation in which the lessor delivered lessees' goods to their customers. *Bridge Auto Renting Corporation* v. *Pedrick,* 174 Fed 2d. 733.

The tort cases point to the liability of the lessee. In terms of the present case Hemingway could not delegate its responsibility to others. Those who carry goods for it, including the respondent, must be considered as a part of the Hemingway organization for the limited period of the lease. *Barry* v. *Keeler,* 322 Mass. 114, at 127, 76 N. E. 2d. 158; *Lowell, et al.* v. *Harris, et al.,* (Cal.) 74 Pac. 2d. 551; *Costello* v. *Smith, et al.,* 179 Fed. 2d. 715; *Law* v. *Holland Transportation Co., Inc.* (Mass.) 96 N. E. 2d. 286; *Restatement of the Law, Torts,* Sec. 428.

The "grandfather clause" cases are of interest. In *United States, et al.* v. *N. E. Rosenblum Truck Lines, Inc.,* 315 U. S. 50, 62 S. Ct. 445, owner-lessors serving a common carrier sought to acquire contract carrier "grandfather" rights. The Supreme Court said:

> "for the Congressional intent to avoid multiple 'grandfather' rights on the basis of a single transportation service is equally applicable to prevent appellees from being considered either as contract or as common carriers within the meaning of the Act."

See also *Thompson* v. *United States,* 321 U. S. 19, 64 S. Ct. 392.

Why we may ask, should not an interstate carrier augment its equipment when needed? And why should not a lessor supply the carrier's needs without becoming thereby a carrier in his own right? It does not accord with the common sense of the situation, in our view, to hold both Hemingway and Mr. Curtis to be interstate carriers.

Hemingway, and not Mr. Curtis, was an interstate carrier within our statute. The permit issued to Hemingway was sufficient protection for the respondent.

Respondent not guilty;

Respondent discharged.

BOURQUE-LANIGAN POST NO. 5
THE AMERICAN LEGION
vs.
PETER P. CAREY

Kennebec. Opinion July 14, 1952.

Contracts. Parties. Res judicata.

A party must have some interest in a subject matter of potential litigation to entitle him to maintain an action thereon.

Intention may control the relationship created by transactions between parties.

One entitled by contract to have a building erected on a particular parcel of land does not lose his right of action for a breach of the contract therefor by conveying the bare legal title of the land to a corporation within his control.

The defense of *res judicata* is available whenever a subject matter in controversy has been brought directly in issue in earlier proceedings terminating in a judgment thereon.

ON EXCEPTIONS.

Action for breach of contract heard by a referee with rights reserved in the rule of reference. The case is before the Law Court upon exceptions to the acceptance of the referee's report in favor of *plaintiff*. Exceptions overruled.

Perkins, Weeks & Hutchins, Charles N. Nawfel, Foahd J. Saliem, for plaintiff.

Jerome G. Daviau, for defendant.

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

MURCHIE, C. J. The issue raised by the defendant's exceptions herein, whereby he seeks to challenge the acceptance of a referee's report, within the right reserved in the rule of reference, must be resolved, in final analysis, by testing the written objections thereto, filed pursuant to Rule 21 of the Rules of Court, 129 Me. 511. See *Brewster* v. *Churchill,* 148 Me. 8, 88 A. 2d. 585, and cases cited therein.

The objections were five in number, but the allegations of error carried in the Bill of Exceptions relate exclusively to the second of them, the substance of which is stated hereafter. It was the election of the defendant not to attempt the prosecution of exceptions applicable to any of the others, as is made apparent by the fact, noted in his brief, that he is relying:

> "upon the bill of exceptions alone, without the printed record."

At oral argument defendant's counsel stated frankly that all the objections other than the second were waived. To determine the impact of that one the facts must be stated.

These disclose that the plaintiff is an American Legion Post, organized under what is now Chapter 50 of our Re-

vised Statutes (1944), at a time when the property holding of a corporation so organized was limited to $100,000. It was raised to $500,000 by P. L. 1949, Chap. 25. Prior to the change the plaintiff contracted with the defendant for the erection of a building, to serve as a legion home, on a parcel of land it then owned, at a cost of $131,000. Either because of the property limitation fixed by its charter, for convenience, or for both said reasons, and possibly others, the plaintiff caused a business corporation to be organized under the general law, R. S. 1944, Chap. 49, as the plaintiff's records show:

> "to effectuate the purposes of realizing a new home for the post and to carry out all the business details connected therewith."

Among its By-Laws was one declaring the "Intent of Corporation," which recited that "upon request" of the plaintiff, all its assets would be conveyed to the plaintiff "without profit," and that "in the meantime":

> "recognition will be given to the obligation of this corporation to conscientiously exercise its charter powers in the interests and to the future advantage of"

the plaintiff.

After the organization of the corporation, named "The Bourque-Lanigan Post No. 5, The American Legion Building Corporation," referred to hereafter as the "Corporation," and before any work under the contract was commenced, the plaintiff conveyed the land on which the defendant had undertaken to construct the home to the Corporation. The Corporation mortgaged the property to raise funds to meet the contract terms, made all payments under the contract which were made to the defendant, and ultimately ousted him from the premises and brought his contract work to an end. There was no assignment of the contract. There was no novation. The work proceeded without

interruption, so far as the Bill of Exceptions shows, and the award made by the referee shows his finding, which cannot be reviewed in the absence of the record, that the contract was breached by the defendant.

The defendant does not deny the breach, or claim that the damage award was excessive. Instead he relies exclusively on the claim set forth in the second of his written objections, that the plaintiff, having conveyed the legal title to the land on which the building was to be erected to the Corporation, has no standing in law to collect damages for the breach.

We can find no basis for the claim in any of the authorities cited by the defendant, or elsewhere. He cites us to 1 Am. Jur., Actions, Pars. 3, 8, 20, 28, 31 and 62; 47 C. J., Parties, Pars. 32, 36 and 39; 39 Am. Jur., Parties, Pars. 10 and 14; 2 Am. Jur., Agency, Par. 22; 4 Am. Jur., Assignments, Par. 2; 5 C. J., Assignments, Par. 61, Footnote (b); *Reed* v. *Nevins,* 38 Me. 193; *Pollard* v. *Somerset Mutual Fire Insurance Co.,* 42 Me. 221; *Morrison* v. *Clark,* 89 Me. 103, 35 A. 1034, 56 Am. St. Rep. 395; and *Weed* v. *Boston & Maine Railroad,* 124 Me. 336, 128 A. 696, 42 A.L.R. 487.

The texts declare definitely that a party must have some interest in a subject matter of potential litigation to entitle him to maintain an action thereon, as is well illustrated by *Reed* v. *Nevins, supra,* where an obligee in a poor debtor's bond sought recovery thereunder unsuccessfully after he had assigned it to a third person, and *Weed* v. *Boston & Maine Railroad, supra,* where trover was denied a plaintiff who had neither the title nor the right of possession to the personal property which was the subject matter of the action. So it must be with any action which is dependent on title to property of any kind. The authorities make it clear also that under appropriate circumstances a right may be assigned without the execution of a formal assignment.

The present case deals with a breach of contract, and specifically with a contract entered into between the parties to the action. The fact that there has been a breach of it, by the defendant, is not denied. The defendant asserts, merely, that the plaintiff has no title to either the land on which the building was to be erected, or the contract under which the work of construction was to be carried on. He asserts, in effect, that the conveyance of the title to the land and the Corporation's oversight of his construction work operated to effect an assignment. In this connection it is interesting to note what Judge Savage said, speaking for a court that was unanimous, in *Coombs* v. *Harford,* 99 Me. 426, 59 A. 529. The plaintiffs therein were attempting to proceed as the assignees of a bond, under an assignment made without consideration, for the express purpose of placing them in position to bring the action. They were members of the lodge to which the bond ran. They were, he said, its "servants and agents," and:

> "such was the relation of the lodge to them and the claim, that * * * it could at any time have revoked and cancelled the assignment."

In *Weed* v. *Boston & Maine Railroad, supra,* it was made plain that intention might control the relationship created by transactions between parties.

There can be no doubt of the intention underlying the transactions here in question between the plaintiff and the Corporation. The latter was vested with the bare legal title to the land on which the building was to be constructed for the purposes of the former, and within the former's control. We know of no reason why it should not collect damages for defendant's breach of contract in its own name, where the contract still stands.

The defendant suggests the possibility of danger that after he pays the plaintiff the damages awarded by the

referee, he may be answerable to the Corporation for the same breach of his contract. That there is no fear of such an eventuality is demonstrated quite effectively by one of the cases cited on his behalf, *Morrison* v. *Clark, supra.* The defense of *res judicata* is available whenever a subject matter, in controversy:

> "was brought directly in question by the issue in the proceedings which terminated in the former judgment."

For other cases dealing with that defense, see *Emery* v. *Fowler,* 39 Me. 326, 63 Am. Dec. 627; *Piper* v. *Daniels,* 126 Me. 458, 139 A. 480; *Libby* v. *Long,* 127 Me. 293, 143 A. 66. There can be no possibility of doubt on the facts of the present case, as presented in the Bill of Exceptions, concerning the relationship between the plaintiff and the Corporation. That relationship would be a complete answer to any process instituted by the Corporation to recover for a breach of defendant's contract with the plaintiff when the defendant pays the judgment which will issue in this case.

Exceptions overruled.

ALBERT DENACO *vs.* EDWIN BLANCHE
CARLOS PITCHER *vs.* EDWIN BLANCHE
WILLIAM MAYO *vs.* EDWIN BLANCHE

Kennebec. Opinion July 14, 1952.

Workmen's Compensation. Third Persons.

Indemnity. Public Policy.

Intention governs the construction of an indemnity contract and this must be found from a reading of the whole instrument.

An indemnity contract providing indemnity to the State Highway Commission and its employees for injuries *"received or sustained by* or from the contractor and *his employees in doing the work"* limits indemnity to those injuries by the indemnitee "in doing the work" to which the contract related, or with which it was in any way connected and does not burden the indemnitor outside that field.

Public policy would be involved in an indemnity contract which sought to protect an indemnitee for negligence wherever it may occur, although public policy does not preclude indemnity in a limited field.

ON EXCEPTIONS.

Actions by corporate employer, an assenting self-insurer, under the Workmen's Compensation Act, in the name of its three employees to recover damages for injuries suffered by them, through the alleged negligence of defendant, after paying applicable compensation benefits. Defendant, an employee of the Highway Commission pleaded, among other things, an indemnity contract between the corporate employer and the Commission. There were judgments for plaintiffs and defendant brought exceptions to the Law Court. Exceptions overruled.

Fogg & Fogg, Goodspeed & Goodspeed, for plaintiff.

Robinson, Richardson & Leddy; McLean, Southard & Hunt, for defendant.

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

MURCHIE, C. J. The actions here under review, on defendant's exceptions, were brought to recover damages sustained by the plaintiffs, as the declarations allege, as a result of the negligence of the defendant, when a motor-driven bush-cutting machine he was driving, from the place where he had been engaged in operating it, to a garage for repairs, went out of control. He was an employee of the State Highway Commission, referred to hereafter as the "Commission." The plaintiffs, employees of W. H. Hinman, Inc., an assenting employer under The Workmen's Compensation Act, R. S. 1944, Chap. 26, referred to hereafter as the "Act," being injured thereby while doing road construction work under a contract between the Commission and their employer, received the compensation and medical benefits to which they were entitled thereunder from that employer, a self-insurer under the Act.

The employer brought the actions in the names of the plaintiffs, as authorized by Section 25 of the Act. The Justice in the Trial Court, acting without the intervention of a jury, and with the right of exceptions on questions of law reserved, awarded recoveries substantially in excess of the compensation and benefits applicable to each plaintiff. Under the Act each is entitled to such part of the award made to him as represents the excess over the employer's payments, expenses and costs of action or collection. Defendant's claim that the plaintiffs are nominal parties and that their employer is the real plaintiff, to use the designations applied in *Fournier* v. *Great Atlantic & Pacific Tea Co.*, 128 Me. 393, 148 A. 147, 68 A.L.R. 481, has no bearing on the single issue presented by the Bills of Exceptions.

That issue, raised in brief statements accompanying the pleas of the general issue filed in the cases, which we con-

sider alleged sufficiently in the Bills of Exceptions, despite plaintiffs' challenge thereof, noted hereafter, is grounded on defendant's status as an employee of the Commission and the undertaking of the employer of the plaintiffs in its contract with said Commission to assume certain risks; to defend certain actions; and to indemnify the State and the Commission, their officers and agents, and save it, and them, harmless, from any and all claims in a field wherein, the defendant asserts, the present actions fall. If the employer's contract requires it to save the State and the Commission harmless against any claims where recoveries are based upon the negligence of any employee of the Commission, regardless of the nature of the work on which he was employed when it occurred, it would be true, as the brief statement alleges, that the recoveries of the plaintiffs would be collectible from their employer by the Commission, assuming it to be holden to pay them in the first instance, and the result would be, as the defendant alleges, "a circuity of actions and a multiplicity of suits."

A consideration that could not be overlooked, if we thought that the defendant had any reasonable basis for the claim he asserts, is the Act under which the plaintiffs' employer is proceeding. Its purpose and its operation have been declared on so many occasions heretofore that there can be no necessity for saying more at this time than that it assures the employees of assenting employers moderate recoveries from their employers by the waiver of their rights of action at common law against those employers and that such waiver does not involve any benefit to third persons responsible for injuries to them. The waiver is declared in Section 7 of the Act (where employees take no action to preserve the right in question), and full recognition of their right to supplement the compensation and benefits they receive by full recovery from negligent third persons is carried in Section 25. We have no occasion at this time to consider how the right of an employer to satisfy the

claims of his employees under the Act would be affected by a contract in which he undertook definitely to relieve third persons negligently injuring his employees from common law liability therefor. The present contract, as we read it, does not purport to reach so far.

Reference to it makes it apparent that there is no suggestion of basis for the claim asserted by the defendant. The pertinent part thereof reads:

> "The Contractor shall assume the defense of, and indemnify and save harmless the State and the Commission and their officers and agents from all claims, suits or actions of any character, name and description on account of injuries to any person, persons, property, firm or corporation, received or sustained by or from the Contractor and his employees in doing the work, or in consequence of any improper materials, implements or labor, used therein; and for any act, omission or neglect of the Contractor and his employees therein."

The quoted language is the first of two paragraphs appearing under the caption "Responsibility for Damage Claims" in a printed book of 263 pages carrying the "Standard Specifications" of the Commission, which became part and parcel of every contract for highway work at or near the time that of the employer was executed. The defendant relies on the first part of it. Counsel for the plaintiffs argues, quite properly, that everything which appears under the caption should be considered in determining the intention evidenced by any particular part, and it is undoubted that what follows the quoted paragraph demonstrates clearly that the intention of the whole was to cover fully whatever might happen in the course of the work to which the contract related, and nothing beyond that point. It is not necessary, however, to go outside the very language on which the defendant relies. The injuries for which the employer undertook to be responsible were those:

> "received or sustained *by or from* the Contractor and his employees *in doing the work*" (emphasis supplied).

Counsel for the defendant places his reliance on the word "by," asserting that the use thereof makes the employer's agreement all-inclusive so far as any injury to its employees is concerned, and is entirely clear and free from ambiguity. He reads the word "in" in the phrase "in doing the work" as if it were intended to mean "while" and "in."

Such a construction is obviously a very forced one and would have to be considered so if all that appears after the phrase "in doing the work" could be disregarded. The language following it, however, and the long paragraph which completes the agreement concerning responsibility, makes it undoubted that the intended coverage was limited to the contract work. The employer, as an assenting employer under the Act, was liable, to any employee, for compensation and benefits applicable to injuries suffered by him, arising out of and in the course of his employment, and, as a principal or master, to any person other than an employee who was injured through the negligence of one, within the course of his work. The purpose of the quoted language was to protect the State and the Commission from claims of these two classes, and no others. The possibility that some employee of the Commission, engaged to do work of some other kind in some other location, would injure one of the contractor's employees while driving a motor vehicle in the vicinity where they were working was not within the contemplation of the parties to the contract.

It is unnecessary in this case to consider what language of a contract, if any, will indicate the intention of an indemnitor to protect an indemnitee against liability for negligence wherever it may occur, or the public policy which would be involved if such a contract purported to be so all-inclusive. That public policy does not preclude contracts

carrying an agreement of indemnity against negligence in a limited field is apparent by reference to *E. L. Cleveland Co.* v. *Bangor and Aroostook Railroad Co.*, 133 Me. 62, 173 A. 813, and cases cited therein, and the long annotation following the report of *Griffiths* v. *Broderick*, 27 Wash. 2d. 901, 182 P. 2d. 18, 175 A.L.R. 1, in the last cited report thereof. That annotation considers two types of indemnity contracts, those where:

> "one party agrees not to hold the other liable for damages which the former may suffer due to the negligent act of the latter, or one party agrees to indemnify a second for any liability incurred to a third party by reason of the negligence of the second."

The *Cleveland* and *Griffiths* cases, *supra,* are typical examples of agreements of the first class, the intention that they should protect the indemnitees against claims of a certain kind originating in negligence being made apparent by the references to fires "communicated directly or indirectly" from locomotives, in the one case, and to injuries "arising from any cause," on particular premises, in the other. The present contract falls in the second class. We are aware of no case, which indicates that the defense has not cited us to one, where anyone has ever attempted to contract himself out of liability for negligence wherever and whenever it might occur. Had the defendant been operating the bush-cutting machine in connection with the work the plaintiffs' employer had contracted to do, the defendant's claim might be supportable. He was not. That machine was not in use "in doing the work" to which the contract related, or with which it was in any way connected. The contract imposes no burden on the employer outside that field.

The plaintiffs claim that the exceptions presented by the defendant do not raise any issue "in clear and specific phrasing" or identify "clearly" the ruling of law intended

to be challenged within the principle declared in *Dodge* v. *Bardsley,* 132 Me. 230, 169 A. 306, and cases cited therein, must be rejected. The claim is based on the fact that the defendant did not ask a definite ruling in the Trial Court on the validity of his asserted equitable defense to lay the groundwork for an exception pointing directly to it. The cases were submitted to the Justice for decision of "all issues of fact, law, and equity involved, relating to both the legal and equitable defenses pleaded." The Bills of Exceptions present no challenge of the factual findings necessarily included in the damage awards. They set out carefully the employment status of the parties, quote what the defendant asserts is the controlling language of the contract, and make it apparent that sole reliance is placed on the equitable defense asserted in the brief statements. Careful reading of the Bills makes it obvious, as counsel for the defendant states in his brief, that they are "directed solely toward the equitable defense." Counsel concedes that the factual decisions on negligence and damages are final. The ruling on the equitable defense was correct.

Exceptions overruled.

CHARLOTTE GLAZIER
vs.
EDWARD C. TETRAULT

FRED GLAZIER
vs.
EDWARD C. TETRAULT

York. Opinion July 14, 1952.

Non-suit. Negligence. Evidence. Pedestrians.

In testing the propriety of an ordered non-suit, all the evidence must be viewed most favorably to a plaintiff.

A jury is entitled to draw all reasonable inferences from proved facts.

A non-suit should be ordered when the evidence would not warrant honest and fair-minded juries to decide in favor of a plaintiff.

One struck by a motor vehicle who did not see it until impact can have no intelligent thought about its speed.

A mere scintilla of evidence will not support a factual finding.

Conjecture is not proof.

Inferences based on mere conjecture, or possibilities, cannot support a verdict.

A pedestrian starting to cross a highway is not required as a matter of law to stop, look and listen.

A pedestrian starting to cross a highway should use due care for his own safety.

Mere looking will not suffice. One is bound to see what is obviously to be seen.

ON EXCEPTIONS.

These are negligences actions by a wife and her husband to recover damages for injuries and loss of consortium. The trial Court order a non-suit in each case. The Cases are

before the Law Court on exceptions thereto. Exceptions overruled.

Titcomb & Siddall, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

MURCHIE, C. J. These two actions were argued together under a single Bill of Exceptions alleging error in the ordering of non-suits. They were instituted by a wife and her husband, seeking to recover damages for very serious injuries suffered by the wife, the expenses of the husband traceable thereto, and his loss of consortium.

The injuries were caused by the impact of a motor vehicle operated by the defendant, which struck the plaintiff, Charlotte Glazier, and knocked her down, as she was crossing a public highway, at a point where there was no cross-walk, according to a plan introduced in evidence as an exhibit, to reach her home, shortly after midnight on a February day. She had stepped from the taxicab in which she had been driven to the place where she started to cross the road a few moments earlier, and did not proceed until the cab had driven away. The street was wide and straight. There was neither snow nor ice on the traveled portion of it, although snow was banked at the side in front of her house, and a path near there provided passage between the road and the sidewalk. There was no traffic, and little illumination. The point of impact was not located definitely but was shown, quite conclusively, to be at or near the middle of the road, approximately in front of the home toward which she was proceeding.

The indefiniteness of the evidence on which the plaintiffs rely is disclosed plainly in recitals of the Bill of Exceptions

relative to the testimony given by their witnesses, the only ones called to the stand. One point of uncertainty is where Mrs. Glazier was found, in the highway, after the event. A witness, who reached the scene before she was picked up, testified that she was lying in the center of the road, nearer the side on which her house was located. Another, the officer who investigated the accident, stated that the defendant said he struck her with his right front fender. That statement is inconsistent with others made to the same officer at the time, that she was in the middle of the road when he first saw her, that she was startled, took a step backward, and then started (again) to cross.

Another involves the speed at which the defendant was traveling. The officer testified that the defendant said he was proceeding at twenty to twenty-five miles per hour. Mrs. Glazier told the officer the next morning, when he interviewed her at the hospital, that the defendant was traveling at a "good pace," approximately forty to forty-five miles per hour. Other testimony given by her discloses that she did not see the car as it approached her and that she first realized its presence when she heard the screeching of its brakes and a light flashed in her face, which must have been a headlight on the car.

A third relates to marks on the surface of the highway which plaintiffs' counsel argues must have been made by the tires of defendant's car after the brakes were applied. Mr. Glazier testified that he was awakened from a nap by the sound of brakes, and, on going into the highway, could discern drag marks, twenty paces, or sixty feet, in length, which ran parallel to the road and were seven or eight feet out from the sidewalk on the house side. There was no evidence to connect such marks with the defendant's car, which stopped at the side of the road approximately ten feet beyond them.

There was evidence "tending to show," as the Bill of Exceptions states in summarizing the testimony, that Mrs.

Glazier "looked up and down the street two or three times" before starting to cross, after her taxicab departed, but she admitted on cross-examination, as the summarized statement shows, that she did not look after she started to cross, and it was upwards of forty feet from one side to the other. Her rate of progress is not disclosed, but she was walking, and there is nothing in the record to indicate that she was hurrying. The defendant's car, assuming that he was traveling at his own minimum estimate of speed, would cover almost thirty feet per second and must have been more than a hundred feet nearer her path when she reached the middle of the road than it had been at the instant of her starting.

Disregarding for a moment any question of contributory negligence on the part of Mrs. Glazier, counsel for the plaintiff argues that there was ample evidence on which a jury might have found that the defendant was negligent. He relies on her testimony that the defendant was traveling at a "good rate," which she estimated at forty or forty-five miles per hour; the drag marks in the highway, which he asserts might have been found, by a jury, to have been made by the defendant's vehicle; and the claim that if the lights on the defendant's car had been on, he would have been able to see Mrs. Glazier while he was still two hundred feet from the place where she would cross his path. He argues that a jury might have found that the lights on the defendant's car were not lighted, if the evidence of Mrs. Glazier, that she looked up and down the street and saw no car approaching from either direction, was believed, because she could not have missed seeing a car with the lights on. The declaration carries no allegation that the defendant was traveling without lighted headlights, but if it did, there is no evidence to prove the fact. That it cannot be presumed on any such ground will be noted hereafter.

The plaintiffs rely on the principle of law well established in this jurisdiction, that in testing the propriety of an or-

dered non-suit, all the evidence must be viewed most favorably to a plaintiff. *Johnson* v. *New York, New Haven & Hartford Railroad,* 111 Me. 263, 88 A. 988; *Lewiston Trust Co.* v. *Deveno,* 145 Me. 224, 74 A. 2d. 457. It is recognized that a jury is entitled to draw all justifiable inferences from proved facts. *Ross* v. *Russell,* 142 Me. 101, 48 A. 2d. 403; *Wiles* v. *Connor Coal & Wood Co.,* 143 Me. 250, 60 A. 2d. 786. One of the best statements of the rule is that made by Chief Justice Savage in the first of these cases:

> "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. * * * 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. In such a case it is reversible error to take the issue from the jury."

It is equally well established, however, that when the situation is otherwise, a non-suit should be ordered, or a verdict directed, *Elwell* v. *Hacker,* 86 Me. 416, 30 A. 64; *Hultzen* v. *Witham,* 146 Me. 118, 78 A. 2d. 342, and cases cited therein.

Such is the situation here. There is no evidence in these cases, other than the statement of the injured plaintiff about the defendant's "good pace" (and forty or forty-five mile speed) to establish factually that he was exceeding twenty-five miles per hour. In *Wiles* v. *Connor Coal & Wood Co., supra,* we had occasion to consider the probative value of evidence concerning motor vehicle speed given by one who did not see it until struck by it, and gave our approval to the statement of Chief Justice Rugg in *Koch* v. *Lynch,* 247 Mass. 459, 141 N. E. 677, that such a person:

> "could have had no intelligent thought about * speed."

The record carries a trifle more evidence about the drag marks in the highway than is contained in the recital concerning them in the Bill of Exceptions. That trifle is found in the testimony of Mr. Glazier, after his acknowledgment that he did not know where the marks came from, that they were "fresh." Just how long drag marks made in a highway by vehicles will continue to look "fresh" may be difficult to prove factually, but it is at least apparent that one viewing them cannot give testimony competent to prove that they were made at any particular time.

There are two firmly established principles of law which support the action taken in the Trial Court in these cases. The first is that a mere scintilla of evidence will not support a factual finding. *Connor* v. *Giles,* 76 Me. 132; *Nason* v. *West,* 78 Me. 253, 3 A. 911; *Adams* v. *Richardson,* 134 Me. 109, 182 A. 11; *Bernstein* v. *Carmichael,* 146 Me. 446, 82 A. 2d. 786. As Chief Justice Peters stated it in *Connor* v. *Giles, supra*:

> "a jury cannot be permitted to find there is evidence of a fact when there is not any."

The other is that conjecture is not proof. *Alden* v. *Maine Central Railroad Co.,* 112 Me. 515, 92 A. 651; *Mahan* v. *Hines,* 120 Me. 371, 115 A. 132; *Bernstein* v. *Carmichael, supra.* As was said in *Mahan* v. *Hines, supra,* when a plaintiff seeks to prove his case by inferences "drawn from facts," the facts themselves must be proved.

> "Inferences based on mere conjecture or probabilities"

cannot support a verdict, and when nothing more is presented by a plaintiff, the principle heretofore noted is applicable—a non-suit is in order. The record carries no scintilla of evidence that the headlights on defendant's car were not lighted as he approached the place where Mrs. Glazier was crossing the street. It presents nothing which would

justify even a conjecture that he was driving at excessive speed. Mrs. Glazier was found lying alongside his car and on its left side. The car must have been brought to a full stop at almost the instant she was struck and knocked down.

There is no necessity in these cases to consider the question of negligence on the part of Mrs. Glazier. Many authorities are cited by the plaintiffs wherein it is declared that a pedestrian is not negligent as a matter of law for failing to "stop, look and listen" before crossing a highway. The railroad crossing rule does not apply. The duty is to use due care, and nothing more, but that duty requires that one see what should be seen. In *Milligan* v. *Weare,* 139 Me. 199, 28 A. 2d. 463, this Court set aside a jury verdict rendered, undoubtedly, on the jury's acceptance of the plaintiff's testimony that he looked, saying:

> "Mere looking will not suffice. A pedestrian * * * is bound to see what is obviously to be seen,"

and, also:

> "We are convinced that he either did not look at all * * * or if he did he was so inattentive that he failed to observe the danger which threatened him."

So it must have been in this case. Assuming that Mrs. Glazier looked carefully in both directions before she started to cross the street, as she says, she admits that she did not look again as she made her crossing and entered the farther side thereof, where a car proceeding as the defendant was would normally be traveling. She did not produce evidence which would justify a finding that defendant was negligent. Her own evidence makes it apparent that she did not exercise due care for her own safety.

Exceptions overruled.

UNITED STATES TRUST COMPANY OF NEW YORK TRUSTEES UNDER THE WILL OF HENRY BEAMAN DOUGLASS

vs.

HELEN D. BOSHKOFF, ET AL.

Lincoln. Opinion July 15, 1952.

Wills. Trusts. Joint Tenants. Tenants in Common. Conflict of Laws. Equity.

It seems to be a well settled rule in Maine that in the case of a bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and in the case of the death of a legatee before the termination of the trust, the income must be paid to the legal representatives of the estate of the deceased legatee.

Maine follows the rule that in the absence of an expressed intention otherwise, the law of the testator's domicile will control a testamentary trust.

The fact that a testator selects or nominates as trustee a person or corporation who is living in another state and has possession of the trust funds there, does not, in and of itself mean that the testator intends that the law of the trustee's residence shall apply to the trust.

ON REPORT.

This is a bill in equity for the construction of a will. By agreement of counsel and by order of court the Law Court is to determine the rights of the parties and render final decision. Case remanded to Supreme Judicial Court sitting in equity for a decree in accordance with this opinion.

Hutchinson, Pierce, Atwood & Scribner, for Plaintiff.

Verrill, Dana, Walker, Philbrook & Whitehouse; Drummond & Drummond, for Defendant.

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

FELLOWS, J. This is a bill in equity brought by United States Trust Company of New York, trustee under the will of Henry Beaman Douglass, against Helen Boshkoff, Jean Yeomans, Sarah M. Crone, Alice Douglass Graves, Robert F. Douglass, Jr., Marshall W. Douglass, Grace C. Douglass, New York Academy of Medicine, College of Physicians and Surgeons of the Medical Department of Columbia University, and Columbia University. The bill asks for construction of the will of Henry Beaman Douglass, late of Boothbay, Maine, and comes to the Law Court from Lincoln County on report. By agreement of counsel and by order of a justice of the Supreme Judicial Court sitting in equity, the Law Court is to determine the legal rights of the parties and to render final decision.

Henry Beaman Douglass died in 1946. His will provided for a trust. The widow of the testator waived the provisions of the will and took the share of the estate to which she was legally entitled. In a bill in equity brought by the executor for construction of the will, in the light of the widow's waiver, this Court in *United States Trust Company* v. *Douglass, et als.*, 143 Maine 150, 56 Atl. 2d, 633, held that under the terms of the will, the waiver by the widow did not accelerate distribution, and that the trust provided by the will should be set up to continue during the life of the widow for the benefit of the brother surviving, the children of brothers, and the cousin. Those who may be entitled to share in final distribution must await the termination of the trust.

The testator provided in the fifth paragraph of his will that the residuum of his estate shall be held "in trust, nevertheless, during the life of my said wife, to invest and reinvest the same and to pay to my said wife out of the entire net income arising therefrom, semi-annually or oftener in the discretion of my trustees, at the rate of six thousand (6,000) dollars a year, and certain additional amounts in

the contingencies hereinafter specified, and to pay the remainder of said entire net income yearly to my brothers me surviving, to the children in the first degree me surviving of my brothers, whether my brothers or any of them be living or dead at the time of my decease, and to my cousin, Sarah M. Crone, share and share alike, per capita and not per stirpes."

At the time of testator's death, the survivors referred to in the foregoing paragraph of the will consisted of his brother Robert F. Douglass, the children of Robert F. Douglass in the first degree, viz: Robert F. Douglass, Jr., Marshall W. Douglass and Alice Douglass Graves; the cousin Sarah M. Crone, and the children of Edwin T. Douglass in the first degree, viz: Helen D. Boshkoff and Jean Yeomans.

Grace C. Douglass, named as a defendant in these proceedings, is the widow of the above named Robert F. Douglass and executor of his estate. Said Robert F. Douglass, brother of the testator, died October 23, 1949.

The principal question now before the Court is the disposition of the share of income, left to, and heretofore received by, the late Robert F. Douglass.

The questions raised by the bill and by the answers of the parties interested are (1) Should the interest of the late Robert F. Douglass in the income be paid equally to the survivors, or paid to the estate of Robert F. Douglass? (2) Did Robert F. Douglass have a vested interest in a share of the income of the trust estate which passes to his legal representatives? (3) Should the principal of that portion of the trust estate, from which Robert F. Douglass was entitled to the income during his lifetime, together with accumulated income, be immediately divided into four equal parts and three parts distributed to the defendants New York Academy of Medicine, College of Physicians and Surgeons of the Medical Department of Columbia University, and Columbia

University, each of whom eventually becomes entitled to one-fourth of the principal of the residuum? In other words, does the death of Robert F. Douglass cause a partial acceleration? See *United States Trust Co.* v. *Douglass,* 143 Maine 150, 153, 56 Atl. 2nd, 633. (4) Should the trust be administered, and the assets constituting the corpus thereof be invested, in accordance with the law of the State of Maine or the law of the State of New York?

The will says that the trustee shall "pay * * * net income yearly to my brothers me surviving * * * to the children of my brothers * * * and to my cousin * * * share and share alike, *per capita* and not *per stirpes.*" These persons, entitled to the income during the lifetime of the widow, do not compose a "class," and the testator does not indicate that they take the income in any manner other than as tenants in common. *Stetson* v. *Eastman,* 84 Maine 366. There are no words of survivorship to indicate a joint tenancy in the income, and the provision to share alike indicates tenancy in common. *Blaine* v. *Dow,* 111 Maine 480; *Strout* v. *Chesley,* 125 Maine 171; *Cook* v. *Stevens,* 125 Maine 378, 384; *Doherty* v. *Grady,* 105 Maine 36, 44; *Hay* v. *Dole,* 119 Maine 421, 424.

The only condition imposed by the testator, with respect to receiving the income of the corpus of the trust, "share and share alike," was that the brothers, the children of brothers, and the cousin, be alive at the time of the testator's death. They must be "surviving." There is no indication that the testator required that they continue to live as long as the widow. The testator provided that the income should be paid *during the life of the widow,* to the brother who survived the testator, to children of brothers, and to the named cousin if she survived. The legatees are not named by the testator except Sarah M. Crone, but the relationship is so definitely given that identity is certain. The income for the widow's life was to be paid to Robert F.

Douglass, Robert F. Douglass, Jr., Marshall M. Douglass, Alice Douglass Graves, Sarah M. Crone, Helen D. Boshkoff and Jean Yeomans. Nothing is said by the testator as to what shall be done with income that accrues to one who dies after the testator and before the widow. It is evident, however, from the whole will that the testator did not intend that any portion of his estate was to be administered as intestate property.

The testator carefully provided in his will as follows: "Eleventh. I direct that the income of the trust herein created be paid to the beneficiaries thereof from and after the date of my decease and that no income from any part of my estate be deemed principal for any purpose."

There is no partial acceleration here, as claimed, and the educational institutions, who share in final distribution at the conclusion of the trust, cannot share in income at any time. It is plain that the testator desired all the income distributed among the above named relatives, who survived him, until the end of his wife's life.

It is our opinion that this right to receive the share of income during the lifetime of the widow became and was a vested interest which passes to the legal representatives of the now deceased brother Robert F. Douglass.

It seems to be a well settled rule in Maine, and this Court has stated, "that in the case of the bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and in the case of the death of a legatee before the termination of the trust, the income must be paid to the legal representatives of the estate of the deceased legatee." *Morse* v. *Ballou,* 109 Maine 264, 267; *Davis* v. *McKown,* 131 Maine 203. This is also the rule in Massachusetts. *Shattuck* v. *Wall,* 174 Mass. 167.

In the case of *Davis, et als.* v. *McKown,* 131 Maine 203, 207, where the will of the testator provided that trustees "pay to my daughter, Florence C. Young the sum of five hundred dollars per year in quarterly payments so long as this trust continues," and the daughter died before testator's wife, this Court said: "The mode of gift, and context, and the words used, make clear that the testator bequeathed annual instalments of income to his daughter, for the full period of the trust. Nothing was said as to what should be done with the daughter's portion of the income accruing since her death and to the termination of the trust. It was unnecessary that the testator speak specifically. The law cares for the situation. Such income must be paid to the executor of the daughter's will; she having died testate. *Union Safe Deposit, etc. Company* v. *Dudley,* 104 Maine 297; *Morse* v. *Ballou,* 109 Me. 264, 267."

Counsel for the defendants, New York Academy of Medicine, College of Physicians and Surgeons of the Medical Department of Columbia University, and Columbia University, state in their brief that the testator "did not give a vested interest in one-seventh of the income of the trust estate of Robert F. Douglass" because of the language of the Court in the previous case of *United States Trust Company* v. *Minnie M. Douglass,* 143 Maine 150, 159, which case decided there was no acceleration due to widow's waiver. The words quoted by counsel are: "Under paragraph five of the will, above quoted, if any one of the named life beneficiaries dies during the lifetime of the widow his estate will be entitled to no part." Counsel fail to quote the balance of the paragraph which says: "If the widow's waiver has the effect of acceleration, the life beneficiaries will take a share of the estate now, even though one or all may predecease the widow, and possible future born children will be excluded. This would be a result never contemplated or intended by the testator." This statement of the Court in the previous

case was and is correct, because the foregoing sentence, as well as other sentences quoted by counsel in argument, refer to those provisions of the will regarding final distribution of the corpus of the estate, after the wife's death, and do not refer to the income from the trust, as a complete reading of the opinion will disclose. See *United States Trust Co.* v. *Douglass,* 143 Maine 150 at pages 153, 158, 159.

We are forced to disagree with the claim that, under this will of Henry Beaman Douglass, the income to which Robert F. Douglass would have been entitled during his lifetime should accumulate and be paid at the termination of the trust to those entitled to the corpus. This would be contrary to the expressed wish of the testator in the eleventh paragraph of his will "that no income * * * be deemed principal for any purpose" and also contrary to the rule stated in *Morse* v. *Ballou,* 109 Maine 264, 267. For these reasons, and reasons stated in *United States Trust Co.* v. *Douglass,* 143 Maine 150, no portion of the trust estate should at this time be distributed. The death of Robert F. Douglass permitted no acceleration. The share of income to which the late Robert F. Douglass was entitled should be paid to his legal representatives.

The bill in equity also asks whether the trust in this case should be administered, and the assets constituting the corpus thereof be invested, in accordance with the law of the State of Maine or the law of the State of New York. We do not find that this precise question has ever been formally passed upon by this Court, but as a matter of practice it has long been assumed by the bench and bar of Maine that, in the absence of a clearly expressed contrary intention by the testator, a testamentary trust is controlled by the law of the testator's home state where the will was allowed. The fact that a testator selects or nominates as trustee a person or corporation in whom he has confidence, who is living or may after live in another state and has possession of the

trust funds there, does not, in and of itself, mean that the testator intends or desires that the law of the trustee's residence shall apply to the trust.

The validity, construction, and effect of a will is determined by the law of the testator's domicile. *Gilman* v. *Gilman,* 52 Maine 165; *Emery* v. *Union Society,* 79 Maine 334, 340; *Holyoke* v. *Estate of Holyoke,* 110 Maine 469, 11 Am. Jur. "Conflict of Laws," 476, Par. 169. The construction of the terms of the will follows, of course, the intention of the testator unless some positive rule of law prevents. *Gregg* v. *Bailey,* 120 Maine 263; *Harris* v. *Austin,* 125 Maine 127. The law of the state in which land is situated controls its descent, devise, alienation and transfer, and the construction of instruments intended to convey it. *Philadelphia Trust Co.* v. *Allison,* 108 Maine 326; *Bates* v. *Decree,* 131 Maine 176, 11 Am. Jur. "Conflict of Laws," 351, Par. 63. The statute of Maine gives jurisdiction in equity to determine "mode of executing" and "expediency of making changes" in a trust estate. Revised Statutes (1944), Chapter 95, Section 4, Par. X.

The line is not clear in the decided cases as to what constitutes a question of the administration of a trust estate and what constitutes a question of validity. Unfortunately, the Courts are not in harmony. In view however, of the well considered cases of *Lozier* v. *Lozier,* 99 Ohio 254, 124 N. E. 167, and *In re Johnston's Estate,* 127 N. J., Eq. 576, 14 Atl. 2nd, 469, citing *Chase* v. *Chase,* 2 Allen, (Mass.), 101, in the light of the inferences to be drawn from our own cases where trustees asked instructions, such as *Moore* v. *Emery,* 137 Maine 259, 18 Atl. 2nd, 781 and *Thatcher* v. *Thatcher,* 117 Maine 331, and in view of the long established practice in Maine, we will follow the rule that in the absence of an expressed intention otherwise, the law of the testator's domicile will control. The right of the trustee to receive the trust funds is derived from the decree of the Probate Court.

The Probate Court that allowed the will (or the Equity Court) must pass on the accounts of the trustee.

In this case the law of Maine and not the Law of New York should control the administration of this Douglass trust.

This bill having been brought to obtain the construction of a will upon provisions in relation to which doubts might well exist, costs including reasonable counsel fees should be allowed to all parties to this suit to be paid out of the assets and charged in the Probate account.

Case remanded to the Supreme Judicial Court sitting in equity for decree in accordance with this opinion.

FIRST UNIVERSALIST SOCIETY OF BATH
vs.
LEWIS B. SWETT, ET AL.

Sagadahoc. Opinion July 21, 1952.

Wills. Trusts. Cy Pres. Equity. Charitable Gifts.

A bequest to the Universalist Church of Bath; "the principal to be held intact, the income only to be used for the support of said church." is a bequest in trust.

Cy pres is a rule of judicial construction applied to charitable gifts, giving effect to a testator's general intention as disclosed by the instrument creating the trust where there is a failure of a specific gift.

Absent a general charitable intention, even though the specific purpose be a charitable one, when it fails, unless there be a valid al-

ternate disposition thereof in the will, there is a resulting trust to the executor for distribution to the next of kin as intestate property.

Whether a testator in making a charitable bequest has evinced a general charitable intent is a question of interpretation of the particular will under construction.

ON APPEAL.

This is a bill in equity brought to obtain instructions concerning the disposition of certain property bequeathed under the will of James S. Lowell. The case is before the Law Court on appeal from a decree directing disposition of the property in accordance therewith. Appeal sustained with costs. Bill sustained with costs. Case remanded to sitting Justice for a decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by the sitting Justice, paid by the administrator of the estate of James S. Lowell, d.b.n.c.t.a., and charged in his probate account.

Robinson & Richardson, for Plaintiff.

John E. Wilson,
Ralph A. Gallagher, for Defendant.

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

MERRILL, J. On appeal. This is an appeal from a final decree of a Justice of the Superior Court in Equity upon a bill brought to obtain instructions from the Court as to the disposition of the principal sum and the accumulated unexpended income bequeathed to the plaintiff by the following clause in the will of James S. Lowell, former Judge of Probate of Sagadahoc County:

> "Tenth. I give and bequeath to the Universalist Church of said Bath the sum of $5000; the principal to be held intact, the income only to be used for the support of said church."

There was no residuary clause in the will of the testator. However, the will contained the following clause:

> "Sixteenth. As to my residuary estate, including lapsed or ineffective legacies, I propose to dispose of the same by codicil hereafter."

No such codicil has ever been found or filed.

After the death of Judge Lowell, the exact date of which is not shown by the record, the principal of $5,000.00 was paid over to the plaintiff and it was deposited in the First National Bank of Bath, Maine, on September 20, 1932. The First Universalist Society of Bath which was the "Universalist Church of said Bath" has long since ceased to function. The exact date of such cesser does not appear in the record, but the income on the $5,000.00 fund has accumulated without withdrawal since December 1, 1942. Although the corporate organization of the plaintiff has not been formally dissolved, it has divested itself of all of its property except the fund in question by conveyance to "The Universalist Church of Maine," the State-wide corporate organization of the Universalist Church, to which it owed allegiance. For sometime prior to the filing of the bill the plaintiff had ceased to function as a church or religious society, and the testimony shows that there is no probability of its ever being reactivated as such. In passing, it might be noted that after the church edifice was conveyed to the "Universalist Church of Maine" by the plaintiff, it was reconveyed to the plaintiff, which then conveyed it and the lot on which it stands to the local lodge of Odd Fellows.

In addition to seeking a construction of the will and direction as to the disposal of said fund, the plaintiff sought leave to turn over the same, together with the accumulated unexpended income, to the Universalist Church of Maine to be devoted to Universalist purposes in accordance with the charter of the Universalist Church of Maine.

As drawn, the bill made the Universalist Church of Maine, the First National Bank of Bath, in which the funds are deposited, and Ralph W. Farris, Attorney-General of Maine, parties defendant. The other parties defendant were Lewis B. Swett and Lois Swett Earl, sole heirs and next of kin of Horace W. Swett, who was the sole heir and next of kin of the testator, and Ralph A. Gallagher, who is administrator of the goods and estate of said Horace W. Swett, deceased. By amendment, Alexander A. LaFleur, Attorney-General of Maine, successor in office to said Farris, has been admitted as a party in his place.

The latter three defendants appeared and jointly claimed that the special bequest of $5,000.00, originally bequeathed to the Universalist Church of Bath, together with its income since said church ceased to function, should be turned over as a lapsed legacy to the defendant Gallagher, in his capacity as administrator of the estate of Horace W. Swett, to be distributed by him to the defendants, Lewis B. Swett and Lois Swett Earl as the sole surviving heirs and next of kin of said Horace W. Swett, sole surviving heir of James S. Lowell, the testator, the executor of the will having long since deceased.

The Universalist Church of Maine appeared and claimed the fund and accumulated unexpended income, alleging that the Court could and should direct payment thereof to it under the doctrine of *cy pres*. From a decree directing the bank to pay over the fund in question to the Universalist Church of Maine to hold and use the same for general charitable and religious purposes of Universalism, this appeal was taken.

The fact that the plaintiff corporation has not been legally dissolved is of no controlling import. As we said in *Bancroft* v. *Sanatorium Association*, 119 Me. 56, 67:

> "Such a dissolution would have been appropriate, *Van Oss* v. *Petroleum Co.*, 113 Me. 180, but it

> would not have changed the situation. It would have been but legal interment. Already the spirit had departed from the body, and the living, active corporation for whose sole benefit Mr. Chamberlin (here Judge Lowell) had made this gift had in fact ceased to exist. *Stone* v. *Framingham,* 109 Mass. 303."

This same principle was recognized by this Court in *Snow, et al.* v. *Bowdoin College,* 133 Me. 195, 201 where we said:

> "In the case which we are considering it is not altogether clear from the record whether the Medical School of Maine has ceased to exist as a corporate entity or has merely ceased to function. In either event the aid of equity is properly sought to determine the proper disposition of this fund and its income. If it has become impossible to carry out the exact purpose of the donor, it is entirely immaterial whether such failure has been caused by the demise of the corporation designated by her as the vehicle to execute her desire or by its total incapacity to do what was expected of it."

Nor do we deem it of importance in this case that the bequest was given directly to the local church, and not to a trustee. The will stated that the principal was "to be held intact, the income only to be used for the support of said church." As we said in *Edwards* v. *Packard,* 129 Me. 74, 79:

> "It is unimportant that the word 'trust' does not appear. Technical language is unnecessary. Nor is it necessary that the testatrix should have had in her mind the idea of a trust *eo nomine.* It is sufficient if she intended that her will should follow her property after her death and control or limit its use. *Clifford* v. *Stewart,* 95 Me. 47. An expressed equitable obligation rests upon Miss Howard by reason of the confidence imposed in her by Mrs. Foudray to apply and deal with the property in question for the benefit of herself and others according to the terms of the will expressing this

> confidence. This constitutes a Trust as defined in 8 Words and Phrases (First Series), 7119 et seq; 27 Am. & Eng. Encyc. 1st Ed., 3; 1 Perry on Trusts, 2; *McCreary* v. *Gewinner,* 103 Ga. 528.
>
> It is not defeated by precatory words."

In this case, within the meaning of *Edwards* v. *Packard,* the local church held this bequest of $5,000.00 in trust, the principal to remain intact and the income only to be used for the support of said church.

The specific purpose to which the testator directed that the income of this fund be devoted has failed. The question is whether or not upon the failure of this purpose a trust results by implication of law in favor of the estate of the testator, or whether this Court acting under its equitable powers will apply the principal and accumulated unexpended income *cy pres* to some other charitable purpose.

The doctrine of *cy pres* and the extent of the Court's powers thereunder has been fully and learnedly discussed in the nine prior opinions of this Court hereinafter mentioned, many of which have been cited as leading cases in other jurisdictions and texts. See also note in 74 A.L.R. 671.

We said in *Lynch* v. *Congregational Parish,* 109 Me. 32 at Page 38:

> "*Cy pres* is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts."

The criteria for its application have been well stated by us in *Bancroft* v. *Maine State Sanatorium Association,* 119 Me. 56, 70 as follows:

> "The general principle running through all the cases is that in order to apply the cy pres doctrine, there must be two prerequisites, first, a failure of the specific gift, and second, a general charitable intent disclosed in the instrument creating the trust."

In the case at bar there is no question as to whether or not the specific gift has failed, even as it had failed in each of the Maine cases hereinafter considered. The presiding Justice has found such failure and his finding is unquestioned. The question in the case at bar is whether the will here under consideration sufficiently expresses a general charitable intent so that upon the failure of the specific charitable purpose, a substitution of charitable legatees will be permitted under the *cy pres* doctrine. Of the nine Maine cases where the application of the *cy pres* doctrine was in issue, in only three did we find that the will sufficiently expressed a general charitable intent to enable the Court to apply the doctrine and permit a substitution of legatees. These cases were, *Snow, et al.* v. *Bowdoin College,* 133 Me. 195, *Lynch* v. *South Congregational Parish,* 109 Me. 32 and *Stevens* v. *Smith,* 134 Me. 175. In the other six cases we refused to so apply it. *Bancroft* v. *Maine State Sanatorium Assn.,* 119 Me. 56, *Gilman* v. *Burnett,* 116 Me. 382, *Allen* v. *Nasson Institute,* 107 Me. 120, *Brooks* v. *Belfast,* 90 Me. 318, *Doyle* v. *Whalen,* 87 Me. 414 and *Merrill* v. *Hayden,* 86 Me. 133.

The following cases neither apply nor refuse to apply the doctrine. *Hospital Association* v. *McKenzie,* 104 Me. 320 (question of which of two hospitals qualified under language of bequest), and *Manufacturers Nat'l. Bank* v. *Woodward,* 141 Me. 28 (question of modifying the method prescribed by the testator in carrying out the specific object).

Although the Court cannot apply a fund held in trust, or subject to a trust, *cy pres* unless it be held for a charitable

purpose, it by no means follows that all funds held for a charitable purpose may be applied *cy pres* upon the failure of the particular purpose for which they are held. It is only when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, that the words may be construed so as to give effect to the general intention. *Stevens* v. *Smith,* 134 Me. 175, 178, *Lynch* v. *Congregational Parish,* 109 Me. 32, 38. Absent such general charitable intention, even though the specific purpose be a charitable one, when it fails, unless there be a *valid* alternate disposition thereof in the will, there is a resulting trust to the executor for distribution to the next of kin as intestate property.

Whether or not the testator evinced a general charitable intent or, as otherwise said, evinced an intent to devote the subject matter of the gift to charitable purposes generally, is a question of interpreting the will of the testator. Being a question of interpretation of a will the intent must be discovered within the four corners of the instrument being construed, read in the light of the surrounding applicable circumstances, or as said in *Lynch* v. *Congregational Parish, supra,* "in the light of existing conditions." See also *Bancroft* v. *Sanatorium Assn.* 119 Me. 56, 70, where the Court held with respect to the general charitable intention that it could "not be discovered either in the trust instrument itself or in the circumstantial facts in the light of which that instrument is to be interpreted."

In the present case the testator did not make an unrestricted gift of $5,000.00 to the local church to use as it saw fit. He restricted the church from using any of the principal sum, and directed that the income only should be used for the support of said church. It appears from the record that the testator and his family were attendants at the local church and that during his lifetime he had contributed toward its support. It does not appear that he was a member

of the church, in fact, his name does not appear in the official list of members contained in the records of the church, nor do the records of the church show any connection upon his part with the church or that he ever held office therein. It does appear in evidence that the church was having a hard time to get along and that Judge Lowell hoped that it could and would continue to function. There is nothing in the record to show that the testator knew of the official connection between the local Universalist Church, to which he made his bequest, and the parent State body, which is the claimant of the funds, or that he even knew of the existence of the parent body. His other bequests for charitable uses were to strictly local charities.

Upon these facts we cannot find that the testator evinced any general charitable intention in making this gift to the local Bath church. It was a *specific* gift to a *specific* church for a *specific* purpose. Failing the beneficiary and failing the purpose, in the absence of disposition thereof by Judge Lowell's will, the fund will be distributed as intestate property belonging to his estate by virtue of a resulting trust.

To find a general charitable intent in this case would require us to hold that a mere bequest of money in trust, the income only to be applied to the support of the local church which the testator had attended, evinced a general charitable intent, and that upon the failure of that local church to function the Court could apply the gift *cy pres* to other charitable purposes.

The question of whether or not a testator in making a charitable bequest has evinced a general charitable intent or is making a specific bequest to a specific beneficiary for a specific charitable purpose is a question of interpretation of the particular will under consideration. To attempt to formulate a general rule which would solve all such cases would be an attempt to achieve the impossible. Nor do the

cases from our own or other jurisdictions materially aid in deciding the particular question of interpretation with which we are here concerned, as distinguished from a decision of the fundamental principles of law from which the authority of the Court to apply the *cy pres* doctrine arises. However, the case of *Shannep* v. *Strong,* 160 Kan. 206, 160 Pac. 2nd, 683, is almost on all fours with the present case. In that case the Kansas court found that the dominant purpose and intent of the testator was to aid "two particular churches in his old hometown rather than to create a general charity for religious purposes" and refused to order the property left for the benefit of one of the churches to be applied to the purposes of its parent organization upon the extinction of the particular church.

We find that the intent of the testator in this case was to aid in the support of the particular Universalist Church to which the bequest here in question was made for that express purpose. We are unable to find either in the instrument itself or in the circumstantial facts in the light of which that instrument is to be interpreted the general charitable intent which would authorize us to apply the doctrine of *cy pres.*

As we said in *Brooks* v. *Belfast, supra*:

> "It is not the duty of the court to be 'curious and subtle' in devising schemes to aid testators in disinheriting their next of kin under circumstances like these."

The purpose for which the bequest in question was made having failed because the specific church, for whose support the income of the fund was to be expended, has ceased to exist or function as a church, the gift fails both as to the principal and its accumulated unexpended income. There being no disposition thereof by the will the funds in question should be distributed according to the laws of descent

as intestate property of the testator under a resulting trust in favor of his estate.

In *Bancroft* v. *Sanatorium Association,* 119 Me. 56 at 71, after having held that the gift had failed, we said:

> "It follows from what has been said that this fund now belongs to the estate of the donor as a resulting trust. *Brooks* v. *Belfast,* 90 Maine 318-332; *Fitzsimmons* v. *Harmon,* 108 Maine 456; *Haskell* v. *Staples,* 116 Maine 103; *Gilman* v. *Burnett,* 116 Maine 382, 388; *Hopkins* v. *Grimshaw,* 165 U. S., at 356. The specific trust having failed a trust results by implication of law to the executor under the will."

In the instant case, however, the executor of the will of Judge Lowell has died, and, by implication, it appears that no administrator d.b.n.c.t.a. has been appointed. The funds in question form a part of the estate of Judge Lowell. Being personal property, they do not descend directly to the next of kin, as real estate descends to the heirs, but pass to the personal representative and must be administered and distributed by him under the direction of the Probate Court as intestate property belonging to the estate. The principal sum of $5,000.00, together with the accumulated unexpended income, should be paid to the administrator of Judge Lowell's estate and, if there be none at present, to the one who shall hereafter be appointed and qualifies as such.

Appeal sustained with costs.
Bill sustained with costs.
Case remanded to sitting Justice for a decree in accordance with this opinion.
Costs and reasonable counsel fees to be fixed by the sitting Justice, paid by the administrator of the estate of James S. Lowell, d.b.n.c.t.a., and charged in his probate account.

CHASE MELLEN, JR., ET AL., TRUSTEES
vs.
CHASE MELLEN, JR., ET AL.

Kennebec. Opinion July 29, 1952.

Wills. Distribution. Per Capita. Per Stirpes.

The will of a testator should be construed as a whole to give effect to the intention of the maker so far as ascertainable from the language used.

The will of one testator should not be construed in the dubious light of the construction given that of another by a court of justice.

The principle giving special force to the factual findings of a justice sitting in equity has no application to a declared finding of testamentary intention in a case involving no oral testimony.

The use of the phrase "by right of representation" by a testator, in directing the division of the income of a trust among his children, to give effect to his plan that each should take a proper proportionate share thereof, and no more, cannot be considered as evidencing intention that the division of the corpus thereof at the termination of the trust should be *per stirpes.*

When a testator provides for the equal distribution of the income of a trust among his children, so that each shall have a proportionate share thereof, and no more, and provides for the distribution of the corpus at the termination of the trust among his grandchildren without any express direction that such distribution shall be *stirpital,* the intention is that it should be *per capita.*

ON APPEAL.

Action for the construction of a will. The case is before the Law Court on appeal from a decree ordering a *per capita* distribution. Appeal dismissed.

Sanborn & Sanborn, for Plaintiff.

Verrill, Dana, Walker, Philbrick & Whitehouse & Woodbridge, for Defendants.

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

MURCHIE, C. J. This process was instituted by Chase Mellen, Jr. and George Woodbridge, two of eight grandchildren of Joseph H. Manley, late of Augusta, who died February 7th, 1905. They are the Successor Trustees under his will, executed June 17th, 1902, and are seeking a construction of its Eleventh Paragraph, which must control the disposition of the corpus of a trust created therein and terminated by the death of Sydney S. M. Breck, the last survivor of his four children, on March 18th, 1951. The proceeding was commenced on August 2nd thereafter.

The eight grandchildren are the respondents. They take the entire estate. The issue, an entirely friendly one, as is demonstrated by the fact that all accepted service and joined in the prayer for construction, is whether they are to divide it *per capita* or *per stirpes*. Three are children of Lucy M. Mellen, two of Harriet M. Woodbridge, and three of Sydney S. M. Breck. The two are prosecuting this appeal, which is from a decree ordering a *per capita* distribution. The Justice who entered it filed "Findings" recording his "opinion" that that was what the testator "intended." This represents his construction of the will. A *per capita* division means an eighth for each grandchild. A *stirpital* one would give the two appellants each a sixth and each of the others a ninth.

The case was decided on the Bill and Answers. No facts are in dispute. The making of the will, the deaths of the testator and the last surviving child, the relationships, and all essential probate proceedings were duly alleged and admitted. A copy of the will was attached to the Bill. It represents all the evidence in the case. There was no oral testimony. All the language of the will susceptible of indicating the testamentary intention found by the single Justice, or that for which the appellants contend, is carried in Para-

graphs Seventh to Eleventh inclusive, which read as follows:

"Seventh:—All the rest and residue of my estate, both real and personal and wherever situated, and including all sums which may be received from life insurance policies and benefit certificates, I give, devise and bequeath to my son, Samuel Cony Manley of said Augusta, in trust, nevertheless, for the following purposes, viz: To invest and reinvest said rest and residue in such manner as shall be for the interest of my estate, and to divide the net income equally among as many of my children, Samuel Cony Manley, Lucy M. Mellen, Harriet Manley and Sydney S. Manley, as may at the time be living, and the children of a deceased child or children by right of representation.

Eighth:—In case my said son, Samuel Cony Manley shall marry and shall die without issue leaving a widow, I direct that such widow shall receive during her widowhood the income from the share of my estate from which my said son would receive the income if living.

Ninth:—I express the desire that the Cony homestead, situate on Stone Street, in said Augusta, shall be kept for the personal occupation of my children so long as it can be done without detriment to the interest of my said children.

Tenth:—If at the time of the death of all my children but one, there shall be living no grandchild, nor issue of a grandchild, I direct that the trust created by the seventh item of this my Last Will shall terminate, and that all said estate shall then vest in such one surviving child subject only to the payment of income to a widow of my said son as provided by the eighth item of this my Last Will.

Eleventh:—Upon the death of all my children I direct that the trust created by the seventh item of this my Last Will shall terminate, and that all

> said estate shall then vest in my grandchildren subject only to the payment of income to a widow of my said son as provided by the eighth item of this my Last Will."

Reference to the allegations of the process shows that the family of the testator, which consisted of four children and two grandchildren at the time of the execution of the will, was increased thereafter by the birth of six additional grandchildren. The testator's fundamental plan, undoubtedly, was that his estate should be held intact so long as any of his children survived; that the income yielded by it should be divided among his children to provide support for them during their lives; and that, when such purpose had been accomplished, the principal would be divided among his grandchildren. It is clear that he intended each child to have a proportionate share of the income, for life, and no more, and to take no part of the principal except in the contingency stated in the Tenth Paragraph. The share of the income payable to any one child was not to be increased by the death of another, unless that other died without issue, and not then if the death was that of the son and he should leave a widow. The distribution of income was to be *stirpital.* It was controlled by the word "equally," which assured each child a proportionate share, and the express recital that when a child died leaving issue, his or her children should have the share of the parent "by right of representation."

The testator made it plain, also, that there were to be no vested interests in the principal of his estate so long as the trust continued. Alternative provisions for its termination were carried in Paragraphs Tenth and Eleventh, but in each the declaration was explicit that the estate should "then vest," either in the last surviving child, if there were no grandchildren, or the issue of any, under the Tenth, or in the grandchildren, if there were, under the Eleventh.

The opposing claims were ably presented, within the fundamental rule of testamentary construction always recognized in this Court, that the intention of a testator, if ascertainable from his will, considered as a whole, shall be given effect. *Hopkins* v. *Keazer,* 89 Me. 347, 36 A. 615; *Giddings* v. *Gillingham,* 108 Me. 512, 81 A. 951; *Bryant* v. *Plummer,* 111 Me. 511, 90 A. 171; *Tucker* v. *Nugent,* 117 Me. 10, 102 A. 307; *Merrill Trust Co.* v. *Perkins,* 142 Me. 363, 53 A. 2d. 260; and *Dow* v. *Bailey,* 146 Me. 45, 77 A. 2d. 567. It is urged for the appellees that the construction declared by the single Justice gives effect to the basic design of the will, and is in accord with presumptions applicable to all cases where there is a gift to a class, particularly one the members of which bear identical relationship to the testator. They urge also that the findings of a single Justice should not be disturbed unless obviously wrong, citing *Young* v. *Witham,* 75 Me. 536, and cases decided on its authority. As against this, the appellants insist that the will discloses a *stirpital* intention relative to the principal as plainly implicit as that clearly expressed for the income, and that the case should not be viewed:

> "as a battle between technically caparisoned 'presumptions.' "

Before proceeding to the merits of the case, it seems necessary to dispose of the claim of the appellees, that the principle declared in *Young* v. *Witham, supra,* is applicable to a "finding" of testamentary intention. The claim has no merit in a case which involves no oral testimony. The principle rests upon the particular foundation stated by Chief Justice Peters, when he said:

> "Cases are * heard before a single judge mostly upon oral evidence. When the testimony is conflicting, the judge has an opportunity to form an opinion of the credibility of witnesses, not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable

> of being preserved in the record. A witness may appear badly upon the stand and well in the record."

It seems desirable, also, to declare at the outset that the intention which must control the distribution of this estate must be determined from the will alone, and that decided cases in this jurisdiction, or elsewhere, cannot contribute to its determination. We make this statement because counsel for both appellants and appellees have cited us to numerous decisions of this Court and others. Most of them are discussed or analyzed to some extent in four annotations in A.L.R. 16 A.L.R. 15; 31 A.L.R. 799; 78 A.L.R. 1385; and 126 A.L.R. 157. In the first the writer of the text asserts, in effect, that there is a general presumption that beneficiaries in a will whose shares are not specified therein shall take *per capita*. He expresses the view that the authorities are not in such "hopeless confusion" on the question as is often said, but that there is a degree of confusion does not admit of doubt. Comment upon it is found in such decisions of this Court as *Fogler* v. *Titcomb,* 92 Me. 184, 42 A. 360; *Crosby* v. *Cornforth,* 112 Me. 109, 90 A. 981; *Tibbetts* v. *Curtis,* 116 Me. 336, 101 A. 1023; *Perry* v. *Leslie,* 124 Me. 93, 126 A. 340. In the last of these Justice Morrill declared that it would be both unsafe and unjust to interpret the will of one man by the:

> "dubious light of the construction given by a court of justice to the will of another,"

adding that the remark was:

> "peculiarly applicable * to the consideration of a will involving the distribution of an estate per stirpes or per capita, upon which subject the cases are a multitude, confusing when an attempt is made to classify them, and in many cases contradictory."

We see no reason for referring to any of the cases cited from other jurisdictions except *Stoutenburgh* v. *Moore,* 37 N. J. Eq. 63, to which we refer because its comment that:

> " 'If it is doubtful whether he intended the distribution among his grandchildren to be per stirpes or per capita, the court should adopt a construction in favor of the former method, not only as being most probably in accordance with his intention, but also as being in accordance with the policy of the law,' "

was quoted with approval in the relatively recent case *Central Hanover Bank & Trust Co.* v. *Helme,* 121 N. J. Eq. 406, 190 A. 53. It should be noted, however, that New Jersey, according to the writer of the text in 16 A.L.R., is one of seven states having a notable inclination:

> "toward stirpital distribution wherever possible."

The decisions of this Court cited therein demonstrate that each case is decided on its particular facts and that there is no clear tendency or inclination to prefer either construction to the other. Particular words such as "equally" or "share and share alike" obviously call for a *per capita* distribution, but references to the "laws" of descent, *Hopkins* v. *Keazer, supra, Fairbanks' Appeal,* 104 Me. 333, 71 A. 933, or the identification of beneficiaries by such a word as "heirs," *Tucker* v. *Nugent, supra, Doherty* v. *Grady,* 105 Me. 36, 72 A. 869, have been held to indicate intention for a *stirpital* one. In *Tucker* v. *Nugent, supra,* different paragraphs called for property (1) to be divided "equally between" the heirs of the testatrix and her husband, and (2) to pass to the legal heirs of both, "share and share alike." It was held that the use of the word "between" indicated an equal division for the two groups of heirs, collectively, and that those in each group should divide the half coming to them on a *stirpital* basis.

The only guides to intention available in the will of this testator are the word "equally" and the phrase "by right of

representation" in the Seventh Paragraph, and the absence of both from the Eleventh, unless the absence of express provision for handling the payment of income to a widow of the son (if he had left one still in widowhood) furnishes an additional one. We believe it does. Her existence, and survival, were not to be permitted to delay the vesting of the estate, in a single individual if the trust terminated under Paragraph Tenth, or in a group under Paragraph Eleventh. In the former case the fact that it vested "subject * to the payment" of income measurable on a fractional basis would provide no complication, nor would it under Paragraph Eleventh if the share which vested in each member of the group did so "subject" to an identical charge.

We consider it improbable that a testator who took the great care the will discloses to indicate that his equal division of the income of his estate among his children was intended to provide for grandchildren after the death of a parent would have failed, if such had been his intention, to indicate that when their vesting-time came, they were to take as from their parents subject to variable charges which would collectively aggregate what was to be paid to a widow of the son.

The will gave each grandchild living when it was executed a legacy of one thousand dollars (Paragraph Fourth). It gave each child an equal share of the income, and provided carefully that no one of them should ever take more than a fourth interest therein unless a brother or a sister died leaving no issue. It maintained the equality of the shares of the children by transferring that of each and every one of them to his or her issue on his or her death. The use of the phrase "by right of representation" was essential to accomplish that purpose. We find nothing to indicate that he intended inequality when the first phase of his plan came to an end and the second and final one was at hand. He would have declared that his grandchildren should take from him un-

der their parents if he had so intended. He did provide that they should take from him directly, as a class. In the absence of express provision for a *stirpital* division, it is inevitable, as we see it, that his will must be construed as it was construed in the decree entered by the single Justice.

It is apparent, however, that the Trustees should have submitted the question as they did to judicial determination, and it was both natural and proper for the appellants to pursue the matter to this final determination. The proper cost of the proceedings, therefore, including the reasonable fees and expenses of counsel, should be a charge against the estate, and may be provided either in a new decree or in probate accounting. The case is remanded for the entry of a decree making appropriate provision therefor.

Appeal dismissed.

GUILFORD TRUST COMPANY, TR., ET AL. IN EQ.
vs.
ALEXANDER A. LAFLEUR
INHABITANTS OF THE TOWN OF GUILFORD,
PISCATAQUIS COMMUNITY SCHOOL DISTRICT
AND IVA A. MAGINNIS, ET AL.

Piscataquis. Opinion, August 6, 1952.

Wills. Schools. School Districts. Cy Pres.

A specific bequest to a trustee "for the sole benefit" of the Guilford High School and its students does not lapse because the town of Guilford subsequent to execution of the will but prior to testator's death entered a community school district since R. S., 1944, Chap. 37, Sec. 92-H, enacted P. L., 1947, Chap. 357 as amended by P. L., 1949, Chap. 249 provides "community schools . . . when established may be considered the official secondary schools of the participating towns and all provisions of the general law relating to public education shall apply to said schools."

ON APPEAL.

This is a bill in equity for the construction of a will and advice and instructions in the administration of a trust. The case is before the Law Court on appeal by an heir at law from a decree of a sitting justice upholding the bequest. Appeal dismissed. Decree below affirmed with provision for payment of such further expenses and counsel fees as may be ordered by the sitting justice.

Alexander A. LaFleur, for Town of Guilford.

Frederick J. Laughlin and S. Arthur Paul,
for defendant Maginnis.

Perkins, Weeks and Hutchins,
Alvin W. Perkins,
for Inhabitants of Guilford and School District.

Lester A. Olson, Guardian *ad litem.*

C. W. and H. M. Hayes, Guilford Trust Company.

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

WILLIAMSON, J. On appeal. This is a bill in equity by the Guilford Trust Company, Trustee under the will of William Appleyard, and Raymond W. Davis, given certain duties under the will, for construction of the will and advice and instruction in the administration of a trust. The defendants are Alexander A. LaFleur, as he is attorney general of the State of Maine, the Town of Guilford, the Piscataquis Community School District, Iva A. Maginnis, daughter and sole heir at law of the testator, and persons unknown represented by a guardian *ad litem.*

William Appleyard, late of Guilford, died testate on March 19, 1950 leaving a will duly probated in the County of Piscataquis. His will was dated November 30, 1936. The residue of the estate amounting to approximately $20,000 was left in trust with the plaintiff, Guilford Trust Company, under the third clause of the will as follows:

> "THIRD: All the rest, residue and remainder of my property, real, personal and mixed, wherever situated and however and whenever acquired, I give, bequeath and devise unto the Guilford Trust Company, a corporation organized under the Laws of Maine and having its established place of business in Guilford in said Piscataquis County, in trust, however, for the sole benefit of the Guilford High School in the said Town of Guilford. This trust shall be known as 'The William and Addie A. Sampson Appleyard Guilford High School Memorial Trust Fund'. Addie Adams Sampson Appleyard, now deceased, was my wife. The Trustee may receive its appointment without bond.
>
> "A large portion of this trust estate is now in real estate. Authority is hereby given to said Trustee to sell said real estate, or any portion of it, and convert the same into cash at any time

when it deems it advisable so to do. The said Trustee shall use so much of the yearly income from said trust estate, before or after the sale of said real estate, as shall be available for the exclusive benefit of the said Guilford High School, insofar as it teaches all subjects except religion. I do not attempt to particularize the way in which this income shall be expended. That I leave to the judgment of those who lawfully have in charge the direction and management of the Guilford High School, as now the School Committee; but I do direct that so long as Raymond W. Davis, the Executor of this Will, in whom I have implicit confidence, lives, he shall have full right to act with said School Committee or governing body in determining the particular use to which this annual income shall be expended for said High School. I do express this desire, however, that this income shall not be made use of to the end that it shall save the Town something by way of taxes. I desire the effect of this trust to be a help to the High School in addition to that which would naturally and probably be afforded by the Town were this trust not created. I trust that the School Committee or governing body will be inclined to accept the judgment of Mr. Davis as to the specific use of this income, for, because of my contacts with him, he understands more than anyone else how I feel about this matter.

"Some particular uses which have occurred to me are these, and I do not name them in the order of their importance or desirability:

"1. Income in whole or in part to be used to establish a chair on some subject in the High School to give proper instruction in some branch not in the curriculum or, if there, not adequately taught.

"2. Income in whole or in part to be used for special instruction in public speaking, debating, or composition of articles on public questions.

"3. Income in whole or in part to be used to establish and maintain a chair in said High School in one or more of the following subjects: Philosophy, business law, elementary forestry.

"Still, I say again, while the general use of the income must be solely for the benefit of said High School, the particular use is finally to be determined by the School Committee or governing body of the High School, with the assistance of Mr. Davis, as heretofore stated, whom I regard as my personal representative."

In the findings and conclusions by the sitting justice is the following statement:

"For years the town of Guilford, Maine has owned a brick building in the town, and maintained a school therein known as the Guilford High School. The management and control of this high school has formerly been in the hands of a legal town school committee subject to the usual statutory state supervision.

"On June 20, 1949 a school district comprising the towns of Guilford, Sangerville, Abbott and Parkman, all in the county of Piscataquis, was duly organized according to the provisions of Section 92-A of Chapter 37 of the Revised Statutes of Maine (1944) as amended by Chapter 357 of the Public Laws of 1947 and by Chapter 249 of the Public Laws of 1949, which district is designated and known as the Piscataquis Community School District.

"On June 8, 1949 the town of Guilford executed a lease of its high school building to the Piscataquis Community School District, and after the legal organization of the District had been completed, the possession of the building was delivered to the Trustees of the District and accepted by them. The Guilford High School building has since that time been under the control of the twelve Trustees of the District (three from each town). The cur-

riculum and other matters pertaining to education of scholars are under the control of the School Committee of seven—(three from Guilford, two from Sangerville, one from Abbott, and one from Parkman),—subject, of course, to the usual statutory state supervision.

"Since September 1949 the District has been maintaining a school in the said school building which is attended by children from all of the four towns in the District. The grades that now occupy the building are the same designated grades that occupied the building prior to September 1949 when the school was managed by the Guilford School Committee. It is also a fact that some, if not all the towns now in the District, have for years been sending pupils to the Guilford High School and have paid tuition to Guilford under provisions of Revised Statutes, Chapter 37, Section 98.

"In all the aforenamed bills in equity, except the case involving the Appleyard will, Guilford High School (under the name of 'Guilford High School') existed at the time of the testator's death. In the Appleyard case it was stipulated that the testator died March 19, 1950, and knew in his lifetime of the formation of the Piscataquis Community School District in June 1949, and knew of the possession and control by the District thereafter, although Appleyard made no changes in or additions to his will. The Appleyard will was executed November 30, 1936."

The findings and conclusions cover not only the case at bar but also three other cases relating to the Guilford High School as is indicated in the quotation above. In each case the sitting justice concluded that the cy pres doctrine was applicable.

The sitting justice entered a decree in which he set forth in substance: (1) that the trust was a "general, public, charitable trust"; (2) that the said "District is now the of-

ficial secondary school of said towns, and is, in fact and law, the high school of and for said town of Guilford"; and (3) that the funds "became vested in the plaintiff Guilford Trust Company as trustee, and all rights of his heirs at law became divested." There is also provision in the decree for the management of the fund and in particular the decree reads:

> "6. In accordance with the apparent general purpose of the testator, and in order to carry out his intent as nearly as may be,
>
> "A. Said trust and the income thereof shall be administered according to the provisions of said will for the benefit of Guilford boys and girls, present and future, who desire a high school education, through the facilities of Piscataquis Community School.
>
> "B. The trust will continue to be known as 'The William and Addie A. Sampson Appleyard Guilford High School Memorial Trust Fund', authority in the manner of expending the income of said fund, according to the provisions of said will shall be in the Piscataquis Community School Committee, with such advice from the plaintiff Raymond W. Davis as is therein suggested, and upon such authority, the trustee may if it deems it proper, make disbursements direct to Piscataquis Community School District."

The defendant, Iva A. Maginnis, who alone appeals from the decree below, made six requests for rulings of law which were refused. The requests were as follows: (1) that by reason of the Guilford High School ceasing to exist before the death of the testator, the trust for benefit of Guilford High School lapsed and the remainder vested in the sole surviving heir; (2) that the residue and remainder cannot be applied cy pres; (3) that the intended bequest was a specific and restricted charitable bequest and not a general public charitable bequest for general educational purposes

and could not have been applied cy pres for the benefit of any public educational charity other than the Guilford High School; (4) that since the testator's death there has been no change by which the doctrine of cy pres can be applied; (5) that the court find as a matter of law that at the date of Mr. Appleyard's death that Guilford High School was not an existing entity and the grade school at that time was under the control and an integral part of the Piscataquis Community School District for benefit of scholars in four different towns including Guilford; (6) that there be appropriate instruction to the Probate Court to the end that the defendant, Iva A. Maginnis, obtain the residue of the estate.

The decision below was based on two grounds: 1st, the application of cy pres; and 2nd, that the present high school is the Guilford High School, or in other words that there had been no change in beneficiary or trustee.

In our view it is unnecessary that we consider the cy pres doctrine in deciding the issue. An interesting argument in favor of its application may be made. We prefer, however, to place our decision on the second ground. For illustrative cases on the cy pres doctrine see *Bancroft* v. *Sanatorium Ass'n.*, 119 Me. 56, 109 A. 585; *Snow and Clifford* v. *Bowdoin College,* 133 Me. 195, 175 A. 268; *Manuf'rs National Bank et al.* v. *Woodward,* 141 Me. 28, 38 A. (2nd) 657; and *First Universalist Society of Bath* v. *Swett* (July 1952).

The argument of the heir comes to this and no more; that because the town of Guilford has entered a community school district and not alone but with three towns maintains a high school, therefore a gift for benefit of the high school scholars of Guilford must be lost. The same young men and women who, if they were attending the Guilford High School would be benefited by this gift must, says the heir, lose it because they now attend the high school of the Piscataquis Community School District.

The statute reads:

> "Community schools as herein provided when established may be considered the official secondary schools of the participating towns and all provisions of the general law relating to public education shall apply to said schools."
>
> *R. S. Ch. 37, Sec. 92-H, enacted P. L. 1947, Ch. 357 as amended by P. L. 1949, Ch. 249.*

In this section of the statute we find the answer to the problem. Guilford High School we may well assume was the official secondary school of Guilford. The community school is now the official secondary school of Guilford. It is this school which the taxpayers of Guilford support and it is this school that the children of Guilford have the right to attend.

From the facts we learn that students from at least two of the towns for several years have attended Guilford High School with the towns paying tuition for their instruction. The testator must be held to have had knowledge of the fact that scholars from outlying towns often attended high school in Guilford. Admittedly the testator had knowledge of the formation of the Piscataquis Community School District after he had drawn his will.

The intent of the testator to enlarge and broaden educational facilities for the youth of Guilford in a high school seems clear. He carefully provided that the income should not be used to relieve the town of its normal burden of expense for educational purposes.

We give no weight to the fact that the new high school is physically located in the buildings formerly occupied by the Guilford High School. There is nothing in the will of Mr. Appleyard to indicate that his gift was limited to an institution at a particular location. The point is that the

present high school, wherever located, is in fact and law the official secondary school of Guilford and it is this school, whatever its name, which the testator had in mind in naming the Guilford High School.

We need not on the narrow ground here urged by the heir deprive the testator of his right to give, or the youth of Guilford of their right to enjoy, the increased educational advantages made available through his generosity. To say that the gift must fail because of the change of name and the extension of the area supporting the school would, in our view, give undue weight to a relatively unimportant matter.

Appeal dismissed.

Decree below affirmed with provision for payment of such further expenses and counsel fees as may be ordered by the sitting justice.

WILLIAM CHASE GILMAN
vs.
DAVID W. JACK

Kennebec County. Opinion, September 4, 1952.

Public Utilities. Corporations.

The fact that one holds the same views as do certain investment bankers, that he is urged by such bankers to run for election as a director of a corporation, that he is voted for by them (their votes being necessary for his election) is insufficient to disqualify him as their appointee or representative under Section 17 (c) of Public Utility Holding Company Act of 1935, Tit. 15 U. S. C. A., Sec. 79.

The intent of the Public Utility Holding Company Act of 1935 was to prevent banker control of public utilities.

A person is not a representative of an outside interest such as an investment banker if he is not in any way under the control of such interest and answerable to it for its acts.

ON EXCEPTIONS.

This case arises on information in the nature of *quo warranto* to test the eligibility of informant to serve as a corporate director. The presiding justice found for informant and respondent brings exceptions.

Exceptions overruled.

Hutchinson, Pierce, Atwood & Scribner, for plaintiff.

McLean, Southard & Hunt, for defendant.

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

THAXTER, J. This case involves the interpretation of section 17 (c) of the Public Utility Holding Company Act

of 1935, Tit. 15, U. S. C. A. Sec. 79. Such section reads as follows:

> "(c) After one year from the date of the enactment of this title, no registered holding company or any subsidiary company thereof shall have, as an officer or director thereof, any executive officer, director, partner, appointee, or representative, of any bank, trust company, investment banker, or banking association or firm, or any executive officer, director, partner, appointee or representative of any corporation a majority of whose stock, having the unrestricted right to vote for the election of directors, is owned by any bank, trust company, investment banker, or banking association or firm, except in such cases as rules and regulations prescribed by the Commission may permit as not adversely affecting the public interest or the interest of investors or consumers."

The problem comes before us on an information filed in the nature of *quo warranto* to test the eligibility of the informant to serve as a director of American Power & Light Company, and particularly the right as between the respondent and himself to serve as such director.

It is conceded that at the adjourned annual meeting of the company held October 16, 1951, at which eight directors were to be elected, Mr. Gilman, the informant, received 2,099,600 votes, and Mr. Jack, the respondent, who received the least number of votes cast among the first nine voted for, had 1,532,537. The question here, therefore, is whether Mr. Gilman or Mr. Jack is a director.

The respondent duly filed an answer to the information, which admits in the main the allegations set forth but denies the allegations that the petitioner is eligible to serve as a director in view of section 17 (c) of the Act or to have anything to say as a director about the substance of a pending dissolution decree of the American Power & Light Company.

On the contrary the answer sets forth specifically that the respondent and not the informant was the duly elected and qualified director of the company. The respondent accordingly prayed that he and not the informant be declared duly elected as a director and qualified to serve as such.

It is the contention of counsel for the informant that Mr. Gilman was duly elected a director of American Power & Light Company at such meeting and is entitled to serve as such director. It is the contention of the respondent that though Mr. Gilman on the face of the returns was elected a director, yet he is barred from serving as such because he was an appointee or representative of an investment banker within the meaning of section 17 (c). Such is the only issue in the case, for certainly he was not disqualified to serve for any other reason.

The determination of this question is one which involves the application of this statute to the undisputed facts of this case. The solution of this problem is of vital importance because the American Power & Light Company is in process of dissolution under the Public Utility Holding Company Act of 1935; and the decision of Mr. Gilman as a director, in connection with the plan of dissolution proposed, is vital.

The sitting justice found as a matter of law that the informant was not "an appointee, or representative, of any bank, trust company, investment banker, or banking association or firm," within the meaning of section 17 (c) of the Holding Company Act of 1935 and was eligible to serve as a director of American Power & Light Company. It was accordingly decreed that he and not the respondent, Mr. Jack, was a director of such company. Obviously he was not within any of the other prohibited classes enumerated in section 17 (c).

Exceptions were filed by the respondent to the decision of the sitting justice which held that Mr. Gilman was eligible

to serve as director. These exceptions are now before us. Unless he was the appointee or representative within the meaning of section 17 (c) *supra,* of certain investment bankers who voted for him and whose votes were necessary for his election as director, the exceptions must be overruled.

The respondent's claim that Mr. Gilman was the appointee or at least the representative of certain investment bankers is based upon the following facts. He was known to hold the same views on certain financial problems of the company as did these bankers. They urged him to run for director, voted for him, and their votes were necessary for his election.

These facts, however, are insufficient to constitute him their appointee or representative within the meaning of section 17 (c) *supra.* There is no evidence that he owed any express or implied duty to them to support or carry out their views. Nor is there any evidence that he was not to exercise his own independent judgment as to what would be for the best interests of the corporation in any of his acts as director thereof. On the other hand, the right of entire freedom of action on his part, as such director, is clearly established. Under such conditions the sitting justice properly found as a matter of law that he was not an appointee or representative of investment bankers within the meaning of section 17 (c) *supra.*

Counsel seem to us to argue that the intent of the Holding Company Act enacted in 1935 was to prevent banker control of public utilities. Such purpose of Congress is correctly stated. To that end certain persons are prohibited by section 17 (c) from acting as directors of registered holding companies; among those so disqualified is an appointee or representative of any investment banker. It makes no dif-

ference how high minded or otherwise qualified a person may be. If he comes within one of the prohibited classes enumerated, he is barred from holding office.

The Act is perfectly plain and definite. It is the legislative intent which it is our duty to carry out. That intent we must find primarily from the words of the statute which the Congress has used. It is only when the purpose is not clearly expressed that we have the right to use the usual outside aids to determine it. *Millett* v. *Marston,* 62 Me. 477. In this case this court has frowned on the practice of attempting to interpret what needs no interpretation. It says, citing ancient authorities, pages 478-479:

> " 'The fundamental maxim in the construction of instruments,' says Vattel, book 2, c. 17, sec. 263, 'is that it is not allowed to interpret what has no need of interpretation. Where an instrument is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures in order to restrict or extend it, is but to elude it.' "

We think the failure to heed this warning in this instance has been responsible for counsel seeing in this statute what is not there; and for the distortion of it so that it reads differently from what its framers ever intended. The directors of our corporations in Maine are elected not appointed, and a person is not a representative of an outside interest such as an investment banker if he is not in any way under the control of such interest and answerable to it for his acts.

Mr. Aller, the president of American, who presided at the annual meeting, had certain duties to perform as such presiding officer; but they were ministerial duties, not judicial. In presuming to act in a judicial capacity by declaring that Mr. Gilman was not qualified to serve as a director under

section 17 (c), he usurped what he must have known was a prerogative of the court where the question would ultimately be decided. His decision on this point was without any standing whatever.

The absurd construction of this statute for which the respondent contends adds force to the conclusion of this court in *Millett* v. *Marston, supra,* that such course but makes confusion and ambiguity where none exists; and emphasizes the warning words on page 479 that "To go elsewhere in search of conjectures in order to restrict or extend it, is but to elude it."

The findings of the sitting justice on all the questions before him were correct.

Exceptions overruled.

LIZZIE DOLLOFF
vs.
LAURA E. GARDINER

Waldo County. Opinion, September 6, 1952.

Taxes. Liens. Tax Deeds. Exceptions. Writ of Entry. Waiver and Estoppel.

The proper way to review errors of law in a case heard and determined by the court without the aid of a jury is, if at all, by exceptions.

In writ of entry plaintiff must recover on strength of his own title and not on weakness of defendant's title.

A vote at the annual town meeting that "upon motion, voted to authorize the selectmen, on behalf of the town, to sell and dispose of real estate acquired by the town for non-payment of taxes thereon on such terms as they deem advisable and to execute quit-claim deeds for such property" sufficiently authorizes the signers of a deed from the inhabitants of the town to another.

A town does not waive its rights under prior tax lien certificates by the filing and recording of tax lien certificates in subsequent successive years.

In the absence of evidence to show the contrary, it will be presumed that a town has proceeded in the usual and legal manner.

Each tax lien certificate, when recorded, constitutes a new mortgage based on a new tax assessment.

A town in its private or proprietory capacity may be subject to the operation of law respecting waiver and estoppel but taxation is a governmental rather than a private or proprietory function and the town in taxation matters acts only as a political agent of the state in the assessment and collection of taxes.

ON EXCEPTIONS.

This is a writ of entry to recover certain property conveyed to the defendant by the Town of Knox, their title being derived under the Tax Lien Law, R. S., 1944, Chap. 81, Secs. 97 and 98, as amended. A single justice with jury waived found for defendant and upheld the tax title. The case is before the Law Court on plaintiff's exceptions. Exceptions overruled.

Dubord & Dubord, for plaintiff.

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

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

NULTY, J. On exceptions to decision of a single justice who found for the defendant in a jury waived case heard at the April 1951 Term of the Waldo County Superior Court.

By writ of entry the plaintiff seeks to recover certain property in the town of Knox in said Waldo County claimed

by the defendant under conveyance from the inhabitants of the town of Knox. From the record it appears that the plaintiff acquired her title as the sole heir of her mother who died June 16, 1950, intestate, seized and possessed of the property in question unless it has been lost to the town of Knox by proceedings under the Tax Lien Law, so-called, R. S., 1944, Chap. 81, Secs. 97 and 98, as amended. Defendant's claim of title to the property is based upon a quitclaim deed from the inhabitants of the town of Knox dated July 26, 1950, and it appears from the record and bill of exceptions that the town of Knox instituted and carried to a conclusion the proceedings under the provisions of the above mentioned statutes to enforce liens for taxes assessed by said town for the years 1938, 1939, 1941, 1943, 1944, 1945, 1946, 1947 and 1948, the result of which the defendant claims vested title in said town which title said town conveyed to the defendant as above stated.

The exceptions only raise two questions, although in passing it may be stated that while the plaintiff makes many general claims and assertions which might have been the subject of exceptions, the instant bill of exceptions, other than the two exceptions to which we will hereinafter refer, is not in such form as is required by the rules governing the sufficiency of bills of exceptions generally and those attacking the decision of a single justice in a jury waived case which have been set forth so many times by us that it seems unnecessary to again set them forth at length. A great many of the cases governing the sufficiency of the rules relating to bills of exceptions can be found cited in the recent case of *Public Loan Corporation* v. *Bodwell-Leighton Company,* 148 Me. 93, 89 A. (2nd) 739.

We said in *Tozier, Coll.* v. *Woodworth and Land,* 136 Me. 364, 365, 10 A. (2nd) 454:

> "The proper way to review errors of law in a case heard and determined by the court without the aid of jury is, if at all, by exceptions."

In the instant case we hold that the bill of exceptions, other than the two exceptions hereinafter considered, does not properly present any other alleged erroneous rulings of law in the manner prescribed by statute. R. S., 1944, Chap. 94, Sec. 14.

The basic issue in the instant case is the title of the plaintiff to the property described in the writ of entry. According to our decisions defendant will defeat plaintiff's action if title is shown either in defendant or another. We said in *Bowman* v. *Geyer,* 127 Me. 351, 355, 143 A. 272:

> "The defendant in a real action may show title in another person, *Rowell* v. *Mitchell,* 68 Me. 21. The plaintiff having failed to show title in himself, and the defendant having shown title in another, under whom he had possession, warranted judgment for defendant."

In other words, defendant urges plaintiff must recover upon the strength of her own title and not upon the weakness of defendant's title. See *Wyman* v. *Porter,* 108 Me. 110, 111, 79 A. 371, and cases cited therein.

This brings us to the consideration of the first exception. This exception concerns the admission in evidence by the court of the deed from the inhabitants of the town of Knox to defendant. Plaintiff objected to its introduction stating that it was not admissible until there was proof of authority of the signers of the deed to issue it on behalf of the town. However, a stipulation in the record indicates that the town of Knox at its 1950 annual meeting passed the following vote with reference to the transfer of property acquired through tax proceedings, said vote reading as follows:

> "Upon motion, voted to authorize the selectmen, on behalf of the town, to sell and dispose of any real estate acquired by the Town for nonpayment of taxes thereon on such terms as they deem advisable and to execute quit-claim deeds for such property."

It is our opinion that the quit-claim deed from the Inhabitants of the town of Knox to the defendant, in view of the stipulation, was properly admitted and that plaintiff's objection to its admittance was properly overruled and that the plaintiff suffered no damage thereby.

The second exception of the plaintiff reads as follows:

> "The defendant also offered in evidence her exhibits 3, 4, 5, 6, 7, 8, 9 and 10, being tax lien certificates recorded by the town of Knox for taxes for the years 1947, 1946, 1945, 1944, 1943, 1938, 1939 and 1941. Plaintiff objected seasonably to the admission of each of these exhibits. Plaintiff's objections were overruled and the exhibits admitted. Plaintiff's exceptions were seasonably noted. Plaintiff's grounds for objection to the admission of these exhibits was that all tax lien certificates prior to the year 1948 were inadmissible, because in filing and recording liens in successive years the town waived its rights under said certificates."

It may be noted that the plaintiff, by her exceptions, does not attack the validity of the several tax lien proceedings herein mentioned prior to 1948 in any particular other than setting up the claim that in filing and recording said tax liens in successive years the town waived its rights under said lien certificates and it also is noted that the lien certificate for the year 1948 was duly admitted without objection. We, therefore, hold under the authority of *Town of Warren* v. *Norwood,* 138 Me. 180, 186, 24 A. (2nd) 229, and cases cited therein:

> "that in the absence of evidence to show the contrary, it will be presumed that a town has proceeded in the usual and legal manner, * * * *."

The record shows factually that the conduct of the town of Knox in many respects was inconsistent with a waiver. For instance, it sold the hay on the premises in question in

the year 1948 to the husband of the plaintiff who paid the town for it and, in addition, either during the year 1948 or 1949 it shingled the house situated on the premises with the knowledge of the plaintiff and the plaintiff admits that the town would not agree to release the property to the plaintiff on plaintiff's offer to repair the buildings.

An examination of the statutes governing the filing of tax liens in statutory tax proceedings discloses that the filing of each tax lien certificate in the Registry of Deeds creates a mortgage in favor of the town. The statute then goes on to state, among other things, that if the mortgage, together with interest and costs, shall not be paid within eighteen months after the date of the filing of said certificate, the said mortgage shall be deemed to have been foreclosed and the right of redemption to have expired. We said in *Inhabitants of Canton* v. *Livermore Falls Trust Company,* 136 Me. 103, 106, 3 A. (2nd) 429, speaking of the expiration of the eighteen months period:

> "* * * any right to redeem could not have then been asserted; the time had gone. On the theory of the statute, the town was now owner, absolutely."

Assuming, as we must from the record, that some, if not all, of the tax liens were good in the absence of evidence to the contrary, it appears to us that we reach the same conclusion as was reached by our court in *Inhabitants of Orono* v. *Veazie,* 57 Me. 517, 519, when we recognized that there might be under the then existing law numerous tax sales and numerous tax deeds. In that opinion we said:

> "There may be numerous sales and tax deeds. One deed may be valid and the others convey no title."

It should also be noted that each tax lien certificate, when recorded, constitutes a new mortgage based on a new tax

assessment and inasmuch as the statutory language found in the act which extends the time beyond one year before title would vest if the mortgage was not paid, it must be assumed that the Legislature, when it enacted the legislation, had in contemplation that the foreclosure of the lien or mortgage could not vest title before the time of assessment of taxes for the following year. We come to this conclusion in part because it is substantially the same under the old tax sale procedure which has been on the statute books for many years and we are further strengthened in our belief because if upon filing of the tax lien certificate a mortgage is created, we see no reason why successive mortgages could not be created in a like manner. It should also be borne in mind that until the mortgage matured and the right of redemption was lost, in any event, it is the duty of the assessors to assess the property. The reason for this statement is because we held in *Inhabitants of the Town of Milo* v. *Milo Water Co.*, 131 Me. 372, 377, 163 A. 163:

> "Assessors are not subject to the direction and control of a municipality; their duties and authority are imposed by law."

The plaintiff claims that the town waived its rights under the tax lien certificates by filing and recording tax liens in successive years. This flatly raises the question as to whether or not the town is in such a position that the rules of law governing waiver are applicable to it. The claim arises out of matters not in the control of the town; it concerns the collection of public taxes. We said in *Thorndike* v. *Inhabitants of Camden*, 82 Me. 39, 44, 19 A. 95, in speaking of the powers and duties of towns with respect to taxes:

> "The claim in suit, however, arises out of matters which are not entrusted to the control of town meetings. It concerns the collection of public taxes. The statute (R. S., c. 3, § 46)" (now R. S. 1944, Chap. 80, § 90, as amended by Chap. 158,

P. L. 1949) "empowers a town to raise money for specified purposes,—that is, to fix and order by vote the amount to be assessed and collected for proper town charges,—but there the discretionary power of the town seems to end. The statute gives it no control over the *assessment or collection of any taxes.*" (Emphasis ours.) "It is true, the statute requires the town to appoint the assessors and collectors of all state, county and town taxes to be levied within its territory, but the town does this as the political agent of the state. The appointment could have been entrusted to any other agency. These officers are not corporate agents. They are public officers, owing to the public and not to the town alone, the duties imposed by statute. Only their appointment comes from the town. Their authority is from the statute, and they cannot be controlled by the town in the execution of that authority. *Desty on Taxation,* 508 685. *State* v. *Walton,* 62 Maine, 106.

"No vote of the town can relieve the assessors of any part of their statute duty; nor can such vote control their action in any detail.

* * * * * * * * * *

"* * * * * All these officers proceed, not under any vote of the town but independent of it and under statute authority. It would be their duty to act, when the occasion arises, even in spite of a vote of the town.

* * * * * * * * * *

"* * * * * A town meeting has no authority to review, modify or reverse the judgment of the assessors as to the persons or property to be taxed. Nor has it any authority to excuse a man from paying his tax, or to refund to him a legal tax once paid. To concede that a town can directly or indirectly abate a tax by vote in town meeting, is to concede the power of a town to determine who shall pay taxes, and who shall be exempt, and the consequent power to place the public burdens wholly on such citizens, as the majority shall single

> out for that purpose. This court has emphatically held that a town has no such power, and that the legislature can not confer it. *Brewer Brick Co.* v. *Brewer,* 62 Maine, 62. If the town can not abate the tax it certainly can not excuse the collector from collecting it. The town can not do indirectly what it has no direct power to do."

The plaintiff, as we have pointed out, sets up waiver in her exception, but in her brief she not only argues waiver but estoppel as well. The text book authorities regard waiver and estoppel as closely akin. In fact, we find in 56 Am. Jur., Sec. 3, Page 103, the following statement:

> "In fact, the terms 'estoppel' and 'waiver' are often loosely used interchangeably, but although a waiver may be in the nature of an equitable estoppel and maintained on similar principles, they are not convertible terms. A waiver may amount to an estoppel, but not necessarily so, * * *."

In recent years we have considered the law of waiver and carefully defined it and also the difference between it and estoppel. See *Johnson* v. *The Columbian National Life Insurance Company,* 130 Me. 143, 145, 154 A. 79. See also *Colbath* v. *H. M. Stebbins Lumber Company,* 127 Me. 406, 413, 144 A. 1, and *Libby* v. *Haley,* 91 Me. 331, 333, 39 A. 1004. There is no doubt but that a town in its private or proprietary capacity may be subject to the operation of law respecting waiver and estoppel, but taxation is a governmental rather than a private or proprietary function and the town in taxation matters acts only as a political agent of the state in the assessment and collection of taxes.

We said in *The Inhabitants of the Town of Frankfort* v. *Waldo Lumber Co.,* 128 Me. 1, 3, 5, 145 A. 241:

> "The levying of taxes is a power of sovereignty.
>
> "Municipal officers annually levy or assess taxes on persons and property within their bounds, for the state, their county and their municipality.

"When assessing and collecting such taxes municipal officers are the agents of the State, which is sovereign.

"And in so doing they proceed only under such agency, and they shall proceed strictly as authorized and empowered.

" 'A municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as are clearly and unmistakably granted by the law-making power.'

"A doubtful corporate power, it has been said does not exist; and when any power is granted, and the mode of its existence is prescribed, that mode must be strictly pursued.

"Now the power of taxation is not only an attribute of sovereignty, but it is essential to the existence of government.

"Nor, strictly speaking, is this power of the Legislature transferable, for, as we shall presently see, whenever taxes are imposed, whether by a municipality or the State, it is, in legal contemplation, the act of the State, acting either by her own officers or other agents designated for the purpose.

" 'Hence, when delegated by the Legislature to a municipal corporation, the latter is considered as *pro hac vice,* the agent of the State, acting for the benefit of the municipality. In other words, the municipality, in the eye of the law, is the hand of the State by which the tax is laid and collected.' *Whiting* v. *West Point,* 88 Va., 905; 29 A. S. R., 750; 15 L. R. A. 860.

* * * * * * * * * *

"Under our Constitution, Art. IX, Sec. 9, the State may never, in any manner, suspend or surrender the power of taxation.

"The collection of taxes it delegates to the municipalities. The State may exempt classes of

> property; it provides that a municipality may abate taxes assessed, but assessors attempting abatement must proceed under rigid rules set out in R. S., Chap. 10, Sec. 77, or other appropriate statute."

We said in *Talbot et al.* v. *Inhabitants of Wesley,* 116 Me. 208, 211, 100 A. 937, speaking of estoppel:

> "The defendants are not estopped to deny the validity of the proceedings of the assessors, because, although the assessors were elected by the town, they were public officers, having their duties prescribed by law, for the general welfare; and are guided by law in the exercise of their duties. *Rossire et al* v. *City of Boston,* 86 Mass., 57."

We also said in *Town of Milo* v. *Milo Water Co., supra,* Page 378, which was an action involving the assessment and collection of taxes and wherein one of the defenses was estoppel against the town:

> "Limiting our discussion to the question whether a town can be subject to estoppel in a suit for taxes, where the validity of the assessment is not questioned and no constitutional or statutory bar can be raised, there seems to be a general consensus of opinion in the cases that when the State or a municipality makes itself a party to a contract or to a grant in a business or proprietary capacity it is, in matters relating thereto, subject to the same law of estoppel as other contracting persons who may be parties litigant, but many of the cases so holding recognize the double character of municipal corporations, the one governmental or sovereign, legislative or public, and the other proprietary, business or private. Few cases are to be found bearing directly on the question of whether a municipal corporation, a State or the general government can be estopped, as between it and an individual, to assert its governmental or sovereign power, but some cases by way of dicta appear to recognize the principle that in the strict scope of

governmental or public capacity there can be no estoppel. That taxation is a function of government and a basic sovereign right there can be no question. In *Philadelphia Mortgage and Trust Company* v. *City of Omaha,* 63 Neb., 280, 88 N.W., 523, it was held that the doctrine of estoppel in pais could not be invoked against the city in the collection of taxes lawfully assessed. In the case of *Chicago, St. P. M. & O. Ry. Co.* v. *Douglas Co.* (Wis.), 114 N. W., 511, the Court said, 'The analogies to be deduced from the other sovereign powers necessary to the existence of the State, such as the power of eminent domain, the police power, and the power to declare war and make peace (when such last named powers are not by written Constitution vested elsewhere), are all antagonistic to the idea that a State can be subject to an estoppel in the matter of the exercise of its taxing power.— We are constrained to hold that the complaint shows the lands to be subject to taxation, and that there can be no estoppel in pais asserted against the exercise by the State of the taxing power of the State;'

"Bearing in mind that local, county and State taxes are all included in one tax, it is clear that in this State the town is the State for the purpose of collecting such taxes. In full realization of the fact that few cases can be found bearing squarely on the point, we are nevertheless of the opinion that an equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily included the power of collecting taxes lawfully assessed. To hold otherwise would, we believe, be contrary to sound public policy and destructive of a fundamental sovereign right."

The defense in the instant case is waiver, and estoppel is not specifically raised by the exceptions, but under the facts and circumstances we see no good reason why the same rules of law would not apply to the instant defense of waiver.

Applying the rules of law set forth herein to the instant case and giving effect to the applicable statutes leads to but one conclusion, namely, that on the record and exceptions the town of Knox not only did not waive any rights by the action of the assessors in taxing the property in successive years but it did not acquire any rights to which the law of waiver would apply and inasmuch as the title herein involved is derived from the assessment and collection of taxes by the operation of the statutes, which matters are not in the control of said town, there can be no estoppel for under our decisions it does not lie against the town or even against the State in such matters and until such time as there is legislative authority for the same the collection and assessment of taxes is not within the control of any town except so far as authorized by the Legislature. It, therefore, follows that the decision of the presiding justice below for the defendant was correct. The mandate will be

Exceptions overruled.

LEO J. HOULE, APLT.
vs.
TONDREAU BROTHERS COMPANY
AND
AETNA CASUALTY & SURETY CO., CARRIER

LEO J. HOULE, APLT.
vs.
TONDREAU BROTHERS COMPANY, INC.
AND
AETNA CASUALTY & SURETY CO., CARRIER

Cumberland. Opinion, October 4, 1952.

Workmen's Compensation.

Burden of Proof. Evidence. Appeal.

Whether there is a disability due to injuries or a causal relation between injury and disability and whether a claimant has sustained the burden of proof are questions of fact for the Commission.

The only legal test for the evidence necessary to sustain the burden of proof is its sufficiency to satisfy the mind and conscience of the trier of facts.

Compensation awards can not be made upon possibilities or evenly balanced clearances nor upon choice equally compatible with accident or no accident.

ON APPEAL.

This case is before the Law Court on appeal from a *pro forma* decree of the Superior Court affirming decrees of the Industrial Accident Commission. Appeal dismissed. Decree affirmed.

Sherwood Aldrich, for appellant.

James R. Desmond, for appellee.

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

FELLOWS, J. These two cases heard together come to the Law Court on appeal by the petitioner (employee) from *pro forma* decrees of the Superior Court for Cumberland County affirming decrees of the Industrial Accident Commission. The Commission dismissed the two petitions, asking for award of compensation, for failure to sustain the burden of proof. Each petition alleged a separate and distinct accident. Both were heard together without objection. The first accident was alleged in the first petition (filed with the Commission on January 10, 1952) as having taken place on January 18, 1951. The second petition (filed with the Commission on January 29, 1952) alleged an accident on April 16, 1951.

Leo J. Houle, the petitioner, worked as a meat cutter in the employ of Tondreau Bros. Company at Brunswick, Maine. His duties included care of meats, cutting meats, and waiting on customers. He also hung meat on hooks as it was unloaded from trucks. On January 18, 1951, he went into the refrigerator to get hooks, and on coming out slipped and fell down injuring his right foot. He informed the manager that he must go to his home, and he went home where he bathed his right foot in hot water. Two days after, Dr. Earle Richardson, when consulted, found the Achilles tendon "strained and some fibres possibly broken." Dr. Richardson strapped up his foot. The petitioner was out of work for two and one-half days only, but stated that he had difficulty in walking. Dr. Richardson offered no opinion that any subsequent disability was connected with the original injury. On April 16, 1951, the employee Houle attempted to hang up a "chuck" of beef weighing 70 or 80 pounds, and the beef fell on the instep of his other (left) foot. The foot swelled, and he put his left foot in hot water.

He did not go to a doctor but he told Louis Tondreau about it. He lost no time from his work because of the second accident.

On April 22, 1951, Houle consulted Dr. Morris E. Goldman, an orthopedic surgeon, about his right foot. He complained of pain in the right foot in the region of his ankle. X-rays were taken. He was given medication. On a later visit to the doctor, Houle told Dr. Goldman about pain in his other (left foot) and received Anacin pills to be taken for pain. It was not until August 1951 that Houle ceased to work as usual.

It appears, and is admitted, that Leo J. Houle had a congenital deformity in both his right and left foot. Dr. Goldman said "both feet were of a certain type that ultimately would give him trouble, in that they were the spastic everted —that is, turned out. By out, I mean the top of the foot is turned internally and the bottom of the foot is turned outwardly." Dr. Goldman said also, regarding any pain he may have had, that surgery would relieve. "I expected to relieve his pain to be sure, and I also expected to correct the existing deformities in both feet to avoid trouble later on." Dr. Goldman could not recall that Houle made any complaint of pain in his left foot. Dr. Goldman recommended surgery, however, to the left foot because of the deformity. Dr. Goldman found no evidence of any injury to either foot. "In the course of the examination, his feet were so deformed that I suggested to him, where his work required standing up a great deal, he should consider some form of surgery to his feet to avoid further trouble. He told me he would think it over and came back later on and asked me to arrange for surgery for him."

Dr. Goldman stated that he found no objective symptoms indicating any condition other than the "congenital spastic everted," and that he did not "clearly in my mind" have any

opinion that the alleged accident "accelerated the need for surgery."

The first petition for award of compensation filed by Leo J. Houle was dated January 9, 1952, and alleged that on January 18, 1951 he "slipped upon the floor of the meat room of Tondreau Bros. Company and fell down thereby spraining my right foot and ankle * * * from which I suffered intense pain, which continued until August 10, 1951, when I was unable to work longer and after which an operation on my right foot became necessary." The second petition for award of compensation filed by Leo J. Houle was dated January 21, 1952 and alleged that "the chuck of beef fell upon my left foot knocking me down * * * causing an injury to my left foot which resulted in great pain which became so severe that on August 10, 1951, I was unable to work and after which an operation was performed on my left foot. That to this date I have been unable to work because of said injury, since August 10, 1951." An answer was duly filed to each of the petitions denying all of the allegations.

The two foregoing petitions were heard together and the Commission, after full hearing, made a long, carefully written analysis of all medical and all other testimony applicable to each petition, and dismissed each petition for failure, on the part of the petitioner, to prove that he received injury by accident arising out of and in the course of the employment and that the medical attention and incapacity was due to the accidental injury.

The question presented to the Law Court on these two appeals is whether the Commission was in error in its dismissal of both (or either) of the petitions because of failure to sustain the burden of proof.

The Workmen's Compensation Act says: "If from the petition and answer there appear to be facts in dispute, the

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

At the hearing before the Industrial Accident Commission the petitioning employee was the moving party and upon him was the burden to prove the allegations in his petition and all elements necessary to support his claims for compensation, such as the employment, the accident arising out of and in the course of the employment, the resulting injury, and the causal connection between the condition which he alleges disabled him and the alleged accident. "Surmise, conjecture, guess, or speculation are not sufficient." *Westman's Case,* 118 Me. 133, 106 Atl. 532; *Hawkins* v. *Portland Gas Co.,* 141 Me. 288, 43 Atl. (2nd) 718; *Boyce's Case,* 146 Me. 335, 81 Atl. (2nd) 670; *McNiff* v. *Old Orchard,* 138 Me. 335.

Whether there is a disability due to injury is a question of fact. Whether there is a causal relation between injury and disability is also a question of fact. *Kilpinen's Case,* 133 Me. 183, 175 Atl. 314; *Baker's Case,* 143 Me. 103, 55 Atl. (2nd) 780.

It is the right and duty of the Commission, under the statute, to find the facts, and if the Commission has considered

all the competent evidence and there is competent evidence on which to base the decision, the decision is final. It is also final if the Commission decides there is a lack of probative evidence. Whether a claimant has sustained the burden of proof is the problem of the Commission. It is a question of fact which cannot be disturbed by this court. *Robitaille's Case,* 140 Me. 121; *Weliska's Case,* 125 Me. 147.

What constitutes proof, with relation to the evidence offered to establish the truth of a proposition, is often a most difficult question. It is that evidence which has the power to convince the mind of the existence of a fact, and thus produce belief. It is rarely an absolute demonstration like a mathematical proposition. Properly speaking, however, proof is the effect or result of evidence, while evidence is the medium of proof. In the ordinary affairs of life we cannot require demonstration because it is not consistent with the nature of common and usual subjects. Things or events established by competent and satisfactory evidence are said to be proved. Competent evidence is evidence that is fit and appropriate, such as the production of a writing that is subject to inquiry, or the testimony of a witness having the necessary knowledge of facts and circumstances. Satisfactory evidence is that competent evidence which satisfies an unprejudiced mind of the truth. The amount of competent and satisfactory evidence necessary to sustain the burden of proof can never be defined. It depends on circumstances and conditions. It may come from the testimony of one witness, or it may require many. The only legal test is its "sufficiency to satisfy the mind and the conscience of the trier of the facts." See Greenleaf on Evidence (6th Ed.) Volume 1, Pages 3-15; Bouvier's Law Dictionary (3d Ed.) "Proof,"; 20 Am. Jur. 134, 1043, Secs. 131, 1190.

> "The burden was upon the plaintiff to sustain the allegations of his writ by the weight of the evidence. His witnesses were far outnumbered by

> those brought in by the defendant and contradicted in many of the material facts stated in their testimony, but they were believed by the jury. The weight of evidence is not a question of mathematics. One witness may be contradicted by several and yet his testimony may outweigh all of theirs. The question is what is to be believed, not how many witnesses have testified." *Shannon* v. *Dow,* 133 Me. 235 at 240.

Even if the testimony of a witness is not directly contradicted it does not make it conclusive and binding upon the trier of facts. It is not to be utterly disregarded and arbitrarily ignored without reason. It should be considered and weighed with the other evidence in the case. "The court is not required to put the stamp of verity upon it, merely because it is not directly contradicted by other testimony." *Mitchell* v. *Mitchell,* 136 Me. 406, 418.

The petitioner in this case strenuously contends that the Commission in dismissing his two petitions for award of compensation clearly disregarded evidence of probative force and that the decisions should therefore be set aside. The petitioner claimed and testified that he never suffered pain in either of his feet before these two accidents and that he worked at his job for twenty years. He also claims that he is "corroborated" by a fellow worker who testified that he never heard the petitioner complain of pain. The petitioner says that the foregoing evidence given by him proves the causal connection. He states in his brief that the pain from which he suffered in his feet was attributable to the injuries received by him in the two accidents, the operation performed was incidental and to ease the pain and that his "incapacity following the operation directly followed and resulted from the injuries received in the accidents and was therefore compensable."

The contentions of the petitioner are well stated in his brief and his views of the evidence are well expressed. Had

the evidence introduced by the petitioner "satisfied the mind and conscience" of the Commission, there would have been decisions in his favor, and this court would be obliged to say that there was evidence to support. The Commission, however, found the facts otherwise in the two cases, after careful consideration of all the evidence, and there is likewise competent evidence on which to base the two decisions.

These cases involve medical and surgical questions. There were no objective indications that the petitioner's pain (if there was pain) was caused by the accident, or either accident. The medical testimony was to the effect that these two minor accidents were not the cause of inability to work. These accidents may have aggravated the congenital condition as Dr. Goldman testified, but he stated "I do not know." There was evidence from the doctors to indicate that the petitioner's claims were *possibly* correct but no evidence from the doctors that they were *probably* correct.

Compensation cannot be awarded upon possibilities or evenly balanced chances, or upon a choice equally compatible with an accident and no accident. *McNiff* v. *Old Orchard,* 138 Me. 335; *Bertha Ferris' Case,* 132 Me. 31.

In each of the above named cases of Leo J. Houle v. Tondreau Bros. Company, the entry must therefore be

Appeal dismissed.

Decree affirmed.

STATE OF MAINE
vs.
FRANCIS D. NAGLE

York. Opinion, October 7, 1952.

Public Utilities. Permits. Interstate Commerce.

Subject to some exceptions, it is a sound principle of law that when a permit or license to do an act is required by law, the wrongful refusal to issue such permit or license will not justify the performance of the act.

For the purpose of making sure that the highways are safe for any proposed operation in interstate commerce and that the safety of other users of the highways will not be endangered thereby the State, under its police power, has the right to require permits for the use of its highways in interstate commerce.

The wrongful denial of a permit is not the equivalent of a permit. Nor is a permit to transport one class of goods equivalent to a permit to transport goods generally with an illegal severable restriction contained therein. With respect to goods not covered by the permit one who transports the same is in the same situation as though he had no permit at all.

ON REPORT.

Respondent was indicted for a violation of R. S., 1944, Chap. 44, Sec. 22, as amended. The case was reported to the Law Court upon agreed statement and stipulation that "if the court shall find respondent guilty as charged in the indictment, the case is to be remanded to the Superior Court for sentence of the respondent. If, however, the court shall find the respondent not guilty as charged in the indictment, the case is to be remanded to the Superior Court and nolle prosequi to be entered by the prosecution." Respondent adjudged guilty. Case remanded to the Superior Court. Respondent to be there sentenced in accordance with stipulation.

Alexander A. LaFleur, Atty. General,
Raymond E. Jensen, Asst. Atty. General, for plaintiff.

Berman, Berman and Wernick, for defendant.

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

MERRILL, J. On report. The respondent was indicted for transporting asbestos shingles for hire as an interstate carrier on a highway within the State of Maine "without having then and there authority from the Maine Public Utilities Commission permitting such transportation for hire," he "being then and there authorized by the Maine Public Utilities Commission to act as an interstate carrier only for the purpose of transporting household goods for hire,".

The respondent operated a motor truck as an employee of James J. Keating, Jr., an interstate carrier by motor vehicle. Keating had been issued a permit by the Interstate Commerce Commission as a common carrier over irregular routes. By his permit ICC80416 Keating was limited to the transportation of "Household goods, as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467," "Between Stoneham, Mass., and points and places within ten miles thereof, on the one hand, and, on the other, points and places in Connecticut, Maine, Massachusetts, New Hampshire, New York, and Rhode Island," and "Between Medford, Mass., and points and places in Massachusetts within ten miles of Medford, on the one hand, and, on the other, points and places in Maine, Vermont, New Hampshire, and Connecticut traversing Rhode Island for operating convenience only."

Upon application to the Maine Public Utilities Commission the Commission granted a permit to Keating as a

"motor vehicle interstate carrier, authorizing the operation of the motor vehicles described therein, over and upon the highways in the State of Maine as set forth in Schedule "A" * * * * as provided in Chapter 44, R. S. of Maine, 1944, as amended." Schedule "A" was as follows:

"SCHEDULE 'A'

Showing highways in the State of Maine over which James J. Keating, Jr. is authorized to operate as an interstate carrier

Household goods between Medford, Mass., and points and places in Massachusetts within ten miles of Medford on one hand, and points and places in Maine, on the other."

A plate permit was also issued by the Maine Public Utilities Commission covering the particular truck used in the operation here under examination.

The respondent on the day charged, as an employee of Keating, transported asbestos shingles for hire in interstate commerce, by motor vehicle, on the highway in this State named in the indictment, which highway was a highway covered by the permit issued to Keating.

The case was reported upon the foregoing facts with the stipulation that "if the court shall find the respondent guilty as charged in the indictment, the case is to be remanded to the Superior Court for sentence of the respondent. If, however, the court shall find the respondent not guilty as charged in the indictment, the case is to be remanded to the Superior Court and nolle prosequi to be entered by the prosecution."

The indictment against the respondent is based upon an alleged violation of R. S. (1944), c. 44 Secs. 22 and 30, as amended. At the time of the alleged violation said Section 22, as amended by P. L. 1949, Chap. 263, read as follows:

> "In order that there may be proper supervision and control of the use of the highways of this state, every person, firm or corporation transporting freight or merchandise for hire by motor vehicle upon the public highways between points within and points without the state is required to obtain a permit for such operation from the Commission. Application for such permits shall be made in the manner and form to be prescribed by the Commission in its regulations, and such permits shall issue as a matter of right upon compliance with such regulations and payment of fees, unless the Commission shall find that the condition of the highways to be used is such that the operation proposed would be unsafe, or the safety of other users thereof would be endangered thereby."

So much of R. S. (1944), Chap. 44, Sec. 30, Subsection I, as amended by P. L., 1949, Chap. 390, as is applicable hereto reads as follows:

> "I. Any person, firm or corporation or any officer, agent or employee of any corporation who violates, orders, authorizes or knowingly permits a violation of any of the provisions of sections 17 to 29, inclusive, or of any rule, regulation or order made or issued by the commission pursuant to the authority of sections 17 to 30, inclusive, shall be punished by a fine of not less than $10, nor more than $500, or by imprisonment for not more than 11 months, or by both such fine and imprisonment."

The respondent was, at the time he was performing the transportation for which he was indicted, an employee and driver for James J. Keating, Jr.

Subsection IV of said Section 30 reads as follows:

> "Any driver of any motor vehicle which is being unlawfully used by any person, firm, or corporation in carrying on the business of a common carrier, or of a contract carrier, or of an interstate carrier without a certificate or permit, shall be liable to the penalties provided in this section."

The respondent himself having no permit from the Public Utilities Commission of Maine, it follows that for the purposes of this case, his guilt or innocence must depend upon the rights, permits and privileges, if any, of his employer, James J. Keating, Jr.

It is the position of the respondent that the Commission had *no express authority* to insert any limitation in permits issued to those engaged in interstate commerce, and that its *implied authority,* if any, to insert limitations therein was confined to those insuring that the condition of the highways to be used would be safe for the operation proposed and to make sure that the safety of other users of the highways would not be endangered thereby. The respondent further contends that the Commission had no right to insert in his employer's permit the provision limiting the transportation to household goods; that such provision was an attempt to regulate interstate commerce with respect to such transportation; and that, as such, it is illegal, being in violation of the commerce clause of the Constitution of the United States. U. S. Const. Art. I, Sec. VIII, Par. 3.

Interesting and provocative as a determination of these questions might be, a decision of one or both of them in favor of the respondent would not be decisive of the real issue in this case.

This is not a proceeding to obtain a permit denied or to broaden the scope of the one in fact issued, but it is a prosecution for operating without a permit covering the transportation in question.

The issues here are, first, could the State require a permit for the transportation in question; second, if that question be answered in the affirmative, had the respondent or his employer the permit required by law.

The foregoing issues raised by the respondent might well be germane to a decision of whether or not the Public Utilities Commission of Maine should have issued or could have been compelled to issue a permit covering the transportation here involved. Their decision, however, has no bearing upon whether or not the permit actually issued is broad enough to cover the transportation in question. *The decision of this case depends not upon the kind of permit the respondent or his employer was entitled to receive, but upon that which was in fact received.* Even though the respondent's employer might have compelled the issue of a permit broad enough to cover the transportation in question, a question upon which we neither express nor intimate an opinion, unless and until he does so, the fact remains that unless the permit which he has received is broad enough to cover the transportation of the goods actually transported, he and his employee are transporting goods in interstate commerce without the required permit.

In the instant case the respondent's employer had not received a permit broad enough to cover the transportation in question. He had a permit to transport household goods. He had no permit to transport any other goods. This permit was only affirmative authority to transport the specific goods named therein. It contained no prohibition of the transportation of other goods. As to the goods transported, to wit, the asbestos shingles, the permit neither gave nor denied the right to transport the same. It was entirely silent with respect thereto.

Even if it be conceded for the sake of argument that the Public Utilities Commission of Maine was not authorized to restrict the employer to the carriage of household goods in interstate commerce, or if so authorized by state law such restriction would be an illegal interference with interstate commerce (questions upon which we neither ex-

press nor intimate our opinion), the fact remains that it did not issue the respondent's employer a permit to transport anything other than household goods in interstate commerce.

Nor can the permit in question be construed as a permit to transport goods generally for hire in interstate commerce with a severable illegal restriction upon such transportation. The respondent's employer had no permit from the Public Utilities Commission of Maine to transport goods in interstate commerce generally, nor did he have a permit to transport the goods which were actually being transported. *The situation with respect to the transportation involved is the same as though he had no permit whatever from the Public Utilities Commission of Maine as required by R. S. (1944), Chap. 44, Sec. 22 as amended.*

Subject to some exceptions, it is a sound general principle of law that when a permit or license to do an act is required by law, the wrongful refusal to issue such permit or license will not justify the performance of the act. The remedy of the applicant is to compel the issue of the permit or license. The applicant is not permitted to take the law into his own hands and engage in the action for which the permit or license is required. See 53 C. J. S. 727, Sec. 68, 37 C. J. 267, Sec. 158 and cases cited in note 91; 33 Am. Jur. 395, Sec. 87; and note in Annotated Cases 1917B 147.

The case of *State* v. *Stevens,* 78 N. H. 268, 99 Atl. 723, 725, L. R. A. 1917C, 528 is illuminating. In that case it was claimed that the insurance commissioner wrongfully refused a license to a lightning rod agent who had applied therefor. With respect thereto the court said:

> "The duty imposed upon the insurance commissioner upon application to him for the license of an agent is judicial in its nature; he is to pass upon the question whether the manufacturer's appointee is a suitable person.

> If, acting under an erroneous view of the law, the insurance commissioner wrongfully refused to issue the license, the defendant had an ample remedy in the writ of certiorari.
>
> The judgment of the commissioner that the license ought not to be granted cannot be attacked, collaterally. Pittsfield v. Exeter, 69 N. H. 336, 338, 41 Atl. 82. The defendant would be no better off if such attack were permitted. His claim is that he was entitled to a license, not that he had a right to sell without a license. If the correctness of the defendant's claim were conceded or established, he would still be guilty of a violation of the statute—selling without a license. *A wrongful refusal of a license is not equivalent to a license.* (Emphasis ours.)
>
> Instead of prosecuting by proper proceedings his claim of right to a license, the defendant chose to disregard the law and must submit to the penalty."

In *State* v. *Jamison,* 23 Mo. 330, the court said:

> "It is the *granted license* that justifies a party in carrying on the business of a 'dram-shop keeper,' and therefore, even although the County Court ought to have granted it notwithstanding the remonstrance of the inhabitants, (about which we express no opinion), yet, as they did not, the defendant had no authority to engage in the prohibited trade. It may be that it was improperly withheld, but it is enough here that it *was withheld,* and whether rightfully or wrongfully, is not now material. In either event, the defendant was guilty if he engaged in the prohibited traffic."

As said by the same court in *State* v. *Myers,* 63 Mo. 324:

> "punishment must follow an infraction of the law, (operating without a license) regardless of the reason which prevented a license from being obtained or the motive actuating the officer who, in dereliction of his duty, refused to grant it."

The case of *Royall* v. *Virginia,* 116 U. S. 572, 29 L. Ed. 735, cited in 33 Am. Jur. 395 as holding to the contrary is easily distinguishable from the cases sustaining the general rule. In that case the Supreme Court of the United States recognized the general rule above set forth. It held, however, that a statute which required an attorney at law to obtain a revenue license, in addition to his license as an attorney, and punished for practicing without having obtained the revenue license, was but a form of imposing a tax. Being a tax, the provision for the punishment of one who pursued his profession without the revenue license was a part of the revenue system of the State and was merely a means of enforcing the payment of the tax itself or of a penalty for not paying it. The court further held that the prosecution was legally equivalent to a civil action of debt upon the statute and its substantial character was not changed by calling the default a misdemeanor and providing for its prosecution by information. The court then held that a tender of the amount due in funds legally sufficient under the laws of Virginia to discharge the tax was a complete defense to prosecution for the practice of law without the revenue license.

Except under similar or other special circumstances, none of which are present in this case, we believe that the true and sound rule is that when a permit or license for engaging in a certain class of business is lawfully required, the wrongful refusal of such license, or application therefor is, not a defense to prosecution for carrying on the business without it.

In the instant case the respondent was engaged in transporting asbestos shingles from without the State of Maine into the State of Maine over the highways of the State of Maine for hire without either he himself, or his employer, having the permit from the Public Utilities Commission of

Maine required by R. S. (1944), Chap. 44, Sec. 22 as amended. If the State of Maine could lawfully require such a permit for the privilege of using its highways in interstate commerce, the respondent is guilty.

For the purpose of making sure that the highways to be used are safe for any proposed operation in interstate commerce and that the safety of other users of the highways will not be endangered thereby, the State, under its police power, has the right to require permits for the use of its highways in interstate commerce. As said by the Supreme Court of the United States in *Bradley* v. *Public Utilities Commission,* 289 U. S. 92, 77 L. Ed. 1053 at 1056:

> "Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of the police power. It is primarily a State function, whether the locus be private property or the public highways. * * * * * The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety."

In *Buck* v. *Kuykendall,* 267 U. S. 307, 69 L. Ed. 623 at 626 the court said:

> "It may be assumed * * * * that appropriate State regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable."

In the case of *California* v. *Thompson,* 313 U. S. 109, 115, 85 L. Ed. 1219 at 1223, the court said:

> "It (meaning the Supreme Court of the United States) has uniformly held that in the absence of of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and con-

> venient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce."

In the case of *California* v. *Zook,* 336 U. S. 725, 93 L. Ed. 1005, it was held that the mere fact that Congress enacted a law or authorized a regulation requiring a license for a transaction affecting interstate commerce coincident with a state regulation requiring a license for the same transaction did not necessarily abrogate the state regulation if the enforcement of the state regulation did not conflict with the federal regulation. In that case the state regulation which was sustained was based upon the police power of the state, see *California* v. *Thompson, supra,* and its enforcement did not conflict with the federal regulation.

It is the considered opinion of this court that it is within the power of the State of Maine for the purposes stated in R. S. (1944), Chap. 44, Sec. 22 as amended by P. L., 1949, Chap. 263, to require that those who use the highways of this State for interstate motor transportation obtain a permit therefor, provided such permits are to be granted as a matter of right "unless the Commission shall find that the condition of the highways to be used is such that the operation proposed would be unsafe, or the safety of other users thereof would be endangered thereby." It is our further opinion that there is nothing in the Motor Carrier Transport Act of 1935, 49 U. S. C. A. Secs. 301 *et seq.* which prevents the State of Maine from requiring such permits, for the purposes and under the conditions set forth in said Section 22 as amended, from interstate carriers using its highways for carriage of goods for hire.

Even though the issue of the permit is mandatory provided the condition of the highways to be used is such that it would be safe for the operation proposed, and the safety of other users of the highways would not be endangered thereby, the Public Utilities Commission under the statute here in question has not only the duty but the power and

authority to determine these questions as questions of fact. If the Commission, upon evidence, determines these facts, or either of them, against the applicant for the permit to engage in interstate commerce, it may deny the permit. Even though such denial of the permit be wrongful, as before herein held, the wrongful denial of a permit is not the equivalent of a permit. Nor is a permit to transport one class of goods equivalent to a permit to transport goods generally with an illegal severable restriction contained therein. With respect to goods not covered by the permit, one who transports the same is in the same situation as though he had no permit at all.

True it is in this case that the respondent could justify under a valid permit issued to his employer. However, he, like his employer, cannot justify his acts for which a permit is required because of the wrongful refusal thereof to his employer, or because of the wrongful failure of the Public Utilities Commission to issue a permit to his employer broad enough to cover the transportation in question.

The situation here resolves itself into the simple case of a person who is operating without the permit required by law, to wit, a permit to engage in interstate commerce over the highways of Maine. As it was within the police power to require such permit for the purposes set forth in R. S. (1944), Chap. 44, Sec. 22 as amended, and as neither the respondent nor his employer had such a permit covering the transportation in question, the respondent is guilty of the offense charged. In accord with the stipulation the case is remanded to the Superior Court for sentence of the respondent.

Respondent adjudged guilty.

Case remanded to the Superior Court. Respondent to be there sentenced in accord with stipulation.

DONALD L. GRANT

vs.

KENDUSKEAG VALLEY CREAMERY
FORMERLY
KENDUSKEAG VALLEY CO-OPERATIVE CREAMERY
AND
PERSONS UNASCERTAINED AND UNKNOWN CLAIMING BY, THROUGH OR UNDER SAID KENDUSKEAG VALLEY CREAMERY

Penobscot. Opinion, October 9, 1952.

Cloud on Title. Equity. Remedies.

Equity has jurisdiction to quiet title to real estate under R. S., 1944, Chap. 158, Secs. 52-55.

The mere fact that a concurrent remedy at law exists does not oust equity of jurisdiction.

ON APPEAL.

This is a bill in equity to remove a cloud on title. The presiding justice sustained the bill. The case is before the Law Court on appeal. Appeal dismissed. Decree below affirmed.

Frederick B. Dodd, for plaintiff.

Milton A. Beverage, for guardian *ad litem* et al.

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

THAXTER, J. This was a bill in equity filed in Penobscot County in November, 1951, returnable on the first Tuesday of January, 1952. The object of the bill was to remove a cloud on title. Answers were filed by the guardian *ad litem* for certain defendants and the bill was taken *pro confesso*

as to the other defendant. A hearing was duly had by the sitting justice who sustained the bill granting the relief prayed for and establishing the title of the plaintiff. An appeal was filed by the guardian *ad litem.* The basis of this appeal is that there is no jurisdiction in equity to quiet title to real estate.

Such jurisdiction is, however, expressly given by the statutes of this state to courts of equity and the procedure is specifically set forth. R. S., 1944, Chap. 158, Secs. 52-55. It has been the unquestionable practice here for years. Even though a remedy at law may be available, the remedy in equity is still proper, particularly where the legislature may give such remedy as being more flexible or better adapted to the particular circumstances than the remedy at law.

The mere fact that a concurrent remedy at law exists does not oust equity of jurisdiction. *United States* v. *Howland, et al.,* 4 Wheat. 108, 4 L. Ed. 526; 19 Am. Jur., page 117 *et seq.*

Appeal dismissed.

Decree below affirmed.

ROCKLAND POULTRY CO.
vs.
THOMAS M. ANDERSON

Knox. Opinion, October 10, 1952

Construction Contracts. Substantial Performance. Bias. Prejudice.

Where a construction contract provides that a certain thing be done in a certain manner, or to obtain a certain result, it must be done by the contracting party if it is not impossible, and if it is not prevented by act of God or of the other party. There must be substantial performance.

A verdict shows bias and prejudice where a jury disregards an admission of liability testified to by the defendant and the damages estimated by his own experts.

ON MOTION FOR NEW TRIAL.

This is an action for breach of contract. The jury found a verdict for defendant. The case is before the Law Court on plaintiff's general motion for a new trial. Motion sustained. New trial granted.

Christopher S. Roberts, for plaintiff.

Frank F. Harding, for defendant.

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

FELLOWS, J. This action on the case for alleged breach of the terms of a building contract comes to the Law Court, after verdict for defendant, on plaintiff's general motion for a new trial.

It is alleged, and the contract provided, that "the said Thomas M. Anderson on his part, agrees to construct and

complete for the said Rockland Poultry Company on its lot, Tillson Avenue, Rockland, Maine, an addition to the present building on said lot, said addition to be 62 ft. x 72 ft., taking in additional corner 8 ft. x 22 ft. between the old and new building, two overhead doors 10 ft. x 8 ft., ample and sufficient foundations, drainage systems for poultry business, gutters on floors and sufficient windows for ample and sufficient light. Said Thomas M. Anderson to furnish all material and labor and to complete and make for said Poultry Company a good, strong substantial building of first class material for the sum of $11,476.00. Work to be completed as soon as possible, but not exceeding ten weeks from May 22, 1950."

The plaintiff contends that defendant did not perform his contract as promised and brought this action to recover damages. The declaration alleges as follows: "and the plaintiff avers that the defendant built said building and that the plaintiff in all respects has fulfilled all of said agreement on its part to be performed and paid to said defendant as agreed the sum of eleven thousand four hundred and seventy-six dollars for said work, materials, etc., yet, said defendant did not build said building as promised, in that said building did not have ample and sufficient foundations, but that said foundation was weak and faulty and has since sagged and settled, whereby the floors are cracked, the walls settled and the roof, by reason thereof, warped and bent so that water does not drain from it in a proper manner and that said building was not the strong substantial building that defendant agreed and contracted to erect and build as aforesaid, to the great loss of said plaintiff." The second count in the declaration relating to another building built by defendant was dismissed before trial by agreement.

The case was submitted to the jury and the verdict was for the defendant.

The record shows that the principal facts are that the defendant, Thomas M. Anderson, entered into a written contract with the plaintiff, Rockland Poultry Company, for the construction of a building "good, strong and substantial" with "ample and sufficient foundations." The defendant constructed the building and received his pay in full. The building was used by the Poultry Company for the storage of metal cages containing live chickens. The plaintiff claimed that a section of floor became and was badly cracked and settled below the remainder of the floor. There were other claims made by the plaintiff which were apparently not vigorously pressed or were waived at the trial, including the claim under the second count for another building, which count the docket shows was dismissed. The plaintiff also claimed that in addition to the cracking or settling of the floor, that the foundations "sagged and settled," that "the walls settled and the roof by reason thereof, warped and bent so that water does not drain from it in a proper manner and that said building was not the strong substantial building that defendant agreed and contracted to erect and build." The evidence conflicts in regard to the settling of walls, the alleged improper construction so that water remained improperly on the roof due to warping, and the alleged "sagging" foundations; but the defendant Thomas M. Anderson recognizes and admits the question of the cracking or settling of the floor. His testimony was as follows:

"Q. So you want to leave this thought with the jury: that from your examination Mr. Poust has a strong, substantial floor fit for what it was constructed for? I mean right at the present time.

A. At the present time in that corner, no, it is not, but it is not my fault. There is nothing I could do to help it. It was made land, filled in with all kinds of stuff, which I had no way

—the only way would have been to dig out the whole inside of that fill, that made land, and replace it with other fill.

Q. You signed a contract, didn't you, Mr. Anderson?

A. I did.

Q. You examined the premises?

A. Yes.

Q. You knew what the land was?

A. I could see on the surface. I had not dug into there.

Q. And the important part of a building is the foundation? Isn't that right?

A. Yes.

Q. Now I ask you this: If you had had a proper fill and a proper installation of that floor, would it have settled?

A. On top of that made land, yes, it would have settled.

Q. Did you know it was made land when you put this fill and cement on top of it?

A. Yes, when we begun to dig.

Q. Did you know it was filled land?

A. Poust knew it.

Q. Did you know it?

A. I saw it when we begun to dig, yes, I did know it was a mud hole there years ago and that had been filled in.

Q. Did you examine the premises before you started any construction?

A. Yes."

The defendant also testified in answer to a question as follows:

> "Q. Now with respect to this southeast corner of the building in which one corner of the floor has settled, did you have some discussion with Mr. Shane about that?
>
> A. Yes, they took me in there and showed it to me and I told them what I would do; I would take up two sections and fix it and hammer and plane the other off with an Air-hammer, but they wouldn't accept it."

The defendant's expert witness estimated the cost to repair the settling and cracks in the floor and corners to make them "strong and substantial" according to contract would be from $275.00 to $350.00.

The defendant claims that the evidence was conflicting and that the case presented solely a jury question, citing many Maine decisions such as *Fournier* v. *Gagne,* 117 Me. 561; *Clark* v. *Dillingham,* 116 Me. 508; *Burke* v. *Langlois,* 126 Me. 498, holding that only where the verdict is manifestly wrong should a new trial be granted.

The plaintiff, however, claims that the verdict for the defendant is manifestly wrong because the admitted facts entitle the plaintiff to some damages even if those damages are comparatively small.

A careful examination of the record convinces the court that this claim of the plaintiff is correct. The jury verdict for the defendant is plainly wrong. The damages may not be large, as the plaintiff states in its brief, but the plaintiff is entitled to something for improper construction of the floor under the terms of the contract, which is proved by the admissions of the defendant, to the effect that the floor is not the good and substantial one he promised. There is no conflicting evidence on that point, for the defendant ad-

mits liability in an amount sufficient to make the floor "good, strong and substantial" as the contract required. The contract provided for a good building with "ample and sufficient foundations," and the evidence does not show that to build such a floor was impossible. The defendant's expert witness stated that to build in that building a good floor "you would have to excavate four or five feet." It might be difficult but it was not impossible. It might cost the contractor more than he expected, but he was bound by his contract.

Where a construction contract provides that a certain thing be done in a certain manner, or to obtain a certain result, it must be done by the contracting party if it is not impossible, and if it is not prevented by act of God or of the other party. There must be "substantial performance." *Poland* v. *Brick Company,* 100 Me. 133; *Hill* v. *School District,* 17 Me. 316; *Dickey* v. *Linscott,* 20 Me. 453; *Hattin* v. *Chase,* 88 Me. 237; 17 C. J. S., "Contracts," 1106, 1109, and cases there cited. 12 Am. Jur. "Contracts," 928, Section 362, and cases there cited. *White* v. *Oliver,* 36 Me. 92; *Skowhegan Water Co.* v. *Skowhegan Village Corp.,* 102 Me. 323.

Where a contractor departs from his contract but there is a benefit to the other party and the other accepts, or uses, the subject matter of the contract, the contractor is entitled to receive a fair and reasonable value for services, not exceeding the contract price. The other party may be entitled to damages for failure to perform according to contract. *Skowhegan Water Co.* v. *Skowhegan Village Corp.,* 102 Me. 323, 328; *Veazie* v. *Bangor,* 51 Me. 509.

During the trial, the jury learned from the testimony of the defendant Thomas M. Anderson that he constructed this building for the plaintiff Poultry Company and was paid in full therefor. He also constructed for the Poultry Company

a second building and was paid for that building also. Still later, he made alterations and repairs on a third building for which he was not paid. Anderson, therefore, brought suit against the Poultry Company for these alterations, which action was defaulted without contest by the Poultry Company preceding the trial of this case now under consideration. This pending cross-action by the Poultry Company against Anderson was brought after the suit by Anderson against the Poultry Company. This knowledge on the part of the jury, undoubtedly caused bias or prejudice in favor of the defendant and against the plaintiff. The verdict shows it. The jury disregarded or did not consider the admission of liability testified to by the defendant, and the damages estimated by his own experts.

The economic happiness of any State depends largely on the inviolability of contracts made by its people. It is the duty of the courts to enforce, whenever necessary, the provisions of legal and binding promises.

Here, the defendant admits a liability under his contract which the jury disregarded. The verdict for the defendant was clearly wrong. The entry must, therefore, be

Motion sustained.

New trial granted.

A. C. PARADIS COMPANY

vs.

H. W. MAXIM CO., INC.

MARGUERITE D. MAXIM

JOSEPH COOK AND FIRST FEDERAL SAVINGS AND LOAN ASSN.

Androscoggin. Opinion, October 10, 1952.

Liens. Mortgages. Priority. Waiver.

One who seeks to destroy a validly created lien must show that the lien claimant knowingly surrendered or waived his claim.

Any lien against the premises, whatever its priority, and whether builders lien or mortgage, is a charge against the interest of the owner; therefore if the plaintiff's lien was lost or waived against the owner it would not remain in existence against the interest of a second mortgagee.

A waiver agreement whereby a contractor remises first mortgagee "and said Marguerite D. Maxim (owner) of and from all claims of every kind and nature, particularly for any and all lien claims the undersigned now has or may have against . . . (first mortgagee) and the said property owned by said Marguerite D. Maxim . . ." is not a release or waiver of liens generally and under the facts of the case may not be taken advantage of by a second mortgagee who did not extend credit in reliance thereon.

ON APPEAL.

This is a bill in equity to establish statutory liens. The case is before the Law Court on appeal from a decree of a single justice sustaining the bill. Appeal dismissed. Decree affirmed with additional costs.

Brann & Isaacson, for plaintiff.

Clifford & Clifford,
W. A. Trafton, Jr., for defendants.

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

WILLIAMSON, J. This is an appeal from a decree in equity in consolidated proceedings to establish statutory building liens. The decree was entered following the dismissal of the case without prejudice upon an appeal improperly taken from findings and not from a decree. 148 Me. 43, 87 A. (2nd) 666.

The single justice held that the plaintiff, a subcontractor, had a valid lien with priority over the appellant's second mortgage. The only issue presented in this appeal is: Did the subcontractor waive its lien, otherwise admittedly valid? If the lien was waived or lost, as the second mortgagee contends, then the single justice erred in his decree. If, however, the subcontractor, as it urges, agreed only to subordinate its lien to a certain first mortgage and so did not waive its lien against the premises, then the decree stands. The answer depends upon the meaning of the signed agreement which reads:

> "Know All Men By these Presents, that I/we, the undersigned, in consideration of one dollar and other valuable considerations paid to me/us, the undersigned, by the First Federal Savings and Loan Association, of Lewiston, Maine, the receipt whereof is hereby acknowledged, and for the further consideration of the said First Federal Savings and Loan Association, underwriting a mortgage on the land and buildings owned by *Marguerite D. Maxim* located at *524 Main* Street, *Lewiston,* Maine, do hereby and remise said First Federal Saving and Loan Association and said *Marguerite D. Maxim* of and from all claims of every kind and nature, particularly for any and all lien claims the undersigned now has or may have against the said First Federal Savings and Loan Association and the said property owned by said

Marguerite D. Maxim as a result of work and labor done and materials furnished in the erection, altering or repairing the said property at said number *524 Main* Street, said *Lewiston, Maine.*

Dated this *23rd* day of *September,* A. D. 19*49*
In witness whereof I/we have hereunto set my/our hand and seal.

A. C. PARADIS CO. (SEAL)

Witness:
H. W. Maxim *A. C. Paradis Treas.*"

In reaching a decision we must keep in mind that one who seeks to destroy a validly created lien must show that the lien claimant knowingly surrendered or waived his claim. *Jones on Liens,* 3rd Ed. Sec. 1500. Our court has said:

> "But in this case the plaintiff denies that any notice was given him that he must look to the defendant alone. The statute gives to the laborer a lien. It is for the claimant to prove that he has knowingly surrendered or waived such lien. This the evidence fails to show. It does not even show that the question of an abandonment of lien was distinctly presented for his consideration." *McCabe* v. *McRea, Ship Empire, and Thompson,* 58 Me. 95, at 99

The principle stated above so effectively in the case of a laborer's lien upon a ship applies with equal force to the builder's lien in the instant case.

The parties whose interests must be considered in this appeal are:

1. The plaintiff, A. C. Paradis Company, a subcontractor.
2. The defendant, H. W. Maxim Co. Inc., the main contractor and indebted to the subcontractor.
3. The defendant, Marguerite D. Maxim, owner of the premises on which the lien is claimed.

4. The defendant, First Federal Savings and Loan Association, sometimes called the Bank, holder of a first mortgage on the premises.

5. The defendant, Joseph Cook, appellant, holder of a second mortgage on the premises.

From the agreement alone the intention is obvious that a proposed mortgage by the Bank should be a lien on the premises with priority over the plaintiff's lien for charges both to the date of the financing and in the future as well. No question arises on this score. This intent can be given effect either by the complete destruction of the lien or by the subordination of the lien to the new mortgage.

Did the agreement act as a waiver of the plaintiff's lien against the interest of the owner of the premises? If so, plaintiff was left with his claim against the contractor without the security of the premises. Clearly any lien against the premises, whatever its priority, and whether builder's lien or mortgage, is a charge against the interest of the owner. Therefore, if the plaintiff's lien was waived or lost against the owner it would not remain in existence against the interest of the appellant second mortgagee.

The words of the agreement "remise—Marguerite D. Maxim," and "property owned by said Marguerite D. Maxim" can, in our view, be construed consistently with an understanding (1) either that the plaintiff's lien would be subordinated to the proposed mortgage or (2) that the plaintiff would thereafter look to the contractor for its pay and not to the premises for security.

Surely such an agreement on its face does not prove that the lien claimant "has knowingly surrendered or waived such lien" to use the words of the *McCabe* case, *supra.* We must look further among the surounding circumstances to ascertain the meaning truly to be given to the agreement.

We quote from the findings of the single justice as follows:

> "As between the claimant and defendants First Federal Savings and Loan Association and Marguerite D. Maxim, the intent of the instrument is clear. It releases both of them from any present or future lien claims that the plaintiff may have against the premises. Its effect is as stated. It allowed the property at 524 Main Street to be burdened by the mortgage of the First Federal Savings and Loan Association, clear of the defendant's right to a lien. It is not a release of liens in general terms made to and for the benefit of the world at large. It names names, and these names are First Federal Savings and Loan Association and Marguerite D. Maxim. The instrument falls in the category of restricted waivers and must be construed as giving priority to the mortgage of the First Federal Savings and Loan Association alone."

The second sentence in the quotation above calls for explanation. Taken alone and apart from its context it would seem to be a finding that the plaintiff had agreed that it had no lien whatsoever against the premises. As we have seen the plaintiff could not retain the security of a lien on the premises with priority over the second mortgagee and at the same time agree that there was no such claim against the property ahead of the owner. Taken in its entirety, however, the findings of the single justice make it clear that he did not have such a general release in view but intended to set forth, as his decision shows, that the validly created lien was not destroyed but remained ahead of the appellant's second mortgage.

The circumstances surrounding the agreement point to the construction that the parties intended to subordinate the plaintiff's lien to the proposed mortgage and not to destroy the lien. Prior to the execution of certain mortgages

to the Bank and to the appellant Cook, on September 15, 1949 the situation with respect to the claims of the plaintiff, the Bank and the appellant, were as follows: (1) A valid lien of the plaintiff for labor and materials furnished commencing on July 21, 1949; (2) a first mortgage from the Maxim Real Estate Co. Inc. to the Bank dated May 2, 1949 in the amount of $5,600; (3) a second mortgage from Marguerite D. Maxim, the owner, to the appellant Cook dated May 4, 1949 in the amount of $2,500. It is of no consequence whether the plaintiff's lien ranked before or after either the first or second mortgages inasmuch as both were later discharged.

On September 15, 1949 Marguerite D. Maxim, the owner, executed a first mortgage to the Bank in the amount of $15,000. On the same day she executed a second mortgage to the appellant Cook in the amount of $15,000 to secure money previously advanced in the amount of $12,000 on or before July 1, 1949, and in the amount of $3,000 advanced on or before July 30, 1949.

On September 21st the Bank executed a discharge of the Maxim Real Estate Co. Inc. first mortgage of May 2, 1949. On the following day there were recorded in the Registry of Deeds the discharge of the Maxim Real Estate Co. Inc. mortgage, a discharge not dated of the May 4, 1949 second mortgage from the owner to the appellant Cook, and also the new first and second mortgages.

On September 22nd the Bank advanced $5,684.98 to the owner, Marguerite D. Maxim, which from the amount we may believe was the balance due on the first mortgage of May 2, 1949. On September 23rd it paid $9,315.02 to Marguerite D. Maxim and several subcontractors. The two sums total $15,000. On the same day the agreement in question was executed by the plaintiff and under that date it received a check from the Bank drawn to the order of the

owner-mortgagor and the plaintiff in the amount of $500. At the time of receiving the $500 payment there was due the plaintiff from the contractor the amount of $615.10.

Subsequent to this payment the plaintiff furnished additional labor and materials which resulted in the lien claim, with validity unquestioned unless waived, in the amount found by the single justice to be $2,051.56.

Henry W. Maxim was the president and treasurer of the contractor and the husband of Marguerite D. Maxim, the owner. Surely he knew that the second mortgage of May 1949 to the appellant Cook had been discharged, and that a new mortgage of $15,000 had been given by his wife to the appellant to cover previous advances. He was interested in obtaining money from the Bank through the new financing to pay obligations of his Company, the contractor. Such was the undoubted purpose of the $15,000 first mortgage to the Bank. The work was not completed and much remained to be done, at least in so far as the plaintiff was concerned. This was known to Mr. Maxim, the contractor, Mrs. Maxim, the owner, and to Mr. Cook the second mortgagee. All that the Bank required to make its $15,000 first mortgage a valid first lien on the property was the subordination of building liens thereto, together with a discharge of the second mortgage of May 1949.

Mr. Maxim, whom for our purposes we will call the contractor, in obtaining the agreement made no mention of the appellant's second mortgage to Mr. A. C. Paradis, business manager of the plaintiff. The talk was about new money from the Bank. Indeed Mr. Paradis says that at no time did he ever know there was a mortgage held by Mr. Cook.

On the appellant's theory the plaintiff subcontractor in executing the agreement gave up all right to the security of the property for the labor and materials furnished then and

later by it and relied solely upon the credit of the contractor. As a result of this release the second mortgagee is thus enabled quietly to slide into a position of security ahead of the plaintiff who has added substantial value to the property. Without knowledge of the agreement executed by the plaintiff, for the new second mortgage was executed prior to the date of the agreement, and without the advance of a dollar to the owner or to anyone on her account on the strength of a release of the lien, the appellant on his theory seeks to advance from a position behind the plaintiff to a position ahead of it. Indeed the appellant goes further for he seeks not merely to alter priorities, but to destroy any lien of the plaintiff.

This is not the case of waiver of liens by a contractor "to whom it may concern" and upon which waiver the owner and others are expected to rely. If in this instance it could be shown that Cook discharged his second mortgage given in May 1949 and took the second mortgage of September 15 in reliance upon the fact that the plaintiff had released any right to a lien, then the principle of waiver by estoppel would be the subject of discussion. The appellant, however, offers not the slightest evidence that such was the case. He simply seeks to take advantage of a lien claimant's willingness to assist in the raising of money to the mutual advantage of the contractor, the owner, and other lien claimants by the subordination of its lien to proposed new financing. There is no reason, in our view, why the lien claimant should be deprived of the benefit of his lien with priority over the second mortgagee by the giving of such an agreement.

The agreement as the single justice pointed out is not in the same category as that in *Townsend* v. *Barlow,* 101 Conn. 86, 124 A. 832, as follows:

> "have waived and relinquished and do hereby waive and relinquish all liens and claims of liens we now

> have or hereafter may have (upon the land and buildings in question) for labor done and materials furnished for the construction and erection of said buildings."

In that case it is to be noted that reliance was placed upon the waiver by the party who claimed that the lien was destroyed. For statement of the general rule see 36 Am. Jur. 137, and 57 C. J. S. 792, 803 *et seq.*

Appeal dismissed.

Decree affirmed with additional costs.

STATE OF MAINE
vs.
RAYMOND C. HUME

Kennebec. Opinion, October 15, 1952.

Criminal Law. New Trial. Newly Discovered Evidence. Rules of Court 17.

A petition for a new trial upon the ground of alleged irregularities in the composition, selection, and return of the petit jury contrary to R. S., 1944, Chap. 100, Sec. 100 cannot be considered a motion for new trial on the ground of newly discovered evidence under R. S., 1944, Chap. 94, Sec. 15 because it alleges no newly discovered evidence; it cannot be considered a motion for a new trial on some "other ground" because it would conflict with Rule 17 (Rules of Court).

The petition for new trial filed after the mandate of the appellate court overruling exceptions and dismissing an appeal comes too late save that afforded by R. S., 1944, Chap. 94, Sec. 15.

ON REPORT.

This is a petition for a new trial commenced after the Law Court had overruled the exceptions and dismissed the

appeal in 146 Me. 129, 78 A. (2nd) 496. The petition is before the Law Court upon report and agreed statement. Motion dismissed.

Alexander LaFleur, Atty. General,
James G. Frost, Asst. Atty. General,
Ralph W. Farris, Jr., County Attorney, for plaintiff.

Christopher S. Roberts, for defendant.

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

NULTY, J. This case, which purports to be a petition for a new trial, was filed with the Kennebec County Superior Court at the June Term, 1952, and reported, the parties agreeing thereto, to this court for determination on the motion, the indictment, and record in the original case, but the only record furnished was a copy of the docket entries certified by the Clerk of the Superior Court for the County of Kennebec, and certain stipulated facts which facts relate to the composition and method of selecting and returning the jury at the time of the trial of the petitioner in said Superior Court which took place at the 1950 February Term of said Superior Court.

Briefly, the petitioner alleges that he was indicted for the crime of breaking, entering and larceny and that at his trial he was illegally convicted and sentenced to State Prison and that at said 1950 February Term there were duly summoned by legal venires to serve as petit jurymen some twenty-seven persons and that by reason of challenges, excuses and other causes all of said veniremen were rejected or excused from service except six and that the presiding justice at said Term caused the sheriff to return sufficient jurors from the bystanders or from the county at large to complete the panel. Petitioner further alleges that by reason of there not

being at least seven regular veniremen on said panel, according to the statutes of our state (see Chap. 100, Sec. 100, R. S., 1944), the presiding justice had no authority to so fill said panel and that the jury finally selected was entirely unlawful and constituted no jury as defined or authorized under the laws of our state. Petitioner also alleges that the duly elected sheriff of said county, who was also the chief investigator of and the principal witness in said case, was permitted by the presiding justice to select and choose said additional alleged jurors contrary to the law. Petitioner prays that the verdict which the jury found be declared unlawful and unauthorized and moves that it be set aside and a new trial granted. The docket entries accompanying the report show that after the verdict of guilty the petitioner filed a motion to set aside the verdict and for a new trial which was denied. He thereupon filed an appeal together with a bill of exceptions. Thereafter he was sentenced and the execution of the sentence stayed pending decision by the court on the exceptions and appeal. Subsequently the exceptions were overruled and the appeal dismissed (see 146 Me. 129, 78 A. (2nd) 496), and petitioner was committed to State Prison January 27, 1951, in execution of his sentence.

From the record it appears that the petition or motion cannot be considered a motion for a new trial on the ground of newly discovered evidence certified to this court under and by virtue of Chap. 94, Sec. 15, R. S., 1944, because the motion fails to allege or disclose any newly discovered evidence and, therefore, cannot be considered. If the motion be treated as a motion for a new trial on any other ground, it is in direct conflict with Rule 17 of the Rules of Court in force at the time of the filing of the petition or motion. From the docket entries it is very apparent that the motion was not filed until after the mandate of the appellate court had finally ended the original case. It consequently was too

late. See *In re Hume,* 132 Me. 102, 103, 167 A. 79, and cases cited. There is no authority, either under the Rules of Court or the Statutes of the State for a motion for a new trial after final judgment on a mandate from the Law Court in a criminal case save that afforded by Chap. 94, Sec. 15, R. S., 1944, which in this case, as we have said herein, is not applicable. The mandate will be

Motion dismissed.

LEONE SINCLAIR
vs.
GUY P. GANNETT, PUBLISHER,
ALIAS ET AL.

York. Opinion, October 18, 1952.

Libel. Pleading. Demurrer. Abatement. Misjoinder. Publication. Particulars. Principal and Agent. Photographs.

A plea in abatement for misjoinder is waived upon filing of a special demurrer for the same reason.

An allegation that a newspaper publisher published the alleged libel "with the knowledge and consent of the other defendants" (a staff writer and photographer) does not amount to an alleged publication by the staff writer and photographer.

Publication is an essential element in the action of libel.

Where there is a misjoinder of defendants, only the party misjoined should demur.

When a complaint against several defendants fails to state a cause of action against one of them, he alone may demur.

When liability of a principal rests solely upon respondeat superior, the principal and agent cannot be sued jointly.

Where an alleged libel consists in part in the publication of a photograph such photo may be described in the words of the declaration

and the attaching of a copy of the photo is not an essential ingredient of good pleading.

A motion for specifications or particulars is a more appropriate remedy than demurrer to correct uncertainties arising from a failure to attach to the declaration a photograph alleged to be libelous.

The question whether alleged defamatory matter applied to the plaintiff involves an issue of fact.

ON EXCEPTIONS.

This is a joint action for libel against a publisher and two of its employees. The case is before the Law Court on exceptions to the overruling of pleas in abatement and special demurrers. Exceptions to overruling of pleas in abatement by each defendant overruled. Exceptions to overruling of special demurrers by defendants Dawson and Olson sustained with costs. Exceptions to overruling of special demurrer by defendant Gannett Publishing Company overruled with costs.

Lausier & Donahue, for plaintiff.

Berman, Berman & Wernick, for defendant.

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

WILLIAMSON, J. This is an action for libel against the Guy Gannett Publishing Company, publisher of the "Portland Press Herald," a daily newspaper, and two of its employees, Charles E. Dawson, a staff writer, and John C. Olson, a photographer. The defendants severally bring forward exceptions to the overruling of pleas in abatement and special demurrers.

In substance the charge is that the Imperial Cafe, owned and operated by the plaintiff, was identified as the Calumet

Club, described as a gambling place, in a photograph published in the newspaper in connection with an illustrated article about gambling in the City of Biddeford. The statement in the declaration reads:

> "and immediately beneath said pictures appeared the following: 'By Staff Photographer Olson (meaning the defendant Olson) GAMBLING SITES—Gambling places in Biddeford, which have brought the ire of a special state prosecutor (meaning William H. Niehoff of Waterville appointed by Governor Payne's Attorney General, who led the investigation) who described them as "Nauseating", are shown in the above photos, and also located on the specially-drawn map by Staff Artist Sid Maxell. In photo Number 4 (meaning the photo of the Imperial Cafe) is where the Calumet Club, largest gambling place in the mill city, was located at 17 Alfred Street, next door to the Salvation Army; Number 7, wooden stairs lead to the Coffee House over a fruit store at 35 Main Street, opened by the operator of the Calumet Club when business got too heavy in the Calumet; Number 1, poker games and blackjack were run in this pool parlor at 73 Elm Street, outside the Saco-Lowell Shops; Number 8, the shoe repair shop at 12 Water Street, where the owner ran a gambling spot; Number 2, picture of the padlocked door to the West End Club at 240 Main Street; Number 3, shoe shine parlor at 39½ Franklin Street, where gin rummy was a specialty of the house, and other card games flourished. Not shown in photos, but located by their numbers on the map are also the Greek Coffee House, (number 5) on the second floor at 87 Main Street; and the Billiard Parlor at 53 Main Street, (Number 6), where a Sanford man operated a gambling spot', said foregoing statements clearly differentiating those 'sites' located on the first floor and on the second floor of the building referred to, and associating the plaintiff with Lucien Therrien by said picture or photo of said Imperial Cafe and the aforesaid explanatory

> statement that 'In photo number 4 (meaning the photo of the Imperial Cafe) is where the Calumet Club, largest gambling place in the mill city, was located at 17 Alfred Street, next door to the Salvation Army', thus stating the plaintiff's Imperial Cafe was the location of the Calumet Club operated by said Lucien Therrien as referred to in said articles, said picture being unauthorized and printed and published without the knowledge or consent of the said plaintiff, and said articles published and circulated as stated aforesaid, the essential parts being as follows:"

Exceptions to the overruling of a plea in abatement for misnomer were waived by the publisher and so are not before us. In a proper effort to narrow the issues the publisher conceded in argument that if the article as written could be applied to the plaintiff then it would be a defamation. The defamatory character of the published material is therefore not questioned for purpose of testing the demurrers.

The other pleas in abatement by the defendants are on the groud of misjoinder of defendants. The same point is made in the special demurrers. No useful purpose can be served by keeping alive a dilatory plea where the same question is presented and argued on demurrer. We do not consider precisely under what circumstances a plea in abatement is or is not waived by a subsequent plea. It is sufficient for present purposes to say that the plea of each defendant in abatement for misjoinder was waived upon filing of the demurrer. See 1 *C. J. S.* 271, Sec. 211; 1 *Am. Jur.* 65, Sec. 71. The exceptions in each instance are overruled.

The special demurrers now require attention. The first stated ground in each instance is misjoinder of defendants. The contention is that the plaintiff has improperly joined the employer, liable solely under the principle of *respondeat superior,* with its employees as joint tort-feasors.

In the case of the staff writer — and the case of the photographer is identical — a further objection is that he is not charged with publication of the libel. The plaintiff has alleged publication by the newspaper publisher "with the knowledge and consent of the other defendants," meaning the staff writer and the photographer. Such a statement is not an allegation that the staff writer or the photographer published the defamatory matter. The plaintiff failed to allege an essential element in the action of libel. No cause of action was stated against the staff writer or the photographer. For this reason alone, without consideration of the first ground, the exceptions by the staff writer and the photographer are sustained. Their demurrers should have been upheld. *Macurda* v. *Lewiston Journal Co.*, 104 Me. 554, 72 A. 490; *Milner* v. *Hare,* 126 Me. 14, 135 A. 522; *Reynolds* v. *W. H. Hinman Co.*, 145 Me. 343, 75 A. (2nd) 802; 53 *C. J. S.* 264 *et seq.*, Sec. 169.

The rulings in favor of the staff writer and the photographer although not in terms directed to the publisher have a decisive bearing upon the disposition of the publisher's first stated ground of demurrer. The declaration is sufficient and adequate in so far as the publisher alone is concerned. The publisher may not object, nor does it, to the failure to set forth a cause of action against its codefendants. The rule is stated in 6 *Ency. of Pleading and Practice,* page 310, as follows:

> "*For Misjoinder of Defendants*—Where there is a misjoinder of defendants, only the party defendant so misjoined should demur. And when a complaint against several defendants fails to state a cause of action against one of them, he alone may demur, and not his codefendants."

See also *Wood* v. *Decoster,* 66 Me. 542; 71 *C. J. S.* 424, Sec. 217; 41 *Am. Jur.* 454, Sec. 230.

The objection by the publisher is that the three defendants are jointly charged with libel under circumstances which make such a charge impossible.

Since no case is stated against the staff writer and the photographer, and thus no charge of joint liability, the objection is unfounded. It is sufficient, unless and until the declaration is amended, only to mention two principles of law. First, two or more defendants may be joined in an action for publishing a libel. 1 *Chitty on Pleadings,* (16th American Ed.) 127; *Gould on Pleading,* 3rd Ed. 210; 53 *C. J. S.* 243, Sec. 159; 33 *Am. Jur.* 186, Sec. 198, and cases cited; *Miller* v. *Butler,* 6 Cush. (60 Mass.) 71, 52 *Am. Dec.* 768. The case of *Gordon, pro ami* v. *Lee and Scannell,* 133 Me. 361, 178 A. 353, cited by the publisher, in illustrating the differences between joint and independent tort-feasors does not decide otherwise. The court there held the "pleading sets forth not a mere misjoinder of parties, but a misjoinder of causes of action," which is a situation not here existing. Second, when liability of a principal rests solely upon *respondeat superior,* the principal and agent cannot be sued jointly. *Campbell* v. *Portland Sugar Co.,* 62 Me. 552; *Hobbs* v. *Hurley,* 117 Me. 449, 104 A. 815; 35 *Am. Jur.* 1028, Sec. 592; 57 *C. J. S.* 350, Sec. 579.

We turn from questions involving parties to issues more closely associated with the merits. The publisher strenuously urges that the plaintiff should have made a copy of the photograph a part of her declaration and that for lack thereof the declaration is subject to demurrer. Only with the photograph before the court, the argument runs, can it be determined whether as a matter of law the defamatory matter can be held applicable to the plaintiff, and further the photograph is available to this plaintiff without appreciable effort. It is readily understandable that a picture is worth more than words, and also that proof at trial may not match the words of a declaration. We are of course

considering the problem from the viewpoint of the court. Obviously attaching a copy of the photograph to the declaration would give no new information to the defendants or any of them. Granting that the photograph would prove helpful in deciding the issues here presented, yet we are not prepared to say that a photograph may not adequately be described in words. We do not say that it would be improper to attach a copy of a photograph to the declaration under the circumstances of this case, but only that a copy is not an essential ingredient of good pleading. See 33 *Am. Jur.* 214, Sec. 237, and authorities cited.

The need of a copy of the photograph for an intelligent understanding of the pleadings could have been brought to the attention of the court below by a motion for specifications or for further particulars. *Nadeau* v. *Fogg,* 145 Me. 10, 70 A. (2nd) 730. Such a motion, we believe, is better designed to correct uncertainties of this nature than a demurrer.

There is left only the question of whether the alleged defamatory matter was published of and concerning the plaintiff. Does the declaration pose a doubt whether the plaintiff is the person defamed? Could reasonable men find, assuming the truth of the declaration, that the defamatory matter applied to the plaintiff? Could reasonable men find that the Imperial Cafe shown in the photograph was the Calumet Club? If such questions are answered in the affirmative, the *declaration* is sufficient. The decisive answer must come from the finders of fact. *Macurda* v. *Lewiston Journal,* 109 Me. 53, 82 A. 438; *Chapman* v. *Gannett,* 132 Me. 389, 171 A. 397; 53 *C. J. S.* 341, Sec. 224.

It will serve no useful purpose to discuss in detail the declaration. The publisher calls to our attention that the article does not mention the Imperial Cafe, and that the only connection between the Imperial Cafe and the Calumet Club is drawn from the narrative caption under the photograph.

The photograph is stated in the declaration to be "a picture or photo of the front of the Imperial Cafe, the sign with the words 'Imperial Cafe' being legible thereon, with the numeral 4 appearing in the lower left corner of said picture of the Imperial Cafe." The narrative caption says that "In photo Number 4 is where the Calumet Club, largest gambling place in the mill city, was located at 17 Alfred Street, next door to the Salvation Army." The declaration asserts that the Imperial Cafe is located on Alfred Street next door to the Salvation Army without stating the number of the street. The article as set forth in the declaration reads in part:

> "Around the corner from Main Street just a few steps to 17 Alfred Street and you come to the Calumet Club, (meaning the Imperial Cafe as shown in the photograph 4 on said page 4) the big joint, (meaning the largest house where extensive illegal gambling was conducted) the place where the shipyard workers dropped big rolls (meaning lost large sums of money by illegal gambling)."

The daily newspaper is read in the haste of daily living. The reader can hardly be expected with studious care to search out and to recognize delicate shades in meaning and application of the printed word and picture. In reading the declaration we are of the view that the plaintiff fairly set forth the application of the material to her. We find no error in the declaration on this score.

Exceptions to overruling of pleas in abatement by each defendant overruled.

Exceptions to overruling of special demurrers by defendants Dawson and Olson sustained with costs.

Exceptions to overruling of special demurrer by defendant Gannett Publishing Company overruled with costs.

STATE OF MAINE

vs.

STANLEY CARLETON, WILLARD CARLETON, RAYMOND CARLETON, JR. AND GEORGE JOHNSON

Knox. Opinion, October 28, 1952.

Criminal Law. Exceptions. Breaking and Entering. Evidence. Corpus Delicti. Confessions and Admissions.

A blanket exception to the charge of a presiding justice is ineffectual and cannot be considered.

To establish the corpus delicti to a probability the evidence introduced must be such that a reasonable inference to the existence of the corpus delicti may be deduced therefrom without reliance to the slightest degree upon a confession.

The fact that a heifer was missing from a barn may create suspicion that someone was guilty of breaking, entering and larceny but mere suspicion is not enough.

ON EXCEPTIONS.

This case arises upon indictment for breaking, entering and larceny. During the course of the trial defendants objected to the introduction into evidence of certain admissions and an extra judicial confession in writing by one of them. To the overruling of objections respondents excepted. At the conclusion of the State's case respondent moved for a directed verdict which was denied and exceptions allowed. Exceptions sustained. Verdict set aside. New trial ordered.

Curtis M. Payson, County Attorney, for State.

George W. Wood, for Stanley and Raymond Carleton.
A. Alan Crossman, for Willard Carleton.

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

NULTY, J. This case comes before us on respondents' bill of exceptions from the November 1951 Term of the Knox County Superior Court. The three Carletons named above were indicted, with one George Johnson who did not stand trial, at said term on the charge of breaking, entering and larceny and at the trial at said term were found guilty. During the course of the trial the respondents excepted to the introduction of certain evidence in the nature of admissions made by the respondents to the sheriff of the county and also to the admission in evidence of what is usually termed an extrajudicial confession in writing of one of the respondents, namely, Stanley Carleton. The evidence introduced by the State, which was very brief, consisted of testimony by one George Butler who was the owner of a farm in Union, Maine, in said County of Knox, and after the usual preliminary questions which proved that a barn was located on his farm and that on the date in question, December 3, 1950, he owned certain livestock in the barn. The evidence also proved that Mr. Butler did not live on his farm because his dwelling house had been destroyed by fire and that he was living in Union about two miles from his farm and that on the morning of December 3rd he went to his barn to tend his stock and he discovered that a holstein heifer ten months of age of the value of $110 was missing and that he has never recovered the heifer or found her. He further testified on redirect examination that the barn doors were not locked because there was no padlock but that they were closed and were closed when he came to his barn on the morning of said December 3, 1950. The only other witness for the State was the sheriff of the county, Willard Pease, who stated that he received a complaint from Mr. Butler and that he, in company with a deputy sheriff, went, on De-

cember 3, 1950, to the barn of George Butler and made an investigation. He found the ground frozen and no car tracks or finger prints. He further testified that in September of the year 1951, while conducting another investigation, he interrogated the respondents and that after advising them of their constitutional rights he asked them certain questions in regard to the heifer alleged to have belonged to Mr. Butler. At this point the respondents objected to the introduction of any further testimony by way of statements or admissions of the respondents on the ground that until the corpus delicti had been sufficiently proved by either circumstantial or direct evidence, the statements or admissions were not admissible. The court, however, permitted the witness to testify as to the statements or admissions which the respondent, Stanley Carleton, made to him as a result of the questioning and also permitted, over objection of the respondents, the introduction of the confession in writing of Stanley Carleton. The witness was likewise permitted, over objection, to testify as to the statements or admissions which both Willard Carleton and Raymond Carleton, Jr., made to him with respect to the events which happened on the night of December 3, 1950. The statements and written confession would tend to prove, if legally admissible, that the respondents went to the barn of Mr. Butler on the night of December 3, 1950, in the early morning hours and, after entering the barn took the heifer from the barn, shot it and took it to a house where they dressed the animal, removed the hide and the entrails, and disposed of the hide and entrails by throwing the same into a river at Thomaston and subsequently participated in eating, at various times, the meat. At the conclusion of the State's case the respondents moved for a directed verdict which motion was denied and exceptions allowed. A blanket exception was also taken to the charge of the presiding justice which under the authority of *McKown* v.

Powers, 86 Me. 291, 296, 29 A. 1079, is ineffectual and cannot be considered. We, therefore, have before us two exceptions, one to the admission of the statements or admissions of the respondents together with the admission of the extrajudicial confession of said Stanley Carleton made to the sheriff, the other, the denial of the motion for a directed verdict. The exceptions, whether considered together or separately, raise the same question of law, that is, whether there was sufficient proof of the corpus delicti so that the extrajudicial confession of one of the respondents or the admissions of the respondents were admissible in evidence to corroborate the corpus delicti. In recent months we have considered the subject of corpus delicti in two cases, *State* v. *Levesque,* 146 Me. 351, 81 A. (2nd) 665, and *State* v. *Hoffses,* 147 Me. 221, 85 A. (2nd) 919. In the *Levesque* case it was determined that there was no proof outside of the confession of the burning of a building which would constitute arson and that, therefore, the extrajudicial confession of the respondent in that case would not establish the corpus delicti. In the *Hoffses* case we laid down the rule as to the proper use of extrajudicial confessions within their limitations and adopted the principle which is generally recognized that extrajudicial confessions are competent evidence to corroborate the proof of corpus delicti and we held in that case that the evidence which will qualify an extrajudicial 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." We also called attention to a statement found in Wharton's Criminal Evidence, 11th Ed., Sec. 641, wherein the author declared that additional evidence would be sufficient to authorize the admission of a confession if such additional evidence established the corpus delicti to a probability. We think a proper interpretation of

this quotation from Wharton means that to establish the corpus delicti to a probability the evidence introduced must be such that a reasonable inference of the existence of the corpus delicti may be deduced therefrom without reliance to the slightest degree upon the confession. As said in *Marvin* v. *State*, 72 So. 588, 15 Ala. App. 5:

> "Where evidence is introduced from which a reasonable inference of the existence of the corpus delicti may be deduced, it is the duty of the court to submit the question of the sufficiency and weight of the evidence tending to support that inference to the jury, and this is sufficient proof of the corpus delicti to permit the introduction of a confession of the defendant. Martin v. State, 125 Ala. 64, 28 South. 92; Smith v. State, 133 Ala. 145, 31 South. 806, 91 Am. St. Rep. 21."

In the *Hoffses* case there was ample evidence outside of the confession or admission to make the extrajudicial confession and admission admissible within the aforesaid rules with respect to corroborative proof of the corpus delicti.

Measured by those rules, however, the evidence in this case, dehors the confession and admissions, was insufficient to either establish the corpus delicti to a probability or to create a reasonable inference of its existence.

In the instant case such evidence of the corpus delicti is very meager. It may be summed up by stating that on the morning of December 3, 1950, Mr. Butler went to his barn, the doors of which were unlocked, but closed, and discovered that a heifer was missing. The fact that the heifer was missing may create a suspicion that someone was guilty of the crime of breaking, entering and larceny, but, as we said in *State of Maine* v. *Caliendo*, 136 Me. 169, 175, 4 A. (2nd) 837:

> " * * * mere suspicion, however strong, will not supply the place of evidence and warrant a conviction."

Two distinct propositions are necessary to prove a crime, first, that the act itself was done, and secondly, that it was done by the person charged and by none other; in other words, proof of the corpus delicti and of the identity of the respondent. There is no question but what before a lawful conviction can be had the crime charged must be proved to have been committed by someone. The only evidence of the felonious taking in this case is the fact that the heifer was missing. None of the respondents, as a result of any investigation other than through their admissions or confession, are placed at any time at or near the premises where the barn was located. There must be factual evidence, either cricumstantial or positive, which would tend to prove the corpus delicti before confessions or admissions are admitted in evidence. Another way of stating it is, there must be such extrinsic corroborative evidence of the corpus delicti as will, when taken in connection with the confessions or admissions, establish in the minds of the jury beyond a reasonable doubt that the crime was committed and the respondents' agency therein. See *State* v. *Jacobs*, 21 R. I., 259, 261, 43 A. 31. Whether there was sufficient evidence to establish the corpus delicti so that the case should have been sent to the jury in the first instance is for the court and in the instant case we do not think that there was sufficient proof of the corpus delicti so that as a matter of law on the record in the case the confessions or admissions of the respondents were admissible. The authorities make it clear that the underlying reasons for the doctrine of corpus delicti and the proper use of extrajudicial confessions and admissions rests in the desire to safeguard against the possibility of a conviction for an alleged crime not in fact committed. It would seem that except for the confessions or admissions, the facts proved are not inconsistent with the innocence of the accused, and, such being the case, they must be as consistent with innocence as with guilt.

No felonious taking which is necessary to the crime of larceny appears to be sufficiently proved in the case at bar. It follows that the extrajudicial confession and the admissions of the respondents on the record in this case were not admissible and the exceptions are sustained upon this ground. It necessarily follows also that under the view we take of the proof of the corpus delicti it was error not to direct a verdict for the respondents.

Exceptions sustained.

Verdict set aside.

New trial ordered.

ALBERT F. CUSHING

vs.

INHABITANTS OF THE TOWN OF BLUEHILL, ET AL.

Hancock. Opinion, October 31, 1952.

Equity. Statutes. Construction. Injunctions. Words and Phrases.

The fundamental rule of statutory construction is to ascertain and carry out the legislative intent.

It is at times helpful in statutory construction to examine the history of the legislation under consideration.

The word "extension" when used in a statute of the type under consideration means an enlargement of the main body and usually the addition of something of less import than that to which it is attached.

ON REPORT.

This is a bill in equity to enjoin an alleged cemetery encroachment under R. S., 1944, Chap. 54, Sec. 9. Following

issuance of a temporary injunction the cause was reported to the Law Court upon stipulation and agreed statement. Cause remanded to Superior Court in Equity with instructions to dissolve the temporary injunction and entry of a decree of dismissal of the bill in equity.

William S. Silsby, for plaintiff.

Blaisdell & Blaisdell, for defendant.

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

NULTY, J. This cause is reported to us from Hancock County Superior Court in Equity upon an agreed statement of facts and stipulation.

The action was instituted by the complainant against the Inhabitants of the Town of Bluehill, the individual defendants who are joined being the Selectmen of the Town of Bluehill in office at the time of the bringing of the bill. It involves the construction and interpretation of a part of Sec. 9, Chap. 54, R. S., 1944, relating to burying grounds and from the agreed statement of facts it appears that the bill in equity was entered in the Superior Court for Hancock County by the complainant on July 28, 1950, and that a temporary injunction was ordered to be issued thereon on August 28, 1950. It is agreed that the complainant is the owner and occupant of a certain lot of land in the Town of Bluehill near an old public cemetery owned by said town; that the land owned and occupied by said complainant has thereon a dwelling house and a well from which water is used for domestic purposes and that both said dwelling house and said well are located within twenty-five rods of said old public cemetery owned by said Town of Bluehill which said old cemetery had been used for cemetery pur-

poses for many years before complainant became the owner of the land described and admitted as belonging to said complainant in said bill in equity; that on May 19, 1947, said Town of Bluehill acquired by conveyance from Lincoln H. Sibley approximately one-sixth of an acre of land to be used as an annex to or enlargement of said old cemetery for cemetery purposes; that said annex or enlargement adjoins and is contiguous to the west boundary of said old cemetery and the southerly line of said lot of land so conveyed as aforesaid as an annex to or enlargement of said old cemetery is at all points within twenty-five rods of said complainant's dwelling house and well from which water is taken for domestic purposes as is also the easterly line of said annex or enlargement, and, according to the plan referred to in the agreed statement and made a part thereof, the entire area of said annex or enlargement is within twenty-five rods of said dwelling house and said well; that there are other points in the southerly boundary of said old cemetery which are nearer the said dwelling house and well than the nearest point of said annex or enlargement; that said Town of Bluehill voted to accept the parcel of land from said Sibley and use the same for cemetery purposes and passed certain appropriate votes with respect to selling the lots in said annex or enlargement and fencing the same; that said complainant made written protest to the defendants and to said Lincoln H. Sibley against the proposed annex or enlargement, so-called, and instituted and filed the present bill in equity against the defendants praying for a permanent injunction to prevent the defendants from using the newly acquired Sibley land as an annex or enlargement of said old cemetery for cemetery purposes. The issue raised by the bill in equity and the agreed statement of facts and stipulation is whether said annex or enlargement can be used for cemetery purposes under the language of Sec. 9, Chap. 54, R. S., 1944, which, in its entirety, reads as follows:

> "Sec. 9. **Proceedings by town officers to enlarge public cemetery. R. S., c. 24, § 9.** The municipal officers of any town may on petition of 10 voters enlarge any public cemetery or burying-ground or incorporated cemetery or burying-ground within their town, by taking land of adjacent owners, to be paid for by the town or otherwise as the municipal officers may direct, when in their judgment public necessity requires it; provided that the limits thereof shall not be extended nearer any dwelling-house, or well from which the water is used for domestic purposes, than 25 rods, against the written protest of the owner made to said officers at the time of the hearing on said petition. *Nor shall any person, corporation, or association establish, locate, or enlarge any cemetery or burying-ground by selling or otherwise disposing of land so that the limits thereof shall be extended nearer any dwelling-house or well than 25 rods against the written protest of the owner; provided that nothing in the provisions of this section shall prohibit the sale or disposition of lots within the limits of any existing cemetery or burying-ground, nor the extension thereof away from any dwelling house or well.*" (Emphasis ours.)

It is apparent that the first sentence of said Section 9 hereinbefore quoted is not applicable to the present action because said sentence relates to proceedings by petition of ten voters for enlarging a public cemetery or burying ground. The emphasized part of said Section 9 is the applicable portion of the statute which relates to the present issue between the parties and the construction of it controls the present action. The complainant contended in his brief and argument that the exception or proviso at the end of said Section 9 did not apply to the land enlarging said old cemetery and was applicable to said existing cemetery or burying ground and that lots could be sold or disposed of within said existing cemetery so long as they extended away from the dwelling house or well even though said lots were nearer

than twenty-five rods. Complainant further contended that the interpretation of said Section 9 where a purchaser acquired land upon which was situated a dwelling house and well from which water was taken for domestic purposes, and there then existed a cemetery within twenty-five rods of said dwelling house and well over which the purchaser had no control at the time of the purchase, that the purchaser had the legal right to apply the prohibition of said Section 9 to the end that the purchaser would not be obliged to have an enlargement of the cemetery within twenty-five rods provided the purchaser objected and further that the purchaser had the legal right to object to the sale or disposition of lots within the limits of the then existing cemetery or burying ground unless they extended away from said dwelling house and well from which the water is used for domestic purposes.

We said in *Lipman et al.* v. *Thomas,* 143 Me. 270, 273, 61 A. (2nd) 130, in speaking of statutory construction:

> "The fundamental rule in the construction of a statute is legislative intent. *Craughwell* v. *Mousam River Trust Co.,* 113 Me. 535; 95 Atl. 221. As an aid in ascertaining legislative intent the court will 'Look at the object in view, to the remedy to be afforded and to the mischief intended to be remedied.' The language of the statute 'Is regarded in law as the vehicle best calculated to express the intention of the legislature,' such intention, however, cannot be ascertained by adding to or detracting from the meaning conveyed by the plain language used. *Tremblay* v. *Murphy,* 111 Me. 38; 88 Atl. 55; 61 Ann. Cas. 1915B 1074."

We said in *Acheson et al.* v. *Johnson, State Tax Assessor,* 147 Me. 275, 280, 86 A. (2nd) 628, 630, citing *Lipman et al.* v. *Thomas, supra:*

> "The fundamental rule of statutory construction is to ascertain and carry out the legislative intent."

We also said in *In re Frank R. McLay*, 133 Me. 175, 176:

> "In the interpretation of a statute, the controlling consideration is the legislative intent, and that must ordinarily be found in the words which the legislature has used to define its purpose. If the phrasing is unambiguous, the court has no power to correct supposed errors or to read into an enactment a meaning at variance with its express terms. *The Atlantic and St. Lawrence Railroad Company* v. *Cumberland County Commissioners*, 28 Me., 112, 120; *Hersom's Case*, 39 Me., 476, 481; *State* v. *Howard*, 72 Me., 459, 464; *Pease* v. *Foulkes*, 128 Me. 293, 297, 147 A. 212."

We said in *Craughwell* v. *Mousam River Trust Co., supra*, at Page 535, in speaking of legislative intent:

> "It means the intent gathered from the whole statute, text and context. It means the intent as expressed, but interpreted with reference to the apparent purpose and subject matter of the legislation."

We also said in *State* v. *Standard Oil Co.*, 131 Me. 63, 64, 159 A. 116, in speaking of construing statutes:

> "In construing statutes, courts expound the law; they cannot extend the application of a statute, nor amend it by the insertion of words."

It is at times helpful in statutory construction to examine the history of the legislation under consideration. Statutes relating to burying grounds were enacted by the early legislatures of our State but for the purposes of this case it seems to be unnecessary to consider them prior to the Revised Statutes of 1871 where they are set forth in Chapter 15 of the revision. At that time there was no provision for the enlargement of a public cemetery or burying-yard, as it was then called. The first amendment to said Chap. 15, R. S., 1871, was made by Chap. 241 of the Public Laws of 1874 which added Sections 8, 9, 10 and 11 to said Chapter 15 and

provided for the first time for the enlargement of public cemeteries on petition of ten voters. Sec. 8, as amended, read as follows:

> "Sec. 8. The municipal officers of any town are hereby authorized to enlarge any public cemetery or burying-yard within their town, on petition of ten voters, by taking land of adjacent owners, to be paid for by the town when in their judgment public necessity requires it but in no case shall the limits thereof be extended nearer any dwelling-house than they now are, against the written protest of the owner, made to the municipal officers of the town, at the time of hearing upon said petition."

In Chap. 195 of the Public Laws of 1877 said Sec. 8 of Chap. 241 of the Public Laws of 1874 was amended by striking out all the language of Sec. 8 after the word "it" in the fifth line. In Chap. 141 of the Public Laws of 1879 said Sec. 8 of Chap. 241 of the Public Laws of 1874 was amended so that said Sec. 8 read as follows:

> "Sect. 8 The municipal officers of any town are hereby authorized to enlarge any public cemetery or burying yard within their town, on petition of ten voters, by taking land of adjacent owners, to be paid for by the town, when in their judgment public necessity requires it, providing, that the limits thereof shall not be extended nearer any dwelling-house than twenty-five rods therefrom, against the written protest of the owner, made to the municipal officers of the town at the time of hearing on said petition."

In the same act Chap. 195 of the Public Laws of 1877 was repealed and Sec. 8 of Chap. 241 of the Act of 1874 was revived so far as amended by Chap. 141. In the revision of the Statutes of 1883, Sec. 8 of the Public Laws of 1874, as amended, became Sec. 9 of Chap. 15, R. S., 1883. The exception or proviso to said Sec. 9 in the 1883 revision con-

tained certain changes of language of minor importance and read as follows:

> "Sec. 9. The municipal officers of any town may, on petition of ten voters, enlarge any public cemetery or burying-yard within their town, by taking land of adjacent owners, to be paid for by the town, when in their judgment public necessity requires it, PROVIDED, that the limits thereof shall not be extended nearer any dwelling-house than twenty-five rods, against the written protest of the owner, made to said officers at the time of the hearing on said petition."

In Chap. 47 of the Public Laws of 1891, said Sec. 9 of Chap. 15, R. S., 1883, was amended by adding in the second line after the word "burying yard" "or incorporated cemetery or burying yard", and a new sentence at the end of said Sec. 9, so that said section, as amended, read as follows:

> "Sect. 9. The municipal officers of any town, may on petition of ten voters, enlarge any public cemetery or burying yard *or incorporated cemetery or burying yard* within their town, by taking land of adjacent owners, to be paid for by the town or otherwise as the municipal officers may direct, when in their judgment public necessity requires it, provided, that the limits thereof shall not be extended nearer any dwelling house than twenty-five rods, against the written protest of the owner, made to said officers at the time of the hearing on said petition. Nor shall any person, corporation or association establish, locate or enlarge any cemetery or burying ground by selling or otherwise disposing of lots so that the limits thereof shall be extended nearer any dwelling house than twenty-five rods against the written protest of the owner, *provided, that nothing in this act shall prohibit the sale or disposition of lots within the limits of any existing cemetery or burying ground.*" (Emphasis ours.)

It should be noted that the emphasized exception or proviso clause in said Sec. 9, as amended, expressly permits the sale or disposition of lots within the limits of any existing cemetery or burying ground. In Chap. 197 of the Public Laws of 1893 said Sec. 9 of said Chap. 15, R. S., 1883, was further amended by adding to said section at the end thereof the following words:

> "nor the extension thereof away from any dwelling house."

and the word "act" in the exception or proviso clause was changed to the word "section." In the revision of 1903, Sec. 9, R. S., 1883, became Sec. 8 and Chap. 15 became Chap. 20 and the word burying-yard was changed to burying-ground. In Chap. 60 of the Public Laws, 1907, the first sentence of Sec. 8 of Chap. 20, R. S., 1903, was further amended by adding after the words dwelling house the words "or well from which water is used for domestic purposes" and the second sentence was likewise amended in two places by adding the words "or well." No further amendments since 1907 have been made except in the revision of the Revised Statutes of 1916 the word "within" in two places was changed to "than" and Chap. 20, R. S., 1903 became Chap. 21, R. S., 1916. In the revision of the Statutes, 1930, Sec. 8, Chap. 21 became Sec. 9, Chap. 24, and the present statute now known as Sec. 9, Chap. 54, R. S., 1944, is identically the same as it was after the last amendment in 1907, except for the changes herein mentioned.

It is well to note at this point that whether or not the enactment of a law is wise and whether or not it is the best means to achieve the desired result are matters for the legislature and not for the court. In other words, the expediency of legislation is a matter for legislative determination. See *Baxter et al.* v. *Waterville Sewerage District et al.*, 146 Me. 211, 214, 219, 79 A. (2nd) 585.

With the history of the legislation set forth herein and the applicable rules of law to which we have referred we now pass to the consideration of the last sentence of said Sec. 9 of Chap. 54, including the exception or proviso. The first part of the sentence prohibits the establishment, location and enlargement of any cemetery or burying ground under certain conditions well expressed in said section. Its meaning appears to us to be clear and unambiguous.

Coming now to the exception or the proviso clause, as it is sometimes called, which is specifically made applicable to said Sec. 9 and permits or rather perhaps it states that nothing in said Sec. 9 shall prohibit the sale or disposition of lots within the limits of any existing cemetery or burying ground, again we see no ambiguity and the meaning of the first part of the exception appears to us to be clear and well expressed when the words therein used are given their ordinary meaning.

We come now to the last part of the exception which consists of the language added by the two last amendments, namely, the amendment of 1893 and the amendment of 1907, and now found in said Sec. 9, Chap. 54, R. S., 1944, the words being "nor the extension thereof away from any dwelling house or well." There can be no doubt but that the early legislatures sought to protect dwelling houses prior to 1893 and wells after 1907 against cemetery encroachment. This is made evident by a consideration of the 1874 statute and the statutes of 1879 and 1891, bearing in mind that the twenty-five rod zone was first established in the 1879 statute and existed down to the statute of 1893 when the legislature in Chap. 197 of the Public Laws of 1893 deprived dwelling houses of some measure of protection that had been heretofore accorded them. The same reasoning would apply to the 1907 statute which added the words "or well." In other words, irrespective of whatever doubt there

may be as to the intent of the legislature, it seems clear from the amendments that some measure of protection was taken away from dwelling houses and wells which in effect would strengthen the rights of cemeteries.

The word "extension" when used in a statute of the type under consideration means, in our opinion, an enlargement of the main body and usually the addition of something of less import than that to which it is attached. See *N. Y. Central & Hudson River Railroad Co.* v. *The Buffalo & Williamsville Electric Railway Co.*, 89 N. Y. Supp. 418, 421, 96 App. Div. 471. In Words and Phrases, Permanent Edition, Vol. 15A, Page 615, "extension" means "a stretching out, an enlargement in breadth, or continuation of length," citing *Missouri-Kansas-Texas Railroad Company of Texas* v. *Texas & New Orleans Railroad Co.*, 172 Fed. (2nd) 768, 769. The Connecticut Court in the case of *State* v. *Zazzaro*, 128 Conn. 160, 168, 20 A. (2nd) 737, said:

> "The most common usage of the word "extend", especially in legal connotation, is along the line of its derivation, to stretch out. See 25 C. J. 225."

The Supreme Court of New Jersey in *Middlesex & Somerset Traction Co.* v. *Metlar*, 1903, 70 N. J. Law 98, 56 A. 143, said:

> "The word 'extend,' both by etymology and by common usage, is an exceedingly flexible term, lending itself to a great variety of meanings, which must in each case be gathered from the context, which is owing to the fact that it is essentially a relative term, referring to something already begun; hence, in a concrete sense, it has no persistent meaning, although abstractly it always implies increase or amplification as distinguished from inception, as, for instance, 'the extension of a man's business,' or 'of his line of credit,' or 'of the duetime of his debts.' Extension in space may be in any direction; it is not confined to mere linear pro-

> longation, as the prosecutor contends. In a proper context it may mean broadening instead of prolongation, as in the case of Steelman v. Atlantic City Sewerage Company, 60 N. J. Law, 461, 38 Atl. 742, where the language of the opinion is: 'The context deals with land, not with mathematical lines; hence the natural synonym for "extending" is "reaching" or "stretching," and not "produced" or "protracted".' "

The judgment in the *Traction* case was reversed by the Court of Errors and Appeals of New Jersey in *Metlar* v. *Middlesex & Somerset Traction Co.*, 1906, 72 N. J. Law 524, 63 A. 497, but the court used the following language:

> "It is true that 'extension' is sometimes the equivalent of 'expansion,' and, when predicated of space, may mean lateral, as well as longitudinal, enlargement. A man who says he has extended or intends to extend the boundaries of his yard, or the limits of his farm, may mean an expansion of the area of these properties in any direction; - - - -."

At this point it should be noted that before the last two amendments the legislature had made an exception as to the sale or disposition of lots within the limits of any existing cemetery or burying ground. The last two amendments, for reasons known best to the legislature, as was its right, provided for an extension or an enlargement of an existing cemetery and it used the words "extension thereof away from any dwelling house or well." In our opinion the last amendment is indicative of legislative intent in that it sought to add to the exception already enacted with respect to the sale and disposition of lots in existing cemeteries the further right of enlargement or extension provided the enlargement or extension be away from any dwelling house or well. No one could have any doubt but that the word "thereof" after the word "extension" in said 1893 amendment refers to an extension or enlargement of an existing cemetery. In other words, what the legislature intended, in our

opinion, was that any extension or enlargement of an existing cemetery away from any dwelling house or well means that any enlargement or addition can be made to an existing cemetery or burying ground provided it (meaning the addition or enlargement) extends away or stretches out from the dwelling house or well. Such being the case, it would seem that no matter how far the extension of the cemetery is carried within its side lines it would never reach the house or the well and, furthermore, every point within its area would be further away from the house and well than was the nearest point of its base line and the extension necessarily must be away from the house and well both in direction and in distance. The wisdom of the enactment of any law is a matter for legislative determination and not for this court. The temporary injunction granted the complainant should be dissolved and the bill in equity dismissed. The mandate will be

Cause remanded to the Superior Court in Equity with instructions to dissolve the temporary injunction and the entry of a decree of dismissal of the Bill in Equity.

STATE OF MAINE

JOHN E. SPEAR AND HAZEL B. SPEAR,
APPELLANTS FROM DECREE OF JUDGE OF PROBATE,
IN RE ADOPTION OF TIMOTHY ALLAN SPEAR

Knox. Opinion, October 15, 1952.

Probate Courts. Appeal. Vacation.

PER CURIAM.

A petition was filed by the exceptants in this case in the Probate Court for the County of Knox for the adoption of Timothy Allan Spear, who was the illegitimate infant child of their daughter, Arlene T. Spear. The petition was denied by the Judge of Probate on July 17, 1951. The petitioners on July 31, 1951 appealed to the Superior Court for said County of Knox, sitting as the Supreme Court of Probate, at the November Term, 1951. Such appeal was fully heard by the Supreme Court of Probate. The decision granting such appeal and remanding the case to the Probate Court for action in accordance with the decree of the Supreme Court of Probate was filed March 4, 1952.

Such decree was not filed in vacation after the November Term of court, because a new term of the Superior Court had come in on the second Tuesday of February, 1952. Such decree of the Supreme Court of Probate was therefore void.

The case is governed by the case of *Bolduc et al.* v. *Granite State Fire Ins. Co.*, 147 Me. 129, 83 A. (2nd) 567, in which we said: "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."

The case must be remanded to the Supreme Court of Probate for a hearing *de novo*.

Exceptions sustained.

Case remanded as aforesaid.

C. S. Roberts, for plaintiff.

Frank F. Harding, for defendant.

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

CHARLES CLAPPERTON, SR.
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
THE TRAVELERS INDEMNITY COMPANY,
ROBERT MCLELLAN,
ROBERT MCLELLAN, AS FATHER AND NEXT FRIEND OF
DENNIS MCLELLAN, A MINOR,
LLEWELLYN E. WHITMAN, AND
LLEWELLYN E. WHITMAN AS FATHER AND NEXT FRIEND
OF LLEWELLYN H. WHITMAN, A MINOR

Kennebec. Opinion, November 3, 1952.

Insurance. Declaratory Judgments. Exceptions

A petition for declaratory judgment under an automobile liability insurance policy involves a question of *legal liability* enforcible by an action at law, therefore it is properly entered upon the law docket.

A Law Court review of a declaratory judgment decree involving *legal liability* is by bill of exceptions. (See R. S., 1944, Chap. 94, Sec. 14.)

A presiding justice hearing a petition for declaratory judgment is not hearing the cause by voluntary submission as in jury waived cases, so that rights to exceptions need not be reserved.

The directions, judgments or opinions of a single justice hearing a case may be attacked only for errors in law.

There is no error in law in finding of fact by a single justice unless such fact be found without any evidence to support it.

Bills of exceptions are insufficient which fail to point out whether the error of the alleged findings consists in a failure of evidence or an erroneous application of the law to the facts or other exceptionable ground.

The mere purchase of an occasional policy from an insurance agent, even if the initial selection of the companies be left to the agent, does not, as a matter of law constitute the insurance agent the agent of the insured to keep him insured, or to keep him insured in such companies as the agent may thereafter select, with authority to accept cancellations and procure substituted policies.

ON EXCEPTIONS.

This is a petition for a declaratory judgment seeking a declaration of rights under an automobile liability insurance policy. The case is before the Law Court on exceptions to a decree declaring liability. Exceptions 2 and 4 are overruled. Exceptions 1, 3 and 5 are dismissed.

James E. Glover,
Joly & Marden, Attorneys for petitioner.

Robinson, Richardson & Leddy,
Attorneys for United States Fidelity and Guaranty Co.

Locke, Campbell, Reid & Hebert,
Attorneys for Travelers Indemnity Co.

Dubord & Dubord, for McLellan, et als., specially
Lewis L. Levine

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

MERRILL, J. On exceptions. In this case there was a petition to the Superior Court for a declaratory judgment.

By the petition Charles Clapperton, Sr., against whom several actions had been brought to recover damages in the aggregate sum of $162,000.00 for injuries received in an automobile accident which took place on October 7, 1950, sought to have the court declare his rights under an automobile liability insurance policy issued to him by the United States Fidelity and Guaranty Company. He sought a declaration of "whether or not the said policy was in full force and effect on the date of said accident, October 7, 1950, and whether or not the said policy remained in full force and effect and is valid and collectible insurance in connection with said accident, in the event that the plaintiffs in the negligence actions (who are the individual respondents herein) as recited in paragraph 5 of this petition should recover judgments against the Petitioner."

Briefly, the facts were as follows: On September 8, 1950, one William E. Hambleton, an agent of the United States Fidelity and Guaranty Company who had policy writing powers, sold and delivered to the petitioner an automobile liability policy in the usual form with $25,000-$50,000 limits. On September 25, 1950, the company by letter received in due course notified said agent to return the policy for pro rata cancellation. On September 27, 1950, without having notified the petitioner or having cancelled the policy, the agent bound the petitioner in the same limits with the respondent, The Travelers Indemnity Company, of which company he was also an agent. The Travelers accepted the risk and its policy was delivered to the agent on October 7, 1950. On the same day the petitioner was involved in the accident upon which he may be subject to liability to the individual respondents who have brought actions against him to recover damages therefor. Subsequent to the accident, and the agent's knowledge thereof, the Travelers' policy was delivered to the petitioner by the agent. The premiums on both policies were paid and both

policies were accepted by the petitioner. The petitioner duly notified both insurance companies of the accident. The United States Fidelity and Guaranty Company denied and still denies liability on the ground that its policy had been duly rescinded by mutual agreement as of its date and was not in effect at the time of the accident. It further claims that the policy of The Travelers Indemnity Company had been substituted therefor prior to the accident.

Later in October, the petitioner, at the request of another representative of the United States Fidelity and Guaranty Company, signed a release purporting to cancel their policy and discharge that company, on being assured by said representative that "he (the petitioner) had automobile coverage, double coverage—since he was also covered in the Travelers." The United States Fidelity and Guaranty Company, however, does not rely upon this release as a discharge of liability, but "only as evidence of ratification by Mr. Clapperton of the act of Mr. Hambleton in placing him in the Travelers as of September 27, 1950." The Travelers Indemnity Company not only does not deny liability under its policy but in its brief after quoting the above testimony of the representative of the United States Fidelity and Guaranty Company, states: "That is exactly the position of The Travelers Indemnity Company. That Clapperton on the date of the accident had double coverage, that he was covered *in the U. S. F. & G.* and also in The Travelers."

The Justice of the Superior Court found "that both companies were covering at the time of the accident on October 7, 1950 and any loss arising out of petitioner's liability therefor (as defined in the policies) must be borne equally by the two companies up to the total of the combined coverage but not in excess thereof." After decree by the single justice, the United States Fidelity and Guaranty Company filed a bill of exceptions which, after a recital of facts, is as follows:

"After hearing, the Court ruled and decreed, inter alia, as follows:

1. 'I find that Petitioner selected the USF & G in the first instance because the agent could write the policy and issue it without delay, and that he did not constitute Hambleton his agent to keep him insured in such companies as the agent might select.'

2. 'I find that notice of cancellation by USF & G to its agent was not binding upon Petitioner - - -'

3. 'I find that Hambleton was not acting as Petitioner's agent but was acting as a person engaged in the insurance business feeling a responsibility to a customer and anxious to retain good will and not leave his customer uninsured even for one moment.'

4. 'That liability had become absolute (R. S. 1944, Ch. 56, Sec. 261) - - -'

5. 'I find that both companies were covering at the time of the accident on October 7, 1950 and any loss arising out of petitioners liability therefor (as defined in the policies) must be borne equally by the two companies up to the total of the combined coverage but not in excess thereof.'

To all of which rulings the said United States Fidelity and Guaranty Company says that it is aggrieved, and excepts and prays that its exceptions may be allowed.

The petition, respondents' answers, exhibits, evidence, and the Court's decree are hereby incorporated and made a part of this Bill of Exceptions."

By the foregoing bill of exceptions the respondent, United States Fidelity and Guaranty Company, seeks to attack not only legal conclusions but factual findings made by the Justice of the Superior Court.

The liability, if any, of the respondent, United States Fidelity and Guaranty Company, to the petitioner on its

policy of insurance was a legal liability and enforcible by an action at law. The case, therefore, was properly entered upon the law docket of the Superior Court. *Maine Broadcasting Co.* v. *Banking Co.*, 142 Me. 220; *Sears, Roebuck & Co.* v. *Portland, et al.*, 144 Me. 250.

With respect to proceedings under the Uniform Declaratory Judgment Act, R. S. (1944), Chap. 95, Secs. 38 to 50, both inclusive, Sec. 44 provides that:

> "All orders, judgments, and decrees under the provisions of sections 38 to 50, inclusive, may be reviewed as other orders, judgments, and decrees."

Under this section of the statute, this case being a decision of a single justice sitting as a court of law as distinguished from equity, the only procedure to review his findings is by a bill of exceptions.

In all cases *at law*, when court is held by a single justice, his opinions, directions, or judgments may be attacked by exceptions. R. S. (1944), Chap. 94, Sec. 14. The apparent modification of this rule that requires a reservation of a right to exceptions in cases heard by the presiding justice in jury waived cases, *Frank* v. *Mallett*, 92 Me. 77, 79, has no application to cases heard by the justice in proceedings to obtain a declaratory judgment. In such cases he is hearing the case not because of a voluntary submission to him by the parties, but as the court designated by statute to hear and decide the same. In such cases it is not necessary to reserve a right to exceptions. *Leathers* v. *Stewart*, 108 Me. 96.

The directions, judgments, or opinions of a single justice hearing a case may be attacked only for errors in law. *Dunn* v. *Kelley*, 69 Me. 145; *Pettengill* v. *Shoenbar*, 84 Me. 104, 24 Atl. 584; *Ayer* v. *Harris*, 125 Me. 249, 132 Atl. 742.

Exceptions when taken to findings of fact by a single justice must attack such findings because of, and reach only,

errors in law. There is no error in law in a finding of fact by a single justice unless such fact be found without any evidence to support it. Examples of application of this rule by this court may be found in cases where we have applied it to the decision of a single justice hearing a case at law without the intervention of a jury, *Ayer* v. *Harris, supra,* to a decree of divorce, *Bond* v. *Bond,* 127 Me. 117, 129, 141 Atl. 833, to the decree of a justice of the Superior Court sitting as the Supreme Court of Probate, *Cotting* v. *Tilton,* 118 Me. 91, 94, 106 Atl. 113. The rule has been so uniformly applied by this court that citation of further authorities is unnecessary.

R. S. (1944), Chap. 94, Sec. 14, and the foregoing legal principles are applicable to proceedings to obtain a review of orders, judgments, and decrees of a justice made or rendered in proceedings at law to obtain a declaratory judgment. See *Sears, Roebuck & Co.* v. *Portland, et al.,* 144 Me. 250.

The *sufficiency* of bills of exceptions to orders, judgments, and decrees of a justice in proceedings to obtain a declaratory judgment is determined by the same rules applicable to bills of exceptions to orders, judgments, and decrees of a single justice in other cases.

This court has repeatedly and so recently set forth the requirements of bills of exceptions in general, and of bills of exceptions to the findings of a single justice that no useful purpose would be served by repeating them here. See *McKown* v. *Powers,* 86 Me. 291; *Jones* v. *Jones,* 101 Me. 447 and cases cited; *Bradford* v. *Davis et al.,* 143 Me. 124; *Heath et al., Applts.,* 146 Me. 229; *Sard* v. *Sard,* 147 Me. 46.

Measured by the standards set forth in these cases, the respondent's bill of exceptions is woefully insufficient. It fails to point out whether the erroneous findings of the justice presiding are errors in law because they are findings of

fact made without any evidence to support them, or are errors in law because the justice has erroneously applied or failed to apply established rules of law to the facts found by him to exist or on other exceptionable grounds.

Of the five rulings set forth to which exceptions are taken, only No. 2 and No. 4 can by any stretch of the imagination be deemed rulings of law as distinguished from mixed findings of fact and rulings of law thereon. Treating them as rulings of law, there is no merit in either of these exceptions.

The letter from the respondent, United States Fidelity and Guaranty Company, to its agent to return the petitioner's policy for pro rata cancellation, which is the notice referred to in exception No. 2, was not binding upon the petitioner, and in and of itself could not amount to a cancellation of the policy.

Exception No. 4 to the ruling that liability had become absolute (R. S. (1944), Chap. 56, Sec. 261) is not the complete finding of the justice and the same must be read in connection with the rest of the sentence which was "and also the rights of third parties had intervened." That finding of the justice was in accord with the provisions of the statute quoted by him. The respondent urges that before liability can become absolute there must be a policy in force under which the liability may arise. While this is true, this was not set forth in the bill of exceptions as the ground thereof. Even could the same be implied as contained in the exception, as will be later shown the policy was in force at the time of the accident. The ruling was correct and this exception must be overruled.

The first, third and fifth rulings complained of in exceptions No. 1, No. 3 and No. 5 respectively, are mixed findings of law and fact and the grounds of the exceptions thereto are not stated. When this was called to the attention of

counsel for the respondent at oral argument, the only statement in the bill of exceptions that he claimed amounted to a statement of the grounds of exception was the statement that the respondent was aggrieved.

When a ruling complained of is on its face a ruling of law, as distinguished from a finding of fact or from a mixed finding of fact and ruling of law, a recital of the ruling and a statement of sufficient facts in the bill of exceptions to show that the exceptant is aggrieved thereby and that he excepts thereto is sufficient.

When, as here, the findings to which exceptions are taken are either findings of fact or mixed findings of fact and rulings of law, the bill of exceptions must show the grounds on which it is claimed that the findings and rulings constitute errors in law and how the same are prejudicial to the exceptant.

Measured by these requirements, the bill of exceptions, so far as it relates to the rulings numbered 1, 3 and 5 is insufficient and these exceptions must be dismissed.

However, as this was the first case where we have had occasion to consider the sufficiency of a bill of exceptions to the findings of a single justice in proceedings to obtain a declaratory judgment, we allowed full argument by counsel as to whether or not the several rulings excepted to were erroneous in law. As none of them can be sustained, we violate the rights of no one in stating the reasons why they could not be sustained if in proper form.

The finding that the petitioner selected the USF & G in the first instance because the agent could write the policy and issue it without delay, attacked by exception No. 1, is a finding of fact. The evidence so overwhelmingly supported it that a contrary finding could not be allowed to stand as supported by any evidence. The further finding

attacked by said exception that the petitioner "did not constitute Hambleton his agent to keep him insured in such companies as the agent might select" is at best a mixed question of law and fact. Whether or not agency exists is a question of fact. Whether or not upon certain undisputed facts agency is created may be a question of law.

We are not unmindful that there are cases which hold that when a man places insurance with an agent *with instructions to keep him covered,* and leaves the choice of companies entirely to the agent, such agent is authorized to waive notice of cancellation and to effect substitutions of policies in the line of insurance carried by his client. Examples of these cases are *Rose Inn* v. *National Union Fire Ins. Co. et al.,* 258 N. Y. 51, 179 N. E. 256; *N. Pelaggi & Co., Inc.* v. *Orient Ins. Co.,* 102 Vt. 384, 148 Atl. 869; *Federal Ins. Co.* v. *Sydeman,* 82 N. H. 482, 136 Atl. 136; *Lavoie* v. *North British Mercantile Ins. Co. et al.,* 85 N. H. 550, 161 Atl. 376; *Hollywood Lumber & Coal Co.* v. *Dubuque Fire & Marine Ins. Co.,* 92 S. E. (W. Va.) 858; *Firemen's Ins. Co.* v. *Simmons et al.,* 22 S. W. (2nd) (Ark.) 45.

In all of these cases with the exception of the *Lavoie* case and the *Firemen's Ins. Co.* case, the court found an *express agreement* by and between the insured and the agent *to keep the insured covered* to a stated amount and the *choice of companies was left entirely to the agent.*

The *Lavoie* case involved a succession of binders, none of which were ever delivered to the insured. As the risk was successively rejected by the company in which it was bound, the risk was bound in another. In the *Firemen's Ins. Co.* case, the Arkansas court, quoting from a prior decision thereof, stated: "Our court is committed to the doctrine that authority of such breadth and scope (conferred upon the agent in the beginning to insure the property in any company he represented, leaving the selection or designation of any company to him) has the effect of constituting the

agent of the insurer the agent of the insured also, to accept the policy when written, and to waive the cancellation notice clause, and to accept a new policy in lieu of the old one." Such may be the law of Arkansas but we are not prepared at this time to accept it as the law in this State.

Without intimating our opinion as to the soundness of any of the foregoing decisions from other jurisdictions, the situation in this case differs from that existing in each of those cases and they are not applicable to it. Here the petitioner obtained a specific automobile liability insurance policy from the agent. So far as the record discloses, the only other insurance business that the agent had ever had with the petitioner was to effect a policy of insurance upon the petitioner's home but not upon his furniture. The mere purchase of an occasional policy from an insurance agent, even if the initial selection of companies be left to the agent, does not, as a matter of law, constitute the insurance agent the agent of the insured to keep him insured, or to keep him insured in such companies as the agent may thereafter select, with authority to accept cancellation and procure substituted policies. Not only was the presiding justice justified in finding that the petitioner had not constituted Hambleton his agent with such powers but a contrary finding would be erroneous in law. The respondent takes nothing by exception No. 1.

Insofar as the third finding involves findings of fact they were amply justified by the record. If any question of law is involved therein we have already disposed of the same in our discussion of exception No. 1. The respondent takes nothing by exception No. 3.

For the reasons heretofore stated the respondent takes nothing by exception No. 5. Unless cancelled, the policy issued and delivered to the petitioner by the respondent, United States Fidelity and Guaranty Company, was in full force, and that company was covering at the time of the ac-

cident. The only claim of cancellation is the action of the agent heretofore discussed and held by us to be ineffective therefor. The Travelers has admitted co-existent coverage. The division of coverage so that any loss arising out of the petitioner's liability for the accident, as defined by the policies, must be borne equally by the two companies up to the total of the combined coverage but not in excess thereof, is strictly in accord with the provisions of the two policies with respect to other existing insurance.

Exceptions 2 and 4 are overruled.

Exceptions 1, 3 and 5 are dismissed.

STATE OF MAINE
vs.
INHABITANTS OF THE TOWN OF SWAN'S ISLAND

Hancock. Opinion, November 3, 1952.

Towns. Dependent Children. Pauper Settlement.

The State does not have a right of action at law to recover sums expended for aid to a dependent child under R. S., 1944, Chap. 22, Sec. 234.

ON REPORT.

This is an action to recover for aid to a dependent child. The case is before the Law Court on Report. Judgment for defendants.

George C. West, for State.

Blaisdell & Blaisdell, for Defendants.

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

WILLIAMSON, J. On report. The State seeks by an action in a plea of the case to recover certain sums expended for aid to a dependent child under R. S., Chap. 22, Sec. 234 from the defendant town in which the State alleges the child had his legal settlement. The defendant filed a brief statement as follows:

> "And for special matters of defense to be pleaded with the general issue, the defendants say that reimbursement to the State for Aid to Dependent Children must be, if the defendant is delinquent, collected in the same manner and subject to the same penalties as State taxes as by statute Ch. 22, Sec. 234, and amendment."

The pertinent parts of Section 234 read:

> "**Sec. 234. Towns to be assessed.** The state shall recover from the city, town, or plantation in which the child so aided has legal settlement, ½ of the amount expended for aid to each dependent child, which shall be credited to the regular legislative appropriation for aid to dependent children; . . . Whenever it appears that a city, town, or plantation is delinquent in making reimbursements to the state, the amounts shall be collected by the state in the same manner and subject to the same penalties as state taxes. Any balance due shall be assessed in the succeeding year in the same manner as other state taxes."

Amendments in 1949, Chap. 416, and in 1951, Chap. 266, Sec. 23, are not material.

The position of the State is that in the event of a disagreement between State and town the place of settlement can be determined only by an action in court brought by the State. In its brief the State says: "If the town denies it is the town of settlement how else can the state recover except by court action?" The State presses the argument that the place of settlement of the dependent child, born in 1938, is in the defendant town for the reason that the father emanci-

pated the child sometime between birth and the age of four years. If the child was not so emancipated, then admittedly the defendant town is not the place of settlement.

The father and mother were divorced in 1940. Custody of four minor children was granted to the mother but the child in question was not mentioned in the decree. Neither through further proceedings in the divorce action nor by other available civil or criminal process has there ever been, so far as we are told, a request upon the father to support his child, although no lack of ability on his part is shown.

We are faced, however, with a problem involving the recovery of money spent by the State for aid to a dependent child from a town where in fact neither father nor mother has lived since before the child was born. The defendant town sharply objects to the present action on the ground that it is not authorized by statute. Other objections relate to the necessity under R. S., Chap. 22 as amended of certain investigations and actions as a condition precedent to recovery, and to issues involving the pauper settlement of the father, the emancipation of the child, and the admissibility of evidence. The town and the State are agreed upon the amount of recovery in the event the town is liable.

In our view there is one principle decisive of the case; that is, that the State does not have a right of action at law to recover the funds expended. Section 234 quoted above creates the liability of the town and provides a remedy. The remedy so provided is exclusive.

In *Packard* v. *Tisdale,* 50 Me. 376, Chief Justice Appleton said: "The general rule is well established that the collector of taxes cannot compel their payment by suit except in those cases in which the right of action is given by statute." Justice Walton said in *Embden* v. *Bunker,* 86 Me. 313, 29 A. 1085, in denying recovery in an action upon a note given in payment of taxes: "Town officers cannot be allowed to dis-

regard the statutory modes of doing business and substitute ways of their own." In *Tozier* v. *Woodworth,* 135 Me. 46, at page 52, 188 A. 771, at page 774, Chief Justice Dunn quotes with approval from the decision of Justice Worster, presiding in the Superior Court, in an action upon a promise to pay taxes as follows: "but on the broader ground, that, in this State, a tax collector, as such cannot maintain an action except when empowered by the statute so to do, as held in *Packard* v. *Tisdale, supra.* No statute in this state confers upon a tax collector authority to bring such an action as this." *Cooley on Taxation,* 2nd Ed., page 16 says: "But, in general, the conclusion has been reached that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common law action for the recovery of the tax as a debt will not lie."

The State indeed admits that the statutes do not expressly give a right of action at law to recover state taxes. The State, however, is not without its remedy. There is ample provision for the collection of its taxes. Under R. S., Chap. 81, Sec. 72, for example, the State Treasurer may issue his warrant to the sheriff of the county to collect taxes from delinquent towns. In the act providing for assessment of the state tax for 1951-52 there is a similar provision for the issue of a warrant requiring the sheriff to levy upon the property of inhabitants of delinquent municipalities. In section 8 the act reads:

> "Sec. 8. **School funds withheld from delinquent municipalities.** When any state tax assessed upon any city, town or plantation for the year 1951 remains unpaid, such city, town or plantation may be precluded from drawing from the state treasury the school funds set apart for such city, town or plantation so long as such tax remains unpaid." *P. & S. L. 1951, Ch. 213.*

Like provisions may be found in other acts for the assessment of state taxes, for example, *P. & S. L., 1949, Chap. 202;*

P. & S. L., 1947, Chap. 181; P. & S. L., 1945, Chap. 133; P. & S. L., 1943, Chap. 89.

The State says in substance that the action available to it under the statutes is unduly harsh. Let us, it says, first determine in court the place of settlement and when this fact is determined reimbursement will depend only upon the finding of the amount due. The difficulty with this reasoning is that it is not the course outlined by the legislature to govern the administration of the law. Proper officials of the State must determine the place of settlement and then take the necessary steps to secure the reimbursement to the State Treasury of the funds for which the municipality is responsible. The law will give sufficient protection to a municipality against unwarranted acts by officers of the State. If the town denies that it is the place of settlement, the question may be litigated at some proper stage of the proceedings. If the procedure presently provided by statute for the reimbursement of funds expended for aid to dependent children is not well adapted to existing conditions, the legislature, and not the court, should be requested to make the necessary or desirable changes.

It becomes unnecessary to consider the issues of emancipation, settlement or other questions raised by the parties.

Judgment for defendants.

HENRY T. WINTERS
vs.
JAMES L. SMITH

Kennebec. Opinion, November 3, 1952.

Damages. Affidavit.

A verdict will be set aside and new trial granted on the ground of inadequate damages only when it clearly appears that the jury either disregarded the evidence, or acted from bias, passion or prejudice, or when the smallness of the verdict shows that the jury may have made a compromise.

The affidavit under R. S., 1944, Chap. 100, Sec. 132 makes out a prima facie case only.

ON MOTION FOR NEW TRIAL.

This is an action on an account. After verdict for plaintiff the case is brought to the Law Court on motion by the plaintiff for a new trial on the ground that the damages are inadequate. Motion overruled.

Niehoff & Niehoff, for plaintiff.

Joly & Marden, for defendant.

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

FELLOWS, J. After verdict for the plaintiff in the Superior Court for Kennebec County for the sum of $45.00, this case comes to the Law Court on motion by the plaintiff for a new trial, on the ground that the damages are inadequate.

The case is this: Henry T. Winters, the plaintiff, installed for the defendant, James L. Smith, a bathroom, with fixtures, toilet, and septic tank, and all piping and connections for running water and sewage. The total amount of the

plaintiff's account for labor done and materials furnished was $392.57. The defendant made payments at various times on this account in the total sum of $318.14, for which he was given credit, leaving a claimed balance due the plaintiff of $74.43 with additional charges for interest. The work was not satisfactory to the defendant. There was testimony indicating poor workmanship. Among other complaints, when the toilet was flushed a quantity of water, with an unpleasant odor, came into the basement. The defendant says that there was a three-quarter inch space between the toilet bowl and the base pipe. The plaintiff sent his son to rectify this, but the defendant says he was not satisfied because the plaintiff's son installed a metal ring on the pipe and there continued to be an improper connection, clogging, and odor. The defendant says he made payments to the plaintiff in the admitted sum of $318.14 and that he only withheld an amount that he (defendant) considered sufficient to repair the plaintiff's defective work. This suit was brought by the plaintiff to recover the claimed balance of $74.43 so withheld, plus interest.

The evidence introduced by the plaintiff consisted only of the plaintiff's affidavit filed under the provisions of Revised Statutes 1944, Chapter 100, Section 132 that "the account on which the action is brought * * * is a true statement of the indebtedness * * * and that the prices and items charged therein are just and reasonable." The general issue was the plea. The defendant introduced testimony, without objection, that the plaintiff through his agent and servant, did not do a workmanlike job, and the question presented by the court to the jury was whether the prices charged by the plaintiff in his account annexed were reasonable or not under all the circumstances. The jury verdict was $45.00 as the balance due, and the plaintiff now moves for a new trial because he says the amount of the verdict was inadequate.

A verdict will be set aside and a new trial granted on the ground of inadequate damages only when it clearly appears that the jury either disregarded the evidence, or acted from bias, passion or prejudice, or when the smallness of a verdict shows that the jury may have made a compromise. *Conroy* v. *Reid,* 132 Me. 162, 168 Atl. 215; *Chapman* v. *Portland Country Club,* 137 Me. 10. A compromise verdict must be "essentially equivalent to a verdict for the defendant." *Leavitt* v. *Dow,* 105 Me. 50, 72 Atl. 735.

The affidavit authorized by R. S., 1944, Chap. 100, Sec. 132 makes out a prima facie case only. It raises a presumption of fact, and entitles the plaintiff to judgment, if no other evidence of facts and circumstances rebuts or shows to the contrary. *Mugerdichian* v. *Goudalion,* 134 Me. 290; *Mansfield* v. *Gushee,* 120 Me. 333.

We have examined the record with care, and although the court might, in the first instance, have arrived at a different amount had it been authorized to find the facts, yet it cannot now say that the verdict is clearly wrong. The $45.00 verdict was small but the balance claimed due on this long $392.00 account was only $74.43. The evidence does not fix the date of demand, if in fact formal demand was made, from which to reckon interest. Under the specific directions of the presiding justice, as appears in his charge printed in the record, the questions of the amount due, with the amount of interest, were left entirely to the judgment of the jury, and no exceptions were taken to the charge. The amount of the verdict in comparison to the claimed balance is not so disproportionate as to show a compromise. The testimony introduced by the defendant without objection, if believed, shows that some of the items charged in the long account annexed to the writ may have been excessive under the circumstances. The fact that there was an affidavit filed in this case does not compel a jury to accept as truth that any or all the charges for labor or materials are

correct. The jury had the right to determine, under all the circumstances, whether the prices charged were "just and reasonable" and whether the affidavit was correct when it stated that the account is "a true statement of the indebtedness."

Motion overruled.

RALPH E. JENKINS
vs.
ROBERT S. BANKS

Cumberland. Opinion, November 3, 1952.

Retrial. New Trial. Damages.

When the Law Court sets the verdict aside and grants another trial for the reason that the verdict is contrary to the evidence or against the weight of evidence, the Law Court decision upon retrial of the cause is the law of the case to be followed unless the facts appear to be essentially different.

ON MOTION FOR NEW TRIAL.

This is an action of negligence for personal injuries. The case is before the Law Court upon defendant's general motion for new trial. Motion overruled. Judgment on the verdict.

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 motion. This is an action to recover for personal injuries which resulted in a verdict for the plaintiff in the sum of $11,500.00. After verdict the defendant filed a general motion for a new trial on the usual grounds, including excessive damages.

On a previous trial of the case the presiding justice directed a verdict for the defendant. The case came to this court on exceptions thereto. In our former decision, *Jenkins* v. *Banks,* 147 Me. 438, we held that there was sufficient evidence in the case to warrant the submission thereof to the jury and ordered a new trial.

A careful reading of the present record does not disclose that the facts appearing in the present trial are essentially different from those which were before this court when we held that there was sufficient evidence in the case to require its submission to the jury.

The facts and the legal principles involved in the case are fully stated in our prior decision, *Jenkins* v. *Banks, supra.* As said by this court in *Lord, Berry, and Walker* v. *Mass. Ins. Co.,* 133 Me. 335, 336: "A discussion of the details of the evidence upon which these conclusions are based might be of interest to the parties to the litigation but would be of no value to students of the decisions of this court, and we deem it unnecessary to encumber our reports with such discussion."

It is a well settled principle that "When, for the reason that the jury verdict is contrary to evidence, or against the weight of the evidence, the Law Court sets the verdict aside and grants another trial, the decision of the appellate tribunal becomes the law of the case to be followed by the trial court on the new trial, unless the facts appearing on such new trial are essentially different from those which were before the Law Court when it rendered its decision." *Byron* v. *O'Connor,* 131 Me. 35 and cases cited therein.

Upon the same principle, when on a former trial exceptions to the direction of a verdict are sustained by this court on the ground that the evidence was sufficient to require the submission of that case to the jury, and the case is again tried, if the facts appearing on such trial are not essentially different from those which were before the Law Court when it rendered its decision, its prior decision has become the law of the case and the trial court should submit the case to the jury. This is upon the theory that this court has decided that the evidence is sufficient to raise a question of fact for decision by the jury. This being true, the decision of the jury cannot be set aside as against the evidence. The foregoing considerations are sufficient to dispose of this case so far as liability is concerned.

The damages in this case are large but the injury was very serious. The plaintiff, prior to the accident, was a robust, able-bodied man, gainfully employed, who had in a period of approximately three months prior to the accident earned $554.02 in the employ of the defendant. As of date of the hearing he had lost 574 days and was at that time totally incapacitated for gainful employment. He was confined to the hospital for 117 days. He suffered great pain. Before the accident he weighed 145 pounds and at the time of the trial 124 pounds. In the accident he had fractured several ribs on the left side, suffered a fracture of the first lumbar vertebra and "multiple fractures of the sacrum of his back," and was left with permanent structural deformity. He had incurred doctors' and hospital bills in the aggregate amount of $1,831.25 and had agreed to pay for board and room and care from March 27, 1951 to January 13, 1952. The sum of $418.00 is claimed to be due therefor. Taking into account the amount of the bills incurred for these purposes, loss of wages up to the time of the trial, and his pain and suffering, we cannot say that a verdict in the sum of $11,500.00 is at all indicative of the fact that the jury acted under some bias,

prejudice, or improper influence or have made some mistake of fact or law. Under these conditions the assessment of damages by the jury should not be disturbed. *Pearson* v. *Hanna,* 145 Me. 379, *Cayford* v. *Wilbur,* 86 Me. 414.

Motion overruled.

Judgment on the verdict.

LAWRENCE E. BARTLETT

vs.

BURTON L. NEWTON

Oxford. Opinion, November 11, 1952.

Trover. Parol Evidence. Contracts. Damages.

Parol evidence is inadmissible to substitute a different contract from that evidence by a written instrument.

Parol evidence is admissible to explain what is *per se* unintelligible in a written contract when the explanation is not inconsistent with the written terms.

Parol evidence of extraneous facts and circumstances, to explain the meaning of words used in a written contract, may be admitted to a very great extent without infringing the spirit of the rule which excludes any such evidence designed to vary a written contract or substitute a new and different one from that reduced to writing.

Evidence of an executory parol contract is not admissible to contradict, alter, add to or vary the terms of a written one.

A parol contract, under which one who is obligated by a note to pay money may discharge his obligation by doing something other than paying money, while inoperative so long as it remains executory, may be proved, with its performance, to discharge the debt.

While neither a member of a partnership nor an officer of a corporation has authority to bind his partnership or corporation to subject their accounting to a contract in which neither has a direct interest, such lack of authority has no bearing on such a contract.

One who converts property is entitled to no deduction from the measure of damages applicable generally in an action of trover because of contribution made, or claims held, by a third person.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action of trover. After a jury verdict for plaintiff the defendant brings the case before the Law Court upon general motion for a new trial and exceptions to the admission of certain testimony. Motion and exceptions overruled.

William E. McCarthy, for plaintiff.

Gerry Brooks, for defendant.

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

MURCHIE, C. J. Defendant's exceptions, to the admission of evidence, a particular instruction given to the jury (not perfected as hereafter noted), and the refusal of fifteen requested instructions, must all fail if the evidence challenged was properly admitted. That evidence related to the claim of the plaintiff that by prearrangement with the defendant he was entitled to pay a note, secured by chattel mortgage, by yarding a stated amount of cordwood instead of in money.

The action is trover. The taking of the property alleged to have been converted is not denied by the defendant, who justifies his taking as proper, in foreclosing his mortgage. The mortgage covered, specifically, a tractor purchased earlier by the plaintiff under a conditional sales agreement, with certain equipment identified therein but not described in the mortgage. Defendant's claim is that the recital that the mortgaged property was subject to a conditional sales agreement, identified in the mortgage, gave him a lien on

all the property purchased under the agreement. The verdict brought under review indicates that the jury decided factually that the parties had made the trade to which the plaintiff testified, prior to or contemporaneously with the execution of the note and chattel mortgage, and that the plaintiff had performed the service it involved prior to the maturity of the note. Defendant challenges, also, the sufficiency of the evidence to justify that verdict, by general motion for a new trial carrying the usual allegations.

The motion is not sustainable. The record carries ample competent evidence, if it was admissible, as it was, to support the verdict. Defendant's real claim in this connection is that the plaintiff's testimony:

> "puts a heavy strain upon the most optimistic credulity",

as was said in *Liberty* v. *Haines,* 103 Me. 182, 68 A. 738, and should have required proof of a "clear, convincing and conclusive" nature not supplied. Reference to that case and the authorities reviewed in it provides no support for the defendant. The necessity for credulity is more than eliminated by examination of the note itself. A recital therein, immediately following its promise "to pay * * * in 60 days" and prior to the recital "and interest annually until paid," is that the sum named is to be "collected from Wheeler Brothers account at Newton & Tebbetts mill at West Bethel." This indicates conclusively that when the note was given it was contemplated by the parties that it might be paid in some manner other than by the handing of cash to the payee by the maker. In this connection it is perhaps worthy of note that counsel for the defendant, presenting fifteen written requests for special instructions touching each and every other aspect of the case, asked for no amplification of the instructions given the jury on the burden of proof resting upon the plaintiff.

The case was before this court heretofore on report, submitting it "for the rendition of such judgment as the law and the evidence require, upon so much of the latter as is legally admissible." *Bartlett* v. *Newton,* 147 Me. 185, 84 A. (2nd) 679. That report was discharged on the ground that the only issue involved was one of fact which 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."

There can be no point in setting out in full the several requests for instructions. Six of them, in varying language, raise the identical issue asserted by the defendant in objecting to the admission of evidence concerning conversations between the plaintiff and the defendant at or prior to the time when the note and mortgage were executed, on the ground that whatever was said was "merged in the note" and conversations could not be proved "to vary the terms" thereof. Reliance, of course, is on the established principle of law, as briefly stated in Greenleaf's Evidence, that:

> "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument."

As more fully stated by the same authority, Sec. 275, Thirteenth Edition:

> "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement * * * was reduced to writing; and all oral testimony of a previous *colloquium* * * * conversations or declarations at the time * * *, as it would tend * * * to substitute a * * different contract * * *, to the prejudice, possibly, of one of the parties, is rejected",

quoted, almost verbatim, from *Stackpole* v. *Arnold,* 11 Mass. 27 at 30, 6 Am. Dec. 150. That writer, thereafter, however, asserted both that:

> "Parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms",

and that:

> "To ascertain the meaning of words used it is obvious that parol evidence of extraneous facts and circumstances may in some cases be admitted to a very great extent, without in any way infringing the spirit of the rule."

The foundation for the rule itself is stated more fully in 1 Jones on Evidence, Sec. 434, quoting verbatim the declaration of Stephen's Evidence, Art. 90, as follows:

> "When any * * * contract * * * has been reduced to the form of a document * * * no evidence may be given of * * * the terms of such contract * * * except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible * * *. *Nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence.*"

The closing sentence of that statement of the rule is emphasized herein because it supplies the reason ascribed by Greenleaf to the rule itself—that one of the parties might be prejudiced if a "different contract" (from the one signed) was proved. It explains, also, why oral testimony may be admitted to explain the meaning of words, or their use, without infringing the spirit of the rule.

Decided cases and other recognized authorities make it apparent that there is a great difference between executory contracts and executed ones when parties have contracted that the maker of a note may pay it in some manner other than in currency. *Crosman* v. *Fuller,* 17 Pick. 171; *Bu-*

chanon v. *Adams,* 49 N. J. L. 636, 10 A. 662, 60 Am. Rep. 666; *Patrick* v. *Petty,* 83 Ala. 420, 3 So. 779; *Consolidated Oil Co.* v. *Schaffner,* (Tex. Civ. App.) 286 S. W. 258—aff. 293 S. W. 159; *Braly* v. *Henry,* 71 Cal. 481, 60 Am. Rep. 543; 3 R. C. L. 1284, Sec. 516; 8 Am. Jur. 482, Sec. 835; 10 C. J. S. 981, Sec. 446. The Massachusetts, New Jersey and Texas cases, the two latter cited in American Jurisprudence, make it clear that executed contracts providing for the payment of a note in something other than money constitute payment, and a defense against any action thereon. The distinction between executory and executed contracts in this regard is well drawn in such cases as *Richardson* v. *Cooper,* 25 Me. 450, and *Cushing* v. *Wyman,* 44 Me. 121, the latter presenting a considerable review of authorities. A most excellent statement of the rule and its qualifications was made in *Patrick* v. *Petty, supra,* as follows:

> "When there is a promissory note, or other written obligation to pay money, and contemporaneously there is an oral agreement that the obligation is to be discharged by the doing of something other than the payment of money, so long as the contemporaneous, oral agreement remains executory, it is wholly inoperative, and no defense whatever to a suit on the obligation. When, however, the collateral, oral agreement has been performed, it becomes a complete cancellation and discharge of the written obligation, and a defense to an action brought to recover money. This is payment, not in money, but in something else, agreed to be received, and received as a substitute for money."

Such are the facts as the jury found them to be in this case.

Three additional requests for instructions relate to the fact that the note was a personal transaction between the plaintiff, an employee of the Wheeler Brothers named in the note, and the defendant, who was the president of Newton & Tebbetts, Inc., a corporation identified therein as "New-

ton & Tebbetts," and that while one of the partners in Wheeler Brothers signed the note as a joint maker with the plaintiff, he had no authority to bind the partnership (in that manner) and the defendant was not authorized to make the trade to which the plaintiff testified on behalf of his corporation. That Wheeler Brothers might have objected if Newton & Tebbetts, Inc., had attempted to charge the note to them, as it did not, or that Newton & Tebbetts, Inc., might have refused to pay the plaintiff the agreed price for yarding cordwood, and there was no evidence it did, is not material in litigation between the present parties, the maker and payee of the note which never passed to other hands. The accounting presented by the defendant between his corporation and Wheeler Brothers makes no mention of any cordwood yarded by the defendant.

Before alluding to five additional requests for instructions, four of which will be disposed of collectively in considering an instruction given the jury, to which an exception was taken that is not perfected in the Bill of Exceptions, special mention should be made of that reading:

> "If the jury finds there was an agreement binding on the parties that plaintiff was to be allowed six dollars a cord for yarding such wood, the plaintiff cannot recover unless the evidence satisfies the jury and they find that plaintiff did yard one hundred cords of such wood."

In substance that instruction was more than amply given. The justice presiding advised the jury that there should be a finding for the plaintiff if his story that the money was loaned with the understanding that it was to be repaid by labor in the woods was believed, and that by reason of it:

> "he within a short space of time went onto those premises and yarded over a hundred cords of wood, and that being true that his obligation was met, the note was paid and that the mortgage was of no effect",

and stated thereafter, the requirements of the burden of proof having been explained, that if the plaintiff:

> "has sustained the burden of proving that contract (the one to which he had testified) and his performance"

thereof (the yarding of the cordwood), he would be entitled to recover (because the mortgage the defendant assumed to foreclose was not in effect at the time his action was taken).

Four of the remaining exceptions are meaningless to the issue, in view of the jury finding relative to the oral contract and its performance. The exception not perfected, as heretofore noted, was that the jury must find for the plaintiff in some amount because the tractor equipment identified in the conditional sales agreement, and not mentioned in the mortgage, was not covered by the latter. The four instructions here treated collectively raise the same issue. They cannot be material in view of the fact that the jury found that the note had been paid. Under such circumstances the mortgage furnished no justification for taking any of the property by foreclosure.

This leaves for consideration the tenth request for instruction, which was, in effect, that if the jury should find for the plaintiff, allowance must be made for the unpaid purchase price due under the conditional sales agreement. This was not pressed by the defendant, and might be regarded as waived, no authority having been offered for its support. It is obvious, however, that as a matter of defense in mitigation of damages the burden rested upon the defendant to prove the amount. The record carries no evidence on the point other than the general statement of a representative of the conditional sales vendor, at the first trial of the case, that "about four thousand dollars, a little less" had been paid on the purchase price, leaving "a couple

of thousand dollars due" (made a part of the present record by stipulation), and the affirmation of the plaintiff at the retrial after that statement was read to him, that, as far as he knew, "there was two thousand dollars" still due. Notwithstanding that the principle which fixes the measure of damages in trover as the value of the property converted at the time of its conversion, with interest from the date thereof, is so well established as to require no citation of authority, we cite *Brown* v. *Haynes*, 52 Me. 578, because it decides so squarely that one who converts property is entitled to no deduction from the usual measure of damages because a third person had made payments to the owner under a conditional sale by which no title passed. We know of no reason why a converter of property of the value of $6,500, the present verdict, by the foreclosure of a mortgage securing $581.40, the amount secured, after the debt had been fully paid, should be entitled to any deduction because of a debt outstanding against the property converted, held by another.

Motion and exceptions overruled.

PERRY L. THOMPSON AND EDWARD K. THOMPSON
vs.
DENNIS J. GAUDETTE

PERRY L. THOMPSON
vs.
DENNIS J. GAUDETTE

Sagadahoc. Opinion, November 14, 1952

Estoppel. Tax Deeds. Silence. Statute of Limitation.

Splitting cause of action. Waiver.

The doctrine that if one knowingly, though passively, suffers another to purchase and expend money on land, without making known his claim, shall not afterward be permitted to exercise his legal right against such person, should be carefully and sparingly applied to circumstances of actual fraud, fault, negligence equivalent to fraud, silence under a duty to speak, or active intervention.

One is not estopped to assert his title by the casual knowledge that the purchaser of a defective tax title in possession of land is making improvements upon the land.

Strict compliance with all directions of the statute is essential to the validity of a tax sale of lands.

To create an estoppel, the conduct, misrepresentations or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party.

The law distinguishes between silence and encouragement.

One asserting title has as much right to assert it on the last day of the twenty years' limitation allowed by statute as upon the first day after disseizin and no estoppel can arise by the mere taking of full statutory time.

Under the rule relative to the splitting of actions, one who is disseized of an entire single parcel of land should not bring successive or simultaneous actions against the same disseizor when he could recover the whole in a single action.

A defendant may waive the rule against splitting causes of action and such waiver may be presumed where the defendant pleads the general issue, agrees to a reference under rule of court, and proceeds to trial without objection.

ON EXCEPTION.

These are real actions to recover land. The cases were referred to a referee under rule of court. The referee found for defendant in each case. The cases are before the Law Court on exceptions to the rejection and setting aside of the referee's report by the Superior Court. Exceptions overruled.

John P. Carey, for plaintiff.

Aldrich & Aldrich, for defendants.

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

MERRILL, J. On exceptions to rejection of referee's reports. These were two real actions brought to recover land in the city of Bath. They were heard together before the same referee, who found for the defendant in each case. Written objections were filed to the referee's reports. The reports were set aside and rejected by the Justice of the Superior Court. The cases are before us on exceptions to this action by the presiding justice.

One Lizzie B. Thompson, the mother of the plaintiffs, owned a parcel of land in the city of Bath which comprised the premises described in both writs. During her lifetime this parcel was sold several times for non-payment of taxes, the city of Bath being the purchaser at the several tax sales. The city never entered or took actual possession under its tax deeds or any of them. All of the tax sales were defective. However, prior to the decease of Lizzie B. Thompson, the city of Bath sold the premises in question to the

defendant and conveyed them to him by quit-claim deed dated May 19, 1930, recorded May 20, 1930. Lizzie B. Thompson died the next day, May 21, 1930. There is no evidence from which it could be found that she knew that the sale to the defendant had been made or was even in contemplation. The plaintiffs claim title to the demanded premises by descent from and as the only heirs of their mother, Lizzie B. Thompson.

On June 29, 1934, Edward K. Thompson quit-claimed to the defendant all of his right, title and interest in and to a specific parcel of the common land.

On May 11, 1950, Perry L. Thompson brought a real action to recover from the defendant one undivided half of so much of the land inherited from his mother as was described in said deed from Edward K. Thompson to the defendant. On the same day Perry L. Thompson and Edward K. Thompson brought a real action against the defendant to recover the balance of the parcel inherited from their mother. These are the actions now before us for consideration.

The defendant in each case filed a plea of the general issue with a brief statement setting up the statute of limitations and also an equitable estoppel. Both cases were referred under rule of court to the same referee who heard them together. He found *against* the defendant on the issue of *adverse possession* in both cases, the defendant having been in possession but 19 years and 357 days, and there being no evidence that the city of Bath had ever entered or taken actual possession of the premises. The referee, however, found *for* the defendant in both cases on the ground that the plaintiffs were *equitably estopped* from asserting their title against him.

The equitable estoppel sought to be established against these plaintiffs is not based upon any affirmative action on

their part. The referee found that the failure of the plaintiffs to assert their title or to warn the defendant of an intent so to do when they knew that he had purchased the tax title to the premises from the city, had entered into possession of the premises and fenced the same, and had made improvements, including the moving a house and small building thereon, estopped them and each of them from asserting their title against him. In other words, the defense in these cases sustained by the referee is equitable estoppel based on silence. The defense relies upon the principles set forth in *Martin* v. *Me. Cent. R. R. Co.*, 83 Me. 100 at 105, as decisive of the issues presented by these cases. In that case it is declared:

> "It is now familiar law that the owner of real or personal property may, by his conduct in inducing others to deal with it without informing them of his claim, debar himself from asserting his title to their injury. 'No principle,' says Chancellor Kent, in *Wendell* v. *Van Rensalaer*, 1 Johns. Ch. 344, 'is better established or founded on more solid considerations of equity and public utility than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel.' But it is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive."

However, in the Martin case we called attention to limitations upon the application of the doctrine just stated when we said:

> "Thus, while it is well established that the owner of land may by his conduct preclude himself from asserting his legal title, 'it is obvious that the doc-

> trine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles, if they were allowed to be affected by parol evidence. It should appear that there was either actual fraud, or fault or negligence equivalent to fraud on his part in concealing his title, or that he was silent when the circumstances would impel an honest man to speak, or that there was such actual intervention on his part as in *Storrs* v. *Barker, supra.' Trenton Banking Co.* v. *Duncan,* 86 N. Y. 221; *Shaw* v. *Beebe,* 35 Vt. 205."

The equitable estoppel in the *Martin* case, however, was not based upon silence. It was based upon the active conduct of the plaintiff. In that case the plaintiff had acquired title by adverse possession to property the record title of which was in his uncle. The defendant's predecessor in title sought to purchase the water right in question from the plaintiff. The plaintiff informed its representative that while he occupied the land, his uncle owned it. He agreed to see his uncle with the representative of the defendant's predecessor in title to see if the uncle would sell the water right or transfer it. Thereupon, he accompanied the representative of the defendant's predecessor in title to his uncle who, in the plaintiff's presence, executed a deed thereof to the defendant's predecessor in title under the immediate direction of the plaintiff. It further appeared that the plaintiff received from his uncle the consideration paid for the title. Under these circumstances, the court held that the plaintiff was estopped from asserting any title to the disturbance of the defendant's easement acquired under the title from his uncle.

The situation in the instant case is entirely different. So far as the record discloses, in this case the defendant acquired the tax title from the city of Bath without the

knowledge of either the plaintiffs' mother or the knowledge of the plaintiffs or either of them. Nor is there any evidence from which it could be found that either the mother or the plaintiffs knew of the defendant's contemplated purchase or that he was negotiating therefor. Furthermore, the defendant acquired that title prior to the decease of the plaintiffs' mother and before the plaintiffs' title passed to them by descent from her. The record does not show that the plaintiffs, or either of them, knew of the improvements made upon the land by the defendant or of his intent to make them before he made the same. The plaintiff, Perry L. Thompson, had no knowledge of any of the acts of the defendant with respect to the premises until after their completion. The record discloses that Edward K. Thompson did know that the defendant was finishing the house which he had moved onto the premises, the presence of which the plaintiff, Edward K. Thompson, did not discover until after the foundation was in and the house moved thereon. His only knowledge was the casual knowledge of a traveller on the highway seeing men working around the house after the foundation was in and the house thereon. Under these circumstances, failure to assert title or to give warning to the defendant does not furnish sufficient grounds to raise an equitable estoppel against the plaintiffs, or either of them, from asserting their title to the premises in question.

In these cases the plaintiffs claim as heirs of their mother whose title the city of Bath ineffectually attempted to forfeit for non-payment of taxes by tax sales. The defendant entered upon the premises under the quit-claim deed from the city of Bath with full knowledge that the only title that the city of Bath claimed to have in the premises was founded upon tax sales. In *Lowden* v. *Graham,* 136 Me. 341 at 344, we said:

> "A cardinal principle in determining the validity of tax sales has been iterated and reiterated in the

decisions of our Court. It is known as the rule of strict construction. Apt citations are:-

'The sale of land for taxes is a procedure *in invitum,* and the provisions of the statute authorizing such sale must be strictly complied with or the sale will be invalid.' *French* v. *Patterson,* 61 Me. 203 at 210.

'As the plaintiff's title is founded solely upon the provisions of the statute, such provisions must be strictly complied with.' *Greene* v. *Lunt,* 58 Me., 518 at 532.

'It has, therefore, been held, with great propriety, that, to make out a valid title, under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to, and authorizing such sales, have been punctiliously complied with.' *Brown* v. *Veazie,* 25 Me., 359.

'To prevent forfeitures strict constructions are not unreasonable.' *Cressey* v. *Parks,* 76 Me., 532.

'It is deemed essential to the validity of a tax sale of lands that there shall be a strict compliance with all the directions of the statute.' *Kelley* v. *Jones,* 110 Me., 360, 86 A., 252, 255.

See also *Baker* v. *Webber,* 102 Me., 414, 67 A., 144; *Ladd* v. *Dickey,* 84 Me., 190, 24 A., 813."

The defendant invokes an estoppel against the plaintiffs who are the sole heirs of the owner whose premises he purchased, based upon their silence and failure to assert their superior title to the premises when they knew that he had made and was making expenditures for improvements on the premises. In *Rogers* v. *Street Railway,* 100 Me. 86 at 93, speaking through Wiswell, C. J., we said:

"It is also undoubtedly true that, in order to create an estoppel, the conduct, misrepresentations or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, *and who*

> *did not have the same means of ascertaining the truth as did the other party.* (Emphasis ours.) * * * * * It is true that a person will not be estopped merely by his silence and failure to disclose facts that may be ascertained by an examination of public records, when the situation is not such as to place upon him the duty of making known the truth. In such a case he may rely upon the notice given to all by the public records. *Mason* v. *Philbrook,* 69 Maine, 57. But where the situation is such that it is his duty to speak, as where inquiries are made of him, or where, instead of merely remaining silent, he does some positive affirmative act, which would naturally have the effect of misleading or deceiving one, then the mere fact that the truth can be ascertained by an examination of the records, does not prevent the operation of the estoppel against him. *Hill* v. *Blackwelder,* 113 Ill. 283; *Robbins* v. *Moore,* 129 Ill. 30; *Morris* v. *Herndon,* 113 N. C. 237; *David* v. *Park,* 103 Mass. 501; Pom. Eq. Jur., Vol. 2, sec. 895; 11 A. & E. Encyl. of L., 2nd Ed., 436, and cases cited. *The law distinguishes between silence and encouragement.* While silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad and doubtful title would be a positive fraud that should bar and estop the party. Knouff v. Thompson, 16 Pa. St. 364." (Emphasis ours.)

See also *Stearns* v. *Kerr et als.,* 134 Me. 352.

Here the invalidity of the tax sales and the consequent failure of title in the city of Bath, the defendant's grantor, was as easily ascertainable by the defendant as it was by the plaintiffs. The defendant could have searched the records of the city of Bath and ascertained the defect in the tax sale proceedings as easily as could the plaintiffs. The information was open to both alike. There is no evidence that the plaintiffs had searched the records and discovered or knew of the invalidity of the tax sales prior to the time when the defendant had made all of the expenditures which

he did make and which he now relies upon as creating the estoppel. On the other hand, it is clear that as early as 1934 the defendant knew that his title was at least doubtful, and that if he made improvements upon the property within the six years required under the betterments statute the plaintiffs might upset his title and that without reimbursement for the improvements he had made. It was for this reason and under advice of counsel that he obtained the quitclaim deed from Edward K. Thompson.

It is to be borne in mind that although the plaintiffs, taking by descent and not by purchase, had only such title as their mother had at the date of the death, *Stearns* v. *Kerr et al.*, 134 Me. 352, there is not a scintilla of evidence in the case of an estoppel against the mother. The defendant purchased from the city of Bath but two days prior to the mother's death. The case is void of evidence that the mother had knowledge that the purchase was even contemplated by the defendant or that it had been effected. Therefore, estoppel, if it exists, must be an estoppel which has arisen subsequent to the devolution of title from the mother to the plaintiffs. There is no evidence that they, or either of them, had any knowledge respecting the transfer from the city of Bath to the defendant until after it was fully accomplished.

While we are not prepared to state that circumstances could not exist under which the owner of land might be equitably estopped from asserting his title against the purchaser of a tax title thereto from the city, he certainly owes no active duty of protecting the purchaser of such tax title from his own folly in purchasing a void title and dealing with the land as an owner thereof. Knowledge that the purchaser has purchased the land, knowledge that he is in possession of the same, and casual knowledge that he is making improvements thereon does not cast upon the owner the duty to speak. As we said in *B. & M. Railroad* v. *Hannaford*

Bros. et al., 144 Me. 306, 315: "Silence may give rise to estoppel but only when there is a duty to speak." In that case we quoted with approval the following statement from 19 Am. Jur. 662:

> "There must be some element of turpitude or negligence connected with the silence or inaction by which the other party is misled to his injury. In other words, to give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and, in addition, an obligation or duty to do so.
>
> The mere fact that another may act to his prejudice if the true state of things is not disclosed does not render silence culpable or make it operate as an estoppel against one who owes no duty of active diligence to protect the other party from injury."

As owners of the property by descent from their mother, the plaintiffs owed the defendant no duty to warn him that his title was or might be void or that they would or might assert their title against his. He had the same means of ascertaining the invalidity of his title that they had. As stated in *Rogers* v. *Street Railway, supra,* "The law distinguishes between silence and encouragement." In this case, there being no duty to speak, silence was innocent and lawful and no positive acts or words of the plaintiffs, or either of them, are shown by means of which the defendant was encouraged in any way to act to his damage. As we said in *B. & M. Railroad* v. *Hannaford Bros. et al., supra,* quoting from 19 Am. Jur. 855, Sec. 200:

> "The rule is well established that it is a question of law for the court, in any proceedings, even though the case may involve a trial by jury, whether the facts constitute an estoppel, if the facts are undisputed."

In this case, taking every fact most favorably for the defendant, it was an error of law to find that the plaintiffs, or

either of them, were estopped from setting up their title as against the defendant. There was no evidence in the case of facts sufficient to create an estoppel.

It was urged in argument that the length of time which the plaintiffs allowed to elapse before they asserted their title made it inequitable for them to assert the same. The statute of limitations gave them a full period of twenty years within which to assert their title. They had as much right to assert it on the last day of the twenty years allowed them within which to bring their action as they did upon the first day after the disseizin. The measure of time being prescribed by statute, taking the full statutory time allowed cannot in and of itself be the basis of an estoppel. The only penalty to which mere delay subjects a *disseizee* is that the defendant may become entitled to recompense for betterments under R. S. (1944), Chap. 158, Sec. 20 et seq. Section 20 provides:

> "When the demanded premises have been in the actual possession of the tenant or of those under whom he claims for 6 successive years or more before commencement of the action, such tenant shall be allowed a compensation for the value of any buildings and improvements on the premises made by him or by those under him whom he claims, to be ascertained and adjusted as hereinafter provided."

If the plaintiffs, or either of them, were estopped it must be because of action taken by them or failure to act by them after the title descended to them. We hold that there was no evidence of either action or inaction upon their part which was sufficient to create an estoppel. It was an error of law on the part of the referee in each case to find estoppel and the exceptions to the action of the Justice of the Superior Court in rejecting the reports of the referee must be overruled.

We are not unmindful of the fact that the title of Perry L. Thompson was in no way affected by Edward K. Thompson's conveyance of all of his right, title and interest in and to a specific portion of the common land to the defendant. After that conveyance Perry was still the owner of an undivided half interest in the *whole* tract. *Soutter* v. *Atwood,* 34 Me. 153; *Soutter* v. *Porter,* 27 Me. 405, 416-17; *Duncan* v. *Sylvester,* 24 Me. 482; *Bigelow* v. *Littlefield,* 52 Me. 24; *Hutchinson* v. *Chase,* 39 Me. 508, 513; 14 Am. Jur. 151, Sec. 86. The defendant having disseized him thereof, he could have brought his sole action against the defendant to recover his undivided interest in the whole. R. S. (1944), Chap. 158, Secs. 9 and 10. Instead of bringing a sole action to recover his undivided interest in the whole, he brought two actions, (1) a sole action to recover an undivided half of the specific parcel conveyed by his co-tenant, Edward, to the defendant and, (2) a joint action with Edward to recover the remainder of the land. Under the rule relative to the splitting of actions, one who is disseized of an entire single parcel of land should not bring successive or simultaneous actions against the same disseizor to recover possession of separate parcels making up the whole when he could recover the whole in a single action. The rule against splitting a cause of action applies to actions for the recovery of land. Consequently, a party claiming title to a single undivided tract or parcel of land cannot maintain different actions against the same defendant to recover different portions thereof. 1 C. J. S. 1339, Sec. 105, 1 C. J. 1120, Sec. 304, *Dils* v. *Justice,* 127 S. W. (Ky.) 472; *Craig et al.* v. *Broocks,* 127 S. W. (Tex.) 572, *Roby* v. *Eggers,* 29 N. E. (Ind.) 365. The defendant, however, may waive the enforcement of the rule against splitting the cause of action and such a waiver will be presumed unless timely and proper objection is made. 1 C. J. S. 1312, Sec. 102 g. The rule relative to waiver is well stated by the court in *Mayfield* v. *Kovac,* 41 Ohio App. 310, 181 N. E. 28, 30:

> "However, we think that it is equally well established by the authorities that the rule prohibiting the splitting of a cause of action is primarily for the benefit of the defendant, and that he may waive the same, and that, where two actions are brought when but one should have been brought, and the person against whom they are brought fails to interpose in the second action, and at the earliest opportunity, a plea in bar, or otherwise object to the trial of such action, and submits the case upon the merits, he will be held to have impliedly consented to the splitting of said single cause of action. Fox v. Althorp, 40 Ohio St. 322; Georgia Ry. & Power Co. v. Endsley, 167 Ga. 439, 145 S.E. 851, 62 A.L.R. 256; Southern Pac. Ry. Co. v. United States (C. C. A.) 186 F. 737; Louisville Bridge Co. v. L. & N. R. Co., 116 Ky. 258, 75 S.W. 285; Cassidy v. Berkovitz, 169 Ky. 785, 185 S.W. 129."

In this case the defendant by pleading the general issue to both actions, agreeing to their reference under rule of court and proceeding to a joint trial of both actions on the merits waived any objection that he had to the splitting of the cause of action. The rendition of judgment for the plaintiff, Perry L. Thompson, in both actions will give him no greater interest in the land or different title therein against the defendant then he would have were he to recover an undivided half of the whole tract in a sole action brought by him against the defendant.

The foregoing observations as to the effect of Edward K. Thompson's deed and the splitting of his cause of action by Perry L. Thompson are made in the interest of clarification and in order that the *ratio decidendi* of this opinion may not be misconstrued. In holding that the present actions may be maintained we do not even by implication intimate that a conveyance of a specific portion of a single parcel of land by one tenant in common by metes and bounds *in and of itself* creates any *legal title* in the premises in his grantee,

or that Perry L. Thompson is a tenant in common *with the defendant* in the parcel quitclaimed to him by Edward. Nor do we intimate that the co-tenant of such grantor may, *as of right* split his cause of action and enforce the same by simultaneous actions to recover separate portions of the common property when he is disseized of the whole parcel by a single defendant. It is only because the present defendant failed to take advantage of the unwarranted splitting of his cause of action by Perry L. Thompson at the first opportunity therefor, and proceeded to a simultaneous reference and trial of both actions on the merits that we hold that the separate actions may now be maintained. We suggest that the proper procedure under facts similar to those in this case and one that might well be adopted by the careful practitioner would be either (1) to bring separate real actions in the name of each plaintiff to recover an undivided half of the whole tract of land which descended to them from their mother, or (2) to bring a joint action in the names of both plaintiffs to recover the same. In such event, and under proper pleadings by the defendant, the parties could make certain that their respective rights would be determined as a matter of right.

The exceptions must be overruled. Entry in each case to be,

Exceptions overruled.

AXEL SMEDBERG
IN BEHALF OF HIMSELF AND OTHERS
WHO MAY WISH TO JOIN AS PLAINTIFFS, IN EQUITY
vs.
MOXIE DAM COMPANY

Somerset. Opinion, November 18, 1952.

Equity. Great Ponds. Nuisances. Damnum absque injuria.

Full ownership and sovereignty over great ponds lies in the State.

It is well settled that no person can maintain an action for a common nuisance, unless he has suffered therefrom some special or peculiar damages other and greater than those sustained by the public generally.

There must be an infringement of the plaintiff's private rights to permit recovery.

A mere hindrance in the enjoyment of a public right is *damnum absque injuria.*

ON APPEAL.

This is a bill in equity to enjoin the raising and lowering of water at Lake Moxie. The case is before the Law Court on appeal from a decree dismissing the bill and sustaining special and general demurrers. Appeal dismissed. Decree below affirmed with costs.

Jerome G. Daviau, for complainants.

Louis C. Stearns,
Louis C. Stearns, 3rd
Perkins, Weeks & Hutchins, for defendants.

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

WILLIAMSON, J. On appeal. This is a bill in equity by the owner of a hotel and sporting camps to enjoin the rais-

ing and lowering of the waters of Lake Moxie, a great pond, at certain seasons of the year by means of the defendant's dam at the outlet. Mr. Smedberg is the only plaintiff, although the bill was brought "in behalf of himself, and others similarly situated who may wish to join. . . ." After hearing on bill and demurrers, both general and special, the single justice entered a decree sustaining the demurrers and dismissing the bill from which the plaintiff appealed.

The issue is: Assuming the truth of the matters well pleaded, does the plaintiff in his bill set forth a cause entitling him to relief in equity?

The plaintiff's hotel and sporting camps are situated near but not touching the shore of Lake Moxie and near the defendant's dam. The plaintiff is not a shore or littoral owner. From a public landing the plaintiff rents boats. The business is operated for the accommodation of persons hunting and fishing in the region of Lake Moxie. There is nothing unusual about the plaintiff's business. It is a part of our great recreational industry.

Under a charter granted by the Legislature in 1911 the defendant was authorized to maintain dams at Lake Moxie "for the purpose of raising and storing a head of water for log driving purposes." *P. & S. L., 1911,* Chap. *155.* Here again there is nothing unusual about the charter.

The plaintiff does not object to the defendant carrying out its chartered purposes; that is, to the maintenance of the dam for log driving purposes. The burden of the complaint is: (1) That contrary to its charter the defendant has caused "the level of the water in Lake Moxie aforesaid to be fluctuated by sluicing out water not for the purpose of log driving or any other legitimate and lawful purpose, thus draining Lake Moxie to its extreme low level and then closing said gates and sluiceways so as to cause the level of water in Lake Moxie to be raised to its extreme high

level, which procedure the defendant has repeated, or caused to be repeated, at least once each year, and particularly in the fall of the year, and sometimes many times each year, contrary to its charter, and therefore, *ultra vires.*"; (2) that fishing in the lake has been seriously damaged in particular by destruction of the spawn; (3) that as a consequence fewer people are attracted to Lake Moxie with loss of revenue to the plaintiff; (4) that many others in business in the vicinity are similarly affected; (5) that the public landing has been rendered inaccessible and useless for the conduct of plaintiff's business of renting boats.

The plaintiff prays, in addition to a prayer for general relief, that the Dam Company may be "perpetually enjoined from fluctuating or changing the level of said Lake Moxie, unlawfully and contrary to its charter and contrary to the public policy of said State of Maine and contrary to the vested interests and property rights of the plaintiff and others similarly situated."

For purposes of the demurrers the defendant concedes, to quote the brief, "that all these very things which plaintiff now complains of have been going on to his detriment for twenty-five years." This condition will continue unless prevented by equity. Under these circumstances is a *legal interest* of the plaintiff threatened with harm or destruction? Has the plaintiff such an interest in the fishing and use of the public landing that equity may give the relief requested?

We start with the proposition that the State has full right to control and regulate the waters of Lake Moxie and the fishing therein. Full ownership and sovereignty over great ponds lies in the State. *American Woolen Co.* v. *Kennebec Water District,* 102 Me. 153, 66 A. 316; *Conant* v. *Jordan,* 107 Me. 227, 77 A. 938; *Opinion of Justices,* 118 Me. 503, 106 A. 865; *Brown* v. *DeNormandie,* 123 Me. 535, 124 A.

697. In *Fernald* v. *Knox Woolen Co.*, 82 Me. 48, 19 A. 93, a littoral owner obtained an injunction against drawing down the water of a lake by deepening the outlet. It was held that the waters of lakes may not be drawn down below natural level without legislative authority. The court said, at page 56: "As great ponds and lakes are public property, the state may undoubtedly control and regulate their use as it thinks proper." For purposes of the demurrers the plaintiff in substance has complained that the defendant is maintaining a public nuisance in controlling and regulating the waters of the lake in a manner not authorized by its charter.

Our problem may be considerably narrowed. First, we may assume that the defendant has violated, and, unless enjoined will continue to violate, its charter in its methods of control of the waters of Lake Moxie. The defendant for purposes of this case is maintaining and threatens to maintain a public nuisance. It goes without question that the public, that is the State, may insist that the defendant confine its activities within the grant of the Legislature. Second, it is unnecessary to consider what rights, if any, in fishing or a public landing may belong to owners of shore property on our great ponds. The plaintiff's hotel and camps are not on the shore. The plaintiff does not contend that he has gained ownership of any nature in shore property from the rental of boats at the public landing.

Two issues remain for consideration. First, does a sporting camp owner under the circumstances outlined suffer an injury different in kind from the injury to the public? May he have injunctive relief based upon a special, peculiar, distinct, and private injury from the maintenance of a public nuisance? Second, in view of the existence of the present situation for twenty-five years without complaint, is plaintiff barred by laches, or is his claim stale? Since the first issue must be answered in the negative, there will be no need of considering the defense of laches or staleness.

Justice Appleton, later Chief Justice, stated the rule clearly in *Brown* v. *Watson,* 47 Me. 161, at page 162, as follows:

> "The law is well settled, that no person can maintain an action for a common nuisance, unless he has suffered therefrom some special and peculiar damages other and greater than those sustained by the public generally."

The problem, as is so often the case, is not in ascertaining the law but in applying the accepted legal principle to the facts. We comment on a few of the many cases in our reports in which the court has been faced with a like question. In *Smart* v. *Lumber Co.,* 103 Me. 37, 68 A. 527, the plaintiff, a riparian owner of a summer cottage on a navigable or floatable stream, recovered against defendant engaged in driving logs for interference with plaintiff's right of access to his cottage. The ground of recovery was not that the plaintiff used the stream more than others, but that his use to reach his cottage differed from the use of the public. In the equity case of *Fernald* v. *Knox Woolen Co., supra,* a littoral owner on a great pond secured an injunction against withdrawal of water below the natural level. The court said, at page 56:

> "And this natural water frontage may be as valuable to the land owner as the right to draw water is to the mill-owner. But whether of equal value or not, it is of equal validity in law, and entitled to equal protection."

Other cases of interest in which the private person has prevailed are: *Cole* v. *Sprowl,* 35 Me. 161 (building on highway); *Dudley* v. *Kennedy,* 63 Me. 465 (obstruction of river); *Franklin Wharf* v. *Portland,* 67 Me. 46 (damage to docks from maintenance of sewer); *Tuell* v. *Inhabitants of Marion,* 110 Me. 460, 86 A. 980 (obstruction to stream by bridge-increasing expense of log driving); *Yates* v. *Tiffiny,* 126 Me. 128, 136 A. 668 (obstruction to highway cutting off

right of access to private property); *Larson* v. *N. E. Tel. & Tel. Co.*, 141 Me. 326, 44 A. (2nd) 1 (obstruction of highway). See also *Lockwood Co.* v. *Lawrence*, 77 Me. 297, 52 A. R. 763 (leading case in equity on rights of riparian proprietors); 39 *Am. Jur.* 378, Sec. 124 et seq. "Nuisances"; *Joyce on Nuisances*, 1906 Ed., Sec. 430; 66 *C. J. S.* 831, Sec. 78 et seq. "Nuisances."

There must be an infringement of the plaintiff's private rights to permit recovery at law or relief in equity. In *Whitmore* v. *Brown*, 102 Me. 47, 65 A. 516, the owner of land at the seashore occupied for summer residential purposes was held to have no complaint in equity against the extension of a wharf or the maintenance of other structures on tide flats owned by the defendant in front of plaintiff's land. The court said, at page 59:

> "Though by reason of her land being on this cove the plaintiff may have more need or occasion than other persons to make use of the public right to the unimpeded navigation of the cove, and her land may be more damaged by the violation of that right, the right itself is still public and not private. Her ownership of land on the cove gives her no greater nor different right to navigate it. Every other citizen has the same right in kind and degree. The plaintiff may have a greater interest than others in the right and a greater need of its enforcement, but that does not change the public right into a private right. *Frost* v. *Wash. Co. R. R. Co.*, 96 Maine, 76. It may be that an individual actually obstructed by an unauthorized structure while in the actual exercise of the public right may maintain an action for damages resulting, as was held in *Brown* v. *Watson*, 47 Maine, 161; but that is a different case from this where the only complaint is of the unfavorable effect upon the enjoyment and value of the land."

In *Frost* v. *Wash. Co. R. R. Co.*, 96 Me. 76, 51 A. 806, the plaintiff sought unsuccessfully to recover damages by rea-

son of the building and maintenance of a trestle, lawfully erected and maintained, across a channel leading to a tide water cove whereby access was cut off from the plaintiff's store and mill to the high seas. The court held that the right of navigation of the plaintiff was neither his private property nor his private right. The damage which unquestionably the plaintiff suffered in loss of revenue and loss of value of his property was no more than *damnum absque injuria.* The trestle in this instance was lawfully erected and maintained and the case in this respect differs from the *Whitmore* case, *supra,* in which the structures proposed and existing were not lawful.

In *Water District* v. *Me. Turnpike Authority,* 145 Me. 35, at page 54, 71 A. (2nd) 520, 531 we read:

> "The only damage claimed by the plaintiff as we have heretofore shown was to its alleged right to use the water of Branch Brook as a source of supply for public distribution. This was a proprietary right which, although exercised by the District, the evidence before the referees did not show that it legally possessed. This does not constitute such special damage to the plaintiff as would entitle the plaintiff to recover, even if the acts of the defendant amounted to the creation or maintenance of a public nuisance."

In *Bouquet* v. *Hackensack Water Co.,* 90 N. J. L. 203, 101 A. 379, LRA 1917F 206, a riparian owner on a stream was denied recovery on a complaint that the acts of the defendant had made the stream less pleasant for boating. It was held that the private right was one of access and that boating was a public right. In *Kuehn* v. *Milwaukee,* 83 Wis. 583, 53 N. W. 912, 18 L. R. A. 553, a commercial fisherman sought an injunction against the city for disposal of garbage in the lake. It was held that the injury was to the public fishery and that the plaintiff had suffered no damage different in kind from the public. A different result was

reached by the Oregon court in *Columbia River Fishermen's P. U.* v. *City of St. Helens*, 160 Ore. 654, 87 P. (2nd) 195.

Other cases in which the result has been in favor of the defendant are: *Low* v. *Knowlton*, 26 Me. 128 (destruction of navigation); *Holmes* v. *Corthell*, 80 Me. 31, 12 A. 730 (obstruction of a way); *Foley, Malloy* v. *Farnham Co.*, 135 Me. 29, 188 A. 708 (trespassers), and *Taylor* v. *Street Ry.*, 91 Me. 193, 39 A. 560 (equity—no injunction by abutting owners against use of street by street railway).

Returning to the present case, what private right of the plaintiff will be violated by the continuance of the present method of control of the waters of Lake Moxie by the defendant? The plaintiff could not properly object to the activities of the defendant if taken under the terms of its charter. Fishing must give way to log driving, if the Legislature so permits.

No more could the plaintiff object to restrictions upon fishing in the lake. The catch may be limited, and the season changed. There is no need to discuss the broad powers of the State in the development and conservation of our inland fishing. The right of the plaintiff in the fishing at Lake Moxie is neither greater nor less in our view than the right of the public generally. Whatever affects the fishing, whether for good or for ill, in a legal sense equally touches all.

The plaintiff has chosen to engage in a business based upon the use of a resource held in trust by the State. He does not thereby create for himself or for his customers a private right requiring or entitling him or them to any greater protection of fishing than belongs to every one of the public. Loss in value from damage to the fishing is not peculiar to the plaintiff. The private camps in the region doubtless are worth less for the same reason. The guide, the storekeeper, and all business men whose livelihood depends in

any part upon the lure of fishing, suffer no less than the plaintiff. The injury to each is identical in kind.

The plaintiff, as the owner of sporting camps, can claim no right of fishing greater than the sum total of the rights of his prospective guests. It is the rights of this changing group of fishermen which in substance he says are threatened with destruction. If the individual fisherman cannot complain but must await and rely upon action by the State, then the group of fishermen have no greater *personal* grievance. If the group has no grievance, their representative, the plaintiff, can claim no violation of a legal right on their behalf, or on his own account, for he had no *personal right* not bound within the rights of the group.

"The true test seems to be whether the injury complained of is the violation of an individual right, or merely a hindrance to the plaintiff in the enjoyment of the public right." *David M. Swain & Son* v. *Chicago, B. & Q. R. Co.*, 252 Ill. 622, 97 N. E. 247, 38 L. R. A. N. S. 763, in which the *Smart* case, *supra,* is cited with approval.

We conclude that the complaint at best from the viewpoint of the plaintiff shows a hindrance only to the plaintiff and his guests, as individuals, in their enjoyment of a public right. Such a hindrance does not affect a private right of the plaintiff. His loss is *damnum absque injuria.*

The claim of damage for loss of business in renting boats at the public landing may be disposed of briefly. A public landing, as the name indicates, is a landing for use of the public in the transfer of persons and goods between land and water. The plaintiff can claim no greater rights than any other member of the public in the landing at Lake Moxie, and such rights do not include a license to use the landing as the site of a private business.

We may also point out that the plaintiff's real objection about the landing seems to be that the defendant did not

keep the lake above its natural level. There is nothing in the complaint to indicate any duty on the part of the defendant to maintain the water at any given level or in particular above the natural level. Surely the defendant was under no obligation because it owned a dam, to maintain the lake at such a level that the landing became accessible for the business venture of renting boats. Again the plaintiff must bear his loss without redress.

The vital complaint of the plaintiff is that defendant in its operation of the dam is destroying the great and valuable resource of fishing upon which the plaintiff in part has based his business. Should the waters be used to aid and improve the fishing or used for other economic and social purposes? The State has full power to regulate and control the fishing on Lake Moxie and the utilization of its waters. The State, and the State alone, on the facts set forth in this complaint has the right to complain against acts of the defendant which may constitute a public nuisance.

It is not enough that plaintiff has been damaged. He must show an infringement of private rights, and this he has failed to do.

Appeal dismissed.

Decree below affirmed with costs.

STATE OF MAINE
vs.
ANTONY CASALE

Cumberland. Opinion, November 21, 1952.

Criminal Law. Evidence. New Trial. Commercial Vice. Directed Verdict. Indictment.

It has always been the rule that relevant statements made in the presence and hearing of the accused are admissible. It must appear to the presiding justice, in the first instance, that the respondent either heard what was said or was in a position to hear so he could have explained, denied or otherwise contradicted if he had so desired. The allowance of such testimony is a matter of sound judicial discretion.

The fact that a defendant does not testify is not evidence of his guilt.

It is when the State's evidence is so weak or defective that a verdict of guilty cannot be sustained, that the court should direct an acquittal.

An indictment which alleges illegal transportation "through and across the State of Maine, to wit, from Portland, through South Portland, Scarborough, in and through the County of Cumberland and into York County" is not wanting in preciseness under R. S., 1944, Chap. 212, Sec. 20.

The tests to be applied on motions for new trial under R. S., 1944, Chap. 94, Sec. 15 for newly discovered evidence, are (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issues, and (5) that it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

This is an action by indictment under R. S., 1944, Chap. 121, Sec. 20 for commercial vice. The jury returned a verdict of guilty. Respondent brought exceptions and moved for a new trial on the ground of newly discovered evidence.

R. S., 1944, Chap. 94, Sec. 15. The case is before the Law Court on exceptions and motion for new trial. Exceptions overruled. Motion overruled.

Daniel C. McDonald and William H. Niehoff, for State.

Walter M. Tapley,
Benjamin F. Chesley of Massachusetts Bar,
James Morelli of Massachusetts Bar, for respondent.

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

FELLOWS, J. This was an indictment found by the Grand Jury of the Superior Court for Cumberland County under the provisions of Revised Statutes 1944, Chapter 121, Section 20, against Anthony Casale for transporting a female person within the state for purposes of prostitution. The indictment was tried at the January term of the Cumberland County Superior Court, and the verdict was guilty. The case now comes to the Law Court on exceptions to the admission of certain testimony; exceptions to the denial of motion for directed verdict, and exceptions to the denial of motion in arrest of judgment. In addition to the foregoing exceptions printed as one volume, there was a motion filed on April 14, 1952 for a new trial on the ground of newly discovered evidence, and the evidence in support was taken out before the Justice of the Superior Court at Portland on April 28, 1952 (Revised Statutes 1944, Chapter 94, Section 15), and this motion for a new trial with the evidence, is a part of this record in a separate volume.

The evidence taken at the trial shows that on January 4, 1951 one Anthony Bruni of Portland, who was acquainted with a girl known to him as Marilyn Sargent, took her in his automobile from the bus station in Portland to "right across from Hay's drugstore" where he introduced her to

the respondent Tony Casale. Bruni told Casale that he (Casale) "could get her a job somewheres as a waitress or something." Bruni then left her with Casale and drove away.

Marilyn Sargent, nineteen years old, testified that she talked with the respondent, Casale, and told him she was experienced in housework and waitress work and wanted a job. Casale said he knew of a job that he could get for her, and she went with him in his automobile from Portland to "Melody Ranch" in Old Orchard, carried on by one Lillian Levesque. "Q. What happened when you arrived there with Mr. Casale in the station wagon? A. Mr. Casale started to get out of the beach wagon, and then he turned around and said to me 'Oh, by the way, this is a cat house,' and I said, 'I don't understand. I don't know what you mean,' and he says, 'This is a house of prostitution,' and I said, 'Well, I don't want anything to do with it.' I said, 'After all I didn't come out here for that kind of a job and I want you to take me back to Portland,' and he said 'No.' He wanted me to come into the house because he wanted to speak with Lillian, and he informed me that I was going into the house, and I went." * * * "Q. Now what happened when you got in there? A. He rang the door bell and Lillian met us at the door, and Lillian took me into the living room. She went back out into the kitchen and conversed with Tony Casale for a few minutes. Then she came into the living room and sat down and started to talk to me. Q. Was the door open? A. Yes. Q. Was he close enough so he could hear the conversation? A. Yes. Q. What conversation was had there with Lillian? * * * (Objection) (Admitted). A. She asked me my name and I told her. She asked me how old I was and I told her, and then I asked her if I was going to be allowed to go back to Portland. She didn't answer my question, and I asked her if I could believe Tony Casale when he said that this was a house of illfame,

and she said 'Yes,' and I informed her that I wanted to go back to Portland, and if I was not allowed to go back to Portland that something would be done about it. Then she got very nasty with me, and told me I wouldn't be allowed to go back to Portland. In the meanwhile Tony Casale went out the door."

Miss Sargent further testified that when Casale had gone, she tried to leave the Levesque house, but the doors had been locked, her hands were twisted by Lillian Levesque, she was taken and locked into an upstairs room, and she was obliged to stay and submit to prostitution for a period of approximately ten days. She had thirty men visit her at $10.00 each, and she was paid half of her earnings by Lillian Levesque. On arriving at Portland after being permitted to leave Old Orchard, she met her "boy friend" Donald Morris, and told him what had happened. She married Morris on January 30, 1951, and she went to the police with her complaint sometime after her marriage.

The respondent did not testify and no evidence was introduced by him. The respondent rested his case at the close of the State's evidence.

EXCEPTIONS

FIRST EXCEPTION: The attorney for the respondent objected to the admission of the testimony (quoted above) regarding the conversation between Marilyn Sargent and Lillian Levesque, on the ground that it was not in the presence or hearing of the respondent. The two women were in the living room and it was admitted that the respondent was approximately 28 feet away, and in the kitchen. Marilyn Sargent testified she could see the respondent in the kitchen near the sink, and that he could hear what was said. The kitchen and living room were separated only by a "very small room," with all doors open from living room to

kitchen. The conversation between the women was "in a regular tone of voice until I got angry and then I believe I raised my voice quite highly." The presiding justice admitted the conversation for consideration by the jury, subject to respondent's objection and exception.

It has always been the rule that relevant statements made in the presence and hearing of the accused are admissible. It must appear to the justice presiding, in the first instance, that the respondent either heard what was said or was in a position to hear, so that he could have explained, denied, or otherwise contradicted if he had so desired.

Whether or not, under all the circumstances, testimony may be given regarding statements made in the presence of the accused, is a matter of sound judicial discretion. What the facts were is a question for the jury, and the jury must pass upon whether the respondent actually heard, and whether he should have spoken or kept silent, or whether he was in a situation where not at liberty to reply. This rule is fully discussed in 16 Corpus Juris, "Criminal Law," 631, Sections 1256-1262, citing Maine and Massachusetts cases. See also *Blanchard* v. *Hodgkins,* 62 Me. 119; *State* v. *Reed,* 62 Me. 129, 141; *Keeling Easter Co.* v. *Dunning,* 113 Me. 34, 37; *Thayer* v. *Usher,* 98 Me. 468; *Gerulis* v. *Viens,* 130 Me. 378, 381. We see nothing in the record to indicate that the presiding justice used other than proper discretion in permitting the witness to testify regarding the claimed conversation. This exception is overruled.

SECOND EXCEPTION: This exception was taken to the denial of respondent's motion for a directed verdict. There are probably only the two persons in the beach wagon who know the material and important facts with regard to the ride given by the respondent to Marilyn Sargent from Portland into York County, and whether she was enticed to ride by the prospect of lawful employment as a waitress or

housekeeper held out to her by the respondent. Did he transport with intent to "induce, entice?" She so testified. Her testimony, if true, contains all the elements necessary to convict the respondent within the terms of the statute. The jury saw her and heard her testify. The jury believed her story relative to the transportation and the purpose.

The statute (Revised Statutes 1944, Chapter 121, Section 20) provides as follows: "Whoever knowingly transports or causes to be transported, or aids or assists in obtaining transportation for, by any means of conveyance into, through, or across the state, any female person for the purpose of prostitution or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such female person to become a prostitute shall be punished." * * * "Such person may be prosecuted, indicted, tried, and convicted in any county in or through which he shall have transported or attempted to transport any female person as aforesaid."

The foregoing statute was passed by the legislature for the purpose of prohibiting commercialized vice. *State* v. *Day,* 132 Me. 38. Similar statutes are in force in many other states. See 73 *Corpus Juris Secundum* "Prostitution," 233, Section 7-C and cases construing similar statutes.

Here the respondent is charged "did knowingly transport by means of a conveyance, to wit: a beach wagon automobile, through and across the State of Maine, to wit: from Portland, through South Portland, Scarborough, in and through the County of Cumberland and into York County, a female person, to wit: Marilyn Sargent, with intent and purpose to induce and entice said female person to become a prostitute." The State's evidence, if believed, and if it convinces beyond a reasonable doubt (with the inferences that may properly be drawn from it) would authorize a jury to convict. *State* v. *Bobb,* 138 Me. 242. The jury could find

that the elements necessary to make out the offense created by the statute are present. It could find that the respondent acted "knowingly," and that he "transported" a "female person through and across the State of Maine" with "intent and purpose, to induce and entice" her to become a prostitute as alleged in the indictment. "The purpose in transporting determines the guilt regardless of whether that purpose be consummated." See *Commonwealth* v. *Neely,* (Penna.), 10 Atl. (2nd) 925 construing a like statute.

The respondent did not offer to testify as was his right and privilege, and the fact that he did not testify is not evidence of his guilt. R. S., 1944, Chap. 135, Sec. 22.

It is when the State's evidence is so weak or defective that a verdict of guilty cannot be sustained, that the court should direct an acquittal. *State* v. *Cady,* 82 Me. 426; *State* v. *Bartley,* 105 Me. 505; *State* v. *Grondin,* 113 Me. 479; *State* v. *Keating,* 123 Me. 561.

This case before us is not one where the verdict should have been directed. The presiding justice was correct in submitting the facts to the jury. The second exception must be overruled.

THIRD EXCEPTION: This exception was to the denial of respondent's motion in arrest of judgment on the ground, as stated in respondent's brief, that "the germane portion of the statute which is concerned in the motion in arrest of judgment is 'into, through, or across the state.'" The indictment alleges "through and across the State of Maine, to wit, from Portland, through South Portland, Scarborough, in and through the County of Cumberland and into York County." The respondent says the indictment is not exact enough, it is wanting in preciseness, and it would not prevent subsequent criminal action. The respondent cites *State* v. *Peterson,* 136 Me. 165 and *State* v. *Lashus,* 79 Me. 541.

The case of *State* v. *Peterson,* 136 Me. 165 was where the complaint for driving under the influence of intoxicating liquor stated only that the respondent "operated a motor vehicle over and on Route 3 in Gray while he was then and there under the influence of intoxicating liquor." The court held the complaint invalid because "Route 3" might have a different meaning than "way" under certain circumstances. "It is wanting in preciseness."

The case of *State* v. *Lashus,* 79 Me. 541, cited by respondent was a complaint that alleged that respondent did "transport from place to place in said State of Maine intoxicating liquors." The court held that the complaint was invalid because no place in Maine was designated. "Had the allegations limited the places * * * the complaint might have been sufficient."

In the case at bar places are limited, to wit, Portland, South Portland and Scarborough in Cumberland County. No particular city or town in York County is alleged, but the evidence admitted without objection, shows that it was Old Orchard. The words "into York County" might well be considered surplusage because not necessary to commit the offense. The offense consists of any transportation, whatever the distance, anywhere in Maine, and the accused may be prosecuted in any county "in or through which he shall have transported or attempted to transport." R. S., 1944, Chap. 121, Sec. 20; *Commonwealth* v. *Neely,* (Penna.), 10 Atl. (2nd) 925. The presiding justice was correct in overruling the motion in arrest of judgment because places are designated in Cumberland County where the indictment was found. The exception to denial of motion in arrest of judgment is overruled.

MOTION FOR NEW TRIAL

The tests to be applied to this motion for a new trial, on the ground of newly discovered evidence, are (1) that the

evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict. *State* v. *Irons,* 137 Me. 294; *London* v. *Smart,* 127 Me. 377.

The testimony was taken on April 28, 1952 before a justice of the Superior Court, to support this motion. R. S., 1944, Chap. 94, Sec. 15. The conviction by the Cumberland County jury was at the preceding January term. The respondent produced eight witnesses to show the claimed evidence as newly discovered, and in addition he offered his own testimony which he did not offer at the trial.

Ivory H. Fenderson of Saco, a contractor, stated that he gravelled the Levesque yard in February 1951, and took a girl known to him as Linda Lynn from Portland to Melody Ranch.

Morris Silverman said that he knew Marilyn Sargent as Linda Lynn and he saw her at Melody Ranch early in 1951 and took her to Graymore Hotel. Later he saw her at Melody Ranch again and she made no complaints that she was a prisoner there. He bought a ticket for her to Stamford, Connecticut and he sent money to her to come back. Octave Boucher worked at the Ranch in January 1951 and knew the Sargent girl as Lynn; that during the time she said she was a prisoner she told him she had been to the movies.

Elmer Jordan took care of horses, and said that Marilyn Sargent had free run of the place and looked "happy and pleasant."

David McCallum, an Assessor of Old Orchard, went to Melody Ranch and sat at table with Marilyn Sargent and Miss Levesque and once he saw Marilyn in a taxicab.

Stephen O'Donnell of Rogers Jewelry Store in Portland, identified an account from his store bearing Marilyn Sargent's signature when she purchased a string of pearls on January 8, 1951.

Lillian Levesque testified she knew Marilyn as Linda Lynn; that Marilyn had been at Melody Ranch several times; that she took Marilyn to Portland several times to shop and once Marilyn bought a necklace; that she (Lillian Levesque) was in New Hampshire when Casale case was tried; that she never held Marilyn a prisoner; that Marilyn stole some of her clothes and demanded money of her with threats; that she (Lillian Levesque) was convicted in York County in January for running the house of ill fame.

Tony Bruni identified Marilyn Sargent as a girl he met on Congress Street in Portland some time after he had introduced her to respondent in January 1951. At her request he took her to Melody Ranch, but the place was closed and he brought her back.

Morris Silverman, David McCallum, Elmer Jordan and Octave Boucher identified Marilyn Sargent as the same person they referred to in their testimony.

Marilyn Sargent (now Marilyn Sargent Morris) was called and testified regarding her marriage on January 30, 1951; that she knew who Bruni and Silverman were but did not know Boucher, Jordan or McCallum, and that she is the same person who was at Melody Ranch.

The respondent Anthony Casale, testified that he did not know Marilyn Sargent was going to testify as she did at his trial; that he was being persecuted; that he had known Lil-

lian Levesque well for twenty years; that he was introduced to Marilyn by Anthony Bruni; that he went to Florida with Lillian Levesque on a trip, after the State's investigation of this case started, but Melody Ranch was closed when they got back; that this accusation against him is a "shakedown" to possibly obtain from him $2,000 to stop proceedings; that he did not think it necessary to get Lillian Levesque to testify at his trial; that he made no attempt to obtain any witnesses for his trial, because "I didn't bother about it. It was none of my business. I thought maybe the State would not prosecute."

The foregoing evidence to support the motion for new trial as being newly discovered, does not in any manner deny the charge in the indictment. Much if not all of the evidence would be admissible only within the discretion of a presiding justice. The evidence was known to the respondent before the trial, or could have been found by the exercise of reasonable diligence. The respondent said "I didn't bother about it." That some of this evidence was known, is shown by the cross examination of State's witnesses. The evidence that was known was not used, as no evidence was introduced in defense. Whether Marilyn Sargent (Morris) was made a prisoner for ten days, or went and stayed at the Ranch willingly, is not the question. The testimony is not material to the issue, as the real issue was and is the transportation and the respondent's purpose. All the evidence offered on this motion for new trial is an attempt to impeach the testimony of Marilyn Sargent as false, by showing that she was not a prisoner and remained willingly, and that she had perhaps been at the Ranch previously. This evidence presented to support the respondent's motion does not stand the legal tests applicable, and a study of all the evidence does not convince the court that, on a new trial, the result would probably be changed. *Boisvert* v. *Charest,* 135 Me. 220; *State* v. *Irons,* 137 Me. 294; *State* v. *Shea,* 132 Me. 16.

The record of this case and the record in support of the motion for new trial, however, does show clearly (1) that no injustice was done at the trial, and no injustice will be done by denial of the motion for new trial, and (2) that the capable attorneys for the respondent were untiring and thorough in their efforts to protect every legal right of the respondent.

Exceptions overruled.

Motion overruled.

AGNES RICHBURG, APPELLANT
FROM DECREE OF JUDGE OF PROBATE
IN ESTATE OF WALLACE E. KELLEY

York. Opinion, November 22, 1952.

Wills, Witnesses, Qualification. Executors. Beneficiaries.

The statute of wills requires that a will, to be valid, must be subscribed in the presence of the testator by three credible attesting witnesses, not beneficially interested thereunder.

The interest which will disqualify a person as a witness to a will is one that is personal, and direct. It is not necessary that it be substantial.

One is not disqualified as a witness to a will by a bequest in favor of his church, his town, a social club in which he holds membership, or to an individual who is his ward.

Neither a contingent beneficiary nor the spouse of a named beneficiary is a competent witness to a will.

The power of disposition of property is the equivalent of ownership.

Whether a testator intends to give property to a person in trust, or for his own benefit, is a question of interpretation of the language used, in the light of all the circumstances.

A charitable intention might be disclosed by language limiting the authority of one to whom property was left for disposal to the field of "such charitable or other purposes as he shall think fit."

The words "dispose of," as used in a will, have the very definite and well-established meaning ascribed to them by the appellant, and cannot be read in the sense of "to destroy."

It is immaterial whether the language of a will leaves property for the beneficial use of one of the attesting witnesses or merely confers a power of appointment over it upon him. In either case, he is not such a witness as the statute of wills contemplates.

Bernstein & Bernstein, for Appellant.

Titcomb & Siddall, for Appellee.

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

MURCHIE, C. J. The single question requiring decision in this case, raised by the appellant's exceptions challenging the decree entered in the Supreme Court of Probate bringing it forward, as in the Reasons for Appeal which carried it to that court from the court of probate in which it was heard originally, is whether the instrument admitted to probate in each of said courts as the last will and testament of Wallace E. Kelley, deceased, was duly attested by three "credible attesting witnesses, not beneficially interested" thereunder, as required by our statute of wills, R. S., 1944, Chap. 155, Sec. 1.

Such has been the requirement in this State since the enactment of P. L., 1859, Chap. 120, substituting that language for the earlier "disinterested and credible attesting witnesses," R. S., 1857, Chap. 74, Sec. 1, which was originally, Laws of 1820, Chap. XXXVIII, Sec. 2, merely "three credible witnesses." Under the 1820 law any will not so "attested and subscribed" was "utterly void," but subsequent provisions declared that when one taking a beneficial

interest under a will was one of the attesting witnesses thereto, his legacy, devise, gift or appointment would be void and he would be admitted as a witness to its execution. Laws of 1820, Chap. XXXVIII, Sec. 8. This provision, and others dealing more completely with the situation it contemplated, last appeared in R. S., 1841, Chap. 92, Secs. 5, 6, 7 and 8. We are unable to find any legislation repealing them, but they were omitted from the revised statutes of 1857, with the "utterly void" recital of the original law, carried in R. S., 1841, Chap. 92, Sec. 2. It was in the 1857 revision that the word "disinterested" was first written into the statute, again without the sanction of special legislative enactment.

Whatever may be the sanction, or lack of sanction, for the changes made in the revision of 1857, they must be considered as having legislative approval in the enactment of the 1859 law heretofore cited, which imposed the requirement, ever since effective, that any will, to be valid, must be subscribed in the presence of the testator by "three credible attesting witnesses, not beneficially interested" thereunder. The test, at all times, since 1841, by express statutory language, R. S., 1841, Chap. 92, Sec. 2, has been competency at the time of attestation.

The test must be applied by reference to the will itself. The claim of the appellant is that one of the three subscribing witnesses thereto, named Executor by Paragraph TWENTY-SECOND of the will, is beneficially interested thereunder, by the recital of its SECOND Paragraph, which reads:

> "I direct my executor to dispose of my clothing and other personal articles and effects as he in his sole discretion may deem best."

It is argued on behalf of the executor that said Paragraph SECOND discloses no intention on the part of the testator to authorize his executor "to dispose of assets of

the Estate having monetary value," and that if "any item of monetary value" should fall into his hands thereunder, he would be required to have it appraised as an asset of the estate, R. S., 1944, Chap. 141, Sec. 57, and "account" for it, pursuant to R. S., 1944, Chap. 141, Sec. 70. Both claims are, of course, entirely sound, but the requirements of both would be satisfied if the property was appraised and an account was filed disclosing that the executor had delivered the property to himself as an individual. Paragraph TWENTY-FOURTH of the will, reading:

> "I hereby give to my Executor full power without order of any Court to sell, mortgage, invest or reinvest, exchange, manage, control and in any way deal with any and all property of my estate during its administration",

makes it entirely plain that whatever, if anything, was to pass under Paragraph SECOND, and it would be a most unusual and unique situation if any person died without possessing some "clothing and other personal articles and effects," was left to the executor for disposal, and would not be a part of the residue of the estate.

Counsel for the executor argues, also, that what he calls the "assumption, with no evidence to support" it, that something of value might pass to the executor under the pertinent paragraph and "be appropriated by him to his financial gain," is far remote from such a "direct, certain, vested and pecuniary interest" as will disqualify a witness, under the decisions of this court. This represents, in fact, an "assumption" that one making his will in a hospital twenty-six days prior to his death, having no wife or issue, as this intended testator did not, and declaring expressly that he made no provision for his heirs-at-law because he felt "that they are capable of caring for themselves," possesses nothing of "monetary value" within the coverage of the words "clothing and other personal articles and effects." The

truth must be, of course, that he possessed something within that coverage which he desired to leave for the disposal of his executor, in whom he had great confidence.

Counsel for the executor cites us to *Warren* v. *Baxter*, 48 Me. 193; *Marston et al., Petitioners*, 79 Me. 25, 8 A. 87; *Coy, Appellant*, 126 Me. 256, 137 A. 771, 53 A. L. R. 208; *Look, Appellant*, 129 Me. 359, 152 A. 84; and *In re Potter's Will*, 89 Vt. 361, 95 A. 646. These cases demonstrate how far courts have gone, particularly this one, in holding the rule of disqualification by beneficial interest down to one that is personal. They do not hold it down to one that is substantial. They do not require that it be direct. They establish that one is not disqualified as a witness to a will by a bequest in favor of his church, his town, a social club in which he holds membership, or an individual who is his ward. A contingent beneficiary may not be a witness. *Trinitarian Congregational Church and Society of Castine, Appellant*, 91 Me. 416, 40 A. 325. Neither may the wife (or husband) of a beneficiary. *Clarke et al., Appellants*, 114 Me. 105, 95 A. 517, Ann. Cas. 1917 A, 837. It is the fact of the benefit, direct or contingent, and not the measure of its value, which controls.

The appellant argues that assuming the executor would not take whatever property might pass under the SECOND Paragraph of the will to his own use, and for his own benefit, it cannot be doubted that the language thereof gives him a power of appointment over it. This court said very recently, *Estate of Annie E. Meier*, 144 Me. 358, 362, 69 A. (2nd) 664, 666, "that the power of disposition of property 'is the equivalent of ownership' ", and it cannot be doubted that under the terms of the SECOND Paragraph, the executor was given "power of disposition" over such articles as might fit the description of property therein. The title thereto would vest in him, under the will, and remain with him until he passed it elsewhere.

As it is written in the Restatement of the Law of Trusts, Vol. 1, Chap. 5, Sec. 125:

> "If property is transferred to a person to be disposed of by him in any manner or to any person he may select, no trust is created and the transferee takes the property for his own benefit."

In "comment" thereon, the Restatement declares (a) that:

> "Whether the transferror has manifested an intention to give property to a person in trust or to give it to him for his own benefit is a question of interpretation of the transferror's language in the light of all the circumstances."

This might be helpful to the claim of the executor if the testator had not, in disinheriting his heirs-at-law and devoting substantially all his property to charitable uses, very carefully excepted his "clothing and other personal articles and effects" from the trust he sought to create for charitable uses. The Restatement illustrates what will disclose the intention of one executing a will, and giving a power of appointment to some person, not to pass the beneficial interest in the property involved to him, by suggesting such language as:

> "for such charitable or other purposes as he shall think fit."

No equivalent language was used in this case. It cannot be said that this intended testator contemplated that the executor who was to take property under Paragraph SECOND should devote the same to any charitable purpose. If that had been his intention, he could have let the property fall into the residue, and pass to the charities he designated as his principal beneficiaries. Conceivably, he may have used the words "dispose of" in the sense of "destroy," assuming the property in question had no monetary value, but this court cannot rewrite the document for him, and his words have the very definite, well-established meaning in

testamentary use which the appellant ascribes to them. It is immaterial whether they might be construed to vest title to the property to which they relate in one of the three persons who subscribed the document as attesting witnesses, for his beneficial use, or merely to confer upon him a power of appointment over the same. The will cannot be allowed because he was not such a witness as the statute contemplates on either construction.

Exceptions sustained.

CARL H. SCRIBNER
vs.
WILLIAM CYR

Penobscot. Opinion, November 22, 1952.

Bills and Notes. Material Alteration. Witnesses.

The writing of the words *with interest* into a promissory note by the holder thereof after delivery constitutes such a material alteration as would render the note void and constitutes an absolute defense to any action thereon. R. S., 1944, Chap. 174, Secs. 124, 125.

A jury may properly consider the unexplained failure of a party to testify with respect to material facts within his knowledge, or to deny the existence of material facts testified to by the adverse party.

ON MOTION FOR NEW TRIAL.

This is an action on a promissory note. The defendant pleaded material alteration. The jury returned a verdict for the plaintiff. Defendant moved for a new trial. Motion sustained. New trial granted.

A. M. Rudman, for plaintiff.

Pilot, Collins & Pilot, for defendant.

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

MERRILL, J. On motion. Action on a promissory note. The defendant pleaded material alteration of the note after delivery. The note was typewritten. Upon examination of the note it is apparent that the words *with interest* had been inserted between the second and third lines near the left-hand margin thereof, and that they have been erased.

The plaintiff introduced the note and rested. The defendant testified that when he executed the note the words *with interest* did not appear therein. He further testified that about ten days prior to the day the first installment of the note was to become due, he received a notice from a bank that the note was in the bank for collection; that he went to the bank, tendered the installment of one hundred dollars then due, but that the man in the bank demanded interest; that he saw the note in the bank and that it then contained the words *with interest,* which have since been erased. He testified that he refused to pay the interest, took back the one hundred dollars and left the bank. He further testified that he then went to the plaintiff and called to his attention the fact that the note had been altered; and that the plaintiff then told him that it was necessary to insert the words *with interest* to make the note legal. He further testified that he told the plaintiff he would not pay the note and that he was going to consult his lawyer. He also testified that after he had refused to pay the note he received another notice respecting the note.

The plaintiff did not testify. Nor was any explanation made of his failure to testify. He called two witnesses, employees of the Old Town Branch of the Eastern Trust and Banking Company. Mr. Porter, the manager, testified that the plaintiff brought the note to him on the day the first installment was due and that he then protested the note at the

plaintiff's request. He testified that at that time the words *with interest* did not appear on the face of the note. He based this solely on the fact that his copy of the protest notice made no mention of interest being due. He also testified that the note had never been in that bank for collection. Mr. Baillargeon, another employee of the Eastern Trust and Banking Company at the Old Town Branch, testified that he had no recollection whatever of the note and had never seen it or the defendant before the time of the trial, and that he and Mr. Porter were the only male employees at the branch bank.

The jury found for the plaintiff. The defendant filed a general motion for a new trial and the case is now before us on that motion.

It is to be noted that this is not the ordinary case presented when the defense to a promissory note is that the same has been materially altered. The usual case involves an attempt on the part of the holder thereof to enforce the note in what the defendant claims is an altered condition. Here the plaintiff is now attempting to enforce the note in what the defense claims was its original condition, but after a material alteration thereof had been made and then erased.

If the words *with interest* were written into the note by the holder thereof after delivery they would constitute a material alteration of the note. Such alteration would render the note void and would constitute an absolute defense to any action thereon. R. S. (1944), c. 174, Secs. 124, 125; *Lee* v. *Starbird,* 55 Me. 491; *Waterman* v. *Vose et al.,* 43 Me. 504. The fact that such alteration was subsequently erased would not restore validity to the note. *Waterman* v. *Vose et al., supra;* 2 Am. Jur. 661, Sec. 90; 3 C. J. S. 914, Sec. 8; 2, C. J. 1180, Sec. 12, n. 67-68.

The fact that the words *with interest* were written into the note, which was typewritten, out of regular order and

that they have since been erased, together with the further fact that the defeasance clause in the mortgage securing the note did not provide for the payment of interest, are very suspicious circumstances. They cast suspicion on this note. They are entirely consistent with and tend to establish the fact that the words were inserted in the note after it was issued. These facts, coupled with the foregoing positive testimony of the defendant, certainly subject the plaintiff to the burden of going forward with testimony to explain when and in what manner the apparent alteration and erasure thereof came to be upon the note.

The note was in the plaintiff's possession. The alteration had been specifically pleaded. Inspection of the note disclosed the insertion and erasure of the words *with interest.* This must have been known to both the plaintiff and his counsel. We can assume that plaintiff and his counsel must have fully realized that suspicion was cast upon the note by the insertion and erasure of these words. They must have realized that if the words were inserted and erased after the note was issued such action would constitute an absolute defense to the note. If the insertion of the words *with interest* and the erasure thereof were innocently done (viz.: at a time or under circumstances which would not affect the validity of the note), the plaintiff should be able to offer some explanation thereof. Furthermore, the physical condition of the note is entirely consistent with the foregoing testimony of the defendant. Unless that testimony was true the plaintiff could, and we believe would, deny it. At least such is the action that one would reasonably expect an honest man with an honest claim to take. The foregoing testimony by the defendant is either true or intentionally false. It cannot be the result of faulty recollection or misunderstanding on his part. It is either true or its relation by the defendant under oath constituted deliberate, wilful perjury. Perjury is not to be presumed.

The unexplained failure of the plaintiff to even offer himself as a witness and to deny the testimony given by the defendant respecting their conversation leads to but one conclusion. That conclusion is, that the defendant's testimony is true, that a denial of his statements by the plaintiff would be perjury, and that this was a risk that the plaintiff did not choose to take. The testimony of the two employees of the Old Town Branch of the Eastern Trust and Banking Company does not cast sufficient doubt on the defendant's testimony to overcome the effect of the plaintiff's silence when it had become his duty to speak. Nor would it justify the jury in disregarding the positive, uncontradicted testimony of the defendant relating the conversation between himself and the plaintiff relative to the alteration of the note.

The unexplained failure of a party to testify with respect to material facts within his own knowledge, or to take the stand and deny the existence of material facts testified to by the adverse party, has long been recognized as proper matter for the consideration of the jury. *Page* v. *Smith,* 25 Me. 256; *Perkins* v. *Hitchcock,* 49 Me. 468, 477; *Union Bank* v. *Stone,* 50 Me. 595, 599; *York* v. *Mathis,* 103 Me. 67, 81; *Devine* v. *Tierney and Findlen,* 139 Me. 50, 55; *Bubar* v. *Bernardo,* 139 Me. 82, 88; *Berry* v. *Adams,* 145 Me. 291, 295. In cases of this character it is ordinarily stated that the jury are to give such weight to the fact that the plaintiff did not appear to testify in the case, or did not deny the testimony of the defendant, as they think it deserves. But as stated in *Union Bank* v. *Stone, supra:* "The importance of any given fact or circumstance is ever varying—according to the ever changing facts and circumstances with which it is surrounded."

There may be cases, however, where the unexplained failure of a party to take the witness stand and testify as to

facts within his own knowledge, or to deny facts testified to by his adversary is of such importance and so significant in connection with the other facts in the case that a jury can reasonably reach but one conclusion with respect thereto. This is such a case.

Here the plaintiff's failure to controvert the positive testimony of the defendant cannot be explained, as is often the case, as the result of careless inadvertence. On this record it was not a mere failure by the plaintiff to deny a single though important fact. It was the deliberate failure to even take the witness stand in his own behalf, and there meet *the issue* tendered by the pleadings. Not only did he fail to explain that which it should be in his power to explain, the suspicious condition of the note, but he also failed to deny the detailed testimony of the defendant relative to a conversation with himself which, if true, was fatal to his right to maintain his action. If this testimony were true, and the plaintiff knew it to be true, he might well be silent. The utterance of the truth would destroy his cause of action. He does not offer his own testimony with respect to crucial facts known only to himself and the defendant, and concerning which the defendant's testimony is a complete answer to his cause of action. As well said by this court in *Union Bank* v. *Stone, supra:*

> "He prefers the adverse inferences, which he cannot but perceive may be drawn therefrom, to any statements he could truly give, or to any explanations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse, than would be the testimony he would be obliged, by the truth, to give."

The verdict of the jury in this case must have been based upon the fact that they considered the rule as to the effect of alterations of a note a harsh one and one which would

allow the defendant to escape what, in its inception, had been an honest indebtedness.

Motion sustained.

New trial granted.

ARTHUR S. DAVIS, JR.
vs.
HAROLD INGERSON

Cumberland. Opinion, November 25, 1952.

Attachment. Arrest. Abuse of Process. Capias. Rule 18, New Trial.

The use of a capias writ under R. S., 1944, Chap. 107, Sec. 1 is optional with the plaintiff.

A defendant cannot protect himself from arrest on mesne process by tendering property sufficient to secure the demand.

If plaintiff intends to use a writ as a capias he must give special direction to the officer.

While the right to use a capias under the statute is absolute it should never be resorted to for vengeful feeling but should be used only in the clearest cases of right.

While practice at variance with Rule 18 should not be encouraged an instruction which is plainly erroneous or which might have misled the jury constitutes error in law for which a general motion for new trial may be granted.

ON MOTION FOR NEW TRIAL.

This is an action for abuse of process, malicious prosecution and false arrest. After verdict for the plaintiff, the defendant moved for a new trial. Motion sustained. Verdict set aside. New trial granted.

Basil L. Latty, attorney for plaintiff.

Paul L. Powers,
Richard S. Chapman, attorneys for defendant.

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

NULTY, J. This action comes before us on a motion for a new trial by the defendant after verdict for the plaintiff at the June 1952 Term of Cumberland County Superior Court. The declaration contained three counts, one for abuse of process, one for malicious prosecution, and one for false arrest. The count charging false arrest by agreement of counsel was not pressed at the time of trial in the Superior Court.

The following is a summary of the pertinent, admissible and material evidence:

On August 21, 1951, the defendant was the owner of a motor truck from which pulpwood was being unloaded by a servant of the defendant. On the same day plaintiff came with a loaded truck of pulpwood destined to be unloaded at the same location where defendant's truck was being unloaded. There was ample space available for unloading use of the two trucks but the plaintiff, in backing his truck to the location, collided with the defendant's truck causing certain minor damage, to wit, a broken mirror. There is a conflict of testimony as to whether or not the plaintiff pulled forward after the damage to the plaintiff's mirror and again backed into defendant's truck causing damage to the fender.

It is in evidence that there was some conversation between the plaintiff and the defendant's servant because of the damaged mirror and that the plaintiff was willing to pay for that damage. Somewhat later on the same day the defendant claims to have discovered that a fender was damaged by the contact of the two trucks and he testified that

there was yellow paint in a dent on his fender and that the plaintiff's truck was yellow. About a week later the defendant consulted his attorney concerning other legal matters and also sought advice with respect to the damage to his truck. At a later date the attorney wrote a letter for the defendant, making a written demand upon the plaintiff for the amount of the damage which the defendant contended had been caused to the defendant's truck by the plaintiff's truck and some time later the defendant, through his attorney, commenced an action of trespass on the case against the plaintiff and the writ used for the form of action was what is commonly known as a capias or attachment writ to be used as a capias and authorized by Chap. 107, Sec. 1, R. S., Me. 1944. The attorney for the defendant delivered the writ to be served as a capias to the deputy sheriff and within a few days the plaintiff, hearing that the deputy sheriff wanted to see him, approached said sheriff and, after a brief discussion, informed the sheriff that he, said plaintiff, would not pay the full bill, amounting to approximately fifteen or sixteen dollars, but was willing to pay for the mirror, the cost of which, according to the record, was $1.35. The deputy sheriff then suggested to the plaintiff that he had better talk with the defendant's attorney, whereupon the plaintiff, in company with the sheriff and plaintiff's brother, who had joined plaintiff, proceeded to the office of the attorney for the defendant. The plaintiff again refused to pay the amount demanded by the defendant's attorney, although he did again offer to pay for the mirror, and the attorney for the defendant suggested to the plaintiff that the plaintiff furnish a bond at the same time stating to the plaintiff that he would accept the plaintiff's parents as sureties. There was some conversation between the defendant's attorney and the plaintiff as to the procedure for procuring a bond and plaintiff was told by the attorney for the defendant that the plaintiff could have his attorney prepare it or that the defendant's attorney would prepare it

but that the charge for preparing it would be $5.00. The conversation terminated and plaintiff directed defendant's attorney to prepare the bond and after the sureties signed the plaintiff left the office of the defendant's attorney and the deputy sheriff signed the return on the capias writ setting forth that he had arrested the now plaintiff and, upon tender of a bond, released him and the bond and the writ were subsequently filed in the Superior Court for Cumberland County. At the March 1952 Term of the Superior Court the action was tried before a jury which returned a verdict in favor of the then defendant who is now the plaintiff and who subsequently brought the present action.

There was evidence in the record that the plaintiff, a short time before the recited events, had been employed by the defendant and that the plaintiff terminated his employment for the defendant and they separated on what might be called unfriendly terms.

The instant action, which appears to be based upon the alleged wrongful use of a capias or attachment writ as a capias and the plaintiff sought to prove his declaration by introducing considerable evidence that the plaintiff was possessed of property of various types and that for that reason there was property which could have been attached and that, therefore, the use of the writ as a capias was illegal. Chap. 107, Sec. 1, R. S., 1944, seems an answer to plaintiff's claim and reads as follows:

> "**Sec. 1. Arrests upon mesne process. R. S., c. 124, § 1.** No person shall be arrested upon mesne process in a suit on contract, express or implied, or on a judgment on such contract, except as provided in the following section; and the writ or process shall be varied accordingly; but in all other actions, the original writ or process may run against the body of the defendant, and he may be arrested and imprisoned thereon, or give bail as provided in chapter 102."

Our court has heretofore considered the use of a capias or attachment writ and we said in *Oliver* v. *Kallock,* 133 Me. 403, 404, 178 A. 843, in speaking of the commencement of an action which was instituted by a writ of capias or attachment and which was intended to be served as a capias writ:

> "Such use of the writ is optional with the plaintiff. *Commonwealth* v. *Sumner,* 5 Pick., Mass., 360. *Spaulding's Practice,* 102."

See also *Cleaves* v. *Jordan,* 34 Me. 9. The Massachusetts court, in said case of *Commonwealth* v. *Sumner, supra,* Page 366, said:

> "* * * * * * * * * * there is no distinction in our statutes between a capias and writ of attachment; they are one writ with different powers, according to the will of him who uses them."

Spaulding's Practice, Chap. VII, Sec. 4, Page 50, in speaking of capias or capias or attachment writs, makes the following statement:

> "These writs are precisely the same in form * * *. They differ only in the mode of service. * * * With the summons, the writ is an attachment; without it, a mere capias, or in other words, the precept of the writ in the form given, being in the alternative, either 'to attach the goods or estate of the defendant' or 'for want thereof to take his body,'—if the writ, with the accompanying summons, is served according to the first command—it is a writ of attachment,—if without the summons and according to the second command, it is capias."

See also *Howe's Practice,* Chap. 7, Sec. II, Page 55.

Spaulding's Practice, Chap. XII, Sec. 1, Page 102, in speaking of arrests in general and the service of a capias, states:

> "Though the order in the writ in the form prescribed, be, to attach the goods, &c. and 'for want

> thereof,' to take the body, yet the plaintiff may, if he choose, direct the body to be taken in the first instance, that is, he may, at once, use the writ as a capias. And the defendant cannot protect himself from arrest, by tendering property sufficient to secure the demand, for that would be to compel the plaintiff to use his writ, as a capias or attachment, when, in fact, he has an election to use it either as such, or as a capias. * * * *.
>
> "But if the plaintiff wish the person of the defendant to be arrested,—that is, if he intend to use the writ as a capias, he must give such special direction, either on the writ, or verbally to the officer, for though an officer would be justified in at once serving the writ as a capias without further directions than those contained therein, he is under no obligation to do so. And, in fact, it is only by such special direction, that the plaintiff can express his election to use his writ as a capias."

In view of the statute quoted and the authorities and the decisions thereunder, we recognize the absolute right of a plaintiff or his attorney to use a writ of capias or attachment as a capias as provided by statute, but we do give our hearty approval to the admonition found in *Colby's Practice,* Page 133, which was also recognized and contained in part in the fifth edition of the *Maine Civil Officer,* Page 67, Note (o), entitled "Arrest on Civil Process" which reads as follows:

> "(o) The power of arresting a person for a debt or other civil cause, based simply upon the allegations in the declaration in the writ, unaccompanied by even the oath of the party plaintiff, (except in actions of assumpsit,) and before any proof whatever is made of the justice of his claim, is one of the most remarkable anomalies in the laws of our Republic. The right of personal security is the most sacred of rights; and an arrest being a sort of personal indignity, should never be resorted to for the purpose of gratifying the vengeful feeling of any person, but only in the clearest cases of

> right; for an unnecessary arrest is morally an assault and battery. An officer when making an arrest is bound, on demand, to make known his authority."

The motion for a new trial sets forth, among other reasons, that the verdict was against the law and against the evidence. It is apparent that the present defendant (plaintiff in the former action) had an absolute right to use a writ of capias or attachment as a capias in all actions provided by statute. This being so, it is rather difficult for us to find in the admissible record in this case any of the essential elements of the actions known as abuse of process and malicious prosecution. The plaintiff in the instant case sought to show, as we have said before, that he had ample property which could have been attached and, that being so, the use of the writ of capias or attachment as a capias was not warranted. We have already pointed out that this assumption is not true and much evidence, therefore, admitted in the instant action as to the property affairs of the present plaintiff became immaterial and extraneous and not pertinent to the issue. Likewise, the evidence on the part of the defendant, who was plaintiff in the former action, by which he sought to prove not only that he had made diligent search for property of the present plaintiff but that he had also taken the advice of his attorney after disclosing fully all facts to him, and that the diligent search and the attorney's advice were a sufficient answer to the present plaintiff's claims. All of that evidence was immaterial, extraneous and not pertinent to the issue as well as much other evidence introduced and sought to be rebutted with respect to the motives of the present defendant, then plaintiff in the former action. We said in *Adams* v. *Merrill,* 145 Me. 181, 187, 74 A. (2nd) 232, 236:

> "Jurors are human, and like all human beings are so influenced by extraneous, erroneous, and often malicious, acts or statements, that they fail to dis-

> tinguish what is important, true or material. Anything that might prejudice the ordinary person will probably throw the mental viewpoint of some, if not all, the jurors out of alignment. The warnings in a judge's charge will many times fall on ears deafened by a prejudice. The estimate of the value of vital evidence depends, too often, on the manner in which it affects a juror's likes, dislikes, and emotions."

We also said in *Adams* v. *Merrill, supra,* 145 Me. 187, 188:

> "Courts have always endeavored to prevent a prejudicial fact that is not relevant to 'creep' into testimony, and to correct by the charge, so far as possible, the effect when it is inadvertently or boldly brought out in evidence, and not objected to. If it is prejudicial, and if it probably affected the improper decision of the jury, a new trial may be granted on motion. * * *
>
> "The general rule of course is, that the admission of improper evidence is not available as ground for new trial unless objection was made thereto at the time, but when improper evidence is so prejudicial that the jury verdict indicates that an unjust decision was in part due to a sympathy or a prejudice occasioned by that evidence, the verdict is clearly wrong. *Raymond* v. *Eldred,* 127 Me. 11, 17; *Ritchie* v. *Perry,* 129 Me. 440."

As we have pointed out in this opinion, the use of a writ of capias or attachment as a capias is proper and optional with any plaintiff in all cases permitted by statute and, therefore, much, if not all of the evidence relating to the property affairs of the then defendant in the former action and the diligence used by the then plaintiff in the former action became immaterial and extraneous and, perhaps, prejudicial, or, at least, such evidence could have misled the jury. That being so, we feel that the verdict, under the circumstances, was clearly wrong and that, therefore, a new trial should be granted, but if there were any doubt as to whether or not the evidence prejudiced or misled the

jury, we believe it is completely removed when the charge of the presiding justice is examined, which, in this case, is made a part of the record. Before considering portions of the language of said charge, we believe it pertinent to state that ordinarily a general motion for a new trial does not reach a defect in the charge of the presiding justice. This court has said many times that practice at variance with Rule 18 of the Rules of Court, which rule definitely states:

> "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.",

should not be encouraged. There is, however, a rather definite exception to the application of the rule which has developed in instances where a jury has been given instructions which were plainly erroneous or which justified belief that the jurors might have been misled as to the exact issue or issues which were before them to be determined. See *Roberts, Admr.* v. *Neil,* 138 Me. 105, 107, 22 A. (2nd) 135, and *Cox* v. *Metropolitan Life Insurance Company,* 139 Me. 167, 172, 28 A. (2nd) 143, and cases cited therein. In our opinion the hereinafter quoted portions of the charge of the presiding justice come within the limits of the exception to the rule referred to in *Roberts, Admr.* v. *Neil, supra,* and *Cox* v. *Metropolitan Life Insurance Company, supra.* The presiding justice, in charging the jury in respect to the capias or attachment writ which was served as a capias, said:

> "This writ, and I am now speaking of Plaintiff's Exhibit 3, the original writ, commands the officer to attach the estate of Stanwood Davis of Freeport to the value of $200, and for want thereof to take the body of the defendant. You see the writ commands the officer to attach and, for the lack of goods in the estate of the defendant in this particular case to arrest his body or to take him and detain him.

> "Now what do the words 'for want thereof' mean; for want of estate to be attached? If reasonable diligence is used on the part of a plaintiff in a writ of this kind to ascertain whether or not the defendant has property that may be attached, then he should use that due diligence and not resort haphazardly to a writ of this particular kind in which the person of the defendant is restrained. So it is for you to decide from all of the facts in this case whether the plaintiff in that case, through himself or his attorney, used reasonable diligence to determine that there was not sufficient property of the defendant in that case that he could safely attach."

Again, in his charge, he said, speaking further of defendant's diligence:

> "You have had the testimony of the defendant, through himself and his agent or his lawyer, as to what diligence was used in an attempt to discover whether or not this particular defendant at the time, how plaintiff, had any personal property that could be reasonably and with safety attached. You are to say whether or not investigation was made to determine whether or not any automobile was registered in the name of the then defendant. You are to say whether or not it would be the duty of a person who wished to make an attachment, if possible, of the assets of a defendant, and as to how he might ever be able to tell how much was owed by outsiders to another person."

It is our opinion that the quoted instructions were plainly erroneous and the giving of them, as well as certain other erroneous instructions which we have examined but have not quoted when considered with immaterial and extraneous evidence, constituted errors of law. Such being the case under the authority of *Springer* v. *Barnes,* 137 Me. 17, 20, 14 A. (2nd) 503, 504, where we said:

> "A general motion ordinarily does not reach a defect in the judge's charge. Where, however, manifest error in law has occurred in the trial of a case

> and injustice inevitably results, the law of the case may be examined on a motion for a new trial on the ground that the verdict is against the law.",

the defendant would be entitled to a new trial on the ground that the verdict is against the law. For other cases to the same effect, see *Pierce* v. *Rodliff,* 95 Me. 346, 50 A. 32; *State* v. *Wright,* 128 Me. 404, 148 A. 141; *State* v. *Mosley,* 133 Me. 168, 175 A. 307; *Roberts, Admr.* v. *Neil, supra,* and *Cox* v. *Metropolitan Life Insurance Company, supra.*

We conclude that because of the errors of law, the defendant's rights were highly prejudiced resulting in an improper decision of the jury. This creates a manifest injustice and it is our duty to order a new trial. The mandate will be

Motion sustained.
Verdict set aside.
New trial granted.

INHABITANTS OF THE TOWN OF POLAND
vs.
INHABITANTS OF THE CITY OF BIDDEFORD

York. Opinion, December 23, 1952.

Pauper Settlement. Evidence. Dependent Children. Municipal Officers. Records. Confidential Records.

A clerk of the Board of Overseers is not disqualified as a witness because of a failure of preliminary proof of compliance with R. S., 1944, Chap. 82, Sec. 14 requiring that such clerk be sworn and give bond.

Evidence of prior aid of defendant to pauper under A. D. C. program is admissible to prove settlement at the time such aid is given although such evidence is not conclusive.

It is proper for a clerk to testify according to her own knowledge or recollection.

A form entitled "Municipal Acknowledgment of Settlement" offered to prove what appears on the records of defendant is erroneously received in evidence where it is merely shown to the witness to refresh recollection and there is no suggestion that the witness had personal knowledge of many of the details contained in the form.

A record and its contents is made known to the court by production of a duly authenticated copy properly proved.

The law does not permit a recording or certifying officer to make his own statement of what he pleases to say appears of record.

R. S., 1944, Chap. 22, Sec. 9 does not preclude as confidential State records, "Municipal Acknowledgment of Settlement" form where the data in the form came from defendant and not the State.

ON EXCEPTIONS.

This is an action in assumpsit to recover for pauper supplies and general relief. The case is before the Law Court on exceptions. Exceptions sustained.

Frank W. Linnell, attorney for plaintiff.

Wm. P. Donahue, attorney for defendant.

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

WILLIAMSON, J. This is an action in assumpsit by the town of Poland against the city of Biddeford to recover for pauper supplies and general relief furnished to Blanche Gagnon, wife of Joseph Gagnon, and their five minor children. The case is before us on exceptions: first, to the refusal of the presiding justice to charge that there could be no recovery for general relief expenses after June 15, 1951 on the ground that the statute below providing therefor was unconstitutional; and second, to the admission of certain evidence relating to the settlement of Joseph Gagnon.

On May 5, 1951 Mrs. Gagnon sought aid for her children and herself from the overseers of the poor of the plaintiff. Her husband was then confined in jail. A "pauper notice" alleging the place of settlement to be in Biddeford was sent to the defendant under date of May 7th. In turn the defendant gave to the plaintiff seasonable notice denying settlement.

Mrs. Gagnon also applied to the State for aid to her dependent children, and commencing June 15, 1951 aid was received under the "A. D. C." program. The plaintiff continued to furnish relief to Mrs. Gagnon until she moved with her children to Lewiston in November 1951, under the statute which reads in part, as follows:

> "**Sec. 227-A. Recipients and relative with whom the child is living not to be pauperized.** The receipt of aid to dependent children shall not pauperize the recipient or the relative with whom the child is living and the receipt of general relief

> by such recipient or relative with whom the child is living, made necessary by the presence of the child in the family, shall not be considered to be pauper support. General relief expenses incurred by any municipality or by the state in behalf of such recipient or relative with whom the child is living, made necessary by the presence of the child in the family, may be paid from funds made available for the relief of the poor, but shall in no other respect be treated as pauper expense. The town of settlement of the recipient, or the state in non-settled cases, shall reimburse the place of residence for such general relief in the same manner as is provided by sections 24 and 28 of chapter 82. (The Pauper Law)
>
> "During the period of time that a relative with whom the child is living receives general relief under the provisions of this section, such relative shall not acquire or lose a settlement or be in the process of acquiring or losing a settlement."
>
> *R. S. Chap. 22, Sec. 227-A, enacted in P. L., 1949, Chap. 396, Sec. 2.*

In argument the defendant urges that the jury improperly included in its verdict certain items, namely, debts of Mr. and Mrs. Gagnon. Neither by exception nor by motion for new trial are these objections properly before us. We point out that upon a new trial care should be taken to exclude from consideration items not legally recoverable. See *Vinalhaven* v. *Lincolnville,* 78 Me. 422, 6 A. 600.

FIRST EXCEPTION: Since under our view of the second exception the case must be returned for a new trial, we neither examine nor pass upon the constitutional question raised by the first exception. *Payne* v. *Graham,* 118 Me. 251, 107 A. 709, 7 A. L. R. 516; *Morris, et al.* v. *Goss,* 147 Me. 89, 83 A. (2nd) 556; *Bolduc* v. *Pinkham, et al.,* 148 Me. 17, 88 A. (2nd) 817.

SECOND EXCEPTION: The principal issue for the jury was the determination of the settlement of Joseph Gagnon.

Admittedly Mrs. Gagnon and the children had the same settlement as Joseph. The burden was upon the plaintiff to place the settlement in Biddeford, and the jury so found.

The objections center about the testimony of Mrs. Mathurin, clerk of the overseers of the poor of the defendant. Objection was made that the witness was allowed to testify without preliminary proof of compliance with R. S., Chap. 82, Sec. 14, and was permitted to describe her duties and acts which she performed. Under the statute overseers of the poor may authorize a designated person (or persons, in the case of a city of the population of the city of Biddeford) "to perform such of the duties imposed upon them by the provisions of this chapter (relating to paupers, their settlement and support) as they may determine; . . ." The statute provides that before entering upon the performance of their duties the designated person or persons shall be sworn and give a bond. In the instant case the defendant in its bill of exceptions describes Mrs. Mathurin as clerk of the board of overseers, and in her testimony she said she had acted as clerk since 1939.

In our view a party in a case of this nature is not required to prove each step of the qualification of a clerk of overseers of the poor. The risk of a clerk or other person designated under the statute testifying without proper qualification or describing his duties inaccurately or falsely, is not heavy in comparison with the burden otherwise placed upon persons dealing in good faith with such a clerk. In this instance, for example, any limitations of authority as clerk upon the witness could readily have been shown by the defendant. There is no sound ground to exclude the testimony of the clerk for this reason.

The clerk testified in substance as follows: Since 1939 she has been the clerk of the board of overseers. In 1946 pauper support was given by the defendant to the Gagnon

family. No application was made for reimbursement of such aid to any other town. She does not recall whether or not an application for reimbursement was made to the State. The city of Biddeford is reimbursing the State to the extent of 18% of the aid furnished the children of Joseph and Blanche Gagnon under the statute providing for recovery by the State "from the city, town or plantation in which the child so aided has legal settlement. . ."

> *R. S., Chap. 22, Sec. 234, as amended by P. L., 1949, Chap. 416, and P. L., 1951, Chap. 266, Sec. 23.*

The evidence of the aid in 1946 and of the payments to the State under the "Aid to Dependent Children" or "A. D. C." program was properly admitted. The aid and the payments were acts by the city tending to prove settlement in Biddeford at the time. As we have seen, the settlement of father, mother and children was the same, and hence evidence of the settlement of the one would necessarily bear upon settlement of the other. The evidence was entitled to some weight but was not conclusive against the city. *Rockland* v. *Farnsworth,* 93 Me. 178, 44 A. 681. It was open to explanation on the part of the defendant, which could have been permitted to show, if it could, that the overseers acted under an entire misapprehension as to the facts. *Harpswell* v. *Phippsburg,* 29 Me. 313. See also *New Vineyard* v. *Harpswell,* 33 Me. 193; *Appleton* v. *Belfast,* 67 Me. 579; *Weld* v. *Farmington,* 68 Me. 301; *Norridgewock* v. *Madison,* 70 Me. 174; *Fairfield* v. *Oldtown,* 73 Me. 573; *Bridgton* v. *St. Albans,* 77 Me. 177.

The clerk testified, it is to be noted, from her own knowledge or recollection. The evidence was admissible. We are not at this point concerned with the records of the defendant.

There remains the question of the admissibility of a certain paper or form headed "Municipal Acknowledgment of

Settlement" and testimony based thereon. At its first appearance the form was shown to the clerk for the purpose of refreshing her recollection. She testified that it was a form to determine settlement. The examination proceeded:

"Q. Was that taken from the records of your Department? Information that appears in that form, was it taken from the records of the Overseers of the Poor of the City of Biddeford?

A. You mean the lower part here?

Q. Yes.

A. Yes.

Q. And what does that record show, Mrs. Mathurin, as to settlement of the Gagnon family?

Mr. DONAHUE. I object.

The COURT. Admitted. Exception."

The witness read the form which purported to show that the settlement of the children and of the father was in Biddeford, with details about the birth and marriage of the father and other data, including the fact that aid was given by the defendant in 1946 and in January 1947. On cross-examination it appeared that the form was received from a Mr. Daggett, an employee of the division of Public Assistance of the State Department of Health and Welfare, and was prepared apparently by Mr. Daggett with the assistance of the clerk from the records of an investigation made in part at least by the overseers of the poor of the city of Biddeford in 1946.

Here we have a paper, at first shown to the witness to refresh her recollection, and later introduced not to refresh her recollection but to prove what appears on the records of the overseers of the poor of the defendant. There is no sug-

gestion that the clerk had personal knowledge of many of the details contained in the form.

Records of pauper support must be kept under the statute which reads in part:

> "Overseers of the poor and all other officers having charge of the administration of pauper funds shall keep full and accurate records of the paupers fully supported, the persons relieved and partially supported, and the travelers and vagrants lodged at the expense of their respective towns, together with the amount paid by them for such support and relief. . ."
>
> *R. S., Chap. 82, Sec. 12, as amended by P. L., 1951, Chap. 10.*

The form is not the record. It was not produced as a copy of the record. It was produced as a statement of what the witness said was contained in the records.

Clearly the form served a purpose at the trial far more important than a memorandum refreshing the recollection of the witness. Both in the reading of the contents and in the admission of the form itself, the contents gained without right the dignity of proven facts. In so far as the records of the city or its officers were admissible, they should have been proven in a proper manner. In *McGuire* v. *Sayward,* 22 Me. 230, the headnote, well justified by the opinion, reads: "What the record itself does declare, is to be made known to the court by a duly authenticated copy of it; and the law does not permit a recording or certifying officer to make his own statement of what he pleases to say appears by the record. A mere certificate, therefore, that a certain fact appears of record, is not evidence of the existence of the fact." In *Rumford* v. *Upton,* 113 Me. 543, 549, 95 A. 226, 229, involving admissibility of evidence of a town treasurer, the court said:

> "As already observed, the town treasurer is a public officer and his records public records. Where a

> public record is in existence, entries therein may be proved by the production of the record itself, or by a certified copy, or by an examined copy: *Owen* v. *Boyle,* 15 Maine, 147, 152; *State* v. *Gorham,* 65 Maine, 270, 272; *State* v. *Lynde,* 77 Maine, 561; *State* v. *Howard,* 103 Maine, 63; 1 Gr. Ev., Sec. 485. Here attempt was made to prove the contents of the record in neither of the modes authorized: see *Owen* v. *Boyle,* supra: *McGuire* v. *Sayward,* 22 Maine, 230, 233, where certificates of the officer in custody of the records containing a statement of what he says will appear by an inspection of the records, were excluded. The exception must be overruled."

There can be no serious dispute of the importance of this evidence to a jury charged with finding whether Joseph Gagnon and his family had a legal settlement in Biddeford. The defendant is entitled to have the fact of such settlement, if it is a fact, proved by competent evidence. The exception must be sustained.

The defendant also objects to the introduction of the form "Municipal Acknowledgment of Settlement" on the ground that thereby the plaintiff made an illegal use of confidential records of the State. *R. S., Chap. 22, Sec. 9.* It is sufficient to point out that the data in the form came from the defendant and not from the State. Therefore the case does not present a question of use of confidential records of the State. The defendant gains nothing from this objection.

Exceptions sustained.

HARRY E. ROWELL ET AL.

vs.

AMIABLE JARIS AND TRUSTEES

York. December 23, 1952.

Deceit. Material Fact. Sales, Damages.

A statement concerning the adequacy of water supply by an owner-vendor to a prospective purchaser of a home constitutes an assertion concerning a material fact readily known to the owner.

ON MOTION FOR NEW TRIAL.

This is an action of deceit. After verdict for plaintiff, defendant moved for new trial. Motion overruled.

Charles W. Smith, for plaintiff.

Lausier & Donahue, for defendant.

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

WILLIAMSON, J. The defendant's motion for a new trial is overruled. The case is an action of tort for deceit in the sale of defendant's home to the plaintiffs. The defendant argues: (1) that his statements with respect to the water supply were statements of opinion and not of fact; and (2) that the damages were excessive.

It will serve no useful purpose to review the evidence. The jury necessarily found that the defendant in the course of his negotiations with the plaintiffs falsely represented to them in substance that there was "plenty of good, clear water," that the statement was made with knowledge of the plaintiffs' requirement of an adequate supply for a family

of four, and that the words were spoken by the defendant and understood by the plaintiffs as a statement of fact. It was within the province of the jury to reach its conclusion on the evidence.

One cannot readily think of a fact more important or material to the purchaser of a home than the adequacy of the water supply, or of a fact more readily known to the owner.

Given a statement of *fact,* and not of *opinion,* no questions here arise about the presence of the remaining elements essential to establish liability in an action for deceit. Among the many cases stating and illustrating the applicable principles are: *Crossman* v. *Bacon & Robinson Co.,* 119 Me. 105, 109 A. 487; *Clark* v. *Morrill,* 128 Me. 79, 145 A. 744; *Shine* v. *Dodge,* 130 Me. 440, 157 A. 318; *Coffin* v. *Dodge,* 146 Me. 3, 76 A. (2nd) 541; *Bolduc* v. *Therrien,* 147 Me. 39, 83 A. (2nd) 126. See also *Lessard* v. *Sherman Corp.,* 145 Me. 296, 75 A. (2nd) 425.

The jury returned a verdict of $2,025. There was evidence of a difference of $2,000 in the value of the home property from lack of an adequate water supply. How the additional $25 crept in is uncertain. It may well be chargeable to a bill for cleaning a septic tank.

In any event it is too small an amount in relation to the damage sufficiently proved to warrant interference at our hands.

Motion overruled.

GEORGE W. DONNA ET AL.

vs.

CITY OF AUBURN ET AL.

Androscoggin. Opinion, December 24, 1952

Equity. Pleading. Demurrer. Equity Rule 27.

A Bill in Equity which alleges merely that plaintiffs are *informed and believe* the existence of material and essential facts is fatally defective.

Failure to traverse mere allegations of belief does not constitute an admission of the facts.

A demurrer admits only allegations of fact well pleaded.

ON EXCEPTIONS.

This is a Bill in Equity seeking to restrain payment of money by the defendant. After amendment, answer and demurrer the case was heard upon demurrer and dismissed without costs. The case is before the Law Court upon exceptions to a decree sustaining the demurrer and dismissing the bill. Exceptions overruled.

Decree dismissing bill without costs affirmed.

John A. Platz, for plaintiff.

Frank W. Linnell, for defendant.

Cole & Trumble, Pro Se.

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

MERRILL, J. On exceptions. This is a taxpayers' bill brought to restrain the payment of money upon a contract

alleged to have been executed by the city manager of the city of Auburn pursuant to an order of the city council. The bill purports to be brought under authority of R. S. (1944), c. 95, Sec. 4, Par. XIII. The plaintiffs claim that the contract is not binding upon the city because of lack of authority on the part of the city manager to execute the same. The city manager executed the contract pursuant to an order of the city council. Plaintiffs claim that under the charter of the city of Auburn, authority to execute the contract could be conferred only by an Ordinance, as distinguished from an Order. After filing, the bill was amended. Answer with demurrer therein was filed. The case was heard upon the demurrer to the bill as amended. Decree was filed sustaining the demurrer and ordering that the bill be dismissed without costs. It is upon the plaintiffs' exceptions to this decree that the case is now before us.

The amended bill is fatally defective. With respect to the existence of facts clearly material and essential to the maintenance of the bill, it alleges merely that the plaintiffs are *informed and believe* the facts. Whitehouse in his Equity Practice, First Edition, Page 243, Sec. 208, states:

> "Whatever is essential to the plaintiff's case and is within his knowledge and belief must be alleged positively as a fact. Where the bill alleges merely that the plaintiffs are informed and believe the facts set out in that clause of the bill, it is fatally defective. It does not allege *the facts* upon information and belief, it alleges information and belief of the facts only."

The foregoing statement by Whitehouse is well sustained by the decisions of this court. In *Messer* v. *Storer,* 79 Me. 512 at 519, we said:

> "It does not allege the facts upon information and belief. It alleges information and belief of the facts only. Such an allegation in equity is insufficient to raise the issue sought to be raised."

In the case of *Bailey* v. *Worster,* 103 Me. 170 at 174, as to many essential charges the plaintiff merely stated that he "is informed and believes." The court after holding that such a form of charging was fatally defective, went on to hold that a failure to traverse such allegation was not an admission under Equity Rule 27 of the truth of the facts referred to in such allegation. In that case we said:

> "Chancery Rule XXVII provides that 'all allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true.' The difficulty, however, is that the allegations to which these defective answers were made were not well pleaded. The complainant did not allege facts, but only that he was informed and believed certain allegations. In such cases Chancery Rule XXVII does not apply."

In the case of *Automobile Co.* v. *Hall and L. S. Bean Co.,* 135 Me. 382, after reiterating the rule, and citing *Messer* v. *Storer, supra, Bailey* v. *Worster, supra,* Whitehouse Equity Practice, *supra,* and the case of *Robinson* v. *Robinson,* 73 Me. 170, 177, we not only held that such allegations were not well pleaded, raised no issue, and that Equity Rule 27 did not apply, but we further held that such defective allegation could not be cured by proof, stating "Evidence without allegation is as futile as allegation without evidence."

Although a demurrer, for the purpose of considering the sufficiency of the bill, admits the truth of the allegations therein, it admits only allegations of fact *well pleaded.* As to all of those facts of which the plaintiffs alleged only that they "are informed and believe," the demurrer does not admit their existence. It admits only the plaintiffs' information and belief respecting the same. As the existence of these facts was material and essential to the maintenance of the bill, the bill was fatally defective for lack of positive averment thereof. This is not a mere defect in form. The defect is one of substance. This is the necessary result of

Automobile Co. v. *Hall and L. S. Bean Co., supra* which held that such allegation with respect to facts essential to the maintenance of the bill was so defective that it could not be cured by proof. The defect was open to attack by general demurrer for lack of equity in the bill. The ruling below sustaining the demurrer was correct and the exceptions to the decree sustaining the demurrer and dismissing the bill must be overruled.

Exceptions overruled.

Decree dismissing bill without costs affirmed.

WILFRED LAJOIE
vs.
GERRY BILODEAU, D. B. A.
SUNSET BEVERAGE CO.

IRENE LAJOIE
vs.
GERRY BILODEAU, D. B. A.
SUNSET BEVERAGE CO.

Androscoggin. Opinion, January 8, 1953

Negligence. Food. Directed Verdict. Evidence. Res Ipsa Loquitur. Burden of Proof.

On review of a refusal to direct a verdict for defendant, the evidence must be considered in the light most favorable to plaintiff.

The mere presence of a brush in a bottle of ginger ale is evidence of negligence on the part of a defendant bottler, where there is testimony, which, if believed, indicates that the bottle had not been opened since leaving the defendant. This is not a case of *res ipsa loquitur.*

Negligence may be established by circumstantial evidence.

ON EXCEPTIONS.

These are two actions of negligence for damages resulting from alleged deleterious food. The cases are before the Law Court on exceptions to the refusal of the Presiding Justice to direct a verdict for defendant in each case. Exceptions overruled.

Clifford and Clifford, for plaintiff.

John A. Platz, for defendant.

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

FELLOWS, J. These two actions for negligence brought by Wilfred Lajoie and his wife Irene Lajoie were tried together before a jury in the Androscoggin County Superior Court. At the conclusion of the evidence, the defendant moved that the Presiding Justice direct a verdict in each case, which motion was denied in each case and exceptions taken. There were verdicts for the plaintiffs in the sums of $125 and $425 respectively.

The jury could have found, and undoubtedly did find, that in November 1951 the defendant had sold and delivered to the retail grocery store of Rene Parent & Son in Auburn, some bottles of "Sunset Ginger Ale," which had been manufactured and bottled by the defendant in his bottling plant.

On or about November 25, 1951, Constance Lajoie, the fifteen-year-old daughter of the plaintiffs, went to the Parent store and purchased one of the quart bottles of Sunset Ginger Ale, that had been delivered to the store by the defendant. The bottle was dark green in color, with a side label and a top label. She carried the bottle home without opening it and placed it on the cupboard shelf in the kitchen. She there opened the bottle. The bottle reacted normally,

there was "nothing unusual." There was evidence to indicate that the bottle had not been previously opened or tampered with. Miss Lajoie poured some of the ginger ale into a water glass and took it to her mother who was then in bed with a leg injury. The plaintiff, Irene Lajoie, took a swallow and said it "tasted funny," but continued to drink, and then "wanted to have my father taste it because it didn't taste so good." The father tasted of it and suggested that it be divided among the children. Constance drank some. When Constance Lajoie started to divide it, she heard a "rattle sound in the bottle" and observed an "old dirty brush" in the bottom of the bottle, and "something like rust going up and down in the ginger ale." The bottle, with the brush and the remaining liquid containing the particles of sediment or rust, were taken care of by Lajoie and were in evidence at the trial.

The plaintiff Irene Lajoie became seriously ill immediately after she drank the ginger ale. The daughter Constance also became ill for a short time. Dr. Archambault, who attended, testified that the "gastritis" in his opinion was caused by "the contaminated ginger ale."

The defendant Bilodeau, apparently accepted the task of denial and explanation, and in defense offered evidence tending to show that his ginger ale consumed by Mrs. Lajoie was properly and carefully bottled in accordance with modern methods of washing and sterilizing, which methods were thoroughly explained to the jury; that the bottling plant was regularly inspected and approved by State inspectors; that there were four separate and independent inspections of each bottle passing through the plant; that there were no brushes on any of defendant's machines like the one found in the plaintiff's bottle, and defendant had never used such a brush; that the inspector at times was a fifteen-year-old boy; that the syrup and carbonated water goes into the bottle automatically and is automatically sealed; that at the

bottling plant 200 to 300 cases of 12 to 24 bottles per case go through inspection each day; that empty and returned bottles do come back to the plant "with marbles, pins, anything" but "never found anything after it had been capped;" that when an inspector is ill other men are used as inspectors; that in the opinion of the defendant Bilodeau, it was not "possible at all" for a brush to be in a bottle and to escape being seen or detected in some manner by an inspector. One of the inspectors admitted, however, that on final inspection he once found a cork stopper in a bottle.

From the record in this case the jury, if it believed the evidence of the plaintiff, could properly find that the bottle of ginger ale was in the same condition when opened by Constance Lajoie as it was when it left the defendant's bottling plant.

On exceptions to refusal to direct a verdict, the evidence must be considered in that light which is most favorable to the plaintiff. *Barrett* v. *Greenall,* 139 Me. 75, 80. A verdict should be directed when the evidence raises a pure question of law or when reasonable minds would draw but one conclusion therefrom. It must be apparent that a contrary verdict could not be sustained. *Giguere* v. *Morrisette,* 142 Me. 95; *Andreu, Dostie* v. *Wellman,* 144 Me. 36.

This is not a case where the doctrine of *res ipsa loquitur* is invoked, as in instances where the cause of accident is wholly unexplained and an inference of negligence may possibly be warranted from the accident itself. *Stodder* v. *Coca-Cola Bottling Plants,* 142 Me. 139. This is an action for negligence on the part of a defendant manufacturer where the cause of the injury is susceptible of proof by certain facts from which an inference of negligence may be lawfully drawn, if those facts are believed. Circumstances may properly indicate to the jury a failure on the part of the defendant bottler to use due care, and also that the necessary due care was exercised by the plaintiff. See the fol-

lowing Maine cases of negligence for contaminated water: *Hamilton* v. *Water Company,* 116 Me. 157; *Jackson* v. *Water Co.,* 125 Me. 512. See also regarding foods sold by retailer, *Bigelow* v. *M. C. R. R. Co.,* 110 Me. 105, and *Pelletier* v. *Dupont,* 124 Me. 269, 39 A. L. R., 972 where the actions were on contract, and not actions for negligence against the manufacturer. The proof in negligence cases may raise a presumption of negligence and the burden of proceeding may then be upon the defendant to explain. Evidence in some negligence cases indicating carelessness, if not satisfactorily explained, may be conclusive (as wrong side of road in automobile cases), *Larrabee* v. *Sewall,* 66 Me. 376, 381; *Brown* v. *Sanborn,* 131 Me. 53.

The mere presence of the brush in the bottle is evidence of negligence on the part of the defendant, where there is testimony which, if believed, indicates that the bottle had not been opened since leaving the defendant bottler. It could be properly inferred that the brush was there when processing of the bottle began, or was introduced during the filling of the bottle with ginger ale, and that there was negligence on the part of the defendant in permitting it to get into the bottle, or negligence in not discovering it in the bottle. The condition of the brush and the presence of other foreign matter, like particles of brush or rust, might show that the brush had been in the liquid for a long period. The Massachusetts court said in *Tonsman* v. *Greenglass,* 248 Mass. 275, 278, 142 N. E. 756, "the piece of metal was in the centre of the loaf, and was 'covered with green stuff,' and the bread 'smelled something terrible.' The process of mixing the ingredients, and the machinery used, were described by one of the defendants, but no explanation was offered as to the presence of this foreign substance in the loaf. The jury reasonably could infer that it got into the bread during the process of manufacture, because it was imbedded in the centre or soft part, and the discoloration of the iron and

the bad odor indicated that the metal was there while the dough was soft and during a period of fermentation or other chemical change."

The identical questions presented by this case, involving a foreign substance in bottled goods, have not previously been passed upon by the Law Court of Maine, but they have been decided in many other jurisdictions. In the case of *Middleboro Coca-Cola Bottling Works* v. *Campbell,* 179 Va. 693, 20 S. E. (2nd) 479, there was a similar state of facts, and the reasoning of the Virginia Court regarding proof follows closely the manner of reasoning by our own court in the water pollution case of *Hamilton* v. *Water Company,* 116 Me. 157. The Virginia case holds that proof of a foreign substance in a food package that has not been tampered with, makes out prima facie a case of manufacturer's negligence, and if not overcome by the manufacturer's evidence, will sustain a verdict for the consumer. "Negligence may be established not only by positive but by circumstantial evidence, when the circumstances are sufficient by fair and reasonable inference to take the case out of the realm of conjecture." *Middleboro Coca-Cola Bottling Works* v. *Campbell,* 179 Va. 693, 20 S. E. (2nd) 479. See also *Rudolph* v. *Coca-Cola Bottling Co.* (New Jersey), 132 Atl. 508; *Cloverland Farms Dairy* v. *Ellin* (Maryland), 75 Atl. (2nd) 116; *Tonsman* v. *Greenglass,* 248 Mass. 275, 142 N. E. 756; 22 Am. Jur. 881-900 "Food," Sections 97, 103, 105, 116; 36 C. J. S. "Food," 1121, Section 69. See also Annotations in 4 A. L. R. 1560; 47 A. L. R. 153; 105 A. L. R. 1043; 171 A. L. R. 1218.

The record, of these two cases now under consideration, shows that there was evidence introduced by the plaintiffs from which, if believed, the jury was authorized to draw lawful inferences that establish liability on the part of the defendant bottler. Had the jury relied on the evidence of the defendant, it could have found that the defendant was

not guilty of any alleged negligence. Each of these two cases presented disputed questions of fact for jury determination, and the presiding justice was correct in his refusal to direct verdicts for the defendant.

Exceptions overruled.

CLARENCE L. MACDONALD
vs.
SAUL H. SHERIFF,
HELENA C. ROGERS
AND
ROLAND J. POULIN
AS THEY CONSTITUTE AND ARE THE
STATE LIQUOR COMMISSION

Penobscot. Opinion, January, 1953.

Liquor. Administrative Law. Time. Statutes. Injunction.

A state statute providing that the Liquor Commission may by regulation "give effect to daylight saving time" does not authorize the commission by regulation to regard the Town of Hermon as having adopted "daylight saving time" because a majority of business establishments therein are conducted on and in accordance with daylight time.

ON APPEAL.

This is a Bill in Equity praying for a permanent injunction enjoining the State Liquor Commission from enforcing certain of its rules. The case is before the Law Court on appeal from a decree granting the injunction. Appeal dismissed. Decree below affirmed.

Pilot, Pilot & Collins, for plaintiff.

Alexander A. LaFleur, Attorney General,
Henry Heselton, Assistant Atty. General, for defendants.

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

NULTY, J. This case comes before us on appeal by the defendants from a final decree of the sitting justice granting a permanent injunction against the defendants as they constitute and are the State Liquor Commission in a bill in equity filed in Penobscot County Supreme Judicial Court.

From the bill in equity, the answer, the findings of facts by the sitting justice and the agreed stipulation, the following facts seem clear:

The complainant, on January 1, 1952, was duly issued by the State Liquor Commission a spirituous and a vinous liquor license and also a malt liquor license for the year 1952, which licenses, by their terms, permitted said complainant to legally carry on the sale of liquor in premises located in the town of Hermon in the County of Penobscot commonly known as Hotel "Turn-In." It also appears that the complainant asserted, and it is not seriously denied, that he lawfully conducted his business during the year 1952 in accordance with what is now known as Sec. 22-C, Chap. 57, R. S., 1944, said Sec. 22-C having been enacted by the Legislature by Sec. 102, Chap. 349, P. L., 1949, and former Secs. 36 and 53 of said Chap. 57, as amended by Chap. 97, P. L., 1947, were repealed by Secs. 103 and 105 of said Chap. 349, P. L., 1949, and as amended by Chap. 252, P. L., 1951, and in accordance with United States Eastern Standard Time. It is also stipulated and agreed that for the year 1952 the town of Hermon did not by vote adopt daylight saving time, so-called.

Chap. 1, Sec. 4, R. S., 1944, defines standard time as follows:

> "**Sec. 4. Standard time defined. R. S., c. 1, § 8, 1931, c. 273, § 1.** Within this state the standard time shall be that which is known and designated by the federal statute as 'United States Eastern Standard Time.' "

The United States Eastern Standard Time referred to above was established and enacted by an act of Congress which is known as the Act of March 19, 1918, Chap. 24, Secs. 1, 2 and 4, 15 U.S.C.A., Secs. 261, 262, 263, and said Act provided in substance that for the purpose of establishing standard time of the United States the continental United States was divided into five zones. It was provided that the standard time of the first zone shall be based upon the mean astronomical time of the seventy-fifth degree of longitude west from Greenwich; the bases of the other zones are similarly set forth and it was provided that the limitations of each zone were to be defined by an order of the Interstate Commerce Commission having regard for the convenience of commerce and for the junction and division points of Interstate Commerce. Sec. 263 provided that the standard time of the first zone, which included the State of Maine, would be known and designated as United States Eastern Standard Time.

So far as our research shows, United States Eastern Standard Time has been the legal time in use in the State of Maine, at least, since 1931, except that during the emergency created by what we call the second world war, that is, the war between the United States and Germany, Italy, Japan and other foreign countries, by Chap. 330, P. L., 1941, Sp. Sess. 1942, standard time in our State was advanced one hour. Under the provisions of the act, when the emergency ceased the act was terminated by proclamation of the Governor effective as of September 30, 1945. The only other

reference to daylight saving time or to a different time than United States Eastern Standard Time in our statutes which has been called to our attention appears in R. S., 1944, Chap. 57, now known as Sec. 22-C to which we will hereafter refer.

We, therefore, declare that except when changed or modified by the Legislature, United States Eastern Standard Time is the legal time for all legal business of the State of Maine and, whenever in our statutes time is referred to, unless it is otherwise specified, it means United States Eastern Standard Time as defined by R. S., 1944, Chap. 1, Sec. 4, above quoted. In short, the liquor licenses issued to and held by the complainant permit the operation of the business of selling liquor during the hours prescribed therein and those hours refer to United States Eastern Standard Time unless that time is changed or modified by the Legislature as above stated.

Sec. 22-C, Chap. 57, R. S., 1944, as amended, reads as follows:

> "**Sec. 22-C. Sale on certain days and hours prohibited.** No liquor shall be sold in this state on Sundays or on the day of holding a general election or state-wide primary and no licensee by himself, clerk, servant or agent shall between the hours of midnight and 6 A. M. sell or deliver any liquors, except no liquors shall be sold or delivered on Saturdays after 11:45 P.M.; provided, however, that liquor may be sold on January 1st of any year from midnight to 2 A. M. unless January 1st falls on Sunday; *provided further, however, that the commission by rule and regulation may set hours for sale which will give effect to daylight saving time during times when the same is in effect.* No licensee shall permit the consumption of liquors on his premises on Sundays or after 15 minutes past the hours prohibited for sale thereof, except by bona fide guests in their rooms." (Emphasis ours.)

Sec. 6, Sub-Sec. VIII of Chap. 57, R. S., 1944, with respect to the power of the State Liquor Commission to establish rules and regulations reads as follows:

> "**VIII. (1935, c. 179, § 2)** To establish regulations for clarifying, carrying out, enforcing, and preventing violation of all or any of the laws pertaining to liquor, which regulations shall have the force and effect of law unless and until set aside by some court of competent jurisdiction or revoked by the commission."

We might add for purposes of clarification that the emphasized portion of said Sec. 22-C hereinbefore quoted was enacted by said Chap. 97, P. L., 1947, and at that time affected Secs. 36 and 53 of Chap. 57. When Chap. 349, Sec. 102, P. L., 1949 was enacted as Sec. 22-C, Secs. 36 and 53 of said Chap. 57 were repealed. The State Liquor Commission, acting in pursuance of Chap. 57, Sec. 6, Sub-Sec. VIII, and after the adoption of the amendment enacted by said Chap. 97, P. L., 1947, which was the daylight saving proviso now contained in Chap. 57, Sec. 22-C, promulgated what is known as Rule 15 which reads as follows:

> "**Rule 15. Daylight Saving Time.** If any municipality in which any licensee is conducting his business adopts Daylight Saving Time, so-called, the hours of opening, closing and carrying on any liquor business in such municipality shall be the hours prescribed in Chapter 57 of the Revised Statutes, except that instead of Eastern Standard Time they shall mean Daylight Saving Time during that part of the year that Daylight Saving Time is in effect in any such municipality. A municipality shall be deemed to have adopted Daylight Saving Time within the meaning of this regulation if the municipality so votes, *or if without such vote a majority of such business establishments therein are conducted on and in accordance with such time.*" (Emphasis ours.)

The State Liquor Commission, through its inspection agencies, notified the complainant that he was carrying on his liquor business contrary to the Statutes and the Rules prescribed thereunder by the State Liquor Commission because the State Liquor Commission had determined that a majority of such business establishments in the town of Hermon were being conducted on daylight saving time and that unless complainant changed his hours to accord with what the State Liquor Commission had determined was the time generally used in the town of Hermon, which was claimed to be daylight saving time under Rule 15, it would be necessary to call the complainant before the Commission to consider the suspension or revocation of the licenses held by complainant. The State Liquor Commission based its claims that complainant was violating the laws on what we have referred to herein as Sec. 22-C of Chap. 57, R. S., 1944, and Rule 15 promulgated by the Commission under Sec. 6, Sub-Sec. VIII of Chap. 57, R. S., 1944, maintaining that it was the intention of the Legislature to grant the State Liquor Commission the right to make necessary rules and regulations relating to the operation and control of licensed premises with respect to daylight saving time, so-called.

We have noted that there is no state statute in effect which provides for state-wide daylight saving time, so-called, but we do know as a matter of common knowledge that certain municipalities have voted to conduct their private municipal and business affairs from the last of April to the last of September on daylight saving time, so-called, which is time one hour in advance of United States Eastern Standard Time.

The Commission claims that under said Sec. 22-C, Chap. 57 and Commission Rule and Regulation 15, it has the right to regulate the hours that the complainant may carry on his liquor business and that is all it sought to do with respect to the liquor licenses of the complainant. In other words, it

claims that Sec. 6 of Chap. 57, Sub-Sec. VIII gives it the right to promulgate Rule 15 which establishes by proper rule and regulation whether or not any particular town, in the instant case the town of Hermon, is carrying on its business on daylight saving time, so-called, in spite of the fact that the town of Hermon did not see fit to vote at a special meeting of the Inhabitants thereof to adopt daylight saving time, so-called, for its private and municipal business affairs.

As we see the question and issue before this court it is, what right does the Commission have to establish in the town of Hermon daylight saving time, so-called, by a Commission rule and regulation. We do not have before us the question of whether or not the Commission can, under Sec. 22-C, Chap. 57, make certain changes in the hours which will give effect to daylight saving time, so-called. On that question we neither express or intimate any opinion but we do feel, however, that the Commission has greatly exceeded its authority when it pretends or attempts to put daylight saving time, so-called, into effect in the town of Hermon. The State Liquor Commission derives its power from the Legislature. It has no other powers than those which the Legislature has prescribed and nothing has been called to our attention which in any way authorizes the State Liquor Commission to establish daylight saving time in any community by the promulgation of some rule of its own. Commissions and bureaus of the State derive their powers from the Legislature and we have had occasion from time to time to consider how far a commission or a bureau of the State can go in making rules and regulations. We said in *Appeal of Glovsky,* 146 Me. 38, 41, 77 A. (2nd) 195, in referring to certain features of the State Liquor Law:

> "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."

We also said in *Larson* v. *New England Telephone & Telegraph Co.*, 141 Me. 326, 332, 44 A. (2nd) 1, in speaking of the powers of the Highway Commission:

> "The Commission being purely a creature of statute is subject to the rule universally applicable to all bodies that owe their existence to legislative act. It must look to the statute for its authority."

We also said in *Cooper* v. *Fidelity Trust Company*, 134 Me. 40, 50, 180 A. 794, 799, in discussing the validity of acts of the Bank Commissioner, an agency of the State created by the Legislature:

> "His duty is to administer the law, not to make it or set it aside. His directions to that effect, reported here, were clearly outside his authority and void."

We also said in *Alley* v. *Inhabitants of Edgecomb*, 53 Me. 446, 448, in speaking of the rights and powers of towns:

> "They have no inherent right of legislation like that of the State, but act only by a delegated power which must be measured by the terms of the grant."

In the case of *Anheuser-Busch et al.* v. *Walton*, 135 Me. 57, 67, 68, 190 A. 297, a similar question came up as to how far the State Liquor Commission could go in making rules under said Sec. 6, Sub-Sec. VIII of Chap. 57, R. S., 1944 (then Public Laws of 1935, Chap. 179, Sec. 2), and we said:

> "Its power to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the legislature. What the commission has attempted to do in this instance constitutes a flagrant usurpation of a prerogative which belongs to the legis-

> lature, and is subversive of those principles which are the foundation of orderly government."

We said in *Coca-Cola Bottling Plants, Inc., Aplt.* v. *Johnson,* 147 Me. 327, 332, 87 A. (2nd) 667:

> "Our duties are judicial in nature. We must guard against trespassing upon the fields of the legislative and executive branches of government. * * * Our task is to ascertain and to give effect to the intention of the legislature."

If changes are necessary for any reason whatsoever in the State Liquor Law and its administration, such changes must come from the Legislature. They cannot be effected by rule or regulation of the State Liquor Commission, nor can they be brought about by a decision of our court. We can only say this—what the Commission has tried to do in this case is a prerogative that belongs to the Legislature and until the Legislature gives the Commission power and directions to promulgate rules putting into effect by some method daylight saving time, the Commission greatly exceeds its authority in putting into effect the emphasized part of Rule 15 which the sitting justice held invalid and set aside.

As we view this matter the decision of the sitting justice in issuing a permanent injunction was correct and proper. The mandate will be

Appeal dismissed.

Decree below affirmed.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

vs.

PUBLIC UTILITIES COMMISSION

Kennebec. Opinion, January 27, 1953.

Public Utilities. Rates. Words and Phrases. Exceptions.

The Public Utilities Commission is the judge of the facts in rate cases and the courts may intervene only when the Commission (1) abuses its discretion entrusted to it, (2) fails to follow the mandate of the legislature, (3) or fails to be bound by prohibitions of the Constitution.

"Fair value" under R. S., 1944, Chap. 40, Sec. 16, means "present value" and must include increases in value over original cost.

The ascertainment of "fair value" is not a matter of formulas but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts.

The right to derive a fair income is an essential element in the consideration of "fair value."

Actual cost is competent evidence of present value but it is not conclusive.

The failure to consider evidence of fair value is an error of law which can properly be brought before the Law Court on exceptions.

The failure to consider "current costs" upon the question of "fair value" constitutes error of law.

A rate basis limited to "net investment plus working capital and materials and supplies" does not meet the legislative mandate of "fair value."

In the determination of reasonable return on fair value the failure to apportion expenses of interstate and intrastate operations according to the relative use of facilities and equipment constitute error of law.

Commission rulings which are prejudicial and unsupported by evidence constitutes errors of law.

EXCEPTIONS.

This case arises on complaint before the Public Utilities Commission under R. S., 1944, Chap. 40, Sec. 73 for a rate

increase. The case is before the Law Court on exceptions to the order of the Commission dismissing the complaint. Exceptions sustained. Case remanded to the Maine Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

Locke, Campbell, Reid & Hebert,
James L. Reid,
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William M. Hogan, Jr.,
Attorneys for New England Telephone and Telegraph Company.

John M. Gepson, of Counsel.
Alexander A. LaFleur, Attorney General,
Ernest L. Goodspeed, Asst. Attorney General,
for the State of Maine.

A. F. Martin, Attorney for the City of Lewiston.

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

THAXTER, J. This complaint was filed November 30, 1950 in accordance with R. S., 1944, Chap. 40, and particularly under the provisions of section 61 of that chapter. It alleges that the Public Utilities Commission of Maine has jurisdiction over the operations of the Telephone Company within the State of Maine; that its rates are not now reasonable and just taking into consideration the fair value of its property devoted to intrastate telephone service with a fair return thereon; that such rates unless increased will continue to be unjust, unreasonable and insufficient, in that revenues and net earnings will continue to be insufficient to yield a fair return. And more particularly the Company points out that there have been substantial increases in its operating expenses due in part to economic changes attend-

ing the Korean war and the country's rearmament program, increased wages, and increased taxes; that the Company must make additional expenditures to its plant to maintain, extend and improve its service; and that its credit has already begun to suffer due in part to these conditions and to its inability to earn a fair return on the fair value of its property devoted to the public service within the State of Maine. The Company asks that the Commission investigate its rate structure for intrastate business for the purpose of remedying these conditions. Findings of fact were requested from the Commission, including findings "as to the fair value of Respondent's property devoted to the public use, the rate of return thereon allowed, and its income and operating expenses."

The Company in 1948 had filed with the Public Utilities Commission and in accordance with the provisions of R. S., 1944, Chap. 40, Sec. 73, a petition, No. 1316, praying for emergency relief in the form of an order authorizing an interim increase in rates pending disposition of an entirely new schedule. A thorough investigation was made by the Commission on that complaint; and extensive findings were made. The Commission cancelled certain of the proposed rates which had been filed by the Company; accepted others subject to some amendments; and the Company proceeded to operate under the new schedule of rates ordered and approved by the Commission. According to the contention of the present petition the Company found, however, that costs were still rising and that under the decree of the Commission it was unable to earn a fair return on the fair value of its property used in intrastate service. Accordingly, on November 30, 1950, the present complaint, No. 1370, was filed praying for a further investigation and hearing and that reasonable earnings be allowed to provide a fair return on the fair value of its property devoted to the public service in the State of Maine. Such hearing was had and on

May 19, 1952 an order was filed by the Commission that this new complaint be dismissed. In this case, as in the preceding one, Commissioner Hill dissented. By agreement of counsel the record and order in the earlier case, No. 1316, are made a part of the record in this.

Exceptions to the decree of the Commission were filed by the Telephone Company and the case is before us on these exceptions.

The Commission is the judge of the facts in rate cases such as this. This court under the statute which created it is only a court to decide questions of law. It must be so, for it has not at its disposal the engineering and the technical skill to decide questions of fact which were wisely left within the province of the Commission. Only when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions of the constitution, can this court intervene. Then the question becomes one of law. We cannot review the Commission's findings of fact and seek to determine what rates are reasonable and just. When the Commission decides a case before it without evidence, or on inadmissible evidence, or improperly interprets the evidence before it, then the question becomes one of law. The rule is the same as in hearings on appeals from the Industrial Accident Commission. *Hinckley's* Case, 136 Me. 403.

The exceptions are ten in number.

Exception 1 is to the order of the Commission dismissing the petition of the Company, and alleges that such order or decree of dismissal compels the Company to provide service at rates which are insufficient to yield a fair return on the fair value of its property used in providing service within the State of Maine.

Exception 2 is to the refusal of the Commission to consider current costs in figuring the rate base for determining

the fair value of the Company's property used in furnishing intrastate service in Maine.

Exception 4 is substantially to the same effect as Exception 2 and alleges that the ruling of the Commission referred to in such exception does not take into consideration the fair value of the Company's property used in furnishing intrastate service in Maine and does not provide a fair return on such property.

The other exceptions which will be considered hereafter are to certain specific rulings on subsidiary points in which it is declared that the same error to consider fair value appears in each specific instance or that there is an apparent error in figuring net earnings either in including or excluding relevant evidence as to value of the Company's property devoted to public service within the State of Maine, or that certain expenses for service within Maine are wrongfully excluded.

In short, all these ten exceptions raise questions of law, the main complaint being that the Commission has failed to follow the mandate of the statute in its refusal to give consideration to the evidence of the present fair value of the Company's property as required by sections 16 and 17 of R. S., 1944, Chap. 40. These sections read as follows:

> "**Sec. 16. Public utility to furnish safe and reasonable facilities; charges to be reasonable and just. R. S. c. 62, § 16.** Every public utility is required to furnish safe, reasonable, and adequate facilities. The rate, toll, or charge, or any joint rate made, exacted, demanded, or collected by any public utility for the conveyance or transportation of persons or property between points within this state, or for any heat, light, water, or power produced, transmitted, delivered, or furnished, or for any telephone or telegraph message conveyed, or for any service rendered or to be rendered in connection with any public utility, shall be reason-

able and just, taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk, and depreciation. Every unjust or unreasonable charge for such service is prohibited and declared unlawful.

"**Sec. 17. Valuation of property to be made if necessary for fixing rates. R. S. c. 62, § 40.** The commission shall fix a reasonable value upon all the property of any public utility used or required to be used in its service to the public within the state whenever it deems a valuation thereof to be necessary for the fixing of fair and reasonable rates, tolls, and charges; and in making such valuation it may avail itself of any reports, records, or other information available to it in the office of any state officer or board."

The Commission not only receives its authority from the Maine statute but is bound by the provisions of the state and federal constitutions which forbid the taking of private property without just compensation. Constitution of Maine, Article I, Sec. 21; Constitution of the United States, Amendments, Articles V. and XIV. It is unnecessary to discuss these overriding constitutional provisions because, as we have before said, the Maine Public Utilities Commission is a creature of statute and bound to act in accordance with the statute which created it. This, as the exceptions before us point out, it has not done. Without expressing any opinion on the constitutional questions here involved, if there are any, we shall discuss these exceptions. These allege in general that the Commission in establishing and approving rates for telephone service within the State of Maine has not followed the statutory mandate, particularly in that it did not give due consideration to the fair value of the Company's property within the State of Maine with a fair return thereon. Of the three commissioners, Commissioner Hill in an able opinion dissented.

EXCEPTION 1.

The record in this case shows that the Telephone Company, which is the complainant in this case, is a New York corporation doing business in Maine, New Hampshire, Massachusetts, Vermont and Rhode Island, and is subject to the jurisdiction of the Public Utilities Commission of the State of Maine insofar as its intrastate traffic in Maine is concerned. It is one of the component parts of the American Telephone & Telegraph system and is physically interconnected with the other companies of such system. The stocks of the companies comprising this vast enterprise are controlled by said American company, together with the stocks of certain corporations which manufacture supplies and do research work for the system as a whole. Its services beyond the State of Maine are under the control of the Federal Communications Commission and of the various regulatory bodies in the states through which the companies in the system and the American company itself operate. The Maine Public Utilities Commission and this court have jurisdiction over the New England company so far as its services are rendered solely within this state. It is only necessary to mention this set-up to understand the complexity of the situation here involved; for example, the equipment such as exchanges and telephone lines are used in common by the New England company for intrastate traffic and by the system generally for interstate traffic. What proportion of the revenues from all traffic, both intrastate and interstate, belongs to the complainant, and what proportion of the expense of the joint operation should be borne by it, are exceedingly complicated questions. Furthermore, the system of accounting is prescribed by federal law and is under the control of the Federal Communications Commission, and no other accounts can lawfully be kept. Of necessity, therefore, there must be some uniformity of operations and accounting within the different jurisdic-

tions. The problem of apportioning such receipts and expenses is known as "separations," which is a word used by those having this matter before them for solution, be they scientists, accountants, or lawyers. Various formulas have been proposed for the solution of the matter, known by various names; but the art is still in a nebulous state. We should bear in mind the warning of Justice Hughes in the *Minnesota Rate Cases (Simpson* v. *Shepard)* 230 U. S. 352, 57 L. Ed. 1511, at page 1556, in discussing the fair value of the property used for the convenience of the public that the "ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts."

The Commission must find the fair value of the Company's property devoted to the public service within this state before it can determine what rates will yield a fair return on the fair value of such property. The first exception alleges that the findings of fact of the Commission, on which the decree of dismissal of the complaint was based, not only compelled the Company to furnish service at rates insufficient to provide a fair return on the fair value of its property used in providing intrastate service, but the gist of the Company's argument is that the Commission deliberately refused to find the fair value. We shall address ourselves in the first place to these two matters: (1) What are the elements determining fair value? (2) Did the Commission refuse to find it?

Fair value has been considered by the courts of this state many times. One of the essential elements has been said to be "the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more

exacted than the services in themselves are worth." We wish to emphasize that it is the "fair value" of the property at the time it is being used for the public. *Kennebec Water District* v. *City of Waterville,* 97 Me. 185, 204. And again the same court says in the same case at page 207: "The plaintiff, in request 2, asks that the actual cost of the plant and property together with proper allowances for depreciation be declared to be legal and competent evidence upon the question of the present value of the same. We so hold, It is competent evidence, but it is not conclusive. It is not a controlling criterion of value, but it is evidence. *National Water Works Co.* v. *Kansas City,* 62 Fed. Rep. 853, 27 L. R. A. 827; *Smyth* v. *Ames, supra; San Diego Land Co.* v. *National City, supra; Cotting* v. *Kansas City Stock Yards Co., supra; West Chester Turnpike* v. *West Chester County,* 182 Pa. St. 40; *Griffin* v. *Goldsboro Water Co.,* 122 N. C. 206, 41 L. R. A. 240. Of course this element is subject to inquiry as to whether the works were built prudently, and whether they were built when prevailing prices were high, so that actual cost, in such respects, may exceed present value. *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739." We think that these two comments point out clearly that fair value means present value and that original cost is but one of several criteria of such value.

This court said the same thing in *Brunswick and Topsham Water District* v. *Maine Water Company,* 99 Me. 371, page 379: "In determining what would be a fair return, undoubtedly, the amount of money actually and wisely expended is a primary consideration. Actual cost bears upon reasonableness of rates, as well as upon the present value of the structure as such. It thus bears upon what is a fair return upon the investment, and so upon the value of the property. In estimating structure value, prior cost is not the only criterion of present value, and present value is what is

to be ascertained. The present value may be affected by the rise or fall of prices of materials. If in such way the present value of the structure is greater than the cost, the company is entitled to the benefit of it. If less than the cost, the company must lose it. And the same factors should be considered in estimating the reasonableness of returns."

Such opinions of nearly half a century ago undoubtedly formed the basis for the early decisions of our first Public Utilities Commission and those of the various commissions which have followed it since down to the time when the present commission seems to have pronounced a different doctrine of its own. We are indebted to the brief of complainant's counsel for the following quotations from the unreported opinion of one of these early commissions composed of Commissioners Cleaves, Skelton and Bunker, in the case of *Hines* v. *Lewiston Gas & Light,* F. C. 56, on January 18, 1918:

> " 'This Commission has in all rate cases taken the present value of the property to be the value upon which the utility is entitled to a fair return. Usually, it has ascertained this value by finding the cost of reproduction new less depreciation. In the case of Butler et als. vs. Lewiston, Augusta & Waterville Street Railway, Me. P.U.C. Rep. 1916, 100, P.U.R. 1916, D 25, it adopted the original cost as the measure of value on which a return might be enjoyed.
>
> " 'That case has been cited as committing the Commission to the theory that the original cost of a property is its value for rate making purposes; and some statements in the decision, given as reasons for not making an independent physical valuation; standing alone, appear to justify such a conclusion. They were, however, intended to explain why that evidence alone, in a case like that then under discussion, taking into consideration the comparatively recent date of construction and the condition of the utility's accounts, why such evi-

dence alone was sufficient on which to base an appraisal.

" 'The law says that the rate shall be fair taking into consideration the fair value of the property. When authorities quit theorizing, or trying to reach preconceived conclusions, they come very near agreeing that "fair value" means what everybody thinks it means—not what it first cost, but what you can get one like it for now.

" 'Here follow the quotations from the opinions of Judge Savage in the two Maine cases (quoted, p. 25, supra) and from the opinions of the Supreme Court of the United States in *Consolidated Gas Co.* v. *Willcox and Minnesota Rate Cases,* likewise above quoted.)

" 'It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than it cost.

" 'Whatever may be the merits of the respective theories, and there are very plausible arguments and eminent support for both, we are not satisfied that we should disregard the rulings of the highest court of our State, or those of the highest court in the nation spoken finally by no less an authority than Justice Hughes; nor undertake to hold that when the legislature said "value" it meant "investment".' "

From then to the present time such construction of the words "fair value" has been approved by the Supreme Judicial Court of this state.

In the case of *Gay* v. *Damariscotta-Newcastle Water Co.,* 131 Me. 304, the public utility petitioned for an increase in

hydrant rentals. The commission disallowed the increase but in doing so pointed out that it had made an appraisal of the company's plant in which it had considered the original investment "in the light of changes in costs of labor and supplies." Thereby this court inferentially at least gave approval to the doctrine that reproduction cost less depreciation was one of the important elements which should be considered in determining fair value.

Rockland v. *Camden and Rockland Water Co.*, 134 Me. 95, was a rate case in which the following rule was laid down, page 97:

> " 'The rate . . . shall be reasonable and just, taking into due consideration the fair value of all its property with a fair return thereon, ...' R. S., *supra,* (Sec. 16).
>
> "Such is the fair value concept, better called the rate base."

Sweet v. *City of Auburn,* 134 Me. 28, was the case of a petition for tax abatement. This court said as to value page 32:

> "If, during a time of crisis, it is impossible to determine the true worth of real estate by reference to the price which such property will bring in the market, resort may be had to other factors. Consideration may be given to the original cost of construction less depreciation, although perhaps this is less important than other things, to reproduction cost with an allowance for depreciation, to the purchase price, if not sold under stress or unusual conditions, to its capacity to earn money for its owner. No one of these elements is controlling, but each has its place in estimating value for purposes of taxation. *Spear* v. *City of Bath, supra; Central Realty Co.* v. *Board of Review, supra; Underwood Typewriter Co.* v. *City of Hartford,* 99 Conn., 329, 122 A. 91; *Massachusetts General Hospital* v. *Inhabitants of Belmont,* 233 Mass., 190, 124 N. E., 21; *Somers* v. *City of Meriden, supra;* 2 Cooley, Taxation (4 ed.), 1147."

And again at page 34, referring to certain opinion testimony as to value, it is said:

> "Such in brief is the testimony which the petitioner claims shows an over-valuation of this property. It does not, however, tell the whole story. The original cost, measured by a scale of prices of a score of years ago, may throw some light on the problem but is of minor significance. Neither is the purchase price at the receiver's sale of great consequence. The property changed hands during the depths of a depression at a time when, to say the least, it was difficult to find purchasers who could finance so large an enterprise. That the petitioner was able to buy it at that time for $100,000 is of small moment."

And in *Damariscotta Newcastle Water Co.* v. *Itself,* 134 Me. 349, we were seeking to find the elements which make up value and we specifically approved a finding of the Public Utilities Commission of a rate base for a water company of $140,000. This amount was $40,000 more than the original cost. The commission said:

> " 'After careful consideration of all the elements presented in this case and analysis of the affairs of this company and its predecessors as introduced in evidence, including original cost, outstanding securities, reproduction cost and reproduction cost less depreciation, and the economic condition of these communities and municipalities as shown by the testimony, we conclude that the fair value of the company's property as a going concern including a reasonable amount for cash working capital, is $140,000, which we shall adopt as the rate base in this case.' "

To the same general effect as these opinions of this court are the following from other states in which the doctrine of "fair value" is discussed. *Pittsburgh* v. *Pennsylvania Public Utility Commission* (Pa. Supreme Court 1945) 44 A. (2nd) 614; *Havre De Grace & Perryville Bridge Co.* v. *Pub-*

lic Service Commission of Maryland, 132 Md. 16, 103 A. 319: *East Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (Supreme Ct. Ohio 1938) 12 N. E. (2nd) 765; *Tobacco River Power Co.* v. *Public Service Commission* (Supreme Ct. Mont. 1940) 98 P. (2nd) 886. In the *Maryland* case cited *supra,* the court said, page 29:

> "The real point to be ascertained was not what it had cost either the railroad company to build the bridge, or the incorporators of the Bridge Company to acquire it, but what was its fair value at the time of the investigation by the Commission."

To the same effect also is the following language of Justice Hughes of the Supreme Court of the United States in the *Minnesota Rate Cases, supra,* 57 L. Ed. 1511, 1556:

> "The basis of calculation is the 'fair value of the property' used for the convenience of the public. Smyth v. Ames, 169 U.S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418. Or, as it was put in San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; 'What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.' "
> *****
>
> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in Smyth v. Ames (169 U. S. pp. 546, 547): 'In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by stat-

> ute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.' "

We must bear in mind that federal courts are not bound by statute as the courts of our own state are to consider the fair value of the utility property in determining the rate base on which a return should be allowed. North Dakota recognizes that a different rule is applied by federal and state courts and the court there points out that the commission must determine fair value which must include consideration of evidence of increase in value of assets over the amount originally invested in the property. The evidence of reproduction cost less depreciation is one of the major factors which must be considered by the commission reaching its conclusion. *Northern States Power Co.* v. *Board of Railroad Commissioners,* 71 N. D. 1; *Northern States Power Co.* v. *Public Service Commission* (N. D. 1944), 13 N. W. (2nd) 779. The failure to consider evidence of a fair value is an error of law which can properly be brought before this court on exceptions.

We do not need to examine the record to determine that the Maine Public Utilities Commission did not do what the statute required it to do, for the Commission admits that it has not done so. What other conclusion can be drawn from its opinion where it gives the following reasons for not doing so?

> "A main objection to 'current costs' is the lack of definiteness and stability. Such prices are mov-

> ing up and down with a frequency that a change of rates to keep pace would be impracticable."

We do not expect the impossible, and mathematical accuracy is not required. See Justice Hughes' opinion in the case of *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 75 L. Ed. 255, at page 264, wherein he says, after pointing out many of the same difficulties which perplexed our own Public Utilities Commission:

> "While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential (Rowland v. Boyle, 244 U. S. 106, 108, 61 L. ed. 1022, 1023, P.U.R. 1917E, 685, 37 S. Ct. 577; Groesbeck v. Duluth, S.S.&A.R. Co. 250 U.S. 607, 614, 63 L. ed. 1167, 1172, P.U.R. 1920A, 177, 40 S. Ct. 38) it is quite another matter to ignore altogether the actual uses to which the property is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden—to what extent is a matter of controversy."

Also the language of Justice Hughes in the *Minnesota Rate Cases, supra,* heretofore quoted, should at all times be borne in mind by our own Maine Public Utilities Commission. And see our own language as to value in *Sweet* v. *City of Auburn, supra.*

Particularly pertinent is the language of Justice Hughes where he says further, 57 L. Ed. 1555: "It is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon." And so we might add it is not the province of the Maine Public Utilities Commission to adopt a dif-

ferent rule for measuring values than that which the legislature has declared. In interpreting legislation such as this we are the servant of the legislature and of the people of this state. We do not make the law. The Maine Public Utilities Commission has in this instance transgressed its functions and has gone beyond the limit of what it was authorized to do. This exception raises a fundamental issue of law and must be sustained.

EXCEPTION 2.

"The Company has evidenced to us in several exhibits that the average net investment on December 31, 1951 was $36,103,100 which includes working capital of $1,655,000. The average net investment in property would therefore be $34,448,100. In all its computations for different rates of return (6½% and 7½%) the Company has used the foregoing base.

"The Company has requested the Commission to increase this figure by some amount to reflect 'current costs.' The majority of the Commission find no valid reason to alter the opinion expressed in the prior case, F. C. #1316, September 14, 1949 (80 PNS 397) and finds no necessity for restating the position there set forth. A main objection to 'current costs' is the lack of definiteness and stability. Such prices are moving up and down with a frequency that a change of rates to keep pace would be impracticable. Current cost represents in terms of today's dollars, what it would have cost to build the plant as it was built over a period of many years. If the Company were confronted with the necessity of building with current dollars its plant in Maine, it is safe to say that many changes would be made, notably in our many 'crank' phones, and the magnitude of these and other changes would be such as to afford no valid basis of comparison between such a plant and the present plant. By using 'current costs' of plant, the Company is apparently striving to get along

with a lower rate of return, but not less income, an attempt we do not subscribe to.

"Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said finding and ruling does not take into due consideration the fair value of all complainant's property used in furnishing intrastate service in Maine."

This exception raises the same question as does Exception 1. The Commission in its rulings must abide by the statute, and must in establishing its rate base recognize current costs both insofar as those costs affect the fair value of its plant within the State of Maine and the operation of it. The Company is entitled to have determined as its rate base the fair value of its plant and equipment, together with the value of its net working capital. It makes no difference that such figure may be more or less than the average net investment even though that may have been the rate base on which the Company had based its figures previously. This exception must be sustained.

EXCEPTION 3.

This exception is to a ruling of the Public Utilities Commission expressed in the following language in its opinion:

"By using the foregoing, in so far as the SLU factor is concerned, increasing the holding time of toll, decreasing exchange holding time and increasing its traffic units and applying a factor of 3, we get a SLU factor of 10.8563. That multiplied by the property subject to SLU gives $2,498,200 to be transferred to interstate. The transfer of this property carries with it $549,600 of expense.

"In a similar manner there is $2,996,900 of plant affected by Traffic Units in allocation. By increasing the traffic units to reflect actual interstate use, $299,700 of property is transferred and $29,900 of expense.

"According to evidence submitted by the Company, a change in the traffic coefficients means a transfer of $98,000 of property to interstate account and its concomitant of $66,000 expense. The three foregoing transfers of property and expenses to interstate seem to be entirely justified, equitable and reasonable.

"Having made these changes in property, a new rate base results, in place of the $35,200,000 previously referred to, on net investment plus working capital and materials and supplies, of $32,302,-200. Using the estimated increase in wages annualized at $412,000, the increase in Federal Income Tax of 52% and giving effect to the transfer of expenses, the Company on 1951 figures will be earning on an estimated income of $15,103,700, approximately $1,931,000 on Maine intrastate plant as against $2,100,000 on a full 6½% return. Expenses not including Federal Income Tax are computed at $12,127,200.

"Complainant alleges that it is aggrieved by said findings and rulings and that its rights are substantially prejudiced thereby in that said findings and rulings (a) wrongfully determine the fair value of complainant's property used in furnishing intrastate service in Maine (b) exclude substantial amounts of complainant's property used in furnishing intrastate service in Maine and (c) exclude substantial amounts of expense incurred by complainant in providing intrastate service in Maine and hence erroneously determine that complainant's earnings are higher than they are in fact."

The exceptant claims to have been aggrieved by this ruling in the following particulars: (1) that the fair value of the Company's property used in intrastate service in Maine is wrongfully determined; (2) that substantial amounts of the Company's property used in furnishing intrastate service in Maine have been excluded; and (3) that substantial amounts of expense in providing intrastate service have been omitted; and that because of these last

two errors, the complainant's true earnings from service within Maine appear to be much higher than they actually are in fact.

As to the first ground of grievance we can say only that the fair value of the Company's property within Maine is not merely erroneously determined. That value has not been determined at all. The Commission found as its rate basis not the fair value but, to use its own words, the "net investment plus working capital and materials and supplies." In determining that this exception must be sustained we do not need to say more, particularly as the values herein enumerated must be refigured. We might add, however, that values do not become proper merely because they conform to the Phoenix Plan, the Charleston Plan, or to those of some other manual. The sole issue is whether they conform to the statutes of Maine. This exception must be sustained.

EXCEPTION 4.

Exception 4 is as follows:

> "It is our considered opinion that approximately 6.5% return on net investment including working capital and materials and supplies is fair and reasonable to the Company and to the customer.
>
> "Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby for the reason that said finding and ruling does not take into due consideration the fair value of all complainant's property used in furnishing intrastate service in Maine with a fair return thereon."

What we have said before, particularly with respect to exceptions 1, 2 and 3, applies here. The rate of return may be correct; but it is figured on a base which represents "net investment" and not "fair value." If fair value is less than net investment, the public is paying too much for the ser-

vice rendered; if fair value is more than net investment, the Company may not be receiving as much as it is entitled to have. This exception is sustained.

EXCEPTION 5.

This exception reads as follows:

> "It is therefore our opinion that earnings after the adjustments are made are not out of line and are fair, just and reasonable.
>
> "Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said earnings are not earnings in fact being received by the Company and such erroneous determination of such earnings forms the basis of an erroneous finding and ruling as to the fair return being received by the Company."

What the Company says, as we view it, is that it is not only entitled to an income based on a reasonable return on the fair value of its property devoted to the public service within Maine, but that in figuring such fair return it is entitled to deduct the expenses of operating its plant within this state. The problem of allocating these expenses between interstate use and intrastate use is a real one; for the plant and equipment of the Company are used in common for both services. The seeming confusion grows out of our form of government under which Maine as other states has control of operations within the state, and the federal government through the Federal Communications Commission has jurisdiction over operations which go beyond the borders of the state. Justice Hughes, speaking for a unanimous court in the *Minnesota Rate Cases, supra,* laid down the principal standard for apportioning expense as that of the relative use of the facilities and equipment employed in the two services, interstate and intrastate service.

After a careful reading of the opinion and findings of the Maine Public Utilities Commission in both cases, No. 1316

and No. 1370, we are convinced that the majority of this Commission disregarded this factor which the Supreme Court and many state courts have held to be the most important element of all in applying separations. This exception by the Company was well taken and must be sustained.

EXCEPTION 6.

This exception reads as follows:

> "We would take the holding time in August and apply it to a year's messages. We have repeatedly given our reason for using August holding times instead of March. No valid reason has been given by the Company for using March figures. Company tries to claim it makes no difference. If it doesn't, no harm can result in applying August holding times. To reiterate, LDI lines are 'engineered' for peak use which comes in August (barring Aroostook County). During August the holding times are longer, the traffic units are larger, the number of interstate calls is the highest than at any time in the year. It therefore necessarily follows that in August the largest amount of property is devoted to interstate use. This property so devoted consists of at least two general kinds, without going into too many details. There is the LDI plant belonging to A.T.&T. for instance. Unless that plant is connected to subscribers for use it is valueless. There is the subscribers' plant that is allocated on a use basis to LDI use—interstate and intrastate. When such subscribers' property becomes a part of interstate LDI use, it is the same as if built for that purpose. It can no more be reallocated to intrastate use, to be supported by intrastate customers, than the LDI property can be reassigned to intrastate use.
>
> "Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said finding and ruling forms the basis for an erroneous exclusion of complainant's property used in providing intrastate

> service in Maine and forms the basis for an erroneous exclusion or disallowance of expenses reasonably incurred in providing intrastate service in Maine and hence leads to an erroneous and unlawful determination of earnings and return being received by complainant."

The Commission was concerned here with what portion of the plant of the Company was properly allotted to intrastate service in Maine; also what portion of the expenses should be charged to the operation of it. We have stated before that the only proper way to decide these questions is to determine them on the basis of the relative use of the plant in the two services, intrastate and interstate. As was acknowledged by Chief Justice Hughes in *Smith* v. *Illinois Bell Telephone Co., supra,* the problem is a difficult one and exactness cannot be expected in the solution of it. It is all the more important because it is a jurisdictional question; and must be decided broadly after giving due consideration to the rulings of the federal authorities on the same point. Otherwise chaos will result, particularly if the Commission gives undue consideration to the result to be achieved rather than to the proper and scientific methods of arriving at such result. The Company contends that the Commission has given too much stress to the subscribers' line usage factor, and has weighted that factor so that it shows a greater usage of plant in interstate service than is warranted, also that too large amounts of expense have been apportioned to such service. In such a way the net earnings from intrastate service appear larger than they really are. As the rulings of the Commission on this point are prejudicial to the Company, and unsupported by the evidence, the exception is sustained.

EXCEPTION 7.

This exception reads as follows:

> "Because the toll circuits are 'tailored' on August business, because the highest percentage of

> LDI calls with respect to all originating calls occurs in August, in fairness to the Maine customer, to New England Company and to A.T.&T. Company, it is our opinion that August business should determine the holding time and not other months when the per cent of LDI is low.
>
> "Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said finding and ruling forms the basis for an erroneous exclusion of complainant's property used in providing intrastate service in Maine and forms the basis for an erroneous exclusion or disallowance of expenses reasonably incurred in providing intrastate service in Maine and hence leads to an erroneous and unlawful determination of earnings and return being received by complainant."

We have already said that the solution of the separations problem hinges on the relative use of the plant and the lines of the Company in Maine between interstate traffic and intrastate traffic. Justice Hughes says in the *Minnesota Rate Cases, supra,* 57 L. Ed., page 1566: "That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business." So also there must be a division of expenses and these should be apportioned on the same basis of relative use. What the Commission has done is to take the month of August as typical of the entire yearly service because, to use its own words, "the highest percentage of the LDI calls with respect to all originating calls occur in August." In this manner an undue proportion of the expense of operation is thrown into interstate use, and it would appear that the intrastate service is not bearing its just proportion of expenses. This appears to be another case where the Commission was apparently concerned with what the result would be, instead of the proper method of arriving at such result. Likewise the Commission is confusing the number of LDI originating

calls with the length of time consumed in completing such calls. This exception is sustained.

EXCEPTION 8.

This exception reads as follows:

> "The problem is for the Commission to find the usage of plant. Using any thing less than the peak means that plant constructed for peak usage has to be supported by someone other than toll rate payers during off peak periods. It is our considered judgment that peak holding time and traffic units during those holding times should govern in making the separation.
>
> "Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said finding and ruling forms the basis for an erroneous exclusion of complainant's property used in providing intrastate service in Maine and forms the basis for an erroneous exclusion or disallowance of expenses reasonably incurred in providing intrastate service in Maine and hence leads to an erroneous and unlawful determination of earnings and return being received by complainant."

What we have said in discussing Exception 7 applies here. The Commission seems to have been concerned with throwing the largest amount of expense of operation on interstate traffic as possible. In this way, to the prejudice of the Company, earnings from intrastate operations appear larger than they really are and the need for extra income less than it really is. This exception is sustained.

EXCEPTION 9.

This exception reads as follows:

> "Furthermore, the Company's method of working the Separations Manual disregards all factors

except actual use. Our objections to this were stated in F.C. 1316 reported in 80 PNS at 409. We still adhere to the opinions there expressed and do not see how so called 'free' calls can be treated equally with 'pay' calls. For the monthly charge one can use an indefinite number of local calls and no other charge is made. If he calls outside the exchange area, each call requires a payment. In the case just referred to, the Commission applied a factor of 2 to the station component to attempt at equalization and fair comparison. This was a minimum figure.

"Mr. Tozier in the previous case (F.C. 1316) had stated that the calling rate might triple if a 10¢ rate were removed and calls to that 10¢ area became unrestricted. Mr. Upton agreed, and he was 'Market Engineer' for the Company, had been with it 17 years, serving in the Commercial Depart as a Traffic Engineer and also as a District Manager. Mr. Tozier had been with the Company 23 years, a Traffic Manager and District Traffic Superintendent.

"In view of our further experience, we are irresistibly led to the conclusion that Tozier and Upton were nearer right and that we should use a factor of 3 rather than 2, a minimum figure.

"Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said finding and ruling forms the basis for an erroneous exclusion of complainant's property used in providing intrastate service in Maine and forms the basis for an erroneous exclusion or disallowance of expenses reasonably incurred in providing intrastate service in Maine and hence leads to an erroneous and unlawful determination of earnings and return being received by complainant."

The Commission here complains because the Company in applying its separations has given major consideration to the factor of actual use. As we have said before, this is the

major element to which consideration should have been given. The refusal to give to this factor due consideration constitutes in itself justifiable ground of exception. Nor are we particularly sympathetic with the reasons which the Commission gives for its failure to do so, i.e., that it felt called on to give to other factors more consideration than to us seems proper to allocate to those factors. This exception must be sustained.

EXCEPTION 10.

This exception reads as follows:

> "This procedure does not result in any less money for the New England Telephone and Telegraph Company. It does not require any larger payments by the customer. It simply means that more property is assigned to A.T.&T. Co. to support and the expenses in connection with that property would be paid for by A.T.&T. Company.
>
> "Complainant alleges that it is aggrieved by said finding and ruling and that its rights are substantially prejudiced thereby in that said finding and ruling wrongfully assumes that complainant can recover losses of intrastate revenue and earnings, to which it is lawfully entitled, from interstate service or from persons or corporations not engaged in rendering or using intrastate service in Maine."

The above ruling of the Commission which prompted this exception seems to us the most unjustifiable of all. It substantiates what we have before intimated—that the Commission is attempting to justify the correctness of its ruling on this point because the result of doing so may mean the giving of lower rates to intrastate service in Maine than would otherwise be the case. It says in effect that the allotment of the income which will make up the difference between the interstate and the intrastate rates is justified because the interstate rates will be compelled to carry the burden. In other words, it is permissible to take money from

certain customers so long as the income received from those customers is not allotted to intrastate use where it may properly belong. In solving the separations problem, this is exactly what the experts have been trying to avoid. We do not need to look farther than the following language of Justice Hughes in the *Minnesota Rate Cases, supra,* 57 L. Ed. at page 1556:

> "Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth case (id. p. 541). The reason, as there stated, is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business."

This exception is sustained.

CONCLUSION

The constitutional question of whether the rates fixed by the Commission are confiscatory has not been considered in this opinion and we express no opinion on that point. The problem is much narrower than that—namely, whether the Commission in setting up its standards for fixing its rate base and allotting the expenses chargeable to intrastate service has followed Sections 16 and 17 of Chapter 40 of the Revised Statutes of Maine.

In establishing its rate base on which a reasonable return is purportedly allowed by the schedule of rates which the

Commission has permitted the Company to establish, the Commission has ignored the question of the fair value of the Company's property. It has sought to establish a rate base on its own theory of what would be best for the people of this state, the so called prudent investment theory which may be quite different from the standard of fair value which the statute requires it to respect. This error in and of itself constitutes a valid ground of exception and requires us to remand this case for a new decree giving full effect to the principles set forth in this opinion. Furthermore, in applying the rate base which it has set up, the Commission has committed errors which constitute an arbitrary exercise of power.

The problems in this case are the outgrowth of our dual form of government under which the states are recognized as supreme in their control over state affairs, and the authority of the federal government as exclusive in national affairs. To mark the limits of each sovereignty within its own sphere is an exceedingly complex problem, made more difficult by the fact that the facilities used in performing both interstate and intrastate services are used in common by both services. The solution of this intricate matter is not made easier by the failure of the Public Utilities Commission to follow the statute of our own state with respect to fair value. The question is a jurisdictional one.

The Company is entitled to earn a reasonable and just return on the fair value of its property devoted to the public service within the State of Maine after making due allowance for the expenses of operating its plant and facilities within the State of Maine.

Justice Hughes in his opinion in the *Minnesota Rate Cases, supra,* though it concerned rates on the railroads of the country, involved practically the same question as is here presented. It was there held that it could be decided

only by giving due consideration to the relative use of the facilities of the railroads in intrastate and in interstate service after apportioning the expenses which should be properly allocated to each service.

In the two *North Dakota* cases, and in fact in all of our own cases, fair value is held to be present value, value at the time the inquiry is made, and must include increases in value over original cost. Thus the amount of the capital prudently invested in the property, though it is a factor which may be considered, is given a secondary place in determining fair value.

The method of approach to the problem which the Commission has adopted leads almost inevitably to the errors of which the Commission has been responsible here. It has been more concerned with the result at which it was going to arrive than with the methods by which it reaches that result. It should have given heed to the words of our early commission where it is said in the *Hines* case, *supra*, "we are not satisfied that we should disregard the rulings of the highest court of our State, or those of the highest court in the nation spoken finally by no less an authority than Justice Hughes; nor undertake to hold that when the legislature said 'value' it meant 'investment'. Commissions are not a law unto themselves, and they have no right to take short cuts across the rights of others—even of those engaged in a public service—to reach popular results."

Exceptions sustained.

Case remanded to the Maine Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

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

QUESTIONS PROPOUNDED BY THE SENATE
BY ORDER DATED JANUARY 20, 1953

ANSWERED JANUARY 27, 1953

STATE OF MAINE

In Senate, January 20, 1953.

ORDERED,

Whereas, Section 2 of Article IV, Part First, of the Constitution of Maine requires that "The legislature shall, within every period of at most ten years and at least five, cause the number of the inhabitants of the state to be ascertained, exclusive of foreigners not naturalized, and Indians not taxed"; and

Whereas, the same section further provides that "The number of representatives shall, at the several periods of making such enumeration, be fixed and apportioned among the several counties, as near as may be, according to the number of inhabitants, having regard to the relative increase of population"; and

Whereas, the last apportionment of representatives was made by the legislature in 1941, so that more than ten years have elapsed since an apportionment was made or enumeration of inhabitants caused to be made for the purpose of apportionment; and

Whereas, the 95th legislature did not ascertain the number of inhabitants, either by causing an enumeration to be made or by adopting the federal census enumeration or any other, and did not reapportion representatives; and

Whereas, the foregoing facts appear to create a solemn occasion while the following questions appear to be important questions of law within the meaning of Section 3 of Article VI of the Constitution; now, therefore, be it

ORDERED, that the Justices of the Supreme Judicial Court be respectfully requested to give their opinion on the following questions:

Question 1. Is it the right of the 96th legislature to ascertain the number of inhabitants and to apportion representatives according to the provisions of Sections 2 and 3 of Article IV, Part First, of the Constitution?

Question 2. If the answer to Question 1 be in the affirmative, is it also the duty of the 96th legislature so to enumerate and apportion?

Question 3. Should an enumeration of inhabitants, when made by the 96th legislature, be made as of the latest date when it should have been made at the end of the ten years' period beginning with the 1941 apportionment, or should it be made as of the date of its actual making within the term of the legislature which means it?

Question 4. Should a ten-year reapportionment of representatives made or provided for by the 96th legislature run from the year when it is made or from the year when it should have been made?

Question 5. Is it within the power of the legislature, it having first ascertained the number of inhabitants, to enact a law requiring any state official or any governmental body of the state to make the reapportionment based upon the enumeration of inhabitants as made by the legislature and otherwise according to the provisions of the Constitution?

Name: EDWARD E. CHASE

County: Cumberland Passed as amended.

A true copy. Attest:

/s/ CHESTER T. WINSLOW
Secretary of the Senate

SENATE AMENDMENT "A" TO SENATE ORDER REQUESTING OPINION OF JUSTICES OF SUPREME JUDICIAL COURT RE APPORTIONMENT OF REPRESENTATIVES.

Amend said Order by inserting after the word "representatives" in the 4th paragraph, 4th line, the following:

> "by reason of failure of House and Senate to agree upon a bill for that purpose, as shown by the Legislative Record"

In Senate Chamber
Jan. 22, 1953
Read and adopted

CHESTER T. WINSLOW
Secretary

Senator HARDING
Knox

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine.

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, the undersigned Justices of the Supreme Judicial Court, having considered the questions submitted by the foregoing Senate Order, answer as follows:

QUESTIONS 1 AND 2

Article IV, Part First, Section 2, of the Constitution of the State of Maine reads as follows:

> "Section 2. The house of representatives shall consist of one hundred and fifty-one members, to be elected by the qualified electors, and hold their office two years from the day next preceding the biennial meeting of the legislature. The legislature shall, within every period of at most ten years and at least five, cause the number of the inhabitants of the state to be ascertained, exclusive of foreigners not naturalized, and Indians not taxed. The number of representatives shall, at the several periods of making such enumeration, be fixed and apportioned among the several counties, as near as may be, according to the number of inhabitants, having regard to the relative increase of population."

It is the duty of the Legislature to obey this mandate of the Constitution.

See Opinion of the Justices, 3 Me. 477, at 479.

Neither the language nor the purpose of the foregoing provision of our Constitution permits an escape from its performance. See *Fergus* v. *Kinney,* 333 Ill. 437, 164 N. E. 665, 666.

The duty is a continuous one and is cast in turn upon every legislature succeeding that which has omitted to perform it until that duty is performed. That is to say, if the apportionment is not made within the period prescribed by the Constitution, the duty to make it devolves upon the legislature then next sitting and upon each following legislature until that duty is performed. *Botti* v. *McGovern,* 97 N. J. Law 353, 118 A. 107, 108.

This same principle is declared in *Fergus* v. *Kinney, supra* when the Illinois Court said:

> "The duty is a continuing one, and, if it is not discharged at or within the time prescribed, the burden of its performance rests upon successive General Assemblies until the section has been obeyed."

The reason is well stated in *Botti* v. *McGovern, supra,* quoting from *People ex rel. Carter* v. *Rice,* 135 N. Y. 473, 31 N. E. 921, where it is said:

> "It cannot be tolerated that a Legislature, by mere omission to perform its constitutional duty at a particular session, could thereby prevent for another ten years the apportionment provided for by the Constitution."

The duty to apportion the state is a specific legislative duty imposed by the Constitution solely upon the legislative department of the state, and it alone is responsible to the people for the failure to perform it. See *Fergus* v. *Marks,* 321 Ill. 510, 152 N. E. 557.

The duty of causing the number of inhabitants to be ascertained may be discharged in any reasonable manner which may be determined upon and adopted by the Legislature, including that which has undoubtedly been used through the years, viz., adopting therefor the last Federal Census.

We answer Questions 1 and 2 in the affirmative.

QUESTION 3

While the ascertainment of the number of inhabitants should be as of the time it is made, the Legislature is entitled to use therefor such information as is currently available. This, as stated in our answer to Questions 1 and 2, includes the last Federal Census, which is now controlling in determining senatorial representation under our Constitution, Art. IV, Part Second, Section 1.

QUESTION 4

There is nothing in the Constitution which requires the Legislature to state the term of the continuance of any apportionment it makes. If made, it must continue for at least five years. However, the Legislature cannot constitutionally prescribe that it continue for more than ten years from the time it is made, nor can the Legislature, by prescribing that an apportionment continue for more than five years, deprive a subsequent legislature of its constitutional power to reapportion after the expiration of five years. In view of the fact that no action by this Legislature in making an apportionment can control the action of subsequent legislatures for more than five years, we cannot say that the Legislature *should* take either course concerning which the inquiry is made. It is for the Legislature and not for the Justices of the Supreme Judicial Court to determine whether it will be wise to make an apportionment of representatives in 1953, as it should, which will expire with the Legislature of 1961, as does the senate representation provided by the Legislature of 1951 in Resolves of 1951, Chap. 132.

QUESTION 5

The duty laid upon the Legislature with respect to reapportionment is a non delegable duty.

Dated at Portland, Maine, this twenty-seventh day of January, 1953.

Respectfully submitted:

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

W. S. LIBBEY COMPANY

vs.

ERNEST H. JOHNSON,
STATE TAX ASSESSOR

Androscoggin. Opinion, February 3, 1953.

Sales Tax.

Laws should be construed to give effect to legislative intention, when the same is determinable.

The Sales and Use Tax Law imposes a tax on all tangible personal property sold at retail in this State, after its effective date, regardless of price, except for such sales and commodities as are excluded from its operation by its express terms.

The sales taxes imposed by the Sales and Use Tax Law, as enacted by Legislative Document No. 1273, are taxes upon the retailers making the sales subject to its provisions.

The legislative intention underlying the enactment of the new Section 34 of the Sales and Use Tax Law, as enacted by Section 10 of the State Tax Act, P. & S. L., 1951, Chap. 213, was not to transfer the tax liability to the consumers purchasing tangible personal property subject thereto, but to make all tax payments collected of such consumers, by the retailers liable to the State therefor, available as deductions for income tax purposes.

ON REPORT.

This case arises on appeal from a refusal of the State Tax Assessor to reconsider a deficiency assessment. The case is before the Law Court on report and agreed statement. Appeal to the Superior Court denied. Case remanded for a decree sustaining the assessment without costs, interest or penalty.

Skelton & Mahon,
Frederick G. Tainter, for plaintiff.

Alexander A. LaFleur, Attorney General,
Boyd L. Bailey, Asst. Attorney General,
Miles P. Frye, Asst. Attorney General, for State.

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

MURCHIE, C. J. The plaintiff's appeal herein comes to this court on report, under an Agreed Statement of Facts, to which reference will be made when certain unusual features concerning the legislation it brings under review, and the mis-printing of that legislation in the session laws of 1951, have been noted. The legislation is the Sales and Use Tax Law, R. S., Chap. 14-A, mis-printed in P. L., 1951, Chap. 250. It was enacted by Legislative Document No. 1273 of the Ninety-Fifth Legislature, referred to hereafter as "L. D. 1273," but is not available in its original form anywhere in our printed laws or statutes, and never will be.

P. L., 1951, Chap. 250, Sec. 1, as printed, carries thirty-four sections which "shall be known and may be cited as the 'Sales and Use Tax Law.' " This was the recital of L. D. 1273, where the first thirty-three were enacted, as emergency legislation, effective May 3, 1951, with a Section 34 that was repealed by Section 9 of P. & S. L., 1951, Chap. 213, referred to hereafter as the "State Tax Act." It was therein ordered that the repealed section should not be printed "as a part of the session laws of 1951." With the fact that it was not so printed, this court, of course, has no quarrel. It is entirely within the competence of the Legislature to repeal legislation before it becomes effective, and direct the Director of Legislative Research, the official charged with the duty of printing our session laws, P. L., 1947, Chap. 392, to omit the printing of it. Section 3 of the Sales and Use Tax Law provides that the tax imposed by its terms shall be applicable to sales made in this State

"on and after July 1, 1951," and the State Tax Act was enacted, as emergency legislation, prior to that time, on May 21, 1951. The Sales and Use Tax Law was in effect from May 3, 1951 to May 21, 1951 for the limited purpose, as its emergency preamble discloses, of authorizing the creation and organization of "an efficient administrative agency for the collection" of the taxes it was designed to impose.

The repealed section was not an essential part of the law, carrying nothing more than a declaration of policy with reference to state property taxation, which was to be effective only if sales taxes were collected under its provisions, and property in the unorganized area of the State could be subjected to a tax not applicable in our cities and towns. See *Opinion of the Justices*, 146 Me. 239, 80 A. (2nd) 421. It was after the justices of this court gave an advisory opinion against the constitutionality of such special taxation that the section was repealed. We quote it, to have it in print in a place more available than the single one where it may now be found, i.e., in the engrossed copy of L. D. 1273, in the office of the Secretary of State. In doing so, we include the section number and caption, for a reason that will be apparent when the section which replaced it, and is printed as part of P. L. 1951, Chap. 250, is quoted hereafter:

> "**Sec. 34. Elimination of state property tax.** In the event that the provisions of this chapter become effective for the purpose of collecting taxes as levied herein, there shall be no state property tax levied for the year 1952 and thereafter."

The new section, enacted in the State Tax Act, as noted, appears twice in the printed session laws of 1951, (1) in P. L., 1951, Chap. 250, where it very definitely does not belong, and (2) as Section 10 of the State Tax Act, wherein it was enacted, to further amend "Chapter 14-A of the re-

vised statutes," from which the original Section 34 had been deleted in the section preceding. The recital was that said chapter was amended by adding thereto a new section "to be numbered 34." We quote it from P. L., 1951, Chap. 250, emphasizing the identification of the State Tax Act, following the caption, as the source of its enactment. It is identical with Section 10 of the State Tax Act, except for that explanatory material:

> "**Sec. 34. Tax is levy on consumer. P. & S. L., 1951, c. 213, §§ 9, 10.** The liability for, or the incidence of, the tax on tangible personal property provided by this chapter is hereby declared to be a levy on the consumer. The retailer shall add the amount of the tax on such property and may state the amount of the taxes separately from the price of such property on all price display signs, sales or delivery slips, bills and statements which advertise or indicate the price of such property. The provisions of this section shall in no way affect the method of collection of such taxes on such property as now provided by law."

For a reason which is not apparent, but is quite incomprehensible, to this court, the Director of Legislative Research read the "to be numbered 34" of Section 10 of the State Tax Act as a direction, or authorization, for printing it as such in P. L., 1951, Chap. 250, Sec. 1. We use the word "incomprehensible" because that Chapter, as printed, presents the only instance of which we are aware wherein a partial revision of a law has been printed in our session laws, and that one in the form of emergency legislation. The emergency preamble which was used for the State Tax Act recites facts applicable to nothing except state property taxation, which is the subject matter of the first eight of its twelve sections. Therein there are no factual recitals applicable to the amendments of other laws effected by Sections 9 to 12 thereof, inclusive. In striking contrast, the emergency preamble used for L. D. 1273 was entirely ap-

propriate, as this court declared in *Morris* v. *Goss,* 147 Me. 89, 83 A. (2nd) 556, to take the Sales and Use Tax Law, as enacted in Section 1 thereof, out of the operation of Article IV, Part Third, Section 16 of the Constitution, and would have accomplished the same result for the new Section 34 if that had been enacted as a part thereof. Reference to *Morris* v. *Goss, supra,* however, and its recognition that emergency preambles may present questions of law reviewable by this court, makes it apparent that neither the original Section 34 of L. D. 1273, the repeal thereof, nor the enactment of the new Section 34 would have been effective on approval of the acts in which they were carried if appropriately challenged. It is undoubted, however, under the principle declared in *Lemaire* v. *Crockett,* 116 Me. 263, 101 A. 302, that each and all of them became effective after the expiration of ninety days from the adjournment of the Legislature.

For the purposes of this case it is entirely immaterial whether the original Section 34 of the Sales and Use Tax Law ever became effective, or when the new one did. The latter became effective in any event after the lapse of the constitutional referendum period, on August 20, 1951. It is clearly part and parcel of the Sales and Use Tax Law, and was enacted for the express purpose of declaring the legislative intention underlying the enactment of that law in L. D. 1273. Decisions heretofore rendered in the construction of particular parts of it give full recognition to the principle of statutory construction which declares that legislative intention, when determinable, must be given effect. *Acheson* v. *Johnson,* 147 Me. 275, 86 A. (2nd) 628; *Coca-Cola Bottling Plants, Inc.* v. *Johnson,* 147 Me. 327, 87 A. (2nd) 667; *Hudson Pulp and Paper Corporation* v. *Johnson,* 147 Me. 444, 88 A. (2nd) 154; *Androscoggin Foundry Co.* v. *Johnson,* 147 Me. 452, 88 A. (2nd) 158. As was said in *Berry* v. *Clary,* 77 Me. 482, 1 A. 360, legislative intention is the "guiding star in the construction of every statute."

The issue presented by the plaintiff's appeal is accurately set forth in the Agreed Statement of Facts as whether it "is subject to assessment of taxes on sales made by it of less than twenty-five cents in amount." The facts set forth therein may be summarized as follows, all section references being to the Sales and Use Tax Law. The plaintiff is a manufacturer who is a "retailer," as that term is defined in Section 2, by reason of the sale of foods and beverages to its employees at the cafeteria in its plant for consumption on the premises. The defendant is the State Tax Assessor, the official charged with the duty of administering the law. The plaintiff, in a stated period, made such sales to its employees amounting to $3,329.39, and collected sales taxes thereon, under the provisions of Section 5, amounting to $38.43, which it remitted to the defendant when making a report showing a "total sale price," as required by Section 12, in the amount stated. The tax rate of two per cent, fixed by Section 3, would involve a tax of $66.59 on that gross. The plaintiff was assessed for a deficiency of $28.16, under the provisions of Section 18, whereupon it filed a petition for reconsideration of such assessment, under Section 29, and took the appeal which brings the case forward, under Section 30, when its petition was denied.

The plaintiff's claim that the Sales and Use Tax Law, as originally written in L. D. 1273, imposed no tax on retailers, and that the provisions of Sections 3, 5 and 14, declaring that they should pay such taxes, adding them to sales prices, and be liable therefor as for personal debts, were designed for no other purpose than to provide a "method of collection," is entirely untenable, as will be shown hereafter, and it may be said in passing, perhaps, that the very special reliance placed on the new Section 34 by its counsel discloses that it is the statement carried therein, that the tax is "a levy on the consumer," upon which all the claims made, in last analysis, are based.

The legislative intention to tax sales regardless of price is clearly apparent in the language of Section 3, which imposes a tax "on the value of all tangible personal property, sold at retail in this state" after the date heretofore named, except as otherwise provided in the law itself. The later provisions thereof, and of Section 10, which carries numerous exemptions, make no reference to sales prices, except in the one instance noted *infra*. Section 5 authorizes retailers to add taxes to sales prices in accordance with a schedule established therein, but in no case where a sale is made at 24c or less. The closing provision of Section 3 carries the only price recital and is in itself a complete answer to the claim that sales on which a retailer can collect no tax from a consumer under the Section 5 schedule are not intended to be taxed. It is there stated that:

> "No tax shall be imposed upon such property sold at retail for 10c or less, provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the state tax assessor."

Construed in its entirety, as all statutes should be construed, *Sargent* v. *Inhabitants of Hampden,* 29 Me. 70; *Berry* v. *Clary, supra; Newbert* v. *Fletcher,* 84 Me. 408, 24 A. 889, L. D. 1273 makes the legislative intention entirely clear that all sales not specifically exempted shall be taxed, that retailers "shall pay" the taxes levied, Section 3, which shall be their "personal" debts to the state, Section 14, and that the consumer shall pay no more than the taxes retailers are authorized to add to sales prices by Section 5, which, as part of the price, "shall be a debt of the purchaser to the retailer until paid." There is no provision other than that carried in Section 4, applicable to use taxes only, which charges a consumer with the duty of paying a tax to the state. The tax payable to the state on each sale is computed from the sale price. It is only when such price is fifty cents or some multiple thereof that one who purchases from a

retailer pays that retailer the exact amount thereof. There can be no doubt that it was the retailer, and not the consumer, who was intended to be taxed by the Sales and Use Tax Law, as enacted in L. D. 1273, or that the retailer was vested with the limited right to pass the tax applicable to each particular sale along to his customer so far, and so far only, as the schedule of Section 5 permitted. The tax imposed upon a retailer, as Section 3 specifically declares, "shall be in addition to all other taxes" the retailer is required to pay.

This brings us to the provisions of the new Section 34. It has been quoted in full heretofore. Its essential provisions are carried in the opening and closing sentences, that the:

> "liability for, or the incidence of, the tax * * * is * * * a levy on the consumer"

and that its provisions, as a whole:

> "shall in no way effect the method of collection * * * as now provided by law."

Counsel for the plaintiff stresses the liability language, reading the word "or" as the equivalent of "and", and relying on the principle recognized in *Howard* v. *Bangor and Aroostook Railroad Co.*, 86 Me. 387, 29 A. 1101, that in cases of doubt and uncertainty:

> "the last words control all preceding words for the purpose of correcting any inconsistency of construction."

It is so stated, in effect, in Endlich on the Interpretation of Statutes, Sec. 183, quoted in the cited case, where one of the closing recitals is:

> "And it has been seen that a reading of the provisions of the whole statute * may give to earlier sections the effect of restricting the meaning of

> later ones, as well as to the latter the effect of restricting the operation of the former."

If the principle was to be applied literally, the closing recital that the "method of collection" was not to be affected would control the whole, and plaintiff would fail on such ground, as it seems reasonably manifest was the legislative intention. The words "and" and "or" are convertible in our laws "as the sense of a statute may require," R. S., 1944, Chap. 9, Sec. 21, I, it is true, and it would be possible within that rule of construction to read the opening sentence of the section as counsel for the plaintiff does, but it has been recognized that the word "or" is sometimes used to give an alternative description of something already identified, *State* v. *Willis,* 78 Me. 70, 2 A. 848, *State* v. *Cushing,* 137 Me. 112, 15 A. (2nd) 740, and a recent decision of this court declares that it is often used in the sense of "to wit." *Hurd* v. *Maine Mutual Fire Insurance Co.,* 139 Me. 103, 27 A. (2nd) 918. If we read the recital the "liability for, or the incidence of, the tax" as "the liability for, to wit, the incidence of, the tax," we find the reason underlying the amendment of the law by the addition of the new Section 34 clearly indicated in a statement made on the floor of the House of Representatives by the Chairman of the Committee on Taxation, when the State Tax Act was reported thereto. That statement was:

> "Since some question has arisen regarding the right of payers of the sales tax to deduct the same from federal income tax, a provision has been put into this bill to make it perfectly clear that the sales tax is a tax on the consumer so that the consumer can deduct it in computation of his income tax." Legislative Record, Page 2045.

The "incidence" of all taxes, in final analysis, falls on the consumer, and it was clearly within the contemplation of the Legislature when L. D. 1273 was enacted that such part of the tax imposed by Section 3 as was added to selling

prices under the schedule established by Section 5 was to be paid to retailers making sales of tangible personal property by the purchasers thereof. That it was not contemplated that the exact amount of the tax should be so added was made apparent by authorizing the addition of the tax "or the average equivalent" thereof, as well as by the closing provision of Section 5, that:

> "Breakage under this section shall be retained by the retailer as compensation for the collection."

This provision carries clear implication that it was contemplated, generally, that retailers would collect more money in taxes under the provisions of Section 5 than would be required to meet the liability imposed upon them by Section 3, but it demonstrates even more clearly that there was no legislative intention, as the plaintiff argues, that retailers should remit the exact amount of their collections, neither more nor less.

Reference to P. L., 1949, Chap. 8 will disclose that the provisions of the new Section 34 are substantially identical with those added to our cigarette tax law, R. S., 1944, Chap. 14, Secs. 186 to 205, as amended, in the cited act, the purpose, then, being that stated by the chairman of the Committee on Taxation when the new Section 34 was under consideration. We learn from the defendant's brief, which is not challenged by counsel for the plaintiff, that prior to the enactment of P. L., 1949, Chap. 8, two decisions of the Federal Treasury Department, under the Tennessee tobacco and cigarette tax law and the Federal Income Tax Law, I. T. 3616, C. B. 1943, p. 136, 138, and I. T. 3906, C. B. 1948-1, p. 33, disclosed that one paying an income tax may use cigarette (and sales) tax payments, made under state laws, as deductions for income tax purposes when the legislation under which they are paid places the incidence thereof on the consumer, and not otherwise.

Counsel for the defendant cites us also to decisions under the laws of California, North Dakota, Tennessee and Utah; *DeAryan* v. *Akers,* 12 Cal. (2nd) 781, 87 Pac. (2nd) 695; *F. W. Woolworth Co.* v. *Gray,* (N. D.), 46 N. W. (2nd) 295; *Smoky Mountain Canteen Co.* v. *Kizer,* (Tenn.), 247 S. W. (2nd) 69; *W. F. Jensen Candy Co.* v. *State Tax Commission,* 90 Utah 359, 61 Pac. (2nd) 629. Notwithstanding the fact that decisions of other courts under the statutes of other states are not helpful, because the "language and provisions of their sales and use tax acts" are different from our own, as stated in *Hudson Pulp and Paper Corporation* v. *Johnson, supra,* the cited cases demonstrate, effectively, a tendency to the liberal construction of sales and use tax laws —to make taxation the rule and exemption the exception, as the Tennessee Court stated in the *Smoky Mountain* case, *supra.* It is true, as the plaintiff claims, that none of the laws construed in those cases from other jurisdictions carries a provision similar to that of the new Section 34, and it may be noted, also, that the California and Tennessee laws both state specifically that the taxes they levy are upon "the privilege of selling tangible personal property at retail." Our own law makes that entirely plain in the registration and license sections, Sections 6 and 7, and the declaration of Section 8 is most explicit that the:

> "burden of proving that a sale was not a sale at retail shall be upon the person who made it."

The intention of the law that every sale is taxable to the retailer unless specifically exempted is entirely apparent, and there can be no semblance of foundation for the claim that any sales are exempt from taxation on the basis of price alone except those made "for 10c or less" within the requirements of Section 3.

The appellant is holden for the tax assessed. It being stipulated that in that event "the assessment shall be sustained for the State Tax Assessor in the amount of $29.43,

without costs, interest or penalty," the case is remanded to the Superior Court for a decree to that effect.

Appeal to the Superior Court denied.

Case remanded for a decree sustaining the assessment without costs, interest or penalty.

ARTHUR G. STEWART
vs.
ESTATE OF CARRIE K. STEWART

Kennebec. Opinion, February 17, 1953.

Wills. Words and Phrases. Life Tenants. Trusts. Repairs and Improvements.

When a deed or a devise of a life estate to an individual for life uses the phrase "what remains," the words either give implied powers to sell or otherwise dispose of the property, or else the words have no meaning whatever.

The intention of a testator must be collected from the whole instrument.

Ordinarily, where an individual holds a life estate with remainder over, no temporary repairs can be charged to capital.

A life tenant cannot as a general rule incumber the remainder although the intent of the testator is controlling where a will or trust is involved.

The provisions of a will leaving the residue of real and personal property in trust for the "use and benefit" of a son during his life and "what remains" to a grandson forever, does not limit the son to the net income from real estate but authorizes the trustee, in accordance with testator's intent, to invade the principal in making unusual repairs and improvements to the real estate.

ON EXCEPTIONS.

This case arises on objections by a remainderman to the final account of the trustee under a will. Following allowance of the account the case was appealed to the Supreme Court of Probate where a decree was entered allowing the account. The case is before the Law Court on exceptions.

Exceptions overruled.

Richard B. Sanborn, for plaintiff.

Charles A. Peirce, for Clarence Stewart.

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

FELLOWS, J. This case comes to the Law Court on exceptions by Arthur G. Stewart to a decree of a Justice of the Superior Court for Kennebec County, sitting as the Supreme Court of Probate. The decree found no error on the part of the Judge of Probate for Kennebec County in allowing certain payments in the account and private claim of Clarence E. Stewart testamentary trustee and life beneficiary. This decree of the Supreme Court of Probate dismissed the appeal, taken from the Probate Court by remainderman Arthur G. Stewart, and the pending exceptions by him were taken.

The facts are these: Carrie K. Stewart died in 1936, and at the time of her death she had, as near relatives, a son Clarence Elmer Stewart, and a grandson (the son of a deceased son) Arthur Gilbert Stewart.

The will of Carrie K. Stewart provided (1) that her son Clarence Elmer Stewart should have his father's writing desk for his life, and upon his decease the desk to go to her grandson Arthur Gilbert Stewart, (2) the sum of $500 was

given to a Spiritualist Society, (3) the home place with lots and furnishings was given to the trustee under the will, in trust for the grandson Arthur Gilbert Stewart with right on the part of the trustee to sell if "wise and best." The trust to continue until the grandson is twenty-one, (4) to a grandniece "my Springer highboy," (5) then comes the fifth paragraph of the will which is now directly in issue, and is as follows:

> "Fifth: I give, devise, and bequeath the remainder and residue of my property be it real or personal to my trustee hereafter named. The said property to be held in trust for the use and benefit of my son Clarence Elmer Stewart. The Trustee to have the right to sell or dispose of real estate, and to place the proceeds on interest, for the benefit of my son Clarence Elmer Stewart the rest of his natural life, at his demise, the same or what remains, shall go to my grandson Arthur Gilbert Stewart, forever."

The inventory of the estate of Carrie K. Stewart filed in June 1938, listed real estate as of the value of $3,000 and the rights and credits $1,746.87, a total of $4,746.87. The first account of Clarence E. Stewart, allowed for the three-year period January 1, 1944 to January 1, 1947, showed gross income from rent and bank interest of $1,716.47, with total expenditures for ordinary repairs, water rates, taxes, and insurance, as $755.10. The net income of $961.37 was paid to Clarence E. Stewart.

The second account of Clarence E. Stewart as trustee, allowed for the years January 1, 1947 to January 1, 1950 showed gross income $1,872.84 and after payment of taxes, ordinary repairs, water rates, and insurance, the net income $1,215.73.

The third and final account, now in dispute in these proceedings, for the period January 1, 1950 to April 4, 1951,

shows gross income $817.22 with the claimed expenses totalling $683.25 (which final account with a bill for outside painting, contains the disputed items in Clarence E. Stewart's private claim for permanent improvements and unusual repairs, which he asks to be taken from the bank deposits of the trust, and amounts to $596.28. This is objected to by Arthur G. Stewart the remainderman).

Woodbury Wallace, named in the will, was first appointed executor and trustee. Upon Wallace's resignation, Clarence E. Stewart, the life tenant, was appointed trustee May 22, 1944 and acted as such until he was removed by the Probate Court in April, 1951, on the petition of Arthur G. Stewart, appellant, for alleged lack of proper notice to said Arthur G. Stewart when Clarence E. Stewart was first appointed, and because "impartial trustee should be appointed." Arno A. Bittues was appointed trustee April 4, 1951.

The real estate referred to in the fifth paragraph of the will has been rented since 1936, and the trustee accounts have been filed by Clarence E. Stewart as trustee during the years 1944-1949 and allowed by the Probate Court. The third and final account and private claim filed by Clarence E. Stewart and now objected to, includes contested items for rewiring house, for new ceilings in dining room and kitchen, for copper tubing to toilet, for new roof, for wiring for electric stove, and for outside painting of house, which the agreed facts show were initially paid by Clarence E. Stewart from his own personal funds.

On July 23, 1951, the Probate Court allowed the account and the private claim of $596.28 to Clarence E. Stewart, and the court stated in its decree as follows:

> "It seems to be clearly the law in this state that when a life estate in both real and personal property has been granted, a devise of whatever remains or the use of words of similar import an-

> nexes to the life estate by implication a power of disposal. Therefore, it seems to the Court that in the instant case the testatrix in using the words 'the same or what remains' intended that the trustee within the limits of reasonable discretion could also draw on the corpus of the trust for the use and benefit of the life tenant.
>
> The testatrix, in setting up this trust, was providing for her own son, who was her only living child, her only other child (a son) had predeceased her. She had already made provision in the third clause of her Will for the grandson, Arthur Gilbert Stewart, who is the son of her deceased son. And after providing for her son she directs the disposition of the property remaining at his death - - - - which appears to be a plain implication that the corpus of the estate might be or was likely to be diminished during her son's life, for to conclude otherwise, would be to give very little or no practical significance to the word remain."

An appeal was taken by Arthur G. Stewart from this decree of the Probate Court allowing the final account and claim of Clarence E. Stewart, for the reason that "it is the duty of a trustee to take care of repairs on a building in his trust and only to turn over the net income." Upon hearing in the Supreme Court of Probate, the justice presiding found no error in the Probate Court's decision, and dismissed the appeal. The decision of the Supreme Court of Probate said in part:

> "Testatrix had two objects of her bounty, her son and her grandson. By the third clause she provides directly and substantially for the grandson. By the fifth clause she provides that the residuum of her estate be held in trust for the 'use and benefit' of her son. She further gives her trustee the express right to dispose of the real estate and put the proceeds at interest. At the death of the son, 'the same or what remains' goes to the grandson. The intention is plain. The words used are broad

> in scope. It is apparent that the principal may be invaded for the 'use and benefit' of the son, and the remainder over is purely incidental to main intent and purpose of the clause which was designed to offer broad protection to the son during his life. There was no error in the court below in allowing the payments charged to principal and decree must be 'Appeal Dismissed.' "

The bill of exceptions states that the Supreme Court of Probate was in error in holding that (1) "the work done here might properly be classed as unusual repairs," (2) in error in holding that "the principal may be invaded for the use and benefit of the son," and (3) in error in holding that "there was no error in the court below in allowing the payments charged to principal."

We have not been able to find any authoritative case, and no such case has been called to our attention, where the words in a will, that establish a *trust* and provide for termination of a *trust,* contain provision for "what remains." It is an unusual trust provision and places this case in a new and separate class among the multitude of classified will provisions.

The decisions are numerous in this and other states holding that the intention is always the controlling rule, and that when a deed or a devise of a life estate, to an individual for life, uses the phrase "what remains," the words either give implied powers to sell or otherwise dispose of the property, or else the words have no meaning whatever. *Loud* v. *Poland,* 126 Me. 45; *McGuire* v. *Gallagher,* 99 Me. 334; *Young* v. *Hillier,* 103 Me. 17.

The intention of a testator must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other so as to give to every provision its proper field of

operation, and to every word its natural and appropriate meaning. In case of ambiguity or apparent contradiction, the surrounding circumstances as to property and family should be taken into consideration. *Bodfish* v. *Bodfish,* 105 Me. 166.

> "All authorities have recognized for generations that a last will and testament executed according to existing statutes is the final declaration of a person in regard to the disposition of his property. The name itself certifies that it is his 'testimony' upon that subject, and is the expression of his 'mind' and 'will' in relation to it. The right to make a will is not a natural right, but is a privilege granted by statute, that permits the owner of property to direct use and ownership after his death. It has always been recognized that a testator may make any disposition of his property that he desires, if it is not inconsistent with the laws, or contrary to the policy of the state. It is the true intention of the testator that governs primarily, in the construction of words used to express that intention. 'The intent of a testator is not to be thwarted unless some positive rule or canon of construction makes it necessary.' Ellms v. Ellms, 140 Me. 171; 35 A. (2nd) 651. 'If you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it.' Merrill Trust Co. v. Perkins, 142 Me. 363; 53 A. (2nd) 260, 262. ***** If the will to be construed does not violate some positive rule of law, the intentions of the testator must prevail; and when one considers the differences as well as the similarities in sane human minds, with their capacities for reasonable or unreasonable wishes, likes, dislikes, hopes and fears, it should be understood that no fixed and definite path can be found for all. Some wills must necessarily be, and often are, outside the common and ordinary pathway. 'No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light af-

forded by the will of another.' Bradbury v. Jackson, 97 Me. 449; 54 A. 1068, 1070."

U. S. Trust Co. v. *Douglass,* 143 Me. 150, 154, 159.

Ordinarily, where an individual holds a life estate with remainder over, no temporary repairs can be charged to capital. "The life tenant whether legal or equitable cannot, as a general rule, incumber the remainder." *Veazie* v. *Forsaith,* 76 Me. 172. It is sometimes stated that "a tenant for life must make all ordinary repairs necessary to preserve the property and prevent its going to waste unless there is some provision to the contrary in the instrument creating the estate." He is not bound, however, to make unusual or extraordinary repairs and permanent improvements. What constitutes unusual, temporary or permanent repairs depends on circumstances. See 21 Corpus Juris "Estates," 951, Sec. 90; 31 C. J. S. "Estates," 55, Sec. 44; 33 Am. Jur. "Life Estates," 976-989, Secs. 448-458; Annotation in 128 A. L. R., 252 citing *Veazie* v. *Forsaith,* 76 Me. 172, and Annotation in 175 A. L. R. 1434. The authorities without exception, however, recognize that where the instrument creating the life estate, or creating the trust, is a will, the intention of the testator as therein indicated or expressed, is the controlling rule.

It is the will of Carrie K. Stewart and her intention, as indicated in the will, that controls the results in the case under consideration. The will recognizes two persons as the objects of her bounty. One person is her son and the other the son of a deceased son. Mrs. Stewart gives her "home place for the use and benefit of my grandson Arthur Gilbert Stewart" and this first trust (not in dispute) is to exist "until my said grandson attains the age of twenty-one years." She then gives the remainder of her property real and personal to the trustee (which is in dispute) "for the use and benefit of my son Clarence Elmer Stewart." The trustee is to have the right to sell or dispose of real estate,

and to place the proceeds on interest for the "benefit of my son Clarence Elmer Stewart the rest of his natural life" and "at his demise, *the same or what remains* shall go to my grandson."

We have examined with care the record containing the will, the probate accounts, and this disputed claim for unusual repairs and improvements, and we are not able to find that the Justice of the Superior Court sitting as the Supreme Court of Probate was in error in allowing the disputed accounts which had been allowed in the Probate Court. The testatrix left the residue for the "use and benefit of my son Clarence Elmer Stewart." She did not limit the "use and benefit" to net income after all expenses of every nature. During the past fifteen years the expenses of ordinary repairs, to keep the property rentable, the taxes, insurance, water rates, and ordinary painting and papering have properly been paid by the trustee from rents received. Clarence Stewart has received the net balances. The testatrix did not intend, however, that her son, Clarence Stewart, as life beneficiary should be required to permanently improve the property for the benefit of a grandson already liberally provided for. The grandson is to have "what remains." The son has the "use and benefit."

The charges in the accounts were carefully passed upon by the Probate Court, and we cannot say that, under the terms of the will and under all the existing circumstances, the disputed items for rewiring, new ceilings, copper tubing, new roof, and complete outside painting were not for "permanent and unusual" repairs or improvements, and we cannot say that they were not properly approved. We must adopt, as above quoted, the reasoning of the Kennebec Probate Court, and the reasoning in the finding and decree of the Justice of the Superior Court sitting as Supreme Court of Probate. No other construction gives effect to all the terms of this will.

Exceptions overruled.

DISSENTING OPINION

WILLIAMSON, J. I would sustain the exceptions. The son has requested reimbursement for expenditures chargeable, in his view, against principal and not against income. He has not asked that principal be paid to him under the "use and benefit" clause. His claim reads in part: "that it is necessary to protect the real property * * * that * * * $596.28 * * * be expended in making permanent repairs on the buildings."

The claim deals with investment of trust funds in the real estate and not in the destruction of the trust principal through invasion.

The testatrix had no intention that the trustee under her will could deviate from normal practice in the management of the trust estate. The propriety of expenditures, the liability of the trustee, or the trust property for charges, the apportionment of charges between income and principal, including the allocation of such charges, all are matters of trust management. They do not involve the exercise of a discretionary power to dispose of the principal by the trustee. In this instance this power has been exercised by the court below for the son surely had no such power under the will.

If the son wishes to obtain money by invasion, and thus the destruction in part of the principal of the trust established by his mother for himself and her grandson, he should make his request in plain terms. I would treat the case as a problem in the management of a trust without considering its partial destruction through invasion.

STATE OF MAINE

SUPREME JUDICIAL COURT

Law Term
Portland
February, 1953

ORDER FIXING TIMES FOR BAR EXAMINATIONS

Pursuant to the provisions of Section 1 of Chapter 93 of the Revised Statutes of Maine of 1944 it is

ORDERED that the Board of Examiners for the examination of applicants for admission to the Bar be and hereby are directed to hold sessions at Bangor or Orono in the County of Penobscot on the first Wednesday of February in each year and at Portland on the first Wednesday of August in each year, for the purpose of examining all applicants for admission to the bar, as to their legal learning and general qualifications to practice in the several courts of the state as attorneys and counselors at law and solicitors and counselors in chancery, and that this order supersedes any and all prior orders of this Court with respect to the holding of any sessions of said board after the date hereof.

By the Court

HAROLD H. MURCHIE
Chief Justice

February 10, 1953.
A true copy.

Attest:

HAROLD H. MURCHIE
Chief Justice

ELVIN BRAGDON
vs.
EVERETT BICKFORD

Piscataquis. Opinion, February 20, 1953

PER CURIAM.

This action of trespass to recover damages for injury to plaintiff's garden by defendant's sheep is brought to this court on defendant's general motion for a new trial after verdict for the plaintiff.

On the issue of liability it cannot be doubted that defendant's sheep did damage plaintiff's garden. There is no occasion to stress the principle that in resolving such an issue the evidence must be viewed in the light most favorable to the plaintiff.

On the issue of damages we would say no more than that this court should not presume to interfere with a jury's exercise of its function in that field unless an award is clearly excessive, as this one is not.

Motion overruled.

Lester Olson, for plaintiff.

Anthony J. Cirillo, for defendant.

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

LEO HUTCHINS
vs.
ALBERT E. LIBBY, EXECUTOR

Cumberland. Opinion, March 12, 1953.

Pleading. Demurrer. Time. Place. Rule of Court 11. Bill of Particulars. Amendments.

A *quantum meruit* count expressed in general terms is not defective because of the addition of separate numbered clauses in the nature of specifications. (Revised Rule 11)

Allegations of *time* and *place* are essential to good pleading and a lack thereof may be taken advantage of on general demurrer.

A plaintiff may be compelled to include allegations of *time* and *place* on motion for specifications or particulars.

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.

ON EXCEPTIONS.

This is an action of assumpsit on a count in *quantum meruit*. The case is before the Law Court on exceptions to the sustaining of a demurrer. Exceptions overruled. Demurrer sustained.

Agger & Goffin,
Nathaniel W. Haskell, for plaintiff.

Benjamin Thompson,
Welch & Welch,
Clifford E. McGlauflin, for defendant.

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

WILLIAMSON, J. This is an action of assumpsit on a count in *quantum meruit*. The presiding justice in the Su-

perior Court sustained a general demurrer to the declaration, and the case is before us on exceptions to his ruling.

The relevant part of the declaration reads:

> "In a plea of the case for that the said deceased, in his lifetime, in consideration that the plaintiff, at his request, had done and performed certain labor and services for him, promised the plaintiff to pay him on demand so much money as he reasonably deserved to have therefor; and the plaintiff avers: (Here follow three numbered clauses in which the plaintiff sets forth in some detail the nature and extent of his claim) and the Plaintiff avers that he reasonably deserved to have therefor the sum of Nineteen Thousand Twenty Five ($19,025.00) Dollars; . . ."

The defendant urges that each numbered clause constitutes a separate count and directs his argument to defects therein. In this view the defendant is in error. There is one and only one count as set forth above. The numbered clauses neither add to nor detract from the *quantum meruit* count expressed in general terms. They are in the nature of specifications filed by the plaintiff of his own will and not by order of court on defendant's motion. See Revised Rule 11, 147 Me. 468.

For purposes of decision upon the demurrer, the count in *quantum meruit* stands alone. Accordingly it is unnecessary for us to consider objections by the defendant which relate only to the numbered clauses and not to the count.

There remain for discussion objections by the defendant on the grounds that the plaintiff has failed to allege consideration, indebtedness, time, and place.

A comparison of the count with time tested and approved forms for *quantum meruit* discloses that the only substantial difference lies in the lack of allegations of time and place in the count before us. In the forms we find the words

"at...., on the.... day of ...." before the words "in consideration that the plaintiff." For forms see 1 Maine Civil Officer, 8th Ed. (1950) 209. The same form is also found in the Seventh edition (1908) page 152, of the Maine Civil Officer, and with the omission of the words "on demand" in the Second edition (1871) page 27. See also Oliver's Precedents 5th Ed. (1905) 16, 19.

The defendant gains nothing from the claimed defects from failure to allege indebtedness and consideration. The defendant has confused indebitatus assumpsit with *quantum meruit.* The difference readily appears from an examination of the forms. See 1 Maine Civil Officer, 208, 209.

We are left then with the failure to allege a definite time and place. Such averments are essential in good pleading. The declaration is defective. *Armstrong* v. *Supply Corporation,* 127 Me. 194, 142 A. 734. But have the defects been reached by a general demurrer? Are they matters of form open only on a special demurrer? The rule is stated in *Wellington* v. *Small,* 89 Me. 154, 157, 36 A. 107, 108, in these words:

> "It has been uniformly held in this State, that a definite time and place must be stated in the declaration, as pertaining to the venue, and that their total absence may be taken advantage of on general demurrer. *Shorey* v. *Chandler,* 80 Maine, 411. In this case, as in *Cole* v. *Babcock,* 78 Maine, 41, no definite time was anywhere alleged."

In *Shorey* v. *Chandler,* 80 Me. 409, 411, 15 A. 223, 224, Chief Justice Peters said:

> "In this state the general rules of pleading are simple and certain, and should be adhered to. The law should be observed because it is the law. The toleration of constant departures from the rules soon casts them into confusion and disrepute.
>
> "No rule has been better established in this state than that requiring in declarations that the time of

> every traversable fact shall be named. The pleader must name some certain day, whether correctly named or not. The rule imposes no burden or risk. It is easier to obey than it is to disobey it. Declarations omitting this certainty of allegations have been repeatedly held in this state to be bad on demurrer, the last reported case, in which previous cases are cited, being *Cole* v. *Babcock,* 78 Maine, 41. The plaintiff suggests that a special demurrer is required to point out the defect. We think a general demurrer is sufficient. The demurrer was general in the case cited, and also in most the cases there cited."

The demurrer must be sustained.

It is not precisely clear what advantage the defendant gains from the demurrer. There can be no criticism of him for testing the sufficiency of the pleading. It is his right to insist that the pleading be technically correct. Of what can the plaintiff complain when it is his failure to follow the rules of good pleading that has brought about the difficulty? We may point out, however, that the defendant could have gained substantially the result he seeks through a motion for specifications or for further particulars. Upon such a motion the plaintiff could have been compelled by order of the court to set forth his case in sufficient detail for purposes of defense. *Nadeau* v. *Fogg,* 145 Me. 10, 70 A. (2nd) 730; *Sinclair* v. *Gannett, Publisher,* 148 Me. 229, 91 A. (2nd) 551.

The plaintiff may amend his declaration if it is amendable upon compliance with the provisions of the statute. R. S., Chap. 100, Sec. 38. *Maine Central Institute* v. *Haskell,* 71 Me. 487; *Page* v. *Bourgon,* 138 Me. 113, 22 A. (2nd) 577. Clearly in this case the declaration is amendable. The ultimate decision cannot rest upon the failure of the plaintiff to include in the declaration simple allegations of time and place which need not be proved as stated. The case is well within the statement of the court in *Pullen* v. *Hutchinson,* 25 Me. 249, 252, as follows:

> "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."

The above rule was recently quoted with approval in *Kennebunk, Kennebunkport and Wells Water District* v. *Maine Turnpike Authority,* 147 Me. 149, 154, 84 A. (2nd) 433. Other cases illustrating a liberal policy for amendment of pleadings are *Mansfield* v. *Goodhue,* 142 Me. 380, 53 A. (2nd) 264; *Bartlett* v. *Chisholm* (2 cases) 146 Me. 206, 79 A. (2nd) 167, and 147 Me. 265, 86 A. (2nd) 166, involving the necessity for purposes of jurisdiction of an allegation that a real estate broker is duly licensed.

Exceptions overruled.

Demurrer sustained.

RAYMOND G. PERRY
vs.
H. J. CURTIS, E. B. HOLLOMBY, ROCH TREMBLAY,
ERNEST L. GOODSPEED, ERNEST L. GOODSPEED, JR.
AND
PROVINCIAL TRANSPORT COMPANY

PROVINCIAL TRANSPORT COMPANY
vs.
RAYMOND PERRY, ERNEST L. GOODSPEED,
ERNEST L. GOODSPEED, JR., H. J. CURTIS,
E. B. HOLLOMBY, AND ROCH TREMBLAY

Kennebec. Opinion, March 12, 1953.

Equity Appeal.

The decision of a single justice upon matters of fact in equity proceedings will not be reversed in the Law Court unless *clearly wrong.*

ON APPEAL.

These are cross bills in equity brought in the Supreme Judicial Court before a single justice. The cases are before the Law Court on appeal from a decree sustaining the bill in the first action and dismissing it in the cross action. Appeal dismissed. Decree below affirmed.

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

MeLean, Southard & Hunt, for defendant.

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

FELLOWS, J. These cross bills in equity were brought in the Supreme Judicial Court for Kennebec County before a

single justice for determination of the question whether Raymond G. Perry or Provincial Transport Company is the owner of the capital stock of the Maine corporation known as International Coach Lines, Inc. The other parties to the bills, who hold stock, are Ernest L. Goodspeed and Ernest L. Goodspeed, Jr., who hold their stock for Raymond G. Perry; and H. J. Curtis, E. B. Hollomby and Roch Tremblay who hold for Provincial Transport Company.

The court found and decreed in the first bill that Raymond G. Perry was the owner and was entitled to the assignment and return of the capital stock of International Coach Lines, Inc., and that the second bill be dismissed. The bills in equity now come to the Law Court on an appeal filed to the decree in the first case by the defendants Curtis, Hollomby, Tremblay, and Provincial Transport Company, and in the second case on an appeal filed by the Provincial Transport Company.

The real question at issue in each case depends on whether an offer was accepted by Perry, which offer was made by the Provincial Transport Company in January 1949, to purchase the stock of International Coach Lines, Inc., together with a liability to pay counsel who had been acting for International. If the offer by Provincial to Perry was not accepted by Perry, Provincial has no interest in International.

The complete resolution passed by Provincial on January 31, 1949 was as follows:

> "RESOLVED,
>
> THAT purchase of International Coach Lines, Inc., be approved at a price of $6,000.00, together with assumption of a contingent liability of $3,000.00 payable to that Company's counsel as, if and when the Montreal-New Brunswick route commenced operations,

> AND THE officers of the Company be, and they are hereby authorized to take all steps necessary to complete this transaction."

The record is an extensive one, and consists of the long direct and cross examinations of Raymond G. Perry of nearly 400 pages, and more than seventy-five exhibits consisting of letters, accounts, corporate records, applications for permits, bonds, certificates, etc. Curtis, Hollomby and Tremblay who were officers or employees of Provincial Transport Company and also directors and stockholders of International Coach Lines, Inc., were not called to testify. The contention of Provincial and its officers now is that the decision of the sitting justice is clearly wrong because "Perry's story is so incredulous, is so inconsistent with itself and with known facts" that "it shows that Perry did accept Provincial's offer of January 31, 1949," and that "his explanation was incorrect or probably incorrect."

Briefly, Perry's testimony is that while he was Traffic Manager of Provincial Transport Company in Montreal, he had the idea of a bus line across the state of Maine from Montreal, Quebec, to St. John, New Brunswick, and after preliminary surveys of highway conditions, population, and competing carriers, he employed attorneys to organize in Maine the International Coach Lines, Inc. He secured permits and franchises from regulatory bodies and executed agreements relative to this proposed bus line. The Provincial made no objection and apparently approved Perry's outside activity, until in 1948 when a new management took over Provincial. The new management was interested in the ownership of the proposed line and it became necessary to commence its operation to avoid loss of franchise.

In January 1949 Provincial made the offer to Perry which Perry testified was never accepted by him. Perry says that Provincial and Perry afterwards agreed to operate the bus line on a temporary basis to ascertain fair value. Provin-

cial put in some initial working capital with buses on lease. In February, Curtis and Tremblay were elected directors of International, and in July 1949 Hollomby became a director and treasurer of International. Perry says it was understood that Provincial was to purchase the capital stock of International when it was ascertained through experience what a fair value was, all to be subject to the approval of any statutory board of regulation. Many of the conversations and agreements testified to by Perry were made with Curtis as general manager of Provincial, and Curtis did not testify to explain or to contradict. The appellants contend that Perry accepted the offer to purchase, but the appellants introduced no testimony, and they say that even without contradictory testimony, certain exhibits should be construed contrary to Perry's explanations.

The explanations of Perry could be believed, however, by the sitting justice in view of the fact that when these many letters and documents were written and prepared, Perry was in the employ of Provincial Transport and hoped to sell at a satisfactory figure, and Perry desired to have bus service over the proposed line of International. Perry evidently felt that he needed the assistance of Provincial and needed the name and influence of Provincial to obtain permits from regulatory boards and commissions, such as the Interstate Commerce Commission, Quebec Transportation Board and the Public Utilities Commission of Maine, in order to start and continue service.

It will serve no useful purpose to consider the many facts and circumstances shown by the testimony of Perry and the exhibits. It is sufficient to say that Perry testified positively that the above offer of Provincial was never accepted by him. There are some statements in some letters and applications to the effect that International was a "subsidiary" of Provincial, or was operated by Provincial, but if the testimony of Perry is believed, the equivocal statements can be

construed as consistent with Perry's explanations. Some of the letters from officers of Provincial can also be considered to recognize the fact that the offer was not accepted. Comprehensive and clearly stated briefs have been filed by the able and learned council on each side, and an examination of each and all briefs in connection with the record shows an abundance of evidence from which, if believed, the presiding justice could make the findings and decrees made. If the presiding justice had not believed Perry's explanations, he could have, and no doubt would have, decided to the contrary.

The presiding justice in finding the principal fact had the right to find facts regarding the surrounding circumstances, and to consider, as he did consider, all the evidence in the case in reaching his conclusions. Circumstances are often vital to indicate the probabilities of truth.

The decision of a single justice upon matters of fact in equity proceedings, will not be reversed in the Law Court unless it is clearly wrong. The appellant has the burden to show the error. "An equity appeal is heard anew on the record, but the findings made by a sitting justice in equity, of facts proved, or that there was a lack of proof, are not to be reversed on appeal unless clearly wrong." *Wolf* v. *W. S. Jordan Co.*, 146 Me. 374, 82 Atl. (2nd) 93; *Levesque* v. *Pelletier*, 144 Me. 245, 68 Atl. (2nd) 9. Unless it appears to be manifestly wrong or is shown by the appellants to be clearly wrong, the decree appealed from must be affirmed. *Adams* v. *Ketchum*, 129 Me. 212, 151 Atl. 146; *Young* v. *Witham*, 75 Me. 536. See also opinion by Justice Merrill in *Sears, Roebuck* v. *Portland*, 144 Me. 250, 258, 68 Atl. (2nd) 12, 16, and opinion by Justice Nulty in *Flagg* v. *Davis*, 147 Me. 71, 75, 83 Atl. (2nd) 319, 320.

Under the well established rules, referred to in the above cases, the question is not that there is possibility of error on

the part of the fact finding justice, nor is it enough that a different view of facts and circumstances might have been taken. It is only when a decision is *clearly wrong* that an appeal will be sustained.

The fact that parties to these bills in equity, who were directly involved in many matters testified to by Raymond Perry, did not take the stand to testify in explanation or contradiction of statements made, was a proper circumstance to be considered by the sitting justice. This unexplained failure to take the witness stand and to testify to facts within their knowledge or to deny facts testified to, is of great significance. As was said by this court in a very recent case: "The unexplained failure of the plaintiff to even offer himself as a witness and to deny the testimony given by the defendant respecting their conversation leads but to one conclusion. That conclusion is, that the defendant's testimony is true." *Scribner* v. *Cyr*, 148 Me. 329, 93 Atl. (2nd) 126.

We have examined the record with care and have considered the contentions of the appellants as expressed in oral argument and in briefs submitted, and we are unable to say that the decisions of the sitting justice in these two cases are in any manner erroneous. We certainly cannot say that they are shown to be "clearly wrong."

Appeals dismissed.

Decrees below affirmed.

ALPHONSE LaFLAMME

vs.

CLIFFORD HOFFMAN

Cumberland. Opinion, March 17, 1953.

Real Actions. Equity. Parol. Gifts. Contracts.

Consideration. Promissory Estoppel.

A life estate being an estate in freehold cannot be transferred or created by parol.

A writing not under seal lies in parol. A written parol transfer of a freehold estate in land is as ineffective *to pass legal title* as an oral one.

As a general rule equity will not lend its aid to perfect a defective gift.

Where a contract supported by a promise to convey land for a valuable consideration exists, performance of the acts which constitute the consideration followed by the promisees going into possession of the property and making expenditures thereon with the knowledge and consent of the promisor, *although not sufficient to entitle him to a conveyance if the promise was merely a voluntary one to make a gift,* would be sufficient to take the case out of the Statute of Frauds, and to authorize a court of Equity, in the exercise of its sound discretion, to decree specific performance of the contract to convey.

A parol contract cannot be created without consideration from the promisee.

Acts performed in reliance upon a promise cannot constitute a consideration therefor and transfer a naked promise into a contract unless the performance of the acts is *at the request of the promisor.*

The doctrine of promissory estoppel whereby any action induced by a promise may render the promise binding, at least so far as parol promise to make a gift of a freehold estate in land is concerned, is rejected by the Maine Law Court.

ON EXCEPTIONS.

This is a real action to recover a parcel of real estate. Defendant pleaded *null disseizin.* The case was referred to a referee who reported in favor of defendant. Plaintiff's objections to the acceptance of the referee's report were overruled and the case is before the Law Court on plaintiff's exceptions to the overruling of his objections. Exceptions sustained.

Connolly & Cooper,
Clifford E. McGlauflin, for plaintiff.

Agger & Goffin, for defendant.

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

MERRILL, J. On exceptions. This was a real action brought to recover a parcel of real estate situate in Portland in our County of Cumberland, of which the plaintiff claims the defendant had disseized him. The declaration in the action is in proper form and alleges that the plaintiff, within twenty years last past, was seized of the premises in question in fee simple. The writ was returnable to, and entered in the Superior Court in the County of Cumberland at the May 1952 Term thereof. At the June Term, by agreement of the parties, the case was referred under rule of court, with right of exceptions as to matters of law reserved. In vacation, and prior to the issuance of the rule, the defendant pleaded the general issue *null disseizin,* with the following brief statement:

> "That there is a lease running to the plaintiff & his heirs, which is a valid & existing lease."

At the hearing before the referee the defendant sought to justify his possession of the premises (to which the plain-

tiff had *legal title*) under the instrument hereinafter set forth, together with the fact that he had been let into possession of the premises by the plaintiff and, as he claimed, had constructed a house thereon. The instrument just referred to is as follows:

"MEMORANDUM OF AGREEMENT.

By and Between Alphonse Laflamme of Portland in the County of Cumberland and State of Maine and Clifford Hoffman of said Portland.

The said Alphonse Laflamme hereby agrees to give to the said Clifford Hoffman the right to use, occupy, build and maintain a home on land on Campbell Road in said Portland which was purchased by the said Laflamme of the Chas. F. Grant Estate on Jan. 19, 1949, consisting of fourteen (14) acres of land more or less. This agreement to hold during the natural life of the said Clifford Hoffman. In case of the death of the said Alphonse Laflamme proper provisions will be made in his will and testament for the continuance of this agreement.

In case of the death of the said Clifford Hoffman the said Alphonse Laflamme hereby agrees to make proper adjustment for any cash that the said Hoffman may have expended in connection with the property or he will continue right of possession to the heirs of the said Clifford Hoffman.

Dated at Portland this twenty fourth day of January A.D. 1949.

Signed in the presence of
PERLEY C. DRESSER

ALPHONSE LAFLAMME"

The referee found that after the defendant came into possession of the premises, which was at some time in the year 1949, the plaintiff and the defendant "proceeded to

erect a dwelling upon the demanded premises. The materials used cost some $6,000. Of that sum the defendant supplied several hundred dollars. Both plaintiff and defendant labored in the construction and the defendant contributed a large share of the work."

The referee held "The instrument clearly means that a life estate was by it given and that the life estate was 'to hold during the natural life' of the defendant." The referee further stated: "Whether it is a gift *in praesenti,* as we interpret and construe it, or whether it is only a promise to convey, the authorities deem it sufficient basis for equitable estoppel under the requisite circumstances." The referee made the further finding: "The possession of the demanded premises was given by the plaintiff to the defendant who had been induced by the plaintiff to leave an apartment previously occupied and to move with his wife and children to the locus in controversy. Possession was delivered by the plaintiff to the defendant in furtherance of the gift essayed. Permanent and valuable improvements which cannot be compensated in damages were made by the defendant upon the demanded premises. The defendant has changed his condition and circumstances by his reliance upon the purported gift of the plaintiff to the end that it is inequitable to remove him from possession of the demanded premises. 155 A.L.R. 73. The plaintiff is equitably estopped from demanding possession of the premises declared upon. *Calkins* v. *Pierce,* 112 Me. 474 at 478. The defendant did not plead equitable estoppel or estoppel *in pais* but such is not required. *Rangely* v. *Spring,* 28 Me. 143. The deed which is Plaintiff's Exhibit 1 discloses a price of $1,000 paid by the plaintiff for the land of the demanded premises." The referee reported in favor of the defendant. These findings by the referee are challenged by the objections and exceptions to acceptance of the report. It is upon these exceptions that the case is before us.

In this case the defendant seeks to justify his possession under a parol gift of a life estate in land, the legal title to which is in the plaintiff. A life estate being an estate in freehold cannot be transferred or created by parol. *Calkins* v. *Pierce,* 112 Me. 474, 476. A writing not under seal lies in parol. A written parol transfer of a freehold estate in land is as ineffective *to pass legal title* as an oral one. Under some circumstances parol transfers of land will be enforced in equity.

As a general rule, equity will not lend its aid to perfect a defective gift. *Brown* v. *Crafts,* 98 Me. 40, 47; *Savings Bank* v. *Merriam,* 88 Me. 146, 151; *Savings Institution* v. *Hathorn,* 88 Me. 122, 126 and 127; *Strout, Admr.* v. *Burgess,* 144 Me. 263, 287.

There is, however, an exception to this general rule which is and has been recognized by this court. In a case which turned upon whether or not an oral parol gift of real estate, possession of which had been delivered by the donor to the donee who had made improvements thereon, was enforcible in equity, *Bigelow* v. *Bigelow,* 95 Me. 17, 23, this court speaking through Wiswell, C. J., said:

> "Whether, at that time, he was such an equitable owner, depends upon the determination of these two questions: first, did John promise, for a *valuable consideration,* to make a conveyance of this farm to Levi? This is a question of fact to be determined by the jury. Next, was the contract, if one was made, in view of the subsequent performance by Levi, one that should be enforced in equity? *If a contract existed,* we think the performance upon the part of Levi of the acts which constituted the consideration for that contract, followed by his going into possession of the property with the knowledge and consent of the person holding legal title, and making expenditures thereon, *although not sufficient to entitle him to a conveyance if the promise was merely a voluntary one*

> *to make a gift,* would be sufficient to take the case out of the operation of the statute of frauds, and to authorize a court of equity, in the exercise of its sound discretion, to decree specific performance of the contract to convey. Green v. Jones, 76 Maine 563; Woodbury v. Gardiner, 77 Maine 68." (Emphasis ours.)

The referee was aware of this case and in his findings disposed of it as follows:

> "In Bigelow v. Bigelow, 1901, 95 Maine 17 at 23, our Court indicated that a voluntary promise to make a gift of real estate followed by an assumption of possession by the donee and the making of expenditures upon the premises by the donee would not be sufficient to take the case out of the Statute of Frauds and authorize a court of equity to afford the donee specific performance. No authorities are cited for our Court's statement. The position taken is against the general authority in the United States. The promise in Bigelow v. Bigelow was oral."

Contrary to the intimation by the referee, *Bigelow* v. *Bigelow* was not a hasty, ill-considered opinion by this court. The case had been before the court once before, *Bigelow* v. *Bigelow,* 93 Me. 439. In that opinion by Wiswell, J., concurred in by Peters, C. J., Haskell, Strout and Savage, JJ., the court denied the validity of the parol gift on the ground that it was voluntary and that there was no consideration therefor. In a new trial the justice at nisi prius ordered a verdict which in effect denied the validity of the gift. When before the court a second time on exceptions to this ruling, this court stated the rule as quoted *supra* (*Bigelow* v. *Bigelow,* 95 Me. 17, 23), and specifically stated that unless there was a *consideration* for the promise to make the gift, the same was not enforcible in equity. However, there being evidence from which the jury could have found the existence of a consideration, exceptions to

the direction of the verdict were sustained. The opinion from which we quoted *supra* and which is so cavalierly treated by the referee, was written by Chief Justice Wiswell and was concurred in by Justices Emery, Whitehouse and Savage, all of whom were later Chief Justices of this court, and Justice Strout. The decision has remained unmodified and unchanged to this day. So far as we know it has been unchallenged save for the foregoing action by the referee in this case. It declares the law of this State.

True it is that in *Bigelow* v. *Bigelow* the parol gift was oral. Here the parol gift was written. However, a written parol transfer of an estate in freehold is just as ineffective, as a transfer, as is an oral one. Neither one can transfer title.

Furthermore, a parol contract cannot be created without consideration from the promisee. This rule is so fundamental that no authorities need be cited therefor. Parol promises, either written or oral, are not enforcible unless supported by consideration. Detriment to the promisee is a sufficient consideration for a contract. As said in *Bigelow* v. *Bigelow,* 95 Me. 17, 22:

> "it would be a detriment to the promisee, in the legal sense, if he *at the request of the promisor* and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience and which he was not obliged to perform." (Emphasis ours.)

There is no evidence in this case of a consideration for the attempted gift in question. Acts performed in reliance upon a promise cannot constitute a consideration therefor and transform the naked promise into a contract unless the performance of the acts is, in the legal sense, *at the request of the promisor.* In other words, as stated in *McGovern* v. *City of New York,* 234 N. Y. 377, 388, 138 N. E. 26, 31:

> " 'Nothing is consideration,' it has been held, 'that is not regarded as such by both parties.' Philpot v. Gruninger, 14 Wall. 570, 577 (20 L. Ed. 743); Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 579, 12 Sup. Ct. 84, 35 L. Ed. 860; DeCicco v. Schweizer, supra, 221 N.Y. at page 438, 117 N.E. 807, L.R.A. 1918E, 1004, Ann. Cas. 1918C, 816. The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough. Fire Ins. Asso. v. Wickham, supra. Promisor and promisee must have dealt with it as the inducement to the promise. Holmes, Common Law, p. 292; Wisconsin & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386, 24 Sup. Ct. 107, 48 L. Ed. 229; 1 Williston, Contracts, § 139, p. 309."

The same doctrine is well stated in 12 Am. Jur. 568, § 75 as follows:

> "Consideration is in effect the price bargained and paid for a promise. In other words, it is something given in exchange for the promise. Nothing is consideration for a contract that is not regarded as such by *both parties*. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise does not necessarily make it the consideration for the promise in that contract. To give it that effect, *it must have been offered by one party and accepted by the other as an element of the contract*. Accordingly, the fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough to furnish a consideration for a contract. *The promisor and promisee must have dealt with it as the inducement to the promise*. In other words, on the one hand, the consideration must be the inducement to the making of the promise, and on the other, it must be induced by the promisor's express or implied request. *The classic doctrine is that 'the promise and the consideration must purport to be the motive each for the other, in whole or at least in part; it is not enough that the promise induces the detri-*

> *ment or that the detriment induces the promise if the other half is wanting.'* " (Emphasis ours.)

We are not unmindful that the text in American Jurisprudence following the above passage continues as follows:

> "There is, however, much authority to the effect that action induced by a promise renders the promise binding at least under some circumstances." 12 Am. Jur. 568, § 75.

This doctrine of promissory estoppel, at least so far as parol promise to make a gift of a freehold estate in land is concerned, was rejected by this court in *Bigelow* v. *Bigelow*, 95 Me. 17. We see no cause for reversing that decision or modifying the same to meet the exigencies of this case.

The defendant having neither a legal nor an equitable estate in the premises, and having been notified to quit the possession thereof, his right to possession as against the plaintiff had terminated prior to the commencement of this action. The plaintiff had the legal title to the premises and a right of entry therein. Whether or not the defendant's pleadings were sufficient to raise the issue of an equitable right to possession, we already having held that he had none, we need not now determine. We neither decide nor do we intimate our opinion as to whether or not the defendant herein may, in a separate action, recover from the plaintiff, either in whole or in part, the expenditures incurred in reliance upon the plaintiff's promise to make the gift, or for the benefits thereby conferred upon the plaintiff.

The court erred in accepting the report of the referee. The case must go back and be disposed of in accordance with the rule laid down in *Moores* v. *Inhabitants of Springfield*, 144 Me. 54, 73. The court below may, in its discretion, strike off the reference, it may recommit it to the referee who heard it before; or, with the consent of the parties, it may, after this reference is stricken off, refer it anew to another referee or referees.

Exceptions sustained.

BERNARD R. CRATTY

vs.

SAMUEL ACETO & CO.

Kennebec. Opinion, March 17, 1953.

Pleading. Special Demurrer. Amendments. Motion to Make Certain.

Where defendant's first special demurrer has been overruled and no exceptions taken, the ruling becomes final (R. S., 1944, Chap. 100, Sec. 38).

While an amendment to a declaration made by the opposite party may open the pleading to demurrer anew, it does not open it for new rulings upon identical questions previously adjudicated.

Following an amendment to a declaration the only causes, which can be assigned and relied upon in the second demurrer, are such defects as may appear by the amendment.

Amendments to a defective declaration are not even allowable unless they are either in the form of a new count sufficient in substance and form, or unless by insertion, addition, or deletion, they cure defects upon which a previous demurrer was sustained.

Lack of certainty and definiteness in a general allegation of negligence is a matter of form, and in this respect can be taken advantage of only by special demurrer or by motion to make more definite and certain.

Where a defendant elects to attack a lack of certainty by special demurrer rather than motion to make definite, and is overruled without exception being taken, the same principle which prevents renewing the demurrer prevents raising the same question by motion.

ON EXCEPTIONS.

This is an action to recover for injuries to a house allegedly caused by concussion in turn caused by alleged negligent use of explosives. On return day defendant filed special demurrer. On second day of the term plaintiff amended without objection. On the fourteenth day of the term the special demurrer was overruled without excep-

tions being taken. On the eighteenth day of the term defendant demurred anew to the declaration as amended. The demurrer was overruled. The case is before the Law Court on defendant's exceptions to the overruling of the second demurrer. Exceptions overruled.

Cratty & Cratty, for plaintiff.

Locke, Campbell, Reid & Hebert, for defendant.

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

MERRILL, J. On exceptions to overruling of defendant's special demurrer to an amended declaration. This was an action to recover for injuries to the house of the plaintiff caused by concussion which in turn was caused by the alleged negligent use of explosives by the defendant.

On the return day the defendant filed a special demurrer to the plaintiff's declaration alleging as grounds therefor certain formal defects in the declaration. Among the formal defects set forth in the special demurrer was the failure to allege any specific day, month and year when the defendant caused the damages sued for. Another formal defect was the failure on the part of the plaintiff, he having alleged negligence and damage caused thereby generally, to set forth "the specific acts or circumstances of negligence on the part of the defendant and its servants," or to allege "in what particular or particulars they were negligent." On the second day of the term, the plaintiff filed a motion to amend his declaration which was granted. No exceptions were or have been taken to the allowance of the amendment. Procedural defects, if any, in this respect must be considered as waived by the defendant.

On the fourteenth day of the term, the special demurrer was overruled. *No exceptions were or have been taken to the overruling of this demurrer.*

On the eighteenth day of the term, the defendant filed another special demurrer. This second demurrer was to "the plaintiff's declaration as amended."

The amendment added certain allegations to the original declaration, but neither deleted nor changed a single averment thereof. Nor did the amendment render the original declaration less certain than in its original form, nor did it in any way modify any particular allegation contained in the original declaration.

The first five grounds of demurrer set forth in the second special demurrer were the *same*, both factually and verbally, as the first five grounds of demurrer set forth in the first demurrer, which, as before stated, had been overruled by the court, and to the overruling of which no exceptions then had nor now have been taken. The presiding justice overruled the second demurrer. The case is now before us upon exceptions to this action on his part.

The defendant's first special demurrer having been overruled and no exceptions having been taken to the ruling of the presiding justice, that ruling became final. R. S. (1944), Chap. 100, Sec. 38, and *Plaisted* v. *Walker*, 77 Me. 459, 461. The grounds of demurrer which were open to the defendant in its first demurrer cannot be again urged by it in support of its second demurrer, to wit, the demurrer to the amended declaration. While the amendment made by the opposite party may open the pleadings to demurrer anew, it does not open them for new rulings upon the identical questions already previously adjudicated on a prior demurrer in the same case, and to which rulings no exceptions were taken. The fact that a demurrer may be filed to an amended declaration as a matter of right does not enable

the demurrant "to dig up a dead demurrer and have its sufficiency again passed upon." See *Equitable Mfg. Co.* v. *Hill-Atkinson Co.*, 87 S. E. (Ga. App.) 715; *Missouri State Life Ins. Co.* v. *Lovelace*, 58 S. E. (Ga. App.) 93, 98; *Central of Georgia Ry. Co.* v. *Waldo*, 65 S. E. (Ga. App.) 1098. This principle is recognized in 41 Am. Jur. 472, § 254, where it is stated: "In the absence of a proper exception or objection, one whose demurrer has been overruled will not ordinarily be permitted in a later pleading or motion to present the same question which has been passed on by the court in overruling the demurrer." See also annotations in 13 A. L. R. 1120, 106 A. L. R. 445.

Although we are unaware of any cases in which this court has passed upon this precise question, the same principle is recognized in *Bean* v. *Ayers*, 69 Me. 122. In that case a demurrer was sustained to a declaration. After the sustaining of the demurrer an amendment was allowed. A special demurrer was then filed to the amended declaration. The second cause of demurrer assigned was the want of a proper averment of demand and refusal. The declaration in this respect was precisely the same as it was at the time of the former special demurrer. The cause of demurrer assigned in the second demurrer was not assigned or presented to the consideration of the court in the first demurrer. The court held that the defendant had waived that cause for demurrer stating: "Otherwise if there are several defects in form, in the declaration, the defendant might have as many special demurrers as there are defects, pointing out only one defect at a time, thus unnecessarily protracting litigation, and unjustly enhancing the costs." The court further stated: "We think the only causes of demurrer which can be assigned or relied upon, in the second demurrer, are such as appear by the amendment."

We apply this same rule to this case. The only causes of demurrer which were open to the defendant under the sec-

ond demurrer are such, if any, as appear by the amendment itself. It is to be here noted that the defendant neither objected to nor took exception to the allowance of the amendment. Its second demurrer is not to the amendment but to the declaration as amended, to wit, to the whole declaration. It is bound by the prior ruling of the court that the original declaration, as a declaration, was sufficient in substance and in form. Unless the amendment which has been added to the declaration vitiates the declaration, the demurrer to the amended declaration must be overruled. The amended declaration contains every allegation of the original declaration without deletion or change. There is nothing in the amendment which lessens or takes away the force and effect of the original declaration. Therefore, the original declaration having been held sufficient, the demurrer to the declaration in its amended form must be overruled.

This case, however, must be carefully distinguished from those cases in which the demurrer to the original declaration has been sustained. Amendments to a defective declaration are not even allowable unless they are either in the form of a new count sufficient in substance and form, or unless by insertion, addition or deletion they cure the defects upon which the previous demurrer was sustained. Under the rule in *Bean* v. *Ayers, supra,* an amended declaration is not demurrable for formal defects contained in the original declaration and not relied upon as grounds for demurrer in the prior special demurrer. If formal defects not raised by a prior special demurrer are not open on a second demurrer, much less should grounds of demurrer which have been overruled on the former demurrer, without exceptions being taken to such action, be considered upon a second special demurrer to the amended declaration.

Lack of certainty and definiteness in a general allegation of negligence is a matter of form, and in this respect can be taken advantage of only by special demurrer or by motion

to make more definite and certain. *Couture* v. *Gauthier*, 123 Me. 132; *Reynolds et al.* v. *Hinman Co.*, 145 Me. 343, 345. The defendant has an election as to which of these two courses of action he will adopt. In this case having elected to attack lack of certainty by demurrer, the defendant is bound by its election. Furthermore, its demurrer having been overruled, the same principle which prevents it from renewing its demurrer prevents it from again raising the same question by a motion for specifications.

We have sustained the overruling of the defendant's second demurrer on technical grounds relating to the procedure adopted, but we neither intimate, much less hold, that the plaintiff's original declaration was good in form, or that we would have sustained the action of the justice at nisi prius in overruling the first demurrer had his action been attacked by exceptions. The defendant having sought to take advantage of formal and technical defects in the declaration by special demurrer cannot now complain of an adverse result based upon its own failure to follow the technical rules of procedure. However, the ultimate rights of no one have been harmed, for if proper procedure be followed the case can be tried and decided upon its merits on the declaration in its present form.

Exceptions overruled.

GEORGE S. HUNT
DOUGLAS HERSEY
MILDRED F. HERSEY
vs.
EMILE BEGIN AND ALBERT CEDRIC DOW

(Three cases)

Penobscot. Opinion, March 17, 1953.

Negligence. Exceptions.

On exceptions to the refusal to direct a verdict for defendant the evidence with the inferences properly drawn therefrom must be considered in the light most favorable to plaintiff.

It cannot be said as a matter of law that a driver is free from negligence when traveling at a high speed to pass an oncoming truck in blind reliance that a parked truck will not turn in front of him.

ON EXCEPTIONS.

These are three negligence cases brought by guests against the driver of the car in which they were riding and the driver of another car which collided therewith. The cases are before the Law Court after verdicts for plaintiffs on exceptions by the driver of guests' car to the refusal to direct a verdict in his favor. Exceptions overruled.

Edward Stern, for plaintiff.

James E. Mitchell,
Richard J. Dubord, for defendant Begin.
James M. Gillin, for defendant Dow.

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

WILLIAMSON, J. These three automobile accident cases were brought by guests in the Begin car against the defend-

ants Begin and Dow. The cases, tried together, are before us after verdicts against both defendants on exceptions by Begin to the refusal of the presiding justice to direct verdicts in his favor. It is admitted that the plaintiffs were in the exercise of due care.

The issue is whether the jury was warranted in finding negligence on the part of Begin. Under the familiar rule we take the evidence with the inferences properly drawn therefrom in the light most favorable to the plaintiffs. If reasonable men and women could find Begin was negligent, the verdicts must stand. We are not, of course, a second jury.

The principle has been stated and applied recently in *Bernstein* v. *Carmichael,* 146 Me. 446, 82 A. (2nd) 786; *Gamache* v. *Cosco,* 147 Me. 333, 87 A. (2nd) 509; *Gosselin* v. *Collins,* 147 Me. 432, 87 A. (2nd) 883; *Crockett* v. *Staples,* 148 Me. 55, 89 A. (2nd) 737.

From our examination of the record with the plan and photographs, we are of the view, without going into detail, that the jury could have found substantially the situation herein described.

The accident took place in Etna on U. S. Route No. 2 in daylight on the afternoon of October 2, 1951 within one hundred feet westerly from a mail box on the north side of the highway. Route No. 2 is a main highway with a paved surface twenty feet in width. There is a "down grade" from the top of a rise seven hundred fifty feet easterly of the mail box with a grade of 6%, a steep grade in the opinion of the surveyor who prepared the plan, ending at the mail box at the foot of the grade. From the top of the rise Route No. 2 stretches westerly for a half mile in a straight line with no obstructions to vision at any point. The weather was clear. The pavement was damp after a rain, but it does not appear that the condition of the highway had any bearing upon the accident.

There were three vehicles involved in the accident. Begin, with the plaintiff passengers, was driving westerly from Bangor on the "down grade" at a speed of fifty to fifty-five miles per hour. The Dow truck was stopped at the mail box, headed westerly and entirely off the pavement. The Merrill Transport Company tractor and trailer, or gasoline truck, was proceeding easterly toward Bangor and approaching the Dow truck and the Begin car at a speed of forty miles per hour.

This was the situation when the Begin car was three or four car lengths easterly, and the Merrill truck one hundred fifty feet westerly, of the mail box. They were about two hundred feet apart and approaching to pass at a combined speed of ninety or more miles per hour. At this moment Dow, without warning or signal, started westerly from the mail box and within at most no more than a few feet turned his truck in front of the Begin car. The Begin car first struck the left rear of the Dow truck and then the left side of the Merrill truck which was advancing in the eastbound traffic lane, or south half of the pavement. The great and damaging force of the collision with the Merrill truck is apparent from the photographs.

In the emergency both Begin and the driver of the Merrill truck applied their brakes and sought to avoid a collision. Tire marks led one hundred twelve feet to the point where the Begin car stopped on the pavement headed easterly. The Merrill truck turned to the right and came to a stop within about sixty feet with the tractor off the highway.

Begin did not blow his horn on approaching the Dow truck, nor did he reduce his speed. He testified "Well, I was quite a ways off and I did notice that pick-up truck on the right-hand side; we see often on the highway somebody parked on the side; so I just kept on going." He did not, so he said, see the Merrill truck.

Some weeks after the accident Begin, so plaintiff Douglas Hersey testified, said "He asked me how my mother was (plaintiff Mildred F. Hersey), and I was, and he said he felt kind of sleepy on the way home and he guessed it was his fault in a way." Begin vigorously denied any admission of this nature. The jury, however, was entitled to believe the plaintiff Douglas Hersey and to give weight to the evidence in reaching their conclusion.

No question is raised about the negligence of Dow. It is apparent that the Begin car and the Merrill truck would have passed near the mail box without incident, each in its own traffic lane, had not the Dow truck entered the picture.

Neither speed, nor failure to blow his horn to warn Dow, nor road conditions, nor admissions of sleepiness point, says the defendant, to negligence on Begin's part in the slightest degree, or in any event sufficiently to warrant the jury's finding. The entire fault, the only negligence, so the argument runs, lies in the negligence of Dow, who created the emergency in which Begin was an innocent participant.

Begin, in our view, places too narrow limits upon the cause of the accident. We may agree that the acts of Begin from the instant Dow drove his truck in front of Begin do not alone spell negligence. Probably he did as well as anyone could have done to escape from danger.

The question, however, is not only what part Begin played after the danger became immediate, but what part, if any, did he have in creating the emergency. If he was not in the exercise of due care when suddenly the Dow truck entered his traffic lane, he cannot complain that his negligence and that of Dow were found to be proximate causes of the accident.

What was the situation ahead of Begin when he came over the rise seven hundred fifty feet easterly of the mail

box and the Dow truck? He must be charged with knowledge not only of what he saw, but of what he should have seen. His judgment and the acts or failure to act springing from his judgment must be tested in light of this knowledge.

The jury could find that Begin as a reasonably prudent man should have considered at least the circumstances here mentioned.

In normal course he would pass the Merrill truck at the base of the grade near the position of the Dow truck. Should the Dow truck turn into the highway in front of him, he would place himself and his guests in a position of extreme danger. Indeed, he could have anticipated in such an event precisely what in fact did happen. He could not stop in the westbound lane without colliding with the Dow car; nor could he turn into the eastbound lane without colliding with the Merrill truck.

The Dow truck was stopped at a mail box. Such stops are usually made for a brief period. The approaching driver could well expect that when the truck moved, it would turn into the westbound traffic lane at a slow speed. The pavement was wide enough for two vehicles but not for three. Begin chose to rely wholly upon Dow remaining off the pavement until he passed the Merrill truck.

Could the risk of collision under the circumstances have been avoided by Begin in the exercise of due care? In our view the jury was justified in finding negligence on the part of Begin arising from his speed or from the failure to blow his horn to warn Dow.

Begin's speed calls for explanation. Under the statute a speed in excess of forty-five miles per hour at the scene of

the accident was "prima facie evidence that the speed is not reasonable and proper." *R. S. Chap. 19, Sec. 102, Par. II.* (Amendments in P. L., 1949, Chap. 38, Secs. 7 and 8, and P. L., 1951, Chap. 292, Sec. 3, are not here material). His speed was thus evidence in itself of negligence, but of course it was not necessary for the plaintiffs to tie their claims of negligence in speeding to a violation of the statute.

Begin had ample opportunity to reduce his speed to the end that he would not pass the Merrill truck at or near the Dow truck. Why did he not slow down so that he would first pass the oncoming Merrill truck, thus leaving the eastbound lane open in passing the Dow truck?

Or why did not Begin give Dow warning by blowing his horn? Begin did not, it is true, violate the "audible warning" statute, for he did not, certainly of his own will, pass or attempt to pass the Dow truck when it was "proceeding in the same direction." *R. S., Chap. 19, Sec. 103.* (An amendment in P. L., 1947, Chap. 86 is not here material.) The jury, however, was not prohibited from considering that a failure to give warning was negligence under the circumstances. Could they not have concluded that had Begin blown his horn—a simple act—Dow would have been warned of Begin's approach, and that thus the accident would have been prevented?

The admission of sleepiness by Begin suggests that the true cause of the accident was the inattention of Begin, together with Dow's negligence. Why did not Begin see the Merrill truck? Why was he so lax in his attention to oncoming traffic? Begin could have avoided so much risk with so little effort.

We cannot say as a matter of law that a driver travelling at a high speed to pass an oncoming truck in blind reliance that a parked truck will not turn in front of him is in the exercise of due care.

The jury measured the defendant against the standard of the reasonably prudent man under the circumstances, and found him lacking. The verdicts must stand.

Exceptions overruled.

LYNWOOD E. HAND, ADMR. D.B.N.
ESTATE HATTIE S. TRACY
vs.
C. DANA NICKERSON

Aroostook. Opinion, March 18, 1953.

Law Court. Report. Joint-tenancy. Survivorship. Pleading.

No case should be reported to the Law Court unless a decision thereof in at least one alternative would enable the court finally to dispose of the case.

No case whether at law or in equity should be reported to the Law Court unless in the opinion of the presiding justice it involves (1) *questions of law of sufficient importance or doubt to justify reporting the same and* (2) *the parties agree to the report.*

The Law Court may pass upon the facts presented when a case is otherwise properly before it on report.

A declaration stating that a bank account standing in the joint names of a decedent and another is to become the sole and absolute property of the survivor is insufficient to create a survivorship under R. S., 1944, Chap. 55, Sec. 36 as amended, where the parties are neither husband and wife nor parent and child.

Matters of technical pleading will, where a case is submitted on report of the evidence, be regarded unless the contrary appears as having been waived.

ON REPORT.

This is an action at law by an administrator to recover the proceeds of a joint savings deposit held in the name of

the decedent and defendant. The case is before the Law Court on report. Judgment for the plaintiff for $1,608.79 with interest thereon from the date of the writ to the date of final judgment, the same to be computed and added by the clerk below.

Asa H. Roach, for plaintiff.

James P. Archibald, for defendant.

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

MERRILL, J. On report. This case was reported to this court by a Justice of the Superior Court upon the following certificate:

> "This case is by agreement of the parties *herby* reported to the Law Court in the most comprehensive manner, to embrace every question of law and fact which the case hereby reported involves and to submit the whole controversy obtaining for final decision."

The tendency to report cases to this court which present no questions of law of sufficient importance or doubt to justify the same makes it necessary for us to re-examine the circumstances and again state the rules under which cases may be reported to this court sitting as a Law Court.

No case should be reported to this court unless our decision thereof in at least one alternative would enable us to finally dispose of the case. See *Cheney* v. *Richards,* 130 Me. 288, 291; *Harding* v. *Harding,* 130 Me. 515. This rule is general but it has special significance with respect to reporting questions of law on interlocutory matters. See *Shaw* v. *Slate Co.,* 96 Me. 41, 44, with respect to equity cases, and *Casualty Co.* v. *Granite Co.,* 102 Me. 148, with respect to actions at law. In the latter case, in a decision discharg-

ing the report, we said with respect to reporting an interlocutory motion to this court without a stipulation for final disposition:

> "Cases cannot be thus sent to the Law Court piece meal, one question at a time, the case to be returned again to the Law Court when and as often as another question may arise. *Monaghan* v. *Longfellow,* 82 Maine, 419. As said by the court in *State* v. *Brown,* 75 Maine, 456. 'If the case be sent to us once in this way, there is no reason why it could not come up in the same way over and over again upon motions possible to be made.' That the parties agree to such a course does not make it lawful. It would transform the Law Court into an advisory board for the direction of the business of the court at nisi prius, a function the Law Court cannot assume. *Noble* v. *Boston,* 111 Mass. 485. All interlocutory motions and other interlocutory matters should be disposed of at nisi prius, saving to the parties their rights of exception or appeal, if any. They should not be sent to the Law Court even upon report at the request of the parties, except at such stage of the case, or upon such stipulation, that a decision of the question may, in one alternative at least, dispose of the case itself. The legislature in constituting the Law Court and defining its jurisdiction (R.S., ch. 79, sec. 46,) (now R.S., (1944) c. 91, § 14) did not intend it to be used as a substitute for presiding Justices nor to relieve Judges in the trial courts from the duty of deciding, as they arise, mere interlocutory questions incident to the progress of the trial or the case.
>
> As well might motions for the appointment of auditors or surveyors, or questions of the admissibility of evidence, or requests for instructions, etc., be sent to the Law Court for original decision. It is evident, that even by agreement of parties, a trial should not be interrupted or postponed in order to obtain the opinion of the Law Court upon such questions, at least unless the parties stipulate that

> the opinion in some alternative shall practically end the case. *Noble* v. *Boston,* 111 Mass. 485."

The Law Court sits as a *court of law.* It is the exception, not the rule, when this court sitting as the Law Court passes upon and determines questions of fact. The unrestrained power of justices at nisi prius, either with the consent or at the request of the parties, to report cases to this court for determination is inconsistent with the purposes for which this court was established and the duties and powers with which it has been invested by statute.

"This Law Court has jurisdiction to determine *causes in equity certified on report* only when the presiding justice *is of the opinion,* and *so certifies,* that a question of law is involved *of sufficient importance or doubt to justify the same* and the parties agree thereto." (Emphasis ours.) R. S. (1944), Chap. 95, Sec. 24, *Fenn* v. *Fenn et al.,* 130 Me. 520.

The authority of this court to determine cases *at law* on report is conferred by R. S. (1944), Chap. 91, Sec. 14 and is confined to cases presenting *"questions of law."* It is to be noted that Section 14 of Chapter 91 does not *specifically* set forth the limitations contained in the statute relative to reporting a cause in equity, to wit, that the same must in the opinion of the presiding justice involve *questions of law of sufficient importance or doubt to justify reporting the same* or that *the parties must agree to the report.* However, it has been the *almost universal practice* to include a declaration to that effect in certificates reporting *cases at law.* While such a declaration in a certificate reporting a *case at law* is not strictly necessary, such a case should not be reported to this court, even when the parties request that it be done, except under those conditions.

This court has held that an action at law cannot be reported unless the parties agree thereto. We said in *Baker* v. *Johnson,* 41 Me. 15, 18:

> "Questions of law may also be raised for the law court on reports of evidence, as well as on exceptions or agreed statements of facts. But it is not competent for a Judge presiding at *Nisi Prius* to *order* the evidence to be reported or the parties to agree upon a statement of facts. If the parties do not consent to raise questions of law by a report of the evidence, or by agreed statement of facts, it is the duty of the presiding Judge to hear the evidence when addressed to the Court, or cause it to be produced before the jury, when properly addressed to a jury, and to make such rulings, orders, or decrees thereon, as in his opinion the law of the case requires. To these rulings, orders or decrees, in matters of law, any party who is thereby aggrieved, may allege exceptions, which exceptions, when properly authenticated, may, after all preliminary and interlocutory matters have been disposed of, be entered upon the docket of the law court for final determination."

Even as the requirement that the parties agree to a report of a case at law is implied, in like manner, *it is also implied* that the questions of law involved must be of *sufficient importance or doubt to justify reporting the same.* Otherwise, any case could be reported to the Law Court for decision, because the decision of every case involves a question of law and its application to the existing facts. When this court has heretofore stated in opinions that no question of law was or that only questions of fact were presented by the report under consideration, it was with the implication that such questions of law as were involved in the case were not of sufficient importance or doubt to justify reporting the same. See *Zoidis* v. *Breen et al.,* 132 Me. 489, *Associated Fish Products* v. *Hussey,* 145 Me. 388, *Bartlett* v. *Newton,* 147 Me. 185.

In cases reported to the Law Court on the evidence because of questions of law involved, this court may also pass upon the facts. *Dansky* v. *Kotimaki,* 125 Me. 72. This

power of the court to pass upon the facts of a case, however, is incidental to its jurisdiction to pass upon the questions of law properly presented by the report. Unless questions of law of sufficient importance or doubt to justify reporting the case to the Law Court are presented, this court ordinarily will not assume to pass upon controverted questions of fact. However, in exceptional cases, this court has sometimes regarded it to be its duty to finally dispose of litigation without compelling the parties to incur further expense and has finally disposed of a case reported to it when no controverted questions of law were presented. See *Lord, Berry & Walker* v. *Massachusetts Ins. Co.,* 133 Me. 335.

It is very questionable whether this case presents any question of law of sufficient importance or doubt to justify reporting the same to us. We could well discharge the report upon the authority of *Zoidis* v. *Breen et al., Associated Fish Products* v. *Hussey,* and *Bartlett* v. *Newton, supra.* Nevertheless, in this particular case we regard it to be our duty to finally dispose of this litigation without compelling the parties to incur further expense, and we do so upon the authority of *Lord, Berry & Walker* v. *Massachusetts Ins. Co., supra.* However, as stated in *Dansky* v. *Kotimaki, supra,* this court in so doing "does not deem it necessary to include in its opinion an analysis of the testimony. Detailed reasons for reaching conclusions of fact (herein would) have no value as precedents and uselessly encumber the reports." As in that case we shall state our reasons for conclusions only in outline.

This was an action at law brought by the plaintiff as administrator d.b.n. of the estate of Hattie S. Tracy against C. Dana Nickerson. The action was brought to recover the proceeds of a savings deposit in the First National Bank of Houlton withdrawn by the defendant. The deposit, at the decease of Miss Tracy, stood in the name of "Tracy, Hattie

S. or C. Dana Nickerson," "payable to either or survivor." It was withdrawn by the defendant, C. Dana Nickerson, the day after Miss Tracy's death. It then amounted to $2,723.44. This account was opened December 15, 1947 when a prior deposit, which had been in the names of "Tracy, Hattie S. and Angie S. Manson, sister" "payable to either or survivor," was withdrawn on an order signed by Hattie S. Tracy, the then survivor of herself and sister. The proceeds of said former deposit were immediately deposited in a new account, "the deposit in question," in the names of "Tracy, Hattie S. or C. Dana Nickerson," "payable to either or survivor" of them. There was also on file in the First National Bank of Houlton a declaration signed by the defendant and Miss Tracy dated December 15, 1947 stating that this bank account standing in their names and payable to either or the survivor was to become the sole and absolute property of the survivor.

As above stated, the defendant withdrew this deposit the day after Miss Tracy's death. He did so claiming to be the absolute owner of this new account. He did not assert this claim by virtue of the survivorship agreement or as the survivor. He claimed that Miss Tracy made an absolute and irrevocable gift of the original deposit to him in her lifetime. He further claimed that before the new account was opened Miss Tracy had by her gift to him divested herself of all right, title and interest in the former deposit, and that the new deposit was a deposit of his own funds and that he was the sole owner thereof.

After the withdrawal of the deposit the defendant paid therefrom the expenses of the last sickness and funeral of, and the cost of a gravestone for Miss Tracy various sums amounting to $1,114.65. He claimed that if it should be determined that he was not entitled to the bank deposit, he should be reimbursed for these expenditures made for and in behalf of the estate.

Unless the decedent, Miss Tracy, made a valid and irrevocable gift *inter vivos* of the bank deposit formerly standing in her name to the defendant, this case is governed by *Garland, Appellant,* 126 Me. 84, and the long line of authorities cited therein, and the deposit in question belonged to and formed a part of the estate of Miss Tracy. Nor does the declaration filed with the bank affect this result. It was insufficient to create a survivorship under R. S. (1944), Chap. 55, Sec. 36 as amended. The parties were neither husband and wife nor parent and child as required by said statute. The defendant was a nephew of Miss Tracy.

The burden of proof is upon the defendant to establish the gift which is the foundation of his claim. *Rose* v. *Osborne,* 133 Me. 497, 501.

Upon a careful examination of the admissible testimony in the record, we are unable to find that a valid gift of the original deposit was made by Miss Tracy to the defendant.

No useful purpose would be served by a restatement of the legal principles governing gifts of this nature or of the authorities declaring the same. The principles are well stated in *Rose* v. *Osborne, supra,* which is replete with citations of the many relevant and governing opinions of this court respecting the same.

The deposit in question belonged to Miss Tracy. It formed a part of her estate. The defendant having withdrawn the same after her death is accountable to the administrator d.b.n. therefor in this action.

At the argument it was conceded by counsel for the plaintiff that if the defendant was accountable for the proceeds of the deposit, he should be allowed his claim of $1,114.65 for the expenditures that he made therefrom for the benefit of the estate. We make such allowance. In doing so, however, we do not even intimate our approval of the procedure under which the defendant sought allowance thereof.

However, "Matters of technical pleading will, where a case is submitted on report of the evidence, be regarded, unless the contrary appears, as having been waived." *Foley, Malloy* v. *Farnham Co.*, 135 Me. 29, 33. See also *Pillsbury* v. *Brown*, 82 Me. 450; *Hurd* v. *Chase*, 100 Me. 561, 564.

In accordance with the terms of the report we find for the plaintiff in the sum of $1,608.79 with interest thereon from November 23, 1951, being the date of the writ. The entry will be,

Judgment for the plaintiff for $1,608.79 with interest thereon from the date of the writ to the date of final judgment, the same to be computed and added by the Clerk below.

EDNA HEARD BAKER, ET AL.
vs.
ARTHUR PETRIN, ET AL.

York. Opinion, March 23, 1953.

Dedication. Trespass. Words and Phrases. Damages.

Dedication is an appropriation of land to some public use made by the owner and accepted for such use by or on behalf of the public.

Mere acquiescence by the owner in occasional and varying use by the public is not sufficient to establish dedication. There must be a clear intent to so dedicate.

"Intent to dedicate" and "acceptance by the public" are questions of fact.

Acceptance must be made in a reasonable time.

The designation of an area as "common" on a plan of lots is not conclusive evidence of the owner's intent to dedicate such area to the public.

The word "common" has been used in differing situations to convey different meanings.

If the jury finds as a fact that a wilful trespass has been committed and plaintiff's fence was injured or thrown down, the statute for the recovery of double damages applies (R. S., 1944, Chap. 111, Sec. 9).

ON EXCEPTIONS.

This is an action of trespass for the alleged wilful destruction of plaintiffs' fence. After verdict for the plaintiffs with a special finding of "wilfulness" the presiding justice doubled the damages. The case is before the Law Court on general motion for new trial and exceptions. Motion overruled. Exceptions overruled.

Waterhouse, Spencer and Carroll,
N. B. & T. B. Walker, for plaintiff.

Lausier & Donahue, for defendant.

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

FELLOWS, J. This is an action of trespass *quare clausum,* brought in the Superior Court for York County, to recover statutory double damages for the destruction of a long guard rail fence on land claimed by the plaintiffs under a lease from the heirs of the original proprietors of "South Point Cottage Lots" so-called, at Biddeford Pool in the city of Biddeford, Maine. The action is brought by Edna Heard Baker, Janet G. Edwards and Frances P. Wood against Arthur Petrin, Wilfred Bolduc, Norbert Tremblay, Antonio Mariello, Arthur Pratt and Antoine Martel. The defendants filed plea of the general issue with brief statement claiming dedication of the locus to the public. The case was tried before a jury and the verdict for single damages

was $950.00, with special finding that the trespass was wilfully committed, and the damages were doubled by the justice presiding. The defendants filed general motion for new trial and also submitted a bill of exceptions. There was a view by the jury at beginning of trial.

The principal facts in this case appear to be that in the year 1882 the proprietors of certain land at Biddeford Pool in Biddeford, Maine, laid out more than 275 cottage lots, with streets and avenues between lots to provide access, and called them "South Point Cottage Lots." The lots did not border directly on the Atlantic Ocean because the strip of land, varying in width and consisting of rocks, beaches, and some level areas with beach grass and bushes, between the lot development and the ocean, was not laid out in lots as appears on the plan recorded in York Registry in 1882. Lots have been sold with reference to the plan since 1882. This method of laying out many cottage lots, where owners of the greater number of cottages cannot see the lake or ocean, is usual in Maine summer developments, in order that a lot owner may have opportunity to fully use the nearby shore or beach, with other owners, for recreational purposes.

This portion of the development, not laid out in lots and bordering directly on the ocean, was very irregular in size and shape, and extended around the easterly and southerly sides of the lot area. One part now in question was triangular in shape and approximately 180 feet wide, or deep, and was marked on the 1882 plan "Common." The evidence shows that when this was part of a farm and known as South Point Pasture, it had a barn on it, sweet grass was gathered from it, cottagers picnicked there, farmers hauled seaweed from the rocks on the shore, and the lobstermen and fishermen went to and from boats over it, as occasion required. The area was remote from the city, and only occasionally or rarely used by cottage owners and fishermen,

until the present days of automobiles with "parties and parking."

Easterly of the area comprising the lots, and westerly of the area on the ocean shore that was marked "Common," there was a 50-foot highway named "Ocean Avenue" on the plan. This highway next to the lotted area, and along the ocean side of the lots, was between the cottage lots and that part of the shore that was not laid out in lots.

In 1913 the city of Biddeford purported to lay out and accept portions of Ocean Avenue according to the plan of 1882, but the city did not fully comply with the Statutes and Charter, and evidence conflicts as to this highway's width and exact location, and exactly where it had been used and travelled. No plan of the street was filed when "laid out" by the city, and there was no complete record in the city's street record.

The plaintiffs are the owners of lots on the easterly and ocean side of the development. The plaintiffs' lots are on Ocean Avenue. Across the Avenue from the plaintiffs' lots lies the land marked "Common" on the ocean front.

On September 18, 1894, the then proprietors sold to the United States government, by indenture with the Secretary of the Treasury, certain of the lots across the Avenue from the "Common," for the establishment of a Life Saving Station with "right to erect and maintain 'Wreck Spar' on the 'Common,' so-called, be the contents what they may, with full right of egress and ingress thereto * * * and the right to pass over said streets and shore in any manner in the prosecution of said purpose, and also the right to erect such structures upon the said land as the United States may see fit." On April 3, 1896, another indenture with the Secretary of the Treasury conveyed more lots, with rights similar to those in the first indenture. Fire hydrants and electric lights have been installed at various points along the high-

way, under either the direction of water and electric companies, or by the city.

In 1930, and for some years previously, the drivers and occupants of automobiles in large numbers were using this land, across the Avenue from the plaintiffs' lots, for "parking and drinking party purposes," to the great annoyance and disturbance of the lot owners at all times of the day and night. Automobiles were used as beach houses to put on swimming garments, and clothes were hung on bushes to dry. There was much noise. There was much rubbish left. On July 25, 1930 the plaintiffs (or their predecessors in title) obtained a lease from the then proprietors, of a portion of this vacant land between Second and Fourth Streets (as and if extended to the sea) and marked "Common" on the plan of 1882, subject to "all rights and easements of the public in any way acquired over and along Ocean Avenue, so-called, and land adjacent thereto." The lease was to continue until six months' written notice be given to terminate. After receiving the lease, the plaintiffs, or their predecessors in title, apparently went into possession, as they engaged a surveyor to run the lines of Ocean Avenue, and they then in 1930 proceeded to erect a substantial automobile fence or guard rail fence along the easterly or southeasterly side of the travelled portion of the Avenue. The fence was built of strong wooden posts and heavy wire cable, and built to prevent automobiles from entering and parking on the vacant land thus situated on the ocean and marked "Common" on the 1882 plan. Openings were left near a hydrant, and near the ends of the fence, so that persons on foot had access to the sea. The fence, claimed to be owned by the plaintiffs, extended a short distance beyond the limits fixed by the lease. After the erection of this fence, the plaintiffs had no further trouble from drinking parties and automobile "parkers" during more than twenty

years from 1930, and until the trespass and destruction of the fence in 1951.

There was conflicting evidence regarding the bounds of Ocean Avenue, and whether the fence was or was not within the limits of Ocean Avenue as laid out on the plan of 1882. The presiding justice in his charge referred to and explained Revised Statutes 1944, Chapter 84, Section 102 relative to a 20-year fence as a bound. There was conflicting evidence on what had been the regular travelled portion since 1882. There was conflicting evidence on whether there was a "driveway," or usual place across the so-called "Common" to the shore where farmers and fishermen could drive to the water, and a conflict as to whether or not they did so drive. There was a conflict as to whether sand had been taken away, and whether the owners or lessees had forbidden the taking of sand but had permitted the taking of seaweed. A seventy-four year old witness, who was a daughter of one of the early proprietors and owners, testified, without objection, in relation to the "Common" on the plan, as follows: "When the land was laid out, it was restricted land, put aside by my grandfather and uncle, Thomas Cole, for the use of, to protect the people on the other side of the road. It wasn't to be built on" * * * "and it was for the purpose of the land owners down there, the lot owners." She further testified that the use of this land by the public to get seaweed and to get to boats was permissive, but the taking of sand was prohibited and prevented by her father and other owners. It was only occasionally or rarely used by the general public from 1882 to the advent of the automobile. It was used by the lot owners to go to the shore to swim, to picnic, to gather sweet grass and other recreational activities.

In August 1951, the Mayor of the city of Biddeford said to the husband of one of the plaintiffs: "That fence is coming down Monday morning." The witness answered: "That

fence is on private property and we don't want you to touch that fence," and the Mayor repeated: "That fence is coming down Monday morning."

On the morning of August 21, 1951, the defendants (who were then the Assistant Street Commissioner of Biddeford and his crew) with two trucks, commenced to tear down the fence. At this time an attorney for the plaintiffs was present and told the defendants not to move or destroy the fence. The defendants, however, demolished the fence. The estimates of value of the fence were from $1200 to $1500, with one witness who was a truck driver for the city estimating that the fence could be replaced for $200 by using the same materials. The verdict was $950 with a special finding that the trespass was committed wilfully and knowingly.

The claim of the defendants, as stated in pleadings and in briefs, is that the land where the alleged trespass was committed "was dedicated to the public partly as a public way known as Ocean Avenue and the balance of said land as the 'Common' with the right of owners of lots on plan of 'South Point Cottage Lots' to enjoy the rights as members of the public * * * and said plaintiffs are not owners within the statutory provisions relative to the recovery of double damages."

Dedication is an appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. There must be a clear intent to so dedicate. Mere acquiescence by the owner in occasional and varying use by the public is not sufficient to establish dedication. See Bouvier's Law Dictionary (Eighth or Rawles Revision), citing *Campmeeting Association* v. *Andrews,* 104 Me. 342. See also the recent case of *Arnold et al.* v. *Boulay,* 147 Me. 116 and cases there cited, relative to sale of lots in reference to plan where portions of the land is apparently to be left unoccupied, and holding that there may be "an

easement by implication based upon estoppel" without dedication.

Whether there is an intent to dedicate to the general public, and the acceptance by the public are of course questions of fact. The intention must be unequivocally and satisfactorily shown. Acts and circumstances may rebut evidence that may indicate the owner's intention, such as location, value, local conditions, treating the land as his own, leasing, maintaining a fence, etc. *White* v. *Bradley,* 66 Me. 254; *Bartlett* v. *Harmon,* 107 Me. 451; *Littlefield* v. *Hubbard,* 124 Me. 299; *Piper* v. *Voorhees,* 130 Me. 305.

If there was an intention to dedicate it must be accepted in a reasonable time. *Burnham* v. *Holmes,* 137 Me. 183; *Kelley* v. *Jones,* 110 Me. 360.

The defendants say the word "Common" on the plan is evidence of the intent of the owner in 1882 to dedicate this land to the general public. That is of course true, but it is only evidence. It is certainly not conclusive as the defendants contend, under the facts and circumstances here. It might only be conclusive as an estoppel between the purchaser of a lot and the owner, under the doctrine expressed in *Arnold* v. *Boulay,* 147 Me. 116. When the plan was made and filed in 1882, the lots were on the coast in a remote place and outside built-up sections of the city. It was plainly a plan intended to encourage prospective buyers of lots for summer residences, by indicating a section not to be built upon and not to be used to interfere with the lot owners' right of access to the sea.

The word "Common" has long and often been used, and used in differing situations, to convey different meanings. It does not always mean the general public. See Bouvier's Law Dictionary, Rawles Edition "Common." What was meant, under all the circumstances in this case, was a question for jury determination. Was there an intention to in-

vite free use by the general public, or was the then intention to protect the lot buyers? Were there any acts to indicate acceptance by the public? Was the land fenced off for more than twenty years with the consent and approval of the owners? What do the sales to the government and the lease to these plaintiffs indicate? Was occasional use by the general public permissive or adverse? These and other facts may or may not determine the principal question, but all may be evidence to indicate intention.

The defendants cite in their brief the Colonial Ordinance of 1641-47 from "Ancient Charters and Laws of the Colony and Province of Massachusetts Bay," Chapter 63, which related to fishing and fowling in great ponds, bays, coves and rivers, and the stopping or hindering the passage of boats. We fail to see the application of the Ordinance under the existing circumstances, or under the points in issue in this case, nor do we see application of many cited cases relative to use and ownership of upland, shore, and flats, such as ownership of seaweed, *Hill* v. *Lord,* 48 Me. 83, or fishing privileges, *Matthews* v. *Treat,* 75 Me. 594, or filling up flats, *Marshall* v. *Walker,* 93 Me. 532, which cases were decided on common law rights of the owners of the shore, and the common law rights of the public "where the tide ebbs and flows." The charge of the justice presiding was adequate, and no exceptions were taken.

The statutory provision relative to the recovery of double damages is contained in R. S., 1944, Chap. 111, Sec. 9, and is as follows:

> "Whoever cuts down, destroys, injures, or carries away any ornamental or fruit tree, timber, wood, underwood, stones, gravel, ore, goods, or property of any kind from land not his own, without license of the owner, or injures or throws down any fences, bars, or gates, or leaves such gates open, or breaks glass in any building is liable in damages to the owner in an action of trespass. If said acts are

> committed wilfully or knowingly, the defendant is liable to the owner in double damages."

There is evidence that the fence in question in this case was built and owned by the plaintiffs who claimed to hold the land under lease, and if that was found by the jury to be the fact and that there was a wilful trespass and the plaintiffs' fence was injured or thrown down, the foregoing statute applies. See *Little* v. *Palister*, 3 Me. 6.

We have examined the record with care, and viewing the evidence in the light most favorable to the plaintiffs, as the rule requires, we see no reason to grant the motion for new trial for either excessive damages, or that the verdict is against the law, the evidence, or the weight of evidence. The verdict is not "manifestly wrong." *Eaton* v. *Marcelle*, 139 Me. 256, 29 Atl. (2nd) 162; *McCully* v. *Bessey*, 142 Me. 209.

EXCEPTIONS

During the trial the defendants took certain exceptions to the admission or exclusion of certain testimony, and also exceptions to refusal to give to the jury two requested instructions.

1. In cross examination of a surveyor this question was asked by defendants' counsel and excluded:

> "Q. If the white fence in front of the Edwards property is the true line of Ocean Avenue as shown upon the plan recorded in York Registry of Deeds, Plan Book 3, Page 2, then that fence in some areas was located less than 50 feet from the white fence in front of the Edwards house, is that correct?"

The exclusion of the question was within the discretion of the justice presiding. It was argumentative. It was immaterial where Mrs. Edwards put her fence. It had very distant and doubtful relation to land across the highway

and included within the lease under which the plaintiffs claimed. *McCully* v. *Bessey*, 142 Me. 209; *Torrey* v. *Congress Square*, 145 Me. 234, 75 Atl. (2nd) 451.

2. One of the plaintiffs testified, under objection, that her father, speaking to one Hill, an heir of one of original owners and both deceased, that "he didn't care about having the wreck pole (of the Life Saving Station) stuck out in front of his house," to which Hill replied that "he would see what they could do about having it down." This statement was from one lot owner to another, and speaking of and concerning land across the street from their lots, in which each as lot owners had an interest. It was admissible within the judicial discretion of the trial judge either as construed to be "traditionary evidence," *Piper* v. *Voorhees*, 130 Me. 305, or found by the presiding justice to be a declaration of an ancient person while in possession of and on his own land. *Royal* v. *Chandler*, 83 Me. 150. It does not appear that discretion was abused. In the light of other evidence in the case the testimony was harmless. To "see" what one could do proves neither claimed authority nor power to accomplish.

3. The defendants objected to admission of the lease under which plaintiffs claimed possession, on the ground that the declaration contained no allegation regarding it. It was admissible within the court's discretion, as relevant and bearing on possession or right to possession of the land in question.

4. Defendants objected to admission of testimony of a witness to the effect that she was the sole heir of her sister. If this was an abuse of the court's discretion, the error was cured by the later introduction of the records of the Probate Court showing that fact.

5. The attorney, who had forbidden the defendants to remove the fence, testified, under objection, that one of the

defendants said in answer to his prohibition, "we have got to take this fence down or we will lose our jobs." The objection was based on the claim that the jury might be prejudiced and might believe that the city and not the defendants was financially responsible. The defendants or defense witnesses testified, however, at the trial that the defendants were in the city employ and under orders of the Street Commissioner. We fail to see that the statement was inadmissible. It was discretionary. It was spontaneous and made at the time. It was as likely to be prejudicial to the plaintiffs as to the defendants. The defendants take nothing by this exception.

6. The testimony of the witness who built the fence, as to his opinion of its value at time of removal, was objected to on the ground that he was not qualified as an expert. He was in the hardware business and had sold the various kinds of fence material, and he had built fences. He stated that when built the fence cost more than $300 and was worth, when torn down, three or four times as much. Whether a witness is qualified as an expert is a preliminary question for the justice presiding, and no exceptionable error appears here. *Hunter* v. *Totman,* 146 Me. 259, 80 Atl. (2nd) 401. In fact, the jury must have seen the fence materials when taking the view, as they were piled on the premises, and with a Maine jury there was probably no benefit from or necessity for an expert.

7. This seventh exception was taken when the court excluded certain exhibits offered by the defendants, being copies of city records or proceedings before the Mayor and City Council relative to relocation or altering of portions of Ocean Avenue in 1915. The exclusion was proper as these records did not refer to that part of Ocean Avenue on or near the land in dispute. They were not relevant and were immaterial. The justice presiding was correct in his use of discretion.

8. The defendants offered in evidence the record of location of a street light at corner of Bay Street and Ocean Avenue. This was not near the disputed area and only admissible within the court's discretion. The presiding justice was right in excluding it.

9. This exception was taken when the surveyor was asked to testify that certain courses, monuments, and other data in the city records relative to the laying out or acceptance of Ocean Avenue were in his opinion contradictory. This was within the discretion of the justice presiding, as the surveyor could well have been considered by the court as a witness qualified to give such testimony.

10. The defendants requested the following instruction to the jury at the close of the charge: "That the plaintiffs are not owners within the statutory provisions relative to the recovery of double damages." The refusal to give this instruction was proper. The jury were to find the fact of ownership of the fence, as well as the responsibility of the defendants. If the plaintiffs, in fact, owned the fence and the tearing down was wilful, the plaintiffs were entitled to double damages. R. S., 1944, Chap. 111, Sec. 9. *Benner* v. *Benner,* 119 Me. 79. The declaration alleged the fence to be the property of these plaintiffs, and it was early held that even a tenant at will can have an action for injury to his property. *Little* v. *Palister,* 3 Me. 6; *Hayward* v. *Sedgley,* 14 Me. 439, 32 Am. Jur. 219, Sec. 236, "Landlord and Tenant." See also Annotation in 12 A. L. R. (2nd) 1192; 24 Cyc. 1072. The statute gives extra damages for wilful destruction of the *owner's* property.

11. At the end of the charge to the jury, the presiding justice was also asked to give the following instruction which was refused and exception taken: "The word 'Common' written upon a block on a map of real estate indicates a public use; and when the owner of such real estate makes

conveyances of portions thereof by express reference to such map, such acts on the part of the owner, if unexplained, operate as a dedication to the public use of the block so marked." The refusal was proper. The requested instruction erroneously indicates that the word "Common" may be conclusive evidence of dedication to the public. The owner is not obliged to "explain." "Explanation" may consist of acts or existing conditions. The jury may and should take into consideration all the circumstances that may or may not indicate intention to dedicate to the general public. *White* v. *Bradley,* 66 Me. 254; *Littlefield* v. *Hubbard,* 124 Me. 299, 302; *Arnold et al.* v. *Boulay,* 147 Me. 116.

It is our opinion, therefore, that the entry must be

Motion overruled.

Exceptions overruled.

STATE OF MAINE
vs.
MAINE STATE FAIR ASSOCIATION

Androscoggin. Opinion, April 15, 1953.

Criminal Law. Indictments. Pleading. Statutes.

Common ordinary words used in indictments or complaints are to be interpreted according to their ordinary and common meaning.

The definition of words used in a statute or ordinance does not *per se* modify or restrict their meaning when used in complaints for the violation of the statute or ordinance in which they are defined. To give to the words when used in an indictment or complaint the restricted meaning in which they are used in the statute or ordinance it is necessary to do so by direct allegation in terms or to set forth in the indictment or complaint sufficient facts necessary to charge a violation of the statute or ordinance.

An indictment is insufficient which does not *necessarily* charge a violation of the statute or ordinance.

ON REPORT.

This is a prosecution for violation of an ordinance of the City of Lewiston. Following a verdict of guilty by the Municipal Court the case was appealed to the Superior Court. The case is before the Law Court upon agreed statement from the Superior Court. Complaint dismissed. Judgment for the respondent.

Irving Isaacson, Asst. County Attorney, for plaintiff.

Philip M. Isaacson, for defendant.

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

MERRILL, C. J. On report. This is a prosecution for violation of an ordinance of the City of Lewiston. The respondent, Maine State Fair Association, after having been found guilty by the judge of the Municipal Court of the City of Lewiston and sentenced to pay a fine of five dollars and costs of prosecution appealed to the November 1950 Term of the Superior Court in the County of Androscoggin. The appeal was duly entered and the case was before the Superior Court upon the complaint and warrant and plea of not guilty entered in the court below. At the April 1952 Term the case was reported to this court upon an agreed statement of facts.

The complaint charges that the respondent Association, "on the fifth day of September in the year of our Lord one thousand nine hundred and fifty at said Lewiston, in said County, with force and arms and unlawfully did then and there use the race track located in the City of Lewiston, for harness racing and for commercial gain without a permit so

to do, in violation of the ordinances of the city of Lewiston, against the peace of said State, and contrary to the form of the statute in such cases made and provided."

The section of the ordinance for the violation of which the defendant is being prosecuted is as follows:

> "Sec. 2. No person shall use any race track for races without first obtaining a permit and paying the proper fee therefore as hereinafter provided."

The previous section of the ordinance defines the words "Races" and "Race Track" and other words used therein, and is as follows:

> "Sec. 1. The following words and terms as used in this Ordinance shall be deemed to mean and shall be construed as follows:
> 'Races' A meeting for contests in the running of horses with intent to financial gain to any person, including 'sulky races', 'harness races,' 'and races of horses in any form over a regular course at a set time, with the exception of and intent to exclude 'running races' with 'runners' so-called.
> 'Meet' or 'Meeting' The total number of consecutive days, excluding Sundays during which races are run.
>
> 'Person' The word 'person' as used in this ordinance shall mean and include any person, association, firm partnership, limited partnership or corporation.
>
> 'Permit' A permit issued in pursuance of this ordinance.
>
> 'Race Track' Any fair grounds, race track or field in the City of Lewiston, which has on it any structure or grandstand, so-called, with a capacity of over one hundred (100) persons and which is used by spectators at races.
>
> 'Grandstand' Any structure on the race track used by spectators during the running of races."

The words *"race track"* and *"races"* when used in Section 2 of the ordinance are not used in their ordinary but in the restricted sense and meaning set forth in Section 1 of the ordinance. Races are *races within the meaning of the ordinance* only when they are "a meeting for contests * * * with intent to financial gain to any person * * * over a regular course at a set time." A race track is a *race track within the meaning of this ordinance* only when it has "on it any structure or grandstand, so-called, with a capacity of over one hundred (100) persons and which is used by spectators at races." Unless a race track is a *race track of the kind defined in Section 1 of the ordinance,* its use without a permit is not prohibited by Section 2 of the ordinance. Unless the races for which the race track, as defined in the ordinance, is used *are races of the kind defined in Section 1 of the ordinance,* the use of the race track therefor without a permit is not prohibited by Section 2 of the ordinance.

It is an elementary rule of criminal pleading that common, ordinary words used in indictments or complaints are to be interpreted in accordance with their ordinary and common meaning. As said in Beale's Criminal Pleading and Practice, Page 95, Section 94, "Words and phrases in the indictment, when they have not acquired a technical legal meaning, will be interpreted according to their ordinary use."

A statute by definition of common words therein may restrict the meaning thereof when and as used in the statute. The same is true of a city ordinance enacted pursuant to authority granted either by general law or under the city charter.

However, such words when used in indictments or complaints for violation of the statute or ordinance will be interpreted according to their ordinary or common meaning,

as distinguished from the restricted meaning assigned to them by the statute or ordinance. The definition of words used in a statute or ordinance does not *per se* modify or restrict their meaning when used in complaints for violation of the statute or ordinance in which they are defined. To give to the words when used in an indictment or complaint the restricted meaning in which they are used in the statute or ordinance it is necessary to do so by direct allegation in terms or to set forth in the indictment or complaint sufficient facts necessary to charge a violation of the statute or ordinance.

If the complaint or indictment, interpreted according to the common and ordinary usage and meaning of the words therein, does not *necessarily* charge the respondent with a violation of the statute or ordinance, the complaint or indictment is insufficient and will not sustain a conviction.

A contrary holding would violate the respondent's constitutional right "To demand the nature and cause of the accusation, and have a copy thereof;" guaranteed to him by Art. I, Sec. 6 of the Constitution of Maine. The fundamental reasons therefor have been examined and stated so many times by this court that detailed analysis and restatement would serve no useful purpose. *State* v. *Lashus,* 79 Me. 541; *State* v. *Androscoggin Railroad Co.,* 76 Me. 411; *State* v. *Doran,* 99 Me. 329; *State* v. *Mace,* 76 Me. 64; *State* v. *Moran,* 40 Me. 129; *State* v. *Crouse,* 117 Me. 363; *State* v. *Beckwith,* 135 Me. 423; *State* v. *Strout,* 132 Me. 134; *State* v. *Peterson,* 136 Me. 165, and *Smith, Pet'r.* v. *State of Maine,* 145 Me. 313.

Particular attention is called to the comparatively recent case of *Smith* v. *Bellmore,* 144 Me. 231 which involved the use of the word *"liquor"* which had been defined in R. S. (1944), Chap. 57, Sec. 1. In this case we held that a com-

plaint alleging a sale of *"liquor"* was insufficient to charge a sale of *intoxicating liquor,* although the statute had defined the word *liquor* when used therein as meaning intoxicating liquor. The word liquor in the complaint was interpreted according to its common and ordinary meaning which included both intoxicating and non-intoxicating liquor. The *allegation* in the complaint *was not aided* by the *definition* in the statute.

In this case the ordinance defines the meaning of certain words when used in the ordinance. It does not define the meaning of those same words when used in a complaint. There are no facts set forth in the complaint showing that the *race track* alleged to have been used therein was a *race track* within the definition of the words as used in the ordinance, or that the words *harness racing* were within the definition of "races" contained in the ordinance.

The ordinance does not prohibit the use of a race track, even if the race track is one within the definition of the ordinance, for harness racing without a permit, unless the harness racing is carried on "with intent to financial gain." Nor would it be a violation of the ordinance to use the race track for financial gain without a permit unless it was used for racing with such intent. The allegation in the complaint is that the respondent used the track for harness racing *and* for commercial gain. It does not allege that it was used for harness racing *for* commercial gain, or in the words of the ordinance *"with intent to financial gain."*

The complaint charges no violation of the ordinance. The State does not contend that it charges the respondent with the violation of any law other than the ordinance in question.

As the complaint does not sufficiently charge a violation of the ordinance, it is unnecessary for us to inquire into the

validity of the ordinance, or its application to the respondent. If the respondent were to be found guilty upon this complaint since it charges no offense, the conviction could be attacked by motion in arrest of judgment. *State* v. *Peterson,* 136 Me. 165. If the respondent were to be found guilty and sentenced, the sentence would be reversed on a writ of error. *Smith, Pet'r.* v. *State of Maine,* 145 Me. 313. The complaint must be dismissed, and the entry will be,

Complaint dismissed.

Judgment for the respondent.

*(MURCHIE, C. J., having deceased, did not join in this opinion.)

JAMES A. CLAPPISON, ET AL.

vs.

FRED J. FOLEY, ET AL.

Sagadahoc. Opinion, April 17, 1953.

Equity, Amendments. Demurrer. Pleading. Fraud. Fiduciary.

An amendment which is itself demurrable should not be allowed.

A general allegation of fraud is not sufficient in a bill in equity to set forth jurisdiction based on fraud. The facts constituting the fraudulent conduct must be set forth with sufficient particularity to enable the court to determine whether, if true, such facts amount in law to fraud.

A general allegation of fiduciary or confidential relationship is insufficient. The court must be able to ascertain from the facts as alleged whether such relationship exists.

ON EXCEPTIONS.

This is a bill in equity. The case is before the Law Court on exceptions by plaintiff to the sustaining of a demurrer to the amended bill. Exceptions overruled.

Goodspeed & Goodspeed, for plaintiff.

John J. Devine,
Berman & Berman & Wernick, for defendant.

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

FELLOWS, J. In this bill in equity pending in Sagadahoc County, James A. Clappison of Bath complains against Fred J. Foley, Margaret M. Foley, Alice F. Littlefield, Harold E. Foley, Fred Foley, Jr., John J. Devine and Community Oil Co., Inc., all of Portland. The original bill was brought by James A. Clappison, Alice C. Clappison, and James A. Clappison, Inc., against these same defendants, and upon demurrer filed by the defendants, the presiding justice sustained the demurrer with the right on the part of the plaintiffs to amend the bill. The justice stated in his decision, sustaining the demurrer, that it was not decided on the claim of laches. The plaintiff, James A. Clappison moved to amend by filing a new and amended bill as an amendment. The justice presiding denied the motion to amend, because "in my opinion a demurrer to the amended bill would be sustained." The plaintiff filed exceptions.

The issue raised is stated in the bill of exceptions as follows:

> "The sole issue raised by these exceptions is whether or not, as a matter of law, the amended bill, so-called, as amended by the addition of Paragraph 8A of the prayers for relief, is itself demurrable

> in the matter of substance and jurisdiction. If it is, the exceptions should be overruled. If it is not, the exceptions should be sustained."

An amendment which is itself demurrable, should not be allowed. *Gilbert, et al.* v. *Dodge,* 130 Me. 417; *Garmong* v. *Henderson,* 112 Me. 383; *Gray* v. *Chase,* 115 Me. 350.

In the amended bill the plaintiff, James A. Clappison, seeks to enforce rights to which he, as an individual, claims to be entitled under a contract that he made with the defendant, Fred J. Foley, who allegedly obtained said contract by fraudulent conduct. The contract was relative to the future formation of a corporation to be known as the James A. Clappison Company, the equal distribution of shares of stock between the parties in the new corporation, and the conveyance to the new company of Clappison's private business, as hereafter more fully stated. The bill asks for accountings with the defendants, and any or all of them, with a lien on the stock of James A. Clappison Company held by Foley, and other defendants, to enforce judgment. The bill further prays that the stock of Clappison Company held by Foley and the other defendants be ordered transferred to the plaintiff. The plaintiff does not seek to set aside the conveyance of his personal business which he made to the new corporation.

The allegations in the amended bill are: that the plaintiff was the individual owner on December 21, 1933 of a gasoline and oil business at Bath, which represented a good will acquired through several years, together with physical properties consisting of leases, storage tanks, pumps and other equipment; that the defendant Foley being familiar with the growth and possibilities of plaintiff's business, and, as the bill states, "fraudulently intending and craftily contriving to eventually procure all of the plaintiff's said business and its good will and all of its assets and its profits for him-

self without paying adequate compensation therefor, started his operations to that end by endeavoring to persuade and entice the plaintiff during the year 1933 to join with him in the formation of a corporation to take over all of said plaintiff's business, and in which said Foley promised that the plaintiff and he would each own and/or control a one-half interest in said business, and receive equal profits and enjoy equal rights therein."

The bill further alleges that "the plaintiff, being inexperienced and easily influenced in such matters, and not having the same business acumen as said Foley, and trusting in the apparent friendship and superior experience of said Foley, finally yielded to Foley's said importunities, and on December 21, 1933 at Foley's office in Portland, as the result thereof, the James A. Clappison, Inc., Company was organized, with an even division of stockholding rights between them."

The plaintiff Clappison, it is alleged, conveyed to the Clappison Company his profitable business, as soon as the Clappison Company was organized. That he joined with the defendant, Fred J. Foley, in organizing said corporation; that the same number of shares of stock of said corporation were issued to him and said Fred J. Foley, or their nominees; that neither Fred J. Foley, his nominees, nor any of the individual defendants ever paid any consideration for the stock of the Clappison Company standing of record in their names; and that said Fred J. Foley and said John J. Devine became directors of the Clappison Company at the time of its organization. It is less definitely alleged that the exceptant took all such action as the result of promises, or representations, made to him by the defendant, Fred J. Foley, as to the more profitable relationship which would exist in the future between the Community Oil Company, controlled by Foley, and the James A. Clappison Company.

The plaintiff further alleges that "the principal promise and inducement" offered to him by said Fred J. Foley was that by the organization of the Clappison Company, and the pooling of its orders with those of the Community Oil Company, the increase in the volume of business of the Community Oil Company would make a lower cost of products available with "allowable discounts and commissions," which Fred J. Foley and said Community Oil Company would pass along and credit to the Clappison Company, the benefits of all which would accrue to the plaintiff "as the owner of an equal interest with said Foley in said Clappison Company." It is alleged that whatever benefits may have accrued, no accounting has been made.

The defendants demurred to the original process. The demurrer admits the truth of all factual allegations which are well pleaded. Whitehouse, Equity, 357, Sec. 321; *Donna* v. *Auburn,* 148 Me. 356, 93 Atl. (2nd) 484. The causes of demurrer alleged against the original process were both general and special. There were allegations in the demurrer that a court of equity had no power, on the alleged facts, to grant the relief sought; that the bill contained no equity, and had failed to state a case remediable therein, or one within the jurisdiction of such a court; that the claims sought to be asserted were barred by laches, and by the Statute of Limitations. The sitting justice sustaining the demurrer expressly declared "I do not place my decision upon the claim of laches urged by the defendants" and made no mention of the other special causes of demurrer. The allegations show that nearly twenty years have elapsed. See *Estey* v. *Whitney,* 112 Me. 131; *Getchell* v. *Kirkby,* 113 Me. 91, relative to recission and restitution, although restitution or tender not always necessary, *Masters* v. *Van Wart,* 125 Me. 402; *Pitcher* v. *Webber,* 103 Me. 101.

There are two grounds upon which the plaintiff says the court has equity jurisdiction, viz: a "fiduciary" or "confidential" relationship by virtue of which Foley owed Clappison strict and unusual duties that he failed to observe, and "constructive" fraud in that Foley deliberately misrepresented what was to be accomplished in the future. The factual allegations, however, are not sufficient to set forth either claim.

A general allegation of fraud perpetrated by the defendant against the plaintiff is not sufficient in a bill in equity to set forth jurisdiction based on fraud. The facts constituting the fraudulent conduct must be set forth with sufficient particularity to enable the court to determine whether, if true, such facts amount in law to fraud. *Stevens* v. *Moore,* 73 Me. 559; *Merrill* v. *Washburn,* 83 Me. 189; *Semo* v. *Goudreau et al.,* 147 Me. 17.

The same principle governs the sufficiency of allegations of fiduciary or confidential relationship. A general allegation that the defendant occupied a fiduciary or confidential relationship toward the plaintiff is not a sufficient allegation thereof. The facts constituting the alleged relationship must be set forth with sufficient particularity to enable the court to determine whether, if true, such facts create a fiduciary or confidential relationship.

Measured by these standards, the factual allegations are not sufficient to sustain either claim.

The allegations are that the plaintiff was inexperienced and easily led; that the plaintiff did not possess the same business ability as the defendant Foley, and that the plaintiff trusted in the "apparent" friendship and superior experience of Foley. This but describes many business dealings. One man generally has the more ability or the more experience. One urges the other to "put in your property and I

will put in my time and experience." Often successful ventures follow, and often not. The court, however, cannot take jurisdiction in equity in such cases unless there shall be in fact an actual confidential or fiduciary relationship in the legal sense between the parties which will give rise to the legal effects flowing therefrom. Whenever such relationship 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 raises a presumption of undue influence and casts upon that party the burden of proof to show affirmatively his compliance with equitable requisites and of entire fairness on his part and freedom of the other from undue influence. *Eldridge* v. *May,* 129 Me. 112, 116. This relationship has been found to exist in cases of brothers and sisters, *Eldridge* v. *May,* 129 Me. 112, attorney and client, *Burnham* v. *Heselton,* 82 Me. 495, nurse and patient, *Gerrish* v. *Chambers,* 135 Me. 70, 189 Atl. 187, director and corporation, *Bates Shirt Co.* v. *Waite,* 130 Me. 352.

As above stated, the facts in this case set forth in the bill in equity are insufficient to show that such a relationship existed between the parties. Here the allegations show that each had been conducting a more or less successful business and that the friendship was only alleged to be "apparent." The allegations do not show a fiduciary relationship. *Sacre* v. *Sacre,* 143 Me. 80, 90, 95; *Gerrish, Exr.* v. *Chambers,* 135 Me. 70, 74; *Stanley* v. *Shaw,* 120 Me. 483. Further than this, had there been facts alleged that showed a fiduciary relationship, where are the allegations to clearly show fraud? For all that appears by the bill, Foley was a business optimist, and "shrewd salesman" and his "promises" related to what might, and to his mind would, happen in the future. See 23 Am. Jur. "Fraud," 890, Sec. 109, and relative to deceit and "salesmanship" see *Coffin* v. *Dodge,* 146

Me. 3, 76 Atl. (2nd) 541; "Dealer's talk" not actionable, *Bishop* v. *Small,* 63 Me. 12; *Prince* v. *Brackett, Shaw and Lunt,* 125 Me. 31. See also *Hutchins* v. *Hutchins,* 141 Me. 183, 191.

This bill in equity is not a bill where the Clappison corporation is seeking a remedy for damage suffered through mismanagement by its officers. It is not a bill where the plaintiff as a stockholder is seeking such remedy on behalf of the corporation. The plaintiff seeks a remedy for private personal damage, separate from his status as a stockholder in the Clappison corporation, because of promises made before any corporation was formed, and because he says these promises were broken. "Promises of performance of future acts do not constitute actionable representation." *Stewart* v. *Winter,* 133 Me. 136, 137; *Coffin* v. *Dodge,* 146 Me. 3, 76 Atl. (2nd) 541; *Long* v. *Woodman,* 58 Me. 49, 53. See 37 C. J. S. "Fraud," 231, Sec. 11.

From our study of the record, we cannot agree with the plaintiff's contentions that the allegations of fact in the amended bill can be fairly construed to show a fiduciary relationship of trust and confidence between the plaintiff Clappison and the defendant Foley, so that failure on the part of Foley to keep alleged promises constitute an abuse of trust and confidence. The factual allegations do not show inferiority in the one party and superiority in the other, with such a confiding relationship that equity requires one party to be afforded extraordinary and solicitous protection. We are obliged to agree with the decision of the sitting justice that the second bill should not be allowed as an amendment because it is itself demurrable.

Exceptions overruled.

*MURCHIE, C. J., took part in consultations but died before the writing of this opinion.

ARTHUR J. LESIEUR

vs.

LOUIS B. LAUSIER

York. Opinion, April 17, 1953.

Elections. Incompatible Offices. Judges. Mayor. Eligibility. Appeal.

In proceedings under R. S., 1944, Chap. 5, Secs. 85-89 an appeal is not to the Law Court but to the Justices of the Supreme Judicial Court. On appeal the case is considered *de novo.*

The offices of mayor and judge of a Municipal Court are incompatible. They cannot be held by one person.

When incompatible offices are under one government the acceptance of one vacates the other whether or not the person becomes the lawful incumbent of the second office.

Eligibility with reference to compatibility of office is determined as of the time of the commencement of the term of office.

The proceeding under R. S., 1944, Chap. 5, Secs. 85-89 may be commenced before or at any time during the term of the office at stake.

ON APPEAL.

This is a proceeding under the "contested election" statute, R. S., 1944, Chap. 5, Secs. 85-89. A Justice of the Superior Court found in favor of petitioner and respondent appealed. Appeal sustained. Petition dismissed with costs.

N. B. and T. B. Walker,
Gendron & McDougal,
Waterhouse, Spencer & Carroll,
Crowley & Nason, for plaintiff.

Lausier & Donahue,
Simon Spill, for defendant.

SITTING: MERRILL, C. J., THAXTER, FELLOWS, NULTY, WILLIAMSON, TIRRELL, JJ. (THAXTER, J., dissents.)

WILLIAMSON, J. On appeal. This is a petition under the "contested election" statute to determine whether the petitioner Arthur Lesieur was elected mayor of Biddeford for the current term commencing January 1, 1953 and is entitled to the office. *R. S., Chap. 5, Secs. 85-89 inclusive.*

The petitioner and the respondent were the only candidates for mayor at the election of December 15, 1952. On the basis of the official returns showing 3985 votes for the respondent and 3945 votes for the petitioner, the respondent was declared elected. On December 19th the petitioner commenced the present proceeding alleging in substance that if absentee ballots illegally cast, and ballots defective, invalid and void on their face should be set aside, the petitioner would be found to have a majority of the votes legally cast and thus entitled to the office of mayor. The respondent took the oath of office on January first and has since then been in possession of and has conducted the office of mayor.

The Justice of the Superior Court before whom the matter was returnable found that the petitioner received 3986 votes and the respondent 3846 votes. In a judgment rendered on February second the justice said, in part:

> "Upon these findings of law and fact, as a whole it is my judgment that the petitioner has received a majority of the legal votes cast for the office of Mayor in the Biddeford municipal election of December 15, 1952, for the term beginning January 1, 1953, and, for that reason, I hereby declare him to have been duly and legally elected to said office, and to be entitled thereto for the term stated.
> "The fact that the petitioner is Judge of the Municipal Court does not, in my opinion, disqualify him as a candidate for Mayor. If and when he

> assumes the latter office, he will vacate the former under the holding in Howard vs. Harrington, 114 Me. 443, 96 A. 769."

The respondent duly entered an appeal "which appeal shall briefly set forth the reasons therefor" (Sec. 87)—in this instance thirty-five in number. It may be noted that the appeal is not to the Law Court but to the Justices of the Supreme Judicial Court who "shall immediately consider the cause and decide thereon and transmit their decision to the clerk of courts in the county where the suit is pending . . ." (Sec. 87) On appeal the case is considered *de novo.*

The statutory proceeding is designed to combine the ouster from office of quo warranto with the introduction into office of mandamus. Informative cases on the history and scope of the statute and the proper procedure to be followed are *Prince* v. *Skillin,* 71 Me. 361; *Bartlett* v. *McIntire,* 108 Me. 161, 79 A. 525; *Tremblay* v. *Murphy,* 111 Me. 38, 88 A. 55; *Howard* v. *Harrington,* 114 Me. 443, 96 A. 769, L. R. A. 1917 A. 211.

In our view we need consider only the fifth reason of appeal, reading as follows:

> "5. Because the Petitioner, Arthur J. Lesieur, is not entitled by law to the office of Mayor of the City of Biddeford, as claimed by him for that since the first day of January, 1953, and prior thereto, he has been the legally appointed and qualified Judge of the Municipal Court of the City of Biddeford which office is incompatible with that of Mayor of the City of Biddeford, and since the fifteenth day of December, A. D. 1952, the date of election, and the first day of January, A. D. 1953, the date the Mayor assumes office in the City of Biddeford, and since February 2, 1953, the date of judgment of the Justice of the Superior Court, he has performed and continued to perform the duties of said office whereby he has waived, surrendered,

> abandoned, terminated and vacated his rights, if any, to the said office of Mayor, the term of which began January 1, 1953, and has thereby disqualified himself."

The petitioner in challenging the conclusions of the fifth reason does not question the facts. Indeed we take judicial notice that the petitioner has held and exercised the office of judge of the Biddeford Municipal Court as there stated.

The decisive question is: Did the petitioner vacate or surrender his claim to the office of mayor by continuing in and exercising the office of judge of the Municipal Court after the time fixed by law for the assumption of the duties of the office of mayor by one elected to said office? The controlling date in this respect is January 1, 1953. *Sections 16 and 17 of the city Charter of Biddeford; P. & S. L., 1941, Chap. 84, Sections 9 and 10.* If the answer is in the affirmative, then the petitioner has no standing under the statute cited above to contest the election of the respondent. The petitioner may have judgment in his favor only if he "is entitled by law to the office claimed by him . . ." (Sec. 86) If the claimant is disqualified, clearly he has no right to proceed under the statute.

There are certain basic principles with respect to incompatible offices which we need no more than mention.

First: The offices of mayor and judge of the municipal court are incompatible. They cannot be held by one person. *Howard* v. *Harrington, supra.*

Second: The acceptance of a second office vacates the first office, whether or not the person becomes the lawful incumbent of the second office. This is the rule when the offices are under one government. We are not concerned with distinctions arising, for example, when the first is a federal office and the second a state office. *Stubbs* v. *Lee,* 64

Me. 195, 18 Am. Rep. 251 (state offices) ; *Bunting* v. *Willis,* 27 Gratt. (Va.) 144, 21 Am. Rep. 338 (federal and state offices) ; 42 Am. Jur. 940, Public Officers, Sec. 77 et seq; 67 C. J. S. 133, Officers, Sec. 23. To put the rule in terms of the present case, the *respondent,* the declared winner, by qualifying as mayor on January first vacated any state office or claim to state office he may have held incompatible with the office of mayor. This result followed whether or not it should appear that he was legally elected. *Shell* v. *Cousins,* 77 Va. 328; *Rex* v. *Hughes,* 5 Barn. & C. 886, 108 Eng. Reprint, 329, 8 Dowl. & R. 708; also annotations in 100 A. L. R. 1168, and in 14 Am. and Eng. Anno. Cases 628. Although the title to the second office may be invalid nevertheless its acceptance vacates the first office.

In *Howard* v. *Harrington, supra,* with Chief Justice Savage speaking for the court, the principle that acceptance of the second office vacates the first office is carried a step further. There, as here, the petitioner was a candidate for the office of mayor to which the respondent was declared elected. While the case, brought under the "contested election" statute, was pending and during the term of office to which Howard claimed to have been elected, he accepted the office of judge of the police court.

After a careful review of the authorities the court concluded that the office of mayor and of judge of the police court were incompatible, and the court said on page 449:

> "Thence it is that two such offices must be held to be incompatible. And we are all of opinion that when one who has the office of mayor of Rockland, or one who has the right of office, accepts the incompatible office of Judge of the police court, he thereby abandons, surrenders and vacates ipso facto, such election, or right of election, as he had to the office of mayor.

> "Since the petitioner has vacated and surrendered his right to the office of mayor, we think that he cannot maintain this petition. The ultimate purpose of the petition is to oust the respondent, by showing that the petitioner is entitled to the office. And it is only when a petitioner 'is entitled by law to the office claimed by him,' R. S., ch. 6, sect. 71, that the Justice hearing the case may issue an order to the party unlawfully claiming or holding said office, commanding him to yield up said office to the officer who has been adjudged to be lawfully entitled thereto. Sect. 73. The petitioner has now no interest in the proceeding."

In the *Howard* case the petitioner, while claiming the present right to be mayor, *accepted the incompatible office of judge.* Here the petitioner, while claiming the present right to be mayor, has *continued to exercise the incompatible office of judge.* The court in the *Howard* case treated the claim of right to the office as the equivalent of the office itself. Had Howard been the mayor, then of course acceptance of the office of judge would have vacated or forfeited the office of mayor. From this starting point the court concluded that by taking the office of judge he vacated or surrendered his *claim of present right to the office* of mayor. The underlying principle to be derived from the court's reasoning is that eligibility with reference to compatibility of office is determined as of the time of the commencement of the term of office. The phrase "commencement of the term of office" where used in this opinion refers to the time fixed by law for assumption of the duties of the office. In the instant case the time is established at the first day on which the mayor-elect is entitled to hold the office. It is not necessary, however, that the time be so firmly fixed. For example, public officers appointed by the governor and council must qualify within thirty days after being commissioned. *R. S., Chap. 11, Sec. 8.* "A Member-elect (of the National House of Representatives) may defer until the meeting of the Con-

gress his choice between the seat and an incompatible office." 1 *Hinds' Precedents of the House of Representatives (1907), page 601, par. 492.*

The principle is applicable with full force in the instant case. We hold that retention of the first office beyond the commencement of the term of the second office is a declination or forfeiture of the second office. Let us suppose that there had been no contest and that the petitioner had been declared elected but failed to qualify for the office. Would it not necessarily follow that his continuance in an incompatible office pointed directly and conclusively to the forfeiture or declination of any claim of title to the mayoralty?

The petitioner is a contestant under the statute seeking to gain the office from a declared winner. Obviously there was no obligation on his part pending the determination of the contest to take the oath of office or to attempt to take possession of the office of mayor on January first. He had commenced a contest and only if successful, and if he then so chose, would he qualify.

The position of the declared winner and the contestant, however, are precisely alike in this respect, namely, that each claims that he was the lawfully elected mayor for the stated term. The respondent has the benefit of possession of the office on the basis of the election returns, but the validity of the election was not thereby determined.

We have seen that when the second office of incompatible offices is accepted, the first office is thereby vacated. It does not follow, however, that the second office cannot be declined or that claim of title thereto may not be forfeited or abandoned. The acceptance of the second office, when the time comes to assume its duties, is a fact—a widely known fact. The judge has become the mayor and ceased to be the judge. Under like reasoning the continuance of the judge

in office is a fact. The judge has chosen to remain the judge and no longer claims title to the office of mayor. In either case the decisive facts are matters of public notice.

This reasoning is forcefully stated in a Report of the Committee of Elections to the House of Representatives in the case of General Blair, reading in part:

> "But this record raises another question which, so far as the committee can learn, has not before arisen, and which it becomes necessary to examine. Mr. Blair was appointed a brigadier general August 7, 1862, and a major general, November 29, 1862, the duties of which latter office he discharged till January 1, 1864, when he tendered his resignation, which was accepted January 12, 1864. On this latter day he was qualified, and took his seat in the House of Representatives. The first regular session of the 38th Congress, fixed by law, commenced on the first Monday of December, 1863. It therefore appears that Mr. Blair held and discharged the duties of the office of major general for more than a month after the commencement of the session fixed by law of the Congress in which, after resigning that office, he subsequently took his seat. Now, if the reasoning already submitted, and the conclusions which the committee have drawn therefrom, be correct, viz., that the acceptance of an office incompatible with one already held must be deemed and treated as the resignation of the former, then does it not follow that the continuance in the discharge of the duties of the former office, after the time at which the law requires the entering upon and discharge of the incompatible duties of the latter, must be deemed and treated as a declination of this latter office? If two offices are tendered at the same time to the same person, and he is at liberty to choose between the two, but either the nature of the offices, or the requirements of the law or Constitution, forbid the acceptance of both, no one will doubt but that, after an election between them is made and the

duties of one have been entered upon, it is too late then to take the other. As both cannot be taken, the one is declined in the acceptance of the other. Does the fact that these two offices are tendered at the same time, make any difference in the principle? A man in the discharge of the duties of one office is tendered another, whose duties he is required to enter upon at a certain time, but the functions of both he cannot perform. When the time arrives at which the duties of the latter office commence, he is at liberty to choose. If he takes the latter, the functions of the former, *ipso facto*, cease as the result of his choice. If he determines to continue to hold the former, does he not of necessity decline the latter, as a like result of that choice? When he accepts one office, the law interprets the act as a surrender of any incompatible office. Shall it not put a like interpretation upon a continuance to discharge the duties of the other? If he may be permitted to keep vacant the one office one month by continuing in the incompatible one during that time, he may two or twelve months, or during its whole term. If these *acts* are not to be taken as an election on his part; then that election is yet to be made; and what interposes to require it to be made till the day before the term expires, or then? And thus may the people of any district, or any number of districts, be deprived altogether of representation. The committee can not arrive at any conclusion fraught with such results, but are of opinion that, when the time arrives at which the duties of two incompatible offices are by law to be discharged, a man at liberty to choose between the two, as effectually declines one not entered upon, by continuing in the one already held, as he would vacate the former if he did enter upon the latter.

"It therefore follows that Mr. Blair, by voluntarily continuing to hold and discharge the duties of the office of major general till January, 1864, declined and disqualified himself for the office of representative, the duties of which, by law, com-

> menced on the first Monday of the December preceding."

Reports of Committees of the House of Representatives, First Session, 38th Congress, 1863-64, volume 1, Report number 110; *McCrary on Elections* (Fourth Edition) Pages 258-260.

An interesting reference to the Blair case which we have found in a judicial opinion is in *United States* v. *Dietrich,* 126 Fed. 676, 682, where Judge Van DeVanter, later a Justice of the Supreme Court of the United States, without expressing an opinion on the question, said:

> "It may be that to have continued in the office of governor beyond the next meeting of the Senate would have operated as a declination of the office of senator (the case of Gen. Blair of Missouri, Reports of Committees 1st Sess., 38th Cong., No. 100 (110) and that of Gov. Hill of New York, Cong. Rec., vol. 23, pt. 1, 52d Cong., 2d Sess., pp. 74, 180, seem to be opposing precedents on this question); but to have continued in the office of governor after election as a senator, but not beyond the next meeting of the Senate, would have been permissible under the law, and would not have affected defendant's right to accept the senatorship if the Senate should give its favorable judgment upon his election, credentials, and qualifications."

The reasoning of the Blair case is appealing and is in accord with the underlying fundamental principals on which *Howard* v. *Harrington, supra,* was decided.

Applying the principle of the *Howard* case, *supra,* namely, that the claim of title to office by a contestant is equivalent to the office for purposes of testing incompatibility and the right to proceed under the "contested election" statute, we find that the petitioner has declined and disqualified himself as clearly and completely as did General Blair.

The rule adopted does not strike with undue harshness upon the petitioner. It is true that he must surrender the office held to litigate a claim of title to the office sought. There is a risk involved, but it is a risk he is not compelled to take. Had the petitioner been declared the winner and taken office, he would have vacated the judgeship, and yet in a contest with the respondent he might also have lost the mayoralty. The risk of losing the judgeship without gaining the mayoralty cannot be avoided.

Under the "contested election" statute the proceeding may be commenced before or at any time during the term of the office at stake. There is no compulsion on the petitioner to start the contest within a given period. On the petitioner's theory the candidate defeated on the returns and occupying an incompatible office can continue to exercise such office and at the same time hold the threat of a contest over the incumbent long after the start of the term. The removal of this candidate from the role of contestant will not determine the validity of the incumbent's election, but it will make the latter's title to that extent more certain.

Indeed the compelling reason why action in the first office must operate as a surrender of claim of title to the second office is the need of the public to know with certainty who possesses the power and authority to act in public office. Chief Justice Appleton stated the principle in words often quoted:

> "Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office-holder to determine." *Stubbs* v. *Lee,* supra.

The rule that we herein announce, namely, that continuance in and exercise of the duties of an incompatible office after the time fixed by law for the assumption of the duties of a new office by one elected thereto vacates and surrenders a claim to the new office, is the logical and necessary extension of the rule in *Stubbs* v. *Lee, supra.* The rule is, to use words of Chief Justice Appleton, "certain and reliable as well as one indispensable for the protection of the public."

The petitioner having forfeited any claim to the office of mayor no longer has an interest in this proceeding. Accordingly we need neither consider nor determine whether in fact he was legally elected. When it appears that a petitioner could not serve if elected, the case ends.

Appeal sustained.

Petition dismissed with costs.

DISSENTING OPINION.

THAXTER, J. I fully agree with the majority opinion to the extent that it holds that the two offices of mayor of the City of Biddeford and judge of the Biddeford Municipal Court are incompatible and cannot both be held by the same person at the same time.

The question in this case, involving as it does the purity of the ballot and the right to public office, is a very sensitive one, and I dislike to have to differ with my associates on a matter of this kind.

The law on this point has been clearly expressed by this court. The ban against holding incompatible offices whether it be by the constitution, by statute, or by the common law, ordinarily is not directed against one who seeks two incompatible offices but against the exercise of the duties of those incompatible offices. Thus, unless it is expressly forbidden,

a person may run in an election for an office incompatible with one which he holds, or be appointed to such an office. *Howard* v. *Harrington,* 114 Me. 443. It is only when such person either expressly or by implication qualifies for the second that he is held to give up the first. *Stubbs* v. *Lee,* 64 Me. 195; 42 Am. Jur. 940. The principle is well stated by Justices Emery, Whitehouse and Peabody of our own court as follows:

> "II. The Constitution, Art. 4, Sec. 11, does not declare that the holder of an office of profit under the state shall not be elected to the legislature,—shall not be eligible to an election,—but simply declares that he shall not 'have a seat in either house during his continuing in such office.' Hence he need not resign his office before his election to the legislature. It is enough if he resigns it at the time of taking his seat in the legislature, and such resignation may only be by taking his oath or seat. The right of the electors to elect whom they will to any elective office is to be construed liberally, as abridged only by the express terms of the constitution or statute and not by mere implication. *Barker* v. *People,* 3 Cowen, 686. Thus, it has been judicially held that one who is an alien at the time of his election may yet take the office if he be naturalized after his election. . . . . ." *Opinion of The Justices,* 95 Me. 564, 586.

What does the majority say here? They concede that these general principles are good law, and that a person may be elected to an office incompatible with one he holds. He is all right until he qualifies or, in the opinion of the majority attempts to do so, for the new office. When however he seeks to enforce the right given him by his election, and to protect the rights of the people who elected him, he finds himself, in the opinion of the majority, unable to do so.

A person may do everything necessary to attain office, announce his candidacy, file primary nomination papers, con-

duct his campaign, tell the voters of his qualifications,—everything except to see that the votes are properly counted. When he takes the proceedings permitted by sections 85-90 of Chap. 5 of the Revised Statutes of 1944, protecting the integrity of elections, he is out of luck.

Such a doctrine does not to me make sense. The authorities cited to sustain it are not in point. This is particularly so in the case of General Blair. I have read the full record in this case with great care. He for more than a month voluntarily and deliberately failed to qualify for the office of representative to Congress from Missouri while he continued to serve as a major general in the Union army. How could we find a clearer intention than that to abandon the rights given to him by his election to Congress? Here there was no intention by Mr. Lesieur to abandon his rights to his election as mayor of the City of Biddeford at all. Quite the contrary. He asserted those rights forcefully from the first in the manner in which the statute permitted him to do so.

This court must do one of two things. Either we must repudiate the doctrine which has always been held in this state, which has been for a long time set forth by some of our greatest judges such as Chief Justices Appleton, Emery and Whitehouse, or we must hold that Mr. Lesieur did not, because of service as judge of the Municipal Court, abandon his claim to have been honestly elected to the office of mayor of the City of Biddeford. There is no alternative. The gist of the opinion in *Stubbs* v. *Lee, supra,* certainly substantiates this; and in all the Maine cases which hold that acceptance of one incompatible office is an abandonment of the other we must remember that there was a voluntary election between the two.

Howard v. *Harrington, supra,* cited in the majority opinion, is a particularly instructive case. After having been elected mayor of Rockland, Howard was appointed by

the governor judge of the police court of Rockland, an incompatible office with that of mayor, and was commissioned as such judge. By qualifying as judge the case holds correctly that he gave up his right to claim that he was elected mayor. How could he have more clearly shown that he waived his claim that he was elected mayor than by qualifying for his judgeship?

The majority seem to me to have been more concerned with the chronology of events than with what those events show to have been the intention of the parties.

By contesting his right to the office of mayor of the City of Biddeford, Mr. Lesieur would not thereby give up the office of judge of the Biddeford Municipal Court while the mayoralty contest was pending.

We must not forget the language of Chief Justice Appleton in *Stubbs* v. *Lee, supra,* at page 198, which states the general rule to be "that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former." It is not just the "acceptance" of an office which vacates another incompatible one, but the "qualification" as well as the "acceptance" which does so.

What I am trying to say is simply this: "If the appellee, Mr. Lesieur, had the right to run in the election for the incompatible office of mayor of Biddeford, he had the right to see that the votes were properly and fairly counted in that election when he ran for that incompatible office."

I think that the appeal should be dismissed and that we should proceed in accordance with Sections 85-90 of Chap. 5 of the Revised Statutes to determine the result of the election. It is an onerous job to do so but I think such is our duty.

SIDNEY ST. F. THAXTER

ROBERT L. CRAM, REG. OF DEEDS

vs.

INHABITANTS OF COUNTY OF CUMBERLAND

Cumberland. Opinion, April 27, 1953.

Statutes. Revision. Repeal.

It is for the court to determine the expressed legislative intent.

Statute provisions, unless absolutely conflicting, are to be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect—not using one section to evade or abrogate the other.

An existing statute that is inconsistent with a new statute enacted upon the same subject matter must be regarded as necessarily repealed by the subsequent legislation.

A subsequent statute providing "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed" effectuates the repeal of a prior inconsistent statute notwithstanding the inclusion of such prior statute in subsequent revisions of the general law.

When a statute is incorporated in a general revision of all the statutes, and reenacted along with the reenactment of other statutes, its purpose and effect are not changed unless there be some compelling change in the language. Usually a revision of the statutes simply reiterates the former declaration of the legislative will.

Where two inconsistent statutes are carried into the codified law the one last passed, which is the later declaration of the legislative will, should prevail regardless of the order in which they are placed in the compilation.

ON REPORT.

This is an action to recover compensation for work performed as Register of Deeds of the County of Cumberland under R. S., 1944, Chap. 79, Sec. 243. The case is before the Law Court on report. Case remanded for entry of judgment for defendant.

Nathaniel M. Haskell, for plaintiff.

Daniel C. McDonald, County Attorney,
Frederick S. Sturgis, County Attorney, for defendant.

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

MERRILL, C. J. On report. This is an action brought by the plaintiff, who is Register of Deeds for Cumberland County, to recover compensation for compiling and completing a revised and consolidated index covering all deeds recorded in the Registry of Deeds for said County for the period from January 1, 1945 to and including December 31, 1949. Compensation is claimed under R. S. (1944), Chap. 79, Sec. 243. So much of said section as is applicable is as follows:

> "The registers shall make an alphabetical index to the records without charge to the county, * * * As often as every 10 years the register shall revise and consolidate such index * * * For this work the register shall receive a reasonable compensation to be approved by the county commissioners of the respective counties and drawn from the county treasury."

The plaintiff's claim is resisted by the county which claims that R. S. (1944), Chap. 79, Sec. 231 absolves it from any liability for the aforesaid work. Said Section 231, in part, is as follows:

> "Registers of deeds in the several counties shall receive annual salaries from the treasuries of the counties in monthly payments on the last day of each month, as follows: * * *
> Cumberland (as amended) $3,600, * * *
> The sums above mentioned shall be in full compensation for the performance of all official duties and no other fees or compensation shall be allowed them. All registers, except in the western district

> of Oxford County, shall devote their entire time to the duties of the office. They shall account quarterly under oath to the county treasurers for all fees received by them or payable to them by virtue of the office, specifying the items, and shall pay the whole amount of the same to the treasurers of their respective counties quarterly on the 15th days of January, April, July, and October of each year. They may make abstracts and copies from the records and furnish the same to persons calling for them and may charge a reasonable fee for such service, but shall not give an opinion upon the title of real estate. Fees charged by them for abstracts and copies shall be retained by them and not paid to the county."

With respect to the payment for services rendered in revising and consolidating the index, which is an official duty of the register, these two sections of the statute are apparently in direct and irreconcilable conflict one with the other. If the provisions of Section 231 relative to compensation of registers of deeds prevail, the plaintiff cannot recover. On the other hand, if the provision of Section 243 relative to the compensation of such registers for services in revising and consolidating the index is to prevail, the plaintiff would be entitled to receive a reasonable compensation for his services. The question is one of construction.

It is for the court to determine the expressed legislative intent. "The legislative intention must prevail in the construction of statutes whenever that intention can be ascertained." *Lyon* v. *Lyon*, 88 Me. 395, 401.

"Statute provisions, unless absolutely conflicting, are to be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect—not using one section to evade or abrogate another." *Collins* v. *Chase*, 71 Me. 434, 436.

"All existing statute provisions upon a particular topic are to be examined together to ascertain the intent of each; and a meaning which is found to be incompatible with any plain provision must be rejected." *Merrill* v. *Crossman,* 68 Me. 412, 414.

An existing statute that is inconsistent with a new statute enacted upon the same subject matter must be regarded as necessarily repealed by the subsequent legislation. *Poor* v. *Willoughby,* 64 Me. 379.

The foregoing general principles to be applied in the construction of statutes are elementary and further citation of authorities thereon is unnecessary.

In this case the two sections of the statute which we are considering, R. S. (1944), Chap. 79, Secs. 231 and 243, although reenacted simultaneously in the revisions of 1916, 1930, and 1944 successively, were not initially enacted simultaneously. Their legislative history is illuminating.

Section 231, the section relied upon as affording a defense to this action, was first enacted in its present form as Chapter 141 of the Public Laws of 1915. Section 2 of the 1915 act expressly provided that "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

Section 1 of Chapter 141 of the Public Laws of 1915 was carried into the revision of 1916 without any change material to the issues here involved. It appeared as R. S. (1916), Chap. 117, Sec. 43 and except for changes in the amount of salary to be paid to the several registers, appeared again in R. S. (1930), Chap. 125, Sec. 44, and is now R. S. (1944), Chap. 79, Sec. 231, quoted *supra.*

An examination of the legislation which P. L., 1915, Chap. 141 replaced is not only interesting but throws light upon its construction.

Prior to 1893, registers of deeds received no salaries but were compensated for their services in the registries principally by the fees for recording. By the following acts, P. L., 1893, Chap. 219, P. L. 1895, Chap. 22, P. L., 1901, Chap. 230, salaries were established for the registers of deeds of Penobscot, Kennebec and Androscoggin Counties respectively. The provisions of these three acts were carried into the Revision of 1903, Chap. 116, Sec. 6. After specifying the salaries, with allowances for clerk hire, the statute provided:— "The above salaries shall be received instead of the fees provided by law, and said registers shall collect such fees and pay them into the treasuries of their counties quarterly, for the use of said counties."

By R. S. (1903), Chap 11, Sec. 15, provision was also made for the revision of the index by the registers "for which they shall receive a reasonable compensation to be approved by the county commissioners of the respective counties," which provision without change material to decision of this case was continued in R. S. (1916), Chap. 12, Sec. 15, R. S. (1930) Chap. 15, Sec. 15, and now appears in R. S. (1944), Chap. 79, Sec. 243, quoted *supra.*

It is to be noted that the provisions of R. S. (1903), Chap. 116, Sec. 6 with respect to the salaries of registers of deeds in the counties of Androscoggin, Kennebec and Penobscot provided that the salaries should be received instead of the fees provided by law, and that the registers should collect the fees and pay them into the treasuries of their counties. This provision evidently applies only to fees to be charged and collected according to the schedule of fees set forth in the statute. It manifestly did not apply to the compensation to be paid to them for services in consolidating and revising the index under R. S. (1903), Chap. 11, Sec. 15. It would be absurd to make provision for the payment of a reasonable sum by the county commissioners to the registers

for revising and consolidating the index, and then require them to pay such sum into the county treasuries. In 1905 the Legislature passed an act, P. L., 1905, Chap. 173, placing all registers of deeds on a salary basis with a provision that the salaries "shall be in full compensation for the performance of all official duties and in lieu of all fees," and that the registers account quarterly to the county treasurers for the fees received by them or payable to them by virtue of the office.

In 1907, the 1905 act was amended by some readjustment of salaries and clerk hire but the foregoing provision of the 1905 act was continued verbatim. P. L., 1907, Chap. 177.

It is unnecessary for us to decide whether or not the 1905 act and the 1907 act repealed the provisions of R. S. (1903), Chap. 11, Sec. 15 relative to compensation to the registers of deeds for revision and consolidation of the index as inconsistent therewith. If any doubt existed with respect thereto it was settled by P. L., 1915, Chap. 141. That act not only stated that "the sums above mentioned (the salaries) shall be in full compensation for the performance of all official duties" but expressly provided "that no other fees *or* compensation shall be allowed them. (Emphasis ours.) All registers, except in Oxford, western district, shall devote their entire time to the duties of the office." Section 2 of the act as above stated declared that all acts or parts of acts inconsistent with the provisions of the act were thereby repealed. Furthermore, a provision contained in Section 1 of the act relating to the registers provided that "they may make abstracts and copies from the records and furnish the same to persons calling for them and may charge a reasonable fee for such service, but shall not give an opinion upon the title to real estate. Fees charged by them for abstracts and copies shall be retained by them and not paid to the county."

This latter provision allowing registers, who were full time officials, to perform certain specified acts and receive and retain fees therefor clearly indicates that the provision that the salaries were to be in full compensation for the performance of all official duties and that no other fees or compensation shall be allowed to them is, save for the exception, all inclusive, and excludes any right to the additional compensation allowed under the then existing statute for revising and consolidating the index. We hold that P. L., 1915, Chap. 141 repealed the provision of R. S. (1903), Chap. 11, Sec. 15, as then amended, which provided for the payment of compensation to the registers of deeds, for revising and consolidating the index of deeds.

As above stated, in the revision of 1916, P. L., 1915, Chap. 141 appeared as R. S. (1916), Chap. 117, Sec. 43; and although the provision for extra compensation for revising and consolidating the index had been repealed by P. L., 1915, Chap. 141, that provision again appeared in R. S. (1916), Chap. 12, Sec. 15. It again appeared in R. S. (1930), Chap. 15, Sec. 15 and now appears in R. S. (1944), Chap. 79, Sec. 243.

A general rule for the interpretation of provisions in the Revised Statutes is well stated in *Cummings* v. *Everett,* 82 Me. 260, 264, 265:

> "Of course, the whole chapter should be studied; but it should be borne in mind that though technically enacted together, the different sections and clauses were first enacted independently, at different times, under different circumstances and for different purposes. In our efforts to ascertain the meaning of any section or clause, we should resort to the original statute from which it was condensed and search for the legislative intent in the words of the statute, and also in its occasion and purpose, and in the jurisprudence of the time. When a statute is incorporated in a general revision of all the

> statutes, and re-enacted along with the reenactment of other statutes, its purpose and effect are not changed unless there be some compelling change in the language. Usually a revision of the statutes simply iterates the former declaration of legislative will. *Hughes* v. *Farrar,* 45 Maine, 72; *French* v. *Co. Com.,* 64 Maine, 583, 585. * * * Moreover the whole body of previous and contemporaneous legislation should be considered in interpreting any statute. The legislative department is supposed to have a consistent design and policy, and to intend nothing inconsistent or incongruous."

We have had many cases before this court involving the interpretation of statutes included in revisions, of which we would mention *Hughes* v. *Farrar,* 45 Me. 72; *French* v. *County Commissioners,* 64 Me. 583; *Cummings* v. *Everett,* 82 Me. 260; *Inhabitants of St. George* v. *City of Rockland,* 89 Me. 43; *Taylor* v. *Inhabitants of Caribou,* 102 Me. 401; *Martin* v. *Bryant,* 108 Me. 253; *Stevens* v. *Dixfield and Mexico Bridge Company,* 115 Me. 402; *Glovsky* v. *Realty Bureau,* 116 Me. 378; *Mitchell* v. *Page,* 107 Me. 388; *State* v. *Holland,* 117 Me. 288; *Camden Auto Co.* v. *Mansfield,* 120 Me. 187; *Densmore* v. *Hall,* 109 Me. 438; *Tarbox* v. *Tarbox,* 120 Me. 407; *People's Ferry Co.* v. *Casco Bay Lines,* 121 Me. 108.

None of these cases discusses, nor in any case heretofore decided by this court have we discovered any discussion of the construction of inconsistent provisions contained in a revision of statutes, when the inconsistency is due to the fact that the revision contains a repealed law or section from a prior revision which had been repealed in the interval between revisions. This question has been considered many times in other jurisdictions. The rule with respect thereto is clearly stated in the recent case of *In Re Initiative Petition No. 249,* 222 Pac. 2nd (Okla.) 1032, 1034, where it is said:

"The general rule is that where two inconsistent statutes are carried into the codified law the one last passed, which is the later declaration of the legislative will, should prevail, regardless of the order in which they are placed in the compilation. 50 Am. Jur., p. 471, section 457. Ramsey v. Leeper, 168 Okl. 43, 31 P. 2d 852; Stephenson v. O'Keefe, 195 Okl. 28, 154 P. 2d 757."

In *Kershaw* v. *Burleigh County,* 47 N. W. (2nd) (N. D.) 132 at 134, in a well reasoned opinion, the court said:

"As previously noted we are here concerned with two irreconcilable statutes carried into the codified law. Statutes do not lose their historical rank or status through the process of codification. 'The general presumption obtains that the codifiers did not intend to change the law as it formerly existed.' State ex rel Kositzky v. Prater, 48 N.D. 1240, 189 N.W. 334, 337. 'The general rule is that where two inconsistent statutes are carried into the codified law, the one last passed, which is the later declaration of the legislative will, should prevail, * * *' 50 Am. Jur. 471, § 457. In Ramsey v. Leeper, 168 Okl. 43, 31 P. 2d 852-860, in passing on this question the court said:

'Another point that must not be overlooked is the effect, if any, of the incorporation of both of these statutes in the Revised Laws of 1910. It has been many times held in this jurisdiction that the adoption of the Revised Laws of 1910 amounts to a re-enactment of the law therein included. Barnett v. Barnett, 158 Okl. 270, 13 P. 2d 104; Quick v. City of Fairview, 144 Okl. 231, 291 P. 95; Herndon v. State, 16 Okl.Cr. 586, 185 P. 701.

'The question then arises, Does this re-enactment of the statutes by the adoption of the Revised Laws of 1910 destroy the importance of the fact that one was passed subsequent to the other? Does it render the two statutes coequal in point of time as an expression of the legislative will? The true rule applicable to this situation is concisely stated in 59

C.J. at page 1101, par. 649, wherein it is said: "The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will; but where every means of reconciling inconsistencies has been employed in vain, the section last adopted will prevail, regardless of their relative positions in the code or revisions."

'And again in 25 R. C. L. p. 1012: "The place assigned to a statute in a compilation cannot control the plain meaning expressed in the statute itself. Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the law making power in enacting separate statutes upon the same subject, regardless of the order in which they are placed in the compilation." * * *

In Hines v. Harmon, 178 Okl. 1, 61 P. 2d 641, 644, the court said: 'It is also the contention of plaintiffs in error that both of these statutes, having been brought into the Revised Statutes of 1910, have an equal status as having been simultaneously passed. The authorities do not sustain this contention but hold to the contrary. 59 C.J. 928; 25 R.C.L. 925; Wright v. Oakley, 5 Metc. (Mass.) 400; Scheftels v. Tabert, 46 Wis. 439, 1 N.W. 156; State v. Wimpfheimer, 69 N.H. 166, 38 A. 786; Commonwealth v. McNamara, 93 Pa. Super. 267; Jessee v. DeShong (Tex.Civ.App.) 105 S.W. 1011; State v. Prouty, 115 Iowa, 657, 84 N.W. 670; Pratt v. Swan, 16 Utah, 483, 52 P. 1092; State v. Ward, 328 Mo. 658, 40 S.W. 2d 1074; Hillsborough County Commissioners v. Jackson, 58 Fla. 210, 50 So. 423, 424, 138 Am. St. Rep. 110, 19 Ann.Cas. 148; Adkins v. Arnold, 235 U.S. 417, 35 S.Ct. 118, 119, 59 L.Ed. 294.'

These holdings were reaffirmed in Ex parte Burns, 88 Okl.Cr. 270, 202 P. 2d 433. See also: Arkansas City v. Turner, 116 Kan. 407, 226 P. 1009; City of

> Wichita v. Wichita Gas Co., 126 Kan. 764, 271 P. 270.
>
> The rule of law stated in the foregoing cases with reference to the subject of this inquiry is, we believe, the correct rule and is supported by a large number of cases from other jurisdictions. We hold that where irreconcilable provisions have been carried into the codification of the laws of the state and all other guides for ascertaining the legislative will are lacking, resort may be had to the chronology and history of the statutes incorporated in the codification as such statutes existed prior thereto to aid in their interpretation."

We would call especial attention to the following cases: *Ex parte Burns,* 202 Pac. 2nd (Okla.) 433; *Adkins* v. *Arnold,* 235 U. S. 417; *Hillsborough County Commissioners* v. *Jackson,* 50 So. (Fla.) 423; *State* v. *Woodman,* 272 Pac. (Kan.) 132; *Ramsey* v. *Leeper,* 31 Pac. 2nd (Okla.) 852; *Lamar et al.* v. *Allen et al.,* 33 S. E. (Ga.) 958; *Northern Pacific Railroad* v. *Ellison,* 28 Pac. (Wash.) 333, same case on rehearing, 29 Pac. (Wash.) 263; *Graetz* v. *McKenzie,* 28 Pac. (Wash.) 331. To cite further authorities would serve no useful purpose.

Of the cases cited above, *Lamar et al.* v. *Allen et al.,* 33 S. E. (Ga.) 958, is particularly helpful as it disposes of the contention that of provisions contained in the same chapter of a revision the one bearing the later section number prevails over those bearing an earlier number, on the theory that it is the latest expression of the legislative will. The Georgia court, conceding that it is a well settled rule of construction that when there is a conflict between two parts of a single act the latest in position will be declared to be the law, as from its position it is presumed to be the last expression of the legislative will, held that the rule has no application in a revision when the inconsistent provisions were not initially simultaneously enacted. The court said: "A

rule founded upon the same principle is applicable when there are two conflicting sections in a code, and that is, that section prevails which is derived from a source which can be considered as the last expression of the lawmaking power." The court then held that the last expression of the law making power was that act which chronologically was last enacted. Applying this rule to the several sections contained in the code in the order of their original enactment, the court then held that Section 4596 would prevail over Section 4849 and that Section 4595 would prevail over both of them.

If repugnant provisions of prior statutes are compiled and adopted in a general Revision of the Statutes, it must be presumed that the repugnancy was overlooked and that it was the intention of the Legislature to bring forward the latest expression of the legislative will where irreconcilable inconsistency or repugnancy appears in different sections of the Revised Statutes. *Hillsborough County Commissioners* v. *Jackson, supra.*

Applying the foregoing rule of law to the case in hand, the provision contained in Section 231 of Chapter 79 of the Revised Statutes of 1944, that the salaries of the respective registers of deeds "shall be in full compensation for the performance of all official duties and that no other fees or compensation shall be allowed them" must prevail over the provision of Section 243 that for the work of revising and consolidating the index the registers "shall receive a reasonable compensation to be approved by the county commissioners." The latter provision had been repealed prior to the revision of 1916 and its continuance in the revisions of 1916, 1930, and 1944 as a part of the section in which it is found did not give it new life.

In accordance with the stipulation of the parties and the terms of the order reporting the case to us, we find that the

defendant is not liable and that judgment must be entered in its favor.

Remanded for the entry of Judgment for the defendant.

*(MURCHIE, C. J., having deceased, did not join in this opinion.)

NOTE BY MERRILL, C. J.

Since filing the foregoing opinion the writer thereof has discovered the case of *Lyon* v. *Ogden,* 85 Me. 374, which involved the interpretation of conflicting sections in the Revised Statutes of 1883, the conflict being between R. S. (1883), Chap. 65, Sec. 36, and R. S. (1883), Chap. 64, Secs. 12, 13, 14, and 15. In that case the conflict was caused, as here, by a failure to delete from the Revision of 1883 a provision which had been repealed by implication by P. L., 1874, Chap. 169. The case of *Lyon* v. *Ogden* is in entire accord with the reasoning of the court and the conclusion reached by it in the foregoing opinion.

This note is filed in the interest of accuracy as to the state of the decisions in this jurisdiction. It is filed because it is stated in the opinion that the court had not discovered any discussion of the construction of inconsistent provisions contained in a revision of statutes when the inconsistency is due to the fact that the revision contains a repealed law or section from a prior revision which had been repealed in the interval between revisions. *Lyon* v. *Ogden* is such a case and wholly supports the foregoing opinion.

OPINION

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

QUESTION

PROPOUNDED BY THE HOUSE OF REPRESENTATIVES IN AN ORDER PASSED APRIL 28, 1953

ANSWERED APRIL 30, 1953

HOUSE OF REPRESENTATIVES ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In House of Representatives

WHEREAS, there is now pending before the 96th Legislature H. P. 1283 a joint order under the provisions of which members of the House and Senate would be reimbursed for expense other than travel in attending the daily sessions of this Regular Session of the Legislature. The text of joint order being as follows:

> "ORDERED, the Senate concurring, that the members of the Senate and House of Representatives be reimbursed for expense, other than travel, in attending the daily sessions of this Regular Session of the Legislature in the amount of $7.00 for each day in attendance, and
>
> BE IT FURTHER ORDERED, that the State Controller be, and hereby is, directed to pay from current Legislative appropriations said reimbursement to members of the House and Senate, on account of ex-

pense, as aforesaid, upon the filing of sworn certificates of attendance."

WHEREAS, it is important that the Legislature be informed as to the Constitutional validity of said Order now pending;

WHEREAS, it appears to the House of the 96th Legislature that the following is an important question of law and the occasion a solemn one;

NOW, THEREFORE, BE IT

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

QUESTION

Is it within the power of the Legislature to provide for the reimbursement of Senators and Representatives for expenses in attendance at daily sessions, other than travel, as provided in the pending joint order?

ANSWER OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

The undersigned Justices of the Supreme Judicial Court, in accordance with the provisions of the Constitution, respectfully answer herein the question propounded by the House of Representatives in an Order passed by the House April 28 A. D. 1953 relative to House Paper No. 1283, a joint Order under the provisions of which members of the House and Senate would be reimbursed for expense other than travel in attending the daily sessions of this Regular Session of the Legislature.

The proposed Order concerning which the foregoing question has been submitted to the Justices provides for reimbursement of members of the Senate and House of Representatives for expenses other than travel in attending the daily sessions of the current Legislature.

There is a well recognized distinction between legislative expenses and personal expenses of members of the Legislature. This distinction is clearly stated in the case of *Griffith* v. *Turner,* 117 Kan. 755, 233 Pac. 510, which distinction is approved in *Dixon* v. *Shaw,* 122 Okla. 211, 253 Pac. 500. In *Griffith* v. *Turner* the Court said:

> "The distinction between expenses that are legislative and those that are personal is that legislative expenses are those that are necessary to enable the legislature to properly perform its functions, while those that are personal are those that must be incurred by a member of the legislature in order to be present at the place of meeting—expenses for his personal comfort and convenience, which have nothing to do with the performance of his duty as a member of the legislature. Personal expenses are those incurred for rooms, meals, laundry, communications with their homes, and other things of like character."

It is obvious from the Order submitted to us and concerning which the question is asked that the nature of the expenses for which reimbursement is therein provided is personal rather than legislative as above defined. By the very terms of the Order it is confined to expense in attending the daily sessions of the Legislature. This clearly refers to the personal expenses of the legislators as distinguished from such expenditures as they might make in the performance of and as an aid to their legislative duties as such.

It is common knowledge that it has been the practice of the Legislature by order as distinguished from act, bill or

resolve to provide for payment of legislative expenses, as above defined, from current legislative appropriations. As said in *Dixon* v. *Shaw*, as reported in 50 ALR at Page 1237:

> "What are proper legislative expenses, in order to enable the body to function as not only a lawmaking, but an inquisitorial, body, and whatever amount in its judgment is necessary therefor, under the prevailing conditions of life, is a matter within the determination of the legislature, and over which the courts can and would exercise no control."

Such expenses can be provided for by legislative order. Not only are they not subject to review by the court, but they do not require the assent of the Executive branch of the Government, being purely a matter for determination by the Legislature with respect to its own functioning as a legislature. When, however, the Legislature attempts to authorize or direct the payment of money for other than legislative expense such appropriation or payment is one of public concern and one which can be effected only by an act or resolve of the Legislature passed as a law by both branches thereof and submitted to the Executive for his executive approval in accordance with the Constitution.

The nature of the expenses for which reimbursement is provided in the proposed Order being personal, they cannot be authorized or payment thereof directed by a joint legislative order.

The fact that we have based our answer upon the ground that the proposed action is sought by a joint order rather than by an act or resolve must not be taken as an intimation by us that had the proposed action been taken by a legislative act or resolve it would have been either permitted by or would be in conflict with the Constitution of this State.

Whether or not personal expenses of legislators as distinguished from legislative expense incurred by them is compensation within the meaning of that word as used in constitutions (See Constitution of Maine, Art. IV, Part Third, Sec. 7) is a question upon which the courts are in irreconcilable conflict. This conflict is greatly increased by the fact that the constitutions of the several states, the courts of which have passed upon the question, are phrased in different language and have been adopted with different historical backgrounds.

Whether or not a bill or act would violate the provisions of our Constitution, even if it were possible in some manner to provide for reimbursement for the personal expenses of legislators, either current or prospective, a question upon which we neither express nor intimate an opinion, would depend upon the exact wording of such bill or act. No such bill or act is before us. For these reasons we deem it to be improper at this time to express an opinion as to whether or not under some or what conditions, if any, the constitutionality of an act for that purpose might be sustained. The question is not now before us, and could only be intelligently answered by the consideration of a specific act or resolve.

Dated at Portland, Maine, this thirtieth day of April, 1953.

Respectfully submitted,

EDWARD F. MERRILL
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
WILLIAM B. NULTY
ROBERT B. WILLIAMSON
FRANK A. TIRRELL, JR.

RULES OF SUPREME JUDICIAL COURT

STATE OF MAINE

SUPREME JUDICIAL COURT May 12, 1953

All of the Justices of the Supreme Judicial Court concurring, the Revised Rules of the Supreme Judicial Court as established May 16, 1952, effective August 1, 1952, are hereby amended by adding thereto another rule, the same to be numbered 7. Said Rule 7 is as follows:

7

SUPPLEMENTAL RULE RELATIVE TO COPIES FOR THE LAW COURT AND BRIEFS FOR THE LAW COURT

> No typewritten or mimeographed copy of the case furnished under Rule 5 and no typewritten or mimeographed copy of a brief furnished under Rule 6 which is single-spaced will be deemed fairly or legibly printed, written or typewritten within the meaning of either of said rules.

Rule 7 shall take effect immediately and shall be recorded in Volume 148 of the Maine Reports.

EDWARD F. MERRILL
Chief Justice, Supreme Judicial Court

GEORGE GEYERHAHN

vs.

EMMA VIRGINIA GEYERHAHN

Cumberland. Opinion, May 26, 1953.

Divorce. Insanity.

Insanity is not a ground for divorce in Maine.

ON EXCEPTIONS.

This is a libel for divorce. The case is before the Law Court on exceptions to a decree denying the divorce. Exceptions overruled.

Richard S. Chapman, for libellant.

Daniel C. McDonald, for libellee.

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

THAXTER, J. This is a libel for divorce brought by a husband against his wife for cruel and abusive treatment. Two children have been born to the marriage, George age 8, and Gordon age 6. Service was made on the libellee and on her legally appointed guardian. She is now and apparently has been for a number of years hopelessly insane. The judge who heard the case denied the divorce; and exceptions were taken to this court.

Undoubtedly the libellant has had a very unhappy time. Dr. Francis H. Sleeper, the superintendent of the hospital, was a witness. He testified that this woman was under his care at the hospital for some three years; that a lobotomy, a very radical brain operation, was performed in an effort to help her; but her condition must be regarded as hopeless. The trial judge made no findings of fact.

Insanity is not a ground for divorce in Maine and this court has no power to make it one. We do not make the laws. The trial court may have found that this unfortunate woman may not have known the difference between right and wrong; or he may have been of the opinion that the evidence of cruel and abusive treatment was insufficient to grant the divorce.

We said in *Hadley* v. *Hadley,* 144 Me. 127, 130: "It is well established in this State that the general principle applicable to factual findings, i.e., that those made by the trier of fact will not be disturbed in appellate proceedings if supported by credible evidence, is controlling in divorce proceedings."

Exceptions overruled.

RICHARD J. DUDDY

vs.

GEORGE E. MCDONALD, ADMR.
ESTATE OF JAMES M. MULHERRIN

Cumberland. Opinion, May 29, 1953.

Executors and Administrators. Funeral Expenses Statute of Limitation.

A statute of limitation barring all actions *"against said decedent"* where *"no administration is had upon the estate of a deceased person within six years from the date of death of said decedent, and no petition for administration is pending"* operates as a bar to a claim even though administration was not sought until nine years after decedent's death.

The excepting phrase *"and no petition for administration is pending"* does not operate so as to validate a claim otherwise barred merely because a creditor or someone in his behalf may have filed a peti-

tion for administration subsequent to the expiration of six years from date of decedent's death. It is to a petition filed within that time that the phrase *"no petition for administration is pending"* refers.

Courts in construing statutes should carry out the purposes of the legislature.

Statutes of Limitation should be construed in favor of the bar which the legislature intended to create.

Strictly speaking, a claim for funeral expenses is not a claim against the decedent because such expenses are not incurred until after his death. However, a claim therefor is a claim against the *estate of the decedent* and *"against the decedent"* within the meaning of the statute of limitation.

ON REPORT.

This is an action of assumpsit against decedent's estate. The administrator pleaded the statute of limitations. The case is before the Law Court on report. Judgment for defendant.

Edward T. Devine,
Bernard M. Devine, for plaintiff.

Arthur A. Peabody, for defendant.

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

THAXTER, J. On report. This is an action of assumpsit brought against the estate of James M. Mulherrin for funeral expenses. Mulherrin died intestate February 10, 1943. Not till nearly nine years later, on September 9, 1952, was administration sought on his estate. Then a petition for administration was filed and letters of administration were issued to the defendant George E. McDonald on the same day. A proof of claim was filed in the Cumberland County Probate Court on October 10, 1952; and suit was commenced

*Died March 7, 1953.

in the Superior Court for said County of Cumberland at the November Term 1952. The administrator filed a plea of the general issue with a brief statement setting up the statute of limitations. This statute, R. S., 1944, Chap. 99, Sec. 114, as set forth in the plea reads as follows:

> "Where no administration is had upon the estate of a deceased person within 6 years from the date of death of said decedent, and no petition for administration is pending, all actions upon any claim against said decedent shall be barred."

The contention of the plaintiff is that this statute does not control in this case because it applies only where "no petition for administration is pending."

But a claim does not come within the exception of the statute merely because a creditor or someone in his behalf may have filed a petition for administration *subsequent* to the expiration of the six years from the date of the death of said decedent. Statutes of limitation usually require that actions be commenced within a specified time after the right of action accrues. Actions brought within such period toll the statute. The purpose of the exception in Section 114 *supra* is to make provision for tolling this statute of limitations by filing a petition for administration within six years from the date of the death of the decedent. It is to a petition filed within that time that the phrase "no petition for administration is pending" refers.

It might also be urged by the plaintiff that a claim for funeral expenses is not within the bar of R. S., 1944, Chap. 99, Sec. 114, above set forth, on the ground that it is not a "claim against the decedent." *Strictly speaking,* a claim for funeral expenses is not a claim against the decedent because such expenses are not incurred until after his death. However, a claim therefor is a claim against the *estate of the de-*

cedent. For the purposes of the statute of limitations against the enforcement of claims against estates, a claim for funeral expenses is a claim "against the decedent" within the meaning of those or similar words when used in such a statute.

We have repeatedly said that the effort of this court in construing a statute should be to carry out the purpose of the legislature which enacted it. *State* v. *Day,* 132 Me. 38; *In re Frank R. McLay,* 133 Me. 175; *Tarr* v. *Davis et al.,* 133 Me. 243; *Town of Ashland* v. *Wright,* 139 Me. 283; *Beck* v. *Corinna Trust Co.,* 139 Me. 350; *Steele* v. *Smalley,* 141 Me. 355; *White* v. *March,* 147 Me. 63.

Statutes of limitation are statutes of repose and as was said in *Gray* v. *Day,* 109 Me. 492, 496, "should be construed strictly in favor of the bar which it was intended to create and not liberally in favor of a promise, acknowledgment or waiver . . .". A creditor for funeral expenses is given special rights. He can petition for administration as a creditor of the deceased, even though his claim is not strictly against the deceased, *Breen* v. *Burns,* 280 Mass. 222, 182 N. E. 294, and is given priority in case an estate is insolvent. As said in Wilson's Maine Probate Law, Page 178:

> "Under our laws all the real estate of a deceased debtor is liable for the payment of his debts. If his estate is insolvent, the real estate must be sold by the administrator in order that the proceeds may be divided ratably among his creditors. If his estate is solvent, each creditor has a lien on the real estate, which he can enforce by law against any person he may find in possession thereof, whether an heir, devisee or grantee of either of them. The claim of the creditor is paramount to every title that can be acquired after the decease of the debtor. This lien, if it were as unlimited in its duration as in its extent, would destroy all se-

> curity in any title to real estate; as it would in general affect all the land in the country in the course of every successive generation."

Such is the underlying reason requiring limitation upon the presentation and enforcement of claims against the estates of deceased persons. Inasmuch as the funeral expenses are a charge upon the estate of the deceased and constitute a preferred claim against the assets of the deceased, it is as important that such claims be subject to the bar of Section 114 *supra* as those which are strictly debts of the decedent. We hold that within the meaning of R. S., 1944, Chap. 99, Sec. 114 *supra,* the reasonable funeral expenses of the decedent are "claims against the decedent." See *Breen* v. *Burns,* 280 Mass. 222, *supra,* in which it was held that one incurring reasonable funeral expenses of the deceased was "a creditor of the deceased" within the meaning of the statute of limitations with respect to actions by creditors of the deceased.

The claim here sued was barred by the statute pleaded in defense.

Judgment for the defendant.

*(MURCHIE, C. J., having deceased, did not join in this opinion.)

RICHARD J. DUDDY

vs.

GEORGE E. MCDONALD, ADMR.
ESTATE JAMES M. MULHERRIN

PER CURIAM.

This is a Petition to rectify alleged errors in the Opinion in the case of Richard J. Duddy v. George E. McDonald, Admr. Estate James M. Mulherrin, argued before the Law Court at the February Term, 1953, which Opinion was filed May 29, A. D. 1953, and which has not yet appeared in either the official Maine Reports or the Atlantic Reporter.

A careful examination of the original case discloses no error of law or fact in the Opinion rendered which requires correction.

Petition dismissed.

Motion denied.

EDWARD F. MERRILL
SIDNEY ST. F. THAXTER
RAYMOND FELLOWS
WILLIAM B. NULTY
ROBERT B. WILLIAMSON
FRANK A. TIRRELL, JR.

The Justices of the Supreme Judicial Court

*JOSEPHINE GUTHRIE DUTILL

vs.

EDWARD F. DANA

EXECUTOR UNDER THE WILL OF NORMAN P. BROWN

AND

MAINE GENERAL HOSPITAL

Cumberland. Dated December 8, 1952

Executors, Wills and Administrators.

Descent. Murder. Trusts.

There are three lines of decision governing the right of an heir who murders his ancestor to take property; first, that the murderer takes the property and keeps it; second, that the murderer does not take the property because under the common law one cannot profit by his own wrong; and third, that the murderer and those claiming under him hold the property so acquired as constructive trustees for those next in succession.

The Maine Courts recognize that a constructive trust may be imposed upon one who obtains title to property unconscionably.

IN EQUITY.

This is a Bill in Equity before the Supreme Judicial Court at *nisi* by a sole heir at law seeking to have the executor of deceased estate declared a constructive trustee for his benefit. The case was presented upon agreed statement of facts. The court authorized a presentation of a decree in accordance with the opinion which sustains the bill.

Sidney W. Thaxter, attorney for complainant.

* This case was heard by Mr. Justice Nulty of the Supreme Judicial Court at *Nisi Prius.* The court's findings of fact and rulings of law at nisi are reported because of the novelty and importance of the questions presented. The case is herewith published by the Reporter by special permission of the Chief Justice.

Edward Dana, Pro Se, attorney for executor.

John F. Dana, attorney for Maine General Hospital.

FINDINGS OF FACT AND RULINGS OF LAW

The instant case is a bill in equity which seeks to have the Executor of the Estate of Norman P. Brown declared a constructive trustee of property acquired by the late Norman P. Brown as a result of murdering his mother, Mary I. Brown, he being the son and sole heir of said late Mary I. Brown. The bill was originally brought against Edward F. Dana as executor under the will of Norman P. Brown and by separate petition the Maine General Hospital was made party defendant because of the fact that said hospital was named the sole beneficiary under the terms of the will of said Norman P. Brown which will has been duly probated in the Probate Court for the County of Cumberland and State of Maine. Answers have been filed by said Edward F. Dana, Executor, and by the Maine General Hospital and in addition to the answers an agreed statement of facts has been filed to which all parties have assented. The agreed statement of facts has obviated the taking out of any oral testimony and there appears to be no dispute in the facts before this court. By it the parties agree and stipulate that the late Norman P. Brown was sane and in his right mind; that he murdered his mother on March 19, 1951, and that immediately thereafter he attempted suicide and subsequently, three days later, died in the Maine General Hospital from his self inflicted wounds. It also appears from the record that the complainant is the sole present heir at law of the estate of Mary I. Brown who would be entitled to inherit from the estate of said Mary I. Brown in the event that the late Norman P. Brown became disqualified by operation of law from inheriting his mother's

estate as her son and sole surviving heir. The amount in question is $5,369.73 which represents the balance of the estate of Mary I. Brown after the payment of all debts and expenses of administration and it is this sum which the said Edward F. Dana, executor, received from the estate of Mary I. Brown under an order of distribution signed by the Judge of Probate for Cumberland County and which complainant seeks to have the executor, Edward F. Dana, hold as constructive trustee for complainant's benefit.

The legal questions arising in this matter, so far as known, have never been before the Maine courts and it raises the following issues:

1. Whether an heir or next of kin who murders his ancestor while in his right mind is entitled to inherit from the ancestor.

2. If said heir or next of kin is barred from so inheriting, whether a constructive trust may be imposed upon him or the representative of his estate for the benefit of the person who would have been the decedent's heir or next of kin if the murderer had predeceased her.

The question at issue is well stated in *Scott on Trusts.* Vol. 3, § 492, Page 2390, in the following language:

> § 492. **Acquisition of property by murder.** In 1897 Professor James Barr Ames submitted to the legal profession a monograph discussing the question "Can a murderer acquire title by his crime and keep it?" At that time there were very few cases in which this question had been presented to the courts. Professor Ames suggested three possible answers to his question: (1) that the murderer takes the property and keeps it; (2) that the murderer does not take the property; (3) that the murderer takes the property but holds it upon a constructive trust. He suggested that it would run counter to the principles of equity to permit the murderer to enrich himself by his crime. On the

> other hand, he suggested that it would violate the Statute of Wills or Statute of Distributions to hold that the legal title did not pass to the murderer. He advocated the third view, that "The legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer."

An examination of the authorities and the decided cases discloses that in this country there are three different lines of decisions concerning the right of a person who murders his ancestor and either inherits or would inherit his ancestor's property. A great many decisions, particularly among the older cases, have held that the murderer takes the property and keeps it. Perhaps the leading case is *Wall* v. *Pfanschmidt,* 265 Ill. 180, 106 N. E. 785 (1914). In that case the court decided that since the Legislature had declared the public policy of the state in enacting the statutes of descent, the courts were without power to change it by reading into the statute an exception. The criticism of this particular case and decisions of other states which follow the rule laid down in the Illinois case is aptly summed up in *Page on Wills,* Vol. 1, Sec. 232, which states:

> "The Statutes of Descent in the United States are intended to change the rules of the common law as to the persons who would inherit from the ancestor; but there is nothing to indicate that they were intended to change the other rules of the common law, including the rule which excluded an heir who had killed the ancestor wrongfully."

The Statutes of Maine governing the descent of real and personal property do not specifically exclude an heir who murders his ancestor (R. S., 1944, Chap. 156, Secs. 1 and 20). In addition to the statutes the Constitution of Maine contains in Art. I, Sec. 11, a prohibition on attainder which works "corruption of the blood or forfeiture of estate." It

should be noted that to deny the murderer the privilege of taking property which he is technically entitled to inherit because of the murder is not inflicting an additional punishment upon him but is merely preventing him from profiting by his own wrong. He is not suffering a forfeiture of estate under Art. I, Sec. 11, of the Constitution of Maine because he is not being deprived of any other property which he may have acquired rightfully. Sec. 187 of the *Restatement of the Law* under the title "Restitution" reads as follows:

> "(2) Where a person is murdered by his heir or next of kin and dies intestate, the heir or next of kin holds the property thus acquired by him upon a constructive trust for the person or persons who would have been heirs or next of kin if he had predeceased the intestate."

Under said Sec. 187, Comment (a) reads in part as follows:

> "The rules stated in this section are applicable although the Statute of Wills or the Statute of Descent and Distribution makes no provision for the situation where the devisee or legatee or heir or next of kin kills the decedent. The effect of the rules stated in this section is not to make an exception to the statute but is to apply to persons taking under the statute the equitable principal that they should not be permitted to profit by their own wrongful acts.
>
> "Although the murderer is not permitted to keep the property which he acquires by the murder, he will not be deprived of property which he does not acquire through the murder. It is this distinction which underlies the rules stated in this section and the following sections."

The second line of decisions, that the murderer does not take the property, appears to be founded upon the very ancient maxim of the common law that no one shall be permitted to profit or take advantage of his own wrong, or, put-

ting it another way, to acquire property by his own crime. The reason for the decision appears to be, according to the leading case of *Riggs* v. *Palmer,* 115 N. Y., 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819 (1889), based upon the maxims dictated by public policy which have their foundation in universal law administered in all civilized countries and have nowhere been superseded by statutes. Actually there is but little difference in result between the second line of decisions and the third line of decisions which will be hereinafter referred to other than the matter of procedure. The second rule simply shortcuts the distribution. See *Ellerson* v. *Wescott,* 148 N. Y. 149, 42 N. E. 540 (1896).

The third line of decisions supports the proposition that the murderer and those claiming under him or for him holds the property so acquired as a constructive trustee for those next in succession. By the use of this rule courts do not need to concern themselves with the fact that the statute of descent and distribution provides that the property should go to the heir and next of kin because it is their position that the statute operates in accordance with the laws of descent and distribution and the only question then to be considered is whether the heir or next of kin or those claiming under the heir should be allowed to keep the property. Many states have passed statutes which preclude the murderer or those claiming under him from inheriting, but in the absence of a statute many states and the courts therein have held that the murderer or those claiming under him or his personal representative, as the case may be, hold the property so acquired as a constructive trustee for those next in succession. A discussion of this situation is found in *Scott on Trusts,* Vol. 3, Sec. 492, at Page 2381. There are some excellent cases in New Jersey in which the murderer or those who claim under or through him have not been allowed to profit by the murder. We will refer to those later. In our own state, in *Gilpatrick* v. *Glidden,* 81 Me. 137, 16 A.

464 (1888), our court recognized that a constructive trust may be imposed upon one who obtains title to property unconscionably. The court said at page 150:

> "So for like reason, when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscientious for him to retain it for his own benefit while in fact another is entitled to it, or to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title but by imposing on him the duty of holding and using his title for the real beneficiary."

See also *Sacre* v. *Sacre et al.*, 143 Me. 80, 55 A. (2nd) 592.

Perhaps one of the leading cases holding that the murderer, or his personal representative, should be held as constructive trustee for the benefit of those next in succession is the case of *Whitney* v. *Lott,* 134 N. J. Eq. 586, 36 A. (2nd) 888 (1944). In that case the court found that a husband murdered his wife and thereafter committed suicide. In determining the rights of the husband in the wife's property, the court invoked the policy of the common law that no one should be allowed to profit by his own wrong, stating, in effect, that that doctrine itself has been universally recognized in the laws of civilized countries for centuries and is as old as equity. The doctrine referred to is found in *Domat,* pt. 2, bk. 1; *Code Nap.* 727; *Mackelday's Roman Law,* 530; *Coke's Littleton* 148-B; *Broom's Legal Maxims,* 9th Ed. 197. The decision also refers to the discussions on the subjects in the various law reviews and text books on equity, including the Restatement of the Law entitled "Restitution," Par. 187, *supra.* It concluded that the wife's property was held by those claiming through the husband as constructive trustees or trustees maleficio.

After considering the three divergent lines of decisions herein referred to, the court comes to the conclusion that

the reasoning in the third line of decisions set forth herein should be the proper rule and best calculated to do justice to all. It therefore holds that legal title passes to the murderer but equity will treat him or those claiming under him or for him as a constructive trustee because of the unconscionable mode of its acquisition and compel him or those to convey it to the heirs or next of kin of the deceased exclusive of the murderer. The reasoning in this case is vindicated by ample and increasing authorities and it is in line with the public policy expressed in the equitable maxims of the common law. It is accordingly determined that the legal title of the property belonging to the late Mary I. Brown passed to her late son, Norman P. Brown, in accordance with the laws of descent and distribution and that said late Norman P. Brown immediately upon acquisition became answerable in equity as a trustee ex maleficio and he who acquired the legal title through him, that is as the executor of his will in this case, Edward F. Dana, has since held it as constructive trustee. Equity has jurisdiction to reach the property although its legal title has passed to the personal representative of the wrong doer.

A decree may be presented to this court for signing and filing in accordance with the findings herein made.

WILLIAM B. NULTY
Justice, Supreme Judicial Court

December 8, 1952

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BOUNDARIES

The location of a boundary line of property as described in a deed is a question of law.

Deeds should be construed most strongly against grantors, and in favor of grantees.

A description used in a deed should be honored in its entirety, and not by reference to disjointed parts of it.

"Easterly" does not always indicate "due east," and when such is used more than once in a deed, it must have been intended that the same course was contemplated each time.

When a plaintiff in trover has secured an award not justified by evidence, under an erroneous ruling of law, and the record makes it apparent that he is entitled to some recovery, damages should be determined in subsequent proceedings.

Brewster v. *Churchill*, 8.

BURDEN OF PROOF

CAPIAS

CARRIERS

CEMETERIES

CHARITY

CHATTEL MORTGAGES

An instrument providing "1 year after date I promise to pay to the order of Marcoux's Garage, Inc. Fifteen Hundred Dollars at 6% this note to cover 1944 G. M. C. Army Truck Motor 270242700 Serial 168901 value received Eddie Lambert" and dated 4/13/1949, is an equitable mortgage under the circumstances of the instant case, and "encumbrance" within the meaning of the Exclusion provisions of an automobile Fire Policy which provided" This policy does not apply; — (h) under coverage D, E, F, G, H, 1, and I, while the automobile is subject to any bailment lease, conditional sale, mortgage or *other encumbrance* not specifically declared and described in this policy;". (Italics supplied.)

A chattel mortgage is an instrument whereby the owner of personal property transfers the title to such property to another as security for the payment of money or the performance of some obligation or contract subject to be defeated on payment of the money or the performance of some obligation or contract.

An equitable mortgage includes every contract so convincingly established as to show a clear intention to give a lien on specified chattels of, and in the possession of the lienor, and the contract ought

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See Title, *Grant* v. *Kenduskeag Creamery et al.*, 209.

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Constitution of United States, 14th Amendment,
Bolduc v. *Pinkham et al.*, 17.

CONTRACTS

By R. S., 1944, Chap. 126, Sec. 18 it was the intention of the legislature to prohibit every pecuniary transaction in which chance has any place "affording a chance to get something for nothing."

The law leaves the parties to an illegal contract where it finds them.

If the contract is divisible, an action may in some cases be maintained for legal items.

If a contract is not advisable and there are both legal and illegal elements, neither can be recovered.

Where the evidence justifies a finding that the contract is illegal or that the plaintiff failed to perform as alleged a judgment for defendant will not be disturbed.

Jolovitz v. *Redington and Co., Inc.*, 23.

Where a construction contract provides that a certain thing be done in a certain manner, or to obtain a certain result, it must be done by the contracting party if it is not impossible, and if it is not prevented by act of God or of the other party. There must be substantial performance.

A verdict shows bias and prejudice where a jury disregards an admission of liability testified to by the defendant, and the damages estimated by his own experts.

Rockland Poultry Co. v. *Anderson*, 211.

Parol evidence is inadmissible to substitute a difference contract from that evidence by a written instrument.

Parol evidence is admissible to explain what is *per se* unintelligible in a written contract when the explanation is not inconsistent with the written terms.

Parol evidence of extraneous facts and circumstances, to explain the meaning of words used in a written contract, may be admitted to a very great extent without infringing the spirit of the rule which excludes any such evidence designed to vary a written contract or substitute a new and different one from that reduced to writing.

Evidence of an executory parol contract is not admissible to contradict, alter, add to or vary the terms of a written one.

A parol contract, under which one who is obligated by a note to pay money may discharge his obligation by doing something other than paying money, while inoperative so long as it remains executory, may be proved, with its performance, to discharge the debt.

While neither a member of a partnership nor an officer of a corporation has authority to bind his partnership or corporation to subject their accounting to a contract in which neither has a direct interest, such lack of authority has no bearing on such a contract.

One who converts property is entitled to no deduction from the measure of damages applicable generally in an action of trover because of contribution made, or claims held, by a third person.

Bartlett v. *Newton*, 279.

See *Res Judicata, Bourque-Lanigan* v. *Carey*, 114.
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COURTS

No case should be reported to the Law Court unless a decision thereof in at least one alternative would enable the court finally to dispose of the case.

No case whether at law or in equity should be reported to the Law Court unless in the opinion of the presiding justice it involves (1) *questions of law of sufficient importance or doubt to justify reporting the same and* (2) *the parties agree to the report.*

The Law Court may pass upon the facts presented when a case is otherwise properly before it on report.

A declaration stating that a bank account standing in the joint names of a decedent and another is to become the sole and absolute property of the survivor is insufficient to create a survivorship under R. S., 1944, Chap. 55, Sec. 36 as amended, where the parties are neither husband and wife nor parent and child.

Matters of technical pleading will, where a case is submitted on report of the evidence, be regarded unless the contrary appears as having been waived.

Hand Admr. v. *Nickerson*, 465.

See Elections, *Lesieur* v. *Lausier*, 500.
See *Spear Aplt.*, 256.

CRIMINAL LAW

CY PRES

DAMAGES

DAMNUM ABSQUE INJURIA

DECEIT

A statement concerning the adequacy of water supply by an owner-vendor to a prospective purchaser of a home constitutes an assertion concerning a material fact readily known to the owner.
Rowell et al. v. *Jaris et al.*, 354.

DECLARATORY JUDGMENTS

A petition for declaratory judgment under an automobile liability insurance policy involves a question of *legal liability* enforcible by an action at law, therefore it is properly entered upon the law docket.

A Law Court review of a declaratory judgment decree involving *legal liability* is by bill of exceptions. (See R. S., 1944, Chap. 94, Sec. 14.)

A presiding justice hearing a petition for declaratory judgment is not hearing the cause by voluntary submission as in jury waived cases, so that rights to exceptions need not be reserved.

The directions, judgments or opinions of a single justice hearing a case may be attacked only for errors in law.

There is no error in law in finding of fact by a single justice unless such fact be found without any evidence to support it.

Bills of exceptions are insufficient which fail to point out whether the error of the alleged findings consists in a failure of evidence or an erroneous application of the law to the facts or other exceptionable ground.

The mere purchase of an occasional policy from an insurance agent, even if the initial selection of the companies be left to the agent, does not, as a matter of law constitute the insurance agent the agent of the insured to keep him insured, or to keep him insured in such

DIRECTED VERDICT

See Exceptions.

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Insanity is not ground for divorce.

Geyerhahn v. *Geyerhahn*, 534.

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See Wills, *U. S. Trust Co.* v. *Boshkoff, et al.*, 134.

ELECTIONS

Regular elections must be held that the people may select those whom they desire to guard and govern and it is the duty of the proper officials to follow the laws with respect thereto that the voting rights of all citizens be protected and preserved.

The precise and stated time of holding elections is not always material if another time is not prohibited.

Practically all courts have upheld elections where adequate notice has been given and where the voters have fully and freely expressed, or had the opportunity to express their will.

Mandatory provisions of law must be strictly complied with.

Directory provisions of law need be complied with, under excusable circumstances, only so far as may be.

Wherever possible from a standpoint of legal justice to validate an election it is the duty of the court to do so.

State v. *Marcotte, et al.*, 45.

In proceedings under R. S., 1944, Chap. 5, Secs. 85-89 an appeal is not to the Law Court but to the Justice of the Supreme Judicial Court. On appeal the case is considered *de novo*.

The offices of mayor and judge of a Municipal Court are incompatible. They cannot be held by one person.

When incompatible offices are under one government the acceptance of one vacates the other whether or not the person becomes the lawful incumbent of the second office.

Eligibility with reference to compatibility of office is determined as of the time of the commencement of the term of office.

The proceeding under R. S., 1944, Chap. 5, Secs. 85-89 may be commenced before or at any time during the term of the office at stake.

Lesieur v. *Lausier*, 500.

EQUITY

Full ownership and sovereignty over great ponds lies in the State.

It is well settled that no person can maintain an action for a common nuisance, unless he has suffered therefrom some special or peculiar damages other and greater than those sustained by the public generally.

There must be an infringement of the plaintiff's private rights to permit recovery.

A mere hindrance in the enjoyment of a public right is *damnum absque injuria*.

Smedburg et al. v. *Moxie Dam Co.*, 302.

A Bill in Equity which alleges merely that plaintiffs are *informed and believe* the existence of material and essential facts is fatally defective.

Failure to traverse mere allegations of belief does not constitute an admission of the facts.

A demurrer admits only allegations of fact well pleaded.

Donna et al. v. *Auburn et al.*, 356.

The decision of a single justice upon matters of fact in equity proceedings will not be reversed in the Law Court unless *clearly wrong.*

Perry v. *Curtis et al.*, 438.

See Chattel Mortgages, *Lambert* v. *New England Fire Ins. Co.*, 60.
Decree, see *Paradis Co.* v. *Maxim Co., Inc., et al.*, 43.
See Demurrer, *Kelley et al.* v. *Maine Central R. R. et al.*, 95.
See Pleading, *Clappison et al.* v. *Foley et al.*, 492.
See Title, *Grant* v. *Kenduskeag Creamery et al.*, 209.
See Title, *LaFlamme* v. *Hoffman*, 444.

ESTOPPEL

See Taxation, *Dolloff* v. *Gardner*, 176.
See Title, *LaFlamme* v. *Hoffman*, 444.
See Title, *Thompson* v. *Gaudette*, 288.

EVIDENCE

To establish the corpus delicti to a probability the evidence introduced must be such that a reasonable inference to the existence of the corpus delicti may be deduced therefrom without reliance to the slightest degree upon a confession.

The fact that a heifer was missing from a barn may create suspicion that someone was guilty of breaking, entering and larceny but mere suspicion is not enough.

State v. *Carleton et al.*, 237.

See Bills and Notes, *Scribner* v. *Cyr*, 329.
See Contracts, *Bartlett* v. *Newton*, 279.
See Negligence, *Lajoie* v. *Bilodeau*, 359.
See Negligence, *Glazier* v. *Tetrault*, 127.
See New Trial, *State* v. *Hume*, 226.
See New Trial, *State* v. *Casale*, 312.
See Paupers, *Poland* v. *Biddeford*, 346.

EXECUTORS AND ADMINISTRATORS

A statute of limitation barring all actions *"against said decedent"* where *"no administration is had upon the estate of a deceased person within six years from the date of death of said decedent, and no petition for administration is pending"* operates as a bar to a claim even though administration was not sought until nine years after decedent's death.

The excepting phrase *"and no petition for administration is pending"* does not operate so as to validate a claim otherwise barred merely because a creditor or someone in his behalf may have filed a petition for administration subsequent to the expiration of six years from date of decedent's death. It is to a petition filed within that time that the phrase *"no petition for administration is pending"* refers.

Courts in construing statutes should carry out the purposes of the legislature.

Statutes of Limitation should be construed in favor of the bar which the legislature intended to create.

LABOR

See Demurrer, *Kelley et al.* v. *Maine Central R. R. et al.*, 95.

LACHES

See Demurrer, *Kelley et al.* v. *Maine Central R. R. et al.*, 95.

LEGISLATURE

Apportionment, see *Opinion of Justices*, 404.
Legislative Expenses, see *Opinion of Justices*, 528.

LESSORS

See Public Utilities, *State* v. *Torrey*, 107.

LIBEL AND SLANDER

A plea in abatement for misjoinder is waived upon filing of a special demurrer for the same reason.

An allegation that a newspaper publisher published the alleged libel "with the knowledge and consent of the other defendants" (a staff writer and photographer) does not amount to an alleged publication by the staff writer and photographer.

Publication is an essential element in the action of libel.

Where there is a misjoinder of defendants, only the party misjoined should demur.

When a complaint against several defendants fails to state a cause of action against one of them, he alone may demur.

When liability of a principal rests solely upon respondeat superior, the principal and agent cannot be sued jointly.

Where an alleged libel consists in part in the publication of a photograph such photo may be described in the words of the declaration and the attaching of a copy of the photo is not an essential ingredient of good pleading.

A motion for specifications or particulars is a more appropriate remedy than demurrer to correct uncertainties arising from a failure to attach to the declaration a photograph alleged to be libelous.

The question whether alleged defamatory matter applied to the plaintiff involves an issue of fact.

Sinclair v. *Gannett et al.*, 229.

LIENS

See Chattel Mortgages, *Eastern Trust* v. *Bean et al.*, 85.
See Mortgages, *Paradis Co.* v. *Maxim et al.*, 218.
See Taxation, *Dolloff* v. *Gardner*, 176.

LIFE ESTATE

See Wills, *Stewart* v. *Stewart*, 421.

LIMITATION OF ACTIONS

See Executors and Administrators, *Duddy* v. *McDonald Admr.*, 535.
See Title, *Thompson* v. *Gaudette*, 288.

LIQUOR

A state statute providing that the Liquor Commission may by regulation "give effect to daylight saving time" does not authorize the commission by regulation to regard the Town of Hermon as having adopted "daylight saving time" because a majority of business establishments therein are conducted on and in accordance with daylight time.

MacDonald v. *Sheriff et al.*, 365.

LOTTERIES

MALICE

MALICIOUS PROSECUTION

MASTER AND SERVANT

MAYOR

MESNE PROCESS

MINORS

MISJOINDER

MORTGAGES

One who seeks to destroy a validly created lien must show that the lien claimant knowingly surrendered or waived his claim.

Any lien against the premises, whatever its priority, and whether builders lien or mortgage, is a charge against the interest of the owner; therefore if the plaintiff's lien was lost or waived against the owner it would not remain in existence against the interest of a second mortgagee.

A waiver agreement whereby a contractor remises first mortgagee "and said Marguerite D. Maxim (owner) of and from all claims of every kind and nature, particularly for any and all lien claims the undersigned now has or may have against . . . (first mortgagee) and the said property owned by said Marguerite D. Maxim . . ." is not a release or waiver of liens generally and under the facts of the case may not be taken advantage of by a second mortgagee who did not extend credit in reliance thereon.

Paradis Co. v. *Maxim et al.*, 218.

MUNICIPAL CORPORATIONS

The 14th Amendment to the Constitution of the United States does not prohibit zoning legislation in the States.

Neither the Fifth Amendment to the Constitution of the United States nor the Constitution of Maine prohibits zoning legislation in this State.

The provisions of R. S., 1944, Chap. 80, Sec. 88, as amended, impose no mandatory requirement that zoning ordinances shall establish general rules permitting exceptions and variances, as such.

The failure of the City to file its zoning map in the office of the City Clerk, in accordance with the recital of its zoning ordinance does not render the ordinance invalid against one having knowledge of the lines of the zone established thereby.

Bolduc v. *Pinkham, et al.*, 17.

It is a condition of R. S. 1944, Chap. 81, Sec. 6, Par. I as amended by P. L. 1945, Chap. 90 that tax exempt property be "appropriated to public uses."

Under the statutes exempt property of a public municipal corporation outside the corporate limits must form a part of the water utility system for either corporate or municipal purposes.

A use otherwise public does not become private by reason of ownership by a town.

The wisdom of placing a town in the business of a public utility outside its own territorial limits is a matter for the legislature not the court.

Boothbay v. *Boothbay Harbor*, 31.

See Elections, *State* v. *Marcotte, et al.*, 45.
See Paupers, *Poland* v. *Biddeford*, 346.
See Taxation, *Lewiston* v. *Johnson*, 89.
See Wills, *Guilford et al.* v. *Guilford et al.*, 162.

MURDER

Murder is the unlawful killing of a human being with malice aforethought, express or implied.

Where an unlawful killing is proved, the law presumes it to have been done maliciously and the burden is upon the defendant to rebut the inference of malice, which the law raises from the act of killing, by evidence in defence.

State v. *Turmel*, 1.

See Executors and Administrators, *Dutill* v. *Dana*, 541.

NEGLIGENCE

R. S., 1944, Chap. 19, Sec. 78 as amended by P. L., 1947, Chap. 98, provides that signs and signals shall be prima facie evidence that said signs and signals were erected in accordance with law; and statutes giving the right of way to the traveler on the favored way and requiring the traveler to stop at a stop sign are applicable to the instant case. (P. L., 1949, Chap. 146; R. S., 1944, Chap. 19, Sec. 79, as amended by P. L., 1949, Chap. 144).

A plaintiff is not bound to anticipate defendant's negligence.

Crockett v. *Staples*, 55.

In testing the propriety of an ordered non-suit, all the evidence must be viewed most favorably to a plaintiff.

A jury is entitled to draw all reasonable inferences from proved facts.

A non-suit should be ordered when the evidence would not warrant honest and fair-minded juries to decide in favor of a plaintiff.

One struck by a motor vehicle who did not see it until impact can have no intelligent thought about its speed.

A mere scintilla of evidence will not support a factual finding.

Conjecture is not proof.

Inferences based on mere conjecture, or possibilities, cannot support a verdict.

A pedestrian starting to cross a highway is not required as a matter of law to stop, look and listen.

A pedestrian starting to cross a highway should use due care for his own safety.

Mere looking will not suffice. One is bound to see what is obviously to be seen.

Glazier v. *Tetrault*, 127.

On review of a refusal to direct a verdict for defendant, the evidence must be considered in the light most favorable to plaintiff.

The mere presence of a brush in a bottle of ginger ale is evidence of negligence on the part of a defendant bottler, where there is testimony, which, if believed, indicates that the bottle had not been opened since leaving the defendant. This is not a case of *res ipsa loquitur*.

Negligence may be established by circumstantial evidence.

Lajoie v. *Bilodeau*, 359.

On exceptions to the refusal to direct a verdict for defendant the evidence with the inferences properly drawn therefrom must be considered in the light most favorable to plaintiff.

It cannot be said as a matter of law that a driver is free from negligence when traveling at a high speed to pass an oncoming truck in blind reliance that a parked truck will not turn in front of him.

Hunt, Hersey v. *Dow, Begin*, 459.

See Retrial, *Jenkins* v. *Banks*, 276.

See Workmen's Compensation, *Denaco, et al.* v. *Blanche*, 120.

NEW TRIAL

A petition for a new trial upon the ground of alleged irregularities in the composition, selection, and return of the petit jury contrary to R. S., 1944, Chap. 100, Sec. 100 cannot be considered a motion for new trial on the ground of newly discovered evidence under R. S., 1944, Chap. 94, Sec. 15 because it alleges no newly discovered evidence; it cannot be considered a motion for a new trial on some "other ground" because it would conflict with Rule 17 (Rules of Court.)

The petition for new trial filed after the mandate of the appellate court overruling exceptions and dismissing an appeal comes too late save that afforded by R. S., 1944, Chap. 94, Sec. 15.

State v. *Hume*, 226.

It has always been the rule that relevant statements made in the presence and hearing of the accused are admissible. It must appear to the presiding justice, in the first instance, that the respondent either heard what was said or was in a position to hear so he could have explained, denied or otherwise contradicted if he had so desired. The allowance of such testimony is a matter of sound judicial discretion.

The fact that a defendant does not testify is not evidence of his guilt.

It is when the State's evidence is so weak or defective that a verdict of guilty cannot be sustained, that the court should direct an acquittal.

An indictment which alleges illegal transportation "through and across the State of Maine, to wit, from Portland, through South Portland, Scarborough, in and through the County of Cumberland and into York County" is not wanting in preciseness under R. S., 1944, Chap. 212, Sec. 20.

The tests to be applied on motions for new trial under R. S., 1944, Chap. 94, Sec. 15 for newly discovered evidence. are (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it

PROBATE

See Spear Aplt., 256.

PUBLICATION

See Libel and Slander, *Sinclair* v. *Gannett et al.*, 229.

PUBLIC UTILITIES

An owner-lessor in the business of furnishing a truck with a driver to a carrier for use in the interstate operations of the carrier is not required to obtain a permit under R. S. 1944, Chap. 44, Sec. 22, as amended by P. L. 1949, Chap. 263 and R. S. 1944, Chap. 44, Sec. 30, Clause IV.

There is a distinction between the lease of a truck with a driver to a *carrier* to augment its equipment and the lease to a *shipper* of transported goods. In the latter situation the lessor is engaged in transportaion for hire and must have a permit.

State v. *Torrey*, 107.

The fact that one holds the same views as do certain investment bankers, that he is urged by such bankers to run for election as a director of a corporation, that he is voted for by them (their votes being necessary for his election) is insufficient to disqualify him as their appointee or representative under Section 17 (c) of Public Utility Holding Company Act of 1935, Tit. 15 U. S. C. A., Sec. 79.

The intent of the Public Utility Holding Company Act of 1935 was to prevent banker control of public utilities.

A person is not a representative of an outside interest such as an investment banker if he is not in any way under the control of such interest and answerable to it for its acts.

Gillman v. *Jack*, 171.

Subject to some exceptions, it is a sound principle of law that when a permit or license to do an act is required by law, the wrongful refusal to issue such permit or license will not justify the performance of the act.

For the purpose of making sure that the highways are safe for any proposed operation in interstate commerce and that the safety of other users of the highways will not be endangered thereby the State, under its police power, has the right to require permits for the use of its highways in interstate commerce.

The wrongful denial of a permit is not the equivalent of a permit. Nor is a permit to transport one class of goods equivalent to a permit to transport goods generally with an illegal severable restriction contained therein. With respect to goods not covered by the permit one who transports the same is in the same situation as though he had no permit at all.

State v. *Nagle*, 197.

The Public Utilities Commission is the judge of the facts in rate cases and the courts may intervene only when the Commission (1) abuses its discretion entrusted to it, (2) fails to follow the mandate of the legislature, (3) or fails to be bound by prohibitions of the Constitution.

"Fair value" under R. S., 1944, Chap. 40, Sec. 16, means "present value" and must include increases in value over original cost.

The ascertainment of "fair value" is not a matter of formulas but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts.

SALES

SALES TAX

SCHOOLS

SETTLEMENT

SLANDER

SPECIFICATIONS

STATUTES

It is for the court to determine the expressed legislative intent.

Statute provisions, unless absolutely conflicting, are to be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect—not using one section to evade or abrogate the other.

An existing statute that is inconsistent with a new statute enacted upon the same subject matter must be regarded as necessarily repealed by the subsequent legislation.

A subsequent statute providing "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed" effectuates the repeal of a prior inconsistent statute notwithstanding the inclusion of such prior statute in subsequent revisions of the general law.

When a statute is incorporated in a general revision of all the statutes, and reenacted along with the reenactment of other statutes, its purpose and effect are not changed unless there be some compelling change in the language. Usually a revision of the statutes simply reiterates the former declaration of the legislative will.

Where two inconsistent statutes are carried into the codified law the one last passed, which is the later declaration of the legislative will, should prevail regardless of the order in which they are placed in the compilation.

Cram v. *Cumberland*, 515.

STATUTORY CONSTRUCTION

The fundamental rule of statutory construction is to ascertain and carry out the legislative intent.

It is at times helpful in statutory construction to examine the history of the legislation under consideration.

The word "extension" when used in a statute of the type under consideration means an enlargement of the main body and usually the addition of something of less import than that to which it is attached.

Cushing v. *Bluehill et al.*, 243.

STATUTES CONSTRUED

REVISED STATUTES

PUBLIC LAWS

TAXATION

TIME

TITLE

TOWNS

TRESPASS

TROVER

TRUCKS

TRUSTS

VACATION

WAIVER

WILLS

It seems to be a well settled rule in Maine that in the case of a bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and in the case of the death of a legatee before the termination of the trust, the income must be paid to the legal representatives of the estate of the deceased legatee.

Maine follows the rule that in the absence of an expressed intention otherwise, the law of the testator's domicile will control a testamentary trust.

The fact that a testator selects or nominates as trustee a person or corporation who is living in another state and has possession of the trust funds there, does not, in and of itself mean that the testator intends that the law of the trustee's residence shall apply to the trust.
U. S. Trust Co. v. *Boshkoff, et al.*, 134.

A bequest to the Universalist Church of Bath; "the principal to be held intact, the income only to be used for the support of said church," is a bequest in trust.

Cy pres is a rule of judicial construction applied to charitable gifts, giving effect to a testator's general intention as disclosed by the instrument creating the trust where there is a failure of a specific gift.

Absent a general charitable intention, even though the specific purpose be a charitable one, when it fails, unless there be a valid alternate disposition thereof in the will, there is a resulting trust to the executor for distribution to the next of kin as intestate property.